How to wake a sleeping giant: The Supreme Court of Canada and the law of search and seizure in 1998

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In reviewing the 1997 term, I relied upon Shakespeare in concluding that "the law hath not been dead, though it hath slept." It appears that the judicial hibernation is not yet complete, and the 1998 term did not produce any earth-shattering or groundbreaking decisions in the area of search and seizure. In the 17 years of our Charter era, the Supreme Court of Canada has done a commendable job in articulating the broad principles that animate our protection against unreasonable search and seizure, but the instantiation of these broad principles is proving to be a painful period of growth and decline.

Last year, the court resolved three search and seizure controversies. Two of the three cases are not directly concerned with the day-to-day administration of criminal justice and the rulings therein will not have a dramatic impact on policing in Canada. In both the *Schreiber* case (1998), 158 D.L.R. (4th) 577, and the *M.R.M.* case, the court diminished Charter protection with respect to extraterritorial searches conducted at the request of Canadian law enforcement officials (*Schreiber*) and searches conducted by school officials who are not directly acting as agents of the state (*M.R.M.*). The unique institutional settings within which these cases arose led to a relatively non-contentious conclusion that the reasonable expectation of privacy in these settings is lessened and accordingly s. 8 of the Charter is to be applied with less vigour, if at all.

Although reasonable people will disagree, it is at least arguable that the court's parsimonious application of the Charter in these contexts is justifiable. The greatest potential for abuse of power and disregard of Charter values is raised within the context of the domestic criminal process. Accordingly, the full force of Charter protection could justifiably be reserved solely for confrontational interactions between police and citizen, and leaving a watered-down version of our rights to operate in unique institutional contexts is not necessarily an abandonment of the Charter dream.

Most significantly, in the one case this term arising out of a conventional police–citizen interaction (*Caslake* (1998), 121 C.C.C. (3d) 97), the court appears to have maintained a vigilant stance against arbitrary police conduct. In *Caslake*, the court addressed the issue of whether search incident to arrest extended to the search of an impounded vehicle seized some six hours earlier when the accused was arrested for a narcotics offence. The police were of the view that they had an automatic right to search any impounded vehicle as part of an inventory process; however, the majority of the court concluded that a thoughtless and automatic power to conduct an inventory search upon arrest exceeded the scope of the power to search incidental to arrest. Years earlier, the court had provided some concrete guidance with respect to this power (*Cloutier* (1990), 53 C.C.C. (3d) 257), and it had been well established that the police did not need to have reasonable and probable grounds to conduct a search incident to arrest. However, the court in *Caslake* was clear in establishing that the removal of the requirement of having reasonable and probable grounds does not lead to the police having *carte blanche* in searching incident to arrest. Lamer C.J.C. stated that in conducting a search incident to arrest "there must be some reasonable prospect of securing evidence of the offence for which the accused is being arrested" and that there must be "sufficient circumstantial evidence to justify a search of the vehicle." In light of the fact that the police believed they had an automatic right to search the vehicle, they did not turn their minds to the criteria of a "reasonable prospect of securing evidence," and the majority found that the search violated s. 8 of the Charter. Of course, in line with a tiresome and disconcerting pattern, the court ultimately admitted the evidence on the basis that the evidence seized was not conscriptive in nature and the seriousness of the violation did not warrant exclusion.

Despite the actual result of the case, I have had occasion to argue in other courts that the *Caslake* decision clearly represents a restrictive approach to the power of search incident to arrest. This argument was met by the state's response that the decision actually represents an expansive and hands-off approach to police powers. In a separate, concurring judgment, in *Caslake*, three judges concluded that inventory searches were part and parcel of the power, and these judges focused upon the abrogation of the warrant requirement and reasonable and probable grounds to support their view that this search power can operate in an assembly-line manner. Although my interpretation was supported by one extra judicial body (4-3), I have never found head-counting to be a satisfactory way to resolve a dispute. As the argument devel-

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oped in court, I realized that the *Caslake* case had not definitively resolved the issue of the scope of the power to search incident to arrest, and once again ambiguity had reigned supreme.

Ambiguity may be the lifeblood of the legal profession but it should be considered anathema for both the police and those who are governed by the police. However, the conflicting interpretations of *Caslake* pose a fairly predictable and innocuous problem. The common law has never been considered an effective vehicle for law making and rarely does one case serve as a definitive last word on an issue. Nonetheless, the demands and dictates of the Charter have thrust the judiciary into a quasi-legislative role and now the common law must not only serve to resolve interpersonal disputes but it must serve to set investigative policy for the future. As a political institution or mini-legislature, the Supreme Court of Canada must ensure that its decisions are clear, comprehensive, and internally coherent. Without these qualities, a decision will never be able to do anything beyond resolving the very dispute presented in the individual case. Like any legislative act, the objective is to reduce future litigation and not increase legal conflict by issuing decisions that raise more questions than they answer.

The problem of conflicting interpretations of *Caslake* pales in comparison to the invisible problem of the court failing to seize opportunities. While the court struggled with the issue of the scope of the power to search incident to arrest, the court failed to seize the opportunity to resolve a more pressing problem–that is, does there exist a power to search incident to detention? On December 18, 1998, the court denied leave to appeal in the *Ferris* case (1998), 126 C.C.C. (3d) 298 in which the British Columbia Court of Appeal found that there existed at common law a power to search incident to detention. For no apparent reason, the court refused to take the opportunity to provide some guidance with respect to an intrusive investigative activity which presumably occurs on a daily basis. Based upon the recognition that investigative detentions take place daily, the Ontario Court of Appeal in 1993 followed the American example (the "stop and frisk" doctrine) and concluded that, under the common law "ancillary powers" approach to police powers, there existed a power to briefly detain upon reasonable suspicion for investigatory purposes (*Simpson* (1993), 79 C.C.C. (3d) 482). The power is to detain to question for a brief period of time but the Court of Appeal did not impose any obligation to answer, nor did they contemplate a power to search incident to this brief detention.

The power to search incident to detention may be a reasonable power but it stands upon a weak jurisprudential foundation and, more importantly, it is without any legislative support. Somehow a new power of search without legislative authority has been spawned in the Charter era, and the Supreme Court of Canada did not even blink.

Like wildfire, other courts seized upon this new halfway house between freedom and arrest, and inevitably the power expanded by increments. Now, there are four appellate courts which have clearly recognized a power to search incident to detention (*Ferris* (B.C. C.A.), *supra*; *Dupois* (1994), 26 C.R.R. (2d) 363 (Alta. C.A.); *Lake* (1996), 113 C.C.C. (3d) 208 (Sask. C.A.); and *McAuley* (1998), 124 C.C.C. (3d) 117 (Man. C.A.). As these courts worked on the creation of a new power to search, one would have thought that the Supreme Court of Canada would have enthusiastically seized the opportunity to resolve this debate. Especially in light of the court's clear pronouncements in the past that the judicial branch of government should not create new powers of search (for example, *Wong* (1990), 60 C.C.C. (3d) 460), one would have thought that the court would have been moved to intervene to review a development that appears to directly contradict the court's own theory about the proper judicial function in the area of search and seizure.

In the Supreme Court's very first pronouncement on s. 8 of the Charter, it went to great lengths to emphasize that the Charter "is not in itself an authorization for governmental action" and that "it does not confer any powers, even of 'reasonable' search and seizure, on these governments" (*Hunter*, [1984] 2 S.C.R. 145). The power to search incident to detention may be a reasonable power but it stands upon a weak jurisprudential foundation and, more importantly, it is without any legislative support. Somehow a new power of search without legislative authority has been spawned in the Charter era, and the Supreme Court of Canada did not even blink. Every day in Canada, police officers are briefly detaining suspects and probing their pockets, their vehicles, and perhaps even their bodies–all this without truly knowing whether the courts would approve and support this activity in the absence of legislative authorization. Coming out of the rather languid 1998 term, we are thus left with only one important question: How to wake a sleeping giant?