Cross-examination of Police in Stop & Search Matters

1. Types of stop and search matters:

1.1. Broadly speaking, there are 4 types of stop and/or search arguments you can run:

I. My client was unlawfully stopped because **(“The unlawful stop”)**:

- The officer’s suspicion was not based on reasonable grounds: s 21 LEPRA (if person); s 36 LERPA (if vehicle).

- The reason for the stop was not communicated to him/her by the officer: ss 202 and 204A LEPRA.

II. My client was unlawfully stopped and searched because **(“The unlawful stop and search”)**:

- The officer’s suspicion was not based on reasonable grounds: s 21 LEPRA (if person); s 36 LERPA (if vehicle).

- The reason for the stop and search was not communicated to him/her by the officer: ss 202 and 204A LEPRA.

III. My client’s vehicle was unlawfully stopped for a roadside breath test because **(“The stop for an improper purpose”)**:

- This is not the real reason he/she was stopped (i.e. the roadside breath test was a “ruse”): Schedule 3, Division 2, clause 3 Road Transport Act, s 36 LEPRA; *R v Buddee* [2016] NSWDC 422 and *R v Large* [2019] NSWDC 627.

IV. My client was unlawfully stripped search because **("The unlawful strip search")**:

- If carried out at a police station - the officer did not suspect on reasonable grounds that the strip search was necessary for the purposes of the search: s 31(a) LEPRA.

- If carried out somewhere other than a police station - the officer did not suspect on reasonable grounds that:

    - The strip search was necessary for the purposes of the search: s 31(b) LEPRA.

    - The seriousness/urgency of circumstances necessitated the strip search: s 31(b) LEPRA.

- The officer did not, as far as was reasonably practicable:

    - Inform him/her of why it was necessary to remove his/her clothing: s 32(2) LEPRA.

    - Ask him/her for his/her co-operation: s 32(3) LEPRA.

    - Afford him/her reasonable privacy: s 32(4)(a) LEPRA.

    - Conduct the search as quickly as was reasonably practicable: s 32(4)(b) LEPRA.

    - Conduct the least invasive search practicable in the circumstances: s 32(5) LEPRA.

    - Allow him/her to dress as soon as the search was finished: s 32(9) LEPRA.

    - If clothing is seized – leave him/her with reasonably appropriate clothing: s 32(10) LEPRA.

    - Conduct the search in a private area: s 33(1)(a).

- The search was (when it was reasonably practicable to do otherwise) conducted in the presence or view of a person:

    - Of the opposite sex (and the exception in s 33(7) does not apply): s 33(1)(b) LEPRA.

    - Whose presence was not necessary and the exception in s 33(7) does not apply): s 33(1)(c) LEPRA.

- The search involved:

    - An examination of his/her body cavities and/or touching of his/her body: s 33(4) LEPRA.

    - The removal of more clothes than the offier believed was reasonably necessary: s 33(5) LEPRA.

    - More visual inspection of his/her body than the officer believed was reasonably necessary: s 33(6) LEPRA.

- If the client is a young person or has impaired intellectual functioning – the search was not conducted in the presence of:

    - His/her parent or guardian (and the exception in s 33(3A) does not apply): s 33(3)(a) LEPRA.

    - If parent or guardian is not acceptable to him/her – some other appropriate support person (and the exception in s 33(3A) does not apply): s 33(3)(b) LEPRA.

- If the client is a young person or has impaired intellectual functioning, and the exception in s 33(3A) applies, no record was made of the reasons why the search was conducted in the absence of a parent or guardian or other appropriate support person: s 33(3A) LEPRA.

1.2. Searches pursuant to a warrant are a separate issue and are not discussed in this paper.

2. Some observations about the law in stop and search matters:

Do I make the s 138 objection?

2.1. There are 2 reasons why you would run a stop and/or search argument:

I. To get the "fruits" of the stop and/or search excluded; or

II. In the case of an offence allegedly committed against a police officer - to cast doubt on the "execution of duty" element of that offence.

2.2. If you are trying to get the "fruits" of the stop and/or search excluded (e.g. drugs, stolen goods, firearms, your client's conduct) you will need to rely on s 138 of the Evidence Act.

2.3. When you make a s 138 objection, the Court will likely ask you to particularise the contravention/impropriety. Indeed, if you run a voir dire on the issue, you are required to particularise the contravention/impropriety: *R v Salender Salindera (unrep)* NSWCCA 25/10/1996. The consequence is that the s 138 objection puts the prosecution on notice of the issue/s.

2.4. In my opinion, if you are trying to cast doubt on whether an officer was "executing their duty" at the time of the alleged offence, it is generally better not to make the s 138 objection.

Do the police need reasonable grounds to stop someone?

2.5. Yes – the reasonable grounds requirement applies to the stop power, as well as the search power: *R v Fortescue, Michael* [2010] NSWDC 272.

2.6. Although the proposition should be uncontroversial, many officers are not aware of it. If the officer you are cross-examining in an "unlawful stop" matter is not aware of this, this potentially gives you a significant tactical advantage. See page 6, lines 0 – 50 of the transcript for *R v Derrick* (2018/00021437) (2 July 2018) as an example of how to exploit that advantage.

2.7. Usually, the bigger challenge is convincing the Court your client has been "stopped" within the meaning of s 21(1) of LEPRA. See page 7, lines 5 – 24 of the transcript for *R v Derrick* (2018/00021437) (2 July 2018) as an examples of questions you may want to ask in cross-examination to establish your client was "stopped".

Is non-compliance with s 202 a contravention of the law? Does non-compliance with s 202 make the exercise of the power unlawful?

2.8. An officer conducting a stop and/or search must, as soon as it is reasonably practicable to do so, provide:

- Evidence that they are an officer (unless in they are in uniform): s 202(1)(a) LEPRA.
- Their name and place of duty: s 202(1)(b) LEPRA.
- The reason for the exercise of the power: s 202(1)(c) LEPRA.

2.9. Until relatively recently, it was not clear whether non-compliance with s 202 was a contravention of the law and/or made the exercise of the power unlawful. Section 204A was inserted into LERPA to resolve this ambiguity.

2.10. Section 204A makes clear that non-compliance with s 202(1)(b) does not make the exercise of the power unlawful (unless the exception in 204A(2)

applies). In other words, non-compliance with this provision will not take an officer outside the execution of their duty.

2.11. Frustratingly, it is not clear whether non-compliance with s 202(1)(b) still amounts to a contravention of the law. The terms of s 204A(1) seem to suggest it does not: *'A failure by a police officer to comply with ….. obligation ….. does not …… affect the validity of anything resulting from the exercise of that power'*. Assuming this interpretation is correct, non-compliance with s 202(1)(b) would not provide a basis for exclusion under s 138. Even if it were a contravention, the terms of s 204A militate strongly in favour of the Court admitting the evidence.

2.12. On the other hand, LEPRA is silent on whether non-compliance with s 202(1)(a) and/or (c) amounts to a contravention and/or makes the exercise of the power unlawful.

2.13. The fact that LEPRA expressly provides that non-compliance with s 202(1)(b) does not make the exercise of the power unlawful, but is silent as to effect of non-compliance with 202(1)(a) and/or (c), suggests that non-compliance with these provisions amounts to a contravention and/or makes the exercise of the power unlawful. Support for this interpretation can be found in transcript of *R v Leighton Everingham-Baker* (2018/00258198) (31 May 2019) at pages 21 – 22.

2.14. It is worth paying close attention to reasons the officer gives your client for stopping and/or searching them. While s 202(1)(c) does not require detailed reason, it likely requires more than *"I'm searching you because you are acting suspiciously"*. If the reasons seem insufficient, you may want to argue non-compliance with s 202(1)(c).

2.15. Section 202(1)(c) applies to the power to stop, as well as the power to search. Many officers are not aware of this, and will not comply with s 202(1)(c) until they commence searching your client. If you are running a "unlawful stop" matter, this is an additional contravention you can point to.

What is a strip search?

2.16. A non-exhaustive definition of a strip search can be found in s 3 of LEPRA: *a) requiring the person to remove all of his or her clothes, and b) an examination of the person's body …. and of those clothes.*

2.17. The definition found in s 3 of LEPRA is just an example, indeed an "extreme" example, of a strip search. However, just because a person is not required to remove all or even most of his/her clothes, it does not mean that strip search has not been conducted.

2.18. For example, in *Daniel Fromberg v R* [2017] NSWDC 259 it was held that the actions of officer amounted to strip search, even though the only item of clothing that Mr Fromberg was required to remove was his belt.

Does the reasonable grounds requirement apply to every officer involved in the stop and/or search?

2.19. Yes – every officer involved in the stop and/or search of your client must be satisfied that there are reasonable grounds for the search: *Attalla v State of NSW* [2018] NSWDC 190 at [62] reasoning by analogy.

2.20. This can be contrasted with the power to arrest without a warrant. An officer can arrest a person without a warrant - regardless of whether they are satisfied of the requirements in s 99(1) of LEPRA - if directed to do by another officer, so long as the officer giving the direction is satisfied of the requirements: s 99(2) LEPRA.

3. Cross-examining police on the grounds for their suspicion:

3.1. In the majority of stop and/or search cases you will be arguing that the officer's suspicion was not based on reasonable grounds and therefore was unlawful.

3.2. The decision to make an argument of this kind is usually based on the grounds put forward by the officer in their statement. Most prosecutors will call further evidence from the officer in order to supplement the grounds in their statement. This can be devastating to your case.

3.3. The first goal is to try and prevent this from happening. If this evidence is admitted, the next step is to try and impugn each of the "new" grounds, as well as the "expected" grounds.

How do I prevent this from happening?

3.4. First, listen carefully for leading questions. Leading questions are not limited to the sorts of questions that are typically asked in cross-examination. Questions that indirectly lead a witness (i.e. indirectly suggest an answer) are also impermissible. For example, if an officer has catalogued the "grounds" they relied on, and the prosecutor asks "was there anything else?", this is, in my view, an indirectly leading question and is impermissible.

3.5. An officer's statement can be tendered (subject to the other rules of evidence) if it complies with s 33 of the Evidence Act. If it does not comply, and you are worried about them supplementing their grounds, you may want to make them give their evidence viva voce. In my experience, when an officer gives their evidence viva voce they will be so focused on remembering what happened, that they will often forget some of their grounds. This can be contrasted with the situation where they are taken to the paragraphs in their statement that deal with the grounds relied on and asked to expand on them.

How do I impugn the "new" grounds?

3.6. The main way to impugn the "new" grounds is by cross-examining the officer who exercised the power.

3.7. Occasionally, you will be able to impugn the "new" grounds by cross-examining another officer who was present. For example, you may be able to adduce evidence from the officer that your client did not seem drug affected.

3.8. You may also want to consider calling your client on the voir dire to contradict the officer. For example, your client may be able to give evidence that they were not acting nervously or were not drug affected.

How do I cross-examine the officer who exercised the power about their “new” grounds?

3.9. At law school, you are taught to always ask closed questions in cross-examination. The main advantage of this approach is it allows you to control the witness.

3.10. However, in some circumstances it is worth asking open-ended questions. For example, if you are confident the officer will not have a good answer. See the transcript of *R v Leighton Everingham-Baker* (2018/00258198) (31 May 2019) at pages 10 - 11. Or if there are no “bad” answers: “What date did you write your statement?” “Was this the day of the incident?” If the officer gets it wrong, you can hand them their statement and correct them. Depending on the issue, this could have an adverse impact on the Court’s assessment of their reliability. If the officer gets it right, you are in the same position as you would be if you asked it as a closed question. Moreover, by having a mix of open and closed questions, your cross-examination will feel more like a conversation.

3.11. Where an officer gives evidence of “new” grounds, you should cross-examine them on:

i. The fact that they are only now mentioning this ground; and

ii. The substance of the ground.

Why is this ground only being mentioned now?

3.12. In determining whether an officer had reasonable grounds for their suspicion, the Court is concerned with what was operating on their mind at the time they exercised the power. The Court is not concerned with grounds relied on after the fact. When the officer has given evidence of a “new” ground, your job is to leave the Court with the impression that this ground was not operating on their mind at time they exercised the power. A common “new” ground is that your client seemed drug affected. The

following questions may assist in such a case (I note many of them are open-ended):

- When did this incident happen?
- Do you agree that was about 6 months ago?
- When did you write your statement?
- Do you agree that is the same day as the incident?
- Is it fair to say that the incident was fresh in your memory when you wrote the statement?
- Do you agree that your memory of what happened was better when you wrote the statement than it is now?
- Do you mention the fact that my client is drug affected in your statement?
- Have you taken statements from witnesses before?
- Roughly how many?
- (If officer is experienced) Would it be 100s?
- Do you impress on those witnesses the importance of including all relevant details – that they can remember - in their statement?
- Do you get them to look over their statement to make sure all relevant details - that they can remember - have been included?
- Aside from your statement in this matter, have you written other statements?
- Roughly how many?

- You are of course aware of the importance of including all relevant details – that you can remember - in your statement?

- You of course would have looked over your statement before you signed it?

- Do you know you need reasonable grounds before you can search someone?

- Do you agree that in your statement you mention there was intel on my client?

- Do you agree that you mention my client was acting nervous?

- Is it fair to say then, that in writing your statement you turned your mind to setting out the basis for your suspicion?

- You had no difficulty including those details, did you?

- Did you prepare the fact sheet in this matter?

- Do you agree that you mentioned my client was acting nervous there?

- Do you agree that you mentioned there was intel on my client?

- Is it fair to say then, that in writing the fact sheet, you turned your mind to setting out the basis for your suspicion?

- You had no difficult mentioning those details in the fact sheet?

- Do you mention that my client looked drug affected in the fact sheet?

- In terms of why this isn't in your statement, you say you just forgot to include this?

- Do you agree that this is important detail?

- And you can't give the Court any other explanation as to why it is not in there, other than that you forgot?

- When did you remember this detail?

- Do you agree that you can do a supplementary statement?

- Was there anything preventing you from doing this?

- Do you know if you search someone without reasonable grounds it can result in evidence been excluded?

- You are aware that this what the defence is trying to do here?

- Do you agree that if the evidence was excluded you wouldn't have a case?

- (If appropriate) I suggest my client did not appear drug affected.

- I suggest that the reason this was not included in your statement is because it was not operating on your mind when you made the decision to search.

- I suggest that you included it today to try and stop the evidence from the search from being excluded.

3.13. You may also want to consider subpoenaing COPS records and notebook entries relating to the incident. The "new" ground is almost never mentioned in those documents. You can weave this is into your cross-examination:

- Do you agree this is your notebook entry of the incident?
- Do you agree that you mention my client looking nervous?
- Do you agree that you mention there was intel on my client?
- You had no trouble including those details?
- Do you mention that my client seemed drug affected in your notebook entry?
- Do you agree that this is your COPS record of the incident?
- Do you agree that you mention my client looking nervous?
- Do you agree that you mention there was intel on my client?
- You had no trouble include those details?
- Do you mention that my client seemed drug affected in your COPS entry?

Impugning the substance of the grounds

3.14. You also want to impugn the substance of each of the grounds relied on by the officer - this applies to “new”, as well as “expected” grounds. Below are some suggestions on how you might do this.

Lack of eye contact:

3.15. This is one of the most common grounds relied on by officers. It is also one of the most tenuous. Most Magistrates are aware of this, and will not put much weight on it. However, it is generally worth cross-examining on. Most officers have done some form of cultural awareness training. As part of

that training, they are usually told that many Aboriginal people will not make eye contact with people in positions of authority. Even if they have not learnt this, you can generally get them to agree that, based on their experience working with Aboriginal people, this is something that they are aware of. See the transcript of *R v Leighton Everingham-Baker* (2018/00258198) at page 11 for an example of this.

Suspicious demeanor:

3.16. Like lack of eye contact, suspicious demeanor is a ground commonly relied on by offices. You may wish to call your client to contradict the officer's evidence on this issue. However, at the very least, you should also get the officer to agree that there could be a number of innocent explanations for your client's demeanor, and that it is part of their job to consider innocent explanations.

3.17. In support of a submission that the Court should not place much weight on this factor, see *R v Yana ORM* [2011] NSWDC 26 at [55].

Intel:

3.18. A common ground relied on by officers is intel. Intel is admissible for a non-hearsay purpose, namely, as evidence going towards the officer's suspicion. Further, the brief service requirements do not apply to intel, and there is no obligation on the prosecution to serve it on you.

3.19. Often officers will not have a great memory of the specifics of the intel. If the evidence they give about the intel is very general, it is usually better to leave this issue alone in cross-examination. At the end of the evidence, you can make a submission to the effect that the evidence was so general that it does not materially add to the basis for their suspicion.

3.20. Also, pay careful attention to whether the intel relates to the circumstance relied on as the basis for the search. For example, if the officer indicates that they searched your client because the suspected your client had drugs on them, intel relating to break and enters will not materially add to basis

for their suspicion. See the transcript of *R v Leighton Everingham-Baker* (2018/00258198) (31 May 2019) at pages 10 – 11 for an example of this.

Record:

3.21. It is well established that a person's record cannot, of itself, amount to reasonable grounds for a stop and/or search: *O'Connor v R* (12 August 2010) (judgment of Judge Charteris). However, this does not mean it is not relevant.

3.22. As with intel, often officers will not have a good memory of your client's record. If the evidence they give about your client's record is very general, it is usually better to leave this issue alone in cross-examination. At the end of evidence, you can submit on why the Court would not place much weight on it.

Exculpatory factors:

3.23. In assessing whether the officer had reasonable grounds, the Court should also consider exculpatory factors i.e. factors that point away from the need to stop and/or search your client. You should cross-examine the officer on these and get them to agree that these factors were apparent to them at the time. This can be a very powerful line of cross-examination See the transcript for *R v Ashley Freeman* (2017/00303064)(11 January 2018) at page 29 for an example of this.

4. Cross-examining on the s 138(3) factors:

4.1. In stop and/or search matters much of your cross-examination will focus on establishing the contravention/impropriety. However, it is important to also cross-examine on matters bearing on whether the Court admits the evidence.

4.2. Section 138(3) of the Evidence Act sets out a non-exhaustive list of factors that the Court must consider when assessing whether to admit the evidence. Two factors that you may you wish to consider cross-examining on are:

i. Whether the contravention/impropriety was intentional/reckless: s 138(3)(e), Evidence Act; and

ii. Whether any other proceedings have been or are likely to be taken in relation to the contravention/impropriety: 138(3)(g), Evidence Act.

Intentional/reckless or accidental/careless?

4.3. The issue of whether the contravention was intentional/reckless or accidental/careless is critical to the Court's assessment of the gravity of the contravention. The Court is much less likely to admit the evidence if satisfied that the contravention/impropriety was intentional/reckless: *R v Gallagher; R v Burridge* [2015] NSWCCA 228 at [51] – [55].

4.4. It is always difficult to persuade the Court that a contravention/impropriety was intentional/reckless. Invariably, when you put to an officer that they knew what they were doing was wrong or that this possibility crossed their mind, they will deny this. The Court does not have to accept this denial. However, the Court is likely to accept it unless you can point to something to contradict it.

4.5. An effective technique is to cross-examine the officer on "factually similar hypotheticals" and get him/her to agree that they know that the conduct described in that hypothetical is unlawful or improper. An example of this can be found in the transcript to *Darrell Wright v R* (2017/0073926) (26 August 2019) at page 17, lines 30 – 50.

4.6. You should also consider cross-examining the officer on their experience and training. The more experienced and well-trained the officer the more likely the Court will conclude that the officer knew what they were doing was unlawful/improper. If they are a very junior officer you may want to steer clear of these issues.

4.7. In many cases you will not be able to persuade the Court that the contravention/impropriety was intentional/reckless. However, it does

necessarily not follow that the contravention/impropriety was accidental/inadvertent. The fact that a contravention/impropriety was accidental/inadvertent is a matter militating in favour of admission. The onus is also on the prosecution to establish, on balance, any factor militating in favour of admission: *Parker v Comptroller-General of Customs* [2009] HCA 7 at [28]. It may be that the evidence is such that the Court cannot make a finding as to the state of mind of the officer.

4.8. Further it does not follow that because a contravention/impropriety was accidental/careless that the contravention is not serious: *R v Leighton Everingham-Baker* (2018/00258198) (31 May 2019) page 22, lines 20 - 25.

Have proceedings been taken or are they likely?

4.9. The fact that proceedings (aside from the hearing itself) have not been taken against the offending officer, and are not likely to be taken, is a factor militating against admission. The reason is that if the Court does not exclude the evidence, the officer will likely not suffer any consequences for their contravention/impropriety. Proceedings may take the form of additional training or disciplinary action.

4.10. You may wish to cross-examine the officer on whether they have been (or, to the best of their knowledge, are likely to be) subject to any disciplinary action or further training as a result of the incident. Invariably, the answer is no.

4.11. Magistrates often disallow this line of questioning on the basis that it is not relevant. See for example the transcript for *R v Leighton Everingham-Baker* (2018/00258198) (31 May 2019). However, see *Darrell Wright v R* (2017/0073926) (26 August 2019) and *R v Gallagher; R v Burridge* [2015] NSWCCA 228 in support of the proposition that it is relevant.

4.12. If you do not cross-examine on this issue, in most cases there will be no evidence either way. This is not the same as positive evidence that no alternative proceedings have been (or are likely to be) taken.

Is an unlawful search a grave contravention?

4.13. While every case will turn on its own particular facts, in my view an unlawful search (especially of a person) is an inherently grave contravention (i.e. it is grave even if the contravention was not intentional/reckless). In my experience, if the search is a strip search or involves a young person, the Court will generally view the unlawful search as grave. However, where the search is a regular one, and the subject is an adult or their car, the Court is less likely to take this view.

4.14. In support of a submission that such a search is a grave contravention it is often useful to draw the following matters to the Court's attention:

- The power to search a person (or their vehicle) is a significant power. The law requires that the power *'be exercised strictly in compliance with the statutory'* requirements: *Henderson v O'Connell* [1937] VicLawRp 35 at 176. In cases where the only contravention is non-compliance with s 202(1)(c), the prosecution will inevitably submit that the contravention is trivial or technical. *Henderson v O'Connell* provides some support for the proposition that it is not.

- An unlawful search of a person constitutes an assault. It may also amount to false imprisonment. It thus constitutes a significant interference with an individual's liberty: *Shalhoub v State of New South Wales* [2017] NSWDC 363. It is the Court's role to protect individual liberty: *Kuru v State of New South Wales* [2008] HCA 26. The Court can fulfil this role by not admitting the evidence.

4.15. In order to highlight the gravity of the unlawful search, you may want to call your client on the voir dire. Your client can give evidence about how the unlawful search made them feel. This can be very powerful evidence, and is very difficult for the prosecutor to challenge. Further, if your client is regularly stopped and/or searched, you may want consider adducing evidence of this.

4.16. Calling your client is always risky. However, if you call them on the voir dire in a stop and/or search matter, they cannot be cross-examined about the substantive offence (unless this is relevant to s 138 objection), and in any event, you can simply object to that evidence being admitted in the hearing proper.

Is an unlawful stop a grave contravention?

4.17. It is generally difficult to convince the Court that an unlawful stop is inherently grave, especially if the stop is only momentary. If you are running an "unlawful stop" case, where the evidence you are seeking to exclude is crucial to the prosecution case, and the offence is serious, you should give serious consideration to calling your client to give evidence about how the unlawful stop made them feel.

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