POLICE ACADEMY
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A newsletter devoted to operational police officers across British Columbia.

'CHARTER' NOT REQUIRED PRIOR TO SAFETY SEARCH

R. v. T.A.V., 2001 ABCA 316

As a result of a wiretap, police received information that two girls traveling together would be going from Vancouver to Edmonton on a bus carrying firearms and perhaps narcotics. Police attended the bus depot and followed two girls, one of whom was the accused, as they left the depot; each carrying a bag. Police approached the girls and identified themselves. When asked, the girls stated they were coming from Vancouver. The accused also produced a paper with an address and the girls were described as being "quite agitated". One girl was arrested and Chartered for possession of a firearm after an officer opened her bag and found a gun. A second officer arrested and Chartered the accused for possession of a concealed weapon after he felt and saw the butt of a gun in the accused's bag. At headquarters however, the girls gave their dates of birth and at this time it was recognized they were young offenders. They were then given the warnings pursuant to s.56 of the *Young Offenders Act (YOA)* and their bags were searched and the contents photographed. As a result, a revolver, pistol, and ammunition were found in the accused's bag while a gun with a silencer, a second silencer, and ammunition were found in the other girl's bag. At trial, the accused was convicted of five counts of illegally possessing weapons.

The accused appealed her convictions to the Alberta Court of Appeal arguing, among other grounds, that the evidence should have been excluded because the police violated her rights at the time of the initial detention under s.8 (search and seizure) and s.10 (right to counsel) of the *Charter* as well as the special rights afforded young persons under s.56 of the *YOA*. Since the search of the accused's bag was warrantless, the Crown had the burden of proving that the search was nonetheless reasonable. Two reasons were offered to demonstrate that the search was authorized:

- *Criminal Code*: s.117.02
- common law: investigatory safety search

Criminal Code

Section 117.02 of the *Criminal Code* permits the warrantless search of a person in exigent circumstances if the officer has reasonable grounds to believe a weapon offence has been or is being committed and evidence is likely to be found on the person. In upholding the trial judge's finding that exigent circumstances existed and it was not practicable to obtain a warrant, McClung J.A. for the unanimous court stated:

> "Exigent" indicates in dictionary usage, the "requiring of immediate action or aid; pressing, urgent" or "[a] state of pressing need; a time of extreme necessity; a critical occasion, or one that requires immediate action or remedy; an emergency, extremity, strait" … Practically speaking, this involves the presence of "emergency-like circumstances as for example the presence of weapons in a motor vehicle stopped on a highway" or where " police action literally must be `now or never' to preserve the evidence of the crime" … Therefore, in the case of a warrantless search of a home, exigent circumstances may permit the search where it is necessary to prevent imminent bodily harm or death, or where it is necessary to prevent imminent loss or destruction of evidence…
>
> …here the officers did not know the identities of the two suspects on the bus, nor did they confirm that they had indeed arrived in Edmonton until mere minutes before they were detained as they left the bus station. In making the finding that there were exigent circumstances, the trial judge assessed the relevant time period to be that arising after 11:00 at the bus depot. This is a reasonable finding given the evidence led before him. (references omitted)

Common Law

Alberta's top court also held the search to be justified under the common law power of search incidental to a lawful detention based on an articulable cause a detainee is involved in criminal behaviour. Articulable cause is a lower standard than reasonable grounds and is defined as "a constellation of objectively discernible facts which give the detaining officer reasonable cause

to suspect that the detainee is criminally implicated in the activity under investigation". Even if the officers did not have reasonable grounds, the wiretap information and their observations at the bus depot provided at least an articulable cause to suspect the girls were involved in criminal behaviour. Since the officers were legitimately concerned with their personal safety, the search was justified as an incident to the detention. The Court, at para. 30-31:

> The power to search upon detention is coupled to the need to assure the safety of police officers, as well as other citizens. Therefore officers are given the right to search and are given latitude in order to protect themselves…. It is a power which extends to a search for weapons where the circumstances indicate that such a concern is real… In a brief detention, such as here, the focus expands from investigation to the protection of involved officers…
>
> The seriousness of the circumstances leading to the detention dictate whether there will be a search as well as its scope… The common-law power to search pursuant to detention or arrest is not an unlimited power, but a frisk search has gained acceptance as a minimal intrusion… Here a search for weapons in the bags of the suspects was justified due to the probability of criminal activity attending the possession of handguns. (references omitted)

Right to Counsel

Having found the accused detained, the court addressed whether a failure to give a warning of the right to counsel was a breach of the *Charter*, thus affecting the reasonableness of the search. In the circumstances, the Court found that if the search was conducted to protect the officers no s.10(b) violation could "logically" be made out:

> A failure to give a warning of the right to counsel was held to be relevant to the reasonableness of a search. However, it has been questioned whether this 10(b) warning must always be given immediately upon detention or upon every detention… When a brief search is conducted to ensure the safety of the officers involved, it seems implausible that this must be preceded by a 10(b) warning.

And further:

> Here, if the right to search pursuant to a lawful detention is in place to protect the safety of the officers, it is not likely to be undone by a failure to first warn of a right to counsel…

Section 56 *YOA*

Section 56 of the *YOA*, "intended to ensure there is no improper questioning of young persons", provides a statutory mechanism to exclude statements improperly obtained for non-compliance. However, s.56 applies only to oral or written statements and does not include the suppression of physical evidence: The Court, at para. 34.

> Section 56 is merely a rule of evidence about incriminating statements, and it does not hamper investigation… [I]f another Charter violation is proven, s. 24(2) still applies to youths. This same difficulty lies with [the accused's] s. 10(b) argument: if the police had the right to perform a search for weapons without having to first give a warning or opportunity to contact parents or counsel, the weapons would have been discovered before any duty arose under s. 10(b) or any sections of the YOA . (references omitted)

Since there were no *Charter* infringements, there was no basis to exclude the evidence. Furthermore the Court ruled, even if there had been a *Charter* breach there was no reason to exclude the non-conscriptive real evidence under s.24(2) because the admission of the firearms was not likely to bring the administration of justice into disrepute.

Editor's note: It must be noted that the failure to provide the s.10(b) warning in this case was assessed in relation to whether the protective search was unreasonable and not as a consequence of an incriminatory statement being obtained. It appears the law is unsettled on the admissibility of a statement obtained from an accused following an investigative detention but prior to a *Charter* warning. Although the s.10(b) right to counsel imports temporal immediacy[1] and is not engaged by the length of the detention[2], some courts suggest that the right to counsel need not be provided during the early stages of an investigative detention. For example, in *R. v. Clough and Watts* 2000 BCPC 0160, Gordon J. stated, at para 24:

> [I]t seems ridiculous to suggest that a citizen who is detained briefly at the roadside such that a speeding ticket can be issued has a right to counsel. Neither does a citizen who is to be briefly detained for articulable cause such that the police can investigate an offence that is being or has been recently committed entitled to counsel. To hold otherwise would totally frustrate the day-to-day work of police officers. (emphasis added)

[1] R. v. Feeney[1997] 2 S.C.R. 13, R. v. Poloshek ( ) 134 C.C.C. (3d) 187 (Ont.C.A.)
[2] R. v Elshaw (1991) 67 C.C.C. (3d) 97 (S.C.C.) at p.125

In *R. v. Reid* [2000] O.J. No. 2969 (Ont.Crt.Jus.), Sparrow J. suggests the immediacy of s.10(b) rights does not "necessitate unreasonable conduct on the part of the police" and the police "must be permitted to react sensibly on the spur of the moment", perhaps to ask a question or two. In *R. v. Dupuis* (1995) 162 A.R. 197 (Alta.C.A.), police entered a residence in pursuit of a suspect and at gunpoint required the occupants to lie down. The Court "concluded the police could detain while they pursued their enquiries without violating s.10(b) of the *Charter*"[3]. However, the police are not required to advise the detainee of the right to counsel before they are searched. The police are entitled to pursue their investigation to a point where any risk of violence is removed before providing s.10(b) rights[4]. In order to avoid the issue altogether, it may be prudent for the officer to provide the *Charter* warning in a pre-emptive fashion prior to questioning. However, whether such an obligation arises in law remains unclear.

Complete case at www.albertacourts.ca

WARRANT VALID DESPITE IRRELEVANT INFORMATION

R. v. Lam, 2002 BCCA 99

The accused appealed his convictions for production of a controlled substance and possession for the purpose of trafficking arguing the information to obtain (ITO) was not capable of supporting the warrant when all the irrelevant information was removed from it. Furthermore, even if what remained was sufficient to support the warrant, the irrelevant information "made the judicial task of deciding whether the information was capable of supporting" the warrant too difficult and it should be set aside.

Although the Court agreed that there was a significant amount of irrelevant material in the ITO, it disagreed with what was truly irrelevant, marginally relevant, or slimly relevant. Lambert J. for the unanimous appeal Court wrote:

> It is important that the Information be examined as a whole and not one piece of evidence at a time, because each piece of evidence colours other pieces of evidence and a fuller picture emerges by considering all the evidence together. That does not justify including material that is irrelevant but relevance can only be tested in relation to the total picture painted in the Information.

In this case, the power consumption, drawn curtains, neglected house, burnt out lawn, and registration of a vehicle to a house where a previous grow operation had been found, when taken together, were sufficient to support the warrant. The appeal was dismissed.

Complete case available at www.courts.gov.bc.ca

SEARCH INCIDENT TO ARREST: TAKING A LOOK!

Sgt. Mike Novakowski

A police officer has the authority, deeply rooted in common law, to search a person incidental to arrest. This search authority is discretionary, does not impose a duty to search, and if the police officer is satisfied that the law may be effectively and safely applied without a search, the officer may choose not to search[5].

Requirements

The are three requirements necessary for a search to be reasonable as an incident to a lawful arrest[6]:

- **a lawful arrest**. The lawfulness of the search derives from the legality of the arrest[7]. If the arrest is not lawful, the resulting search will not be lawful either. In many cases, the belief that reasonable grounds for arrest exist is a condition precedent to a valid arrest[8]. In the absence of reasonable grounds upon which to base the arrest, any search conducted will also be invalid[9].

[3] See comments of William J. in Swansburg v. Smith (1996) Docket:CA019235 (B.C.C.A.)
[4] R. v. Lal (1996) Docket:CC940845 (B.C.S.C.) affirmed [1998] B.C.J. No. 2446 (B.C.C.A.) leave to appeal to dismissed [1999] S.C.C.A. No. 28 (S.C.C.),
[5] Cloutier v. Langlois & Bedard (1990) 53 C.C.C. (3d) 257 (S.C.C.)
[6] Stillman v. the Queen [1997] 1 S.C.R. 607 (S.C.C.)
[7] Caslake v. the Queen [1998] 1 S.C.R. 51 (S.C.C.)
[8] R. v. Belnavis (1996) 107 C.C.C. (3d) 195 (Ont.C.A.) at p.213.
[9] See R. v. Young (1993) 79 C.C.C. (3d) 559 (Ont.C.A.) at p.565.

- **the search must be conducted as an "incident" to the arrest.** The purpose or objective of the search must in some way be "connected" or "related[10]" to the arrest and the manner and scope of the search must bear some reasonable relationship to the offence suspected and the evidence sought[11]. Searching does not envelop purposes that have no connection to the reason for the arrest[12]. For example, a vehicle inventory search based solely on departmental policy cannot be justified as an incident to arrest[13]. Nor would a search for improper police motives such as suspect intimidation or public ridicule. Valid objectives of a search incidental to a lawful arrest include[14]:

- **ensuring the safety of the police and public.** The police have a right to protect themselves and a duty to protect the public, including the arrestee, from threats to their physical well being. Not only must the arresting officer be concerned with their own safety, they must ensure the safety of other personnel within the criminal justice system who may be in contact with the arrestee such as jail guards, Sheriffs, or court staff. Instruments that may aid the arrestee in escape are also of concern during a search of this nature.

- **protecting or discovering evidence.** The police are entitled to secure or discover evidence related to the arrest. For example, a search following a drug arrest warrants a search for drug related evidence, but not pornography. In this way, what the police are looking for must be associated to the reason for the arrest. If the police "contrive" an arrest at a particular location as a camouflage or subterfuge to justify the subsequent search, the search would fall outside the scope[15].

- **the search must be conducted in a reasonable manner.** The physical manner or method of the search must be carried out in a just and proper fashion. The search must not be conducted by abusive means and the nature of the search must be proportionate to the objectives of the search and other circumstances of the situation. Although a search may be uncomfortable, such as a search that requires the removal and seizure of clothing, it is not necessarily unreasonable.

Exigent Circumstances

Search incidental to arrest is an exception to the unreasonable presumption of a warrantless search[16]. It is not necessary for the officer to believe that exigent circumstances exist or that it would be impracticable to obtain a warrant before conducting the search[17]. The presumption of unreasonableness is rebutted by a lawful arrest[18].

Reasonable Grounds

Although the arresting officer must possess reasonable grounds to effect the arrest, the existence of an independent belief that the person arrested has weapons or evidence on their person or in their immediate surrounding area is not required[19]. Reasonable grounds to justify arrest must pre-exist the search. If however, the search provides the reasonable grounds for the arrest, the search cannot be justified as an incident to the arrest[20].

Timing of the Search

If a search is carried out after an arrest, there is no requirement that the search be conducted immediately following the arrest. Postponing a search to a later time or place does not defeat the reasonableness of a search. However, this does not provide an unqualified right to search anytime after an arrest. The delay from the time of arrest to the time of search must be reasonable and the police will be required to give some explanation as to why the search was delayed[21]. A search may also be conducted prior to an arrest provided the officer has reasonable grounds to arrest

[10] *Caslake v. the Queen* [1998] 1 S.C.R. 51 (S.C.C.)
[11] R. v. I.D.D. (1987) 38 C.C.C. (3d) 289 (Sask.C.A.)
[12] R. v. Belnavis (1996) 107 C.C.C. (3d) 195 (Ont.C.A.) at p.213.
[13] *Caslake v. the Queen* [1998] 1 S.C.R. 51 (S.C.C.)
[14] *Caslake v. the Queen* [1998] 1 S.C.R. 51 (S.C.C.)
[15] R. v. Lim (No. 2) (1990), 1 C.R.R. (2d) 136 (Ont.H.C.J.), R. v. Concepcion (1994), 48 B.C.A.C. 44 (B.C.C.A.) at para. 27
[16] R. v. Golub (1997) 117 C.C.C. (3d) 193 (Ont.C.A.), Stillman v. the Queen [1997] 1 S.C.R. 607 (S.C.C.)., R. v. Golden 2001 SCC 83
[17] R. v. Smellie (1994) 95 C.C.C. (3d) 9 (B.C.C.A.), R. v. Drapeua (1993) 39 B.C.A.C. 237 (B.C.C.A.), R. v. Shynuk [1997] B.C.J. No.265 (B.C.C.A.) appeal to S.C.C. dismissed [1997] S.C.C.A. No.151.
[18] R. v. Klimchuk (1991) 67 C.C.C. (3d) 385 (B.C.C.A.),
[19] *Caslake v. the Queen* [1998] 1 S.C.R. 51 (S.C.C.), Cloutier & Langlois v. Bedard (1990) 53 C.C.C. (3d) 257 (S.C.C.), R. v. M. (M.R.) [1998] 3 S.C.R. 393 (S.C.C.), R. v. Morrison (1987) 35 C.C.C. (3d) 437 (Ont.C.A.), R. v. Polashek (199) 134 C.C.C. (3d) 187 (Ont.C.A.), R. v. Golub (1997) 117 C.C.C. (3d) 193 (Ont.C.A.)
[20] R. v. Belnavis (1996) 107 C.C.C. (3d) 195 (Ont.C.A.) at p.213.
[21] *Caslake v. the Queen* [1998] 1 S.C.R. 51 (S.C.C.), R. v. Copan (1994) 39 B.C.A.C. 307 (B.C.C.A.), R. v. Miller (1987), 38 C.C.C. (3d) 252 (Ont.C.A.)

the person before the search[22]; the arrest may not be incidental to the search and independent reasonable grounds to arrest must exist irrespective of the outcome of the search[23]. Thus, an otherwise "unlawful" arrest would not become lawful merely because the officer discovered evidence.

SCOPE

A search incidental to arrest includes a search of the arrestee and is extended to encompass a search of the immediate surroundings of the arrest location[24]. Although the courts have not attempted a comprehensive definition of the words "immediate surroundings"[25], immediate surroundings is a broader and a less restrictive standard than the area within the "immediate control" of the arrestee[26].

Personal Searches

Canadian jurisprudence has divided the search of a person into essentially four distinct categories[27]:

- "pat down" or "frisk" search
- "strip" or "skin" search
- "body cavity" search
- "bodily substance" search

It is without dispute that the police have the power to frisk, or "pat down" an arrestee. A frisk search is a "relatively non-intrusive procedure: outside clothing is patted down to determine whether there is anything on the person of the arrested individual. Pockets may be examined but the clothing is not removed "[28].

Strip or skin searches (disrobing), requiring the removal of an arrestee's clothing, is greater an affront to human dignity than a frisk or pat-down search. Although a search incidental to arrest does not generally require reasonable grounds beyond the grounds necessary to support the arrest, an exemption to this common rule exists in cases of strip searches[29]. Strip searches represent a significant invasion of privacy, and are often humiliating, degrading, and traumatic experiences. To undertake this type of intrusive search, the officer must possess reasonable grounds justifying the strip search in addition to justifying the arrest. Strip searches carried out as a matter of routine or policy, or abusively or for the purpose of humiliating or punishing the arrestee will be unreasonable. Furthermore, the strip searches should be conducted at the police station unless there are exigencies requiring the search be conducted in the field. For practical purposes, the following points are noteworthy[30]:

- Although permissible as an incident to arrest, strip searches are presumptively unreasonable and the onus lies with the police in justifying the search.
- In conducting a strip search the police must possess reasonable grounds that the search is necessary for safety or evidentiary concerns. These reasonable grounds are independent from the grounds justifying the arrest. Mere possibility that a person has weapons or evidence upon their person is insufficient.
- Searches conducted as a matter of routine or policy, or to humiliate or punish are unreasonable.
- There is a distinction between strip searches on arrest and strip searches related to safety in full custodial settings such as a prison. The appropriateness of routine strip searches of individuals integrated into a prison population cannot be used to justify strip searches of individuals briefly detained by police or held overnight in cells. Although police officers have legitimate concerns that short term detainees may conceal weapons, these concerns cannot justify routine strip searches of all arrestees and must be addressed on a case-by-case basis.
- Strip searches are to be generally conducted at a police station except in cases of exigent circumstances where the police have reasonable grounds to believe that the search is necessary in

[22] R. v. Debot (1987) 30 C.C.C. (3d) 207 (Ont.C.A.), R. v. Lee [1993] B.C.J. No.1220 (B.C.S.C.)
[23] R. v. Debot (1986) 30 C.C.C. (3d) 207 (Ont.C.A.) affirmed on other grounds (1989) 52 C.C.C. (3d) 193 (S.C.C.), R. v. Tomaso (1988), 70 C.R. (3d) 152 (Ont.C.A..), R. v. Charlton (1992) 15 B.C.A.C. 272 (B.C.C.A.), R. v. Belnavis (1996) 107 C.C.C. (3d) 195 (Ont.C.A.)
[24] Cloutier & Langlois v. Bedard (1990) 53 C.C.C. (3d) 257 (S.C.C.), R. v. Wong (1987) 34 C.C.C. (3d) 51 (Ont.C.A.) affirmed (1990) 60 C.C.C. (3d) 460 (S.C.C.)., R. v. Charlton (1992) 15 B.C.A.C. 272 (B.C.C.A.), R. v. Smellie (1994) 95 C.C.C. (3d) 9 (B.C.C.A.),
[25] R. v. Concepcion (1994) 48 B.C.A.C. 44 (B.C.C.A.)
[26] R. v. Lim (No.2) (1990) 1 C.R.R. (2d) 136 (Ont.H.C.J.)
[27] See R. v. Simmons [1988] 2 S.C.R. 495 (S.C.C.) and R. v. Stillman [1997] 1 S.C.R. 607 (S.C.C.).
[28] Cloutier & Langlois v. Bedard (1990) 53 C.C.C. (3d) 257 (S.C.C.)
[29] R. v. Golden 2001 SCC 83
[30] R. v. Golden 2001 SCC 83

the field such as an urgency to search for weapons that could be used to harm the officer, others, or the arrestee.

- A person should be provided the opportunity to remove items themselves or the assistance or advice of trained medical professionals should be sought to ensure material can be safely removed.

Whether the search was conducted out of public view or whether the officer conducting the search was the same gender as the arrestee will also be important factors in assessing the reasonableness of the search.

It is clear from jurisprudence that a high level of justification will be required if a search of body cavities is conducted[31]. Assistance of trained medical personnel aiding in the search will also be assessed in the overall reasonableness.

Taking biological samples of an arrestee as an incident to arrest is an exemption to the common law power. In *Stillman v. the Queen* [1997] 1 S.C.R. 607 (S.C.C.) the police took hair and saliva samples, as well as dental impressions from the accused who had refused to provide them. In addressing whether the samples were lawfully obtained incidental to arrest, Cory J. for the majority, at para. 49 held:

> The common law power of search incidental to arrest cannot be so broad as to encompass the seizure without valid statutory authority of bodily samples in the face of a refusal to provide them. (emphasis added)

Vehicle Searches

Vehicles are "legitimately the objects of search incident to lawful arrest as they attract no heightened expectation of privacy that would justify an exemption from the usual common law principles"[32]. The power to search may even extend to include a motor vehicle from which the person had emerged at or shortly before the time of their arrest[33]. Provided the search is rationally connected to the arrest (safety, evidence), "there is no logical reason that the entirety of what may be reasonably said to be the surroundings ought not to be searched"[34]. This may include trunks of motor vehicles, which are not necessarily taboo[35].

In *R. v. Smellie* (1994) 95 C.C.C. (3d) 9 (B.C.C.A.) leave to appeal to S.C.C. refused (1997) C.C.C. (3d) vi (S.C.C.) the accused argued that the search, which included the removal of a door panel, was not within the scope of search incidental to arrest. The Court held that previous judgements "make it clear that in searching a vehicle as an incident of arrest the police are entitled to at least search the interior of a vehicle as well as the trunk".

In *R. v. Speid* (1991) 8 C.R.R. (2d) 383 (Ont.C.A.), leave to appeal to S.C.C. denied [1992], 1 S.C.R. ix, police were refused the issuance of a search warrant by a justice of the peace. Police nevertheless proceeded with a search of the accused's vehicle, which was in the immediate surroundings, following his arrest. A unanimous Court in dismissing the appeal stated:

> In our opinion the police officers were entitled to search the appellant and the car driven by him which was still in the immediate surroundings as an incident of the appellant's lawful arrest, in order to discover and preserve relevant evidence….The fact that the search and seizure were not conducted immediately upon arrest, but only after the refusal of an unnecessary search warrant did not interfere with this entitlement. (emphasis added)

Residential Searches

It is "well recognized that the home is granted the highest degree of protection from unwanted state intrusions[36]". In proper circumstances, a search may be conducted of a residence, or parts thereof, as an incident to arrest[37].

For example, in *R. v. Golub* (1997) 117 C.C.C. (3d) 193 (Ont.C.A.) police searched the residence of the accused following his arrest outside his door after he exited his apartment. The nature of the call involved a firearm and the use of the police Emergency Task

[31] R. v. Greffe [1990] 1 S.C.R. 755 (S.C.C.)
[32] Caslake v. the Queen [1998] 1 S.C.R. 51 (S.C.C.), see also R. v. Smellie (1994) 95 C.C.C. (3d) 9 (B.C.C.A.), R. v. Poleshek (199) 134 C.C.C. (3d) 187 (Ont.C.A.), R. v. Drapeau [1993] B.C.J. No.2528 (B.C.C.A.)
[33] R. v. Klimchuk (1991) 67 C.C.C. (3d) 385 (B.C.C.A.), see also R. v. Brezak [1950] 2 D.L.R. 265 (Ont.C.A.), R. v. Vu (1998) 118 B.C.A.C. 162 (B.C.C.A.)
[34] R. v. Smellie (1994) 95 C.C.C. (3d) 9 (B.C.C.A.) leave to appeal to S.C.C. refused (1997) C.C.C. (3d) vi (S.C.C.)
[35] R. v. Charlton (1992) 15 B.C.A.C. 272 (B.C.C.A.), R. v. Polashek (1999) 134 C.C.C. (3d) 187 (Ont.C.A.), R. v. Smellie (1994) 95 C.C.C. (3d) 9 (B.C.C.A.) leave to appeal to S.C.C. refused (1997) C.C.C. (3d) vi (S.C.C.)
[36] R. v. Evans (1996), 104 C.C.C (3d) 23 (S.C.C.)
[37] R. v. Concepcion (1994) 48 B.C.A.C. 44 (B.C.C.A.), R. v. Joly (1999) 118 O.A.C. 334 (Ont.C.A.) appeal to S.C.C. dismissed [2000] S.C.C.A. No. 18 (S.C.C.), R. v. Golub (1997) 117 C.C.C. (3d) 193 (Ont.C.A.), R. v. Bedard [1998] O.J. No.2087 (Ont.C.A.)

Force (tactical team). As a result of the search, a firearm was found under a bed mattress. The Court found that the police interest in protecting the safety of those at the scene outweighed the privacy interest of the individual and was therefore an exception to the warrant requirement in searching a dwelling house[38].

The primary focus on whether the search in a dwelling house is legal will rest on the lawfulness of the arrest. Thus, where a search of a hotel room used as a dwelling resulted in the seizure of papers that were strewn about the room, the papers could be lawfully seized provided the initial arrest was lawful[39]. In *R. v. Joly* (1999) 118 O.A.C. 334 (Ont.C.A.) appeal to S.C.C. dismissed [2000] S.C.C.A. No. 18 (S.C.C.), the police walkthrough of the accused's apartment following his arrest in the apartment and brief examination of evidence in the bathtub was proper. However, the officer must recognize that the person's dwelling has a heightened expectation of privacy as compared to other places (ie. vehicles) and the scope of a search incidental to that arrest may be curtailed somewhat as to its spatial scope. Because of this increased privacy expectation in a home, officer safety may in some cases warrant a broader search power in a dwelling than gathering evidence[40].

Right to Counsel

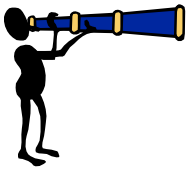
Although a person who is arrested must be advised of their right to counsel under s.10 of the *Charter*, an incidental search need not be suspended while the arrestee is afforded a reasonable opportunity to exercise that right[41]. The search may proceed but the police must cease questioning the arrestee until a reasonable opportunity to contact counsel is provided if the person asserts a desire to do so.

Summary

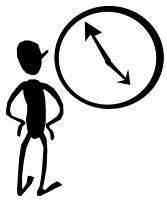
The enquiry into whether a search incidental to arrest will be reasonable will first hinge on the legality of the arrest. If the arrest is not lawful, the resultant search will not be lawful. If the arrest is valid, the second test will be whether the search was truly "incidental" to the arrest. The search must be undertaken for a purpose "connected" or "related" to the arrest, such as safety or evidence gathering, and will include focal, spatial, and temporal limits.

The focal limit refers to the articles that are the subject, or focus, of the search including weapons or evidence. Reasonable grounds to believe such evidence (or weapons) will be found is generally not a prerequisite to this power of search, unlike swearing an information to obtain a search warrant. However, strip and body cavity searches do require greater justification.

The spatial limit refers to the place or geographical area to be searched. This could include the person, a motor vehicle, a residence, or other place in which a person may have a reasonable expectation of privacy. The test is whether the targeted area of the search is properly circumscribed as "immediate surroundings". A search that exceeds this boundary will not be authorized in its excess.



The temporal limit refers to the time between the search and the arrest. Generally, the search will occur shortly after the arrest. However, failure to promptly carry out a search will not in all cases be fatal to the validity of the search. Although the court may draw an adverse inference from the delay, this inference can be defeated by a reasonable explanation. In fact, a search may occur before an arrest provided reasonable grounds existed prior to the search and irrespective of the results.



Finally, the search must be conducted in a reasonable manner. Legality alone will not save a search that is excessive in its execution. The police are not entitled to conduct a search as they choose. The police must demonstrate the physical manner, or intensity, of the search was appropriate and was not abusive or otherwise disproportionate to the objectives sought or other circumstances of the situation. These boundaries on the common law power to search incidental to arrest must be carefully considered and dutifully respected.

[38] See also R. v. Bedard [198] O.J. No.2087 (Ont.C.A.) for a similar result.
[39] R. v. Chau (2000) Docekt:C31982 (Ont.C.A.)
[40] R. v. Golub (1997) 117 C.C.C. (3d) 193 (Ont.C.A.) at p.210.
[41] R. v. Debot [1989] 2 S.C.R. 1140 (S.C.C.), R. v. Guberman (1985), 23 C.C.C. (3d) 406 (Man. C.A.).

IN CUSTODY ABANDONMENT: GUM TRICK VIOLATES CHARTER

R. v. Nguyen,
(2002) Docket:C24776 (OntCA)

Police arrested the accused for the murder of his distant cousin who had been sexually assaulted and brutally beaten to death. At one point the trial was put over for two weeks to permit a motion by Crown for an adjournment; an application for a general warrant to obtain bodily samples and dental impressions was going to be made. Prior to the two week returnable date, the police and Crown conspired to circumvent the accused's refusal (on the advice of his counsel) to provide DNA, by offering the accused a piece of chewing gum with the hope that it would be chewed and discarded. The plan involved the following steps that were summarized by the trial judge as follows:

- "Two female police officers were selected to transport the accused in an attempt to create an atmosphere conducive to acceptance of the gum.
- "The officers were to respond if spoken to and were to participate in conversation unrelated to the case. The sliding window into the back seat of the police car was left open for this purpose.
- "Gum was to be offered, officer to officer, accepted, and then offered to the accused. Acceptance by the accused was to be voluntary. The officers were not to suggest, persuade or insist. They were neither to ask for the return of the chewed gum, nor to suggest the accused discard it. If the accused swallowed the gum or put it in his pocket, nothing was to be done. If the gum was discarded, they were to retrieve it.
- "The toilet bowl in the court house security cell was drained. Paper towelling was placed to catch anything dropped in the bowl. A clean waste basket was placed outside the cell to provide another opportunity for the accused to deposit the gum.

The plan was successful and on two occasions the accused accepted, chewed, and discarded a piece of gum which was seized without a warrant and submitted for DNA analysis; one piece of gum on the way from the detention centre to the courthouse which was discarded in the dry toilet bowl and a second stick on the return trip from the courthouse to the detention centre which was discarded in a trashcan in the security garage of the detention centre. On both occasions, the trial Court found that even though the police "presented the opportunity for the accused to unwittingly circumvent his decision not to supply bodily samples" and that they were banking on the accused's "ignorance or oversight about the possible consequences flowing from abandoning chewed gum" (DNA), they did not encourage or persuade him; the accused voluntarily accepted and chewed the gum "entirely independent of police suggestion or inducement other than the offer". At trial, the judge found the warrantless seizure valid because the accused could no longer claim a privacy interest in the discarded gum; therefore s.8 of the *Charter* was not triggered. Furthermore, the judge found the "trick" used by the police did not undermine the accused's refusal in providing body samples and therefore did not violate the privilege against self-incrimination. The accused appealed his conviction to the Ontario Court of Appeal arguing, among other grounds, that the trial judge erred in admitting the DNA evidence derived from the chewing gum.

S.7 Charter-Protection Against Self Incrimination

When does a trick become so dirty that it amounts to an improper subversion of a person's freedom to choose whether to provide the DNA sample or not therefore violating their right against self-incrimination? In describing the offer of gum in this case as a "passive" ploy, the trial judge found it similar to placing an undercover officer in a cell for no purpose but to listen, thereby creating an opportunity to speak with someone. Police offered no "active" deception, unfairness, threats, promises, coercion, persuasion, or inducement to accept, chew, return, or discard the gum. By offering the gum the police merely created the opportunity; taking advantage of that opportunity was dependent on the accused. The Ontario Court of Appeal agreed with the trial judge in finding the trick acceptable.

S.8 Charter-Unreasonable Seizure

Normally, where a person who is not in custody discards an item such as a cigarette butt, the police may collect the item without a warrant or without

consent because the person relinquishes their privacy interest in the item discarded. However, a person in custody cannot prevent the police from retrieving the item. A person in custody who produces items containing bodily fluids will have no choice but to discard those substances in receptacles under police control. Whether a person relinquishes any privacy interest in the samples while in custody will be determined on a case-by-case basis. In this case, the Crown conceded that the warrantless seizure of the gum constituted a violation of the accused's s.8 *Charter* rights. However, despite the s.8 breach, the DNA evidence was admissible under s.24(2) of the *Charter* because the administration of justice would not be brought into disrepute by its admission. Consequently, the appeal from conviction was dismissed.

Complete case available at www.ontariocourts.on.ca.

PRIVATE PORNOGRAPHY MITIGATING CIRCUMSTANCE: CONDITIONAL SENTENCE REASONABLE

R. v. Schan,
(2002) Docket:C36525 (OntCA)

Ontario's Court of Appeal recently varied the sentence of an accused who pled guilty to possessing child pornography. Although the trial judge properly focused on the evils of child pornography and the principles of denunciation and deterrence in passing sentence, he did not properly focus on the fact the accused only downloaded the pornographic images for his own use and did not distribute the material. Furthermore, the accused's marriage and relationship with his children had ended, he suffered from depression, and attempted suicide. As a result, the Appeal Court substituted an 18 month conditional sentence.

Complete case available at www.ontariocourts.on.ca.

Note-able Quote

"*Freedom is not the sole prerogative of the lucky few but the right of all human beings.*" Author unknown.

ENTRY TO ARREST LAWFUL: ALL EVIDENCE NEED NOT BE DESTROYED

R. v. Duong and Tran, 2002 BCCA 43

Police officers who were responding to a home invasion canvassed the neighbourhood for possible witnesses. One of the officers approached the front door of a residence and knocked. As a male opened the door, the officer felt a rush of warm, humid air carrying the odour of both burning and growing marihuana. As the officer questioned the male about the home invasion he observed a female standing inside the house. The officer described the male at the door as "fidgety", rocking on his heels, looking over his shoulder, avoiding eye contact, and attempting to pull the door closed behind him. The officer called for backup and after a second officer arrived, the male and female were arrested inside the residence for growing marihuana. The officers then checked the residence to satisfy themselves there were no other persons present. While inside the residence the police made several observations including a padlocked basement door, fans humming in the basement, and a locked rear basement door. The two arrested occupants were transported to the police lockup while police obtained a search warrant. A search warrant was executed resulting in the seizure of a commercial marihuana grow operation from the basement and other evidence linking the arrested occupants to the premises. At trial, the evidence was admitted and the accused were convicted of producing marihuana and possession for the purpose of trafficking. The accused appealed their convictions arguing the police violated their right under the *Charter* to be secure from unreasonable search or seizure and that the evidence should be excluded because the police did not have reasonable grounds on which to base either the arrests or the search warrant, nor were there exigent circumstances justifying entry to effect the arrests or the walk through search following the arrests.

Lawful entry to effect arrest?

Since the decision in R. v. Feeney [1997] 2 S.C.R. 13, entry to effect an arrest in a dwelling house is generally prohibited unless the police are in fresh pursuit or in cases of exigent circumstances. Section

529.1 of the *Criminal Code*, Parliament's response to the Feeney decision, allows the police to enter a residence without a warrant to effect an arrest if the following three preconditions are satisfied:

1. the police have the power of arrest under s.495(1)(a) or (b),
2. reasonable grounds the person is within the residence exist; and
3. it would not be practicable to obtain a warrant because of the existence of exigent circumstances.

Were the arrests lawful?

Section 495(1) of the *Criminal Code* permits an arrest for an indictable offence based on reasonable grounds. Reasonable grounds require a subjective belief held by the officer that is supported by objective criteria. The following grounds offered by the arresting officer, and accepted by the trial judge, were sufficient:

- the odour detected at the door;
- the humid, warm air coming from the house;
- the demeanour of the male answering the door; and
- the officer's experience in the field with the distinct odour of growing marihuana

Grounds to believe person(s) present?

This precondition was satisfied because the officer saw the accused in the residence.

Exigent Circumstances?

Exigent circumstances are defined in the *Code* as including circumstances where the officer believes, on reasonable grounds, that entry is necessary to prevent the imminent loss or destruction of evidence relating to an indictable offence. The standard for assessing the existence of exigent circumstances is reasonable grounds. In other words, did the officer believe exigent circumstances existed and was that belief supported by objective criteria? In this case, the trial judge concluded exigent circumstances existed after accepting the officer's testimony that:

- if he left to get a warrant the accused could escape and he would subsequently be unable to identify him;
- the accused and anyone else inside could destroy evidence;
- because of an officer shortage that evening he would have difficulty obtaining additional officers to watch the house; and
- he was dealing with an 'active' crime rather than one that could be dealt with later.

The accused argued that a commercial marihuana grow operation could not be dismantled and destroyed in the hour it would have taken the officer to obtain the warrant, unlike a quantity of cocaine which could easily be destroyed. Although the court agreed that the operation could not be completely destroyed, other evidence linking the accused to the operation, such as documents and fingerprints on equipment could be made unavailable had the accused been left inside the home for that hour. The British Columbia Court of Appeal refused to interfere with the trial judge's conclusion that exigent circumstances existed.

Entry as an Incident to Arrest?

In addition to the entry being lawful under the warrantless entry provisions of the *Code*, the appellate Court also examined whether the entry of the premises and the initial search were lawful as an incident to arrest at common law. For a search to be incident to arrest, the following threefold test must be satisfied:

1. the arrest must be lawful
2. the search must be for a valid investigatory objective
3. the search must be conducted in a reasonable manner

Since the arrest was lawful, the Appeal Court found the officer's "entry of the premises without a warrant to ensure its security and to preserve evidence was a lawful incident of that arrest and was not carried out in an unreasonable manner". The entry and search were therefore lawful at common law.

Complete case available at www.courts.gov.bc.ca.

Note-able Quote

"*Innocent people are inevitably caught up in the criminal processes and those who prefer to be hostile and unco-operative with the police in the conduct of their duties are more likely to suffer unfortunate consequences".* SaskCA Justice Wakeling[42]

[42] Schell V. Truba et al. [1990] S.J. No.547 (SaskCA)

2001 ENHANCED COUNTERATTACK ROADCHECK STATISTICS

The Enhanced Counterattack Roadcheck statistics for British Columbia police forces are in for 2001. Ending December 31, 2001 there were a total of 4,727,195 vehicles checked, 23,729 roadside BAC screenings, 726 standard field sobriety tests, and 148 drug recognition expert screenings. As a result, a grand total of 741 impaired driving charges were processed (up from 732 in 2000), 832 administrative driving prohibitions and 10,376 (1,016 for drugs) 24 hour prohibitions were served. Finally, 21,317 violation tickets were written and 442 other Criminal Code charges were laid. The statistics for BC's municipal police departments are as follows:

Department	Vehicles checked	Roadside BACs	Impaired charges	215s
Abbotsford	153,804	759	7	290
Central Saanich	84,197	224	24	106
Delta	150,397	694	10	256
Esquimalt	76,509	168	10	68
Nelson	23,309	123	5	66
New Westminster	165,565	413	9	195
Oak Bay	35,881	218	1	59
Port Moody	59,745	150	1	87
Saanich	154,582	455	7	204
Vancouver	837,270	5,238	10	2,102
Victoria	268,215	2,015	20	570
West Vancouver	213,120	1,172	22	422

The Cowichan Valley RCMP generated the most impaired driving statistics. They checked 91,511 vehicles resulting in 134 charges (up from 68 in 2000).

Note-able Quote

" *The driving of a motor vehicle is neither a God-given nor a constitutional right. It is a licensed activity that is subject to a number of conditions, including the demonstration of a minimum standard of skill and knowledge pertaining to driving…*" SCC Justice Cory[43]

[43] *Gaslake v. O'Donnell* [1994] 1 S.C.R. 670

SEIZED JOURNALS ADMISSIBLE

R. v. Anderson
(2002) Docket:C33913 (OntCA)

Police executed a search warrant and seized journals encompassing the several year time frame relating to several charges against the accused. The journals consisted of 500-1,000 pages of handwritten notes; some exculpatory and some inculpatory. At trial, the Court excluded the journals finding their admission in the trial would violate the accused's right to silence and the principle against self incrimination protected under the *Charter*. On appeal by Crown, the Ontario Court of Appeal recognized that both rights are embodied in the *Charter*, but they are not absolute. The right to silence is triggered when the accused, in a criminal proceeding, is subject to the coercive powers of the state through detention or "when an adversarial relationship arises between the individual and the state". The principle against self-incrimination may "mean different things, at different times, in different contexts".

In this case, the police did not elicit the statements contained in the journals; they were created before any police investigation, detention, or arrest. The statements were not made under compulsion, coercion, or after detention or arrest, nor was there an adversarial relationship at the time the entries were made. The Crown appeal was allowed and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca.

USE OF DEER DECOY NOT ENTRAPMENT

R. v. Sigurdson, 2002 BCPC 0019

The accused was convicted of hunting with the aid of a light, hunting during prohibited hours, and discharging a firearm on or across a highway contrary to the *Wildlife Act*. Conservation officers had set up a deer decoy at night along a road outside the Williams Lake area. The accused, who was driving along the roadway in the

company of another person, stopped, loaded his rifle, and fired two shots at the decoy. The accused attempted to leave the area but was stopped, arrested, and subsequently released. After being found guilty of these charges, the accused argued that he had been entrapped by the conservation officers on three grounds. First he argued, the area targeted by conservation officers was outside the geographic area where reports about this kind of illegal activity had been occurring. Second, the decoy operation was designed to entrap persons. Finally, the decoy itself was "so spectacular a trophy that he could not resist it"; "the size and symmetry of the rack on the decoy was of such quality that it proved to be an irresistible lure".

The test for entrapment is two fold:

- Were the police acting on a reasonable suspicion that the person is engaged in criminal activity or were they acting pursuant to a bona fide inquiry in an area where particular criminal activity is likely occurring?, and
- Even if they had a reasonable suspicion or were acting on a bona fide inquiry, did they go beyond providing an opportunity and induce the commission of an offence?

In this case, the judge found the police were engaged in a bona fide investigation, acted reasonably in what they did, and did not go beyond providing an opportunity. Largely based on the evidence of the conservation officers, the judge found the antlers on the deer were "neither exceptional in size or symmetry so as to act as an extraordinary lure to law abiding members of the public". The defence of entrapment, which could result in a judicial stay of proceedings, had not been made out.

Complete case available at www.provincialcourt.bc.ca

MISTATEMENT OF PUNISHMENT RENDERS CONFESSION INADMISSIBLE

R v. Monk and Alexis, 2002 BCCA 103

The accused was arrested by police for murder. After the arrest, he contacted a lawyer and refused to talk to the police on the advice of counsel. Nonetheless, he did reveal that he wished to become a youth probation counselor which the police later used to develop a theme that if the accused accepted responsibility he could build on his hopes for the future. The police officer developed a rapport with the accused and after talking to him for about two hours, obtained a confession. Prior to the confession, the accused asked the officer if the judge would reduce his sentence if he cooperated. The police officer advised the accused that the judge would have to sentence him to no less than ten years in jail. However, the police did not advise the accused that the minimum sentence for conviction on second degree murder was life imprisonment without parole for at least ten years. The trial judge was satisfied that the accused believed he was facing a ten-year sentence and not a life sentence. As a consequence, the trial judge ruled the statement inadmissible; it was induced by the hope of a ten-year sentence with a chance of early release (2/3 of a ten year sentence). In rejecting the Crowns appeal, the British Columbia Court of Appeal stated:

> [I]t was open to the trial judge to conclude that [the accused] was induced to confess so that he could secure a minimum ten year sentence….The inducement was implicit rather than express. Neverthe-less, the constable ventured into a high risk area…as "[t]he classic 'hope of advantage' is the prospect of leniency from the courts". (references omitted)

Complete case available at www.courts.gov.bc.ca

ASD SAMPLE PREMATURE: RESULTS UNRELIABLE

R. v. Burns, 2002 ABQB 135

The Crown appealed the accused's acquittal on a charge of driving while over 80mg% because the police officer should have waited fifteen minutes from the time of the accused's last drink before administering the approved screening device (ASD). The accused told the officer that he had a "few beer" and his last drink was about ten minutes before the stop. The officer made a demand requiring the accused provide a sample into an ASD. As a result, a fail was registered and from that result alone, the officer formed reasonable grounds and read the breathalyzer demand. Consequently, the accused complied and provided a sample in excess of 80 mg%. At trial, the judge found the officer knew she should have waited fifteen minutes and by not doing so the "fail" reading was unreliable. An RCMP crime

laboratory analyst was called by the defence and testified the fifteen minute waiting period after a last drink ensured the dissipation of any alcohol which may affect the reliability of the test. As a consequence, the officer's belief to support the breathalyzer demand based solely on the "fail" was not reasonable because she knew the reading was unreliable. The resultant certificate of breath samples was obtained as a result of a *Charter* violation and was ruled inadmissible. In rejecting the Crown's appeal, the Alberta Court of Queen's Bench Justice stated:

> The requirement to wait 15 minutes to ensure the reliability of the analysis arises only where the police officer is inclined to believe the suspect's claim of recent alcohol consumption. …[A] police officer is entitled to disbelieve the suspect, presumably with articulable reasons for doing so. In such a case, there will be no doubt in the officer's mind regarding the reliability of the ASD results
>
> I conclude … that when an officer has reason to believe or suspect that alcohol has been consumed within 15 minutes, the officer should delay administering the test to ensure that the ASD results are reliable. However, where there is no credible evidence that the suspect was drinking within 15 minutes, then the screening analysis should be administered as soon as reasonably possible.

The appeal court judge refused to interfere with the trial judge's decision and the acquittal was upheld.

Complete case at www.albertacourts.ca

SEARCH WARRANT FOR HOUSE PERMITS SEARCH OF VEHICLE ON PROPERTY

R. v. Nguyen, Pham, and Vu, 2002 BCPC 0012

Police were in possession of a search warrant that authorized the search of a residence but was silent about the search of two vehicles on the property. After finding two sets of keys in the home, police opened and searched the vehicles parked in the back yard area of the property. In one vehicle, police located photographs and documents which were tendered at trial as evidence. The accused Vu argued that his s.8 Charter right to be secure against unreasonable search and seizure had been violated because the police did not have a warrant to search the vehicles. After reviewing the applicable case law, Justice Maughan found there to be no breach:

> In the case at bar, police searched the residence and found evidence of an active and extensive marihuana production. Indications by way of food and clothing and personal items tended to show the house was occupied by at least one person. They also found documents pertaining to [the accused] Vu which tended to indicate he had some connection with the residence, storage of items such as ballast[s] to be used in marihuana production and finally two sets of car keys which opened the two vehicles parked in the back yard. The sets of keys which opened the Honda also opened locks for the residence, including one of two locks securing the basement entry to the marihuana grow area.
>
> Because of the clandestine nature of marihuana growing operations, it is reasonable to expect the materials used to operate such an enterprise and the final production results of the enterprise were likely transported on an ongoing basis to and from the residence in private motor vehicles. The vehicles parked behind the residence had been observed there for at least a few hours, so that it cannot be said their presence on the property was momentary or incidental. The documents found in the vehicles were quickly and easily located and did not apparently involve any dismantling of the vehicle.

Complete case available at www.provincialcourt.bc.ca

Editor's Note: The Court distinguished this case from British Columbia Supreme Court case (*R. v. Brown* (1997) B.C.J. No. 2642) where the search of a vehicle not mentioned in the warrant was found to be unreasonable. In that case, the police searched and found drugs in a residence not belonging to the accused. They also found a car key dropped by a third party. They searched the car they knew belonged to the accused which was parked partly on the driveway. Inside the vehicle police found decks of cocaine with the accused's fingerprints on them. Romilly J. found the police did not have reasonable grounds to believe there were drugs in the vehicle, exigent circumstances did not exist, and there was no search incident to arrest. As a consequence the evidence in the Brown case was ruled inadmissible.

Note-able Quote

"*Six ways to bury a good idea; it will never work; we've never done it that way before; we're doing fine without it; we can't afford it; we're not ready for it; and it's not our responsibility*". Author unknown

CARE & CONTROL: BEDROOM DEFENCE ACCEPTED

R. v. Bishop, 2002 BCPC 0006

The accused had consumed seven to eight beer at a motel pub after having driven there following an argument with his spouse. Not wanting to go home and not having enough money to purchase a motel room nor anywhere else to go, the accused decided to sleep in his pickup truck until morning. During his sleep, the accused awoke and started his truck to allow the heater to warm the interior, but later fell asleep with the engine running. Police found the accused asleep in his truck slumped behind the steering wheel. The engine was running, the automatic transmission was in park, and the emergency brake was on, as well as the radio. As a result, the accused was charged with being in care control of a motor vehicle while impaired and having a blood alcohol level in excess of 80 mg%.

At trial, the Crown relied on the presumption found in s.258(1)(a) of the *Criminal Code* which provides that a person who occupies the operator's seat of a vehicle is deemed to have care control of the vehicle unless they prove that they did not occupy that position for the purpose of setting the vehicle in motion. In this case, the trial judge accepted the evidence of the accused that his intent was to sleep in the vehicle rather than to occupy the driver's seat for the purpose of setting the vehicle in motion. Furthermore, the Crown was unable to establish care and control independent of the presumption. In dismissing the charges, Gill J. at para. 11 stated:

> In the case at bar there is no dispute that the vehicle's motor was running. However given that the transmission was in "Park" with the emergency brake activated and the accused asleep, I conclude that the risk of the accused unintentionally putting the vehicle in motion, which would have required a number of discrete steps on his part, was negligible. His explanation, that because he had no place to stay he did not intend to drive until the next morning, combined with the fact that his vehicle was parked in a motel parking lot and away from any road traffic, renders any possibility that he may have awakened, changed his mind and driven away, speculative. The element of care control not having been proven beyond a reasonable doubt, the matter is dismissed.

Complete case available at www.provincialcourt.bc.ca

DOCUMENTS & 'HIGHLY AROMATIC' ODOUR PROVE POSSESSION

R. v. Nguyen, 2002 BCPC 0040

Police responded to a report by a neighbour of a break and enter at a residence where police found suspects nearby in possession of large plastic bags containing marijuana. Police then went to the home and entered to secure it and ensure there were no other suspects present. No one else was located but a marijuana grow operation was discovered. Police returned with a warrant, searched the premises, and located 111 marijuana plants and several pieces of documentary evidence. The accused, who was not present at the home, was charged with unlawfully producing marihuana and possession of marihuana for the purpose of trafficking. There was no direct evidence that the accused had ever been present or seen in the home and there were no fingerprints relating her to the operation, nor were any keys for the premises found in her possession.

In this case, the Crown relied on circumstantial evidence and the doctrine of constructive possession set out in s.4(3) of the *Criminal Code*. The trial judge found that there was circumstantial evidence of the accused's presence at some point in the house established through the existence of her personal documents in the home. Police found a tenancy agreement signed by the accused, a report of the rental premises and contents, a hydroponic feeding program, utilities bills, Visa bills, and banking documents with the accused name and address, a photograph of the accused, personal cheques, a life insurance payment in the name of the accused, and automobile driver insurance. The landlord also testified that he leased the residence to the accused and her daughter and the rent was paid by post-dated cheques in the name of the accused.

To establish constructive possession under the *Code*, the Crown must prove that the accused had both control over and knowledge of the marihuana grow operation. Control does not necessarily mean actual physical control but some power or authority over the drugs. In this case, the trial judge found the accused had control over the premises because she was the lessee, provided the post dated cheques for the rent

to the landlord, and the hydro, telephone, and cable were in her name. In taking judicial notice that growing marihuana is a "highly aromatic plant" along with the presence of the dated documents found at the home, the judge was satisfied that the accused had taken the documents there and therefore would have known about the grow because of the odour. Furthermore, the accused was paying the $400 a month hydro bill. In finding possession proven, Challenger J. stated:

> With respect to the evidence of other possible persons in the home, I have considered s.4(3)(b) and the doctrine of constructive possession. It is clear [the accused] had control of the premises as the lessee, as the payer of the rent and utilities. Whether others were utilizing the premises does not negate her control, according to all of the evidence before me, nor her knowledge. I also note that the other person who apparently resided at that home was closely connected to the accused, sharing life insurance and car insurance.

As a result, the accused was convicted of both counts.

Complete case available at www.provincialcourt.bc.ca

CRIMINAL CONVICTIONS DO NOT BAR CIVIL SUIT

Vlad v. Edmonton (City) Police Service, 2002 ABQB 108

The plaintiff was convicted of the *Criminal Code* offences of assaulting a police officer with the intent to resist arrest and obstructing a police officer in the execution of his duty and offences under Alberta's *Highway Traffic Act* of running a red light and failing to stop for police. His appeals from conviction were dismissed by Alberta's Court of Queen's Bench, the Alberta Court of Appeal, and the Supreme Court of Canada. The accused, now plaintiff, seeks damages against the defendants Edmonton police chief, Edmonton City Police Service, and a named police constable in the amount of $3 million alleging unreasonable use of force and *Charter* breaches. The defendant police applied to the Alberta Court of Queen's Bench for an order requiring the plaintiff post a security for costs of the court proceedings; they argue that the plaintiff has insufficient funds to pay the estimated $96,000 defence costs if he loses. They also argued that "the events giving rise to the criminal convictions are exactly the same as those giving rise to the civil proceeding" and by asking the civil court to come to a different conclusion the plaintiff is launching a collateral attack on the convictions. Furthermore, the defendants allege his claim is "frivolous and vexatious and an abuse of court process".

On the other hand, the plaintiff argued that this proceeding was not a collateral attack on the criminal proceedings but finds merit in *Charter* breaches not addressed at the criminal trial such as a strip search conducted at police headquarters following his arrest. Moreover, the plaintiff alleges that the actions of the police contributed to his inability to find work following this incident.

In finding that the plaintiff has an inability to raise funds and an order for security costs would "effectively end" the lawsuit, Moreau J. held it would not be just and reasonable in this case to require him to post security for costs and dismissed the defendants' application. Furthermore, the Court was "unable to say that the plaintiff's case is plainly without merit" because the plaintiff's allegations were not specifically ruled upon at the criminal trial. The civil trial is set for spring 2002.

Complete case at www.albertacourts.ca

DUTY TO BE AWARE OF WARRANT LIMITATIONS

R. v. Kyllo, Lubkey, & Toupin, 2001 BCCA 528

The three accused appealed their convictions to the British Columbia Court of Appeal. They were convicted of robbery and in addition, the accused Kyllo was convicted of murder. Although the three judge appellate panel overturned their convictions on the basis of an improper instruction by the judge to the jury, Hubbard J.A. made additional comments concerning the execution of the search warrant that are worth noting.

When the accused was arrested at his home the police observed a pair of boots on the porch by the back door. A warrant was later applied to search the whole house but one was granted only for a search of the "curtilage" of the house; limiting the search to the perimeter and area surrounding the outside of the home. Two officers executed the warrant and the

boots, which later became important evidence in the trial, were seized from within the residence by an officer who did not obtain the warrant. He testified he thought the warrant was for the whole house while the officer who obtained the warrant testified he told him it was restricted to its perimeter. Although the trial judge concluded that the seizure of the boots violated s.8 of the *Charter*, she nevertheless admitted the non-conscriptive evidence under s.24(2) because the violation was inadvertent, the execution of the warrant was "exemplary", and the boots were important evidence.

Hubbard J.A. however, described the breach as "serious" because the officer was "under a duty to make himself aware of the limitations of the warrant". As was reasoned, if he had made himself aware, "he would have known he had no authority to enter and search the residence". Furthermore, even if the officer was confused about the word "curtilage" as Crown suggested, the officer has "a duty to clear up the confusion before executing [the warrant]". Moreover, the fact the police carried out the search in an "exemplary" manner did not mitigate the seriousness of the breach. "Exemplary conduct is to be expected of investigating officers whether they enter a house with consent of the occupants or under the authority provided by a warrant". Even if the officer made a "mistake" in this case, "the failure to make himself aware of the terms of the warrant before embarking on its execution demonstrates an absence of good faith".

The appeal was allowed and a new trial ordered.

Complete case available at www.courts.gov.bc.ca

'RESIDUAL' PRIVACY INTEREST IN RECOVERED STOLEN PROPERTY

R. v. Law et al., 2002 SCC 10

The accused's locked safe, which was stolen from a restaurant, was recovered by police after it was abandoned by thieves and found open in a field. An investigation into the theft was completed and the safe was placed in the exhibit room for return to the owner. However, prior to its return another officer, aware of but unconnected to the theft investigation, acted on "a gut feeling" the accused were committing tax violations and examined the documents inside the safe. The officer took the documents, many of which he could not understand because they were written in Chinese characters, and photocopied them without a warrant or without consent. The documents provided financial evidence for offences under the *Excise Tax Act*. At trial, the judge held the accused's righs under s.8 of the *Charter* were breached and the evidence was excluded. This was upheld by the New Brunswick Court of Queen's Bench but was overturned by the New Brunswick Court of Appeal. The principle question on further appeal to the Supreme Court of Canada was whether the accused, as owners of the safe, maintained a reasonable expectation of privacy in the documents?

Unlike the principle of abandonment where a person voluntarily relinquishes or discards an item, the documents were locked in a safe that was stolen; the accused did not participate in the safe's 'abandonment' in the field. "The mere fact that the police recover lost or stolen property is insufficient to support an inference the owner voluntarily relinquished his expectation of privacy". Although it would be expected that the police would conduct an investigation of the contents to determine the thief, such as a fingerprint analysis, the examination did not extend to the pursuit of totally unrelated hunches. Bastarache, J. for the unanimous Supreme Court held the accused "retained a residual, but limited, reasonable expectation of privacy in the contents of their stolen safe" and "one would have expected the stolen property to remain private following its recovery, as it was before its theft".

Furthermore, the plain view doctrine, which permits the seizure of inadvertently discovered and immediately obvious evidence coming within the view of a lawfully positioned officer, was of little assistance because their was nothing facially wrong with the documents. In fact, the officer did not inadvertently detect anything incriminating through the unaided use of his senses; it wasn't until after the documents were translated that the officer formed his grounds. The appeal was allowed and the evidence ruled inadmissible.

Complete case available at www.scc-csc.gc.ca

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