

POLICE ACADEMY

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IN SERVICE:10-8

A PEER READ PUBLICATION



JUSTICE INSTITUTE
of BRITISH COLUMBIA

A newsletter devoted to operational police officers across British Columbia.

SEX, DRUGS & GUNS: CANADA TACKLES VIOLENT CRIME



Effective May 1, 2008 some of Bill C-2's provisions came into effect. This Bill, cited as the "*Tackling Violent Crime Act*" amends the *Criminal Code* in various areas, including:

- firearms offences;
- sexual predators;
- drug driving.

Guns

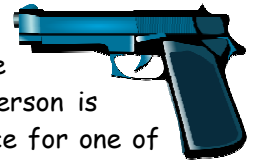
Under the new law, two new offences were added and minimum penalties for gun related crimes have been increased. It is now an offence under s.98 of the *Criminal Code* for a person to break and enter and steal a firearm. This section parallels the break and enter provisions found in s.348 by creating four separate ways to attach culpability:

- Breaking and entering with intent to steal a firearm;
- Breaking and entering and stealing a firearm;
- Breaking out after stealing a firearm;
- Breaking out after entering with intent to steal a firearm.

Break has the same meaning as found in s.321 and "place" means any building or structure—or part of one—and any motor vehicle, vessel, aircraft, railway vehicle, container, or trailer. This definition differs somewhat from the definition of place found in s.348 in that the new s.98 place includes a motor vehicle. The maximum punishment for this offence is life in prison and the offence does not distinguish between dwelling houses or not for sentencing purposes as s.348 does.

Also a new provision, s.98.1 creates an offence of robbery with intent to steal a firearm or successfully stealing one. This offence also brings a maximum life sentence. Serious firearm offences have increased penalties for first (three year minimum) and subsequent offences (five year minimum). Furthermore, several firearm related offences involving the use of restricted or prohibited firearms will see minimum offences increased to five years (for a first offence) and seven years (for second and subsequent offences). An earlier offence, however, shall not be taken into account for the purpose of second and subsequent offences if 10 years has elapsed between the day of earlier conviction and the new conviction. (see page 46-47 for sentencing grid).

Bail hearings for offences involving firearms or other weapons now restrict the release of charged persons. Where a person is held and brought before a justice for one of the applicable firearms or weapons offences, the onus shifts to the accused to justify release and why they should not be detained.



Sex

The age for consenting to sexual activity has also been raised from 14 years of age to 16. When an accused is charged with a sexual offence, such as sexual interference, invitation to sexual touching, sexual exploitation, bestiality in the presence of or by a child, indecent exposure, or sexual assault, it is not a defence that the child or youth under the age of 16 consented to the sexual activity.

There are, however, close in age exceptions where consent by a person under 16 years of age is a defence.

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Unless otherwise noted, all articles are authored by Sgt. Mike Novakowski, MA (Abbotsford Police). The articles contained herein are provided for information purposes only and are not to be construed as legal or other professional advice. The opinions expressed are not necessarily the opinions of the Justice Institute of British Columbia. "In Service: 10-8" welcomes your comments on or contributions to this newsletter. If you would like to be added to our electronic distribution list e-mail Mike Novakowski at mnovakowski@jibc.ca

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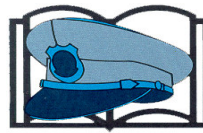
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'IN SERVICE: 10-8' e-LETTERS TO THE EDITOR



"I really enjoy the articles published in 10-8 as they are interesting and work worthy related." - RCMP



Constable, New Brunswick

"I'd like to be added to your distribution list. It's a fantastic publication, with current and relevant information." - RCMP



Constable, Atlantic Canada

"I was introduced to the 10-8 In service newsletter today for the first time. I read it through, especially the case law, and found it extremely informative and helpful." - Police Detective, Ontario



"This is a wealth of information for the 21st century police officer. In today's policing you need to stay on top of the latest case law rulings, and to do that you need to read, read, and read some more! With more than 25 years now in policing...I still learn something new each and every day I come to work!" - Police Constable, Alberta



"Excellent publication, this should be standard reading for all police officers across the country. ... Greatly appreciated and again, great publication." - RCMP Staff Sergeant, North West Territories



"I would like to be added to your distribution list for your publication. One of my instructors in recruit classes let me read it and I have found it very beneficial now that I am on the streets. Thanks again." - Police Constable, Alberta



"Could you re-direct your great In Service:10-8 newsletter ... ? I am soon to retire and would love to keep reading your newsletter and stay current. Thanks..." - Police Constable, Alberta



www.10-8.ca

"I had the 10-8 forwarded to me and I immediately recognized its value to me as an investigator. Please add me to the e-mail distribution list for future 10-8's" - Police Detective, Alberta



"I have been reading your newsletters since 2002 and have used them in the training of new and current ... Police since then. I find your articles get right to the point, and would like you to add me to your mailing list. Thanks." - Police Sergeant, Ontario



"My Supervisor just sent me a copy of your most recent issue & it's obvious that I NEED to subscribe! Great publication! Thanx." - Police Constable, New Brunswick



"I find your material to be very educational; it is by far some of the most interesting police related documents I have read in a long time." - Police Officer, Ontario



"I just received the latest issue of 10-8 and I must say you are doing an excellent job in producing this paper. ... Thanks for producing a great document." - Ministry of the Environment Employee, Ontario



SHAKEN BABY SYNDROME (ABUSIVE HEAD TRAUMA) CONFERENCE October 5-7, 2008

The Seventh North American Conference on Shaken Baby Syndrome/Abusive Head Trauma is being held on October 5-7, 2008 in beautiful Vancouver, British Columbia. This year, over 100 specialized experts will be presenting from around the world, including a strong legal track.

****BC Residents**** Prevent Shaken Baby Syndrome BC has arranged a group rate reduction for all BC professionals and parents. The group rate for BC attendees is only \$150 USD for the full three days of training. When registering, under Group Code enter BC Group Rate to receive the discounted rate.

For more information please visit
www.dontshake.org/conference2008

IN-SERVICE LEGAL ROAD TEST



The "In Service" Legal Road Test is a simple multiple choice quiz designed to challenge your understanding of the law.

Each question is based on a case featured in this issue. See page 27 for the answers.

- Which of the following is an equivalent legal standard for a reasonable suspicion?
 - an educated guess;
 - random speculation;
 - an accurate hunch;
 - articulable cause;
 - reasonable and probable grounds.
- The accused must prove an officer did not have reasonable grounds for a breath test when they challenge breathalyzer samples under s.8 of the *Charter*.
 - True
 - False
- When relying on presumptive, or deemed, care or control under s.258(1)(a) of the *Criminal Code* the Crown is not required to prove a risk of danger to the public.
 - True
 - False
- A breach of a conditional sentence order does not create a new offence like breaching a probation order would.
 - True
 - False
- The *Youth Criminal Justice Act's* adult sentencing scheme for presumptive offences, like murder and manslaughter, violates the *Charter*.
 - True
 - False
- Which of the following connections between a *Charter* breach and the obtaining of evidence can result in the application of s.24(2).
 - temporal;
 - causal;
 - contextual;

VOICE RECOGNITION OBTAINED DURING ARREST PROCESS ADMISSIBLE

R. v. Lepage & Oliynyk, 2008 BCCA 132



Following a lengthy drug importation and conspiracy investigation involving wiretaps, both accuseds were arrested by police. Lepage was arrested at a residence while Oliynyk was arrested at the Vancouver Airport. At the time of Lepage's arrest, he uttered eight words in response to questions and statements made by the officer. This allowed the officer to identify his voice as one on the intercepted telephone calls. Oliynyk, when arrested, was warned and advised of his *Charter* right to consult counsel. He said he wished to telephone his lawyer, but police said he couldn't until they arrived at the Chilliwack detachment. He was taken to a police vehicle for transport where he had a brief conversation with police officers, including asking who had "ratted" on him. As a result of this exchange, Oliynyk's arresting officer was also able to identify his voice as a participant in the intercepted telephone calls. Police then arrived at the Chilliwack detachment a couple of hours after the arrest.

At trial in British Columbia Supreme Court on drug charges, the voice identification evidence was a necessary component of the proof against the accuseds. They argued the voice identification was inadmissible because their ss.7 and 10(b) *Charter* rights had been breached. And if the voice identification evidence was excluded, they contended the case against them was insufficient to sustain a conviction. The Crown, on the other hand, submitted the evidence was properly admissible.

The trial judge found there was nothing out of the ordinary concerning the arrest processes in this case and that the officers did not use a ruse or guise to obtain the voice identification evidence. Both knew they were speaking to police officers and there had been no *Charter* breaches up to the point where the evidence of voice identification was obtained. She found Oliynyk willingly chose to ask questions and release the sound of his voice to the officer, and was not compelled to actively participate in the production of evidence or to participate in a process to be used against him at the direction of police. Nor

did choosing an arresting officer familiar with Lepage's telephone voice, which also would provide an opportunity for voice recognition or identification, violate his *Charter* rights.

Although the trial judge concluded that Lepage's rights were not breached, she did find Oliynyk's s.10(b) was violated because of the two hour delay in allowing him to consult counsel. In the judge's view, the police could have, in a timelier manner, afforded him an opportunity for a private call to his lawyer by taking him to the Richmond detachment, which was closer to the airport where he was arrested, rather than transporting him to Chilliwack. Oliynyk's voice identification was, however, not obtained in a manner that infringed or denied his s.10(b) *Charter* right within the meaning of s. 24(2) because the evidence was obtained just on leaving the airport—there had not yet been a denial of his rights. The considerable delay in affording him access to counsel had no effect on obtaining the voice identification evidence since it was obtained within a reasonable time period before a proper opportunity to contact counsel could have been provided. The accuseds were convicted of conspiracy to traffic in and import cocaine.

The accuseds then appealed to the British Columbia Court of Appeal arguing, among other grounds, that all evidence of voice identification obtained during the arrest processes should be excluded. They submitted the police should not be able to utilize a conversation occurring at the time of arrest between an accused and police officers to assist in identifying their voices on intercepted private communications.

Justice Hall, authoring the unanimous judgment of the Court, ruled that the voice identification evidence garnered by the police in the course of a normal arrest procedure was admissible. He stated:

The factual situation in the present case seems quite different from the circumstances existing in [cases where voice identification evidence had been obtained by deception and in breach of *Charter* rights]. Here there was no attempt by the police to elicit information about the crimes from the [accuseds], nor could there be any doubt on the part of these [accuseds] that they were conversing with police officers. The voice identification evidence obtained by the arresting officers was obtained openly by the officers in the course of a normal arrest procedure. Unlike the situation...where an investigative procedure, a

line-up, was conducted after arrest, no such investigative procedure occurred here. Where evidence was excluded, post-arrest investigative procedures found to violate s. 7 or 10(b) rights of an accused had been employed by the police to obtain admissions. Where evidence is obtained by the police not as a result of any breach of rights of an accused person, as was found to be the factual situation by the judge in the case at bar, it is difficult to appreciate on what basis the evidence could or should be ruled to be inadmissible. In my opinion, the judge did not err in ruling the evidence of voice identification to be admissible. [reference omitted, para. 36]

And although the accused Oliynyk was denied the right to consult counsel in a timely manner, the trial judge found there was no relationship between the breach and the obtaining of the voice identification evidence. Because the breach was not causative of the obtaining of this evidence, the evidence was admissible and the accuseds appeal was dismissed.

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

COMPLETE ASD DESCRIPTION NOT NECESSARY

R. v. Beck, 2008 BCPC 128



At an impaired driving and over 80mg% trial in which the accused failed a roadside screening test, the investigating police officer described the apparatus used as an "approved screening device". When asked for a more detailed description, the officer said it was an Alco-Sensor IV, without designating a model. Under the Approved Screening Devices Order seven devices are approved, two of which are Alco-Sensor IVs, one a model DWF and the other a model PWF.

Judge Saunderson of the British Columbia Provincial Court found the Crown had proved that the investigating police officer used an approved screening device and therefore the "fail" reading on the device provided the grounds to make a breathalyzer demand, which resulted in readings high enough to support a conviction for driving with a blood alcohol content over 80mg%.

A complete description of the approved screening device was not necessary. A less than complete description was sufficient as long as the court was

satisfied an approved screening device was used, whether or not it was perfectly or completely described:

Neither a partial nor a complete description of the particular device is necessary for a court to come to that conclusion. The police officer's assertion that it was an approved screening device, if accepted, is enough. [para. 4]

Here, the judge accepted that the device used was an approved screening device within the meaning of the *Criminal Code*.

Complete case available at www.provincialcourt.bc.ca

APPROVED SCREENING DEVICES

Under the Approved Screening Devices Order, the following devices are approved for the purposes of s.254 of the *Criminal Code*:

- (a) Alcolmeter S-L2;
- (b) Alco-Sûr;
- (c) Alcotest(R) 7410 PA3;
- (d) Alcotest® 7410 GLC;
- (e) Alco-Sensor IV DWF;
- (f) Alco-Sensor IV PWF; and
- (g) Intoxilyzer 400D.



Legally Speaking:

Right to Silence



"The common law recognizes an individual's right to remain silent, but the right to remain silent does not include or extend to the right not to be spoken to by state authorities. Likewise, the right to silence contained within the s. 7 Charter guarantee does not prohibit police from questioning a detainee. Police persuasion, which falls short of denying the detainee the right to choose or of depriving him or her of an operating mind, does not breach the right to silence." - Ontario Court of Appeal Justice Watt, *R. v. Rybak*, 2008 ONCA 354, references omitted, para. 189

Note-able Quote

"A moment's insight is sometimes worth a life's experience." - Oliver Wendell Holmes

SUPREME COURT NEUTERS RANDOM DOG SNIFF AT BUS DEPOT

R. v. Kang-Brown, 2008 SCC 18



A three member plain clothes police team, along with a sniffer dog, was patrolling a Greyhound bus terminal as part of a Jetway project, a program which monitors the public for drugs, weapons, proceeds of crime, or other contraband at airports, bus depots, or train stations. The accused was observed disembark from an over-night bus from Vancouver to Calgary carrying a bag high over his shoulder. This behaviour, in combination with an elongated stare, rubbernecking, and an odd circling of the bus, drew the officer's attention and he entered into a conversation with the accused.

During the conversation the officer learned the accused purchased his ticket last minute. He attempted to obtain consent to search the bag and as the officer was about to touch it, but the accused pulled it away and appeared agitated, panicked, antsy, and fidgety. The officer signalled for a police dog handler to bring over Chevy, a dog trained in detecting illegal drug odours with a track record of 90 to 92 percent accuracy. The dog immediately indicated the presence of drugs in the bag, which had been placed on the ground. The accused was arrested and 17 ounces of cocaine was found in the bag as was a small amount of heroin in his clothing.

At trial in the Alberta Court of Queen's Bench the accused sought exclusion of the evidence under s.24(2) of the *Charter* because, he argued, the police violated his right, among others, to be secure against unreasonable search and seizure. He submitted that the dog sniff was a warrantless search and was therefore unreasonable. The trial judge concluded that the odour emanating from the bag voluntarily brought into a public transportation facility was not information in which the accused had a reasonable expectation of privacy.

He unsuccessfully appealed to the Alberta Court of Appeal arguing the actions of the police dog amounted to a search protected under the *Charter*. Justice Cote, authoring the majority opinion of the Court, concluded not every government examination will

intrude upon a reasonable expectation of privacy and thereby amount to a search. He found that not all information gleaned by the police in a public place about the contents of a private place is a search. He ruled there was no search and therefore no s.8 breach. Furthermore, even if the dog sniff was a search, Justice Cote held the evidence would be admissible under s.24(2). The majority dismissed the accused's appeal and his conviction was affirmed.

Justice Paperny, on the other hand, disagreed with the majority. In her dissenting opinion she concluded that the police did violate the accused's rights under s.8, would have excluded the evidence under s.24(2), and entered an acquittal.

The accused then appealed to the Supreme Court of Canada, which needed to determine whether he had a reasonable expectation of privacy thereby making the use of the sniffer dog a search. And if there was a search, whether it was unreasonable, and if it was unreasonable, whether the trial judge erred in not excluding the evidence under s.24(2).

Was there a Search?

All nine judges agreed that there was a search. A search for constitutional purposes occurs when the state intrudes upon a person's reasonable expectation of privacy. Justice Binnie (with Chief Justice McLachlin concurring) found the use of the dog a search "because of the significance and quality of the information obtained about concealed contents." Justice Deschamps concluded the accused showed he had a subjective expectation of privacy because he held the bag close to his body and made it clear to police—both verbally and physically—that he wanted to control access to it. Objectively, the dog alert "allowed for a strong, immediate and direct inference to be made about the contents of the [accused's] bag, and this involved a certain intrusion on informational privacy." She continued:

The right to informational privacy protects biographical information, including the very nature of the information. In a case involving this right, the relevant elements of informational privacy include intimate personal details about an accused, such as his or her having come into contact with a controlled substance either as a drug trafficker, an illegal drug user or a legal drug user (such as a user of marijuana for medicinal purposes), or by being in the company of drug users. The very personal nature of this

information suggests that the [accused] had an objectively reasonable expectation of privacy.

Other factors also indicate that the [accused] had an objectively reasonable expectation of privacy. He owned and used the bag, he was present at the time of the search, the bag was one that could be carried close to the body, and he did not abandon it or leave it unattended. The conduct of the police in this case also intruded to a certain extent on the [accused's] right to territorial privacy: members of the public have historically used bus terminals to travel as a means of exercising their freedom of mobility, security screening was not done routinely in this terminal and there were no signs indicating that a luggage search was possible. [paras. 175-176]

However, she also recognized that the privacy interest was low. The search here was conducted in a public place, not a private residence nor a workplace, and the search technique used was minimally intrusive. Similarly, Justice Bastarache stated:

In my view, the circumstances of this case support a finding that the [accused] had a reasonable, but limited, expectation of privacy in his luggage at the time the dog sniff occurred. A subjective expectation of privacy is evidenced by the protective manner in which the [accused] carried his bag and his refusal to allow a voluntary search to occur. From an objective perspective, it is significant that the odour identified by the dog was not accessible to humans and that its detection provided immediate information about the contents of the [accused's] luggage. This Court has held that informational privacy protects "a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual". The information collected about the contents of the [accused's] bag falls within this biographical core, and both a subjective and objective expectation of privacy have thus been established. [reference omitted, para. 227]

Justice Bastarache also found the privacy expectation at the bus depot was significantly reduced and compared it to that associated with

border crossings, where the state has an interest in fighting illegal activity when travelers transport their belongings. Similarly, at airports passengers voluntarily use the terminal to access public transportation and the state has an interest in ensuring it is both secure and not used for criminal activity.

Since the search in this case was not authorized by statute, the court examined whether it was authorized at common law and if it was, what the required legal standard would be needed to trigger the power.

What's the Appropriate Standard?

In the fragmented judgment, three separate legal standards were examined: reasonable and probable cause, reasonable suspicion, and generalized suspicion.

Reasonable and probable cause (or reasonable grounds to believe) is the standard generally required for searches and seizures under Canadian law.

Reasonable suspicion (or reasonable grounds to suspect) is a lower standard than reasonable and probable cause. Justice Binnie described this standard as "something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds." Justice Deschamps noted this standard has been equated to an articulable cause (but a mere hunch would be insufficient) and, in determining whether the standard is met, the totality of the circumstances must be considered. She stated:

The reasonable suspicion standard is lower than the standard of reasonable grounds to believe required for a lawful arrest. To meet the reasonable suspicion standard, the police must rely on "a constellation of objectively discernible facts". While no single factor can on its own ground reasonable suspicion, a number of factors taken together may cause the police to entertain a reasonable suspicion. However, a mere "hunch based on intuition gained by experience" is not enough to meet the reasonable suspicion standard. [references omitted, para. 165]

Justice Deschamps opined that this intermediate standard was justifiable because of the lower expectation of privacy and the use of the dog was a

"From an objective perspective, it is significant that the odour identified by the dog was not accessible to humans and that its detection provided immediate information about the contents of the [accused's] luggage."

minimally intrusive investigative tool—it occurred in a public place, could only detect drugs, was not random, and was used as a last resort in a progressing investigation.

A generalized suspicion, as Justice Bastarache explained, does not require a reasonable or individualized suspicion related to a particular person, but rather it relates to a particular place or event. In his view, random searches could be appropriate on the basis of a generalized suspicion that drugs were likely on the premises. This search power would not only serve to detect crime, but to prevent and deter it.

The Case for Reasonable and Probable Grounds

Four judges (Justice Lebel with Justices Fish, Abella, and Charron concurring) refused to lower the threshold for the use of a drug sniffing dog from the general standard in search and seizure law of reasonable and probable grounds. They decided that the appropriate standard for the use of a dog was not the downgraded standard of reasonable suspicion, nor the even looser test of generalized suspicion. These judges declined to craft new common law rules reducing the standard and found police investigative powers arising from the use of dogs were better left for Parliament to establish a proper statutory framework. They concluded the police breached the accused's s.8 *Charter* rights and found the evidence inadmissible under s.24(2). They would allow the appeal and set aside the conviction.

Two other judges commented that if the police already had reasonable grounds to believe contraband was present as these four judges required, the use of the sniffer dogs would have been superfluous and unnecessary while another two observed their use would only expedite a more intrusive search.

The Case for Reasonable Suspicion

Four judges found that all the police required was a reasonable suspicion to conduct this search at common law. In Justice Binnie's view (with Chief Justice McLachlin concurring), the police were entitled to call in the aid of sniffer dogs where they

have reasonable grounds to suspect the presence of contraband:

Where reasonable suspicion exists, a sniffer-dog search is authorized by the common law, and the common law itself is reasonable on the basis of reasonable suspicion, given the minimally intrusive, narrowly targeted and high accuracy of "sniff searches" by dogs with a proven track record like Chevy. [para. 60]

However, two of these four judges favouring a reasonable suspicion standard ruled the police did not meet the required standard, while the other two agreed they had. Justice Binnie concluded the search was not authorized by law nor was it conducted reasonably. Rather than conducting the search on the basis of objectively verifiable evidence supporting a reasonable suspicion, the police were acting merely on speculation and initiated the warrantless search on inadequate grounds. Since the sniff search was conducted without reasonable suspicion, the alert did not provide valid grounds for the arrest. However, Justice Binnie noted, if there was a reasonable suspicion for the sniff, the positive alert by Chevy, in light of his accuracy, would have given the police grounds to proceed with an on-the-spot warrantless verification search of the accused's bag. Then, after

the hand search confirmed the presence of drugs, an arrest could follow. An arrest prior to this hand search would have been premature Justice Binnie said.

As for the admissibility of evidence, Justice Binnie found it should have been excluded. Although the drugs were non-conscriptive evidence, the administration of justice would have been brought into disrepute if the

evidence was admitted. The police lacked the reasonable suspicion required for the exercise of this "exceptional power" in the absence of prior judicial authorization. Further, although drug trafficking is a serious matter so too are the constitutional rights of the travelling public.

The other two judges favouring a reasonable suspicion standard (Justice Deschamps with Justice Rothstein concurring) held the police met the necessary reasonable suspicion standard to justify the search. Justice Deschamps found the trial judge

"The reasonable suspicion standard is lower than the standard of reasonable grounds to believe required for a lawful arrest. ... However, a mere "hunch based on intuition gained by experience" is not enough to meet the reasonable suspicion standard."

properly considered a global view of the facts, or totality of the circumstances, in concluding the experienced and trained officer had met the requisite standard. She was critical of Justice Binnie's approach in deconstructing "the evidence in microscopic detail, piece by piece and stage by stage". "Breaking the conduct of the police down by stages to determine whether each piece of evidence is relevant or probative instead of considering the evidence as a whole as it naturally unfolded results in an artificial analysis," she said. "In my view, this recasting of the facts neither accurately nor fairly reflects the totality of the facts and circumstances confronted by the police in this case."

As well, Justice Deschamps found the search was conducted in a reasonable manner. The dog passively indicated by sitting down. Once the dog alerted, the positive indication provided reasonable grounds to make the arrest and then search the bag by hand incidental to that arrest. There was no *Charter* breach and therefore no reason to enter into a s.24(2) enquiry.

The Case for Generalized Suspicion

Justice Bastarache agreed with Justices Binnie and Deschamps that the common law allows for the use of sniffer dogs on the basis of a reasonable suspicion, but also in some cases, such as public bus terminals or schools, that a generalized suspicion is all that's required. Rather than requiring a reasonable suspicion relating to a specific individual, as the police had here, it would have also been appropriate for them to randomly search the luggage of all bus depot passengers if the police had a reasonable suspicion that drug activity might be occurring at the terminal and reasonable informed passengers were aware that their baggage may be subject to a sniffer-dog search. He stated:

In my view, it is, in some circumstances, appropriate for police to conduct random searches using sniffer dogs on the basis of generalized suspicion. Allowing this type of search recognizes the important role sniffer dogs can play not only in detecting crime but also in preventing and deterring crime. Given the accuracy and efficiency of sniffer-dog searches, it is reasonable to conclude that their known presence, or potential presence, at particular

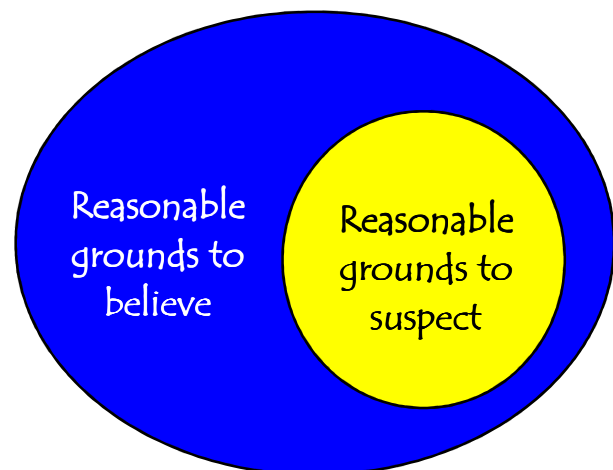
locations would have a significant preventative effect. Allowing random searches in certain situations also has the benefit of avoiding inappropriate profiling and reducing any embarrassment which may be associated with a targeted search... [para. 246]

In this case, it was unnecessary for Justice Bastarache to determine whether the use of the sniffer dog in this case was reasonable on the basis of a generalized suspicion because he found the police had a reasonable (individualized) suspicion. He also found the search was minimally intrusive. The dog did not touch the accused or even sniff him. She did not bark, was not aggressive, and was only interested in the bag. The alert was also subdued. The dog simply sat down. The alert was immediate. It did not take long nor create an inconvenience for the accused. The only personal information revealed was the presence or absence of one of the nine drugs the dog was trained to detect. The dog did not interfere with the accused's bodily integrity in any way. And no stigma was attached to having a bag sniffed at a bus depot. The accused was not frisked, nor was his bag opened and searched. It was not an embarrassing process.

Final Result

In the end, six of the nine judges would have excluded the evidence, while three would have allowed it. Thus the accused's appeal was allowed and his conviction was overturned.

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



Reasonable grounds to suspect, or reasonable suspicion, is a lesser but included standard of reasonable grounds to believe.



R. v. Kang-Brown judgment grid

Judge(s)	Was there a search?	Is there common law authority to use a sniffer dog to search?	What is the minimum standard required to justify the search?	Was the standard reached?	Was s.8 breached?	Should the evidence be excluded under s.24(2)?
Lebel Fish Abella Charron	Yes	No	Reasonable and probable grounds	No	Yes	Yes
McLachlin Binnie	Yes	Yes	Reasonable suspicion	No	Yes	Yes
Deschamps Rothstein	Yes	Yes	Reasonable suspicion	Yes	No	Not necessary to determine
Bastarache	Yes	Yes	Reasonable suspicion, and in some cases a generalized suspicion	Yes	No	Not necessary to determine

RANDOM SCHOOL SEARCH WITH DRUG DETECTION DOG UNCONSTITUTIONAL *R. v. A.M.*, 2008 SCC 19



A high school principal, concerned about the presence of drugs in his school, had offered a standing invitation for police to bring drug detector dogs into the school. Two years later three police officers with a dog arrived at the school one morning and told the principal they wanted permission to go through the school, which was immediately granted. After students were instructed to remain in their classrooms, the police randomly searched the school.

In a gymnasium the dog alerted on one of several unattended backpacks lying next to a wall. An officer looked through the contents of the backpack and found 10 bags of marihuana, 10 "magic mushrooms", a pipe, lighter, rolling papers, and a roach clip. As well, the accused's wallet and identification were in the backpack. He was charged with possession of marihuana and psilocybin for the purpose of trafficking.

At trial in the Ontario Court of Justice the judge concluded there were two searches: one using the drug dog and the other being the physical search of the backpack. He also found the search was a police search disguised as a school search and there were no reasonable grounds to believe drugs would be found. Both searches were unreasonable and the evidence was excluded under s.24(2).

The Crown appealed to the Ontario Court of Appeal arguing, in part, that the police were in fact acting as agents of the school, that the dog sniff was not a search (but if it was it was reasonable), and that the physical search of the backpack was reasonable. Justice Armstrong, authoring the unanimous judgment, ruled that the search was a police search. The police had not been requested by any school authority that day, had not given notice of their intention to search, and neither the principal nor any teacher played an active role in it. "The fact that some two years earlier the school principal had issued a standing invitation to the police to search the school with the assistance of a sniffer dog does not ... turn the search ... into a search by school authorities in police uniforms," he said.

Justice Armstrong found it unnecessary to decide whether the dog sniff alone amounted to a search. Rather, he concluded that both the sniff and backpack search engaged s.8 of the *Charter*. Students have a reasonable expectation of privacy in the contents of their backpacks, much like an adult's privacy in the contents of a briefcase. Students backpacks are not searched during the normal course of a school day nor do they expect their backpacks to be searched. The dog was a physical extension of its handler and was connected to the physical search of the backpack. Since the search was warrantless it was prima facie unreasonable and the Crown could not rebut this presumption. Further, the search was randomly conducted with the entire student body held in detention. The evidence was inadmissible and the appeal was dismissed.

The Crown then appealed to the Supreme Court of Canada where the justices had to determine whether the accused's rights under s. 8 of the *Charter* were breached and whether the evidence was properly excluded at trial.

Was there a search?

Most judges agreed there was a search in this case, but not all. Seven judges concluded there was a search since the accused had a reasonable expectation of privacy in the contents of his backpack. Justice Binnie explained that the positive alert led immediately to the warrantless physical examination of the contents of the backpack. As part of his privacy analysis he stated:

The backpacks from which the odour emanated here belonged to various members of the student body including the accused. As with briefcases, purses and suitcases, backpacks are the repository of much that is personal, particularly for people who lead itinerant lifestyles during the day as in the case of students and travellers. No doubt ordinary businessmen and businesswomen riding along on public transit or going up and down on elevators in office towers would be outraged at any suggestion that the contents of their briefcases

"The backpacks from which the odour emanated here belonged to various members of the student body including the accused. As with briefcases, purses and suitcases, backpacks are the repository of much that is personal, particularly for people who lead itinerant lifestyles during the day as in the case of students and travellers. ... Because of their role in the lives of students, backpacks objectively command a measure of privacy."

could randomly be inspected by the police without "reasonable suspicion" of illegality. Because of their role in the lives of students, backpacks objectively command a measure of privacy.

As the accused did not testify, the question of whether or not he had a subjective expectation of privacy in his backpack must be inferred from the circumstances. While teenagers may have little expectation of privacy from the searching eyes and fingers of their parents, I think it obvious that they expect the contents of their backpacks not to be open to the random and speculative scrutiny of the police. This expectation is a reasonable one that society should support. [paras. 62-63]

Although a student's expectation of privacy is lessened in a school setting, it nonetheless existed and was not abandoned when the students left their backpacks in the gymnasium as they were directed to their classrooms. The dog sniff also permitted an inference about the precise contents of its source. The information was specific and meaningful about contents concealed in an enclosed place in which the accused had a continuing expectation of privacy and was intended to be kept private, unlike a FLIR image which only showed that activities in a house generated heat or electricity records that were known to third parties. "By use of the dog, the policeman could 'see' through the concealing fabric of the backpack," said Justice Binnie. The Crown's further argument that there can be no reasonable expectation of privacy in contraband was not accepted. The sniff of the backpack was therefore a search.

Justice Bastarache also found the accused had a reasonable, but significantly diminished, expectation of privacy in his backpack when it was sniffed. Subjectively, student backpacks frequently contain personal items they wish to keep private. Objectively, the odour detected by the dog sniff was not accessible to humans and its detection provided immediate information about the contents of the backpack, thus revealing a "biographical core of personal information" about the accused and his personal choices that would

otherwise have been kept secret from the state. Nor is an individual required to be physically in possession of an object to have a reasonable expectation of privacy in it.

Justice Deschamps (with Justice Rothstein concurring) found the dog sniff from an empirical perspective may have been a search (the positive indication enabled the police to ascertain what was inside the backpack with a high degree of accuracy) but it was not a search from a constitutional perspective. The accused did not have a subjective expectation of privacy. Students and parents were aware of a drug problem and that a zero tolerance policy on drugs was in affect and also knew sniffer dogs might be used. Nor was the expectation of privacy objectively reasonable. The place where the search occurred was a school with a known drug problem. It involved an unattended backpack and was a non-personal search. And the accused was not present when the backpack was searched. It was in plain view and was neither worn nor carried by him. The investigative technique was also relatively non-intrusive. The drugs could be detected without opening the backpack and could not convey any information other than their presence. Justice Deschamps concluded that the use of the dog did not intrude upon a reasonably held privacy interest and therefore s.8 was not engaged, there was no need for police to have individualized grounds for the dog sniff, and there was no need to determine whether the search was reasonable or whether s.24(2) applied.

Was the Search Reasonable?

The warrantless search was presumptively unreasonable unless it met the requirements of being authorized by a reasonable law and conducted in a reasonable manner.

Justice Lebel (with Justices Fish, Abella, and Charron concurring) ruled the search was neither justified by statute nor common law. The police were not using the dog to narrow a search under the authority of a warrant. Nor was it being carried out by school authorities on the basis of a reasonable suspicion. As for the common law, the four judges refused to create a legal framework for the general use of drug sniffing dogs. In their view, the accused's s.8 *Charter* right was violated and the evidence was properly excluded under s.24(2).

Jutsice Binnie (with Chief Justice McLachlin concurring) concluded the police had a common law power to use the sniffer dog as part of their duty to investigate crime and bring perpetrators to justice. However, this common law power is subject to *Charter* compliance. But because the dog sniff was minimally intrusive and tightly targeted (alerts only to contraband drugs with a high degree of accuracy), the reasonable and probable grounds standard was not required. If it were the required standard, the police would already have enough to get a warrant for a physical search without the sniffer dog confirmation and there would be no need to deploy it. Instead, the police were entitled to use sniffer dogs on the basis of a reasonable suspicion in the context of a routine criminal investigation. A reasonable suspicion requires a subjective belief backed by objectively verifiable indications—a reasonably well educated guess is not sufficient. This lower standard is appropriate because a properly conducted search requires no physical contact with the person or object sniffed, the sniff discloses only the presence of illegal drugs (or not), and as in this case, the dog had an enviable record of accuracy.

Further, the police do not have to get prior authorization provided they are already lawfully present when the search occurs. And "if the sniff is conducted on the basis of reasonable suspicion and discloses the presence of illegal drugs on the person or in a backpack or other place of concealment, the police may...confirm the accuracy of that information with a physical search, again without prior judicial authorization." Without this minimal standard of reasonable suspicion, the use of the dog will breach s.8. In this case, Justice Binnie agreed with the trial judge that this search was a random speculative one, not based on reasonable suspicion, and the evidence was properly excluded.

As a note, Justice Binnie ruled the accused had not been unlawfully detained under s.9 of the *Charter* when the principal instructed all students over the public address system to remain in their classrooms during the police search of the school. The principal's announcement was for the purpose of maintaining order and discipline under Ontario's *Education Act*.

Justice Bastarache viewed the drug sniff as falling within the police powers of preserving the peace and preventing crime—identifying individuals carrying

illegal drugs to ensure a safe school environment. These types of searches are also minimally intrusive. They are expedient, cause minimal inconvenience, and only the presence or absence of drugs is revealed in a non-threatening manner. The accused was also not present when the search occurred, there was no interference with his bodily integrity, and this was neither an embarrassing or humiliating encounter.

In balancing a student's privacy interests with the public's interest in preventing and deterring the presence of drugs in schools, Justice Bastarache found schools are an environment in which it is appropriate to base random searches of bags on a lower standard of a generalized suspicion, provided reasonably informed members of the public would be aware random searches may be used. There is no need for an individualized suspicion about a particular student. However, unlike an airport, bus, or train depot where there is a generalized, ongoing suspicion about drug activities, Justice Bastarache was not prepared to accept that this conclusion applies to all schools. Rather, the random use of sniffer dogs at a school requires a suspicion that "drugs will be located at that specific location at the specific time the search is being performed."

In this case the police were not acting on a current reasonable suspicion drugs were present. Although the principal was concerned about drugs at the school, his concern was insufficient to justify the random searches. Thus, the absence of a generalized suspicion resulted in a s.8 *Charter* breach. The evidence, in Justice Bastarache's view, was nevertheless admissible. It was non-conscriptive and the *Charter* breach was not serious. The search occurred where there was a diminished expectation of privacy and the breach was neither deliberate nor willful. The constitutional violation was inadvertent and police acted in good faith. Trafficking is a serious crime and the evidence was crucial to the Crown's case. Its exclusion, not its admission, would bring the administration of justice into disrepute.

Final Result

In the end, six of the nine judges would have excluded the evidence, while three would have allowed it. Thus the Crown's appeal was dismissed and the accused's acquittal was upheld.

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

R. v. A.M. judgment grid

Judge(s)	Was there a search?	Is there common law authority to use a sniffer dog to search?	What is the minimum standard required to justify the search?	Was the standard reached?	Was s.8 breached?	Should the evidence be excluded under s.24(2)?
Lebel Fish Abella Charron	Yes	No	Reasonable and probable grounds	No	Yes	Yes
McLachlin Binnie	Yes	Yes	Reasonable suspicion	No	Yes	Yes
Bastarache	Yes	Yes	Reasonable suspicion, and in some cases a generalized suspicion	No	Yes	No
Deschamps Rothstein	No	Yes (see Kang-Brown)	Reasonable suspicion (see Kang-Brown)	Not necessary to answer since there was no search	Not necessary to answer since there was no search	Not necessary to answer since there was no search

CROWN MUST PROVE NECESSARY GROUNDS FOR BREATH DEMAND IN *CHARTER* CHALLENGE

R. v. Gundy, 2008 ONCA 284



A police officer working an evening R.I.D.E. campaign stopped a truck driven by the accused. The accused said she had two glasses of wine, her eyes were bloodshot, she had difficulty finding her licence, and smelled of alcohol. The officer made a demand that she forthwith provide a sample of her breath into an approved screening device. Following a "demo" of the device by the officer, the accused blew into it and registered a fail. The results of the test caused the officer to form the grounds for believing the accused had committed an over 80mg% offence. The accused was arrested and the Intoxilizer breath demand was read. Once back at the police detachment she spoke to a lawyer and then complied with the breath demand, providing two sample (217mg% and 207mg%).

At trial in the Ontario Court of Justice the accused argued, among other grounds, that the officer did not have reasonable and probable grounds to make the Intoxilizer demand because the Crown failed to prove that the device used was an approved screening device. The trial judge ruled that the officer referred to the device she used by name, an Alcotest, which is an approved screening device. She also testified she demanded a sample of breath as required for analysis by an "approved screening device". And the Intoxilizer operator said she received the grounds for the demand based upon the arresting officer administering a screening test with "an approved screening device". Based upon the evidence, the trial judge was satisfied an approved screening device was used and that there were proper grounds to make the demand for a breath sample. She was convicted of over 80mg% contrary to s. 253(b) of the *Criminal Code*.

The accused appealed her conviction to the Ontario Superior Court of Justice. The appeal judge concluded the evidence showed an approved screening device was used thus rendering the grounds proper to make the Intoxilizer demand. The appeal was, however, allowed on a different ground and a new trial was ordered. The accused then appealed the trial

judge's order of a new trial, instead submitting that an acquittal should have been entered.

The Ontario Court of Appeal was again required to determine, in part, what the Crown must prove in showing that the investigating officer made a valid breathalyzer demand under s.254(3) where the grounds for the demand depend upon the results of an approved screening device test. In answering this question, there were two issues arising regarding reasonable and probable grounds; the admissibility of the breathalyzer results under the *Criminal Code* and the impact of s.8 of the *Charter*.

***Criminal Code* Admissibility**

Under the *Criminal Code* the breathalyzer results are admissible by certificate (s.258(1)(g)) or through *viva voce* evidence and the Crown is also able to rely on the presumption that evidence of the results of the analysis is proof of the concentration of alcohol in the blood of the accused. The admissibility of the certificate under ss.258(1)(c) or (g), however, does not require proof of reasonable and probable grounds. The absence of reasonable and probable grounds may afford a defence to a charge of refusing to submit to a breathalyzer, but is not relevant and does not affect the admissibility of the certificate if the demand was acceded to. Thus, absent a *Charter* challenge to the admissibility of the results, the prosecution need not establish that the officer had reasonable and probable grounds for the demand. Justice Rosenberg stated:

If the accused does not challenge the admissibility of the results of the Intoxilizer/Breathalyzer analysis on the basis that the accused's rights under the *Charter* were violated, the Crown is not required to establish that the officer had reasonable and probable grounds to make the s. 254(3) demand.

Any objection to the admissibility of the results of the analysis should ordinarily be made, at the latest, when the Crown tenders the evidence either through a certificate under s. 258(1)(g) or by way of oral testimony. [para. 50]

s.8 *Charter* Admissibility

Justice Rosenberg concluded that the burden is on the Crown to establish the requisite grounds if the accused objects to the admissibility of the results of the analysis pursuant to ss. 8 and 24(2) of the

Criminal Code Presumptions of Identity and Accuracy

s.258(1)(c)	Presumption of identity	samples of the breath taken pursuant to a demand under s. 254(3), if taken as soon as practicable and, in the case of the first sample, not later than two hours after the offence is proof that the concentration of alcohol in the blood at the time when the offence was committed
s.258(1)(g)	Presumption of accuracy	a certificate of a qualified technician stating the analysis of the samples made by means of an approved instrument in proper working order operated by the technician is evidence of the facts in the certificate.

Charter on the basis that the officer lacked reasonable and probable grounds to make the demand. In other words, it is for the prosecution to prove reasonable and probable grounds existed and not the accused to prove they didn't exist:

The taking of breath samples is a warrantless seizure. A minimum constitutional requirement for a valid seizure within the meaning of s. 8 of the *Charter* is that the seizure was authorized by law. A lawful seizure of breath samples requires that the officer had reasonable and probable grounds to believe that the motorist committed an offence under s. 253. Accordingly, if a police officer took breath samples from a motorist in circumstances where the officer did not have reasonable and probable grounds, the seizure would be unlawful and violate s. 8 of the *Charter* and the evidence obtained would potentially be inadmissible under s. 24(2). [references omitted, para. 30]

If an accused is able to establish on the balance of probabilities that the taking of breath samples infringed his *Charter* rights (because Crown failed to show the requisite reasonable and probable grounds for making the breathalyzer demand) the breathalyzer evidence might well be excluded if the admission of those breathalyzer results would bring the administration of justice into disrepute.

If an officer forms his reasonable and probable grounds to make an Intoxilizer demand from the results of an approved screening device, there is both a subjective and objective component. The officer must subjectively have an honest belief that the suspect has committed the offence and, objectively, there must exist reasonable grounds for this belief. It is not sufficient for the officer to

personally believe that they have reasonable and probable grounds. It must also be objectively established that those reasonable and probable grounds did in fact exist—a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed. And where the officer is aware that the results of the approved screening device are unreliable because of the circumstances in which the test was administered, then the officer cannot have the requisite subjective belief. However, the officer is entitled to rely on an approved screening device's accuracy unless there is credible evidence to the contrary. Justice Rosenberg explained further:

Note that it is the reasonable and probable grounds that must be shown to exist. It may turn out that, in fact, the motorist's ability to drive was not impaired or that the motorist's blood alcohol level did not exceed the legal limit. The question is whether a reasonable person with the same information as the officer would have concluded that there were reasonable and probable grounds to believe an offence had been committed. Thus, if the device used by the officer was not in fact an approved screening device, the objective component may or may not be made out; it depends upon whether the officer could reasonably believe that the device he or she was using was an approved device. [para. 43]

And:

In determining whether the particular device was approved, the court must consider all the evidence, including any circumstantial evidence. The court is entitled to draw reasonable inferences from the evidence. Thus, in my view, if the officer in his or her testimony refers to the device as an "approved

screening device", the trial judge is entitled to infer that the device was indeed an approved device. As such, the officer is entitled to rely upon the "fail" recorded by the device to find that there were reasonable and probable grounds to make the breath demand.

The officer is not required to refer to the device by its particular brand and number such as "Alcotest 7410 GLC". Further, references to a part only of the identification such as "Alcotest" or "Alcotest GLC" do not rebut the reasonable inference from the officer's reference to the device as approved that it is indeed an approved screening device. The addition of the manufacturer's name, for example "Drager Alcotest 7410 GLC", is likewise not fatal. Further, in my view, the context in which the officer refers to the device as approved is of no particular moment. Thus, if the officer testifies that he or she used an approved screening device, or agrees with the suggestion that it is an approved screening device, such testimony is direct evidence upon which the trial judge can rely. [references omitted, paras. 45-46]

In this case, the judge was not confined to direct evidence and could reasonably infer the officer used an approved device because she said she made a demand for the motorist to provide a sample for analysis by an approved screening device. In Justice Armstrong's view, it is not reasonable to infer that an officer who says that they used an approved screening device actually used an unapproved one. Furthermore, even if the Crown is unable to establish that the officer had the requisite reasonable and probable grounds and therefore an accused's s.8 rights have been shown to be violated, exclusion of the results of the Intoxilizer is not automatic. The accused must still establish that admission of the evidence would bring the administration of justice into disrepute under s.24(2). Justice Rosenberg summarized the *Charter* argument analysis as follows:

"Where the accused objects to the admissibility of the results of the analysis pursuant to ss. 8 and 24(2) of the Charter that the officer lacked reasonable and probable grounds to make the demand, the burden is on the Crown to establish the requisite grounds."

"Reasonable and probable grounds involve an objective and subjective test. ... Where the officer did not have the requisite reasonable and probable grounds, the warrantless seizure of breath samples for analysis in an Intoxilizer or breathalyzer is an unreasonable seizure within the meaning of s. 8 and the results may be excluded under s. 24(2) of the Charter."

Where the accused objects to the admissibility of the results of the analysis pursuant to ss. 8 and 24(2) of the Charter that the officer lacked reasonable and probable grounds to make the demand, the burden is on the Crown to establish the requisite grounds.

Reasonable and probable grounds involve an objective and subjective test. Where the grounds depend upon a "fail" from an approved screening device, the Crown must prove that the officer reasonably believed that he or she was using an approved device.

In the absence of credible evidence to the contrary, the officer's testimony that he or she made a demand with an approved screening device is sufficient evidence that the officer had the requisite reasonable belief. The officer is not required to give the particular model number or otherwise identify the device. Obvious errors such as incomplete reference to the model number do not undermine the officer's testimony that the device was an approved screening device.

Where the officer did not have the requisite reasonable and probable grounds, the warrantless seizure of breath samples for analysis in an Intoxilizer or breathalyzer is an unreasonable seizure within the meaning of s. 8 and the results may be excluded under s. 24(2) of the Charter. [para. 50]

Here, the Crown established that the officer used an approved screening device. The officer's reference to an "Alcotest" did not undermine her direct evidence that she used an approved screening device and she therefore had reasonable and probable grounds to make the Intoxilizer demand and there was no violation of s.8 of the *Charter*. The accused's appeal seeking an acquittal was dismissed.

Complete case available at www.ontariocourts.on.ca

Latin Legal Lingo

Viva voce—*by word of mouth; verbally; orally*

ASD USED TO CONFIRM REASONABLE GROUNDS OF IMPAIRMENT

R. v. Paquet, 2008 NBCA 29



A police officer activated his radar and registered the speed of a vehicle travelling in the opposite direction at 123 km/h in an 80 km/h zone. The officer stopped the vehicle and identified the driver and one passenger. He noted a smell of alcohol on the accused's breath, red eyes, and that he was nervous. The accused tried to avoid direct eye contact, was uncooperative, unable to provide his driver's licence, and visibly aggressive. The officer believed the accused was visibly intoxicated and probably not capable of driving a motor vehicle. As a result of his observations, the officer demanded the accused accompany him to the patrol car and submit to a approved screening device test. The officer wanted to confirm the accused's level of intoxication, but he refused and sped away. A pursuit ensued for about one kilometre until the accused put his signal light on to turn into a private driveway. He was arrested for driving while impaired and dangerous driving and was taken to the police detachment, providing breath samples of 180mg%.

At trial in New Brunswick Provincial Court the accused was convicted of over 80mg% and obstructing a peace officer in the execution of his duty. The trial judge noted the accused was nervous, not able to provide his driver's licence, had a strong smell of alcohol on his breath, avoided making eye contact with the officer, exhibited abnormal or bizarre behaviour, refused to accompany the officer to the patrol car, was aggressive and uncooperative, and a car chase ensued. Recognizing that the standard for reasonable and probable grounds is more than a mere suspicion, but less than evidence required to convict, the judge found the officer had reasonable and probable grounds to believe the accused committed an offence under s.253(b). Therefore the demand was reasonable.

The accused appealed to the New Brunswick Court of Queen's Bench arguing, among other grounds, that the officer did not subjectively have reasonable and probable grounds to believe that he was committing an offence contrary to s.253. He submitted the evidence

only showed that the officer merely suspected he might have alcohol in his blood when the breathalyzer demand was made. In discussing what reasonable grounds entailed, appeal Justice Young stated:

The existence of reasonable and probable grounds entails both an objective and a subjective component. The police officer must subjectively have an honest belief that the suspect has committed the offence and objectively there must exist reasonable grounds for this belief.

Whether a peace officer has reasonable and probable grounds to believe that an offence is being committed and therefore, that a demand is authorized under s. 254(3) of the Criminal Code is essentially a question of fact, and not one of pure law. In other words, it is an issue of mixed fact and law. [references omitted, paras. 36-37]

As for the use of an approved screening device failure, Justice Young found it could be used for two purposes; providing reasonable and probable grounds for a breathalyzer test or to confirm reasonable and probable grounds. He said:

Indeed, to suspect that a driver has alcohol in his body is sufficient to justify a demand [to submit to a test with an approved screening device]. But a "fail" result, in and of itself, may be sufficient to raise the officer's suspicions to the reasonable and probable grounds required to ask a driver to submit to the more accurate breathalyzer test under s. 254(3) of the Criminal Code.

A "fail" result on an approved screening device can also be used by the peace officer to confirm his reasonable grounds, giving him further reasonable and probable grounds to believe that the person is impaired. [references omitted, paras. 44-45]

And further:

A peace officer's observations as to signs of impairment may well be sufficient, in and of themselves, to form the basis for the reasonable and probable grounds required to make the breathalyzer demand.

In this case, [the officer's] testimony shows that, subjectively, he had more than a suspicion that [the accused] had alcohol in his body. The purpose of the screening device test was to confirm [the accused's] high level of intoxication.

So, the fact that the officer here asked the [accused] to submit to an approved screening device

test in the first place does not establish that he did not subjectively have reasonable and probable grounds to believe that [the accused] had committed an offence contrary to s. 253 of the Criminal Code. When he read the standard demand for [the accused] to submit to the breathalyser, the officer expressly stated that he had reasonable and probable grounds to believe that [the accused] had committed an offence. [references omitted, paras. 47-49]

In dismissing the accused's appeal, the appeal judge ruled that the trial judge's findings as to the officer's reasonable and probable grounds were reasonable and supported by the evidence as a whole. The accused's conviction was affirmed.

The accused then appealed to the New Brunswick Court of Appeal again arguing, in part, that the officer did not have reasonable grounds to believe the accused was committing an offence under s.253 and demand a breath sample. Justice Deschenes, authoring the unanimous judgement of the Court, found the accused's argument was without merit for the reasons given by the Court of Queen's Bench. The accused's appeal was dismissed.

Complete case available at www.canlii.org

ABSENCE OF PRINTS DID NOT EXCULPATE

R. v. Wight, 2008 BCCA 189



Police executed a search warrant at a residential property and found a marihuana cultivation operation in the basement that included 283 budding plants and 136 clones, an automatic watering system, 1,000 watt lights, fans, and ventilation through an upstairs closet. A large bag of cannabis bud was found in the living room on the main floor and there was an odour of marihuana throughout the house along with the pervasive noise from fans in the basement.

Three people were arrested at the property, including the accused who was found at the bottom of the stairs leading from the main floor to the basement. He had a vial of cannabis roaches in his pocket. Police found a T-4E form and a Telus bill in the kitchen in the name of the accused with a different address. They also found a Blockbuster card with his name in a pie plate in the kitchen. But police did not find any of his fingerprints on the grow equipment.

At trial the three occupants of the house were convicted of producing marihuana and possession for the purpose of trafficking, including the accused. In finding the accused guilty, the trial judge relied on the location where he was found early in the morning, the pervasive odour and noise from the cultivation, and the documents in his name found in the premises. But a fourth person, the tenant of the property, who was not present at the time of police entry was later charged and subsequently acquitted because he had a residence elsewhere.

The accused appealed to the British Columbia Court of Appeal arguing, in part, that the police search did not find documents linking anyone to actually living in the house and the documents found in his name were insufficient to establish his residency or "significant visitation" at the house. He contended that the evidence was consistent with him being simply transient and the marihuana found on his person was consistent with personal use. Plus none of his fingerprints were found on the equipment in the cultivation operation.

Justice Mackenzie, delivering the opinion of the appeal court, noted the elements of both offences were knowledge and control. Knowledge of the cultivation could be conclusively inferred from the basement location where the accused was found and the pervasive noise and smell of the cultivation. Even though the circumstances indicated that the accused was not the tenant of the premises and may have resided elsewhere, "the time of day, the location where he was found in the basement, and the documents in his name lead convincingly to the conclusion that he was more than a casual transient and that he was involved in the cultivation," said Justice Mackenzie. "The absence of fingerprints does not exculpate him." Justice Mackenzie held the circumstantial evidence was sufficient to support a conclusion beyond a reasonable doubt that the accused had sufficient knowledge and control of the marihuana cultivation. The accused's conviction was upheld and his appeal was dismissed.

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

Terminology Tip:

Exculpate—to free from blame; prove guiltless.

BYLAW FLASHLIGHT ASSIST BREACHES CHARTER

R. v. Kostecki, 2008 BCSC 551



A bylaw enforcement officer attended an industrial warehouse unit, consisting of an office area and garage beside it, for the purpose of inspecting it and determining if any business was operating that required a business licence. The business licence for the unit had expired and had not been renewed. The bylaw officer was acting under the authority of a Business Licence Bylaw authorizing him as a licensed inspector to enter any land, building or other place at any reasonable time for the purpose of ascertaining whether the regulations and provisions of the bylaw, including the necessity for a business licence, were being complied with. The unit had two doors, one for people to enter and the other a garage door.

The bylaw officer could not see into the windows because they were covered with something. He knocked on the person door twice and the accused appeared. After speaking with the accused about business operations, the bylaw officer asked if he could come in. The accused said he would check with his friends who were working on vehicles inside the unit. After waiting for about 15 minutes, the bylaw officer became concerned with his safety. He had been told there were other males present, could not see inside, and wanted to do an inspection. He concluded it probably was not the safest situation for him to inspect on his own so he contacted the local police and asked if an officer could be sent to ensure the peace.

Before the police officer arrived, the bylaw officer had another conversation with the accused. He was further told the other men inside were busy building a mezzanine, which would require a building permit and raised concerns about fire and safety issues. He was also told that the accused was putting a mattress in for a place to reside, which was an unauthorized use of the property. When the police officer arrived, the bylaw officer told the accused he was going to inspect the premises. The bylaw officer entered, followed by the police officer. There was no business activity apparent inside the unit or any other people.

Inside the garage was a transport trailer. The bylaw officer looked in the trailer but it was too dark to see

anything. He asked the police officer to shine his flashlight into the trailer, which he did. The police officer discovered a marihuana grow operation in progress and immediately arrested the accused and read him his *Charter* rights. He was transported to the police detachment and a search warrant was obtained for the premises. The accused was charged with possessing marihuana for the purpose of trafficking and unlawfully producing the drug.

At trial in British Columbia Supreme Court, the accused challenged the search for and seizure of the marihuana because he argued the police violated his *Charter* rights under s.8. In first finding the bylaw officer had the authority to enter the premises for inspection, Justice Truscott said:

A bylaw officer does not need consent to enter premises for the purpose of ascertaining compliance with the bylaws, if the bylaws authorize such entry. The bylaw officer does not need a search warrant as the entry does not violate protection against unreasonable search and seizure covered by s. 8 of the Charter.

Here [the bylaw officer] was given the authority to enter at any reasonable time by the bylaw and the bylaw itself does not offend s. 8.

Here [the bylaw officer] sought to inspect for bylaw compliance at a reasonable time and his actions did not offend s. 8. [references omitted, paras. 33-35]

As for the officer accompanying the bylaw officer, Justice Truscott concluded it was appropriate. The bylaw officer had the authority to enter without a warrant and the police could accompany him for peacekeeping reasons:

I conclude that [the police officer] had the right to enter to ensure the peace while [the bylaw officer] performed his duties. Whether his authority came from statutes directly or from the general duties of a police officer to keep the peace, I am satisfied that he had that authority to enter for that purpose. [para. 38]

However, the police officer's use of the flashlight was problematic. The police officer himself had no warrant to search or seize anything nor did he have the accused's consent to search the trailer. He testified he did not give his flashlight to the bylaw officer to use because it was his policy to not lend out his tools. Justice Truscott found he was acting in his

capacity as a police officer when he searched the trailer with his flashlight rather than acting only as the bylaw officer's assistant in carrying out the duties of the bylaw officer. The police officer therefore breached the accused's s.8 *Charter* rights. Justice Truscott described this as follows:

If [the police officer] was entitled to be in the unit with [the bylaw officer] to keep the peace and [the bylaw officer] had used [the police officer's] flashlight and discovered the marihuana grow operation himself, he would likely have reported that to [the police officer] standing by and [he] would have had grounds to arrest [the accused] and grounds for a search warrant.

As it was, it was [the police officer] who discovered the marihuana grow operation himself and then arrested [the accused].

I conclude that [the police officer] overstepped his authority as a police officer in searching the trailer with his flashlight. He did not say in his evidence that he was doing so as part of his responsibility to ensure the peace. The only evidence is that he did this at the request of [the bylaw officer] to assist in his inspection of the trailer. [paras. 41-43]

Since the search warrant was based substantially on the grounds of the police officer's own observation of the marihuana grow operation in the trailer the warrant was set aside. The marihuana evidence was therefore obtained as a result of a *Charter* breach.

The evidence, however, was admissible under s.24(2). The marihuana was non-conscriptive evidence that would not affect trial fairness. The *Charter* violation was not serious, but rather it was inadvertent or a technical breach. Nor did the police officer act in bad faith when he shone his flashlight into the trailer. He did it to aid the bylaw officer in doing his inspection. The police officer could have obtained the same information from the bylaw officer if he had given the flashlight to the bylaw officer to use. Further, the accused did not have any significant expectation of privacy in the unit or in the trailer. As well, possessing a marihuana grow operation for the purpose of trafficking and unlawful cultivation are serious offences in this society where drug use is becoming a bigger problem every day. The marihuana evidence was crucial to the Crown's case and the admission of this evidence would not bring the administration of justice into disrepute.

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

NO NEED FOR DANGER ANALYSIS IN PRESUMPTIVE CARE OR CONTROL

R. v. Hayes, 2008 NSCA 23



At about 1:00 am the accused was returning home in minus eight degree Celcius weather on his snowmobile when it became immobilized on a highway in a residential area without street lights, although the engine continued to operate. He tried to get his snowmobile moving again by examining and working on it on the highway. He grabbed it by its sides, put his feet into the tracks, and pulled up on it to see if the track was frozen and would break free. During the half hour he worked on the snowmobile the accused drank a pint of rum. He sat on the driver's seat, smoked a cigarette and fell asleep with the engine still running and the snowmobile in the middle of the lane with no lights on.

Two police officers on patrol came across the accused asleep on the driver's seat of his snowmobile at 3:10 a.m. There was no other traffic on the highway and the accused's helmet and one mitten were lying on the ground beside the snowmobile. He smelled strongly of alcohol and had to be supported by the officers to walk from his snowmobile to the police car.

At trial in Nova Scotia Provincial Court the accused was found guilty of having care or control of a motor vehicle, a snowmobile, while impaired by alcohol contrary to s.253(a) of the *Criminal Code*. The judge was not satisfied the accused had established, on the balance of probabilities, that he would not put the snowmobile in motion if he could. Furthermore, by leaving the motor vehicle on the highway he endangered other users of the highway while in care or control. He was fined \$600, ordered to pay a victim impact surcharge, and had the minimum one year Canada wide driving prohibition imposed.

The accused successfully appealed his conviction to the Nova Scotia Supreme Court. The appeal judge found the trial judge was unclear why he had convicted the accused; on the basis that he was deemed to have care or control of the snowmobile because he had not rebutted the s.258 presumption or on the basis of actual care or control. The appeal judge found that the trial judge accepted the

accused's testimony that he did not intend to set his snowmobile in motion after he had worked on it and drank his rum for half an hour. As for actual care or control, the appeal judge concluded there was no risk of danger to the public by leaving the snowmobile on the highway. An acquittal was entered. The Crown then appealed to the Nova Scotia Court of Appeal.

Under s.253 of the *Criminal Code*, every one commits an offence who has the care or control of a motor vehicle, whether it is in motion or not, while the person's ability to operate the vehicle is impaired by alcohol. Under s.258(1)(a) a person who occupies the operator's seat of a motor vehicle shall be deemed, or presumptively be held, to have care or control of the vehicle unless they establish that they did not occupy that seat or position for the purpose of setting the vehicle in motion. If the presumption is not rebutted there is no need for the court to decide whether there was a risk of danger to the public or whether the vehicle was operable or immovable. The operability or dangerousness of the vehicle is irrelevant.

In this case, the trial judge found the accused had not rebutted the presumption and was therefore in presumptive care or control of his snowmobile. "Not having rebutted the s.258(1)(a) presumption, the trial judge was required by law to find [the accused] was deemed to have care or control of his vehicle and was guilty," said Justice Hamilton, authoring the unanimous opinion of the Nova Scotia Court of Appeal.

Complete case available at www.canlii.org

BY THE BOOK:

s.258(1)(a) *Criminal Code*.



"In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or in any proceedings under subsection 255(2) or (3), (a) where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a motor vehicle ... the accused shall be deemed to have had the care or control of the vehicle ... unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle ... in motion ..."

CSO BREACH PROCEEDINGS MUST INCLUDE WITNESSES STATEMENTS

R. v. McIvor, 2008 SCC 11



The offender was sentenced to a 12-month conditional sentence for a number of property-related offences. Her conditions included that she not be in the direct company of her co-accused without permission from her sentence supervisor, obey a curfew unless authorized in writing by her supervisor or required to be outside her residence for a *bona fide* medical emergency, keep the peace and be of good behaviour; and not possess identification, credit cards, cheques or documents in any name other than her own. While under sentence, she was involved in a motor vehicle collision while a passenger in a vehicle driven by her co-accused. She was also outside of her residence past her curfew and in possession of stolen property found in the vehicle, which included identification and other documents in the names of third parties.

At the breach of conditional sentence hearing, the Crown relied exclusively on the supervisor's report, adduced in accordance with the notice and service requirements under the *Criminal Code* (ss.742.6(5) and (6)). The report, signed by the supervisor, set out the relevant conditions and stated the accused had not been given permission to be out beyond her curfew or to be in contact with her co-accused. Attached to the supervisor's report was a comprehensive police report prepared by the investigating officer, who was not himself a witness to any of the material facts. The report summarized the information obtained from several witnesses concerning the circumstances surrounding the motor vehicle collision. However, there were no signed statements from any of the witnesses included in the police officer's report.

During a preliminary motion in British Columbia Provincial Court, the accused sought a dismissal of the breach allegations on the ground that the supervisor had failed to include signed statements of witnesses with his report, contrary to s. 742.6(4). This section states:

An allegation of a breach of condition must be supported by a written report of the supervisor, which report must include, where appropriate, signed statements of witnesses.

The Provincial Court judge rejected the accused's argument, found her in breach, terminated her conditional sentence order, and committed her to custody until the expiration of her sentence.

The accused appealed to the British Columbia Court of Appeal. A majority overturned the hearing judge's decision. Justice Smith, along with Justice Donald, found the comprehensive police report was not a witness statement within the meaning of s.742.6(4) because a "witness" is a person present at an event and able to give information about it. Rather, "statements of witnesses" refers "to written accounts of the facts alleged to constitute the breach prepared by persons having personal knowledge of those facts.

In Justice Smith's view, the supervisor's report lacked signed statements of witnesses and was therefore inadmissible as evidence. He set aside the order of the hearing judge and restored the conditional sentence. Justice Hall, in dissent, found the police officer's report was the functional equivalent of a signed witness statement. The police report was very detailed, seemed reliable on its face, and provided sufficient information to allow the accused to challenge its contents. In his view, the accused could apply to have any witness attend before

the court for cross-examination and therefore there was no possible unfairness in the hearing proceedings. Justice Hall found that the majority's approach elevated form over substance, and did not accord with Parliament's intent to create an expeditious breach process.

The Crown then appealed to the Supreme Court of Canada arguing the supervisor's written report is admissible in evidence as long as the notice requirements under s.742.6(5) are complied with. The hearing judge can then determine whether it would have been appropriate for the supervisor to include "signed statements of witnesses" and to assign the necessary weight to the report on a case-by-case basis.

Justice Charron, authoring the unanimous judgment for the seven member court, first noted several characteristics of a conditional sentence breach proceeding including:

- it is not simply a hearing to obtain information about the offender's background in order to fashion a fit sentence; and
- it is more akin to a prosecution for breach of probation, coupled with a revocation hearing to lift the suspension of a sentence.

R. v. McIvor, 2008 SCC 11 - Probation / CSO Comparison Grid

	Breach Probation	Breach Conditional Sentence
Nature or proceedings	New distinct criminal offence S.733.1 CCC	Not a new offence
Punishment	2 yrs imprisonment (max) -if suspended sentence, probation order can be revoked and accused sentenced for original offence	Incarceration for time remaining on original sentence -if CSO breached, presumption offender should serve remainder of sentence
Arrest	Dual offence (s.495 CCC)	Treat as indictable offence (s.495 CCC)
Release	Usual procedures apply	Reverse onus (s.515(6) CCC)
Proceeding commencement	Laying of charge proceeds in usual way	Within 30 days (or as soon as practicable)
Standard or proof	Beyond a reasonable doubt	Balance of probabilities
Evidentiary rules	Common law rules applicable to criminal courts <ul style="list-style-type: none"> • Comply with hearsay exclusionary rule • Evidence generally presented by viva voce testimony • Right to cross-examination 	Special statutory regime <ul style="list-style-type: none"> • Allows for documentary proof of breach • Imposes a leave requirement on cross-examination

Justice Charron concluded that the hearing judge had no admissible evidence before him on which to find the accused had breached her conditional sentence order. The supervisor's report, regardless of its contents, was not admissible unless it included signed statements of witnesses. She stated:

... the Crown contends that the supervisor's report, whatever its contents, is admissible so long as the notice and service requirements set out in s. 742.6(5) have been complied with. According to the Crown, whether or not to include signed statements of witnesses is left entirely to the discretion of the supervisor or the prosecutor. I do not accept this argument. It ignores the mandatory language of s. 742.6(4). Parliament's intent that the inclusion of signed statements of witnesses be mandatory in certain circumstances is manifest by its choice of the word "must" in the English version and the expression "*le cas échéant*" in the French version. The Crown's argument also fails to consider the usual evidentiary rules against which the statutory provision was enacted. In other words, in interpreting the meaning of s. 742.6(4), one must ask to what extent did Parliament intend to depart from the ordinary rules of evidence that would otherwise apply?

If the Crown is correct in saying that the supervisor's report is admissible, however formulated, the supervisor alone could in all cases provide admissible evidence regarding the breach. This would be so regardless of whether he or she had any direct knowledge of the material facts alleged to constitute the breach. If Parliament had so intended, there would have been no need to make reference to signed statements of witnesses at all, let alone provide that they "must" be included where appropriate. The approach advocated by the Crown would also constitute a significant departure from the rules of evidence that ordinarily circumscribe the scope of a witness's admissible testimony. In the context of this case for example, this would mean that the supervisor himself, from the viewpoint of his desk, would be permitted to provide evidence that [the offender] was out beyond her curfew, in the company of her co-accused ..., and in possession of stolen goods, including documents in a name other than her own. I find it of interest to note that even proof of service of the report requires a more demanding standard than that proposed by the Crown for proof of the breach itself. Under s. 742.6(6), service of the report may be proven by oral evidence under oath, or an affidavit or solemn declaration, by "the person claiming to have served it".

... [S]ubject to leave being granted requiring the attendance of any of the witnesses, the legislative scheme simply allows the Crown to prove the breach by adducing in documentary form the evidence it would otherwise have been required to present in the usual way by *viva voce* evidence. As such, it is an enabling provision. Of course, documentary evidence admissible under some other statutory authority, such as s. 30 of the *Canada Evidence Act*...continues to be admissible. (I note in this respect that [police officer's] report would not be admissible under this latter provision because s. 30(10) expressly excepts "a record made in the course of an investigation" from its application.) [paras. 21-23]

However, Justice Charron held that the contents of the documents that may be introduced under s.742.6(4) is not limited in terms of "firsthand knowledge" as the majority of the British Columbia Court of Appeal had ruled.

...Under the usual common law evidentiary rules, a witness's testimony is not necessarily restricted to personal observations. The contents of the supervisor's report and of any witness statement should likewise be defined in terms of what the author of the report or the statement could testify to if called to give *viva voce* testimony. Indeed, the supervisor or witness may well end up before the court if leave is granted under s. 742.6(8) requiring their attendance for cross-examination. The contents of the documents adduced under s.742.6(4) and (5) should mirror what their testimony would be.

In some cases, the supervisor will be in a position to provide all of the information necessary to prove the allegation of breach. For example, this would be the case if the alleged breach consisted of a failure to report to the supervisor, or a refusal to attend for counselling as directed. In the present case, the supervisor could attest to the fact that he had "read the CSO to [the offender], explained the conditions and the consequences of failure to comply by those conditions". He could also attest, as stated in his report, that he had never given "[the offender] written permission to be out beyond her curfew or to be in the company of [her co-accused]". However, the supervisor could not have provided admissible testimony about any of the facts alleged to constitute the breaches of the conditional sentence order if called upon to testify. [The police officer] was in no better position. To the extent that the supervisor's report exceeded those boundaries, it was inadmissible as proof of breach. Given the nature of the allegations, it

became "appropriate" and necessary to include "signed statements of witnesses" from those persons who could provide information about the material facts.

I stated earlier that the contents of the supervisor's report or of any witness statement need not be confined to firsthand knowledge where the information would be otherwise admissible if offered *viva voce*. For example, the report may include a summary of evidence expected to be non-contentious, even if the supervisor could not personally give that evidence. Since a copy of the report must be served on the offender, any question concerning the admissibility of this evidence can be resolved between the parties by agreement. If no agreement can be reached, a signed witness statement may be sought where appropriate. In addition, in the context of this expedited proceeding, the supervisor may well include in his report relevant information about the offender to assist the court in determining an appropriate sanction in the event that the court finds that the offender breached a condition of the conditional sentence order. Similarly, the signed report of an investigating police officer may be included even if it is not grounded in the personal knowledge of the officer where it provides relevant context concerning the material facts. For example, the police report may well disclose some circumstance that would call into question the reliability of a witness's statement. The evidence would be admissible, in the same way as the police officer's testimony would be, for that limited purpose.

In my view, Parliament sought to achieve a proper balance between the need for an efficient process and the requirements of procedural fairness. By allowing the prosecution to present all of its evidence in documentary form, it is not necessary to routinely marshal witnesses before the court in every case. The hearing may proceed in a simpler and more expedited fashion. On the other hand, the requirement that signed statements of witnesses be included assures a minimum level of reliability. Personal authentication of the material facts alleged to constitute a breach is important. It is one thing to have the actual witnesses attesting to the material facts by apposing their signature, and quite another for a police officer to repeat information received from witnesses, or a supervisor to relate it third hand.... [paras. 24-27]

The Crown's appeal was dismissed.

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

WHAT ARE A CSO's COMPULSORY CONDITIONS?

Under s.742.3(1) of the *Criminal Code* a court shall prescribe an offender to do all of the following as conditions of a conditional sentence order:

- keep the peace and be of good behaviour;
- appear before the court when required to do so by the court;
- report to a supervisor within two working days, or such longer period as the court directs, after the making of the conditional sentence order, and thereafter, when required by the supervisor and in the manner directed by the supervisor;
- remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and
- notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.

WHAT CAN A JUDGE DO IF A CSO IS BREACHED?

s.762(9) of the *Criminal Code* allows a court, when satisfied, on a balance of probabilities, that an offender has breached a condition of the CSO to do several things:

- take no action;
- change the optional conditions;
- suspend the conditional sentence order and direct that the offender serve in custody a portion of the unexpired sentence and that the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions; or
- terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence.

NO BAD FAITH WHEN POLICE RELY ON MISTAKEN AUTHORITY OF CHILD CARE WORKER

R. v. Renshaw, 2008 ONCA 379



A Children's Aid Society (CAS) worker attended a residence and entered it to investigate whether the home contained a child in need of protection. At the request of CAS, police officers accompanied the worker to keep the peace and provide protection. During the entry police found marihuana being grown.

At trial in the Superior Court of Justice, the judge found the CAS worker did not have the authority to enter the residence, although she had an honest, but mistaken belief, she could. The police therefore conducted an illegal search and breached the accused's s.8 *Charter* rights when they entered. Even though the judge found the violation serious since it involved an illegal trespass onto private residential premises without a warrant, the evidence was admitted anyway. He found the *Charter* breach was not flagrant, brazen, deliberate or wilful. The accused was convicted of possessing marihuana for the purpose of trafficking and production of marihuana.

The accused appealed his conviction to the Ontario Court of Appeal arguing the trial judge erred in admitting the evidence under s.24(2) because the breach was more serious than he found and not properly assessed and accounted for in the s.24(2) analysis. The Appeal Court, however, dismissed the appeal.

First, the admission of the evidence would not affect trial fairness. Second, although the breach was serious, the accompanying police officers were entitled to rely on the CAS worker's authority to enter the premises when carrying out their duty to respond to a request for assistance by a childcare worker. Nor did police act in bad faith. As the Appeal Court stated:

On the findings of the trial judge, this was not a police investigation and the police had no prior interest in the [accused]. The police had a duty to respond to a request for assistance from the CAS and the evidence supported the propriety of a CAS concern about the safety of the CAS worker who attended at the [accused's] home. The trial judge also found that the police did not participate in

questioning the [accused] and that they were performing their primary function of keeping the peace by providing protection to the CAS worker. Finally, we reiterate that the trial judge found, and the [accused] accepts, that the involved police officers were entitled to assume that the CAS was exercising its authority lawfully when the CAS worker entered the [accused's] home. [para. 11]

Although a warrantless search of a personal residence is a serious matter, the Ontario Court of Appeal concluded the case did not fall within the most serious category of *Charter* breaches. The trial judge assessed the impact of excluding the evidence on the administration of justice and properly admitted it. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

APPROACH TO HOME OK TO INVESTIGATE POSSIBLE OFFENCE

R. v. Desrochers, 2008 ONCA 255



The accused was injured in a motorcycle accident after he drove at a high rate of speed into an 'S' curve and slid. Two civilian witnesses saw the accident and aroused the accused, who was now snoring and smelled of alcohol. After coming to, the accused got back on his motorcycle and drove away. The civilians called 911 and followed him for seven kilometers where he stopped at a residence and entered the garage on his motorcycle. A police officer dispatched to the scene of the accident noted a large skid mark and that the road was either in a state of disrepair or had been resurfaced with gravel. He then went to the accused's home, where he gathered information from one of the witnesses that the accused might be impaired, had blood on his hands and face, had been snoring while unconscious, and was seen enter the garage.

When the officer approached the front door and knocked he heard people running. Shortly thereafter the accused's wife answered the door and the officer entered the foyer area of the front entrance across the threshold but within the radius of the front door plane. The accused's wife did not object and while talking to the officer continued to have her hand on the handle of the front door. The officer asked the accused's wife if her husband required medical attention, but she stated that he would be all right.

When asked if he could speak to the accused, his wife said he was "in bed". He asked again and the accused's wife went to find him.

The accused, dressed in a bathrobe, presented himself to the officer. The officer noted injuries and asked if he was all right. The accused said "Yes", but was offered an ambulance anyway and declined. When asked for his driving documents to complete an accident report, the accused declined, saying "There was no accident". The officer asked again but the accused said, "No, I'm not giving them." The officer noted a strong odour of alcohol coming from the accused, bloodshot eyes, and poor balance—he was swaying while standing. The officer formed the opinion that the accused was impaired by alcohol and arrested him. His speech was slightly slurred and his eyes were glassy. He subsequently provided two breath samples—190mg% and 195mg%. He was charged with impaired driving and over 80mg%.

At trial in the Ontario Court of Justice, the judge concluded the officer was conducting a preliminary investigation when he went to the accused's door, as opposed to seeking evidence with respect to a criminal offence that he believed had taken place. He also found the officer did not act unconstitutionally when he stepped inside the threshold of the residence when the accused's wife backed up, and remained within the radius of the front door plane without objection while he engaged in conversation.

The judge found the officer's intentions in approaching the residence were twofold:

- 1) to investigate concerns with respect to the observations made by the witnesses. The officer was conducting a preliminary investigation to determine whether there was any evidence of a criminal offence having taken place. The officer was fulfilling his legal duty in conducting the investigation by going to the doorway of the residence. The conversation was at a place "where guests are usually greeted" and the officer was not told to leave, did not push his way in, and there was a lower expectation of privacy

at the entrance to the household. Exigent circumstances (the investigation of a suspected impaired driver) may have also existed entitling the officer to be present at the residence; and

- 2) to address issues with respect to possible injury.

The trial judge ruled there was no s.8 *Charter* breach and the accused was convicted of impaired driving.

The accused unsuccessfully appealed to the Ontario Superior Court of Justice, arguing the trial judge erred in not finding a s.8 *Charter* breach. The officer was fulfilling his obligations pursuant to the Ontario *Police Services Act* by investigating circumstances that might have constituted criminal conduct resulting in possible injury. This case was not like the Supreme Court of Canada judgment in *R. v. Evans*, (1996), 104 C.C.C. (3d) 23 (S.C.C.), where the only purpose of the officer's knocking on the door was to determine whether there was a smell of marijuana in the house

and therefore took the police attendance outside the invitation to knock doctrine. In this case it was necessary to engage the occupants in questioning and conversation. The purpose of the police was to ask questions of the homeowner and their intent to facilitate communication, even investigative questioning, did not exceed the bounds of the implied right to approach and knock.

"While citizens are entitled to a high expectation of privacy with respect to their homes, a criminal is not immune from arrest in his own home and there are strong policy considerations militating against making a home a sanctuary against arrest and encouraging individuals to see the police," said the appeal judge. "Occupiers of dwelling houses give an implied licence to any member of the public, including police officers on lawful business, to come on to private property and knock at the doors of the dwellings." The officer was entitled to approach and knock on the door of the suspect and make inquiries as to whether he wished to speak to him. The fact the interview occurred slightly inside the boundary of the home, and within the radius of the front door, did not vitiate otherwise wholly lawful conduct. If it did, the right protected by the

"[T]he officer did not go to the door under a pretext and with the intention of conducting an unlawful search of the home. The implied invitation doctrine applies to this case and renders the police conduct in approaching the house and knocking on the door lawful."

Charter would have been trivialized. (see *R. v. Desrochers* (2007) Court File No. 04-11353 for details).

The accused then challenged the appeal court's ruling to the Ontario Court of Appeal. In its endorsement of the lower courts, the Ontario Court of Appeal said this:

The trial judge accepted the officer's evidence that he went to the door to speak with the [accused] in connection with the accident that he had been involved in a short time earlier. Unlike Evans, the officer did not go to the door under a pretext and with the intention of conducting an unlawful search of the home. The implied invitation doctrine applies to this case and renders the police conduct in approaching the house and knocking on the door lawful.

The contention that the officer's entry into the house violated s. 8 of the *Charter* cannot succeed in the face of the trial judge's finding that the officer stepped into the foyer at the entrance to the home on the implied invitation of [the accused's wife]. That finding was open on the evidence.

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

'IN SERVICE' LEGAL ROAD TEST ANSWERS

1. (d) **Articulable cause**—see *R. v. Kang-Brown* (at p. 6 of this publication).
2. (b) **False**—see *R. v. Gundy* (at p. 14 of this publication).
3. (a) **True**—see *R. v. Hayes* (at p. 20 of this publication).
4. (a) **True**—see *R. v. McIvor* (at p. 21 of this publication).
5. (a) **True**—see *R. v. D.B.* (at p. 27 of this publication).
6. (d) **All of the above**—see *R. v. Wittwer* (at p. 42 of this publication)

Note-able Quote

"Do the best you can in every task, no matter how unimportant it may seem at the time. No one learns more about a problem than the person at the bottom."
- Sandra Day O'Connor

YCJA ADULT PRESUMPTIVE SENTENCING

UNCONSTITUTIONAL

R. v. D.B., 2008 SCC 25



The accused, a 17 year old youth, pled guilty to manslaughter after knocking the 18 year old victim to the ground and punching him. The victim lost consciousness and died. Manslaughter is a presumptive offence under the *Youth Criminal Justice Act* (YCJA). The accused sought a youth sentence under the YCJA, where the maximum is three years imprisonment. The Crown, on the other hand, sought an adult sentence and recommended five years' imprisonment.

In the Ontario Superior Court of Justice the accused challenged the constitutionality of the presumptive YCJA provisions which place the onus on a young person to prove that a youth sentence, not an adult one, should be imposed. He also challenged the constitutionality of the provision that requires the young person justify the continuance of a ban protecting him from publicity. The judge allowed the *Charter* challenge and concluded that a youth sentence involving intensive rehabilitation custody would be an appropriate punishment. He imposed a youth sentence of 30 months in a juvenile correctional facility

The Ontario Court of Appeal dismissed a Crown appeal, holding the onus provision in the YCJA placed a considerable burden on the young person. This reverse onus provision breached two principles of fundamental justice:

- 1) young offenders should be dealt with separately and not as adults in recognition of their reduced maturity; and
- 2) the Crown must assume the burden of demonstrating beyond a reasonable doubt that there are aggravating circumstances in the commission of the offence that warrant a more severe penalty.

The Ontario Court of Appeal also held that the publication ban provisions contravene s.7 of the *Charter* because publishing a young person's identity adds to the harshness of their punishment and the Crown should bear the burden of proving that it is

appropriate for the young person to be deprived of the ban. These s.7 violations could not be saved by s.1 of the *Charter*. The Crown then appealed to the Supreme Court of Canada.

Presumptive Provisions

In a split decision (5:4), Canada's highest court ruled that the reverse onus provisions do violate the *Charter*. Section 7 guarantees that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Presumptive offences under the *YCJA* include first and second degree murder, attempted murder, manslaughter, aggravated sexual assault, and other serious violent offences committed by a youth who is at least 14 years old. The *YCJA* requires that young persons convicted of a presumptive offence shall be sentenced as adults unless the youth can justify the imposition of a youth sentence. In other words, this sentencing scheme requires the young person to prove that the presumption should not apply, rather than the Crown being required to show why it should. If a young person convicted of a presumptive offence makes an application for a youth sentence, the court is required to consider the seriousness and circumstances of the offence, and the age, maturity, character, background and previous record of the young person and any other relevant factors.

Justice Abella, writing the opinion of the majority, concluded that placing the onus on young persons to displace the presumption of an adult sentence violated s.7. Because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment. And Canada has a separate legal and sentencing regime for young people. Therefore, this entitles young people to a presumption of diminished moral blameworthiness or culpability. The *YCJA* also has numerous sentencing provisions designed to protect young persons from custody. For example, the police must consider whether alternatives such as extra-judicial measures or extra-judicial sanctions would be adequate before proceeding to court. As well, the *YCJA* sends a clear message about restricting the use of custody for young offenders.

In order for a principle to be one of fundamental justice under s.7, three criteria must be met:

- 1) it must be a legal principle;
- 2) there must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate; and
- 3) it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

Justice Abella found that the principle of a presumption of diminished moral culpability was a legal principle. Special rules based on reduced maturity and moral capacity have long governed young criminals and Canada has consistently acknowledged the diminished responsibility and distinctive vulnerability of young persons in its legislation. And there is little doubt that this principle is fundamental to the operation of a fair legal system. Finally, "the principle that young people are entitled to a presumption of diminished moral culpability throughout any proceedings against them, including during sentencing, is readily administrable and sufficiently precise to yield a manageable standard."

The presumption of an adult sentence in the onus provisions is inconsistent with the principle of fundamental justice that young people are entitled to a presumption of diminished moral culpability. By putting the onus on the young person to justify their continued entitlement to the presumption (of being treated as a youth), rather than on the Crown to demonstrate why it no longer applies, breaches s.7 of the *Charter*. Justice Abella stated:

Because the presumptive sentence is an adult one, the young person must provide the court with the information and counter-arguments to justify a youth sentence. If the young person fails to persuade the court that a youth sentence is sufficiently lengthy based on the factors set out in s. 72(1), an adult sentence must be imposed. This forces the young person to rebut the presumption of an adult sentence, rather than requiring the Crown to *justify* an adult sentence. It is therefore a reverse onus.

No one seriously disputes that there are wide variations in the maturity and sophistication of young persons over the age of 14 who commit serious offences. But the onus provisions in the presumptive offences sentencing regime stipulate that it is the offence, rather than the age of the person, that

determines how he or she should be sentenced. This clearly deprives young people of the benefit of the presumption of diminished moral blameworthiness based on age. By depriving them of this presumption because of the crime and *despite* their age, and by putting the onus on them to prove that they remain entitled to the procedural and substantive protections to which their age entitles them, including a youth sentence, the onus provisions infringe a principle of fundamental justice. [paras. 75-76]

And further:

In the case of presumptive offences, it is the young person who must satisfy the court of the factors justifying a youth sentence, whereas it is normally the Crown who is required to satisfy the court of any factors justifying a more severe sentence. A maximum adult sentence in the case of presumptive offences is, by definition, more severe than the maximum permitted for a youth sentence. A youth sentence for murder cannot exceed ten years; for second degree murder, seven; and for manslaughter, three. The maximum adult sentence for these offences is life in prison.

A young person should receive, at the very least, the same procedural benefit afforded to a convicted adult on sentencing, namely, that the burden is on the Crown to demonstrate why a more severe sentence is necessary and appropriate in any given case. The onus on the young person reverses this traditional onus on the Crown and is, consequently, a breach of s. 7. [paras. 81-82]

Privacy Provisions

The privacy provisions in the *YCJA* determine whether or not a young person's identity will be disclosed. When a young person is convicted of a presumptive offence they lose the privacy protection of a publication ban, which restricts the information about them that can be made publicly available. In the case of a young person receiving an adult sentence, they cannot apply for a publication ban. And in the case of a young person being convicted of a presumptive offence but given a youth sentence, a publication ban that normally attaches to a youth sentence is not imposed. Rather, the young person must satisfy the court that a publication ban should be imposed. The majority ruled that this onus on young persons to demonstrate why they remain entitled to the ongoing protection of a publication ban also infringed s. 7:

... lifting a ban on publication makes the young person vulnerable to greater psychological and social stress. Accordingly, it renders the sentence significantly more severe. A publication ban is part of a young person's sentence (s. 75(4)). It is therefore subject to the same presumption as the rest of his or her sentence. Losing the protection of a publication ban renders the sentence more severe. The onus should therefore be, as with the imposition of an adult sentence, on the Crown to justify the enhanced severity, rather than on the youth to justify retaining the protection to which he or she is otherwise presumed to be entitled. The reversal of this onus too is a breach of s. 7. [para. 87]

Further, the saving provision of s.1 of the *Charter* could not justify the breaches. The majority found that Parliament's objectives could easily be met by placing the onus on the Crown:

This does not make young persons less accountable for serious offences; it makes them *differently* accountable. Nor does it mean that a court cannot impose an adult sentence on a young person. It means that before a court can do so, the Crown, not the young person, should have the burden of showing that the presumption of diminished moral culpability has been rebutted and that the young person is no longer entitled to its protection.

Promoting the protection of the public is equally well served by putting this onus on the Crown, where it belongs. The Crown may still persuade a youth court judge that an adult sentence or the lifting of a publication ban is warranted where a serious crime has been committed. And young persons will continue to be accountable in accordance with their personal circumstances and the seriousness of the offence. But the burden of demonstrating that more serious consequences are warranted will be, as it properly is for adults, on the Crown.

Under the presumptive offences regime, an adult sentence is presumed to apply and the protection of a publication ban is presumed to be lost. The impugned provisions place the onus on young persons to satisfy the court that they remain entitled to a youth sentence and to a publication ban. This onus on young persons is inconsistent with the presumption of diminished moral culpability, a principle of fundamental justice which requires the Crown to justify the loss both of a youth sentence and of a publication ban. [paras. 93-95]

As for the sentence in this case, it was upheld and the publication ban remained in effect.

Minority View

The minority agreed that young persons are entitled, based on their reduced maturity and judgment, to a presumption of diminished moral blameworthiness and that this presumption was a principle of fundamental justice. They did not, however, agree that this presumption lead to the further presumption of a youth sentence or a publication ban. The *YCJA* presumption for adult sentences and publication for serious violent offences does not preclude the imposition of a youth sentence or a publication ban where considered appropriate. Justice Rothstein, writing the minority judgment, stated:

I do not agree...that the publication and sentencing provisions create a reverse onus which contravenes the principle of fundamental justice requiring that the Crown bear the burden of proving aggravating sentencing circumstances. First, even though the legislative scheme treats a publication ban as part of the sentence for appeal purposes, the potential publication is neither state imposed nor part of the young person's sentence in fact. Second, the impugned provisions in no way relieve the Crown of its burden of proving all aggravating facts on sentencing. In effect, the presumptive sentencing regime simply provides for a higher range of sentences for young persons convicted of the most serious violent offences. Even so, Parliament has provided young offenders with the opportunity to satisfy the youth justice court that the presumptive higher range of sentence or the presumptive publication should not apply. Providing this opportunity to young offenders, especially when the sentencing judge is required to prompt young offenders to take advantage of the opportunity, represents Parliament's approach to balance the status of young offenders with the need to protect society from the perpetrators of the most serious violent crimes. It does not place a "persuasive burden" on young offenders that eliminates the Crown's burden of establishing aggravating sentencing factors. [para. 109]

The Crown's appeal was dismissed.

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

Note-able Quote

"When you have police officers who abuse citizens, you erode public confidence in law enforcement. That makes the job of good police officers unsafe." - Mary Frances Berry

DESPITE EXTREMELY SERIOUS CHARTER BREACHES, EVIDENCE ADMITTED

R. v. Harrison, 2008 ONCA 85



A police officer saw a Dodge Durango without a front licence plate and decided to stop it. When he activated his emergency lights and manoeuvred in behind the vehicle he noticed it had an Alberta rear licence plate and realized it did not require a front one. He nonetheless decided to stop the vehicle to maintain his "integrity"—he already had his emergency lights on and had begun the stop. He then also wanted to check to see if the driver was eligible to drive in Ontario.

There were two men in the vehicle. The officer asked the accused for his licence and vehicle registration, insurance and rental agreement. The accused looked for but was unable to produce his licence. During the encounter the officer noted the vehicle looked lived-in—it was messy and littered with used food and drink containers— and there was clothing and bags on the back seat and two boxes in the rear compartment. And both occupants provided different versions of their association. After conducting computer checks, the officer learned the accused's drivers licence had been suspended and he was arrested for that offence. The officer decided to search the vehicle as an incident to the arrest because the accused hadn't "identified himself properly" and the officer believed the accused's driver's licence could be within the vehicle.

For safety reasons the officer asked the occupants if there were drugs or weapons inside the vehicle. He didn't want to get pricked by a needle or pull a trigger on a handgun when searching. His suspicions were also aroused from his training and experience, including a Drug Interdiction Course, that there could possibly be drugs, weapons, cash or a combination thereof inside the vehicle. Both men responded in the negative to the officer's questions about the presence of drugs or weapons. The officer searched the rental vehicle and found 77 pounds of cocaine with a street value of between \$2,463,000 and \$4,575,000 in the two boxes located in the rear area. The men were arrested for possessing cocaine for the purpose of trafficking.

At trial in the Ontario Superior Court of Justice on a charge of trafficking, the accused argued his *Charter* rights were breached and he sought to have the evidence excluded. The judge found the officer breached ss.8 and 9 of the *Charter*. He held the men were arbitrarily detained and that the search of the vehicle was unreasonable. In his view, the officer did not have reasonable grounds to stop and search the car and knew it. He found that the officer's explanation for stopping the vehicle and detaining its occupants was contrived and defied credibility. The search of the vehicle after arrest was not "truly incidental" to the arrest for driving while under suspension and the officer's stated purpose for the search was certainly not reasonable. The officer's actions were flagrant, brazen, not committed in good faith, and the *Charter* breaches were extremely serious. However, the judge refused to exclude the cocaine under s.24(2) because trial fairness was not compromised and the *Charter* breaches "pale in comparison to the criminality involved in the possession for the purposes of distribution of 77 pounds of cocaine, if such is proven." The accused was convicted and sentenced to five years of in prison.

The accused then appealed to the Ontario Court of Appeal arguing the trial judge erred in his s. 24(2) analysis. Justice O'Connor, authoring the majority opinion, disagreed. He first noted several considerations concerning s.24(2).

- It "was written to constitute an intermediate position between the automatic exclusionary rule familiar to American Bill of Rights jurisprudence and the automatic inclusionary rule of the common law for non-conscriptive real evidence."
- Its main purpose "is to protect the reputation of the administration of justice" and "is not a remedy for police misconduct." Because the application of s. 24(2) focuses on the reputation of the administration of justice, the views of the community at large are relevant. That is not to say that courts should always rely on the actual views of the community. Such a populist approach would risk subjecting the *Charter* to the volatile ebb and flow of majority sentiment and would thus arguably run counter to the very idea of constitutionally entrenched rights. That said, the question of disrepute is not to be analyzed solely from the perspective of judges or the legal community. The

standard is that of the reasonable person, and ... '[t]he reasonable person is usually the average person in the community, but only when that community's current mood is reasonable.' The reasonable person standard ... 'serves as a reminder to each individual judge that his discretion is grounded in community values.'"

- "Section 24(2) directs judges to consider 'all the circumstances' in determining whether a *Charter* violation mandates exclusion. The court in *Collins* chose to divide the factors involved in this inquiry into three categories: those relating to the effects of the breach on trial fairness, those relating to the seriousness of the constitutional breach, and those relating to the effect of excluding the evidence on the reputation of the administration of justice. Ultimately, however, the question is whether admitting the evidence would bring the administration of justice into disrepute." [paras. 29-32]

As well, a trial judge's decision to exclude or admit evidence under s. 24(2) is subject to considerable deference and should not be interfered with unless there is a clear legal error or it is unreasonable.

In this case the admission of the cocaine would not result in an unfair trial. And although the trial judge ruled the breaches "extremely serious"—the officer's conduct was "brazen and flagrant" and "the search was not conducted in good faith"—they were not the most egregious category of *Charter* violations. The officer did not have a carefully thought out plan or practice to breach the *Charter*. He suspected that there were drugs in the car and his on-the-scene decision to follow his suspicions without reasonable grounds was a serious mistake. However, by the time the car was searched it was arguable the officer had enough information to warrant a search even though he agreed that he did not have enough information to obtain a warrant. This was a flawed decision making process rather than a more planned and premeditated course of action. The detention was brief—about 15 minutes between the start of the traffic stop and the accused's arrest for driving with a suspended licence—and no physical force or restraint was used. And further, the accused's privacy interest was not great. This was not a search of a person, a residence or an office, but only a car. With this in mind, Justice O'Connor stated:

The courts have held that an individual's privacy interest in a vehicle and its contents - a factor not mentioned in the trial judge's ruling on the voir dire - are lower than the privacy interest in a person's body, home or office. In this case, the vehicle was a rental vehicle. The [accused] was not the lessee. He was properly arrested for driving while under suspension. Moreover, the [accused] did not testify in the voir dire about any perceived violation of his privacy interest. He did not even look to make sure his own bags were in the vehicle's rear compartment prior to leaving Vancouver. Indeed, he told [the officer] that the boxes belonged to [his passenger]. This denial of ownership is an important factor. [references omitted, para. 45]

The majority concluded that the effects of the *Charter* breaches under ss. 8 and 9 were relatively minor.

Further, the trial judge did not err in analyzing the effect of admitting or excluding the evidence on the reputation of the administration of justice. In this stage of the analysis, courts consider the seriousness of the offence, the reliability of the evidence, and its importance to the case. The charges were very serious and there was no case without the drugs.

Nor did the majority accept the accused's argument that admitting the evidence would amount to judicial condonation of police misconduct. Just because a trial judge admits evidence does not mean they are condoning the *Charter* breaches. "The very nature of s. 24(2) contemplates that judges will admit evidence in some cases where there has been a breach of the *Charter*, but the exclusion of evidence would bring the administration of justice into greater disrepute than its admission," said Justice O'Connor. Instead, the trial judge clearly condemned the police misconduct in this case despite admitting the evidence. Section 24(2) involves a balancing test with no single factor trumping all others. "Police conduct is rarely determinative of the s.24(2) analysis," continued Justice O'Connor. "A trial judge engaged in a proper s.24(2) analysis can find serious police misconduct and, because of other factors in play, legitimately admit the evidence improperly obtained." The majority stated:

"[P]olice conduct is but one factor in the s.24(2) analysis. The wording of s.24(2) and all of the leading cases over 20 years compel trial judges to engage in an analysis of many factors... There is rarely an automatic equation between police misconduct and exclusion of the evidence."

When considering whether admitting the evidence would bring the system into disrepute, it is important to bear in mind that the police misconduct was not shown to be systemic in nature or the result of an operational policy or guidelines or even an order from a senior officer. While clearly the misconduct was serious, the actions involved were those of one police officer, who had been on the force for four years. That officer made some flawed decisions during the roadside encounter and later when testifying. However, this is not a case where it has been shown that there is or even might be an institutional problem. Furthermore ... s.24(2) of the *Charter* is not intended as a remedy for police misconduct.

As the trial judge recognized, police conduct is but one factor in the s. 24(2) analysis. The wording of s. 24(2) and all of the leading cases over 20 years compel trial judges to engage in an analysis of many factors under the *Collins* analytical framework. There is rarely an automatic equation between police misconduct and exclusion of the evidence.

By way of illustration, had the police officer in this case engaged in more egregious conduct, such as entering the [accused's] home without a warrant, or threatening or assaulting the [accused], that may well have tipped the balance in favour of exclusion. The same holds true in terms of the nature and quantity of the drugs seized - a small amount of marijuana may well have yielded a different result. In our view, this is precisely the dichotomy of result that s. 24(2) envisions and that *Collins* and its progeny permit. [paras. 60-62]

And further:

There is no doubt that the present case involved the interprovincial transport of a very large amount of cocaine. The seized cocaine was estimated to be worth between \$2,463,000 and \$4,575,000. The traffickers stood to profit handsomely from the long chain of social ills that would have flowed from the sale of 77 pounds of cocaine.

In our view, a reasonable member of the community could very well find that excluding from evidence such a large quantum of drugs as a result of the police action in this case would bring the

administration of justice into greater disrepute than admitting the seized narcotics.

.....
Thus ... we believe that without minimizing the seriousness of the police officer's conduct or in any way condoning it, it was open to the trial judge to find that reasonable members of the community could well conclude that the exclusion of 77 pounds of cocaine, with a street value of several millions of dollars and the potential to cause serious grief and misery to many, would bring the administration of justice into greater disrepute than would its admission. [paras. 67-70]

A Different View

Justice Cronk, writing a dissenting opinion, concluded the evidence should have been excluded. In his view, the *Charter* violations were not only very serious but also intentional. The police officer knew that he did not have reasonable and probable grounds to stop the car or search it, but did so anyways. "This is not a case where a police officer made a good faith error in judgment, misunderstood the extent of his authority, engaged in trivial or inadvertent constitutional violations, or is being held to an unduly harsh assessment with the benefit of hindsight," said Justice Cronk. "This is a case where the police officer's actions, both at the time of the detention ... and the search ... were deliberate, without legal justification, and disdainful of the rights and freedoms protected by the *Charter*." He also noted that the officer tried to mislead the trial judge about his conduct. Justice Cronk would have allowed the appeal, set aside the accused's conviction and entered an acquittal.

Complete case available at www.ontariocourts.on.ca

THE MENTAL SIDE OF FITNESS TRAINING

Insp. Kelly Keith, Atlantic Police Academy

Whether you want to do your best at losing 10 lbs, completing your first triathlon, or competing in a high level sporting event, the formula for success is very similar. Here are a few points to remember if you want to perform your best.

You Must Be Focused

The body/mind connection of physical activity (or anything else for that matter) cannot and should not

be overlooked. When you are in the gym or out jogging you must be focused. If you are not focused and/or don't want to be there you are not going to be your best! Your performance in sports will be dramatically improved if you enjoy it, you look forward to going, you look forward to the great feeling afterwards, or are even feeling great about the results. Focus on some short-term goals, enjoy what you're doing, know why you want to do it, and go for it.

Ensure You Have The Appropriate Intensity

Intensity is a required ingredient to get better at running, swimming or even eking out the last reps on the bench press. It is that simple. Also knowing when and how to turn on and off this intensity is required. Get intense and go for it on the last reps or last miles if you want to perform your best!

You Must Believe In Yourself

Believe 100% and nothing less. If you don't believe you can achieve what you're aiming to do, there is no point in doing it! If you are telling yourself you are "not that good", it makes no difference how much natural talent you have. You will live up to your expectations and be "not that good". On the other hand, if you tell yourself that you can "do it" and believe in your ability to "do it", you will "do it". All this obviously put in perspective and what you are trying to achieve is achievable!

Don't Be Afraid To Fail

Fear of failure is a performance killer. You will only grow as an athlete by failing! Babe Ruth struck out more than anyone else the same year he set the home run record. How many people care how many times he struck out? When attempting any activity there will be failures - you have a choice as to how to look at those failures. You can learn from them which makes you stronger and better for the next time or you can get frustrated, not try again, or even quit. Not a lot more has to be said about this topic, however it is a shame that people do not hit their home runs because they afraid to strike out.

Have Faith

You need to believe in yourself and surround yourself with people that believe in you. Find a comrade that you know will encourage you and be a positive impact on you and tell them your goals. This cannot be overlooked. Someone who is positive towards your

goals, believes in you and will assist you in achieving your goals will greatly enhance your chances in attaining those goals, not to mention get you on track if you sway off every now and then.

Fitness Tip That Works - Count down your reps which is far more motivating than counting up. Give it a try and see what you think!

About the Author - Insp. Kelly Keith is a 20 year veteran of law enforcement. He presently teaches Physical Training, Use of Force and Tactical Firearms to Corrections, Law and Security, Conservation Officers and Police Cadets at the Atlantic Police Academy. Kelly is a second degree black belt in Jiu-Jitsu and a Certified Personal Trainer, Strength and Conditioning Instructor, and a Certified Sports Nutrition Specialist. He can be reached by email at KKeith@pei.sympatico.ca

'STRADDLE EVIDENCE' DID NOT REBUT OVER 80mg% PRESUMPTION

R. v. Gibson, R. v. MacDonald, 2008 SCC 16



A fragmented Supreme Court of Canada has ruled that straddle evidence presented by experts in two over 80mg% trials was insufficient to rebut the presumption of identity found in s.258(1) of the *Criminal Code*.

Facts: R. v. Gibson

A police officer saw Gibson driving his all-terrain vehicle on the highway and stopped him. Gibson's breath smelled of alcohol and his speech was slurred. The officer administered two breathalyzer tests, which indicated that Gibson's blood alcohol content (BAC) was 120mg% and 100mg%. Gibson was charged with operating a vehicle over 80mg% contrary to s.253(b) of the *Criminal Code*.

At trial in Nova Scotia Provincial Court Gibson testified he consumed ten beers over a period of seven hours and five of them shortly before being stopped by the police. An expert witness testifying for the defence said that Gibson's BAC would have been between 40mg% and 105mg% when stopped, based on the average alcohol elimination rates of men of his age, height and weight and assuming the

pattern of consumption testified to was accurate. The trial judge accepted Gibson's and the expert's evidence, found the presumption in s.258(1)(d.1) of the *Criminal Code* had been rebutted, and was left with a reasonable doubt that Gibson's BAC exceeded the legal limit. He was acquitted.

The Crown appealed to the Nova Scotia Supreme Court arguing that expert evidence based on elimination rates in the general population could not constitute evidence to the contrary. The appeal court justice ruled that rejecting evidence of elimination rates in the general population would amount to making the presumption an irrebuttable one. Thus, Gibson's acquittal was upheld. On further appeal, the Nova Scotia Court of Appeal set aside the acquittal and ordered a new trial. It ruled that an expert opinion based on average tendencies of the population was without foundation and thus inadmissible. The Court found the hypothetical elimination rates were not capable of rebutting the presumption in s. 258(1)(d.1).

Facts: R. v. MacDonald

A police officer stopped MacDonald at a check stop. The officer noted MacDonald smelled of alcohol, was talking in a deliberate manner and had some difficulty walking. Two breath tests produced readings of 146mg% and the he was charged with operating a vehicle while his BAC exceeded 80mg%, contrary to s.253(b).

At trial in Alberta Provincial Court MacDonald testified that he had consumed six cans of beer over four and a half hours and had consumed the last can five minutes before being stopped by the police. An expert witness testified he tested MacDonald several months after he was charged and found his elimination rate to be 18.5 mg per hour. Assuming MacDonald eliminated alcohol at the same rate on the night of the offence, his BAC would have been 71mg% — below the legal limit. However, during the expert's test, the type and pattern of alcohol consumption and the amount of food consumed was not re-created. Furthermore, the expert stated that a man of MacDonald's age, height and weight who eliminated alcohol at an average rate would have had a BAC of 64mg% and 109mg% at the time of driving. The trial judge ruled the expert evidence did not tend to show that MacDonald's BAC had not exceeded 80mg% and convicted him.

On appeal, the Alberta Court of Queen's Bench upheld the conviction, concluding the evidence of a range of possible blood alcohol levels lying both below and above the legal limit was speculative and was not probative of MacDonald's BAC at the time of the offence. The Alberta Court of Appeal upheld the lower judgments, stating that evidence of BAC disregarding the personal characteristics of the accused at the time of the alleged offence constitutes an attack on the fictional nature of the presumption and is inadmissible. It rejected the use of average elimination rates and of straddle evidence based on elimination rates in the general population.

Both Gibson and MacDonald then appealed to the Supreme Court of Canada arguing that straddle evidence—expert opinion evidence stating that an accused's BAC may have been over or may have been within the legal limit—is capable of rebutting the statutory presumption set out in s.258(1)(d.1).

The Quartet

Four judges (Justice Charron with Justices Bastarache, Abella, and Rothstein concurring) found the expert straddle evidence did not rebut the presumption and dismissed the appeals.

Under s.253 it is a criminal offence for a person to operate a motor vehicle having consumed alcohol in such a quantity that the concentration in the person's blood exceeds 80mg%, regardless of whether the person is actually impaired at the time. And the offence created by s.253(b) is not the quantity of alcohol consumed, but consumption resulting in a BAC exceeding 80mg%. Parliament regards driving with this level of alcohol sufficient risk to warrant criminalization. Section 258(1) then establishes three evidentiary presumptions to simplify the prosecution of the offence of driving over the legal limit. These presumptions are "legal or evidentiary shortcuts designed to bridge difficult evidentiary gaps".

Straddle evidence — expert opinion evidence which says that the accused's blood alcohol concentration may have been over or may have been within the legal limit at the material time; the range of possible blood alcohol concentrations straddles the legal limit of 80 mg of alcohol per 100 ml of blood.

Section 258(1)(g) contains the presumption of accuracy. It provides that a technician's certificate stating the accused's BAC at the time of the breathalyzer test is presumed to be accurate, in the absence of any evidence to the contrary.

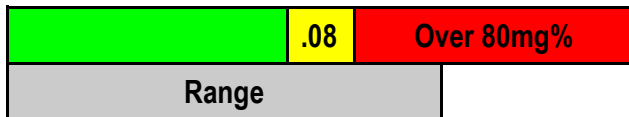
Section 258(1)(c) contains the first presumption of identity. It states that where breath alcohol samples have been taken in accordance with certain technical requirements, the accused's BAC at the time of the breathalyzer test is presumed to be the same as their BAC at the time of the alleged offence, in the absence of evidence to the contrary. Section 258(1)(d.1) contains a second presumption of identity. It states that where the breathalyzer test produces a reading above 80mg%, the accused's BAC is presumed to have exceeded 80mg% at the time of the alleged offence, absent evidence tending to show the accused's BAC did not in fact exceed 80mg%. In order to rebut the statutory presumptions of identity, an accused whose breathalyzer reading exceeds 80mg% must show that their BAC was different at the time of driving than at the time of the test and also that their BAC did not exceed 80mg% at the time of the alleged offence. The standard of proof required to rebut the statutory presumptions is reasonable doubt.

Justice Charron examined the three approaches to straddle evidence:

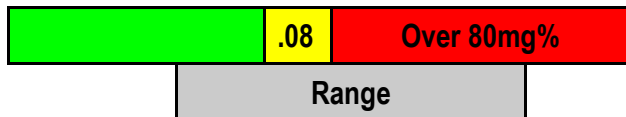
- 1) the Heideman line of analysis. Straddle evidence can never rebut the presumption in s. 258(1)(d.1). Rather, the entire range of hypothetical values must fall below 80 mg% for the presumption to be set aside.

	.08	Over 80mg%
Range		

- 2) the "prevailing direction" approach. Some courts have accepted that straddle evidence can rebut the statutory presumption if the accused's range of possible BACs is more below the legal limit than above. Does the range of possibilities have a leaning or prevailing direction which makes it clear that the accused's BAC was not over 80mg%? If it does, or if the Court is left with a reasonable doubt on the issue, then the evidence amounts to "evidence to the contrary" and the presumption is disarmed.



- 3) the "some evidence" approach. It is sufficient for the accused to point to evidence which tends to show that their BAC could have been below 80mg% at the time of the alleged offence. There is no need for an accused to demonstrate that their BAC is actually below 80mg%. It is only necessary to adduce credible evidence tending to show that it is possible under the circumstances.



After reviewing these three approaches, Justice Charron concluded that straddle evidence is "simply an attack on the presumption itself and that it cannot constitute evidence 'tending to show' that the accused's blood alcohol level did not exceed 80 mg at the material time":

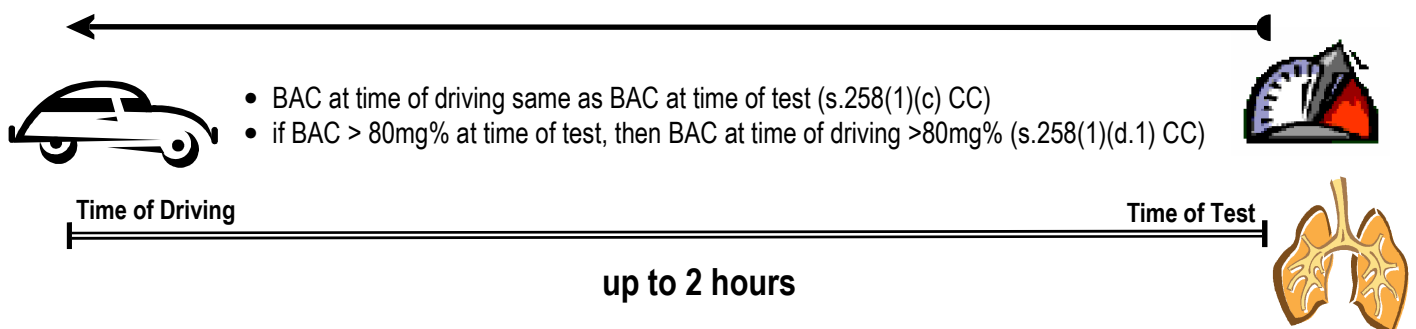
[I]t is my view that in *all* cases straddle evidence merely constitutes an attempt to defeat the statutory presumption itself and, as such, does not tend to show that the accused's blood alcohol concentration did not exceed the legal limit at the time of the alleged offence within the meaning of s. 258(1)(d.1). I also conclude, on the basis of the undisputed scientific fact that absorption and elimination rates vary continuously, that post-offence testing of the accused's own elimination rate will rarely, if ever, add anything of value to the expert opinion evidence and, for obvious policy reasons, should not be encouraged, let alone required.

It is undisputed that the human body absorbs and eliminates alcohol over time, and that absorption and elimination rates vary, not only from person to person, *but also from time to time for the same individual*, depending on a number of factors, some of which concern the person's digestive process at the relevant time. It is therefore impossible to ascertain the precise rate at which the accused was metabolizing alcohol at the time of the alleged offence. Parliament can be assumed to have known that blood alcohol levels are subject to these inherent variations. Yet, it saw fit to implement the presumption. The legislative scheme must be interpreted in this context.

Because absorption and elimination rates continually vary, it is readily apparent that a breathalyzer reading of 95 mg, for example, may not reflect the *actual* concentration of alcohol in the accused's blood at the time of the alleged offence — it would depend on the rate at which the particular accused is metabolizing the alcohol during the relevant time period on the day in question. Yet, it can be no defence for an accused to say that the actual alcohol concentration at the material time may have been less than the legal limit based on this variable alone. To admit such a defence would obviously fly in the face of the presumption itself. It is because of these inherent variations in absorption and elimination rates that the presumption of identity is needed in the first place. In order to facilitate proof of the offence, the presumption treats all persons as one person with a fixed rate of elimination and absorption.

Straddle evidence puts the accused in no better position. It merely confirms that the accused falls into the category of drivers targeted by Parliament — namely, those who drive having consumed enough alcohol to reach a blood alcohol concentration exceeding 80 mg. Parliament, in creating this offence, clearly regarded driving with this level of

Presumptions of Identity



consumption as posing sufficient risk to warrant criminalization. It is therefore not enough to show, based on evidence about the accused's pattern of consumption of alcohol during the relevant time period, that the accused consumed enough alcohol to exceed the legal limit, *albeit* in a quantity that would place him within a range that may be somewhat different than that which could be extrapolated from the breathalyzer reading. It is clear from the wording of s.258(1)(d.1) that the presumption can only be rebutted by evidence that tends to show that the accused's blood alcohol concentration *did not exceed the legal limit* and, hence, that the accused was not in the targeted category of drivers.

In order to displace the presumption, the evidence must show, therefore, that based on the amount of alcohol consumed, the accused's blood alcohol concentration would not have been above the legal limit at the time of driving, *regardless* of how fast or slow the accused may have been metabolizing alcohol on the day in question. Of course, the court need not be convinced of that fact. It is sufficient if the evidence raises a reasonable doubt.

Further, because it is scientifically undisputed that absorption and elimination rates can vary from time to time, nothing is really gained by post-offence testing of an accused's elimination rate. Short of reproducing the exact same conditions that existed at the time of the offence, assuming this is even possible, any expert opinion evidence based on actual tests would have to be given with the qualification that absorption and elimination rates vary from time to time, and therefore the accused's blood alcohol level at the material time cannot be measured with precision. Ultimately, the best evidence an expert can provide, as the expert opinion evidence adduced in Mr. MacDonald's case exemplifies, is likely to be a range reflecting average elimination rates. In any event, it is my view that this Court should not interpret this legislative scheme, which is intended to combat the social evils resulting from drinking and driving, as requiring accused persons, some of whom may well be battling with alcohol addiction, to submit to drinking tests in order to make out a defence. Surely, Parliament cannot have so intended. [paras. 3-8]

And further:

[I]t cannot be disputed that the presumption is a legal fiction and that a breathalyzer reading that exceeds the legal limit may not be reflective of the *actual* concentration of alcohol in the accused's

blood at the time of the offence because it always depends on the rate at which the particular accused is metabolizing the alcohol during the relevant time period on the day in question. Yet the offence is clearly made out. The breathalyzer test provides legal proof that the accused "consumed alcohol in such a quantity" that it put him or her over 80 mg contrary to s. 253 of the *Criminal Code*. The accused cannot rebut the presumption by relying on inherent variations in absorption and elimination rates. Straddle evidence puts the accused in no better position. Evidence that merely confirms that alcohol was consumed in a sufficient quantity to produce a blood alcohol concentration that exceeds the prescribed limit, *whether or not it be within the same range that could be extrapolated from the breathalyzer reading*, cannot rebut the presumption under s. 258(1)(d.1). When considered in this sense, straddle evidence, in effect, is tantamount to arguing, for example, that the accused should not be convicted because he or she only drank a sufficient quantity of alcohol to reach a 90-mg concentration rather than a 95-mg concentration as recorded by the breathalyzer. Parliament, by creating this offence, clearly regarded driving with this level of consumption as posing sufficient risk to warrant criminalization. To hold otherwise would be to defeat the presumption itself and it cannot be allowed. [para. 32]

In these cases, the expert opinion evidence placed the accused's BAC both above and below the legal limit at the time of driving. It did no more than confirm that the accused fell within the category of drivers targeted by Parliament and did *not* rebut the statutory presumption under s. 258(1)(d.1) of the *Criminal Code*.

The Trio

Three judges (Justice Lebel with Justices McLachlin and Fish concurring) concluded that, depending on a number of factors, straddle evidence may or may not provide a sufficiently probative evidentiary basis to rebut the presumption arising from the accused's failure of the breathalyzer test. In their view, both expert evidence of alcohol elimination rates in the general population and straddle evidence can be relevant and are therefore not inherently inadmissible for the purpose of rebutting the presumption. However, the probative value of such evidence will often be so low, as were the cases here, that it was not sufficient to rebut the s.258(1)(d.1) presumption.

Justice Lebel described the purpose and effect of the presumptions as follows:

Under s. 258(1)(g), blood alcohol tests are presumed to be accurate, provided that certain procedures are followed. This presumption, as well as the presumption established under s. 258(1)(c), was adopted by Parliament after a review of the scientific evidence then available about the reliability of the tests and their fairness to the accused. It is known as the presumption of accuracy [and is rebuttable on] evidence to the contrary [tending] to show that the blood alcohol content of the accused did not exceed the legal limit at the time of the breathalyzer test. Otherwise, one is only challenging the presumption itself without providing any exculpatory evidence.

Under s. 258(1)(c), the blood alcohol content of the accused while he or she was driving is presumed to have been the same as at the time a blood alcohol test was administered, provided that certain procedures were followed and "in the absence of evidence to the contrary". This is often referred to as the presumption of (temporal) identity. Like s. 258(1)(g), s. 258(1)(c) does not specify whether rebutting the presumption requires evidence that the accused was not over the legal limit or whether evidence of mere difference over time will suffice....

[Section 258(1)(d.1) establishes] the presumption that, in the absence of evidence tending to show that the accused had a blood alcohol content of 80 mg or less while driving, a blood alcohol analysis indicating a result of over 80 mg is proof that the accused had a blood alcohol content of over 80 mg while driving. The presumption provided for in s. 258(1)(d.1) has been referred to as an "additional" presumption of identity... [I]t applies regardless of whether the accused is challenging the accuracy of the blood alcohol test or the presumption of identity. This is because s. 258(1)(d.1) applies even if the requirements of s. 258(1)(g) are met. For example, let us consider the case of an accused who rebuts the presumption of accuracy in s. 258(1)(g) with evidence both that his or her blood alcohol content at the time of the breathalyzer test was different than that indicated by the machine (as required by s. 258(1)(g)) and that it did not exceed the legal limit *at the time of testing* (as required by the common law). In such a situation, s. 258(1)(d.1) will nevertheless apply, which means that the accused must also prove that his or her blood alcohol content did not exceed the legal limit *at the time of the alleged offence* in order to rebut the presumption. [paras. 48-50]

The presumption found in s.258(1)(d.1) can be rebutted by adducing evidence tending to show that the concentration of alcohol in the blood of the accused did not exceed 80mg% at the time the offence was committed. An accused need not prove that the blood-alcohol level of the accused did not exceed the statutory limit at the relevant time. Rather, evidence to the contrary is evidence that is capable of raising a reasonable doubt as to the presumed fact. Straddle evidence and evidence based on alcohol elimination rates in the general population is not inherently inadmissible for the purpose of rebutting the presumptions in s.258(1). However, in the absence of evidence tending to show that the BAC of the accused at the time of the offence was below the legal limit, that evidence will rarely have sufficient probative value to rebut the presumptions.

For expert opinion evidence to be admissible it must be, among other things, relevant. For the expert evidence to be relevant, it must relate to a fact in issue in the trial, tend to prove it, and its probative value must outweigh its prejudicial effect. In Justice Lebel's view, expert evidence of alcohol elimination rates and BAC in respect of the general population was not inherently inadmissible and could be given some weight. The experts in these cases testified as to what the BAC of a person of each accused's age, sex, height and weight would have been if they eliminated alcohol at a rate within the range of the general population and their consumption pattern, which had a foundation in the evidence. However, the probative value of evidence based on rates in the general population will often be so low that it fails to raise a reasonable doubt that the accused had a blood alcohol content exceeding 80mg%, as indicated by an approved instrument for measuring BAC. Elimination rates vary between individuals and each individual's rate will vary depending on such factors as the amount of food consumed, the type of alcohol consumed, and the pattern of consumption.

Expert evidence of the elimination rate of a particular accused as established by a test, as opposed to the elimination rate of the general population, is potentially more probative of their BAC while driving. However, because an individual's elimination rate varies over time based on a number of factors, the probative value of evidence based on the elimination rate of the accused will depend on the number of variables controlled for in the elimination rate test.

And evidence of the elimination rate of an accused at the time of the offence, would be more likely to rebut the presumption in s.258(1)(d.1) than mere evidence of the elimination rate of the accused under testing conditions.

As for straddle evidence—evidence of a range of blood alcohol levels whose lowest value lies below the legal limit and whose highest value lies above it—Justice Lebel held it too could be relevant for the purpose of rebutting a presumption that the BAC of the accused was above 80mg%. Although not conclusive, it could be capable of raising a reasonable doubt, depending on where the ranges straddled the legal limit. "A wide 'straddle range', such as those in the present appeals (40-105 mg for Mr. Gibson and 64-109 mg for Mr. MacDonald), cannot be considered evidence to the contrary of the breathalyzer result, since it does not tend to prove that the accused was at or under the legal limit. Similarly, a range that is overwhelmingly above the legal limit may be of limited probative value," said Justice Lebel "A narrower range, or one whose values lie overwhelmingly below the legal limit, will generally have greater probative value. In the end, the more that is known about probabilities within the range, the more probative the evidence may be." He continued:

Another factor going to weight is whether the breathalyzer result is consistent with the straddle range. If it is, the Crown can argue that the straddle evidence supports the breathalyzer result. Although such evidence would be admissible, it is difficult to imagine that it could leave the trier of fact with a reasonable doubt. If, on the other hand, the breathalyzer result is inconsistent with the straddle range, this is simply another factor to be considered by the trier of fact. It could support either the contention that the breathalyzer reading was inaccurate, or the contention that the expert's testimony is poor evidence of the actual blood alcohol content of the accused while he or she was driving. That being said, it should be recalled that in cases where an accused may have continued to absorb alcohol between the time of the alleged offence and that of the breathalyzer test, the breathalyzer reading may be consistent with the straddle range even if it lies outside the range.

In sum, straddle evidence is by its very nature consistent with both innocence and guilt. Accordingly, such evidence will rarely suffice on its own to raise a reasonable doubt as to the accuracy

of a breathalyzer result admitted in accordance with the relevant provisions of the *Criminal Code*. For the reasons given, however, it is not inadmissible on that ground. Evidence that does not in itself tend to show that the blood alcohol ratio of the accused was at or under the legal limit cannot be excluded for that reason. Here as elsewhere, ultimate sufficiency and threshold admissibility are conceptually distinct issues. Once straddle evidence is admitted, it will be left to the trier of fact to determine whether that evidence, considered in light of the evidence as a whole, raises a reasonable doubt as to the accuracy of the breathalyzer result. And I hasten to add that the straddle evidence and the other evidence relied on by the defence will warrant an acquittal only if it tends to prove that the blood alcohol level of the accused at the relevant time did not exceed 80 mg. In cases where the range of possible blood alcohol levels is based on average elimination rates across the population as a whole, straddle evidence will rarely be sufficient in itself to raise a reasonable doubt about the presumed fact that the blood alcohol level of the accused exceeded the legal limit. It nevertheless remains admissible for the reasons given and may, bearing in mind the evidence as a whole, constitute evidence to the contrary for the purpose of rebutting the presumption in s. 258(1)(d.1). Whether a reasonable doubt exists must be assessed in light of all the evidence, given that the Crown has adduced evidence, in the form of a breathalyzer test result, of a blood alcohol content over the legal limit at the time of the offence. [paras. 74-75]

Here, the expert evidence in Gibson's case was sufficiently relevant to be admissible and was not without foundation, so it could be given weight. However, because the expert's straddle evidence was based on elimination rates in the general population, and consisted of a wide range of values including values significantly above the legal limit, it did not rebut the s.258(1)(d.1) presumption by raising a reasonable doubt that his BAC actually exceeded 80mg%. The expert evidence in MacDonald's case included straddle evidence based on elimination rates in the general population and evidence based on MacDonald's own elimination rate according to tests conducted subsequent to the offence. This straddle evidence was admissible. However, the trial judge did not have a reasonable doubt that MacDonald's BAC was over the limit at the relevant time and it would have been unreasonable for him to find that the straddle

evidence in this case was capable of raising a reasonable doubt.

The straddle evidence adduced in both cases failed to rebut the presumption and both appeals were dismissed.

The Dissenting Duo

Two judges (Justice Deschamps with Justice Binnie) dissented. They would adopt the prevailing direction approach to straddle evidence. "Evidence that tends to show that the [BAC] of the accused at the time of interception did not exceed the legal limit based on an elimination rate of 15 mg per hour, or on the actual elimination rate of the accused according to test results, will suffice to raise a reasonable doubt," stated Justice Deschamps:

In my view, the prevailing direction approach can be used to justify an acquittal, because the evidence presented at trial need only raise a reasonable doubt. "[A] reasonable doubt is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence". ..."[T]he 'evidence to the contrary' to which it refers must tend to show — but it need not prove — that

the blood-alcohol level of the accused did not exceed the statutory limit at the relevant time. The exculpatory evidence, in other words, must have probative value, but it need not be so cogent as to persuade the court". Therefore, when an accused adduces straddle evidence, that evidence need not prove his or her blood alcohol level at the time of interception. It is sufficient that the evidence tends to show that the blood alcohol level of the accused did not exceed the legal limit at the material time. [references omitted, para. 86]

In Gibson's case the prevailing direction favoured a level that did not exceed the legal limit and an acquittal should have followed. Justice Deschamps would have allowed Gibson's appeal, set aside the decision for a new trial, and restored the acquittal. In MacDonald's case, Justice Deschamps would have allowed the appeal and ordered a new trial.

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

Note-able Quote

"It takes 8,460 bolts to assemble an automobile, and one nut to scatter it all over the road." - author unknown

R. v. Gibson & MacDonald judgment grid

Judge(s)	Could the straddle evidence in these cases rebut presumption of identity in s.258 CC ?	Power quote
Bastarache Abella Charron Rothstein	No	"[I]n <i>all</i> cases straddle evidence merely constitutes an attempt to defeat the statutory presumption itself and, as such, does not tend to show that the accused's blood alcohol concentration did not exceed the legal limit at the time of the alleged offence within the meaning of s. 258(1)(d.1)."
McLachlin Lebel Fish	No, but straddle evidence is not inherently inadmissible and may sometimes rebut presumption	"In cases where the range of possible blood alcohol levels is based on average elimination rates across the population as a whole, straddle evidence will rarely be sufficient in itself to raise a reasonable doubt about the presumed fact that the blood alcohol level of the accused exceeded the legal limit. It nevertheless remains admissible for the reasons given and may, bearing in mind the evidence as a whole, constitute evidence to the contrary for the purpose of rebutting the presumption in s. 258(1)(d.1)."
Binnie Deschamps	Yes,	"[W]hen an accused adduces straddle evidence, that evidence need not prove his or her blood alcohol level at the time of interception. It is sufficient that the evidence tends to show that the blood alcohol level of the accused did not exceed the legal limit at the material time."

REFERENCE TO EARLIER TAINTED STATEMENT FOULS FRESH START

R. v. Wittwer, 2008 SCC 33



A police officer questioned the accused about some sexual offences while he was in custody at a provincial correctional centre on an unrelated charge. The interview lasted 1 hour and 40 minutes during which the accused spoke about a sexual encounter involving two victims that occurred about three or four months earlier. Because the officer had failed to properly advise the accused of his right to counsel, the police decided to question him again.

A different officer conducted a second interview over two months later. At this time the accused was properly informed of his right to counsel but no effort was made to enable him to contact his lawyer. This interview was not videotaped and the audio recording was of poor quality. Recognizing that this second statement was likely inadmissible, the police decided to question him a third time.

Yet again a different officer conducted the third interview, about three months after the second one. This interview lasted almost five hours. The officer informed the accused of his right to counsel and told him his decision whether to answer questions should not be influenced by anything he had previously said to other police officers. The officer did not acknowledge the contents of the earlier interviews because he wanted to sever any connection between them. The officer questioned the accused, but the accused persisted for more than four hours in refusing to discuss the matter. The officer then acknowledged that he knew about the sexual encounter the accused described in the first interview. He felt that it was the only way he could get the accused "to talk". The accused then immediately gave a statement, repeating what he had said in the earlier interviews.

At trial in British Columbia Supreme Court the accused was convicted on three counts of sexual interference.

The judge found the officer's purpose of the third interview was to obtain a statement independent from the two earlier tainted statements. The judge acknowledged that the accused persisted in declining to talk until he knew the officer was aware of what he said earlier. However, the judge nonetheless found there was a "significant temporal separation" between the third and first statements. And any causal connection between the two statements was weak. The statement was therefore admissible. An appeal to the British Columbia Court of Appeal was unsuccessful. The accused then appealed to the Supreme Court of Canada.

"The statement will be tainted if the breach and the impugned statement can be said to be part of the same transaction or course of conduct. The required connection between the breach and the subsequent statement may be 'temporal, contextual, causal or a combination of the three'. A connection that is merely 'remote' or 'tenuous' will not suffice."

A unanimous Supreme Court concluded that the third statement admitted by the trial judge was tainted by the earlier *Charter* breaches and therefore subject to exclusion under s.24(2). As part of the 24(2) analysis, the evidence must be obtained in a manner that infringed or denied any *Charter* rights. In deciding whether a statement was tainted by an earlier breach, Justice Fish, writing the Court's opinion, put it this way:

In considering whether a statement is tainted by an earlier *Charter* breach, the courts have adopted a purposive and generous approach. It is unnecessary to establish a strict causal relationship between the breach and the subsequent statement. The statement will be tainted if the breach and the impugned statement can be said to be part of the same transaction or course of conduct. The required connection between the breach and the subsequent statement may be "temporal, contextual, causal or a combination of the three". A connection that is merely "remote" or "tenuous" will not suffice. [references omitted, para. 21]

Here, Justice Fish was satisfied the connection was temporal, causal, and to some extent contextual:

- **Temporal**—when the officer made mention of the the first inadmissible statement to the accused during the third interview, he immediately made a statement.
- **Causal**—The third statement was elicited after more than four hours of resistance and only after reference to the first tainted statement.

- Contextual—Any prior gap between the first and third statements “was intentionally and explicitly bridged by [the] association of one with the other in the course of [the third interrogation]”.

In Justice Fish's view, although the officer attempted a permissible fresh start, it ended as an impermissible interrogation inseparably linked to its tainted past. The existence of the first statement was a substantial factor in the making of the third one. The connection between the two was direct and obvious. If the third interviewer had not said he was aware of what the accused said earlier, he would not have made the same incriminating admission. “What we have here, then, is not a suspect's change of heart but an interrogator's fatal change in strategy,” said Justice Fish:

The interrogating officer knew that the earlier statements had both been obtained in a manner that infringed the [accused's] right to counsel under the Canadian Charter of Rights and Freedoms. He evidently understood as well that his use of the prior statements in this third interrogation would jeopardize the admissibility of any admissions obtained as a consequence. That is why he refrained for more than four hours from invoking the prior statements though he believed...that this alone would get [the accused] to incriminate himself. [para. 4]

And further:

With a view to obtaining these incriminating admissions from the accused, the police knowingly and deliberately made use of an earlier statement that they themselves had obtained from the appellant in a manner that infringed his constitutional rights under the Charter. This alone is sufficient to taint the subsequent statement and to cry out for its exclusion.... To hold otherwise is to invite the perception that the police are legally entitled to reap the benefit of their own infringements of a suspect's constitutional rights. And this, in my view, would bring the administration of justice into disrepute. [reference omitted, para.26]

The accused's third statement was therefore inadmissible under s.24(2). The accused's appeal was allowed, his convictions were set aside, and a new trial was ordered.

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

MERE PRESENCE AT SEARCH WARRANT LOCATION INSUFFICIENT FOR ARREST

R. v. Whitaker, 2008 BCCA 174



The police began a currency exchange investigation after receiving information that the tenant in the accused's basement suite made several suspicious transactions involving the conversion of American currency into Canadian funds. As a result of the investigation, a police officer obtained a search warrant to search the accused's property under s.11 of the *Controlled Drugs and Substances Act*. The officer's grounds for belief included hydro consumption records, surveillance, a high traffic volume to the residence, criminal records including drug convictions of those attending the residence, the odour of marihuana on money that was exchanged, security lights and a large fence around the property, and the choice of property being difficult for police to surveil. The search warrant allowed police to search the residence, basement suite, outbuildings, and vehicles situated at the property for marihuana, equipment and tools used, money, score sheets and documentation for the offences of production, trafficking, and possession of property obtained by the commission of drug-related offences.

Police entered onto the accused's property and observed him coming out of one of the bay doors of a detached garage at the back of the property. Four other men were standing in front of the garage and all were arrested, including the accused, for trafficking in a controlled substance. The accused was turned over to another officer who re-arrested him and advised him of his *Charter* rights. The accused said he wanted to speak to a lawyer as soon as possible, but was not provided an opportunity until some two hours later. In total, nine persons on the property were arrested, including the accused's wife. She was found, along with her two children, in a small office area in the detached garage.

The police searched the property but did not find a marihuana grow operation. Rather, they seized 16 separately wrapped one-half pound bags of marihuana, a plastic bag containing 217 grams of marihuana, score sheets, and drug-related paraphernalia, three plastic

garbage bags of marihuana stalks and buds, various documents in the residence and detached garage connecting the accused and his wife to the property, and a large screen television, a Sea-Doo, a snowmobile, and several vehicles.

At trial in British Columbia Supreme Court the accused argued the search warrant was invalid, the officer lacked the reasonable grounds necessary to arrest him, and that his right to counsel was breached. The trial judge, however, held that the grounds for the warrant amounted to a credibly-based probability that marihuana was being grown and sold on the accused's property and that an occupant was in possession of property obtained by the commission of drug-related offences. As for the accused's arrest, it was lawful. The judge found the police were justified in not immediately providing the accused with an opportunity to contact a lawyer, due to the logistics of having to deal with a number of arrested persons at once, but should have when they had the situation under control and the arrestees were taken to the police detachment. Thus the accused's rights under s.10(b) were breached. The evidence was admitted under s.24(2) and the accused was convicted of possessing marihuana for the purpose of trafficking. The accused then appealed to the British Columbia Court of Appeal.

Reasonable Grounds: Warrant

The accused contended that the warrant for his property was overbroad and the reasonable grounds for it did not allow for the entire property and all the structures on it to be searched. He submitted that the police only had enough grounds to believe that evidence of drug-related offences would be found in the basement suite belonging to his tenant.

In noting that the reasonable grounds standard requires something more than mere suspicion, but less than "proof beyond a reasonable doubt" or a "prima facie case", and even less than the standard applicable in civil matters of proof on the balance of probabilities, Justice Frankel, delivering the judgment for the unanimous appeal court, described it this way:

A determination with respect to whether reasonable grounds exist requires a consideration of the "totality of the circumstances". This means that, "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 of the evidence together".

Further, the assessment of the facts relied upon to establish reasonable grounds is made on a practical, non-technical, and common sense basis. [T]he person deciding whether the reasonable grounds standard has been met is entitled to "put two and two together".

When a judicial order authorizing a search or seizure is challenged at trial, the trial judge's role is to determine whether the order could have been granted. This determination is made based on the record which was before the authorizing judicial officer as amplified on the review. "[T]he test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether, in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge". [references omitted, paras. 41-43]

In this case, Justice Frankel agreed there were reasonable grounds to believe that evidence of marihuana-related offences would be found on the accused's property as a whole, not just in the basement suite. However, he disagreed that the electrical billing records provided reasonable grounds to believe there was a marihuana grow operation on the property. The officer compared the amount of electricity used at the property during the preceding two years against his own residence over the same period. But he did not account for another building behind the residence on the accused's property that he did not know what it was used for. Given that there was more than one building on the the accused's property, the officer's comparative analysis was of no value and without this flawed interpretation of the billing records, there was nothing to support a reasonable belief that marihuana production was taking place.

However, when severed, there were still reasonable grounds to search for the other items listed in the warrant in connection with the investigation of the trafficking and possession of the proceeds of crime offences. The police were, therefore, authorized to search the entire property for marihuana, score sheets, documentation, and other items relating to those offences. The search warrant for the entire property was properly issued and the seizure of the drugs and other items did not violate the accused's s.8 *Charter* rights.

Reasonable Grounds: Arrest

The accused argued that his arrest was both unlawful and arbitrary because neither arresting officer knew who he was when they arrested him. The Crown, on the other hand, contended that both officers subjectively believed they had reasonable grounds to arrest under s.495(1)(a) of the *Criminal Code* and that their grounds were objectively reasonable. And if not, the Crown submitted that the police had reasonable grounds to arrest every adult person on the property.

There was no evidence that the arresting officers knew who they were arresting. Neither had seen the accused before nor took steps prior to executing the search warrant to ascertain his appearance. Thus, the accused and the other men found standing by the detached garage were arrested simply because they were there. The police, absent knowledge the accused was the person under investigation when they arrested him, lacked the necessary objective grounds to justify his arrest.

And although there may be circumstances where the police have reasonable grounds to arrest everyone at a particular place, this was not such a case. The police had no basis to infer that the property in this case was being used solely for drug-related activity. Nor did they have reason to believe that everyone visiting the property was involved in criminal activity. Justice Frankel said this:

The fact that a person is at, or inside, a place believed to contain drugs, and in respect of which a search warrant has been issued, does not, without more, provide objective grounds for his or her arrest. The police are not entitled to arrest first and then determine whether the person arrested is connected to the offence(s) under investigation.

[In this case] it cannot be said that there were objective reasonable grounds to believe that every adult found on the property was involved in the drug-related criminal activity believed to be taking place there. Accordingly, [the accused's] arrest as a found-in was unlawful. [paras. 60-61]

However, not all unlawful arrests result in arbitrary detention under s.9 of the *Charter*. But in this case the accused's s.9 rights were breached. Justice Frankel stated:

In my view, [the accused] was arbitrarily detained. The police arrested him with the four other men who were standing in front of the garage, simply because he was there. That the officers subjectively believed they had reasonable grounds to arrest every adult on the property does not justify their actions. Even though this belief was honestly held, it was not a reasonable one given that the police knew it was likely that persons unconnected with criminal activity would be on the property.

The situation is exacerbated by the fact that the police did not determine [the accused's] appearance before the arrest, even though he was one of the persons under investigation and the owner of the property to be searched. I am not suggesting this is a requirement in all cases. However, as there was no urgency, and a photograph of [the accused] was available (likely because of his prior criminal history), the police should have taken steps to find out what he looked like before going onto his property. [paras. 63-64]

And the arbitrariness issue could not be saved by the common law power of investigative detention which requires a lower standard than reasonable grounds for belief. "The difficulty with this argument is that the police did not invoke the common law power of investigative detention; they invoked the statutory power of arrest, with its more extensive power of incidental search of the person," said Justice Frankel. "When the police have wrongfully arrested someone, their actions cannot be defended on the basis that they could have detained this person on some other basis. In deciding whether the police infringed *Charter* rights, they are to be judged on what they did, not what they could have done." And the Court declined to express an opinion whether the common law could authorize the police to "detain", as opposed to "arrest", a person merely because he or she is found at or in a place being searched pursuant to a warrant.

Admissibility

Despite the *Charter* breaches the evidence was admissible under s.24(2). The evidence was non-conscriptive and its admission would not affect trial fairness. The police did not intentionally violate the *Charter* which lessens the seriousness of the breaches and militates in favour of admission. As well, the search was conducted pursuant to a valid warrant and the discovery of the drugs and other items occurred independent of the s.9 and s.10(b) breaches. Any connection between the breaches and the discovery of the evidence was temporal, not causal. And all of the evidence would have been discovered even if no one had been present when the police executed the warrants. Finally, the offences were serious. Thus, the exclusion of the evidence, rather than its admission, would bring the administration of justice into disrepute.

The accused's appeal was dismissed.

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

NEW LAWS (continued from page 1)

If a complainant is 12 or 13 years old and the accused is less than two years older (but not in a position of trust or authority or in a dependent or exploitive relationship), consent is a defence. Similarly, if the complainant is 14 years old but less than 16, consent is a defence if the accused is married to the complainant or less than five years older and not in a position of trust or authority or in a dependent or exploitive relationship.

The offence of luring a child by means of a computer has also been amended in the *Criminal Code*. It is now an offence to communicate by means of computer with a person believed to be under 16 for the purpose of facilitating sexual interference, invitation to sexual touching, bestiality in the presence of or by a child, indecent exposure, or abduction.

Impaired Driving

Effective July 2, 2008 several new provisions dealing with drug impaired drivers will also come into effect. Currently, under s.254(2) of the *Criminal Code*, a peace officer may demand a roadside test into an approved screening device where they reasonably suspect a person operating a motor vehicle has alcohol in their

body. With the new amendments roadside testing will now be permitted when:

- The officer has reasonable grounds to suspect a person has alcohol or a drug in their body;
- In the case of alcohol, the officer can use an approved screening device or demand physical coordination tests prescribed by regulation;
- In the case of a drug, the officer can also demand physical coordination tests prescribed by regulation; and
- The demand can be given up to three hours after driving or care and control.

The phrase "believes on reasonable and probable grounds" will be dropped from the breathalyzer demand section (s.254(3)) and replaced with "reasonable grounds to believe."

If the officer believes the person is impaired by a drug, or by drugs and alcohol, they will be able to demand the person submit to an evaluation by an evaluating officer to determine whether the person's ability to operate a vehicle is impaired. If the evaluating officer is then satisfied there are reasonable grounds to believe the person is impaired by a drug or both drugs and alcohol, they will be able to demand a sample of oral fluid, urine or blood. If a person refuses or fails to provide a sample they commit an offence.

The penalties for impaired driving, over 80mg% and refusal will also rise.

Impaired, Over 80mg%, Refusal Punishment Grid

	Old	New
First offence	Minimum \$600 fine	Minimum \$1000 fine
Second offence	Minimum 14 days in jail	Minimum 30 days in jail
Subsequent offences	Minimum 90 days in jail	Minimum 120 days in jail
By indictment	Maximum 5 years	No change
Summarily	Maximum 6 months	Maximum 18 months

The legislation also clarifies that a video recording may be made of the coordination tests under s.254(2) or the evaluation under s.254(3).

As it stands now, only impaired driving causing accidents (where bodily harm or death results) has an increased penalty. The new laws will create offences for causing accidents while over 80mg%. For example, a person over 80mg% who causes an accident resulting in bodily harm will be subject to a maximum 10 year prison sentence. If a person over 80mg% causes an accident resulting in death they could go to jail for life.

And refusing the tests after an accident also brings harsher sentences. If a person refuses and at the time knew or ought to have known their operation of the vehicle caused an accident resulting in bodily harm they could face a maximum 10 year sentence. Similarly If a person refuses and at the time knew or ought to have known their operation of a vehicle caused an accident resulting in death they could face a maximum life sentence.

The presumptions of identity for breathalyzer readings will also change. Presently, blood alcohol

concentration (BAC) tests are proof, in the absence of evidence to the contrary, of the BAC at the time of driving (if taken no later than two hours after the offence) under s.258(1)(c). The new law will state that "evidence of the results of the analyses ... is conclusive proof" of the BAC at the time of driving unless the accused can show all of the following:

- The instrument was malfunctioning or operated improperly,
- The malfunction or improper operation resulted in the BAC result exceeding 80mg%, and
- The accused's BAC would not in fact have exceeded 80mg% at the time of the offence.

If the test results are different, the lowest concentration will be used.

There are also evidentiary changes to the presumption of identity for blood samples under s.258(1)(d) and the over 80mg% presumption under s.258(1)(d.1). Court challenges will likely be limited to scientific evidence.

See www.parl.gc.ca for more information.

NEW FIREARMS OFFENCE SENTENCING GRID

Section	Offence	Old Punishment	New Punishment
s.95	Possess loaded prohibited or restricted firearm or with readily accessible ammunition	<u>Dual offence</u> By indictment <ul style="list-style-type: none"> • minimum 1 yr • maximum 10 yrs Summarily <ul style="list-style-type: none"> • maximum 1 yr 	<u>Strictly indictable offence</u> <ul style="list-style-type: none"> • first offence <ul style="list-style-type: none"> • minimum 3 yrs • maximum 10 yrs • second and subsequent offences <ul style="list-style-type: none"> • minimum 5 yrs • maximum 10 yrs
s.99	Trafficking in firearms, prohibited devices, ammunition, or prohibited ammunition	<u>Strictly indictable offence</u> By indictment <ul style="list-style-type: none"> • minimum 1 yr • maximum 10 yrs 	<u>Strictly indictable offence</u> <ul style="list-style-type: none"> • first offence <ul style="list-style-type: none"> • minimum 3 yrs • maximum 10 yrs • second and subsequent offences <ul style="list-style-type: none"> • minimum 5 yrs • maximum 10 yrs
s.100	Possessing firearms, prohibited devices, ammunition, or prohibited ammunition for the purpose of trafficking	<u>Strictly indictable offence</u> By indictment <ul style="list-style-type: none"> • minimum 1 yr • maximum 10 yrs 	<u>Strictly indictable offence</u> <ul style="list-style-type: none"> • first offence <ul style="list-style-type: none"> • minimum 3 yrs • maximum 10 yrs • second and subsequent offences <ul style="list-style-type: none"> • minimum 5 yrs • maximum 10 yrs

Section	Offence	Old Punishment	New Punishment
s.103	Unauthorized importation or exportation of a firearm, prohibited device, or prohibited ammunition	<u>Strictly indictable offence</u> By indictment <ul style="list-style-type: none"> • minimum 1 yr • maximum 10 yrs 	<u>Strictly indictable offence</u> <ul style="list-style-type: none"> • first offence <ul style="list-style-type: none"> • minimum 3 yrs • maximum 10 yrs • second and subsequent offences <ul style="list-style-type: none"> • minimum 5 yrs • maximum 10 yrs
s.239	Attempted murder with restricted or prohibited firearm	<u>Strictly indictable offence</u> By indictment <ul style="list-style-type: none"> • minimum 4 yrs • maximum life 	<u>Strictly indictable offence</u> <ul style="list-style-type: none"> • first offence <ul style="list-style-type: none"> • minimum 5 yrs • maximum life • second and subsequent offences <ul style="list-style-type: none"> • minimum 7 yrs • maximum life
s.244	Discharging a restricted or prohibited firearm with intent	<u>Strictly indictable offence</u> By indictment <ul style="list-style-type: none"> • minimum 4 yrs • maximum life 	<u>Strictly indictable offence</u> <ul style="list-style-type: none"> • first offence <ul style="list-style-type: none"> • minimum 5 yrs • maximum 14 yrs • second and subsequent offences <ul style="list-style-type: none"> • minimum 7 yrs • maximum 10 yrs
s.272	Sexual assault with restricted or prohibited firearm	<u>Strictly indictable offence</u> By indictment <ul style="list-style-type: none"> • minimum 4 yrs • maximum 14 yrs 	<u>Strictly indictable offence</u> <ul style="list-style-type: none"> • first offence <ul style="list-style-type: none"> • minimum 5 yrs • maximum 14 yrs • second and subsequent offences <ul style="list-style-type: none"> • minimum 7 yrs • maximum 10 yrs
s.273	Aggravated sexual assault with a restricted or prohibited firearm	<u>Strictly indictable offence</u> By indictment <ul style="list-style-type: none"> • minimum 4 yrs • maximum life 	<u>Strictly indictable offence</u> <ul style="list-style-type: none"> • first offence <ul style="list-style-type: none"> • minimum 5 yrs • maximum life • second and subsequent offences <ul style="list-style-type: none"> • minimum 7 yrs • maximum life
s.279(1.1) s.279.1 s.344 s.346(1.1)	Kidnapping with a restricted or prohibited firearm Hostage taking with a restricted or prohibited firearm Robbery with a restricted or prohibited firearm Extortion using a restricted or prohibited firearm	<u>Strictly indictable offence</u> By indictment <ul style="list-style-type: none"> • minimum 4 yrs • maximum life 	<u>Strictly indictable offence</u> <ul style="list-style-type: none"> • first offence <ul style="list-style-type: none"> • minimum 5 yrs • maximum life • second and subsequent offences <ul style="list-style-type: none"> • minimum 7 yrs • maximum life

Note: If a firearm is used in the above noted offences but it is not a restricted or prohibited type, then a four year minimum sentence is mandatory.



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