POLICE ACADEMY
715 McBride Blvd. New Westminster B.C. V3L 5T4

IN SERVICE:10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

A newsletter devoted to operational police officers across British Columbia.

BY THE BOOK:

New - s. 231.1 B.C.'s *Motor Vehicle Act:* Banning Smoking When Children Present

On April 7, 2009, British Columbia's *Motor Vehicle Act* was amended by adding a section that now bans smoking in a motor vehicle when children are present. April 7 is also World Health Day. The new section reads:

Smoking in motor vehicle prohibited - s. 231.1

(1) In this section, "tobacco" means tobacco leaves or products produced from tobacco in any form or for any use.

(2) A person must not smoke tobacco, or hold lighted tobacco, in a motor vehicle that is occupied by a person under the age of 16 years, whether or not any window, sunroof, car-top, door or other feature of the vehicle is open.

(3) A person who contravenes subsection (2) commits an offence.

The Lieutenant Governor in Council may make regulations exempting any person or class of persons from the requirements of this section and prescribing conditions for those exemptions.

Alexa's Team - see page 4

Upcoming Events:

✓ Strategic Crisis Leadership – p. 5
✓ 2009 World Police & Fire Games – p. 16-17
✓ Counterfeiting & Trade Mark Infringement Offences – p. 23
✓ The Mega Trial Phenomenon – p. 24

HIGHLIGHTS IN THIS ISSUE

	Pg
Inventory Search Not Limited To Itemizing 'Visible Contents'	6
'Sexual Purpose' Of Child Photos Determined Objectively	10
Safety Search Justified In Circumstances Of Warrant Execution	12
Arrest Standard Does Not Require *Prima Facie* Case For Conviction	13
Judge Not Required To Endorse Dynamic *CDSA* Search	14
Dual Purpose Incidental Search Lawful So Long As One Purpose Reasonable	20
Guns, Bail & Jail: Bill C-2 Review	26
Supreme Court Hearings Rise	28
Arresting Officer Relying On More Than Investigator's Broad Opinion	36

National Library of Canada Cataloguing in Publication Data

Main entry under title:

In service:10-8. -- Vol. 1, no. 1 (June 2001)-

Monthly.

Title from caption.

"A newsletter devoted to operational police officers across British Columbia."

ISSN 1705-5717 = In service, 10-8

1. Police - British Columbia - Periodicals. 2. Police – Legal status, laws, etc. – Canada – Cases – Periodicals. I. Justice Institute of British Columbia. Police Academy. II. Title: In service, 10-8. III. Title: In service, ten - eight.

POLICE LEADERSHIP APRIL 10-13, 2011

Mark your calendars!!! The British Columbia Association of Chiefs of Police, the Ministry of Public Safety and Solicitor General, and the Justice Institute of British Columbia, Police Academy are hosting the Police Leadership 2011 Conference in Vancouver, British Columbia. This is Canada's largest police leadership conference and will provide an opportunity for delegates to discuss leadership topics presented by world-renowned speakers.

www.policeleadershipconference.com

SUPPORT THE BADGE: RELATIONAL SURVIVAL FOR POLICE FAMILIES

"The true weight of the badge is not overcome by muscle, not found in the gym, not measured on a scale. This weight requires a strength and conditioning for which few officers are trained. The badge is not just pinned on a chest, it is pinned on a lifestyle." - Police Officer

www.supportthebadge.ca

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

"One of my co-workers receives your newsletter and often forwards it on to me. I find the review of current issues and case law very beneficial. I'd like to be on the mailing list to receive this newsletter regularly." - **Police Constable, Ontario**

****

"I was sent several copies of 10-8 by another officer and would like to be added to the mailing list. Our department doesn't do a good job on keeping us up to date with Canadian case laws and I find your publication very helpful." - **Conservation Officer**

****

"I would like to commend you folks on this great publication, I have been a loyal reader for some time now. I am writing to see if you could please add me on the email list so I may share it with my fellow officers ... Thank you and keep up the good work.." - **Police Constable, Ontario**

****

"I was wondering if you can add me to your e-mail list for the a/n publication. I have found many of the articles to be of great interest and would enjoy being able to continue to read them as their are published." - **RCMP Corporal, Saskatchewan**

****

"Keep up the excellent work...it is surely valued by us law enforcement folks." - **Government Employee, British Columbia**

POLICE & PEACE OFFICERS' NATIONAL MEMORIAL DAY

Sunday September 27, 2009

Police and Peace Officers' National Memorial Day provides Canadians with an opportunity to acknowledge the dedication of police and peace officers who have died in the line of duty.

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 42 for the answers.

1. When obtaining a search warrant under s.11 of the *Controlled Drugs and Substances Act* a judge is required to endorse any dynamic (no-knock) entry.
   (a) True;
   (b) False.

2. Flight from a crime scene can be considered by an officer in deciding whether there are reasonable grounds to arrest.
   (a) True;
   (b) False.

3. A search incidental to lawful arrest will not become unreasonable if the police have more than one purpose in mind as long as one of the purposes is legitimate as an incident to the arrest.
   (a) True
   (b) False

4. What percentage of the Canada's Supreme Court decisions were unanimous in 2008?
   (a) 24%;
   (b) 55%;
   (c) 76%;
   (d) 87%;
   (e) 92%.

5. The police are not required to hold off questioning a detainee who has exercised their right to counsel and asks to speak to a lawyer again.
   (a) True
   (b) False

6. For a police officer to be qualified as an expert in drug investigations the officer must have acquired their special knowledge through formal study.
   (a) True
   (b) False

www.10-8.ca

TOP IMPAIRED DRIVING INVESTIGATORS RECOGNIZED BY BCAA TRAFFIC SAFETY FOUNDATION

On Thursday February 26th the British Columbia Automobile Association (BCAA) Traffic Safety Foundation publicly recognized 26 R.C.M.P. and Municipal Police Department officers for their exemplary efforts to remove impaired drivers from the roadways in the Lower Mainland of British Columbia.

The 26 police officers were recognized at a reception at the BCAA offices in Burnaby where they were inducted into "Alexa's Team" in honour of four year old Alexa Middelaer who was killed on May 17, 2008 in Delta as the result of the actions of an alleged impaired driver. Alexa's Parents, Laurel and Michael Middelaer presented certificates and a personal letter to each of the officers.

The police officers recognized were:

Abbotsford Police

- Cst. Leisa Shea - Fraser Valley Integrated Road Safety Unit

New Westminster Police

- Cst. Josh Hooker

Port Moody Police

- S/Sgt. Manj Kaila - NCO i/c Greater Vancouver Integrated Road Safety Unit
- Cst. Victoria Heller

R.C.M.P.

- Cst. John Fenety - Greater Vancouver Integrated Road Safety Unit
- Cst. Alice Fox - Greater Vancouver Integrated Road Safety Unit
- S/Sgt. Dave Peat - NCO i/c Surrey Detachment Traffic
- Cpl. Lorne Lecker - Surrey Detachment Traffic
- Cst. Tom Meleady - Surrey Detachment Traffic
- Cst. Duane Hillier - Fraser Valley Integrated Road Safety Unit
- Cst. Trevor Vokins - Langley Detachment Traffic
- Cst. Jason Bayer - Langley Detachment Traffic
- Cst. Terry Gillespie - Sea-To-Sky Traffic Services
- Cst. Steve Small - Fraser Valley Traffic Services
- Cst. Glen Porter - Ridge Meadows Detachment (formerly Deas Island Traffic Services)
- Cst. Mark Booth - Deas Island Traffic Services
- Cst. Alan Windover - Port Mann Traffic Services
- Cst. Mark Cumbers - Port Mann Traffic Services
- Cst. Dustin Young - Surrey Detachment (formerly Port Mann Traffic Services)
- Cst. Joshua Becker - Port Mann Traffic Services
- Cpl. Richard O'Rourke - Coquitlam Detachment Traffic
- Cst. Michael Halewood - Coquitlam Detachment Traffic

Vancouver Police

- Cst. John Bercic

West Vancouver Police

- Cst. Steve McCuaig - Greater Vancouver Integrated Road Safety Unit
- Cst. Eric Melim
- Cst. Dave Noon

These 26 police officers were collectively responsible for investigating 389 impaired drivers who were recommended for criminal charges. They also issued 188 90-day Administrative Driving Prohibitions and 1,140 24-Hour Driving Prohibitions. In 2008 these police officers removed a total of 1,717 drinking drivers from Lower Mainland roads.

In 2009, "Alexa's Team" will be expanded to recognize outstanding impaired driving investigators from throughout British Columbia, both R.C.M.P. and municipal police departments.

Source: S/Sgt. I.E. (Ted) Emanuels, Traffic Operations Officer, R.C.M.P. Lower Mainland District

JUSTICE INSTITUTE of BRITISH COLUMBIA

Canada's leading public safety educator

Strategic Crisis Leadership

Featuring Renowned Crisis Expert: Bruce T. Blythe

The JIBC Police Academy and Emergency Management Division are pleased to present: *Strategic Crisis Leadership* with crisis expert, Bruce T. Blythe. Join us for an engaging and interactive session complete with lunch and refreshments.

At the heart of any crisis response are strategic decisions that will serve as defining moments. These strategic decisions have the critical power to bring you and your organization swiftly toward successful resolution - or they can spiral you deeper into entanglements that can increase the damage. Attend this interactive session with renowned crisis leadership expert, Bruce T. Blythe, and learn how you can become a crisis champion in your organization.

About the Workshop:

Leadership in unexpected crises can require skills and capabilities beyond daily leadership activities. This *Strategic Crisis Leadership* seminar answers the question, "How can leaders throughout the organization optimize their personal and team effectiveness when an unexpected crisis hits?"

What you will Learn:

Most crisis preparedness programs focus on the tactical level, such as evacuation, emergency response or communications. Beyond tactics, participants in this seminar will learn the importance of *strategic* crisis decision-making and crisis management, including:

- Making the right decisions and taking the right action during high consequence crisis situations
- Optimizing personal and team effectiveness when an unexpected crisis hits
- Becoming crisis champions

Who Should Attend:

This workshop is invaluable to all levels of personnel at first responder agencies, local authorities or other organizations who may be required to take a crisis leadership role should an emergency or disaster occur.

Speaker Profile - Bruce T. Blythe

A certified clinical psychologist, Bruce T. Blythe is also the CEO of Crisis Management International, a worldwide organization of crisis management specialists, business continuity planners and former FBI and Secret Service agents. From serving as a consultant to the FBI on terrorism and workplace violence to providing onsite crisis consulting to more than 200 companies in the aftermath of 9/11, Mr. Blythe specializes in helping crisis managers and senior executives increase the likelihood of effective strategic decisions and actions during high consequence situations. An engaging and in-demand speaker, he has made numerous appearances on the Today Show, CNN, 20/20 48 Hours and CNPC. Mr. Blythe is also an accomplished author, having published *Blindsided: A Manager's Guide to Catastrophic Incidents in the Workplace* and provided commentary to notable publications including *The Wall Street Journal, Newsweek, USA Today* and the *New Yorker*.

Speaker: Renowned Crisis Leadership Expert: Bruce T. Blythe

Register Now!

- Registration Fee: $130+GST
- Early Bird Rate: $99+GST
  (for regististrations received before April 10)

Date:

Friday, April 24, 2009 - 9AM to 3PM
**Lunch and refreshments included

Location:

JIBC - New Westminster Campus
715 McBride Boulevard

Course Code:

SPE106

How to Register:

Fax in the attached registration sheet to: 604-528-5653
or
Contact the Registration Office:

- 604-528-5590
- 1-877-528-5591
- register@jibc.ca

Workshop Series

Emergency Management Division • Police Academy

INVENTORY SEARCH NOT LIMITED TO ITEMIZING 'VISIBLE CONTENTS'

R. v. Wint, 2009 ONCA 52,

The accused was stopped for "stunt driving" after he nearly sideswiped an unmarked police vehicle and then drove for eight kilometres along a highway at a speed of 170 km/h. Stunting is an offence under s.172(1) of Ontario's *Highway Traffic Act* (*HTA*) and one for which the vehicle may be impounded. While radioing for assistance the officer saw the accused place a number of music CDs into a small black drawstring bag on the back seat of his vehicle. Two backup officers soon arrived and the accused was placed in a cruiser. The two back-up officers then conducted an inventory search of the vehicle.

A black bag found on the floor behind the passenger seat was opened and a small black nylon CD case was seen inside it. The case felt heavy and, based on information received from the dispatcher, the officer was concerned that it might contain a gun. No gun was found but an ounce of crack cocaine was, along with about two ounces of marijuana, three cell phones, a blackberry and a digital weigh scale. In addition to being charged with stunt driving, the accused was also charged with possessing cocaine and possessing marijuana for the purpose of trafficking.

At trial in the Ontario Court of Justice the judge concluded that the police did not breach the accused's s.8 rights because he found the police were entitled under s.172 of the *HTA* to do an inventory search of the car. The black bag was plainly visible in the car's interior and the police were conducting a lawful inventory search when they found it. The trial judge also ruled that even if the accused's s.8 *Charter* rights were breached the evidence was nonetheless admissible under s.24(2). The evidence was real, the breach technical, and the officers were acting in good faith. The accused was convicted of simple marihuana possession and possessing cocaine for the purpose of trafficking.

The accused appealed to the Ontario Court of Appeal arguing the trial judge erred in his analysis, both factually and legally. Factually, he submitted that the trial judge should have rejected police evidence that they were doing an inventory search, but instead were really searching for a gun. Legally, he contended that the police must limit their inventory search to itemizing only visible property of apparent value—opening the bag could not be justified and the police could do no more than note its presence. Thus, in the accused's view, the police were not entitled to search the black bag and CD case and the fruits of their search should have been excluded under s.24(2) of the *Charter*.

The Ontario Court of Appeal rejected both of the accused's arguments. First, the trial judge found the police were in fact conducting an inventory search. The search was not a sham nor conducted for an improper or ulterior purpose. Just because the police may have also been looking for a gun did not render the inventory search unlawful. Second, inventorying visible property is not restricted to itemizing objects found in a car, but can include itemizing an object's contents.

The rationale for an inventory search — documenting contents of apparent value — serves the person's property interest by safeguarding it while it is in police custody. In this case, the Court stated:

> Given the underlying rationale of inventory searches, to proceed [by only itemizing objects found in a car, but not their contents] would render these searches virtually meaningless. Thus, if the police found a purse and could not look inside it, they would have no way of knowing whether it contained pennies or thousands of dollars and if the latter, what steps should be taken to safeguard the large sum of money. That, in our view, would defeat the purpose of the exercise. In short, if inventory searches are to be meaningful and serve the purpose for which they are intended, the police cannot be hobbled as the [accused] would suggest. They must be able to search and itemize the contents of objects such as purses, wallets and bags like the one observed in this case, to

"[The police] must be able to search and itemize the contents of objects such as purses, wallets and bags … to determine their contents. Of course, any inventory search must be executed in a reasonable manner and as is the case with other warrantless searches, reasonableness of police conduct will be judged against the totality of the circumstances revealed in each case."

> determine their contents. Of course, any inventory search must be executed in a reasonable manner and as is the case with other warrantless searches, reasonableness of police conduct will be judged against the totality of the circumstances revealed in each case.
>
> The search of the black bag and its contents, as well as the search of the CD case and its contents, was entirely reasonable and justified. Indeed, the police would have been derelict in their duties had they not carried out the searches. [paras. 15-16]

Thus, the search of the bag and CD case was lawful and did not breach the accused's s.8 *Charter* rights. And furthermore, the Court of Appeal saw no error with the trial judge's s.24(2) analysis. The evidence was admissible and the accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

FLIGHT FROM CRIME SCENE IMPORTANT IN ASSESSING GROUNDS

R. v. Williams, 2009 ONCA 35

A police officer on patrol received a radio call of a robbery in progress at a gas station, which was just around the corner. The officer responded with lights and siren and, within the moments he needed to arrive, the radio dispatcher provided a description of the robber. The officer saw the accused, who shared most of the robber's distinguishing traits, running away from the scene. There was nobody else on the street and the officer believed he had found the robber. After a short pursuit, the accused was arrested, searched, and 34 grams of crack cocaine was found in his pocket.

"The determination of whether the officer had reasonable grounds must be made in the context of the circumstances presented to the officer. In this case, the circumstances included a fleeing suspect."

At trial in the Ontario Superior Court of Justice, the trial judge excluded the crack cocaine under s.24(2) of the *Charter* after finding the officer breached the accused's ss.8 and 9 *Charter* rights. She ruled the officer lacked the objective grounds for the detention and search. In her view, the descriptive factors were generic, applied to thousands of people, and, because there was a weight discrepancy between the suspect description and the accused, the officer should have entered the gas station to confirm that the robber was no longer there. The trial judge held the admission of the drugs would bring the administration of justice into disrepute and the accused was acquitted of possessing cocaine for the purpose of trafficking.

The Crown appealed to the Ontario Court of Appeal arguing the trial judge erred in finding *Charter* breaches when she concluded the officer's grounds to arrest the accused were not objectively reasonable. In the Crown's opinion, there were ample grounds to justify the accused's arrest and the search that followed was incidental thereto.

The Ontario Court of Appeal agreed with the Crown, holding the totality of the circumstances test formed the basis for the objective assessment of the grounds proffered for the arrest. The Court stated:

> In this case, the totality of the circumstances strongly supports the officer's decision to detain and arrest the [accused]. The officer was told that there was a robbery in progress at the gas station. Within about a minute, he was at the site and saw a person, running away from the station. When the officer first observed the runner, he was about 20-25 metres from the station. The description he had been given was: male, black, wearing a blue hat and blue jeans, 39-40 years old, 5' 7" tall and 240 pounds. The person he spotted running away from the gas station was: male, black, wearing a black baseball cap, blue jeans and a black leather jacket, 38 years old, 5' 9" tall and 160 pounds. Of these six factors, five are either identical or very similar and one (weight) is spectacularly different. In our view, in "the totality of the circumstances", including a robbery scenario, a man running from the scene, and elapsed time of about a minute, the single significant difference between the radioed description of the potential robber and the description of the man [the officer] saw running from the scene is not enough to render the detention and arrest objectively unreasonable.

> … It is true that the five identical or similar factors are generic in the sense that they apply to many people. However, in this case the potential application of these factors is hugely reduced – to be precise, to one – by the singular fact that there was only one person the officer saw when he arrived at the scene and that person was running away from an alleged robbery site.
>
> Nor do we think that the weight discrepancy required [the officer] to stop his chase and enter the gas station to ascertain if the robber was still there. In light of the timing (about a minute) and the situation (a man running from the scene), the officer was entitled to continue the chase of the suspect he saw in front of him. The determination of whether the officer had reasonable grounds must be made in the context of the circumstances presented to the officer. In this case, the circumstances included a fleeing suspect. [paras. 5-8]

The Crown's appeal was allowed and a new trial ordered.

Complete case available at www.ontariocourts.on.ca

BY THE BOOK:

Division 9.01 B.C.'S *Motor Vehicle Act Regs.*

Duty to report bullet marks or blood stains

"The owner or manager of every motor vehicle repair shop or garage shall keep a record in writing of all repairs made therein to the body, hood, radiator, fenders, running board or wheels of any motor vehicle, showing the make and style of the motor vehicle, its licence number, the name of the person procuring the repairs to be made, the nature of the repairs and the date on which the repairs are made, and shall, upon the request of any peace officer, furnish to the peace officer complete information respecting the repairs so made; and in the case of any motor vehicle on which marks are found which have the appearance of or in any way resemble bullet marks or blood stains, the owner or manager shall immediately notify the officer in charge of the nearest Provincial or municipal police office respecting the same." [emphasis added]

SMELL OF ALCOHOL ON BREATH PROVIDES ENOUGH FOR ROADSIDE DEMAND

R. v. Carson, 2009 ONCA 157

The accused was convicted of driving over 80mg% in the Ontario Court of Justice. The trial judge concluded that the officer had reasonable grounds to make a roadside breath demand under s.254(2) of the *Criminal Code*. The accused's appeal to the Ontario Superior Court of Justice was successful. The appeal judge ruled that the investigating officer could not conclude that the driver had alcohol in his body based on the smell of alcohol on his breath. His conviction was overturned.

The Crown then appealed to the Ontario Court of Appeal, which restored the conviction after finding the appeal judge erred. In relying on an earlier decision (*R. v. Lindsay* (1999), 134 C.C.C. 463 (Ont.C.A.)) the appeal judges held that the smell of alcohol on a person's breath can provide the necessary grounds to demand a roadside sample. Plus, in this case, the officer had more than the odour of alcohol. The accused also denied he had drank any alcohol. These two factors, taken together, provided the necessary grounds for the demand.

Complete case available at www.ontariocourts.on.ca

LEGALLY SPEAKING:

Reasonable suspicion - odour of alcohol

"An officer may make an ALERT demand where she reasonably suspects that a person who is operating a motor vehicle has alcohol in his or her body (s.254(2) of the *Criminal Code*). There need only be a reasonable suspicion and that reasonable suspicion need only relate to the existence of alcohol in the body. The officer does not have to believe that the accused has committed any crime. …. The fact that there may be an explanation for the smell of alcohol does not take away from the fact that there exists a reasonable suspicion within the meaning of the section." - Ontario Court of Appeal, *R. v. Lindsay*, (1999),134 C.C.C. 463 (Ont.C.A.)

UTTERING FALSE LENS RESULTS IN CONVICTION

R. v. Baptista, 2008 BCPC 388

A police officer who received a LENS (Law Enforcement Notification) to attend as a witness at a trial did not show up. When confronted by his superior, the officer said he had been denotified and produced a copy of the denotification bearing a denotification stamp. The document, however, was a false document constructed and altered from a denotification given to another police officer in another case. The accused police officer was charged with making a false document and with uttering it.

At his trial in British Columbia Provincial Court the Crown argued that the accused was the only person with a motive to produce the false document — to avoid the negative consequence of failing to attend court. The accused, on the other hand, submitted that another officer could simply have been playing a prank on him, given that some officers are prone to playing jokes. Judge MacArthur rejected the officer's claim and convicted him of uttering a false document. He stated:

> ... In my view, the evidence that the accused presented the forged document when asked to account for his non-attendance creates an overwhelming inference that he either authored the false document himself or uttered it, knowing it to be false.
>
> Although there is some evidence that police officers, perhaps like members of any organization, may essentially from time to time play harmless pranks on one another particularly on young members, ... in my opinion in this case it would be speculative to say that this would have occurred or could have occurred such as to create a reasonable doubt.
>
> It seems to me what occurred would have been beyond the purview of a prank or a joke which would normally be harmless. The court must decide the case on the evidence before it, and here there is simply no evidence of any potential mischief of such magnitude.
>
> The evidence is that when asked for an explanation as to why he did not attend court as required, the accused produced a false document which would absolve him.
>
> In the absence of any other evidence a conclusion is inescapable in my opinion as to his culpability. [paras. 7-11]

Complete case available at www.provincialcourt.bc.ca

DID YOU KNOW...

...that under TITLE 18, PART I, CHAPTER 44, § 931 of the *United States Code* there is a federal prohibition on the purchase, ownership, or possession of body armor by violent felons. The section reads:

§ 931
(a) In General.— Except as provided in subsection (b), it shall be unlawful for a person to purchase, own, or possess body armor, if that person has been convicted of a felony that is—
(1) a crime of violence (as defined in section 16); or
(2) an offense under State law that would constitute a crime of violence under paragraph (1) if it occurred within the special maritime and territorial jurisdiction of the United States.
(b) Affirmative Defense.—
(1) In general.— It shall be an affirmative defense under this section that—
(A) the defendant obtained prior written certification from his or her employer that the defendant's purchase, use, or possession of body armor was necessary for the safe performance of lawful business activity; and
(B) the use and possession by the defendant were limited to the course of such performance.
(2) Employer.— In this subsection, the term "employer" means any other individual employed by the defendant's business that supervises defendant's activity. If that defendant has no supervisor, prior written certification is acceptable from any other employee of the business.

§ 16 of CHAPTER 1 defines a crime of violence as meaning "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. As for punishment, § 924(7) of CHAPTER 44 provides that "Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both."

INFERENCE OF POSSESSION REASONABLE & COMMONSENSICAL

R. v. Chu, 2009 ONCA 121

The Ontario Court of Appeal upheld an inference of possessing marihuana plants — knowledge and control — in the absence of evidence from the accused. The inference was based on the following: (1) the house was being used only to cultivate marijuana and it was virtually uninhabitable because of the temperature and smell; (2) the accused was in the house for at least thirteen minutes; and (3) the accused had a key to the front door. The operation in the house was of a size and nature that required human "attention" and care. This was a common sense observation by the judge and the accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

LOST NIGHTSTICK DID NOT RENDER TRIAL UNFAIR

R. v. Serre, 2009 ONCA 108

A man, who had a nightstick in his hand, broke into the home of a woman who was sleeping. The man said he was looking for someone and he left, saying he would come back. The woman looked outside the window, saw the intruder get into a vehicle occupied by two others, and then called police. A couple of hours later the vehicle returned and the woman immediately called 911. When the police attended, they found three people at the car including the accused, who was sitting in the front passenger seat. They also found a black nightstick poking out from underneath the front passenger seat.

The nightstick was entered as evidence at the preliminary inquiry and the victim was shown a nightstick that was the same as the one the intruder had held during the first confrontation. She described it as about 12 inches long and black. After the preliminary inquiry, however, the nightstick went missing. At trial, the officer described the missing nightstick as black and about a foot-and-a-half long, with etching by the grip. The accused was convicted of break and enter of a dwelling house with intent to commit an indictable offence, uttering a threat to cause bodily harm and possession of a weapon for a purpose dangerous to the public peace and sentenced to four years in prison.

The accused appealed his convictions to the Ontario Court of Appeal arguing, among other grounds, that his defence was prejudiced and he was denied a fair trial because the alleged weapon, a nightstick, was lost and unavailable at trial. He submitted that if the nightstick had not been lost he would have been able to show that the complainant's description of the nightstick was different from its actual appearance.

The Ontario Court of Appeal rejected the accused's argument. "The nightstick was available at the preliminary inquiry and defence counsel asked no questions of the complainant about it at that time," said the Court. "At the trial, the police officer who found the nightstick described it and the discrepancy between that description and the description given by the complainant was before the trial judge. We can see no way in which the [accused's] case was compromised because the actual nightstick was not available at the trial." The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

'SEXUAL PURPOSE' OF CHILD PHOTOS DETERMINED OBJECTIVELY

R. v. Grant, 2009 BCCA 72

The accused was convicted in British Columbia Supreme Court on one count of making child pornography and one count of possessing child pornography. A cleaning person had found eight Polaroid photographs hidden in the floor vent of an apartment where the accused had lived. The photographs depicted the anal and vaginal areas of a four year old girl who was completely naked in six of the eight photographs. The photographs were all taken at close range and the girl was posed in positions designed to maximize exposure of her private parts. The police also took a tape recorded statement from the accused where he admitted taking the photographs, did not deny hiding them, and told police what he had done was wrong.

The accused appealed his conviction to the British Columbia Court of Appeal arguing, in part, that the evidence fell short of establishing that the photographs were taken for a "sexual purpose", within the meaning of s. 163.1 of the *Criminal Code*. In his view, his state of mind could not be inferred from the photographs, which were equally consistent with the "cute" behaviour of a child "playing freely".

Chief Justice Finch, delivering the decision of the unanimous court, rejected the accused's argument. Section 163.1(1)(a)(ii) of the *Criminal Code* defines "child pornography" as "a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means … the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years."

"It is settled law that whether the materials have as their "dominant characteristic" a "sexual purpose" is to be determined objectively. The question is whether a reasonable viewer, looking at the pictures objectively and in context, would see their dominant characteristic as the depiction for a sexual purpose of a sexual organ or the anal region of a person under the age of eighteen."

"It is settled law that whether the materials have as their 'dominant characteristic' a 'sexual purpose' is to be determined objectively," said Chief Justice Finch. "The question is whether a reasonable viewer, looking at the pictures objectively and in context, would see their dominant characteristic as the depiction for a sexual purpose of a sexual organ or the anal region of a person under the age of eighteen." He continued:

> In my opinion, the evidence in this case amply demonstrates that, viewed objectively and in context, the photographs' dominant characteristic is the depiction of their subject matter for a sexual purpose. The photographs themselves, together with the fact they were hidden, and the [accused's] admission that he had done wrong, can lead only to the conclusion that there was no innocent purpose in their taking. … [para. 16]

The accused's appeal was dismissed.

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

Note-able Quote

"To see what is right, and not to do it, is want of courage or of principle." - Lisa Alther

DELAY IN TAKING BREATH SAMPLES EXPLAINED

R. v. Burbidge, 2008 ONCA 765

After being stopped for speeding the accused failed an approved screening device (ASD) and he was read his rights to counsel, cautioned about his right to remain silent, and a breathalyzer demand was given. He said he wished to speak to duty counsel and was transported to the police station where he was afforded his right to counsel in private. He provided two breath samples, both more than double the legal limit. However, there was another driver at the station who was also required to provide breath samples. This required the accused to be taken back and forth to cells between the taking of each sample. The accused was convicted at trial in the Ontario Superior Court of Justice for over 80mg%, sentenced to 3 ½ years in jail, and given a lifetime driving prohibition. He had thirteen prior drinking and driving related offences on his record.

The accused then appealed to the Ontario Court of Appeal arguing the 37 minute time interval between speaking to his lawyer and the taking of the second breath sample rendered the sample not being taken as soon as practicable.

Noting that the *Criminal Code* requires at least a 15 minute interval between the first and second breath samples, the Court of Appeal recognized that the phrase "as soon as practicable" means the tests must be taken within a reasonable prompt time under the circumstances. In this case, the accused had to alternate his turn on the breathalyzer with the other driver and his samples were taken as soon as practicable. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.ca

Note-able Quote

"A man will fight harder for his interests than for his rights." - Napoleon Bonaparte

SAFETY SEARCH JUSTIFIED IN CIRCUMSTANCES OF WARRANT EXECUTION

R. v. Osanyinlusi, 2008 ONCA 805

Police attended a house to execute a search warrant for evidence related to a series of robberies. Under the warrant police were seeking several items, including articles of clothing and things used by the person suspected of the robbery. As police were about to enter or were entering the house, the accused, who was not the robbery suspect but who rented a room at the home, attempted to obstruct their entry. He was apprehended by the officers and handcuffed. An obvious bulge was noted in one of the accused's front pants pockets and a search revealed a cell phone and some crack cocaine in individually wrapped pieces. In another pocket he had a roll of cash. Officers also found a small unlocked safe sitting in plain view on a chair in an upstairs bedroom containing a set of scales, two clear baggies with crack cocaine, a set of car keys that fit a motor vehicle belonging to the accused in the driveway, and an Ohio driver's licence in the accused's name.

At trial in the Ontario Superior Court of Justice the judge upheld the search warrant and found the search of the accused lawful. The trial judge stated:

> It is a well-recognized principle that a search warrant generally authorizes the search of the property specified in the warrant. A search warrant does not authorize the search of persons found on the specified premises or property… The search of [the accused's] person, therefore, was a warrantless search. As such the Crown bears the onus of justifying the search of the accused and the seizure of items in his pockets. The Crown is required to demonstrate on the balance of probabilities that the search and seizure were authorized by law, and carried out in a reasonable manner. [para. 37]

And further:

> In the case at bar [the officer] was forcefully and persistently obstructed by the accused in the execution of a search warrant. First, by immediately closing the door when informed of the search warrant, and secondly, by alerting others in the house to the police presence. This conduct understandably made the officer concerned about being able to safely execute the warrant. The situation required an immediate response. He handcuffed [the accused] to subdue him, and noticed a bulge in his right pocket. In the circumstances this reasonably alerted him to a possible risk of harm.
>
> [The officer] knew that several other officers were behind him entering, or about to enter, the house. Based on the information he received on the briefing he was aware of the probability of weapons such as knives or meat cleavers being in the house. At that point he did not know who else was in the house, but would have logically assumed the presence of others due to the accused calling out to inform them of the police presence. At that critical moment, and after noting the bulge, reaching into the pocket of the accused was a reasonably necessary interference with his privacy right in order to responsibly perform his police officer duty. Though searching pockets is in many circumstances considered an intrusive invasion, in these circumstances it was an intrusiveness that was necessary and minimal for the intended purpose of ensuring safety in the execution of the search warrant.
>
> Accordingly, I find there was a constellation of objectively discernable facts which give rise to articulable cause for [the officer] to detain [the accused]. The search that followed was reasonably necessary both on a subjective and on an objective view of all the circumstances. There was a perceived and objective risk to officer safety in the context of the spontaneous and forceful conduct of [the accused] in obstructing the officers in the lawful execution of the search warrant. The search was brief and conducted in a reasonable manner. [paras. 47-49, see R. v. Osanyinlusi, 2006 CanLII 21070 (ON S.C.) for the trial judge's comments]

"[T]he officers who attended the … residence were lawfully present in the execution of a valid search warrant, which authorized the search of the entire premises. They were further entitled to detain and search the [accused] at the entrance to the premises as a person who appeared to be obstructing the execution of the warrant."

The accused was convicted by a jury of possessing cocaine for the purpose of trafficking and was sentenced to two years imprisonment to be served in the community.

The accused appealed arguing, among other grounds, that the trial erred in admitting evidence obtained by a s.8 *Charter* breach because the warrant was invalid. The Ontario Court of Appeal upheld the warrant, thus the accused's detention and search were lawful. The Court of Appeal stated:

> It follows that the officers who attended the … residence were lawfully present in the execution of a valid search warrant, which authorized the search of the entire premises. They were further entitled to detain and search the [accused] at the entrance to the premises as a person who appeared to be obstructing the execution of the warrant…. [para. 12]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.ca

ARREST STANDARD DOES NOT REQUIRE *PRIMA FACIE* CASE FOR CONVICTION

R. v. Nguyen, 2009 ABCA 38

Police were dispatched at about 3:00 p.m. to a firearms incident at a shopping mall. Shots had reportedly been fired and two vehicles occupied by younger Asian males, including a newer black BMW, were said to be involved. The BMW's license plate number matched that of the accused's. About twenty minutes later police conducted a high risk vehicle stop on the accused's BMW. Once he exited his vehicle, he was handcuffed, placed in a police car, advised he was under arrest for weapons offences and was Chartered and cautioned. The accused's person and clothing were swabbed for evidence of gunshot residue, as was his BMW and a pair of fingerless gloves found in the trunk. Gunshot residue was found on the accused's right hand and right side of his face, on the gloves, on both the interior and exterior of the driver's side door, as well as on the driver's seat.

"In order to arrest without a warrant, a police officer must have reasonable and probable grounds to believe the suspect has committed an indictable offence. … Police are not required to establish a prima facie case for conviction, only reasonable and probable grounds for the arrest."

At trial in the Alberta Court of Queen's Bench police testified the vehicle was stopped and the accused was arrested because he was driving a black BMW with a license plate matching a vehicle believed to be involved in the shooting and there was a bullet hole in its rear window. The accused was subsequently convicted of two firearms offences arising out of the shooting.

The accused appealed to the Alberta Court of Appeal suggesting, among other grounds, that the police did not have reasonable grounds to believe the driver of the BMW had committed an indictable (weapons) offence since they said they believed the BMW had also been shot at. And just because the police believed the BMW had been involved in the shooting, that potential involvement in a crime did not meet the required threshold of reasonable grounds to arrest the driver. The arrest, he contended, was therefore unlawful and the search for gun residue as an incident to arrest was illegal and thus unreasonable under s.8 of the *Charter*.

The Court, however, rejected the accused's argument. "In order to arrest without a warrant, a police officer must have reasonable and probable grounds to believe the suspect has committed an indictable offence," said the Court. "The test has subjective and objective elements [and] police are not required to establish a prima facie case for conviction." On this point the Court stated:

> It is both subjectively and objectively reasonable and probable that the young Asian male driver of a vehicle with a bullet hole in the back windshield, which has a license plate and characteristics matching those of a vehicle involved in a shooting 20 minutes prior, committed a weapons offence. That the BMW was likely shot at does not in anyway diminish the probability that someone in the BMW was also a shooter, given the information available to the police. It must be remembered that eye-witnesses to the shooting indicated that the shooter associated with the BMW fired multiple shots at those associated with the Honda. [para. 33]

Since the accused's arrest was lawful the trial judge properly found that the search for gun residue was properly conducted as incident to arrest.

Complete case available at www.albertacourts.ab.ca

JUDGE NOT REQUIRED TO ENDORSE DYNAMIC CDSA SEARCH

R. v. Perry & Richard, 2009 NBCA 12

The police received reliable information that the accused was trafficking in cocaine and was in unlawful possession of a handgun. They conducted surveillance on him and swore an information to obtain a search warrant under the *Controlled Drugs and Substances Act (CDSA)* to search his home. The information to obtain read, in part, that a rapid and effective entry of the residence without announcement was needed to secure the evidence and for officer safety, but an endorsement for the no-knock was not specifically requested nor obtained. Police met to plan the warrant's execution and a battering ram was used to force entry. Officers entered, guns drawn, and yelled "police." The accuseds Perry and Richard, the only two occupants of the house, were arrested. They both were charged with several drug, firearm, and other offences.

"It does not take much imagination to think of situations where circumstances change after the issuance of a warrant, which either eliminate the need for a "no knock" entry or require one which was previously thought unnecessary. Following the issuance of the warrant, police officers and judges should not be required to meet again to address the appropriate mode of entry. To impose such a requirement upon police and the judiciary would result in the micro-management of police investigations."

At trial in New Brunswick Provincial Court the judge ruled the evidence was obtained in the course of an unreasonable search, contrary to s.8 of the *Charter*. In her view, the "no knock" entry was unreasonable because the issuing judge had not endorsed the warrant to authorize such an entry. She concluded that in the absence of exigent circumstances a "dynamic" or "no knock" entry must be endorsed by the issuing judge before one is permitted. As well, the trial judge refused to allow the Crown to lead evidence, other than what was explained in the information to obtain, to justify the "no knock" entry. The evidence was excluded the evidence under s.24(2) of the *Charter* and the Perry and Richard were acquitted.

The Crown appealed to the New Brunswick Court of Appeal arguing the trial judge erred in holding that a no knock endorsement by a judge was required and in excluding relevant evidence offered for the purpose of explaining the need for a no knock entry in this case.

Before rendering its opinion, the Appeal Court made it clear that this was a search for items that could be easily destroyed or hidden and one of the items, the handgun, could create a potential danger to police. This was not a warrantless residential search, did not involve a search for a marihuana grow operation, nor was it a search warrant to which special rules applied, such as a lawyers office or media outlet. Rather, this was the type of search that obligated compliance with statutory requirements and proper announcement prior to entry, except in exigent circumstances. "Included within the definition of exigent circumstances are the need to prevent the destruction of evidence and considerations of officer safety and the safety of persons within the premises," said Justice Bell, authoring the unanimous judgment. "If evidence is led that an announcement by the police, prior to entry, might result in the destruction of evidence, risks to officer safety, or risk to the safety of someone on the premises, then no notice is necessary. The reasonableness of the manner in which the search is conducted can only be measured by an assessment of the circumstances within the knowledge of the police prior to, and during the course of the search."

"Included within the definition of exigent circumstances are the need to prevent the destruction of evidence and considerations of officer safety and the safety of persons within the premises. If evidence is led that an announcement by the police, prior to entry, might result in the destruction of evidence, risks to officer safety, or risk to the safety of someone on the premises, then no notice is necessary"

The Court concluded that prior authorization (endorsement) was not required for a dynamic or "no knock" search. Justice Bell stated:

> [T]here is no legislative provision which requires or permits such an endorsement. No doubt for good reason. It does not take much imagination to think of situations where circumstances change after the issuance of a warrant, which either eliminate the need for a "no knock" entry or require one which was previously thought unnecessary. Following the issuance of the warrant, police officers and judges should not be required to meet again to address the appropriate mode of entry. To impose such a requirement upon police and the judiciary would result in the micro-management of police investigations. The development of the law should not sanction the management of police operations by the judiciary except where necessary in the course of fulfilling judicial functions. I do not consider the pre-determination of the method by which police are to exercise their discretion and respond to changing circumstances in executing the search of a suspect's premises to constitute part of the judicial function. [at para. 6]

"I can find no authority for the proposition, in either the statute law or at common law, that an issuing judge has the authority to determine, a priori, whether a "no knock" entry will be permitted in cases involving a search with warrant of a suspect's premises or residence."

And further:

> I can find no authority for the proposition, in either the statute law or at common law, that an issuing judge has the authority to determine, *a priori*, whether a "no knock" entry will be permitted in cases involving a search with warrant of a suspect's premises or residence. In the present case, information on oath was laid before a judge setting out the suspect's alleged implication in serious criminal conduct. Such alleged criminal conduct, supported by oath, was not a feature in any of the media and law firm cases to which reference has been made. The alleged criminal conduct involved possession of contraband that could be easily disposed of and one item, a handgun, that presented a potential danger to police officers. [para. 17]

The Court ruled that, unlike the provisions Parliament enacted following the Supreme Court's *Feeney* decision now requiring prior judicial authorization for unannounced entries to arrest (s.529.4 *Criminal Code*), there is no similar requirement in relation to the execution of a search warrant under the *CDSA*. The common law continues to occupy the field in these situations. And the reasonableness of a "no knock" entry, like the reasonableness of the search itself, is subject to scrutiny in the "manner" the search was carried out. "This reality obviates the need for prior judicial authorization for a no knock entry," said Justice Bell. "Trial judges are required to assess the allegation of unreasonableness, including the method of entry, based upon all of the evidence available. In determining the reasonableness of a search, trial judges are not limited to the information available to the issuing judge but must consider all evidence available to the police at the relevant time(s)."

"Police are to be given full opportunity to explain their actions. In assessing whether exigent circumstances exist to justify a "no-knock" entry, the Court must not limit the testimony of police officers, or anyone else for that matter, to the evidence contained in the information to obtain."

In this case the trial judge was unable to fully assess the reasonableness of the "no knock" search because she limited the police testimony on the voir dire. In allowing the appeal and ordering a new trial Justice Bell stated:

> I am of the opinion trial judges are required to consider all of the circumstances surrounding the search in order to determine whether exigent circumstances exist for a "no knock" entry and whether the search (including the entry) was conducted in an unreasonable manner. Police are to be given full opportunity to explain their actions. In assessing whether exigent circumstances exist to justify a "no-knock" entry, the Court must not limit the testimony of police officers, or anyone else for that matter, to the evidence contained in the information to obtain. The whole of the circumstances within the knowledge of the police must be available to the trial judge. I am of the view the trial judge erred in limiting the police officer's testimony. As a result of that error, she could not make an informed decision on whether or not exigent circumstances existed, and furthermore, whether the accused had succeeded in meeting the onus upon them to demonstrate that the search was conducted in an unreasonable manner. [para. 28]

Complete case available at www.canlii.org

2009 WORLD POLICE & FIRE GAMES
BRITISH COLUMBIA, CANADA

BE FIRST ON THE SCENE

- SIGN UP TO COMPETE
- VOLUNTEER
- GET INVOLVED

www.2009wpfg.ca

TELUS · BCAA · Chevron · TRANS LINK · Granville Island · British Columbia · City of Burnaby · City of Vancouver · The Province · Global BC · Canada Wide Media Limited

2009 WORLD POLICE & FIRE GAMES
BRITISH COLUMBIA, CANADA

SPORT & EVENT SCHEDULE

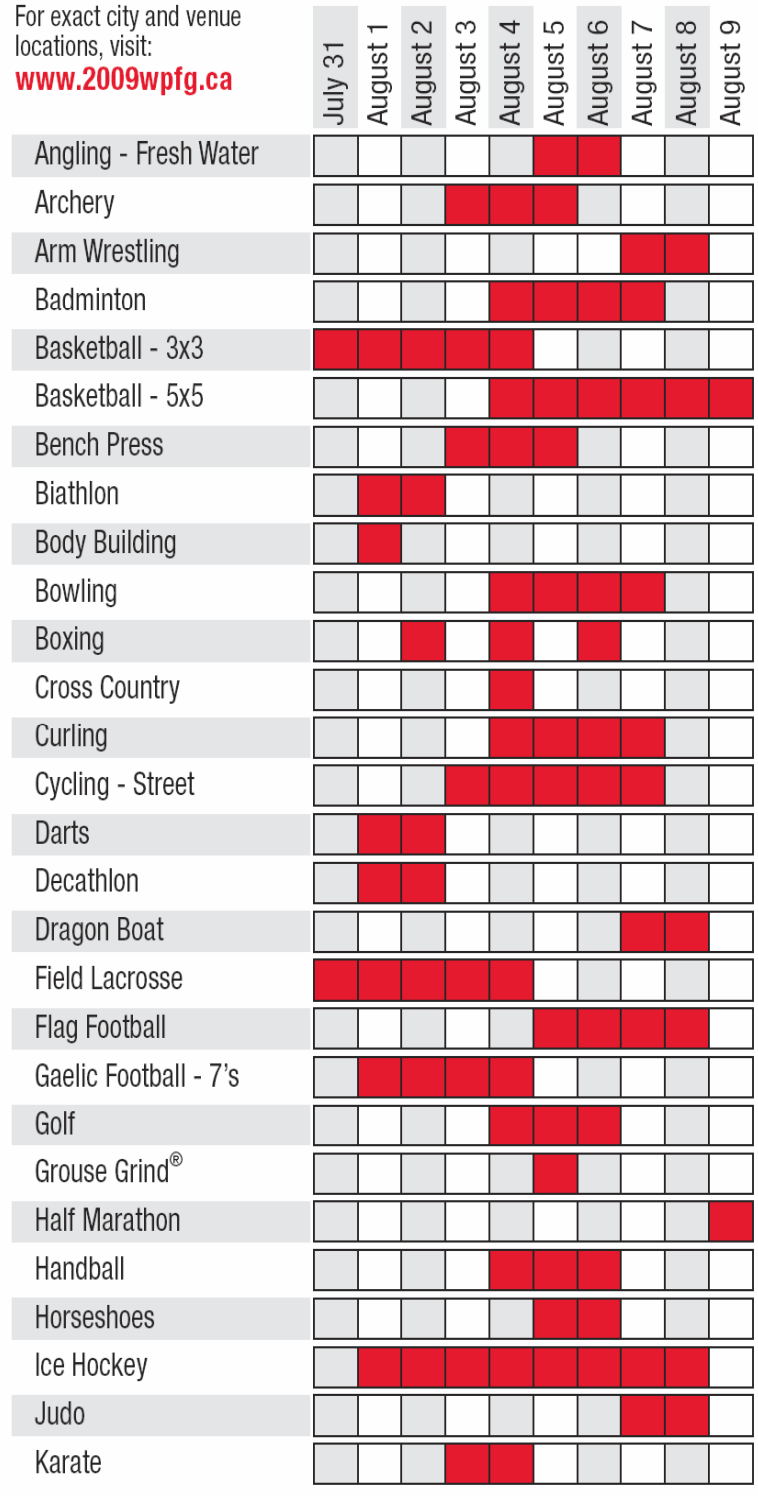
10 DAYS.
67 EVENTS.
12,000 COMPETITORS.

www.2009wpfg.ca

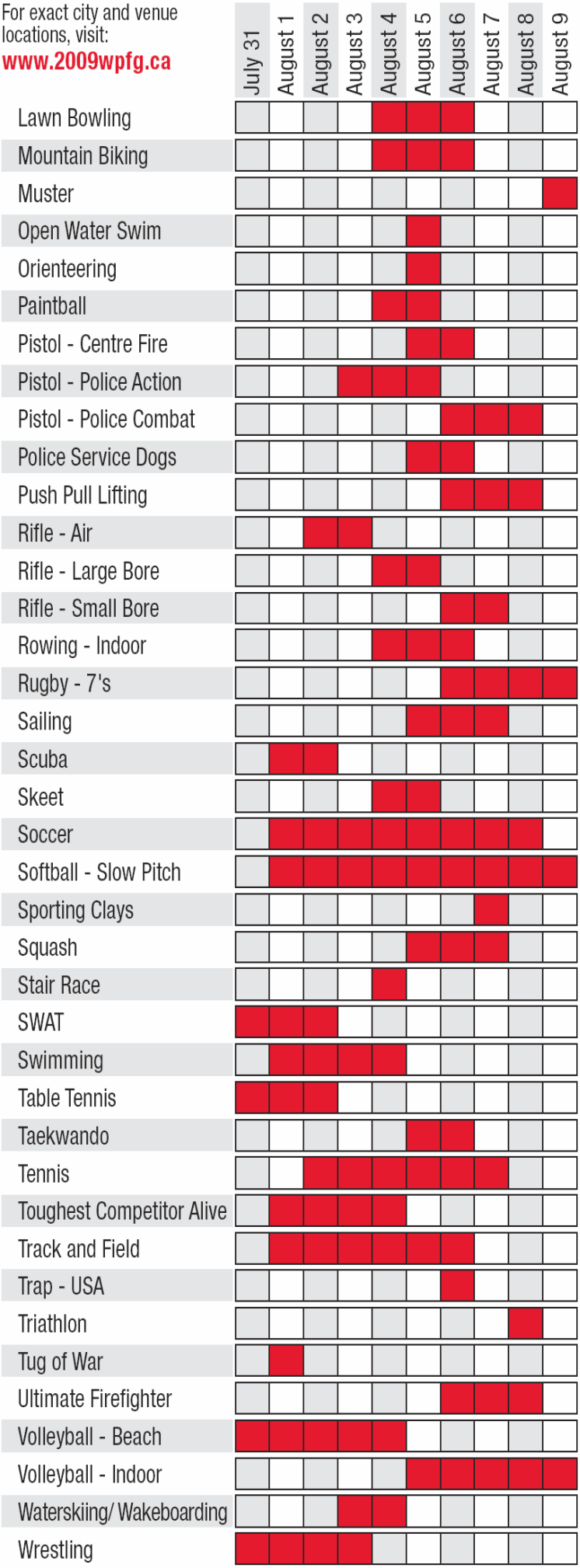
2009 WORLD POLICE & FIRE GAMES

BRITISH COLUMBIA, CANADA

For exact city and venue locations, visit:
www.2009wpfg.ca



For exact city and venue locations, visit:
www.2009wpfg.ca



Schedule subject to change.

JJP OBLIGED TO REFUSE TELEWARRANT IF IN-PERSON APPLICATION CAN BE MADE

R. v. Nguyen et al., 2009 BCCA 89

Police investigated a tip of a marihuana grow operation at a residence with the aim of obtaining a search warrant. During the investigation a B.C. Hydro security officer advised the police about theft of electricity at the same address. On a Sunday, an information to obtain a search warrant was sworn by way of telecommunications under s.487.1 of the *Criminal Code*. In the grounds portion of the information the officer swore he believed the Provincial Courthouse was closed and that he was unable to access the services of a Provincial Court Judge or Judicial Justice of the Peace. Section 487.1 allows search warrants to be issued by telecommunication where it is "impracticable" for the informant to appear in person before a Provincial Court Judge or Judicial Justice of the Peace. A search warrant was granted and police executed it, finding 426 plants in various stages of growth. The accuseds were charged with production of marijuana, possession for the purpose of trafficking marijuana, and theft of electricity.

"It is reasonable to infer from the evidence that the Centre would advise a constable if a justice of the peace was available. Furthermore, the Judicial Justice of the Peace who signed the telewarrant would be aware of the statutory preconditions of telewarrants and would be obliged to refuse the application if a justice of the peace had in fact been available."

During a *voir dire* in British Columbia Provincial Court the judge had to determine, among other things, whether the search warrant was valid. The officer testified he knew the courthouse was closed and explained that when he telephoned the Judicial Justice of the Peace Centre ("JJP Centre") he was told to send his request by fax. The trial judge concluded that the officer acted reasonably in the circumstances. The warrant application was made on a Sunday and he was told by the JJP Centre to fax the materials in; it was reasonable for the officer to follow this procedure. The trial judge refused to quash the warrant and convictions were entered on all charges.

The accuseds then appealed to the British Columbia Court of Appeal arguing, among other grounds, that the telewarrant should not have been issued because the officer did not enquire if he could appear in person before the JJP. As a result, the accuseds submitted their s.8 *Charter* rights were breached and the evidence should have been excluded under s.24(2).

Justice Kirkpatrick, delivering the judgment of the unanimous British Columbia Court of Appeal, disagreed with the accuseds:

> In my opinion, there is no merit in the [accuseds'] argument that the trial judge erred in this respect. Since the onus is on the person bringing a Charter challenge to prove a violation of his rights on a balance of probabilities, the onus was on the [accuseds] to demonstrate that the standard of impracticability was not met. I am not persuaded that the trial judge erred in failing to set aside the telewarrant on the basis that [the police officer] did not ask the Centre if a Judicial Justice of the Peace was available. The [accuseds] tendered no evidence to demonstrate that a Judicial Justice of the Peace was available to receive in-person applications. The trial judge accepted the police officer's evidence that he called the Centre and was told to fax the materials. It is reasonable to infer from the evidence that the Centre would advise a constable if a justice of the peace was available. Furthermore, the Judicial Justice of the Peace who signed the telewarrant would be aware of the statutory preconditions of telewarrants and would be obliged to refuse the application if a justice of the peace had in fact been available. [references omitted, para. 18]

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

Note-able Quotes

"When I found the skull in the woods, the first thing I did was call the police. But then I got curious about it. I picked it up, and started wondering who this person was, and why he had deer horns." - Jack Handy (Deep Thoughts)

911 CALL ADMISSIBLE AS EVIDENCE

R. v. Liang, 2009 ABCA 2

The complainant and her current boyfriend were at home when they heard noises outside a basement window. The complainant went upstairs to investigate and saw someone running from the window while her current boyfriend hid in the bathroom. The complainant phoned 911 and asked for the police to come. On the 911 tape the caller gave her name and address and said she was "having problems with her ex", who she identified as the accused. The caller said the accused was knocking at the door and screaming and banging noises were heard on the tape. The complainant saw the intruder, thought it was her ex-boyfriend, the accused, but was not certain of this. From the bathroom, her current boyfriend heard screaming and the door being kicked. The attending police officer saw footprints on a door to the home and stab marks on the bathroom door.

At trial in the Alberta Court of Queen's Bench a *voir dire* was held to determine the admissibility of a tape recording of the 911 call. The complainant could not confirm that it was her voice on the tape nor did the Crown call a witness to authenticate the tape or to confirm when it was recorded. The trial judge found that the circumstances of the call were not conducive to fabrication or concoction and held it was the complainant who made the call and it was made on the night in question.

The trial judge ruled that she was unable to accept the unsworn tape "in favour of sworn testimony at trial...to the extent that there may be a conflict" but that she had to look at all of the evidence, and the tape was a piece of evidence that she could consider (together with all of the evidence). Relying primarily on the complainant's testimony at trial, which was completely consistent with the statements and sounds on the 911 tape, the trial judge was satisfied on the totality of the evidence that it was the accused who broke into the home. He was convicted of being unlawfully in a dwelling house with intent to commit an indictable offence contrary to s.349(1) of the *Criminal Code* and mischief.

The accused appealed to the Alberta Court of Appeal arguing, among other grounds, that the trial judge erred in admitting the 911 tape without evidence of the substantial accuracy of it. He contended that the tape should not have been admitted without evidence from the maker of the tape as to its accuracy. Justice Costigan, delivering the opinion of the Court of Appeal, rejected the accused's submission. "It is not necessary to establish either the integrity of a tape or a speaker's identity before a tape can be admitted," he said. "A video tape is admissible once it is established the tape was not altered or changed and it depicts the scene of the crime." Here, the contents of the tape were consistent with the complainant's testimony at trial as well as that of her current boyfriend and the investigating police officer. As well, the trial judge found that the complainant was the caller on the tape and it was open to her to conclude on all of the evidence that the tape was admissible. The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

INTERACTION NON-COERCIVE: *CHARTER* RIGHTS RESPECTED

R. v. Jeanes, 2009 ONCA 96

Following a series of break and enters an off-duty police officer observed a distinctive boot tread on the accused's shoe that linked him to the break ins. In a friendly and conversational tone the officer said to the accused, "I would like to see the bottom of your boot". At trial in the Ontario Superior Court of Justice the police officer testified that he had not arrested or restrained the accused and no evidence was offered to challenge the police officer's evidence or to support the contention that the accused had been subject to a physical or psychological restraint.

The trial judge found that the police officer "calmly approached [the accused], identified himself by name as a police officer and asked if he could see the tread pattern. He did not order [the accused] to show it to him. [The accused] voluntarily complied not once but twice with this request."

The accused's appeal to the Ontario Court of Appeal submitting that his *Charter* rights were breached, however, was rejected. "On the evidence, it was open

to the trial judge to make these findings and to conclude that the [accused] had voluntarily complied with a non-coercive request and that he had not been subject to any significant physical or psychological restraint nor had there been any violation of his bodily integrity or reasonable expectation of privacy," said the Court. "Those findings are fatal to the [accused's] contention that the rights guaranteed by ss.8, 9 and 10 of the *Charter* were violated." The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

DUAL PURPOSE INCIDENTAL SEARCH LAWFUL SO LONG AS ONE PURPOSE REASONABLE

R. v. Chubak, 2009 ABCA 8

Two officers responded to an area where a young man had been beaten and stabbed and saw a group of young people gathered in the vicinity. As the patrol car turned around, a white Honda Prelude, driven by the accused, pulled up to the group. The officers parked their vehicle near the group facing the Prelude, exited the vehicle, and approached. The accused was seen to grab something that was black with an orange top from the backseat of the Prelude. An officer then approached the Prelude and observed the item, a large can of bear spray, between the accused's legs. He was attempting to remove it from its black case. The accused was removed from the vehicle and arrested for possession of a prohibited weapon while the passenger was arrested for possession of a weapon for a purpose dangerous to the public peace.

The accused was searched and police found a wallet containing $1,090 as well as a folding knife. The accused's vehicle was then searched for other weapons and a collapsible baton and another knife were found. A number of ringing cell phones were located and a small blue container on the driver's side door was found with crack cocaine in it. Police continued their search and a white envelope containing more crack cocaine and a digital scale was found behind a loose ash tray and stereo compartment. The accused was subsequently charged with possessing a controlled substance, unlawfully possessing property, possessing a prohibited weapon x 2, and possessing a weapon for a purpose dangerous to the public peace.

At trial in Alberta Provincial Court the officer testified that, after finding the large sum of money and the ringing cell phones, he determined that they may be dealing with "individuals that are dealing drugs and are arming themselves with weapons." As a result he expanded his search of the vehicle. The trial judge concluded that the search of the accused's person was lawful as incident to the arrests for possession of a prohibited weapon and possession of a weapon dangerous to the public peace, and for security purposes. The police had been called in relation to the stabbing so it was reasonable for them to also be concerned about potential weapons in the vehicle. Thus, the search for further weapons in the vehicle was also lawful as an incident to arrest. However, the trial judge ruled that opening the small blue container was a general search, which was not sanctioned by law and breached the accused's s.8 *Charter* right. The drug evidence was excluded. The Crown offered no further evidence and suggested all charges be dismissed. Hence, the accused was acquitted.

The Crown appealed the accused's acquittals to the Alberta Court of Appeal which was tasked with determining whether the police breached s.8 of the *Charter*. Section 8, which provides that "everyone has the right to be secure against unreasonable search and seizure," will not be violated if a search is authorized by a reasonable law and is carried out in a reasonable manner. And although a warrantless search is *prima facie* unreasonable, a search

"When police search a person as part of a search incident to arrest, they are not precluded from looking at, and taking into their control and custody, anything they find on the arrested person, so long as the search is for a reason related to the arrest. ... The same principles apply to searches conducted incident to arrest that are not of the arrested person, but of the arrested person's immediate surroundings, including the automobile that the arrested person was extracted from at the time of the arrest."

incidental to arrest at common law qualifies as an exception to the rule, with some limitations. There are three justifiable reasons for conducting a search incidental to arrest: ensuring police and public safety; protecting evidence from destruction; and discovery of evidence to be used at trial.

In this case the accused conceded that the arrest was lawful and that the search for weapons incidental to arrest was also lawful, but complained that the search exceeded the scope of the common law once it expanded to include a search for drugs and involved the small blue container. In his view, once the search expanded to include a search for drugs, it no longer qualified as a lawful search incidental to arrest, violating his s.8 *Charter* right against unreasonable search and seizure. The Crown, on the other hand, submitted that the officers were not restricted to searching for weapons but were entitled to search for anything that would explain the accused's possession of bear spray, such as evidence of a drug operation.

In determining whether a search is truly incidental to an arrest a subjective and objective analysis is required. Subjectively the officer must have one of the purposes for a valid search incident to arrest in mind when the search is conducted. And objectively the officer's belief that this purpose will be served by the search must be reasonable. "Therefore, in order for the search in this case to be lawful, the officers must have been searching for purposes of safety, to preserve evidence, or to find evidence to support the arresting charge," said Justice Ritter for the majority. "If their search was for one of those reasons, it must have also been objectively reasonable." And a search will still be lawful if "searching officers … subjectively have more than one reason for the search, so long as one of the reasons is objectively justified as incidental to arrest, … the entirety of the search can be connected to that reason."

"When persons are lawfully arrested, their expectation of privacy is reduced so that a search of their immediate surroundings conducted contemporaneously with the arrest is to be expected, so long as the search has a purpose related to the arrest. subjective element."

In this case the officer said police were looking for weapons and drugs after discovering the money and cell phones. He testified that he believed the blue container did not contain a weapon, but there was no evidence as to the officer's subjective belief that it could not have possibly contained evidence in support of the weapons charge. "Therefore, the entire fruit of the constables' dual purpose search in this case is admissible, even in the absence of [the officer] articulating a subjective reason that would justify the search," said Justice Ritter. He continued:

> Moreover, what was being searched was the car, as part of the immediate surroundings of an arrested person. When police search a person as part of a search incident to arrest, they are not precluded from looking at, and taking into their control and custody, anything they find on the arrested person, so long as the search is for a reason related to the arrest. For example, police may find a piece of paper on the arrested person. That piece of paper may be totally innocuous, or it may disclose that the arrested person just purchased a knife or firearm which has not yet surfaced in the search. It may also disclose that the arrested person was involved in a crime unrelated to the search. If it does, and even if the police were beginning to suspect that the arrested person was involved in such a crime, the piece of paper is admissible in evidence as a fruit of a search incident to arrest.
>
> The same principles apply to searches conducted incident to arrest that are not of the arrested person, but of the arrested person's immediate surroundings, including the automobile that the arrested person was extracted from at the time of the arrest. This is particularly the case when weapons have already been found as part of that search.
>
> Given the circumstances in this case, in combination with [the officer's] evidence, to find that the subjective reasons for searching changed in any tangible way over the course of the constables' search would impose a conceptual and temporal disconnect that did not exist. The law must not become so complex that it prevents police officers from administering their duties. When persons are lawfully arrested, their expectation of privacy is reduced so that a search of their immediate surroundings conducted contemporaneously with the arrest is to be expected, so long as the search has a purpose related to the arrest. Here, that purpose existed, both subjectively and objectively. That the search included the small blue container does not

negate its legitimacy. [paras. 19-21]

The majority also recognized that pretextual searches will not meet the requisite subjective or the objective elements of the test. But this search was not based on pretext. "The circumstances of the arrest give credence to concerns regarding weapons and officer safety," said Justice Ritter. "This was not a traffic stop that cloaked the true motivation for the search":

> The trial judge appears to have recognized that both a subjective and objective basis for a search was required. However, he failed to apply the law that says a dual purpose search meets the subjective part of the test, so long as one of the purposes - here the instigating and ongoing purpose - meets the subjective element. Had he done so, he would have found the search to be lawful and would have admitted the fruit of that search. [para. 23]

"[A] dual purpose search meets the subjective part of the test, so long as one of the purposes - here the instigating and ongoing purpose - meets the subjective element."

The Crown's appeal was allowed and a new trial was ordered on the controlled substance charges and unlawful possession of property.

A Different View

Justice Berger disagreed with the majority. In his view, "the dual purpose foundation relied upon is … an inadequate basis upon which to render lawful the warrantless search for drugs in the small blue candy container" and he did not agree that "a lawful search incidental to arrest invariably immunizes a temporally concurrent separate and distinct search carried out for a different purpose." Nothing about the blue container suggested "anything weapon like." The search had been expanded to a drug search with a deliberate and precise purpose in mind unrelated to the search for weapons incidental to arrest. Justice Berger stated:

> If an officer's sole purpose is to search for weapons incidental to arrest (including a search of the arrested person's immediate surroundings) and s/he comes upon drugs, the contraband is not rendered inadmissible at a subsequent trial on a charge of possession or trafficking. But if the officer embarks upon a search for drugs unrelated to the reason for the arrest, this second separate and distinct purpose will not serve to justify the warrantless search. In the case at bar, the search of the small blue candy container cannot be said to have served the officer's purpose in searching for weapons nor, given his testimony, would it be reasonable for him to entertain such a belief. He opened the container to search for drugs without any reasonable prospect of securing evidence of the offence for which the accused had been arrested. At that point, the search for weapons had been suspended, albeit temporarily. It follows that an infringement of s. 8 of the Charter, in my opinion, is made out.
>
> ……
>
> In the instant case, there is no suggestion whatsoever in the evidence that the police could not effectively and safely apply the law by seeking a telewarrant to search the vehicle for drugs. [paras. 32-34]

However, Justice Berger would admit the evidence under s.24(2). The drugs found in the vehicle were real and non-conscriptive and admissibility would not impact trial fairness. There is a lesser expectation of privacy in a vehicle than in a home or office and the search was not especially obtrusive. As well, "the police were dealing with a potentially volatile situation while investigating a serious crime of violence in the presence of a large group of individuals in the early morning hours. Furthermore, the accused "was armed with bear spray and it was necessary for the police to respond immediately without much opportunity to reflect upon the legality of the search." And finally, the evidence was crucial to the Crown's case. In holding that the administration of justice would not be brought into disrepute, Justice Berger said:

> [T]he search for firearms had been suspended, albeit temporarily, when the officer came upon the blue container. In my view, the search for weapons was renewed immediately after the contraband was discovered in that container. The additional contraband later found incidental to that resumed search, in my opinion, was the product of a lawful search incidental to arrest. After all, one could reasonably anticipate that the search for weapons would have extended to a search of the ashtray and stereo compartment whether or not drugs had been discovered in the blue container. [para. 40]

Having found the evidence admissible, Justice Berger agreed that a new trial should be ordered

Complete case available at www.albertacourts.ab.ca

JUSTICE INSTITUTE
of BRITISH COLUMBIA

Police Academy

Counterfeiting and Trade Mark Infringement Offences
April 21, 2009

In an effort to bring timely, relevant information on meaningful topics to front line operational police officers, the Police Academy at the Justice Institute of British Columbia is pleased to present a day-long seminar on **Counterfeiting and Trade Mark Infringement Offences.**

The cost for the course is $125 per person plus GST. Lunch is provided.

Seminar Overview:
This special event will focus on the dramatic increase in the counterfeiting problem, review the link to organized crime and terrorism financing, and discuss the full extent and types of products being counterfeited in Canada and world wide. The session will also deal with the sophistication of counterfeit products, its impact on economies and businesses and illustrate examples of counterfeit seizures that have taken place in Canada, by way of a case study of recent seizures of uncertified counterfeit products and counterfeit products with counterfeit certification labeling.

The second half of the day will focus on the proper investigation of the offences and the evidence required to secure a conviction. S/Sgt Doug Fisher of the Vancouver Police Anti-Fencing/Property Crime Unit will be delivering a presentation on some of the techniques used in investigations of trademark infringement and anti-counterfeiting enforcement, proper seizing and identifying of exhibits and effective courtroom presentation in securing a conviction.

Presenting on the topic will be Lorne Lipkus. Mr. Lipkus is a founding partner in the Toronto, Ontario, law firm of Kestenberg Siegal Lipkus LLP. He practices throughout Canada in the area of intellectual property litigation with a principle focus on anti-counterfeiting enforcement, including, obtaining and serving Anton Piller Orders and assisting law enforcement in executing criminal search warrants and dealing with all aspects of border enforcement. He has been a member of the IACC since 1998 and is also a member of the Canadian Bar Association. Mr. Lipkus is the Chair of the Counterfeiting and Trade Offenses Committee of the Canadian Bar Association. He graduated from McGill University's Faculty of Law with a Bachelor of Civil Law in 1978 and with a Bachelor of Laws in 1979, and was called to the Ontario Bar in 1981. In addition to the lectures and training sessions Mr. Lipkus conducts in the intellectual property area, he is a published author and lecturer on both franchise litigation and the execution of judgments. He has been qualified as an expert in the identification of counterfeit merchandise in several cases before the Federal Court of Canada.

When:	Tuesday, April 21, 2009 0830 hrs to 1600 hrs
Where:	Theatre, JIBC New Westminster 715 McBride Blvd
Cost:	$125 plus GST * Lunch will be provided (Event Code POLADV595)
To Register:	Call 604-528-5590 Greater Vancouver Area 1.877.528.5591 (Toll Free - North America) Monday – Friday 8:30 am to 4:00 pm
Email:	registration@jibc.ca

JUSTICE INSTITUTE of BRITISH COLUMBIA

Police Academy

Advanced Programs

The Mega Trial Phenomenon

In an effort to bring timely, relevant information to operational law enforcement professionals and others involved in the criminal justice system the Police Academy at the Justice Institute of British Columbia is pleased to present **Michael Code** who will deliver his research findings on the **Mega Trial Phenomenon** at the JIBC New Westminster Campus (Theatre) on **Wednesday, May 20 from 0830-1600**. The content of the presentation will be of interest to investigators, police executives, Crown attorneys and defense counsel who have been, or may become involved, in the investigation and trial of a major crime.

Michael Code, B.A. (Toronto) 1972, LL.B. (Toronto) 1976, LL.M. (Toronto) 1991, is an assistant professor at the Faculty of Law. He received his call to the Bar of Ontario in 1981. From 1981 until 1991 he practised with the Toronto firm of Ruby and Edward, where he specialized in criminal and constitutional litigation. Prof. Code has lectured in criminal law at Woodsworth College, University of Toronto, and in evidence law at Osgoode Hall Law School. He was an editor of the *Canadian Rights Reporter* from its inception in 1982 until 1996. He spent 1990 on sabbatical from his law firm studying towards an LL.M at the Faculty of Law. In 1991, Prof. Code was appointed Assistant Deputy Minister, Criminal Law, Ministry of the Attorney General for Ontario. In 1996 he returned to private practice with the firm of Sack Goldblatt Mitchell. He was a visiting scholar at the University of Toronto Faculty of Law in 2005-06, and joined the Faculty full-time in 2006. He received 2007 Mewett Award for Excellence in Teaching.

During his career, Prof. Code has argued some of the leading *Charter of Rights* cases in the Supreme Court of Canada and the Court of Appeal for Ontario. In recent years he has appeared as Commission counsel at the *Driskell Inquiry* into a wrongful conviction in Manitoba, as counsel to the Ontario Securities Commission in the *Rankin*, *YBM Magnex* and *Bre-X* cases, as counsel to the RCMP in a dispute over production of criminal investigative documents to civil litigants in British Columbia, as counsel to the SIU in relation to various police investigation issues in Ontario, as counsel to the Manitoba Crown in a contempt prosecution where the Chief Justice was the victim, in a successful mediation and resolution of a gang-related "mega-trial," and as defense counsel in the "Air India" terrorism trial in Vancouver.

Prof. Code is a member of the Ontario Securities Commission's Enforcement Advisory Committee. In March 2008 he was appointed by the Attorney-General for Ontario to conduct a policy review, together with former Chief Justice LeSage, addressing the problems associated with long and complex criminal trial procedure and to make recommendations for change.

Cost of this one day seminar is $125 (plus GST). Register by calling 604.528.5590 or 1-877-528-5591 or via email at registration@jibc.ca. Seating is limited and seats will be allocated on a first come, first served basis. If you have any questions, or for further information please contact: **advancedpolicetraining@jibc.ca**

SINGLE PHOTO VIEWING BY OFFICER OK IN RECOGNITION CASE

R. v. Bob, 2008 BCCA 485

On the same day a red mountain bike was stolen from a residence a police officer responding to an unrelated call saw a man on a red bicycle. As the officer was going to approach the man to speak with him he was about "90 to 95 percent sure" it was the accused, who was wanted on an outstanding warrant. The officer said he was 10 to 15 feet from the man when he first saw him, and had him in view for five to ten seconds before the man began to ride away on the bicycle. The officer yelled for him to stop but the man kept riding, followed by the officer in his police car. The man eventually dropped the bike and fled on foot, but the officer could not catch him. The officer was able to give a limited description of the man. He had pronounced lips and cheek bones and was wearing a baseball cap, sunglasses, a hooded top with the hood down, and dark pants. The bicycle was seized and the officer returned to the police station where he looked at a police photo of the accused on the computer to confirm that the man he saw on the bicycle was indeed the accused. The photo made up his mind and he was at that point "completely satisfied" that it was the accused on the bicycle.

"There is a significant difference between cases in which a witness is asked to identify a stranger never seen by him before the offence, and cases in which a witness recognizes a person previously known to her. While caution must still be taken to ensure that the evidence is sufficient to prove identity, recognition evidence is generally considered to be more reliable and to carry more weight than identification evidence."

At trial in British Columbia Provincial Court the officer identified the accused as the man he saw on the bicycle. The officer said that he had dealt with the accused on four or five occasions when he had been arrested by other officers. The accused's mother testified that the accused had three relatives who resembled him, and who had been mistaken for him in the past when they were all at school. The accused, however, did not testify. His mother's evidence did not sufficiently undermine the officer's on scene identification, which had been reinforced or confirmed by the photograph. And although he acknowledged the need to be cautious about in-court identification evidence, the judge observed that the officer knew the accused prior to the offence and had "very substantial prior dealings" with him. The officer not only recognized the accused as the person with the bicycle, but also in the courtroom and from prior dealings. The trial judge was satisfied the officer's identification was reliable and offered proof beyond a reasonable doubt that that person on the bicycle was the accused. The accused was convicted of possessing stolen property under $5,000.

"[I]t is well known that an identification procedure that singles out the accused as a suspect is problematic. This is why an identification arising from showing a witness one photograph, instead of conducting a proper photo lineup, is considered prejudicial and given little weight. However, this concern does not arise to the same extent when the person identified is already known to the witness."

The accused then appealed to the British Columbia Court of Appeal based on the frailties of eyewitness identification. He submitted the trial judge misapprehended the officer's evidence in his identification of the accused riding the bicycle. He also argued the judge failed to apprehend the defective nature of the evidence in confirming identification by viewing a single photograph of him and incorrectly placed too much weight on the in-court identification.

Justice Neilson, delivering the opinion for the Appeal Court, noted that this was not a case of identification but rather a case of recognition. "There is a significant difference between cases in which a witness is asked to identify a stranger never seen by him before the offence, and cases in which a witness recognizes a person previously known to her," she said. "While caution must still be taken to ensure that the evidence is sufficient to prove identity, recognition evidence is generally considered to be more

reliable and to carry more weight than identification evidence." She continued:

> Here, the trial judge was clearly aware of that distinction, and viewed this as a case of recognition. There was evidence to support that approach. There was no suggestion at the trial that [the officer] was not a credible witness. He had had previous dealings with [the accused]. He had an adequate chance to observe him with the bike, and he was 90-95 percent sure that he was the man he saw. He knew that there was a warrant out for [the accused's], and was sure enough of his identity that he tried to stop him on that basis. He was able to describe [the accused's] unique facial features, based on his previous dealings. [para. 14]

In this case, the officer had not conclusively identified the accused when he saw him with the bike. Rather, this was a sequential identification, with a qualified positive identification at the scene and confirmed later by the photograph. In rejecting the view that the trial judge erred in accepting identification evidence that was based in part on viewing a single photograph, Justice Neilson stated:

> [I]t is well known that an identification procedure that singles out the accused as a suspect is problematic. This is why an identification arising from showing a witness one photograph, instead of conducting a proper photo lineup, is considered prejudicial and given little weight. However, this concern does not arise to the same extent when the person identified is already known to the witness.
>
> In this case, [the officer] had a high level of certainty that the man he saw was [the accused]. He only needed to look at [the accused's] photo to raise this to absolute certainty. The danger of implicitly suggesting to a witness that the person in the photo was the suspect did not arise. There was no point in conducting a lineup. [paras. 16-17]

And although identification of a stranger by a witness for the first time is given little weight at trial, the considerations are different when the accused is previously known to the witness. The trial judge was aware of the need to be cautious in relying on in-court identification and understood the identification was significantly reinforced by the officer's previous dealings with the accused. The accused's appeal was dismissed.

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

GUNS, BAIL & JAIL: BILL C-2 REVIEW

With the recent gang and gun violence in the Metro Vancouver area some discussion has arisen over firearm offences and the applicable bail and jail consequences. Last year in May 2008, Bill C-2's provisions came into effect. This Bill, cited as the *"Tackling Violent Crime Act",* amended the *Criminal Code* in various areas including firearms offences.

As a result of Bill C-2, several offences involving the use of restricted or prohibited firearms saw minimum penalties increased to five years (for a first offence) and seven years (for second and subsequent offences). An earlier offence, however, will 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.

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. Generally speaking, judges must release an accused person at a bail hearing (on conditions if necessary) unless the prosecutor provides justification, or shows cause, why the accused should be kept in custody pending trial. A reverse onus provision, like the ones now related to specific firearms offences, shifts the burden from the prosecutor (to justify detention) to the accused (to justify release). In proving whether detention/release is justified, criteria a court will consider relate to court appearance, protection and safety of the public, and maintaining confidence in the administration of justice, including the strength of the Crown's case, the gravity of the offence, the circumstances of the offence (such as whether a firearm was used) and , if a firearm was used, whether a minimum punishment of three years or more attaches (s.515(10) *Criminal Code*).

Where the reverse onus provisions apply and an accused is released, the judge must include in the record a statement of the reasons for making the order.

FIREARMS OFFENCE SENTENCING GRID

Section	Offence	Old Punishment	New Punishment	Bail - Reverse Onus?

s.95	Possess loaded prohibited or restricted firearm or with readily accessible ammunition	Dual offence
		By indictment
		• minimum 1 yr
		• maximum 10 yrs
		Summarily
		• maximum 1 yr
			Dual offence
			By indictment
			• first offence
			  • minimum 3 yrs
			  • maximum 10 yrs
			• second and subsequent offences
			  • minimum 5 yrs
			  • maximum 10 yrs
			Summarily
			• maximum 1 yr
				No-Reverse onus does not apply unless accused charged by indictment and was under a firearms/weapons prohibition order at the time.
				(s.515(6)(viii) C.C.)

s.99	Trafficking in firearms, prohibited devices, ammunition, or prohibited ammunition.	Strictly indictable offence
		By indictment
		• minimum 1 yr
		• maximum 10 yrs
			Strictly indictable offence
			• first offence
			  • minimum 3 yrs
			  • maximum 10 yrs
			• second and subsequent offences
			  • minimum 5 yrs
			  • maximum 10 yrs
				Yes-Reverse onus applies.
				(s.515(6)(vi) C.C.)

s.100	Possessing firearms, prohibited devices, ammunition, or prohibited ammunition for the purpose of trafficking.			
s.103	Unauthorized importation or exportation of a firearm, prohibited device, or prohibited ammunition.			

s.244	Discharging a restricted or prohibited firearm with intent	Strictly indictable offence
		By indictment
		• minimum 4 yrs
		• maximum life
			Strictly indictable offence
			• first offence
			  • minimum 5 yrs
			  • maximum 14 yrs
			• second and subsequent offences
			  • minimum 7 yrs
			  • maximum 10 yrs
				Yes-Reverse onus applies.
				(s.515(6)(vii) C.C.)

s.272	Sexual assault with restricted or prohibited firearm	Strictly indictable offence
		By indictment
		• minimum 4 yrs
		• maximum 14 yrs
			Strictly indictable offence
			• first offence
			  • minimum 5 yrs
			  • maximum 14 yrs
			• second and subsequent offences
			  • minimum 7 yrs
			  • maximum 10 yrs
				Yes-Reverse onus applies.
				(s.515(6)(vii) C.C.)

s.239	Attempted murder with restricted or prohibited firearm	Strictly indictable offence
		By indictment
		• minimum 4 yrs
		• maximum life
			Strictly indictable offence
			• first offence
			  • minimum 5 yrs
			  • maximum life
			• second and subsequent offences
			  • minimum 7 yrs
			  • maximum life
				Yes-Reverse onus applies.
				(s.515(6)(vii) C.C.)

s.273	Aggravated sexual assault with a restricted or prohibited firearm			
s.279(1.1)	Kidnapping with a restricted or prohibited firearm			
s.279.1	Hostage taking with a restricted or prohibited firearm			
s.344	Robbery with a restricted or prohibited firearm			
s.346(1.1)	Extortion using a restricted or prohibited firearm			

SUPREME COURT HEARINGS RISE

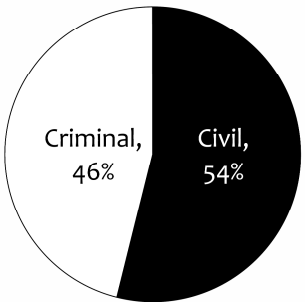
In its Bulletin of Proceedings: Special Edition, *"Statistics 1998 to 2008"*, the workload of the Supreme Court of Canada has been outlined. In 2008, the Supreme Court heard 82 appeals, up from 53 in 2007.

Case Life Span

The time it takes to render a judgment from the date of hearing is lower than the previous year. In 2008 it took 4.8 months for the Court to render a decision, down from 6.6 months in 2007. Overall, it takes an average of 16.9 months for the Court to render an opinion from the time an application for leave to hear a case is filed. This is 2.2 months shorter than it took in the preceding year (2007).

Appeals Heard

Case Type



Of the 82 cases heard in 2008, British Columbia is once again the origin of the most appeals of any province at 20 (up from 13 last year), followed by Quebec (17), the Federal Court of Appeal (12), and Ontario (11). No appeals originated from the Northwest Territories, Nunavut, Prince Edward Island, or Newfoundland.

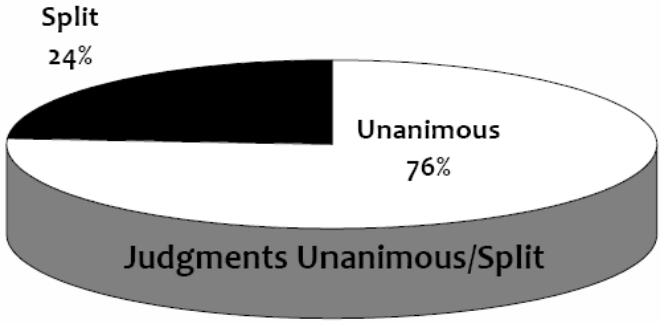
Of all the appeals heard in 2008, 54% were civil while the remaining 46% were criminal. Seven percent of those dealt with *Charter* criminal cases.

Sixteen of the appeals heard in 2008 were as of right. This source of appeal includes cases where there is a dissent on a point of law in a provincial court of appeal. The remaining 66 cases had leave to appeal granted. This is where a three judge panel gives permission to the applicant for the appeal to be heard.

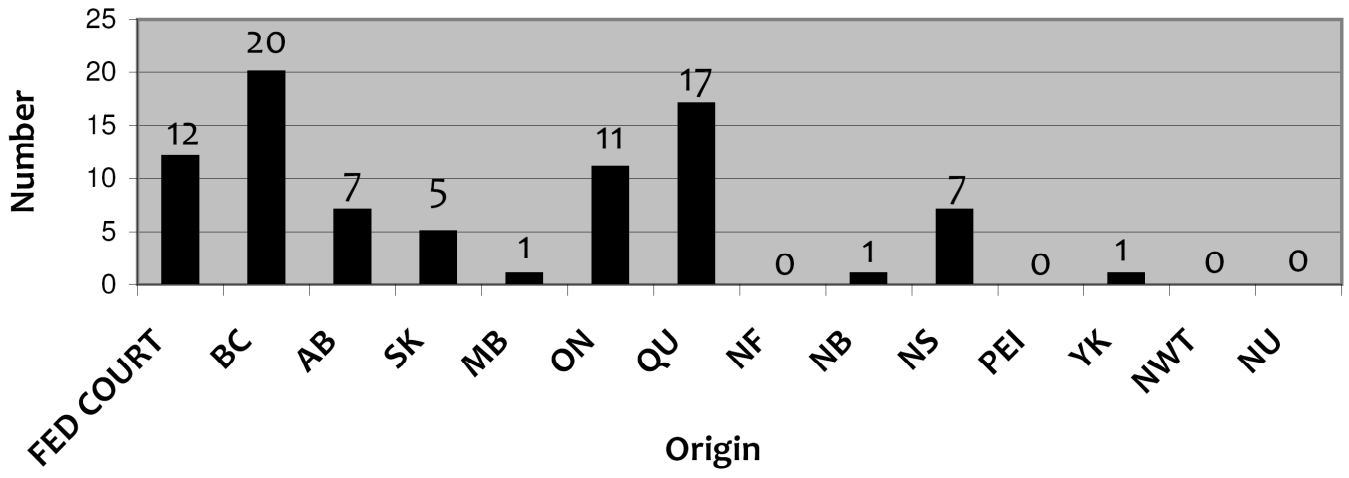
Appeal Judgments

There were 74 appeal judgments released in 2008, up from 58 in 2007. Five of the 74 decisions last year were delivered from the bench while 69 were delivered after being reserved. As well, 25 of the appeals were allowed while 19 were dismissed. A further 38 of the appeals heard were under reserve as of December 31, 2008. And the court was more unanimous than previous years. In 2008 76% of the judgments were unanimous. This is up from 62% unanimity in 2007.

Source: www.scc-csc.gc.ca/stat/pdf/doc-eng.pdf



Supreme Court: Origin of Appeals Heard



POLICE NEED NOT HOLD OFF AFTER DETAINEE EXERCISES RIGHT TO COUNSEL

R. v. McCrimmon, 2008 BCCA 487

The accused was arrested at his home on a Saturday morning for sexual assault, administering a noxious substance, and a number of similar offences. He was advised of the reasons for his arrest and was informed of his right to retain and instruct counsel. He was told he could call any lawyer he wanted, that he had the right to contact a legal aid lawyer, and that there was a 24-hour legal aid telephone service available. The accused said that he wished to call a lawyer.

He was taken to the police detachment where he gave the officer the name of his lawyer. The officer looked-up the lawyer's telephone number and called his office, leaving a message on the answering machine. But no attempt to find the lawyer's home telephone number was made, nor did the accused request this be done. Asked if he would like to call the legal aid number, the accused said that he would, although his preference was to speak with his own lawyer. The officer called legal aid and the accused spoke in private with a lawyer for approximately five minutes. He said he was satisfied with having spoken to legal aid and understood the advice he had received. He also said he did not know if his lawyer would call back.

"[T]he police are not required 'hold off' when a detainee who has exercised his or her right to counsel asks to speak with a lawyer again"

A member of the Major Crime Interview Team, with specialized training in interrogation techniques, took the accused to an interview room and spoke with him for approximately three hours and twenty minutes. At the beginning of the interview the accused confirmed that he had spoken with a legal aid lawyer and said the lawyer had advised him not to say anything. The investigator told the accused that he did not have to say anything, but that anything he did say may be used in evidence.

When the investigator broached the subject of the incidents under investigation the accused stated that he did not want to discuss them until he had spoken with his lawyer. However, he also said that he did not mind speaking with the officer. Ten minutes later, the accused again stated that he wished to speak with a lawyer before answering any further questions. His request to be taken back to his cell was declined and the investigator engaged him in further conversation. As the interview continued, the investigator attempted to persuade the accused to discuss the incidents under investigation. Several themes were repeated by the investigator, such as the police only know one side of the story and there is likely another side, and perceptions can change once people have an explanation for why someone has committed a crime. The officer interspersed his remarks with references to what the police knew about the incidents and showed the accused pictures of some of the women who had been assaulted.

A little more than two hours after the start of the interview and after he had been shown photographs from a store security camera, the accused began to admit his involvement in the offences under investigation. During the next hour the accused made a number of statements that implicated him in the two incidents. Later, in the cell area, the accused asked if the lawyer he wanted had called back. The officer said that he did not think so. The accused stated that he had retained that lawyer only once before in connection with an impaired driving charge.

At trial in British Columbia Provincial Court the judge found there were no promises or threats made, there was no atmosphere of oppression (the interview was not grilling and the investigator used a calm tone of voice and was not aggressive) and throughout the interview the accused was aware of, and understood, his right to remain silent. His statements were the product of an operating mind and the police treated him with courtesy and respect. As a result, the trial judge found the Crown had proven the voluntariness of the accused's statements beyond a reasonable doubt and they were therefore admissible under the common law confessions rule. As well, since the statements were voluntary the accused's s.7 *Charter* right to silence was not breached. And finally, the trial judge also rejected the accused's contention

that his rights under s.10(b) of the *Charter* were violated when he was denied an opportunity to speak with the lawyer of his choice and when questioning was continued after he had indicated he wished to speak with a lawyer. The accused was convicted on two charges of sexual assault and two related charges of administering a noxious substance.

The accused appealed his convictions to the British Columbia Court of Appeal arguing his statements were inadmissible. He contended police continued to question him despite his requests to speak with a lawyer, to remain silent, and to be taken back to his cell. As well, he submitted that he was not able to speak with counsel of his choice and that there was an atmosphere of oppression that rendered his statement involuntary.

Justice Frankel, delivering the opinion of the Appeal Court, rejected the accused's challenges. First, the trial judge did not err in concluding the statements were voluntary. He considered all the relevant circumstances, was alive to the pertinent legal principles, and applied them to the facts. The accused understood that he did not have to speak with the police and that the investigator's persuasive efforts to encourage the accused to speak did not deprive him of the ability to make an informed choice to do so. And since the statements were admissible under the confessions rule there can be no finding of a *Charter* violation of the right to silence in respect of the same statement. As for the accused's s.10(b) *Charter* rights, Justice Frankel stated:

> With regard to s. 10(b) of the Charter, I would reject [the accused's] argument that he had a right to speak with the lawyer of his choice before being interviewed by [the investigator]. … "[T]he right to counsel is intended to ensure that detainees receive immediate legal advice so that they will be able make informed choices in their dealings with the police". Here [the accused] exercised his right to counsel before the interview, and expressed satisfaction with the legal advice he had received. There is no evidence here that that advice was inadequate… Indeed, on several occasions during the interview, [the accused] indicated an awareness of his rights. In these circumstances, it cannot be said that there was a denial of the right to counsel. [references omitted, paras. 20]

And finally, as for the police continuing to question the accused after he asked to further speak with a lawyer, "the police are not required 'hold off' when a detainee who has exercised his or her right to counsel asks to speak with a lawyer again." There was no error in admitting the accused's statements and his appeal was dismissed.

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

QUESTIONS OUTSIDE LEGITIMATE PURPOSE OF TRAFFIC STOP FIRST STEP IN UNREASONABLE SEARCH

R. v. Nguyen, Nguyen, & Reith, 2008 SKCA 160

A police officer on highway patrol in Saskatchewan observed the accuseds vehicle travelling at a fairly high rate of speed on the TransCanada Highway. This area on the TransCanada Highway had been the location of numerous drug courier arrests of people bringing substantial quantities of marihuana from British Columbia to Ontario and the officer had frequently been involved in these investigations. The vehicle was clocked on radar at a speed of 107 km/h in a 100 km/h zone. It was snowing at the time and the officer belived the driver was driving too fast for road conditions. He pulled the vehicle over.

D. Nguyen, the driver, appeared nervous as did Reith, the front passenger. H. Nguyen was lying down in the back seat and appeared to be sleeping. The officer detected a heavy smell of cologne, but no smell of marihuana. The officer became aware the vehicle was rented and obtained the rental agreement together with D. Nguyen's Ontario driver's licence. The officer learned the driver was not a party to the rental agreement, but it was in the name of the passenger, H. Nguyen, who was licensed in British Columbia. D. Nguyen stated that all three accused were acquainted with each other as they had played basketball together even though there was a five year discrepancy in their ages. The officer checked CPIC and none of the accused had a criminal record. The officer gave D. Nguyen a warning ticket for travelling

too fast for road conditions, but was suspicious the men were drug traffickers.

"Investigative detention will not avoid Charter challenge if its purpose is to determine whether a crime has been or is being committed as opposed to determining whether the detainee is linked to a recent or on-going crime."

D. Nguyen was the first to be detained for the drug investigation. He was provided with his rights to counsel and the standard police warning, but said he did not wish to contact counsel at that time. He said that they were going to Toronto from Calgary to visit relatives, but that he did not know when or how they were going to get home. When asked if he was transporting drugs he said he was not transporting anything right now.

The officer then detained H. Nguyen for investigation. He did not appear surprised or shocked, but was extremely nervous—his voice was shaking and he had a dry mouth. He was advised of his rights and said he did not wish to call a lawyer. The officer then asked him a few questions and was told all three men began their trip together in Vancouver and were going to check out Toronto. When asked whether there were drugs in the vehicle he responded, "I don't know".

At this point the officer believed he had reasonable grounds to arrest all three men for trafficking in marihuana because of the inconsistent statements provided by the Nguyens as to their travel history, the use of a rental car, the nervous behaviour of all three men, and the powerful smell of cologne, often used to mask the odour of marihuana. He arrested H. Nguyen first for trafficking in a controlled substance and then Reith. Reith was read his rights but did not request to contact a lawyer. When asked whether there were any drugs in the vehicle, he said there were lots that belonged to all three men. The officer then returned to his vehicle and arrested D. Nguyen. The vehicle was taken to the police detachment were it was searched. Nineteen pounds of marihuana was seized from four suitcases found in the vehicle.

At trial in the Saskatchewan Court of Queen's Bench the Crown submitted that the warrantless search was lawful as an incident to arrest. The trial judge did not determine whether the officer had the authority to detain either D. of H. Nguyen for investigative purposes or to question them. Instead, he found the Crown failed to prove the officer had reasonable grounds to arrest any of the occupants. Although the officer may have subjectively believed reasonable grounds existed, that was not enough. The officer lacked objective reasonable grounds. "There was no smell of marihuana, the accused had no previous record, the fact that they were nervous and their story as to the reason for their journey does not, by itself, establish that reasonable and probable grounds existed," he said. The arrest was unlawful and breached s.9 of the *Charter*. The searches that followed were also unreasonable and a breach of s.8 and the evidence was excluded under s.24(2).

The marihuana was conscriptive evidence and its admission would negatively impact trial fairness. The *Charter* breach was also serious. The officer was not acting in good faith. He did not have reasonable grounds to conduct a search nor did he attempt to obtain a search warrant after the vehicle was seized. The trial judge characterized the officer as being overzealous in his pursuit of drivers on the TransCanada highway where the only initial indicia that lead to detention and arrest was the pervasive smell of cologne, nervousness, and a car rental agreement. In his view the admission of the drugs seized, obtained by the illegal search of the vehicle, would bring the administration of justice into disrepute. The three men were acquitted of possessing marihuana for the purposes of trafficking.

The Crown appealed to the Saskatchewan Court of Appeal arguing the trial judge erred in excluding the discovery of the marihuana in the vehicle. The Crown submitted that the accuseds *Charter* rights had not been violated and the marihuana was admissible. In particular, the Crown contended that the trial judge failed to consider whether Reith's confession, after the arrest of H. Nguyen and Reith, but prior to the arrest of D. Nguyen, gave the officer reasonable and probable grounds, at the very least, for that last arrest. The Crown therefore argues that the trial judge erred in finding that the accused's rights pursuant to either ss.8 or 9 of the *Charter* had been breached. It also argued that, in any case, the judge erred in excluding the evidence under s. 24(2). As an alternative ground, if the *Charter* was infringed the

evidence should not have been excluded under to s. 24(2).

Justice Jackson, writing the majority opinion of the Saskatchewan Court of Appeal, found an investigative detention in the circumstances of this case could not be justified. She described the requirements for a lawful investigative detention this way:

> The Court in Mann carefully placed strict limits on the use of investigative detention. There must be: (i) "a recent or on-going criminal offence"; and (ii) a "clear nexus" between the detainee and that offence. Having satisfied these two criterion, the decision to detain must be "further assessed" against all of the circumstances to ensure that the detention was reasonably necessary. Investigative detention will not avoid Charter challenge if its purpose is to determine whether a crime has been or is being committed as opposed to determining whether the detainee is linked to a recent or on-going crime. …
>
> Before a police officer can detain a person for investigative purposes, there must be some aspect of the circumstances, relied upon by the officer, to permit a future judicial assessment as to whether a crime has been or is being committed or is about to be committed, as a first step in the Mann analysis. … An ongoing police investigation, a reported crime, or an odour of contraband of sufficient strength, as examples, might lead a judge to conclude in assessing police conduct after the fact that, at the point of detention, a crime has been or is being committed or is about to be committed. None of these indicia of a recent or on-going criminal offence are present in this case. [paras. 13-14]

Here, however, D. Nguyen was initially detained for exceeding the speed limit for road conditions, an offence in Saskatchewan under *The Traffic Safety Act*. A police officer may stop a person in relation to such an infraction under s.209.1 of *The Traffic Safety Act*. But the police officer, in effecting the stop, was not entitled to do what he did in this case. Questioning, which goes beyond the legitimate purpose of an initial stop, constitutes a new inquiry and, absent reasonable grounds, may be the first step of an unreasonable search or unreasonable detention. When the vehicle was first stopped the only activity under investigation was that of travelling too fast for road conditions. And when D. Nguyen was subsequently placed under investigative detention for a crime in relation to drugs, the only indicia of criminal activity beyond the speeding infraction was excessive nervousness, a strong odour of cologne, and a rented car. These factors, in Justice Jackson's view, were nebulous and ambiguous factors and even when taken together did not meet the criteria to establish the existence of a recent or on-going criminal offence.

When the officer questioned D. Nguyen whether there were any drugs in the vehicle he embarked on a

BY THE BOOK:

s.209.1 of Saskatchewan's *Highway Traffic Safety Act* - Authority of peace officer to stop and request information

(1) A peace officer may require the person in charge of or operating a motor vehicle to stop that vehicle if the peace officer:
(a) is readily identifiable as a peace officer; and
(b) is in the lawful execution of his or her duties and responsibilities.
(2) A peace officer may, at any time when a driver is stopped pursuant to subsection (1):
(a) require the driver to give his or her name, date of birth and address;
(b) request information from the driver about whether and to what extent the driver consumed, before or while driving, alcohol or any drug or other substance that causes the driver to be unable to safely operate a vehicle; and
(c) if the peace officer has reasonable grounds to believe that the driver has consumed alcohol or a drug or another substance that causes the driver to be unable to safely operate a vehicle, require the driver to undergo a field sobriety test.
(3) No person in charge of or operating a motor vehicle shall, when signalled or requested to stop by a peace officer pursuant to subsection (1), fail to immediately bring the vehicle to a safe stop.
(4) No person in charge of or operating a motor vehicle shall fail, when requested by a peace officer, to comply with the requests of a peace officer pursuant to subsection (2).

warrantless search that the Crown had not established was authorized by law. As the driver of the car, he had a certain expectation of privacy and his rights under s.8 of the *Charter* had been violated. H. Nguyen was a passenger in the car and he had not been stopped for speeding. But he was placed in a police car and advised that he was under investigative detention. There was no police authority for this. He too was questioned and asked about drugs in the vehicle and, as the renter of the car, he would have also had some expectation of privacy. Thus, when he was questioned about the presence of drugs in the vehicle, he was subject to a warrantless search for drugs contrary to s.8 of the *Charter*.

"Before a police officer can detain a person for investigative purposes, there must be some aspect of the circumstances, relied upon by the officer, to permit a future judicial assessment as to whether a crime has been or is being committed or is about to be committed... An ongoing police investigation, a reported crime, or an odour of contraband of sufficient strength, as examples, might lead a judge to conclude in assessing police conduct after the fact that, at the point of detention, a crime has been or is being committed or is about to be committed."

Reith was not placed under investigative detention, but was effectively detained without authority when he was placed in a separate police car. He was not asked any questions, but was instead arrested without reasonable grounds, contravening s.9 of the *Charter*. After Reith said were lots of the drugs in the vehicle and that they belonged to all three men the officer arrested D. Nguyen and searched the vehicle. But Crown did not refer to the Reith statement to augment the officer's reasonable grounds to arrest D. Nguyen. It was Crown that made the considered choice not to use the Reith statement to support the arrest. "A trial judge should not be found to have committed an error of law for having failed to consider a means of convicting the accused, which was effectively taken off the trial judge's plate by Crown counsel," said Justice Jackson. "There is no obligation on a trial judge to make a better case for the Crown than that which was presented." And she continued:

> On appeal, the confession is used for the first time to support the arrest of the third individual, and thereby confer the authority to search as an incident to arrest with consequences for all three accused. Upon a review of the transcript, it is apparent that the police officer was asked no questions about the confession in this context. When Crown counsel made submissions to the trial judge, the confession is not mentioned as a basis for the arrest, but is used only to avoid suppression of the evidence obtained contrary to the Charter. We should not use the Court's authority to set aside acquittals and order a new trial on the basis that the trial judge committed an error of law in such circumstances. [para. 42]

The majority sustained the trial judge's analysis of s.24(2) in excluding the marihuana and the Crown's appeal was dismissed.

Another Opinion

Justice Smith disagreed with her colleagues. In a dissenting judgment she noted the onus is on an accused to prove their detention was arbitrary and breached s.9 of the *Charter*. But here, since the search of the vehicle was warrantless, it was *prima facie* unreasonable and the onus therefore fell on the Crown to demonstrate that the search was reasonable and did not infringe s. 8. A search will be reasonable if it is authorized by law, the law is reasonable, and the search was conducted in a reasonable manner. In this case, the Crown said the search was justified as a search incident to a lawful arrest. "This common law right authorizes the warrantless search of a vehicle incident to a lawful arrest, noting that automobiles attract no heightened expectation of privacy that would justify an exemption from the usual common law principles," said Justice Smith. "The purpose of the search must be for a valid objective in the pursuit of criminal justice. Such objectives include ensuring the safety of the police and the public and the discovery of evidence that can be used at the trial of the person arrested."

In this case, there was no question that the purpose of the search was to obtain evidence of the presence of a controlled drug and that the search was conducted in a reasonable manner. The only issue left to be resolved, in Justice Smith's view, was whether any of the arrests were lawful. If so, a warrant was not required for the search. In her analysis she ruled

the initial stop of the vehicle was not arbitrary—it was "perfectly legal"—as the trial judge said—for highway traffic purposes. And although the trial judge failed to distinguish the grounds available or required for an investigative detention, Justice Smith found the test for a valid investigative detention had been met. She stated:

> It is now well established that the police are entitled to detain individuals for investigation even where they lack reasonable grounds to arrest, provided they have what used to be called "articulable cause", "reasonable suspicion", or "reasonable cause to suspect", and now is referred to "reasonable grounds to detain". …
>
> While the judgment in Mann refers to suspicion of a "clear nexus between the individual to be detained and a recent or on-going criminal offence", recent case law has applied the doctrine to cases where on-going criminal activity is, itself, only suspected. … There must be more than a "hunch" to support reasonable suspicion, which must be reasonably founded in a constellation of facts known to the police officer. In addition, the detention must be brief and limited.
>
> In my view, although the trial judge did not address the issue, that test was met on the circumstances of this case. The police officer indicated a number of circumstances that made him suspicious that the respondents were presently engaged in transporting drugs and specifically marijuana. Some of these were what has been referred to as "red flags", or circumstances that, while often associated with drug trafficking, are not necessarily so and are, individually, innocuous, i.e., equally consistent with perfectly innocent activity. Examples of such innocuous indicators include traveling in a rented vehicle, traveling east from British Columbia, and evidence of making a long trip without overnight stops. Such circumstances, although legitimately considered in the total context of circumstances, cannot, in themselves or cumulatively, constitute "suspicious circumstances" since they are equally consistent with innocent activity.
>
> However, some of the circumstances relied upon by the officer in this case rise above the level of innocuousness. The overpowering smell of cologne or air freshener permeating the vehicle, known to the police officer to be commonly used to mask the odour of marihuana, is, in my view, such a circumstance. While an innocent explanation is, of course, possible, it is considerably more likely to be associated with nefarious conduct. Nervousness of the vehicle's driver and passenger could be seen as intermediate circumstances. Common sense tells us that most people stopped by the police for a traffic infraction will display nervousness. In this case, the officer testified that the nervousness was extreme on the part of both the driver and the front seat passenger. These circumstances combined with the other factors that [the officer] said made him suspicious: renting a car to drive to Toronto from Calgary but making the return trip by air, and vagueness about travel plans, meet the test, in my view, of a "constellation" of factors that raised a reasonable suspicion justifying the investigative detention. The fact that there was no detectable odour of marihuana or evidence of drug paraphernalia is irrelevant to this issue, for such evidence would likely have provided reasonable and probable grounds for arrest. [references omitted, paras. 85-88]

Justice Smith also noted that the initial detention met the other criteria required of an investigative detention. It was brief—D. Nguyen and H. Nguyen were questioned for only a few minutes—and the questions focused directly on the officer's suspicions. They were both advised of their right to remain silent and to consult a lawyer. And neither was subjected to a search of any kind at this stage of the detention. She would not interfere, however, in the trial judge's holding that the arrests of H. Nguyen and Reith were unlawful, although she described it as a close call.

But the arrest of D. Nguyen was lawful. The officer did have reasonable grounds to arrest him following Reith's statement that there was a large quantity of marihuana in the vehicle and that it belonged to all three men. And the trial judge failed to consider this distinction between the circumstances of D. Nguyen and the other two men:

> … it is clear that, by the time he came to arrest Duy Nguyen, the facts known to the officer now included the overwhelmingly probative fact of David Reith's confession. While it is clear from his testimony that the officer believed that he had reasonable and probable grounds for the arrest even before hearing that confession, and therefore did not, in one sense, "rely" on it as grounds to arrest Duy Nguyen, it would be unreasonable to assume that this crucial fact was considered irrelevant by him and that it did not contribute to his subjective belief that he had reasonable and

> probable grounds to arrest Duy Nguyen. Objectively, of course, this fact clearly tips the balance in favour of the reasonableness, and therefore the lawfulness, of this final arrest. [para. 96]

The search of the vehicle that followed was therefore a lawful search incident to the arrest of D. Nguyen and was therefore reasonable and did not breach any of the s.8 rights of any of the accuseds. And even if H. Nguyen was unlawfully arrested and the arrest breached his rights under s.9 of the *Charter*, the search of the vehicle was lawful and was not causally related to H. Nguyen's arrest.

Reith's statement was also not obtained in a manner that breached the *Charter*, even if his arrest was unlawful (in the absence of reasonable grounds) and a s.9 breach. "The statement was not causally related to his arrest, for the same questions were posed to the other respondents prior to their arrests, and the temporal connection between the arrest and the statement was broken by the interviewing event, the police caution," said Justice Smith. "There is no suggestion that the statement was in any way coerced or involuntary."

His confession and the marihuana evidence derived from it could therefore not be excluded under s.24(2). Since the warrantless search of the vehicle was lawful as an incident to D. Nguyen's arrest, there were no s.8 *Charter* breaches in relation to any of the men. Justice Smith would have allowed the appeal, admitted the evidence, set aside the acquittals, and order a new trial.

Complete case available at www.canlii.org

COURT SIDE:

Charter s.8:
Everyone has the right to be secure against unreasonable search or seizure.

Charter s.9:
Everyone has the right not to be arbitrarily detained or imprisoned.

USING BREATHALYZER'S MARGIN OF ERROR AS 'REASONABLE DOUBT' WRONG

R. v. Almedia, 2009 ONCA 237

After the accused provided breath samples of 102 and 92 mg% he was charged with over 80mg%. At trial in the Ontario Court of Justice he testified that he had three beers shortly before getting behind the wheel. A witness, associated to the accused, supported this evidence. An expert said that if the accused only had three beers his breathalyzer readings should have been 50mg%, well below the legal limit.

The trial judge ruled that there was a reasonable doubt because the accused's breathalyzer readings were "so close to the line"—only 12mg% over the legal limit. "I too was raised in an age where lawyers didn't like the idea of people being convicted by machines," said the judge. "And we used to cut a lot – cut people a lot more slack than 12 milligrams percent." The charge was dismissed.

The Crown appealed to the Ontario Court of Appeal arguing the accused was not acquitted because of a reasonable doubt based on the "evidence to the contrary", but instead because the readings were "so close to the line". The Appeal Court agreed, holding the trial judge made a legal error in presuming a margin of error and acquitting because of it. "The trial judge's reasonable doubt seems based on an assumption of a margin of error in readings provided by breathalyzer machines," said the Court. "In our view, the trial judge acquitted essentially because he was not prepared to accept, as a basis for a conviction, a reading that was within, or very close to, what the trial judge perceived to be the machine's margin of error." Since the trial judge did not ultimately determine whether the accused's evidence to the contrary raised a reasonable doubt, the acquittal was quashed and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

"This is a court of law, young man, not a court of justice." - Oliver Wendell Holmes

ARRESTING OFFICER RELYING ON MORE THAN INVESTIGATOR's BROAD OPINION

R. v. Le, 2009 BCCA 14

A police officer obtained a search warrant after receiving a faxed report from a person contracted by BC Hydro to detect electrical theft. When the warrant was received, the officer advised her colleague, who was keeping the house under surveillance, that anybody who exited was arrestable for theft of electricity. The surveilling officer observed the garage door open and a van come out of the residence. The accused was arrested and his keys to the vehicle and the house were seized. He was then transported to the police station by a third officer. Using the keys seized on arrest the police entered the house discovering a relatively sophisticated marihuana grow operation. There were wires running in the residence, sophisticated venting systems, and a locked or somehow barricaded door to the basement that protected the marihuana grow operation.

"The police officer who must have reasonable and probable grounds to arrest is the one who decides that the suspect should be arrested. The officer who actually effects the arrest is entitled to rely on the request or instruction of another police officer who has the requisite reasonable and probable grounds to justify the arrest. It is not necessary that the officer who actually performs the arrest form an independent judgment that there are reasonable and probable grounds."

At trial in British Columbia Provincial Court the trial judge found the accused's arrest lawful and the search of his person and vehicle valid. The trial judge found the police had "ample reasons to believe, and had reasonable grounds to believe, that the theft of electricity was taking place" at the accused's residence. And although the Crown conceded the information to obtain the search warrant did not support a nighttime search, the evidence was nonetheless admissible under s.24(2) of the *Charter*. The accused was convicted of producing marihuana, possession for the purpose of trafficking, and theft of electricity. He then appealed.

Justice Levine, delivering the unanimous British Columbia Court of Appeal judgment, dismissed the accused's appeal. Citing an earlier judgment, the Court noted that an arrest will be lawful if there is:

> both a subjective and an objective basis for the reasonable grounds to arrest the suspect. The arresting officer or the officer who directs the arrest must believe that he has reasonable and probable grounds—the subjective element. Further, it must be shown that a reasonable person standing in the shoes of the officer would have believed that reasonable and probable grounds existed to make the arrest -- the objective element…. The police officer who must have reasonable and probable grounds to arrest is the one who decides that the suspect should be arrested. The officer who actually effects the arrest is entitled to rely on the request or instruction of another police officer who has the requisite reasonable and probable grounds to justify the arrest. It is not necessary that the officer who actually performs the arrest form an independent judgment that there are reasonable and probable grounds. [at para. 8]

Here, the investigating officer subjectively believed that anyone leaving the residence was arrestable and communicated that belief to the arresting officer. However, this broad opinion on arrest was not objectively reasonable. Although the arresting officer was entitled to rely on the investigator's subjective belief that is not all that he was acting on. He acquired further information—he saw the accused's vehicle leaving the previously closed garage which was inferred to show he had some control over the home. This observation provided the objective grounds for believing that there was an offence being committed at the residence, and linked those grounds with the accused.

There was no error by the trial judge in concluding the arrest was valid. The search of his person and his vehicle, and the seizure of his house keys, following the arres and the trial judge did not err in the s.24(2) analysis.

Complete case available at www.canlii.org

NO OTHER REASONABLE INFERENCE AVAILABLE FROM FINGERPRINT

R. v. Gauthier, 2009 BCCA 24

A break-in occurred at a trailer residence. Somebody had cut the screen on the back door and forced it open causing damage to it. A gun cabinet in the back bedroom was open. One gun was on the floor and another was on the bed, together with shotgun shells, a clear glass jar and a Bud Light beer bottle that was blue in colour. In the living room was another firearm on the floor, as well as strewn papers and a plant that had been knocked over. A rifle, three pairs of binoculars, some hunting knives and some clothing had been stolen. The guns had been locked in a case and the key to the case had been in a dresser beside the table. When the owner left the residence a day or two prior to the break-in there were three red Budweiser beer boxes in front of the freezer and a blue Budweiser box on top of it with some bottles in it. He did not leave the items on the bed, including the empty beer bottle. The accused's fingerprint was found on the beer bottle that was on the bed in the master bedroom.

"In all the circumstances, the only reasonable inference to be drawn from the proven facts is that the [accused] was the person who broke into the trailer and who relocated many items in it, including the beer bottle. Without speculation, no other conclusion arises."

At trial in British Columbia Supreme Court the owner of the trailer testified that when his friends visited his home they would bring a case of beer, but he did not know who bought the red Budweiser case. He said he did not know the accused nor did he leave the bottle on the bed or know how it came to be there. The trial judge concluded it was reasonable to infer that the bottle was left by the offender along with other things, such as the gun, which were moved in the course of the break-in. She rejected the defence's speculative argument that the print may have been left on the bottle at some other time and that it may have been brought in either by the offender or by one of the owner's friends. There was no evidence the accused was acquainted with any of the owner's friends nor that he handled any of the bottles which may have been carried into the residence by someone else. The bottle was found on the bed beside a gun and other items moved in the break-in. The accused was convicted of breaking and entering with intent to commit an indictable offence.

The accused appealed to the British Columbia Court of Appeal arguing the trial judge erred in applying the law of circumstantial evidence in finding him guilty. He again submitted that a beer bottle is extremely portable and that it could have been brought to the trailer by the owner's friend with whom he was associated; or the offender, other than the accused, could have brought it with him when he broke into the trailer after the bottle had been handled by the accused.

Justice Low, delivering the opinion of the unanimous Appeal Court, disagreed. When a guilty verdict is based on circumstantial evidence the trier of fact must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts:

> In my opinion, these theories do not rise above speculation. There is no evidence that any friend of [the victim] had an association with the [accused] or that the [accused] might have innocently handled the beer bottle at some other time and place. The significant facts are that the beer bottle was found in the bed with items that had been strewn around by the intruder. It might or might not have come from the beer box that was on the freezer. But its position on the bed with a fingerprint on it clearly linked it to the offender and the fingerprint had been placed there by the [accused]. No other explanation for the presence of the beer bottle on the bed and the fingerprint on the bottle reasonably emerges from the evidence.
>
> In all the circumstances, the only reasonable inference to be drawn from the proven facts is that the [accused] was the person who broke into the trailer and who relocated many items in it, including the beer bottle. Without speculation, no other conclusion arises. [paras. 11-12]

The accused's appeal was dismissed.

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

WHAT MAKES YOU AN EXPERT?

What exactly is required for an officer to be qualified as an expert witness so that he or she can give an opinion as to whether the facts of a case indicate drug trafficking? Must the officer show their qualifications are superior to, or more extensive or specialized than those of the average or ordinary police officer? Is formal study required? Or is it enough that the officer can provide an opinion which is outside the ordinary knowledge and experience of the judge or jury?

The recent Alberta Court of Appeal case of *R. v. N.O.,* 2009 ABCA 75, highlighted this very issue. In this case the Crown sought to have a police witness qualified as an expert so he could give an opinion on the use, packaging, and distribution of cocaine, pricing, paraphernalia, consumption patterns, jargon, common street terminology, practices and habits of cocaine traffickers, and its observable effects. The police witness was a detective with 13 years experience. His early drug-related experience was in the context of performing a broader policing mandate. And he had previously been assigned to a drug-specific unit for about 14 months. His role broadened again, until he was promoted to detective in the drug control unit. By the time of trial, he had accumulated just under two years of dedicated drug-related experience and about 11 years that included, but was not limited to, drug-related enforcement. He had made about 100 undercover drug purchases and received extensive training, some of which was specific to drugs and some of which involved drugs, e.g. undercover techniques. He also instructed courses on undercover techniques. But he had not been previously qualified as an expert witness.

The trial judge focused on whether the officer's qualifications were superior to, or more extensive or specialized than, those of an average experienced police officer. She refused to qualify the officer as an expert explaining she was given no information to rate his expertise against the average, ordinary, usual, even well-experienced police officer, let alone an expert. The officer had not been peer-reviewed or acknowledged for his expertise, and the trial judge questioned whether his time as an instructor went beyond someone sharing his experience with others. And the officer had not been previously qualified as an expert.

The Crown appealed the trial judge's finding on whether the officer was an expert. The Alberta Court of Appeal unanimously agreed that the trial judge erred by focusing on whether the officer's qualifications were superior to or more extensive or specialized than those of the average or ordinary police officer. This was not the correct test. Instead, the trial judge was required to determine whether the officer had "the expertise to explain the vagaries of the drug trafficking milieu or the customs associated with cocaine trafficking so as to assist the trier of fact in drawing the appropriate inferences from the factual matrix." As well, she also erred in refusing to accept the officer's qualifications as an expert, in part, because he had never previously been qualified. The Court said:

> Expert evidence is admissible if it is relevant and necessary to assist the trier of fact, does not violate an exclusionary rule and the proposed witness is qualified to give it.
>
> Relevance is "a threshold requirement". The opinion must "be necessary in the sense that it provide information 'which is likely to be outside the experience or knowledge of'" the trier of fact. To be qualified as an expert, a proposed witness must be "shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify".
>
> ……
>
> It is immaterial how this "special or peculiar knowledge" or "special knowledge and experience" was acquired. It may be from study or instruction, practical experience or observation; formal study is not a requirement. There is no bar simply because a witness has not been previously qualified.
>
> Police witnesses may give expert evidence. In part, this is because the "drug trafficking milieu may in fact be the subject of a speciality" but police witnesses may also have expertise "going beyond that of the trier of fact". [references omitted, paras. 19-22]

Thus, the trial judge used the wrong test in refusing to qualify the officer as an expert witness.

"It is immaterial how this 'special or peculiar knowledge' or 'special knowledge and experience' was acquired."

NO BREACH USING MATCH BETWEEN SCENE SAMPLES & SET ASIDE DNA ORDER

R. v. Newell, 2009 NLCA 18

The accused was convicted of robbery in Newfoundland Provincial Court. He was sentenced to one year imprisonment and he was ordered to provide a DNA sample for the national DNA data bank. He then launched an appeal. During the period he was appealing his robbery conviction, biological evidence from two commercial break and enters was collected and sent for DNA profiling and inclusion in the national DNA data bank's Crime Scene Index. Matches were made between the DNA profile generated from the biological materials from the break-ins to that of the accused. The accused's earlier conviction for robbery was subsequently overturned on appeal and the DNA order originating from the robbery conviction was set aside. Later, an officer applied for two DNA warrants under s.487.05 of the *Criminal Code* to obtain a bodily substance from the accused for forensic DNA analysis in relation to each break and enter. The earlier DNA matches between the biological samples obtained from the break and enters and the accused's known offender DNA provided the grounds for the new DNA warrants.

The warrants were served on the accused and he agreed to provide the samples. These samples were forwarded for comparison with profiles in the Crime Scene Index and a positive match was made between the samples collected pursuant to the DNA warrants and the commercial break-ins. The accused was charged with two counts of break and enter under the *Criminal Code*, as well as two breaches of undertaking.

At the trial in Newfoundland Provincial Court on these new charges, the accused contended that his rights under s.8 of the *Charter* had been breached and the evidence obtained through the DNA warrants was inadmissible under s.24(2). The trial judge found there had been a breach of s.8 of the *Charter* because the blood samples obtained pursuant to the DNA warrant constituted an unreasonable search and seizure since it was obtained on the basis of information (the match) which itself had been obtained pursuant to a DNA order subsequently invalidated. The accused's DNA profile, which he was forced to supply as a result of a criminal conviction that was subsequently overturned on appeal, should not have been in the DNA data bank when the DNA warrants were issued. The evidence obtained under the DNA warrant was excluded and the accused was acquitted.

"Release of information regarding a match does not reveal intimate details about the lifestyle and personal choices of the individual."

The Crown challenged the trial judge's ruling before the Newfoundland Court of Appeal. It argued that when the matches were made during the appeal period before the order had been set aside, the accused's DNA profile was legitimately in the Convicted Offenders Index and there was therefore no reason why the matches could not provide the reasonable and probable grounds to apply for the DNA warrant. The accused, on the other hand, submitted that setting aside the DNA order revived his privacy interest in the previously obtained DNA sample and the subsequent use of the information from the sample to obtain the warrant was unreasonable.

Justice Barry, writing the decision for the Court, noted that s.8 of the *Charter* protects everyone against unreasonable search or seizure. A search will be reasonable if it is authorized by law, the law itself is reasonable, and the manner in which the search was carried is reasonable. And DNA warrant provisions have been found to be constitutional. So the question the Appeal Court was left to answer was whether a *Charter* violation occurred when information derived from a DNA sample after the original DNA order had been set aside was used to support the DNA warrant.

"The *Charter* right to privacy includes the right to informational privacy," said Justice Barry. "Existence of a reasonable expectation of privacy is determined by a contextual approach, which examines a number of factors, including: [1] the nature of the information; [2] the nature of the relationship between the parties; [3] the place where the information was obtained; [4] the manner in which the information was obtained; and [5] the seriousness of the crime being investigated." He also noted that, as convicted offenders still under sentence, persons targeted by the DNA databank provisions have a much reduced expectation of privacy

and, by reason of their crimes, have lost any reasonable expectation that their identity will remain secret from law enforcement authorities. After reviewing several cases, Justice Barry concluded the accused did not have a reasonable expectation of privacy in the DNA match:

> … [H]ere the nature of the information obtainable from the DNA sample fell within the "biological core of personal information" constitutionally protected, even though its use was restricted to the purpose of identification. However, the information used to ground the application for the DNA warrant, that resulted in the evidence which the trial judge ordered excluded, was merely the fact that there had been a match between [the accused's] DNA profile obtained from the sample and biological evidence from two crime scenes. That information … is not of the sort which, if released, will lead to an increased risk of state abuse or undermine the dignity, integrity or autonomy of individuals… Release of information regarding a match does not reveal intimate details about the lifestyle and personal choices of the individual.
>
> Turning to … the relationship between the parties, when the match was made, [the accused] fell within the category of convicted offender with … a "much reduced expectation of privacy". The main question for this Court is whether the privacy interests of individuals would be unduly threatened if police are permitted to use, after the initial DNA order has been set aside, information previously derived from a DNA sample. More specifically, does the setting aside of a DNA order result in the restoration of such a high level of expectation of privacy to the DNA sample and information derived from it that subsequent use of the information should be prohibited? I am not persuaded that the fundamental principles underlying the right to privacy must lead to such a result.
>
> … [T]o avoid the "system of subsequent validation for searches", which will arise if courts engage in ex post facto analysis, it is still appropriate to note that in the present circumstances the only individuals affected by the release of information regarding a match would be those who have left biological evidence at a crime scene and whose DNA profile ends up in the national DNA databank because of a conviction. Framing the question in broad and neutral terms … in a society such as ours, would persons who leave biological evidence at a crime scene have a reasonable expectation that information regarding a match with their DNA profile in the national DNA data bank would remain private because the initial DNA order has been set aside? The answer is "no". They may have a revived or heightened expectation in the privacy of their DNA sample once the order has been finally set aside. But no threat to individual dignity, integrity or autonomy arises from permitting use of the information about the match and no significant risk of state abuse. The fact of the match is the information for which privacy is sought. But release of that information cannot threaten Charter values since there is no dissemination of a biological core of personal information.
>
> It should also be noted here, in considering the relationship between the parties, that s. 487.056(1) of the Code authorizes taking a DNA sample even though an appeal is pending. Also, s. 9(2)(a) of the DNA Identification Act provides for information in the convicted offender's index to be permanently removed after an authorizing order has been "finally" set aside. To avoid frustrating the Crown's right of appeal, this has to mean, in the present context, after expiration of the 60 day period for appealing the decision to set aside the DNA order. So [the accused's] profile was lawfully in the data bank … [and he] would have no significant expectation of privacy … when the DNA warrants were issued.
>
> Considering … the place where the information was obtained, it was not obtained from the residence of a citizen but from an officially sanctioned data bank, pointing to a reduced expectation of privacy. On the fourth factor, the manner in which the information was obtained, it is significant that the information flowed from a valid court order, which led to a DNA sample and a DNA profile being recorded. Absolutely no hint of police misconduct or willful blindness arises in this case.
>
> As to the fifth factor, the seriousness of the crimes being investigated, two break and entries may not be at the most serious end of the spectrum of offences but neither should they be regarded as not serious. Significant weight must be given here to the state's interest in effective law enforcement when performing the balancing exercise … and assessing whether the individual's interest in being left alone must give way to this state interest. [references omitted, paras. 50-56]

And further:

> The position [the accused] found himself in after the DNA order had been set aside is analogous to

> that experienced by the suspects in Tessling and Plant: the information sought to be contained by a claim to privacy had already escaped the possession and control of the suspect. In Tessling heat escaping from a house could not be controlled; in Plant the electricity records were generated and controlled by a third party (the electrical company). …. Similarly, once the information about the DNA match had been conveyed to the police officers investigating the two crime scenes in a lawful manner, [the accused] could have very little expectation of privacy regarding the information. It may have been good luck for society that police obtained the DNA match during the appeal period, before this Court set aside the DNA order. But the release of this information linking him to biological evidence found at two crime scenes, like the heat emanating from Tessling's house, meant the information was largely outside his control and available for use by the police as authorized by the DNA legislation. Plant and A.M. support the conclusion that it does not unduly diminish Charter values to interpret the legislation as contemplating use of information derived from a DNA sample, after a ruling setting aside the original DNA order, where the information has been obtained while the order was operative. [para. 59]

Thus, in evaluating and applying the five informational privacy factors and properly balancing individual and state interests, Justice Barry concluded the accused's s.8 *Charter* rights were not breached. Therefore, the trial judge erred in finding an unreasonable search or seizure. And since there was no *Charter* violation there was no need to determine whether the evidence obtained pursuant to the DNA warrants should have been excluded under s.24(2). The Crown's appeal was allowed, the accused's acquittal was set aside, and the matter was remitted for trial.

Complete case available at www.canlii.org

PROPER BREATH DEMAND INFERRED FROM CIRCUMSTANCES

R. v. Truscott, 2009 BCSC 364

The accused was stopped at a Counterattack road check and admitted to having consumed "a few" alcoholic drinks. A roadside breath sample was demanded into an approved screening device and the accused failed. He was arrested for impaired driving, given his *Charter* s.10(b) and read the breath demand. He was taken to the police detachment where efforts to obtain two samples was unsuccessful. He made five attempts at providing a breath sample but only one was successful, registering a reading of 250mg%.

At trial in British Columbia Provincial Court the officer said he read the breath demand verbatim from a card, but the card was not read into the court record. The judge, although noting that it may be preferable for the officer to read into the record the exact wording of the demand, inferred a proper breath demand was nevertheless made because the officer said he had read a breath demand to the accused from a card, the accused indicated he understood, went to the detachment, and made several attempts to provide a sample of his breath. The accused was convicted of failing or refusing to provide a breath sample, contrary to s. 254(3) of the *Criminal Code.*

The accused appealed to the British Columbia Supreme Court arguing the trial judge erred in concluding that the Crown had proved that a lawful and valid breath demand was made, an essential element of the offence of refusal to provide a breath sample. In his view, there was absolutely no evidence of the form of demand and no evidence of compliance with the provisions of the *Criminal Code*. The Crown, on the other hand, submitted the trial judge correctly inferred from the surrounding circumstances that the substance of the breath demand was clear. The officer said he read the breath demand verbatim and, following the accused's arrest for impaired driving, he was taken to the detachment, introduced to the breath technician, and he purposely provided four invalid samples and one valid sample.

In dismissing the accused's appeal Justice Warren agreed with Crown that the trial judge did not err in inferring that a valid demand was made. "The trial judge then considered all of the circumstances from that moment until the [accused] was charged with refusal to provide a breath sample, and on that evidence, having heard and seen the arresting officer and the attending qualified technician, as well as the evidence given by the [accused], she rightly concluded in my view, that the police officer had made a proper breath demand," said Justice Warren. And further:

The Crown submits that the following facts were capable of supporting a valid demand:

- the [accused] was stopped in a Counterattack roadblock and admitted consuming "a few alcoholic drinks";
- [he] was asked to walk to the police car in order for a roadside test to be conducted;
- an approved screening demand was made;
- [he] provided a valid sample into the approved screening device and the result was a fail;
- [he] was arrested for impaired driving;
- he was taken to the police station;
- a qualified technician designated by the Attorney General introduced himself;
- the qualified technician demonstrated to the [accused] how to provide a valid sample;
- [he] purposely provided four invalid samples;
- [he] provided one sample suitable for analysis;
- [he] understood what was required of him because he testified that all times he blew and he blew into the tube until he had no oxygen left in his lungs; and
- [he] understood that he would be charged with a criminal offence if he did not provide valid samples.
- These factual circumstances together with the police officer's evidence at trial that he read the breath demand to the [accused] was a sufficient body of evidence from which the trial judge could conclude beyond a reasonable doubt that lawful demand had been made. [para. 20]

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

'IN SERVICE' LEGAL ROAD TEST ANSWERS

1. (b) **False**—see *R. v. Perry & Richard* (at p. 14 of this publication).
2. (a) **True**—see *R. v. Williams* (at p. 7 of this publication).
3. (a) **True**—see *R. v. Chubak* (at p. 20 of this publication).
4. (c) **76%**—see "Supreme Court Hearings Rise" (at p. 28 of this publication).
5. (a) **True**—see *R. v. McCrinnon* (at p. 29 of this publication).
6. (b) **False**—see *"What Makes You an Expert?" R. v. N.O.* (at p. 38 of this publication).

INCIDENTAL ARREST SEARCH NOT OBJECTIVELY JUSTIFIED: EVIDENCE ADMITTED ANYWAYS

R. v. Wilkening, 2009 ABCA 9

Specially trained police officers, as part of a "Jetway" program, were at a bus depot looking for suspiciously behaving passengers when there attention was directed towards the accused because his luggage consisted of a large box labeled as containing a flat screen television. Officers engaged the accused in conversation and then conducted a CPIC check by telephone, which revealed that he was the subject of an outstanding warrant for violating a provision of Alberta's *Traffic Safety Act*. He was arrested on the warrant and patted-down. No weapons, illicit substances, or other contraband was located. He was then placed in their police van and the box he was carrying was placed in the back of the van. It was searched and police found a flat-screen television together with several handguns.

At trial in Alberta Provincial Court the officers testified they searched the box as incident to the accused's arrest, concerned for officer safety with carrying an unsearched box in their vehicle when they transported him to lockup. The trial judge, however, determined that the warrantless search of the box breached the accused's s.8 *Charter* rights. Although the subjective portion of the test for search incidental to arrest was made out, no objective reasons why officer safety was a concern, other than conjecture as to the contents of the box, were offered. He reasoned that there was nothing to suggest that the accused was violent, as he was cooperative throughout, and that a *Traffic Safety Act* violation hardly raised the specter of violence. Moreover, stated concerns about explosives and bio-hazards were belied by the manner in which the search was conducted, with absolutely no protection from any such concern. On this point the trial judge stated:

> The scenario then exists where two highly experienced R.C.M.P. officers choose to lift a box with unexplained contents to the rear of an unprotected van. They then, in the presence of one looking over the other's shoulder, proceed to open and reach into the box without protection for all of

> the safety concerns enunciated through various points in their evidence. While their actions may have been reasonable had their suspicions been limited to guns, knives or other weapons solely, they take no obvious precautions against the threat of explosion or biochemical hazard which [one officer] indicates to be constituent part of their safety concern. The box was within feet of one or all of the officers throughout the entire encounter with the Accused prior to discovering the guns. The actions taken by all three officers in the conduct of handling the Accused and his possessions were inconsistent with their own descriptions of the potential threats posed to them. [para. 76, 2007 ABPC 241]

As a result, the search of the box was not reasonable as incidental to the accused's arrest—it had nothing to do with the *Traffic Safety Act* arrest warrant and there was no reasonable concern for safety that might have justified a search of the box. Following a s.24(2) *Charter* analysis, however, the evidence was admitted and the accused was convicted.

The accused appealed to the Alberta Court of Appeal arguing the trial judge erred in admitting the evidence under s.24(2). In his view, the police officers' purpose, from the moment they observed the accused, was to search the box, which made the breach more serious than the judge considered. By engaging him in conversation and learning his name, a computer search revealed the traffic warrant, which in turn led to the accused's arrest and provided the officers with the pretext to search the box. The Crown, on the other hand, submitted that the trial judge erred in finding a s.8 *Charter* breach in the first place because the search was properly conducted as an incident to arrest.

The unanimous Appeal Court found it unnecessary to address the s.8 analysis because the evidence was nonetheless admissible under s.24(2). The trial judge found the officer's subjectively believed they should and were entitled by law to search the box incident to arrest. This was not an unreasonable conclusion the Appeal Court ruled:

> The officers testified they were concerned about their personal safety in transporting the un-searched box with [the accused] to the police lock-up. They were aware, based on their experience, that the bus terminal was used for the transit of firearms and drugs, and testified that this added to their concerns about what might be in the box. [The accused] argues that the police did not need to take the box with them when they transported him to lock-up. We are not persuaded by this argument. [The accused] was arrested just outside the Calgary bus depot, traveling alone and carrying the box. Police cannot be expected to take steps to secure property carried by arrested persons, other than to place that property in police-controlled locked compounds. Nor can they be expected to simply abandon such property on the street. [para. 14]

And the officers' failure to ensure that the search was objectively incidental to arrest did not demonstrate bad faith. The evidence was real and non-conscriptive, and there was a reduced expectation of privacy in a partially open box carried through a public place:

> The trial judge properly considered that the box carried by [the accused] would attract a lessor degree of privacy expectation than would a home or a private vehicle. We also agree that an unlocked cardboard box is not in the same category as locked luggage or a locked trunk. In this case, the box did not even completely obscure what was in it. When someone walks through a public place with part of the contents of a container exposed, their expectation of privacy with respect to all of that container has to be less than that of another person who carefully packaged items to the point of securing the container with a lock. [para. 18]

As well, the the manner of the search was not abusive—it was not a body cavity search but a search of a box carried by the accused when he was arrested. There was ample basis for the judge to conclude that the evidence should be admitted under s.24(2). The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

We're expecting
35,000 visitors next year.

2009
WORLD
POLICE & FIRE
GAMES

And we could use some help.

Next summer athletes and their families from around the world will arrive in Vancouver for the 2009 World Police and Fire Games, July 31st through August 9th. Ten days of intense competition featuring up to fourteen thousand competitors, challenging each other in the spirit of excellence, inspiration and friendship. It's your chance to show off your athletic skills and help us show off our city. Visit the website to sign up, volunteer and find out all the ways you can help make the games a success.

For more information **visit www.2009wpfg.ca**

WORLD GAMES · City of Burnaby · TELUS · BRITISH COLUMBIA The Best Place on Earth · BCAA · CITY OF VANCOUVER · Chevron