IN SERVICE: 10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

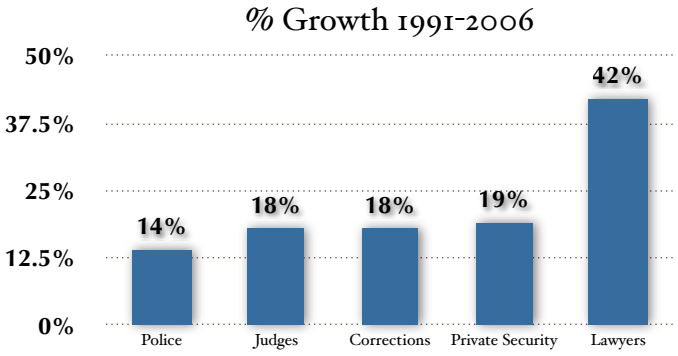
A newsletter devoted to operational police officers in Canada.

LAWYER GROWTH OUTPACES POLICE

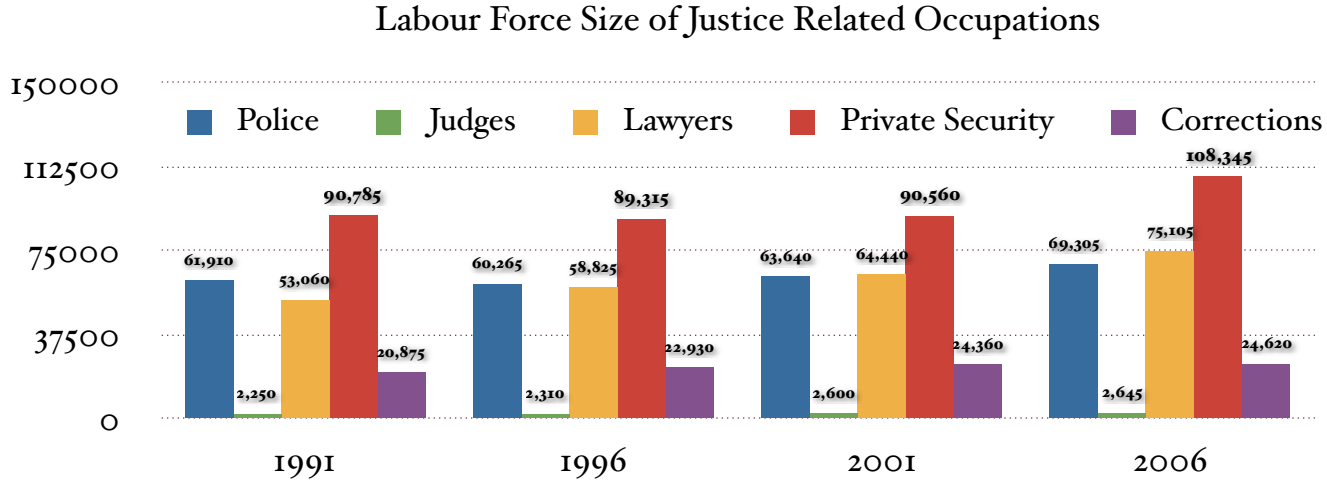
A 2009 Statistics Canada report, *"Aging of Justice Personnel"*, shows the growth in the number of lawyers is outpacing the growth in the number of police officers. Between 1991 and 2006 the number of police officers in Canada rose from 61,910 to 69,305, an overall increase of 7,395 or 12%. Lawyers, on the other hand, rose from 53,060 to 75,105, an increase of 22,045 or 42%. Over the same time period, the number of judges increased 18% (+395), correctional services personnel 18% (+3,745), and private security personnel 19% (+17,560). This can be compared to a 14% growth in the overall Canadian work force. The report suggested that the substantial increase in lawyers could be attributable to the increased complexity of criminal cases. Justice workers represented about 2% of all Canadian workers.

Ages

In 2006 the median age of a police officer was the lowest of all workers in justice related occupations at 39 years, compared to 41 for correctional services and private security personnel, 44 for lawyers, and 58 for judges, which was the oldest median age. Most police officers, almost 80%, were aged 25 to 49, while only 57% of the total Canadian labour force was between these ages. And more than 47% of police officers were between 25 and 39. Relatively few police officers were younger than 25 (5%) or older than 49 (16%). There were only 235 officers 19 and younger and 240 officers 65+. As for judges, most were 50 years or older (88%).



(Source: Statistics Canada, 2009, Aging of Justice Personnel, Catalogue no. 85-002-x, Vol. 29, no. 1.)



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

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

2010 FRASER VALLEY CRIMINAL JUSTICE CONFERENCE

See page 13

POLICE MAY VIDEOTAPE STATEMENT FROM THE OUTSET

R. v. Young, 2009 ONCA 891

The accused, disguised in a UPS uniform and carrying a UPS box, went into a jewelry store with an accomplice and produced a loaded shot gun. He ordered the store owner and an employee to lie on the ground and open the store safe. The owner managed to push the alarm button and the accused and his accomplice fled, but before leaving he turned back and shot the store owner, shattering his shin bone.

The accused's fingerprint was found on the UPS box and the store owner identified him from a photo array. He was also interviewed by police. The statements the accused made were not videotaped, although the police station had facilities available to do so. The police officers believed they could not record their investigative interview without the accused's permission and, when he was asked, he refused to consent to being videotaped. The accused made a series of inculpatory statements to the police and provided information they had not known before. The accused was charged with nine offences including robbery, use of a firearm and attempted murder.

> "In short, the police are entitled to begin to videotape or tape record an accused's statement. If the accused then objects or refuses to be videotaped, at least there will be a record of the accused's refusal."

At trial in the Ontario Superior Court of Justice the voluntariness of the accused's statements to police became an issue, including the police failure to videotape, even the initial portion of the officers' interview with the accused. During cross examination the officers were adamant that they would have been invading the accused's privacy and that it was unlawful if they started videotaping the accused as soon as he was in the interview room. Justice Molloy noted that there is no ironclad rule against admitting a statement that is not tape recorded but the Crown will face a heavy onus in establishing voluntariness where recording equipment is available but not used. However, Justice Molloy found there was an ongoing misperception among some police officers on the right to videotape (or tape record) the taking of a statement from an accused. In her view, police should videotape an interview from the outset:

> I agree that the taking of a formal statement from a suspect is different from filming the routine matters that occur at arrival and booking. However, there is nothing about the taking of a formal statement that precludes it being tape recorded right from the start. It is appropriate to explain to a suspect that the interview is being videotaped and why, and there is nothing wrong with discontinuing the videotaping if the suspect does not wish to be recorded. However, there is absolutely no legal requirement to start the interview without taping and to only turn on the recording device upon obtaining consent. Quite to the contrary, the norm should be that a suspect is spoken to from the outset with the videotape in operation. It should only be discontinued if the suspect objects.
>
> It is not clear to me where these officers got the idea that it was unlawful to start the recording before getting permission. However, this is not the first time that I have heard police officers speak of it. It appears to be a commonly held view. Crown counsel in this case was unaware why police officers had this understanding, but agreed that there was no legal basis for it. I felt it important to comment on this formally in the hope that steps would be taken within the police force to educate officers on the importance of recording interviews from the outset. [references omitted]

The accused was convicted on all counts, but the attempt murder charge was reduced to a conviction for aggravated assault. He was sentenced to 11 years in prison with four years credit for pre-trial custody.

The accused appealed to the Ontario Court of Appeal arguing, in part, that the trial judge did not instruct the jury strongly enough on why the police failure to

videotape the statements might affect their reliability and weight. The Appeal Court, however, rejected the accused's submission and affirmed the comments of the trial judge regarding the recording of statements. By at least recording the suspect from the beginning of the interview, if he refused or wished not to have his statements taped this recording would avoid any later dispute and a court would not be relying on the bald assertion by police that the suspect refused to be recorded.

"In short, the police are entitled to begin to videotape or tape record an accused's statement," said the Court. "If the accused then objects or refuses to be videotaped, at least there will be a record of the accused's refusal." The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

UNDERCOVER OPERATION AT RAVE NOT ENTRAPMENT

R. v. Yee, 2009 BCPC 0369

Police set up an undercover drug sting at a Rave attended by about 5,000 people. The Rave was officially sanctioned by the city, held in an ice arena, and alcohol was prohibited. Attendees were to be 16 years of age and older and pay about $100 per ticket. For the most part, attendees ranged in age from teenagers and to people in their early or mid-twenties. A common theme at Raves involved the use of amphetamine, commonly known as ecstasy. People would take ecstasy to heighten their senses and in particular human touching. Upwards of twelve police officers were deployed with three of the officers being undercover, tasked with purchasing ecstasy. The undercover officers would randomly approach individuals in the coliseum and ask if they had "any E" for sale. The accused was standing in a smoking area near the dance floor. and was asked if he had "any E". The accused indicated he did and led the undercover officer from the smoking area onto the dance floor where he sold two tablets of ecstasy for $5 each. Following the transaction, the undercover officer signalled the cover team and the accused was arrested. Following a search incidental to arrest, nine further ecstasy tablets along with two marihuana cigarettes were located on the accused.

At trial in British Columbia Provincial Court the accused was convicted of trafficking two tablets of ecstasy and possessing nine tablets of ecstasy along with two marihuana cigarettes. However, he argued that he was entrapped by the undercover police officer and a stay of proceedings ought to be directed because the investigative methodology used by the police amounted to an abuse of process. He contended the police method of walking up to people randomly inviting them to commit an offence when they know nothing of the individual was not be pursuant to a bona fide inquiry, considering there where thousands of people attending a Rave. He urged that there were other investigative tools which could have been pursued pursuant to a bona fide inquiry, such as "scoping" of certain individuals through static, but effective, surveillance. This would more readily identify actual drug traffickers and potentially yield larger dealers than individuals like the accused. But he submitted tactics such as surveillance were not utilized for reasons of expediency.

The Crown, on the other hand, submitted that the police were conducting a bona fide inquiry; they simply presented an opportunity to people who may be traffickers and did not hold out any inducement to encourage the commission of an offence. The location of the Rave at the Coliseum was a clearly identifiable geographical location. As a result the police could present any individual, such as the accused, with the opportunity to commit the particular offence.

> "[The] investigation was as a result of a reasonable suspicion of drug trafficking and not a mere suspicion. That reasonable suspicion was well founded and the investigation resulting in the arrest of [the accused] was pursuant to a bona fide inquiry."

Doctrine of Entrapment

Entrapment is as an aspect of the common law doctrine of abuse of process. When established on a balance of probabilities the remedy is a stay of proceedings. It is not entrapment, however, for the police to present people with the opportunity to commit a particular crime so long as the police have a reasonable suspicion the people are already engaged in criminal activity or if the police acted in the course of a bona fide investigation. Reasonable suspicion is something more than a mere suspicion but something less than a belief based on reasonable and probable grounds. Reasonable suspicion must exist either with respect to the person being targeted or with respect to the area being targeted. A bona fide investigation occurs where the police direct their investigation at an area where it is reasonably suspected that criminal activity is occurring. When such a location is defined with sufficient precision, the police may randomly present any person associated with the area with the opportunity to commit the particular offence. Such randomness is permissible within the scope of a bona fide inquiry.

In this case, Judge Rideout found the police were aware that ecstasy was actively trafficked and consumed at Raves based on prior investigations. Overdosing was also of particular concern for police. The police undercover operation at the Rave was a bona fide inquiry because both police officers clearly established the reasonable suspicion that drug trafficking in ecstasy would be taking place. The "investigation was as a result of a reasonable suspicion of drug trafficking and not a mere suspicion," said Judge Rideout. "That reasonable suspicion was well founded and the investigation resulting in the arrest of [the accused] was pursuant to a bona fide inquiry."

The accused failed to establish on a balance of probabilities that he was entrapped and the application for a stay of proceedings was denied.

Complete case available at www.provincialcourt.bc.ca

www.io-8.ca

CAPB ASKS MP's TO VOTE AGAINST DISMANTLING GUN REGISTRY

According to a recent press release, the Canadian Association of Police Boards (CAPB), the national association representing civilian oversight of policing in Canada, has written to all members of parliament asking them to reconsider dismantling the gun control system.

CAPB's members provide governance and oversight to more than 35,000 municipal police officers and chiefs in Canada. In their role as civilian oversight bodies, police boards appoint and manage the performance of chiefs and deputy chiefs, set policing objectives, establish policies, and generally represent the public interest. It is from this critical and unique vantage point that CAPB advocates for strong firearms laws. CAPB believes such laws to be essential for the safety and security of individuals, families, communities and police officers and accordingly it vigorously opposes any ideologically motivated effort to weaken existing provisions as being inimical to the public interest.

As civilian oversight bodies of municipal policing, CAPB will not support any attempt to weaken police ability to deal with gun violence. At a time when gun crime is a serious concern in communities across the country, reducing gun control will be irresponsible and a disservice to the cause of building safe communities.

If passed, Bill C-391 will not only eliminate the need to register more than 8 million rifles and shotguns but it will also require that the existing registration records on long guns be destroyed. The federal firearms program is a vital tool for effective policing. The registry is consulted thousands of times on a daily basis by police services across the country.

CAPB is proud of Canada's international reputation as a country with effective gun control legislation and strenuously opposes any legislation that weakens Canada's current firearms registry.

CAPB is, therefore, asking members of parliament to vote against this bill.

FLAWED PATHOLOGICAL EVIDENCE RESULTS IN ACQUITTAL

R. v. Sherret-Robinson, 2009 ONCA 886

The accused was charged with the first degree murder of her four month-old-son. Dr. Charles Smith, a once well respected pathologist, performed the autopsy on the infant. He testified at the preliminary inquiry that the baby died from asphyxia, probably as a result of suffocation or smothering by a third party. He also testified about other injuries to the infant that supported a finding of intentional killing, namely, haemorrhages in the neck tissues, a skull fracture and a healing fracture of the left ankle. Based on this evidence, the accused was committed for trial on the charge of first degree murder which was later reduced to second degree murder.

The police, the Crown and the defence all relied upon Dr. Smith's expert opinion and, given his stature at the time, the accused and her counsel did not believe that they could successfully contest his opinion. Just prior to trial, Crown counsel agreed to withdraw the murder charge and lay a charge of infanticide. In return, although she initially pleaded not guilty to the infanticide charge, the accused agreed not to contest a set of facts that included an allegation that she smothered her child. The facts also set out a summary of the evidence that Dr. Smith gave at the preliminary inquiry, including reference to the skull fracture and the fracture to the child's ankle. The accused reached an agreement with the Crown that led to her conviction for infanticide and she was sentenced to one year imprisonment. The accused had always maintained that she did not harm her child.

Years later Ontario's Chief Coroner began to review 45 cases in which Dr. Smith had provided an opinion or testified. This review eventually led to the Inquiry into Pediatric Forensic Pathology in Ontario. The findings by eminent pathologists and other experts demonstrated serious errors by Dr. Smith in many cases. In this case, Dr. Smith's opinion was wrong in several important respects. The skull fracture was, in fact, a normal developing cranial suture. The haemorrhages to the neck were, in fact, dissection-related artefacts from the autopsy itself. As for the injury to the left ankle, the experts could say only that it could have been caused deliberately or accidentally. The experts also stated that other findings relied upon by Dr. Smith, the petechial haemorrhages and congestion of the lungs, are common findings in infant deaths and not diagnostic of an intentional act. And although Dr. Smith found swelling of the brain, the new expert evidence shows that there was no evidence of swelling of the brain. As to the cause of death, the experts could find no positive evidence to support a finding of suffocation or smothering by a third party. At the time of his death, the infant was not sleeping in a regular crib, but rather in a playpen that contained blankets and quilts. The autopsy findings and the findings at the scene suggest that death probably occurred by an accidental asphyxial means in an unsafe sleeping environment.

In the Ontario Court of Appeal the accused sought to have the new information regarding Dr. Smith's opinion admitted as fresh evidence. The Crown conceded this material met the test for fresh evidence and that the fresh expert opinion now conclusively refutes critical aspects of Dr. Smith's opinion; an opinion that was a central underpinning of the Crown's case at trial and without that evidence there was no reasonable prospect of conviction. Had the evidence been available back at the time of the incident the Crown would have never proceeded with a prosecution. The fresh evidence was compelling and although not conclusive of the cause of death, it is likely the infant died accidentally.

In this case, the the accused was wrongfully convicted of infanticide because of the flawed pathological evidence, she was subject of a miscarriage of justice, served a one-year jail sentence and lost the custody of her other child. The fresh evidence was admitted, the appeal was allowed, the conviction for infanticide was set aside and an acquittal was entered.

Complete case available at www.ontariocourts.on.ca

BC's NEW 'ASSISTANCE TO SHELTER ACT'

British Columbia's new *Assistance to Shelter Act* is now in effect. This new provincial legislation establishes a scheme for issuing and cancelling extreme weather alerts and gives police officers authority to transport persons at risk to emergency shelters when extreme weather alerts are in effect.

Here is how it works. A "community representative" or the Minister of Housing and Social Development (or delegate) may issue an "extreme weather alert." In the case of a community representative they may determine when extreme weather conditions exist, issue an extreme weather alert, notify the minister and all police forces within the geographical area where the Extreme Weather Response Plan applies, determine when the extreme weather conditions no longer exist, cancel the extreme wether alert and notify the minister and all police forces within the geographical area of the cancelation (s.2(2)). The minister also has the power to cancel an extreme weather alert issued by a community representative where the community representative fails to cancel it and extreme weather conditions no longer exist.

Notification to the police force of the extreme weather alert called or cancelled by the community representative or Minister must be done by written report (fax or by electronic mail) and include:

- the date of the issuance/cancellation of the extreme weather alert;
- the time of the issuance/cancellation of the extreme weather alert;
- the description of the extreme weather conditions that led to the issuance/cancellation of the extreme weather alert;
- the description of the geographical area to which the extreme weather alert applies/applied;
- the name of the person issuing/cancelling the extreme weather alert;
- (f) the names of the persons or entities that will be notified by the community representative or the minister, as applicable, of the issuance/cancellation of the extreme weather alert as required under the Act.

(see ss.3-6 of the *Assistance to Shelter Regulation*)

The Minister, or their delegate, may issue an extreme weather alert where extreme conditions exist in a geographical area but there is no Extreme Weather Response Plan for the area. As well, the Minister may also issue an alert where extreme weather conditions exist but are not addressed or identified in the Extreme Weather Response Plan for that area, or extreme weather conditions exist as described in the Extreme Weather Response Plan for the area but the community representative has not issued the alert. (s.3)

Assessment

Where an extreme weather alert is in effect, a police officer may assess whether a person is at risk:

> s.5(1) If an extreme weather alert has been issued under section 2 or 3 and is in effect, a police officer may assess whether a person is a person at risk.

A police officer includes a person under the *Police Act* who "is a provincial constable or municipal constable or has the powers of a provincial constable or municipal constable." In assessing risk, the police officer must consider a number of factors:

> s.5(2) In an assessment under subsection (1), a police officer must consider whether all of the following apply:
> (a) the person is in the geographical area to which the extreme weather alert applies;
> (b) the person is, or reasonably appears to be, 19 years of age or older;
> (c) the person, in the opinion of the police officer, is suffering physical harm or is at risk of suffering physical harm because of the extreme weather conditions;
> (d) any other prescribed considerations.

Request to Attend Emergency Shelter

Under s.6(1) of the *Act*, the police may request a person at risk to go to emergency shelter or accommodation:

> s.6(1) If a police officer has made an assessment under section 5 that a person is a person at risk, the police officer may request the person at risk to choose to
> (a) accompany the police officer to an emergency shelter, or
> (b) go unaccompanied to
> (i) an emergency shelter, or
> (ii) any other accommodation that would protect the person at risk from the extreme weather conditions.
> (2) For purposes of subsection (1) (b) (ii), the accommodation must be accommodation
> (a) to which the person at risk can secure entry,
> (b) in which the person at risk is entitled or permitted to reside,
> (c) that is a structure, vehicle or vessel primarily designed to be used as living quarters and provides protection from physical harm or risk of physical harm due to extreme weather conditions, and
> (d) that meets any other prescribed conditions.

An "emergency shelter" is defined as "a building or a portion of a building that is used to provide temporary accommodation free of charge to persons to meet the persons' immediate basic needs for shelter."

Transport and Use of Force

Under s.7 of the *Act* a police officer may use reasonable force to transport a person at risk to an emergency shelter if they refuse or fail to respond to an officer's request that the person go accompanied or unaccompanied to a shelter:

> s. 7 If a person at risk refuses to comply with or fails to respond to the police officer's request under section 6, the police officer, using reasonable force if necessary, may transport the person at risk to an emergency shelter.

Complete legislation available at www.bclaws.ca

YOUTH ATTITUDES TOWARDS POLICING

In recently released report (June 2009) the Police Sector Council commissioned a study by Ipsos Reid involving youth between the ages of 16 to 27. As part of the study, the group looked at the attitudes of youth towards policing:

- ☑ Youth say first hand contact with police officers/civilian employees (excluding friends and family), television news programs, and first hand contact with police officers who are friends or family members have shaped their views of policing the most.

- ☑ A majority of youths disagree that being a police officer means you're not allowed to think on your own.

- ☑ A majority of youth agree that being a police officer means you have to be a role model for others. They also say that the police play a positive role in society and that the police play a positive role in their community.

- ☑ While youth agree that the police play a positive role in society, they also feel that the police should be more active in their community.

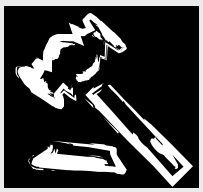
- ☑ A majority of Canadian youth agree that the ethnic make up of any given police force should be a refection of the community it serves. While youth agree that the make up of a police service should reflect the community, the same proportion agree that in some cultural communities policing is not seen as a positive career choice.

Complete report at:

www.policecouncil.ca/reports/PSCYouthFocus1.pdf

LEGALLY SPEAKING:

INTERNET



"The Internet is an open door to knowledge, entertainment, communication - *and exploitation.*" - Supreme Court of Canada Justice Fish in *R. v. Legare,* 2009 SCC 56 at para. 1.

s.172.1 CC REQUIRES SUBJECTIVE STANDARD OF FAULT

R. v. Legare, 2009 SCC 56

The 32 year old accused, claiming to be 17, engaged in two private online "chats" with the complainant, who was 12 years old at the time. He was in Alberta and the complainant was in Ontario. They first "met" in a public chat forum but moved "fairly quickly" from a public to a private chat. The initial exchanges were not recorded but the accused admitted that the private chat was sexual in nature. The second private chat was recorded and was almost entirely sexual and included words by both parties indicating a desire to engage in explicit sexual activity with each other. During the chat, the complainant told the accused she was 13, even though she was 12. The complainant gave the accused her phone number and he called, telling the complainant — in coarse and explicit language — that he "would love" to perform oral sex on her. The complainant hung up and there were no further calls.

The complainant's father became aware of the conversation and notified the police. A transcript of the second chat was eventually retrieved. Nearly two years after the chat sessions, the accused was arrested and his computer was seized but no child pornography or record of other incriminating communications was found. The accused was charged with invitation to sexual touching under s. 152 of the *Criminal Code* and luring a child under s. 172.1(1)(c).

At trial in the Alberta Court of Queen's Bench the judge characterized the accused's conduct as "both despicable and repugnant", but found that it was not caught by either ss.152 or 172.1(1)(c). The trial judge analysed both the actus reus (prohibited act) and the mens rea (culpable intent) that constituted the essential elements of s. 172.1(1)(c). Regarding the actus reus, the trial judge found the Crown was bound — but had failed — to establish that the accused's conduct facilitated the commission of one of the specified secondary offences under ss. 151 or 152. With respect to the mens rea, the trial judge accepted defence counsel's submission that the phrase "for the purpose of facilitating the commission of an offence" requires an intention to lure for the specific purpose contemplated by s. 172.1(1)(c). Although the judge recognized that the Crown was not required to prove that the accused intended to carry out the specified secondary offence he nonetheless concluded that the accused must be shown to have intended to lure a child for that purpose. The accused had not arranged a meeting with the complainant nor did he intend to do so. His intention to "talk dirty" was insufficient. Interpreting s. 172.1 otherwise would cast "the net too wide." The accused was acquitted on both counts.

On appeal to the Alberta Court of Appeal the accused's acquittal on s.152 was affirmed but his acquittal on s.172.1 was set aside and a new trial was ordered. The Appeal Court ruled that the trial judge adopted an unduly narrow interpretation of s. 172.1(1)(c) by requiring, as an essential element of that offence, a "present intent to bring about an opportunity to commit one of the secondary offences". The trial judge erred in law in his interpretation of the requisite actus reus and mens rea under s. 172.1(1)(c).

The accused then appealed to the Supreme Court of Canada, seeking the reinstatement of his acquittal without a new trial. Justice Fish, authoring the unanimous judgment for the seven member

Supreme Court of Canada first noted that Parliament had adopted legislation under s.172.1 "to shut [the] door on predatory adults who, generally for a sexual purpose, troll the Internet for vulnerable children and adolescents. Shielded by the anonymity of an assumed online name and profile, they aspire to gain the trust of their targeted victims through computer 'chats' — and then to tempt or entice them into sexual activity, over the Internet or, still worse, in person." Section 172.1 criminalizes preparatory conduct even more remote from the infliction of harm than other incipient or inchoate crimes, such as attempt and counselling or procuring the commission of an offence. He then went on to outline the elements of a charge under s. 172.1(1)(c):

> [Section] 172.1 of the Criminal Code ... prohibits the use of computers to communicate with underage persons "for the purpose of facilitating the commission" of a specified (or secondary) offence. And, more particularly still, our concern is with s. 172.1(1)(c), which consists of three elements: (1) an intentional communication by computer; (2) with a person whom the accused knows or believes to be under 14 years of age; (3) for the specific purpose of facilitating the commission of a specified secondary offence — that is, abduction or one of the sexual offences mentioned in s. 172.1(1)(c) with respect to that person. Included among them is "Invitation to sexual touching", a crime under s. 152 of the Code. [references omitted, para. 3]

And further

> It will immediately be seen that s. 172.1(1)(c) creates an incipient or "inchoate" offence, that is, a preparatory crime that captures otherwise legal conduct meant to culminate in the commission of a completed crime. It criminalizes conduct that precedes the commission of the sexual offences to which it refers, and even an attempt to commit them. Nor, indeed, must the offender meet or intend to meet the victim with a view to committing any of the specified secondary offences. This is in keeping with Parliament's objective to close the cyberspace door before the predator gets in to prey.

BY THE BOOK:

s. 172.1(1) ***Criminal Code***

Every person commits an offence who, by means of a computer system within the meaning of subsection 342.1(2), communicates with ... (c) a person who is, or who the accused believes is, under the age of fourteen years, for the purpose of facilitating the commission of an offence under section 151 [sexual interference] or 152 [invitation to touching], subsection 160(3) [bestiality] or 173(2) [exposure of genitals] or section 281 [abduction] with respect to that person.

Note: Section s. 172.1(1)(c) as it read at the time of trial has since been renumbered as 172.1(1)(b) and amended to raise the underage requirement to 16 years from 14.

... ...

> What s. 172.1(1) prohibits is thus apparent both from its remedial purpose and from the express terms adopted by Parliament to achieve that objective.
>
> Section 172.1(1) makes it a crime to communicate by computer with underage children or adolescents for the purpose of *facilitating* the commission of the offences mentioned in its constituent paragraphs. In this context, "facilitating" includes *helping to bring about* and *making easier or more probable* — for example, by "luring" or "grooming" young persons to commit or participate in the prohibited conduct; by reducing their inhibitions; or by prurient discourse that exploits a young person's curiosity, immaturity or precocious sexuality.
>
> I hasten to add that sexually explicit language is not an essential element of the offences created by s. 172.1. Its focus is on the intention of the accused at the time of the communication by

> computer. Sexually explicit comments may suffice to establish the criminal purpose of the accused. But those who use their computers to lure children for sexual purposes often groom them online by first gaining their trust through conversations about their home life, their personal interests or other innocuous topics.
>
> ... ...
>
> Accordingly, the content of the communication is not necessarily determinative: what matters is whether the evidence as a whole establishes beyond a reasonable doubt that the accused communicated by computer with an underage victim *for the purpose of facilitating* the commission of a specified secondary offence in respect of that victim.
>
> The italicized words in the preceding paragraph, drawn textually from 172.1 (1)(c), make clear that the intention of the accused must be determined subjectively. ... [T]he accused must be shown to have "engage[d] in the prohibited communication with the specific intent of facilitating the commission of one of the designated offences" with respect to the underage person who was the intended recipient of communication ... [references omitted, paras. 25-32]

"s. 172.1(1) (c) comprises three elements: (1) an intentional communication by computer; (2) with a person whom the accused knows or believes to be under 14 years of age; (3) for the specific purpose of facilitating the commission of a specified secondary offence — that is, abduction or one of the sexual offences mentioned in s. 172.1(1) (c) — with respect to the underage person."

As a result, the Supreme Court ruled that the application of a subjective standard of fault was the appropriate mens rea required to prove the offence of s. 172.1. "Requiring the Crown to prove that the accused communicated by computer with the specific intent mandated by the plain language of the provision helps to ensure that innocent communication will not be unintentionally captured by the Code," said Justice Fish:

> To sum up ... s. 172.1(1)(c) comprises three elements: (1) an intentional communication by computer; (2) with a person whom the accused knows or believes to be under 14 years of age; (3) for the specific purpose of facilitating the commission of a specified secondary offence — that is, abduction or one of the sexual offences mentioned in s. 172.1(1)(c) — with respect to the underage person.
>
> All three elements must, of course, be established by the Crown beyond a reasonable doubt.
>
> In determining whether the Crown has discharged its burden under s. 172.1, it is neither necessary nor particularly helpful for trial judges to recast every element of the offence in terms of its actus reus, or "act" component, and its mens rea, or requisite mental element. As in the case of attempt, s. 172.1 criminalizes otherwise lawful conduct when its specific purpose is to facilitate the commission of a specified secondary offence with respect to an underage person. Separately considered, neither the conduct itself nor the purpose alone is sufficient to establish guilt: It is not an offence under s. 172.1 to communicate by computer with an underage person, nor is it an offence under s. 172.1 to facilitate the commission of a specified secondary offence in respect of that person without communicating by computer.
>
> In this unusual context, determining whether each of the essential elements ... constitutes all or part of the actus reus or mens rea of s. 172.1(1)(c) is of no assistance in reaching the appropriate verdict on a charge under that provision. More specifically, forcibly compartmentalizing the underage requirement of s. 172.1(1)(c) — "a person who is, or who the accused believes is, under the age of fourteen years" — as either part of the actus reus or part of the mens rea, may well introduce an element of confusion in respect of both concepts.
>
> Is it part of the actus reus that the accused communicated with a person of any age whom the accused believed to be under 14? Is it part of the mens rea that the person was in fact under

> 14? I see no conceptual or practical advantage in attempting to resolve these questions. It seems to me preferable, in setting out the elements of s. 172.1, to adopt "language which accurately conveys the effect of the law without in itself imposing an unnecessary burden of translation and explanation".
>
> I believe that the elements of the offence, as I have set them out, achieve that objective: They satisfy the principle of legality by affording the required degree of certainty, respecting the will of Parliament, and reflecting "the overall need to use the criminal law with restraint".
>
> Finally, it is neither necessary nor necessarily sufficient for the impugned acts of the accused to be objectively capable of facilitating the commission of the specified secondary offence with respect to the underage person concerned. Accordingly, the content of the communication is not necessarily determinative: What matters ... is whether the evidence as a whole establishes beyond a reasonable doubt that the accused communicated by computer with an underage victim for the purpose of facilitating the commission of a specified secondary offence with respect to that victim. [references omitted, paras. 36-42]

The trial judge adopted an unduly restrictive construction of s.172.1(1)(c) and misapprehended the essential elements of the offence. The accused's appeal was dismissed and the order of the Alberta Court of Appeal setting aside the acquittal and ordering a new trial was upheld.

Complete case available at www.ontariocourts.on.ca

PRESENCE OF CELL PHONE IRRELEVANT TO LIMITATION ON RIGHT TO COUNSEL

R. v. Bell, 2009 ONCA 321

At about 1:30 a.m. police observed the accused, with a passenger, speeding. They followed his truck into the downtown core area of the city. The accused was stopped and could be seen through the rear window of the pickup truck drinking something with his head tilted back. The accused exited from the driver's seat of the pickup truck and walked towards the officer who was standing at the rear left-hand corner of the truck. The officer questioned the accused about drinking in his vehicle, but he denied consuming alcohol while in it. The accused had a strong odour of alcoholic beverage on his breath and that his eyes were bloodshot. An open bottle of Budweiser beer was found in the truck.

The officer formed a reasonable suspicion that the accused was driving a motor vehicle with alcohol in his body and read the approved screening device (ASD) demand, but did not have one with him. He called for one to be delivered to his location and it was delivered a minute later by another officer. The officer told the accused that he had to wait 15 minutes to administer the ASD (because of the potential presence of mouth-alcohol and the need for it to dissipate). After waiting, the accused subsequently provided a breath sample and registered a "Fail". The accused was arrested for operating a motor vehicle while over 80mg%, read his right to counsel, given a demand for a breath sample under s.254(3) of the *Criminal Code,* and advised of the standard police caution. The accused said he wanted to talk to a lawyer and was transported to the police station, located approximately 1 1/2 blocks away, where he spoke to a lawyer of his choice. He subsequently provided breath readings of 176 mg% and 181mg% and was charged with operating a motor vehicle with more than 80mg%.

In the Ontario Court of Justice the trial judge noted that the accused was stopped only a one to two minute walk from the police station and less than a one minute drive away. The officer did not ask the accused if he had a cell phone (which he did) and the officer himself was carrying his own personal cell phone. However, the officer decided to wait 15 minutes because he believed the accused has just consumed alcohol in the truck. In the trial judge's view the officer's decision to wait 15 minutes before administering the ASD test was appropriate. There was no need to provide the accused with an opportunity to consult counsel during the 15 minute waiting period. The accused was convicted.

The accused then appealed to the Ontario Superior Court of Justice arguing that the availability of the cell phone and the proximity to the police station were relevant considerations in determining whether there was a realistic opportunity to consult counsel. The appeal court judge found that in this case, "the ready availability of a cell phone and the location where the [accused] was stopped being in close proximity to the police station were not relevant considerations in determining whether the [accused's] right to counsel had been breached." "[T]he officer was entitled to delay taking the breath sample for up to 15 minutes to allow mouth alcohol to dissipate in order to enable a proper analysis of the [accused's] breath to be made," said the appeal judge. "The delay, on the facts in this case, was a justifiable limitation on the [accused's] right to counsel." The accused's appeal was dismissed and the certificate of analysis was properly admitted in evidence.

"[W]hen there is a 15 minute delay for the purpose of obtaining a proper breath sample, the demand is valid and the delay is a justified limitation on the right to counsel under s. 10(b). The fact that the detainee or the officer had cell phones is therefore irrelevant."

On further appeal by the accused to the Ontario Court of Appeal his argument was again dismissed. In a short endorsement, the Ontario Court of Appeal stated:

> To be clear, when there is a 15 minute delay for the purpose of obtaining a proper breath sample, the demand is valid and the delay is a justified limitation on the right to counsel under s. 10(b). The fact that the detainee or the officer had cell phones is therefore irrelevant. [para. 2]

Complete case available at www.ontariocourts.on.ca
Lower court case available at www.canlii.org

The **Fraser Valley Criminal Justice Conference** will be held at the **Ramada Plaza and Conference Centre** in Abbotsford, British Columbia from **April 27-30, 2010**. The 2010 Conference Topic is **"Youth, Communities and the Criminal Justice System."** Speakers will include Supt. Dan Malo, Andrée Cazabon, Dr. Irwin Cohen, Dr. Matt Logan, Crystal Meth Society, Glen Flett, Dr. Lohrasbe, Sgt. Chris Thompson, Rosalind Currie, Diane Sowden, Dr. Ray Corrado, Dr. Mary Ellen O'Toole, Det. Judy Dizy, Det. Chris Eeg, Gil Johnston, and Victor Porter. For more information visit:

www.fvcjc.ca

Fraser Valley Criminal Justice Conference 2010

Youth, Communities and the Criminal Justice System

April 27- 30, 2010

TUESDAY, April 27, 2010

5:00 pm- 7:00pm	**Registration**	
7:00 pm - 9:00 pm		Evening Welcome Reception

WEDNESDAY, April 28, 2010

8:00 am - 8:30 pm	Registration and Continental Breakfast		
8:30 am - 9:00 pm	Opening Ceremonies/ Welcoming Remarks Deputy Chief Rick Lucy		
9:00 am - 12:00 am	***Understanding Gangs*** Keynote Address: Gil Johnston (SIO) and Supt. Dan Malo		
12:00pm - 1:00 pm	Lunch		
1:00pm - 2:00 pm	***Gangs in Prison*** Gil Johnston	***Criminal Investigations and Computer Forensics*** Det. Chris Eeg	***Risk Profiles for Serious and Violent Youth Offending*** Dr. Ray Corrado and Dr. Irwin Cohen
	Move to Afternoon Break Out Session		
2:30 pm - 3:30 pm	***Active Shooters*** Sgt. Chris Thompson	***Crystal Meth- A Community Response*** METH BC	***Youth Violent Offender Programming in British Columbia: An Overview*** Dr. Heather Gretton and Dr. Grant Burt
3:30 pm - 4:30 pm	Meet the Speakers and Questions		

The Early Bird registration fee is $329 for payments received prior to January 15th, 2010. Thereafter, a regular registration fee of $399 will apply. The Ramada Inn Hotel is providing accommodations for approximately $120/night on a first come, first serve basis.

The full three-day conference will entail keynote addresses and break-out sessions that are carefully orchestrated to best suit a varied audience. One of the key goals of the conference is to bring together professionals in the field that can speak from their experiences and established expertise to assist in early intervention, prevention, and risk management. The participants will have an opportunity to network and build partnerships to meet individual organizational goals, as well as the common objective of reducing crime in our communities.

Fraser Valley Criminal Justice Conference 2010

Youth, Communities and the Criminal Justice System

April 27- 30, 2010

THURSDAY, April 29, 2010

8:00 am - 9:00 am	Continental Breakfast		
9:00 am - 12:00 pm	***Engaging with Youth*** **Andrée Cazabon - Filmmaker and former street youth**		
12:00 pm - 1:00 pm	Lunch Break **TCO 2 Presentation**		
1:00 pm - 2:00 pm	***It Can Happen to Anyone*** Diane Sowden	***BC's Office to Combat Trafficking in Persons*** Victor Porter and Rosalind Currie	***Youth, Homicide and Aggression*** Dr. Michael Woodworth
	Move to Afternoon Break Out Session		
2:30 pm - 3:30 pm	***It Can Happen to Anyone*** **(Part II)** Dianne Sowden	***Project Resiliency*** D. Bassi, P. Thomas, D. Pearn, C. Pettit	***Fishing Upstream*** Dr. Matt Logan and Glen Flett
3:30 pm - 4:30 pm	Meet the Speakers and Questions		

FRIDAY, April 30, 2010

8:00 am - 9:00 am	Continental Breakfast
9:00 am - 12:00 pm	***The Mission Oriented Shooter:*** ***Case Studies of the Worst School and Campus Shootings; Implications for Law Enforcement, Mental Health and School Professionals*** Dr. Mary Ellen O'Toole
12:00 pm - 1:00 pm	Lunch Break **Honourable Kash Heed** **Minister of Public Safety and Solicitor General**
1:00 pm - 2:00 pm	***False Allegation of Child Abduction:*** ***Lessons since Susan Smith*** Kathleen E. Canning
	Break
2:15 pm - 4:00 pm	***Psychiatric Issues in Murder cases*** Wendy Dawson, QC, Dr. Matt Logan, Dr. Lohrasbe
3:30 pm - 4:30 pm	Meet the Speakers and Questions

JUDGE NOT EXPECTED TO LEAVE COMMON SENSE AT COURTROOM DOOR

R. v. Twohey, 2009 BCCA 428

Two police officers saw the accused sitting alone in his vehicle and talking on a cell phone. The police checked the license plate and discovered that the accused was prohibited from possessing a cellular telephone. When they went back to speak to the accused, his vehicle was gone but they found him four or five blocks away. The police stopped the accused, who was still alone in the vehicle. He was arrested and searched and police found $860 in $20 and $50 bills, but no cell phone on his person. When asked where the cell phone was he replied that he had tossed it out the window.

The vehicle, of which the accused was the registered lessee, was searched and one of the officers located a cellular telephone battery, a SIM card and a battery cover for the back of a cellular telephone in the area between the driver's seat and the middle console. Two large Samurai swords were found in the back seat. A dog handler and drug-sniffing dog were called; the dog "hit" on the driver's side power console for the windows and the police located a black pouch containing 12 small baggies containing 9.5 grams of cocaine, as well as a cellular telephone which was missing the SIM card, battery and battery cover. Police put all the parts of the telephone together. The display indicated three missed calls and the phone began ringing right away. The callers were seeking to buy drugs.

At trial in British Columbia Provincial Court neither officer could say that the telephone they found was the same telephone they saw the accused using. However, they did not find any other cellular telephones in the car. The trial judge concluded that if the telephone found in the compartment was the same telephone that the police had observed the accused using, then the inevitable inference was that the accused knew about the hiding place and therefore he knew about the drugs.

The trial judge did not accept the accused's unsworn statement that he tossed the telephone out the window. The accused was convicted for possessing cocaine for the purpose of trafficking under s. 5(2) of the *Controlled Drugs and Substances Act* and sentenced to a six month conditional sentence.

The accused appealed to the British Columbia Court of Appeal arguing the trial judge's finding that he possessed the cocaine was unreasonable, and that the trial judge misapprehended the evidence and drew the wrong inferences from the evidence. He submitted that there was no direct evidence that he knew about the drugs hidden under the power window console. In his view, the trial judge's conclusion that he knew about the drugs turned on the judge's finding that the cell phone located by the police was the same cell phone he was seen talking on, but his explanation that he tossed the telephone out the window was improperly rejected. Plus, since there was a brief period of time when the police did not have the accused under observation, he contended that the trial judge could not conclude that the telephone he was talking on was the same telephone the police found. The accused contended there was no evidence connecting him to the drugs found in the car as there was no forensic evidence linking him to the pouch of cocaine.

"It is not disputed that in order to find that the [accused] possessed the drugs the learned trial judge needed to be satisfied beyond a reasonable doubt that he had knowledge and control of the drugs," said Justice Bennett. "Knowledge and control does not need to be proved by direct evidence. Such a finding can be made based on circumstantial evidence, but only when the trier of fact is satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts."

In this case, the trial judge's conclusion that the police saw the accused using this cell phone was supported by the evidence. Only one telephone was

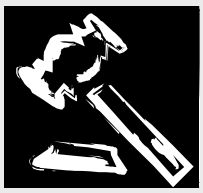
found in the car, although it was in parts. When put together, it displayed three missed calls and began to ring continually. The accused's submission that there were other rational explanations which were overlooked was rejected. The accused's contention that he threw his cell phone out the window and that some other unknown person or prior owner of the vehicle put a disassembled, but functioning telephone in the car, did not stand up in the face of the evidence as a whole. Nor did the accused's related argument that some unknown person or prior owner hid the drugs in the same compartment where part of the telephone was located. "Trial judges are not expected to leave their common sense at the door when they enter a courtroom," said Justice Bennett for the unanimous Appeal Court. The accused's appeal was dismissed.

"Trial judges are not expected to leave their common sense at the door when they enter a courtroom."

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

LEGALLY SPEAKING:

Proof



"It must be remembered that [judges] are not expected to treat real life cases as a completely intellectual exercise where no conclusion can be reached if there is the slightest competing possibility. The criminal law requires a very high degree of proof, especially for inferences consistent with guilt, but it does not demand certainty." - British Columbia Court of Appeal Justice McEachern in *R. v. To*, 1992 BCAC 223 at para. 41.

SAMPLE MUST BE RECEIVED DIRECTLY INTO INSTRUMENT

R. v. Mulroney, 2009 ONCA 766

At about 2:30 a.m. police saw the accused driving his vehicle erratically, weaving from side to side. The police stopped him and the accused failed a roadside breath test. He was arrested and taken to the police station for a breathalyzer test. He was charged with impaired driving and over 80mg%.

At trial in the Ontario Court of Justice the qualified breath technician testified he used an Intoxilyzer 5000C that was designed to receive and analyze breath samples for blood alcohol concentration, that it appeared to be working properly, and that the accused blew into the mouth-piece of the instrument as instructed, providing two suitable samples for analysis. At the conclusion of the Crown's case, the accused successfully had the charge of impaired driving dismissed. He then moved to have the over 80mg% charge dismissed, arguing that there was no evidence that his breath sample went directly into the breathalyzer and that s. 258(1)(c)(iii) was therefore not complied with. The trial judge dismissed the motion, instead holding that there was evidence sufficient to conclude that the breath sample went directly into the instrument. The accused was convicted of over 80mg% and sentenced to an $800 fine and was prohibited from driving for 12-months.

The accused then successfully appealed to the Ontario Superior Court of Justice. The appeal judge held that there was no evidence that the mouth-piece was connected to the Intoxilyzer or, even if it was, that there was no intervening apparatus between the two. The appeal judge concluded that there was no evidence that could properly lead to a reasonable inference that the breath samples were provided by the accused directly into the approved instrument. The accused's appeal was allowed, his conviction was set aside, and an acquittal was entered.

The Crown then appealed to the Ontario Court of Appeal arguing two points. First, as a matter of statutory interpretation, s.258(1)(c)(iii) does not require that a breath sample be received from an accused directly into an approved instrument in order for the evidence of the analysis to be conclusive proof of the concentration of alcohol in the accused's blood. The Crown submitted that in the wording of the legislation, "directly" applied only if the breath sample is being received into an approved container, but when it is being received into an approved instrument there is no such constraint. The Crown submitted that the section provided no constraint at all on how the breath sample gets into an approved instrument. Second, the Crown argued that the trial judge was correct to find that there was evidence sufficient to conclude that the accused's breath sample was received directly into the approved instrument.

Justice Goudge, authoring the opinion of the Ontario Court of Appeal, first outlined the requirements of the *Criminal Code* with respect to breath samples as it related to the appeal:

> The Criminal Code provides that if certain conditions are met, the results of a breathalyser test constitute conclusive proof of the concentration of alcohol in an accused person's blood, both at the time of the test and at the time when the offence was alleged to have been committed. One of these conditions is set by s. 258(1)(c)(iii). It requires that each sample be "received from the accused directly into an approved container or into an approved instrument operated by a qualified technician". ... [para. 1]

"[T]he proper interpretation of s. 258(1)(c)(iii) is that the breath sample from the accused must be received ... directly into the approved instrument itself."

As for the Crown's first argument, it was rejected. Justice Goudge opined that "the Crown had to establish beyond a reasonable doubt that the breath samples were received into the approved instrument directly from the accused."

> Because the section provides the Crown with proof that is deemed conclusive of the concentration of alcohol in an accused's blood, I think that the liberty interest of the accused requires a strict interpretation of the section. The same strict approach also serves the objective of preserving the integrity of the breath sample in order to ensure accurate results. On the other hand, implicit in the section is the contemplation that a breath sample could properly be received into an approved instrument not directly from an accused, but from an approved container, if there were any.
>
> With these considerations in mind, I think the proper interpretation of s. 258(1)(c)(iii) is that the breath sample from the accused must be received into an approved instrument either from an approved container if one is used, or, if not, directly into the approved instrument itself. [paras. 16-17]

But the Court of Appeal accepted the Crown's second argument:

> Here there was not just evidence that the breathalyser used was an approved instrument and a result was obtained. Nor did the trial judge simply take judicial notice that this must mean that the breath sample was received directly into the instrument. [The qualified breath technician] testified that the instrument was designed to receive and analyse breath samples, that it appeared to be working properly, that the respondent blew into the mouth-piece of the instrument as instructed, and that this provided a suitable sample for analysis. None of this evidence was contested by the [accused].
>
> In my view, this was ample circumstantial evidence from which the trial judge could properly conclude as he did, namely that the [accused's] breath samples were received directly into the approved instrument in this case. [paras. 21-21]

The Crown's appeal was allowed and the accused's conviction was restored.

Complete case available at www.ontariocourts.on.ca

BY THE BOOK:

s. 258(1)(c)(iii) *Criminal Code*

s.258. (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255(2) to (3.2) ...

(c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if ...

(iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician ...

evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses were made and at the time when the offence was alleged to have been committed was, if the results of the analyses are the same, the concentration determined by the analyses and, if the results of the analyses are different, the lowest of the concentrations determined by the analyses, in the absence of evidence tending to show all of the following three things — that the approved instrument was malfunctioning or was operated improperly, that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood, and that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed[.]

www.10-8.ca

RISK THAT DRIVER WOULD PUT CAR IN MOTION & CREATE DANGER ESTABLISHES CARE or CONTROL

R. v. Ruest, 2009 ONCA 841

At about 2:50 a.m. on New Year's day the accused, who had been drinking and celebrating the New Year, left an Army Navy Club. Several of his friends had encouraged him to call a taxi, rather than drive, because of his inebriated state. However, he insisted he would drive and offered to give his friends a ride home. One friend was so concerned that she called the police. A police officer arrived about a minute after the call and saw one car parked in the Army Navy Club parking lot. The accused was scraping ice off the its rear window. The engine was running and the accused's fiancée was sitting in the front passenger's seat.

The police officer approached the accused and spoke to him. He had difficulty standing on the icy parking lot and the officer noticed other signs of impairment. Because there were no keys in the vehicle, the officer asked the accused to give him the keys. In response, he pulled the keys out of his pocket and gave them to the police officer. There was a remote starter on the key chain and the car could not be driven until the key was inserted in the vehicle. The accused was arrested and a subsequent analysis of his breath revealed blood-alcohol levels of 160mg% and 150mg%. He was charged with care or control while impaired under s.253(1)(a) and blowing over under s.253(1)(b).

At trial in the Ontario Court of Justice the judge made the following findings of fact:

- the accused's car was parked in the parking lot of the Army Navy Club;
- the car was operable;
- the accused was standing at the car clearing ice from the window;

- the accused intended to get into his car and drive away in the immediate future and would have done so, but for the arrival of the police officer;
- the accused engaged the engine of the motor vehicle using a remote starter device;
- the accused had the keys to the car;
- the accused had opened the driver's side door and removed the snow scraper;
- the accused did not sit in the driver's seat and had not inserted the key in the ignition; and
- the car could not move without the key being inserted in the ignition.

Despite these findings the judge nonetheless concluded the accused was not in care or control. He had been intercepted prior to entering the vehicle and prior to inserting the key into the ignition. Thus, there was no present danger. The accused was neither in the vehicle nor in a position to bring about any danger or harm to anyone within the meaning to be given to the legislation. The accused was therefore acquitted because there was no proof of "some actual evidence of risk or danger, as might occur by starting to enter the vehicle or by placing the key in the ignition".

The Crown appealed to the Ontario Superior Court of Justice, but the accused's acquittal was upheld. The appeal judge ruled that the Crown had not proven the actus reus of the offence of "care or control"- the risk necessary. The Crown again appealed, this time to the Ontario Court of Appeal.

Justice Doherty, delivering the judgment of the Ontario Court of Appeal, ruled the lower courts applied a too narrow and restrictive notion of the degree of risk required in determining whether a person was in care or control.

In earlier, but binding appellate authorities, the actus reus of care or control was described as "the act or conduct of the accused in relation to that motor vehicle must be such that there is created a risk of danger, whether from putting the car in motion or in some other way." (see *R. v. Wren* (2000), 144 C.C.C. (3d) 374 (Ont.C.A.) As a result, Justice Doherty then framed the question on appeal as: "did the conduct of the [accused] in relation to his car create a risk that the [accused], while impaired, would put his car is motion and thereby create a danger?" He answered it this way:

> ... [The accused's] stated intention to get in his car and drive away in the immediate future was the paramount feature of the risk assessment to be made in this case. An intention to drive the vehicle is not an essential element of the offence of "care or control". ... It is, however, part of the conduct of the accused that is relevant to the determination of whether that conduct in relation to the motor vehicle had created a risk of danger. The [accused's] intention to get into the car and drive away, probably within seconds, had the officer not arrived certainly magnifies the risk that the [accused] would put his car in motion and create a danger.
>
> The [accused's] car was operable, running and sitting in an unobstructed parking lot, and the [accused] had the keys in his pocket. He intended to drive away, presumably as soon as the window was cleared. With respect to the decisions below, it is impossible to say on these findings of fact that the [accused] was not in care or control of the vehicle .... Speculation as to when the [accused] first assumed the necessary care or control of the vehicle is irrelevant to his criminal liability. The point is that by the time the officer arrived and stopped the [accused] from getting into his vehicle and driving away, the [accused] had taken steps to start the vehicle and prepare for its immediate departure. There was an obvious, significant risk that the [accused] would put the car in motion and endanger the public.
>
> .....
>
> In this case, the existence of the

"An intention to drive the vehicle is not an essential element of the offence of "care or control". ... It is, however, part of the conduct of the accused that is relevant to the determination of whether that conduct in relation to the motor vehicle had created a risk of danger."

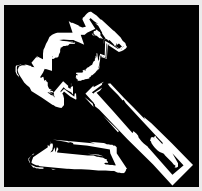
> mischief targeted by the "care or control" criminal prohibition is all the more obvious in that the [accused] fully intended to get into his car and drive away. This was not a case where liability turned on a possible risk that the vehicle might be started despite the driver's intention not to start the vehicle. Rather, this is a case where a driver was standing at a fully operable vehicle with the keys and with the intention to get in the vehicle and drive it away. [references omitted, paras. 15-18]

In Justice Doherty's view, the facts unequivocally established the legal elements of the offence of "care or control" and the accused was guilty. The Crown's appeal was allowed, the accused's acquittal was set aside, and a conviction of impaired care and control was entered.

Complete case available at www.ontariocourts.on.ca

LEGALLY SPEAKING:

"Care or Control"



"The mischief sought to be prohibited by the section as expressed by the wording is that an intoxicated person who is in the immediate presence of a motor vehicle with the means of controlling it or setting it in motion is or may be a danger to the public. Even if he has no immediate intention of setting it in motion he can at any instant determine to do so, because his judgment may be so impaired that he cannot foresee the possible consequences of his actions." - New Brunswick Court of Appeal in *R. v. Price* (1978), 40 C.C.C. (2d) 378 (N.B.C.A.) at p.384.

www.10-8.ca

UNLAWFUL PURPOSE MUST BE DIFFERENT FROM SUBSEQUENT OFFENCE

R. v. Quinn, 2009 ONCA 817

The accused answered a telephone call the complainant made to an escort agency. Once in the complainant's home, having concluded some preliminary negotiations and activities, the accused went downstairs on the pretence of getting a drink of water. She unlocked the door to the house. By pre-arrangement, others entered the residence, handcuffed and beat the complainant with the butt of an imitation firearm, and ransacked the premises, taking various items with them as they left, closely followed by the accused. At trial in British Columbia Supreme Court the judge explained the requirements of liability, including the grounds that the accused was a party to the principals' offences under s.21(2) of the *Criminal Code* because she formed a common intention with them to commit and to help them commit robbery. The jury found the accused guilty of robbery, using an imitation firearm while committing robbery, unlawful confinement and assault causing bodily harm arising out of her conduct during the home invasion.

The accused appealed arguing, among other grounds, that the trial judge failed to adequately instruct the jury on the objective foreseeability component in s.21(2) of the *Criminal Code*. The British Columbia Court of Appeal agreed:

> The "unlawful purpose" in s. 21(2) must be different from the "offence" the principal commits in carrying out the common purpose. ... In this instance, the same robbery cannot serve as both the "unlawful purpose" and the "offence". If s. 21(2) applied at all in this case, the more appropriate "unlawful purpose" may have been a home invasion or the unlawful entry offence of s. 349(1) of the Criminal Code. [para. 12]

The jury was not properly instructed on the legal principles that they were to apply to determine whether the the accused's guilt had ben established beyond a reasonable doubt. Her appeal was allowed, the convictions were quashed, and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

BY THE BOOK:

s. 21(2) *Criminal Code*

s. 21(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

IMPAIRED AMENDMENTS OPERATE RETROSPECTIVELY

R. v. Dineley, 2009 ONCA 814

The accused went to a nightclub to drink with several friends. He returned to his car and soon after he started driving the car mounted a curb and struck a parked vehicle. The police arrived to investigate the accident and conducted breath tests that produced blood alcohol concentrations of 99mg% and 97mg%. The accused was charged with impaired driving and driving over 80mg%.

At trial in the Ontario Court of Justice the accused raised the "Carter defence". The Crown then pointed out that s.258 of the *Criminal Code* had been amended and the provisions operated retrospectively. Thus, the accused's proposed toxicology evidence would be irrelevant. The trial judge, however, concluded that the Crown could not raise the issue at this point and the evidence related to the Carter defence resulted in the accused's acquittal. The Crown then appealed the accused's acquittal for driving over 80mg% to the Ontario Superior Court of Justice, again arguing that the amendments to s.258 applied retrospectively to offences committed before it came into effect, but involving trials commencing or continuing after that date. The appeal judge concluded it was not improper for the Crown to raise the retrospectivity issue when the trial resumed, but held Bill C-2 (the amendments to the *Criminal Code*) did not apply retrospectively. In his view, the amendments virtually eliminated a defence and were therefore substantive law and not exclusively procedural. Thus, the amendments could only take prospective effect. The accused's appeal was dismissed and the accused's acquittal was upheld.

The Crown then appealed to the Ontario Court of Appeal. Justice MacPherson, writing the unanimous judgment, first found the amendments of Bill C-2 were essentially procedural or evidentiary in nature, not substantive in nature. He then went on to conclude that the amendments did not eliminate the Carter defence:

> The Carter defence has not been virtually eliminated, neutered or abolished. It has been changed, but it survives in a different form, subject as always to the ingenuity of defence lawyers and the new jurisprudence that the courts will inevitably enunciate. [para. 26]

Instead, the defence will need to shift its direction to the reliability of the approved instrument by such things as cross-examining the operator, or pointing to an error on the face of the test records or a problem with the alcohol standard solution. In Justice MacPherson's opinion, the amendments merely altered the evidentiary content of a defence and did not remove or eliminate it, therefore the provisions applied restrospectively. The Crown's appeal was allowed and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

SAY WHAT?

PROSPECTIVE - looking towards the future

RETROSPECTIVE - looking backwards

THE 'CARTER DEFENCE'

What is the Carter defence? It is also known as the two drink defence. In the *National Survey of Crown Prosecutors and Defence Counsel on Impaired Driving (June 2009)*, the Carter or two drink defence is described as follows:

> With the "2-drink" defence, the accused suggests that the evidential breath test result must be incorrect because it is incompatible with other evidence (e.g., testimony of the accused or witnesses, receipts to demonstrate the amount of alcohol consumed, etc.). The defence will also often present testimony from an expert witness (e.g., a toxicologist) that, based on evidence of the amount of alcohol the accused reported he/she consumed, the accused's BAC would have been less than that recorded by the evidential test. [at p. 43]

With Bill C-2, the *Tackling Violent Crime Act*, s. 258(1)(c) of the *Criminal Code* was amended on July 2, 2008 to now provide that the result of a driver's lowest breath test is conclusive proof that their blood alcohol concentration at the time of the offence, in the absence of evidence tending to show that:

- ☑ the approved instrument was malfunctioning or was operated improperly,
- ☑ the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood, and
- ☑ the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed.

Furthermore, s.258 (d.01) excludes the following as evidence tending to show that an approved instrument was malfunctioning, was operated improperly, or the analysis was performed improperly:

- ☐ the amount of alcohol that the accused consumed,
- ☐ the rate at which the alcohol that the accused consumed would have been absorbed and eliminated by the accused's body, or
- ☐ a calculation based on that evidence of what the concentration of alcohol in the accused's blood would have been at the time when the offence was alleged to have been committed.

Other Impaired/Over 80 mg% Defences:

Last Drink defence - the accused alleges that their pattern of alcohol consumption was such that the blood alcohol concentration was still rising at the time they were driving and that it had not yet exceeded 80mg%.

Drinking After Driving defence - the accused alleges that they consumed alcohol after driving but before the samples were taken. Thus the reading at the time of driving was actually lower (and below the legal limit) than at the time of test when the alcohol had been absorbed and showed a reading higher than the legal limit.

Bolus (or Mouth Alcohol) defence - the accused alleges that the blood alcohol concentration reading over the legal limit was artificially high due to mouth alcohol arising from alcohol immediately prior to the stop. The observation period before and between each sample makes it unlikely that mouth alcohol is the source of an elevated reading.

Charter Defences

Right to Counsel defence - the accused alleges that the police violated their constitutional right to counsel under s.10(b) of the *Charter* and therefore the breathalyzer readings should be excluded under s.24(2).

s.10(b) Charter - Everyone has the right on arrest or detention ... (b) to retain and instruct counsel without delay and to be informed of that right; ...

Unreasonable Search & Seizure defence - the accused alleges that the police did not have the requisite reasonable suspicion under s.254(2) of the *Criminal Code* for the ASD demand, which then provided the reasonable grounds necessary for the breathalyzer demand and resultant breath samples. Or, the accused alleges that the police officer did not have the requisite reasonable belief to demand a breath sample under s.254(3). If successful, the accused will make an application to have the breathalyzer readings excluded under s.24(2) of the *Charter* resulting from the s.8 breach.

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

Arbitrary Detention defence - the accused alleges they were detained arbitrarily under s.9 of the *Charter* and the evidence flowing therefrom is inadmissible under s.24(2).

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

OTHER NOTE-ABLE REPORT RESULTS

Paperwork - "Lawyers agree that the most compelling evidence, again, in addition to the BAC, comes from the police (e.g., paperwork containing details of the investigation). " (at p. 52)

Video Evidence - "Crown prosecutors and defence counsel note that video at the roadside is almost never available, and video taken during booking or the breath test is available slightly more often. Even though such video is not often available, both Crown prosecutors and defence counsel agree that it can sometimes or often be of considerable value, resulting in a guilty plea, a conviction at trial, or an acquittal." (at p. 52)

DID YOU KNOW

"Lawyers generally agree that impaired driving cases can be challenging to process as they frequently involve more scientific and technical evidence and complex legal arguments, relative to other types of CCC cases. In fact, due to the nature of the evidence, these cases are often considered as challenging as homicides and sexual assaults. As such, the manner in which evidence is collected, documented, and presented in Court can significantly impact outcomes." -*National Survey of Crown Prosecutors and Defence Counsel on Impaired Driving* (June 2009) at p. 51-52.

Evidence of Impairment - "A majority of Crown prosecutors across jurisdictions (50-70%) believe that police officers rely too heavily on the BAC result (CCC s. 253(b)) as evidence of impairment, to the detriment of other evidence related to behavioural signs of impairment. As a result, Crown must more often proceed on the 'over 80' charge instead of the 'impaired driving' charge. Unfortunately, when cases are challenged in Court and the results of the breath test are brought into question, the Crown do not often have behavioural evidence to demonstrate the defendant was impaired and prove any impaired driving charge (CCC s.253 (a)). So when the breath result is challenged by defence counsel, prosecutors encounter substantial difficulty proving the case beyond a reasonable doubt and these cases can result in an acquittal despite a positive BAC reading based on a two tier evaluation and a certificate from the breath technician." (p. 53)

Police Training - "To facilitate the accurate and relevant collection of evidence and its presentation in Court, a majority (85%) of prosecutors agreed that police officers can benefit from more training in the

enforcement of impaired driving laws as well as in giving Court testimony." (p. 54)

Case Preparation - "[T]he survey revealed that defence counsel spend at least twice as many hours, and in some instances, four times as many hours preparing for impaired driving cases as do Crown." (p. 63)

Conviction Rate - "The average overall conviction rate (including plea agreements, guilty pleas and convictions at trial) for impaired driving cases is 78%. This is comparable to a recent Statistics Canada study revealed that Criminal Code traffic offences had findings of guilt in almost 80% of cases (CTV 2008). ... Based on the findings from this survey, a majority of jurisdictions report an overall estimated conviction rate of 72%-73%. Higher overall conviction rates are reported in the Saskatchewan, Manitoba and Northwest Territories region (86%) and the Atlantic region (90%). Nationally, the average overall conviction rate for impaired driving cases is 78%." (p. 65)

Reasons for Acquittal - "More prevalent issues related to acquittals are linked to procedures and practices followed by police during an investigation and arrest ... More than 1/3 of prosecutors and defence counsel (37% and 43% respectively) agree that improper procedures by arresting officers are always or often a problem. Defence counsel is somewhat more likely to report that officers did not have reasonable suspicion for an ASD demand; 17% of Crown and 26% of defence counsel say that officers always or often do not have reasonable and probable grounds for an evidential breath or blood test. Errors in police paper work were cited by prosecutors and defence counsel as always or often an issue in 13% and 16% of cases respectively. Prevalent issues related to acquittals are linked to procedures and practices followed by police during an investigation and arrest." (p. 68)

"The Charter issues most frequently raised include: officers not having reasonable and probable grounds (RPG) for arrest, section 8 pertaining to search and seizure, section 9 involving the right not to be arbitrarily detained, and section 10(b) which is the right to retain and instruct counsel without delay. Occasional and infrequent references to other Charter sections were noted, but not raised as serious concerns." (p. 71)

Training, Training & More Training - "Impaired driving cases are complex due to the nature of intersecting scientific, legal and constitutional issues. Case law in this area has grown exponentially, making it difficult for police and lawyers to keep abreast of current decisions. ...

It cannot be overlooked that, while *Charter* issues pose a considerable challenge in the processing of impaired driving cases, this is not unusual. In fact, these issues impact a broad cross-section of cases and will likely continue to do so in the future. However, efforts can be taken to minimize their impact by ensuring that police are aware of relevant cases as the law evolves, and understand what impact these decisions will have on their investigative procedures. Crown and defence counsel can play a significant role in ensuring that officers are well-equipped to navigate constitutional issues in the future.

The findings also suggest that the processing of cases can be improved with some practical measures. To begin, Crown and police can benefit from more consistent and sustained institutional efforts regarding education and training in this area, particularly in light of the rapidly evolving jurisprudence. Some jurisdictions have more ongoing and comprehensive initiatives than others however, they are frequently ad hoc and informal. Unfortunately, educational and training efforts are driven internally, often as a function of policy, available resources, and competing priorities. To this end, better and more consistent education and training initiatives for practitioners on impaired driving issues can help agencies move collectively towards reducing or eliminating cases in which evidentiary issues lead to an acquittal." (p. 108)

Complete report available at:

http://www.tirf.ca/publications/PDF_publications/Lawyers_Survey_Report_Final_2009.pdf

Did You Know

"Today, defendants are willing to go to trial because the potential payoff is significant. One commonality that cannot be overlooked is the distinct willingness of people to fight to avoid a criminal conviction as well as the one year driving prohibition. These findings clearly demonstrate that, in the face of such severe penalties, many of those accused of impaired driving see the penalties as an incentive to go to great lengths to avoid a conviction, which has substantial implications for the ability of the justice system to manage such cases in its current form." -*National Survey of Crown Prosecutors and Defence Counsel on Impaired Driving* (June 2009) at p. 111.

REQUEST FOR DRIVER TO EXIT VEHICLE IS NOT COMPELLED PARTICIPATION IN ROADSIDE TESTS

R. v. Quenneville, 2009 ONCA 325

At about 2:20 a.m. in mid-December a police officer saw a vehicle travelling at an abnormally slow speed. The officer followed the vehicle and activated his emergency lights to stop the vehicle, but the vehicle continued for about two blocks after the emergency lights were activated and then turned into a residential driveway and stopped. The officer approached the driver's side of the vehicle and the driver opened his door. A smell of alcohol was detected and the driver was requested to produce his driver's license, insurance and ownership papers. The driver's speech was slurred and he was asked to exit the vehicle, stumbled while getting out. The driver placed his hand on the ground when he stumbled and when he attempted to stand up, he stumbled backwards into his vehicle and could not stand without leaning on his vehicle.

At trial in the Ontario Court of Justice the police officer testified that he stopped the vehicle for a sobriety check given the hour (2:20 a.m.), the abnormally slow driving speed and the time of year (holiday season) he suspected the driver might be impaired. The driver not immediately stopping reinforced his suspicion. The accused was convicted of impaired under s.253(a) of the *Criminal Code*.

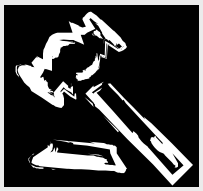
The accused appealed to the Ontario Superior Court of Justice submitting that the evidence observed by the police officer when he was ordered to exit the vehicle was not admissible. The appeal judge found that if the accused had exited the vehicle voluntarily then the stumbling evidence would have been admissible. On the other hand, if the accused exited the vehicle pursuant to a demand for sobriety screening pursuant to s.48(1) of the *Highway Traffic Act* then it could not be used as evidence of impairment at trial. The Crown argued that asking the accused to exit his vehicle and observing the manner in which he did was not a sobriety screening test, analogizing the order to exit the vehicle to the order to produce the driver's documents. The appeal judge rejected this analogy noting that the officer was authorized by law to request the driver's documents and, other than pursuant to s.48(1) of the *Highway Traffic Act* or for officer safety, he had no authority to ask the accused to exit his vehicle. Since the trial judge failed to address the admissibility of the stumbling evidence (which may or may not have been admissible), the accused's appeal was allowed and a new trial was ordered.

The Crown then appealed to the Ontario Court of Appeal which restored the accused's conviction at trial. "The line drawn ... as to the limitation on the use of evidence acquired at the roadside, is evidence obtained through the 'compelled direct participation' in sobriety trials," said the Court in a short endorsement. "The observations made as the [accused] exited his vehicle, even in response to a direction from the officer, is not compelled direct participation in the roadside tests so as to attract the limitation on use."

Complete case available at www.ontariocourts.on.ca

LEGALLY SPEAKING:

Admissibility of Non Compelled Roadside Observations



"I have concluded that the provisions allowing for a breach of the motorist's s. 10(b) rights at the roadside would not be saved under s. 1 if the evidence resulting from compelled participation in the tests -- designed to firm up mere suspicion of impairment or a blood-alcohol level exceeding 80 mg. -- could be used for trial purposes to incriminate and convict a motorist of either offence. I wish to make it clear that this conclusion applies only to evidence obtained from compelled direct participation by the motorist in roadside tests authorized by s. 48(1) of the HTA, specifically designed to determine impairment or a blood-alcohol level exceeding 80 mg. I am not referring to observations the officer might make of the driver while carrying out other authorized duties. Thus, by way of example, an officer may observe signs of impairment in a driver, such as a strong odour of alcohol, blood-shot and glassy eyes, dilated pupils, slurred speech, unsteadiness of gait upon the driver exiting the vehicle, or other similar signs. These observations would be admissible at trial to prove impairment." - Ontario Court of Appeal Justice Moldaver in *R. v. Milne* (1996), 107 C.C.C. (3d) 118 (Ont.C.A.) .

BY THE BOOK:

s. 48(1) Ontario's *Highway Traffic Act*

s.48(1) A police officer, readily identifiable as such, may require the driver of a motor vehicle to stop for the purpose of determining whether or not there is evidence to justify making a demand under section 254 of the Criminal Code (Canada).

CONTINUED SEARCH AFTER DISAVOWING SAFETY RATIONALE INAPPROPRIATE

R. v. Aselford et al., 2009 ONCA 28

After stopping a vehicle a police officer saw guns in plan view in the back seat. The accused told the officer that the guns were toys, which the officer confirmed, but she continued searching the vehicle anyways. The officer subsequently located a bag of marihuana and the accused was charged.

At trial in the Ontario Court of Justice the officer testified that once she knew the guns were toys she "didn't need to investigate further." The evidence was clear that the discovery of the toy guns and the

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marihuana were not simultaneous and the officer did not have reasonable grounds to search the vehicle. The trial judge concluded that the continuation of the search after the guns were ascertained to be toys was completely inappropriate and the police breached the accused's *Charter* rights. The marihuana was excluded as evidence and the accused was acquitted.

The Crown then appealed to the Ontario Court of Appeal arguing the discovery of the marihuana was legal because the officer safety rationale allowed the officer to continue the search. However, as the Court of Appeal noted, the officer disclaimed a safety rationale for continuing the search when she confirmed the guns were toys. Unless the officer seized the toy guns and marihuana at the same time, the officer needed reasonable grounds to continue the search after learning the guns were toys, which she did not have. The Ontario Court of Appeal upheld the s.8 breach as well as the trial judge's s. 24(2) analysis. The Crown's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

CHARTER ARGUMENT NOT RAISED AT TRIAL DISMISSED ON APPEAL

R. v. Sterling, 2009 ONCA 65

The police entered an apartment with the permission of a homeowner and subsequently charged the accused, who was found therein. The accused argued his *Charter* rights were breached but the Ontario Superior Court of Justice held the accused did not have a reasonable expectation of privacy in the apartment and the police entered with the permission of the homeowner. The accused was convicted and sentenced to 4½ years in prison.

The accused then appealed to the Ontario Court of Appeal, attempting to re-characterize his *Charter* claim to now argue that he was subjected to an investigative detention, that he was unlawfully searched, and that his s.10(b) rights were breached.

The Court of Appeal refused to hear the arguments about detention and the right to counsel because they were not raised at trial. However, even if the accused was detained for investigation the police actions did not amount to a search:

- the accused's clothing and appearance were in plain view;
- the accused was asked for identification and provided it;
- the police did not do a pat-down search of the accused until after his arrest; and
- although the accused answered some police questions, he eventually refused to answer them or to cooperate with the police.

And even if the accused's s.8 *Charter* rights were breached the evidence was nonetheless admissible under s.24(2). The accused's conviction and sentence appeals were dismissed.

Complete case available at www.ontariocourts.on.ca

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