JIBC

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

IN MEMORIAM

On March 1, 2010 36-year-old Peel Regional Police Service Constable Artem (James) Ochakovsky was killed in an automobile accident in Brampton, Ontario. He was on patrol when his vehicle collided with another vehicle at an intersection.

Constable Ochakovsky had served with the agency for two years. He is survived by his wife and 3-year-old son.

Source: Officer Down Memorial Page available at www.odmp.org/canada

On March 8, 2010 37-year-old Ontario Provincial Police Constable Vu Pham was shot and killed while making a traffic stop in a rural area near Leadbury, Ontario.

He was responding to a call when he stopped the vehicle. The 70-year-old driver of the car immediately opened fire on Constable Pham. Over 25 shots were fired in the subsequent exchange in which Constable Pham was fatally wounded.

The suspect was shot and wounded by other officers a short time later.

Constable Pham was transported to London Health Sciences Centre, where he succumbed to his wounds.

Constable Pham had served with the Ontario Provincial Police for 15 years. He is survived by his wife and three children.

Source: Officer Down Memorial Page available at www.odmp.org/canada

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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

Note-able Quote

"A jury consists of twelve persons chosen to decide who has the better lawyer." - Robert Lee Frost.

DID YOU KNOW...

...that the Supreme Court of Canada took, on average, 7.4 months to render a judgment after they heard arguments on an appeal. For more information on other 2009 Supreme Court statistics see page 26.

EVIDENCE OF MARIHUANA GROW OPERATION ADMISSIBLE DESPITE CHARTER BREACH

R. v. Ngai, 2010 ABCA 10

Police received a Crime Stoppers tip of suspicious activity at the accused's home—no one appeared to live in the house, an Asian male driving a Jaguar had visited the residence, the windows were covered, and there was condensation on basement windows and the back door. Physical reconnaissance was conducted and police saw corrugated plastic covering the lower windows of the house and a brown stain running down the siding. The accused's phone number corresponded to a residence where other residents had been charged with drug related offences. On request by police, a digital recording ammeter (DRA) was attached to the electrical supply line for the house, which was outside the property line. The DRA recorded an approximate 18-hour cycling pattern, consistent with a marijuana grow operation. The listed utilities subscriber for the residence was not the accused, but shared the same phone number. This listed subscriber did not appear to be a real person and was also the listed utilities subscriber for another residence which police had previously been searched and found to contain 778 marihuana plants. The police applied for and obtained a search warrant, locating a 1,600 plant sophisticated grow operation within.

At trial in the Alberta Court of Queen's Bench the accused argued, among other grounds, that the police violated his s.8 *Charter* right to be secure against unreasonable search or seizure because the DRA was installed without a warrant. He submitted that the definition of "customer information" in Alberta's *Code of Conduct Regulation* (*Regulation*), enacted pursuant to the *Electrical Utilities Act*, permitted a utility to disclose data relating to electrical consumption to the police, but such data did not include DRA information. Thus, in his view, the police required a warrant unless they had a customer's consent. The Crown, on the other hand, contended that the legislation permitted the use of DRAs and external searches for information about the home which might give rise to an inference about what was going on inside, depending on other available evidence. Furthermore, the Crown suggested that there was no reasonable expectation of privacy in computerized electrical consumption records because they did not reveal intimate details about the personal life, lifestyle or private decisions of the occupant. The Crown did, however, concede that without the DRA evidence there would not be enough grounds to justify the issuance of the search warrant.

The trial judge ruled that the *Regulation* permitted the use of a DRA and concluded there was no invasion of privacy interests through its use. There was no breach of the *Charter* and the evidence obtained pursuant to the search warrant was admissible. The accused was convicted of unlawful possession and unlawful production of marihuana.

The accused then appealed to the Alberta Court of Appeal. Based on the Alberta Court of Appeal's judgment in *R. v. Gomboc*, 2009 ABCA 276 (see Volume 10, Issue 1 of this publication), which had not been decided at the time this case originally went to trial, the Crown took the position that the information obtained from the DRA was subject to a reasonable expectation of privacy and using it to collect the electrical data was an unreasonable search under the *Charter*. Furthermore, it agreed that the *Regulation* could not authorize the seizure of evidence in criminal matters in the absence of judicial authorization. Nonetheless, the Crown argued that the evidence was admissible under s. 24(2).

The admissibility of evidence analysis under s.24(2) directs courts to balance the effect of admitting the evidence on society's confidence in the judicial system. This analysis consists of a three stage examination:

1. the seriousness of the *Charter* infringing state conduct (admission may send the message the justice system condones serious state misconduct);

2. the impact of the breach on the *Charter* protected interests of the accused (admission may send the message that individual rights count for little); and

3. society's interest in the adjudication of the case on its merits.

Seriousness of the Charter infringement

In this case the police obtained the DRA information without a search warrant. However, at the time the warrant was obtained the requirement for a search warrant for DRA information was unsettled. The courts were divided as to whether or not a warrant was required and there was no definitive binding case law from either the Supreme Court of Canada or the Alberta Court of Appeal. As well, the police had noted many indicia consistent with the house being utilized as a marijuana grown operation. Thus, the search was not egregious and was not a "suspicion-based search". Instead, it was a retroactive warrantless search.

Impact on Charter protected interests

The house was not the accused's residence. No one lived there and the the information revealed by the DRA did not reveal "any part of the biographical core of personal information" related to the accused. The use of the DRA information was minimally intrusive with respect to a building that was not being utilized as the accused's residence.

Society's interest in adjudication

The 1,600 marijuana plants was highly relevant and reliable evidence and its exclusion could undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute. The evidence was critical and virtually conclusive of guilt. And "the actions of the police did not represent a 'brazen and flagrant' disregard of the Charter," said the Court. "Rather the police were attempting to do their best in the face of legal uncertainty."

In admitting the evidence, the Court stated:

> We conclude that the police conduct in this case was not egregious but rather at most consistent with one line of judicial authority as opposed to another, a situation compounded by the then conflicting practices of the Provincial Court judges in Calgary. We also note that the DRA information in question did not relate to the [accused's] residence nor did it reveal any part of his biographical core of personal information. Finally, the societal interest in seeking the truth and having admitted into evidence strong, cogent and reliable evidence favours its admission. [para. 54]

The accused's appeal was dismissed and his conviction was affirmed.

Complete case available at www.albertacourts.ab.ca

WARRANTLESS VEHICLE SEARCH PROPER AS INCIDENT TO ARREST

R. v. Tosczak, 2010 SKCA 10

Following a routine traffic stop, a police officer approached the open driver's window of the vehicle and detected an odour of raw marijuana. He also detected a strong smell of body spray, which he believed was used to mask the odour of marijuana. He obtained the accused's driver's licence and registration, returned to the police car and ran the usual checks, found nothing untoward, and then returned to the accused's vehicle. He leaned on the edge of the window, smelled a strong odour of raw marijuana, and saw a can of spray deodorant on the floor. Believing he had reasonable grounds to arrest the accused for possession of marijuana, he asked him if he had anything illegal in the vehicle or on his person. The accused handed him a roach and he was arrested for possessing marijuana. The officer conducted a pat-down search and located a package of marijuana in the accused's jacket. The accused was then placed in the police car and informed of his right to counsel. The officer then searched the interior of the vehicle, finding a wooden stash container, a joint, another small roach, and a notebook he suspected contained entries of drug transactions. He then opened the

trunk and unzipped a duffle bag that smelled strongly of raw marijuana, finding several ziploc bags of marijuana, another bag of marijuana, and a set of scales. The accused was then informed he was now under arrest for possessing marijuana for the purpose of trafficking and again was informed of his right to counsel.

At trial in Saskatchewan Provincial Court the accused was convicted of possessing marijuana for the purpose of trafficking and sentenced to two years less a day (to be served in the community), his vehicle was forfeited, and he was prohibited from possessing firearms for a period of ten years. The accused then appealed to the Saskatchewan Court of Appeal alleging the trial judge failed to find that the police officer had violated his rights under ss.8 and 10(b) of the *Charter*.

Search

Justice Cameron, authoring the unanimous opinion of the Court, found the pat-down search of the accused's person following his arrest outside the vehicle amounted to a reasonable search because it was conducted lawfully and reasonably as a search incidental to a lawful arrest, as was the subsequent search of the vehicle. "The search of the vehicle, although conducted without warrant, was not unreasonable," said Justice Cameron. "This search was 'truly incidental' to the lawful arrest of the [accused] for possession of marijuana." He continued:

> We say that because the police officer searched the vehicle almost immediately after the arrest and did so with a view to both discovering additional evidence and protecting evidence from destruction. Those were his purposes. And he believed that one or the other of them would be served by the search, a belief that was reasonable in the circumstances. In short, he was attempting to achieve a valid purpose connected to the arrest and had a reasonable basis for doing so. Hence, we share the view of the trial judge that the search of the vehicle was reasonable. [para. 10]

Right to Counsel

The accused submitted that his initial detention under and for the purposes of Saskatchewan's *Traffic Safety Act* turned into a drug-related investigative detention and, at that point, the police officer was required to inform him immediately of the reason for the detention and of his right to consult counsel. When the police officer returned to the accused's vehicle following the registration check, he believed he had reasonable grounds to arrest the accused and therefore the detention turned into a drug-related investigative detention and the officer was under a duty to comply with s.10(b) of the *Charter* before asking whether the accused had anything illegal in the vehicle and receiving the roach in response.

Even assuming, without deciding, that the officer was required to advise the accused of his right to counsel as suggested by defence, the Court of Appeal would not set aside the conviction because the evidence discovered by the police officer during the search of the vehicle was nevertheless admissible under s.24(2) of the *Charter*. First, the evidence was not "obtained in a manner" that infringed the accused's s.10 rights, for it was "difficult to see any meaningful nexus between such breach as may have occurred and the discovery of this evidence." Second, having regard for the revised approach to s.24(2) the evidence should not be excluded because its admission would not bring the administration of justice into disrepute. "When this case arose, the case law was uncertain about what constitutes detention, was in a state of flux about whether the police had to comply with [s.]10 on investigative detentions, and was inaccurate about whether the police had to comply with [s.]10 immediately or only after an appropriate interlude," said Justice Cameron. "We also observe that the police officer in this case in fact complied with [s.]10 and did so in a manner he thought was consistent -- and indeed was consistent -- with the law as it stood at that time." The accused's appeal was dismissed.

Complete case available at www.canlii.org

VEHICLE SEARCH INCIDENT TO OFFENCE FOR WHICH DRIVER ARRESTED

R. v. Volk, 2010 SKCA 3

After stopping the accused for speeding past an emergency vehicle at 1:27 pm., a police officer approached the driver's side of the car and immediately smelled raw cannabis marihuana emanating from the interior of the vehicle. Meanwhile, his partner had approached the passenger side, engaged the passenger in conversation, and also smelled marihuana. The accused was told that he was being stopped for a traffic violation and, on request, produced a license and registration. The two officers moved to the rear of the vehicle where they indicated to each other they had smelled marihuana coming from the inside of the car. The officer asked the accused to exit the vehicle, and told him that marihuana could be smelled and that it was believed to be in the vehicle. The accused was arrested for transporting a controlled substance and provided with his *Charter* rights and police warning at 1:32 pm. The officer said he would be searching the car. The accused indicated he wanted to contact a lawyer, but the officer did not allow it citing safety and privacy concerns - even though he had a cell phone. The officer nonetheless asked the accused some questions about marihuana. The accused subsequently entered the car and produced three baggies weighing 21 grams. Police then fully searched the vehicle, including the trunk, and found 14.5 pounds of marihuana and 180 grams of psilocybin. The accused was re-arrested for possessing marihuana for the purpose of trafficking and was again *Chartered* and warned. He was transported to the police detachment and given an opportunity to call counsel at about 2:37 pm.

At trial in the Saskatchewan Court of Queen's Bench the judge found the initial stop for the traffic infraction was lawful. He believed the officers had smelled marihuana and held there were ample grounds for the arrest. Because of the odour the officers subjectively believed that the accused was in possession of marihuana and there were also objective grounds for this belief – the officer's extensive experience and ability to distinguish between raw and smoked marihuana. As well, the officers independently came to this conclusion based on their interactions with the driver and the passenger. There was no need to advise the accused that he was being detained for a drug investigation as soon as the marihuana odour was detected. There were only five minutes between the stop and the arrest, during which the accused was asked for his license and registration, told about the traffic violation, the officers conferred, and then returned to asked the accused to exit.

The trial judge also ruled that the accused's right to counsel had not been breached. The hour and 13 minute delay was not inordinate considering the 30 kms. from the scene to the detachment. Nothing was discovered during this time and the search would have occurred in any event. And even if there was a breach, the evidence was still admissible under s. 24(2) of the *Charter*. The accused was convicted of having marihuana and psilocybin in his possession for the purpose of trafficking contrary to s.5(2) of the *Controlled Drugs and Substances Act* and was sentenced to an 18-month conditional sentence order, a 10-year firearms prohibition, a DNA order, a forfeiture order, and a $100 victim surcharge. The accused then appealed to the Saskatchewan Court of Appeal submitting his rights under ss. 8, 9 and 10 of the *Charter* were breached and the evidence should have been excluded under s.24(2).

Section 9

Justice Ottenbreit, writing the opinion for the unanimous court, found there was no investigative detention:

> It was common ground that the initial traffic stop was a valid one. It was not necessary for the police officer to immediately advise [the accused] upon smelling the marihuana emanating from the vehicle that he was being detained for a drug investigation. The trial judge was correct in observing that in the five minutes between the time of the stop and the arrest of [the accused] for transportation of marihuana,

> the officers were dealing with the traffic stop element only and the investigation was converted into a drug investigation only after the officers consulted at the rear of [the accused's] vehicle. [The police officer] immediately thereafter advised [the accused] that he believed that he had marihuana in the car and arrested him. [para. 14]

As for the arrest, it too was lawful. The accused conceded that there were objective reasonable grounds for the arrest and the subjective belief that the accused was in possession of marihuana was also present. "Both testified that they smelled what they believed to be raw marihuana in the vehicle and believed the vehicle was transporting marihuana," said the Court. "The two officers had sufficient subjectively reasonable grounds for the initial arrest and, therefore, s. 9 of the Charter had not been breached and that the arrest was lawful."

Section 8

Since the arrest was lawful, the search of the car was also lawful as an incident to the arrest:

> [A] police officer has a common law right to search an arrested person incidental to that arrest. The officer does not require additional reasonable grounds, as the authority for the search is derived from the lawful arrest. This right to search includes a search of the surroundings and the seizure of anything found there. [para. 16]

This common law search power also authorizes the warrantless search of a vehicle incident to a lawful arrest:

> There was ample evidence before the trial judge by which he could conclude that the search of the vehicle was incident to [the accused's] arrest and was therefore valid. The trial judge concluded, based on the overwhelming smell of marihuana in the vehicle, that the officers subjectively believed [the accused] was liable to arrest and arrested him. The officers testified that it was their view that a search warrant was not necessary as the accused had been arrested. Upon arrest [the accused] was advised that the car would be searched. The search of the vehicle was clearly incident to the very offence for which he had been arrested. [para. 18]

Thus, there was no s.8 breach.

Section 10

Once the traffic stop was dealt with, the accused was immediately informed of why he was being arrested and given his rights to counsel and police warning. After the drugs were found in the trunk, he was re-arrested and given his rights again. He was promptly and appropriately informed of the reasons for his arrest and s.10(a) had not been breached.

However, s. 10(b) was breached by the police. After the accused requested to speak to counsel the officers asked him questions and attempted to elicit information from him about the drugs. The accused was diligent in communicating his desire to talk to counsel and once he indicated that he wished to talk to counsel, any further questioning should have been delayed until he had the opportunity to do so. "Because he could not contact counsel at the place of the police stop, it was incumbent on the police officers to first afford him these rights before questioning," said the Court. However, despite the s. 10(b) right, there was no causal connection between the breach and the discovery of the drugs in the trunk. The search would have proceeded and the drugs would have been found in any event. The accused's statements about drugs, and his subsequent retrieval of the baggies did not assist the officers in finding the drugs in the trunk or prejudice his legal position in respect of those drugs. The police officers would have searched the vehicle after concluding they had smelled marihuana emanating from it.

Section 24(2)

Despite the s.10(b) breach, the evidence was admissible. The only marihuana that was discovered as a result of the unlawfully obtained statement was 21 grams of marihuana from the car. No statements led to the finding of the marihuana and psilocybin in the trunk. In deciding whether evidence is admissible under s. 24(2) a court must consider and balance: (1) the seriousness of the *Charter* infringing

state conduct; (2) the impact of the breach on the *Charter* protected interests of the accused; and (3) society's interest in the adjudication of a case on its merits.

In this case, eliciting information from the accused after he had indicated he wished to speak to a lawyer was a serious infringement of the accused's s. 10(b) right. The police officers were relatively experienced and presumably knew that the accused should be afforded an opportunity to speak to a lawyer before questioning him. However, the evidence indicates that neither officer was abusive or acting in bad faith and the questioning was limited. The search incident to arrest was in good faith.

As for the the impact of the s.10(b) breach on the *Charter* protected interests of the accused, it was at the lower end of the scale. "The drugs were not derivative evidence," said Justice Ottenbeit. "There was no causal link between the drugs found in the trunk of the vehicle and the statement elicited from the accused. There is a lower expectation of privacy with respect to a vehicle than in a home since a driver knows that he may be stopped for reasons of highway safety. This was not a case where the dignity or personal integrity of the accused was breached."

And finally, society's interest in the adjudication of the case favoured admission:

> The drugs found are not derivative evidence. The evidence is real or physical and the reliability of the evidence in this case is therefore unquestioned. The drugs formed almost the entirety of the case and were of crucial importance to the Crown's case. In our view, the exclusion of the drugs in this case may impact negatively on the repute of the administration of justice. The public interest in having a trial adjudicated on its merits is high and favours admission. [para. 30]

The evidence was admissible and the accused's appeal was dismissed.

Complete case available at www.canlii.org

TRUTH IN SENTENCING ACT GETS GREEN LIGHT

Effective February 22, 2010 Bill C-25, *Canada's Truth in Sentencing Act* came into force. This Act amends the *Criminal Code* to specify the extent to which a court may take into account time spent in custody by an offender before sentencing. Now, under s. 719(3) of the *Criminal Code*, a judge shall limit any credit for time spent in custody to a maximum of one day for each day spent in custody. However, under s.719(3.1) a court may give one and a half (1½) days for each day spent in custody if the circumstances justify it. A judge is also required to give reasons on the record for any credit granted and there are some changes to filling out the warrant of committal to reflect sentences imposed and the credit given.

Former s.719 (3) Criminal Code - In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence.

Replaced by:

New provision - s.719(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

(3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

(3.2) The court shall give reasons for any credit granted and shall cause those reasons to be stated in the record.

(3.3) The court shall cause to be stated in the record and on the warrant of committal the offence, the amount of time spent in custody, the term of imprisonment that would have been imposed before any credit was granted, the amount of time credited, if any, and the sentence imposed.

(3.4) Failure to comply with subsection (3.2) or (3.3) does not affect the validity of the sentence imposed by the court.

RESEARCH REPORTS VIEWS

Domestic Violence

"Domestic violence is different from other crimes because the victim usually has had, or is currently in, an intimate relationship with the abuser. Domestic violence is a power-based crime, most often based on gender. The power and control dynamics make this crime particularly dangerous for the victim and uniquely challenging for the justice system. The likelihood of repeat violence is high; the abuser is known ahead of time; the victim's ties with the abuser are complex, typically not ending with intervention; and often the victim's fears of proceeding result in retractions of her initial report. Furthermore, whenever the woman has dependent children, any risk to the mother is a risk to the children. Given victims' particular vulnerability at this time, it is crucial to take into account issues of cultural or other forms of diversity that may make it especially challenging for victims to access services to keep them and their children safe." *Domestic Violence Response: A Community Framework for Maximizing Women's Safety*, developed by Victim Services and Crime Prevention Division, Ministry of Public Safety and Solicitor General, (January 2010), at p. 1. *www.pssg.gov.bc.ca/victim_services/publications/docs/domestic-violence-response.pdf*

Note-able Quote

"Above all, I would teach him to tell the truth ... Truth-telling, I have found, is the key to responsible citizenship. The thousands of criminals I have seen in 40 years of law enforcement have had one thing in common: Every single one was a liar." - J. Edgar Hoover

ENTRAPMENT: LEGITIMATE INVESTIGATION DID NOT PROVIDE OPPORTUNITY TO COMMIT CRIME

R. v. Imoro, 2010 ONCA 122

After receiving an anonymous tip that a man was selling drugs on the 12th floor of an apartment building, police decided to investigate and an undercover officer went to the apartment building and took the elevator to the 12th floor. When the elevator doors opened, the accused approached the officer and said, "Come with me." The officer responded, "You can hook me up?" and the accused answered, "Yeah man." He led the officer and another man, who had been on the elevator with the officer, to his apartment. Once inside, the accused sold some marijuana to the other man and then asked the officer what he needed. The officer said "hard", meaning crack cocaine, but the accused said that he had only "soft", meaning powdered cocaine. The officer asked for $40 worth and was provided with a bag of cocaine from some prepackaged supplies. The officer used police 'buy money' to make the deal. The next day, the officer went back and the accused opened the door, greeted the officer, and sold him another $40 worth of cocaine. Police then obtained a search warrant for the apartment and seized cocaine, marijuana, and the police 'buy money'. The accused was arrested and charged with two counts each of trafficking in cocaine, possessing controlled substances (cocaine and marijuana) for the purpose of trafficking, and possessing proceeds of crime.

In court, the accused plead not guilty, claimed entrapment, and brought a motion to exclude the evidence or stay the proceedings. The Ontario Superior Court Justice concluded that the conduct of the undercover officer amounted to entrapment. She found entrapment occurred at the time of the initial contact between the undercover officer and the accused. The officer's question, "Can you hook me up?" was the first reference to drugs raised by the officer (the accused made no prior offer), amounted

to giving the accused an opportunity to sell drugs and was done when the officer did not have reasonable suspicion that the accused was engaged in drug trafficking. The trial judge then excluded the seized drugs and buy money under s.24(2) of the *Charter* and the accused was acquitted.

The Crown then argued before the Ontario Court of Appeal that the trial judge erred in finding that the accused was entrapped by police into committing drug trafficking offences.

Entrapment

Although the police must have considerable leeway in the techniques they use to investigate criminal activity - especially consensual crimes such as drug trafficking where traditional techniques may be ineffective - their powers of investigation cannot be untrammeled. Thus, the doctrine of entrapment reflects judicial disapproval of unacceptable police or prosecutorial conduct in investigating crimes. "In their efforts to investigate, deter and repress crime, the police should not be permitted to randomly test the virtue of citizens, or to offer citizens an opportunity to commit a crime without reasonable suspicion that they are already engaging in criminal activity, or worse, to go further and use tactics designed to induce citizens to commit a criminal offence," said Justice Laskin, writing the Court of Appeal's opinion. "To allow any of these investigative techniques would offend our notions of decency and fair play."

"In their efforts to investigate, deter and repress crime, the police should not be permitted to randomly test the virtue of citizens, or to offer citizens an opportunity to commit a crime without reasonable suspicion that they are already engaging in criminal activity, or worse, to go further and use tactics designed to induce citizens to commit a criminal offence. To allow any of these investigative techniques would offend our notions of decency and fair play."

Entrapment can occur in two ways:

1. when the police, acting without reasonable suspicion or for an improper purpose, provide a person with an opportunity to commit an offence. To make out entrapment under this prong the court must find that the police provided an opportunity to commit an offence and that they did so without reasonable suspicion.

2. even having reasonable suspicion or acting in the course of a good faith inquiry, the police go beyond providing an opportunity to commit a crime and actually induce the commission of an offence.

When entrapment is found "the court will not allow the Crown to maintain a conviction because to do so would be an abuse of process and bring the administration of justice in disrepute." A claim of entrapment involves a two-stage trial. Because the doctrine of entrapment does not put the accused's culpability into issue, but the conduct of the state, the judge (or jury) must first determine whether the accused is guilty of the crime (has the Crown discharged its burden of proving beyond a reasonable doubt all the essential elements of the offence?) If the accused is guilty then the judge moves to the second stage to consider entrapment. If the claim of entrapment is successful the standard remedy is for a court to enter a stay of proceedings.

Although the officer did not have a reasonable suspicion that the accused was engaged in drug trafficking when the officer asked "Can you hook me up?", Justice Laskin found the question did not provide the accused with an opportunity to sell drugs. Here the trial judge erred in properly distinguishing "between legitimately investigating a tip and giving an opportunity to commit a crime":

> By the question "Can you hook me up?" all the officer really asked [the accused] was whether he was a drug dealer. The question was simply a step in the police's investigation of the

> anonymous tip. It did not amount to giving [the accused] an opportunity to traffic in drugs. That opportunity was given later when the officer and his fellow passenger in the elevator were inside [the accused's] apartment. By then, having observed a drug transaction between [the accused] and the other man, the officer certainly had reasonable suspicion – indeed virtually certain belief – that [the accused] was engaged in drug trafficking. [para. 16]

Thus, no entrapment occurred, the acquittals were set aside, verdicts of guilty were entered, and the case was returned to the trial court for sentencing. And although the Ontario Court of Appeal refused to decide whether a remedy of exclusion under s.24(2) of the *Charter* was appropriate on a finding of entrapment, it tended to agree with the Crown's submission that resort to s.24(2) distorted the underpinnings of the entrapment doctrine:

> ... I think the Crown's contention has merit. A court considers s. 24(2) of the Charter where the state has improperly obtained evidence of an offence. A court considers entrapment where the accused alleges the state has improperly brought about the commission of the offence. Under s. 24(2), the court must determine whether the admission of the evidence would compromise the fairness of the trial. On a claim of entrapment, the court does not consider the fairness of the trial, but instead whether it was fair that there was a trial. These considerations suggest that a s. 24(2) remedy is ill-suited for a finding of entrapment. [para. 28]

Complete case available at www.ontariocourts.on.ca

Section Twenty-Four Two Review

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

GOING BEYOND BARE DUTIES DOES NOT NECESSARILY VIOLATE RIGHT TO COUNSEL

R. v. Wolbeck, 2010 ABCA 65

After seeing a vehicle cut a "donut" on a gravel road, a county constable followed the vehicle and pulled it over. The accused had glassy eyes, slurred speech and was rummaging through some documents. When asked, he said that he had consumed alcohol. The accused was *Chartered* and cautioned, indicated he understood his rights, and said he wanted to call a lawyer. The county constable called the RCMP and an RCMP officer arrived about 10-15 minutes later. He approached the accused, advised him that he was conducting an impaired driving investigation, and formed the opinion that the accused had been operating a motor vehicle while impaired. The accused was arrested, read the breathalyzer demand, and given the various cautions. He asserted his right to counsel, was transported to the police detachment, and was placed in a telephone room. As requested, the officer dialed the number for legal aid and handed the phone to the accused, who was left in the phone room to complete his telephone conversation in private. He subsequently provided breath samples and was charged with impaired care or control and over 80mg%.

At trial in Alberta Provincial Court the accused did not testify. The judge found that the accused had asked the officer to assist in contacting Legal Aid. There was no evidence that the accused did not want to call Legal Aid and wanted to call someone else. He had the opportunity to use a telephone book and to tell police if he was having problems contacting his counsel of choice. There was no s. 10(b) *Charter* breach and the results of the breath tests and certificate of analysis were admitted. The accused was convicted under s.253(b), over 80mg%. The impaired charge under s.253 was stayed.

On appeal to the Alberta Court of Queen's Bench the accused was acquitted. The appeal judge concluded that the accused's right to contact

counsel had been violated. The results of the breath tests and certificate of analysis were excluded under s.24(2) and a new trial was ordered on the impaired driving charge, which had been stayed.

The Crown's appeal to the Alberta Court of Appeal arguing, among other things, that there was no s. 10(b) breach was successful. "Once the Crown has shown that the accused had a reasonable opportunity to consult counsel, the burden of proving a Charter breach is on the accused, on a balance of probabilities," said the Court.

Right to Counsel

The three member Alberta Court of Appeal summarized the duties of police with respect to the rights of a detained person to consult counsel as follows:

> (a) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel;
> (b) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
> (c) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).
>
> The first duty is called the "informational" duty, and the last two are called "implementational" duties. The implementational duties only come into play if the detained person indicates a desire to contact counsel. The detained person must be diligent in exercising his rights to counsel, and he may waive his rights and make a statement to the police. The burden of proving waiver is on the Crown. [references omitted, para. 20]

In this case the informational duty was discharged. There was no suggestion the accused was not advised of his right to counsel or of the availability of Legal Aid. He was then placed in a room with a telephone, a telephone book, information about Legal Aid, and he was given an opportunity to consult counsel in private. This discharged the relevant implementational duty of providing a reasonable opportunity to exercise the right:

> Once the police have discharged their informational and implementational duties they are entitled to take a passive role with respect to the accused's right to counsel. But merely because the police go further than their bare duties does not automatically mean that there is an infringement of the accused's right to counsel. Further involvement by the police, or gratuitous assistance rendered to the accused in exercising the right to counsel, does not equate to a breach of the Charter right. "Assistance" or "involvement" are not the same thing as "interference" or "infringement". The determination of whether the involvement of the police is "interference" or "assistance" is one best left to the [judge] as it will be highly dependent on the circumstances in each case.
>
> Even though the police only have the informational and implementational duties mentioned, it does not follow that they must desist from providing any assistance to the accused in his or her attempts to contact counsel. ... There is no Charter prohibition on the police assisting an accused in contacting counsel, only a prohibition on the police interfering with the right to contact counsel. That the police provided some assistance (whether requested or not) is a neutral factor unless there is evidence of interference in the right to contact counsel. There is no such evidence on this record. Specifically, there is no evidence that the police contrived in some way to make the [accused] consult Legal Aid rather than some other counsel. Indeed there is no evidence that the

"Once the police have discharged their informational and implementational duties they are entitled to take a passive role with respect to the accused's right to counsel. But merely because the police go further than their bare duties does not automatically mean that there is an infringement of the accused's right to counsel."

[accused] ever had any intention to consult anyone other than Legal Aid. [paras. 22-23]

"The burden of proving an actual, not just a theoretical, breach of a Charter right is on the accused."

Here, there was no evidence to support a *Charter* breach. There was nothing to suggest the accused wanted to call someone other than Legal Aid. Nor was there any evidence that his handcuffs in any way impeded his ability to talk to Legal Aid on the telephone, or to use the telephone book or telephone. The accused requested assistance in contacting Legal Aid, but the officer did not take over this personal right. Nor was there any evidence that the accused wanted or intended to "look through a telephone book or consider his options", nor was his right to choose counsel in any way restricted. "The burden of proving an actual, not just a theoretical, breach of a Charter right is on the accused," said the Court. "Mere assistance or involvement by the police in contacting counsel is not interference with the right to counsel."

As well, "the police do not need 'any reasonable belief that [an accused] was unable to contact counsel personally'" before they offer or provide assistance. Nor is providing assistance "taking over" the right unless the accused's personal will is overborne by the police and his attempts to contact counsel thwarted. The accused could have simply declined any assistance. And even if the officer had suggested that the accused contact Legal Aid, this was one of his informational duties. "It cannot be a breach of the [accused's] Charter right for the officer to discharge his duties under the Charter." Finally, there was no evidence of any lack of privacy that interfered with the ability to contact counsel. Since there was no s.10(b) *Charter* violation there was no need to consider s.24(2). The appeal was allowed and the over 80mg% conviction was restored.

Complete case available at www.albertacourts.ab.ca

COURT TO CONSIDER OF CHARTER BREACH PATTERN IN DECIDING ADMISSIBILITY

R. v. Lauriente, 2010 BCCA 72

After receiving a Crimestoppers tip about a grow operation located on a five acre rural property owned by the accused Mr. Lauriente and occupied by him, his wife and two children, police undertook a week long investigation. During the investigation, the lead police investigator trespassed on the property and made some observations which were consistent with the property being used for a grow operation. She also directed that Mr. Lauriente be stopped. A photograph of Mr. Lauriente was surreptitiously taken for surveillance purposes and other information was obtained to further the investigation. A search warrant was obtained and Mr. Lauriente was arrested in a vehicle as he left the property just prior to the execution of the warrant. The accused Catalano was found standing among marijuana plants in an outbuilding on the property which also contained various paraphernalia consistent with a marijuana grow operation. He was advised of his right to counsel and indicated his wish to speak with a lawyer. However, before he was provided with a reasonable opportunity to do so, the accused Catalano was asked if he had any identification on him and for the keys to the truck which was parked outside. He pointed to a jacket on a nearby chair. The officer found keys to the truck and to the building housing the grow operation in the jacket pocket. The accused's wife, Ms. Lauriente, was arrested inside the residence. The evidence included 64 marijuana plants and associated grow operation paraphernalia, hydro records, cash, and other items.

At trial in British Columbia Supreme Court, charges against Ms. Lauriente were stayed by Crown. And the trial judge found several *Charter* breaches. First, the judge concluded that the trespass amounted to a breach of s.8. The judge also found that the highway stop was not based on any concern for highway safety but was a ruse by the police to enable further

information to be gained in relation to the investigation. The stop was arbitrary and violated s.9. As well, the detention during the highway stop involved a breach of s.10(a) - the right to be advised of the reason for detention. Further, the trial judge found that questioning Catalano after he had asserted his right to counsel, but before he had a chance to exercise it, was a breach of his rights under s.10(b) of the *Charter*. Finally, although the charges against Ms. Lauriente were stayed during the trial, the judge also found that her s.9 *Charter* right was breached in that the police did not have reasonable grounds to arrest her when they executed the warrant. Although the trial judge nonetheless upheld the validity of the search warrant, the evidence was excluded under s.24(2) and acquittals of producing marijuana and possession for the purpose of trafficking followed.

The Crown appealed the acquittals to the British Columbia Court of Appeal and sought a new trial, arguing the evidence should not have been excluded. In the Crown's view, the trial judge erred in applying s.24(2) of the *Charter* by (1) failing to consider the question of "standing" and giving each accused standing to rely on the breaches of the other's *Charter* rights (including Ms. Lauriente) and (2) failing to consider whether there was a sufficient temporal or causal nexus between the breaches of *Charter* rights found, and the evidence obtained as a result of the search, to justify excluding that evidence on a s.24(2) analysis. But the Court of Appeal disagreed.

Standing

Because each of the accuseds' *Charter* rights were breached, each of them had standing to seek the exclusion of evidence pursuant to s. 24(2). Therefore, the trial judge did not give standing to each of the accuseds to seek a *Charter* remedy based on breaches of the rights of a third party. As well, in determining the seriousness of the individual breaches and whether the admission of the evidence could bring the administration of justice into disrepute, the court was entitled to take into account the pattern of *Charter* breaches during the course of the investigation and search, and their cumulative effect. Had the accused Catalano been arrested in circumstances where his *Charter* rights had not been breached, he would have no standing to seek *Charter* relief; only the accused Mr. Lauriente would have such standing based on the breaches of his *Charter* rights. But Catalano's rights were breached as well.

> [B]oth Mr. Lauriente and Mr. Catalano had standing to seek relief pursuant to s. 24(2) of the Charter based on the infringement of their individual Charter rights. Mr. Lauriente's rights under s. 8, 9, and 10(a) had been infringed; Mr. Catalano's rights under s. 10(b) had been infringed. This was simply not a case of an accused who had no standing seeking to rely on the breach of a third party's Charter rights in order to obtain standing. ...
>
> I turn, then, to the use the trial judge did make of the cumulative effect of the breaches of the respondents' Charter rights. It is apparent from her reasons that she relied on the cumulative effect of the breaches of the rights of Mr. Lauriente and Mr. Catalano (and, to a lesser extent, the breach of Ms. Lauriente's s. 9 Charter right) as evidencing a pattern of disregard of Charter rights by the police during the course of the investigation, and in their execution of the warrant. In that respect, she properly considered the cumulative effect of the breaches as relevant to a determination of the seriousness of the breaches, and in relation to the question of whether the admission of the evidence obtained in relation to those breaches could bring the administration of justice into disrepute. ... [paras. 26-27]

Nor did the fact that the cumulative effect of the *Charter* breaches involve more that one accused undermine the trial judge's analysis:

> This case involved one investigation in which the police overstepped the law in several instances evidencing a pattern of disregard of Charter rights which the trial judge found to be serious. She specifically found that each of the individual Charter breaches were serious, albeit not at the extreme end of the range, or reflecting bad faith on the part of the police. If she had considered the breaches individually, as if they had occurred in a vacuum, or in circumstances which were otherwise unremarkable, she may

> have concluded that the serious remedy of the exclusion of evidence was not warranted; that is, that the admission of the evidence obtained thereby could not have brought the administration of justice into disrepute. But these breaches did not occur in a vacuum, they occurred in the context of a relatively brief investigation where each step in the investigation followed and built on the prior step, ultimately culminating in the obtaining and execution of the search warrant which led to the respondents' (and Ms. Lauriente's) arrest, and the further breach of Mr. Catalano's right to counsel. In my view, the trial judge was entitled to have regard to all of these breaches, both in placing the seriousness of the individual breaches in context, and, more particularly, in determining whether this pattern of disregard of the Charter by the authorities could bring the administration of justice into disrepute. [para. 30]

Nexus

The required nexus between the particular *Charter* breaches relating to each accused and the evidence sought to be excluded was present. In order for s. 24(2) to apply there is a two stage analysis. The first is a threshold requirement; were the *Charter* breaches sufficiently linked to the evidence sought to be excluded? If this is satisfied, then the second stage (the evaluative component of s.24(2)) is triggered – could the admission of the evidence bring the administration of justice into disrepute?

There was a sufficient link between the breaches and the evidence. "The fact that the validity of the warrant was ultimately upheld did not sever the connection between the breach and the impugned evidence," said Justice Prowse delivering the Court of Appeal judgment:

> Here, the warrantless perimeter search of Mr. Lauriente's property, and the highway stop of his vehicle for the purpose of taking his photograph and gathering further information from him, were tactical investigative methods chosen by the police to further the investigation which were sufficiently temporally linked to the evidence discovered upon execution of the warrant to justify the trial judge in moving to the second stage of the s. 24(2) analysis.
>
> [I]t is also apparent that the breach of Mr. Catalano's s. 10(b) right was temporally connected with the discovery of the evidence in issue. It is not an answer for the Crown to say that the evidence would have been discovered in any event; that is an issue which arises at the second stage of the s. 24(2) analysis, not at the first stage, where the only issue is whether there is a temporal connection or other sufficient nexus between the fact of the breach and the finding of the evidence. There can be no doubt that such a connection existed here with respect to Mr. Catalano. [paras. 49-50]

The Crown's appeal was dimissed.

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

SEARCH WARRANT REFUSAL NOT BINDING ON OFFICER'S GROUNDS TO ARREST

R. v. Bacon, Cheng & Burton, 2010 BCCA 135

The police set up surveillance after receiving several complaints from neighbours about frequent short visits by vehicles coming and going at all hours to a townhouse, occupied by the accused's Bacon and Burton. Police saw about 15 transactions over a week, which the police suspected were drug related, taking place at and from the townhouse. Satisfied that the residence was being used as a drug transfer house police applied for a warrant to search the premises. A Judicial Justice of the Peace (JJP) refused the warrant, indicating that the materials fell "short of supporting reasonable grounds to believe that the items to be searched for will be at the requested location". While revising his material for a further warrant application, the lead investigator received a call from his police surveillance team, who reported seeing another transaction between Bacon and Cheng; they transferred packages between vehicles and drove to a meeting point. The lead investigator instructed the team to arrest Bacon and Cheng, who were in Cheng's vehicle. On arrest, the vehicle was searched and resulted in the seizure of one-half pound of marihuana, 92 methamphetamine pills, 15 ecstasy pills, 4 packages of cocaine, $2,600 in cash,

a score sheet, cell phones and a Blackberry. Shortly after the arrest, Burton quickly drove away from the townhouse. The police stopped and arrested her and seized $88,000 from her vehicle. A subsequent search warrant application for the townhouse, supported by the seizures incidental to arrest, was successful. A search of the townhouse turned up 24 pounds of pre-packaged marihuana, score sheets, a quantity of cash, four firearms (two automatic and two semi-automatic), illegal ammunition, silencers, a bulletproof vest, a police uniform, and a police scanner.

At trial in British Columbia Provincial Court on a 15 count information charging drugs and weapons offences the accuseds were acquitted. The judge found the arrest to be unlawful and excluded the evidence seized incidental to the arrest. He found that the lead investigator did not have the requisite subjective belief that there were reasonable grounds that Bacon and Cheng had committed an offence. He excluded the evidence taken incidental to the arrest under s.24(2) as a remedy for breaches of ss.8 and 9 of the *Charter*. He also found the search warrant to be invalid, having excised the evidence obtained at the arrest. The evidence gathered pursuant to the search warrant was also excluded.

The Crown then challenged the trial judge's rulings to the British Columbia Court of Appeal arguing the rejection of the prior search warrant application was not binding on the police so as to render the arrest unlawful. The Crown also submitted that the trial judge took the wrong approach in reviewing the validity of the warrant. The accuseds, on the other hand, contended that the judge found an absence of subjective grounds as a result of the lead investigator's incredible belief, not on the history of the warrant process.

Justice Donald, writing the opinion for the Court of Appeal, said that "[i]f the arrest of Bacon and Cheng was lawful, the product of the incidental search unquestionably provided an adequate basis for a valid search warrant of the townhouse". But here, the trial judge held that the lead investigator could not have held an honest belief in reasonable grounds because the first warrant application failed. Since the JJP did not find the 15 prior transactions sufficient, one more of the same kind of thing (the Bacon/Cheng exchange) was not going to make any difference. The judge erroneously treated the JJP's warrant refusal as a binding pronouncement such that it was not open to the lead investigator to believe that he had grounds to authorize an arrest. So the trial judge either erred by finding the officer could not form a belief contrary to the JJP's refusal, despite the officer's actual state of mind, or by conflating the analysis of subjective grounds with objective grounds.

In this case, however, the lead investigator testified that he believed he had grounds to arrest. "In the absence of an adverse credibility finding, it must be taken that [the lead investigator] genuinely held the belief," said Justice Donald:

> The JJP's decision disposed of a discrete application but it did not bind anyone. The police could have applied again on the same material to a Provincial Court judge who would have been free to make a de novo decision without regard for the JJP's view of the material.
>
> It follows that the refusal could not have disqualified the officer's belief in the grounds of arrest. The officer was not obliged to alter his belief to conform with the JJP's opinion. The validity of the arrest had to be judged according to ... the presence of a subjective belief and objectively reasonable grounds. [references omitted, paras. 19-20]

"It follows that the [search warrant] refusal could not have disqualified the officer's belief in the grounds of arrest. The officer was not obliged to alter his belief to conform with the JJP's opinion. The validity of the arrest had to be judged according to ... the presence of a subjective belief and objectively reasonable grounds."

Because the Court of Appeal ordered a new trial they did not engage in a close analysis of the objective grounds justifying the arrests. However, Justice Donald

did state that "there is a body of evidence upon which a reasonable finding of objective grounds could be made."

As for the validity of the search warrant, the trial judge erred in setting it aside. Rather than invalidating the warrant because of certain objectionable features, he was required "to strip away the objectionable features and examine the sufficiency of what remained." And although there may be a residual discretion to strike down a warrant for abuse of process, the alleged mistakes in this case were a long way from such an abuse. The Crown's appeal was allowed, the acquittals were set aside, and a new trial was ordered.

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

COMMON LAW ALLOWS POLICE TO TOW UNINSURED VEHICLE

R. v. Waugh, 2010 ONCA 100

The accused was charged with two counts of obstructing the same peace officer. During the first incident, the officer was on foot patrol when he observed a rusted Pontiac vehicle that appeared to be in poor condition and did not have a front licence plate. He instructed the accused to stop and pull over. The accused was unable to produce a driver's licence, a valid vehicle permit, or proof of valid insurance. Believing the vehicle was uninsured, the accused was told that the vehicle would be impounded and a tow truck was summoned. A CPIC search revealed the accused had three previous convictions for operating a vehicle without insurance. The accused refused to get out of the car. Instead, he locked himself in and asked that a supervisor be called. While waiting for a supervisor the accused was served with several provincial offence notices. He started the car and began to drive away. Pursued by the police, he ultimately turned off the road and parked the car in a private laneway about 150 to 250 metres away from the point where he had been stopped. Because the vehicle was parked on private property and not on a highway, the police were unable to tow it. The accused was then charged with the offence of obstructing police on the basis that he had failed to follow the police instructions not to move the vehicle and had prevented them from properly towing it.

During the second incident, the officer was again on foot patrol when he noticed a vehicle approaching that appeared to be in poor condition – it was rusted, the suspension was not proper, and the vehicle was leaning to one side – and it lacked a front licence plate. He signalled for the vehicle to stop but it didn't when initially requested to do so. As the officer approached the vehicle to instruct the driver to pull over, the accused put the vehicle in motion, veered to the right, drove around the officer, and proceeded along the street. The officer repeatedly called for the accused to stop, but he proceeded to turn into a laneway designated as a fire route. Eventually, the accused did stop, but not before driving within an arm's length of the police officer who was tapping on the hood telling him to stop. The accused was able to produce a valid driver's licence and vehicle ownership permit, but not proof of insurance. Because the accused's vehicle validation sticker was insured by a company – "Your Own Insurance Company" – that did not exist, the officer informed the accused that his licence plate (a dealer plate displayed inside the rear window) would be seized and the car would be impounded. After a tow truck was called, the accused, with some resistance, got out of the vehicle through the passenger side door and then quickly slammed it. He locked the keys inside the car, preventing the police from seizing his licence plate. Again, he was arrested for the offence of obstructing police.

At trial the accused explained that during the first incident he thought he was free to drive off once he he had received the offence notices. The judge, however, rejected this evidence and convicted the accused of obstructing police. About two months later a different judge convicted him of obstructing police in relation to the second incident. Five years later the Ontario Superior Court of Justice dismissed the accused's conviction appeals.

The accused then appealed to the Ontario Court of Appeal arguing that the police officer was not

engaged in the lawful execution of his duties at the time of the original arrests. Thus, the offence of obstruct police was not made out. Regarding the first incident, he submitted that since he had been properly served with valid provincial offence notices, the police had no further authority to impound the uninsured vehicle; they had no authority to require him to get out of the vehicle and he was not obstructing by failing to do so. Regarding the second incident, he contended that the police had no authority to impound the vehicle or to seize the licence plate because the vehicle was uninsured; thus they had no basis for believing in the circumstances that the licence plate had been improperly obtained. Finally, he contended the police were not entitled to enforce the provisions of Ontario's *Highway Traffic Act* (*HTA*) through the obstruction provisions of the *Criminal Code* (*CC*).

Justice Blair, authoring the unanimous judgment, disagreed with the accused. "Peace officers act in the execution of their duty only if exercising a power conferred by statute or by common law," he said. As for a statutory power to impound a vehicle reasonably believed to be uninsured, there was none. Neither Ontario's *HTA* or the *Compulsory Automobile Insurance Act* (*CAIA*) provided such an authority. Nor did Ontario's *Police Services Act*. However, the police did have "the authority to stop and impound [the accused's] vehicle based on powers inherent in the execution of their common law duties," said Justice Blair. "Those duties include the preservation of the peace, the prevention of crime and the protection of life and property, from which is derived the duty to control traffic on the public roads":

> It may be true ... that the common law has never explicitly recognized the authority of the police to tow a vehicle as deriving from their general police duties. However, I see no reason why that should not be the case provided the Dedman/Waterfield test is met in the circumstances and provided the police act reasonably and prudently. Here, in my view, the test is met and the police acted reasonably and prudently.
>
> [The police officer] and his companion officers were attempting to enforce the provisions of the Compulsory Automobile Insurance Act, acting on a reasonable belief, in both incidents, that [the accused's] vehicle was not insured. They were also acting pursuant to their common law duty to protect the life and property of the public and to ensure the safety of the roadways. The first branch of the test is satisfied.
>
> Was the use of the power justifiable in the circumstances, as required by the second branch? In my opinion, it was.
>
> An uninsured vehicle has no right to be on a public highway in Ontario. The police had a reasonable belief that [the accused's] vehicle was uninsured. What were they to do? If they permitted the uninsured vehicle to continue to be driven on the highway, they ran the risk of an accident occurring and of someone being seriously injured or killed without the benefit of the safety network envisaged by the Compulsory Automobile Insurance Act. If they did not permit the vehicle to be driven away – and it remained on the highway without being towed – it would constitute a hazard. The ability to impound the vehicle and have it towed away, in the circumstances, is a reasonable exercise of the police common law duty to prevent crime (the commission of further insurance-related driving offences), to protect the life and property of the public, and to control traffic on the public roads. [paras. 27-30]

And even though the operation of motor vehicles is subject to a highly regulated and comprehensive statutory regime establishing the powers of the police (including towing powers) and the penalties for violating this scheme, the court filled the gap by resorting to the ancillary powers of police at common law. "I accept that courts should be cautious in extending police power by resort to their common law ancillary powers, particularly in circumstances where the legislature has put in place an elaborate and comprehensive regulatory regime with carefully balanced powers and sanctions," said Justice Blair. "However, the compulsory automobile insurance scheme enacted in Ontario is an important lynch-pin in the overall regime to promote the safety and well-being of the public on the highways":

> It does so by attempting to ensure that, when accidents occur, there is a financial safety network in place to support those who sustain personal injury or property damage, and their families. That regime, and the role compulsory insurance plays in it, can only be reasonably protected if the police have the authority to cause uninsured vehicles to be removed from public highways and towed to safety in certain circumstances. [para. 32]

As well, although the right to circulate in a motor vehicle on the public highway is considered a 'liberty' for purposes of the constitutional debate surrounding motor vehicle legislation, it is not a fundamental liberty like the ordinary right of movement of the individual, but a licenced activity that is subject to regulation and control for the protection of the public. "Permitting the police to cause an uninsured vehicle to be impounded and towed to safety falls squarely within the exercise of their duty to protect the life and property of the public," said the Court. "[This] outweighs the concern for caution in extending police powers through resort to their common law duties in circumstances such as these."

Obstruction

Since the police were engaged in "the lawful execution of their duties" when attempting to impound the vehicle in both cases, the accused's actions sufficiently frustrated the police efforts to constitute an offence under s.129 of the *CC*.

Were the Police Attempting to Use the Criminal Code Indirectly to Enforce Provincial Legislation? The accused's additional argument that, even if the police were acting in the execution of their duties by attempting to enforce Ontario legislation related to the vehicle, the offence of obstructing police under the *CC* was not available given the presence of more moderate means of enforcement was also rejected. Both s.23 of the *HTA* and s.2 of the *CAIA* provide for fines as a means of enforcing the requirement that motor vehicles be insured. Neither statute provides for the power of arrest and a police officer's power to enforce the statutes is limited to issuing tickets. But in this case, the police were not using precisely the same conduct forming the provincial statute offences as the basis for the obstruct police charge:

> In my view, however, the "precisely the same conduct" analogy does not fit here. The police were not attempting to use the obstruct police charge to enforce the Highway Traffic Act offences for which [the accused] had already been ticketed, in relation to the first incident. Those tickets did not capture the offence committed, which was to interfere with the police officers' efforts to impound the vehicle and have it towed away. Nor, with respect to the second incident, were they attempting to enforce the "fail to stop" requirements of s. 216 of the Highway Traffic Act. The offence of obstruct police, in that instance, was founded on [the accused's] attempts to frustrate both the towing of the vehicle and the investigation regarding the validity of the licence plate.
>
> Moreover, in neither incident was there any evidence that the police were attempting to utilize the provisions of the Criminal Code for punitive purposes. [paras. 41-42]

As well, the officer was entitled to seize the plate that was located in the rear window of the vehicle in order to investigate whether the plate or validation sticker had been obtained by means of a false statement in a certificate of insurance used to obtain it, contrary to the *CAIA*. Under the *HTA* a police officer is permitted to seize a vehicle licence plate or evidence of validation of a permit if the officer has reasonable grounds to believe the number plate or evidence of validation of a permit was obtained by false pretences. The police were attempting to do this when the accused jumped out the passenger side of his vehicle – opposite from where the police were standing – and locked the doors with the keys inside, thus frustrating their attempts to seize the plate. He was guilty of obstructing the police in the execution of their lawful duty on this basis as well. The accused's appeals were dismissed.

Complete case available at www.ontariocourts.on.ca

LAW DOES NOT MANDATE CONFIRMATION OF OFFENCE BEFORE MAKING ARREST

R. v. Hillgardener, 2010 ABCA 80

An RCMP officer with only two years experience (but 75 prior drug investigations) received a phone call just before midnight from an informant indicating that a street-level drug trafficker, a young woman with brown or black hair who identified herself as "Ashley", could be found driving a black Acura RSX in the "downtown" area of town and would be carrying a large amount of cocaine in her purse for the purposes of trafficking. The informant also provided the vehicle plate number. This informant was known to the officer, having provided credible information in the past on eight occasions in exchange for compensation. The officer confirmed that the informer was later paid for the information provided in this case as on other occasions. He also confirmed that the informer had a criminal record, but it did not include perjury. The officer declined to be more specific about the informer in order to keep the informer's identity confidential and deliberately left information out of his notes capable of revealing the informer.

Relying on the informer's information, the officer then went downtown to the area which was, to his knowledge, a "hotbed of drug activity". The officer agreed in cross-examination, however, that there were several such areas in the city, naming three in particular before conceding that it was "pretty much the whole area." The officer started checking locations in his marked police vehicle. He saw the reported vehicle with a female in it, alone, at about 12:15 am. The officer followed the Acura for about 20 seconds, turned on his emergency equipment, pulled it over and approached. The occupant matched the general description of a younger female with dark hair. Without asking who she was, to see her driver documents, or how long she had been in vicinity, the officer told her she was under arrest for trafficking in cocaine and to exit the vehicle. She got angry, questioned the reason for arrest and was resistant. She was handcuffed and put in the back of the police car. Her purse was left behind in the vehicle. The officer testified that he had seen the purse open on the accused's lap when she was first arrested as if she was intending to provide her driver's documents. The officer agreed that he had not seen any contraband or money in plain view, nor did he see the accused talking on a cell phone before arresting her. Nor did he see anything suspicious in the purse when it was open on the her lap. The officer then went back to the vehicle, took possession of, and searched the purse, which in his view, was incidental to arrest. But he agreed that he had no urgency or danger concerns when he searched the purse. In the purse he found a street-dealer's stash; 90 grams of cocaine consisting of 11 quarter-ounce pieces of crack cocaine in a zip-loc bag, a pill bottle with 51 more pieces, $500 in cash, and two mobile phones.

The trial judge found both the accused's arrest and the subsequent search of the purse to be unlawful. He held that the arresting officer did not have the reasonable grounds contemplated by s.495(1) of the *Criminal Code* to justify the arrest. The judge found the information that was provided was compelling and came from a credible source. However, he found the officer had corroborated some things - the car, the licence plate, the woman description - but not the information that she was doing something illegal (involved in the drug trade). In his view, the police were required to confirm some aspect of the offence by the accused before reasonable grounds was met. The judge also held that the officer should not have searched the purse without a warrant since the accused was in the police vehicle and the officer could have obtained a warrant to search the purse. This, by itself,

> "The law does not mandate confirmation of the offence itself in all cases before effecting an arrest. ... "[The] precision and accuracy of precise details surrounding the matter together with a history of proven reliability can constitute reasonable and probable grounds."

made the search of the purse unreasonable (even if the arrest was lawful) because the accused was no danger to the officer and exigent circumstances did not exist. The evidence was excluded under s.24(2) and the accused was acquitted of possessing cocaine for the purpose of trafficking and possessing proceeds of crime.

The Crown appealed to the Alberta Court of Appeal arguing that the trial judge erred in holding there was no reasonable grounds. The Crown submitted that the judge departed from the totality of the circumstances test and elevated a single factor (independent verification of the tip) to an essential pre-condition. On the other hand, the accused submitted that the judge did not err in holding that every element of the **three part reasonable grounds test** requires "some" evidence, and that the trial judge correctly found that there was no corroboration of the tipster's information about the accused being a drug trafficker before her arrest.

The Alberta Court of Appeal noted that the issue was not whether the officer could have done more (such as ask questions or identify the accused) but whether what the officer knew and did provided reasonable grounds. "The law does not mandate confirmation of the offence itself in all cases before effecting an arrest," said the Court. "[The] precision and accuracy of precise details surrounding the matter together with a history of proven reliability can constitute reasonable and probable grounds." Confirmation of the offence alleged by the tipster itself was not required before the arrest. Thus, the law did not oblige the officer to corroborate the specific allegation of drug trafficking in some manner before arresting the accused. In this case, the informer had been reliable on multiple occasions and had a cash incentive to be reliable with his tips.

As for the search of the purse independently constituting a s.8 *Charter* breach as an incident to arrest because there were no exigencies, the trial judge also erred. The Court of Appeal stated:

> It is clear that the informer's tip provided grounds to believe the purse contained evidence. This was arrest, not investigative detention, so the officer safety limitation discussed in investigative detention cases is not applicable to the situation. [para. 28]

Searches incidental to arrest are not only permissible for safety reasons but also to protect evidence from destruction at the hands of the arrestee or others and to discover evidence which can be used at the arrestee's trial. Further, a search incidental to arrest does not independently require reasonable grounds. Here, the trial judge's reasons stopped at safety and protection of evidence from destruction. He did not address the discovery of evidence usable at trial rationale which was reasonably to be expected from searching the purse.

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

Complete case available at www.albertacourts.ab.ca

Three Part Reasonable Grounds Test

The framework for the totality of the circumstances test in determining whether a police officer has reasonable grounds involves three inter-related considerations:

- was the information predicting the commission of a criminal offence compelling?
- where that information was based on a "tip" originating from a source outside the police, was that source credible?
- was the information corroborated by police investigation prior to making the decision to arrest or conduct the search?

Weaknesses in one area may, to some extent, be compensated by strengths in the other two. For example, the precision and accuracy of precise details together with a history of proven informant reliability can constitute reasonable grounds, without independently corroborating the offence itself.

Jurisprudence Jolt

IN BRIEF: This section provides a peek of what's happening in appeal courts across the country.

Saskatchewan Court of Appeal

SENTENCING JUDGE TO LOOK AT RECORD AS A WHOLE IN DECIDING DNA ORDER

Following the accused's conviction for trafficking morphine under s. 5(1) of the *Controlled Drugs and Substances Act*, the sentencing judge declined to make a DNA order under the *Criminal Code* because it was her first drug offence and she had no record of violence. The Saskatchewan Court of Appeal, however, found the sentencing judge erred. The judge failed to look at the accused's record as a whole—53 prior convictions—and the objectives of the DNA provisions. "In light of the nature of the [accused's] current offence, her lengthy record, her history of recidivism, and the relatively modest impact an order would have on her privacy and security interests, we are satisfied an order should have been made," said Justice Cameron for the unanimous Court of Appeal in holding that bodily samples be taken from the accused. - **R. v. Heisler, 2010 SKCA**

Alberta Court of Appeal

PRESENCE AS PASSENGER IN VEHICLE DOES NOT NECESSARILY PROVE POSSESSION

Two stolen Neon motor vehicles were driven well over the speed limit into a cul-de-sac where one T-boned the other before three males from the vehicles fled the area. Both Neons were later found to have damaged ignitions and one was missing a side mirror and the other a hub cap, which were found nearby parked car and truck that were damaged the same night. Witnesses saw the males leaving the scene, run through a condominium parking lot, jump a fence, and enter a field where they were subsequently arrested by police. A police dog tracked from the fence to where the suspects were stopped and two of the suspects (not the accused) had glass shards in their clothing and their fingerprints were found in each of the Neons. At trial the accused was convicted of several offences including dangerous driving, possession of a stolen vehicle, and three counts of leaving the scene of motor vehicle accidents. But the convictions were quashed on appeal.

Although it was reasonable for the trial judge to infer that the accused was a passenger in one of the Neons and one of three persons who fled the vehicles immediately after the crash, there was nothing directly linking him to either specific Neon vehicle. And the theory that all three were involved in a "joint venture" to race the Neons and smash them up was just a theory. "It had a certain plausibility but nothing more than that," said the Alberta Court of Appeal. "It was still essentially speculation." Proof of possession of stolen property requires proof of knowledge and control. Since the accused was at least a passenger in one of the Neons knowledge of the stolen nature of the vehicles might be inferred from the condition of the steering columns and post-crash conduct, but there was no evidence of control by him. There was no evidence of abetting possession of stolen property nor evidence that he was a driver. He was nothing more than a passenger. And even if the accused was physically inside one of the Neons when it was being driven in a dangerous manner, there was no evidence he was driving or did anything to aid or encourage either of the drivers to drive dangerously. There must be evidence before it can be inferred that a passenger is a party to a driving offence. Any inference that he assisted, counseled, or encouraged the manner of driving was conjecture. As for the hit and run convictions there was no evidence the accused did anything but run away with the others. "Whether or not he was a driver, he would have had a motive to run away and so did the other two," said the Court. "The others did not need his encouragement to run away themselves for the same reason. Flight, a form of post-offence conduct which is itself a species of circumstantial evidence, may justify an inference in favour of a specific reason for the flight unless there is more than one equally valid reason within the boundaries of inference for the flight. There was more than one reasonable inference here [and it was] not likely that any of them had to encourage the others to flee the scene." - **R. v. Smith, 2010 ABCA 46**

Ontario Court of Appeal

NO FREESTANDING CONSTITUTIONAL RIGHT TO ADEQUATE INVESTIGATION

Following charges being laid against the accused for fraud and forgery involving the alleged defrauding of a company (where he was the CFO) of about $1.8 million, he wanted a second forensic audit done by the Crown. He suggested that he had previously worked for the firm that did the audit and that the auditor who did the first audit may have had a personal animus against him. The second audit proposed by the accused would have been very expensive and was not done. The trial judge ruled that the constitutional right to make full answer and defence included the right to have the prosecution investigate any defences that were "not fanciful or speculative." Thus, the accused was constitutionally entitled to have the police pursue an avenue of investigation if the defence could show there was a realistic possibility that pursuing that line of investigation could assist them. The Crown's failure to produce the second forensic audit constituted a violation of the Crown's "duty to investigate" and denied him the opportunity to make full answer and defence. The trial judge entered a stay of proceedings.

The Crown challenged the judge's ruling to the Ontario Court of Appeal, which overturned the lower court's opinion and found the "Crown was not under any duty, constitutional or otherwise, to obtain the forensic audit demanded by the defence" and that its "failure to do so did not result in any constitutional violation of the accused's right to make full answer and defence." Justice Doherty, authoring the Appeal Court's judgment, concluded there was no freestanding constitutional right to an adequate investigation. The prosecutorial authorities carry the ultimate responsibility to determine the direction of an investigation, not the defence. - **R. v. Darwish, 2010 ONCA 124**

"You're a Policeman"

When the hours seem long and the going, rough
When the pay seems small and the criminals, tough
Just square your shoulders and call their bluff
Let them be the ones to cry, "Enough"

W.H. Drane Letser, Inspector, FBI
May 1, 1936

CASE QUOTE

"An accused does not have a freestanding constitutional right to an adequate investigation of the charges against him or her. Inadequacies in an investigation may lead to the ultimate failure of the prosecution, to a specific breach of a Charter right or to a civil remedy. Those inadequacies do not, however, in-and-of-themselves constitute a denial of the right to make full answer and defence.

An accused also does not have a constitutional right to direct the conduct of the criminal investigation of which he or she is the target. ... [T]he defence cannot, through a disguised-disclosure demand, "conscript the police to undertake investigatory work for the accused". That is not to say that the police and the Crown should not give serious consideration to investigative requests made on behalf of an accused. Clearly, they must. However, it is the prosecutorial authorities that carry the ultimate responsibility for determining the course of the investigation. Criminal investigations involve the use of public resources and the exercise of intrusive powers in the public interest. Responsibility for the proper use of those resources and powers rests with those in the service of the prosecution, and not with the defence.

Nor does the disclosure right, as broad as that right is, extend so far as to require the police to investigate potential defences. ... [references omitted, paras. 29-31]

An interpretation of the right to make full answer and defence that imposes a duty on the prosecution to investigate possible defences is also irreconcilable with the basic features of the criminal justice system. No doubt, the Crown has obligations to an accused and to the administration of justice that go beyond those normally imposed on opposing counsel in litigation. However, the criminal justice system remains essentially an accusatorial and adversarial one. The prosecution, which includes the Crown and the police, is charged with the responsibility of investigating and prosecuting crime in the public interest. To do so the prosecution must investigate allegations, lay charges and prove those charges in a criminal proceeding. To properly perform these functions the prosecution must decide on the nature and scope of an investigation. The accused is entitled to the product of that investigation, but is not entitled to dictate the nature or scope of that investigation. ." [para. 39] R. v. Darwish, 2010 ONCA

Ontario Court of Appeal

CIRCUMSTANCES PROVE KNOWLEDGE & CONTROL

The accused was convicted by a jury in the Ontario Superior Court of Justice on a charge of possessing crack cocaine for the purpose of trafficking, even though there was no direct evidence linking him to the cocaine. The Crown's case was circumstantial, which included (1) about 26.92 grams of crack cocaine situated in plain view on the centre console of the car between the driver and the accused, who was a passenger in the front seat of the car; (2) the drugs, contained in a small opaque grocery bag, were perched on the console atop two cell phones; (3) the grocery bag was knotted over its contents into a shape like a golf ball; (4) the drugs had a street value in excess of approximately $5,380; (5) the accused was in the stopped vehicle for at least five minutes prior to his arrest; and (6) on his arrest, the accused had $270 in small denominations in his possession.

On appeal to the province's top court, the accused argued that there was insufficient evidence of his knowledge or control of the cocaine to establish constructive possession under s.4(3)(a)(ii) of the *Criminal Code* or joint possession under s.4(3)(b). The Ontario Court of Appeal found the evidence of the physical proximity of the drugs to the accused, the degree of visibility of the drugs, the shared use of the vehicle at the time of the accused's arrest, the quantity and value of the drugs seized, the size and nature of the bag containing the drugs, the presence of equipment – cell phones – normally used in drug trafficking, and possession by the accused of monies in a form and amount consistent with drug trafficking provided, in combination, a sufficient basis on which a jury could properly infer knowledge and control of the crack cocaine by the accused. The accused's conviction appeal was dismissed. - **R. v. Duvivier, 2010 ONCA 136**

Ontario Court of Appeal

NO CANADIAN CONSTITUTIONAL RIGHT TO POSSESS FIREARMS

The accused, a firearms dealer and manufacturer, allowed his firearms licence and Firearms Acquisition Certificate to expire without renewal. His wife (and co-accused) also allowed her firearms licence to expire. The police, acting on the authority of two search warrants, seized more than 200 firearms and related devices, together with more than 20,000 rounds of ammunition and boxes of military-related books and associated paraphernalia from the couple's home. Many of these weapons were discovered in a hidden storage room in the basement of the house. At trial in the Ontario Superior Court of Justice the accused testified he was preparing to defend himself, and others, in the event of a war. Even though he knew that he did not, nor any business run by him, have any legal authorization or licence permitting the possession of the firearms and associated devices, he argued that he and his wife were entitled to possess the firearms because they had a constitutional right to possess firearms for self-defence. The trial judge disagreed and the accuseds were convicted of various weapons related offences.

The accuseds then appealed to Ontario's highest court, arguing, among other grounds, that the trial judge erred in his ruling regarding the constitutionality of the firearms provisions. The Ontario Court of Appeal rejected the accuseds' submission that they had a constitutional right to possess arms in their home for self-defence, free from government interference or regulation. Parliament has the jurisdiction to constrain the right to posses firearms and the Supreme Court has already recognized that the possession and use of firearms is a heavily regulated activity aimed at ensuring peace, order, and public safety. And even assuming that a right to possess and use firearms comes within the reach of s.7 of the *Charter*, it is not absolute. "The impugned firearms legislation does not prohibit the right to possess and use firearms for self-defence – in the home or elsewhere," said the Court of Appeal. "It simply regulates the circumstances under which such possession and use are permissible." Further, there is no protected constitutional right in Canada to possess or use firearms. Possession and use of firearms is not a right or freedom guaranteed under the *Charter*, unlike the American Constitution. Rather, possessing guns in Canada is a privilege. The accuseds' conviction appeal was dismissed. - **R. v. Montague, 2010 ONCA 141**

Note-able Quote

"Even when laws have been written down, they ought not always to remain unaltered." - Aristotle

Ontario Court of Appeal

EVEN WITHOUT STATEMENTS POSSESSION PROVEN

A plainclothes police officer was conducting curfew checks on individuals involved with gangs and violent crimes when his attention was drawn to a vehicle that was associated to a prohibited driver. The vehicle sped through a residential neighbourhood and failed to stop at stop signs nor indicate turns. A traffic stop was subsequently made and the accused (the lone occupant) was arrested for dangerous driving. However, he was not advised of his s.10(b) right to counsel. When asked if there were any guns or weapons in the car, the accused said there was a gun on the back seat. Police looked and found a loaded handgun under a coat on the rear seat. He was then told of his right to counsel. Police also took a video statement about an hour after arrest. At the accused's trial on several weapons offences the judge ruled that the right to counsel had not been breached during the obtaining of the roadside statement. The accused was convicted. On appeal by the accused to the Ontario Superior Court of Justice the roadside statement was found to have resulted from a s.10(b) *Charter* breach as was the video statement, a derivative of the roadside one and thereby tainted as a result. Nevertheless, the appeal judge admitted both statements under s.24(2) and the accused's appeal was dismissed.

The accused then appealed to the Ontario Court of Appeal which agreed that the statement given at the scene of the arrest and the later statement taken at the police station violated s.10(b). However, even if the statements should have been excluded the convictions would have still followed. Since the accused conceded that the gun itself was properly admitted, his knowledge that the gun was in the back seat and that he was in possession of it was supported by the following facts:

- the car belonged to the accused;
- he was the only occupant in the car;
- the loaded gun was sitting on the car's back seat underneath the accused's coat; and
- there was no evidence inconsistent with the accused's guilt. He did not testify.

The accused's appeal was dismissed. - **R. v. Davis-Harriot, 2010 ONCA 161**

British Columbia Court of Appeal

CELL PHONE CALLS ORDERING DRUGS ADMISSIBLE TO HELP PROVE POSSESSION

Acting on informant information, the police established surveillance on a road close to a residence where the accused, who was known to them, was believed to be living. After stopping a vehicle in which she was travelling, the police arrested her. At the scene of the arrest, a cellular telephone in the accused's purse rang. Police answered it and the caller said he wished to purchase drugs and asked for the accused by name. The officer asked the caller to call back. A second officer answered a second call: the caller again asked for the accused. They discussed the price of the drugs to be purchased and a meeting was arranged. More calls asking for the accused by name and discussing the purchase of drugs were received. A subsequent search of the accused's residence resulted in the discovery of drugs, together with drug paraphernalia and various documents bearing the accused's name, in the master bedroom. The locked door of the bedroom was also opened with a key found in the accused's purse. At trial in British Columbia Provincial Court the accused was convicted on three counts of possessing a controlled substance for the purpose of trafficking.

On appeal to the British Columbia Court of Appeal the accused argued that the trial judge erred in finding that the Crown had proven beyond a reasonable doubt that she was in possession and control of the substantial quantity of drugs that were found in a house on the execution of a search warrant by the police. She contended, in part, that the judge erred in admitting the evidence of the calls to her cellular telephone on the ground the evidence was hearsay because it was offered for the truth of its contents. But Justice Lowry disagreed. "Such calls are admissible as circumstantial evidence of knowledge of the purpose of drugs, which is an element of possession," he said. The calls could be used to prove the nature of the activities to which the accused was involved. - **R. v. Williams, 2009 BCCA 284**

Note-able Quote

"Intelligence is when you spot a flaw in your boss's reasoning. Wisdom is when you refrain from pointing it out." - James Dent

British Columbia Court of Appeal

'NO ONE WOULD BE SO STUPID' DEFENCE REJECTED

While going through airport screening the accused placed his black canvas sports bag on the tray and the x-ray machine clearly showed a handgun in the open side compartment of the bag, together with what looked like a phone charger and other items. The police were contacted, seized the bag which contained a loaded .38 semi-automatic pistol, and arrested the accused. At trial the accused acknowledged that other articles in the bag were his but testified that the gun was not, that he did know it was in his bag, and that he did not know how it got there. He essentially argued that no one, especially him, could be so stupid as to carry a gun in a bag through security since it would be obvious that the gun would be visible when the bag went through the screening process. Although the accused may have forgotten about it, the judge found the accused was in possession of the prohibited, unlicensed, and concealed gun. He was convicted of three weapons offences and sentenced to about 18 months in jail and given a lifetime firearms prohibition.

An appeal by the accused to British Columbia's high court was dismissed. The case against him was compelling. The accused testified he had packed his own bag, all of the items in the bag returned to him were his, and that he used the bag on a regular basis. There was no evidence of anyone else having contact with the bag from the time he packed it the night before until the time he placed it on the screening conveyer belt. Nor did he offer any explanation when asked as to how the gun came to be in the bag if he did not place it there. This was not placing the onus on the accused to prove that someone else placed the gun in his bag. - **R. v. Lynnerup, 2009 BCCA 531**

SUPREME COURT TAKES LONGER TO RENDER JUDGMENT

In its "*Bulletin of Proceedings: Special Edition, Statistics 1999 to 2009*", the workload of the Supreme Court of Canada was reported. In 2009 the Supreme Court heard 72 appeals, down from 82 in 2008. This was the second lowest number of appeals heard by Canada's top court in a single year during the last decade (up from 58 appeals heard in 2007).

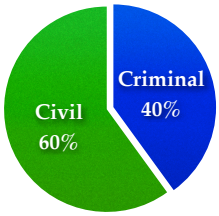
Case Life Span

The time it takes for the Court to render a judgment from the date of hearing the case is at an eleven year high. In 2009 it took 7.4 months for the Court to announce its decision after hearing arguments, up from 4.8 months in 2008. Overall it takes 18.2 months, on average, for the court to render an opinion from the time an application for leave to hear a case is filed. This too is up from the previous year (16.9 months).

Appeals Heard

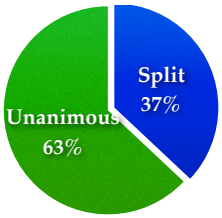
Of the 72 appeals heard in 2009, Quebec was the origin of the most appeals of any province at 22, followed by Ontario (12), Alberta (11), British Columbia (9), the Federal Court of Appeal (9), Saskatchewan (3), Yukon (2), and Manitoba, Northwest Territories, Nunavut, and Prince Edward Island each with one. No appeals originated from New Brunswick, Newfoundland, or Nova Scotia.

Of the appeals heard in 2009, 60% were civil while the remaining 40% were criminal. Fifteen percent (15%) of the criminal cases dealt with *Charter* issues, up from only 7% in 2008.



Twelve of the appeals heard in 2009 were as of right. This source of appeal includes cases where there is a dissent on a point of law in a provincial court of appeal. The remaining 60 cases had leave to appeal granted. This is where a three judge panel gives permission to the applicant for the appeal to be heard.

Appeal Judgments



There were 70 appeal judgments released in 2009, down from 74 in 2008. Only two decisions last year were delivered from the bench while the remaining 68 were delivered after being reserved. Fourteen of the appeals were allowed while 19 were dismissed. Another 39 were under

reserve as of December 31, 2009. And the court was more split than the previous year. In 2009, only 63% of the Court's decisions were unanimous. The remaining 37% were split. This disagreement, or lack of unanimity, among Canada's top jurists has never been so high during the last decade except for 2007 where the Court was unanimous in only 62% of its opinions.

Source: www.scc-csc.gc.ca

EVIDENCE ABOUT GUN ADMISSIBLE DESPITE COPS EXCEEDING SCOPE OF INSTALL

R. v. Beaulieu, 2010 SCC 7

As part of an extensive drug trafficking investigation, police obtained an authorization to intercept the accused's private conversations. While installing listening devices in his car, officers discovered hidden electrical switches underneath the dashboard. The officers followed the wires and found that they led to the centre of the console. They dismantled the console and found a hidden compartment containing a leather case. The installation was stopped, the case opened, and a loaded firearm discovered. So as not to jeopardize the ongoing investigation the police had the firearm rendered unusable and placed it back in the car. One year later the accused was charged with possessing a loaded prohibited firearm contrary to s. 95 of the *Criminal Code*. The gun was never recovered.

At trial in the Court of Quebec, the accused challenged the admissibility of the testimony relating to the discovery of the firearm. The judge found that the search was not performed for the purpose of installing the device, ensuring officer safety or protecting the investigative technique, but the police, surprised by the discovery of the wires and hidden compartment, had abandoned the plan to install listening devices. As a result, the search exceeded the scope of the judicial authorization and violated s.8 of the *Charter*. The judicial authorization did not give the police *carte blanche* to search the vehicle in a manner or for a purpose that exceeded the terms of the judicial order. The judge, however, admitted the evidence pursuant to s.24(2), primarily on the basis that the police officers did not believe they were exceeding the powers granted to them by the authorization and had not evidenced a flagrant disregard of the accused's *Charter* rights.

On appeal, however, a majority of the Quebec Court of Appeal (2:1) reversed the trial judge's decision to admit the evidence. In the majority's view the evidence was inadmissible under s.24(2), the accused's conviction was set aside, and an acquittal was entered.

The Crown then appealed to the Supreme Court of Canada, which agreed that the majority of the Court of Appeal erred in interfering with the trial judge's weighing of the factors in the s.24(2) analysis. "'Considerable deference' is owed to a trial judge's s.24(2) assessment of what would bring the administration of justice into disrepute having regard to all the circumstances," said Justice Charron for the unanimous Supreme Court. "In this case, the trial judge considered proper factors and made no unreasonable findings." Even with the new three-part inquiry for determining whether the admission of evidence would bring the administration of justice into disrepute, which includes:

- the seriousness of the *Charter*-infringing state conduct;
- the impact of the breach on the *Charter*-protected interests of the accused; and
- society's interest in the adjudication of the case on its merits;

the outcome would not have been affected. The *Charter* breach was at the less serious end of the spectrum. As for the impact of the breach, the accused had a reduced privacy interest in his car and the scope and invasiveness of the search was limited. And finally, with regard to society's interest in an adjudication on the merits, the evidence was crucial to the Crown's case, and the gun was reliable evidence. The Crown's appeal was allowed and the accused's conviction restored.

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

IMPAIRED DRIVING OFFENCES & EVIDENCE TO THE CONTRARY

Staff Sergeant Steven Ing, LL.B.
Victoria Police Department

A recent decision from the Ontario Court of Justice (Provincial Court level) regarding an impaired driving charge and the "evidence to the contrary" defence has helped to clarify the effect of Bill C-2. Readers may recall that in July 2008, Bill C-2 amended s.258 of the *Criminal Code* (*CC*), which is the section that creates the legal presumption that a reading from an approved instrument of over 80 mgs is proof that the offence was committed, absent any evidence to the contrary.

Historically in BC, courts were allowing an extremely wide latitude to the "evidence to the contrary" defence, which in lay terms worked this way: the accused and/or his pals claimed that the accused only had 2 drinks; the defence calls an expert to say that if the accused only had 2 drinks, his reading couldn't have been over 80. This was often accepted as creating a reasonable doubt even in the face of a perfect breath test operation (again, especially in BC).

The 2008 *CC* amendments specify that the "evidence to the contrary" must consist of more than the accused simply claiming that their alcohol consumption pattern could not have produced the readings obtained by police (the new requirements for the defence are summarized below). Although there have been no published BC decisions in relation to the Bill C-2 amendments, a recent case in Ontario clarified that the amendments themselves are not unconstitutional. In addition to the constitutional challenge, the accused also claimed that the "evidence to the contrary" defence itself was effectively neutralized by the amendments. However, on that point the court found that the defence still exists - it is simply harder to successfully raise now.

What is relevant for operational purposes is that the decision clarifies how the "evidence to the contrary" defence now works. The defence must present evidence that raises a reasonable doubt in ALL of 3 areas:

- The approved instrument malfunctioned or was operating incorrectly;
- The malfunction or improper operation produced a result over the legal limit;
- The accused's BAC was under the legal limit at the time of the offence.

Therefore, an accused who wants to raise this defence must now present more than just the traditional consumption/expert back calculation evidence - the accused will have to provide specific evidence with regard to the operation of the instrument (i.e. incorrect calibration, procedural checks not followed, etc.). Consumption evidence, in and of itself, is now insufficient to be considered "evidence to the contrary".

Where officers are faced with a challenge in court the way the defence was formerly run (that is, where the accused only presents consumption "evidence" to rebut the breath test reading), the Police/Crown response should be along the following lines:

An "evidence to the contrary" defence that offers nothing more than an accused's consumption pattern will no longer be capable of possessing the requisite air of reality where the balance of the evidence is incapable of raising a reasonable doubt about the accuracy of breath tests.

The benefits of this decision are most likely going to be seen by Crown Counsel, police supervisors who are reviewing impaired driving reports, and investigators who may be faced with a threatened "evidence to the contrary" defence that does not meet the new criteria. However, be aware that the decision is from the Ontario Court of Justice (their Provincial Court), meaning it is persuasive but not binding here in B.C. The decision itself is 62 pages long, and has not been made available online yet. The case name is *R. v. Muzuva*, and it was an oral judgment delivered by Justice Fraser on Jan. 7, 2010.