JIBC

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

IN MEMORIAM

On June 21, 2010 25-year-old RCMP Constable Chelsey Robinson was killed in an automobile accident while looking for an impaired driver in Edmonton, Alberta.

She had received reports that a drunk driver was traveling in the wrong direction on a highway at 12:35 am. As she attempted to locate the car her patrol car collided with a tractor trailer at an intersection.

Responding units located her patrol car in a nearby ditch. She was transported to a hospital in Edmonton where she succumbed to her injuries a short time later.

Constable Robinson had served with the Royal Canadian Mounted Police for only seven months.

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

On July 13, 2010 26-year-old RCMP Constable Michael Potvin drowned after his boat capsized on the Stewart River in the Yukon. He and another constable were taking the boat out near the community of Mayo when it capsized.

Constable Potvin, who wasn't wearing a life jacket, attempted to swim to shore but was unable to make it. His body was recovered on July 30th. He had served with the RCMP for only a year.

According to the Officer Down Memorial Page, 58 Canadian officers have lost their lives due to drowning.

Highlights In This Issue

National Library of Canada Cataloguing in Publication Data

Main entry under title:

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

Title from caption.

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

ISSN 1705-5717 = In service, 10-8

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

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

"I'm told by police that [vehicle compartments are] getting elaborate in almost a James Bond–ish sort of way. You turn on the radio, you push a button, you slip it into a particular gear, and a particular panel either moves or disappears, and you have access to a very well concealed compartment where gang members can put guns, drugs and cash." - British Columbia Attorney General, the Honourable Mike de Jong, speaking to Bill 16 - B.C.'s *Armoured Vehicle and After-Market Compartment Control Act*, May 3, 2010.

ILLEGALLY INTERCEPTED CELL PHONE CALLS ADMISSIBLE

R. v. Stanton, 2010 BCCA 208

The accused, and three others, was charged on a 12-count indictment with various offences. The charges included assault causing bodily harm, assault with a weapon, unlawful confinement, aggravated assault, robbery and conspiracy to commit an unlawful confinement. At trial in British Columbia Supreme Court there was an issue as to whether the interception of the accused's private communications breached his rights under s.8 of the *Charter*. The judge found there was a breach because the authorization did not contain a properly drafted cellular phone "resort-to" clause. But, the judge concluded that even if the the accused's s.8 rights had been breached, the calls were admissible under s.24(2) of the *Charter* using the *Collins/Stillman* considerations (whether the admission of the evidence would affect trial fairness, the seriousness of the breach, and the effect of admission on the administration of justice).

Since the calls were not conscriptive evidence, their admission would not affect trial fairness. The breach was serious - the Crown Agent seeking the authorization made a "deliberate", "unreasonable" and "negligent" decision not to seek a cellular telephone "resort-to" clause that would have permitted lawful interception of the calls. Further, the police "must have become aware" of the absence of a resort-to clause authorizing interception and chose nonetheless, "unreasonably" and "negligently", to intercept the calls anyway. But the police and Crown Agent's conduct fell in the middle ground between good and bad faith - there were neither aggravating nor mitigating circumstances affecting the seriousness of the breach. Finally, the trial judge ruled that the administration of justice would be brought into greater disrepute if the calls were excluded. None of the calls were "essential to the proof of the Crown's case", neither the admission nor the exclusion of the calls would have any "long term effect on the administration of justice", and each charge was "serious". The intercepted calls were admissible and the accused was convicted of unlawful confinement, robbery, assault causing bodily harm, and conspiracy to commit unlawful confinement.

The accused then appealed to the British Columbia Court of Appeal arguing the trial judge erred in failing to exclude the intercepted calls under s.24(2) of the *Charter*. Had the calls not been admitted, he contended that the other evidence remaining against him would not have established his guilt beyond a reasonable doubt.

Since the time of the trial judge's decision, the Supreme Court revised the factors to be considered in a s.24(2) analysis. The three branches for analysis are now:

a) the seriousness of the Charter-infringing state conduct,
b) the impact of the breach on the Charter-protected interests of the accused, and
c) society's interest in the adjudication of the case on its merits.

> "State conduct resulting in Charter violations varies in seriousness. At one end of the spectrum, admission of evidence through inadvertent or minor violations may minimally undermine public confidence. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of Charter rights will inevitably have a negative effect on public confidence."

In the accused's view, the three new factors all weighed against the admission of the calls and that, on balance, society's confidence in the justice system would be weakened by their admission and they therefore should have been excluded.

In this case the Court of Appeal upheld the admission of the evidences even if the revised s.24(2) framework for admissibility was used.

Seriousness of the Charter-infringing State Conduct

"State conduct resulting in Charter violations varies in seriousness," said Justice Rowles, speaking for the Court of Appeal. "At one end of the spectrum, admission of evidence through inadvertent or minor violations may minimally undermine public confidence. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of Charter rights will inevitably have a negative effect on public confidence. Evidence that the conduct was part of a pattern of abuse tends to support exclusion."

Impact of the Breach on the Accused

"The impact of a Charter breach may range from fleeting and technical to the profoundly intrusive," said Justice Rowles. "The more serious the impact on an accused's protected interests, the greater the risk that admission of the evidence may signal to the public that Charter rights are of little actual avail to the citizen. An unreasonable search contrary to s. 8 may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not."

Society's Interest in Adjudication of the Case

"The public interest in truth-finding remains a relevant consideration under the s.24(2) analysis and the reliability of the evidence is an important factor," said the Court. "If a breach undermines the reliability of the evidence, it points in the direction of exclusion. Conversely, exclusion of relevant and reliable evidence may 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 fact that the evidence obtained in breach may facilitate the discovery of the truth and the adjudication of the case on its merits must be weighed against factors pointing to exclusion in order to balance the interests of truth with the integrity of the justice system."

In concluding that the evidence in this case was admissible, the Court of Appeal stated:.

> The warrantless interception of private communications generally represents a highly intrusive breach of privacy and the judge in this case recognized the breach as being a serious one. While the judge found the breach itself to be serious, he determined that the conduct of the police demonstrated neither good faith nor bad faith. Significantly, the Charter-infringing state conduct was not wilful or reckless (the serious end of the spectrum) nor was it inadvertent or minor (the minor error end of the spectrum). In other words, the state conduct in this case fits somewhere in the middle of the continuum of seriousness. Furthermore, there was no evidence that the conduct was part of a pattern of abuse and, based on the evidence of the Crown precedent for authorizations in use at the time as well as the evidence put forward by the defence of other authorization orders that had been made, the conduct could not be taken to be representative of what the Crown agents were doing. The police could have intercepted the communications lawfully if the "resort-to" paragraph contained in the Crown Counsel precedent relating to cellular phones had been included in the authorization. This is a case in which the impugned conduct might be termed "one-off" and unlikely to be replicated, particularly not by anyone involved in or knowledgeable about this investigation or prosecution.
>
> As to society's interest in an adjudication on the merits, the judge decided to admit evidence that was both highly reliable and relevant. There is no suggestion that the breach in this case undermined the reliability of the evidence in any way. Exclusion of the intercepted communications would have deprived the Crown of real, reliable evidence that the Crown considered important to its case and the societal interest in the truth-seeking function of a trial. The nature and quality of the evidence points to inclusion rather than exclusion in the circumstances of this case. [paras. 63- 64]

The accused's appeal was dismissed.

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

ONTARIO's PUBLIC WORKS PROTECTION ACT

Recently, media reports on the G8 and G20 Summits held in Ontario has highlighted Ontario's *Public Works Protection Act* (*PWPA*). It was this legislation that authorized police to identify, search, and arrest persons under prescribed circumstances in relation to Ontario's public works.

What is a 'Public Work'?

Under s.1 of the *PWPA* a "public work" is defined as follows:

> "public work" includes,
> (a) any railway, canal, highway, bridge, power works including all property used for the generation, transformation, transmission, distribution or supply of hydraulic or electrical power, gas works, water works, public utility or other work, owned, operated or carried on by the Government of Ontario or by any board or commission thereof, or by any municipal corporation, public utility commission or by private enterprises,
> (b) any provincial and any municipal public building, and
> (c) any other building, place or work designated a public work by the Lieutenant Governor in Council.

Pursuant to a regulation made on June 2, 2010 and coming into force on June 21, the following were designated as public works for the purposes of the *PWPA*:

> s.1(1) Everything described in clause (a) of the definition of "public work" in section 1 of the Act that is located in the area described in Schedule 1, including, without limitation and for greater certainty, every sidewalk in that area.
>
> 2. The places described in paragraphs 1, 2 and 3 of Schedule 2.

SCHEDULE 1

AREA REFERRED TO IN PARAGRAPH 1 OF SECTION 1

The area in the City of Toronto lying within a line drawn as follows:

Beginning at the curb at the southeast corner of Blue Jays Way and Front Street West; then north to the centre of Front Street West; then east along the centre of Front Street West to the east curb of Windsor Street; then north along the east curb of Windsor Street to the centre of Wellington Street; then east along the centre of Wellington Street to the centre of Bay Street; then south along the centre of Bay Street to a point directly opposite the north wall of Union Station; then west along the exterior of the north wall of Union Station to the centre of York Street; then south along the centre of York Street, continuing east of the abutments under the railway overpass, and continuing south along the centre of York Street to the centre of Bremner Boulevard; then west along the centre of Bremner Boulevard to the east curb of Lower Simcoe Street; then south along the east curb of Lower Simcoe Street to the north curb of Lake Shore Boulevard West; then west along the north curb of Lake Shore Boulevard West to the south end of the walkway that is located immediately west of the John Street Pumping Station and runs between Lake Shore Boulevard West and the bus parking lot of the Rogers Centre; then north along the west edge of that walkway to the bus parking lot of the Rogers Centre; then west along the south edge of the bus parking lot of the Rogers Centre to the west edge of the driveway running between the parking lot and Bremner Boulevard; then north along the west edge of that driveway to the north curb of Bremner Boulevard; then west along the north curb of Bremner Boulevard to the east curb of Navy Wharf Court; then north along the east curb of Navy Wharf Court to the southwest point of the building known as 73 Navy Wharf Court; then east along the exterior of the south wall of that building; then north along the exterior of the east wall of that building to the curb of Blue Jays Way; then north along the east curb of Blue Jays Way to the curb at the southeast corner of Blue Jays Way and Front Street West.

SCHEDULE 2

DESIGNATED PLACES REFERRED TO IN PARAGRAPH 2 OF SECTION 1

1. The area, within the area described in Schedule 1, that is within five metres of a line drawn as follows:

Beginning at the south end of the walkway that is located immediately west of the John Street Pumping Station and runs between Lake Shore Boulevard West and the bus parking lot of the Rogers Centre; then north along the west edge of that walkway to the bus parking lot of the Rogers Centre; then west along the south edge of the bus parking lot of the Rogers Centre to the west edge of the driveway running between the parking lot and Bremner Boulevard; then north along the west edge of that driveway and ending at Bremner Boulevard.

2. The area, within the area described in Schedule 1, that is within five metres of a line drawn as follows:

Beginning at the southwest point of the building known as 73 Navy Wharf Court; then east along the exterior of the south wall of that building; then north along the exterior of the east wall of that building and ending at the curb of Blue Jays Way.

> 3. The below-grade driveway located between Union Station and Front Street West and running between Bay Street and York Street in the City of Toronto.

The regulation designating the areas found in Schedule 1 and Schedule 2 was revoked on June 28, 2010.

Powers of peace officer

Section 3 of the *PWPA* prescribes the powers afforded to peace officers (and guards as appointed) to request identification, conduct warrantless searches of persons and/or vehicles, to deny entry, and use as much force as is necessary to prevent entry:

> A guard or peace officer,
>
> (a) may require any person entering or attempting to enter any public work or any approach thereto to furnish his or her name and address, to identify himself or herself and to state the purpose for which he or she desires to enter the public work, in writing or otherwise;
>
> (b) may search, without warrant, any person entering or attempting to enter a public work or a vehicle in the charge or under the control of any such person or which has recently been or is suspected of having been in the charge or under the control of any such person or in which any such person is a passenger; and
>
> (c) may refuse permission to any person to enter a public work and use such force as is necessary to prevent any such person from so entering.

Offences

Section s.5(1) of the *PWPA* sets out a number of offences, including neglecting or refusing to obey a request or direction of peace officer:

> Every person who neglects or refuses to comply with a request or direction made under this Act by a guard or peace officer, and every person found upon a public work or any approach thereto without lawful authority, the proof whereof lies on him or her, is guilty of an offence and on conviction is liable to a fine of not more than $500 or to imprisonment for a term of not more than two months, or to both.

Arrest

Section 5(2) provides a peace officer with the warrantless power to arrest a person for neglecting or refusing to comply with a request or direction by a peace officer:

> A guard or peace officer may arrest, without warrant, any person who neglects or refuses to comply with a request or direction of a guard or peace officer, or who is found upon or attempting to enter a public work without lawful authority.

Case Law

The *PWPA* has been considered in a number of Ontario cases, particularly those concerning searches at courthouses.

In ***R. v. Skeete***, [2002] O.J. No. 3048 (Ont.C.J.) the accused entered a Hamilton courthouse and the shaving kit bag he had with him was manually searched for weapons. It contained crack cocaine and he was arrested and charged with possession for the purpose of trafficking, possessing proceeds of crime, and breach of recognizance. The judge ruled that s.3 of the *PWPA* complied with s.8 of the *Charter* and did not need to include a requirement of reasonable grounds. "The legislation is self-explanatory and necessary for the protection of all involved who are present in our courts," said the judge:

> In my opinion there is a lowered expectation of privacy when one enters a public building, such as a courthouse, especially where notices of pending searches are clear and present. A person has a right to turn around and leave prior to search. There is full autonomy. They may then return, knowing full well that they will be searched upon return. It is a general search and no individual is singled out for special treatment, thereby preserving individual integrity. It is performed for security purposes and not criminal investigations. There should be very little expectation of privacy and, consequently, as a result, that limited expectation does not require

> that searches only be conducted where there are reasonable and probable grounds. [para. 29]

The judge upheld the constitutionality of the *PWPA*, finding it was a valid piece of "legislation enacted for very important purposes by a duly elected legislature."

In ***R. v. Campanella*** (2005), 75 O.R. (3d) 342 (Ont.C.A.), the accused entered the Hamilton Courthouse to appear on a drug charge. While going through screening her purse was manually searched and a baggie of marijuana was found. She was arrested and charged. The Ontario Court of Justice, the Ontario Superior Court of Justice, and the Ontario Court of Appeal all held that the search and seizure did not violate s.8 of *Charter*. The security screening that took place was authorized by s.3(b) of the *PWPA*. "Public work" was defined in s.1 to include "any provincial and any municipal public building", which obviously included a courthouse. As well, s.137 of the *Police Services Act* provided that the police services board was responsible for ensuring the security of the courthouse.

In ***R. v. S.S. et al***, [2005] O.J. No. 5002 (Ont.S.C.J.) the accuseds, charged with serious criminal offences including murder, attempted murder, robbery, drug trafficking, weapons offences and belonging to a criminal organization, challenged the requirement that all individuals entering the courtroom would be searched with a hand wand and manual or visual searches of carried receptacles, including lawyers' briefcases, would be undertaken for weapons or escape implements. The Chief of Police, for reasons of security and public safety, had concluded that prior security clearance should not be extended to lawyers (Crown or defence counsel) or court staff. The searches were authorized under s.3(b) of the *PWPA* and the judge ruled there was no actual or potential violation of anyone's s.8 *Charter* rights and there was no basis to declare s.3(b) unconstitutional.

In ***R. v. Skinner-Withers***, 2006 ONCJ 47 the accused was taken from the police station to the courthouse for his bail hearing. He was patted down for weapons or contraband, but became agitated. A scuffle ensued and he punched an officer in the face. He was charged with assaulting a peace officer engaged in the lawful execution of his duties. At trial the accused argued the offence had not been made out because the search was illegal (there was no authority for it) and even if it was authorized, it was unreasonable because he had already been searched on a number of occasions after being taken into custody the previous day. The court found that not only did the *PWPA* authorize the routine search of persons out of custody (as was the case in *Campanella*), it also authorized searches of persons already in custody. "[I]ndividuals (accused and non-accused alike) who enter court buildings out of custody may be routinely searched," said the judge. "It cannot be the case that those who attend court facilities in custody should not be subjected to similar, non-invasive precautionary measures".

In ***R. v. Nicolosi***,[1993] O.J. No. 3406 (Ont.G.D.) Toronto Police officers stopped the accused and subsequently impounded the vehicle he was driving. The police undertook an inventory search and found a handgun. In the Ontario Court of Justice (General Division) the Crown attempted to justify the search pursuant to s.3(b) of the *PWPA* (among other authorities). The judge however, rejected this argument. Although, s.1 of the *PWPA* defined a "public work" as including a highway (and "highway" is defined as including any street), the evidence did "not establish that any of the steps taken by police were for the purpose of protecting a public work." Therefore, there was no basis to invoke the provisions of the *PWPA*. The search, however, was upheld as a lawful inventory search under Ontario's *Highway Traffic Act* permitting impoundment of the vehicle (see *R. v. Nicolosi* (1998), 127 C.C.C. (3d) 176 (Ont.C.A.)).

Note-able Quote

"[I]f you were making $500 or $600 an hour and $5,000 or $6,000 a day in court, you wouldn't be complaining about long trials. You'd want them to go on forever! ... And for those who think that way, the Charter is like a gift from heaven. It is the godsend of all godsends." - Ontario Court of Appeal Justice Maldover, remarks to the Justice Summit, *"The State of the Criminal Justice System in 2006: an Appellate Judge's Perspective" - November 15, 2006, Toronto, Ontario.*

BC COURT FACILITY SECURITY

Courtroom security in British Columbia is the responsibility of Sheriffs services. Among other things, Sheriffs also escort prisoners by ground and air to and from remand facilities for court appearances.

Searching Persons

Under s.6.1(3) of British Columbia's *Sheriff Act* (*SA*), a sheriff may search a person for weapons inside or entering a court facility.

> A sheriff may do one or more of the following:
> (a) search a person for weapons in the manner prescribed by the minister before the person enters a court facility or at any time while the person is inside the court facility.

Under s.2 of the *Sheriff Act Security Regulation* (*SASR*), the search conducted under s.6.1(3) of the *SA* may be a pat-frisk search or screening search. These types of searches are defined under s.1(1) of the *SASR* as follows:

> **"pat-frisk search"** means a hand search or a search by use of a hand-held screening device, conducted by a sheriff
> (a) of a clothed person, from head to foot, down the front and rear of the body, around the legs, and inside clothing folds, pockets and footwear, and
> (b) of any personal possessions, including clothing, that the person may be carrying or wearing.

> **"screening search"** means a search by a sheriff of a clothed person and any personal possessions, including clothing, the person may be carrying or wearing, that is conducted visually or with the use of a screening device, including without limitation, a walk-through or hand-held metal detector or a fluoroscope.

In order to search a person inside a court facility a sheriff may require the person move to another place inside the facility (s.6.1(3)(b) SA). Furthermore, a sheriff may seize any weapon in the possession of a person who is in, or is attempting to enter, a court facility (s.6.1(3)(c) *SA*). If the person refuses to be searched for weapons, refuses to move to another place for the purpose of a search, or refuses to relinquish a weapon in their possession, a sheriff may refuse a person entry to, or evict a person from, a court facility (s.6.1(4)(a)-(c) *SA*). Furthermore, if a sheriff has reason to believe that the person is (i) a threat to the safety of the court facility or to the health or safety of any of its occupants, or (ii) disrupting court proceedings, they may refuse the person entry to or evict them from the court facility (s.6.1(4)(d) *SA*).

Arrest

In addition to the powers of a sheriff to search, seize, and evict, a sheriff may arrest a person under s. 6.1(4.1) of the *SA*.

> ... a sheriff may arrest a person who is in a court facility area or evict a person from a court facility area if
> (a) the person is in possession of a weapon and refuses to comply with the sheriff's request to relinquish the weapon to the sheriff, or
> (b) the sheriff has reason to believe that the person is
> (i) a threat to the safety of the court facility or the health or safety of any of the occupants of the court facility, or
> (ii) disrupting court proceedings.

Use of Force

A sheriff is entitled to use reasonable force in refusing entry, evicting, or seizing a weapon under s. 6.1(5) of the *SA*:

> A sheriff may use reasonable force in
> (a) refusing a person entry to a court facility, a restricted zone or a court facility area,
> (b) evicting a person from a court facility or a restricted zone, or
> (c) seizing a weapon from a person who is in, or is attempting to enter, a court facility or a court facility area.

Searching Prisoners

Under s.6.2(2) of the *SA,* a "sheriff may conduct a search of a prisoner and any personal possessions, including clothing, that the prisoner may be carrying or wearing." A prisoner means "a person in lawful custody of a sheriff" (s.6.2(1) *SA*). A strip search is defined in s.1(1) of the *SASR* as:

> "strip search" means a visual inspection by an authorized person of a nude person that includes
> (a) a visual inspection of the following:
> (i) the person undressing completely;
> (ii) the open mouth, hands or arms of the person;
> (iii) the soles of the feet and the insides of the ears of the person;
> (iv) the person running his or her fingers through his or her hair;
> (v) the person bending over, and
> (b) the person otherwise enabling the authorized person to perform the visual inspection.

Strip searches are permitted provided that:

> s.6.2(4) Before a sheriff conducts a strip search of a prisoner, the sheriff must
> (a) believe on reasonable grounds that the prisoner may be in possession of **contraband**,
> (b) believe on reasonable grounds that a strip search is necessary in the circumstances, and
> (c) obtain the authorization of the sheriff's supervisor, unless the sheriff believes on reasonable grounds that the delay necessary to comply with this requirement would result in danger to human life or safety.

However, s.6.2(4) "does not apply to a strip search of a prisoner conducted by a sheriff on taking custody of the prisoner for transport from a penitentiary under the control of Canada" (s.6.2(5) *SA*). And "a strip search of a prisoner must be conducted by a sheriff of the same sex as the prisoner unless the delay that would be caused by complying with this requirement would result in danger to human life or safety" (s.6.2(6) *SA*).

However, "if the circumstances allow, before conducting a strip search, a sheriff must (a) inform the prisoner to be strip searched of the reasons for the strip search, and (b) explain how a strip search is conducted" (s.2.1(1) *SASR*). As well, under s.2.1 of the *SASR* additional procedures must be adhered to:

> s.2.1(2) A strip search that is conducted by a sheriff must be
> (a) observed by one other sheriff or other peace officer,
> (b) carried out in as private an area as the circumstances allow, and
> (c) carried out as quickly as the circumstances allow.
> (3) The person referred to in subsection (3) (a) must be the same gender as the prisoner who is the subject of a strip search unless the sheriff's supervisor believes on reasonable grounds that the delay necessary to comply with this requirement would result in danger to human life or safety.

Contraband

Under s.6.2 of the *Sheriff Act* "contraband" means

(a) contraband described in paragraphs (a) to (e) of the definition of "contraband" in the Correction Act, or

(b) an object or substance that, in the opinion of a sheriff's supervisor, may threaten the security or safety of sheriffs or persons in the custody of sheriffs.

Under paragraphs (a) to (e) of British Columbia's *Correction Act*, contraband means:

(a) an intoxicant;

(b) if possessed without prior authorization, a weapon, any component of a weapon or ammunition for a weapon, or anything that is designed to kill, injure or disable or is altered so as to be capable of killing, injuring or disabling;

(c) an explosive or bomb, or any component of an explosive or bomb;

(d) if possessed without prior authorization, any currency;

(e) if possessed without prior authorization, tobacco leaves or any products produced from tobacco in any form or for any use.

DID YOU KNOW?

...that according to a recent Leger Marketing poll released in May 2010, 83% of Canadians surveyed agreed that adult sentences should be considered for youths found guilty of serious crimes, like murder and aggravated assault. Half (50%) agreed completely while another 33% agreed somewhat in tougher sentences for youth convicts. Residents in Alberta (90%), Manitoba/Saskatchewan (89%) and the Maritimes (89%) were more likely to agree in tougher sentences while residents in Quebec (79%) and British Columbia (78%) were less likely to agree. In Ontario, 82% agreed in tougher sentences.
(source http://www.legermarketing.com/documents/SPCLM/105262ENG.pdf)

ROBBERY IN CANADA

What is robbery?
Robbery is defined as an incident of theft that also involves violence or the threat of violence.

In Statistics Canada's Spring 2010 release "*Police-reported robbery in Canada, 2008*", the following highlights were reported:

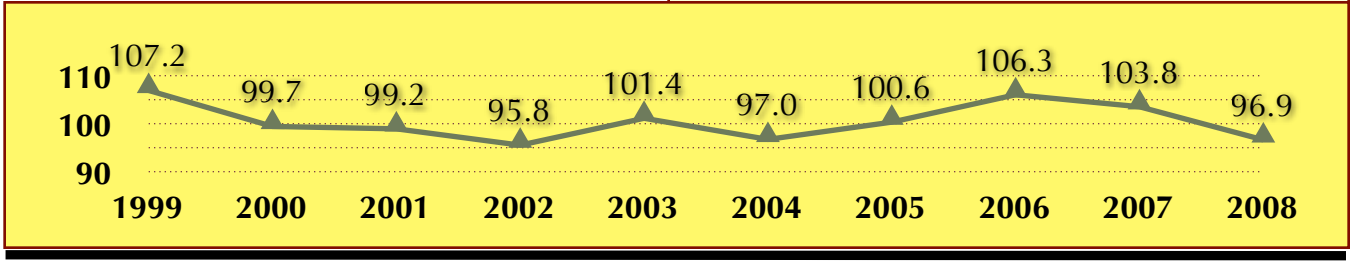
- in 2008 there were about 32,000 robberies;
- robberies accounted for 7% of all violent crime;
- robberies in Canada were down -6.7% in 2008 from 2007;
- over the past 10 years (from 1999 to 2008) robberies in Canada were down -9.6%;
- the greatest decreases in robberies over the past 10 years have occurred in Quebec (-30.1%), British Columbia (-22.1%), and Manitoba (-21.6%);
- the greatest increases in robberies over the past 10 years have occurred in Newfoundland (+114.7%), Nunavut (+94.9%), and Saskatchewan (+32.1%);

2008 ROBBERY RATES

Area (province or territory)	Rate per 100,000 residents	Rate change from 2007 to 2008
Manitoba	157.9	-21.6%
Saskatchewan	128.4	-18.1%
British Columbia	123.0	-3.7%
Alberta	105.5	-4.3%
Ontario	92.2	-5.5%
Quebec	90.0	-4.1%
Nova Scotia	61.3	-15.8%
Northwest Territories	53.1	-11.0%
Nunavut	50.9	+22.3%
Yukon	45.3	-7.8%
New Brunswick	28.1	-9.3%
Newfoundland	27.4	-13.9%
Prince Edward Island	16.4	+42.0%
Canada	96.9	-6.7%

- the only violent crimes that occur more often than robbery are assault and uttering threats;
- while most violence occurs between people who know each other, robberies are usually committed by a stranger;
- about 25% of robberies also involved an additional offence, most commonly a weapon offence, assault, or uttering threats;

Police-reported robbery in Canada, 1999-2008, rate per 100,000 population



- robbery is committed predominately by young males. In 2008, 87% of those accused of robbery were male while nearly 66% were between 12 and 24 years of age;
- the highest rates of robbery were among 15 to 18 year olds.

There are three major locations where robberies occur:

- ✦ **outdoor public locations** (such as streets, parking lots, open areas, and transit facilities);
- ✦ **commercial or institutional locations** (such as convenience stores and gas stations, banks or financial institutions, other commercial places like office buildings and grocery stores, schools, and other non commercial places like community centres, hospitals, and churches);
- ✦ **residences** (such as private dwelling units (home invasions) and other private property structures).

Source: Statistics Canada, Spring 2010, "Police-reported robbery in Canada, 2008", catalogue no. 85-002-X, Vol. 30, no. 1.

Robbery by Location Type

Location	Number	%	Rate per 100,000
Outdoor Public	**13,634**	**50.3%**	**41.7**
Street	9,123	33.7%	27.9
Parking Lot	1,669	6.2%	5.1
Open Area	1,646	6.1%	5
Transit Facility	1,196	4.4%	3.7
Commercial or Institution	**10,682**	**39.4%**	**32.7**
Convenience Store & Gas Station	3,518	13%	10.8
Bank or Financial	1,240	4.6%	3.8
Other Commercial Place	5,024	18.5%	15.4
School	560	2.1%	1.7
Other Non-Commercial Place	340	1.3%	1
Residence	**2,782**	**10.3%**	**8.5**
Private dwelling unit	2,679	9.9%	8.2
Other private structure	103	0.4%	0.3

Top Ten 2008 Robbery Rates by Census Metropolitan Area (CMA)

CMA	Rate per 100,000	Rate change from 2007 to 2008
Winnipeg, MB	232.7	-23.0%
Regina, SK	221.9	-11.9%
Saskatoon, SK	211.8	-29.4%
Vancouver, BC	170.8	-4.9%
Edmonton, AB	170.5	+0.9%
Montreal, QC	151.2	-2.1%
Toronto, ON	133.4	-6.0%
Thunder Bay, ON	131.3	-7.7%
Abbotsford-Mission, BC	126.7	+3.0%
Halifax, NS	122.2	-11.2%

- the CMAs with the greatest percent increases in robberies from 2007 to 2008 were Trois-Rivieres QC (+63.7%), Gatineau QC (31.4%), Saint John NB (+30.7%), Windsor ON (+30.4%), and Kelowna BC (+14.3%);
- the CMAs with the greatest percent decreases in robberies from 2007 to 2008 were Saguenay QC (-42.7%), Brantford ON (-35.1%), Saskatoon SK (-29.4%), Moncton NB (-27.4%), and Kitchener ON (-24.6%);
- over the past 10 years from 1999 to 2008, Thunder Bay ON reported the greatest increase in robberies at +122.9%.

SPITTING ON COP WARRANTS CUSTODIAL SENTENCE

R. v. Charlette, 2010 SKCA 78

The accused's mother called police to report that her daughter, the accused, had been abusive, was causing a disturbance, and needed to be removed from the home. While being placed in police cells, the accused spit in an officer's face twice, and spit upon his clothing once. And she continued spitting as the officers attempted to lock the cell door. Earlier, the accused told police she had a "contagious disease," but when asked whether she really had such a disease, she laughed and said "maybe he should go get checked out." The police officer who was spit upon undertook a series of treatments and tests. At a later time, after initially refusing to provide access to her medical records, the accused did grant access which ultimately revealed she was not suffering from any disease. The accused was released on bail, but on successive occasions refused to comply with the curfew and alcohol terms of her release.

The accused plead guilty to assault and six counts of breaching her interim release conditions. At her sentencing hearing the officer provided a victim impact statement that indicated he, and his family, were deeply troubled by the possibility he had contracted a communicable disease. The ongoing tests and treatment he was required to undergo were difficult and bothersome. At the time he had an unhealed wound on his face, which added to his distress. The accused had a minor youth record, a severe addiction problem, and social issues. Her pre-sentence report indicated that she did not accept that she had done anything wrong and during the sentencing hearing she acted out, demonstrating little concern for the harm she had caused.

In Saskatchewan Provincial Court the sentencing judge emphasized the accused's need for rehabilitation and gave her time served (nine days on remand) plus six months' probation for the assault and six breaches. The terms of probation did not require a curfew, nor have an alcohol abstinence or treatment clause. She was required to report in person to her probation officer, reside at an approved residence, take personal counselling, and write a letter of apology within 60 days of sentencing.

The Crown appealed the sentence to the Saskatchewan Court of Appeal, submitting that the judge over-emphasized the sentencing principle of rehabilitation and did not recognize the gravity of the offence. As well, the sentence would not deter the accused, or others, from committing a far too common type of assault against police officers - spitting. The Crown contended that a sentence of 30 to 90 days, plus an 18-month probation order, would be appropriate.

Justice Jackson, delivering the opinion of the Court of Appeal, agreed. "Spitting on someone is a particularly distasteful and harmful form of assault," she said. "It is almost always accompanied by the veiled or express threat of transmitting a communicable disease. The possibility of contracting a disease is real, and the fear of developing a disease preys on the victim's mind for some time to come. Police officers, whose jobs require them to confront individuals in close quarters, have few resources to counter an assault of spitting."

The Court ruled that a custodial sentence was in order. The sentence of probation imposed by the Provincial Court, with its terms, constituted no sentence at all, the Court of Appeal found. In its place, a fit sentence of 60 days custody, along with a six month probationary period with a clause requiring her to abstain from alcohol and drugs, was imposed.

"Spitting on someone is a particularly distasteful and harmful form of assault. ... Police officers, whose jobs require them to confront individuals in close quarters, have few resources to counter an assault of spitting."

Complete case available at www.canlii.org

BREATHALYZER READINGS CAN BE CONSIDERED IN ASSESSING CREDIBILITY

R. v. Kernighan, 2010 ONCA 465

The accused was convicted of driving over 80mg%, contrary to s.253(b) of the *Criminal Code*. At trial, the Crown relied on the testimony of the blood technician to establish that the two breathalyzer readings of 140mg% and 130mg% were both taken within two hours of the alleged offence. The accused raised the "Carter defence", arguing that the readings did not reflect his blood alcohol content at 9:38 p.m., the time at which he was caught driving. He said he consumed only five beers and, based on his account of events, an expert toxicologist said the accused's blood alcohol concentration would have been between 0% and 41mg% when he was pulled over by the police. A judge of the Ontario Court of Justice, after considering the defence evidence in light of the breathalyzer readings and the evidence as a whole, concluded the accused's "evidence to the contrary" was not reasonably capable of belief.

An appeal by the accused to the Ontario Superior Court of Justice was unsuccessful. The appeal judge found no error in taking the breathalyzer readings into consideration when assessing the evidence to the contrary and the accused's credibility.

The accused then appealed to the Ontario Court of Appeal. He submitted that the trial judge erred in using the breathalyzer readings when assessing his credibility and the evidence to the contrary. In his view, there are no circumstances where breathalyzer readings can be used to assess the credibility of any evidence to the contrary. The Crown, on the other hand, contended that there is only a prohibition against using breathalyzer readings in assessing credibility when the presumption of accuracy is challenged. However, here the Crown was not relying on the presumption of accuracy but on the oral evidence of the breath technician to establish the accuracy of the readings. In the Crown's view, the accused was challenging the presumption of identity and the trial judge was entitled to consider the accused's breathalyzer readings.

Justice Gillese, delivering the unanimous judgment for the Court of Appeal, agreed with the Crown. "The presumption of accuracy relates to the accused's blood alcohol concentration at the time the breath sample was taken," he said. "Challenging this presumption requires adducing some evidence that the certificate does not in fact correctly reflect the accused's blood alcohol level at the time of the breathalyzer test." He continued:

> The presumption of identity, on the other hand, relates to the accused's blood alcohol concentration at the time of the offence. Challenging the presumption of identity requires adducing some evidence to suggest that the accused's blood alcohol concentration at the time of the offence was not the same as it was at the time that the breath samples were taken.
>
> The presumption of accuracy allows the Crown to file the certificate of the breath technician as proof of the [accused's] breath sample readings without having to call the breath technician as a witness in the trial (s. 258(1)(g)). In the present case, the Crown chose to call the breath technician as a witness and, therefore, did not

THE 'CARTER DEFENCE'

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

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

rely on the presumption of accuracy. It relied only on the presumption of identity, contained in ss. 258(1)(c) and (d.1), to establish the blood alcohol content at the time of driving.

[T]he prohibition against using breathalyzer readings to assess the accused's evidence to the contrary applies only to situations in which the Crown is relying on the presumption of accuracy and the accused is challenging that presumption. [references omitted, paras. 14-16]

Since the Crown was relying on the presumption of identity and not the presumption of accuracy, the trial judge was entitled to consider the breathalyzer readings in assessing the accused's evidence to the contrary. "Where defence counsel challenges the presumption of identity but not the presumption of accuracy, a consideration of the breathalyzer readings does not raise the spectre of circular reasoning," said the Court. Such circular reasoning arises when the breathalyzer readings are used to prove their own accuracy. But here, where the presumption of identity challenges the breathalyzer readings, they are part of the body of evidence that can be considered in determining whether the defence evidence is capable of raising a reasonable doubt. The accused's appeal was dismissed

Complete case available at www.canlii.org

Criminal Code Presumptions of Identity and Accuracy

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

How it works

Presumptions of Identity

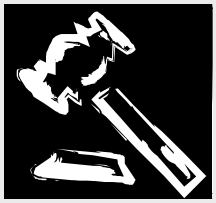
- BAC at time of driving same as BAC at time of test (s.258(1)(c) CC)
- if BAC > 80mg% at time of test, then BAC at time of driving >80mg% (s.258(1)(d.1) CC)

Time of Driving — Time of Test

up to 2 hours

LEGALLY SPEAKING:

Sentencing-Cocaine Trafficking



"[C]ocaine has consistently been recognized by this Court as a deadly and devastating drug that ravages lives. Involvement in the cocaine trade, at any level, attracts substantial penalties. It is significant that the CDSA classifies cocaine as one of the drugs for which trafficking can attract a life sentence." – Nova Scotia Court of Appeal Justice Bateman in *R. v. Butt*, 2010 NSCA 56 at para. 13, setting aside a 3.5 year sentence for a guilty plea to possessing cocaine for the purpose of trafficking and substituting a sentence of five years incarceration..

DNA ABANDONED: NO s.8 BREACH

R. v. Usereau, 2010 QCCA 894

A man was shot dead outside his home while another person who was shot survived. During the melee, the hood of the assailant's winter jacket came off and a handgun was found in the area. A DNA profile was identified from the hood and three DNA profiles were found on the gun. The accused subsequently became a suspect and was placed under police surveillance. The police wanted to recover an object on which his DNA would be found. Without his knowledge, but with the permission of a restaurant employee, the police obtained a glass and straw the accused had used while dining. The

items were submitted for DNA analysis. There was a match between the DNA found on the glass and the profile found on the hood. A DNA warrant was then obtained and executed on the accused. Again there was a match. The accused was arrested and charged with murder and attempted murder.

At trial in Quebec Superior Court the accused argued that the warrantless seizure of the glass and straw breached his *Charter* rights and the evidence should have been excluded, along with the subsequent DNA matches. For without the DNA evidence generated from the glass, it was submitted that there would not have been reasonable grounds to support the application for the DNA warrant. The Crown, on the other hand, submitted there was no seizure; it was a mere collection of objects because the accused did not have a privacy expectation in the DNA he abandoned. The trial judge agreed with the Crown that there was no *Charter* violation and, even if there was, the evidence was nonetheless admissible under s.24(2).

The accused then challenged the trial judge's ruling to the Quebec Court of Appeal contending that, although the glass and straw had been abandoned, he still retained a permanent expectation of privacy in his DNA information. He suggested that, under the DNA provisions of the *Criminal Code,* the police required his consent or at least reasonable grounds to decode his DNA. Without such consent or grounds, the police upset the balance between crime control and individual privacy interests, thereby violating his right not to incriminate himself. As well, he raised the concern that the police could retain his DNA information in a secret DNA data bank for future use, an idea at odds with the government's destruction requirements of DNA information under the *Criminal Code*.

A majority of the Quebec Court of Appeal rejected the accused's arguments. In assessing whether a person abandons an item such that they cease to have a reasonable expectation of privacy in it, a court must determine whether the person asserting s.8 *Charter* protection has acted in such a manner that a reasonable and independent observer would conclude their assertion was unreasonable. Here, "there can be little doubt that a reasonable and independent observer would conclude that [the accused's] continued assertion of a privacy interest in a glass and a straw after he had left the restaurant is unreasonable in the totality of the circumstances," said Justice Hilton. He continued:

> [The accused], however, goes further and contends that the collection of DNA evidence in this manner can give rise to legislatively unauthorized covert banks of DNA evidence over which no control can ever be exercised. This apocalyptic view is highly speculative at best. There is no evidence that any such covert banks exist or have ever existed. Nor is there a risk that DNA profiles obtained without a warrant under the regime provided for in the Criminal Code will be permanently maintained as if they had been obtained with a warrant and their destruction not subsequently ordered.
>
> This Court has already interpreted restrictively what permanent use can be made of DNA samples obtained during a police investigation pursuant to a warrant under section 487.051 [*Criminal Code*], as opposed to samples taken pursuant to an accused having pleaded guilty to a designated offence mentioned in section 487.04 [*Criminal Code*]. The time to consider the legality of samples maintained in a covert bank will arise if and when it is established that such a bank exists, and an accused applies to exclude evidence derived from the use of his or her DNA samples in such a bank. [paras. 48-49]

This ground of appeal was dismissed, but a new trial was ordered on other errors by the trial judge.

Complete case available at www.canlii.org

www.10-8.ca

ARREST BASED ON MORE THAN MERE HUNCH

R. v. Larocque, 2010 QCCA 1171

The police obtained a search warrant for an apartment that had been monitored as a suspected outlet for drug dealers. That day, the accused attended as a passenger in a vehicle with another man who was known as being active in drug trafficking and the main target of the investigation. Officers in place to execute the warrant intercepted visitors and potential buyers to obtain additional evidence. Upon leaving the premises a few minutes later, the men returned to their vehicle and left, only to be stopped by a patrol officer. The accused was arrested for drug possession, told of his right to counsel, and searched. The search of the vehicle was unsuccessful, but four bags of marijuana and one bag containing 28 tablets of methamphetamine were found on the accused. He was again placed under arrest, this time for possession for the purpose of trafficking. He was taken to the police station where two additional bags of tablets are found. He subsequently acknowledged that he had been involved for about three months in the sale of narcotics.

At trial in Quebec District Court the accused submitted that the arrest was unlawful for lack of reasonable grounds and the subsequent search was also unreasonable. Thus the substances should have been excluded as evidence. The trial judge, in reviewing s.495 of the *Criminal Code,* noted that the mere presence of the accused in the car of the known drug dealer could not provide reasonable grounds. However, the information the officer had in preparation for the warrant could contribute to establish such grounds, even in the absence of direct knowledge. Similarly, events that the officer personally witnessed while watching the surrounding area prior to the search established the reasonableness of his grounds for arrest. Seeing a person leave the scene of an apartment used for the likely sale of drugs, along with seeing a man known to police for his involvement in trafficking enter the residence and then emerge a few minutes later, could provide a reasonable belief that he was now in possession of narcotics. It was not required that the officer be persuaded by the standard of proof beyond a reasonable doubt. The accused was convicted on three counts of possession and trafficking of narcotics. Furthermore, the detention could also be analyzed as one for investigative purposes. The reasons for justifying the warrantless arrest could also be reasonable grounds for suspecting the accused's involvement in drugs. Nevertheless, even if the accused's *Charter* rights were breached, the trial judge ruled the evidence admissible under s.24(2).

The accused argued before the Quebec Court of Appeal that his motion to exclude evidence should have been allowed and that an acquittal should have followed. In his view, the police lacked reasonable grounds to make the arrest and therefore the search was also unreasonable as an incident to it. As well, the accused submitted that the police should have obtained a warrant in advance, but did not have reasonable grounds to do so (just as they lacked the grounds for arrest).

Arrest

Under s.495(1) of the *Criminal Code* the officer could lawfully arrest the accused without a warrant if he had a reasonable belief in the commission of a crime. This requires not only a subjective belief in reasonable grounds, but the belief must also be objectively justifiable.

Subjectively, the officer had been briefed on the information obtained in recent weeks by colleagues responsible for monitoring the apartment targeted by the search warrant, and he had also been assigned to watch the apartment during the hours preceding the arrest so he could see firsthand the extent of back-and-forth transactions that took place. Seeing the accused enter the apartment and leave a few minutes later, plus the information that the investigator had been informed about during the briefing before the raid, provided reasonable grounds for believing that the accused could be in possession of drugs when leaving the residence.

Objectively, under the circumstances, any other officer who received the same information that the

arresting officer had would have been inclined to conclude from the actions of two individuals that they had probably bought drugs from the occupants of the apartment under surveillance. It was not just a mere hunch, but a subjective belief based on grounds that were objectively justified.

Search

Under the common law the police may conduct a search of arrested persons as an incident to arrest. However, this is not an absolute power. The arrest must be lawful, the search must have been made "incidental" to the lawful arrest, and the search must be conducted reasonably. Here, the arrest was lawful for drug possession and the search was for purposes consistent with providing evidence to substantiate drug offences. The search was also carried out reasonably.

Since there was no *Charter* violations there was no need to consider s.24(2).

Complete case available at www.canlii.org

EVIDENCE DISCOVERED AFTER ARREST CANNOT BE USED TO JUSTIFY IT

R. v. Boudreau-Fontaine, 2010 QCCA 1108

A citizen called 911 fearing that a suspicious person parked near his home in a red Mitsubishi was in possession of a laptop and was connected to a wireless network to steal data. Patrol officers approached the scene and saw a red Mitsubishi car. It was parked bumper to bumper with the car behind it. The accused was in the car and had a computer. One of the officers said he saw a blue screen divided into two sections that looked like the windows of MSN, a chat service. As police approached the car the accused closed the applications of his computer. He was sweating and seemed nervous. He said he was leaving a friend's house and stopped to look at his computer files relating to investments. He had a digital camera with him, stating he had it to take pictures of cars on the street. He provided his driver's licence. A computer check revealed that he was on probation following a conviction for production and distribution of child pornography and one of the conditions prohibited him from accessing the Internet and possessing a firearm. In another case, he was restricted from accessing the Internet and being in the presence of minors unless accompanied by adults. He was arrested for breaching his probation, handcuffed, searched, read his rights, and placed in the back of a patrol car. His computer was seized and his vehicle searched. Several items were found, including binoculars, knives, latex gloves, a mobile phone, a keyboard, a digital camera, and a GPS. A search warrant was obtained for examining the computer to show that it was connected to the Internet, thereby violating the conditions of his probation.

At trial in Quebec Court the judge ruled that the accused's rights under s.8 of the *Charter* had been breached and the evidence was excluded. The judge rejected the officer's testimony that he saw the accused visit MSN. The arrest and search were unlawful and the accused was acquitted of possessing child pornography and of failing to comply with a probation order that prohibited him from accessing the Internet.

The Crown then appealed to the Quebec Court of Appeal submitting, among other grounds, that the trial judge erred in finding that the police had no reasonable grounds to arrest the accused and, therefore, the evidence was not obtained in breach of s.8. As well, even if there was a *Charter* violation, the Crown suggested that the evidence should have been admitted.

Since the Crown never argued the law applicable to investigative detention, the Court of Appeal only analyzed the law regarding arrest under s.495 of the *Criminal Code*. The vehicle search was warrantless; therefore the Crown was required to demonstrate, on a preponderance of evidence, that it was not unreasonable. For a search be reasonable, it must be authorized by law, the law must be reasonable, and the search must be conducted in a reasonable manner. If the power to search stems from the exercise of common law to search as an incident to arrest, the arrest must be lawful, the search must be incidental to the arrest, and the search must be executed reasonably. For an arrest to be lawful, the

peace officer must believe on reasonable grounds that a crime has been committed and the reasons must be objectively justified.

In this case, the Crown failed to establish on a preponderance of evidence that the officers had sufficient information to justify the accused's arrest for violating probation in connection with accessing the Internet. In so deciding, it was important that the reasons provided by the police be examined without taking into account the later discovery of the contents of the computer, as this information was not available when the arrest was made. At the time of the arrest the police had no reason to believe that the accused was connected to the Internet. Consequently, the trial judge's finding that the police had no reasonable grounds to arrest the accused was not unreasonable. Although the police cannot be blamed for wanting to improve their grounds before making an arrest, they can not use the later discovery of evidence to conclude that there were reasonable grounds at the time they made the arrest.

Nor could the results of the computer analysis be used to assess the police officer's credibility and the reliability of his testimony in showing that he had reasonable grounds. Whether it is used to show reasonable grounds or confirm an officer's testimony, the ban on taking into account evidence subsequently discovered applied. In either case, the reasons given by the police become reasonable simply because they are proven correct. The proper approach is to assess the grounds at the time of the police action. The evidence discovered later may show, for example, that the intuition of the officer was justified or that it was true, either because he was right, or because, as in this case, he was lucky. Constitutional rights cannot be based on chance or on another form of uncertainty. The Court of Appeal concluded that the accused's arrest was illegal and that the search of the vehicle as well as the ensuing seizure were unreasonable and violated s.8. The evidence was excluded.

Complete case available at www.canlii.org

SEARCH INCIDENTAL TO ARREST DOES NOT REQUIRE EXIGENCIES

R. v. Nolet et al, 2010 SCC 24

The accuseds were travelling in Saskatchewan along the Trans-Canada Highway in with an empty 53-foot Quebec-licensed commercial tractor-trailer unit. They were stopped in a random check under Saskatchewan's *Highway and Transportation Act* (*H&TA*). Vatsis was driving, Nolet was in the passenger seat, and another man, now deceased, was in the sleeping compartment. It was determined that the truck's registration was not pro-rated to include the province, the appropriate fuel sticker had expired, and the log-book was incomplete and indicated that the truck normally operated east of the Manitoba border. On request, the accused agreed to let the officer inspect the empty trailer. The officer thought the trailer "looked odd" but, being alone, decided not to enter the trailer. He decided to pursue the defective trucking document issues by inspecting the interior of the tractor and to look for more documents, such as previous bills of lading, tickets, and other log books. In the sleeping compartment he found a small duffle bag. When he touched the bag, its contents crackled like paper, so he opened it, assuming it contained old log-books or travel documents. However the bag contained $115,000 bundled in small denominations, mainly $20 bills. His experience suggested the packaging of cash was typical of drug transactions and the men were arrested for possessing the proceeds of crime.

After back-up arrived the trailer was again inspected. The interior measurements were about three feet shorter than the exterior length, indicating the presence of a hidden compartment. The rig was driven about 10 km to the nearest police station when, about an hour and a half later, the officers opened up the hidden compartment and discovered 392 pounds of packaged marijuana valued at between $1.1 and $1.5 million. The next day, an officer from the Integrated Proceeds of Crime Unit searched the tractor-trailer rig for the purpose of creating an inventory of the contents pursuant to policy. More documentation was discovered that

was relevant to the *H&TA* offences, including factory decals, registration papers and permits for different companies that, when applied to the exterior, would make the truck look completely different.

At trial in the Saskatchewan Court of Queen's Bench the judge concluded that police inspection powers under the legislation governing commercial vehicles on the highway did not extend to permit a warrantless search of the small duffle bag located in the sleeping compartment of the tractor unit in these circumstances; where the officer had no reasonable grounds to believe that criminal offences had been committed. While the expectation of privacy in a commercial vehicle is generally less than in a private vehicle, which is generally less than in a private home or office, this lesser privacy interest was still entitled to *Charter* protection. The judge found the warrantless searches were unreasonable and the evidence of the money and the marijuana was excluded. The accuseds were acquitted.

On appeal by Crown to the Saskatchewan Court of Appeal, a majority found that a mere hunch or speculation that a trailer had been altered or re-fabricated, even if hidden contraband was the suspected reason for the alteration, did not taint an otherwise lawful regulatory search. The accuseds had not established that the police were using the highway regulatory inspection as a pretext for their actions. The detention was not arbitrary and the search for documents was lawful. There was no s.8 *Charter* breach and the money should not have been excluded. The arrest was lawful and the marijuana was located during a proper search incidental to arrest. The marijuana and cash was admissible and a new trial was ordered.

"A roadside stop is not a static event. Information as it emerges may entitle the police to proceed further, or, as the case may be, end their enquiries and allow the vehicle to resume its journey."

The dissenting justice ruled that the police could not rely on a regulatory search power once their "focus" became criminal activity. The search authority extended to regulatory matters only and police could not search for contraband as one of the defined purposes of the search. In her view, the cash was inadmissible under s.24(2), but the marijuana should have been admitted. Thus, she would have upheld the accused's acquittal on the proceeds of crime charge, but order a new trial in relation to the drug charges.

The accused then appealed to the Supreme Court of Canada. He argued that his detention was arbitrary under s.9 of the *Charter* and the searches that followed were unreasonable under s.8.

Phase I: the Initial Stop

Random roadside stops for highway purposes must be limited to their intended objectve and cannot be turned into an unfounded general inquisition or an unreasonable search. It does not provide a general search power for searching every vehicle, driver, and passenger that is pulled over. However, "a roadside stop is not a static event," said Justice Binnie, speaking for the entire Supreme Court. "Information as it emerges may entitle the police to proceed further, or, as the case may be, end their enquiries and allow the vehicle to resume its journey."

Here, the initial stop was valid. The accuseds' truck was stopped to conduct an *H&TA* document check. This was not a case where the accused had been pulled over for no valid purpose, nor was the random check stop specifically set up to also locate contraband as well as highway infractions. Instead, the random stop program was directly related to legitimate highway purposes; commercial trucking was regulated by legislation in every aspect. Thus, the initial stop under s.40 of Saskatchewan's *Highway Traffic Act* did not breach s.9.

Phase II: the Regulatory Search

Under s.32(1) of Saskatchewan's *Motor Carrier Act* a peace officer is authorized to "order the driver or owner of a vehicle to submit the vehicle . . . or the cargo being carried on such a vehicle to any examination and tests that the peace officer considers necessary". Similarly, s.63(5) of the *H&TA*

provides authority to conduct a warrantless search of a vehicle for evidence of a regulatory contravention under the *H&TA*. Here, "after the initial stop, the officer quickly obtained reasonable grounds to believe that the [accuseds] were operating the truck in violation of the *H&TA*, having regard to the lack of a truck licence valid in Saskatchewan, the display of an expired fuel sticker and inconsistent entries in the driver's log-book," said Justice Binnie. "At the time the officer began to investigate the cab of the tractor unit, it was quite within his statutory authority to search for further evidence related to *H&TA* offences." Thus, the continued detention was not arbitrary and the search of the tractor-trailer unit for relevant papers was authorized by the *H&TA*.

As for the search in the sleeping area of the cab, including the space behind the front seats, there was a reasonable expectation of privacy. Living quarters, however rudimentary, are not a *Charter*-free zone. But the level of expectation is low, even in the sleeping area, since the cab of a tractor-trailer rig is also a place of work. The entire cab is therefore vulnerable to frequent random checks in relation to highway transport matters.

The continued lawful detention and search under s. 63(5) did not become unlawful because the officer began to suspect criminal activity. Police officers patrolling highways are interested in many offences, including criminal ones as well as provincial matters. However, "police power, whether conferred by statute or at common law, is abused when it is exercised in a manner that violates the Charter rights of an accused," said Justice Binnie. He continued:

> I do not agree that the officer's concurrent interest in contraband (even if it was "predominant") rendered the H&TA search unlawful or unreasonable within the scope of s. 8 of the Charter. As already stated, knowledge of transportation legislation is a requirement to be licensed as a driver. Commercial drivers are well aware of the police authority to conduct random stops and to search a vehicle for evidence of infractions. Commercial trucking is a highly regulated industry. Breaching a law will not in itself reduce an individual's legitimate privacy expectations (otherwise, it would be argued that offenders would always forfeit s. 8 protection relevant to evidence of the offence), but here, as events progressed from the police stop to the initial regulatory search of the cab, there was no police invasion of the minimal privacy interest that existed. ..."[T]he expectation that the search might also uncover drugs" ... did not convert a Charter-compliant regulatory search into a Charter violation. [references omitted, para. 43]

"Looked at individually no single [factual element] is likely sufficient to warrant the grounds for the detention and seizure. The whole is greater than the sum of the individual parts viewed individually."

The paper-like contents of the bag felt more like items connected to the *H&TA* inquiry than personal clothing or drugs. The warrantless search was authorized by s.63(5) of the *H&TA* and it was not unreasonable for the officer to open the bag. Given the very limited privacy interest, the search of the duffle bag did not breach s.8. The cash was then in plain view.

Phase III: the Arrest

Although the discovery of a large sum of cash may not on its own constitute objective, reasonable grounds to arrest for possession of proceeds of crime, its existence may contribute to such grounds if the circumstances create a reasonable inference that the money was proceeds of crime:

> Here, the context was sufficient to supply the officer with the "something more": three men in an empty, improperly licensed truck making a run across the prairies at midnight on a highway where the truck was not entitled to be. The explanation for where the cargo had gone, and why the truck was apparently empty as it headed east, did not correspond to the documents, which were riddled with multiple discrepancies. The unexplained $115,000 was in bills of small denominations wrapped in bundles which the police officer believed to be typical of drug dealings... While the Crown did not attempt to qualify the officer as an expert on drug monies, the officer's experience and training supported the probative value of his evidence on this point. The

> cumulative effect of the factual elements previously described provides objective support for the officer's subjective belief that he had reasonable and probable grounds to make the arrests. … "Looked at individually no single one is likely sufficient to warrant the grounds for the detention and seizure. The whole is greater than the sum of the individual parts viewed individually." [references omitted, para. 48]

Phase IV: Search After Arrest

The police may search as an incident to arrest if they are trying to achieve some valid purpose connected to the arrest, such as:

- ensuring the safety of the police and public;
- protecting evidence from destruction at the hands of the arrestee or others; or
- discovering evidence which can be used at the arrestee's trial."

Here, the accuseds were arrested for possessing proceeds of crime. "It was clearly 'incidental' to this arrest to search the vehicle in which the cash was found for evidence of the criminal activity to which the money related," said Justice Binnie. "The officers' belief that this purpose would be served by a search of the trailer (given their previous roadside observation of the discrepancy in the dimensions) was itself reasonable. The important consideration is the link between the location and purpose of the search and the grounds for the arrest." The two hour delay between the roadside arrest and the search of the trailer's secret compartment at the police station did not render this search unreasonable. There remained a close causal and spatial connection between the arrest and the search.

As well, there was no requirement for the police to demonstrate a distinct and separate showing of reasonable grounds to search. Nor was a showing of exigent circumstances required to further search the trailer without first obtaining a search warrant. The trigger for the warrantless search power incidental to arrest is not "exigent circumstances" but connection or relatedness - to search for evidence of the crime to which the arrest related. The search and seizure of the marijuana did not breach s.8 of the *Charter*; it was discovered during a proper search for evidence incidental to a valid arrest.

Phase V: the Inventory Search

The Supreme Court ruled that the inventory search was invalid. The inventory search by itself did not serve a valid objective in pursuit of the ends of criminal justice because its purposes related to concerns extraneous to the criminal law. The officer's work in inventorying the vehicle was incidental to police administrative procedures rather than to the arrest of the accused. Therefore, it did not meet the requirements of a warrantless search and the inventory search breached s.8.

s.24(2)

Despite the breach resulting from the inventory search, the fruits of that search were admissible under s.24(2):

> The task for courts remains one of achieving a balance between individual and societal interests with a view to determining whether the administration of justice would be brought into disrepute by admission of the evidence. In my view, the evidence found in the "inventory search" which consists largely of additional trucking documents plus the potentially misleading "decals" ought not to be excluded. Had the RCMP officers continued their post-midnight search incident to arrest they would have been within their rights to do so, and the subject evidence would have been readily discoverable at that time. The subsequent inventory search for administrative purposes of an impounded truck that has already been searched (though less meticulously) should be classified as a technical breach with a minimal impact on the Charter-protected interests of the [accuseds]. The evidence ought to be available for whatever relevance it may have to assist in the resolution of the outstanding charges on their merits. [para. 54]

The accused's appeal was dismissed.

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

SUBSEQUENT SENTENCE INVALIDATES PROBATION ORDER

R. v. Howse, 2010 NLCA 40

The accused was sentenced in Newfoundland Provincial Court to two years imprisonment and three years probation after pleading guilty to two counts of break and enter (s. 348(1)(b) *Criminal Code (CC)*) and three counts of breach of recognizance (s.145(3) *CC*). About 19 months later he was convicted of several more offences (s.355(b) CC x 3, s.430(1) CC x 2, and s. 4(1) *Controlled Drugs and Substances Act*) for which he was sentenced to six months imprisonment.

The Crown successfully argued to the Newfoundland Court of Appeal, with the accused's consent, that the imposition of the six month sentence made the probation order invalid and therefore it should be set aside. Section 731 of the *Criminal Code* allows a court to impose a probation order in addition to imprisonment provided that the term of incarceration does not exceed two years. But this provision must be read in conjunction with s. 139(1) of the *Corrections and Conditional Release Act* which requires two overlapping sentences be treated as "one sentence", starting on the date that the first sentence commenced and ending on the date the last sentence expired. "Where that unexpired 'one sentence' exceeds two years, a probation order may not be imposed, and any probation order that may have been properly imposed, in respect of any prior sentence that is a component part of the 'one sentence', becomes invalid," said Justice Wells for the Court of Appeal.

Here, the deemed "one sentence", exceeded two years. Thus, the probation order made for the break and enter and breach of recognizance offences, while valid at the time that it was made, became invalid when the second sentence of six months was imposed for the other offences. The Crown's appeal was allowed and the probation order was set aside.

Complete case available at www.canlii.org

BY THE BOOK:

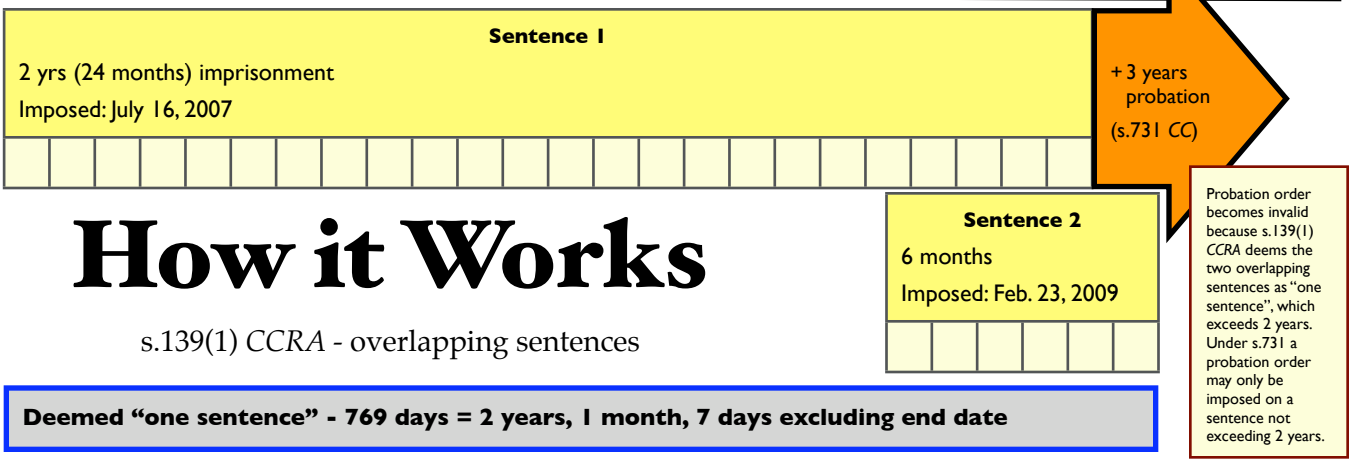
s. 139(1) *Corrections and Conditional Release Act*

Additional Sentences

Where a person who is subject to a sentence that has not expired receives an additional sentence, the person is, for the purposes of the Criminal Code, the Prisons and Reformatories Act and this Act, deemed to have been sentenced to one sentence commencing at the beginning of the first of those sentences to be served and ending on the expiration of the last of them to be served.

How it Works

s.139(1) *CCRA* - overlapping sentences



PROBING PROBATION FACTS

What is probation?

"An offender sentenced to a term of probation remains in the community, but is subject to a number of conditions for the duration of the probation order. Some conditions are compulsory and apply to all offenders on probation. These include keeping the peace and appearing before the court when required to do so. The optional conditions vary from case to case, and can include performing community service, abstaining from the consumption of alcohol and attending treatment. Violating the conditions of a probation order is a criminal offence subject to possible prosecution that could result in a maximum sentence of imprisonment of two years. Probation is mandatory in cases where the accused is given a conditional discharge or a suspended sentence. Probation may be supervised or unsupervised."

- The most frequently imposed sanction in adult criminal cases is probation, given **45%** of the time. A term of imprisonment is given in **34%** of cases while fines are given in **30%** of cases;
- Crimes against the person are most likely to include a term of probation. Seventy five percent (**75%**) of guilty cases involving crimes against the person received probation while **57%** of property crime offenders received probation. Administration of justice offences, such as fail to appear, breach of probation, unlawfully at large, and failing to comply with orders, were given probation about **34%** of the time;
- About **28%** of adults receiving probation for crimes against the person were also sentenced to a term of custody;
- The most common adult probation length was between six months to a year (**51%**) followed by terms of probation between one to two years in length (**31%**);
- The longest term of probation an offender can receive is three years. This is a statutory limit prescribed by the *Criminal Code*, s732.2(2)(b):

  "no probation order shall continue in force for more than three years after the date on which the order came into force"
- The mean, or average, adult probation length was **451** days. Aside from homicide and attempt murder, the longest average probation lengths attach to sexual offences*****, such as sexual interference, sexual exploitation, voyeurism, incest, child luring, and making, distributing, possessing, and accessing child pornography (**732** days) followed by robbery (**686** days), sexual assault (**665** days), and criminal harassment (**619** days);

PROBATION BY OFFENCE TYPE & LENGTH

Offence Type	Percent probation		Mean (Average length)	
	Adult	Youth	Adult	Youth
Criminal harassment	89.9%	67.1%	619 days	390 days
Common assault	80.1%	60.3%	399 days	348 days
Uttering threats	79.1%	70.6%	496 days	344 days
Other sex offences*	73.6%	74.1%	732 days	516 days
Major assault	70.4%	71.8%	515 days	381 days
Mischief	69.0%	60.2%	375 days	352 days
Sexual assault	68.3%	75.5%	686 days	503 days
Fraud	64.9%	65.9%	549 days	379 days
Break and enter	64.6%	75.3%	549 days	387 days
Weapons offences	54.2%	70.3%	481 days	382 days
Theft	52.0%	59.7%	406 days	341 days
Robbery	50.8%	76.2%	730 days	411 days
Disturb the peace	46.2%	45.5%	318 days	313 days
Possess stolen property	45.8%	66.8%	421 days	346 days
Prostitution	44.3%	50.0%	381 days	x
Breach of probation	36.5%	47.5%	403 days	366 days
Drug possession	32.5%	48.1%	319 days	276 days
Drug trafficking	31.6%	78.4%	437 days	352 days
Fail to appear	25.8%	44.3%	356 days	374 days
Unlawfully at large	17.3	24.9%	375 days	346 days
Impaired driving	10.9%	26.2%	402 days	322 days

- The mean, or average, adult custodial sentence for breaching probation was **29** days while the average fine given is **$301**;
- The mean, or average, youth (open or closed) custodial sentence for breaching probation was 48 days. In Nunavut, **86.2%** of youths found guilty received probation while in Saskatchewan that number dropped in half to **43.1%**.

Source: Statistics Canada, Summer 2010, "Adult criminal court statistics, 2008/2009", catalogue no. 85-002-X, Vol. 30, no. 2.

Source: Statistics Canada, Summer 2010, "Youth court statistics, 2008/2009", catalogue no. 85-002-X, Vol. 30, no. 2.

POLICE REPORTED DATING VIOLENCE

A recently released Statistics Canada publication provides insight into dating violence in Canada. The report, entitled "*Police-reported dating violence in Canada, 2008*", was released in June 2010. Highlights of the report include:

- there were **22,798** incidents of dating violence reported to Canadian police in 2008. This compares to **43,845** incidents of spousal violence reported during the same time period;
- dating relationships accounted for **27%** of all violent incidents perpetrated by intimate partners;
- dating relationships accounted for **30%** of all homicides perpetrated by intimate partners, while spousal and common law relationships accounted for the remaining **70%**;
- **82%** of victims reporting dating violence to police were female;
- for the five year reference period from 2004-2008, police reported dating violence has increased. Rates of dating violence for female victims has increased **40%** while rates for male victims increased **47%**;
- the most frequently committed violent offence in dating relationships was common assault while homicide was the least committed;

Offence Type	Number	%
Homicide/Attempt	14	0.06%
Sexual Assault	648	2.84%
Major assault (level 2 & 3)	2,415	10.59%
Common assault (level 1)	11,438	50.17%
Forcible confinement	735	3.22%
Criminal Harassment	3,235	14.19%
Uttering threats	2,669	11.71%
Indecent or harassing phone calls	1,354	5.94%
Other violent offences	290	1.27%
Total Offences	**22,798**	**100%**

- **69%** of dating violence incidents reported to police resulted in charges;
- **71%** of incidents involving female victims resulted in charges while **57%** of incidents involving male victims resulted in charges;
- about **10%** of male victims of dating violence and **1%** of female victims involved same-sex relationships;
- **57%** of dating violence occurs once the relationship has ended - it was perpetrated by a former partner;
- most dating violence occurred in a private dwelling;

Location of dating violence	%
Residence of victim	45%
Residence of accused	12%
Residence of neither victim or accused	14%
Not a private dwelling	21%
Unknown	8%

- the majority of victims of dating violence (**52%**) reported no injury, did not involve the use of a weapon, nor physical force. **41%** received minor physical injury (no professional medical treatment was required or only some first aid such as a band aid or ice) and **2%** received major physical injury (requiring professional medical attention at the scene or transportation to a medical facility). In **5%** of incidents it was unknown whether injury to the victim was sustained;
- **52%** of dating violence incidents involved no weapon, **40%** involved the use of physical force, and **6%** involved a weapon. In **2%** of incidents it was unknown what method of violence was used;
- of the **1,307** incidents involving weapons, **25** involved a firearm, **409** involved a knife or other cutting instrument, **190** involved a club or blunt instrument, and **683** involved other weapons, such as explosives, fire, motor vehicles, or other devices to poison.

Source: Statistics Canada, Summer 2010, "Police-reported dating violence in Canada, 2008", catalogue no. 85-002-X, Vol. 30, no. 2.

BC's NEW BODY ARMOUR CONTROL ACT

Effective July 1, 2010 British Columbia's *Body Armour Control Act* (*BACA*) became law.

What is body armour?

The meaning of body armour is found in s.1 of the *BACA*. It states that "body armour" is:

> (a) a garment or item designed, intended or adapted for the purpose of protecting the body from projectiles discharged from a firearm, as defined in section 2 of the Criminal Code, or
>
> (b) a prescribed garment or item;

Schedule 2 of the *Body Armour Control Regulation* prescribes the additional following garments as body armour:

> (a) a garment or item designed, intended or adapted for the purpose of protecting the body from puncture or stab wounds intended to be inflicted by another person:
>
> (b) panels or plates that
>
> (i) protect the body from projectiles discharged from a firearm or puncture of stab wounds, and
>
> (ii) are designed to be inserted into pockets of vests, jackets or other garments to create or enhance body armour.

Offences

There are several offences created under the *BACA* including possession of body armour except under the authority of a permit (s.2(2)). The legislation provides an exemption to individuals from requiring a permit to possess body armour while performing the job for which the exemption is granted. These include licensed armoured car guards, private investigators, security consultants, security guards, body armour salespersons, peace officers, sheriffs, corrections officers, and conservation officers, and individuals who possess a valid firearms licence issued under the *Firearms Act* (Canada).

Under s.13(5) it is an offence for a person to "obstruct, impede or refuse to admit an inspector or a peace officer who is exercising powers or performing duties under this Act or a warrant issued under, or for the purposes of enforcing, this Act."

Search

Section 21 authorizes the warrantless search for and seizure of body armour:

> s.21 (1) If an inspector or a peace officer has reasonable grounds for believing that a person is in possession of body armour in a public place and, on request of the inspector or peace officer, the person
>
> (a) refuses or is unable to produce a valid body armour permit, and
>
> (b) is unable to identify the basis on which he or she is exempt under section 2 (3) from the requirement to hold a body armour permit,
>
> the inspector or peace officer, without a warrant, may search the person and any personal property in that person's possession and seize any body armour found.
>
> (2) Section 23 (4) and sections 24 to 24.2 of the Offence Act apply in respect of body armour seized under subsection (1) of this section and, for the purposes of section 23 (4) of the Offence Act, an inspector is deemed to be a peace officer.
>
> (3) If, under section 24 (2) (a) of the Offence Act, a justice orders that body armour referred to in subsection (2) of this section be detained, despite section 24 (3) of the Offence Act, the body armour may be detained for up to one year before an order under section 24 (5) of that Act, authorizing its continued detention, is required.

Public Protection

Section 10 of the *BACA* allows the Registrar of Security Services to immediately and without notice cancel or suspend a body armour permit if he or she considers it necessary to protect the pubic. Written notice of this decision along with the reasons for it must then be provided to the permit holder as soon as practicable. The permit holder must then immediately surrender the permit and the body armour.

The *Violation Ticket Administration and Fines Regulation* has also been amended to permit the service of Violation Tickets for offences under the *BACA*.

As well, an individual committing an offence under s.13 could be liable on conviction to a fine of not more than $10,000 or imprisonment for not longer than 6 months, or both. A business entity that commits an offence under s.13(2) is liable on conviction to a fine of not more than $100,000 or imprisonment for not longer than 6 months, or both.

A charge for an offence under s.13 may not be laid more than one year after the commission of the offence.

Provision	Contravention	Fine	Victim Surcharge Levy	Ticketed Amount
Body Armour Control Act				
section 2 (2)	Possess body armour without valid body armour permit	$250	$38	$288
section 3	Fail to sell, destroy or return body armour at end of exemption	$250	$38	$288
section 7 (a)	Fail to carry body armour permit when possessing body armour	$100	$15	$115
section 7 (b)	Fail to produce body armour permit on request of peace officer or inspector	$100	$15	$115
section 7 (c) (i)	Fail to report theft of body armour permit	$100	$15	$115
section 7 (c) (ii)	Fail to report change in employment	$100	$15	$115
section 7 (c) (iii)	Fail to report change in residential address	$50	$8	$58
section 7 (c) (iv)	Fail to report criminal charge or conviction	$250	$38	$288
section 7 (d) (i)	Fail to surrender body armour permit at end of term	$100	$15	$115
section 7 (d) (ii)	Fail to provide evidence of sale, destruction or return of body armour at end of permit term	$250	$38	$288
section 7 (e) (ii)	Fail to comply with terms and conditions imposed by registrar on body armour permit	$100	$15	$115
section 7 (f)	Allow another person to use own body armour permit	$500	$75	$575
section 8 (1)	Sell body armour with neither a valid security business licence nor a valid security worker licence	$500	$75	$575
section 8 (2)	Sell body armour to a person who neither holds a valid body armour permit nor is exempt from that requirement	$500	$75	$575
section 9 (3) (a)	Fail to surrender body armour permit when cancelled by registrar	$250	$38	$288
section 9 (3) (b)	Fail to provide evidence of sale, destruction or return of body armour when permit cancelled	$250	$38	$288
section 10 (3)	Fail to surrender body armour under summary action notice	$250	$38	$288
section 13 (3)	Supply false or misleading information	$500	$75	$575
section 13 (5)	Obstruct inspector or peace officer	$500	$75	$575
section 13 (6)	Use body armour permit issued to another person	$500	$75	$575

BRITISH COLUMBIA
The Best Place on Earth

Application for a *NEW* Permit to Possess Body Armour

Before applying, read, understand and be able to comply with all requirements as set out under the Body Armour Control Act and Regulations, and as outlined on the Security Industry and Licensing website: **www.pssg.gov.bc.ca/securityindustry**
Fees cannot be refunded.

PART 1: FEES & TERMS

PAYMENT MADE BY: ❑ bank-issued certified cheque or money order made *payable to the Minister of Finance*
❑ credit card (attach *Authorized Credit Card Usage* Form SPD0606) DO NOT SEND CASH - PERSONAL CHEQUES NOT ACCEPTED

TERM OF PERMIT & FEE: 5 Years - $90 **TOTAL ENCLOSED: $** _____

PART 2: APPLICANT INFORMATION

Legal Name: (Surname) _____ (Given) _____ (Middle) _____

Additional Name(s) *(alias, maiden name, etc.):* (Surname) _____ (Given) _____ (Middle) _____
(Surname) _____ (Given) _____ (Middle) _____

Date of Birth: (year/month/day) _____ **Gender:** ❑ Male ❑ Female

Citizenship: (check [✓] one)
❑ I was born in Canada—attached is a clear copy of my birth certificate or valid Canadian Passport.
❑ I was **not** born in Canada but now have citizenship—attached is a copy of my valid Canadian Passport or Citizenship Certification Card.
❑ I was **not** born in Canada, but I am legally entitled to work in Canada. Attached is a clear copy of my Record of Landing (IMM1000), Confirmation of Permanent Resident Document (IMM5292), Permanent Resident Card, ***OR*** my current work or student permit which is numbered: #_____ and expires (year/month/day)_____
❑ I am a citizen of (name of country) _____ and have attached copy of official documentation as proof.

Photo Identification: (check [✓] one) One clear copy of your photo ID is required - *it must be current.* Check off the type you are attaching:
❑ Driver's Licence ❑ Passport ❑ BCID ❑ Canadian Firearms Licence
❑ Canadian Permanent Resident Card ❑ Canadian Native Status Card (must have photo)
❑ Valid Government-Issued Photo ID: (describe) _____

Physical Description: (this information will appear on your permit) Height (ft./inches or cms): _____ Weight (lbs or kgs):_____
Hair Colour: ❑ black ❑ blonde ❑ brown ❑ red ❑ gray ❑ bald
Eye Colour: ❑ blue ❑ brown ❑ black ❑ green ❑ hazel

Contact Information: (your contact information **will not** appear on your permit)
Residential Address: Apt.#_____ Street Address _____
City/Town: _____ Province: _____ Postal Code:_____
Mailing Address: If your mailing address is different than your residential address, please provide it below:
_____
Phone: (_____) _____ **E-Mail Address** _____
❑ ***Yes***, send an electronic ***copy*** of my permit to this e-mail address when the original permit is mailed to me.

Photograph (this photo will appear on your permit):
❑ Yes, I have attached a passport-quality photo of myself that has been taken within the last 12 months.

Criminal History:
❑ No ❑ Yes ... **I have a criminal record.**

FORM #SPD0600
PSSG10-007 (07/2010)

Ministry of Public Safety and Solicitor General
Policing and Community Safety Branch, Security Programs and Police Technology Division
PO Box 9217 Stn Prov Govt, Victoria BC V8W 9J1
Phone: (250) 387-6981 (if outside Victoria, call through Enquiry BC: Vancouver 604 660-2421 / elsewhere in BC, toll-free 1-800-663-7867)
Fax: (250) 387-4454 E-mail: sgspdsec@gov.bc.ca **Security Industry and Licensing website: www.pssg.gov.bc.ca/securityindustry**

DID YOU KNOW...

... that on March 26, 2009 a private members bill (Bill C-349) introduced by MP Dawn Black (NDP: New Westminster-Coquitlam, BC) received first reading in the House of Commons. The bill proposed to amend the *Criminal Code* and make it a criminal offence to use body armour while committing or attempting to commit an indictable offence or during flight after committing or attempting to commit such offence. Body armour would have been defined as "any material worn by an individual for the purpose of protecting his or her body from gunfire or stabbing, regardless of whether the material is worn alone or is used as a complement to a garment or other material." A first offence would have brought a minimum jail sentence of six months and a maximum of five years. A second or subsequent offence would result in a one year minimum sentence. All sentences would have been consecutive to any other punishment arising out of the same event or series of events.

However, pursuant to a decision made by the Speaker of the House on March 3, 2010 the bill was not maintained.

ARMOURED VEHICLES IN B.C.: PROPOSED BILL 16 (2010)

The British Columbia government has passed Bill 16, the *Armoured Vehicle and After-Market Compartment Control Act*, that will, once in force, establish the requirement for a person who operates an armoured vehicle to hold a permit or, in some cases, be exempted. "Armoured passenger vehicles, the evidence shows, facilitate gang and gun violence", said the Honourable Mike de Jong when introducing the Bill. "[Armoured vehicles] embolden gang members, give them a feeling of invincibility and a feeling that they can act violently and with impunity." As well, this Bill will prohibit after-market compartments in vehicles, unless the vehicle owner is exempt from the prohibition, and require persons installing after-market compartments to report each installation to the police. "These after-market compartments are used by gang members to hide not just weapons but also drugs and cash, and to further illegal activities," said de Jong.

In the Bill, an "armoured vehicle" is defined as "a motor vehicle manufactured or adapted for the purpose of protecting its occupants from explosions caused by explosive devices or from projectiles discharged from a firearm, as defined in section 2 of the Criminal Code." An "after-market compartment" is "a compartment in a vehicle, which ... (a) is not part of the manufacturer's design of or equipment for the vehicle, and (b) is incorporated into the equipment or structure of the vehicle after it has left the factory in which it was manufactured."

Section 2 of the legislation will prohibit the operation of an armoured vehicle except under permit. The prohibition, however, would not apply to a peace officer, a security worker licence holder whose employment involves operating an armoured vehicle, armoured car operators, or a person exempted by regulation. Section 7 will ban the ownership, operation, or use of a vehicle that contains an after-market compartment, unless exempted under regulation. And anyone who installs an after-market compartment in a vehicle will be required to immediately contact the nearest provincial or municipal police office and provide the officer in charge with the name and address of

Armoured police vehicle on display at the 2010 Abbotsford International Airshow.

the vehicle's owner; the make, model, and year of the vehicle; and the location in the vehicle where the compartment has been placed and how it can be opened. Under s.12, a person who contravenes either ss. 2 or 7 commits an offence and is liable on conviction to a fine of not more than $10,000 and/or six months in jail. If it is a business entity that commits the offence the maximum fine will rise to $100,000. The time limit for laying charges will be one year after the date of the act or omission that constituted the offence.

"[T]here is a developing, emerging phenomenon where people — particularly, it seems, those engaged in criminal activity — have decided that as a way to enhance their own feelings of invincibility, they will purchase vehicles and have them altered and have armoured plating attached to them and in effect create a form of civilian tank — a tank on the road that they can drive around. If they become involved in violence, gunfights or that sort of thing or are confronted by other elements, criminal elements with whom they have disputes, they will feel better protected. It gives these people a sense of invincibility. It seems clear that it is influencing their behaviour and, as a result, putting the vast majority of law-abiding citizens at risk in the process." -
Honourable Mike de Jong
(Monday May 3, 2010)

Police Powers

Section 10 of the Bill will provide police with powers of seizure:

> s.10(1) If a peace officer has reasonable grounds for believing that a person is operating an armoured vehicle and, on request of the peace officer, the person
>
> (a) refuses or is unable to produce a valid armoured vehicle permit, and
>
> (b) is unable to satisfy the peace officer that the person is exempt ... from the requirement to hold an armoured vehicle permit,
>
> the peace officer, without a warrant, may seize the motor vehicle and take it to a secure place for the purpose of preserving the motor vehicle until a search warrant is obtained.
>
> (2) If
>
> (a) a peace officer has reasonable grounds for believing that a person owns or is operating or using a vehicle that contains an after-market compartment, and
>
> (b) on request of the peace officer, the person is unable to satisfy the peace officer that the person is exempt under the regulations from the prohibition in section 7 (1),
>
> the peace officer, without a warrant, may seize the vehicle and take it to a secure place for the purpose of preserving the vehicle until a search warrant is obtained.

If a vehicle is seized under this section a report to a justice will be required under B.C.'s *Offence Act*. But the vehicle can be detained for up to a year before continued detention is required. Normally a thing seized may only be detained for three (3) months under the *Offence Act* before an order for continued detention is required.

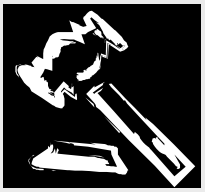
If a vehicle contains an after-marker compartment and the owner is not exempt, under s.11 a peace officer may order the owner, operator, or user of the vehicle to cease operating or using it until the after-market compartment has been removed.

Section 12 will create an offence for a person to obstruct, impede or refuse to admit a peace officer who is exercising powers or performing duties under this *Act* or under a warrant issued for the purposes of enforcing this *Act*.

On June 3, 2010 this *Act* received Royal Assent but is not yet in force.

LEGALLY SPEAKING:

Assaults Against Police



"Assaults on peace officers are to be denounced and deterred, for their tasks are difficult enough without being subjected to abusive behaviour of the kind exhibited by the [accused]." – Saskatchewan Court of Appeal Justice Bateman in *R. v. McArthur*, 2010 SKCA 90 at para. 5, setting aside a one year global custodial sentence and substituting a sentence of 24 months for assaulting police plus six months consecutive for other offences (less remand time of course).

CONSECUTIVE DRIVING PROHIBITIONS FIT

R. v. Irvine, 2010 ABCA 212

After being charged with driving over 80mg% in June 2006, the accused was released on bail by a judge. In March 2008, while still on judicial interim release, he was involved in a head on collision, seriously injuring two occupants in the other car. He refused a blood sample, but his hospital blood analysis was 193mg%. He was charged with refusing a breath test and driving over 80mg% from this incident. He subsequently pled guilty to driving over 80mg% for the 2006 incident, and refusing a breath test and driving over 80mg% for the 2008 incident. These incidents were his third and fourth convictions for similar offences. The Alberta Provincial Court judge accepted a joint submission for a six month jail sentence. But he also imposed two 3-year driving prohibitions for each set of offences to be served consecutively. The accused appealed this sentence to the Alberta Court of Appeal arguing, in part, that the trial judge erred in imposing consecutive driving prohibitions.

Driving Prohibitions

Section 259 of the *Criminal Code* provides for mandatory driving prohibitions for first, second and subsequent offences:

Mandatory order of prohibition

s.259(1) *Criminal Code*

When an offender is convicted of an offence committed under section 253 [impaired/over 80mg%] or 254 [refusal] ... the court that sentences the offender shall, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating a motor vehicle on any street, road, highway or other public place, or from operating a vessel or an aircraft or railway equipment, as the case may be,

(a) for **a first offence**, during a period of not more than three years plus any period to which the offender is sentenced to imprisonment, and **not less than one year**;

(b) for **a second offence**, during a period of not more than five years plus any period to which the offender is sentenced to imprisonment, and **not less than two years**; and

(c) for **each subsequent offence**, during a period of **not less than three years** plus any period to which the offender is sentenced to imprisonment.

Since these were the accused's third and fourth convictions the judge was required to give him a 3-year driving prohibition. And the consecutive sentences were not unfit. "These convictions were for two separate offences separated by a number of years," said the Court. "Indeed, to have directed concurrent prohibitions would result in the [accused] having no prohibition for the second conviction, and would violate the spirit of section 259(1)(c) which requires a three-year prohibition for each subsequent offence." The accused's appeal on this ground was dismissed.

Complete case available at www.albertacourts.ab.ca

BLOOD DELIVERY VEHICLE MAY NOW USE HIGH OCCUPANCY VEHICLE LANES

On June 25, 2010, British Columbia's *Motor Vehicle Act Regulations*, ss.42.01 - 42.03, was amended to allow blood delivery vehicles the use of high occupancy lanes. To be eligible, a vehicle must meet the following definition:

"blood delivery vehicle" means a motor vehicle that is

(a) owned or operated by or on behalf of the Canadian Blood Services,

(b) clearly marked as a Canadian Blood Services vehicle, and

(c) used to transport blood or blood products.

Blood delivery vehicles now enjoy the same exemptions for using high occupancy lanes as the following:

- the driver of a marked vehicle responding to a disabled vehicle or another emergency on the laned roadway where the high occupancy vehicle lane is located;
- the driver of an emergency vehicle;
- a peace officer on active duty;
- an operator of a cycle, motor cycle, taxi or handy dart vehicle.

Cycles, however, do not enjoy the use of high occupancy lanes on the Trans-Canada Highway.

VEHICLE INSPECTION DOES NOT RENDER RANDOM SAFETY RELATED STOP ARBITRARY

R. v. Kenyon, 2010 MBCA 70

The police noticed that a semi-tractor, without a trailer, bearing out-of province licence plates was not displaying an International Fuel Tax Agreement (*IFTA*) sticker. The police pulled the semi over to verify regulatory compliance but the accused was unable to supply a driver's licence or any documentation to confirm his identity, and was also unable to provide an *IFTA* licence even though he said he had paid for it. Furthermore, his daily log books were incomplete. The accused was asked to exit the semi so the police could search inside it to look for documents relating to the vehicle's use that would clarify the situation. The officer had no suspicions of any criminal activity. But when he opened one of the drawers he observed used pipes with residue, typically used by persons to smoke cocaine or methamphetamine.

The officer stopped his search, arrested the accused for drug possession, read him his rights, and gave the police caution. The officer went back into the semi to search incident to the arrest for evidence on the possession charge. He noticed that the cabin ceiling had been altered and, based on his past experience, believed that the ceiling may contain a hidden compartment. He again left the vehicle, arrested the accused for trafficking and possession for the purpose of trafficking, and re-advised him of his *Charter* rights and the police caution. The officer re-entered the semi to search for evidence on the new charges. Inside the ceiling, police found 43 bags containing about 195,000 ecstasy tablets and 40 one-kilogram bricks of cocaine. The accused was arrested a third time, for possessing ecstasy and cocaine for the purpose of trafficking. Again, he was read his *Charter* rights and given the police caution.

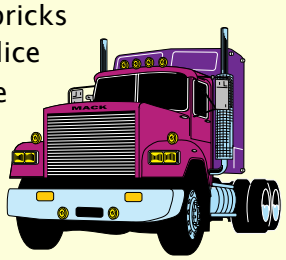
At trial in the Manitoba Court of Queen's Bench the trial judge found that the accused's ss.8 and s. 9 *Charter* rights were not breached as a result of the stop and warrantless search of the semi-tractor cabin. Up until the contaminated drug pipes were observed, the purpose of the traffic stop and search of the vehicle was to ensure compliance with commercial vehicle regulations.

The judge rejected the accused's argument that the initial stop of the vehicle was arbitrary because the police were using it as a pretext to search for drugs:

> I am satisfied the initial stopping of the vehicle was not arbitrary. I accept [the officer's]evidence that he decided to stop the vehicle to check for compliance with IFTA. I also accept his evidence that he planned to check the driver's licence, the vehicle registration, the log books and supporting documents. Section 76.1 of The Highway Traffic Act authorizes a peace officer acting in the course of his duties to stop a vehicle to make inquiries and request documentation generally in relation to the driver's identity, licence, registration, sobriety, and mechanical fitness of the vehicle. Random stops are justified because of the safety aims of highway traffic legislation, provided the officer is acting lawfully and within the scope of the legislation. [para. 20]

What did the officer see?

The officer noticed the rear air dam above the sleeper berth had been sealed. Based on his experience, he thought this was consistent with the existence of a false compartment in the vehicle. He also noticed the upholstery in the ceiling did not go under the plastic trim and appeared to have been folded to hide something. He pulled down the ceiling covering and noticed there was a false compartment. He was able to unscrew some bolts to gain access to the compartment where he saw numerous bags of what appeared to be ecstasy pills and bricks of cocaine. In all, police found 40 kilos of cocaine and 19 bags containing about 195,000 ecstasy tablets in the false compartment.



Nor did the accused's detention at the scene become arbitrary after the officer decided to conduct an inspection of the vehicle:

> Commercial trucking is a highly regulated industry. Commercial carriers are subject to a plethora of federal and provincial regulations and obligations, including those relating to fuel tax payments, the maintenance of log books and supporting documents. The authority to detain commercial carriers on a highway arises by necessary implication from the power to conduct inspections under the federal Commercial Vehicle Drivers Hours of Service Regulations ... and The Highway Traffic Act. [para. 22]

The judge concluded that the officer's request for documents was within the scope of his authority and the accused's inability to produce satisfactory documentation provided reasonable grounds for the officer to conduct a further inspection to ensure compliance with the *HTA* and the regulations. Further, as soon as the evidence of a criminal offence was observed, the police had authority to detain under their power of arrest.

As for the search, the police had authority under s. 241.1(4) of the *HTA* to conduct the inspection of the vehicle. All of the required documentation had not been produced and the documentation that was produced was incomplete. The officer had reasonable grounds to suspect the *Act* and regulations relating to commercial trucking was not complied with. Once the drug paraphernalia was discovered there were reasonable grounds to believe that an offence of possessing a controlled substance had been or was being committed. The arrest gave the police authority to continue the search of the vehicle as a search incidental to arrest because it was reasonable to believe that drugs might be found near where they were used. There was no obligation to obtain a search warrant once the drug paraphernalia had been found in the course of the regulatory inspection. The judge held that the accused's rights under s.8 of the *Charter* were not infringed. The accused was convicted of possessing ecstacy and cocaine for the purpose of trafficking. He was sentenced to 12 years in prison.

The accused then appealed to the Manitoba Court of Appeal arguing the trial judge erred in holding that his rights under ss.8 and 9 of the *Charter* were not breached. Justice Chartier, authoring the unanimous judgment, however, agreed with the trial judge that there were no *Charter* violations when the police initially stopped and then searched the semi to ensure compliance with commercial vehicle legislation:

> The law recognizes broad powers for search and inspection of commercial vehicles when the purpose is regulatory oversight as opposed to criminal investigation. As the roadside detention was authorized by s. 76.1(1) of The Highway Traffic Act, ... (the HTA), there was no need to inform the accused of his right to counsel until his arrest on the drug charges. The warrantless search of the vehicle for commercial documents during the inspection was authorized by both federal (s. 18(2) of the Commercial Vehicle Drivers Hours of Service Regulations, 1994 ... and provincial legislation (s. 241.1(4) of the HTA), and it was carried out in a reasonable manner. Furthermore, an officer may open compartments inside a vehicle to look for motor safety documents required to be produced by law when a motorist fails to produce same ... [reference omitted, para. 7)

And even if there was a *Charter* breach, the Court of Appeal would not have excluded the evidence under s.24(2). The accused had a reduced expectation of privacy in a commercial motor vehicle and the relevant factors favoured admission of the drug evidence. The accused's appeal was dismissed.

Complete case available at www.canlii.org

Editor's note: Supplemental trial judge's reasons extracted from *R. v. Kenyon*, 2009 MBQB 259

SENTENCING PROCESS CAN ADDRESS CHARTER BREACHES

R. v. Nasogaluak, 2010 SCC 6

After receiving a tip about an intoxicated driver, the police initiated a high-speed pursuit with the accused. He attempted to evade the police cruisers and dangerously reversed his car toward the officer's vehicle. The accused came to an abrupt stop and, with a gun and flashlight pointed towards him, was ordered out of the vehicle with his hands up. He didn't comply and instead placed his feet back inside the vehicle, clutching the steering wheel and door frame. An officer grabbed him and punched him in the head to prevent him from driving away and striking another officer standing in front of the vehicle. The accused let go of the steering wheel and reached out to an officer, who then struck him in the head with his fist a second time, pulled him out of the car, and wrestled him onto the ground. He was punched in the head a third time and pinned face down on the pavement, but refused to offer up his hands to be cuffed. He was then punched twice in the back, breaking his ribs and puncturing one of his lungs. No recordings were made of this interaction despite the presence of video cameras in the cars. He was transported to the detachment where he provided two breath samples well over the legal blood alcohol limit. No record was made of the force used during the arrest, drawing of a weapon, or of the accused's injuries. Although there were no obvious signs of injury and the accused did not expressly request medical assistance, he did state twice that he was hurt and was observed crying and saying: "I can't breathe." No attempts were made to provide the accused with medical attention. He was released the following morning and went to hospital where it was learned that he had broken ribs and a collapsed lung requiring emergency surgery.

At trial in the Alberta Court of Queen's Bench the accused pled guilty to impaired driving under s. 253(a) of the *Criminal Code* and flight from police under s.249.1(1). But he requested a stay of proceedings, submitting that the police breached his *Charter* rights because they used excessive force in arresting him, failed to properly report his injuries, and failed to obtain medical assistance for him. If a stay was not granted, the accused wanted a reduced sentence to remedy the *Charter* breaches. The trial judge found violations of the accused's ss.7 and 11(d) rights. The judge found the first and second punches were lawful; the first necessary to remove the accused from the vehicle and prevent him from driving away or causing harm to the other officer and the second necessary to subdue him and force him to the ground when he was non-compliant. However, in the judge's view, the third punch to the head and the two punches to the back were unwarranted and excessive. As a remedy, the judge refused to enter a stay, instead reducing the accused's sentence. Rather than giving him a typical sentence of 6 to 18 months incarceration, using s. 24(1) of the *Charter* he imposed a 12 month conditional discharge with a one year driving prohibition.

The Crown's appeal to the Alberta Court of Appeal was unsuccessful. A majority of the Court of Appeal concluded that the trial judge did not make a palpable and overriding error in holding that the use of force was excessive in the circumstances, even though they would not have necessarily made the same finding. The judge considered relevant factors, that the events happened quickly, and that the accused was uncooperative and intoxicated. The majority would not interfere with the ruling that the excessive force, failure to report injuries, and failure to obtain medical care was a s.7 breach. As well, the Court of Appeal upheld the granting of a sentence reduction as a *Charter* remedy under s.24(1) only if the violation somehow mitigated the seriousness of the offence or if it imposed additional punishment or hardship on the accused (as was the case here, since the accused had suffered broken ribs and a punctured lung). But the majority found a sentence falling below a statutorily mandated minimum could not be ordered. The accused's conditional discharge was set aside for the impaired driving offence since there was a minimum fine of $600 for a first offence. The evading a police officer offence had no minimum punishment and the majority did not interfere with the conditional discharge ordered on it. Justice Côté, in dissent, agreed that a sentence

reduction could be available in some circumstances to remedy a *Charter* breach but could not reduce a sentence below a statutory minimum. However, he had difficulty accepting that the *Charter* breaches were so egregious that they warranted the remedy of a conditional discharge on the evading police offence and would have re-sentenced the accused.

> "[P]olice officers do not have an unlimited power to inflict harm on a person in the course of their duties."

Both the Crown and the accused appealed to the Supreme Court of Canada.

Excessive Force

The unanimous Supreme Court concluded that the trial judge had made no palpable and overriding error in his findings that the police had used excessive force at the time of the accused's arrest. Justice Lebel, writing the Court's opinion, described the law regarding police use of force as follows:

> [P]olice officers do not have an unlimited power to inflict harm on a person in the course of their duties. While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.
>
> The legal constraints on a police officer's use of force are deeply rooted in our common law tradition and are enshrined in the Criminal Code [such as s. 25 of the Code]. ...
>
> Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only

R. v. Nasogaluak Argument Grid

Argument	Crown	Defence
Excessive Force	• in concluding there was excessive force the trial judge failed to assess the degree of force used by police against the legal standard found in ss.25 and 27 of the *Criminal Code* and in the relevant case law.	• the Court of Appeal correctly reviewed and applied the legal principles on excessive force and the s.7 *Charter* breach finding was proper.
Use of sentence reduction as a Charter remedy	• a sentence reduction might be appropriate but s. 24(1) of the *Charter* should not be used to circumvent the statutory and common law principles of sentencing; • reduced sentence must still fall within the range of appropriate sentences for the offence charged; • must not shift focus of the sentencing from the offender's culpability and gravity of offence to the conduct of state officials.	• a sentence reduction as a s.24(1) *Charter* remedy should be available; • the court's broad discretion under s.24(1) permits a sentence reduce a sentence below the statutory minimum when necessary to provide effective *Charter* relief; • the sentencing principles in the *Criminal Code* should not impede an individual exercising a right to a meaningful *Charter* remedy; • a broad interpretation of s.24(1) should be adopted that would allow for the reduction of sentences below the regular range of appropriate sentences in order to remedy a *Charter* breach.
Legality & fitness of sentence	• conditional discharge for impaired driving was illegal because *Criminal Code* provides for a minimum sentence; • conditional discharge for evading police, although legal, was inadequate and therefore unfit. The offence was serious, the accused acted deliberately, and the public interest required a period of incarceration.	• conditional discharge for the offence of impaired driving should be restored and the Court of Appeal erred in substituting a $600 fine.

as much force as was necessary in the circumstances. That is not the end of the matter. Section 25(3) also prohibits a police officer from using a greater degree of force, i.e. that which is intended or likely to cause death or grievous bodily harm, unless he or she believes that it is necessary to protect him- or herself, or another person under his or her protection, from death or grievous bodily harm. The officer's belief must be objectively reasonable. This means that the use of force under s. 25(3) is to be judged on a subjective-objective basis. If force of that degree is used to prevent a suspect from fleeing to avoid a lawful arrest, then it is justified under s. 25(4), subject to the limitations described above and to the requirement that the flight could not reasonably have been prevented in a less violent manner.

> Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. ... [references omitted, paras. 32-35]

"Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances."

Whether or not the trial judge cited the relevant case law and provisions of the *Criminal Code*, he adhered to the correct legal principles in deciding whether the force was excessive. "Even taking into account the fact that these events occurred over a very brief period of time and that the police had to make hasty decisions to respond to the situation at hand, in my opinion, the Court of Appeal did not err when it found that the police had used more force than was necessary in the circumstances," said Justice Lebel. Further, the officers' conduct amounted to a s.7 *Charter* violation. Leaving aside the question of whether police officers may have an affirmative duty to obtain medical assistance for persons under their care, the substantial interference with the accused's physical and psychological integrity upon his arrest and detention engaged s.7. "The excessive use of force by the police officers, compounded by the failure of those same officers to alert their superiors to the extent of the injuries they inflicted on [the accused] and their failure to ensure that he received medical attention, posed a very real threat to [the accused's] security of the person that was not in accordance with any principle of fundamental justice," stated the Court.

Sentence Reduction as *Charter* Remedy

The Supreme Court examined the relationship between the sentencing provisions of the *Criminal Code* and the remedy section of the *Charter*, particularly in the context of responding to excessive use of force by police. The Court ruled that in exceptional cases a sentence reduction is available as a form of *Charter* relief under s.24(1). But generally, the consequences of a *Charter* breach can be addressed through the sentencing process itself. Of course, sentencing has a constitutional dimension; s.12 of the *Charter* forbids the imposition of cruel and unusual punishment (ie. a grossly disproportionate sentence that would outrage society's standards of decency). The *Criminal Code* sentencing provisions provide judges with a broad discretion in crafting a sentence tailored to the nature of the offence and the circumstances of the offender, subject to case law, the *Criminal Code*, and the *Charter*. Any mitigating or aggravating factors will then increase or decrease the sentence. Thus, using their broad discretion under the *Criminal Code*, it may be appropriate for a judge to address a *Charter* breach when passing sentence without resorting to s.24(1) of the *Charter*. "If the facts alleged to constitute a Charter breach are related to one or more of the relevant principles of sentencing, then the sentencing judge can properly take those facts into account in arriving at a fit sentence," said the Court. "It would be absurd to suggest that simply because some facts also tend to suggest a violation of the offender's Charter rights, they could no longer

be considered relevant mitigating factors in the determination of a fit sentence." The Court continued:

> [T]he sentencing regime under Canadian law must be implemented within, and not apart from, the framework of the Charter. Sentencing decisions are always subject to constitutional scrutiny. A sentence cannot be "fit" if it does not respect the fundamental values enshrined in the Charter. Thus, incidents alleged to constitute a Charter violation can be considered in sentencing, provided that they bear the necessary connection to the sentencing exercise. As mitigating factors, the circumstances of the breach would have to align with the circumstances of the offence or the offender, as required by s. 718.2 of the Code. Naturally, the more egregious the breach, the more attention the court will likely pay to it in determining a fit sentence. [para. 48]

"[I]ncidents alleged to constitute a Charter violation can be considered in sentencing, provided that they bear the necessary connection to the sentencing exercise."

And further:

> Indeed, s. 718 of the Criminal Code describes the fundamental purpose of sentencing as that of contributing to "respect for the law and the maintenance of a just, peaceful and safe society". This function must be understood as providing scope for sentencing judges to consider not only the actions of the offender, but also those of state actors. Provided that the impugned conduct relates to the individual offender and the circumstances of his or her offence, the sentencing process includes consideration of society's collective interest in ensuring that law enforcement agents respect the rule of law and the shared values of our society. [para. 49]

Even though excessive force by the police can be remedied through a reduction in sentence by applying the sentencing provisions of the *Criminal Code*, the Supreme Court did not foreclose the use of the remedial provision of s.24(1) of the *Charter* in exceptional cases. "Sentence reduction outside statutory limits, under s. 24(1) of the Charter, may be the sole effective remedy for some particularly egregious form of misconduct by state agents in relation to the offence and to the offender," said Justice Lebel. "In that case, the validity of the law would not be at stake, the sole concern being the specific conduct of those state agents."

Legality & Fitness of Sentence

Although the Alberta Court of Appeal did not need to rely on s. 24(1) it nonetheless crafted a fit and appropriate sentence in recognizing the serious acts of the police officers and addressing the circumstances of the accused while remaining within the statutory parameters of the *Criminal Code*. All appeals were dismissed.

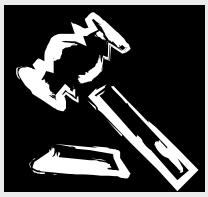
Complete case available at www.scc-csc.gc.ca

Others intervening in the Nasogaluak appeal:

- Director of Public Prosecutions of Canada
- Attorney General of Ontario
- Attorney General of Manitoba
- Canadian Civil Liberties Association
- Criminal Lawyers' Association (Ontario)
- Criminal Trial Lawyers' Association

LEGALLY SPEAKING:

Drugs: Possession v. Production



"Possession is not an included offence in production but involvement in production generally also results in possession. Possession as defined in s. 4(3) of the Criminal Code requires both knowledge and a measure of control. Production involves some active participation in the growing of the plants, which includes assisting in maintaining the environment of the growing plants with intent to help their development." - British Columbia Court of Appeal Justice Mackenzie in *R. v. Rong*, 2010 BCCA 165. at para. 10..

VICTIM'S MOTHER NOT A PERSON IN AUTHORITY: VOIR DIRE NOT NEEDED

R. v. S.G.T., 2010 SCC 20

The victim, a teenager, reported to police that the accused, her stepfather, touched her in a sexually inappropriate manner. The accused agreed to be interviewed by the police and at the end of the interview he wrote an apology to the victim on the police statement form. He was charged with sexual assault. Later, but before trial, the victim's mother sent a number of emails to the accused requesting consent for the victim to leave the country for a visit. In one of the emails the accused again apologized, writing in part, "I am so, so sorry if I caused her [the victim] emotional pain."

At trial in the Saskatchewan Court of Queen's Bench the victim testified. As well, the Crown wanted to enter the accused's confession to police, including the written apology, and the email he sent to the victim's mother. On a *voir dire*, the trial judge found that the police officer had offered an inducement by implying that the matter was not significant, that it was extremely minor, that the accused would not lose his job, and all that was necessary was an apology and that the accused would not be charged if he did so. The statement was ruled involuntary and therefore inadmissible. The email, however, was admitted without a *voir dire* and, in the trial judge's view, was "a confession of guilt and remorse." Despite the accused's denial that he sexually assaulted his stepdaughter, the trial judge disbelieved him and a conviction of sexual assault followed.

The accused challenged his conviction before the Saskatchewan Court of Appeal. The Court of Appeal found the trial judge erred in failing to conduct a *voir dire* to determine the admissibility of the email. In its view, among other things, the confessions rule, or derived confessions rule, may have provided a basis for the exclusion of the email if the mother could be characterized as a person in authority. If there was a connection between the inadmissible confession to police and the email, such that the accused sent the e-mail as a result of the inducement offered by the police officer some five weeks earlier, then the email may be inadmissible as well. Thus a *voir dire* was required. The conviction was set aside and a new trial was ordered. The Crown then appealed to the Supreme Court of Canada.

"[T]he derived confessions rule serves to exclude statements which, despite not appearing to be involuntary when considered alone, are sufficiently connected to an earlier involuntary confession as to be rendered involuntary and hence inadmissible."

Confessions Rule

Justice Charron, authoring the judgment for the five member majority, examined the common law rules relating to the admissibility of confessions:

> The distinction between an admission and a confession is apposite here. Under the rules of evidence, statements made by an accused are admissions by an opposing party and, as such, fall into an exception to the hearsay rule. They are admissible for the truth of their contents. When statements are made by an accused to ordinary persons, such as friends or family members, they are presumptively admissible without the necessity of a voir dire. It is only where the accused makes a statement to a "person in authority", that the Crown bears the onus of proving the voluntariness of the statement as a prerequisite to its admission. This, of course, is the confessions rule.
>
> ... ...
>
> A person in authority is typically a person who is "formally engaged in the arrest, detention, examination or prosecution of the accused". Importantly, there is no category of persons who are automatically considered persons in authority solely by virtue of their status. The question as to who should be considered as a person in authority is determined according to the viewpoint of the accused. To be considered a person in authority, the accused must believe that the recipient of

> the statement can control or influence the proceedings against him or her, and that belief must be reasonable. Because the evidence necessary to establish whether or not an individual is a person in authority lies primarily with the accused, the person in authority requirement places an evidential burden on the accused. While the Crown bears the burden of proving the voluntariness of a confession beyond a reasonable doubt, the accused must provide an evidential basis for claiming that the receiver of a statement is a person in authority.
>
> ... Thus, where the receiver of the statement is an obvious state actor, such as a police officer, the fact that the person's status was known to the accused at the time the statement was made will suffice to meet the evidentiary burden. Whenever the evidence makes clear that a voir dire into admissibility is required, the trial judge must conduct one even if none is requested unless, of course, the defence waives the requirement and consents to the statement's admission. When the receiver of the statement is not a typical or obvious person in authority, it usually falls on the accused, in keeping with the evidential burden, to raise the issue and request a voir dire. [references omitted, paras. 20-23]

Here, the victim's mother was not a person in authority; she was simply an ordinary witness in the proceedings. The accused did not testify that he believed the victim's mother could influence or control the proceedings nor was there any evidence that the victim's mother had any control over the prosecution or that she was operating on behalf of the investigating authorities. Since the accused's mother was not a person in authority there was no need to hold a *voir dire*. The trial judge did not err.

Derived Confessions Rule

The derived confessions rule, which emanates from the common law confessions rule, was described by the majority as follows:

> In brief, the derived confessions rule serves to exclude statements which, despite not appearing to be involuntary when considered alone, are sufficiently connected to an earlier involuntary confession as to be rendered involuntary and hence inadmissible. [para. 28]

And further:

> [S]tatements made to a person in authority that are sufficiently connected to a previous involuntary confession to be deemed also involuntary. [para. 30]

There is, however, no general rule excluding a subsequent statement regardless of the degree of connection to the initial inadmissible statement. In determining whether a subsequent statement is sufficiently connected to a prior, inadmissible confession, a contextual and fact-based approach is used. This includes looking at a number of factors such as:

- the time span between the statements,
- advertence to the previous statement during questioning;
- the discovery of additional incriminating evidence subsequent to the first statement;
- the presence of the same police officers at both interrogations; and
- other similarities between the two circumstances.

But the majority refused to decide whether the derived confessions rule extended to admissions made to ordinary persons. In this case, the accused did not raise the derived confessions rule at trial, nor bring a *Charter* application seeking the exclusion of the e-mail. Instead, his lawyer consented to the admission of the email. In any event, it was difficult to find evidence of a connection between the two statements which would have alerted the need to conduct a *voir dire*:

- the time span between the initial apology and the e-mail was over five weeks;
- the inducement held out by the police was the suggestion that the accused may not be charged if he apologized. By the time the e-mail was sent he had been charged;
- there was no advertence to the previous inadmissible statement in the e-mail to the victim's mother;
- the two statements were made to different persons in entirely different circumstances. The first statement was made to a police officer in

the context of a custodial interrogation, while the second was made to the victim's mother in an e-mail relating to permission to allow travel;

- the accused's later testimony at trial revealed that the apology in the e-mail concerned a completely unrelated incident.

The majority found the Court of Appeal erred in overturning the conviction. The appeal was allowed, the order for a new trial set aside, the conviction was reinstated, and the matter was sent back to the Saskatchewan Court of Appeal to consider the accused's remaining grounds of appeal.

A View of Two

Justices Fish and Binnie had a different opinion. In their view the trial judge was legally bound to determine the admissibility of the accused's second "apology", as it was clear that it might be a "derived confession"and inadmissible because of its close connection to the earlier excluded statement. In their dissent, they described the derived confessions rule this way:

> The confessions rule serves to exclude involuntary statements made to persons in authority. The derived confessions rule is a corollary of the confessions rule. It excludes statements that are so closely connected to inadmissible confessions as to be "tainted" by association and, for that reason, inadmissible as well.
>
> The derived confessions rule thus excludes statements that, while not inadmissible when considered in isolation, are excluded because of their temporal or causal connection to another statement found by the court to be inadmissible. This occurs whenever "either the tainting features which disqualified the first confession continued to be present or ... the fact that the first statement was made was a substantial factor contributing to the making of the second statement".
>
> The question is a contextual one, aimed at determining the degree of connection between the two statements. ...
>
> In short, derived confessions are inadmissible not because they are themselves involuntary statements made or given to a person in authority, ... but because they are "tainted", or contaminated, by another inadmissible statement. [references omitted, paras. 63-66]

In the minority's view, the connection between the two statements was apparent and a *voir dire* to determine whether the second statement was contaminated by the first was required. As for whether the derived confession need be made to a person in authority for it to be subject to exclusion, a matter the majority found unnecessary to answer, Justice Fish stated:

> As a matter of principle and logic, it seems clear to me that derived confessions need not be made to a person in authority in order to be found inadmissible. The purpose of the rule — to exclude statements with a sufficient connection to a prior inadmissible statement — would be frustrated if such a requirement were strictly enforced. Whether or not the subsequent statement was made to an authority figure, if it is prompted by the same police conduct that resulted in the earlier confession, or if it discloses the contents of the earlier statement made to authorities, it is a product of the inadmissible confession and is itself inadmissible on that ground alone. Of course, whether the statement is made to police will be a relevant factor in determining whether the required connection between the two statements has been made out. [para. 85]

The minority would have dismissed the Crown's appeal and upheld the order of a new trial.

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

- 

INTERNET LURING APPLIES EVEN THOUGH COP POSED AS CHILD

R. v. Levigne, 2010 SCC 25

The accused, a 46 year old man, engaged in a series of sexually explicit Internet chats with an undercover officer who repeatedly and clearly represented himself as "Jessy G", a 13-year-old student in grade 7. Throughout the online chat sessions, the accused reiterated his wish to perform oral sex on "Jessy G". After arranging to meet "Jessy G" and attending at a local restaurant for a sexual encounter, the accused was arrested and charged with offences under s. 172.1 of the *Criminal Code*; communicating by computer with an underage person, or person whom he believed to be underage, for the purpose of facilitating the commission of an offence mentioned in the legislation.

At trial in the Alberta Court of Queen's Bench the accused said he took no steps to ascertain the real age of "Jessy G". But he testified that he did not believe "Jessy G" was 13 because his online profile indicated that he was 18 and that there were moderators in the public chat rooms who would remove children (even though his communications with "Jessy G" occurred in a private chat room).

The trial judge found that s.172.1(4) had no application because the accused's belief was not put forward as a defence, but instead was an essential element of the offence. Under s.172.1(3) of the *Criminal Code,* where there is evidence that the person with whom the accused communicated was represented to the accused as being underage it is, in the absence of evidence to the contrary, proof that the accused believed that the person was underage. Thus, it was presumed the accused believed that he was communicating with an underage sexual target. But the trial judge acquitted the accused, finding his testimony (evidence to the contrary) left a doubt as to whether the accused actually believed that his sexual target was underage.

The Crown successfully appealed to the Alberta Court of Appeal. The Court of Appeal found that the trial judge had misapprehended the combined effect of ss.172.1(3) and (4) by failing to apply the "reasonable steps" requirement found in s.172.1(4). Instead of ordering a new trial, the accused's acquittals were set aside, convictions entered, and the matter was returned to the trial court for sentencing.

The accused then appealed to the Supreme Court of Canada requesting the Court of Appeal decision be reversed and his acquittals restored, or at least a new trial ordered. But the Supreme Court refused to do so.

Internet Luring

Section 172.1 of the *Criminal Code* creates the offence of internet luring. Justice Fish, speaking for all nine judges, described the crime as follows:

> Section 172.1 prohibits the use of computers to communicate with an underage person or a person whom the accused believes to be underage for the purpose of facilitating the commission, with respect to that person, of the specified sexual offences. ... s. 172.1(1) (a) and s. 172.1(1)(c), ... both consist of three elements: (1) an intentional communication by computer; (2) with "a person who is, or who the accused

"[T] the anonymity of an assumed online profile acts as both a shield for the predator and a sword for the police. As a shield, because it permits predators to mask their true identities as they pursue their nefarious intentions; as a sword (or, perhaps more accurately, as a barbed weapon of law enforcement), because it permits investigators, posing as children, to cast their lines in Internet chat rooms, where lurking predators can be expected to take the bait."

believes is" underage; (3) for the specific purpose of facilitating the commission of an enumerated secondary offence with respect to that person.

Section—172.1 was adopted by Parliament to identify and apprehend predatory adults who, generally for illicit sexual purposes, troll the Internet to attract and entice vulnerable children and adolescents.

In structuring the provision as it did, Parliament recognized that the anonymity of an assumed online profile acts as both a shield for the predator and a sword for the police. As a shield, because it permits predators to mask their true identities as they pursue their nefarious intentions; as a sword (or, perhaps more accurately, as a barbed weapon of law enforcement), because it permits investigators, posing as children, to cast their lines in Internet chat rooms, where lurking predators can be expected to take the bait... [paras. 23-25]

Thus, an accused can be convicted under s.172.1 for failing to take reasonable steps to determine the real age of the sexual target even though the target was in fact an adult pretending to be a child, not a child pretending to be an adult. And the offence is made out when an accused communicates for the purpose prohibited by the section with a person whom the they believe to be underage. That is the conduct deemed undesirable and criminalized.

The Supreme Court noted that s.172.1 had four defining characteristics (two substantive and two procedural) to enhance its effectiveness:

Substantive: Closing the cyberspace door before the predator gets in to prey. Section 172.1 creates an incipient or "inchoate" offence; a preparatory crime capturing otherwise legal conduct meant to culminate in the commission of a completed crime. It criminalizes conduct that precedes the commission of the sexual offences to which it refers, and even an attempt to commit them. The offender need not meet or intend to meet the victim with a view to committing any of the specified secondary offences.

Substantive: Section 172.1 makes it an offence to communicate by computer for a prohibited purpose with a person who is underage, or who the accused believes is underage. Were it otherwise, "sting" operations of the kind that occurred here could not be mounted.

Procedural: Under s.172.1(3), evidence that the target of the communication was represented to the accused to be under the specified age "is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age". This rebuttable presumption facilitates the prosecution of child luring offences while leaving intact the burden on the Crown to prove guilt beyond a reasonable doubt. Put differently, s. 172.1(3) assists the Crown in discharging its evidential burden on the element of culpable belief, but preserves for accused persons the benefit of any reasonable doubt where the record discloses "evidence to the contrary".

Procedural: Under s.172.1(4), the accused's belief that the person with whom he or she communicated was not underage will not afford a defence to the charge "unless the accused took reasonable steps to ascertain the age of the person". This provision forecloses exculpatory claims of ignorance or mistake that are entirely devoid of an objective evidentiary basis.

Considering the purpose of s.172.1, Justice Fish found the combined effect of ss. (3) and (4) should be understood and applied in the following way:

1. Where it has been represented to the accused that the person with whom they are communicating by computer (the "interlocutor") is underage, the accused is presumed to have believed that the interlocutor was in fact underage;

"interlocutor" – someone who takes part in a conversation.

2. This presumption is rebuttable. It will be displaced by evidence to the contrary, which must include evidence that the accused took steps to ascertain the real age of the interlocutor. Objectively considered, the steps taken must be reasonable in the circumstances.

3. The prosecution will fail where the accused took reasonable steps to ascertain the age of their interlocutor and believed that the interlocutor was not underage. In this regard, the evidential burden is on the accused but the persuasive burden is on the Crown.

4. Such evidence will at once constitute "evidence to the contrary" under s. 172.1(3) and satisfy the "reasonable steps" requirement of s. 172.1(4).

5. Where the evidential burden of the accused has been discharged, they must be acquitted if the trier of fact is left with a reasonable doubt whether the accused in fact believed that their interlocutor was not underage.

The trial judge had erred in holding that s.172.1(4) had no application. The "reasonable steps" requirement imposed foreclosed successful claims of mistaken belief, absent an objective evidentiary basis. "Parliament has deliberately proscribed in that section communications for the prohibited purpose with a person who is or who the accused believes is underage and cannot have intended to impose a 'reasonable step' requirement on one but not the other," said Justice Fish. "In either instance, the accused's belief that the person was not underage will afford a defence — but only if the accused took reasonable steps to ascertain the age of his or her interlocutor, as required by s. 172.1(4)."

In this case "Jessy G" was plainly and repeatedly represented as only 13 and no reasonable steps to ascertain that he was in fact 18 were taken. His belief that "Jessy G" was 18 was not reasonable in the circumstances nor available as a defence because the steps he took were neither "reasonable" nor "steps to ascertain the age" of the person with whom he was communicating by computer for his sexual gratification. The accused's appeal was dismissed.

BY THE BOOK:

s.172.1 *Criminal Code*: Luring a Child

(1) Every person commits an offence who, by means of a computer system within the meaning of subsection 342.1(2), communicates with

(a) a person who is, or who the accused believes is, under the age of eighteen years, for the purpose of facilitating the commission of an offence under subsection 153(1) [sexual exploitation], section 155 [incest] or 163.1 [child pornography], subsection 212(1) [procuring] or (4) [prostitution] or section 271 [sexual assault], 272 [sexual assault with weapon or cause bodily harm] or 273 [aggravated sexual assault] with respect to that person;

(b) a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under section 151 [sexual interference] or 152 [invitation to sexual touching], subsection 160(3) [bestiality] or 173(2) [exposure] or section 280 [abduction] with respect to that person; or

(c) a person who is, or who the accused believes is, under the age of 14 years, for the purpose of facilitating the commission of an offence under section 281 [abduction] with respect to that person.

s.342.1(2) "computer system" means a device that, or a group of interconnected or related devices one or more of which,

(a) contains computer programs or other data, and
(b) pursuant to computer programs,
    (i) performs logic and control, and
    (ii) may perform any other function.

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

Editor's Note: At the time of trial, the Internet luring provision was s.172.1(1)(c). Today, it has since been renumbered as s.172.1(1)(b). As well, the threshold age has been raised from 14 years to 16.

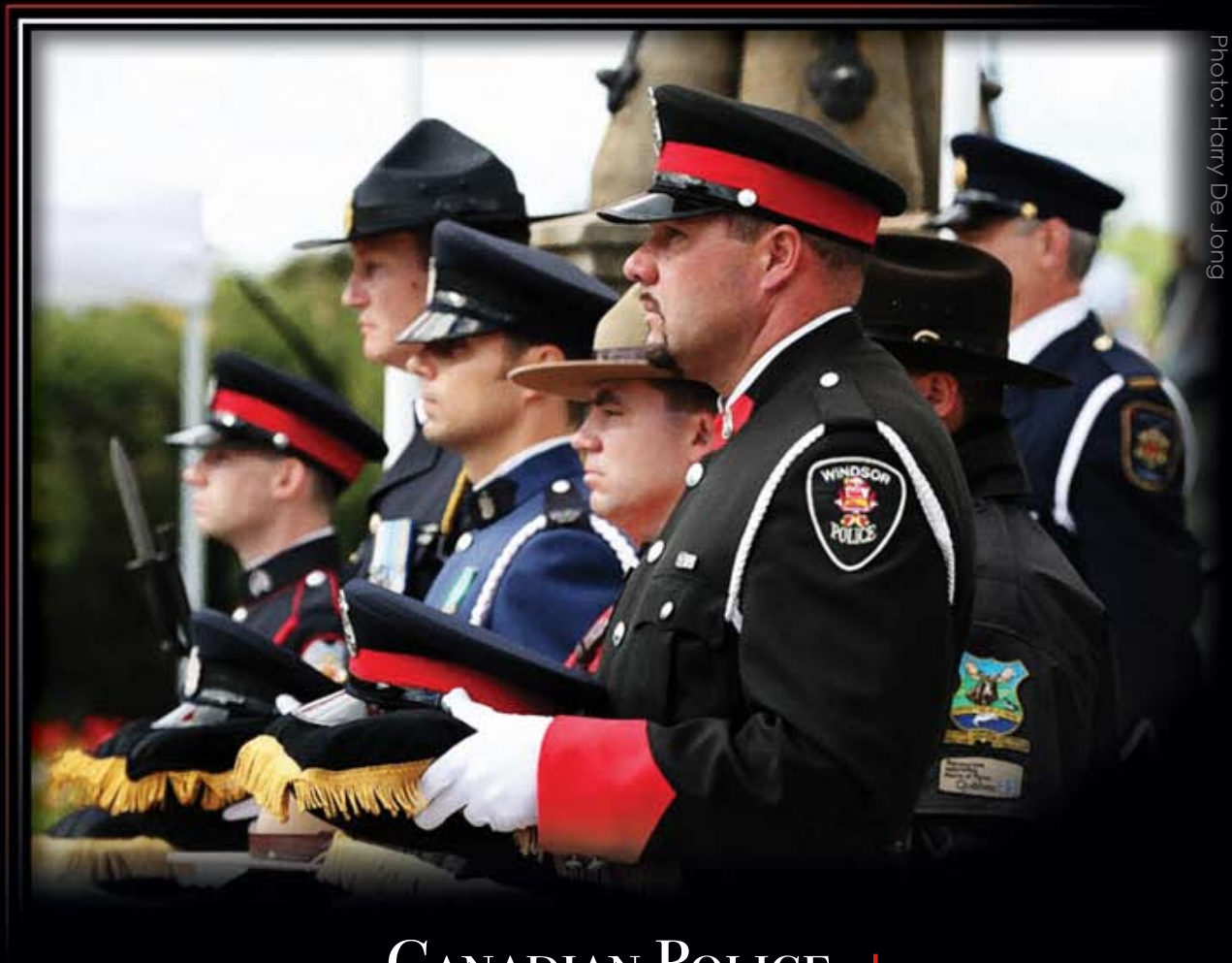


Photo: Harry De Jong

Canadian Police and Peace Officers' Memorial Service

September 26, 2010
Parliament Hill
Ottawa, Ontario

La Commémoration des policiers et agents de la paix canadiens

Le 26 septembre 2010
Colline du Parlement
Ottawa (Ontario)

THE MEMORIAL LA COMMÉMORATION

JUSTICE INSTITUTE of BRITISH COLUMBIA LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

The Justice Institute of British Columbia Library is an excellent resource for learning. Here is a list of its most recent acquisitions which may be of interest to police officers.

50 one-minute tips for better communications: speak, write and present more effectively.
Phillip E. Bozek.
[Rochester, NY] : Axzo Press, 2009
HF 5718 B69 2009

The art and science of security risk assessment.
Ira S. Somerson.
[Alexandria, Va.] : ASIS International, c2009.
HV 8290 S663 2009

The business of listening: become a more effective listener.
Diana Bonet Romero.
[Rochester, NY] : Axzo Press, 2009.
HD 30.3 B654 2009

Communication in crisis and hostage negotiations : practical communication techniques, stratagems, and strategies for law enforcement, corrections and emergency service personnel in managing critical incidents.
by Arthur A. Slatkin.
Springfield, Ill. : Charles C. Thomas, Publisher, c2010.
HV 6595 S53 2010

Data mining for intelligence, fraud, & criminal detection : advanced analytics & information sharing technologies.
Christopher Westphal.
Boca Raton : CRC Press, c2009.
HV 8079 C65 W47 2009

Executive protection : rising to the challenge.
by Robert L. Oatman.
Alexandria, Va. : ASIS International, c2009.
HV 8290 O284 2009

The explanation of crime : context, mechanisms and development.
edited by Per-Olof H. Wikstrom, Robert J. Sampson.
Cambridge : Cambridge University Press, 2009.
HV 6080 E975 2009

Forensic factor. Sniper [videorecording]**.**
[Scarborough, Ont.] : Distribution Access [distributor], 2007.
1 videodisc (DVD) (60 min.) : sd., col. ; 4 3/4 in.
For 23 days in October, 2002, a sniper terrorizes the Washington DC area, shooting thirteen people and killing ten. The victims are ordinary people doing routine activities. Nothing links them; they are chosen at random. Police mount one of the largest investigations in American history to catch a ruthless and elusive killer. In the end, their most productive clue comes from the sniper himself, who calls a police tip line and brags about a previous shooting in Alabama. Authorities are able to recover a single fingerprint from that crime, which eventually leads them to not one, but two killers, including a seventeen-year-old boy.
HV 8079 H6 F674 2007 D939

Gangs in Canada.
Jeff Pearce.
[Edmonton] : Quagmire Press, c2009.
HV 6439 C3 P42 2010

Generation blend: managing across the technology age gap.
Rob Salkowitz.
Hoboken, N.J. : John Wiley & Sons, c2008.
HD 6279 S25 2008

Managing high-risk sex offenders in the community : risk management, treatment and social responsibility.
edited by Karen Harrison.
Cullompton, UK ; Portland, Or. : Willan, 2010.
HV 6556 M36 2010

Managing personal change : stay positive and stay in control.
Cynthia D. Scott, Dennis T. Jaffe.
[Rochester, NY] : Axzo Press, 2009.
BF 471 S267 2009

Mentoring: make it a mutually rewarding experience.
Gordon F. Shea,Stephen C. Gianotti.
[Rochester, NY] : Axzo Press, c2009.
HF 5385 S54 2009

New directions in surveillance and privacy.
edited by Benjamin J. Goold and Daniel Neyland.
Cullompton, Devon, U.K.; Portland, Or.: Willan Pub., 2009.
K 3263 N49 2009

The power of appreciative inquiry : a practical guide to positive change.
Diana Whitney & Amanda Trosten-Bloom ; foreword by David Cooperrider.
San Francisco : Berrett-Koehler Publishers, c2010.
HD 30.3 W52 2010

Presentation skills : captivate and educate your audience.
Steve Mandel.
[Rochester, NY] : Axzo Press, 2009.
PN 4121 M319 2009

Standing in the fire : leading high-heat meetings with calm, clarity, and courage.
Larry Dressler.
San Francisco : Berrett-Koehler Publishers: [Distributed by] Ingram Publisher Services, c2010.
HF 5734.5 D74 2010

Supervising police personnel : the fifteen responsibilities.
Paul M. Whisenand.
Upper Saddle River, N.J. : Pearson Prentice Hall, [2010], c2011.
HV 7936 S8 W48 2010

Use of force report writing: part 1: legal considerations. [videorecording]
Burlington, NC : ALERT Publishing Inc., c2001.
1 videodisc (DVD) (14 min.) : sd., col. ; 4 3/4 in.
This program presents experts who offer their tips on proper writing skills, with a particular emphasis on report writing for use-of-force incidents. It stresses the most common mistakes made in incident report writing.
HV 7936 R53 R468 2001 D1009

s.24(1) REMEDY CAN INCLUDE DAMAGE$ FOR CHARTER BREACHES

Vancouver (City) v. Ward, 2010 SCC 27

Police received information that an unknown individual (described as a white male, 30 to 35 years, 5' 9", with dark short hair, wearing a white golf shirt or T-shirt with some red on it) intended to throw a pie at Prime Minister Chrétien while participating in a ceremony in Vancouver's Chinatown. The plaintiff, a Vancouver lawyer, was mistakenly identified as the would be pie-thrower. He was a white male, had grey, collar-length hair, was in his mid-40s, was wearing a grey T-shirt with some red on it, and was running, appearing to be avoiding interception. The officers chased him down and handcuffed him. The plaintiff loudly protested his detention, created a disturbance, and was arrested for breach of the peace. He was taken to the police lockup and effectively strip searched. His car was impounded for the purpose of searching it once a search warrant had been obtained. But detectives subsequently determined that they did not have grounds to obtain a search warrant nor evidence to charge the plaintiff with attempted assault. After being held for about four and a half hours he was released, several hours after the ceremony and the Prime Minister had left Chinatown.

The plaintiff brought an action in tort and for breach of his *Charter* rights arising from his arrest, detention, strip search, and car seizure. The trial judge found the plaintiff's arrest for breach of the peace was lawful, but held the strip search undertaken by the province's correctional officers as well as the vehicle seizure by the police violated his right to be free from unreasonable search and seizure under s. 8 of the *Charter*. Plus, the plaintiff's rights under s.9 were breached when he was held in the police lockup longer than necessary. The judge assessed damages under s.24(1) of the *Charter* at $100 for the seizure of the car, $5,000 for the strip search, and $5,000 for wrongful imprisonment. He rejected the governments' argument that damages were an inappropriate remedy for *Charter* breaches absent bad faith, abuse of power, or tortious conduct.

The province and the city unsuccessfully appealed to the British Columbia Court of Appeal. The majority agreed that bad faith, abuse of power, or tortious conduct were not necessary requirements for the awarding of *Charter* damages. A dissenting justice, would have allowed the defendants' appeals, finding that damages could not be awarded where the police did not act in bad faith and simply made a mistake as to the proper course of action.

The defendants then appealed to the Supreme Court of Canada.

Damages Under s.24(1) *Charter*

Section 24(1) of the *Charter* allows courts to grant "appropriate and just" remedies for *Charter* breaches. This can include damages for breaching a claimant's *Charter* rights ruled the Supreme Court of Canada. But *Charter* damages are not private law damages; they are a distinct remedy for constitutional damages. "The nature of the remedy is to require the state (or society writ large) to compensate an individual for breaches of the individual's constitutional rights," said Chief Justice MacLachlin, speaking for the unanimous Supreme Court. "An action for public law damages — including constitutional damages — lies against the state and not against individual actors. Actions against individual actors should be pursued in accordance with existing causes of action." She then went on to outline a four step process in assessing when damages under s.24(1) are available:

Step One: Proof of a *Charter* Breach - the first step is to establish a *Charter* breach on which the claim for damages is based.

Step Two: Functional Justification of Damages - the claimant must demonstrate that damages are appropriate and just to the extent that they serve a useful function or purpose. Damages must further the general objects of the *Charter*:

- **the function of compensation** - compensating the claimant for loss and suffering caused by the

breach. A breach of an individual's *Charter* rights may cause personal loss which should be remedied and compensated. Personal loss includes physical, psychological, pecuniary, or harm to intangible interests such as distress, humiliation, embarrassment, or anxiety caused by the *Charter* breach;

"pecuniary" - of or relating to money.

- **the function of vindication** - vindicating the right by emphasizing its importance and the gravity of the breach. *Charter* rights must be maintained and cannot be allowed to be whittled away by attrition. Vindication focuses on the harm the infringement causes the state and society as a whole, such as impairing public confidence or diminishing public faith in constitutional protections;

- **the function of deterrence** - deterring state actors from committing future breaches. Deterrence has a societal purpose and seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution. Like "general deterrence" in criminal sentencing, which sends a message to others who may be inclined to engage in similar criminal activity, deterrence as an object of *Charter* damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future.

Step Three: Countervailing Factors - even if the claimant establishes that damages are functionally justified, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations supporting a damage award and render damages inappropriate or unjust. Although a complete catalogue of countervailing considerations will develop in the jurisprudence, two considerations include the existence of alternative remedies and concerns for good governance.

- **Alternative Remedies:** If other remedies adequately meet the need for compensation, vindication and/or deterrence, a further award of damages under s.24(1), which operates concurrently with and does not replace other areas of law, would serve no function and would not be "appropriate and just". Alternative remedies include private law remedies for personal injury actions, other *Charter* remedies like declarations under s. 24(1), and remedies under legislation permitting proceedings against the Crown. Once the claimant establishes basic functionality the evidentiary burden then shifts to the state to show that the functions engaged can be fulfilled through other remedies. The claimant need not show that she has exhausted all other recourses. Rather, it is for the state to show that other remedies are available in the particular case that will sufficiently address the breach. But the existence of a potential claim in tort does not bar a claimant from obtaining damages under the *Charter*. Tort law and the *Charter* are distinct legal avenues. However, a concurrent action in tort, or other private law claim, bars s. 24(1) damages if the result would be double compensation. As well, declarations of a *Charter* breach may provide an adequate remedy, particularly where the claimant has suffered no personal damage.

- **Good Governance:** The concern for effective governance may negate the appropriateness of s.24(1) damages. Good governance concerns may take different forms. At one extreme, it may be argued that any award of s.24(1) damages will always have a chilling effect on government conduct, and hence will impact negatively on good governance. On the other hand, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity. For example, state action taken under a statute which is subsequently declared invalid will not give rise to public law damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down. Duly enacted laws should be enforced until declared invalid, unless the state

conduct is clearly wrong, in bad faith, or an abuse of power.

Step Four: Quantum of s.24(1) Damages - the amount, or quantum, of damages must be "appropriate and just". The objects of compensation, vindication, and deterrence will determine the amount of damages awarded. Where the objective of compensation is engaged, the concern is to restore the claimant to the position they would have been in had the breach not been committed. Any claim for compensatory damages must be supported by evidence of the loss suffered. This may include pecuniary loss - injuries (physical and psychological) may require medical treatment, with attendant costs while prolonged detention may result in loss of earnings.

Non-pecuniary damages, such as pain and suffering, are harder to measure but tort law can provide assistance. Where the objectives of vindication and deterrence are engaged, the seriousness of the breach must be evaluated with regard to the impact of the breach on the claimant and the seriousness of the state misconduct. The more egregious the conduct and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be. But the damages must not only be appropriate and just to the claimant, they must also be appropriate and just to the state. Large awards and the consequent diversion of public funds may serve little functional purpose in terms of the claimant's needs and may be inappropriate or unjust from the public perspective. In considering what is fair to the claimant and the state, the court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests. To be "appropriate and just", an award of damages must represent a meaningful response to the seriousness of the breach and the objectives of compensation, upholding *Charter* values, and deterring future breaches. In assessing s. 24(1) damages, the court must focus on the breach of *Charter* rights as an independent wrong, worthy of compensation in its own right. At the same time, damages under s.24(1) should not duplicate damages awarded under private law causes of action, such as tort, where compensation of personal loss is at issue.

Strip Search Damages

In this case the trial judge found that the strip search violated the plaintiff's personal rights under s.8 of the *Charter* **(step 1)**. And his injury was serious **(step 2)**. "He had a constitutional right to be free from unreasonable search and seizure, which was violated in an egregious fashion," said the Supreme Court. "Strip searches are inherently humiliating and degrading regardless of the manner in which they are carried out and thus constitute significant injury to an individual's intangible interests." The plaintiff did not commit a serious offence, he was not charged with an offence associated with evidence being hidden on the body, no weapons were involved and he was not known to be violent or to carry weapons. Nor did he pose a risk of harm to himself or others. Plus the officers should have been familiar with settled law regarding routine strip searches and their inappropriateness. The *Charter* breach significantly impacted the plaintiff's person and rights, and the police conduct was serious. The objects of compensation, vindication, and deterrence of future breaches were all engaged. The state, however, did not establish any countervailing factors **(step 3).** Alternative remedies were not available to achieve the objects of compensation, vindication, or deterrence with respect to the strip search. The plaintiff's claims for assault and negligence had been dismissed and no tort action was available for a breach of his s.8 right. And a declaration under s.24(1) would not satisfy the need for compensation. Furthermore, the state did not establish that an award under s.24(1) for damages was negated by good governance considerations. As for quantum of damages **(step 4)**, although strip searches are inherently humiliating and a significant injury to an individual's intangible interests regardless of the manner in which they are carried

out, the strip search in this case was relatively brief and not extremely disrespectful. It did not involve the removal of the plaintiff's underwear nor the exposure of his genitals. He was never touched during the search and there was no indication that he suffered any resulting physical or psychological injury. A moderate damages award was proper. The trial judge's award of $5,000 was appropriate.

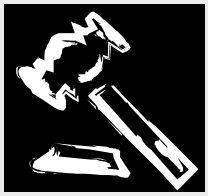
Car Seizure Damages

The trial judge ruled the vehicle seizure breached s. 8 **(step 1)**. However, the object of compensation **(step 2)** was not engaged by the seizure of the car because the plaintiff did not suffer any injury as a result of it. His car was never searched and he was subsequently driven to the police compound to pick it up. Nor were the objects of vindication and deterrence compelling. While the vehicle seizure was wrong, it was not of a serious nature. The police officers did not illegally search the car, but arranged for its towing under the impression that it would be searched once a warrant had been obtained. When the officers determined that they did not have grounds to obtain the required warrant, the vehicle was made available for release. Thus, the Supreme Court concluded damages for the vehicle seizure were not justified and a declaration under s.24(1) that the vehicle seizure violated s.8 adequately served the need for vindication and deterrence of future improper car seizures. The award of $100 was set aside, and a declaration under s.24(1) that the seizure of the vehicle violated s.8 was substituted.

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

LEGALLY SPEAKING:

Alcohol: Odour v. Amount



"The odour of alcohol on one's breath is some indication of the consumption of alcohol, but no indication of the amount consumed." - Ontario Court of Appeal Justice Doherty in *R. v. Ramage, 2010 ONCA 488 at para. 16.*

2010 Abbotsford Police Challenge Run
Saturday September 18, 2010

The Abbotsford Police Challenge Run started in 1990 to raise funds for BC Special Olympics. Since its inception, the number of participants and sponsors has increased to the point where the Abbotsford Police Challenge has become a premier event of its kind in the Fraser Valley. The Abbotsford Police Challenge is committed to being a family oriented event and for those who don't run there is a 5 kilometer fun run/walk route so no one is excluded from participating. It is now one of the leading community fundraisers for the BC Special Olympics, ALS Society, and the United Way.

EVENTS

10K Challenge and 5K Fun Run

Walkers, runners, wheelchairs and strollers welcome!

LOCATION

Civic Plaza, next to the Abbotsford Police Department 2838 Justice Way, Abbotsford, BC

RACE TIME

Both events start at 9:00 am

Warm-up led by Apollo Athletic Club at 8:30am

INFORMATION

Abbotsford Police Department

Phone: 604-859-5225 or 1-800-898-6111; ask for the Challenge Run or visit the website at:

www.abbypd.ca