JIBC IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

MOTIVE MATTERS: WHY YOU DO WHAT YOU DO COUNTS

Not too many prosecutors, or police officers for that matter, want to gamble on s. 24(2) of the *Charter*. Sometimes the gun or drugs get in, but sometimes they're out and the factually guilty are found legally innocent and walk free. Rather than rolling the dice in the hopes evidence will be admitted, it is far better to build a *Charter* proof case in the first instance. The admissibility analysis doesn't take to kindly to willful breaches. A police officer forging ahead knowing that their actions are violating constitutional standards is very often the evidentiary kiss of death. Deliberate breaches or blatant disregard for *Charter* rights are the epitome of bad faith, will aggravate the seriousness of state action, and likely support exclusion, all other things being equal.

One thing to keep in mind is that a police officer's purpose or intention can and often does impact the legality of their actions. Motive really does matter. The jurisprudence is rife with examples. Just ask the Toronto Police officer who stopped a van for traffic infractions and saw Milton Harris, a passenger, not wearing his seatbelt as the law required (*R. v. Harris*, 2007 ONCA 574). Harris was leaning forward and had his left hand down the small of his back. The officer was concerned for his safety and ordered everyone to keep their hands where they could be seen. He then asked all occupants to identify themselves, including Harris, so he could check them out on CPIC. After running Harris the officer learned he was breaching his bail curfew, arrested and searched him, and found cocaine tucked in the waistband of his underwear.

The trial judge threw out the cocaine as evidence, finding that the police breached Harris' *Charter* rights. Without the cocaine, the Crown had no case and Harris was acquitted. On appeal by the Crown, Ontario's highest court upheld the lower court's ruling that asking Harris to identify himself for the purpose of querying CPIC in the circumstances was an unreasonable search and seizure. The Court of Appeal, however, noted that the officer could have asked Harris to identify himself in order to give him a seatbelt ticket. If he did this he could have conducted a CPIC inquiry anyways which would have led to the same results and the events would have unfolded exactly the way they did. As Justice Doherty put it, if the officer had properly understood the limits of his authorities under Ontario's *Highway Traffic Act* and turned his mind to issuing the ticket for not wearing a seatbelt, he would have requested identification for that purpose. The officer would have still learned Harris was breaching his bail, arrested him, searched him, and found the drugs. Clearly what the officer was thinking made the difference on whether or not a *Charter* breach occurred. On one hand, asking Harris for ID to query CPIC was a breach, while on the other hand asking him for ID to issue a ticket and then querying CPIC was not!

Another, perhaps more common motive analysis involves provincial motor vehicle legislation permitting random vehicle stops. These types of stops pass constitutional muster as a reasonable limit on one's *Charter* rights if the officer's reason for stopping the vehicle falls within the ambit of traffic safety. However, if the officer arbitrarily stops the vehicle for reasons only related to general crime prevention or detection, the stop will not be saved by s. 1 of the *Charter*. Hence, in both cases there is an arbitrary vehicle stop but the constitutionality of the detention hinges on the officer's reason for doing so.

Motive matters in almost every action police take. Be smart. Understand the law.

Highlights In This Issue

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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

"Justice is blind in the sense that it pays no heed to the social status or personal characteristics of the litigants. But justice receives a black eye when it turns a blind eye to unconstitutional searches and seizures as a result of unacceptable police conduct or practices. The public must have confidence that invasions of privacy are justified, in advance, by a genuine showing of probable cause." - Supreme Court of Canada Justice Fish, *R. v. Morelli* 2010 SCC 8 at para. 110-111.

THREE JUDGES, THREE VIEWS ON POLICE ACTIONS

R. v. Dault, 2010 QCCA 986

Shortly after midnight police checked a parking lot behind a car wash adjacent to a bar. They knew from experience that users of the bar regularly parked in the lot. They saw several vehicles, including one occupied by two people. The vehicle was running, the lights were off, and the windows were defrosted, unlike other vehicles in the lot. One officer went to the passenger side while another approached the driver's side. The driver's door was ajar and an officer smelled a strong odour of alcohol. He knocked on the window, but the accused, who did not react, was facing the passenger. The officer at the passenger side noted movement of hands on the dashboard of the vehicle and the presence of a case with a credit card. He opened the door and saw the passenger forming a line of cocaine. He yelled to his partner about the drugs. The officer at the driver's side then opened the driver's door. The accused, occupying the driver's seat, appeared intoxicated; he was unable to exit the car and stand, had a very pasty mouth, difficulty speaking, a strong breath of alcohol, and was incoherent. Both men were arrested, informed of their rights, and taken to the police station. The accused provided two breath samples; 127mg% and 124mg%. He was charged with ss. 253(a) (impaired) and (b) (over 80mg%) of the *Criminal Code* and possession of cocaine under the *Controlled Drugs and Substances Act*.

At trial in the Court of Quebec one of the officers testified he was suspicious and wanted to see what the occupants were doing and whether they were capable of driving the vehicle. The accused argued that his detention was illegal and arbitrary under s. 9 of the *Charter* and that he was subject to an unreasonable search under s. 8, which included opening the car doors. In his view, the evidence should have been excluded under s. 24(2). The Crown, on the other hand, submitted that the police were acting under their general powers to maintain peace and public order, crime prevention, and public safety.

The trial judge agreed with the accused and concluded that the police action in opening the doors was not justified under Quebec's *Highway Safety Code* (*HSC*), the *Criminal Code*, common law or any other law permitting police to stop people in a motor vehicle. The police had no suspicion in relation to the commission of a crime, no suspicion in connection with the operation of a motor vehicle, nor any reasonable or probable grounds or articulable cause justifying such an intervention. The detention was arbitrary and the evidence was obtained in violation of the accused's *Charter* rights. The evidence was excluded under s. 24(2) and the accused was acquitted of all charges. The Crown's appeal to the Quebec Superior Court was unsuccessful, so it challenged the lower court's ruling to the Quebec Court of Appeal.

The Crown again submitted that the police could lawfully, under their general powers or under provincial motor vehicle legislation, approach the accused's vehicle to check if everything was okay and, having arrived near it, make more observations which justified the accused's detention and arrest for impaired. The accused, on the contrary, suggested the police were fishing, had no reason to approach the vehicle, and their actions were unconstitutional; thus the evidence inadmissible.

In its decision, the justices of the Quebec Court of Appeal delivered three separate opinions.

Say One (Evidence In)

Justice Dalphond held that the lower courts erred. He noted there were six aspects to this case which rendered the police action in approaching the vehicle lawful:

1. The police were patrolling the area when they noticed the presence of the vehicle with two occupants, its engine running, windows defrosted, and lights out. They were not acting as part of an investigation nor responding to a call. Rather, they were proceeding under their general powers.
2. They were in a public space, a parking lot apparently open to all. After parking their

vehicle the officers walked toward the accused's car. They did not enter a private area under the accused's control and it was lawful for any person to do what the police did without violating any law.

3. The accused was in a stationary vehicle, the windows were defrosted, and it was in a lighted space. Anyone who approached the vehicle could then see inside it. The presence in a motor vehicle does not attract an expectation of privacy for the driver as high as the presence in his residence, let alone the passenger. In these circumstances the police, like any other person who approached the vehicle, could legally observe what was happening.

4. The accused's vehicle was stopped when the officers spotted and approached it on foot to conduct a check. The police vehicle (with emergency lights off) was not parked in order to prevent the departure of the accused's vehicle. The police did not detain the accused or his vehicle. A reasonable person would not have concluded that a detention had yet crystallized

5. The driver's side window was ajar and on reaching near the vehicle, the officer noted a strong odour of alcohol. He knocked on the driver's window without the accused reacting by turning to him. This, along with other information already noted (eg. near a bar, late Saturday night hour, engine running with headlights off), was sufficient to conclude that the officer had enough to reasonably suspect that the accused had custody or control of a vehicle and had consumed alcohol, requiring him to submit to coordination tests or to provide a breath sample pursuant to s. 254 of the *Criminal Code*. The officer also had reason to suspect the presence of alcohol within the meaning of s.636.1 of Quebec's *HSC*.

6. The police detected the strong odour of alcohol, before they saw the line of cocaine on the dashboard of the vehicle.

The evidence gathered before the opening of the doors was sufficient to justify the detention of the accused for the purposes of coordination tests or a breath test. Opening the doors did not make the police action arbitrary. Police may patrol to ensure peace and security, prevent the commission of crime and assist citizens. As part of their general powers while on routine patrol police can talk to people and ask them questions. The police had no specific crime in mind and even less evidence that a crime was being prepared or was in progress. They simply wanted to check a stopped vehicle, which had attracted their attention: did the driver need help? were the passengers engaged in illegal activity? did the driver hesitate to put the vehicle in motion because they were impaired? Once near the vehicle the police could legally make observations, visual and olfactory. There was no detention, nor a search or seizure at this time.

With the new observations made near the vehicle the accused could then be detained to investigate his ability to drive or have a vehicle under his control. The circumstances had changed: the police were acting on more than a simple intuition or "hunch". The detention was not arbitrary. The olfactory and visual observations made at the driver's door was not an unlawful search. The officer then had reasonable grounds to intervene by asking the driver to submit to testing (detention for investigative purposes).

Justice Dalphond, however, found that opening the door did breach s. 8. The officer did not have grounds to believe that a crime was being committed - his partner did not tell him about the line of cocaine he saw on the approach to the vehicle. But shining a flashlight would have put this in plain view anyways. The intrusion was unplanned and committed in good faith. Additionally, opening the door was imminent because the officer wanted to ask questions following the detection of a strong odour of alcohol; it would have been inevitable that the accused would have been asked to leave the vehicle to give a test or submit to a breath sample. The vehicle's interior would have been illuminated and the line of cocaine on the dashboard would have been discovered.

The evidence obtained as a result of the illegal search needed to be distinguished from the other evidence. There was no reason to exclude the

evidence gathered before police opened the doors. This included evidence related to impairment. And the evidence obtained after the doors were opened was admissible under s. 24(2). Justice Dalphond allowed the Crown's appeal and ordered a new trial.

Say Two (Evidence In)

Justice Gagnon found that s. 636 of Quebec's *HSC* did not provide the police with lawful authority in this case to open the doors. Although s. 636 allows the police to immediately stop a vehicle and question the driver to verify sobriety, it does not always allow the police to search while exercising this authority. Opening the passenger door without warning, followed by opening the driver's door, was not helpful for the exercise of powers conferred on the police under s. 636. The officer on the driver's side, at first, knocked on the glass door. If opening the passenger door constituted an unreasonable search, then so did opening the driver's door. The officer did not say he opened the door to check the sobriety of the driver, but instead in response to his colleague. It was not reasonably necessary to conduct such a search in the exercise of powers conferred in ss. 636 and 636.1 of the *HSC*, at least at the preliminary stage of the sobriety check.

The common law also did not allow the officers to search the vehicle without reasonable grounds for suspecting the commission of a crime. The accused's *Charter* rights had been violated. But Justice Gagnon agreed that the evidence should not be excluded. Although the intrusive conduct of the police was significant, the search did not violate the personal dignity of the accused and did not occur in the context of a high reasonable expectation of privacy. Furthermore, possessing cocaine was a serious offence and the seized drugs were reliable evidence and vital to the prosecution. The circumstances surrounding the acquisition of the evidence was not likely to bring the administration of justice into disrepute. Rather, it was its exclusion that would bring disrepute. Justice Gagnon allowed the appeal and ordered a new trial.

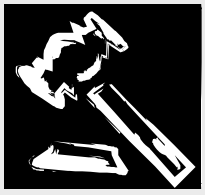
Say Three (Evidence Out)

Justice Hesler concluded that the trial judge did not err. His findings were neither unreasonable nor based on a mistake or misinterpretation of the law. At trial, the Crown only argued that the police had acted under their general power of detention for investigative purposes under the common law, without any recourse to the powers conferred by s. 636 of the *HSC*. Here, the trial judge found there were no concrete or articulable reasons for the detention; it was exerted on the basis of a hunch. It was not the role of an appeal court to substitute its opinion for that of the trial judge; an appeal court must show deference to a lower court's findings. In this case, the only evidence against the accused was collected in violation of his rights; it could not be collected independently, without the breach. In Justice Hesler's opinion, the use of the illegally obtained evidence would affect trial fairness and bring the administration of justice. He would have dismissed the appeal.

Complete case available at www.canlii.org

LEGALLY SPEAKING:

Conspiracy



"Conspiracy occurs when there is an agreement by two or more persons to commit a criminal offence. It is rarely proven by direct evidence of the agreement in question. However conspiracy, like any other crime, can be proven by direct and circumstantial evidence. In addition, it can also be proven by hearsay evidence. - New Brunswick Court of Appeal Justice Bell in *R. v. Black*, 2010 NBCA 36 at para. 40.

Note-able Quote

"One way to make sure crime doesn't pay would be to let the government run it." - Ronald Reagan

EVIDENCE ADMISSIBLE DESPITE CHARTER BREACH

R. v. Simard, 2010 QCCA 1240

Late in the evening police drove past a church and saw two vehicles parked side by side in a remote corner; no other vehicles were parked nearby. The officer felt it was unusual to see vehicles parked there, but noted nothing suspicious. The vehicles were parked legally, there was no offence under Quebec's *Highway Safety Code*, and there was no 9-1-1 call. One of the vehicles had two men sitting in it. The police decided to check it out and parked right in front of the vehicle occupied by the two men. They turned on their take down lights; very high intensity bulbs on the front of the patrol vehicle used to illuminate vehicle interiors. Behind the occupied vehicle were the steps to the front of the church, so the men could not back out and it was almost impossible for them to drive away; the vehicle was stopped and the occupants were not free to move. The police saw the two men make sudden movements, as if concealing something. The patrol vehicle was higher than the other car, which allowed police to see the two men. The driver was seen lean forward and the passenger was seen hiding something in the front pocket of his sweater. An officer took his flashlight, opened his door and proceeded at a rapid pace towards the accused (passenger), while his partner ran to the driver's side. The accused had his left hand over his pocket as if he was hiding something. The officer ordered the accused to show him what he had in his pocket, but he refused. He was ordered out of the vehicle. While this was happening the other officer leaned into the vehicle and smelled a strong odour of bulk marihuana.

The officer stepped back to allow the accused to open his door and he then immediately fled and ran to the back of the church. He was apprehended and was arrested for drug trafficking. Inside the accused's shirt pocket was a plastic "Ziploc" type bag filled with 98 grams of marihuana. He was advised of his right to remain silent and his right to counsel. A search revealed a $5 bill, a key ring, and nine $20 bills in his pockets. The driver was also arrested for drug trafficking. He was searched and 27 grams of marihuana was found in his jean pocket. Key's found on the accused activated the unlock function of the other vehicle parked nearby. Police opened the driver's side door to search for evidence of the accused's identity and to see if the ignition was damaged. The center console was opened and a wallet containing the accused's identification and a roll of $20 bills fastened with a rubber band, totalling $1,360, was found. A heavy bag containing clear plastic bags of marihuana and three mobile telephones was also located. The vehicle was towed to the police station and a justice subsequently issued a telewarrant authorizing the search of the vehicle. Police found 510 cartons of cigarettes in the car. The accused's residence was also searched under warrant (he had told police he had marihuana plants at his home). He was charged with several tobacco and drug offences.

The trial judge concluded that the detention was arbitrary and that the search was improper because it was incidental to that arbitrary detention. In addition, the detention was for investigation and the search had not been conducted in order to ensure the safety of the police officers. He found the accused had been psychologically detained before the officers detected the odour of marijuana and ordered the accused to show what he had in his pocket. The police acted as if they had reasonable grounds to believe that a criminal offense was committed or was about to be and accordingly took actions that detained the accused. The police had placed their patrol car in such a position that it prevented the vehicle from moving. They turned on their high intensity lights to see inside and had the intention to search the vehicle visually; to see what was happening. But they had no reason to think, objectively or subjectively, that even an offense had been committed or was about to be committed. The police could have driven close to the vehicle, parked next to it, and with a flashlight, address the occupants, greet them, or ask them if they needed help. But this is not what the police did. Instead, they acted as if they had reasonable grounds to believe that a criminal offence was committed. Plus, even if there were grounds for an investigative detention, the search would have exceeded its

limited safety scope. The police did not search for their protection, but instead thought the accused had drugs in his possession. Finally, the trial judge held that the mere smell of marihuana did not provide reasonable grounds that there were drugs on the accused, especially in regard to a passenger in the car. The evidence was excluded under s. 24(2) of the *Charter* and the accused was acquitted of all charges.

The Crown argued before the Quebec Court of Appeal that the trial judge erred in finding a detention and that the evidence should not have been excluded. Justice Doyon, delivering the Court's unanimous judgment, agreed there was a *Charter* breach but ruled that the evidence was admissible.

The Court of Appeal noted, as did the trial judge, that the two police officers were fully justified to go to the two vehicles to check them out. When a car is parked in public view the police can approach it to see, for example, if someone needed help, if the vehicle was abandoned, or if the situation called for other reasons to intervene. However, how the police park their patrol vehicle, use high-intensity headlamps, and conduct themselves can render the circumstances a detention. Here, there was more than just the use of high-intensity headlamps involved, but also the parking maneuver performed by the police. The police car was positioned in such a manner that it prevented, for all practical purposes, the departure of the vehicle occupied by the accused.

Without completely rejecting safety grounds for explaining the use of the high intensity headlamps, the trial judge concluded that the police intended to visually search the vehicle. In sum, the trial judge did not make a palpable and overriding error in his evaluation of the evidence. It would be difficult to believe that two individuals could freely leave or, at the very least, it could be easily inferred that a reasonable person dazzled by high intensity police headlamps, prevented from moving by the placement of a patrol vehicle, and facing two police officers who moved quickly, would have concluded he had no choice but to comply with this implicit order and stay put. Following the initial interaction, when the officer asked the accused what he had in his pocket and told him to leave the vehicle, the accused was controlled by police and detained.

As for the grounds for detention, one officer testified he simply saw the accused reach into his pocket; he could not say whether there was an object in his hand or not. The other officer said he saw the driver gesturing somewhat similar, but had not seen him hide anything. The trial judge opined that the police did not see what the men had done or even if they had something in their hands. There was no clear link between the individual to be detained and a recent or ongoing criminal offence and the smell of marijuana emanating from the vehicle was not sufficient to order the accused, a passenger, out of the car and to empty the contents of his sweater pocket.

Admission of Evidence

The Court of Appeal, however, found the trial judge erred in excluding the evidence. The accused had not been conscripted against himself when the bag of marihuana was discovered in his sweater. This evidence existed without police intervention and it could not be said that the accused was forced to participate in its creation or discovery; it was simply seized during his arrest. The police misconduct was serious, but it was not very serious. The impact of the *Charter* violations on the accused was also serious, but not extreme. The probative value of the evidence was significant and its exclusion would result in an acquittal. Weighing all of the relevant factors and analyzing them according to the revised s. 24(2) approach, the evidence should have been admitted. The Crown's appeal was allowed, the acquittals were set aside, and a new trial was ordered.

Complete case available at www.canlii.org

Note-able Quote

"No institution can possibly survive if it needs geniuses or supermen to manage it. It must be organized in such a way as to be able to get along under a leadership composed of average human beings." - Peter Drucker

'NO FREE-STANDING' OBLIGATION ON POLICE TO PROVIDE GROUNDS TO LAWYER

R. v. McLean, 2010 BCCA 341

At about 8:30 pm two vehicles were involved in an accident while travelling in opposite directions. The accused was driving a pick-up truck with his twelve year old son in the front passenger seat. As he turned left he collided with an on-coming pick-up truck killing its driver. Neither the accused nor his son were injured. The accused had an odour of liquor on his breath, his face was flushed, his eyes were bloodshot and watery, and he seemed to be swaying three to four inches from side to side. When asked if he had been consuming alcohol the accused said "no". When asked again about his consumption of alcohol that day he said that he had "three beers" and consumed his last drink at 1 p.m. After further conversation he said that his last drink was at 2 p.m. The officer advised the accused that he was being detained for impaired driving causing death and read him the breathalyzer demand and s. 10(b) *Charter* warning.

The accused was taken to the local police detachment and then directly to a telephone room. He spoke to his lawyer on the telephone and, after speaking for about 20 minutes, motioned for the officer to come into the room to speak to his lawyer. The lawyer identified himself to the officer and asked him to provide his reasonable and probable grounds for making the demand. The officer told him that the grounds would be forwarded by way of disclosure. The lawyer told the officer that the law required him to provide his grounds, but the officer disagreed and gave the phone back to the accused, who then carried on the call in private for about 10 minutes and then hung up. The accused provided two samples of his breath, now three and a half hours after the collision, which analyzed as 140mg% and 130mg%.

At trial in British Columbia Supreme Court the judge rejected the accused's submission that his right to counsel had been breached when the officer failed to provide the grounds for the demand to the lawyer. The judge found that the accused had failed to establish that he was denied information that was necessary to giving legal advice that counsel could not have obtained by other means such as asking the accused. A toxicologist testified that the accused's blood alcohol levels would have been between 168mg% and 206mg% at the time of the accident, based on the readings. However, based on the accused's version of his drinking pattern he would have been below the legal limit at the time of driving. The trial judge rejected the accused's evidence and convicted him of impaired driving causing death, over 80mg%, and dangerous driving causing death.

The accused argued before the British Columbia Court of Appeal, in part, that his right to retain and instruct counsel was violated when the investigating officer refused to disclose to his lawyer the grounds for making the breath demand. He wanted his convictions set aside and acquittals entered or, at the very least, a new trial ordered.

Justice Ryan, authoring the unanimous Court of Appeal judgment, disagreed with the accused. Neither the accused nor his lawyer testified on the *voir dire* to assert that the officer's action in not stating his grounds for the breathalyzer demand actually impaired the accused's ability to obtain legal advice. There is no "free-standing obligation on the part of the police to provide the grounds upon which the breath demand was made to counsel for the person to whom the demand has been made," said the Court of Appeal. Here, the accused "failed to establish that his right to counsel was impaired by the action of the state," explained Justice Ryan. "Regardless of whether [the lawyer] might have obtained the required information from his client or not, neither [the accused] nor [the lawyer] testified that [the lawyer's] ability to provide legal advice to [the accused] was impaired by the actions of the police officer." Thus, there was no basis in the evidence to find that the accused's s. 10(b) rights were infringed. The accused's appeal was dismissed.

Complete case available at www.canlii.org

Editor's Note: The British Columbia Court of Appeal did not say that the police never have to inform a lawyer of the grounds for the demand. There may be cases where the lawyer can't get the necessary information from the accused and s. 10(b) may impose an obligation on the police to provide counsel with that information. In this case, however, there was no evidence presented to show that the lawyer's ability to provide legal advice was inhibited; neither the lawyer nor the accused testified.

UNLAWFUL URINALYSIS SEIZURE ADMITTED

R. v. Ramage, 2010 ONCA 488

A vehicle driven by the accused, a former NHL hockey player, crossed four lanes of traffic on a busy four-lane road and struck two oncoming vehicles, killing his passenger (another former NHL hockey player). The driver of one of the other vehicles suffered significant, but not life threatening injuries. It was dusk, the weather was clear, visibility was good, the road was dry, and traffic was steady but not heavy. Some observations were made that included a smell of alcohol in the vehicle and an odour of alcohol on the accused's breath. His eyes were glassy and red and his pupils were dilated. A police officer accompanied the accused to the hospital in the back of the ambulance where he made two statements that indicated he had been drinking. While at the hospital a nurse drew a blood sample for medical purposes. Part of that blood sample was analyzed for blood alcohol content (BAC) at the hospital laboratory. The police later seized the results of that analysis (224mg %). The unused portion of the blood sample taken for medical reasons was later lawfully seized with a warrant by the police and analyzed (242mg%). The accused also urinated into a plastic container provided by the hospital staff. A police officer having custody of the accused at that time transferred some of the urine from the container into two vials, seizing them. They were subsequently analyzed (282mg%). Later, the accused urinated a second time and the officer again seized two vials of that urine and they too were analyzed (237mg%).

At trial in the Ontario Superior Court of Justice a toxicologist called by the Crown testified that the analysis of the blood and urine samples indicated a significant level of impairment at the time of the accident. He opined that a person with the accused's physical characteristics and an average rate of alcohol elimination would have had to consume between 15 and 20 bottles of beer to produce the BAC levels indicated in the blood and urine analysis. The Crown conceded that the urine samples taken by police constituted a warrantless seizure and violated the accused's rights under s. 8 of the *Charter*. But the results were admitted under s. 24(2).

Although he characterized the urine samples as conscriptive evidence, the trial judge held the samples would inevitably have been obtained by non-conscriptive means (a search warrant). The urinalysis results were reliable evidence and their admission would not adversely affect the truth-seeking function at trial. The officer was entitled to be in the room with the accused, did nothing to cause him to urinate, and had merely collected and preserved what he knew could be potentially relevant evidence. The intrusion upon the accused's bodily integrity was "minimal". Finally, the evidence was "highly probative" and important to the Crown's case, the charges were serious and excluding the results of the urine samples would bring the administration of justice into disrepute. The accused was convicted by a jury on five charges; impaired driving causing death, dangerous driving causing death, impaired driving causing bodily harm, dangerous driving causing bodily harm, and over 80mg% (which was stayed by the trial judge). The accused was sentenced to four years in jail and a five-year driving prohibition was imposed.

The accused then appealed to the Ontario Court of Appeal arguing, in part, that the trial judge erred in not excluding the urinalysis results and that the accused could not be convicted of both the dangerous driving and the impaired driving charges arising out of the same delict. He suggested that the dangerous driving charges should have been stayed.

Admissibility

In determining whether evidence is admissible under s.24(2) a court must consider:

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

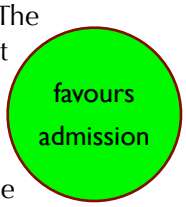
Justice Doherty, authoring the Court of Appeal opinion, noted there was nothing seized from the accused's person nor from inside his body. The officer was never asked to leave the room and his presence did not interfere with the accused's medical treatment or his privacy. The officer did nothing to make the accused urinate or remove the urine from his body. He merely stood by and allowed nature to take its course. Justice Doherty compared the seizure of the urine sample to the seizure of a discarded tissue by an arrestee in custody. It was because the accused was in custody that the officer was able to secure the bodily waste product after the accused had urinated but before the urine was discarded. Nonetheless, the accused still had a legitimate interest in preserving the informational privacy embedded in his urine samples, including information pertaining to his blood alcohol level.

Seriousness of the Charter- infringing state conduct.

Under this branch of the s. 24(2) analysis a Court "looks both at what the police did and their attitude when they did it," said Justice Doherty. "Respect for the justice system must suffer in the long term if courts routinely admit evidence gathered by state conduct that disregards individual rights." The officer's attitude showed little respect for the accused's individual rights and rendered the *Charter*-infringing state conduct more serious than it might have been. The officer, alert to the need to obtain evidence relating to the accused's BAC, took a shortcut to get the urine samples. He took advantage of the accused, who was under his control and in significant physical discomfort. He had no authority to take the urine samples, but did so on two occasions. He could have had the hospital secure the samples and obtained a warrant, which would likely have been granted; this would have respected the accused's constitutional rights. But his conduct did not demonstrate the kind of disregard for individual rights that would be seen, in the long term, as posing a significant threat to the public confidence in the due administration of criminal justice.

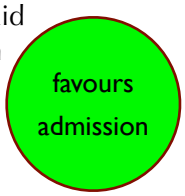
Impact on accused's Charter-protected interests.

"The [accused's] continued privacy interest in the information to be gleaned from his discarded bodily waste is well-removed from the essential core of personal privacy," said the Court. "The [accused] gave up his waste product without any state compulsion or interference." The officer could have segregated the sample and obtained a warrant for it, which would have yielded exactly the same evidence that was presented at trial.



Society's interest in an adjudication on the merits.

The urinalysis results were reliable and potentially significant to the prosecution. "The exclusion of the urinalysis results would inevitably have hindered the search for the truth in this case," said Justice Doherty. "That cost is high given the relatively minor adverse effect on the [accused's] Charter-protected interests."



The evidence was properly admitted.

Kienapple

delict = fault, crime, wrong

In some circumstances, multiple convictions arising out of the same **delict** are not permitted. In this case, there were discrete offences. There is a distinction between offences based on the manner in which a person drives and offences based on the impairment of one's capacity to drive. As Justice Doherty stated:

> An impaired driving charge focuses on an accused's ability to operate a motor vehicle or,

> more specifically, on whether that ability was impaired by the consumption of alcohol or some other drug. A dangerous driving charge focuses on the manner in which the accused drove and, in particular, whether it presented a danger to the public having regard to the relevant circumstances identified in s. 249 of the Criminal Code. The driver's impairment may explain why he or she drove the vehicle in a dangerous manner, but impairment is not an element of the offence. Both impaired driving and dangerous driving address road safety, a pressing societal concern. They do so, however, by focussing on different dangers posed to road safety. Impaired driving looks to the driver's ability to operate the vehicle, while dangerous driving looks to the manner in which the driver actually operated the vehicle. [para. 64]

Here, the accused's conduct could not be described as the same delict. He committed the crime of impaired driving when he got into his vehicle and drove it. The dangerous driving occurred about a half an hour later when he drove across four lanes of traffic into oncoming vehicles. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

DETENTION REQUIRES OBJECTIVE TEST

R. v. Tran, 2010 ABCA 211

After stopping a vehicle for a traffic violation, a police officer approached the passenger side of the accused's vehicle and asked for a licence, registration, and insurance. He saw such things as fast food wrappers and a road map. After further investigation the officer warned the accused about his driving and vehicle safety. Having a hunch, the officer wanted to continue speaking with the accused but he knew he did not have grounds to detain or search the vehicle, so he sought the accused's voluntary cooperation. He told the accused that he was free to go. But as he was about to drive away, the officer asked the accused in a conversational tone whether he would be willing to answer a few questions. The officer told the accused that he was not obliged to answer any questions but that he would appreciate it.

The officer asked the accused where he had been and where he was going. The officer also placed his hands on the open car window. The accused was cooperative, stating he was a real estate agent. They discussed the real estate market and recent news events. The officer asked whether the accused had any objections to a search of his vehicle. The accused told him to go ahead. The officer then said, "Okay. So you don't object if I search your vehicle, understanding it's voluntary. You can stop me if you want, and if I find anything like drugs, cocaine, and marijuana, you'd be charged." The accused replied "It's okay." He was not advised of his right to counsel, nor expressly told that he could refuse to consent. The officer asked him to step out and pop the trunk. The accused got out of his vehicle and walked to the rear where he pushed a button to unlock the trunk. As he did so, he placed his hand on the trunk to prevent it from opening. A brief discussion about real estate occurred and the officer said, "Go ahead and pop the trunk if you want." The accused opened the trunk and police found eight kilograms of marijuana, two kilograms of cocaine, and $10,000 cash in a suitcase. The accused was arrested, read a *Charter* warning, handcuffed, and transported to the police station.

At trial in the Alberta Court of Queen's Bench, the judge found the accused had been arbitrarily detained. The accused testified he was not free to leave and felt compelled to answer the officer's questions. The trial judge concluded that the accused was detained following the completion of the motor vehicle transaction when the officer asked him if he would mind answering a few questions. Even though the officer said the accused was free to go, he did not tell the accused he was neither under arrest nor detained. Plus the officer placed his hands on the open window; the accused could not have driven away in these circumstances without inviting some other charge. Although the officer had the right to stop the accused for the traffic violation, the officer did not have a reasonable suspicion or reasonable grounds for this further detention. The search was also unreasonable under s. 8 of the *Charter*. It was a warrantless search and the police

did not have reasonable grounds to effect a lawful arrest or to obtain a warrant. Nor could the search be justified on safety concerns or on the legitimate investigation of crime, since it was based solely on a hunch or experiential intuition. Additionally, the Crown failed to establish valid consent; the officer failed to expressly tell the accused that the vehicle could not be searched without his consent. Finally, the judge concluded that once the detention occurred the officer had a duty to inform the accused of the reason for his detention and of his right to counsel, thereby breaching s. 10 of the *Charter*. Having characterized the evidence as conscriptive, the trial judge excluded it under s. 24(2) because its admission would bring the administration of justice into disrepute. The accused was acquitted of possessing drugs for the purpose of trafficking.

The Crown challenged the trial judge's rulings to the Alberta Court of Appeal, arguing he erred by finding breaches of ss. 8, 9, and 10 of the *Charter*. In the Crown's view, the trial judge erroneously concluded that the accused was detained in the absence of objective evidence that he was subject to a demand or direction of a peace officer; thus s. 9 was not applicable nor was s. 10 engaged. As well, the Crown contended that a valid consent to search does not require the police to specifically advise the person to be searched that their consent is sought in relation to something that the police "are not otherwise entitled to do". Finally, the Crown submitted that the evidence was excluded because the trial judge applied the wrong test under s. 24(2).

Detention

The Court of Appeal noted that a detention can occur psychologically, where a person has a reasonable perception of the suspension of their freedom of choice. The application or threat of application of physical restraint is not required. The question is whether police conduct would cause a reasonable person to conclude that they were not free to go and had to comply with the police direction or demand. Here, the Court of Appeal found the trial judge applied only a subjective test in determining that the accused was detained. He failed to determine whether a reasonable person would perceive they had no option but to cooperate. Thus, the trial judge erred in law by failing to use an objective test when considering whether the accused was psychologically detained in all of the circumstances. In addition, "the trial judge erred in law in concluding ... that the police say more than just telling a person that he is free to go," said the Court of Appeal. There is no mandatory script that needs be said to a person. Instead, it is important there be clear communication to the person that they are free to go.

Search

A search conducted with consent can be valid. Part of proving valid consent requires the Crown show, on a balance of probabilities, that it was voluntary; not the product of police oppression, coercion or other external conduct which would negate the freedom to choose whether or not to allow the police to pursue the course of conduct requested. Instead, the trial judge held the Crown needed to prove that the accused knew that the police could not conduct a search without his consent. But he didn't consider whether the accused knew this even though (a) there was a request for permission to search the vehicle, (b) the accused was advised that he was free to go, (c) the accused was asked whether he had any objections to a search of the vehicle, and (d) the officer said the search was voluntary and the accused could stop him if he wanted to. These all met the criteria required for a valid consent. Additionally, the trial judge did not assess whether the accused withdrew his consent when he prevented the trunk lid from opening, and if so, whether he consented to the subsequent search. These questions needed to be answered.

The Court of Appeal also ruled that the trial judge erred in classifying the evidence as conscriptive in that the accused was compelled to participate in finding the drugs and their admission would render the trial unfair. Since a new trial was ordered there was no need for a further analysis of the trial judge's s. 24(2) ruling.

The Crown's appeal was allowed, the acquittals were set aside, and a new trial was ordered.

Complete case available at www.albertacourts.ab.ca

INFORMER PRIVILEGE REACHES BEYOND COURTROOM

R. v. Barros, 2010 ABCA 116

Based partially on the information of a confidential informer the police obtained a warrant to search a home. As a result, they found 1.5 kgs. of methamphetamine, 1.5 kgs. of cocaine, three handguns, and a bulletproof vest. Drugs and weapons charges were laid against a man named Qureshi, who retained a lawyer to defend him. The lawyer, in turn, hired the accused, a retired police officer and now private investigator, to find out the identity of the informant. He arranged meetings with Qureshi's associates and gave them a choice of providing their phone numbers, submitting to a polygraph examination, or being branded "uncooperative". He checked their cell phone records to see if any of them had called the lead investigator and compared the informer's disclosed criminal record with the records of the Qureshi group members. He also tried to retain a polygraph operator to test the group, telling each of them that he knew they were the informer. The accused was convinced he had identified the informer and arranged a meeting with the lead investigator. At the meeting the accused said he had identified the informer and that he would not pass that information on to Qureshi, inferring that the charges should be dropped.

He provided a warned statement to police saying he discovered who the informant was and knew their identity with certainty. He also said he knew that if a police source was identified their health and safety would be at risk. He knew from his prior police experience; the protection of a source's identity was paramount and it was routine for the Crown and the police to stay charges if proceeding would result in the exposure of the informant's identity. The accused was subsequently charged with several offences, including attempting to obstruct justice by taking investigative steps to identify a confidential police source for the purpose of interfering with criminal proceedings against Qureshi. As well, he was charged with extortion for attempting to induce the lead investigator in taking steps to stop criminal proceedings against Qureshi as well as for using threats to induce the cell phone numbers from Qureshi's associates with intent to identify the source.

At trial in the Alberta Court of Queen's Bench the judge concluded that there was no evidence for a verdict of guilty on the attempt obstruction of justice charge. She found that the accused was constitutionally entitled to take investigative steps to identify the informer and that his acts were not criminal in nature. He was also acquitted on the extortion charge; the Crown had not proven the objective of "ending criminal proceedings".

The Crown then successfully appealed the directed verdict and the acquittals to the Alberta Court of Appeal. A majority found that attempts to identify a confidential informer and using the subsequently discovered information was criminal in nature. In doing so, Justice Slatter first outlined the basic rules and principles of police informers and the justice system.

Police informers

The identity of police informers and information which might assist in identifying them, is privileged and the privilege overrides the general duty of the Crown to disclose all relevant information to an accused (subject to the "innocence at stake" exception). The rule of informer privilege serves a dual purpose; (1) to protect the informer, and (2) to encourage others to cooperate with the police. Neither the police nor the courts can waive informer privilege; the privilege belongs to the Crown and can only be waived with the informer's consent. The rule is also extremely broad. It applies:

- to the identity of every informer; whether the informer is present or not and even where the informer is a witness;
- to both documentary evidence and oral testimony;
- in criminal and civil trials;
- to the police, Crown, lawyers and judges in their duty to keep an informer's identity confidential;

- to any information which might tend to identify an informer; it is not limited simply to the informer's name.

Although this privilege allowed the Crown to keep the information secret, the accused argued that it didn't prevent others from trying to discover the information independently. Further, he submitted that the privilege only applied in the courtroom; it did not prevent the collection of information about the informer outside the courtroom. Finally, he suggested that there was no rule that prevented him from discovering the informant's identity as part of making full answer and defence.

The majority rejected an independent right to determine an informer's identity, both in the sense that there was no law prohibiting such investigations (meaning anything not prohibited was permitted) or in the sense that the information could be obtained as part of the positive right to make full answer and defence. Even if the "innocence at stake" exception is engaged, the Crown decides whether to produce the information or stay the charges. "Since the Crown is not under any duty to disclose the name of the informer, unless the 'innocence at stake' exception is in play, it follows that there is no general claim right on the part of the accused to have it," said Justice Slatter. "There is no principle of fundamental justice entitling the accused to know the identity of the informer, because even when 'innocence at stake' may require disclosure, the Crown has the option of discontinuing the prosecution." The accused cannot even ask a witness if they are the informer. Thus, it would be inconsistent that the most direct form of inquiry is prohibited, but other collateral inquiries are not only permitted, but are a right of the accused. There is no general rule that privileged information need not be disclosed, but that strangers are entitled to obtain it by any surreptitious means they can devise. As well, the majority found that any right to uncover privileged information by independent inquiries was inconsistent with the objectives of protecting informers and encouraging others to cooperate with the police. "Both the existing informer and the potential informer will regard it as equally dangerous regardless of whether their identity is disclosed by the police, or discovered independently by the accused," said Justice Slatter. "In either case, their safety is jeopardized, and the willingness of citizens to come forward with important information is compromised." This important public policy depends on secrecy, which would be lost if an accused had a private right to expose informers. Thus, an accused person had neither a positive or claim right to identify a confidential informer.

The majority also rejected the suggestion that informer privilege only existed inside a courtroom as part of court procedure and was not binding on anyone outside the courtroom:

> Any such rule would make the informer privilege meaningless and ritualistic. It is artificial to suggest that information that cannot be spoken of in the courtroom, but can be freely discussed anywhere else, is "secret". Further, the whole point of the privilege is to protect the informer. The informer is not at risk of anything happening to him inside the courtroom; the risk lies entirely outside the courtroom. The whole point of the privilege is to prevent the informer's identity from getting into the hands of members of the community who would seek retribution against the informer. Apart altogether from the lack of any authority on the point, this position is illogical.
>
> The informer privilege is commonly referred to as a "privilege". Rules of privilege are generally rules of evidence, and so generally relate to an exception to the normal rules compelling production of relevant evidence, or to the inadmissibility of evidence in judicial proceedings. The informer privilege has both of those characteristics. However, ... the informer privilege is more that just a rule of evidence, and has a wider societal reach relating to the effective investigation of crime. It combines evidentiary implications with a general requirement of secrecy, both in and outside judicial proceedings. As such it could more properly be referred to as a principle of "immunity" or "secrecy".
>
> The informer privilege is not like an exclusionary rule of evidence. Excluded evidence, such as hearsay evidence or character evidence, is kept

> from the trier of fact, but it is often repeated and relied on in day-to-day life. Such evidence is inadmissible, but it is neither privileged nor secret. The point of the informer privilege rule is not to keep the information from the trier of fact, but to keep it from society at large. The mischief is not that the trier of fact might rely on unreliable evidence, but rather that antisocial members of society might seek retribution against the informer. It defeats the whole point to say that the privilege is respected so long as it is maintained within the courtroom, even if the privileged information is widely distributed outside the courtroom. [references omitted, paras. 29-31]

"Since one of the purposes of the informer privilege is to encourage other informers to report crime, undermining the privilege by attempting to identify an informer prima facie amounts to obstruction..."

Informer privilege is binding on all persons, both inside and outside the courtroom, and the privilege, secrecy, or immunity that attaches to the informant does not end at the courthouse door. Nor did the right to make full answer and defence extend so far as to allow the accused to try and ascertain the identity of the informer.

The Charges: Obstruction & Extortion

As for the attempting to obstruct justice charge, the majority concluded that the methods used by the accused to identify the informer were inherently malevolent and oppressive and inclined to obstruct justice.

> Discouraging the reporting of crimes generally, and interfering with trials, by intimidating or discouraging witnesses can be an obstruction of justice. Since one of the purposes of the informer privilege is to encourage other informers to report crime, undermining the privilege by attempting to identify an informer prima facie amounts to obstruction, absent a reasonable justification or excuse. It does so in two ways: it necessarily intimidates the actual informer, and it discourages potential informers and witnesses. The "investigative steps" themselves could, as alleged, amount to an attempt to obstruct justice. [references omitted, para. 68]

And further:

> Trying to disrupt a prosecution by corrupt means is obstruction. Wilfully suggesting that the identity of an informer might inevitably come out if a prosecution was pursued, knowing the risk this would have on the safety of the informer, knowing of the privilege that attaches to that information, and knowing the effect it might have on other potential informers coming forward, is a corrupt means within this rule. Wilfully suggesting that the information might be released unless a prosecution is halted is obstruction. The evidence here could support an inference that the [accused's] comments to [the lead investigator] were wilful and calculated to convey such suggestions, and could thus establish the mens rea required for obstruction. [references omitted, para. 70]

Since the accused's overall course of conduct could arguably amount to an obstruction of justice the directed verdict was in error and a trial was required. As for the extortion charge related to inducing an end to proceedings, the purpose of the meeting was to have the charges dropped or the informer's name might become public and, as a result, the informer might be harmed by third parties (members of Qureshi's group). Proof of an extortion does not require that the threat be overt and clumsy; subtle threats and menaces are enough. The indirect threat in this case was more than sufficient to constitute a threat or menace in law. The accused knew that naming the informer would endanger their safety; any attempt at threatening to reveal it if he did not get his way could amount to extortion. Plus, there was nothing in the evidence to suggest a "reasonable justification or excuse" for what the accused did. Thus, the trial judge's reasons for acquitting the accused were in error and a new trial was ordered on this count as well. A new trial was also ordered on the extortion to obtain the cell phone numbers. To prove extortion, the Crown did not have to prove that the threats were actually successful or actually induced the recipient to provide the telephone numbers; it only required an

"attempt" to accomplish the desired end. Asking for the telephone records was not the threat; it was that the informer's information would be released. The Crown's appeal was allowed and a new trial was ordered.

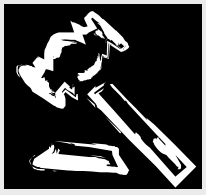
A Second Opinion

Justice Berger, in dissent, would have dismissed the appeal. In his view, informer privilege protects the informant's identity from being revealed or information that would tend to disclose their identity, whether in public or in court. This protects the informer from retribution and encourages cooperation with the criminal justice system. But it does not preclude a legitimate investigation to ascertain the identity of an informer, perhaps to determine whether the alleged informer is an agent of the state, a material witness, or a fictional source fabricated for illegal purposes. Just because a court, Crown, or the police have a duty not to furnish information that may disclose the identity of the informer, no such duty is imposed upon an accused or his legal representative. Justice Berger also rejected the theory that an attempt to ascertain an informer's identity necessarily equates with an intent to reveal the identity. He concluded the trial judge did not err in concluding that identifying a police informant did not in itself constitute an obstruction of justice and the Crown failed to establish beyond a reasonable doubt that the accused's purpose was to interfere with criminal proceedings. He also agreed with the acquittals on the extortion charges.

Complete case available at www.albertacourts.ab.ca

LEGALLY SPEAKING:

Murder Of A Police Officer



"Apart from treason in wartime, killing police officers is probably the most serious crime in Canada." - Alberta Court of Appeal Justice Cote in *R. v. Hennessey*, 2010 ALCA 274 at para. 16.

PROOF OF 'EXPLOSIVE SUBSTANCE' DOES NOT REQUIRE EXPLOSION

R. v. K.D.S.A., 2010 NBCA 24

The accused, a grade nine student, met with his guidance counselor in a school office. He showed the guidance counselor a number of instructional YouTube videos on the subject of constructing a sparkler bomb. During a subsequent meeting he showed the guidance counselor a device he had constructed. The device was turned over to police. It was made of a glass spice bottle covered in gun tape with a "single sparkler as a fuse protruding from the top". It was removed and disarmed at a remote location by a member of the Explosive Disposal Unit. Samples of debris from the disrupted device were forwarded for chemical analysis to a forensic laboratory. The samples were analyzed and an expert in the examination, analysis and identification of explosives found they contained nitrocellulose, polyvinylchloride, copper, iron, barium, ammonium, sodium, potassium, chloride, calcium, nitrate, sulfate, and aluminum ions. In the expert's opinion some of the chemicals commonly appeared in pyrotechnic compositions and if confined could explode. Another expert, qualified in the field of identification and construction of improvised explosive devices, built two reproductions of the device and conducted trials to determine if the reproductions would explode. Twice the devices did not ignite, while on a third modified trial a very large fire, but no explosion, occurred.

At his trial in New Brunswick Provincial Court the accused was found not guilty of possessing an explosive substance. Although the device was described as an "improvised explosive device", the trial judge held that the Crown needed to prove that the device was in fact an improvised explosive device. In his view, there must be an explosion. Since the experts could not get their replicated device to explode the trial judge was not satisfied that the device was an improvised explosive device.

The Crown then appealed the accused's acquittal, arguing that the trial judge erred in law. In its view, the trial judge adopted and applied the wrong definition of the term "explosive substance" when he found there must be an explosion. The New Brunswick Court of Appeal agreed.

Section 82(1) of the *Criminal Code* creates an indictable offence, punishable by a term of imprisonment up to five years, for a person to make or have in their possession or under their care or control any explosive substance, subject to lawful excuse. Section 2 defines an "explosive substance" as including (a) anything intended to be used to make an explosive substance, (b) anything, or any part thereof, used or intended to be used, or adapted to cause, or to aid in causing an explosion in or with an explosive substance, and (c) an incendiary grenade, fire bomb, molotov cocktail or other similar incendiary substance or device and a delaying mechanism or other thing intended for use in connection with such a substance or device.

"[Section] 2 does include 'anything or any part thereof, used or intended to be used, or adapted to cause, or to aid in causing an explosion in or with an explosive substance'" said Justice Quigg. "Furthermore, ... although the replicated devices did not explode, they were capable of starting a fire and thus, were incendiary devices under s. 2." The device did fit into the s. 2 definition of explosive substance and thus s. 82(1). The Court of Appeal found "[n]owhere in the s. 2 definition does the Criminal Code require there to be an explosion. Whether or not the device functions properly should be of no consequence as to whether it meets the legal definition of 'explosive substance'." Since the trial judge based his decision on the fact that the replicated devices failed to explode he would not necessarily have reached the same conclusion that the device was not an "explosive substance" as defined by the *Criminal Code*. The Crown's appeal was allowed and a new trial was ordered.

Complete case available at www.canlii.org

www.10-8.ca

SEARCH WARRANT INVALID, BUT EVIDENCE ADMITTED

R. v. Wong, 2010 BCCA 160

After receiving a tip from an unknown informant, police investigated and conducted surveillance, resulting in the accused's home becoming the target of a search warrant. The affiant believed a methamphetamine lab was at the residential premises occupied by the accused. Because there were previous raids at two other houses preceding this search warrant, the police felt there was some urgency and sought a telewarrant. However, the ITO contained a significant error; it claimed that the accused had been arrested at a residence where a meth lab had been found before. This was not true. The officer later explained at trial that he must have mixed up his papers at the time he was applying for a warrant to search a different house. As well, the ITO also contained another deficiency relating to a vehicle. After the telewarrant was issued the police searched the premises and found the accused inside. Documents in the house suggested the accused had been residing there for some time, and finished and unfinished methamphetamine was found, as were scales and a book detailing how to manufacture methamphetamine. The accused was charged with producing and possessing methamphetamine for the purpose of trafficking.

At trial in British Columbia Provincial Court the judge concluded the residence contained "a passive methamphetamine lab". However, when the judge excised the untrue statements from the ITO there were insufficient grounds remaining upon which a proper basis remained for the issuance of the search warrant. The search of the residence therefore became warrantless. This was a s. 8 *Charter* violation, but the judge admitted the evidence under s. 24(2). The evidence was non-conscriptive real evidence which would not render the trial unfair. The breach did not arise from bad faith, but was inadvertent or careless. He found the erroneous statement about the accused being found at the methamphetamine lab was an honest mistake as opposed to a deliberate disregard for the accused's

Charter rights. The exclusion of the real evidence would bring the administration of justice into disrepute. The judge acquitted the accused on the production charge (since the meth lab was not active) but found him guilty of possessing methamphetamine for the purpose of trafficking.

The accused appealed to the British Columbia Court of Appeal, challenging the trial judge's ruling in admitting the evidence. However, even using the modified framework for the s. 24(2) analysis, the Court of Appeal found the evidence still admissible.

1. **the seriousness of the Charter-infringing state conduct** (admission may send the message the justice system condones serious state misconduct). The judge concluded there was no bad faith, improper motive, or malice; police acted in good faith and the breach arose from inadvertence or carelessness. The police proceeded "with a sense of urgency" because there may have been reason for the occupants of the house to destroy evidence. Although this did not justify the warrantless search, it was relevant in considering the conduct of the police. In addition, the search was not random or based merely on a good guess.

2. **the impact of the breach on the Charter-protected interests of the accused** (admission may send the message that individual rights count for little). The trial judge found the *Charter* breach was more than technical. It was a search of a dwelling; a serious invasion of privacy.

3. **society's interest in the adjudication of the case on its merits.** The trial judge considered that "the production of methamphetamine and possession of it for the purpose of trafficking, are very serious offences" and the presence of a methamphetamine laboratory in a residential neighbourhood "poses an extreme hazard". Methamphetamine production is a community scourge and the exclusion of the evidence would end the prosecution.

The judge then balanced the integrity of the justice system, which should not sanction warrantless searches, particularly those involving the search of a private home, against "the interests of society in an investigatory process which has been used to ferret out serious crime in a residential neighbourhood". The trial judge considered all of the relevant circumstances in determining whether the evidence should be excluded or admitted pursuant to s. 24(2) of the *Charter*. The accused's appeal was dismissed.

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

STAY RESULTS FROM 'HORRENDOUS' POLICE BRUTALITY

R. v. Tran, 2010 ONCA 471

Following several violent residential robberies, the accused Tran, together with several others, was charged with a number of offences. In each home invasion the privacy and security of the dwellings were shattered, victims were violated, both physically and psychologically, and property was taken. On his lawyer's advice Tran turned himself in to police. He received a severe beating at the hands of two police officers resulting in a broken jaw in two places and permanent injury; he now bites himself when he eats, has a sore jaw and loose teeth, and suffers from migraines. The police officers attempted to cover up their behaviour. Despite this, the Crown permitted the officers to remain in court to assist with the prosecution until the trial judge ordered otherwise.

At trial in the Ontario Superior Court of Justice the accused testified that he was shoved and punched and put him in an interview room that was not equipped with a video camera. Police demanded a statement. He continued to invoke his right to silence and was punched in the ribs and the jaw; his mouth bled profusely. He still would not talk and officers tried to conceal their misconduct by cleaning up the blood in the interview room. Tran said they also put him in front of a video camera and tried to get him to say that he had hit his chin on the table; but they were unsuccessful. The officers tried to explain the injuries to other officers by saying that Tran was wiggling his tooth and trying to "play it up", and that he had been violent and uncooperative

with police. The officers, on the other hand, denied the assault; claiming they left Tran alone in the interview room to later find him on the floor, still handcuffed, with blood coming from his lower lip. He said he fell and the officers put him on videotape to tell the truth about the source of his injuries. A medical expert testified that the injuries Tran suffered were consistent with a blow to the jaw; not with a fall. The trial judge disbelieved the officers and found the accused had been brutally assaulted and his *Charter* rights under ss. 7 and 12 had been breached. But the judge refused to stay the proceedings against Tran as a result of the police brutality; the breach did not affect the evidence against him, the charges were serious, and a stay was not appropriate. The accused was convicted of conspiracy to commit robbery. The judge, however, found that the appropriate and just remedy was to reduce the sentence he would otherwise receive by half. After this reduction Tran was sentenced to 14 months imprisonment plus three years probation.

Tran appealed to the Ontario Court of Appeal, arguing, in part, that the trial judge erred in refusing his application to stay the prosecution against him as a result of police actions. In his view, because of the circumstances surrounding the breach and its seriousness the continued prosecution offended the fundamental principles of justice that underlie the community's sense of fair play and decency and therefore the only appropriate response was a stay of proceedings.

The Court of Appeal agreed. "Section 7 provides citizens with a right to be secure against arbitrary force, especially physical violence, by state actors," said Justice Epstein for the unanimous Court of Appeal. "Section 12 deals with the degree to which the state may treat or punish an individual." Sections 24(1) and (2) provide jurisdiction to remedy a *Charter* breach. In this case, the trial judge had two options – (1) reduce the sentence (either by application of the remedial provision of the *Charter* or through the sentencing provisions of the *Criminal Code*) or (2) stay the proceedings. Justice Epstein described the inherent jurisdiction of a court to stay proceedings as a measure of control over the judicial process as follows:

> The common law abuse of process doctrine is designed to protect the fundamental principles of justice that underlie the community's sense of fair play and decency. [T]he judiciary should resort to a stay when necessary to communicate that it will not condone state conduct that transcends what our society perceives as acceptable. The objective of a stay as a remedy is to maintain public confidence in both the legal and the judicial process. [references omitted, para. 83]

The Court found this was one of those "clearest of cases" where a stay should have been granted and the prosecution halted. The nature and degree of the state misconduct demanded a remedy that went beyond a sentence adjustment. "This case involved horrendous police misconduct that breached Tran's ss. 7 and 12 Charter rights, jeopardized the perception of trial fairness and brought the integrity of law enforcement into disrepute," said the Court. Plus, there was no evidence of any effective response to the police brutality. SIU had investigated the matter, but concluded the file, finding there were no reasonable grounds to believe that the officer had committed any criminal offence and, despite the trial judge's findings of serious police brutality, no further action was taken against the officers. So even though the evidence against Tran was unaffected by the brutality and the charges were serious, a stay could be granted because the abuse was more than sufficiently serious to warrant a stay. "It is essential for the court to distance itself from this kind of state misconduct – an unwarranted, grave assault causing bodily harm, delayed medical attention, a cover up that included perjury, a prosecutorial response that affected the perception of trial fairness and no effective response," said Justice Epstein. "Not to do so would be to leave the impression that it tacitly approves of it. The granting of a stay of proceedings affirms the fundamental values of our society and ensures that the rights under the Charter are not, in substance, meaningless." Tran's appeal was allowed and a stay of proceedings was entered.

Complete case available at www.ontariocourts.on.ca

POLICE MUST RESPECT AUTHORIZATION: LISTENING TO INTERCEPTED CALLS UNREASONABLE

R. v. Martin, 2010 NBCA 41

As part of an investigation into the unlawful sale of tobacco, police obtained authorizations to intercept private communications of a known party. The authorization contained a basket clause, which also allowed the police to intercept communications of other individuals. But there was also a clause to guard against the interception of privileged communications between a solicitor and their client. This clause prohibited the interception of communications at the office or residence of a solicitor, and also required the police to stop listening to a communication when they reasonably believed that a solicitor was a party to a communication. If a call was intercepted while on automatic monitoring, the monitor or police officer/ investigator who subsequently reviewed the call was to stop listening to it as soon as they reasonably believed that a solicitor was a party to it. Any communication with the solicitor that was recorded was to be sealed and only accessed upon authorization of a court.

The police subsequently determined they had sufficient grounds to arrest the known party. They set up surveillance and arrested him. He was transported to a police station where he exercised his s. 10(b) *Charter* right to consult with a lawyer. Police continued to monitor the telephone. The monitor noted the line was active and started listening to the call. A man was speaking to the known party's wife and the monitor heard him tell the wife that her husband was detained and to call another person to come to the home and remove some incriminating evidence. Nothing in the conversation led the monitor to believe a solicitor was making that call. The monitor called the lead investigator and they both listened to a recording of the intercepted call. At the beginning of the call the male caller identified himself as a lawyer. The monitor then believed that she was required to comply with the authorization and cease listening to the recording. But the investigator instructed her to play back the entire conversation. As a result police attended the known party's residence, arrested his wife and the accused (a lawyer), and searched the house, finding tobacco residue on the toilet seat and small quantities of tobacco in the bathroom. The accused was charged under s. 139(2) of the *Criminal Code* with attempting to obstruct justice by counselling someone to dispose of evidence.

In the New Brunswick Court of Queen's Bench the accused applied to have the evidence of the intercepted conversation between the known party's wife and himself excluded because the police breached his s. 8 *Charter* rights. He submitted, in part, that the surreptitious electronic interception of his conversation constituted an unreasonable search or seizure because police did not comply with the authorization's conditions that prevented them from listening to a conversation involving a lawyer. As a result he contended that the intercepted communication should be excluded under s. 24(2) of the *Charter* because its admission into evidence would bring the administration of justice into disrepute. The trial judge agreed, finding that both the monitor and the lead investigator should have known from the outset that the conversation involved a lawyer. He reasoned that only a lawyer could have made the call to the known party's wife and police should have realized this because they knew the known party was in custody and they should have expected he would exercise his right to counsel. The intercepted communication was excluded from evidence at trial. Although the evidence would not affect trial fairness, the lead investigator usurped the judicial function and committed a "most serious violation". The accused was acquitted.

The Crown appealed to the New Brunswick Court of Appeal arguing, among other grounds, that the trial judge erred in finding a s. 8 *Charter* violation and in deciding to exclude the evidence under s. 24(2). Justice Richard, writing the opinion of the Court of Appeal, agreed that the actions of the monitor and the investigator failed to respect the provisions of the authorization. As soon as the police realized a

solicitor was involved in the communication they were required to stop listening. However, the Court of Appeal did not agree that the police should have realized it was a solicitor on the phone from the outset of the call. With the first part of the intercepted conversation not listened to, it was mere conjecture that the person calling was a solicitor and there was nothing in the remaining conversation that would lead a reasonable person to believe a solicitor was making that call. When the monitor called the lead investigator and advised him of what she had heard, the lead investigator had no reason to believe a solicitor was involved. Rather, the monitor and the investigator only became aware a solicitor was involved when the monitor started to play the entire conversation for the investigator. At this point, however, Justice Richard held that both the monitor and the investigator failed to comply with the provisions of the authorization requiring them to immediately cease listening. The communication could still be recorded, but it had to be sealed and could not be accessed without authorization from a court. "The Authorization is an order of the Court and it did not leave room for any misinterpretation: as soon as a monitor or police officer/investigator reasonably believes that a solicitor is a party to a communication, the monitor or police officer/investigator must cease listening," said Justice Richard. "This clause of the Authorization applied to both [the monitor] and to [the investigator] and each was individually expected to respect it."

The interception of communications constituted a search and seizure; not complying with the terms of the authorization risked it becoming unreasonable. Here, the interception and recording of the call was not unreasonable because the interception and recording were authorized. The monitor was only required to stop listening if she reasonably believed a lawyer was involved. But by the time she realized that it was, the communication had already been properly intercepted and recorded. However, the Court of Appeal found the continued playback after it was learned a solicitor was involved constituted a separate search, which was not authorized and was unreasonable. Once it was learned a lawyer was involved there was no authority for police to further listen to any part of the communication. By doing so there was an unlawful search that was neither judicially or otherwise authorized by law. The accused's s. 8 *Charter* rights were breached.

Exclusion of Evidence

Seriousness of the Charter-infringing State Conduct

Although what the police did would generally be considered a serious violation, there were extenuating circumstances. The investigator already knew the gist of the communication as related by the monitor before listening to it. Plus there was a sense of urgency. The police needed to prevent the disappearance of evidence; there was information that evidence could be removed from the home before a search warrant was executed. Further, there was nothing to suggest a pattern of police overlooking the terms of authorizations. So the police conduct was serious, but not egregious.

Impact on the Accused's Charter-Protected Interests

Although the privacy interest in one's telephone calls is high, it is not absolute and lawful interceptions can be authorized. Here, the conversation was lawfully intercepted and lawfully monitored until it was learned a solicitor was involved on play back. Justice Richard stated:

> One might ask what privacy interest there is in a conversation that has already been intercepted and recorded by the police. In my view, there remains a privacy interest, but it may not be very high. The interest is that the interception will be processed according to the terms of the Authorization. In this case, it meant being sealed and submitted to a Court before it could be released to the investigators. The privacy interest is not very high because the conversation has already been heard and if, as in this case, it is not protected by privilege, it will likely be unsealed upon the proper application to the Court. I acknowledge that the facts of this case are rather unique. If, for example, [the monitor] had reasonably believed from the outset a lawyer was involved in the communication and had nonetheless listened to the conversation and related it to [the investigator], the situation would be quite different.

Society's Interest in an Adjudication on the Merits

The evidence was highly relevant and reliable. "The intercepted communication speaks for itself," said the Court. "Its importance to the prosecution is also evident. Without the interception, the prosecution's case collapses" and society's interest in an adjudication on its merits would be compromised.

In balancing the above three factors, the Court of Appeal concluded that the admission of the evidence would not bring the administration of justice into disrepute. The Crown's appeal was allowed, the accused's acquittal was set aside, and a new trial was ordered.

Complete case available at www.canlii.org

INMATE HAS PRIVACY INTEREST IN RECORDED CALLS

R. v. Siniscalchi, 2010 BCCA 354

Following a police investigation of several robberies, the accused was arrested and held in a Pre-Trial centre. At the facility there was a telephone system available for inmates to use and calls were automatically recorded. The accused made 21 phone calls on the Inmate Call Control System (ICCS) over a nine day period; seven calls were with his wife and the others to family members (eg. mother, father, cousin, etc.). Prison authorities did not listen to these calls as part of their duties. Acting on a tip from a confidential informant that the accused had confessed involvement in several robberies during one of his telephone calls, police confirmed with an official at the Pre-Trial Centre that he had made a number of phone calls while in custody, but the official refused to provide further information unless a production order was obtained. The police obtained a production order for copies of the recordings. Although the conversations were typically of a personal nature and did not contain any confession of guilt, they did include numerous discussions of the robberies.

At trial on two counts of robbery in British Columbia Provincial Court transcripts of the recorded calls were entered into evidence. The trial judge found the accused had no reasonable expectation of privacy in the telephone calls and therefore there was no infringement of s. 8 of the *Charter* when the recordings were obtained by the police. The Crown said that the transcripts could be used to infer guilt because the statements were consistent with the accused having robbed the victims and there was no denial of his involvement in contexts where a denial would be expected. The trial judge did not, however, use the transcripts for the purposes suggested by Crown. Instead, he used the transcripts only in assessing the accused's credibility and in rejecting his alibi evidence. The accused was convicted.

The accused then appealed to the British Columbia Court of Appeal submitting, among other grounds, that the police breached his s. 8 *Charter* rights when they obtained the recordings and they should have been excluded under s. 24(2) of the *Charter*.

Before rendering its decision, Justice Huddart, speaking for the Court of Appeal, first summarized the principles surrounding s. 8 of the Charter:

1. A claim for relief under s. 24(2) can only be made by the person whose *Charter* rights have been infringed.

2. Like all *Charter* rights, s. 8 is a personal right. It protects people and not places.

3. The right to challenge the legality of a search depends upon the accused establishing that his personal rights to privacy have been violated.

4. As a general rule, two distinct inquiries must be made in relation to s. 8. First, has the accused a reasonable expectation of privacy. Second, if he has such an expectation, was the search by the police conducted reasonably.

5. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances.

6. The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:
   (i) presence at the time of the search;

(ii) possession or control of the property or place searched;
(iii) ownership of the property or place;
(iv) historical use of the property or item;
(v) the ability to regulate access, including the right to admit or exclude others from the place;
(vi) the existence of a subjective expectation of privacy; and
(vii) the objective reasonableness of the expectation.

7. If an accused person establishes a reasonable expectation of privacy, the inquiry must proceed to the second stage to determine whether the search was conducted in a reasonable manner. [references omitted, para. 65]

In this case Justice Huddart found that the accused did have a reasonable expectation of privacy. Although the accused was not present when the recordings were obtained by the police, did not possess or own the physical media on which the conversations were recorded or the place where they were kept, and did not have a historical right to use or the ability to regulate access to them, he had a subjective expectation of privacy in the telephone calls themselves which was objectively reasonable. Even though the privacy expectations that a person has while in prison are substantially diminished, a prisoner does not lose all their s. 8 rights for the duration of their confinement. "While expectations of privacy are severely diminished, they are not eliminated," said Justice Huddart.

"[A]n inmate has some reasonable expectation of privacy in telephone calls, even though they are subject to being monitored."

The ICCS was a system designed to give prisoners the ability to make telephone calls while providing a measure of security for the correctional facility. Under British Columbia's *Correction Act* an inmate's telephone calls can be recorded and monitored, within the limits of the legislation. The legislation is made available to inmates and a booklet explaining that telephone conversations may be recorded was also provided. As well, the "B.C. Corrections Branch Adult Custody Policy" requires that all inmates, on admission, receive and sign a written notice advising that telecommunications are recorded and may be monitored and every telephone location has a notice posted immediately adjacent to it stating, "All telecommunications, other than those to privileged parties, are recorded and may be listened to." Further, when an inmate makes or receives a call (other than a privileged call), they hear a warning that "this call is from a correctional institution and is recorded and subject to monitoring":

> The comprehensive polices that are in place represent a considered compromise between inmate privacy and prison security. Inmates cannot be under any illusion that their conversations are absolutely private. They are warned on coming into the institution, on attending to make a phone call, and on the call being connected, that their calls are recorded, and may be listened to in limited circumstances. They are also told (and s. 15(2) of the Regulation establishes) that the recordings will not be accessed by persons outside the correctional service without lawful authority.
>
> In the circumstances, it is my view that inmates have a diminished (but not extinguished) expectation of privacy in their telephone conversations. They must expect that their calls will be recorded, and are on notice that they may be listened to by authorized officials in limited circumstances. They are also entitled to expect that the contents of their conversations will be kept confidential by those authorized officials except in very limited circumstances – situations detailed in the regulations, including situations where the conversations evidence a threat to persons or to the security of the prison. [paras. 84-85]

In holding that the accused had a privacy interest in the contents of the recordings sufficient to engage s. 8 of the *Charter*, the Court of Appeal stated:

> In my view, ... routine, passive recording of inmate telephone calls is not a violation of s. 8 of the Charter. I do not agree, however, ... that once a call is recorded, an inmate has no privacy interest in its content. Rather, ... an inmate has some reasonable expectation of

> privacy in telephone calls, even though they are subject to being monitored. The expectation is not absolute. It is tempered by the realization that the calls will be intercepted to the extent authorized by the regulations. It is an expectation that calls will only be listened to for proper purposes by prison officials, and that those officials will not disseminate the recordings further in the absence of a judicial authorization or exceptional circumstances (e.g. where the calls disclose concerns for the security or operation of the institution).
>
> In summary, [the accused] could not expect his telephone conversations to be immune from interception by prison authorities. He could also hold no expectation that those authorities would refrain from involving the police if his conversations disclosed threats to security. He was entitled, however, to expect that prison authorities would listen to the conversations only where the statutory pre-conditions were met, and to expect that routine conversations that had no apparent connection with crime or prison security would be kept confidential by any prison official who heard them. [paras. 98-99]

Thus, recording the telephone conversations was proper but it was inappropriate for prison authorities to provide the recordings to the police absent judicial authorization.

Production Order

Here, the police obtained a production order under s. 487.012 of the *Criminal Code* for copies of the recordings. If the production order was valid then s. 8 of the *Charter* would not have been breached. If it was not valid then the evidence was obtained in violation of s.8. Before issuing a production order, the justice or judge must be satisfied, among other things, that there are reasonable grounds to believe the documents or data will afford evidence respecting the commission of the offence. In the affidavit supporting the production order there was only one paragraph addressing this element. It stated that police had information from a confidential informant that accused had called his brother after his arrest and had confessed to him involvement in several robberies. But this was not enough:

> ... In my view, the affidavit was deficient. It simply set out the fact that a confidential tip had been received. The tip was not detailed, and the affidavit provided no indication of the source of the informant's information. There was no evidence tending to confirm the veracity of the tip. Further, the officer who swore the affidavit testified that no investigation of the informant's background had, to his knowledge, been conducted and that he did not know whether the informant had provided reliable information in the past. In short, neither the affidavit nor the surrounding circumstances provide any basis for a conclusion that the confidential informant was reliable.
>
> The affidavit, in essence, left the judicial justice of the peace with no information other than that someone of unknown reliability had reported to a police officer that he had information (the nature of which was unknown) which led him to believe that [the accused] confessed to a crime in the course of a telephone conversation. That could not satisfy the requirement of s. 487.012(3)(b) that there be reasonable and probable grounds to believe that the recordings of the telephone conversations contained evidence respecting the commission of the robberies. The affidavit evidence provided to the J.J.P. was not sufficient for the granting of a production order, and the order ought not to have been granted. [paras. 108-109]

Since the production order was not validly issued the accused's s. 8 *Charter* rights were breached and the Court of Appeal excluded the evidence under s. 24(2). The breach was relatively serious and the effect of exclusion on the truth-seeking function of the trial would have been minimal. But the inadmissible evidence played no role whatsoever in the trial judge's decision to convict the accused and had no effect on the outcome of the trial; thus the error in admitting the evidence was harmless. The accused's conviction appeal was dismissed.

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

CIRCUMSTANTIAL EVIDENCE SUPPORTS CONVICTION

R. v. Au-Yeung, 2010 BCCA 367

A townhouse suspected of containing a marihuana grow operation came to the attention of police due to traffic between it and another suspected grow-op in the area. After conducting surveillance of the townhouse and detecting the odour of marihuana, police decided to obtain a search warrant. While the Information to Obtain was being prepared the accused drove up to the unit; the garage door opened and the accused backed a car in and remained inside for 37 minutes. The garage door then opened and he drove the vehicle, which he did not own, out. He was stopped by police and was arrested immediately; he asked for his keys and wallet. On opening the trunk of the car there was a strong odour of marihuana. A suitcase containing five pounds of marihuana and $10,000 in cash was found. Police also found an electronic garage door opener and keys, as well as the accused's wallet, which had a business card from Vancity Garden Supplies and two swimming passes, one in his name. A search warrant was obtained for the townhouse and the garage door opener from the car was used to open the garage and the keys were used to open the door. Inside the home police found a large marihuana grow operation consisting of several hundred marihuana plants as well as dried marihuana packaged in Ziploc bags identical to those found in the trunk of the car. They also found a receipt from Vancity Garden Supplies. There was evidence only of a female occupant.

At trial in British Columbia Supreme Court the accused's explanation for his presence at the house and the suitcase full of cash and marihuana in the car was rejected as unbelievable. The accused's joint ownership and control of the grow-op and knowledge and control of the marihuana in the car was based on circumstantial evidence, including:

- his relationship with the townhouse and the car owner;
- the availability of the car to him;
- police surveillance linking him to the townhouse unit;
- the garage door opener and house keys found in his possession;
- his direct opening of and entrance into the garage;
- asking for the keys to the house upon his arrest; and
- the marihuana found in the car was of the same weight and packaging as marihuana found in the house.

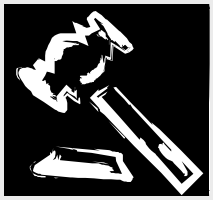
He was convicted of producing a controlled substance and possession for the purpose of trafficking.

The accused then appealed to the British Columbia Court of Appeal arguing, among other grounds, that the circumstantial evidence was not capable of supporting the convictions. But this submission was rejected by the Court of Appeal. "In this case, the circumstantial evidence was overwhelming," said Justice Bennett speaking for the Court. "It all pointed towards the [accused] having knowledge and control of the marihuana in the trunk of the car. It also pointed to his knowledge of and involvement in the grow-op." There was no reason to disturb the trial judge's findings and the accused's appeal against the guilty verdicts was dismissed.

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

LEGALLY SPEAKING:

Alcohol Consumption



"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..

INVOLVEMENT WITH GROW OP DOES NOT ALWAYS ESTABLISH PRIVACY INTEREST

R. v. Stein, 2010 BCCA 173

A police officer flying a helicopter discovered an outdoor marihuana plantation in a rural area. The next day he returned with other officers. He circled low over the property and two vehicles were seen there; one belonged to the accused. It drove from plots of marihuana and stopped at a residence on the property. The truck driven by the accused was stopped by police after it hastily left the property. The accused was arrested and a strong smell of marihuana was noted on his clothing. The helicopter landed on the property and the police looked around. The outdoor marihuana grow operation was capable of producing an estimated $3M of marihuana at street value. Police subsequently obtained a warrant and also searched the accused's truck. In the house they found a considerable amount of dried marihuana and an overnight bag with his personal effects. In the truck, leased in the accused's name, police found a checkbook in his name, as well as a schematic diagram of the grow areas, a how to grow marihuana book entitled "Marihuana Flower Forcing", and a bag containing plastic baggies, clippers, a scale and a Tupperware container with marihuana leaves and bud. There was also a strong smell of marihuana about the truck. The farm property itself was owned by someone else.

At trial in British Columbia Supreme Court the accused sought standing to challenge the validity of the search warrant issued for the property. But the trial judge refused the accused's request. He found the accused had no standing to challenge the search warrant related to the property and therefore no *voir dire* was held. The Crown's argument that the accused had possession and control of the drugs found on the property was not enough for him to establish a reasonable expectation of privacy. He was only found there; he did not own, occupy, control, historically use, regulate access, nor hold an objectively reasonable expectation of privacy over the land. The trial judge nonetheless held there was sufficient circumstantial evidence to find the accused was actively involved in the grow operation such that he was guilty of producing marihuana and possessing it for the purpose of trafficking.

The accused challenged his convictions to the British Columbia Court of Appeal, submitting that he should have been granted standing to challenge the warrant and search of the property. He suggested that since the Crown asserted his presence and association with the grow operation was sufficient for a conviction, then the trial judge erred in not granting him standing to challenge the search of the farm property. Justice Hall, however, in delivering the decision for the Court of Appeal, upheld the trial judge's ruling. Even though the accused had been about the property and was involved in the marihuana plantation, the Crown contended it did not need to assert the accused had a propriety or possessory interest in the property to get a conviction. "It was [the accused's] involvement with the grow operation that was significant, not his involvement with the property," said Justice Hall. A person who seeks standing to challenge a search or the issuance of a search warrant bears the onus of demonstrating a sound evidentiary foundation that they have a privacy interest. In some situations an accused will establish this, such as when the Crown argues that an accused should be found in possession of items in or about a property because they have an ownership interest in or control of the property. In other cases, as was here, being about the property will not be sufficient to establish a privacy interest but can nevertheless found a conviction. The Court of Appeal concluded that the trial judge did not err when he declined to enter into a *voir dire* to determine whether police infringed the accused's privacy interest.

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

HOME FORFEITURE NOT DISPROPORTIONATE DESPITE ABSENCE OF CRIMINAL RECORD

R. v. Wu, 2010 BCCA 366

Responding to a person in distress call, the police attended a residence to find the accused outside on the rear steps. They entered the home and discovered the accused's common-law wife, her mother, and his three year old son. Not finding anyone in distress, they did discover a large marihuana grow operation in the basement of the house. The accused, who did not live at the home, owned the property. He had no criminal record nor was he associated with organized crime. The property was valued at $367,000 with a $152,000 mortgage; leaving the accused with $215,000 in equity. The accused was found guilty in British Columbia Provincial Court of producing marihuana and possession of marihuana for the purpose of trafficking. After the trial his common law wife and their son returned to China while the accused moved back into the property. He was sentenced to a nine month conditional sentence and his house was ordered forfeited.

> "The purposes of the forfeiture provisions ... include taking the profit out of the production and trafficking of drugs. There is also a punitive aspect to the effect of a forfeiture order. There is also a preventive aspect, as the tools of the crime are removed from the criminal."

The accused appealed the forfeiture order to the British Columbia Court of Appeal. Under the *Controlled Drugs and Substances Act*, if a person is convicted of a designated substance offence and the court is satisfied, on a balance of probabilities, that any property is offence-related and that the offence was committed in relation to that property, the court shall order the property forfeited. When the forfeiture of a dwelling house (real property) is involved, the court must be satisfied that the impact of such a forfeiture order would not be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the person convicted of the offence.

The accused argued that the sentencing judge erred in forfeiting the entire property and should have considered partial forfeiture only. But the Court of Appeal disagreed, holding that the order of complete forfeiture was not disproportionate, taking into account all of the circumstances, including his financial circumstances. "The financial success of the grow-op in question is a relevant consideration, as is the offender's equity in the property, but the effect of forfeiture on him personally no longer appears to be a factor to be considered when making a forfeiture order," said Justice Bennett. "The purposes of the forfeiture provisions in the Controlled Drugs and Substances Act include taking the profit out of the production and trafficking of drugs. There is also a punitive aspect to the effect of a forfeiture order. There is also a preventive aspect, as the tools of the crime are removed from the criminal." Here, there was no question that the house was "offence-related property"; the accused had converted his basement from a rental suite to a large urban grow operation. In deciding whether forfeiture was disproportionate in the circumstances, the following factors will be taken into account:

- **the nature and gravity of the offence**, including the character and quantity of the substance involved, the level of sophistication of the crime and the extent of the commercial production or distribution;
  - ✦"This was a fairly large grow-op in an urban setting. There were four growing rooms engaged, and 398 plants at various stages of development, along with harvested marihuana bud. The police expert opined that this was "6 out of 10" in terms of sophistication. While I am not entirely clear what the parameters of that scale are, I think it is safe to say that it was not the most sophisticated grow-op the expert has seen, but it was clearly for commercial production. The plants were well tended and the operation was capable of producing

> $163,000 every three to four months. In other words, it was approximately a half-million dollar per year operation." [para. 25]

- **the circumstances surrounding the commission of the offence**, including the offender's role in the offence, the nature of the property and the manner in which it was used in the commission of the offence, risks to the community, whether the use detrimentally affected legitimate use of the property, whether the property was fortified or adapted to accommodate the offence, the extent of the involvement of the offender in organized crime;
  - ✦ the trial judge found that the grow-op belonged to the accused. Although he did not live at the property, he owned it and was at the premises when the police arrived. His common-law wife and child lived there. The property was in a residential suburban neighbourhood. It was a two-level home with a main floor and basement. The entire basement was converted to be used as a grow-op. Electricity was not stolen but the electrical system had been rigged which was hazardous and posed a fire hazard to neighbours. Grow-ops are notoriously dangerous to neighbourhoods as a result of the violence associated with the drug world, as well as the risk of fire from poor electrical installations. The risk of fire or exposure to violence to the community was significant in this case. There was evidence $800 a month in rental income could have been received had the suite not been converted to a grow-op. Thus, the legitimate use of the property was seriously impinged. The main floor was used as a residence, although the fireplace was entirely blocked off to facilitate venting the grow-op through the chimney. After the arrest, the accused converted the basement back to a suite and he now resided in the basement while other relatives occupied the top floor. His wife returned to China with their son upon her acquittal.

- **whether the offender has a criminal record.**
  - ✦ the accused did not have a prior criminal record nor was there evidence that he was involved with organized crime.

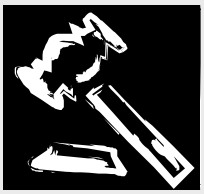
The accused suggested that he did not steal electricity nor have illegal guns on the premises which should be considered mitigating factors. But this was rejected. "I do not see how partial obedience of the law mitigates the circumstances of the offence," said Justice Bennett. "Those crimes are often associated with grow-ops, but they are aggravating factors when present, not mitigating factors when they are not present." In dismissing the accused's appeal against complete forfeiture, the Court of Appeal stated:

> This was a substantial commercial grow operation in an urban setting. The profits were significant and the crop was continual. The property was altered in order to accommodate the grow-op. The risk of danger from fire and drug-related violence to [the accused's] family and neighbours was always present. His profit for six months of cultivation equalled the equity in his house. [para. 40]

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

LEGALLY SPEAKING:

Wilful Blindness



"Wilful blindness does not define the mens rea for particular offences. Rather it can substitute for actual knowledge whenever knowledge is a component of the mens rea. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further enquiries, but deliberately chooses not to make those enquiries. ... [A] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?" - Supreme Court of Canada Justice Charron in *R. v. Briscoe*, 2010 SCC 13 at para. 21.

HARD ENTRY OK RULES SUPREME COURT

R. v. Cornell, 2010 SCC 31

After receiving information from a confidential informant about a "dial-a-dope" cocaine trafficking operation, police obtained three search warrants under the *Controlled Drugs and Substances Act* for two dwelling houses and a motor vehicle. The operation was believed to be connected to an organized criminal group known as the "Fresh Off the Boat" gang, which was engaged in a violent war with another criminal gang. There had been a number of deaths and shootings. A tactical team was to be used at both residences and for the vehicle stop. The team would secure the sites and then turn them over to the investigators who would conduct the searches. The accused was not the target of the investigation, but it was believed his home was used for reloading drugs. At the accused's residence the tactical team conducted an unannounced hard (or dynamic) entry consisting of nine police officers with weapons drawn. The officers were wearing balaclavas and body armour. Police used a battering ram on the front door and entered the house yelling, "Police, search warrant". The accused's 29-year-old mentally challenged brother was the only one in the house and was taken down and handcuffed. He became emotionally distressed, but within four minutes was uncuffed and comforted. The tactical team did not have the warrant in hand when they entered the house. Instead, the lead investigator who was waiting for the house to be secured had a copy of the warrant and entered the residence about four minutes after the tactical team went in. No one asked to see the warrant at the time of entry. Police found 99.4 grams of cocaine in the corner of the accused's basement bedroom. He was later arrested at his workplace.

> "[T]he police must be allowed a certain amount of latitude in the manner in which they decide to enter premises. They cannot be expected to measure in advance with nuanced precision the amount of force the situation will require."

At trial in the Alberta Court of Queen's Bench the accused admitted possessing the cocaine for the purposes of trafficking. But he challenged the manner in which the search was conducted. The trial judge upheld the search and found that the police provided a reasonable explanation for conducting a forced entry in all of the circumstances. They wanted to ensure both that the cocaine was not destroyed and were concerned with their safety, as well as the safety of the public (including possible occupants of the house). The police had reasonable grounds to anticipate either the use of violence by the residents of the home or the destruction of evidence. They had reasonable grounds to believe that a cocaine trafficker associated with violent people was welcome in the home. Plus, the judge found the police had no means of knowing before executing the warrant who, if anybody, was in the residence or whether there was anyone inside who might destroy the cocaine, if there was any, upon learning of the police presence at the door. The police had done what could reasonably be expected in formulating their decision to use a forced entry. As for the entry team not having a copy of the warrant with them, the judge reasoned each member of the police team executing the warrant did not need to have a copy on their person. The warrant was present at the scene and it was reasonable for the tactical team to first secure the premises and for the lead investigator to wait outside with the warrant until it was safe to enter.

By a 2:1 majority the Alberta Court of Appeal dismissed the accused's appeal and affirmed the conviction. "Section 8 of the Charter does not require the police to put their lives or safety on the line if there is even a low risk of weapons being present," said Justice Slatter. The majority concluded that the search warrant was properly issued and that the search itself was conducted reasonably. But Justice O'Brien dissented, concluding that the police made no separate assessment of the residence to determine whether the execution of the warrant

would give rise to a real threat of violence. In his view, the unannounced and violent entry into a private dwelling by masked police officers, with weapons drawn, and without the search warrant in their possession, could not be justified under the circumstances. The police provided no information, specific to the residence or its inhabitants, which could justify the manner of the search. He would have excluded the evidence under s. 24(2).

The accused then appealed to the Supreme Court of Canada, again submitting that the manner of entry by the members of the police tactical team was unreasonable in the circumstances. In his view, the use of a forced, unannounced entry with masked officers was not proper. He suggested, in part, that the police had inadequate information to support the decision to use a hard entry, and that they ought to have taken further investigative steps. As well, they did not have a copy of the search warrant with them at the time of entry. Before addressing the accused's arguments, Justice Cromwell, for the four member majority, first summarized the law regarding unannounced, forced entries.

For a search to be reasonable search under s. 8 of the *Charter* it must be:

- authorized by law;
- the authorizing law must itself be reasonable; and
- the search must be conducted in a reasonable manner.

The onus is on an accused to prove the search breached s. 8 of the *Charter*.

Knock and Announce

In discussing unannounced entry the majority stated:

> Except in exigent circumstances, police officers must make an announcement before forcing entry into a dwelling house. In the ordinary case, they should give: "(i) notice of presence by knocking or ringing the door bell; (ii) notice of authority, by identifying themselves as law enforcement officers and (iii) notice of purpose, by stating a lawful reason for entry. [para. 18]

And further:

> Where the police depart from this approach, there is an onus on them to explain why they thought it necessary to do so. If challenged, the Crown must lay an evidentiary framework to support the conclusion that the police had reasonable grounds to be concerned about the possibility of harm to themselves or occupants, or about the destruction of evidence. The greater the departure from the principles of announced entry, the heavier the onus on the police to justify their approach. The evidence to justify such behaviour must be apparent in the record and available to the police at the time they acted. The Crown cannot rely on ex post facto justifications. ... [W]hat must be present is evidence to support the conclusion that "there were grounds to be concerned about the possibility of violence" [para. 20]

Thus, the main question in this case was "whether the police had reasonable grounds for concern to justify use of an unannounced, forced entry while masked." In answering this question, Justice Cromwell noted that, in addition to according the trial judge substantial fact finding deference, two other factors were important:

- "[T]he decision by the police must be judged by what was or should reasonably have been known to them at the time, not in light of how things turned out to be. Just as the Crown cannot rely on after-the-fact justifications for the search, the decision about how to conduct it cannot be attacked on the basis of circumstances that were not reasonably known to the police at the time. ... Whether there existed reasonable grounds for concern about safety or destruction of evidence must not be viewed "through the 'lens of hindsight' ".

- "[T]he police must be allowed a certain amount of latitude in the manner in which they decide to enter premises. They cannot be expected to measure in advance with nuanced precision the amount of force the situation will require. ... It is often said of security measures that, if something happens, the measures were inadequate but that if nothing happens, they were excessive. These sorts of after-the-fact

assessments are unfair and inappropriate when applied to situations like this where the officers must exercise discretion and judgment in difficult and fluid circumstances. The role of the reviewing court in assessing the manner in which a search has been conducted is to appropriately balance the rights of suspects with the requirements of safe and effective law enforcement, not to become a Monday morning quarterback."

In this case, the majority agreed with the trial judge that the police had sufficient information to justify their decision to undertake a hard, no-knock entry. They had a genuinely held belief that was reasonably based; there were ample grounds for the police to be concerned about violence and the destruction of evidence:

- It was reasonable for the police to be concerned about their safety and the safety of other occupants given their experience that cocaine traffickers frequently use violence. A cocaine trafficker who associated with violent people was welcome in the residence. In a dial-a-dope operation, the dealer usually has a place from which to operate that could contain drugs, money, weapons, and score sheets. Reloading residences, like the one suspected here, are used to reduce the risk of losing large amounts of drugs or money in the event of a police stop while making deliveries;
- The police had reasonable grounds to be concerned that the evidence would be destroyed because they believed that cocaine would be found in the premises and it is a substance that may be easily destroyed;
- No circumstances arose before the search warrant was executed which might remove the exigency of the situation;
- The police had no means of knowing who, if anybody, was in the residence or whether there was any person in the residence who would destroy the cocaine evidence if they learned of police presence at the door;
- The fact that the occupants of the house had no prior criminal record did not affect the reasonableness of the police concern that evidence could be destroyed. Evidence could just as easily be destroyed by someone without a criminal as a person with a criminal record;
- The day before entry a vehicle associated with the dial-a-dope operation was occupied by an individual with an extensive criminal record, which included weapons and drug charges, and an individual believed involved in the operation had driven to the accused's residence, pulled up to the rear, and its driver left the vehicle and appeared to retrieve something from the yard of the residence near the fence. The car was stopped about an hour later and its driver was wearing body armour and was in possession of cocaine and cash. There was good reason to be concerned about violence. If this person thought his business was dangerous enough to justify wearing body armour, it can hardly have been unreasonable for the police to think the same thing. These additional facts strengthened the grounds to believe that cocaine would be in the residence (and therefore liable to be easily destroyed) and that a violent reaction to entry might be encountered.

As for the use of masks by police, the Supreme Court found it was not appropriate for a court to review every detail of the search in isolation. Instead, the question was "whether the search overall, in light of the facts reasonably known to the police, was reasonable," said Justice Cromwell. "Having determined that a hard entry was justified, I do not think that the court should attempt to micromanage the police's choice of equipment." He also noted that this was not a case where police were relying on a blanket policy to always use a hard entry during a search in the absence of evidence indicating a risk of violence or destruction of evidence.

Nor were the police required to undertake further investigation. "The police did not just show up at a previously uninvestigated residence and barge in," said Justice Cromwell. The police had surveilled the residence on three occasions before the day of entry for almost 10 hours and, on the day of entry, they continually watched the house from the morning until entry was made in the evening. The police had also checked several computerized databases. "The

police reasonably believed that the [accused's] residence was being used in a criminal drug dealing enterprise carried on by members of a violent criminal gang and that the [accused] had some association with at least one gang member," wrote Justice Cromwell. "The police were entitled to draw reasonable inferences from these facts." Here, the search was reasonable given the facts collectively known to the police.

Failure to Have Warrant in Hand

As for the accused's contention that the search was unreasonable because the tactical team did not have a copy of the warrant when it made the entry, it too was rejected. Section 29(1) of the *Criminal Code* reads, "[i]t is the duty of every one who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so." No one ever asked to see a copy of the warrant. Therefore, there was no issue of any failure to produce the warrant when requested to do so. All 15 members (nine tactical and six investigative) were not required to have a copy of the warrant with them. The majority said the sensible, purposive, and appropriate interpretation of s. 29(1) in the context of a search with multiple officers was that they were not all required to have a copy. The lead investigator had a copy of the warrant and was in the residence within four minutes. The role of the tactical team was to make the entry and secure the premises and then turn the site over to the investigators who would actually perform the search. It was sufficient that the police team had a copy of the warrant with them when executing it:

> [T]he purpose of s. 29(1) is to allow the occupant of the premises to be searched to know why the search is being carried out, to allow assessment of his or her legal position and to know as well that there is a colour of authority for the search, making forcible resistance improper. These purposes, in my view, are fully achieved by insisting that the warrant be in the possession of at least one member of the team of officers executing the warrant. While I think it is a better practice for someone among the first group of officers in the door to have a copy on his or her person, I would not conclude that the officers failed to have the warrant with them when a copy was in the possession of the primary investigator who was in charge of the search and immediately at hand. Moreover, it cannot in my view be said that the police conduct in relation to the warrant contributed in any respect to making this search unreasonable. [para. 43]

The search was not unreasonable and the accused's appeal was dismissed.

A Different View

Justice Fish, writing a three member dissenting opinion, found the force used by police was not justified. He found that the police had no reasonable belief that a dynamic entry was necessary to protect the safety of the officers nor that evidence would be concealed or destroyed by anyone present or likely to be present at the time if they did not make a swift entry. As well, tactical team members were bound by s. 29 of the *Criminal Code* to have the search warrant with them and there was no evidence that this was not feasible. He concluded that the search did not comply with the statutory constraints of s. 12 of the *CDSA*, nor the accused's s. 8 *Charter* rights:

> The absence of any prior investigation regarding the [accused's] home and its occupants; the violence and destructiveness of the entry; the force used to subdue the sole, mentally disabled occupant of the house; the total failure to justify departure from the "knock and announce" rule in respect of the [accused's] residence; the use of masks without justification; the use of drawn weapons without any reason to suspect that their physical security was at risk; the failure of the entering officers to have with them, as required by law, the search warrant under which they were acting; and all the other facts and circumstances I have mentioned leave me with no doubt that the police in this case violated the right of the [accused], enshrined in s. 8 of the Charter, "to be secure against unreasonable search or seizure".

The minority would have excluded the evidence under s. 24(2), set aside the accused's conviction, and substituted an acquittal.

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

SIMPLY VIEWING IMAGES ONLINE DOES NOT NECESSARILY CONSTITUTE POSSESSION

R. v. Morelli, 2010 SCC 8

A computer technician attended the accused's residence to install a high-speed Internet connection for a home computer. In the spare bedroom where the computer was located the technician observed a web-cam on a tripod which was plugged into a VCR. The web-cam was pointed toward the accused's three-year-old daughter who was playing with some toys on the floor. On the computer screen desktop the technician observed two icons, one entitled "Lolita Porn" and one entitled "Lolita XXX". Because he could not complete the high-speed Internet connection that day, the technician returned the following day to complete the task and now observed that the children's toys were put away, the web-cam was turned toward the computer chair, the computer hard drive had been formatted, and all website links were removed from the desktop. A couple of months later the technician reported what he had seen to the police. The investigating officer also obtained some information from a colleague experienced in investigating child exploitation offences. He was told that persons involved in these types of crimes treasure child pornography collections, categorizing and cataloguing images. An active Internet connection was verified as still being provided to the residence and an information to obtain a search warrant was drafted a couple of months later and signed by a justice.

At trial the accused challenged the validity of the search warrant, arguing the information was so flawed that the justice could not have been satisfied there were reasonable grounds to issue it. The trial judge concluded that there was sufficient evidence to allow the authorizing justice to grant the warrant. The accused was convicted of possessing child pornography and given an 18 month conditional sentence. His appeal to the Saskatchewan Court of Appeal was dismissed by a majority. Justice Richards, however, dissented and would have allowed the appeal because he opined that the trial judge erred in holding that there was a reasonable belief that the accused's computer contained child pornography. Thus, in his view, the search breached the accused's s. 8 *Charter* rights.

The accused then appealed to the Supreme Court of Canada contending that the search warrant was invalid because there were no reasonable grounds. He submitted that the search of his computer breached his s. 8 *Charter* rights and that the evidence found on his computer should have been excluded. The Crown, on the other hand, suggested that there were reasonable grounds justifying the issuance of the warrant and, even if the warrant was improperly issued, the evidence should be admitted under s. 24(2) of the *Charter* and the accused's conviction affirmed. In a 4:3 ruling, however, the Supreme Court of Canada overturned the accused's conviction.

Possessing v. Accessing Child Pornography

The majority first elaborated on the distinctions between possessing child pornography and accessing it. The accused was charged with, and the warrant was based on, possession not access. Possessing child pornography is an offence under s. 163.1(4) of the *Criminal Code*. Justice Fish, however, found that "merely viewing in a Web browser an image stored in a remote location on the Internet does not establish the level of control necessary to find possession. Possession of illegal images requires *possession of the underlying data files in some way*. Simply viewing images online constitutes the separate crime of *accessing* child pornography [under] s. 163.1(4.1) of the *Criminal Code*."

"Possession", defined in s. 4(3) of the *Criminal Code*, includes personal possession, constructive possession, and joint possession. Knowledge and control are essential elements common to both personal and constructive possession, the two types of possession applicable to this case. In terms of personal possession, an "accused must be aware that he or she has physical custody of the thing in question, and must be aware as well of what that thing is. Both elements must co-exist with an act of control (outside of public duty)."

Constructive possession is established where the accused did not have physical custody of the object in question, but did have it "in the actual possession or custody of another person" or "in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person." Constructive possession is complete where the accused: (1) has knowledge of the character of the object, (2) knowingly puts or keeps the object in a particular place, whether or not that place belongs to him or her, and (3) intends to have the object in the particular place for his or her "use or benefit" of that or another person.

However, unlike tangible objects such as traditional photographs, virtual objects can be stored as digital files or displayed on computer monitors. Digital information encoding the image can be possessed even if no representation of the image is visible. Similarly, information underlying an image displayed on a person's computer monitor might remain outside that person's possession, located on a server thousands of kilometres away, over which that person has no control.

The majority of the Supreme Court concluded that the offence of possessing child pornography as it relates to possession of an image on a computer requires possession of the image (underlying data) file and not just its decoded visual representation or mere depiction on-screen. This was so because:

- Parliament has made accessing illegal child pornography a separate crime, different from possession; and
- The traditional objects of criminal possession, such as contraband, drugs, and illegal weapons, are all things, like a data file, that could potentially be transferred to another person.

The Court stated:

> Plainly, the mere fact that an image has been accessed by or displayed in a Web browser does not, without more, constitute possession of that image. An ITO seeking a warrant to search for evidence of possession (rather than accessing) must therefore provide reasonable and probable grounds to believe that the alleged offender possesses (or has possessed) digital files of an illegal image, and that evidence of that possession will be found in the place to be searched. It is not enough to provide reasonable and probable grounds to believe that the alleged offender viewed or accessed illegal images using a computer, without knowingly taking possession — which includes control — of the underlying files in some way. [para. 31]

Nor did having an Internet cache on a computer - copies of files automatically stored on the hard drive by a Web browser - constitute possession:

> When accessing Web pages, most Internet browsers will store on the computer's own hard drive a temporary copy of all or most of the files that comprise the Web page. This is typically known as a "caching function" and the location of the temporary, automatic copies is known as the "cache". While the configuration of the caching function varies and can be modified by the user, cached files typically include images and are generally discarded automatically after a certain number of days, or after the cache grows to a certain size.
>
> On my view of possession, the automatic caching of a file to the hard drive does not, without more, constitute possession. While the cached file might be in a "place" over which the computer user has control, in order to establish possession, it is necessary to satisfy mens rea or fault requirements as well. Thus, it must be shown that the file was knowingly stored and retained through the cache. [paras. 35-36]

Here, the charge was not based on the accused using his cache to possess child pornography. Most computer users are unaware of the contents of their cache, how it operates, or even its existence and, absent that awareness, they lack the mental or fault element essential to a finding that they culpably possess the images in their cache.

The Search - Reasonable Grounds

Justice Fish also concluded that, even if the offence of possession included viewing an image (like the minority opined), the police nonetheless failed to establish the reasonable grounds necessary for the issuance of the search warrant. "Under the Charter,

before a search can be conducted, the police must provide 'reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search'," said Justice Fish. "These distinct and cumulative requirements together form part of the 'minimum standard consistent with s. 8 of the *Charter* for authorizing search and seizure'". But on amplification, there were erroneous statements that needed to be excised as well as numerous omissions that violated the police obligation to provide full and frank disclosure. The ITO was carelessly drafted, materially misleading, and factually incomplete. The informant was required to present all material facts, favourable or not; an informant must be careful not to "pick and choose" among the relevant facts in order to achieve the desired outcome. Irrelevant or insignificant details may be omitted, but there must not be material non-disclosure.

What is Amplification?

When a reviewing Court assesses the sufficiency of a warrant application, it does not decide whether it would have issued the warrant, but must determine whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place. In doing so, the reviewing court does not only review the ITO that was presented to the justice of the peace but may also hear "amplification", or additional evidence, presented at the *voir dire* to correct minor errors in the ITO. Erroneous information included in the original ITO will be excluded. Amplification evidence may correct good faith police errors in preparing the ITO and some minor, technical errors in drafting the affidavit, but not deliberate attempts to mislead the authorizing justice. Amplification evidence, however, cannot be adduced as a means for police to retroactively authorize a search warrant that was not initially supported by reasonable grounds.

In this case the police officer selectively presented facts that painted a less objective and more villainous picture than what would have emerged had he disclosed all the material information available to him at the time. Once stripped of its erroneous and tendentious assertions, and amplified on review, there was insufficient credible and reliable evidence to have permitted the justice to find reasonable grounds to believe that both the accused was in culpable possession of child pornography and that evidence of that crime would be found in his computer:

> In short, ... the ITO in this case is reduced by scrutiny to two links in the browser's list of "Favourites" — links that were known to have been erased four months earlier. At best, this may be a ground for suspicion, but surely the deleted links afford no reasonable and probable grounds to believe that the [accused] was in possession of child pornography, and still less that evidence of that crime would be found upon a search of his computer.

"Under the Charter, before a search can be conducted, the police must provide 'reasonable ... grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search'."

Once the material facts omitted from the ITO are taken into consideration, it is apparent that none of the other evidence in the ITO — principally the presence of the webcam and the claims about propensities of unspecified "types of offenders" — can elevate mere suspicion into sufficient grounds for a warrant. [paras. 95-96]

Since the warrant should not have been issued, the search breached s. 8 of the *Charter*. The majority then analyzed the admissibility of evidence under s. 24(2). "Justice is blind in the sense that it pays no heed to the social status or personal characteristics of the litigants," wrote Justice Fish. "But justice receives a black eye when it turns a blind eye to unconstitutional searches and seizures as a result of unacceptable police conduct or practices. The public must have confidence that invasions of privacy are justified, in advance, by a genuine showing of probable cause. To admit the evidence in this case and similar cases in the future would undermine that confidence in the long term."

The accused's appeal was allowed, the evidence excluded, his conviction quashed, and an acquittal entered.

A Second Opinion

Justice Deschamps, writing a three member minority opinion, had a more expansive conception of possession. In her view, the accused did not need to have control in a place belonging to him, such as his hard drive. Instead, constructive possession simply required the material to be "in any place" for the use or benefit of the accused. Even if the accused did not actually download offending material, possession can be established if they have control over the material for their use or benefit, or for that of someone else. Thus, when reviewing the authorization to search for evidence of child pornography possession, a court must ask whether there was credible evidence to support a reasonable belief that an accused had control, and not that the material had been downloaded and was in fact in the computer.

In this case, the minority also found that the search warrant was properly based on reasonable grounds. "Determining whether evidence gives rise to [reasonable grounds for belief] does not involve parsing the facts or assessing them mathematically," said Justice Deschamps. "Rather, what the judge must do is identify credible facts that make the decision to authorize a search reasonable in view of all the circumstances." It is a non-technical, common-sense approach. A reviewing court does not ask whether it would have reached the same decision as the issuing judge, thereby substituting its own opinion for that of the issuing judge. Instead, it merely determines whether there was credible evidence on which the issuing judge's decision could be based. And the onus lies with the accused to demonstrate that the ITO was insufficient. Here the minority concluded there was reliable evidence that might reasonably be believed as the basis for which the warrant could have issued. The search warrant was valid and there was no need to consider s. 24(2) and the exclusion of evidence.

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

ADMINISTERING CHEMICAL WAS A 'SERIOUS PERSONAL INJURY OFFENCE': CSO UNAVAILABLE

R. v. Carr, 2010 ONCA 290

The accused pled guilty to administering a chemical (Kathlon) with the intent to cause bodily harm under s. 245(a) of the *Criminal Code*. He began having an extra-marital affair with the victim, his co-worker, for about five years. After the relationship ended the victim suffered burns and blisters to the bottom of her feet, back, thighs, arms, and abdomen. At one point the situation became so severe that she had difficulty walking and needed to be off work. Her desk had also been tampered with; memos had gone missing, papers were moved, her computer was damaged, and notes were left on her desk. A private investigator installed hidden surveillance equipment to monitor her work area. The accused was seen tampering with the victim's work area and spraying a substance, later determined to be Aciticide SPX Kathlon, on her chair, computer, and mouse. Kathlon is a chemical causing severe itching, burning and blistering on contact with human skin. The trial judge, however, found the accused's conduct did not amount to a "serious personal injury offence" under s. 752 of the *Criminal Code* such that a conditional sentence was available. He gave the accused an 18 month conditional sentence and two years probation.

On appeal by the Crown the Ontario Court of Appeal found the accused's conduct in this case did constitute a serious personal injury offence because "he plainly endangered the victim's safety on any definition of endangerment and harm. He intentionally exposed her to a corrosive chemical that caused her serious bodily injury," said the Court. He was also well aware of the harm he was causing. He used gloves to handle the substance and he attended a work place meeting about the victim's difficulties at work. He was clearly aware or wilfully blind to the harm he was causing. A custodial sentence of two years less a day was substituted.

Complete case available at www.ontariocourts.on.ca

SENTENCE REDUCED TO PERMIT DEPORTATION APPEAL

R. v. B.R.C., 2010 ONCA 561

The accused pled guilty to sexual exploitation in the Ontario Superior Court of Justice. The Crown asked for three years in custody while the accused asked for a conditional sentence. The judge sentenced him to 30 months imprisonment. He had been in a position of trust and authority over the victim who was the son of his common law partner. The offence was prolonged (the victim was between 15 and 17 years old at the time of the offence) and included several acts of anal intercourse. The accused was a first-time offender, had a good employment history, expressed his remorse, was dealing with a drug and alcohol problem, and appeared to be a low risk to re-offend. He was subsequently ordered deported from Canada as a result of his conviction and sentence.

The accused, now 45 years old, appealed his sentence to the Ontario Court of Appeal contending that he was subject to a deportation order because his sentence was more than two years and, therefore, it should be reduced to allow him a chance to appeal. He had come to Canada from Scotland as a 14 month-old infant but neither he nor his parents took any steps to become a Canadian citizen. Under s. 64(2) of the I*mmigration and Refugee Protection Act* a foreign national or permanent resident may not appeal their deportation order to the Immigration Appeal Division on the grounds of serious criminality if the crime was punished in Canada by a term of imprisonment of at least two years.

The Ontario Court of Appeal agreed with the accused, finding the 30 month sentence was not fit because of the deportation order. It was lowered to two years less a day plus six months probation. "[I]n the unusual circumstances of this case, the certainty of deportation is a factor that properly tips the scale in favour of a sentence of two years less a day," said Justice Sharpe, speaking for the Court of Appeal. "While the sentencing process should not be used to circumvent the provisions of the *Immigration and*

BY THE BOOK:

Immigration and Refugee Protection Act

Division 7 Right of Appeal

s. 64(1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

Serious criminality

(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.

Division 4 Inadmissibility
Serious criminality

s. 36(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

Refugee Act, the calculation of the appropriate sentence is not an exact science. Where there is a range of possible sentences, the fact that an offender will face deportation 'is one of the factors which is to be taken into consideration … in conjunction with all of the other circumstances of the case' in choosing the appropriate sentence and tailoring the sentence to fit the crime and the offender." The Court so concluded for the following reasons:

1. The accused was within less than two months of his statutory release date. He had effectively served his custodial time. Reducing the sentence and adding a term of probation would not significantly interfere with the practical effect of the sentence imposed;

2. The accused had institutional reports indicating he had made significant progress in custody, completing programs to assist sex offenders and those with substance abuse problems, and that he was a low risk of re-offending;

3. The accused had married his long-term partner who was a Canadian citizen;

4. It was apparent that he would almost certainly be deported to a country with which he had no meaningful connection if his sentence was not reduced.

"The sentencing process must retain 'a human face'," said Justice Sharpe. "Appellate courts appropriately exercise their powers in exceptional cases to avoid unintended penalties and consequences that would be patently unjust and unfair. … It would be unfair and unjust to leave in place a sentence that would have the unintended effect of condemning the [accused] to exile in a country with which he has no meaningful connection." The accused's sentence appeal was allowed.

Complete case available at www.ontariocourts.on.ca

"The sentencing process must retain 'a human face'."

LAWFUL PROBATION ORDER NOT NULLIFIED BY NEW SENTENCE

R. v. Knott, R. v. D.A.P., 2010 BCCA 386

Case 1: *R. v. Knott*

In 2005 the accused pled guilty to possessing a weapon dangerous to the public peace (an axe), breaking and entering a residence, possession of stolen identification, and obstruction of a police officer. He was sentenced to two years in prison followed by three years probation. He was also sentenced to a one year concurrent sentence on a second charge of breaking and entering with another three-year probation order. The following month, in a separate proceeding, he pled guilty to charges of possessing stolen property (an automobile), possession of break-in instruments, and obstructing a police officer. He was sentenced to 16 months in prison, to be served concurrently with his other sentences, followed by three years of probation. During his incarceration he assaulted a corrections officer and a week prior to the expiry of his two year custodial sentence he was sentenced to six months for the assault to be served consecutively to the sentence he was serving. Four months later he was sentenced to eight months of incarceration plus a year probation for assaulting an inmate. After serving a total sentence of two years, 11 months, and 16 days he was released and subsequently breached a condition of his 2005 probation order; operating a vehicle without the registered owner present. He was sentenced to 60 days for this breach.

Case 2: *R. v. D.A.P.*

The accused pled guilty to sexually assaulting the 13-year-old daughter and 9-year-old son of his common-law spouse. He was sentenced to a conditional sentence of two years less a day plus three years of probation. Several months later he pled guilty to breaking and entering and unlawful confinement; he had forced entry into the residence of his former partner, the mother of the sexual abuse

complainants. His conditional sentence was converted to incarceration and he was also sentenced to three years' in prison on the new charges, to be served concurrently.

Ruling

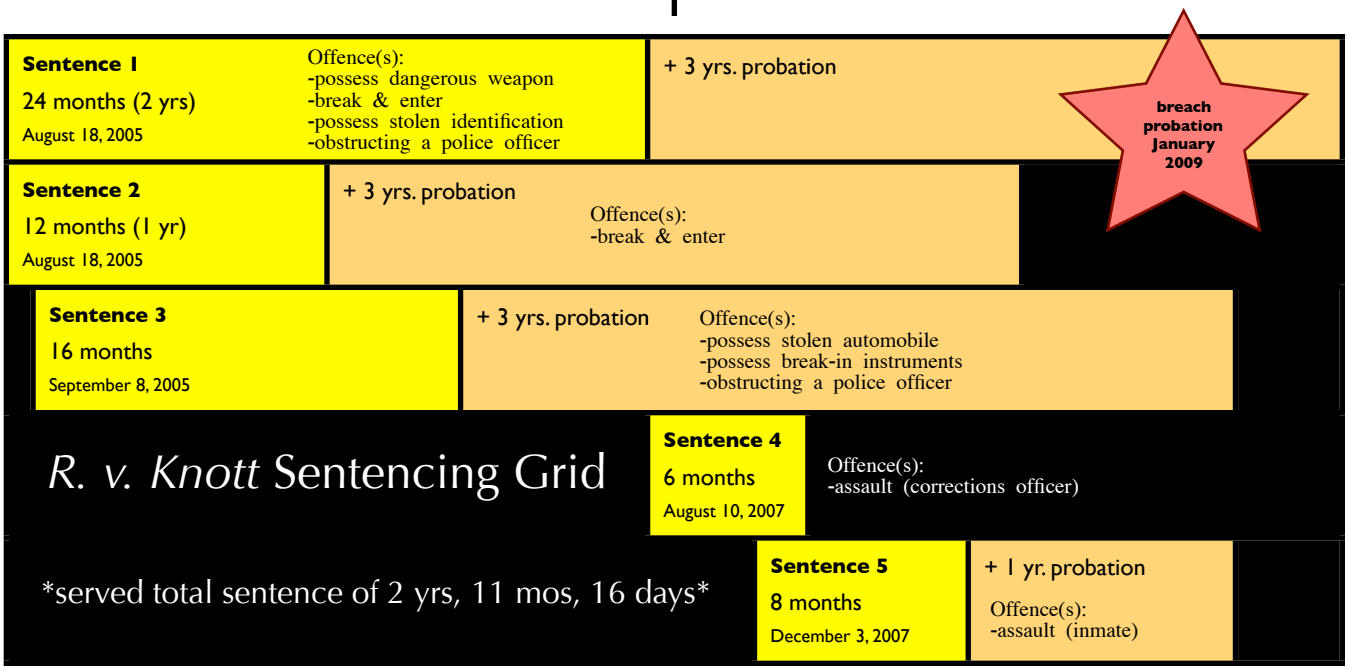
The accuseds sought to have their lawfully imposed probation orders set aside because of the long-standing practice in applying s. 139 of the *Corrections and Conditional Release Act* (*CCRA*) to nullify probation orders when an offender receives a cumulative sentence in excess of two years. The Crown, on the other hand, challenged the law relating to the retroactive invalidation of lawfully imposed probation orders as a result of these sentencing merger provisions.

A division of five judges of the British Columbia Court of Appeal was empaneled to hear the case. The law, as it stood at the time of the appeal, was to merge sentences under s. 139 of the *CCRA* and an otherwise lawfully imposed probation order was rendered invalid if an offender received a sentence that was cumulatively in excess of two years, regardless of when the sentences were imposed. Section 731(1) of the *Criminal Code* only allowed for the imposition of a probation order if the term of imprisonment did not exceed two years. Section 139(1) of the *CCRA* deemed a person to have been sentenced to one sentence commencing at the beginning of the first of those sentences and ending on the expiration of the last sentence to be served.

Justices Hall and Bennett, co-authoring the opinion for the unanimous Court of Appeal, re-examined these merger provisions to probation orders. Three applications of the "two year rule" found in jurisprudence were reconsidered as follows:

1. A single judge imposes a sentence at one sitting which, either individually or cumulatively, exceeds two years (eg. consecutive sentences imposed at the same time by the same judge). This is a straightforward application of s. 731(1)(b) of the *Criminal Code* and is an illegal sentence. Any probation order imposed at this time is unlawful and will be set aside. Section 139(1) of the *CCRA* is not engaged.

   BCCA ruling: NO CHANGE. "[T]he judge who imposes a sentence at one sitting, which is either individually or cumulatively in excess of two years, cannot add probation to that sentence, on a plain reading of s. 731(1)," said the Court of Appeal.



Sentence 1 24 months (2 yrs) less a day CSO June 3, 2008	+ 3 yrs probation
Sentence 2 36 months (3 yrs) + CSO (sentence 1 above) converted to incarceration February 19, 2009	

R. v. D.A.P. Sentencing Grid

Corrections and Conditional Release Act

Multiple Sentences

Additional sentences

s.139(1) 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.

2. The offender is already serving a sentence and a judge proposes to impose a further sentence (including probation) which will bring the total of the sentences beyond two years (eg. a sentence of two years or less with probation is imposed consecutive to a sentence the offender is currently serving). There were two approaches in calculating the two year rule when applying the sentence merger provisions of s. 139 of the *CCRA*: (1) start with the remanent of the first sentence and add it to the second sentence or (2) start with the date on which the first sentence was imposed. Using either approach, probation orders had been found to be unlawful if the entire sentence exceeded two years. Therefore, in cases where the calculated sentence exceeded two years probation should not have been imposed.

   BCCA ruling: Section s. 731(1)(b) of the *Criminal Code* clearly limits probation orders to situations where the sentence to be served does not exceed two years. Therefore, probation should not follow a sentence of more than two years or, put another way, probation should only be imposed if the total of the two sentences does not exceed two years. But the merger provisions of s. 139 of the *CCRA* used in calculating the total sentence should start from the remanent of the first sentence, as opposed to starting with the first day of the first sentence. If the total of the new sentence and the remanent exceeds two years, then probation should not be ordered or, said differently, a probation order may be imposed with a consecutive term of imprisonment if the remanent of the prior sentence combined with the new sentence does not exceed two years.

3. An offender has been sentenced to a lawful sentence and a probation order and a subsequent sentence results in the merged sentence extending beyond two years. In applying s. 139 of the *CCRA* the otherwise lawful probation order would have been set aside if the offender was required to serve more than two years, calculated from the commencement of the first sentence. In other words, a lawful probation order was rendered illegal by the subsequent imposition of a custodial sentence that, when added to the pre-existing sentence, exceeded two years; the unlawfulness resulted by application of s. 139(1) of the *CCRA*.

   BCCA ruling: Section 139 does not apply. "A subsequent sentence should not be held to invalidate a prior lawful sentence," said the Court. "Thus, regardless of any length of sentence imposed subsequent to a lawful probation order, the probation order is not nullified nor does it otherwise become unlawful by application of s. 139(1) of the

CCRA. The only exception is if the offender is subsequently sentenced to life imprisonment because then he or she will be on parole for life. No sentence can be consecutive to a life sentence, thus a probation order cannot follow a life sentence. Any probation order in such circumstances would be redundant."

Application

Both accuseds had a lawfully imposed probation order they were arguing became unlawful because of the imposition of a subsequent sentence. Section 139 did not apply to merge Knott's sentences; the subsequent sentences did not invalidate the original probation order. As for D.A.P., s. 139 also did not apply. The probation order had not yet commenced and his conditional sentence had not yet expired when he received an additional sentence of three years. "The three year maximum term for the probation order is not violated because it will not come into effect until he is released," said the Court of Appeal. "In both cases, the offenders were sentenced to lawful terms of probation. The imposition of the subsequent sentences does not reach back to invalidate the probation order." Both appeals were dismissed.

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

Editor's note: In *R. v. G.E.R.,* 2001 NFCA 56, the Newfoundland Court of Appeal also sat a five judge panel to revisit one of its earlier decisions on whether the total sentence was to be calculated from the commencement of the first sentence or from the remanent of it. It confirmed its previous decision and held that the sentence calculation started at the commencement of the initial sentence. The probation order in that case was set aside, even though it was otherwise a lawful sentence. This reasoning was most recently applied by the Newfoundland Court of Appeal in *R. v. Howse*, 2010 NLCA 40 (see Volume 10. Issue 4, p. 22). Perhaps the Supreme Court will weigh in on this someday and resolve the inconsistency across provincial appellate courts applying the two year rule using s. 139 of the *CCRA*.

BY THE BOOK:

Probation Orders

Making a Probation Order (*Criminal Code*)

s. 731(1) Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission, (a) if no minimum punishment is prescribed by law, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order; or (b) in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.

Duration of Order

"[N]o probation order shall continue in force for more than three years after the date on which the order came into force": s. 732.2(2)(b). The three year maximum length is calculated from the date the order comes into force, not from the date it was imposed.

If an offender is serving a sentence of probation, and receives an additional custodial sentence, the probation order continues in force so far as possible while the offender is in custody: s. 732.2(2)(a). The court, in these circumstances, may extend the order of probation for a period of up to one additional year: s. 732.2(5)(e). It was the intention of Parliament that a probation order should continue to run despite the imposition of a subsequent sentence of incarceration.

Failing or refusing to comply with probation order, without reasonable excuse, is a hybrid offence. If proceeded by indictment a sentence of imprisonment for a term not exceeding two years may follow. A summary conviction may bring imprisonment for a term not exceeding 18 months and/or a $2000 fine.

2009 POLICE REPORTED CRIME

In July 2010 Statistics Canada released its "Police reported crime statistics in Canada, 2009" report. Highlights of this recent collection of crime data include:

- there were **2,161,313** crimes (excluding traffic) reported to Canadian police in 2009; this represents **43,330** fewer crimes reported when compared to 2008;
- the total crime rate dropped **-3%**. This includes a violent crime rate drop of **-1%** and a property crime rate drop of **-4%**;
- impaired driving saw an increase of **+3%** to a total of **88,630** impaired driving offences. Of those, **154** involved death and another **890** bodily harm.

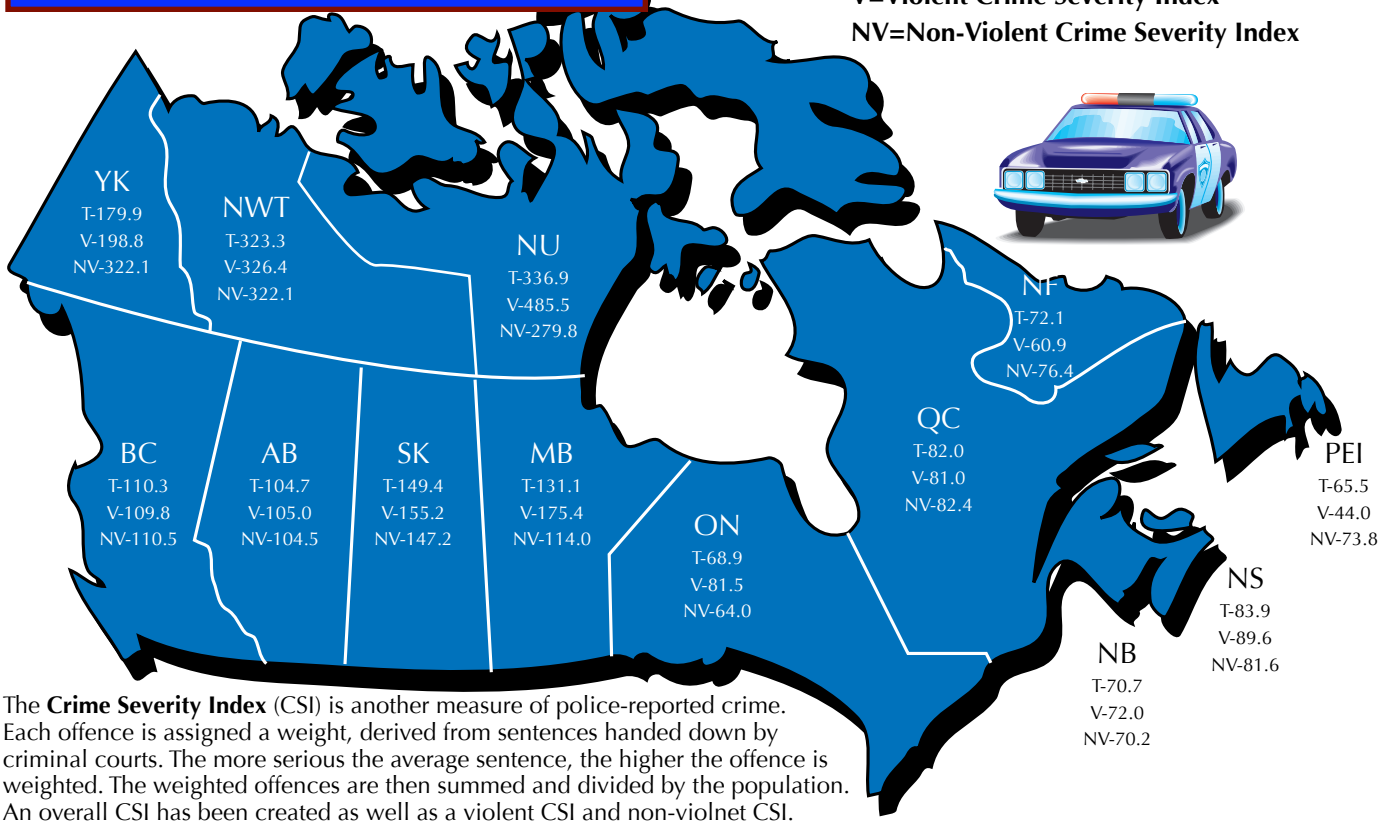
Source: Statistics Canada, 2010, "Police-reported crime statistics in Canada, 2009", Catalogue no. 85-002-X, Vol. 30, no. 2, Summer 2010.

Police-Reported Impaired Driving Offences

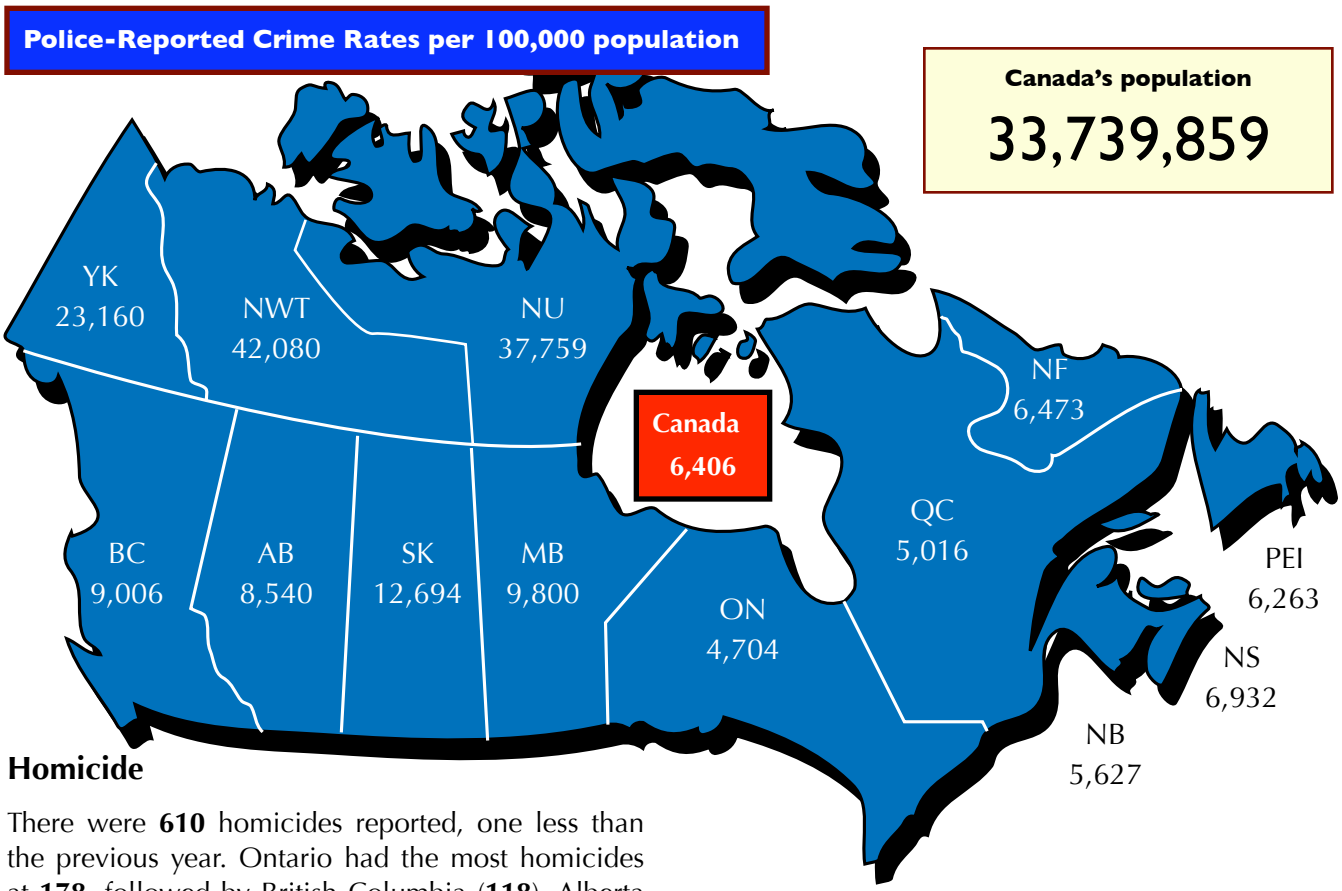
Province	Rate	Impaired Driving Offences	Rate change 2008 to 2009
SK	611	6,289	+1%
AB	477	17,597	0%
PEI	464	654	+39%
BC	384	17,099	+18%
NF	339	1,724	+8%
NS	335	3,142	+18%
NB	324	2,426	-11%
MB	303	3,706	+21%
QC	211	16,493	0%
ON	139	18,129	-4%

Police-Reported Crime Severity Indexes

T=Total Crime Severity Index
V=Violent Crime Severity Index
NV=Non-Violent Crime Severity Index



The **Crime Severity Index** (CSI) is another measure of police-reported crime. Each offence is assigned a weight, derived from sentences handed down by criminal courts. The more serious the average sentence, the higher the offence is weighted. The weighted offences are then summed and divided by the population. An overall CSI has been created as well as a violent CSI and non-violnet CSI.



Homicide

There were **610** homicides reported, one less than the previous year. Ontario had the most homicides at **178**, followed by British Columbia (**118**), Alberta (**95**) and Quebec (**88**). Prince Edward Island reported none while the province of Newfoundland only reported one. The Yukon and the Northwest Territories each reported two homicides. As for provincial homicide rates, Manitoba had the highest (**4.7** per 100,000 population) followed by Saskatchewan (**3.5**), Alberta and British Columbia (both at **2.6**), and Nova Scotia and New Brunswick (both at **1.6**). As for Census Metropolitan Areas (CMA), Abbotsford-Mission, BC had the highest homicide rate at **5.2**. The Canadian homicide rate was **1.8**.

Top Ten CMA Homicide Rates per 100,000

CMA	Rate	CMA	Rate
Abbotsford-Mission, BC	5.2	Edmonton, AB	2.6
Thunder Bay, ON	5.0	Vancouver, BC	2.6
Winnipeg, MB	4.1	Kingston, ON	2.5
Saguenay, QC	3.4	Greater Sudbury, ON	2.4
Halifax, NS	3.0	Saskatoon, SK	2.3

Canada's Top Ten Reported Crimes

Offence	Number
Theft Under $5,000 (non-motor vehicle)	550,183
Mischief	362,767
Break and Enter	205,710
Assault-level 1	181,570
Administration of Justice Violations	169,955
Disturb the Peace	118,815
Motor Vehicle Theft	108,172
Fraud	90,623
Impaired Driving	88,630
Uttering Threats	78,407

Robbery

In 2009 there were **32,239** robberies reported, resulting in a national rate of **96** robberies per 100,000 population. Manitoba had the highest robbery rate followed by Saskatchewan, British Columbia, and Alberta.

Police-Reported Robberies

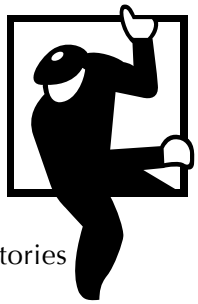
Province/ Territory	Rate	Robberies	Rate change 2008 to 2009
MB	198	2,417	+25%
SK	120	1,235	-4%
BC	111	4,952	-10%
AB	100	3,706	-5%
ON	93	12,210	+1%
QC	86	6,759	-5%
NU	71	23	+26%
NS	62	584	+1%
NWT	30	13	-41%
YK	27	9	-45%
NB	26	197	-6%
NF	23	115	-16%
PEI	13	19	-22%
CANADA	**96**	**32,239**	**-2%**

- robberies with a firearm accounted for **15%** of all robberies while a knife was used in **30%**;
- Winnipeg, MB had the highest CMA rate of robbery in Canada (**293**), **26%** higher than its 2008 rate. Saguenay, QC had the lowest rate (**24**). Three Ontario CMAs reported jumps of more than +30% in robberies; Kingston (**+52%**), Guelph (**+47%**), and Greater Sudbury (**+31%**);
- two CMAs reported declines in robberies of more than -20%; Trois-Rivieres, QC (**-27%**) and St. John's, NF (**-25%**).

Top Ten CMA Robbery Rates per 100,000

CMA	Rate	CMA	Rate
Winnipeg, MB	293	Montreal, QC	145
Regina, SK	214	Toronto, ON	134
Saskatoon, SK	204	Thunder Bay, ON	129
Vancouver, BC	152	Halifax, NS	199
Edmonton, AB	149	Abbotsford-Mission, BC	114

Break and Enter



In 2009 there were **205,710** break-ins reported to police. The national break-in rate was **610** break-ins per 100,000 people. Nunavut had the highest break-in rate (**1,973**) followed by the Northwest Territories (**1,651**) and Saskatchewan (**941**).

Police-Reported Break-ins

Province/ Territory	Rate	Break-ins	Rate change 2008 to 2009
NU	1,973	635	-5%
NWT	1,651	717	-16%
SK	941	9,698	-2%
MB	860	510	+3%
YK	761	256	-1%
BC	755	33,622	-15%
QC	744	58,282	+2%
AB	629	23,181	-3%
NF	566	2,881	+2%
NS	543	5,090	0
PEI	507	715	-12%
NB	463	3,470	-9%
ON	433	56,653	-4%
CANADA	**610**	**205,710**	**-4%**

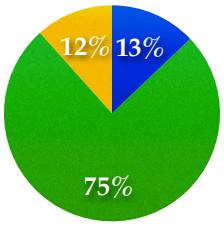
- break-ins accounted for nearly **15%** of all property crimes;
- **60%** of break-ins were to a residence, **30%** to a business location, and **10%** to other locations, such as a shed or detached garage;
- residential break-ins dropped **-2%** while business break-ins declined **-9%**;
- the 2009 break-in rate was **-42%** lower than it was a decade ago;
- among CMAs, Trois-Riveieres, QC reported the highest break-in rate (**875**) while Toronto reported the lowest (**318**). Peterborough, ON (**+27%**), Saguenay, QC (**+21%**), and Moncton, NB (**+13%**) all reported double digit increases in the break-in rate, while Abbotsford-Mission, BC (**-37%**), Victoria, BC (**-29%**), Saint John, NB (**-24%**), Sherbrooke, QC (**-19%**), Kingston, ON (**-17%**), Regina, SK (**-16%**), Thunder Bay, ON (**-16%**), Vancouver, BC (**-13%**), Windsor, ON (**-11%**), Guelph, ON (**-10%**), and Ottawa, ON (**-10%**) all had double digit drops.

Top Ten CMA Break-in Rates per 100,000			
CMA	**Rate**	**CMA**	**Rate**
Trois-Rivieres, QC	875	Vancouver, BC	787
Regina, SK	856	Brantford, ON	775
Saskatoon, SK	856	St. John's, NF	766
Winnipeg, MB	810	Abbotsford-Mission, BC	727
Kelowna, BC	796	Gatineau, QC	713

Drugs

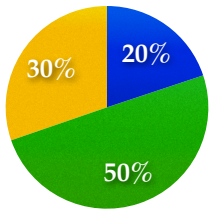
In 2009 there were **97,666** drug-related crimes coming to the attention of police. These offences included possession, trafficking, production or distribution.

Possession Offences by Drug Type



- possession offences accounted for **64,889** of these crimes - cannabis (**48,981**); cocaine (**7,543**); and other drugs (**8,365**). Other drugs include heroin, crystal meth, and ecstasy;
- the trafficking, production, and distribution offences totaled **32,777** - cannabis (**16,335**); cocaine (**9,923**); and other drugs (**6,519**);

Trafficking, Production & Distribution Offences by Drug Type



- British Columbia had the highest drug related offence rates of all 10 provinces for cannabis, cocaine and other drugs;

Drug-related Crime Rates by Province per 100,000 population			
Province	**Cannabis rate**	**Cocaine rate**	**Other drugs rate**
BC	368	112	64
NS	211	34	46
SK	184	39	40
QC	183	24	48
NB	169	35	53
AB	168	83	32
NF	164	34	41
ON	151	42	39
MB	137	60	29
PEI	88	22	42

- the territories continue to have some of the highest drug-related crime rates in Canada.

Territory	Cannabis rate	Cocaine rate	Other drugs rate
NWT	935	262	129
NU	783	16	28
YK	395	155	62

- overall, drug offences were down in 2009 (**-6%**) from 2008, mainly due to a **-21%** decline in cocaine offences.

Motor Vehicle Theft

In 2009 there were **108,172** motor vehicle thefts reported to police, down (**-15%**) from **125,568** in 2008 and down **-40%** from decade ago.

- on average there were **296** vehicles stolen per day in Canada in 2009;
- the motor vehicle theft rate was **321** per 100,000 population
- the most vehicles were reported stolen in Quebec (**27,517**) while the Yukon had the fewest vehicles stolen (**130**);

Police-Reported Motor Vehicle Thefts

Province/ Territory	Rate	Motor Vehicle Thefts	Rate change 2008 to 2009
NU	593	191	+9%
NWT	536	233	-27%
MB	534	6,528	-28%
SK	517	5,326	-3%
AB	495	18,246	-20%
BC	440	19,614	-15%
YK	386	130	-25%
QC	351	27,517	-13%
ON	208	27,175	-13%
NB	172	1,288	0
NS	140	1,311	-17%
PEI	111	157	-8%
NF	90	456	+4%
CANADA	**321**	**108,172**	**-15%**

- eight CMAs reported declines in motor vehicle thefts greater than -20%; Winnipeg, MB (**-34%**), Abbotsford-Mission, BC (**-33%**), Peterborough, ON (**-33%**), Calgary, AB (**-28%**), Saint John, NB (**-26%**), Thunder Bay, ON (**-23%**), Halifax, NS (**-22%**), Regina, SK (**-22%**).

Top Ten CMA Vehicle Theft Rates per 100,000

CMA	Rate	CMA	Rate
Brantford, ON	686	Saskatoon, SK	601
Kelowna, BC	659	Regina, SK	575
Winnipeg. MB	629	Vancouver, BC	464
Abbotsford-Mission, BC	622	Trois-Rivieres. QC	436
Edmonton, AB	601	Hamilton, ON	425

Police Assaults

In 2009 there were **9,822** assaults reported against police officers, an average of about **27** per day. This number is up slightly from **9,806** in 2008.

- over the last decade, from 1999 to 2009, assaults against police officers have risen **+23%**.

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 it's most recent acquisitions which may be of interest to police.

75 e-learning activities: making online learning interactive.

Ryan Watkins.

San Francisco : Pfeiffer, c2005.

LB 1044.87 W38 2005

The 2020 workplace: how innovative companies attract, develop, and keep tomorrow's employees today.

Jeanne C. Meister and Karie Willyerd.

New York : Harper Business, c2010.

HF 5549.5 R44 M45 2010

Anger management for everyone: seven proven ways to control anger and live a happier life.

Raymond Chip Tafrate, Howard Kassinove.

Atascadero, Calif. : Impact, c2009.

BF 575 A5 T35 2009

Before you say yes: a guide to the pleasures and pitfalls of volunteer boards.

Doreen Pendgracs ; foreword by Marian Hebb.

Toronto, Ont. : Dundurn Press, c2010.

HV 41 P463 2010

Campus attacks: targeted violence affecting institutions of higher education.

by Diana A. Drysdale, William Modzeleski, Andre B. Simons.

Washington, D.C. : United States Secret Service : United States Dept. of Education : Federal Bureau of Investigation, 2010.

HV 6534 B53 D793 2010

Effective leadership [sound recording]: how to be a successful leader.

John Adair.

[London, Eng. : Macmillan Digital Audio, 2010]

Leaders play an essential role in every aspect of our modern lives and good leadership is an art that is highly prized. Effective leaders not only control, appraise and analyse, they also encourage, improve and inspire. In Effective Leadership John Adair, Britain's foremost expert on leadership training, shows how every manager can learn to lead. Drawing on numerous examples of leadership in action - commercial, historical, military - he identifies the essential requirements for good leadership and explains how you can enhance your personality, knowledge and position to become the best leader you can be.

BF 637 L4 A264 2010

Effective succession planning: ensuring leadership continuity and building talent from within.

William J. Rothwell.

New York : AMACOM, c2010.

HD 57.7 R689 2010

Five seconds at a time: how leaders can make the impossible possible.

Denis Shackel with Tara Bradacs.

Toronto : HarperCollins Canada, c2010.

HD 38.2 S53 2010

Googling security: how much does Google know about you?

Greg Conti.

Upper Saddle River, NJ : Addison-Wesley, c2009.

QA 76.9 A25 C667 2009

Groundswell: winning in a world transformed by social technologies.

Charlene Li, Josh Bernoff.

Boston, Mass. : Harvard Business Press, c2008.

HF 5415.1265 L48 2008

The handbook for working with difficult groups: how they are difficult, why they are difficult and what you can do about it.

Sandy Schuman, editor.

San Francisco, CA : Jossey-Bass, c2010.

HD 42 H357 2010

How leaders speak: essential rules for engaging and inspiring others.

by Jim Gray.

Toronto, Ont. : Dundurn Press, c2010.

HF 5718 G739 2010

How to succeed at an assessment centre: essential preparation for psychometric tests, group and role-play exercises, panel interviews and presentations.

Harry Tolley, Robert Wood.

London ; Philadelphia, PA : Kogan Page, 2010.

HF 5549.5 E5 T65 2010

Managing workplace bullying: how to identify, respond to and manage bullying behavior in the workplace.

Aryanne Oade.

Basingstoke ; New York : Palgrave Macmillan, 2009.

HF 5549.5 E43 O33 2009

Open leadership: how social technology can transform the way you lead.
Charlene Li.
San Francisco : Jossey-Bass, c2010.
HD 57.7 L5 2010

Organizing for success.
Kenneth Zeigler.
New York : McGraw-Hill, c2010.
HD 69 T54 Z45 2010

The other kind of smart: simple ways to boost your emotional intelligence for greater personal effectiveness and success.
Harvey Deutschendorf.
New York : AMACOM/American Management Association, c2009.
BF 576 D48 2009

Post-traumatic stress.
Stephen Regel, Stephen Joseph.
Oxford ; New York : Oxford University Press, 2010.
RC 552 P67 R44 2010

Preventing and treating bullying and victimization.
edited by Eric M.
Vernberg, Bridget K. Biggs.
New York : Oxford University Press, 2010.
BF 637 B85 P74 2010

The reactor factor: how to handle difficult work situations without going nuclear.
Marsha Petrie Sue.
Hoboken, N.J. : John Wiley & Sons, c2010.
HD 42 S837 2010

Switch: how to change things when change is hard.
Chip Heath and Dan Heath.
New York : Broadway Books, 2010.
BF 637 C4 H43 2010

The theory and practice of online learning.
edited by Terry Anderson.
Edmonton : AU Press, c2008.
LB 1028.5 T496 2008

Think again: why good leaders make bad decisions and how to keep it from happening to you.
Sydney Finkelstein, Jo Whitehead, and Andrew Campbell.
Boston, Mass. : Harvard Business Press, c2008.
HD 30.23 F555 2008

Unforgettable experiential activities: an Active Training resource.
Mel Silberman.
San Francisco, CA : Pfeiffer, c2010.
HF 5549.5 T7 S553 2010

Virtual training basics
Cindy Huggett.
Alexandria, Va. : ASTD Press ; London : Eurospan [distributor], 2010.
HF 5549.5 T7 H84 2010

When good men get angry.
Bill Perkins.
Carol Stream, Ill. : Tyndale House Publishers, c2009.
BF 575 A5 P49 2009

Win at work!: the everybody wins approach to confliction resolution.
Diane Katz.
Hoboken, N.J. : Wiley, c2010.
HD 42 K38 2010

LEGALLY SPEAKING:

Abetting

"S. 21(1)(c) of the Criminal Code] does not involve physical acts of aiding .... Abetting simply requires intentional encouragement, which may be by acts or words. ... Coming along to give "moral" support or company or encouragement can fit that." - Alberta Court of Appeal Justice Cote in *R. v. Hennessey, 2010 ABCA 274 at para.* 39.