JIBC

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

IN MEMORIAM

On June 28, 2011 32-year old York Regional Police Constable Garrett Styles was killed after being dragged by a vehicle while making a traffic stop at approximately 4:50 am.

He had stopped a vehicle being driven by an unlicensed 15-year-old boy. As he spoke to the driver, the van suddenly accelerated and dragged Constable Styles.

The vehicle rolled over, trapping Constable Styles underneath it. Despite being severely injured, he was able to radio for assistance and advise dispatchers and other officers of the situation.

Constable Styles was transported to South Lake Regional Health Centre in Newmarket where he succumbed to his injuries.

The driver of the vehicle that struck him was taken into custody and charged with first degree murder.

Constable Styles had served with the York Regional Police Service for seven years. He is survived by his wife and two young children.

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

"They Are Our Heroes. We Shall Not Forget Them."

inscription on Canada's Police and Peace Officers' Memorial, Ottawa

Highlights In This Issue

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

WHAT'S NEW FOR POLICE IN THE LIBRARY

The Justice Institute of British Columbia Library is an excellent resource for learning. Here are some of its most recent acquisitions that might be of interest to police.

The 8 dimensions of leadership: DiSC strategies for becoming a better leader

Jeffrey Sugerman, Mark Scullard, Emma Wilhelm.

San Francisco, CA: Berrett-Koehler Publishers, c2011.

BF 637 L4 S875 2011

Appreciative inquiry: change at the speed of imagination.

Jane Magruder Watkins, Bernard Mohr, Ralph Kelly.

San Francisco, CA : Pfeiffer, c2011.

HD 58.8 W388 2011

Coping with post-traumatic stress disorder: a guide for families.

Cheryl A. Roberts.

Jefferson, N.C. : McFarland & Co., c2011.

RC 552 P67 R63 2011

Educational gameplay and simulation environments: case studies and lessons learned.

[edited by] David Kaufman, Louise Sauvâe.

Hershey, PA: Information Science Reference, c2010.

LB 1029 G3 E34 2010

AGGRAVATED ASSAULT: NO NEED TO PROVE INTENTION TO MAIM, WOUND, OR DISFIGURE

R. v. Nanemahoo, 2011 ABCA 182

A man was on his deck socializing with family and friends when he saw three young people running in the alley near his home. It was about midnight. He grabbed a golf club and confronted a group of 10 young people behind his garage. The group attacked him with razor-like objects. He was also punched and kicked, which resulted in significant injuries. His face, head, and throat were slashed and his left ring finger was cut, causing tendon damage. Four young people, including the accused, were apprehended shortly after the altercation. The accused had blood on one of his shoes and the victim's blood on his jacket. He also had possession of the victim's golf club, which also had the victim's blood on it. An X-Acto-type blade, partially wrapped in black electrical tape, was found 1-2 feet from where the accused was detained. Fibres found on the blade matched fibres from the accused's jacket. He was charged with aggravated assault and two counts of possessing a weapon.

The accused was found not guilty of the aggravated assault charge in the Alberta Court of Queen's Bench. Instead, he was convicted of the lesser and included crime of assault causing bodily harm, as well as two weapon offences. The trial judge found the accused, a willing participant in the mob beating, had kicked the victim and exacerbated his injuries in doing so. However, the judge was not satisfied beyond a reasonable doubt that the accused had used any form of weapon during the assault or that he personally caused the victim's specific injuries.

The Crown challenged the trial judge's ruling before the Alberta Court of Appeal submitting that the trial judge erred by requiring proof that the accused used a weapon or that he personally caused the specific injuries that wounded, maimed, or disfigured the victim. The Crown also claimed that the judge erred in assessing the *mens rea* needed for aggravated assault.

> "There is no requirement of proof of an intention to maim, wound or disfigure the complainant. At law, the same mens rea applies to aggravated assault as it does to assault causing bodily harm. The only difference between those two offences is the extent of the injuries occasioned to the victim."

Party to the Offence: s. 21 *Criminal Code*

The Court of Appeal found that the trial judge made a legal error by requiring proof that the accused used a weapon and/or personally caused the particular injuries that resulted in the wounding, maiming, or disfigurement. This was a group attack and the party to an offence provisions under s. 21(1)(b) of the *Criminal Code* (*CC*), which states that *"every one is a party to an offence who ... (b) does or omits to do anything for the purpose of aiding any person to commit it,"* applied. The accused's actions made him a party to aggravated assault. He "aided the actual stabbing by ... removing the golf club from the complainant, thereby depriving him of some form of protection," said the Court of Appeal. "Furthermore, ... he participated in the actual assault by kicking the complainant." Thus, the trial judge erred in requiring that the Crown prove the accused used a weapon or personally caused the specific injuries to the victim.

Mens Rea

The judge required that the accused have an intention to wound, maim or disfigure the victim along with the objective foresight of the specific wounds resulting from the assault or the knowledge that others had weapons in their possession and were prepared to use them. This was a mistake. The trial judge erred in assessing the *mens rea* necessary for the offence of aggravated assault. "The *mens rea* for aggravated assault is the *mens rea* for assault simpliciter plus the objective foresight of the risk of bodily harm," said the Court of Appeal. It continued:

> There is no requirement of proof of an intention to maim, wound or disfigure the complainant. At law, the same mens rea applies to aggravated assault as it does to assault causing bodily harm. The only difference between those two offences is the extent of the injuries occasioned to the victim. In convicting the [accused] of the lesser charge of assault causing bodily harm, the trial judge must have held that the [accused] had the mens rea as would be required for assault causing bodily harm which is the same mens rea as required for aggravated assault.
>
> By virtue of the provisions of section 21(1)(b) of the Criminal Code, the [Crown] need not show that the [accused], as a party to the offence, had any greater mens rea than the actual perpetrator and in particular need not establish an objective foresight of the specific wounds resulting from the assault. [paras. 22-23]

The Crown's appeal was allowed, the assault causing bodily harm conviction was vacated, and a finding of guilt was imposed for aggravated assault. The matter was sent back to the Alberta Court of Queen's Bench for sentencing.

Complete case available at www.albertacourts.ab.ca

DENUNCIATION & DETERRENCE KEY IN SENTENCING OF ATTACK ON OFFICER

R. v. Patton, 2011 ABCA 199

After hearing squealing tires and seeing a car parked halfway into the road blocking a truck, a school resource police officer approached the two vehicles and an altercation ensued. When the officer was kneeling on the back of a man he was arresting while using both hands for handcuffing, the 20-year-old accused kicked the officer in the side of the head. The officer was seriously injured from the kick, having to attend a brain injury program and undergoing eight months of physiotherapy. The harm he suffered prevented him from returning to his regular work duties for 16 months after the incident and he continued to suffer migraines and neck problems.

The accused pled guilty in the Alberta Court of Queen's Bench to assault causing bodily harm and uttering threats to cause bodily harm. He had a minor criminal record that arose after this incident; he was convicted and sentenced to breaching a recognizance and obstructing a peace officer after the attack but before sentencing on it. The judge described the kick as "a very severe", "football-styled kick" that was intended to, and did, "inflict serious injury". The officer was completely vulnerable to attack while making an arrest and received no warning of it. The assault was a "cowardly" and "extremely serious attack on a police officer" and denunciation and deterrence became the key sentencing factors.

The Crown sought a global sentence of four to five years imprisonment, less four months credit for a *Charter* breach arising from police misconduct following the arrest and six months credit for the time spent in custody. Defence counsel, on the other hand, suggested a sentence range of between 12 to 18 months, less the 10 months credit proposed by Crown and a further two months credit for the time the accused spent in custody after his bail was revoked. The judge imposed a global sentence of 48 months in jail. He then subtracted 22 months; 12 months for the guilty plea, four months for the *Charter* breach, and six months for the time served before being released on bail. Thus, the accused had 26 months left to serve.

The accused appealed his 48 month sentence arguing the judge erred by failing to follow similar precedents and not properly applying relevant sentencing principles, while also giving undue weight to aggravating factors and insufficient weight to mitigating ones. But the Alberta Court of Appeal disagreed:

- The police officer was in a position of extreme vulnerability when the accused kicked him. The officer was in the process of securing handcuffs on another person and was kneeling on or against the back of that person. He was prone with his head at perfect level for an effective kick to it.

- The victim was a peace officer executing his duty. Many high schools have single police officers attached to them. Those officers are particularly vulnerable to this sort of attack because they work alone.

- The accused was trespassing at the school for an unlawful purpose; to enforce his own concept of vigilante justice. This type of conduct is why there is a need for police at high schools.

- Assault causing bodily harm is to a degree a consequence-based offence. The severity of the harm will normally be a relevant factor in sentencing. It would be expected that a football style kick to the head would normally result in substantial harm to its recipient. Such a kick has a real risk of causing death with the potential of a second degree murder or manslaughter charge.

- Denunciation and deterrence are the prime considerations in sentencing for this type of serious offence. This was a dangerous attack on a vulnerable police officer acting in the course his duties.

"[I]nterfering with a lawful arrest is not a form of motivation that weighs on the mitigating side of the sentencing exercise."

The accused also suggested that the sentencing judge did not consider a number of mitigating factors which should have resulted in a lower sentence. But after review, the Court of Appeal found this argument was without merit. Some of the factors the court rejected as mitigating included:

➡ **Motivation**. Although the accused said he was concerned about his friend being arrested, this motivation was ignoble. "Interfering with a lawful arrest is not a form of motivation that weighs on the mitigating side of the sentencing exercise," said the Court. "It is also impossible to imagine any other positive motive in the circumstances of the [accused's] attack on the vulnerable officer."

➡ **Role in the offence.** The accused's "role in the offence could not have been more singular. He alone kicked the officer in the head. He went to the school with an illicit purpose in mind and when the officer intervened, he took it upon himself to attack the officer."

➡ **Post-offence behaviour.** Sitting quietly in the back of the police car after he was arrested was not mitigating. "By then he was in handcuffs and was doing no more than what is expected of all arrested individuals. Raucous behaviour in a police cruiser may be aggravating, but compliance with societal norms is not mitigating."

Finally, in rejecting the accused's argument that the judge ignored the step principle in fixing an appropriate sentence, the Court of Appeal stated:

> We do not see how that principle is at play in this case. The [accused] was being sentenced as a near first time offender. His prior record was essentially unrelated and was minimal. What occurred here is that a relatively young first time offender committed a serious, life threatening assault on a vulnerable police officer that left that officer with significant lasting consequences. First time offenders are often treated with leniency but some first offences can be so serious as to demand significant incarceration. This is such a case. [para. 26]

The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

"[H]e was a peace officer executing his duty. Many high schools have single police officers attached to them. Those officers are particularly vulnerable to this sort of attack because they work alone."

WATERFIELD TEST JUSTIFIES WARRANTLESS POLICE ENTRY

R. v. Farrah, 2011 MBCA 49

Two patrons using an ATM located inside the front entrance of a bank at 11:30 pm were confronted by a man with a sawed-off shotgun. The robber was wearing a trench coat and a toque, and had a scarf over his face. When the robber was distracted the two patrons fled. As one of the patrons was driving away, the robber fired the shotgun at his vehicle. No one was injured but the vehicle was damaged. A few minutes later a police tracking dog was summoned to the scene. The dog picked up a scent, began tracking, and led police to an apartment building about three blocks away. A belt, commonly used to tie overcoats, was found inside the building. The dog went to the second floor and initially showed interest in suite 16, but then proceeded to the front door of suite 12. The K9 officer noticed water on the floor in front of suite 16 and saw that the door was ajar. The officer knew that a gun had been fired and considered that more than one person might be involved, so he ordered that both suites be secured in the interests of safety by clearing them of any persons.

After police entered suite 12 with their guns drawn, the accused was found hiding under a pile of clothing in a bedroom. He was handcuffed and escorted from the suite. In suite 16 police found a sawed-off double-barreled shotgun in a kitchen closet, which was big enough for a person to walk into and hide. One live round and one empty shell were found in the shotgun and it smelled of burnt gunpowder, as if it had recently been fired. The officers also found, behind the main door to suite 16, a trench coat without a belt, a pair of wet runners, two toques, and a scarf. The belt found inside the building appeared to match the trench coat found in the suite. The accused was arrested for robbery and weapons related offences and read his rights. The police found keys for suites 12 and 16 when they searched him and he told officers that he was in the process of moving from suite 16 to suite 12.

At trial in the Manitoba Court of Queen's Bench the judge found the warrantless search of suite 16 was unreasonable and breached the accused's s. 8 *Charter* rights. She held that the police had acted without authority when they searched suite 16 because the search was neither incidental to arrest nor detention, nor did the 911 call cases apply because the safety concerns in this case arose not in response to a 911 call, "but rather from the recent commission of a crime and the officers' pursuit of one or more of the suspects". In applying the balancing test in *Waterfield/Dedman* to determine whether there was a common law basis for the search, the judge stated:

> While the search was clearly conducted in the execution of police duties, the issue is whether it involved a justifiable use of police powers in the circumstances. That is, a balance must be struck between the competing interest of the police duty and the privacy of the individual. In my view, the common law does not authorize the police to do what they did here. That is, they were not justified in entering a private dwelling house for a purpose connected with the arrest of a suspect or to apprehend a further suspect without the subjective belief that there were grounds for arrest.

The judge found that the police had entered suite 16 for a dual purpose. Not only did they enter to address public and police safety concerns, but also for a purpose connected to the accused's pursuit and their intention to apprehend any other suspects. Because the police did not have the subjective belief that there were grounds for arrest when they entered the suite, their conduct was not justifiable under *Waterfield/Dedman*. Thus, the judge held that common law police powers did not authorize the officers to enter suite 16 without the subjective belief that there were grounds for an arrest. The evidence, however, was admitted under s. 24(2) and the accused was convicted of two counts of robbery with a firearm, possession of a prohibited weapon with ammunition, possession of a sawed-off shotgun for a dangerous purpose, disguise with intent, and mischief under $5,000. He was sentenced to seven years imprisonment, less pre-sentence custody credit.

The accused then appealed to the Manitoba Court of Appeal arguing that the trial judge erred in excluding the evidence resulting from the *Charter* violation. He also appealed his sentence.

The Entry

In determining whether there was a s. 8 *Charter* breach, all of the surrounding circumstances would need to be considered. This determination involves a two-step process:

1) The accused must satisfy the court, on a balance of probabilities, that he had a reasonable expectation of privacy with respect to suite 16. In this case the trial judge found the accused had established that he had a reasonable expectation of privacy and the Court of Appeal accepted this finding.

2) If satisfied that an accused has established a reasonable expectation of privacy, a court will then inquire as to whether the search was reasonable. "Normally, the onus falls on the accused to prove a Charter violation. However, because warrantless searches are presumptively unreasonable, it is the Crown that bears the burden of establishing, on a balance of probabilities, that the search was reasonable. The search will be reasonable if the police are authorized by law (either through statute or common law) to conduct the search, if the law authorizing the search is reasonable and if the search is conducted in a reasonable manner."

Justice Chartier, writing the Court of Appeal's opinion, recognized that the "sources of legal authority for police to conduct warrantless searches will arise through statute or common law." As for the common law, it will typically provide lawful authority for warrantless searches when:

- ✓ there is consent to the search;
- ✓ the police come upon evidence in the course of their duties or unexpectedly in plain view;
- ✓ the search is incident to arrest;
- ✓ the search is incident to detention; or
- ✓ the search is ancillary to the common law police powers and duties to keep the peace and preserve life (the *Waterfield/Dedman* test).

Side Bar

Can't Cut It Both Ways

During a *voir dire* the accused did not testify. However, he nonetheless argued that his s. 8 *Charter* right had been breached when the police entered suite 16 without a warrant. To prove a breach of his s. 8 right, he attempted to establish that he had a reasonable expectation of privacy in suite 16 by relying upon police testimony that he said he was still in the process of moving from suite 16 to suite 12.

Later, however, the accused took the stand at trial and testified that, at the time of his arrest, he had no longer been living at suite 16 and that he had not been there for five days. He was distancing himself from the suite to avoid being found in possession of the gun. In essence, he was saying that he had no privacy interest in suite 16. This was contrary to the position he took during the *voir dire*. Noting the evidence at the *voir dire* departed significantly from the evidence at trial, Justice Chartier stated:

> [T]his contradiction is troublesome. The concern and unease are clear: an accused should not be able to successfully argue a position at a voir dire based upon evidence of, or from him, and then entirely disavow or attempt to disavow that position at trial based upon a change in his evidence. Here, the position he took regarding a privacy interest at the voir dire allowed him to obtain a favourable Charter breach ruling. How can he then be allowed to withdraw from his earlier position and argue that he had no privacy interest in suite 16 and thus cannot be linked to the shotgun found in that suite? The maxim quod approbo non reprobo comes to mind: one cannot approbate and reprobate at the same time.

Noting that "an individual's dwelling house is deserving of special protection from police intrusion," Justice Chartier found that "any authority to perform the search conducted by the police would emanate from ... the ancillary police powers and duties to keep the public peace and preserve life, specifically to ensure public and police safety." In determining whether the entry and search amounted to a lawful exercise of their common law powers (and was therefore authorized by law), the two-pronged *Waterfield/Dedman* test had to be satisfied. The Crown needed to show that:

(1) the search "fell within the general scope of the duties of a police officer under statute or common law", and

(2) the "interference with liberty [was] necessary for the carrying out of the particular police duty and [was] reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference".

Justice Chartier ruled that the trial judge "erred in law by conflating, in her 'justifiability' analysis, the common law police duty to ensure public and police safety with any ancillary action that may have been required following the entry (arresting suspects)":

> In my opinion, whether the police believed they had grounds to arrest was not determinative of whether they were justified to enter the suite in the particular circumstances of this case. What mattered was first, whether the police action (the warrantless entry into a dwelling) "fell within the general scope" of any duty imposed by law or recognized at common law and second, if it did, whether that action was in line, in the circumstances of this case, with the second prong of the Waterfield/Dedman test.
>
> On the first part of the test (whether the search fell within the general scope of police duties), it is trite law that the common law powers of the police include the protection of life and property. Any number of cases have also indicated that the police common law duties includes safety concerns. ... In this case, the principal duty to be performed, and the main reason for entry into suite 16, was to address public and police safety concerns. As a result, the police entry to address such concerns would fall within the general scope of the common law duties of the police.
>
> The second part of the test is whether the carrying out of that duty was "reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference". Put another way, was it a justifiable use of powers associated with the duty? [references omitted, paras. 37-39]

As well as the "'justifiability' factors, there must be an evidentiary basis underlying the police safety concern," said Justice Chartier. "The police must not be speculating or acting on a hunch. They must have reasonable grounds for the concern."

In this case the Court of Appeal found the forced entry into the suite was a justifiable use of police powers to address public and officer safety concerns.

> [T]he information available to the police at the time of entry into suite 16 was that they were in "hot pursuit" of a suspect(s) involved in a robbery at a bank and that a gun had been discharged. They were aware that there was possibly more than one suspect. The tracking dog had led them first to suite 16 and then to suite 12. An unarmed suspect was found in suite 12. The gun had not yet been located. Their attention returned to suite 16. It must be remembered that a live round of ammunition had already been discharged in the direction of one of the complainants. I can easily conclude

Waterfield/Dedman Justifiability Factors

The justifiability of an officer's conduct depends on a number of factors including:

- the duty being performed,
- the extent to which some interference with individual liberty is necessitated in order to perform that duty,
- the importance of the performance of that duty to the public good,
- the liberty interfered with, and
- the nature and extent of the interference.

"A legal warrantless entry into a dwelling will often arise in an emergency setting, where it would be impractical to obtain a warrant because of the fluidity and potential volatility of the situation ... or the dangerousness of the conditions"

> that, on these facts, the police had reasonable grounds to be concerned for public and officer safety.
>
> Finally, it must be determined whether the forced entry into the dwelling to address public and officer safety concerns was justifiable considering the totality of the circumstances. The justifiability analysis is a contextual one and, for that reason, the circumstances of each case will inform the validity of the warrantless search.
>
> Although the police had reasonable grounds for concern, they had no way of knowing, with certainty, who or what they would find upon entry into the suite. They were confronting an unpredictable and potentially volatile situation with a real possibility that the safety of the public or police officers may be imperilled if time were taken to obtain a warrant. Waiting for a warrant was simply not a viable option. There may have been an injured party in that suite, a hostage may have been taken or an armed suspect may have suddenly exited the suite. Immediate action was required to address these safety concerns. There is considerable authority on the need for the police to act quickly when a gun is involved to address the risk posed to the community and the police. [references omitted, paras. 42-44]

Additionally, "where extraordinary circumstances exist (such as a legitimate cause for concern with respect to the safety of those at the scene or of the public generally), ... the police are permitted to enter the dwelling without a warrant to conduct a 'sweep search' for other persons":

> A legal warrantless entry into a dwelling will often arise in an emergency setting, where it would be impractical to obtain a warrant because of the fluidity and potential volatility of the situation (in response to 911 calls) or the dangerousness of the conditions (as in this case, where a shot had been fired and the police were in pursuit of the suspect). To be clear, because of the "high value" placed on the security and privacy of the home, situations calling for a warrantless non-consensual entry in a dwelling will be the exception. [reference omitted, para. 47]

"[T]here must be an evidentiary basis underlying the police safety concern. The police must not be speculating or acting on a hunch. They must have reasonable grounds for the concern."

In this case, the trial judge was preoccupied with the apprehension of suspects (making an arrest) as the purpose of police entry and their lack of a subjective belief that there were grounds to do so when they entered. Instead, the principal reason for entry into suite 16 was to secure the premises as a result of public and officer safety concerns, not to make arrests. Even though the police did make an arrest, it was ancillary to safety reasons for entry.

The *Waterfield/Dedman* test had been met and the entry into and the search of suite 16 was authorized by law. The manner in which the search was conducted was also reasonable. It was limited to what was necessary to meet the ends - clearing the premises of any immediate threat inside:

> The police entered the suite and conducted ... a search "proportionate to [the] concern" ... The purpose of the entry and search was to clear the suite of any persons who may cause harm. In such circumstances, it is reasonable to limit the interference with the person's privacy to a search of any part of the suite which might provide a space for a person to hide. It is uncontested that that is what occurred here. One of the places searched was a closet which was large enough to hide a person. That is where they found the gun. In my view, the search that occurred here was, in all of the circumstances, conducted in a reasonable manner. [para. 51]

The accused's s. 8 rights were not violated. And, even if the *Charter* was breached, the evidence was nonetheless admissible. "Although the expectation of privacy in one's dwelling is prima facie high, the fact that a Charter breach occurred in such a setting does not inevitably lead to the conclusion that the admission of evidence would bring the administration of justice into disrepute," said Justice Chartier. He then went applied the three s. 24(2) lines of inquiry to the trial judge's analysis:

- ***the seriousness of the Charter-infringing state conduct.*** The search of suite 16 was an attempt by the police to ensure public and officer safety and they acted in good faith. Their conduct was driven by real, immediate, and understandable safety concerns. It was not the kind of action a court needed to distance itself from in order to protect the integrity of the justice system.
- ***the impact of the breach on the Charter-protected interests of the accused.*** The search was proportionate to the safety concern. It was limited and focussed and not particularly invasive. The suite was almost bare because the accused had essentially completed his move from suite 16 to suite 12. Nor was he accused's dignity compromised when suite 16 was cleared.
- ***society's interest in adjudication on the merits.*** The gun was reliable evidence and was vital to the Crown's case. The exclusion of it would have a greater negative effect on the repute of the administration of justice than would its inclusion.

The accused's appeal was dismissed.

Complete case available at www.canlii.org

The s. 24 (2) analysis (Grant test) requires the court to consider:
(1) the seriousness of the Charter breach,
(2) the impact of that breach on the accused's Charter-protected rights, and
(3) the societal interest in having criminal matters adjudicated on their merits.
see *R. v. Grant*, [2009] 2 S.C.R. 353

CHARTER VIOLATIONS CAN'T BE LOANED

R. v. Schmidt, 2011 ABCA 216

A drug user rented a one-room apartment in a building known to the police for violence, drug trafficking, and gang member activity. He asked an area patrol officer for assistance in removing unwanted guests staying at and taking over his suite. The officer said he would stop by, knock, and make sure everything was okay. The first time the officer checked two unwanted guests were found sleeping in the man's bed. They were ejected and banned from the building due to their gang affiliation and their history of violence, drug use, and trafficking. A sawed off rifle was also removed from the residence. The drug user told police he did not have the courage to tell unwanted guests to leave and feared that he would suffer physical violence if he tried to eject them or bar them from entering. He also feared that he would suffer physical violence if word got out that he was cooperating with the police or asking for their assistance. As a result of those concerns, a safe word was agreed upon for future conversations that would indicate the man felt safe to speak openly with police.

On a subsequent occasion police performed a routine patrol of the apartment building and stopped at the man's suite. When they knocked on the door, the man opened it and, when prompted, replied that "friends" of his were in the suite. He then backed away from the door and waved his arm which the officers took as an indication for them to enter. That gesture was understood to mean that there were unwanted people in the suite. Because the man did not use the safe word, police were concerned that these "friends" were unwanted gang members, drug users, or drug dealers. The suite was fairly dark and there were four other people in it, including the accused who was sitting semi-conscious on a bench. Clothing and bags were strewn about the apartment and there was drug paraphernalia on a table. The officer approached the accused to identify him and saw his hand on the handle of a steak knife that was resting on a bench. The knife was pointing towards

the officer. The officer was concerned about the situation escalating into a lethal force encounter because of the accused's state and the fact that police were outnumbered 5 to 2 in the small confined space of the suite. He grabbed the accused, pulled him away from the knife, and pushed him up against the fridge, arresting him for possessing a weapon. The accused was patted down and an object was felt in his pocket. The officer pushed the object up and determined that it was a shotgun shell. Two to three feet from where the accused had been seated was a black gym bag lying open on the floor. Using a flashlight to see inside and pushing the flaps apart a little bit, the officer observed a sawed off shotgun (a prohibited firearm). It was not loaded, but a shotgun shell was found in the kitchen area which matched the brand and calibre of the one found in the accused's pocket. These shells could be discharged from the sawed-off shotgun. The accused was also bound by an order prohibiting him from possessing any firearms or ammunition.

An Alberta Provincial Court judge found that police had consent to enter the apartment and he did not believe the tenant's testimony that the officers were not invited in on the day in question. As well, the judge concluded that the accused did not have a reasonable expectation of privacy in the apartment in any event. Moreover, the judge held that the pat-down search upon arrest was reasonable because it was done for officer safety reasons as a direct result of observing the accused holding a steak knife. No *Charter* breaches were found. The black bag was in plain view. It was close to where the accused was sitting and a shotgun shell was found in his pocket. The only rational conclusion was that the accused was aware that the shotgun was in the black bag and that he had knowledge and possession of it. The accused was convicted of possessing a prohibited firearm with ammunition and two counts of possessing a firearm/ammunition contrary to a prohibition order.

"A Charter breach is not something that can be loaned by one citizen to another."

The accused then challenged his conviction to the Alberta Court of Appeal arguing, in part, that the trial judge erred in finding that there was sufficient evidence of consent to search the suite and in finding that there were grounds to detain and search him. But these arguments were rejected.

Consent

The Court of Appeal concluded there was sufficient evidence for the trial judge to determine that the police had consent to enter and search the apartment. The trial judge disbelieved the evidence given by the tenant. Furthermore, "even if the police officers did not have the consent of the tenant to enter and search his apartment, their conclusion that they had his consent was reasonable and means that they acted in good faith in searching," said the Court. This would have been a significant factor in admitting the evidence under s. 24(2) has a constitutional violation been found. As well, "a Charter breach is not something that can be loaned by one citizen to another. If the police were wrong in their understanding that they had consent to search the apartment, that might have been a Charter breach vis-à-vis the tenant," said the Court. "That breach of the tenant's right does not protect the [accused]."

The Pat-Down Search

As for the pat-down search, which resulted in the discovery of the shotgun shell, it was lawful either as a search incident to arrest or incident to investigative detention:

> The search was conducted after the officer observed the [accused] either in a state of sleep or near sleep, or of extreme intoxication, with a knife under his hand. The scenario included what can only be described as a dark drug den with several people in a small confined space, all apparently in a stupor of some sort.
>
> The officer believed that the purpose of the knife involved danger to the police or the others in the apartment. Although the [accused] was not convicted of the charge that flowed from his having the knife, the standards required for an arrest and a conviction are substantially different. The officer had the requisite grounds to make an arrest; search of the person incident to

> arrest does not result in a Charter breach. In R. v. Mann ... the Supreme Court held that police officers who have reasonable grounds to suspect that an individual is connected to a particular crime may detain the individual for investigative purposes, and may also conduct a pat-down search of the individual for the purposes of officer safety and the safety of others. That is exactly what the police did here. ... [paras. 21-22]

The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

DEMONSTRATING FORFEITURE's DISPROPORTIONALITY RESTS ON OFFENDER

R. v. Trieu, 2011 BCCA 303

The police obtained a search warrant for the accused's home and found 492 marihuana plants in two separate rooms. There was evidence the home was lived in and the accused was the sole owner of it. He had bought the house in 2001 for $303,000, of which $193,000 was secured by a mortgage. The most recent property assessment valued the home at $665,000. At trial the accused denied that the marihuana grow operation was his and that, unknown to him, it was the work of tenants renting the house. A British Columbia Provincial Court judge did not believe the accused's testimony, concluded that the operation belonged to him, and entered convictions for unlawfully producing marihuana and possessing marihuana for the purpose of trafficking. The judge considered the size of the marihuana grow operation, its profitability, the absence of any criminal record, and the absence of any evidence that a criminal organization was involved. He found that the impact of a forfeiture order on the home was not disproportionate to the factors mentioned in s. 19.1(3) of the *Controlled Drugs and Substances Act* (*CDSA*) and ordered the accused's entire house forfeited to the Crown. A 12 month conditional sentence was also imposed, as was a weapons prohibition and an order for DNA sampling. He then

THE GROW-OP

- medium size grow operation of low to moderate sophistication;
- 281 vegetative marihuana plants found in a downstairs room, all about 20" tall. The room was equipped with high intensity lights and fans;
- high intensity lights and 211 small marihuana "clones" or cuttings found in another downstairs room, all about 1 1/2 " tall;
- many used plant pots with dried soil in them found in another downstairs room;
- another room had been equipped to grow marihuana but no plants were found there;
- the exhaust system of the house furnace had been disconnected;
- 21 new high intensity lights, one with the accused's fingerprints on it, were found in a box on the landing of the basement stairs;
- two drying marihuana plants were hanging upside down in the closet of an upstairs bedrooms. There was also oscillating fan and a quantity of flexible venting in the closet;
- more light bulbs along with a boxed fan were in another bedroom;
- more high intensity light bulbs along with the clear plastic tops for the flats in which the clones are grown were in an upper floor hallway closet;
- there was evidence of tampering with the electrical system of the house and there were holes for various attempts at ventilation throughout the house; and
- the assessed value of actual crop $123,500 while the potential annual yield between $250,000 up to $616,000.

challenged the forfeiture order to the British Columbia Court of Appeal arguing its impact was disproportionate and that the judge erred in failing to consider partial forfeiture of the property.

Section 19.1(3) of the *CDSA* requires a forfeiture order not be "disproportionate" having regard to the nature and gravity of the offence, the circumstances surrounding its commission, and the criminal record, if any, of the offender. The burden for demonstrating that an order of forfeiture is disproportionate, whether full or partial, rests on the offender. Here, the accused contended, in part, that a complete forfeiture order was disproportionate and should be set aside, emphasizing that he was an immigrant and hardworking family man with no criminal record. The Crown, on the other hand, submitted that the forfeiture order was not disproportionate and the statutory factors set out in s. 19.1(3) were a complete code. In its view, the circumstances of the offender, other than his criminal record, were not to be considered in the proportionality analysis.

The Court of Appeal found the sentencing judge properly considered the factors set out in s. 19.1(3). In agreeing that the order for complete forfeiture was not disproportionate, taking into account all of the circumstances, Chief Justice Finch stated:

> The [accused] does not have a criminal record and there is no evidence of any links to organized crime. However, this was a commercial grow operation in an urban setting. The profits from the operation were significant. The property was altered in order to accommodate the grow operation, including evidence of tampering with the electrical system. The risk of danger from fire and drug-related violence was always present. [at para. 19]

The accused's appeal was dismissed.

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

Note-able Quote

"The right to do something does not mean that doing it is right." - William Safire

DEMAND VALID EVEN THOUGH ASD NOT AVAILABLE FORTHWITH

R. v. Degiorgio, 2011 ONCA 527

Police received information that someone was slumped over the steering wheel of a vehicle stopped in front of a driveway. Its lights were on and its motor was running. The attending police officer approached the vehicle and observed that the window was down. The accused was sitting in the driver's seat. She was alert, her eyes were glassy, and there was a strong odour of alcoholic beverage coming from the area of her mouth. She denied consuming alcohol that day and said she was tired, having come from her friend's house. She also seemed confused about her whereabouts. The officer concluded that there were reasonable grounds to suspect that she had alcohol in her body and he made a demand under s. 254(2) of the *Criminal Code* (*CC*) for a sample of her breath into an ASD, even though he did not have one with him. The accused responded, "I am not blowing into anything". After requesting she step out of the vehicle, the officer asked her if she understood the demand. She said, "Yes, I'm not blowing into anything". The officer told the accused that refusing to comply with the demand was a criminal charge with the same penalty as impaired driving or driving over the legal limit and that it would result in an automatic 90-day driver's license suspension. He made it very clear that she was legally required to provide a breath sample. The officer re-read the demand and asked the accused if she understood. Again she responded, "Yes, but I'm not blowing into anything." She was arrested for refusing to provide a sample into an ASD, advised of her right to counsel, and subsequently released on an appearance notice, departing in a taxi. She was charged with refusing to provide a breath sample under s. 254(5).

The Ontario Court of Justice found that the accused did not have a "reasonable excuse" for not complying with the demand and she was convicted of refusing to provide a breath sample, even though no ASD was available at the scene.

On appeal to the Ontario Superior Court of Justice, the accused argued that the ASD demand was invalid as it did not comply with s. 254(2). She argued that she was under no legal obligation to provide a breath sample because there was no evidence that the officer was in a position to administer the test "forthwith" since he did not have access to an ASD. The appeal judge disagreed and held that the offence was complete when the accused refused to comply with the demand. "[T]he offence is complete once the demand, which conforms with the conditions in s. 254(2) - reasonable grounds to suspect that a person has alcohol or drugs in their body and has operated a motor vehicle or had its care or control within the preceding three hours - is not complied with," said the appeal judge. "If an accused agreed to provide a sample and one is not taken 'forthwith', the sample cannot be used in evidence. To require the Crown to prove that a sample can be taken forthwith whenever an accused has refused to provide a sample engages a theoretical exercise; whereas, if the accused complies with the demand and a sample is not taken forthwith, the Court adjudicates the actual facts."

The accused further appealed, this time to the Ontario Court of Appeal. She again contended that the "forthwith" requirement mandated by s. 254(2) did apply to an outright refusal. In her view, a demand was only valid if the police were in a position to administer the ASD test forthwith. She suggested that the forthwith requirement in s. 254(2) imposed a duty on the police to be in a position to administer the test, even in the face of a refusal. If they were not, then the demand was not valid. She submitted that if the demand was not valid under 254(2), she could not be convicted under s. 254(5).

The demand that was given: I demand that you provide a suitable sample of your breath directly into an approved screening device forthwith to enable a proper analysis of your breath to be made and that you accompany me for the purpose of enabling a sample to be taken. Do you understand?

s. 254 of the Criminal Code

Justice Laforme, writing the Court of Appeal's opinion, first considered s. 254 as a whole:

- Parliament created a two-step detection and enforcement procedure that necessarily interferes with rights and freedoms guaranteed by the *Charter*, but only in a manner that is reasonably necessary to protect the public's interest in keeping impaired drivers off the road.
- s. 254(2)(b) authorizes peace officers, on reasonable suspicion of alcohol consumption, to require drivers to provide breath samples for testing on an ASD. These screening tests, at or near the roadside, determine whether more conclusive testing is warranted.
- s. 254(3) allows peace officers having the requisite reasonable and probable grounds to demand breath samples for a more conclusive breathalyzer analysis.
- Breathalyzers determine precisely the alcohol concentration in a person's blood and thus permit peace officers to ascertain whether the alcohol level of the detained driver exceeds the legal limit. Breathalyzer results can provide the police with evidence to charge the motorist with driving offences such as s. 253(b) – over 80mg%.
- The admissibility of breathalyzer results can depend on whether the police had the requisite grounds to make the demand. Sometimes the only evidence of reasonable and probable grounds for the breathalyzer demand is the ASD results obtained by the police.
- There are two ways in which an ASD breath sample can be legally obtained: (i) by way of a valid demand under s. 254(2 or (ii) voluntarily.
- s. 254(5) provides that "[e]veryone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made under this section."
- "Forthwith" means "immediately" or "without delay". The "forthwith" requirement in s. 254(2) allows for its constitutional integrity. If it were not for the immediacy requirement, s. 254(2) would violate ss. 8, 9 and 10 of the *Charter*.

> The "forthwith" requirement is a corollary of the fact that there is no opportunity for contact with counsel prior to compliance with the ASD demand. Both the police demand and the driver's response must be "forthwith" or immediate; the requirement is for "a prompt demand by the peace officer, and an immediate response by the person to whom that demand is addressed"

In rejecting the accused's argument that an ASD must be available "forthwith" in order for a demand to be valid, Justice Laforme found that neither the text of ss. 254(2) or (5) or the cases that have considered these provisions supported this view:

> The meaning to be given to s. 254(5) must be informed by its purpose. The section criminalizes a refusal to provide potentially incriminating evidence. In doing so, it provides the police with a powerful tool in their efforts to curtail, investigate and prosecute drinking and driving related offences. The deaths and substantial societal costs associated with drinking and driving fully justify the existence of this extraordinary criminal offence.
>
> The conduct criminalized by s. 254(2) consists of a proper s. 254(2) demand and an unequivocal refusal to comply with that demand. The offence is completed when the refusal is given. There is nothing in the language of s. 254(2) that would require the Crown to prove that had the driver not refused to provide the sample, the demanding police officer could have complied with his or her obligation to take the sample "forthwith". Nor can I understand why, as a matter of criminal law policy, a driver who has unequivocally refused to forthwith provide a breath sample should escape criminal responsibility for that refusal based on events subsequent and totally unrelated to the refusal. How is the culpability of the person who refuses to comply with a demand reduced because, as events may have developed, the officer may not have been able to take the sample forthwith?

BY THE BOOK:

ASD Demand: ***Criminal Code***

s. 254(2)(b) If a peace officer has reasonable grounds to suspect that a person has alcohol ... in their body and that the person has, within the preceding three hours, operated a motor vehicle ... the police officer may, by demand, require the person... (b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

.....

s. 254(5) Everyone commits an offence who, without reasonable excuse, fails or refuses to comply with the demand made under this section.

s.254 - a two-step detection & enforcement procedure

	Step One	Step Two
Demand section	s. 254 (2)	s. 254 (3)
Test type	screening test	conclusive test
Triggering threshold	reasonable suspicion	reasonable grounds to believe
Means of testing	approved screening device (ASD)	approved instrument (breathalyzer)
Purpose	to determine whether more conclusive testing is warranted	to determine precisely the alcohol concentration in a person's blood
Evidentiary value	ASD results can provide the reasonable grounds needed for the breathalyzer demand	can provide the evidence to charge the motorist with s. 253(b) – over 80 mg%
s. 10 (b) *Charter*	suspended if sample taken forthwith	informational and implementational components applicable

I read the text itself of s. 254(5) as requiring the Crown to prove the following constituent elements of the offence:

1. The preconditions set out in s. 254(2);
2. A demand that the individual "provide forthwith a sample of breath";
3. The individual of whom the demand was made understood the demand;
4. The individual refused to comply with that demand; and
5. The individual did not have a reasonable excuse for failing to comply with the demand.

[reference omitted, paras. 41-43]

"Forthwith"

Justice Laforme also considered a number of points in determining whether the demand was valid only if the officer was in a position to administer the test forthwith:

- The "forthwith" period is the time in which *Charter* rights are justifiably infringed, i.e. the time in which a detained person can be required to comply with an ASD demand and the time in which a person's response to that demand – be it blowing and registering a Fail, or be it refusing or failing to blow – can incur criminal liability that is unaffected by the *Charter*.
- What would otherwise be an impermissible violation of *Charter* rights is rendered justifiable because of the "forthwith" requirement.
- The question to be decided is whether the police were in a position to receive into an ASD the breath sample the suspect was prepared to provide – or had not refused to provide – during the period of time that no realistic opportunity to consult counsel existed, i.e. "forthwith".
- The right to counsel is triggered upon detention at the roadside. That right is, however, effectively suspended by operation of s. 1 of the *Charter* for the time period captured by the requirement that the sample be taken "forthwith". If the demand is made and the sample provided within the forthwith window of time, the *Charter* is not breached. If, however, the forthwith window expires, then the taking of a sample without first providing the detainee an opportunity to contact counsel is an infringement of s. 10(b) that cannot be saved by s. 1.
- If the demand is otherwise proper and the outright refusal occurs during the "forthwith" timeframe (as in this case), the accused's 10(b) rights are not engaged and cannot affect the accused's liability under s. 254(5). If, however, the refusal is made outside of the "forthwith" timeframe it will engage *Charter* rights such as when a refusal does not immediately follow the demand but instead the driver refuses only when presented with the ASD.

"There is no requirement that a police officer have a reasonable belief that he or she could 'make the demand good' at the time it is made.... [N]either is there a requirement for the Crown to prove that the police could have made the demand good (i.e. that an ASD would have been available) within the 'forthwith' period."

The Court of Appeal found the Crown does not have to prove that the sample could in fact have been taken in accordance with the provisions of the *Criminal Code* to secure a conviction on a charge of refusing to comply with the demand. "There is no requirement that a police officer have a reasonable belief that he or she could 'make the demand good' at the time it is made," said Justice Laforme. "[N]either is there a requirement for the Crown to prove that the police could have made the demand good (i.e. that an ASD would have been available) within the "forthwith" period. Such a requirement is not apparent from the text or purpose of the provision; neither can it be necessitated by *Charter* considerations, because during the 'forthwith' period any such considerations are validly suspended under s. 1." A police officer's ability to actually take the sample in accordance with the demand is not relevant to culpability on a charge of refusing to provide the sample:

> The offence created by s. 254(2) is complete upon the refusal. In the face of such a refusal, the police are not obliged to carry on as if there had been no refusal and the court is not obliged to speculate as to what might have happened had the police officer carried on. The offence is complete upon proof that the preconditions to the demand in s. 254(2) existed, the officer demanded a sample "forthwith", and the [accused] unequivocally refused, without any reasonable excuse, to provide that sample. [para. 65]

And further:

> [T]here are two scenarios that are contemplated involving ss. 254(2) and (5). The first is a demand and the legitimacy of the process thereafter of the motorist's providing self-incriminating evidence of an offence; the second is a demand and a refusal or failure to comply.
>
> In the first scenario, both the police demand and the driver's compliance must be accomplished "forthwith" or immediately. That is to say, the police officer must be able to receive the breath sample, which the person has agreed to provide or has not refused to provide, before there is any realistic opportunity for the detained person to consult counsel.
>
> In the second scenario, where there has been an outright refusal to provide a breath sample, the offence is made out if the demand was properly made. The Crown is not required to establish that the ASD was present at the scene, or that it could have been present at the scene within the "forthwith" period. [paras. 67-69]

In this case, the accused immediately and unequivocally refused on three occasions to provide the sample despite being told of the potential penal consequences. She clearly understood that she was required to provide the sample then and there. The police did not have to continue with the process of locating or deploying an ASD at the scene. The accused's appeal was dismissed and her conviction for refusing to provide a breath sample was upheld.

Complete case available at www.ontariocourts.on.ca

Footnote Word of Caution: The Ontario Court of Appeal noted that an officer making a demand but never intending to actually take a sample, instead hoping that the driver would refuse so that the driver could be charged with refusing to provide a sample, would raise significant abuse of process concerns.

POLICE ACTION A DYNAMIC PROCESS: NOT TO BE OVER ANALYZED BY PARSING EVENTS INTO STATIC MOMENTS

R. v. Amofa, 2011 ONCA 368

Two plain clothed police officers were on duty to observe and investigate people loitering in the Toronto Transit Commission's (TTC) Warden subway station as part of a broader police initiative, the Robbery Reduction Program. This program was in response to a number of recent swarming incidents in subway stations involving groups of youths surrounding, threatening and/or assaulting victims, and forcing them to give up possessions. The Warden TTC station was identified by police as a high risk area for crime. There had been robberies and shootings in the past. The two officers observed the accused and another young man at the top of the stairs leading down to a bus bay at the station. They were blocking the flow of passengers walking from the mezzanine to the bus platform. At the same time they appeared to be making no effort to board a bus; two buses came and went during the period of police observation. The officers formed the opinion that the two men were loitering. After about 20 minutes the men left the stairs and entered a small "to go" bakery on the mezzanine level. One at a time, taking turns, they would leave the bakery, look around outside, and then return. Police thought that the two men were looking for particular people and were concerned that their conduct might be leading towards something serious, such as a robbery, mugging, or something similar.

The two officers approached the accused and the other man in the bakery, identified themselves as police, and told them they were being investigated

under Ontario's *Trespass to Property Act* (*TPA*) for loitering on TTC property. They cooperated by identifying themselves and producing valid drivers' licences. An officer wanted to conduct a "pat down" search for safety reasons. The accused was advised that he was being investigated for an arrestable offence. He was told that he was not under arrest, but that the officer would like to search him. The accused responded by saying, "No, I'll search myself." He pulled some harmless objects out of his pockets and returned his hands to them, refusing to put his hands out where they could be seen. He said he did not want to be searched because he had not done anything. As he was speaking, the accused did not face the officer directly. Instead, he "bladed" his body - police jargon for hiding or obscuring something. The accused was then arrested for trespassing. He resisted and attempted to escape, but was prevented from doing so and a violent struggle ensued. After backup arrived the accused was subdued, searched, and a loaded .45 calibre semi-automatic handgun was found in the waistband of his pants.

At trial in the Ontario Court of Justice the judge found that the two men were detained while being questioned. However, the detention was not arbitrary because the police had a reasonable belief that the men were loitering and they were entitled to question them. The search was lawful and the accused was convicted of possessing a loaded, unauthorized, and restricted firearm under s. 95(1) of the *Criminal Code*.

The accused appealed his conviction to the Ontario Court of Appeal arguing his *Charter* rights were violated in the course of the investigative detention and arrest, and that the trial judge erred in failing to exclude the firearm under s. 24(2) of the *Charter*. He suggested that the police conducted an arrest incidental to a search rather than a search incidental to arrest. In his view, the Robbery Reduction Program was illegal because it formed part of an overall police strategy that amounted to monitoring sites for suspicious-looking people and invoking the power to investigate and arrest under provincial trespass legislation as a pretext to search them. He submitted that the search of the accused was not truly incidental to his arrest nor to an investigative detention. Instead, he contended that the arrest was incidental to the search and therefore the search was illegal. The Ontario Court of Appeal, however, rejected these arguments:

1. "There was nothing arbitrary or improper in the police surveillance of the subway station or in the arrest," said Justice Blair, speaking for the unanimous Appeal Court. He continued:

   > The Robbery Reduction Program was well within the scope of the duty of the police to protect the public. I see nothing inherently objectionable in the police monitoring the subway station for suspicious-looking people – given the history of criminal incidents there, at any rate – and invoking the power to investigate and arrest under provincial trespass legislation were the factual circumstances existed to underpin such action, as they did here. The power to investigate and arrest under provincial trespass legislation is not being abused, or used as a pretext, where the police have the necessary grounds in the circumstances to resort to them. [para. 15]

2. The officers had more than ample grounds to investigate, detain, and arrest the accused for loitering under the *TPA*:

   > The flow of the investigative detention, the arrest and the search was a dynamic process. Section 8 analyses ought not to be reduced to an over-analytical parsing of events into static moments without practical regard for the overall picture.
   >
   > [The officer] had reasonable and probable grounds to arrest the [accused] when he ... first approached the two men, but exercised restraint instead and chose not to do so. Although [the accused's lawyer] submits that the power to search incidental to arrest is not automatically triggered by arrest, he conceded that if [the officer] had arrested the [accused] at this time he could have performed a non-intrusive pat-down search of the [accused]. In my view, the fact that the [accused] remained under investigative

detention at that point in time did not alter this prerogative. [paras. 19-20]

And further:

> The officers were properly safety-cautious in the circumstances. They were rightly concerned about the prospect of potential danger, given the underpinnings of the Robbery Reduction Program itself, the history of violence at that particular subway station, and their observations of the two men on the stairway and at the bakery. [The officer] therefore had "reasonable grounds to believe that his ... safety or that of others [was] at risk" in the circumstances and he would have been justified in conducting a pat-down search at the point of investigative detention.
>
> But he did not conduct a physical search at that time. Instead, the situation continued to evolve.
>
> There is a continuum of conduct to consider here. It started with the officer's telling the [accused] that the officer was going to search him. It then continued through the [accused's] efforts to avoid a search by the officer, the arrest, the attempted escape and the ultimate retrieval of the weapon – all as outlined in more detail above.
>
> In my opinion, [the officer] had reasonable grounds to arrest the [accused] when he first told the [accused] that he was being investigated for an arrestable offence but was not then being arrested, and the actual arrest that occurred a few moments later. Thus, the grounds to arrest for trespassing continued to exist. The arrest was lawful and the circumstances outlined above amply justified a search incidental to that arrest – even if one assumes (as I do not) that there were not sufficient grounds to conduct a search incidental to the original investigative detention. Whether the "search" consisted of the physical pat-down exercise itself, or whether it consisted of the continuum of conduct from the time [the officer] told the [accused] he "was going to search him" until the physical search was completed, is of little significance. The search was justified on either interpretation in the circumstances. [paras. 23-26]

"The flow of the investigative detention, the arrest and the search was a dynamic process. Section 8 analyses ought not to be reduced to an over-analytical parsing of events into static moments without practical regard for the overall picture."

The search process was lawful and did not violate the accused's s. 8 rights. However, even if there was a s. 8 violation, it was of a very minor nature, the breach was slight, and the evidence was nonetheless admissible under s. 24(2). If the grounds to conduct a search were insufficient, they were not missing by much. The loaded firearm was real evidence and was essential to the Crown's case. The circumstances as a whole strongly favoured inclusion of the evidence. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

BY THE BOOK:

Power of Arrest: ***Ontario's TPA***

Arrest without warrant on premises

s. 9(1) A police officer, or the occupier of premises, or a person authorized by the occupier may arrest without warrant any person he or she believes on reasonable and probable grounds to be on the premises in contravention of section 2.

Note-able Quote

"If you have integrity, nothing else matters. If you don't have integrity, nothing else matters." - Alan Simpson

DOCTRINE OF SEVERABILITY SAVES WIRETAP AUTHORIZATION

R. v. Ahmed, 2011 BCCA 254

Agents designated by the Attorney General of British Columbia and the Solicitor General of Canada jointly made an application for a wiretap authorization under s. 186 of the *Criminal Code* in relation to the investigation of firearm and drug related offences. The authorization permitted the police to intercept private communications at various places, including cellular telephone calls. The primary targets of the authorization were the accused and three other men, two from Pakistan. The firearms offences involved efforts to acquire a large cache of automatic weapons while the drug-related offences involved the ongoing importation and distribution of heroin.

In British Columbia Supreme Court the accused accepted that the sworn affidavit filed in support of the authorization satisfied the reasonable grounds requirement for the drug-related offences. But he suggested that it failed to satisfy the reasonable grounds requirement for the firearms offences. The judge rejected this argument and upheld the authorization, finding the police had met the reasonable grounds requirement for both the drug and firearms offences.

The accused renewed his objection to the validity of the authorization before the British Columbia Court of Appeal and sought an order quashing his convictions and directing acquittals, or at least a new trial. The Court of Appeal, however, did not find it necessary to decide whether the authorization was properly issued with respect to the firearms offences because the doctrine of severability applied:

> In the case at bar, there were, in effect, two separate authorizations granted within one formal order: one at the request of the Attorney General of British Columbia to assist in the investigation of firearms offences; the other at the request of the Solicitor General of Canada to assist in the investigation of drug-related offences. The terms of those two authorizations are identical in all respects, e.g., who could be intercepted and where those interceptions could be made. Accordingly, as long as there was a basis for granting one of those authorizations, interceptions made pursuant to the formal order were lawful. [para. 27]

Since the drug-related parts of the authorization could be separated from the firearm-offence related parts, the order could be divided. The valid drug-related portion was preserved, which then formed the basis for the authorization. The interceptions made under the valid drug-related portion were therefore admissible.

The accused had also contended that the investigative-necessity requirement for the authorization was not met and that it was prematurely granted. Under s. 186(1)(b) a judge can only grant an authorization if satisfied "that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures." In the accused's view, the police informer's and/or DEA agents one-party consent, coupled with surveillance and other techniques, was a practical alternative at that stage of the investigative process. But Justice Frankel noted that the investigative necessity requirement must be assessed from a practical perspective, having regard to the objectives of the investigation:

> ... "There must be, practically speaking, no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry." (Emphasis in original.) Further, and of importance, is the fact that this requirement is to be considered having regard to the investigation as a whole, and not just with respect to those named as the targets of the authorization.
>
> In this case, there were reasonable grounds to believe that [the accused] and others in Canada were involved in an international heroin-distribution scheme and that the interception of private communications would assist in the investigation of their activities. As the trial judge

> observed, [the accused's] imminent meeting with an undercover D.E.A. agent presented the police with "a unique opportunity to gather evidence from discussions which might be generated from that meeting." The interception of those discussions would likely result in the police determining who was involved in that scheme and how they operated. From a practical perspective, there was no other reasonable alternative method of pursuing the investigation of those criminal activities in a meaningful way. ... [O]ther investigative procedures alone were unlikely to provide evidence as to the full extent of the drug-related activities of not only [the accused], but also those who worked with him, and those who supplied the drugs. [references omitted, paras. 31-32]

The accused's appeal was dismissed.

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

CROWN MUST ESTABLISH TWO HOUR WINDOW FOR PRESUMPTION TO APPLY

R. v. Corey, 2011 NBCA 6

After drinking some alcohol with others, the accused lost control of his truck and left the roadway, coming to rest in a roadside ditch. One of his passengers was injured. At some point, the vehicle's OnStar system reported the accident to police. Police attended, demanded,and obtained two breath samples, both over 80mg %. The accused was charged with impaired driving causing bodily harm and causing an accident resulting in bodily harm while over 80 mg %.

At trial in New Brunswick Provincial Court the accused was acquitted. The Crown's success hinged upon the evidence of the breathalyzer results and their relation back to the time of the offence by application of the statutory presumption of equivalency found in s. 258(1)(d) of the *Criminal Code*. The trial judge found the Crown failed to discharge its burden of establishing beyond a reasonable doubt that the first breath sample was taken no later than two hours after the offence. The Crown never called the first officer on scene nor the ambulance attendants to testify.

The Crown appealed, submitting before the New Brunswick Court of Appeal that the judge failed to consider the accused's statement that was made to a police officer at the scene. When he was asked what time the accident occurred the accused replied, "You were there ten minutes after it happened,". But this statement was inconclusive because other Crown evidence demonstrated that it could not be taken literally. The evidence suggested that the police likely arrived more than 10 minutes after the accident. Furthermore, how the accused assessed the 10 minute delay between the accident and police arrival was unknown. The accused's appeal was dismissed.

Complete case available at www.canlii.org

Editor's note: Remember, in order to give the breathalyzer demand under s. 254(3) of the *Criminal Code*, a police officer only need formulate their demand within three hours of the alleged driving. The standard for the breath demand is reasonable grounds. The two hour statutory presumption of equivalency provided by s. 258(1)(d), however, is triggered when the Crown establishes that the first breath sample was taken within two hours of the alleged driving. The standard for this is proof beyond a reasonable doubt.

PRIOR SEX CONVICTION MANDATES LIFE LONG ORDER

R. v. Baisley, 2011 NBCA 33

The accused pled guilty in New Brunswick Provincial Court to sexual assault under s. 271(1)(a) of the *Criminal Code*. Although the accused had two prior convictions for sexual assault under s. 271, the sentencing judge ordered under s. 490.012 of the *Criminal Code* that he comply with the registration requirements of the *Sex Offender Information Registration Act* for only 20 years, not life.

The Crown's appeal to the New Brunswick Court of Appeal that the order should have been for life was

successful. "The wording of s. 490.012(3) and s. 490.013(5) is clear and unambiguous, as is the inclusion of sexual assault (s. 271) as a designated offence under s. 490.011(1)," said the Court of Appeal. "The trial judge judge had no authority to order that the duration be for any term other than life."

Complete case available at www.canlii.org

SEARCH WARRANT LAWFULLY OBTAINED: $1.3 M LAWSUIT SET ASIDE

Neumann v. Canada, 2011 BCCA 313

The plaintiff was the principal of a company that bought and sold used mining and construction equipment. His private residence was the registered office of the company. He used a room on the second floor for that purpose. A person receiving over $400,000 in commissions from the plaintiff on the sale of heavy machinery became the target of a Canada Revenue Agency (CRA) investigation for tax evasion. Neither the plaintiff nor his business were targets of the investigation. A criminal investigator for the CRA obtained a warrant to search the plaintiff's house for the purpose of locating and seizing cheques and other business documents related to the CRA target. At 9:00 am CRA officials, along with two armed police officers to keep the peace, rang the doorbell. The plaintiff answered and was advised of the warrant. He was told that he was not the subject of the investigation. Some files were downloaded from his office computer and he was also asked to produce other documentation from files stored in his basement. One of the police officers left between 10:00-10:30 am, a couple of the searchers left at 11:30 am, and by noon everyone was gone except two CRA employees who asked the plaintiff for a written statement. They left a half hour later.

> "The arrival of police officers at one's home armed with a warrant to search is doubtless an upsetting and frightening event for anyone who experiences it."

The plaintiff then sued the CRA in British Columbia Supreme Court alleging it had negligently obtained the search warrant and had violated his *Charter* rights in the search of his home. He testified he was humiliated by the search and that neighbours witnessing the police at his house did not accept his explanation that the CRA was investigating someone else. He also said that he could not get over the effect the search had on him mentally or physically and that his business and many other aspects of his life had suffered. A psychiatrist testified that the plaintiff was traumatized from the shock of the unannounced search and was experiencing depression and post traumatic stress disorder, which would not have occurred if advance notice of the search had been given. The plaintiff argued that s. 8 of the *Charter* imposed a duty on the investigator to minimize the intrusiveness of any search undertaken in the course of an investigation and that the CRA investigator negligently failed to do so when he sought and obtained the search warrant. The CRA investigator, on the other hand, said that a search warrant would give more assurance at getting all of the sought after documents, rather than simply asking for them (voluntary consent), or obtaining a production order, due to the relationship between the plaintiff and the investigation's target.

The British Columbia Supreme Court judge concluded that the CRA agents owed a duty of care to the plaintiff in this search by tax investigators. A jury found that CRA employees infringed the plaintiff's s. 8 *Charter* rights and had negligently obtained and executed the search warrant. The judge awarded the plaintiff $1,300,000.

The Attorney General of Canada and the CRA appealed the verdict to the British Columbia Court of Appeal. Justice Ryan, speaking for the Court of Appeal, found there was no evidence that the search warrant was improperly obtained or executed nor any evidence of negligence or a *Charter* breach. "The arrival of police officers at one's home armed with a warrant to search is doubtless an upsetting

and frightening event for anyone who experiences it," she said. "That said, the search warrant is an important and accepted enforcement tool utilized by those charged with investigating crime. If a search warrant is lawfully obtained and executed, those subjected to it cannot seek compensation for its unintended repercussions."

Negligent Investigation

The law recognizes that an investigating police officer owes a duty of care to a suspect in the course of an investigation. The standard of this duty of care is the standard of a reasonable police officer in like circumstances. But in this case the plaintiff was not a suspect; he was a third party. Assuming that the trial judge was correct in holding that the CRA had a duty to the plaintiff in carrying out the least intrusive search in the circumstances (an issue the Court of Appeal left for another day), the search was reasonable. The investigator chose to obtain a search warrant, rather than relying on other investigative alternatives, because of the close relationship that may have existed between the target of the investigation and the plaintiff. The investigator could not be sure that the plaintiff would produce all of the records pertaining to the commissions paid if simply asked. And it didn't matter whether the investigator actually held this belief at the time he sought the search warrant, or whether he was simply justifying his actions at the time of trial. "The question is whether a reasonable investigator, knowing what [the investigator in this case] knew, would have concluded that a search warrant was necessary in this case," said Justice Ryan. "In my view, it would have been open to an investigator to reach that conclusion. In fact, one might argue that the investigator would have failed in his duties to his employer to do otherwise."

"[T]he search warrant is an important and accepted enforcement tool utilized by those charged with investigating crime. If a search warrant is lawfully obtained and executed, those subjected to it cannot seek compensation for its unintended repercussions."

s. 8 Charter Breach

The Court of Appeal found that the search warrant was justified and therefore there was no *Charter* breach. "A search which is conducted under a valid warrant must be said to be a reasonable search unless the search itself is conducted unreasonably," said Justice Ryan. The fact that CRA agents were accompanied by two uniformed and armed police officers did not render the manner in which the search was conducted unreasonable. "Police are asked to accompany CRA agents in order to keep peace. In this case, as it turned out, there was no trouble that the police needed to deal with. [The plaintiff] accepted the authority of the warrant and was co-operative. Not long into the search the officers left the premises. Nothing in these events could be said to make the search unreasonable." Nor did investigators unnecessarily intrude into other places within the plaintiff's home. They searched in only two places where company records were kept and no other part of the house was searched. There was no evidence to support a claim of an unreasonable search and the issue should not have been left with the jury.

"A search which is conducted under a valid warrant must be said to be a reasonable search unless the search itself is conducted unreasonably"

The finding of negligence and the *Charter* breach were set aside and the case was dismissed.

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

Note-able Quote

"My grandfather once told me that there are two kinds of people: those who work and those who take the credit. He told me to try to be in the first group; there was less competition there." - Indira Gandhi

CHARTER RIGHTS ARE PERSONAL

R. v. Ramos, 2011 SKCA 63

Police stopped a Jeep for speeding. It was clocked on radar travelling at 150 km/h in a 110 km/h zone. The officer advised the male driver that he had been travelling a little quickly. There were two other occupants. A female passenger was in the front seat and the accused, a female passenger, was in the back of the vehicle lying on top of a blanket. The officer told the accused that she should be wearing a seatbelt, but she did not react. After making several observations, the officer considered a number of factors which in his experience led him to have a reasonable suspicion of drug trafficking. However, there was no source information, no tips, no anonymous information, no electronic surveillance, or no other police information suggesting a drug offence. About 10 to 12 minutes after the initial stop, the officer advised the driver he was being detained for transporting a controlled substance and that he was not free to go. He was informed of his right to contact a lawyer and also given the police warning. The passengers, however, were not apprised of the situation and remained in the Jeep. A police dog was run around the vehicle's exterior and it made a positive indication, sitting at the rear of the Jeep.

After considering his observations and the dog's response, the officer believed that there were drugs in the vehicle and all three occupants were arrested for drug trafficking. The vehicle was then searched and an after-market compartment was discovered in the rear cargo area beneath where the accused was laying at the time the vehicle was initially stopped. The compartment was operated by two electronic locks and a hydraulic lift. Inside the compartment was a bag with two bricks of cocaine, each weighing just over one kilogram. A black and white purse containing the accused's identification and a camera was located in the vehicle. The purse, which had been held in police custody, was searched again 11 days after the arrest. In it, a telescopic automotive magnet was found that could be used to open the after-market compartment. The accused was charged with possessing cocaine for the purpose of trafficking.

A Saskatchewan Court of Queen's Bench judge found that the accused was not detained prior to her arrest and therefore her s. 9 *Charter* rights were not breached. In addition, the accused did not assert any power or control over the vehicle or the contents of the cargo area. Thus, she failed to establish any reasonable expectation of privacy in the vehicle or

FACTORS THE OFFICER SAID GROUNDED HIS SUSPICION

(1) The driver was operating a third party vehicle. In the officer's experience and drug enforcement training, he was aware that couriers often use third party vehicles. The driver had a shocked look on his face when asked who the vehicle belonged to and stated that it was not his vehicle. When asked for the car registration, the driver responded that it was not his rather than producing the registration. In the officer's experience, people transporting drugs try to distance themselves in this way from the vehicle and its contents.

(2) The officer believed that the driver did not know in whose name the vehicle was registered. He believed the driver was reading the registration to confirm who the vehicle belonged to, although he said the vehicle was owned by Tran. The officer felt that this behaviour was consistent with the use of a third party vehicle to transport drugs and not the innocent motoring public.

(3) The driver was nervous and continued to be nervous as the stop continued contrary to innocent members of the motoring public who are only nervous initially when stopped by the police. In the officer's experience, drug couriers continue to be nervous until the drugs are found and then there is a de-escalation in their display of nervousness.

(4) Sleeping blankets and pillows in the vehicle suggested that the occupants of the vehicle were spending extended periods of time in the vehicle and possibly rotating drivers. In the officer's experience, drug traffickers want to get from point A to point B as soon as possible to minimize the risk of contact with law enforcement and also do not want to stay in hotels because they do not want to leave the drugs unprotected.

(5) The passenger (accused) lying in the vehicle made little eye contact and no attempt to correct her seating position after the comment about her not wearing a seatbelt. The officer became suspicious that the accused did not correct her seating position because there might be something under the blanket that she was trying to conceal.

(6) Although the driver volunteered the reason for his trip and provided his student permit, the officer found this to be suspicious because drug couriers often rehearse stories and documents ready to legitimize their trips if questioned.

(7) The vehicle was travelling from west to east and, according to the officer, drugs generally move from west to east and cash moves from east to west.

in the contents of the cargo area. The accused's s. 8 rights were not breached by either the dog search or the search of the vehicle. However, the judge determined that the accused did have a reasonable expectation of privacy with respect to her purse and that searching it was unreasonable. The judge then went on to consider the breaches of the the driver's *Charter* rights in relation to the lawfulness of the accused's arrest. The judge concluded that the police did not meet the reasonable suspicion standard in detaining the driver or for using the sniffer dog. But for the driver's rights not being breached, the accused would not have been arrested and her purse would not have been searched. The breaches to the driver's rights rendered the accused's arrest unlawful and the search of the purse unreasonable; it was conducted as an incident to an unlawful arrest. The contents of the purse were excluded as evidence under s. 24(2) and the accused was acquitted.

"The law is well established that section 8 Charter rights are personal rights. To exclude evidence under s. 24(2), the applicant must prove that his or her personal privacy rights, not just another person's rights, were violated."

The Crown appealed the accused's acquittal to the Saskatchewan Court of Appeal arguing the trial judge erred by excluding the contents of the purse on the basis that it had been obtained as a result of a violation of the driver's *Charter* rights rather than the accused's own personal rights. Furthermore, the Crown submitted that the driver's ss. 8 and 9 *Charter* rights were not violated and that the trial judge demanded too high a standard for reasonable suspicion. Finally, the Crown suggested that the evidence was admissible under s. 24(2). The accused, on the other hand, suggested that the trial judge properly considered the facts, applied the appropriate standard of reasonable suspicion, and properly excluded the evidence under s. 24(2). As well, she contended that the trial judge correctly considered breaches of the driver's rights in relation to her arrest and the search of her purse. The driver's *Charter* breaches were causally and temporally connected to her arrest and the search so as to render the evidence in the purse obtained in a manner which violated the *Charter*. Thus, in her view, exclusion under s. 24(2) was available.

Justice Ottenbreit, speaking for the unanimous Saskatchewan Court of Appeal, ruled that the trial judge erred by excluding the contents of the purse against the accused because of a breach of the driver's rights. "The law is well established that section 8 Charter rights are personal rights," he said. "To exclude evidence under s. 24(2), the applicant must prove that his or her personal privacy rights, not just another person's rights, were violated." Justice Ottenbreit summarized the applicable principles as follows:

1. A claim for relief under s. 24(2) of the *Charter* can only be made by the person whose *Charter* rights have been infringed.
2. Like all *Charter* rights, s. 8 protects people, not places; it is a personal right.
3. The right to challenge the legality of a search depends upon whether the accused had a reasonable expectation of privacy, which is to be determined on the totality of the circumstances.

In this case, the Court of Appeal agreed with the trial judge that the accused was not detained prior to her arrest. But, unlike the trial judge, it found the accused's arrest lawful, as was the search that followed. "The power of search incidental to arrest has long been an exception to the general rule that a search conducted without prior authorization is presumptively unreasonable," said Justice Ottenbreit. "Such a search does not require reasonable and probable grounds beyond the grounds

"The power of search incidental to arrest has long been an exception to the general rule that a search conducted without prior authorization is presumptively unreasonable. Such a search does not require reasonable and probable grounds beyond the grounds that were sufficient to support the lawfulness of the arrest itself."

that were sufficient to support the lawfulness of the arrest itself." He continued:

> [T]the starting point for determining whether [the accused's] arrest was lawful must be the circumstances vis-à-vis her and not [the driver]. Although it is not clear whether the drugs were already found when she was initially arrested, the reason for her arrest was certainly the positive indication by the dog. The trial judge had already concluded that [the accused] had no reasonable expectation of privacy in the vehicle and its contents, and that her s. 8 Charter rights had not been breached by the dog search. The refusal by the trial judge to exclude the drugs as against [the accused] is consistent with that lack of breach of [her] Charter rights. There was therefore no basis for excluding the dog search from the factors which inform the presence of reasonable and probable grounds for arrest in the analysis of whether the arrest was lawful.
>
> The police are empowered to arrest a person under the authority of ss. 495(1)(a) and (b) of the Code, which reads as follows:
>
> 495.(1) A peace officer may arrest without warrant
>
> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
>
> (b) a person whom he finds committing a criminal offence...
>
> The positive indication by the dog and the subsequent finding of drugs justified [the accused's] arrest on either the basis of a criminal offence being committed or reasonable grounds to believe that an offence had been or would be committed as contemplated by s. 495(1) of the Criminal Code. Her arrest was therefore neither baseless nor capricious, in the words of Grant, supra, and was not arbitrary and did not infringe the Charter. The arrest of [the accused] was lawful and the subsequent search of her purse incidental to her arrest was therefore lawful as well. [paras. 27-28]

The contents of the accused's purse were admissible, the Crown's appeal was allowed, the acquittal set aside, and a new trial was ordered.

Complete case available at www.canlii.org

'POLICE OFFICERS ARE NOT ABOVE THE LAW'

R. v. Kelly, 2010 NBCA 89

The accused's mobile home came to the attention of police as a by-product of an active drug trafficking investigation, named "Operation Jellybean", and warrant was sought to search warrant it. Operation Jellybean included searches of police databases, an undercover operation, confidential informants, search warrants, tracking warrants, number recorder warrants, wiretap authorizations and extensive daily surveillance, both electronic and physical. But none of the information gathered directly implicated the accused or his residence in the drug trafficking activities. He was not named as a target of the initial investigation nor identified as a participant in any of the communications intercepted. However, over a period of nearly four months, surveillance personnel spotted one of the suspects and his vehicle at the accused's mobile home on four occasions. There was nothing in the ITO for the search warrant, however, to indicate that the suspect actually met the accused or entered his residence, or retrieved anything from or made a delivery to the residence. A FLIR check on the accused's residence was negative for a heat source which would have been consistent with a marihuana grow-operation.

Police attended the accused's home and tried to buy cocaine from him, but this was not successful. The following day the main suspect and two other targets, were arrested. Cocaine was seized during personal and vehicular searches incidental to those arrests. While an officer attended before a Provincial Court judge to swear the ITO and seek the search warrant for the accused's home, four other officers were dispatched to the residence. A superior officer as headquarters told the officers to enter and "secure" the premises so incriminating evidence could not be removed or destroyed, even though the superior was not acquainted with the circumstances nor have any source information that there was a real danger of the imminent elimination of evidence. The officers knocked on the front door, but received no response. No vehicles were in the driveway and

there was nothing to indicate a possibility of persons being inside the residence. The officers nonetheless forced open the front door and entered, identifying themselves as "police". They searched every room to confirm the residence was unoccupied. Once this two minute search was completed, the officers withdrew. Nothing was removed. Within an hour the search warrant was issued, but the ITO did not include the failed cocaine solicitation nor the warrantless entry. When the search warrant arrived it was executed and seven pounds of marihuana and other drug paraphernalia was found inside the accused's trailer.

"[P]olice officers are not above the law and Canadians rightly expect and assume they will discharge their professional responsibilities with punctilious respect for the law. After all, the official motto of the RCMP is "maintiens le droit", not "the end justifies the means"."

punctilious - *strictly attentive to minute details of form in action or conduct; showing great attention to detail or correct behaviour.*

At trial in New Brunswick Provincial Court none of the officers testifying could identify a presenting circumstance indicative of a real risk of the destruction or removal of incriminating evidence from the premises. They said they complied with the instructions to enter that had been given by their superior. The trial judge found the ITO contained enough evidence allowing the issuing judge to infer there were reasonable grounds for the belief that the things to be searched for "could" be in the accused's residence and that the police had suspicions that there may have been drugs there. However, she held that the accused's s. 8 *Charter* rights were violated by the prior warrantless forced entry and search. In her view, there were no "exigent circumstances" that could justify the warrantless entry and search under s. 11(7) of the *CDSA*. "While the police could have attended at the trailer and secured the premises from anyone entering until the warrant arrived, I cannot find the grounds to justify the warrantless entry on 'exigent circumstances'," she said. Nonetheless, the the marihuana seized pursuant to the warrant was admitted under s. 24(2). The accused was convicted of possessing marihuana for the purpose of trafficking and sentenced to 26 months in jail.

The accused appealed his conviction to the New Brunswick Court of Appeal arguing, in part, that the trial judge erred in finding there were reasonable grounds to believe the "things to be searched for" were inside. He also submitted that the evidence should have been excluded under s. 24(2).

The Court of Appeal found the ITO did not provide the necessary reasonable grounds for its issuance and did not disclose information that the ITO deponent had to know was both relevant and significant. Chief Justice Drapeau, delivering the Court's opinion, first noted:

> [I]t is necessary to state a truism: police officers are not above the law and Canadians rightly expect and assume they will discharge their professional responsibilities with punctilious respect for the law. After all, the official motto of the RCMP is "maintiens le droit", not "the end justifies the means". Indeed, the proposition that our country is founded upon principles that recognize the supremacy of the rule of law is enshrined in the introduction to the Canadian Charter of Rights and Freedoms. That text, the contents of which form part of the supreme law of the land, goes on to enunciate a number of rights that all Canadians, no matter how modest their station in life, are entitled to enjoy to the fullest extent, free of unauthorized state interference. Of those rights, one of the most cherished is guaranteed by s. 8, the right to be secure against "unreasonable" search or seizure, and its breach in relation to a person's home is viewed by most citizens, and all courts, as particularly offensive. It is now settled law that a police search complies with s. 8 only if it was executed in a reasonable manner and was authorized by a law, which itself meets minimum constitutional standards. [para. 1]

The Warrantless Entry & Search

The forcible entry and warrantless search of the accused's residence were unlawful and breached s. 8 of the *Charter*, a matter conceded by Crown. No prior judicial authorization had been obtained and police knew of no exigent circumstances that might have legitimized their conduct. For unexplained reasons, a superior officer issued the order to enter. There was no evidence provided for the existence of exigent circumstances. "I can only conclude the warrantless entry and search of [the accused's] home was carried out with shocking insouciance for the law and [his] constitutional rights," said Justice Drapeau. He continued:

> "[T]he warrantless entry and search of [the accused's] home was carried out with shocking insouciance for the law and [his] constitutional rights."

insouciance - lack of care or concern.

> [Section] 11(7) of the CDSA allows a police officer to search a place for a controlled substance without a warrant if the conditions precedent to issuance exist "but by reason of exigent circumstances it would be impracticable to obtain one". Exigent circumstances exist when the thing to be searched for is at imminent risk of disappearance.
>
> It is trite law that positive results do not retroactively clothe a search with the mantle of reasonableness: the search must be authorized at law before it is undertaken. However, evidence gathered as a result of a search that, in one way or another, violates s. 8 may yet form part of the record at trial if its admission would not bring the administration of justice into disrepute. [paras. 3-4]

> "[P]ositive results do not retroactively clothe a search with the mantle of reasonableness: the search must be authorized at law before it is undertaken."

The Warrant

Section 11(1) of the *CDSA* allows a judge to issue a search warrant only if satisfied by information on oath that there are reasonable grounds to believe the thing to be searched for, commonly a controlled substance, is in the place to be searched. But Justice Drapeau cautioned, "neither outright falsehoods nor what might be called lies of omission have their place in the application process, the deponent's duty to the court, and to the administration of justice in general, being to ensure the ITO, in essence, tells the truth, the whole truth and nothing but the truth." As for how s. 11(1) enabled a search, he stated:

> Under s. 11(1) of the CDSA, the issuing judge must be satisfied that the thing to be searched for is in the place to be searched. In the case at bar, the issuing judge had to be satisfied the ITO demonstrated: (1) the deponent believed an offence had been committed; and (2) evidence of that offence would be found in [the accused's] residence. The ITO also had to demonstrate this belief was based upon reasonable grounds. In contrast, the question for the trial judge was whether "there was sufficient credible and reliable evidence to permit [the issuing judge] to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place". [para. 39]

The Court of Appeal found "the trial judge applied an impermissibly low standard" in concluding that it was reasonable to conclude there was a possibility that incriminating evidence could be found at the mobile home. Mere police suspicion or the possibility of finding evidence at the specified place, even if reasonable, is not a sufficient basis for the lawful issuance of a search warrant. Although the substantive sufficiency of the ITO stands to be assessed on both the evidence that is explicitly articulated and all inferences that may be reasonably drawn from the record, at best the ITO only gave rise to suspicions.

Furthermore, "in seeking a search warrant, the ITO deponent must not only set out the relevant facts fully and truthfully, he or she must do so 'plainly'," said Chief Justice Drapeau. "Misleading statements and exaggerations of the available intelligence are

not acceptable. Moreover, the deponent's disclosure obligations require him or her 'to reveal, not to conceal, any unconstitutional investigative step by which the authorities have secured information relevant to the ongoing investigation'." Here, the ITO did not inform the issuing judge of several things, including the ITO deponent's unsuccessful attempt at purchasing drugs from the accused prior to applying for the warrant nor of the prior forcible police entry and warrantless search of the mobile home. The failure of the deponent to incorporate this information in the ITO can only be viewed as an "extremely egregious breach of his duty ... (1) to make full, fair and frank disclosure to the issuing judge; and (2) to set out the relevant facts truthfully, fully and plainly."

Section 24(2)

After considering the factors in the s. 24(2) analysis (the seriousness of the Charter-infringing state conduct, the impact of the breach on the Charter-protected interests of the accused, and society's interest in the adjudication of the case on its merits) the Court of Appeal found that the admission of the marihuana seized from the accused's home would bring the administration of justice into disrepute:

> To summarize, the record reveals: (1) four RCMP officers attended at [the accused's] residence, broke open its front door, entered and conducted a search of its interior, all without any prior judicial authorization and in the absence of exigent circumstances; (2) the hearing before the issuing judge proceeded to its conclusion on the basis of an informational record that the ITO deponent knew was incomplete in material respects; (3) the key provision of the ITO purporting to tie, in a direct way, [the accused's home] to the drug trafficking operation under investigation (as a drug selling and storage location) is misleading in significant respects; (4) both searches were unreasonable because the requisite reasonable grounds for the issuance of a warrant did not exist. The first was also unreasonable because there were no exigent circumstances. As for the second search, it cannot be legitimized by the warrant because of the ITO deponent's egregious breaches of his duties to the issuing judge, most notably his duties of candour and full disclosure; (5) the rights violations are not minor or technical in nature and relate to [the accused's] home; (6) the evidence seized is a controlled substance that has acquired a reputation, deserved or not, for being less deleterious than certain other illegal drugs ...; and (7) the charge does not involve a serious violent crime. [para. 63]

And further:

> In closing, I would add that, if this Court were to rule against evidential exclusion in a case such as the present one, it might be seen as paying mere lip service to the importance of s. 8 rights in relation to a dwelling-house and trivializing the duties of ITO deponents. In my respectful judgment, doing right according to law requires exclusion of the marihuana seized at [the accused's] home ... . [para. 65]

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

Complete case available at www.canli.org

FAILURE TO MENTION ABSENCE OF ODOUR DID NOT UNDERMINE SEARCH WARRANT

R. v. Nguyen & Nguyen, 2011 ONCA 465

After receiving detailed information from an anonymous first time tipster that a house was being used as a marijuana grow-op, the police went to the premises and confirmed much of the information provided by the tipster: all the windows and doors, except one, were covered; in the one uncovered window, a single ceiling light could be seen; the grass was not well kept; there was moisture damage on the roof of the house that was not visible on any other roof in the neighbourhood; there were two exterior timers on the house; and there was no snow accumulated by the vents, unlike similar snow covered vents on neighbouring roofs. Marijuana could not be smelled, nor were any fans or blowers heard. Other police investigation revealed no garbage or recycling placed at the curb,

a license plate number was registered to one of the accuseds, and a thermal imaging device detected an unusual amount of heat emitting from the chimney and vents on the roof. Hydro consumption records at the house indicated that consumption was lower than that of the neighbouring houses of similar size and was not sufficient to support a marijuana grow operation, leading police to believe there was theft of electricity. A second anonymous source provided information that no one lived at the property but an Asian male and female had been seen loading garbage bags into a van at the house. An ITO was sworn, which, in addition to summarizing the information and other police observations, stated the officer had experience and training related to indoor and outdoor marihuana growing operations. A search warrant under the *Controlled Drugs and Substances Act* was obtained and police found a significant marihuana grow operation inside the residence. The two accuseds, who were present at the property at the time of the search, were charged with producing marihuana and possessing it for the purpose of trafficking.

The Ontario Superior Court of Justice concluded that the search warrant should not have been issued. The judge found that some of the statements in the ITO were misleading and that there were several omissions of fact that should have been included. She concluded that the ITO "was carelessly drafted, materially misleading and factually incomplete." The warrant was struck down, the search was unreasonable under s. 8 of the *Charter*, and the evidence was excluded under s. 24(2). Acquittals followed.

The Crown appealed the acquittals, suggesting that the trial judge erred, among other grounds, by finding that there were misleading statements contained in the ITO and that the officer failed to disclose certain facts that he did not observe. As well, the Crown suggested that there were reasonable and probable grounds to justify the search.

Justice Blair, authoring the unanimous Ontario Court of Appeal judgment, first summarized the legal test for reviewing the sufficiency of a search warrant:

> The ultimate test is whether – after excising any offending portions of the ITO – there remains a sufficient basis on the record before the issuing justice, as amplified on the review, for issuance of the warrant. Other factors may be taken into account when arriving at that assessment. For example, misleading statements made to obtain the warrant, or a failure to make full and fair disclosure in the ITO – depending on the nature and severity of these faults – may provide a basis for challenging the decision to grant the warrant. Care must also be taken to confirm the reliability of information obtained from tipsters where that information forms a material basis for the application. [references omitted, para. 23]

And later, while noting that few applications for a search warrant are perfect, stated:

> [T]he central consideration on the review of a search warrant is whether on the record as it existed before the issuing justice and as amplified at the hearing, with any offending portions of the ITO excised, there remains a sufficient basis upon which the warrant could be issued. Police conduct is clearly relevant to that consideration. However, the review is not an exercise in examining the conduct of the police with a fine-toothed comb, fastening on their minor errors or acts or omissions, and embellishing those flaws to the point where it is the police conduct that is on trial rather than the sufficiency of the evidence in support of the application. This is particularly so where, as here, the trial judge has specifically found that the applicant did not intend to mislead the issuing justice. [para. 57]

"[T]he review [of a search warrant] is not an exercise in examining the conduct of the police with a fine-toothed comb, fastening on their minor errors or acts or omissions, and embellishing those flaws to the point where it is the police conduct that is on trial rather than the sufficiency of the evidence in support of the application."

Training

One of the alleged misstatements that the trial judge found to be misleading was that the officer said he had "training" in grow-operations. He had stated:

> I have experience and training relating to indoor and outdoor Marihuana growing operations. As a result of previous Marihuana growing operation investigations, I have become familiar with the signs and appearance of the buildings being used to house such operations.

The Court of Appeal, however, found the the officer did have training in the investigation of marijuana grow operations. Although it was not some sort of "formal" training, such as a classroom course, he did have "on the job training", including training from other experienced officers. "'Formal' training is one form of training, to be sure, but on the job practical training is valuable and counts as well," said Justice Blair. "It ought not to be discounted out of hand." Further, although the officer's experience was not extensive, he did have some. He had been involved with six to nine other marijuana grow operation investigations. There was nothing misleading or inconsistent with his statement.

> "[T]he absence or reference to something not seen, not heard, or not done, will [in most cases] lead to the sensible inference that whatever it is was not seen, not heard or not done."

Omitting the Not Seen, Not Heard, Not Done

The trial judge was critical of the officer for not expressly negativing several facts in the ITO, which were characterized as omissions. These included such things as not stating that there was no smell of marijuana or that fans or blowers were not heard. As well, the ITO did not mention that there was no evidence of electricity theft, no actions of a grow-op aside from that provided by the anonymous sources, and no observations of suspicious activity. However, the Court of Appeal disagreed with this. "In my view, these alleged failures to address things not seen or investigative steps not taken – considered individually or taken as a whole in the context of all 'omissions of fact' – do not amount to material non-disclosure that would undermine the issuance of the warrant," said Justice Blair.

An applicant for a search warrant has a duty to make full, frank, and fair disclosure of all material facts in the ITO supporting the request, which includes the duty not to omit material facts. But "the absence or reference to something not seen, not heard, or not done, will [in most cases] lead to the sensible inference that whatever it is was not seen, not heard or not done." In this case, the facts were not known or matters not observed by the police. This was different than cases where facts known to the police at the time were not disclosed in the ITO. "Although there may be circumstances in which the duty to provide full and fair disclosure will require an applicant for a search warrant to negative something unseen or not done, I would expect such circumstances to arise infrequently," said Justice Blair. He continued:

> The obligation on applicants for a search warrant is not to commit the error of material non-disclosure. "Materiality" is something that bears on the merits or substance of the application rather than on its form or some other inconsequential matter. There is no obligation on applicants to anticipate, and to explain away in advance, every conceivable indicia of crime they did not see or sense and every conceivable investigative step they did not take at the time in order to counter the creative arguments of able defence counsel on a review hearing many months or years after the event. Here, for the most part, the impugned "omissions of fact" relied upon by the trial judge fall into the latter type of category, or they are simply immaterial, or were not omissions at all.
>
> The failure by [the officer] to note that he had failed to smell the pungent odour of marijuana or to hear the sound of fans or blowers that are characteristic of marijuana grow operations warrants some consideration. He admitted in cross-examination that he had tried to smell marijuana, but had not, and that he had not heard the sound of fans or blowers. He also acknowledged that sometimes the smell of marijuana can be sensed and that, on such

> occasion, he is able to tell the issuing justice that he believes there is a grow operation in the home based on that. However, the trial judge failed to advert to [the officer's] additional evidence that he had only been able to smell the odour of marijuana outdoors at two of the eight or nine grow operations he had previously attended, and to hear fans or blowers on one of those occasions. He testified that on most occasions "you cannot detect the odour of marijuana outside", and "it's not very often that you can [hear fans or blowers]."
>
> Thus, there is nothing on the record to indicate that the absence of the smell of marijuana or the sounds of fans outside a grow operation home is a common indicia of the absence of a marijuana grow operation inside. I see little need for the applicant to postulate such a possibility in the ITO and then explain it away. The record, as amplified, explained it away in any event. I agree with the observations of [the officer] in cross-examination that the issuing Justice would likely have assumed from the fact that he did not say he had smelled the odour of marijuana or heard the sounds of fans or blowers, that he had not. These alleged omissions are insignificant. [references omitted, paras. 51-53]

The purported omissions were not material nor, for the most part, properly characterized as omissions in the circumstances.

Section 24(2)

Since there was no s. 8 breach it was unnecessary to address s. 24(2). However, even if there was a s. 8 breach, the Court of Appeal would have admitted the evidence.

The Crown's appeal was allowed, the order quashing the search warrant was set aside, and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

"There is no pillow so soft as a clear conscience." - French Proverb

OFFICER HAD GROUNDS TO ARREST: SEARCH LAWFUL

R. v. Perjalian, 2011 BCCA 323

Police saw a vehicle turn abruptly into a lane, speed well over the limit, and stop behind an apartment building. The passenger quickly got out and entered the building. Two police officers followed and stopped behind the car. As the driver (accused) was getting out of the vehicle, he was detained for the purpose of investigating the speeding violation, an offence under British Columbia's *Motor Vehicle Act*. The officer asked the accused for his driver's licence and registration, but only a licence was produced. A half-full bottle of beer was observed in the centre console of the car. When asked again for the car's registration, the accused turned towards the car as if he intended to get the registration and appeared to deliberately position himself to block the officer's view. The officer saw the accused reach with his right hand and drop a plastic film container on the floor, making no attempt to pick it up or look for the registration. He just turned back and said he could not find it. The officer, a 28 year veteran with 10 years on a drug squad, formed the belief there were drugs in the film container and that the accused was arrestable for either possessing the drugs for the purpose of trafficking or for simple possession. He ordered the accused out of the car, retrieved the film container, and opened it, finding 13 "rocks" of crack cocaine and a "ball" of powder cocaine. The accused was then arrested for possessing cocaine for the purpose of trafficking, handcuffed, searched, and advised him of his right to retain and instruct counsel. The accused said he wished to speak with a lawyer. The car was then searched and a scoresheet (a form of a drug-trafficker's bookkeeping) was found. Cash in the amount of $270 was also seized. While waiting for police transport, the officer asked the accused if he had a crack pipe or needle, to which he responded, "Do I look like a fucking junkie?"

At trial in British Columbia Provincial Court the officer testified that he believed the film container held drugs because of the accused's obvious attempt to dispose of it without detection and, in his experience, containers are used extensively by drug dealers to store and transport their drugs. The officer also said that he did not believe he was prohibited from questioning a suspect who had asked to speak to counsel. He said he had done so in the past. The judge found the accused was under detention when the officers approached him initially to investigate the traffic violation. Police breached ss. 10(a) and (b) of the *Charter* because they failed to immediately inform him of the reason for his detention or of his right to counsel at the outset of the investigation and, later, when the officer came to believe the accused was in possession of drugs. Sections 10(a) and (b) were only complied with when the accused was arrested, some three minutes after the investigation began.

As for the search, it was reasonable. The officer's subjective belief that the film container held drugs was credible and objectively reasonable based on the officer's experience and the circumstances in which he observed the container. His belief was not based on a mere hunch. The seizure and search of the container were lawful. Even though the accused was not actually arrested until shortly after the search the officer had reasonable grounds to arrest the accused when the search occurred; it was therefore justified as a search incidental to arrest. As for the accused's statement, the officer committed a "clear, conscious and flagrant breach" of s. 10(b) in obtaining it by questioning the accused after he indicated he wished to speak to counsel but had not yet been given an opportunity to do so. Although the Crown did not seek to admit the statement, the judge considered this s. 10(b) breach to be relevant as part of a pattern of *Charter* abuse in the s. 24(2) analysis for the drugs and score sheet. The evidence was ultimately admitted and the accused was convicted of possessing cocaine for the purpose of trafficking.

The accused appealed, arguing (in part) before the British Columbia Court of Appeal, that the judge erred in failing to find that police breached his s. 8 *Charter* rights and the evidence should have been excluded. In his view, the Crown did not establish the subjective or objective grounds for his arrest. He had no record for drug offences and the police had no information linking him or the vehicle to drug-related activity, nor did the officer see or smell drugs. Although the presence of an opaque film canister in the car and his conduct may have been suspicious, it fell far short of providing reasonable grounds to justify the arrest for a drug offence.

The Search

Justice Neilson, writing the unanimous judgment, first noted that the "search of the film container was prima facie unlawful because it was conducted without a warrant." However, an exception to this rule exists when a search is conducted as an incident to arrest. A lawful arrest requires reasonable grounds, which encompasses both a subjective and an objective component. In this case, (1) the officer was required to honestly believe he had grounds to arrest the accused for a drug offence, and (2) a reasonable person standing in the officer's position would need to find that belief objectively reasonable. In Justice Neilson's view, it was not established that the trial judge erred in concluding the officer honestly believed the accused was "arrestable" at the time of the search since the officer had seen drug dealers use film containers many times. As for the objective grounds, the Court said this:

> The evidence relevant to that determination includes the following. [The officer] had 28 years' experience with the Vancouver Police Department, ten years of which was with the drug squad. He estimated he had conducted 50,000 drug investigations and made about 4,000 arrests, 85 percent of which dealt with cocaine. In his experience, film containers were used extensively by drug traffickers to store and secrete their drugs. He had encountered this several hundred times. He saw a vehicle with two occupants speed down a laneway and stop behind an apartment building, where the passenger quickly got out and went into the building. [The officer] asked the driver twice for proof of registration. On the second request, the driver turned toward the car door as if attempting to look for the registration, but made no effort to do so. Instead, he positioned himself in a manner

indicative of an attempt to shield his actions from [the officer], and dropped a film canister from his right hand onto the floor of the car on the driver's side. He then turned back to [the officer] and said he could not find the registration.

The standard of proof for reasonable grounds is reasonable probability. This is something more than mere suspicion, but less than the civil standard of proof. In considering whether that standard has been met the circumstances must be considered in their totality, rather than on a piecemeal basis.

In the context of those principles, and viewed from the perspective of [the officer's] knowledge and experience, I am satisfied that a reasonable person would conclude there were objectively reasonable grounds to believe the film canister held drugs. [The accused's] attempt to surreptitiously dispose of that canister in the presence of police leads to an inevitable inference that it held something illegal. [The officer's] extensive experience with the use of such containers in the drug trade forms a proper basis for a conclusion that it was reasonably probable it contained drugs. [paras. 51-53]

"The standard of proof for reasonable grounds is reasonable probability. This is something more than mere suspicion, but less than the civil standard of proof. In considering whether that standard has been met the circumstances must be considered in their totality, rather than on a piecemeal basis."

The accused's secretive conduct was sufficient to raise the officer's subjective suspicion to an objective level. The trial judge did not give too much deference to the officer's intuition or experience and, therefore, did not effectively render the objective element of the inquiry meaningless. The officer had reasonable grounds to arrest the accused for a drug offence at the time of the search, the search was lawful as an incidental to arrest, and did not violate s. 8 of the *Charter*.

Other Breaches

The Court of Appeal also found the police were not required to advise the accused of his right to counsel under s. 10(b) when they initially detained him to investigate the traffic violation. Although s. 10(b) is engaged when a suspect is detained for a motor vehicle offence, the police are not required to advise the detainee of the right to counsel. However, when the officer decided the accused was "arrestable" for possession of illicit drugs, the focus of the investigation changed from a traffic offence to a drug offence and the accused should, at this point, have been immediately advised of his right to counsel. Instead, the officer ordered him to the rear of the vehicle while he looked in the film canister. It wasn't until he was arrested that he was advised of the reason for his arrest and his right to counsel. There was a breach of s. 10(b) when the detention continued after the officer formed the belief that the accused was in possession of illicit drugs.

Although the trial judge's s. 24(2) analysis was upheld, the accused's conviction for possessing cocaine for the purpose of trafficking was set aside and a conviction for simple possession substituted. This was a circumstantial case and a conviction for possessing drugs for the purpose of trafficking required that offence to have been the only reasonable inference that could be drawn from the facts. Since there was information provided by the drug expert that the trial judge failed to consider, along with an absence of other indicia typically found with trafficking, simple possession was an equally reasonable conclusion.

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

Note-able Quote

"He who does not prevent a crime when he can, encourages it." - Seneca

REASONABLE GROUNDS: A PRACTICAL, NON-TECHNICAL, COMMON-SENSE ASSESSMENT

R. v. Ballendine, 2011 BCCA 221

Italian police arrested a person involved in the production and internet distribution of child pornography. His business records disclosed that approximately a year earlier a British Columbia resident (the accused) ordered over two dozen child-pornography videos (DVDs) by email in 2005. That information was passed on to Canadian police in February of 2007. In September 2007 the police subsequently obtained a telewarrant under s. 487.1 of the *Criminal Code* (*CC*) to search the accused's home for the DVDs as well as any computers/computer-related equipment. Although the police did not find any of the DVDs ordered from Italy, a forensic examination of the accused's hard-drive disclosed a large number of other child-pornography videos and a short clip from one of the DVDs. The examination of another hard-drive showed visits to child-pornography websites.

A British Columbia Supreme Court judge upheld the warrant despite several objections raised by the accused about its validity and execution. The evidence was admitted and the accused was found guilty of both accessing and possessing child pornography.

The accused's conviction was challenged to the British Columbia Court of Appeal. He argued, among other grounds, that the police officer submitting the ITO by fax to the judicial justice of the peace (JJP) did not meet the impracticability requirement. He also contended that the information was stale and there was not reasonable grounds to believe the accused was in current possession of child pornography. Further, he suggested that the scope of the warrant was overly broad and that another search warrant was required before the police could conduct a forensic examination of the seized hard-drives. Justice Frankel, writing the unanimous Court of Appeal's decision, rejected all of these submissions.

Telewarrant Impracticability

Under s. 487.1(1) of the *CC*, an application for a search warrant may be made by telephone or other means of telecommunication if the peace officer believes that it would be impracticable to appear personally before a justice to make the application. All telewarrant applications in British Columbia have been made to JJPs at its Justice Centre for about the last 10 years. In this case, the officer said it was impracticable for him to apply for a warrant in person because he had contacted the local courthouse and was told that a local JJP was not available. He did not contact a different courthouse located some 20 kilometers away, nor one located about an hour's drive away, to see whether he could make his application in person at either one of those places. However, there was no evidence as to whether a JJP was available or would have been available to personally deal with an application for a search warrant at either of these other courthouses. The onus on proving a s.8 *Charter* breach on a balance of probabilities was on the accused. Therefore, he was the one required to establish a violation of his rights by the police officer's resort to the telewarrant process. But he failed in demonstrating that the impracticability standard was not met. Justice Frankel stated:

> Before submitting his application to the Justice Centre, [the officer] ascertained that there was no judicial officer at the Victoria courthouse who could deal with it on an in-person basis. That he did not make a similar inquiry at either the Colwood or Duncan courthouses does not, of itself, render his resort to the telewarrant process improper. Of those two locations, only Colwood could be considered a possible practical alternative. However, ... there was no evidence that the application could have been dealt with on an in-person basis there.
>
> It is important to keep in mind that the ITO [the officer] submitted by fax to the Justice Centre contained a statement that, on its face, satisfied the requirements of s. 487.1(1). That being so, the onus was on [the accused] to establish that an in-person attendance, either in Victoria or elsewhere, was not impracticable. This he failed to do. [paras. 37-38]

Reasonable Grounds for Current Possession

The accused submitted that there was nothing in the ITO capable of supporting reasonable grounds to believe that child pornography would likely be found at his residence when the warrant was executed. In his view, by September 2007, the information with respect to having ordered child-pornography videos in 2005 had become so stale as to be undeserving of any consideration. Justice Frankel, however, found this not so. He held that the trial judge did not err in finding that there were reasonable grounds to believe that the videos ordered by the accused were at the premises:

> As has been oft stated, a reasonable-grounds determination is based on a practical, non-technical, and common-sense assessment of the totality of the circumstances. In the case at bar, that determination includes a consideration not only of when the Marzola videos were ordered, but also their contents, how they were ordered, the number ordered, and the cost.
>
> Merely because information is "dated" does not mean it is "stale". While the length of time that has passed is to be taken into account in a reasonable-grounds determination, it is but one factor. [paras. 53-54]

"[A] reasonable-grounds determination is based on a practical, non-technical, and common-sense assessment of the totality of the circumstances."

And further:

> In my view, the trial judge was correct when he concluded that, as a matter of common sense, it is reasonable to infer that someone who spends approximately $1000.00 to acquire more than two dozen child-pornography videos over the internet is likely be a collector of such prohibited material and is likely to retain them for a considerable time. [para. 57]

Thus, the passage of time alone did not necessarily demonstrate the information was stale.

Warrant Scope: Evidence of Residency

The accused had contended that the scope of the warrant was overly broad and should have been more limited. In rejecting this argument, the Court of Appeal noted that not only were there reasonable grounds to believe that evidence related to child pornography would be found on computers (including hard-drives), the warrant also allowed police to search for evidence of residency, which was not restricted to hard copies, but could also include evidence found on computers:

> In addition, as the warrant properly authorized a search for "evidence of residency", the police were entitled to search for such evidence in electronic form. In possessory offences, evidence of occupancy or residency is often tendered by the Crown to establish that an accused was in control of premises and, therefore, in possession of the prohibited item found therein. For example, the presence or absence of such evidence is often an important fact in marihuana grow-operation prosecutions. ... It is self-evident that documents bearing the name of, or related to, a particular person can serve to connect that person to the place where those documents were found. ...
>
> In this case, [the accused] accepts that the police had reasonable grounds to search for what are sometimes referred to as "hard-copies" of such things as documents and photographs that could assist in establishing who had control of the Old Esquimalt Road premises. In my view, they equally had grounds to search for electronic versions of those things. An electronically-stored version of a letter or photograph that connects a person to premises is as cogent a piece of evidence as a hard-copy of the same thing. [references omitted, paras. 62-63]

"An electronically-stored version of a letter or photograph that connects a person to premises is as cogent a piece of evidence as a hard-copy of the same thing."

Hard-Drives Searches

The accused argued that the warrant gave the police authority to search his residence and seize any computers, but it did not authorize them to conduct a forensic examination of those devices. He suggested that a second warrant was required before the police could examine them. Justice Farnkel disagreed:

> [T]here were reasonable grounds to believe that the Old Esquimalt Road premises were being used as a residence. There were also reasonable grounds to believe that a computer used in the commission of the offence being investigated would be found there. As well, the justice of the peace was made aware that an on-site forensic examination of any computer would be impracticable. Far from being implicit, the warrant expressly authorized the police to "search for and seize", amongst other things, computers.
>
> In this case, the police were authorized, on the basis of the warrant, to remove the computer and related equipment from the Old Esquimalt Road premises and to examine them for the purpose of locating any electronically-stored data covered by the warrant. [paras.69-70]

The accused's appeal was dismissed.

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

LEGALITY OF SEARCH FLOWS FROM ARREST'S LAWFULNESS

R. v. Nicholson, 2011 ABCA 218

After police received two tips from confidential informants that an individual named "Josh" was selling drugs, they set up surveillance on the accused. Although no suspicious activity was observed on five days of police surveillance, on another day police saw five encounters involving the Escalade owned and driven by the accused. Unknown individuals were observed enter and exit the vehicle. Each of these encounters lasted between four and thirty seconds. Just over two weeks later police saw the accused driving a Plymouth van owned by him. He did a heat check - a manouevre done by drug traffickers to see if they are being followed by the police. He made a U-turn, turned into a cul-de- sac, and waited in his vehicle before turning back and continuing in the same direction he was originally headed. Some 25 minutes later a car pulled up beside the van in a grocery store parking lot and its passenger entered the van carrying what appeared to be a full knapsack. After about one minute the passenger exited the van with a knapsack that appeared to be lighter. Believing the accused was a drug trafficker and that a drug transaction had taken place, the investigator instructed an uniformed police officer to arrest him for drug trafficking. Shortly afterwards the van was searched without a warrant as an incident to arrest. A blackberry and cell phone were seen on the floor and a black Louis Vuitton bag was between the driver and passenger seats. It contained a plastic bag with 500 grams of cocaine. The accused was read his *Charter* rights, cautioned, and expressed a desire to speak to a lawyer, but was not allowed to do so until some nine hours later. The investigator wanted to search the accused's residence before permitting a phone call. During this time, two attempts were made to question the accused before being he was given the opportunity to exercise his desire to speak with counsel.

At trial in the Alberta Court of Queen's Bench the judge found that the vehicle search was reasonable and therefore s. 8 of the *Charter* was not breached. However, he concluded that s. 10(b) - the right to counsel - had been violated because of the delay in providing the accused access to counsel. He, characterized the police conduct as blatant, unreasonable, and unacceptable. The evidence arising from the seizure was nonetheless admitted under s. 24(2). The accused was convicted of possessing cocaine for the purpose of trafficking.

The accused then appealed his conviction to the Alberta Court of Appeal contending, in part, that the trial judge erred in finding that police had reasonable grounds to arrest him. The search that followed was therefore unlawful and the judge should have excluded the evidence. Furthermore, he submitted that the judge failed to consider whether the Crown had proven possession beyond a reasonable doubt.

Arrest

The Court of Appeal found the accused's arrest and vehicle search to be lawful:

> The legality of a search incident to arrest is derived from the legality of the arrest. The person instructing the arrest must subjectively believe that there are reasonable grounds to make the arrest and those grounds must be objectively reasonable. The trial judge noted that [the officer] testified that he believed the accused was engaged in drug trafficking and instructed a uniformed officer to arrest him. The trial judge referred ... to seven instances of evidence which gave rise to that conclusion (the tips from two confidential informants, the five exchanges with other vehicles on April 1, 2008 and the exchange with the black Acura on April 17, 2008) in concluding that [the officer] had reasonable and probable grounds for the arrest. While the trial judge did not use the word "objectively reasonable", these seven instances can logically be interpreted as meeting the objective component of the test. (references omitted, para. 15]

"The legality of a search incident to arrest is derived from the legality of the arrest. The person instructing the arrest must subjectively believe that there are reasonable grounds to make the arrest and those grounds must be objectively reasonable."

The trial judge properly concluded that the officer had reasonable grounds for instructing the accused's arrest. Thus, there was no s. 8 infringement.

Possession

Proving possession beyond a reasonable doubt is an essential element of the offence of possessing cocaine for the purpose of trafficking. Here, the accused "was the owner and sole occupant of a motor vehicle in which a Louis Vuitton bag containing 500 grams of cocaine was found within arms reach of his position as the driver of the vehicle," said the Court. "The finding of a prohibited item within a motor vehicle owned and operated by an accused is prima facie proof of possession by the accused." Even though the trial judge made no express finding that the accused was in possession of the substance seized from his van, it was inevitable that the judge would have concluded that the evidence established beyond a reasonable doubt that he was in possession of it.

"The finding of a prohibited item within a motor vehicle owned and operated by an accused is prima facie proof of possession by the accused."

Section 24(2) Charter

The Court of Appeal also agreed that the evidence was still admissible even though the accused's s. 10(b) *Charter* rights were breached. There was no connection between the s. 10(b) infringement, which occurred after the search and seizure of the drugs, and the reliable and critical nature of the evidence.

The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

A Word of Caution

Although the Alberta Court of Appeal upheld the accused's conviction, they noted that this case "was certainly not a model police investigation." The police failed to follow basic police procedures, such as:

- police did not tag and label the bag containing the drugs seized from the accused's vehicle on the day it was seized;
- police did not respond to several requests to attend the police detachment to identify the seizure;
- police denied the accused's right to counsel for about nine hours from the time of his arrest, during which two attempts were made to question him after he had asserted his desire to speak with counsel and before being given that opportunity. The trial judge characterized this conduct as blatant, unreasonable and unacceptable.

The justices did not want their judgment to be taken as condoning these investigative failings.

REASONABLENESS OF SAFETY SEARCH TO BE DETERMINED IN LIGHT OF PARTICULAR FACTS

R. v. Aucoin, 2011 NSCA 64

The accused was stopped driving shortly after midnight in a downtown area during a busy Apple Blossom weekend. The licence plate on his car was for another type of motor vehicle. While checking the insurance and registration for the vehicle and the accused's newly issued licence, the officer smelled alcohol and demanded a roadside screening test. The accused was asked to step out of his vehicle and go back to the police car, two or three car lengths away. He was told he was not under arrest and was placed in the back seat of the police car with the door open and his feet outside. Although the screening test indicated a result (20 mg%) below the legal limit, the accused was still in breach of a zero tolerance policy for a newly licenced driver. The officer decided to issue the accused a summary offence ticket for having alcohol in his system as a newly-licensed driver, so he wanted to put the accused in the back seat of the police car while he wrote the ticket in the front seat. The accused's vehicle was going to be towed and the officer was concerned the accused could walk away and disappear while he was writing the ticket. The officer did a safety pat-down and felt something in the accused's right pocket. When asked what it was, the accused said it was ecstasy. He was arrested and two small baggies containing 100 green pills (which later turned out not to be ecstasy) and eight bags of cocaine were removed from his pocket. He was subsequently charged with possessing cocaine for the purpose of trafficking as well as possessing a substance held out to be ecstasy for the purpose of trafficking.

> "We are to consider the reasonableness of [the officer's] actions in light of the particular circumstances he faced, not in the context of other fact situations that may arise."

At trial in New Brunswick Provincial Court the officer testified it was his standard practice, especially when it was busy and alcohol was involved, to place a person in the back seat of his police car while he wrote the ticket up as well as perform a pat-down search for weapons. He wanted to ensure his safety, and that of the accused, even though he had no idea what the accused had in his possession that could be used for harm. The trial judge concluded that the accused's s. 8 *Charter* rights had not been violated by the pat-down search. "Police officers face any number of risks everyday in the carrying out of their policing function, and are entitled to go about their work secure in the knowledge that risks are minimized to the greatest extent possible," she said. "Where an officer has reasonable grounds to believe that his or her safety is at risk, the officer may engage in a protective pat-down search of the detained individual. The search must be grounded in objectively discernible facts to prevent 'fishing expeditions' on the basis of irrelevant or discriminatory factors." She found this case involved some very unusual circumstances. It was late at night and there was no place to write out the ticket other than in the police car. Plus, it would have been inappropriate and unlawful for the officer to leave the accused seated in his own vehicle; it would have been a continuation of the offence. Finally, it was a very busy time and there were many people around. "Given all the circumstances, it was reasonable for [the officer] to request [the accused] to be seated in his police car while he was writing out the ticket," said the trial judge. "And it was also reasonable in all the circumstances for [the officer] to do the very quick pat-down search that he did, and the short conversation that he had with [the accused] before [he] was placed in the back seat of that vehicle. Office[r] safety is a legitimate concern in this particular fact-situation." After an expert said that the cocaine was possessed for trafficking, rather than for personal use, the accused was convicted of possessing cocaine for the purpose of trafficking but not the ecstasy related charge. He was sentenced to two-years in prison.

The accused appealed his conviction to the Nova Scotia Court of Appeal arguing, among other grounds, that the trial judge erred in finding that his s. 8 rights had not been breached by the pat-down search.

The Safety Search

A search incidental to the police power of investigative detention is a warrantless search and is presumed unreasonable unless it can be justified. This requires a determination of whether the search was authorized by law, if the authorizing law itself was reasonable, and if the manner in which the search was conducted was reasonable. In agreeing that the search was reasonable, Justice Hamilton, for the two member majority, stated:

> The issuance of the motor vehicle ticket to [the accused] was the final step of [the officer's] investigation into [the accused's] breach of the MVA. He had a duty to complete this stage of the process. He had to do this in a situation where he had essentially no back-up, it was late at night, he needed the light in the front seat of the police car to write the ticket, he could not place the [accused] in the car he had been driving because it was being removed, and because it may be a continuing offence given the alcohol in the [accused's] blood, and he was concerned the [accused] may take off if left on his own outside the police car. In such circumstances, the brief detention of the [accused] in the back seat of the police car is within the scope of the doctrine of investigative detention and is reasonable. Having decided to place [the accused] in the back seat of the police car, it was also reasonable for the officer to do a pat-down search to ensure that the [accused] had no weapons that he could use to harm the officer or himself.

" In such circumstances, the brief detention of the [accused] in the back seat of the police car is within the scope of the doctrine of investigative detention and is reasonable. Having decided to place [the accused] in the back seat of the police car, it was also reasonable for the officer to do a pat-down search to ensure that the [accused] had no weapons that he could use to harm the officer or himself."

> That is not to say that in other circumstances, if [the officer] followed "his usual practice" of placing someone to whom he is going to issue an alcohol - related motor vehicle ticket in the back seat of his car and doing a pat-down search, such detention and pat-down search would not be a breach of s. 8 of the Charter. We are to consider the reasonableness of [the officer's] actions in light of the particular circumstances he faced, not in the context of other fact situations that may arise. [para. 26-28]

The accused's appeal was dismissed.

A Different Opinion

Justice Beveridge, unlike his colleagues, concluded that the search was not authorized by law and was unreasonable under s. 8. Although the officer had lawful authority to stop the accused under the *MVA* and to engage in a more intrusive detention once the smell of alcohol was detected, he did not have carte blanche to do what he did. There was no arrest to trigger the long recognized common law power of the police to search incident to a lawful arrest. Instead, he was detained pursuant to an impaired driving investigation which ended when the accused tested below the legal limit. By then, the officer was merely engaged in writing a summary offence ticket for a newly licensed driver having alcohol in their blood. The officer's direction for the accused to sit in the rear of the police car created the officer safety issue. Had the officer just wrote the ticket without requiring the accused to sit in the rear of the police car, there were no officer safety concerns and no need to search. Furthermore, the search itself went beyond one reasonably limited to locating weapons.

Complete case available at www.canlii.org

POLICE TO CONSIDER CHARTER IN THEIR ASSESSMENTS

R. v. Timmons, 2011 NSCA 39

At about 10:30 pm, a 24-year-old woman (Nadine) called her mother. She said she was having a fight with the accused, with whom she was living, and wanted to be picked up. Since the family vehicle was not available, the mother called police to have them go for her daughter. The mother told the dispatcher that Nadine was being abused and that the accused "deals in drugs and has a big Rottweiler." The mother said she did not know whether or not there were weapons in the accused's house. Two police officers receiving the call began to search for the accused's home since the mother did not know exactly where it was and had only provided a very vague description. Police called the mother back to get more details. She again confirmed her belief that her daughter was being abused and provided a cell phone number. Police called the daughter. She laughed and said, "so my mother called." The daughter insisted that she was fine, did not need the police, and refused to tell police where she was located. Nonetheless, the police located the accused's residence, arriving at just after midnight, approximately two hours after the original call was reported. Police were aware the accused had outstanding charges for obstructing police and impaired driving, considered him violent, and believed he was involved in drugs.

Shortly after arriving, a scream was heard coming from inside the residence. Seeing a dog dish and chain outside, suggesting a possible guard dog, police drew their weapons. They pounded on the door, demanded entry, and ordered the dog be secured. The daughter opened the door and said everything was fine. She said that no assault had taken place and there was only a verbal argument. She had wanted to leave, but the accused did not want her to take his truck. An officer saw a person (the accused) lying on a bed, went straight to him, asked him to get out of bed, and patted him down for officer safety reasons. The house was then cleared. Each room was entered and spaces that could hold a person were checked to ensure that no one was hiding and that there were no firearms present. Seeing evidence of drugs in plain view (eg. marihuana on top of a clothes basket, a garbage bag containing dried marihuana plants in the kitchen, 170 marihuana seeds in a basket in the basement, Miracle Grow, buckets, insulation venting, lamp, timers, heater, dark plastic) police obtained a warrant authorizing a search of the premises.

The trial judge ruled that the police had a responsibility to enter the residence whether invited or not. "The perceived scream meant that either [the daughter] was lying about being okay, or had been subsequently threatened, or that someone else inside was in trouble," said the judge. "Police had to investigate and check the entire house for the presence of other persons." The judge found there was no qualitative difference between a 911 call arising from within the residence and one where the mother had phoned police out of concern for her daughter's safety. The entry by the police was not only justified but entirely necessary. The judge also held that the police were justified in checking the house to ensure that there were no other occupants and in searching the accused to ensure he had no weapon. There were no *Charter* breaches and the accused was convicted of cocaine and marijuana possession and for possessing marijuana for the purposes of trafficking. The accused then challenged the trial judge's ruling to the Nova Scotia Court of Appeal.

Warrantless Entry and Search

The accused argued that the police violated his rights under s. 8 when they entered and searched his home without a warrant. First, the call was not a 911 call or a distress call made from the home. Second, the police were not justified in entering when Nadine opened the door and said that she was fine. Third, once the police had entered, clearing the house was not justified.

The Court of Appeal noted that an individual is entitled to privacy in his or her own home. "The unauthorized presence of state agents such as the police constitutes an invasion of that privacy," said Justice Olund. But there are exceptions, such as hot

pursuit, exigent circumstances, or statutory authorization. In this case, the police entry before the search warrant was issued was a warrantless search and prima facie unreasonable. For the search to be lawful it would need to be authorized at common law.

The Court of Appeal rejected the accused's argument that the complainant's call was simply a request by a mother looking for a ride for her daughter, and not akin to a 911 call. "In the particular circumstances of this case, the fact that the call which triggered police response was not through 911, by the alleged victim, or from the house is not material," said Justice Olund. It was reasonable for the police to search for the alleged victim and go to the accused's home. Although Nadine told police at the door that she was fine, her statements could have been involuntary and made pursuant to threats of violence. She was still inside with the person reported to have abused her and was possibly under his control. If they had simply accepted what was said at the door at face value and left, the officers could have been abandoning an alleged victim of abuse in the company of her alleged abuser and in a remote and secluded location, without ever seeing or speaking with her alone.

The police entry, however, was unlawful and thus unreasonable under s. 8 of the *Charter*. The person who had been reportedly abused came and opened the door. "If the police were concerned that her assurances that all was well might not be genuine or made of her own free will, they could have asked [the daughter] to step outside the house [and] could then have questioned her face to face and away from any possible influence by the accused," said Justice Olund, continuing:

> If she had been in any danger, Nadine then could have simply left with the five officers. She had been located and was safe with them. There would have been no reason or need to enter the residence.
>
> The police had no information that there was anyone in the house other than [the accused] and Nadine Shaw. However if, because of the perceived scream or otherwise, they were concerned that there might be anyone else in the house who was in trouble, they could have obtained that information from Nadine Shaw, outside the house. They could also have asked whether there were any firearms or weapons there. If she said that there was someone who needed assistance, the officers would have reasonable grounds to believe that that person's safety was a risk. They then would have been justified in entering the house to locate and protect him or her.
>
> If Nadine refused to step outside the house when asked, the police might have suspected that [the accused] was threatening her from behind the door or farther away, and that he was armed. In that case, they would have had to decide how next to proceed. Depending on the circumstances, one reasonable option might well be a warrantless entry with the object of protecting Nadine's safety.
>
> But the police did not ask Nadine to step outside the house. Instead three officers entered. Nadine Shaw told them that she was fine. There was no one nearby or who was interfering with their conversation. The only person in view was a man lying on a bed in a bedroom. There was no evidence that he either moved or reached for something suddenly, or indeed at all. Nevertheless the police went straight into the bedroom, had him get up, did a pat-down search to which the man cooperated, and then proceeded to search his house. [paras. 43-46]

The trial judge failed to consider alternatives to the warrantless entry and the search of the home. Despite the police often being required to make rapid assessments and decisions in potentially dangerous situations, they must always include in their considerations the rights of individuals under the *Charter*. The accused's appeal was allowed, his convictions were set aside, and a s. 24(2) analysis was left for a new trial.

Complete case available at www.canlii.org

Once it has been demonstrated that a search is a warrantless one, the burden is on the Crown to show, on a balance of probabilities, that the search was a reasonable one. A search will be reasonable if it is authorized by law, if the law itself is reasonable, and if the manner in which the search was conducted is reasonable.

DETAINEE UNDERSTOOD RIGHT TO COUNSEL: s. 10(b) NOT BREACHED

R. v. J.W.C., 2011 ONCA 550

The accused, who suffered from bipolar disorder and depression, was a voluntary patient in a hospital's psychiatric unit. He was receiving treatment that included medication, therapy, recreational programming, and community passes. He called police one day from the hospital and said that he wanted to confess to sexual offences that he had committed in the past when he worked as a residential counsellor at various group homes for persons with special needs. The victims were developmentally handicapped, unable to communicate or testify, and never made complaints against the accused. Two officers went to the hospital and confirmed that the accused had called the police. He agreed to go to the station for an interview. He was then taken to the police cruiser where he was informed of his right to counsel. He agreed that he understood his rights. When asked if he wanted to call a lawyer he said, "Not right now." He was then taken to the police station and was again advised of his right to counsel. He said he understood and when asked again whether he wished to call a lawyer said, "Ah I don't know." The interview began and the accused explained that he had been a voluntary patient at the hospital. As the interview continued, he admitted to sexually assaulting a number of patients who were in his care. He provided details of the assaults, identified a number of the victims by their first name or their bedroom location, and gave particulars of the facilities where the assaults took place.

At trial in the Ontario Superior Court of Justice the accused claimed, in part, that his s. 10(b) *Charter* rights were breached. During a *voir dire* he said that he did not fully understand what the officer was saying to him. While he understood he could call a free lawyer, he did not know how to do so. He said "I don't know" because he was confused and nervous. He was trying to think about whether or not he should have a lawyer. As for his statement, he said it was untrue and the product of voices telling him that he had committed sexual offences and that he must be punished and would be killed in jail. The trial judge concluded that the accused had a reasonable time to consider whether he should exercise his right to counsel. He was given his right to counsel twice, once in the police car on the way to the station and again at the station. There was about 12 minutes between the first and second cautions to consider his right to counsel and make a decision whether to exercise that right. Plus, the interview began with open-ended questions as opposed to questions immediately focused on the crimes. "I find that the twelve or so minutes between the first reading of his right to counsel and caution to the beginning of the interview gave a person of his education, admittedly depressed at the time, sufficient time to ask for counsel," said the judge. He was convicted of several sexual offences.

The accused appealed his convictions to the Ontario Court of Appeal submitting, among other grounds, that when he answered "Ah I don't know", it was an equivocal response, and the police were required to obtain a clear waiver that he did not wish to consult counsel. After all, the police knew the accused was suffering from depression and had been removed from a psychiatric facility. In his view, his confession should have been excluded under s. 24(2).

Right to Counsel

In rendering judgment, Justice Rosenberg, speaking for the Court of Appeal, first summarized the s. 10(b) framework. He noted there are two components of the right to counsel:

1. **the informational component:** police must tell the detainee about their right to consult counsel, which includes the availability of duty counsel.

2. **the implementation component:** police must give the detainee an opportunity to exercise their right to counsel. This implies a duty on the police to hold off questioning until the detainee has had a reasonable opportunity to consult with counsel. In some circumstances, a detainee is entitled to a second opportunity to consult counsel: (1) where the police seek to resort to non-routine procedures involving the detainee, such as asking the detainee to participate in a

> line-up; (2) there has been a change in jeopardy because the investigation has taken a new and more serious turn as events unfold; and (3) as events proceed, there is reason to question the detainee's understanding of the right to consult counsel.

In this case, however, the accused's response to the second caution, "Ah, I don't know", was not a positive indication that he did not understand the right to counsel. He said he understood and admitted as much on the *voir dire*. "'Ah, I don't know' was not an expression of uncertainty about the content of the right," said Justice Rosenberg. "Nor was it an invocation of the right to counsel and, by itself, would not trigger an obligation on the police to obtain a clear waiver." Even after he said "Ah, I don't know", the officer confirmed with the accused that he understood his rights.

As for the accused's psychiatric condition, the Court of Appeal stated:

> Even taking into account the [accused's] psychiatric condition as was appropriate, there is nothing to indicate that the [accused] did not understand that he had the right to immediately consult counsel, if he wished to do so. There is no aspect of the interview that indicates that the [accused] did not understand his right to counsel or that he was in any way deprived of the opportunity to exercise that right had he chosen to do so.

In addition, the police were not required to go further and obtain a clearer waiver from the accused. He understood his jeopardy and there was no reason to doubt his understanding of the right to counsel. This was not a case where the detainee was unsure of the nature of the allegations. It was the accused who contacted police. He had exclusive knowledge and control over the information about the abuse he said he committed:

> In another case, a particular detainee's mental illness could be a very important factor, that might well lead to a finding that the detainee did not understand the right to consult counsel. However, in this case the [accused] was a voluntary patient at the hospital and his treating physician was of the opinion that it was appropriate that he be allowed to participate in the police interview that he sought. Moreover, the [accused] understood his right to counsel and appreciated that he could have exercised that right. He had adequate opportunity to consider whether he would do so. In the face of the [accused's] statement that he did not know whether to consult counsel, [the officer] reiterated in plain language that the [accused] could have immediate access to free legal advice. Given these circumstances, in my view, the police were not required to do more than [the officer] did. [para. 30]

The accused failed to establish a s. 10(b) violation and his appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

The Police Station Caution

OFFICER: Um now I'm gonna read a couple of things to you. I've already read them to you once but I'm gonna go over them again.

ACCUSED: Okay

OFFICER: Alright. Ah it's my duty to inform you that you have the right to obtain and instruct [counsel] without delay. You have the right to telephone any lawyer you wish. You also have the right to free advice from a Legal Aid Lawyer. If you are charged with an offence you may apply to the Ontario Legal Aid Plan for legal assistance. 1-800-265-0451 is a toll free number that will put you in contact with Legal Aid Duty [Counsel] Lawyer for free legal advice right now, do you understand?

ACCUSED: Mm huh

OFFICER: Ah do you wish to call a lawyer now?

ACCUSED: Ah I don't know.

OFFICER: Okay. Um but you do understand this [is] a, a phone number for free legal advice?

ACCUSED: Mm huh

OFFICER: And that we'll provide you with an opportunity to call that number, you do understand that right?

ACCUSED: Right

OFFICER: Um do you wish to say anything in an, now you're not charged with anything right now. Um do you wish to say anything ah you're not obliged to say anything unless you wish to do so but whatever you say may be given in evidence do you understand that?

ACCUSED: Mm huh

OFFICER: We're recording this and that we can use it as evidence?

ACCUSED: Okay

OFFICER: Okay. So what I'll do is I'll, I'll get you to um, ah just tell me a little bit about yourself and tell me why you called today. Okay?