JIBC

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

Happy Birthday!!!
Charter Turns 30

The *Canadian Charter of Rights and Freedoms* became law on **April 17, 1982**. That was 30 years ago. Since then the Courts, in applying and interpreting the *Charter,* have tried to tell government and its actors (including the police) where exactly the boundaries of an individual's rights and the countervailing societal interest in effective law enforcement intersect. This is no easy task. Equally, if not more difficult, is applying the law to the facts. But that is exactly what the police must do. It is their duty to take abstract constitutional notions and pinciples (such as privacy) and apply them to daily reality, often in a moments notice, with little time for reflection, second opinion or timeouts. The call you make is the one we all must live with. Training and education is key! That is why **"In Service: 10-8"** is now entering its 12th year of publication. We salute all of our readers and thank them for all that they do in maintaining law and order is this great nation we call Canada.

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.

JUSTICE INSTITUTE of BRITISH COLUMBIA LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

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

Are you ready?: how to prepare for an earthquake.
Maggie Mooney.
Vancouver, BC: Greystone Books, 2011.
HV 599 M66 2011

Business communication: communicate effectively in any business environment.
Marty Brounstein, Arthur H. Bell, Dayle M. Smith; with Connie Isbell.
Toronto, ON: Wiley Pathways, 2010.
HF 5718 B744 2010

Conceptual blockbusting: a guide to better ideas.
James L. Adams.
Cambridge, MA: Perseus Pub., c2001.
BF 441 A28 2001

Domestic violence prevention and reduction in British Columbia (2000-2010).
prepared by Katherine R. Rossiter.
New Westminster, BC: JIBC, 2011.
HV 6626.23 C3 R62 2011

The element: how finding your passion changes everything.
Ken Robinson with Lou Aronica.
New York, NY: Penguin Group USA, 2009.
BF 637 S4 R592 2009

The ethnicity reader: nationalism, multiculturalism and migration.
edited by Montserrat Guibernau and John Rex.
Cambridge; Malden, MA: Polity, 2010.
GN 495.6 E895 2010

First steps: a guide to social research.
Michael Del Balso, Alan D. Lewis.
Toronto, ON: Nelson Education, c2012.
H 62 D45 2011

The fifth agreement: a practical guide to self-mastery.
Miguel Ruiz and Jose Ruiz; with Janet Mills.
San Rafael, CA: Amber-Allen Pub.: Distributed by Hay House, 2010.
BJ 1581.2 R85 2010

Get your loved one sober: alternatives to nagging, pleading, and threatening.
Robert J. Meyers, Brenda L. Wolfe.
Center City, MN: Hazelden, c2004.
HV 5278 M28 2004

How to measure anything: finding the value of "intangibles" in business.
Douglas W. Hubbard.
Hoboken, NJ: Wiley, c2010.
HF 5681 I55 H83 2010

Good boss, bad boss: how to be the best - and learn from the worst.
Robert I. Sutton.
New York, NY: Business Plus, c2010.
HF 5549.12 S88 2010

Investigating harassment in the workplace.
Malcolm J. Mackillop, Jamie Knight, Meighan Ferris-Miles.
Toronto, ON: Carswell, 2011.
HF 5549.5 E43 M33 2011

Many faces of posttraumatic stress disorder.
Susan Rau Stocker.
Uniontown, OH: Holy Macro! Books, c2010.
RC 552 P67 S76 2010

The mindful workplace: developing resilient individuals and resonant organizations with MBSR. Michael Chaskalson.
Chichester, West Sussex; Malden, MA: Wiley-Blackwell, 2011.
RC 489 M55 C43 2011

Out of our minds: learning to be creative.
Sir Ken Robinson.
Oxford: Capstone, c2011.
BF 408 R53 2011

Personal space: the behavioral basis of design.
Robert Sommer.
Bristol: Bosko Books, 2007.
BF 469 S64 2007

Positive psychology at work: how positive leadership and appreciative inquiry create inspiring organizations.
Sarah Lewis.
Chichester, West Sussex; Malden, MA: Wiley-Blackwell, 2011.
HD 57.7 L49 2011

Preventing stress in organizations: how to develop positive managers.
Emma Donaldson-Feilder, Joanna Yarker, and Rachel Lewis.
Chichester, West Sussex, UK; Malden, MA: Wiley-Blackwell, 2011.
HF 5548.85 D66 2011

Psychological illness, mental health and the workplace: Canadian trends and return to work challenges.
Jane E. Sleeth.
Toronto, ON: Carswell, c2011.
RC 967.5 S45 2011

Research strategies: finding your way through the information fog.
William B. Badke.
Bloomington, IN: IUniverse, Inc., 2011.
Z 710 B23 2011

The role of the Royal Canadian Mounted Police during the Indian residential school system.
by Marcel-Eugène LeBeuf on behalf of the RCMP.
Ottawa, ON: Royal Canadian Mounted Police, c2011.
E 96.2 L46 2011

Situated learning perspectives.
Hilary McLellan, editor.
Englewood Cliffs, NJ: Educational Technology Publications, c1996.
LB 1060 S58 1996

Statistics for dummies.
by Deborah J. Rumsey.
Hoboken, NJ: Wiley, c2011.
HA 29 R84 2011

Success built to last: creating a life that matters.
Jerry Porras, Stewart Emery, Mark Thompson.
Upper Saddle River, NJ: Wharton School Pub., c2007.
HF 5386 P757 2007

Surviving your divorce: a guide to Canadian family law.
Michael G. Cochrane.
Mississauga, ON: J. Wiley & Sons Canada, [2011], c2012.
KE 569.2 C624 2011

"This is a man's problem": strategies for working with South Asian male perpetrators of intimate partner violence.
Gary Thandi, with Bethan Lloyd.
New Westminster, BC: JIBC, 2011.
HQ 1090.7 I4 T55 2011

Toxic divorce: a workbook for alienated parents.
Kathleen M. Reay.
Penticton, BC: Dr. Kathleen M. Reay Inc., c2011.
RJ 506 P27 R43 2011

The volunteer management handbook: leadership strategies for success.
edited by Tracy Daniel Connors.
Hoboken, NJ: Wiley, c2012.
HN 90 V64 V65 2012

Why people fail: the 16 obstacles to success and how you can overcome them.
Siimon Reynolds.
San Francisco, CA: Jossey-Bass, c2012.
BF 575 F14 R49 2012

WARRANT, PLUS BRIEFING, PROVIDES GROUNDS FOR WARRANTLESS ARREST

R. v. Charles, 2012 SKCA 34

An Ontario Justice of the Peace issued a warrant commanding Ontario peace officers to arrest the accused for two counts of attempted murder and one count of conspiracy to commit murder. When arrested, the accused was to be brought before a judge in Ontario. Because the accused was in Saskatchewan, two OPP officers went there and asked Saskatoon police to assist in executing the warrant, which had not been endorsed by a justice in Saskatchewan. The OPP showed the Saskatchewan officers the warrant, said it was "Canada-wide" and briefed them for an hour about the circumstances of the charges. Saskatchewan police spotted the accused in the driver's seat of a parked vehicle. As they approached him, he leaned over to the passenger side and then looked back at the officers. He was arrested and the vehicle was searched. Police found a loaded semi-automatic handgun with a defaced serial number under the passenger floor mat. The accused was charged with several weapons offences related to the gun.

Saskatchewan Provincial Court

Saskatchewan officers testified they intended to arrest the accused on the warrant. But they also said the warrant, plus the briefing they received, provided them with reasonable and probable grounds for the arrest. The trial judge found the arrest unlawful because the Saskatchewan officers relied on the warrant to effect the arrest. It was not a "Canada-wide" warrant as described by the Ontario officers. The warrant had not been issued by a superior court nor was it endorsed in Saskatchewan; therefore it could only be executed in Ontario. In the judge's view, "the arrest clearly was done on the strength of a judicial warrant ... , not on the basis of reasonable and probable grounds to arrest." Since the arrest was unlawful, the judge concluded the accused's ss. 8 (unreasonable search and seizure) and 9 (arbitrary detention) *Charter* rights were breached. The evidence of the gun was excluded and the accused was acquitted of all charges.

Saskatchewan Court of Appeal

The Crown argued the arrest was actually warrantless and authorized by s. 495(1) of the *Criminal Code*, with the police relying on the fact of the warrant and the other information obtained during the briefing to provide reasonable and probable grounds that the accused had committed the indictable offence or offences detailed in the warrant. The Crown submitted that the phrase "Canada-wide" warrant (which is not found in the *Criminal Code*) was not used to indicate that the warrant could be executed anywhere in Canada, but rather that the issuing province was willing to pay the expenses for having the accused transported back to its jurisdiction. The accused would then be taken before a judge in the arresting jurisdiction (Saskatchewan) to await formal endorsement of the warrant, which would permit the arrestee's return to the issuing jurisdiction (Ontario).

Justice Smith, delivering the Court of Appeal's decision, found it was unnecessary to decide whether the existence of a warrant itself, issued for an indictable offence, was sufficient to constitute reasonable and probable grounds for an arrest. In this case, Saskatchewan police had considerable information about the circumstances of the offences. This knowledge went well beyond the mere existence of the extra-jurisdictional warrant. They were briefed by the OPP and knew all the facts relied upon by Ontario police in obtaining the warrant. "These facts, especially when coupled with the existence of the arrest warrant based on these facts, clearly provided objectively reasonable and probable grounds for the arresting officers to believe that the [accused] had committed indictable offences." said Justice Smith. "Moreover, both arresting officers, in their testimony, made it clear

"These facts, especially when coupled with the existence of the arrest warrant based on these facts, clearly provided objectively reasonable and probable grounds for the arresting officers to believe that the [accused] had committed indictable offences."

that they held a subjective belief that they had reasonable and probable grounds for the arrest." Even though the warrant was not endorsed in Saskatchewan and the arresting officers were mistaken that it was effective there, the warrantless arrest was valid under s. 495(1). Once an arrest is made under s. 495(1) on reasonable grounds, the *Criminal Code* has a procedure (s. 503(3)) for executing the warrant after the arrest provided the warrant is presented for endorsement at that stage.

The trial judge erred by assuming knowledge of the circumstances relating to the charges in Ontario could not meet the objective test for reasonable and probable grounds because this information was secondhand or hearsay. "The police are entitled to rely on hearsay information to provide reasonable and probable grounds for arrest, so long as that information is reasonably reliable," said Justice Smith. "Information provided to the Saskatchewan officers by the Ontario police was clearly from a reliable source. In addition, the existence of the warrant for arrest based on that information enhanced its credibility." Further, the trial judge mistakenly concluded that police did not subjectively believe they had reasonable and probable grounds for the arrest because they said they would not have arrested the accused had there been no warrant. Both officers actually testified they believed they had reasonable grounds that the accused had committed the offences detailed in the warrant.

The arrest was valid under s. 495(1). Both officers subjectively believed that they had reasonable grounds the accused had committed the indictable offences detailed in the warrant. This subjective belief was based on the briefing they had received from the Ontario officers, supplemented by the existence of the Ontario arrest warrant. Their belief was also objectively reasonable. There was no s. 9 *Charter* violation. Since the arrest was lawful, the search of the vehicle was reasonable as an incident to arrest and no s. 8 breach arose. The Crown's appeal was allowed, the evidence was admissible, the accused's acquittals were set aside and a new trial was ordered.

Complete case available at www.canlii.org

ENTRAPMENT BURDEN LIES ON ACCUSED

Stoyko, 2012 ABCA 90

Two undercover police officers went to the accused's home to buy marijuana. When he answered the door, the officers told him they had met someone at the bar the night before who said he could sell them marijuana. The accused invited the officers inside, asked a few questions about who had referred them and then sold them a half ounce of marijuana for $180. The accused also gave the officers his cell phone number when they asked if they could buy marijuana again in the future. Twelve days later the officers returned and bought another half ounce of marijuana. A search warrant for the accused's home was subsequently obtained and a small amount of marijuana was seized.

Alberta Provincial Court

At his trial the accused admitted he sold the marihuana but argued he was entrapped by the aggressive and intimidating conduct of the police during their unexpected visit to his home. The trial judge rejected this argument and the accused was convicted of trafficking.

Alberta Court of Appeal

The accused broadened the scope of his entrapment argument by claiming that the police engaged in random virtue testing when they attempted to solicit drugs from him. In his view, the police had no basis to target him for the purchase of marijuana. But there was no evidence to support this. Justice Martin, speaking for the Court of Appeal, noted that the police officers were never asked to explain why they chose to target the accused. They simply said they were directed to him by the officer in charge of the investigation. Since the accused did not call or elicit evidence in advancing an entrapment defence, he failed to meet the burden of proof which rested on him to prove, not the Crown to disprove. Since there was no evidence to support the entrapment defence, it had no air of reality to it. The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

NO REASON TO DOUBT POSTAL EMPLOYEE'S VERACITY: WARRANT UPHELD

R. v. Whalen, 2012 NBCA 20

A Canada Post employee discovered two envelopes containing drugs. They had been deposited in the mail but were not properly sealed. The employee reported her observations which eventually formed the basis for a warrant to search the accused's home. When the warrant was executed, police found incriminating evidence proving the accused's involvement in an elaborate scheme for the exportation and trafficking of cannabis through the mail.

New Brunswick Provincial Court

The trial judge accepted the Canada Post employee's evidence that the envelopes accidentally opened, exposing their contents. The judge concluded that the postal employee did not open the envelopes, but that the contents had inadvertently spilled out. He found the warrant valid and the accused was convicted of unlawfully producing marihuana, possession for the purpose of trafficking, unlawfully exporting it from Canada and trafficking. He was sentenced to four years in prison, less 405 days spent in remand, plus ancillary orders under the *Criminal Code*.

New Brunswick Court of Appeal

The accused appealed his conviction, suggesting that the trial judge erred in upholding the validity of the search warrant. In his view, the evidence obtained as a result of the warrant was inadmissible.

The test to be applied when determining the validity of a warrant is "whether, in the totality of the circumstances as set out in the Information to Obtain (the "ITO") and the inferences that could properly be drawn, the issuing judge could have been satisfied that reasonable grounds existed." In this case, the trial judge ruled "there was some evidence in the ITO upon which the issuing judge could rely to issue the warrant." The Court of Appeal continued:

> This was not a case of a confidential or anonymous informant, which might have caused the police to make further investigation. Rather, the police had information from a known witness in circumstances in which there was no reason to doubt its veracity. In these circumstances, it was incumbent upon the police to make a full, fair and frank disclosure in drafting the ITO, but it was not necessary for the officers to investigate further as to the credibility of the postal worker. [para. 6]

Nor was it necessary to consider postal inspection powers under the *Canada Post Corporation Act* or its regulations. The employee did not inspect the envelopes; the contents inadvertently spilled out. Since the warrant was valid, the search was reasonable and there was no need to undertake a s. 24(2) *Charter* analysis. But, even if the ITO was defective, the police were acting in good faith on information they believed credible and under a warrant they expected was valid. The evidence would have been nonetheless admissible. The accused's appeal was dismissed.

Complete case available at www.canlii.org

STAY FOR CHARTER BREACH IS AN EXCEPTIONAL REMEDY

R. v. Salisbury, 2012 SKCA 32

The accused's driving caught the attention of a police officer in the early morning. It was extremely cold, -47° Celsius with the wind chill. He was stopped and arrested at 4:18 am and subsequently provided two breath samples of 180mg% starting at 4:40 am. He was then placed in a cell whereupon he fell asleep. He thought he awoke sometime between 8:00 am and 10:00 am but was not released until shortly before 2:00 pm. He was charged with impaired driving and over 80mg%.

Saskatchewan Provincial Court

The trial judge stayed the charges. In her view, the accused had been arbitrarily detained under s. 9 of the *Charter*. She found that after 7:30 am there was no evidence that the continued detention was

necessary. She rejected a lesser sentence or monetary compensation as an appropriate remedy because they would not ensure future *Charter* compliance by the police. On the other hand, a stay, she opined, would (i) adequately adjust the wrong suffered by the accused, (ii) attempt to secure future compliance by the police with an accused's constitutional rights and (iii) would not bring the administration of justice into disrepute.

Saskatchewan Court of Queen's Bench

The Crown's appeal was successful. The appeal judge upheld the *Charter* violation but found the remedy of a stay was disproportionate to the breach. He set aside the stay of proceedings and remitted the matter to the trial judge to conclude the trial.

Saskatchewan Court of Appeal

The accused asked that the stay be reinstated. The Court of Appeal, however, concluded the *Charter* breach in this case did not warrant such an extreme remedy. "A stay of proceedings as a remedy for a Charter breach is an exceptional remedy to be used only in the clearest of cases," said Justice Lane, delivering the Court's opinion. In agreeing that the appeal judge was correct in finding the stay disproportionate to the breach, he continued:

> The Charter breach in the particular circumstances was not such as to warrant such an extreme remedy. The [accused] twice registered .18. He himself says he did not wake up until between 8:00 and 10:00 a.m. That of itself is in the circumstances a significantly wide range. The fact he was not checked on after 7:30 a.m. does not extend the overholding time as the trial judge did. Further, it would be some considerable period of time given his breathalyzer readings before he could be released unless he had someone to pick him up and, in this case, he gave a rural address nor did he ask to be picked up. [para. 10]

The accused's appeal was dismissed.

Complete case available at www.canlii.org

GARBAGE ABANDONED: NO PRIVACY VIOLATION

R. v. Lewis, 2012 NLCA 11

Three armed and masked men, one armed with a hand gun, violently broke and entered a home, robbing and injuring its two occupants. The female victim had the gun placed at her head while her husband was beat with a claw hammer. The accused, who did not actually enter the home, was a party to the offence by providing the home invaders with the knowledge of where the money was kept. He had been to the home at least twice before and paid for the taxi used to transport all four of them to the residence, conduct a drive-by and confirm that it was the right place for the plan to continue. As part of the investigation, police seized three garbage bags and their contents from an uncovered (no lid) plastic garbage container that was about a foot or two from the city sidewalk near the rented residential premises in which the accused lived with his mother. The container was located adjacent to, but just inside, the property boundary. There was no fence between the residential property line and the sidewalk. The garbage bags contained blood stained clothes and a piece of paper with the address of the home broken into. As a result of this, and other evidence, the accused was charged with several offences including break and enter, breach of probation and breach of recognizance.

Newfoundland Supreme Court

The trial judge concluded that the garbage container was approximately 1.7 feet inside the property line. He noted that it was "about as far away from the entrance to the residence as it could be placed without being on or outside the property line. This would seem to be a place where the garbage would have been customarily located for removal." Having presumed the accused had a subjective expectation of privacy, the judge ruled the expectation was not objectively reasonable. "The garbage bucket was placed at almost the extreme boundary of the property close to a busy, combined, commercial and residential street, in full view and with easy access by the public or any other interested life form, for

example, dogs, cats, gulls or crows, the garbage bucket had no lid on it nor was it itself in any restraint box or system," said the judge. "It was open to anybody interested in it, including scavengers or, as in this case, the police." He continued:

> I find as a fact that on the evidence and viewed in all of the circumstances, the seized garbage had been abandoned and it was open to the police to seize it as part of their ongoing investigation. I find that the police intrusion by stepping on the property was a technical trespass of such a minimum nature as to make the intrusion into the lives of the residents of 189A negligible.

The accused did not have a reasonable expectation of privacy in the seized garbage. He was convicted and, after considering remand time, was sentenced to eight years in prison.

Newfoundland Court of Appeal

The accused argued that the trial judge erred in admitting, among other evidence, the contents of the garbage bags. In his view, his rights under s. 8 of the *Charter* had been breached because the garbage had not been placed at the curb at a time convenient for pick-up in accordance with the city by-law. Therefore, he contended that it had not yet been abandoned. He submitted that the evidence should have been excluded under s. 24(2).

Reasonable Expectation of Privacy

Even assuming, as the trial judge did, that the accused had a subjective expectation of privacy in the bags of garbage, the Court of Appeal agreed that the privacy expectation was not objectively reasonable. Here, the accused abandoned the material. He had discarded the garbage, thereby giving up any expectation of privacy he may otherwise have had in it. The trial judge did not err and the evidence was properly admitted. The accused's appeal was dismissed.

Complete case available at www.canlii.org

DETENTION DID NOT ARISE DURING 'MR. BIG' SCENARIO

R. v. Earhart, 2011 BCCA 490

The accused was arrested for the second degree murder of her common law spouse and admitted to strangling him. She was released on $3,000 bail, required to report to a bail supervisor, disclose her address, refrain from possessing any weapons and abide by a curfew. After her release, police obtained a wiretap authorization, installed a tracking device in her vehicle and monitored her movements. Although she breached her curfew, she was not arrested because police wanted to maintain the viability of surveillance. To further their investigation, police initiated a "Mr. Big" undercover operation, engineering scenarios to gain the accused's trust. As part of this operation the accused was invited out for dinner, then up to a hotel room for a job interview. The room was equipped with audio-video equipment. The undercover operator asked the accused about the murder under the pretence that he could make the charges against her "go away". She admitted she planned the victim's murder but did not execute it. She was then arrested and charged with first degree murder, remanded in custody and again interviewed. Subsequently, she confessed her involvement in the murder.

British Columbia Supreme Court

At trial the accused alleged, in part, that the her s. 7 *Charter* right to silence was breached because the police used tricks and deceit to elicit the statements during the undercover operation. Plus, since she was on bail for the investigated offence, she contended that she was under the control of the state and thus detained. The Crown, on the other hand, suggested that the s. 7 right to silence was only triggered on detention. Since she was not detained, nor in a position that was the functional equivalent of a detention, s. 7 did not apply. The judge ruled that when the accused made the statement during the undercover operation she was not "a person in the power of the state requiring the protection of her s. 7 right to silence." The accused's statements and the

recording were admissible and she was convicted of first degree murder by a jury.

British Columbia Court of Appeal

The accused again submitted that she was detained when she spoke to police during the undercover operation. In her view, police manipulated her movements while on judicial interim release which amounted to the functional equivalent of a detention. Thus, her a s.7 right to silence was breached. Furthermore, she contended that there should be a new approach in assessing the admissibility of statements arising from "Mr. Big" scenarios. The Crown, in contrast, suggested that the right to silence was not engaged because a person on judicial interim release is not detained, functionally or in actuality.

Right to Silence - Charter s. 7

Justice Bennett, writing the Court of Appeal's decision, concluded that the right to silence did not extend to the accused, who had been arrested, charged with an offence and then released on judicial interim release. The terms of her release were not onerous, nor was she under "pronounced psychological and emotional pressure" when she spoke with the undercover operator. "This 'Mr. Big' operation was relatively benign, and there was no physical or psychological constraint imposed on [the accused] by the police," said Justice Bennett. "She was free to agree or decline to speak to the undercover operator." The trial judge did not err in concluding there was no detention.

"Mr. Big" Operations

The Court of Appeal was unwilling to adopt a new approach for determining the admissibility of confessions from suspects in the context of "Mr. Big" operations, which were described as follows:

> The plan generally involves undercover officers convincing a suspect to join a criminal organization. The suspect is eventually introduced to the crime boss, who often professes the influence and ability to internally resolve the suspect's murder charge. The circumstances of these operations vary significantly from investigation to investigation. Some are very lengthy and purport to involve the suspect in increasingly serious criminal activity. In some, the suspect is led to perceive serious threats and assaults perpetrated upon other members of the "gang" if they fail to meet expectations. In others, the scenario put forward is less menacing, involving only offers of employment in the criminal organization conditional upon reassurance that the suspect's background will not cause problems for the organization. If so, the crime boss will take care of it.
>
> Concerns about this investigative technique have been raised for some time. Those concerns are that a suspect who is brought into the criminal underworld will be so intimidated or so keen to impress the crime boss that he or she will falsely confess to a crime. [references omitted, para. 79-80]

"Mr. Big" statements are considered contextually by a court. The Court of Appeal found this "Mr. Big" scenario fell on the less oppressive end of the scale when compared to others in the case law. It was limited to dinner and a 30-minute discussion in the hotel room. There were no serious concerns regarding the reliability of the statements due to oppression, intimidation or other tactics likely to shock the community. The statement was properly admitted and the accused's appeal was dismissed.

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

"MR. BIG" JURY INSTRUCTION

"I want to tell you about confessions. They can be unreliable. People can be persuaded to utter what amounts to a false confession for a number of reasons. You may think people do not confess to things they did not do, but that is not the case. The criminal justice system is all too aware of the fact that people have been known to confess to things they have not done. People have been known to make false confessions out of fear, out of hope, or promise, or favour. Do not start with the premise that people only confess to crimes they have actually committed."

BC Supreme Court Justice as cited in R. v. Earhart, 2011 BCCA 490

FORTHWITH USUALLY REQUIRES A PROMPT DEMAND & AN IMMEDIATE RESPONSE

R. v. Quansah, 2012 ONCA 123

A police officer saw a stopped vehicle facing a green light at 3:03 am. The accused was sitting in the driver's seat with his eyes closed. While trying to wake him up, the officer observed that the accused's eyes were red and bloodshot. The accused drove away and police pursued, but he pulled over shortly thereafter. He was ordered out of the vehicle and handcuffed. The police noted he was unsteady on his feet, his breath smelled of alcohol, and his eyes were red, unfocused and glossy. Between 3:06 am and 3:17 am a limited search for weapons was conducted and a short conversation ensued about alcohol consumption. The accused also said someone else was in the car, which was found to be incorrect. At 3:17 am an approved screening device (ASD) demand under s. 254(2) of the *Criminal Code* was made. The ASD was demonstrated at 3:20 am and, after two insufficient samples, a fail reading was obtained at 3:22 am. The accused was arrested, provided his rights, cautioned and given an Intoxilyzer breath demand. He was transported to the police station, spoke to a lawyer, provided two breath samples (126mg% and 115mg%) and was charged with impaired and over 80mg%.

Ontario Court of Justice

At trial the accused argued the demand was not given forthwith. The judge said forthwith meant within a reasonable time. After considering all of the circumstances before the demand was given, the judge found there was no realistic opportunity for the accused to consult counsel. His s. 10(b) *Charter* rights were not breached and a conviction for over 80mg% was entered.

Ontario Superior Court of Justice

The court ordered a new trial. In its view, the trial judge erred in defining forthwith. "Forthwith" means immediately or without delay, not within a reasonable time.

BY THE BOOK:

ASD Demand: s. 254(2) *Criminal Code*

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 peace 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.

Ontario Court of Appeal

The Crown argued the Superior Court judge applied the wrong test for "forthwith" in s. 254(2). The Crown contended that "forthwith" requires only that there be compliance with a valid demand before the detainee realistically could consult with counsel. In its view, forthwith does not mean "immediately" but "within a reasonable time". The accused, however, submitted that "forthwith" means "immediately or without delay," unless the delay is reasonably necessary. In his view, an ASD demand must be made forthwith upon the officer forming the opinion that the demand is justified and then the sample must also be provided forthwith.

In determining the meaning to be given to s. 254(2), Justice LaForme, speaking for the unanimous Ontario Court of Appeal, first described the provisions purpose:

> Parliament created a two-step detection and enforcement procedure in s. 254 that necessarily interferes with rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms. First, s. 254(2) authorizes peace officers, on reasonable suspicion of alcohol consumption, to require drivers to provide breath samples for testing on an ASD. These

"So long as the demand is validly made pursuant to s. 254(2) – that is, so long as it is made 'forthwith' – for Charter purposes there is no unjustified seizure or arbitrary detention or breach of the requirement to advise the detainee of his or her right to counsel."

> screening tests, at or near the roadside, determine whether more conclusive testing is warranted.
>
> Second, s. 254(3) allows peace officers who have the requisite reasonable and probable grounds – usually obtained from the ASD test – 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 limit prescribed by law.
>
> As our courts have often noted, this two-step process provides the police with a powerful tool 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 procedure. [reference omitted, paras. 18-20]

During the "forthwith" period, a detained person can be required to comply with an ASD demand despite ss. 8, 9 and 10(b) of the *Charter*. "So long as the demand is validly made pursuant to s. 254(2) – that is, so long as it is made 'forthwith' – for Charter purposes there is no unjustified seizure or arbitrary detention or breach of the requirement to advise the detainee of his or her right to counsel," said Justice LaForme. "This is because this statutory detection and enforcement procedure constitutes a reasonable limit on Charter rights, given the extreme danger represented by unlicensed or impaired drivers on the roads."

"Forthwith"

There are implicit and explicit requirements of immediacy in s. 254(2). It explicitly requires the motorist provide a breath sample "forthwith" and implicitly requires that the demand be made as soon as the officer forms the reasonable suspicion that the driver has alcohol in their body. "The term 'forthwith' in s. 254(2), therefore, means 'immediately' or 'without delay' and indicates a prompt demand by the peace officer and an immediate response by the person to whom that demand is addressed," said LaForme. "However, in unusual circumstances 'forthwith' may be given a more flexible interpretation than its ordinary meaning strictly suggests. ... Consequently, if the circumstances dictate that a 'short delay' is necessary for the officer to obtain an accurate result, the officer is justified in delaying either the making of the demand or the administration of the test after the demand." An example of a reasonable delay would be waiting 15 minutes where the officer believes that the ASD reading would be inaccurate (eg. recent alcohol consumption). This example, however, should not be taken to mean that an officer is never required to make an ASD demand as soon as they form the reasonable suspicion that the driver has alcohol in their body. In summary, the Court of Appeal concluded there were five things to consider in assessing the immediacy requirements in s. 254(2):

1. "the analysis of the forthwith or immediacy requirement must always be done contextually. Courts must bear in mind Parliament's intention to strike a balance between the public interest in eradicating driver impairment and the need to safeguard individual Charter rights.

2. "the demand must be made by the police officer promptly once he or she forms the reasonable suspicion that the driver has alcohol in his or her body. The immediacy requirement, therefore, commences at the stage of reasonable suspicion.

3. "'forthwith' connotes a prompt demand and an immediate response, although in unusual circumstances a more flexible interpretation may be given. In the end, the time from the formation of reasonable suspicion to the making of the demand to the detainee's response to the demand by refusing or providing a sample must be no more than is reasonably necessary to enable the officer to discharge his or her duty as contemplated by s. 254(2).

4. "the immediacy requirement must take into account all the circumstances. These may include a reasonably necessary delay where breath tests cannot immediately be performed because an ASD is not immediately available, or where a short delay is needed to ensure an accurate result of an immediate ASD test, or where a short delay is required due to articulated and legitimate safety concerns. These are examples of delay that is no more than is reasonably necessary to enable the officer to properly discharge his or her duty. Any delay not so justified exceeds the immediacy requirement.

5. "one of the circumstances for consideration is whether the police could realistically have fulfilled their obligation to implement the detainee's s. 10(b) rights before requiring the sample. If so, the "forthwith" criterion is not met.

Here, the Superior Court judge was too rigid in applying the "forthwith" definition of "immediately" or "without delay" and not giving it a flexible approach when required. The trial judge's definition of "within a reasonable time" was also wanting if applied too strictly:

> While many if not most cases will permit proceeding without delay, some circumstances will require a flexible approach. A short delay if reasonably necessary for the proper administration of the roadside test must be accommodated if the purpose of the legislative provision is to be realized.
>
> In my respectful opinion, articulation of the precise linguistic equivalent for "forthwith" is less important than a careful consideration of all the circumstances of the particular case. The legal context for this consideration is the objective that "forthwith" sets out, namely a prompt demand and an immediate response, ultimately taking no more than the time reasonably necessary for the prompt performance of the steps contemplated by s. 254(2). [paras. 51-52]

In this case, the time that elapsed between the stop and the sample - about 17 minutes - was reasonably necessary to enable the officer to do his duty. "Because [the accused] had just sped away, the officer understandably conducted a limited search of his car for weapons, had a short conversation with him about his alcohol consumption, and checked out the assertion that there was another person in the car with him," said Justice LaForme. "Having formed the required reasonable suspicion, the officer made the demand and [the accused] provided the sample. In these circumstances, the 17 minute delay was reasonably necessary for the officer to properly perform his task." The Crown's appeal was allowed and the accused's conviction was restored.

Complete case available at www.ontariocourts.on.ca

REQUEST TO EXIT VEHICLE AT BORDER NOT A DISGUISED SOBRIETY TEST

R. v. Brode, 2012 ONCA 140

The accused stopped his car at a Canada Customs booth and was asked routine questions by a Border Services Officer (BSO) about his citizenship, the length of time he spent outside of Canada and his place of residence. The BSO noticed the accused's speech was slurred, his eyes were "a little glossy and red", and there was a "small, faint" smell of alcohol on his breath. When asked about drinking, the accused said he had consumed three drinks. The accused turned his car off and handed over the keys as requested. A BSO designated under the *Customs Act* (*CA*) with powers to respond to suspected impaired drivers was called. The accused was directed out of his car and stumbled as he exited. He had bloodshot eyes, smelled of alcohol, and spoke in a "loud and cocky" manner. The designated BSO formed the opinion that the accused's ability to drive was impaired. He was arrested, cautioned, advised of his s. 10(b) *Charter* rights and subsequently provided breath tests. He was charged with impaired operation of a motor vehicle and over 80mg%.

Ontario Court of Justice

At trial the accused was convicted of impaired driving on the basis of the BSO's evidence, including the signs of impairment observed while he exited his

car at their direction. This was so, despite the accused being detained but not yet advised of his rights under s. 10(b) of the *Charter* when the observations were made.

Ontario Superior Court of Justice

The accused argued the significant evidence forming the basis for the impaired conviction - stumbling, bloodshot eyes, odour of alcohol and speaking in a "loud and cocky" manner - related to observations made between the time he was directed to get out of the car and the time when his s. 10(b) rights were given. He suggested that when these observations were made, the BSOs were engaged in conduct designed to gather evidence of impairment against him and were not obtained while carrying out authorized duties. The appeal judge, however, disagreed and found the impaired evidence was comprised of general observations the designated BSOs made while conducting authorized duties. The accused's appeal was dismissed and his conviction was upheld.

Ontario Court of Appeal

Th accused appealed arguing that designated BSOs have no authorized investigative powers at common law or by operation of statute. In his view, the powers of BSOs are narrow in scope and they do not have the powers of police officers. He submitted that BSOs cannot take steps to gather indicators of impairment before making a demand for breath or blood samples and their observations are limited to those made during the normal discourse involving customs matters. Thus, the BSOs were engaged in unauthorized conduct when they made their impairment observations and this evidence was not admissible to prove impairment. Further, he submitted that even if designated BSOs had the authority to take steps to gather indicia of insobriety, their request that he get out of his car (and seeing him stumble) was a sobriety test itself and could not be used as evidence because it was obtained before his s. 10(b) rights were given.

"A designated BSO may also, where he or she has reasonable grounds to suspect impaired operation of a motor vehicle, make demands for samples of a person's breath, or in some circumstances samples of a person's blood."

The Court of Appeal examined the *CA,* which regulates the movement of goods and people into and out of Canada, and the powers of BSOs pursuant to s. 163.5. Under the *CA,* people entering Canada are required to present themselves to officers at the border. The officers are empowered to detain and question them, perform searches, and examine and seize goods. Designated BSOs have additional powers - including arrest and breath demand authorities - in order to respond to suspected impaired drivers crossing the border into Canada. Justice Epstein summarized the powers of BSO's as follows:

> In relation to any criminal offence under any Act of Parliament, a designated BSO under the Customs Act has the powers and obligations of a peace officer under ss. 495-497 of the Criminal Code to arrest without a warrant a person where there are reasonable and probable grounds to believe he or she has committed an indictable offence or is about to commit such an offence. A designated BSO may also, where he or she has reasonable grounds to suspect impaired operation of a motor vehicle, make demands for samples of a person's breath, or in some circumstances samples of a person's blood. The designated BSO may also require that a person accompany him or her for the purpose of taking samples, and may detain that person until they can be placed in the custody of a peace officer.
>
> There is a limitation on these powers: a designated BSO may not use any power conferred for the enforcement of the Customs Act for the sole purpose of looking for evidence of a criminal offence under any other Act of Parliament. [paras. 25-26]

Although Justice Epstein recognized that s. 163.5 of the *CA* did not expressly give designated BSOs the power to take steps to gather evidence of insobriety, such power was found in the ancillary powers doctrine, grounded in the common law and codified in s. 31(2) of the *Interpretation Act*, which states: "Where power is given to a person, officer or

BY THE BOOK:

Designated BSOs: s. 163.5 *Customs Act*

Powers of designated officers

(1) In addition to the powers conferred on an officer for the enforcement of this Act, a designated officer who is at a customs office and is performing the normal duties of an officer or is acting in accordance with section 99.1 has, in relation to a criminal offence under any other Act of Parliament, the powers and obligations of a peace officer under sections 495 to 497 of the Criminal Code, and subsections 495(3) and 497(3) of that Act apply to the designated officer as if he or she were a peace officer.

Impaired driving offences

(2) A designated officer who is at a customs office performing the normal duties of an officer or is acting in accordance with section 99.1 has the powers and obligations of a peace officer under sections 254 and 256 of the Criminal Code. If, by demand, they require a person to provide samples of blood or breath under subsection 254(3) of that Act, or to submit to an evaluation under subsection 254(3.1) of that Act, they may also require the person to accompany a peace officer referred to in paragraph (c) of the definition "peace officer" in section 2 of that Act, for that purpose.

Power to detain

(3) A designated officer who arrests a person in the exercise of the powers conferred under subsection (1) may detain the person until the person can be placed in the custody of a peace officer referred to in paragraph (c) of the definition "peace officer" in section 2 of the Criminal Code.

Limitation on powers

(4) A designated officer may not use any power conferred on the officer for the enforcement of this Act for the sole purpose of looking for evidence of a criminal offence under any other Act of Parliament.

functionary to do or enforce any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given." BSOs do not, however, share the same general duty that police officers have in preventing crime and protecting life and property. Thus, BSOs do not have the complete set of ancillary police powers that flow from that general duty. But the common law investigative powers for police officers do apply to designated BSOs exercising their authority under s. 163.5. Therefore, the designated BSOs had the power to take reasonable steps in order to determine whether grounds existed for a s. 254 demand:

> It is clear that through the s. 163.5 amendments to the Customs Act, Parliament intended to confer authority on BSOs, so far as constitutionally permitted, to prevent the impaired operation of motor vehicles at entry points into Canada - a duty indistinguishable from that held by police officers to prevent the impaired operation of motor vehicles within Canada. It follows, in my view, that the power to gather evidence of insobriety is necessary to enable designated BSOs to comply with the important obligations associated with responding to the significant threat of harm posed by motorists suspected of being impaired as they drive their vehicles into Canada. In the limited circumstances of their authority under the Customs Act, insofar as designated BSOs have the same obligations as police officers, so too should they have the same ancillary investigative powers.
>
> This conclusion is further supported by the illogical outcome that would ensue if the restrictive interpretation suggested by the {accused] were to ensue. Without the power to gather evidence of sobriety many individuals would unnecessarily be subjected to breath or blood sample demands in circumstances where less intrusive and less costly investigative steps may prove that initial concerns regarding potential impairment were not warranted.
>
> … … …
>
> It follows that at the time of the [accused's] detention, the designated BSOs, acting pursuant to their s. 163.5(3) authority to fulfill their duties and obligations under ss. 254, 256 and 495-497

of the Criminal Code, had the same inferred ancillary investigative powers as police officers who detain a motorist under s. 48(1) of the Highway Traffic Act. [paras. 45-48]

The step taken in directing the accused to get out of his vehicle in order to gather additional indicators of his sobriety was reasonable. It was not intended as a sobriety test itself. The observations made as the accused exited his vehicle, even in response to the officer's direction, was not compelled, direct participation in a roadside test. Thus, evidence gathered in taking this step was not conscriptive in nature such that it was inadmissible to prove impairment. "In my view, this evidence does not support a finding that the officers required the [accused] to get out of his car for the purpose of using his actions while exiting the car as a sobriety test," said Justice Epstein. "The evidence is more indicative of the officers' requesting that the [accused] get out of the car so that once he was outside they could question him and gather indicators of insobriety."

The Court of Appeal also rejected the argument that differences between the legal rights of individuals detained by police within Canada and those detained by BSOs at border crossings were relevant in determining the admissibility of the evidence in this case. Although it is an offence under the *CA* to fail to answer truthfully any question posed by a BSO or to interfere with, molest, hinder, or prevent a BSO who is exercising their lawful authority, this was of no consequence. The evidence of impairment comprised of general observations made while the designated BSOs were engaged in authorized activities. Such observations were admissible to prove impairment. However, the Court of Appeal cautioned that in other circumstances, should they arise, the differences between the legal rights of individuals detained and questioned as part of an impaired driving investigation at the border and those detained for the same purpose within Canada may be a relevant consideration in considering the admissibility of evidence of impairment. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

DRIVING INTENT NOT REQUIRED FOR DE FACTO 'CARE OR CONTROL'

R. v. Andersen, 2012 SKCA 37

At 4:20 am the police found the accused sleeping while sitting in the driver's seat of his parked vehicle with its headlights on and engine running. They also saw vomit on the driver's side door and on the ground below it. They tried to rouse the accused by knocking on the roof of his vehicle and loudly announcing their presence, but he simply gestured at them with a middle finger, indicating they should leave. He then opened the passenger-side window but, when an officer reached in to unlock the door, closed it and nearly caught the officer's arm in it. The officers then directed him to unlock the vehicle's doors and threatened to break one of the vehicle's windows if he did not do so. When he failed to unlock the doors, the officers struck the passenger-side window. The accused unlocked his driver's door, jumped out of his vehicle and went after one of the officers. He was subdued, read his rights and subsequently provided two breath samples; 110 mg% and 100mg%.

Saskatchewan Provincial Court

At trial the accused testified he had no intention to drive his vehicle but merely wanted to sleep off his intoxication before driving home. He said that after consuming 16 beers at a community supper, he entered his vehicle, sat in the driver's seat, started the engine, turned the heater on maximum (because it was cold) and went to sleep almost immediately. He also said he was feeling sick, rolled the window down and vomited. But he couldn't remember anything else until he was shoved against his car by the officers. He could not recall locking his doors, when he started his car, nor rolling down (or up) the passenger window when the officer knocked on it. He also testified that to put his vehicle in motion he would need to depress the brake pedal and push in a button on the gearshift. Although the accused did not have the intention to drive when he entered the vehicle, the trial judge found that his subsequent actions in starting the vehicle, pressing the brake and starting the engine gave him the immediate

ability to set the vehicle in motion through inadvertence. This amounted to "care or control" and the accused was convicted of over 80mg%. The impaired driving charge was stayed.

Saskatchewan Court of Queen's Bench

On appeal the accused's conviction was overturned and an acquittal was entered. In the appeal judge's view, the accused was not in "care or control" because there was "minimal or no risk" that he would have intentionally set his vehicle in motion and no more than a "negligible risk" he would have inadvertently set it in motion.

Saskatchewan Court of Appeal

The Crown appealed contending that the accused was in "care or control." In its view, the accused used the vehicle's "fittings and equipment," or conducted himself with respect to his vehicle, in a manner that involved a risk that it could be set in motion thereby creating a danger to the public or property. The Saskatchewan Court of Appeal agreed, finding the mischief targeted by the "care or control" offence is the risk of intentionally or unintentionally putting a vehicle in motion at a time when doing so might have endangered the public or property. "Acts of 'care or control,' short of driving, are acts which involve some use of a motor vehicle or its fittings and equipment, or some course of conduct associated with a motor vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous," said Justice Caldwell delivering the Court's opinion. "Practically speaking, the risk of danger will be established where the evidence indicates the accused might have intentionally or inadvertently put the vehicle in motion, or both":

> In my respectful opinion, the risk of danger in this case was real and evident. [The accused] was intoxicated. [He] occupied the driver's seat of his vehicle. [His] vehicle was not disabled in any way, was running and was parked in a public parking area and, therefore, could have been easily put into motion by simply depressing the brake and engaging the gear shift (regardless of how many discrete steps one might characterise this as taking). I find no fault with the trial judge's conclusion that, given [the accused's] intoxicated state, these circumstances necessarily involved a risk that [he] could have inadvertently set his vehicle in motion, or that [he] could have, if he awoke, intentionally set his vehicle in motion.
>
> In my opinion, the risk that [the accused] could have inadvertently put his vehicle in motion is manifest in the evidence of his disorderly conduct upon being roused by the police (whether due to his admitted intoxication or, as the summary conviction appeal court judge found, because he was "dazed" or "does not wake easily"). Furthermore, in this analysis of the risk involved, it is critically important that [the accused] testified he had intended to drive home after he had slept off his intoxication in his vehicle. I say this even though an intention to drive is not an essential element of the offence ... and [the accused's] decision was more sensible than the alternative of driving off immediately. Regardless, [the accused's] stated intention to drive home after he had sobered up is relevant to the risk assessment required in "care or control" cases because it is evidence of a risk that he could have put his vehicle in motion at a time when doing so could create a danger to the public or to property. Indeed, on the record in this case, the risk is readily apparent since [the accused] testified that when he was awakened by the police he judged himself "completely sober"; yet, over an hour later, his blood alcohol readings still exceeded the proscribed limit. [paras. 17-18]

The accused had been in *de facto* "care or control" of his motor vehicle while his blood alcohol content exceeded the legal limit. The Crown's appeal was allowed, his acquittal was set aside and his conviction restored.

Complete case available at www.canlii.org

"[A]cts of 'care or control,' short of driving, are acts which involve some use of a motor vehicle or its fittings and equipment, or some course of conduct associated with a motor vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous."

UNDERCOVER OPERATION WOULD HAVE CONTINUED WITHOUT INVALID WIRETAPS

R. v. Mack, 2012 ABCA 42

After the accused reportedly confessed to killing his roommate, police initiated an extensive undercover investigation supported by wiretap authorizations in order to determine the extent of his involvement. During the operation, the accused acknowledged that he was involved in an incident where somebody died. He later admitted that he shot the victim with a .223 or Mini-14 five times: four times in the chest and once in the back. He also said that he still had the gun that he used and that he burned the body over two days to ensure that nothing was left to be identified. He then took one of the undercover officers to a fire pit located on his father's property and told him that this was the location where he had burned the body and spread the ashes. Within a few days he repeated the same story to an undercover crime "boss" during a "Mr. Big" operation. These statements were recorded under the wiretap authorization. Police then conducted a search of the fire pit and found fragments of bones and teeth belonging to the victim as well as shell casings later determined to have been fired from a rifle seized from the accused's home. He was arrested and charged with first degree murder.

Alberta Court of Queen's Bench

The two confessions to undercover police officers formed part of the evidence at trial. Although the accused acknowledged that he twice confessed to undercover police agents that he killed his roommate, he said he lied when he made these statements. He testified that he was under the mistaken impression that he was being recruited into a criminal organization and that the confession was necessary to gain acceptance into it. He said he needed the money and felt that the organization would look after him. He also said that he was afraid for his own safety. The judge accepted the Crown's concession that the wiretap authorizations lacked investigative necessity and therefore breached s. 8 of the *Charter.* The wiretaps were excluded. However, the testimony (or *viva voce* evidence) of the undercover police officers regarding the two confessions was admitted. Although there was a temporal connection between the invalid wiretaps (obtained from a *Charter* breach) and the confessions, there was no causal connection or links between them. The wiretaps did not drive the undercover operations and any causal connection was so remote as to be insignificant. Thus, the statements were not obtained in a manner that breached the *Charter*. A jury found the accused guilty.

Alberta Court of Appeal

The accused appealed his conviction arguing, among other grounds, that his statements made to the undercover police officers should not have been admitted because they were obtained as a result of a s. 8 *Charter* breach. In his view, the trial judge erred by finding that causal connections between the confessions and the wiretaps were required and that any such causal connection was insufficient. Furthermore, he also submitted that the trial judge erred in his instructions to the jury by failing to give a clear sharp warning as to the dangers of relying on the evidence of the undercover operation.

Causal Connection

The Alberta Court of Appeal concluded that the trial judge did not err. Although a strict causal connection between a breach and a subsequent statement is not required, causation as part of the analysis into whether evidence was obtained in a manner that violated the *Charter* has not been rejected entirely. A connection between a breach and a statement which is merely remote or tenuous will not suffice. In this case, the undercover operation would have continued without the wiretap authorization. The information coming from the wiretaps was not used to generate the scenario, but only assured how the operation was running and ensured officer safety. Even if the wiretap information was used to generate any of the scenarios, the scenarios were not linked to the accused's ultimate confessions. "The first [confession] spontaneously occurred outside the

context of an intended scenario," said the Court of Appeal. "The second [confession] was due to the use of the generic 'Mr. Big' or 'crime boss' model, which would have proceeded even in the absence of the wiretaps and was in no way informed by the information derived from the unlawful wiretaps."

"Mr. Big" Scenario

The undercover police investigation, which followed a model commonly referred to as a "Mr. Big" scheme was described as follows:

> This involved an undercover police officer gaining the trust of a target, in this case the [accused], using a pseudonym. Once that trust is established, the undercover operator elevates the relationship by testing the target through mock scenarios to assess the target's willingness to engage in criminal activities, often for modest monetary gain. If the target seems willing, the operator continues to elevate the target's involvement with the promise of joining a criminal organization. As part of the ruse, the target is invited to enter into the purported criminal organization, but only under the promise that he share his criminal history with the "boss" of the organization, to ensure that his admission will not bring undue "heat" to the organization. [para. 27]

In the accused's view, the trial judge should have instructed the jury better on both the dangers of relying on the undercover operators' testimony in the context of the "Mr. Big" operation and the reliability of his confession to police. He suggested that a judge must advise the jury that such statements are inherently unreliable and it is dangerous to rely on such evidence. But the Alberta Court of Appeal disagreed. All that is necessary is that the jury understand that the accused may have lied out of fear for his own safety, desire for money or both. In this case, the trial judge did warn the jury that they must carefully assess the evidence relating to the accused's confession in light of the pressures placed on him during the "Mr. Big" scenario:

> [The judge] cautioned [the jury] to carefully examine the evidence, both with regard to what the [accused] said to the undercover police officers and whether the statements were true. The trial judge advised the jury of the danger that the [accused] lied when he admitted to the offence, because of intimidation, fear, or merely a desire to become part of the organization for monetary reasons. The jury was alive to the fundamental issue, namely the reliability of the [accused's] confessions to police, in the context of the evidence regarding the nature of the undercover operation. [at para. 50]

The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

POLICE NEED NOT PROVE, BEYOND A REASONABLE DOUBT, THAT EVIDENCE WILL BE RECOVERED

R. v. Morgan & Smith, 2012 ONCA 28

Three masked men, armed with a gun and machetes, invaded an apartment and robbed the occupants, stealing cellular telephones, electronic equipment and various pieces of identification. The police were called immediately after the perpetrators left the apartment and arrived shortly thereafter. As a result of their investigation, the police obtained a warrant to search a residence and, in the accuseds' bedrooms, found property taken from the apartment during the robbery, including pieces of identification belonging to the victims. They also found clothing stained with blood containing one of the victim's DNA.

Ontario Superior Court of Justice

At trial the accuseds argued that their s. 8 *Charter* rights were breached and the evidence seized as a result of the search warrant should be excluded under s. 24(2). The judge found the information to obtain (ITO) the warrant contained "extensive misinformation, misleading information and incomplete evidence." He concluded that there had been a clear and deliberate breach or, at the very least, that the police conduct showed a reckless disregard of their obligation to make full and frank disclosure in the ITO. Once he stripped the ITO of its erroneous and tendentious assertions there was insufficient credible and reliable evidence to find reasonable grounds upon which the search warrant

could have been issued. The warrant was therefore invalid and the evidence was excluded under s. 24(2). The accuseds were acquitted.

Ontario Court of Appeal

The Crown challenged the trial judge's ruling contending, among other grounds, that, even after removing any misstatements in the ITO, sufficient evidence supporting the issuance of the search warrant remained. Justice Rouleau, writing the Court of Appeal's decision, agreed. "Even where the ITO contains misleading or false allegations, the reviewing judge is to determine whether, after disregarding the misleading or false allegations, there remains sufficient evidence to justify issuing the search warrant," he said in concluding that there was reliable and relevant evidence upon which the warrant could have been issued. Here, there was sufficient evidence to support the issuing judge's decision that there were reasonable grounds to issue the search warrant based on the following connections:

- **a connection between the searched residence and the robbery.** About 30 minutes after the robbery, Bell Canada was able to place one of the stolen cellular telephones equipped with GPS capabilities within 100 meters of an intersection. The police attended at this location where it was snowing heavily and observed fresh footprints in the snow on the street located directly in front of the accuseds' residence which was located at this intersection. The stolen cellular telephone's location and the fresh footprints provided a basis for inferring a connection between the accuseds' home and the robbery.

- **a connection between the accused Morgan and the robbery.** The accused Morgan matched the victims' general description of the perpetrators - black males, approximately 20 years old with medium builds and measuring between 5 feet 10 inches and 6 feet tall. Morgan was one of only two black men who had been to the victims' apartment to buy a small amount of marihuana but the only one to match the suspect description. Plus Morgan had been seen wearing a red bandana in the same fashion as one of the perpetrators during the robbery. These facts provided a basis for inferring a connection between Morgan and the robbery.

- **a connection between the accused Morgan and the searched residence.** Sometime before the robbery, Morgan placed a telephone call to the victim from a telephone number registered to the residence searched. On the morning following the robbery, a telephone call from that same number was received and recorded on the telephone. The police followed up on the telephone number and confirmed that the telephone calls were made from the landline telephone number registered to the residence with the owner's surname Morgan. The police concluded that Morgan was living at the residence with relatives. These facts provided a basis for inferring a connection between Morgan and the residence searched.

In this case, the ITO was to be viewed as a whole. In doing so, the three critical connections between the accused Morgan, the robbery and the residence searched were established. The burden was not on the police to prove, beyond a reasonable doubt, that evidence of the robbery would be recovered at the residence. Instead, the test was whether there was at least some evidence that might reasonably be believed on the basis of which the authorization could have issued.

When the three connections and other remaining facts were viewed in their totality, the trial judge should have concluded that the ITO provided reliable evidence on which the issuing judge or justice could have issued the search warrant, even when stripped of the information that was materially inaccurate and incomplete. Further, Morgan did not meet his burden to show that, on a balance of probabilities, the warrant could not have been issued.

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

Complete case available at www.ontariocourts.on.ca

FINDING GUN WAS VALID OBJECTIVE OF SEARCH

R. v. Malaj, 2012 ONCA 21

After being refused entry into a restaurant for not complying with the dress code, a man and his three companions were involved in an altercation with restaurant security in the parking lot. The man, wearing a leather jacket and jeans, brandished a .38 calibre handgun and aimed it at the head of the security manager. When police were called, the man ran easterly towards a nearby tractor-trailer parking lot. The gunman was described as "white, Russian decent, balding, with spiky hair, brown leather jacket and blue jeans." Police set up a perimeter and saw a male matching the suspect's description coming out of a bush area. He was trying to enter the truck parking lot but he went back into the bush. Canine and tactical officers unsuccessfully searched for the suspect for over one hour and 40 minutes. Although containment was called off, one officer continued to search. As he drove into the driveway of an apartment building, about one kilometer northeast of the truck parking lot, he saw the accused in its lobby. He noted the accused was wearing a dark leather jacket, blue jeans and had brown spiky hair. When he approached the accused he detected a strong odour of wet leather and noted burrs down the front of his shirt. The officer opined that the accused was the male they were looking for. He was arrested but not told why. The officer ordered the accused to put his hands on his head and turn around. When he was handcuffed and taken to the ground in a prone position, the officer heard a "metal clink." The accused had a loaded handgun, cocked and ready to fire, down the front of his pants. The accused was advised as to the reason for his arrest about 10 minutes later, but no detailed conversation occurred during that time.

Ontario Superior Court of Justice

At trial on charges of pointing a firearm, possessing a loaded prohibited firearm and carrying a concealed weapon, the accused argued that his rights under ss. 8, 9 and 10(a) and (b) of the *Charter* had been breached. In his view, the handgun was inadmissible under s. 24(2). He suggested that the arrest was not supported by reasonable and probable grounds because it was based on a generic suspect description and occurred outside the perimeter area of the investigation about two hours after the original radio broadcast. Since the warrantless search was carried out on the basis of an unlawful arrest and the accused was manhandled in the process, it was unreasonable. He was not offered any reason for his arrest, nor was he advised of his right to consult with counsel, which breached his ss. 10(a) and (b) rights. The Crown, on the other hand, asserted the arrest was based on reasonable and probable grounds, which were both subjectively and objectively justifiable. The search was an incident to the arrest and, given the highly charged and potentially dangerous interaction, was reasonably conducted.

s. 9 Charter - Arbitrary Detention

The trial judge concluded there was no s. 9 *Charter* breach. The arrest was lawful under s. 495(1)(a) of the *Criminal Code*, based on reasonable and probable grounds. Not only did the arresting officer believe, in his mind, that there were reasonable grounds, a contextual examination of all the circumstances surrounding the arrest and the facts known by the arresting officer provided objective justification for that belief. The judge stated:

> While the broadcast description of the suspect alone may not have formed an adequate basis for establishing reasonable and probable grounds, that description, in combination with all of the other facts known to [the officer] taken in their geographic and temporal context, in my view, gave rise to an honest belief that [the officer] had reasonable and probable grounds to arrest the [accused]. That personal belief, in my view, is objectively supported by the totality of the facts known to [the officer] prior to the arrest.
>
> The circumstances of the arrest follow from very serious allegations involving a suspect brandishing and pointing a handgun in the parking lot of a restaurant. Public safety clearly would be at risk in such circumstances.
>
> Further, the arrest occurred in a highly charged and potentially very dangerous situation where both the officer's and public safety could be at risk. [paras. 38-40]

The judge also rejected the accused's suggestion that an investigative detention, along with questioning, would have been the lawful and proper route to take. Such an approach would have been unreasonable in the highly dangerous circumstances facing the officer. Here, the officer "acted swiftly and decisively based on objectively justified reasonable and probable grounds." The arrest was lawful and there was no s. 9 breach.

s. 8 Charter - Unreasonable Search

Since the arrest was lawful, the search was incidental to that arrest and therefore reasonable. The search was directly related to the unlawful possession and use of a handgun and locating it was a valid objective of the search. The judge dismissed the accused's contention that the way he was manhandled by police rendered the search unreasonable:

> It was asserted by the [accused] that the officer's manner of handcuffing him and placing him prone on the ground was physically highhanded and unreasonable. In my view, given the constellation of facts discussed above and the potentially dangerous circumstances faced by the officer, the evidence does not disclose any abusive behaviour on the part of the officer. To the contrary, I find that the manner in which the [accused] was arrested and secured was entirely reasonable.
>
> The officer was faced with a suspect, who he reasonably believed had brandished a handgun, and as such it was reasonable in the course of arresting the [accused] to ensure that he was restrained, and that he could not have access to nor dispose of the handgun. [paras. 49-50]

s. 10(a) Charter - Reason for Arrest

Even though the officer did not advise the accused of his s. 10(a) rights prior to or at the time of his arrest, he was informed of the reason about 10 minutes later. In the circumstances of this arrest, the judge concluded that the accused was "promptly" advised of the reasons for his arrest as required by s. 10(a).

Plus, even if the accused's *Charter* rights were breached, the evidence was nonetheless admissible under s. 24(2). The accused was convicted.

BY THE BOOK:

Powers of Arrest: s. 495(1) *Criminal Code*

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; or

(c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

Ontario Court of Appeal

The accused's further appeal was rejected. In a short endorsement dismissing his arguments, the Court of Appeal stated:

> The trial judge took all these circumstances into account. We find no error in his conclusion that they constitute reasonable and probable grounds for arrest. Because of this the stop and the search were lawful.

As for the ss. 10(a) and (b) arguments, there was no merit in them. The accused's conviction was upheld.

Complete case available at www.ontariocourts.on.ca

Editor's note: Facts taken from the Ontario Superior Court of Justice decision reported at 2008 CanLII 43586 (ONSC).

PLACING FICTITIOUS CRAIGSLIST AD NOT ENTRAPMENT

R. v. Chiang, 2012 BCCA 85

From media reports and investigative files, police had reason to believe that underage females were offering sexual services on the Craigslist website. Police decided to set up a form of "sting" operation by posting the following ad in its erotic services section:

> Sexy, New & Hot
>
> Reply to: freshtna16@gmail.com
>
> Sexy, young tight bodies lookin for fun. In call today only, girls from out of town in downtown Victoria area.
>
> Don't miss this you'll be sorry!!

Individuals responding to the advertisement were given information suggesting that the females were underage. Most did not pursue the matter further. The accused, however, persisted with efforts to obtain sexual services. He was advised in an e-mail that two girls, aged 16 and 17, were available. He chose the 16-year-old based on a fake photo sent to him. In a subsequent phone call he was instructed to bring cash to a meeting that was to take place in a motel parking lot, where a female undercover officer posed as a procurer. He met the undercover officer and confirmed he had cash. He agreed the sex would not be rough and he was only interested in safe sex. When the accused used the key to enter the room, he was confronted by police officers present inside and arrested.

British Columbia Supreme Court

The trial judge convicted the accused of communicating for the purpose of obtaining for consideration the sexual services of a person under the age of 18 years, contrary to s. 212(4) of the *Criminal Code*. In the judge's view, the exchange between the accused and the female undercover officer outside the motel just before he received the room key was sufficient to ground a conviction. The judge also refused to enter a stay of proceedings, rejecting the accused's entrapment claim.

CONVERSATION BETWEEN ACCUSED AND FEMALE UNDERCOVER OFFICER OUTSIDE HOTEL ROOM

Undercover Officer (M-Mackenzie). Hi, are you Bob?

Accused (B-Bob). Yes.

M. Hi Bob. I am Mckenzie. We were just talking on the phone.

B. Yes.

M. Ok, so did you bring the cash?

B. Yeah. (The police officer testified that "Bob" pulled a roll of $20 bills out of one of his shirt pocket and showed it to her.)

M. Great. You don't need to give it to me right now. You can pay later, but I just needed to see it.

B. Oh, ok. (Bob put the money back in his pocket)

M. So I just want to go over some of the ground rules with you quickly.

B. Ok.

M. Because [J.] is only 16, there can be no rough play, or rough sex, or anything like that.

B. She's only 16? (The officer testified that Bob appeared somewhat shocked)

M. Well yeah, I told you that on the e-mail.

B. I thought that was just a number. I didn't know.

M. Well, yeah, that's how old she is. It's cool. She is a great girl and she's totally good to go and she is eager and wants to please.

B. Yeah, but is that alright?

M. Well no - I mean it's not the legal age of 19, but whatever.

B. Oh.

M. There are 16 year olds walking the streets Bob. At least this way we are trying to protect them as best we can, which is why you have to meet me first and go over the rules because we are looking out for them and their safety, right?

B. No, I'm not like that, I'd never be rough. (The officer testified that Bob appeared embarrassed) Do you have some kind of card or ID for me to look at?

M. No, I don't do that Bob. I don't start showing clients my ID.

B. Oh.

M. I don't know what you think you're walking into here Bob, but if you want [the 16 yr. old] she's in there and she's a great girl, but if you don't, well, that's up to you. I just needed to make sure that everything is all good with you and you understand the ground rules of what I've explained already. No rough sex and all that.

B. No, I'm not like that.

M. I'm sure you're not, so it's all cool and if you want [J.], she's in there (indicating to the hotel room - giving a head nod). And I'll get the money from you later or leave it with her. So, I don't know what you want to do.

B. Ok.

M. So you mentioned online that you were looking for straight sex, right? (The officer testified that Bob nodded affirmatively)

M. It's just if you want anything else like a blow job or anal, or anything like that, then I have to know about it because I tell her so she knows what to expect, right? Because she is so young we are just looking out for her.

B. Where is she?

M. She's in room 147, right there. (The police officer gave a head nod indicating the room straight ahead). So once we agree, then I'll give you the key and she'll be waiting.

B. Ok.

M. Ok, so you're in for the $150 for the half hour?

B. Yeah, I'll check it out.

M. Ok, I'll give you the key.

BY THE BOOK:

Prostitution of person under eighteen: s. 212(4) *Criminal Code*

Every person who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person who is under the age of eighteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years and to a minimum punishment of imprisonment for a term of six months.

British Columbia Court of Appeal

The accused challenged the trial judge's entrapment ruling, among other things, arguing that police conduct crossed permissible boundaries. But Justice Hall, delivering the Court of Appeal's decision, disagreed. "The type of crime being investigated by the police in the present case has about it an 'inchoate' quality," he said. "It is the same type of offence as Internet luring of children for a sexual purpose. ... Modern Internet facilities afford easier access to young people for individuals minded to exploit their youth and vulnerability." In this case, "the police had a credibly based belief that conduct prohibited by s. 212(4) of the Criminal Code was occurring in their area." This was consensual criminal activity and it can be difficult for the police to enlist the cooperation of young persons who are actual or potential victims. The "sting" was designed to ferret out people minded to prey on the vulnerabilities of young targets. The erotic services section on Craigslist was similar to a geographic region targeted in drug cases, where random virtue-testing is permissible as part of a bona fide inquiry directed at a circumscribed area where it is reasonably suspected that criminal activity is occurring. In this case, the police were entitled to present any person associated with the Craigslist site, whether placing an ad or responding to one, with the opportunity to commit the s. 212(4) offence and they did not entrap the accused in doing so. Nor was the accused induced into committing the offence at the hotel room:

> The reach of the investigation was carefully limited through the nature of the investigative tool employed, specifically an ad on Craigslist that spoke of "young bodies". Most of the persons who responded to the ad resiled from further proceeding when there was a suggestion of the involvement of underage females. The [accused], however, persisted in his efforts to obtain sexual services. The interaction between the undercover office and the [accused] outside the motel room did not involve pressing and persistent conduct. ... The judge made a specific finding ... that the undercover officer did not "induce" the [accused] to take the room key and enter the room. I consider this a reasonable finding on the evidence. This is a case that, on its facts, is at a considerable remove from the "clearest of cases" where a stay of proceedings would be available on the basis of the doctrine of entrapment. I am in respectful agreement with the trial judge that the police conduct in this case did not exceed proper investigative limits.

The accused's appeal was dismissed.

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

DELAYING SEARCH FOR MISSING GIRL AMOUNTED TO OBSTRUCTION

R. v. Quinones, 2012 BCCA 94

A 12-year-old, grade seven female elementary student contacted the 24-year-old accused on an Internet website by responding to the profile he had posted. The accused had engaged in a sexual relationship with the girl, had intercourse with her on a number of occasions and had made a video of them having sex. One morning he was awoken by knocking at his door. Before answering it, he sent the girl into the bathroom with his father, who was preparing to have a shower. It turned out to be the police at the door. Officers said they were looking for a missing child (the girl), but

the accused lied three times telling them she wasn't there. The accused said his father was in the bathroom and the police waited around to see. When police told the accused the girl's age, he let them open the bathroom door. The accused had delayed the search for the victim for some 20-25 minutes in the hope that police would leave.

British Columbia Supreme Court

At trial the accused claimed he did not know the girl was under 16-years of age. However, he was convicted, among other crimes, of obstructing peace officers under s. 129(a) of the *Criminal Code* for delaying police in searching for the girl.

British Columbia Court of Appeal

The accused argued, among other things, that he mistakenly believed the girl was older, did not consider her missing nor a child, and therefore did not wilfully obstruct the officers. Plus, he said that he sent the girl to the bathroom to keep her safe. The British Columbia Court of Appeal, however, disagreed. In establishing the offence of obstruction, not only was the Crown required to prove identity and the time and place of offence, it was also required to prove that:

- the complainants were peace officers;
- they were in the execution of their duties;
- the accused knew they were peace officers in the execution of their duties; and
- the accused wilfully obstructed the peace officers in the execution of their duties.

The obstruction offence did not require proof that a peace officer had been prevented from the execution of their duties. Justice Hinkson, speaking for the unanimous Court of Appeal, found it was open to the jury to conclude that the accused, regardless of his belief of the girl's age, wilfully caused the attending police officers to delay their search of the bathroom for 25 minutes, hoping they would abandon their search for the girl. The accused's appeal was dismissed.

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

TECHNICIAN'S OBSERVATION NOT CONSCRIPTIVE

R. v. Lutchmedial, 2011 ONCA 585

A motorist observed the accused's van swerving from one lane to another. It went up on the sidewalk and almost hit another car. The motorist called 911 and police saw the accused swerving between lanes while traveling about 40 km/h. Its pace of travel was erratic. The van would slow down and speed up. After the accused stopped, the police approached and found the car's door open. The accused was in an unresponsive, semi-conscious state and looked "extremely sleepy." He was removed from the van and arrested for impaired driving based on the motorist's information, the manner of driving, and the accused's mannerisms when stopped. He was taken to the police station where he was presented to a qualified breath technician. The technician noted a smell of alcohol on the accused's breath, bloodshot and glassy eyes, slight unsteadiness when walking and a very slight slurring of speech. Two breath samples were taken (94mg% and 85mg%).

Ontario Court of Justice

The accused argued his rights under ss. 8 and 9 of the *Charter* were breached and all of the evidence should be excluded. The trial judge found that the police did not have reasonable and probable grounds to believe that the accused had, as a result of the consumption of alcohol, committed the offence of impaired driving under s. 253 of the *Criminal Code*. Therefore, the arrest and demand to provide breath samples were unlawful. The breathalyzer readings resulting from the s. 8 breach (unreasonable search), as well as the answers to certain questions the accused gave as part of, or derivative to, the breath testing were excluded. The arrest, however, was not arbitrary under s. 9. Although the arrest was unlawful for impaired driving, the police could have arrested the accused for dangerous driving. The technician's observations did not arise as a result of the s. 8 breaches and they were admissible. By combining the observations with the testimony of the arresting officers, the accused was convicted of impaired driving.

Ontario Superior Court of Justice

The accused appealed his conviction arguing the trial judge improperly drew a distinction between the results of the tests and the observations of the technician. Not only was the evidence of the breathalyzer tests and statements made to the technician inadmissible, the accused submitted that the technician's observation were conscriptive evidence and should also have been excluded. But the appeal judge concluded that it was open to the trial judge to find that the technician's observation arose outside of the test. In rejecting the accused's arguments and upholding the impaired driving conviction, the appeal judge stated:

> The breathalyzer technician was a police officer involved in the continuing investigation which arose from the detention that was not arbitrary. The observations he made did not arise from the test and were independent of it. If another officer had been involved in the investigation, the same or similar observations would have been made. The question of whether the evidence was "conscripted" did not properly arise. The evidence did not come as a result of a breach of the Charter of Rights and Freedoms and, accordingly, considerations which are required by s. 24(2) of the Charter, including whether or not the evidence was "conscripted", need not be taken into account.

Ontario Court of Appeal

The accused contended that he was arbitrarily detained under s. 9 of the *Charter*. He continued to assert that the observations of his impairment made by the breathalyzer technician should be excluded. Although he agreed that the initial stop by police was lawful due to his "bad driving," he submitted that the police had no grounds to make a breath demand because they did not observe the usual signs of impairment (such as glassy eyes, alcohol odour on breath, slurred speech) and his continued detention was therefore arbitrary. Thus, these observations were inadmissible. But the Court of Appeal, in a short endorsement, ruled that the accused had not been arbitrarily detained. Furthermore, there was a strong line of authority that a police officer's observations of a lawfully detained suspect are not conscriptive evidence because they are not obtained through the suspect's participation:

> "The [accused's] continued detention was justified to further the investigation into his horrendous driving. The observations of the breathalyzer technician were admissible as evidence of impairment because they did not arise as a result of a Charter violation."

> The [accused's] initial detention was lawful pursuant to s. 216(1) of the Highway Traffic Act. The lack of reasonable grounds to arrest the [accused] for impaired driving did not convert his detention into an arbitrary detention. The [accused's] continued detention was justified to further the investigation into his horrendous driving. The observations of the breathalyzer technician were admissible as evidence of impairment because they did not arise as a result of a Charter violation. The observations made by the breathalyzer technician could have been made by any police officer at the station. [para. 4]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: Facts taken from the Ontario Superior Court of Justice decision reported at 2009 CanLI 30966 (ONSC).

SEARCH WARRANT CONTAINED SUFFICIENT INFORMATION FOR EXTRA-PROVINCIAL ENDORSEMENT

R. v. Tohl, 2012 ONCA 9

As a result of conducting an investigation, including surveillance, Quebec police concluded that the accused was supplying drugs in substantial amounts to the Chahwan brothers on a regular basis. They had seen him leave his apartment and go to the Chahwan residence.

Undercover officers purchased drugs from there. They also saw the accused attend a large known drug supplier's home, pick up some packages and then return to his apartment. As a result, a search warrant was issued in Quebec to search the accused's Ontario apartment. The warrant was then endorsed by an Ontario Justice of the Peace under s. 11(3) of the *Controlled Drug and Substances Act* (CDSA).

Ontario Superior Court of Justice

The trial judge concluded there were ample grounds in the information to obtain (ITO) to support the Quebec justice issuing the warrant to search the accused's Ottawa home. He found there was a sufficient link between drug activity and the place to be searched. There was no s. 8 *Charter* breach and the accused was found guilty of possessing cocaine and marihuana for the purpose of trafficking and possessing proceeds of crime.

Ontario Court of Appeal

The accused challenged his convictions arguing the trial judge erred in finding sufficient grounds to issue the warrant and that the Quebec warrant was endorsed by an Ontario justice without a proper record before her. Although the trial judge appeared to overstate the evidence about the connection between the drug activity and the accused's home by finding he left his residence and went directly to the Chahwan residence "on a number of occasions," there was still sufficient evidence to establish the required link and support the conclusion that the accused was the person in control of the apartment. As well, police saw him attend his drug supplier's home, apparently obtain a quantity of drugs and return directly to his apartment. Further, the Court of Appeal stated:

> In addition, there is one other piece of evidence in the ITO that, when considered in the light of the rest of the evidence, supports an inference that there may be evidence of drug crime activity in [the accused's] home: [the accused] has been arrested on drug-related charges before and the last time he was, he was found to have almost a kilo of cocaine in his possession at his home.
>
> Accordingly, and notwithstanding that the trial judge overstated the evidence of a direct connection between the drug dealing and [the accused'] residence, we are satisfied that there was sufficient evidence in the ITO from which the issuing judge could reasonably have inferred that a search of [the accused's apartment] in Ottawa would reveal evidence of criminal activity contrary to the Controlled Drugs and Substances Act. [paras. 8-9]

As for the endorsement ground of appeal, the Quebec warrant contained sufficient information to enable the Ontario justice to conduct her statutory duty under s. 11(3) of the *CDSA*. There was nothing to indicate she failed to properly carry out her duties. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: Application for leave to appeal was filed with the Supreme Court of Canada.

BY THE BOOK:

CDSA Warrant Endorsement: s. 11

Execution in another province

s. 11(3) A justice may, where a place referred to in subsection (1) is in a province other than that in which the justice has jurisdiction, issue the warrant referred to in that subsection and the warrant may be executed in the other province after it has been endorsed by a justice having jurisdiction in that other province.

Effect of endorsement

s. 11(4) An endorsement that is made on a warrant as provided for in subsection (3) is sufficient authority to any peace officer to whom it was originally directed and to all peace officers within the jurisdiction of the justice by whom it is endorsed to execute the warrant and to deal with the things seized in accordance with the law.

POLICE APPROACH WAS NOT RANDOM VIRTUE TESTING: ENTRAPMENT NOT PROVEN

R. v. Gebremicael, 2012 ONCA 68

In an effort to control street level trafficking, a police drug enforcement unit initiated an undercover operation called "Project Cranked." During a briefing, an undercover officer was advised that Hush Fashions, a clothing store, had been identified as a source for powdered cocaine. The undercover officer attended at Hush Fashions, spoke to the accused, and ordered a pair of running shoes. He also spoke about cocaine. When he returned to the store the following month to pick up the shoes, the accused asked the officer how he was making out finding cocaine. When told he was having difficulty, the accused subsequently made arrangements to help the officer make cocaine purchases.

Ontario Superior Court of Justice

A jury found the accused guilty on two counts of trafficking cocaine. He then sought a judicial stay of proceedings arguing that he was entrapped. He believed that he was targeted by police because they had unsuccessfully prosecuted him on drug related charges previously. But the trial judge found no evidence to support this contention. "A number of persons were named as specific targets in 'Operation Cranked' but the accused was not one of them," said the judge. "However, Hush Fashions was identified by the police as a source for powdered cocaine [and] it was, therefore, ... permissible for [the undercover officer] to approach the [accused] in that location and inquire about the purchase of cocaine pursuant to a bona fide investigation associated with 'Operation Cranked'." Nor did the police go beyond providing the accused with an opportunity to traffick cocaine and induce him into committing the offence. The accused's stay application was dismissed and he was sentenced to 14 months in jail and two years probation.

Ontario Court of Appeal

The accused then argued, among other grounds, that the trial judge erred in holding that he was not entrapped. However, his submission that he was randomly virtue tested was again rejected. "The evidence of [the undercover officer] is that he attended Hush Fashions because it had been identified as a source of cocaine," said the Court of Appeal. "This evidence was unchallenged and provided the police with a reasonable basis for approaching the [accused], the person who was running the business." Moreover, the trial judge did not err in rejecting the accused's contention that he was induced into trafficking cocaine. The accused's appeal was dismissed, his conviction upheld and his sentence was found to be fit.

Complete case available at www.ontariocourts.on.ca

Editor's note: Facts taken from the Ontario Superior Court of Justice decision reported at [2010] O.J. No. 6192.

OFFICER HAD REASONABLE GROUNDS DESPITE RELYING ON EXPIRED ASD

R. v Biccum, 2012 ABCA 80

The accused struck two pedestrians (a mother and child) who were crossing a highway. An attending police officer put the accused, who was crying and distraught, in a police car and asked him if he had been drinking. He said he had a few drinks after work. But the officer could not smell any alcohol on the accused's breath because he was smoking a cigarette. On the officer's request an approved screening device (ASD) was brought to the scene. It had a sticker on it indicating that it had "expired" at midnight on the previous day, some 15 hours earlier, and stated "do not use beyond calibration date." Since all the ASDs in the local police office usually expired on the same day, the officer concluded there was no other device or options available to him and he continued the investigation using the "expired" ASD. The ASD's internal verification process showed no signs of malfunctioning. A breath sample that registered a

"fail" was taken. A breath demand followed and the accused provided breath samples exceeding 80mg%.

Alberta Court of Queen's Bench

At his trial the accused challenged the admissibility of the blood alcohol readings, arguing the officer did not have reasonable grounds to demand the sample. While the officer had a suspicion sufficient to support a demand for an ASD sample, the device had "expired" and it was therefore not reasonable for him to rely on the "fail" reading in making the demand for the breathalyzer sample. The trial judge, however, admitted the breath samples. The fact the ASD's re-calibration was overdue was not evidence that it was inaccurate or unreliable. Plus, even without the ASD result, the demand was still appropriately made and reasonable. A conviction followed.

"Facts that were unknown at the time of the search, and that were not then reasonably anticipated, cannot influence the reasonableness of the demand."

Alberta Court of Appeal

The accused then argued that it was unreasonable for a police officer to rely on an expired ASD in taking a sample under s. 254 of the *Criminal Code*. But a 2:1 majority concluded it was not. The Crown had discharged its burden of proving, on a balance of probabilities, the factual matrix underlying the demand for the breath test. The objective reasonableness of the demand must be assessed based on the information known to the officer at the time the demand was made. "Even if there was evidence on this record that it was later proven that the approved screening device was highly accurate, or completely unreliable, that would not affect the reasonableness of the demand when made," said the majority. "Facts that were unknown at the time of the search, and that were not then reasonably anticipated, cannot influence the reasonableness of the demand."

Breath Demands - Reasonable Grounds

For a breath sample demand to be reasonable, the officer must have an honest subjective belief that they have grounds to make the demand and that honest subjective belief must be objectively reasonable. In deciding whether an officer's subjective belief is objectively reasonable, a judge is entitled to consider a police officer's training and experience. Thus, an honest subjective belief of an experienced officer, while not conclusive, can itself be some evidence that the belief was objectively reasonable. Nevertheless, a police officer's testimony still needs to be carefully assessed.

In this case, the reasonableness of the demand for a breath sample was argued almost entirely on the ASD's "expiry." As the majority noted, "it is an error to single out one facet of the entire investigation, and base the reasonableness assessment entirely on that one consideration. ... Obviously, some facts may deserve more weight than others, but the "expiry" of the approved screening device is not determinative. Reasonableness cannot be reduced to the rigid insistence on the existence or non-existence of any one factor."

"It is an error to single out one facet of the entire investigation, and base the reasonablenes s assessment entirely on that one consideration."

In assessing whether the officer's reliance, at least in part, on the expired ASD was reasonable, regard to the total context of the investigation was required. "Reasonableness depends on the facts and context, and it would be an error of law to reduce it to an inflexible rule of law," said the majority. In assessing reasonableness the majority made the following comments:

- "[T]here is nothing in the *Criminal Code* making calibration a condition precedent to use of the device, nor any provision that its readings are conclusive. If the passage of the scheduled calibration time is to be treated, automatically and invariably, as making reliance on the readings unreasonable, absurd results would arise. For example, it would be reasonable to

rely on the device one minute before midnight, but not one minute after midnight of the recalibration date.

- "The expiry of the approved screening device must itself be considered in context. It is relevant that the device "booted-up" normally. It appeared to be working. In [the officer's] experience, if it was not working it would have likely signaled that. The device was only 15 hours past its scheduled calibration date. [The officer] was investigating a serious incident, and he did not have access to any other device.
- "Since the total factual context must be considered, what is reasonable can depend on the circumstances faced by the constable. Necessity can make reasonable what might otherwise be unreasonable. For example, it would generally be unreasonable to exit the second floor of a building by jumping out the window. However, if the first floor is on fire, jumping might well become reasonable. Likewise, if [the officer] knew that there was another unexpired device at the detachment, his use of the expired one in his hands might at some point be unreasonable. All the circumstances must be considered together. The fact that [the officer] was investigating a serious accident, and had no other device available to him is relevant in determining if his actions were objectively reasonable.
- "There was no evidence known to [the officer] about the source or meaning of the need for recalibration. He knew that it was a "practice" to recalibrate every 14 days. He did not, for example, know that the approved screening devices became inherently unreliable immediately after the recalibration deadline. He acknowledged that he did not know exactly what would happen to the approved screening device if it was not recalibrated in time. In sum, [the officer] had no information that the approved screening device was inherently unreliable after its recalibration date, nor did he have any positive evidence that it remained reliable. This is just one factor in the analysis, but it does not amount to ... "credible evidence" that the "fail" reading was unreliable.
- "Further, common experience suggests that "expiry" and "best before" dates are set within a margin of error or safety. When an expiry date is set, it is generally acknowledged that a few devices will actually fail before the expiry date, but that a great many of them will be reliable beyond the expiry date. When such expiry dates will be relied on to make important decisions, it would be counterproductive to set the date at the point where a large proportion of the devices will already have failed, or where even a minute passage of time beyond the set expiry date will have serious adverse consequences. It is true that on this record there is no evidence that the recalibration date on the approved screening device was set having in mind such a margin of error. The only evidence on the record about [the officer's] knowledge on the subject is that it was a "practice" to recalibrate every 14 days.
- "But even if there is no evidence on this record about how the recalibration date was set, there is clear evidence that [the officer] thought that there was a margin of error built in. He demonstrated that by his actions in using the device 15 hours past the recalibration date. The issue is not whether there is any evidence on this record as to whether there is a margin of error built into the recalibration date. The issue is whether it was unreasonable for [the officer] to assume the sufficient continued reliability of the approved screening device beyond that date to justify its use in the particular circumstances in which he found himself. In the whole context of the investigation, would a reasonable constable in the shoes of [the officer] have found it was reasonable to rely, in part, on the "fail" reading?

The majority concluded the demand was lawful:

> In this case the total factual context made the demand for a breath sample reasonable. The [accused] had been involved in a serious motor vehicle accident on good roads on a clear day. He admitted that he had been drinking, although had there been any odor of alcohol it was likely masked by his smoking. He demonstrated physical signs that were consistent with drinking

> and with his emotional state resulting from the accident. The approved screening device registered "fail". While the device was being used past its recalibration date, it was only about 15 hours later. [The officer] did not have access to any other device, and the one he used appeared to be working normally. While there might have been other investigative techniques (such as roadside sobriety tests) available to him, that does not make [the officer's] choice of using the approved screening device unreasonable. [The officer] did not have to prove a prima facie case in order to justify demanding the sample. In all the circumstances, there were reasonable grounds to make the demand. [reference omitted, para. 31]

Since the officer had reasonable grounds for demanding a breath sample, the evidence was properly admitted and the accused's appeal was dismissed.

A Different View

Justice Berger, authoring a minority opinion, disagreed that necessity (a serious accident in a remote location) provided objective reasonableness and overcame the absence of objective factors:

> It is trite law that the officer must have an honest belief that the results of the test were reliable and the reasonableness of this belief must be objectively supportable.
>
> The relevant inquiry, accordingly, is whether that objective test is made out on the facts of this case. Would a reasonable person ignore the label not knowing the significance of the warning on the label? Would a reasonable person realize that the device might not properly record the amount of alcohol in the suspect's bloodstream if timely re-calibration does not occur? Is it objectively reasonable to rely on a device that says "Do not use beyond the calibration date" after that date has come and gone? [para. 37-38]

Although there was no requirement for the Crown to prove that an ASD was working properly, there was no credible evidence to explain why the warning label could objectively be ignored. Thus, Justice Berger concluded that the officer did not have reasonable grounds to demand a breath sample and violated the accused's s. 8 *Charter* rights in obtaining them. However, he would have admitted the certificate of analysis under s. 24(2) and dismiss the accused's appeal as well.

Complete case available at www.albertacourts.ab.ca

SUPREME COURT TAKES LONGER TO DECIDE CASES

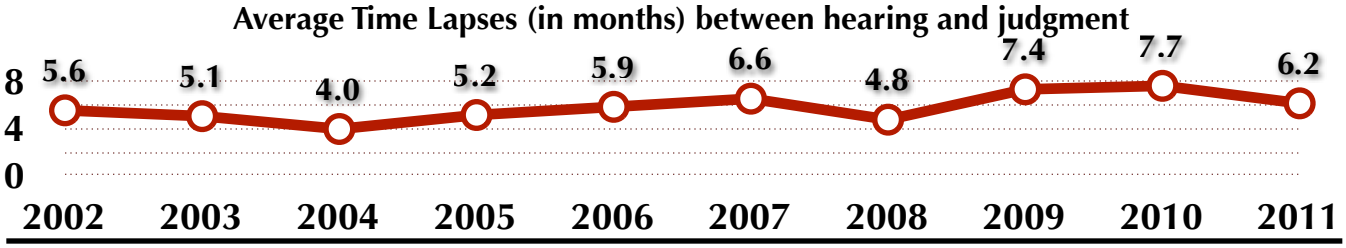
In the "Bulletin of Proceedings: Special Edition, Statistics 2001 to 2011" the workload of the Supreme Court of Canada was reported. In 2011 the Supreme Court heard 70 appeals, up from 65 in 2010. This was the third lowest number of appeals heard by Canada's top court in a single year during the last decade (53 appeals were heard in 2007 and 65 in 2010). The most appeals heard in the last 10 years was in 2005 when 93 were brought before the Court.

Case Life Span

The time it takes for the Court to render a judgment from the date of hearing the case dropped from 7.7 months in 2010 (a 10 year high) to 6.2 months in 2011. Overall it takes 19 months, on average, for the court to render an opinion from the time an application for leave to hear a case is filed. This is up from the previous year (18.8 months). The shortest period of time within the last ten years for the Court to announce its decision after hearing arguments was 4.0 months in 2003.

Applications for Leave

Ontario was the source of most applications for leave to appeal at 159 cases. This was followed by Quebec (152), British Columbia (76), the Federal Court of Appeal (72), Alberta (40), New Brunswick (12), Nova Scotia (11), Saskatchewan (10), Manitoba (7) and Prince Edward Island (2). No applications for leave came from Newfoundland, Northwest Territories, Nunavut or the Yukon.



Appeals Heard

Of the 70 appeals heard in 2010, Ontario had the most of any origin at 20. This was followed by British Columbia and the Federal Court of Appeal with 13 each, Quebec (12), Alberta (5), Nova Scotia (3), Manitoba (2) and Saskatchewan and Newfoundland with one each. No appeals originated from New Brunswick, Northwest Territories, Prince Edward Island, Yukon or Nunavut.

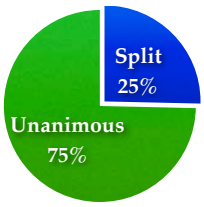
Of the appeals heard in 2011, 50% were civil while the remaining 50% were criminal. Twelve percent (12%) of the criminal cases dealt with *Charter* issues, up slightly from 11% in 2010.

Nineteen (19) of the appeals heard in 2011 were as of right. This source of appeal includes cases where there is a dissent on a point of law in a provincial court of appeal.

The remaining 51 cases had leave to appeal granted. This is where a three judge panel gives permission to the applicant for the appeal to be heard.

Appeal Judgments

There were 71 appeal judgments released in 2011, up slightly from 69 the previous year. Only eight decisions last year were delivered from the bench while the remaining 63 were delivered after being reserved. Thirty-six (36) of the appeals were allowed while 40 were dismissed. In terms of unanimity, the court remained the same over the previous year. In 2011, 75% of the Court's decisions were unanimous. The remaining 25% were split.



Source: www.scc-csc.gc.ca

ONTARIO COURT OF APPEAL: 2011 FAST FACTS

- Canada's busiest appellate court.
- Made up of 22 full-time judges (as at December 2011 there were 20 full-time and three supernumerary judges).
- Appeals were 43% civil, 30% criminal, 22% inmate and 5% family.
- There were 835 appeals heard in 2011, down from 1001 in 2010. Of all appeals, 29% were allowed while the remaining 71% were dismissed. As for criminal appeals, 33% were allowed while 67% were dismissed.
- Has a targeted six-month time period for releasing judgments from the time of hearing.

Source: Court of Appeal For Ontario, Annual Report 2011

BC COURT OF APPEAL: 2011 FAST FACTS

- Made up of 15 full-time judges plus supernumerary judges.
- Delivered 293 written judgments and 103 oral decisions on appeals.
- Of all appeals, 39% were allowed while the remaining 61% were dismissed. As for civil appeals, 42% were allowed while 58% were dismissed.
- Of criminal appeals filed, 48% involved conviction, 39% sentence and 13% acquittals and other types. For criminal appeals heard, 31% were allowed while 69% were dismissed. Drug and assault cases formed the largest categories of criminal appeals.
- 94% of reserved criminal judgments were pronounced within a target six-month guideline.
- Only one criminal appeal was heard by a five judge panel. Three civil appeals involved a five judge panel.

Source: B.C. Court of Appeal 2011 Annual Report