JIBC

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

IN MEMORIAM

On November 29, 2013 36-year-old York Regional Police Service Constable Michael Pegg died as the result of complications from a training accident he was involved in on November 12th, 2013.

Constable Pegg was at the agency's training facility in Vaughan when he broke his leg. He underwent surgery for the injury but remained hospitalized until succumbing to his injuries.

Constable Pegg had served with the York Regional Police Service for 10 years and was assigned to the Air Support Unit as a tactical flight officer.

On December 2, 2013 34-year-old Toronto Police Service Constable John Zivcic succumbed to injuries sustained two days earlier when he was involved in a vehicle crash at an intersection while responding to a call.

After the initial collision, his vehicle struck a tree and he was ejected. He was transported to a local hospital where he remained until passing away.

Constable Zivcic had served with the Toronto Police Service for six years. He is survived by his mother, brother, and sister.

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

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

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

Highlights In This Issue

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Upcoming Events

Human Source Management

January 21-24, 2014

JIBC Police Academy Advanced Training

This course will equip participants with the basic skills required and the best practices to follow associated to the recruitment and handling of informants and agents. It includes preparation of judicial authorizations utilizing informant/agent information, as well as policy and how to effectively report on information delivered from these assets.

www.jibc.ca/course/POLADV715

JUSTICE INSTITUTE of BRITISH COLUMBIA LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

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

Awaken your authentic leadership: lead with inner clarity and purpose.

Tana Heminsley; foreward by Mike Desjardins, Driver (CEO), ViRTUS.

Vancouver, BC: Authentic Leadership Global, Inc., 2013.

BF 637 L4 H45 2013

Basics of social research: qualitative and quantitative approaches.

W. Lawrence Neuman and Karen Robson.

Toronto, ON: Pearson Canada, c2012.

HM 571 N49 2012

Case study research: design and methods.

Robert K. Yin.

Los Angeles, CA: SAGE, 2014.

H 62 Y56 2014

Conflict management for managers: resolving workplace, client, and policy disputes.

Susan S. Raines.

San Francisco, CA: Jossey-Bass, c2013.

HD 42 R35 2013

Justice Institute of BC (JIBC) [videorecording]

New Westminster, BC: Justice Institute of British Columbia, 2013.

1 videodisc (4 min.): sd., col.; 4 3/4 in. (DVD).

JIBC students, graduates and faculty share their perspectives on what makes attending JIBC a unique post-secondary experience. The video showcases the breadth of justice and public safety education programs, academic credentials, and applied research supported by the Institute, all built on a foundation of hands-on, experiential learning.

LE 3 J88 J88 2013 D1560

Learning for success: effective strategies for students.

Joan Fleet, Fiona Goodchild, Richard Zajchowski.

Toronto, ON: Nelson, c2006.

LB 1049 F48 2006

Learning journals: a handbook for reflective practice and professional development.

Jennifer A. Moon.

London, UK; New York, NY: Routledge, 2006.

LB 1060 M664 2006

Lessons from the virtual classroom: the realities of online teaching.

Rena M. Palloff and Keith Pratt.

San Francisco, CA: Jossey-Bass, 2013.

LB 1044.87 P34 2013

Post-traumatic stress disorder and chronic health conditions.

by Steven S. Coughlin.

Washington, DC: American Public Health Association, c2012.

RC 552 P67 C67 2012

Ready! disaster survival for Canadians: 72 hours plus.

Sarah Jane Fraser.

Renfrew, ON: General Store Pub. House, 2013.

HV 551.5 C2 F73 2013

Research decisions: quantitative, qualitative, and mixed method approaches.

Ted Palys and Chris Atchison.

Toronto, ON: Nelson Education, 2013.

H 62 P34 2013

Serial murderers and their victims.

Eric W. Hickey.

Belmont, CA: Wadsworth, Cengage Learning, c2013.

HV 6529 H53 2013

SENSE OF SMELL MAY BE USED FOR GROUNDS

R. v. McNeil, 2013 NLCA 52

A police officer received source information on three separate occasions that the accused was transporting marihuana. The officer considered the informant to be reliable, having received information in the past that had been corroborated by positive searches and arrests, including the seizure of marijuana and cocaine. He had spoken to police 40+ times, had no criminal record and had been paid for information. On the first occasion, the source said the accused "was moving marijuana in a pickup truck." The officer located the accused and a passenger in a Dodge Ram pickup truck, identified them but took no further action that day. Two weeks later the informant told police that the accused had brought out another "load of weed" the previous week. A CPIC search revealed the accused had been charged with a simple possession offence under the *Controlled Drugs and Substances Act*. Then, four days later, the informant again called police, stating the accused was on his way with a load of marihuana. He also said that the accused "never moves less than two pounds."

As a result of the recent information, police found the accused driving a Dodge Ram crew cab pickup truck and pulled him over. He was the sole occupant. When the officers approached the driver's side door, as soon as the window was opened, they instantly smelled the overwhelming odour of fresh, unburned marijuana. The accused was immediately arrested, advised of his right to counsel, right to silence and was cautioned. A search of the accused revealed a quantity of money, a red cell phone and a silver coloured marijuana grinder. In the truck police found four mason jars containing marihuana, a small bag of marihuana in a tool box, a hockey bag containing four large plastic bags of marihuana and $2,200 in cash. In total, 3.15 pounds of marihuana was seized and the accused was charged with possessing it for the purpose of trafficking.

Newfoundland Provincial Court

The judge concluded there was no arbitrary detention under s. 9 of the *Charter*. The police relied on the informant's tip, which they had reason to consider reliable. Further, the police knew the accused and his vehicle from the earlier stop, and knew he had recently been charged with drug possession. They had also received information from a reliable source on three occasions that he was moving more than two pounds of marihuana at a time. When they stopped the vehicle, they smelled the overwhelming odour of fresh, unburned, marijuana coming from the truck. As well, the judge noted, "the smell of marijuana … provides the grounds necessary for the police to believe that the occupant(s) of the vehicle from which the smell of marijuana emanates are or have been in possession of marijuana." The accused was convicted of possessing marihuana for the purpose of trafficking and sentenced to nine months imprisonment less 15 days served on remand.

Newfoundland Court of Appeal

The accused argued he had been arbitrarily stopped and detained by the police and the search of his vehicle violated his rights under s. 8 of the *Charter*. But Justice Welsh, delivering the Court of Appeal's opinion, disagreed. Here, the accused's vehicle was stopped on the basis of the informant's information, which the trial judge accepted as reliable. "The investigative detention was short in duration," said Justice Welsh. "The police officers reported an overwhelming smell of marihuana emanating from inside the vehicle. [The accused], who was the lone occupant, was immediately placed under arrest and advised of his constitutional rights. The search did not take place until after [the accused] was arrested. In these

"[A] police officer may use his senses, including smell, as one element in determining the presence of grounds to proceed with an investigation."

circumstances, the investigative detention could not be said to be arbitrary."

As for the arrest, it was lawful. The informant's information was corroborated by other factors:

> In particular, [the accused] was alone in the vehicle, the police reported the overwhelming smell of marihuana, they knew [the accused] and his vehicle from the [earlier] stop, and they knew he had earlier been charged with drug possession. It follows that there is no basis on which to conclude that the trial judge erred in determining that [the accused's] arrest and the consequent search did not infringe sections 8 and 9 of the Charter. [para. 25]

On the issue of smell, the Court of Appeal noted "a police officer may use his senses, including smell, as one element in determining the presence of grounds to proceed with an investigation." Here, "the smell was just one of many factors on which the police proceeded and was appropriately considered as such by the trial judge."

The accused's *Charter* rights were not infringed and his appeal was dismissed.

Complete case available at www.canlii.org

DEMAND MAKER IRRELEVANT

R. v. Wylie, 2013 ONCA 673

The police made a breath demand under s. 254(3) of the *Criminal Code*. As a result, the accused provided two breath samples; 139 mg% and 137 mg%.

Ontario Court of Justice

Both of the officers who were at the scene testified that a breath demand was made at 1:12 am but each testified that the other had actually made it. Despite uncertainty of who made the demand, the judge ruled that there was ample evidence to conclude that a valid demand had been made. This evidence included two breath samples being provided. Since a valid breath demand was made, the Crown could utilize s. 258(1)(c). As a result, the accused was convicted of over 80 mg%.

Ontario Superior Court of Justice

An appeal judge found the trial judge failed to determine who made the demand and a new trial was ordered. He ruled that the details concerning who gave the demand, what was said, and when and where the demand was made were necessary elements in determining whether the Crown had proven a proper demand.

Ontario Court of Appeal

On further appeal by the Crown, the Court of Appeal restored the accused's conviction. In its view, the Crown's burden in proving its case did not include the details of the demand - who made it was irrelevant:

> All that s. 254(3) requires is that a valid breath demand is made by a peace officer with reasonable grounds to do so and that the demand is made as soon as practicable. There is nothing in the Criminal Code or in the jurisprudence that supports the proposition that the Crown must prove the "who, what, where and when" of the demand. [para. 10]

It was open to the trial judge to find that a valid demand had been made, bringing the Crown's case within the opening words of s. 258(1)(c) ("where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3)"). Furthermore, the accused complied with the demand which, absent a *Charter* challenge, provided a complete answer in the Crown's favour.

Complete case available at www.ontariocourts.on.ca

"There is nothing in the Criminal Code or in the jurisprudence that supports the proposition that the Crown must prove the 'who, what, where and when' of the demand."

ULTERIOR MOTIVE DOES NOT TAINT OTHERWISE LAWFUL SEARCH

R. v. Chan, 2013 ABCA 385

At about 9:40 pm two patrol officers saw a truck parked in front of an apartment. They had month old information that the truck was possibly armored and associated with the accused, a reputed gang member known to carry weapons. After a computer search of the licence plate confirmed the information, the officers parked their vehicle so they could visually monitor the truck. A sergeant in charge of the gang enforcement unit was contacted and a surveillance team was mobilized. At 10:43 pm, two unidentified people entered the truck; a male driver and a female passenger. When the truck went mobile, the surveillance team followed, observed it make an unsignalled lane change and reported the traffic infraction over the police radio. After the truck stopped, let out the female passenger and drove on, the patrol officers pulled the vehicle over at 10:51 hrs by activating their police emergency lights. The accused stopped the truck near the curb, rolled his window down and waited in the vehicle.

Fearing the vehicle might be armoured and the driver armed, a "high-risk vehicle stop" was initiated. Police issued commands to the driver including several directions to exit the vehicle. He refused and, following a two to three minute stand off, police were able to momentary divert his attention on the passenger side, approach the driver's door, unlock it and grab his left arm and remove him from the truck. He was escorted to the police vehicle, advised he was being detained for a traffic offence and asked to provide his driver's licence. He said he did not have it and refused several times to identify himself. He was arrested for obstruction and his truck was searched. When an officer bent forward to look under the seat using his flashlight, he saw part of a handgun stuffed under the seat. The handgun was a Kel Tec .32 calibre semi-automatic, loaded with six live rounds in the magazine and one in the chamber. The accused was then arrested for possessing a prohibited weapon, patted down and advised of his *Charter* rights at 11:08 pm. On his person police located six cell phones, a pager, $995 in cash and other items. The vehicle was searched the following day under a warrant and found not to be armoured. But a machete, two hand axes, a hammer, and a blue bag containing miscellaneous items of clothing such as a balaclava, gloves and hats were found. The accused was charged with obstruction of justice, breach of recognizance and a number of weapons offences. No ticket for the traffic infraction was issued because it seemed insignificant in light of the subsequent events.

Alberta Court of Queen's Bench

The gang unit sergeant testified that if the accused was identified as an occupant of the truck the plan was to pull it over. If, however, the truck went mobile and the accused could not be identified as an occupant, it would be surveilled until there was reason to stop it. The officer who searched the truck testified that he searched it to ensure it was not stolen and to look for the accused's driver's licence, vehicle insurance and registration. The accused argued, in part, that the traffic stop was a pretext to search the truck. In his view, the purpose of the stop was not to enforce traffic laws or investigate traffic infractions but to determine the accuracy of the information police had about the vehicle and its association to the accused. And, even if there was some lawful basis for the stop, the accused contended that the search exceeded the scope as one incidental to arrest or to search for documentation (under the driver's seat).

The trial judge found the accused's detention was not arbitrary. He had failed to signal a lane change, which provided the "excuse" to justify the stop. However, the search was unauthorized and unreasonable. A simple traffic stop would not legally provide the police access to the vehicle to determine whether it contained a firearm. The judge inferred that the police had "every intention to search this

"[A]n officer's ulterior motive to search is, at best, only a factor that does not render a lawful search unlawful."

vehicle in circumstances where a search warrant could not be justified." So although the obstruction arrest was valid, there was no connection between that arrest and the search of the vehicle. The police knew the accused's identity, had no safety concerns and there was nothing to suggest that the truck was stolen. So although there were no ss. 9 or 10 *Charter* breaches, the search was unreasonable under s. 8 and the firearm was excluded as evidence under s. 24(2). The judge found the police action was not inadvertent but a "calculated manoeuver designed to sidestep the accused's *Charter* rights." He was acquitted of the weapons charges, but then pled guilty to obstruction and breach of recognizance (he was on bail for causing a disturbance).

Alberta Court of Appeal

The Crown appealed the trial judge's rulings that the police breached the accused's s. 8 *Charter* right and in excluding the evidence from the vehicle under s. 24(2).

Unreasonable Search?

The Court of Appeal ruled the trial judge overemphasized the police plan to stop and search the accused and his vehicle on any pretext. Rather than finding the police were merely looking for an excuse to search the truck, the court was required to consider the circumstances prevailing at the time of the search. "An officer's ulterior motive to search is, at best, only a factor that does not render a lawful search unlawful," said the Court of Appeal. "Where a dual purpose search is undertaken, its reasonableness must be assessed on a step by step analysis of the interaction between police and the citizen. The ultimate question is whether, mindful of the circumstances as they develop, the police stayed within their authority." By way of illustration, the Court of Appeal noted, "if the police had in fact decided to stop the [accused's] vehicle and conduct an unlawful search, but before they could do so they observed him to be trafficking cocaine from the vehicle, the subsequent stop and search would be lawful no matter their impure thoughts."

"Where a dual purpose search is undertaken, its reasonableness must be assessed on a step by step analysis of the interaction between police and the citizen. The ultimate question is whether, mindful of the circumstances as they develop, the police stayed within their authority."

Here, the trial judge was concerned that the police had decided to stop and search the vehicle with or without legal justification. This pre-stop concern led him to ignore the accused's post-stop conduct in finding the search of the vehicle unconnected to the obstruction charge:

> The trial record reveals that although one of the gang unit officers did express the intent to stop and search the truck with or without justification, there was no evidence that the uniformed officers who in fact stopped and searched the truck acted pursuant to such a plan, or were even aware of it. Indeed, the officers who stopped the truck testified that they were only told that the vehicle was of interest to the gang unit because it was sometimes driven by the [accused] who was a suspected gang member and that the vehicle may be armoured and the [accused] armed. The officer who conducted the search said he did so only after the [accused] refused to identify himself and was being arrested for obstruction.
>
> The trial judge seems to have entirely overlooked the [accused's] conduct following the stop, and did not consider how that conduct and his subsequent arrest may have contributed to providing the police with lawful reason to search the truck.
>
> The trial judge should have considered the [accused's] conduct at the critical time immediately preceding the search, as well as the fact that the officers who conducted the search testified that they were not acting pursuant to an unlawful plan. Accordingly, we are left to question the validity of the conclusion that the search of the truck was unreasonable and amounted to a violation of the [accused's] s 8 Charter right. [paras. 29-31]

> "The requirement for a police officer to have reasonable grounds before arrest without a warrant protects the citizenry from arbitrary police conduct, while at the same time, protecting society from crime."

Thus, there was no evidence that the search that yielded the firearm was actually contaminated by the trial judge's opinion that one or more of the officers were determined to search the vehicle with or without legal justification. In fact, the trial judge concluded that the police had executed a valid stop and made a lawful obstruction arrest.

Exclusion of Evidence

Even assuming that the search violated the accused's s. 8 rights, the trial judge failed to consider a number of important factors in the s. 24(2) analysis. Had he properly considered the relevant factors, his decision to exclude the evidence, particularly the handgun, may have been different.

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

Complete case available at www.albertacourts.ab.ca

STRIP SEARCHES REQUIRE INDIVIDUAL ASSESSMENT: CLASS ACTION NOT CERTIFIED

Thorburn & Jacob v. British Columbia (Public Safety and Solicitor General), 2013 BCCA 480

The plaintiffs, both students, were arrested on charges of mischief for peacefully protesting outside the U.S. Consulate in Vancouver. They were taken to the city jail, patted down and subjected to an intrusive strip search for contraband. A bail hearing followed and they were released on an undertaking. The charges were later stayed.

The policy in the city jail at the time mandated routine strip searches of all new arrivals except those arrested for (1) intoxication in a public place (held in a "drunk tank" until sober) or (2) a bylaw or traffic violation (held in a cell for expeditious process and release). Both these groups were subjected to pat-down searches only because there was no possibility of their being admitted into the city jail's general prison population.

The plaintiffs sought to certify a class action lawsuit against the Ministry of Public Safety and the Solicitor General, the City of Vancouver and the Vancouver Police Board seeking damages under s. 24(1) of the *Charter*. Class action authorizes group litigation by allowing a representative, on behalf of similarly-situated individuals, to advance multiple claims for alleged wrong doing within a single action. They alleged s. 8 *Charter* violations because persons not remanded into pre-trial custody at the city jail were subjected to routine strip searches.

Supreme Court of British Columbia

The chambers judge dismissed the plaintiff's application for class action. She found the plaintiffs had failed to establish four of the five requirements necessary for class certification under British Columbia's *Class Proceedings Act*, including the need to establish common issues. In the judge's view, "the legal test for determining if there was a s. 8 Charter violation requires an individual analysis of the reasonable grounds (subjective and objective) for each potential class member's search." This would require "individual assessments of the subjective beliefs of hundreds of employees who conducted the search during the relevant period." Thus, the chambers judge concluded the commonality requirement for class action certification, among other requirements, had not been satisfied.

British Columbia Court of Appeal

On appeal by the plaintiffs, Justice Smith, authoring the unanimous Court of Appeal's judgment, agreed with the chambers judge that the commonality requirement had not been established.

"Individual assessments would be necessary to determine if reasonable grounds existed (based on the objectively-justifiable subjective belief of the arresting officer or staff member conducting the search) for the arrest and the search incidental to the arrest of each class member, and whether the manner of the search was reasonable in all of the circumstances unique to each proposed class member."

A strip search is constitutionally valid if (1) there are reasonable grounds to arrest, (2) reasonable grounds to justify the strip search incidental to arrest and (3) the search is conducted in a reasonable manner. Here, the plaintiffs could not establish a cause of action by merely relying on the claim that the strip search policy for all new arrivals was unreasonable. The reasonableness of each strip search would require individual fact finding and a legal analysis for each class member's claim. This would necessitate individual trials:

> While a warrantless search is presumptively unreasonable, a Charter right is individual in nature. Individual assessments would be necessary to determine if reasonable grounds existed (based on the objectively-justifiable subjective belief of the arresting officer or staff member conducting the search) for the arrest and the search incidental to the arrest of each class member, and whether the manner of the search was reasonable in all of the circumstances unique to each proposed class member. ... [T]hose circumstances would include a consideration of the likelihood that a detainee might be remanded into custody and thereby be mingling with the prison population. Each of these legal and factual determinations would require a consideration of the multifarious circumstances of each class member (e.g., the reason for the arrest, any prior criminal record or acts of violence and/or possession of weapons, and the extent of the possibility he or she might be remanded into custody). An unreasonable policy alone could not provide the foundation for determining each class member would allow a judge to determine if a cause of action had been established. [para. 41]

So, although the common cause of action is an unlawful search, "each of the elements of the cause of action (reasonable grounds for arrest, search incidental to arrest, reasonableness of the manner of the search including the likelihood of a member being placed into the prison population, and the appropriateness of Charter damages) requires individual findings specific to the proposed class member," said Justice Smith. "In other words, a finding of a s. 8 Charter violation as a result of an unreasonable search of one class member will not found a similar finding for another class member as a finding of an unreasonable search is dependent on a multitude of variable circumstances unique to each class member."

The plaintiff's appeal was dismissed.

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

AGGRAVATED HIV ASSAULT REQUIRES REALISTIC POSSIBILITY OF TRANSMISSION

R. v. Bear, 2013 MBCA 96

The accused took items from a store and left without paying for them. When a security officer attempted to stop him, he pushed her to the floor, fled and entered a bus. The police were called, removed the accused from the bus and arrested him. During police transport, the accused, knowing he was HIV positive, made comments about HIV and spitting. As a precautionary measure, a spit sock was placed over his head. He had an open cut on his lip and spots of blood on his shoes. He was placed alone in an interview room but managed to push up his spit sock, even though handcuffed. He then hid near the door. When a police officer entered the room, the accused stepped out and spit in his face from about two feet away. The spit landed on the officer's eye, nose, and forehead. The officer was taken to the hospital, treated with post-exposure prophylactic drugs but showed no sign of having contracted HIV. The accused was charged with aggravated assault.

BY THE BOOK:

Aggravated Assault: ***s. 268 Criminal Code***

Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

Manitoba Court of Queen's Bench

A doctor testified that HIV was not transmitted casually. In his view, the possibility that HIV could be transferred through blood-tainted saliva, such as a splash of blood in an eye, could not be ruled out. He said it was theoretically possible that HIV virus particles in blood could be mixed with saliva and transmitted via the "source" spitting into another person's eye, mouth or nose. But the doctor was not aware of this ever being reported in the medical literature.

The judge held that the Crown had proven the **mens rea** of the offence but not the **actus reus**. Although the spitting was an intentional act and the accused knew he had HIV, the Crown had not proven that his actions constituted a "significant risk of serious bodily harm." There was no evidence there was any blood in the spit that struck the officer. and the Crown had not established that the risk of transmission was significant enough to prove beyond a reasonable doubt that the officer's life was endangered. In the judge's view, some risk or the fact that the possibility of transmission could not be eliminated, was not proof of a significant risk. The judge also concluded that the evidence did not prove an attempted aggravated assault. However, a conviction for common assault was entered.

Manitoba Court of Appeal

The Crown argued that the trial judge applied the incorrect legal test in determining whether an aggravated assault had occurred and erred in determining that the accused's actions did not endanger the life of the officer.

Endangerment

The offence of aggravated assault requires at least, among other things, that the life of the complainant was endangered. Unlike wounding, maiming or disfiguring, which involve actual causing of serious bodily harm, endangering life may occur without any bodily harm actually occurring. In non-HIV cases, absent bodily harm, endangerment of life requires proof that the complainant's life had been put in such danger that there was a risk of death. However, in HIV cases, endangerment will be established if there is a significant risk of serious bodily injury through a realistic possibility of HIV transmission. A realistic probability of transmission is not a high risk, but it must be more than an extremely low or speculative risk.

Here, the Court of Appeal found that if any blood was mixed with the saliva, the evidence established it was minimal. None of the store witnesses or arresting officers noticed any facial cuts on the accused. The complainant noticed an open wound on the accused's lip but it was not running with blood. The trial judge was entitled to infer that, if there was blood in the saliva, the amount of blood was insignificant and insufficient to prove a realistic possibility of transmission. Justice Steel stated:

> In this case, the HIV transmission is by way of blood mixed with saliva. The evidence as to whether there was indeed blood mixed with the saliva is far from satisfactory. However, even if one assumes there was some blood mixed with that spit, in order to find that the accused endangered the life of the police officer, there must be evidence of a real risk of HIV transmission or, in other words, a realistic possibility of transmission. In my mind, those words produce a similar test.
>
> There was no evidence adduced by the Crown that approached proof of such a risk. Although [the doctor] said that transmission by way of blood-tainted saliva was possible, he equated possible with theoretical and also stated that such a case had never been reported in the medical literature. His evidence was that the concerns centered on a situation where a large amount of visible blood (a blood splash) came into contact with the mucous membrane of the eye or nose.

"An accused is guilty of an attempt if he intends to commit a crime and takes legally sufficient steps towards its commission. Physical impossibility is not a defence to a charge of attempt. The crime of attempt consists of intent to commit the completed offence together with some act more than preparatory taken in furtherance of the attempt."

> ... [T]here was no evidence by which the Crown could prove that there was a realistic possibility of transmission and, therefore, that the police officer's life was endangered. Thus, the trial judge was correct in acquitting the accused of the charge of aggravated assault. [paras. 61-63]

Thus, the officer's life was not put at risk of death when the HIV-positive accused spat at him, despite having an open cut on his lip and his saliva maybe entering the mucous membrane of the officer's eyes and/or nose.

Attempted Aggravated Assault

Under s. 660 of the *Criminal Code* a person may be convicted of an attempt where the complete commission of an offence is charged but not proved. "An accused is guilty of an attempt if he intends to commit a crime and takes legally sufficient steps towards its commission," said Justice Steel. "Physical impossibility is not a defence to a charge of attempt. The crime of attempt consists of ***intent to commit the completed offence*** together with ***some act more than preparatory*** taken in furtherance of the attempt." Thus, an attempt can be proven where the full offence actus reus is deficient because an attendant circumstance is lacking.

In this case, the Court of Appeal found the Crown proved the *mens rea*:

> [T]he accused intended to transmit HIV by spitting. It is immaterial whether he thought his saliva alone was sufficient to do so or he thought that the blood from the cut on his lip mixed with his saliva was sufficient to do so. It is immaterial that it was not a realistic possibility to transmit HIV in this way. His spitting at the police officer coupled with his comments that he had HIV, his threats and his hiding behind the door of the interview room show a completed mens rea along with action that was more than preparatory. The criminal element of attempt may lie solely in the intent. [para. 73]

Despite the Crown's inability to prove endangerment of life (an element of the *actus reus* for the full offence), this was not fatal to a prosecution for attempted aggravated assault. The accused's intent was clear and the conviction for attempted aggravated assault was substituted for the common assault conviction. The matter was sent back to the trial court for sentencing.

Complete case available at www.canlii.org

REASON TO CALL WIFE NOT ARTICULATED: NO s. 10(b) BREACH

R. v. Magalong, 2013 BCCA 478

A church pastor called police to report that the accused had been sexually inappropriate with three girls. He was an immigrant and not entirely fluent in English. The pastor said the accused was suicidal and currently being driven by another person to the police detachment. An officer pulled the car over, advised the accused he was being detained for sexual assault and took him to the detachment. However, the officer did not advise the accused of his s. 10(b) *Charter* rights. He was placed in an interview room where he waited an hour and 45 minutes. A second officer entered the interview room, advised the accused he was charged with sexual assault and told him about his right to counsel. When she asked him if he understood, the accused said, "I understand." When asked if he wanted to talk to a lawyer he said he wanted to talk to his wife. The officer refused this request, instead telling him he had to decide if he wanted to call a lawyer. The accused said, "I don't have a lawyer." When asked if he would like to call a free duty lawyer, the accused said, "Yes ma'am" and a private call was facilitated.

After the call concluded, the officer advised the accused he was also being charged with sexual

interference and again advised him of his right to talk to a lawyer. He spoke a second time to a lawyer and, after the call, confirmed he understood what the lawyer told him. The officer then began an interview. Within 15 – 20 minutes another officer entered the interview room. He told the accused he was under arrest "for sexual assault ... times three and sexual interference times two." The charges were explained at some length and when asked whether it was clear" the accused replied in the affirmative. He acknowledged he had spoken to a lawyer, was satisfied with his call and understood he did not need to talk to the police and that what was being said was being recorded and could be played before a judge in court. He then spoke to police and was subsequently charged with several sex offences.

British Columbia Supreme Court

The Crown sought to use the accused's statement to cross-examine him if he testified. During a voir dire the accused said he was just saying "yes" in response to police questions about his right to remain silent and understanding about a lawyer, "just to end it." He said he would have liked to speak to a lawyer who spoke his first language and he did not understand that he had the right to contact another lawyer. The trial judge found the police breached s. 10(b) of the *Charter* by not promptly advising him of his right to counsel. But his statement was admitted under s. 24(2). The judge rejected the accused's s. 10 (b) argument that the police failed to take further steps to ensure he reasonably understood his right to counsel and by denying him the opportunity to call his wife to arrange counsel of choice. The judge found the accused understood. He was readily able to follow the conversations and was responsive to the questions asked of him. Without some indication by the accused that he did not understand, the judge found there was no extended obligation on the police to do more to ensure understanding. As well, the accused had an obligation to articulate why he wanted to speak to his wife. Otherwise, there was no other way for the police to know that he was wanting to speak to his wife to arrange counsel. The accused did not testify. He was convicted by a jury on two counts of sexual interference (s. 151 *Criminal Code*) and two counts of invitation to sexual touching (s. 152 *Criminal Code*).

British Columbia Court of Appeal

The accused appealed his convictions, arguing the trial judge erred, in part, by failing to find the police breached his s. 10(b) rights by not making other reasonable efforts to explain his right to counsel. In his view, there were exceptional circumstances which should have alerted the police and obliged them to take further steps to reasonably ascertain that he understood his *Charter* right to counsel. Furthermore, he contended that the police denied him an opportunity to talk to his wife to arrange counsel. He said the statement's admission caused him not to testify. He wanted the guilty verdicts set aside and a new trial ordered.

Lack of Understanding?

A detainee's understanding of their right to counsel is central to their ability to exercise it. In this case, Justice Saunders, writing the Court of Appeal's judgment, found the trial judge did not err in ruling that the accused understood his right to counsel when he spoke with the police. In her view, there were no special circumstances that should have caused the police to take more steps to ensure he understood his rights. Whether an accused understands the police advice as to their *Charter* rights will depend on "whether there were objective indicia that should have alerted the police to this deficit of comprehension" or, in other words whether there were "special circumstances." The Court of Appeal stated:

> In the context of language issues, it will often be apparent that the detainee does not understand. In other circumstances, however, a detainee may have facility in English, but better facility in his or her first language. If that case is so, it still may be possible that a detainee understands the information provided, in which case there can be no complaint by the detainee he or she did not receive the mandatory Charter warnings in the language of his or her choice. Where, however, the detainee does not understand, a question arises whether the police should have

> done more to ensure comprehension. I understand the jurisprudence … requires police to do more where there is, objectively, something about the circumstances that positively indicate a lack of comprehension. [para. 28]

The accused submitted the police did not do enough to ensure he understood his rights. There were special circumstances (or objective indicia) that should have alerted the officers he lacked comprehension about his rights. These objective indicia included:

- his lack of ease in the English language
- police knew English was not his first language
- he had a thick accent
- the police had trouble understanding him.

In his view, the police were required to do more and have him repeat back his understanding of his rights (to confirm his comprehension) and ask him whether he required an interpreter.

But here, Justice Saunders agreed with the trial judge's conclusion that the accused did not lack the understanding of his rights based on the questions he was asked and the nature of his answers. "The answers appear responsive to the questions asked and do not demonstrate an inability to follow the conversation," she said. During the exchange with police, the accused demonstrated an ability to express himself both when he didn't understand something and to affirm when he did understand.

Third Party Phone Call?

The police also did not breach the accused's rights when they denied his request to speak to his wife. "[He] did not tell the police that he wanted to contact his wife to ask her to contact counsel for him," said Justice Saunders. "In these circumstances, denying [the accused's] single simple request to contact his wife does not establish a Charter violation."

The trial judge correctly applied the law and the accused's appeal was dismissed.

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

Relying on R. v. K.W.J., 2012 NWTCA 3

In *Magalong*, the reasoning of the Northwest Territories Court of Appeal in *R. v. K.W.J.*, 2012 NWTCA 3 was adopted. In *K.W.J.*, as in *Magalong*, the accused asked to speak to his wife but did not tell the police why. He successfully argued at trial that his s. 10(b) right was breached when he was denied this opportunity. He claimed he wanted to contact his wife to help him exercise his right to counsel. The Appeal Court, however, concluded the trial judge erred in finding a *Charter* breach. Although "a detainee is permitted, as part of the exercise of a right to counsel, to communicate with a third party so long as the purpose is to retain or instruct counsel and there are no investigative concerns arising from the request," it did "not fall to the police to speculate on the reason why the [accused] wanted to contact his wife, unless there are special circumstances that require them to make inquiries." In this case, the reason for contacting his wife was not obvious nor was there special circumstances obliging the police to clarify the purpose:

> [The accused] made only one request to speak to his wife, and did not specify that he required her assistance to obtain a lawyer. We question whether it was obvious in the circumstances that the [accused] wanted to contact his wife for the purpose of exercising his right to counsel, particularly as the officer testified that he would have allowed the [accused] to contact his wife had he known that was the reason.
>
> In our view, a simple request to contact his wife, without more, does not give rise to the inference that the request was to assist in exercising the [accused's] right to counsel. It is not unusual for a detained individual to want to contact family members when provided with access to a telephone, and there may be many instances where the police investigation would be compromised by allowing such communication. Indeed, that may have been the case here, where the charge was sexual assault of the wife's underage niece.
>
> We also find that there were no special circumstances that gave rise to additional obligations on the part of the police officers to clarify the purpose behind the [accused's] request. He was a mature man, and he did not objectively present as having any physical or mental impairment that suggested he required additional assistance on the manner in which to exercise his right to counsel. In our opinion, he failed to diligently pursue his right to counsel by not explaining the reason why he wanted to speak with his wife. [paras. 34-36]

ABSORPTION RATE BEYOND KNOWLEDGE OF ORDINARY PERSON

R. v. Benoit, 2013 NLCA 3

Acting on an anonymous tip, police apprehended the accused at his worksite standing beside a truck. A police officer smelled a faint odor of alcohol from the accused and saw that his eyes were watery. However, he had normal speech and gait, his eyes were not red and his tire tracks along the road were consistent with normal driving. The accused failed a roadside breath test and a s. 254(3) *Criminal Code* demand was made. Two breath samples of 150 mg% were later provided at the police station. The accused told police he had consumed 2 ½ bottles of beer and a drink of vodka. He was charged with over 80 mg%.

Newfoundland Provincial Court

The accused testified he drank one beer at home and the remaining beer at a birthday party he attended on his way to work. He said he received two "little" bottles of vodka from the party hostess to take with him, which he drank when he arrived at work. The party hostess testified the accused drank beer at the party and that she had gifted him two little bottles of vodka. The certificate of analysis showing the breathalyzer test results was admitted. Although this presumptively established a 150 mg% BAC at the time of driving, the judge held that the accused had rebutted the presumption. The testimony of the accused and the party hostess, along with the police officer's observations of the accused and the tire tracks his truck made in the snow, raised a reasonable doubt that his BAC exceeded 80 mg%. The accused was acquitted.

Newfoundland Supreme Court

A Crown appeal was unsuccessful. The appeal judge opined that expert evidence is not always required to rebut the presumption under s. 258(1)(d.1) of the *Criminal Code*. Here, the trial judge reviewed the relevant evidence (normal speech and gait, eyes not red and truck tire tracks consistent with normal driving). Plus, the trial judge found the accused had consumed just over two beers earlier in the evening before driving and then consumed two small bottles of vodka after driving. The appeal judge concluded that the trial judge made no legal error in her interpretation and application of s. 258(1)(d.1). She detailed the basis for her reasonable doubt and determined the Crown had failed to prove all the essential elements of the offence.

Newfoundland Court of Appeal

Section 258(1)(d.1) outlines the evidentiary requirements for an accused seeking to challenge the presumptive proof of breathalyzer certificate evidence on the basis of their post-driving alcohol consumption. Justice Hoegg, speaking for the Court of Appeal, said this:

> Section 258(1)(d.1) provides that a person who consumes alcohol after relinquishing care and control of his or her vehicle but before taking breathalyzer tests can still raise a reasonable doubt about the breathalyzer test results accurately reflecting the accused's blood alcohol levels at the time of driving, but in order to do so, he or she must meet the two evidentiary criteria set out in the section. [para. 17]

And further:

> Section 258(1)(d.1) requires an accused to show that what he or she says about his or her consumption of alcohol, both before and after driving, tends to be consistent with: 1) his or her being under the legal limit when he or she drove, and 2) with his or her test results. A trial judge necessarily has to advert to the evidence and find that it establishes both of these consistencies before he or she can find that the presumptive proof of the certificate evidence is rebutted. The type of evidence the trial judge needs in order to determine the two consistencies, will, as a practical necessity, come from an expert, for an ordinary person is not able to say whether the quantity of alcohol an accused says he or she consumed, both before and after driving, is consistent with that

> accused's blood alcohol level not exceeding .08 when driving and consistent with his or her breathalyzer test results. An ordinary person is simply not possessed of the skills, knowledge and tools necessary to give evidence which addresses the absorption rate of alcohol an accused says he consumed. [para. 21]

Thus, to rebut the presumption, the accused must show his alcohol consumption was consistent with both his BAC being under 80 mg% when he was driving and his breathalyzer test results. But just what kind of evidence will suffice?

The only trial evidence pertaining to the accused's BAC was the certificate of analysis, which presumptively proved his BAC was over 80 mg%:

> Certificate evidence is expert evidence, provided to a court by trained technicians, usually police officers, using scientifically designed machinery and scientific techniques that explain the rate of absorption of alcohol in an accused's blood between the time when an offence was allegedly committed and the time of the breathalyzer tests. This type of evidence is beyond the ken of ordinary witnesses and fact-finders. An ordinary person may well be able to speak to his or her observations of an accused's behaviours, like unsteady gait, slurred speech, erratic driving, etc. which are so commonly known to be associated with impairment by alcohol or drugs that his or her evidence could be used to support a charge of impaired driving, but such evidence does not say anything about the concentration of alcohol in that accused's blood. [para. 20]

In this case, the accused did not satisfy the burden in rebutting the presumption. He did not call evidence to cast doubt on the reliability of the breathalyzer certificate. There was no evidence that tended to show the accused's BAC was under 80 mg% when he drove. Nor was there evidence that the amount of alcohol he said he consumed was consistent with his test results. There was nothing said as to his alcohol absorption rate. This was necessary for the trial judge to determine whether the accused's alcohol consumption before driving (2 ½ beers) was consistent with a BAC under 80 mg% at the time of driving and whether his total alcohol consumption (2 ½ beers + 2 small bottles of vodka) was consistent with his breathalyzer test results (150 mg%). The evidence of normal speech upon arrest and straight tire tracks made in the snow said nothing about his BAC while driving or after breath samples were taken. "Use of evidence about an accused's physical presentation and manner of driving to support the requirements of the section would be pure speculation," said Justice Hoegg. The presumption of the certificate evidence was not rebutted. The Crown's appeal was allowed and a new trial was ordered, allowing the accused an opportunity to adduce expert evidence if he so chooses.

Complete case available at www.canlii.org

BY THE BOOK:

Presumption of Identity: ***s. 258 Criminal Code***

s. 258 (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255 (2) to (3.2),

... ...

(d.1) if samples of the accused's breath or a sample of the accused's blood have been taken as described in paragraph (c) or (d) under the conditions described in that paragraph and the results of the analyses show a concentration of alcohol in blood exceeding 80 mg of alcohol in 100 mL of blood, evidence of the results of the analyses is proof that the concentration of alcohol in the accused's blood at the time when the offence was alleged to have been committed exceeded 80 mg of alcohol in 100 mL of blood, in the absence of evidence tending to show that the accused's consumption of alcohol was consistent with both

(i) a concentration of alcohol in the accused's blood that did not exceed 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed, and

(ii) the concentration of alcohol in the accused's blood as determined under paragraph (c) or (d), as the case may be, at the time when the sample or samples were taken [.]

EXPERIENCE: REASONABLE GROUNDS VIEWED THROUGH OFFICER'S LENS

R. v. Messina, 2013 BCCA 499

Members of the plain clothes Crime Reduction Unit (CRU) saw the accused meet four people at four different locations in about an hour. These four people approached the accused's car on foot, briefly entered his vehicle, exited and then immediately left the area. These encounters included:

1. A police officer saw a disheveled man standing on the sidewalk smoking a cigarette and looking left and right. The officer observed the accused drive up very slowly and stop in front of the man. The man got into the passenger side of the car, it circled the block and then the man left the vehicle and walked into an alley. The officer believed what he saw was consistent with his experience dealing with dial-a-dope operations. He had investigated 20 to 30 suspected drug trafficking incidents, 10 of which led to arrests for dial-a-dope trafficking. As a result, the CRU supervisor authorized surveillance. She was a 17 year police veteran with extensive experience with drug addicts, dial-a-dope traffickers, surveillance projects and street level drug sales.
2. The accused, after driving to a gas station and talking on his cell phone, drove to a location where a "skinny" female got into his car. She came from and returned to what was described as looking like a "crack shack." The officer concluded that the woman's thin build supported an inference that she was a drug user.
3. The accused picked up a male and dropped him off at a McDonald's nearby.
4. The accused then drove to another location where a man entered the car briefly and then left.

Based on his own observations, the observations communicated by other CRU members and a discussion with his supervisor, the officer decided to arrest the accused. He was taken to the police detachment where a strip search yielded two rocks of crack cocaine totalling 0.5 grams.

British Columbia Provincial Court

Both the police officer and the CRU supervisor testified that the meetings between the accused and the four people were pre-arranged. Each person approached on foot, entered the passenger seat of the car, sat in the car for 30-60 seconds, then exited the car and immediately left the area. Despite both officers independently forming reasonable grounds for the arrest, the judge relied only on the arresting officer's testimony and found a s. 9 *Charter* breach. In the judge's view, the arrest lacked the necessary reasonable grounds. The judge concluded that the arresting officer "was operating from behind lenses which cast everything he saw in the light of being connected to a dial-a-dope operation." Further, he found the officer's mindset was such that only inferences supporting guilt were entertained. "The grounds here did not add up to the critical mass necessary to elevate them to reasonable and probable grounds for arrest," said the judge. "The evidence was sufficient to provide the officers with a reasonable suspicion but otherwise amounted to little more than 'acting on a hunch based on intuition and experience'." Since there were insufficient grounds to justify the arrest, the strip search was unreasonable. The evidence, however, was admitted under s. 24(2) and the accused was convicted of possessing cocaine for the purpose of trafficking.

British Columbia Court of Appeal

The accused argued that the trial judge erred in admitting the evidence under s. 24(2). The Crown, on the other hand, contended that the arrest was lawful under s. 495(1) of the *Criminal Code*. And, even if the arrest was not lawful, the Crown submitted the evidence was properly admitted.

Justice Stromberg-Stein, delivering the Court of Appeal's judgment, agreed with the Crown, finding the accused was not unlawfully arrested and the search incidental to arrest lawful.

"In assessing objective justification, the consideration is whether a reasonable person, 'standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest.' The test requires reasonable probability or reasonable belief and not proof beyond a reasonable doubt."

The Arrest

Under s. 495(1) of the *Criminal Code* a police officer may arrest without a warrant a person they have reasonable grounds to believe has committed an indictable offence. Determining the existence of reasonable grounds requires a two-part test:

> The first step requires the arresting officer to have a subjective, personal belief that there are reasonable grounds for the arrest. The second part requires objective justification for the officer's subjective belief. In assessing objective justification, the consideration is whether a reasonable person, "standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest." The test requires reasonable probability or reasonable belief and not proof beyond a reasonable doubt. [reference omitted, para. 20]

An officer's experience can be included in assessing the objective grounds for arrest:

> [The case law] authorities leave no doubt that [the arresting officer's] interpretation of [the accused's] actions must be considered in light of his experience and training as a police officer and a CRU officer. This is what the Crown refers to as the "experience factor", which requires that an officer's reasons for arrest be assessed from the vantage point of a prudent, reasonable and cautious police officer, similarly experienced as the arresting officer, rather than an untrained civilian. [para. 24]

Furthermore, the CRU supervisor had relevant extensive experience and made observations that were completely ignored by the trial judge. She too had independently formed reasonable grounds to arrest the accused:

> Both [officers] have specialized skill and training that the trial judge failed to take into account when deciding whether there were objectively valid grounds for arresting [the accused]. These were experienced officers who had been involved in numerous drug investigations. Their observations, considered in their totality, were sufficient to support objectively reasonable grounds that [the accused] was engaged in drug dealing. They did not have to rule out all other possible innocent explanations for [the accused's] conduct or each event. They were entitled to use their training and experience to conclude from the totality of their observations that [the accused] was trafficking in drugs from his car. [para. 26]

In this case, the trial judge failed to assess objective reasonableness by not considering the proper test: reasonable person "standing in the shoes" of the arresting officer and the CRU supervisor. "The trial judge adopted a layperson's view of what an experienced officer would deduce in the circumstances, focusing on the officer's subjective belief, when her task was to consider whether there was an objective basis for the officers' subjective belief," said Justice Stromberg-Stein. "In my view, the observations made of [the accused's] actions, when considered having regard to the experience of the officers involved, objectively support the officers' belief in the existence of reasonable grounds."

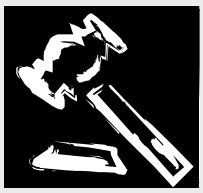
The arrest was lawful and search that yielded the evidence was reasonable having been obtained incidental to the arrest. Since there were no *Charter* breaches, s. 24(2) not engaged. The accused's appeal was dismissed and his conviction upheld.

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

"[The police] were entitled to use their training and experience to conclude from the totality of their observations that [the accused] was trafficking in drugs from his car."

LEGALLY SPEAKING:

The Experience Factor



"Officer training and experience can play an important role in assessing whether the reasonable suspicion standard has been met. Police officers are trained to detect criminal activity. That is their job. They do it every day. And because of that, "a fact or consideration which might have no significance to a lay person can sometimes be quite consequential in the hands of the police". - Supreme Court of Canada in R. v. McKenzie, 2013 SCC 50 at para. 62

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[T]his Court has consistently held that an arresting officer's personal experience is relevant to whether the officer's subjective belief in grounds to arrest is objectively justified." - British Columbia Court of Appeal in R. v. Wilson, 2012 BCCA 517 at para. 21, leave to appeal ref'd [2013] SCCA No. 71 .

"[A] judge is entitled to consider a police officer's training and experience in determining objective reasonableness. What may appear to be innocent objects to the general public may have a very different meaning to an officer experienced in drug operations."

- Alberta Court of Appeal in R. v. Rajaratnam, 2006 ABCA 333 at para. 25.

••• ••• •••

"Being 'placed in the position of the officer' does not just mean making the same observations as the officer, as to many lay people such observations would be meaningless. Included in the assessment of whether the grounds for arrest are reasonable is the officer's experience, training and knowledge." - British Columbia Court of Appeal in R. v. Luong, 2010 BCCA 158 at para. 19.

••• ••• •••

"[N]otwithstanding that each of those factors standing alone can be consistent with non-criminal activity, their combined effect, when viewed through the lens of a police officer's experience, cannot be ignored." - British Columbia Court of Appeal in R. v. Ashby, 2013 BCCA 334 at para. 57

WARRANT MUST SPECIFICALLY AUTHORIZE COMPUTER SEARCH

R. v. Vu, 2013 SCC 60

After receiving a report from B.C. Hydro that electricity was being diverted and not paid for, police obtained a warrant under s. 487 of the *Criminal Code*. The warrant authorized the police to search not only for equipment used to divert electricity but also for "documentation identifying ownership and/or occupancy" relevant to the investigation of the electricity theft. When the police executed the warrant they found a marihuana grow-operation in the basement and an electrical bypass. They also found two computers and a cellular telephone in the living room. One computer (a desk top) was connected to a security video camera monitoring and recording the front of the residence. Footage in this computer showed a black Honda CRV in the driveway; the accused owned a 2007 black Honda CRV. The second computer (a laptop) was actively running MSN Messenger (an on-line chat) and had Facebook (a social networking service) open, both using the name of the accused. Using the laptop's search tools, police located a resumé under the accused's name (and took a photo of it). The cellular telephone was also examined and a photograph, believed to be the accused, was found in it. Both computers and the cellular telephone were seized, removed from the residence and examined further. The accused was charged with production of marihuana, possession for the purpose of trafficking and theft of electricity.

British Columbia Supreme Court

The judge held that the ITO did not support reasonable grounds to believe that documentation showing ownership and/or occupancy of the residence would be found inside the premises. The officer did not say he believed this to be so nor were there any facts to

support such a belief. Nor did the judge accept that the justice of the peace could have inferred that documents evincing ownership or occupation would be found in the residence. The trial judge also ruled that the police were not authorized to search the computers and cellular telephone, holding those searches to be unreasonable. "It is no longer conceivable that a search warrant for a residence could implicitly authorize the search of a computer (or a cellular telephone containing a memory capacity akin to a computer) that may be found in the premises even where the warrant specifically grants an authority to search for documentary evidence of occupation or ownership," she said. In her opinion, a warrant must expressly authorize a search for documents in electronic form. Although the judge admitted the images from the security computer (desk top), the evidence obtained from the personal computer (laptop) and the cellular telephone was excluded. The judge was not satisfied beyond a reasonable doubt that the accused had knowledge and control of the grow-operation. All charges were subsequently dismissed.

British Columbia Court of Appeal

The Court of Appeal concluded there was a basis on which the authorizing justice could have included documentary evidence in the list of things to be searched for. In its view, the trial judge re-weighed the grounds set out in the ITO and substituted her view for that of the authorizing judge. Justice Frankel, writing the Court's judgment, found the facts in the ITO were sufficient to support a reasonable inference that documentation evidencing ownership or occupancy would be found in the residence. Moreover, he also disagreed with the trial judge that the warrant did not authorize the police to search computers and cell phones for documents showing ownership or occupancy. In the Appeal Court's opinion, there was nothing in the nature of electronic devices that required they be treated differently than other receptacles found on premises for which a search warrant has been authorized, such as a filing cabinet. The warrant authorized the police to search for documentation that could assist in determining who was in control of the premises, including documentation contained in the computers and cellular telephone. The evidence obtained from the examination of those devices should have been admitted. The Crown's appeal was allowed, the accused's acquittals were set aside and a new trial was ordered.

Supreme Court of Canada

The accused appealed, arguing the Court of Appeal was wrong in concluding that the warrant (1) properly permitted a search for documentation identifying the owners and/or occupants and (2) included authorization to search the computers and cellular telephone. A nine-member unanimous Supreme Court panel rejected one of these submissions while agreeing with the other.

Documentation?

The Supreme Court found the ITO did establish reasonable grounds to believe that relevant documents would be found in the residence. Although the affiant police officer did not expressly state his belief that documentation identifying ownership and/or occupancy would be found in the residence, the facts in the ITO were sufficient to support a reasonable inference that such evidence would be found. In this case, a justice of the peace could draw the inference that there would likely be documentation inside the residence. Thus, the trial judge (reviewing judge) erred in substituting her opinion for that of the justice of the peace issuing the warrant (authorizing judge):

> The question for the reviewing judge is "whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge". In applying this test, the reviewing judge must take into account that authorizing justices may draw reasonable inferences from the evidence in the ITO; the informant need not underline the obvious.
>
> The ITO set out facts sufficient to allow the authorizing justice to reasonably draw the

"[I]t is a reasonable inference that a residence would be the place to look for documents evidencing ownership or occupation. Where else would one expect to find such documents if not in the residence itself?"

> inference that there were reasonable grounds to believe that documents evidencing ownership or occupation would be found in the residence. In particular, the ITO referred to the premises to be searched as a "residence" and as a "two (2) story house". It also indicated that the [accused] owned the property and that electricity was being consumed there. In my view, it is a reasonable inference that a residence would be the place to look for documents evidencing ownership or occupation. Where else would one expect to find such documents if not in the residence itself? Moreover, I think that the authorizing justice could reasonably infer that a place was being occupied as a residence from the fact that electricity was being consumed at that place and that it had an owner. [references omitted, paras. 16-17]

It was open to the authorizing justice to lawfully issue the search warrant for documents evidencing ownership or occupation of the property, thus there was no s. 8 *Charter* breach on this basis.

Computer Searches

Noting that privacy interests in computers (and cellular telephones) are markedly different from searches of receptacles such as filing cabinets and cupboards, the Supreme Court ruled that a search warrant authorizing the search for documentation identifying ownership and occupancy did not permit police to look in computers and cell phones found in the residence. Instead, the police are required to get specific, prior authorization to search such devices. An after-the-fact review, it found, would not provide sufficient protection for the privacy rights at stake during a computer search. In a sense, computers are to be treated as a separate place requiring a warrant. "Computers potentially give police access to vast amounts of information that users cannot control, that they may not even be aware of or may have chosen to discard and which may not be, in any meaningful sense, located in the place of the search," said Justice Cromwell speaking for the Court. "These factors, understood in light of the purposes of s. 8 of the Charter, call for specific pre-authorization."

Although there is a general proposition that a search warrant to look for specific things at a specific location provides authority to reasonably examine anything at the location within which the specific thing might be found, computers are to be treated differently:

> Computers differ in important ways from the receptacles governed by the traditional framework and computer searches give rise to particular privacy concerns that are not sufficiently addressed by that approach. One cannot assume that a justice who has authorized the search of a place has taken into account the privacy interests that might be compromised by the search of any computers found within that place. This can only be assured if, as is my view, the computer search requires specific pre-authorization. [para. 2]

And further:

> [T]he general principle is that authorization to search a place includes authorization to search places and receptacles within that place. This general rule is based on the assumption that, if the search of a place for certain things is justified, so is the search for those things in receptacles found within that place. However, this assumption is not justified in relation to computers because computers are not like other receptacles that may be found in a place of search. The particular nature of computers calls for a specific assessment of whether the intrusion of a computer search is justified, which in turn requires prior authorization. [references omitted, para. 39]

The Supreme Court then went on to outline, in viable way, how its ruling applied to police searches of computers:

> In practical terms, the requirement of specific, prior authorization means that if police intend to search computers found within a place with respect to which they seek a warrant, they must satisfy the authorizing justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for. If, in the course of a warranted search, police come across a computer that may contain material for which they are authorized to search but the warrant does not give them specific, prior authorization to search computers, they may seize the device but must obtain further authorization before it is searched. [para. 3]

And again:

> Specific, prior authorization means, in practical terms, that if police intend to search any computers found within a place they want to search, they must first satisfy the authorizing justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for. They need not, however, establish that they have reasonable grounds to believe that computers will be found in the place, although they clearly should disclose this if it is the case. I would add here that once a warrant to search computers is obtained, police have the benefit of s. 487(2.1) and (2.2) of the Code, which allows them to search, reproduce, and print data that they find.
>
> If police come across a computer in the course of a search and their warrant does not provide specific authorization to search computers, they may seize the computer (assuming it may reasonably be thought to contain the sort of things that the warrant authorizes to be seized), and do what is necessary to ensure the integrity of the data. If they wish to search the data, however, they must obtain a separate warrant. [para. 48-49]

The Supreme Court, however, rejected a constitutional requirement of search protocols - conditions limiting how computers are to be searched - as part of the warrant. It also was careful to highlight that the warrant requirement for computers only applied to computers found during searches with a warrant and did not apply to all other types of computer searches:

Computers v. Traditional Receptacles?

The Supreme Court provided several reasons why computers should be treated differently than other receptacles, such as cupboards and filing cabinets.

1. **Massive Storage Capacity.** Computers can store immense amounts of information, some of which may be personal. For example, a terabyte hard drive could hold about 1,000,000 books of 500 pages each, 1,000 hours of video or 250,000 four minute songs. Even an 80 gigabyte drive can store 40,000,000 pages of text.

2. **Automatically Generated Information.** Computers often automatically generate information without the users' knowledge, such as temporary files. These files can permit analysts to reconstruct the development of a word-processing document, accessing information about who created and worked on it, or enable investigators to check which websites were visited, the search terms used, and intimate details about a user's interests, habits, and identity.

3. **Retention of Destroyed Data.** Computers retain information that users have tried to erase. "Deleting" a file normally does not actually delete it. If an operating system has not reused a file cluster marked for deletion, it will remained undisturbed. And, even if another file is assigned to the cluster marked for deletion, a tremendous amount of data often can be recovered by an analyst.

4. **Computers Act As Portals.** A search of a computer connected to the Internet or a network gives access to information and documents that are not in any meaningful sense at the location for which the search is authorized. For example, a computer that is connected to a network will allow police to access information on other devices. On in other hand, a s. 487 search warrant will only permit the search of a receptacle, like a filing cabinet, that is physically present *within* the building, receptacle or place for which a search has been authorized and does not permit access to items that are not physically present. While documents accessible in a filing cabinet are always at the same location as the filing cabinet, the same is not true of information that can be accessed through a computer.

"[I]f police intend to search any computers found within a place they want to search, they must first satisfy the authorizing justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for. They need not, however, establish that they have reasonable grounds to believe that computers will be found in the place, although they clearly should disclose this if it is the case."

It is not my intention to create a regime that applies to all computers or cellular telephones that police come across in their investigations, regardless of context. As the [Crown] correctly points out, police may discover computers in a range of situations and it will not always be appropriate to require specific, prior judicial authorization before they can search those devices. For example, I do not, by way of these reasons, intend to disturb the law that applies when a computer or cellular phone is searched incident to arrest or where exigent circumstances justify a warrantless search. Rather, these reasons relate to those situations where a warrant is issued for the search of a place and police want to search a computer within that place that they reasonably believe will contain the things for which the search was authorized. As noted earlier, it is not necessary that the police present reasonable grounds that a computer will be found in order to obtain a warrant that includes authorization to search a computer found in the premises.

While the scope of these reasons is restricted to warranted searches of a place, they apply equally to all computers found within a place with respect to which a search warrant has been issued. Put differently, any time that police intend to search the data stored on a computer found within a place for which a search has been authorized, they require specific authorization to do so. I find no reason, for the purposes of prior authorization, to treat computers differently on the basis of the particular use to which they have been put. For example, in this case, I make no distinction between the "personal" computer and the "security" computer for the purposes of prior authorization because both were capable of storing personal information. Computers do not distinguish between personal data and non-personal data; if information can be reduced to a series of ones and zeros, it can be stored on any computer. Moreover, decisions about whether or not to search the data on a device must be made before police know exactly what it contains. Rare will be the case where police know, at the authorization stage before they search a device, whether a computer is used for personal purposes or not. When it comes to authorization, then, I would treat all computers in the same way. [paras. 63-64]

Exclusion of Evidence

Despite the s. 8 *Charter* breaches, the Supreme Court refused to find the evidence obtained from the personal computer or the cell phone inadmissible under s. 24(2). The accused's appeal was dismissed and the order setting aside his acquittals and ordering a new trial was upheld.

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

A nOte On nOte-taking

A sergeant involved in the Vu case searched the computers. During the trial he admitted he intentionally had not made any notes of his computer searches to ensure he would not have to testify in court about the details of the searches.

The Supreme Court of Canada found this to be a "disquieting" - troubling - aspect of the search.

"This is clearly improper and cannot be condoned," said Justice Cromwell. ***"Notes of how a search is conducted should ... be kept, absent unusual or exigent circumstances. Notes are particularly desirable when searches of computers are involved because police may not be able to recall the details of how they proceeded with the search."***

ODOUR PLUS PROVIDES GROUNDS FOR ARREST

R. v Mohamed, 2013 ABCA 406

After stopping the accused for making an illegal U-turn, the officer saw him rummaging near the passenger seat. She then noted an extremely strong, very skunky and distinct odour of fresh marihuana coming from inside the vehicle as she approached the open driver's window. The accused was nervous, sweating profusely and did not look directly at the officer, instead looking straight ahead. The officer told the accused that she smelled marihuana in the vehicle and asked him if there was any in it. He replied no, but said he may have smoked marihuana a couple of days earlier. The officer didn't believe him and asked him to step outside so she could determine whether the smell of marihuana was coming from the vehicle or from him. The accused got out and the officer told him she could smell marihuana on him. She asked, "Why would I still smell it on you if you didn't have any?" At that point, the accused handed over a soft cigar box from his jacket. In it, the officer found two cigars and one marihuana joint. He was then formally arrested for possessing a controlled substance.

After saying she could still smell marihuana on him, the accused turned over about 5 grams of marihuana, wrapped in plastic, from his sock. He was then patted down and $300 cash was seized. Inside a jacket pocket, which the accused had been wearing, a baggie containing 25 individual pieces of crack cocaine was found. An arrest for possession for the purposes of trafficking followed. The officer then searched the vehicle, finding a black tote in the middle of the passenger's seat. This would have been within the accused's easy reach. Although no longer smelling the odour of marihuana in the car, the officer looked inside the tote and found more individually wrapped pieces of cocaine weighing 134.4 grams and an Arminius revolver, fully loaded. He was then arrested for possessing the firearm and, for the first time, advised of his right to counsel under s. 10(b) of the *Charter*. He was charged with several drug and weapons offences.

Alberta Court of Queen's Bench

The officer testified she was familiar with the odour of marihuana. Based on her training, experience and involvement with between 300-500 marihuana investigations, she said she was capable of identifying and differentiating between the smell of fresh and burnt marihuana. She also said she had grounds to arrest the accused before he produced the marihuana joint. These grounds were based on the odour of fresh marihuana and the accused's extremely nervous behaviour, profuse sweating, looking straight ahead and, aside from answering her questions, he did not engage in conversation with her. The judge ruled the officer had reasonable grounds (both subjectively and objectively) to arrest the accused for marihuana possession, even before he stepped out of the vehicle. The searches of his person and jacket, although warrantless, were searches incident to lawful arrest for officer safety and did not breach s. 8 of the *Charter*. The warrantless search of the tote bag was also valid as incident to arrest for the purpose of discovering evidence that could be used at trial.

The judge also found there was no violation under s. 10(a) - reason for arrest or detention. Although the accused was detained for a drug investigation when the officer told him she smelled marihuana in the vehicle and asked him to get out, a reasonable person in the circumstances would have been aware that the traffic stop had expanded to include an investigation into the presence of marihuana. But the judge did find a s. 10(b) infringement because the officer failed in her obligation to advise the accused immediately upon his arrest about his right to counsel. The evidence, however, was admitted under s. 24(2). The accused was convicted of possessing 159 grams of crack cocaine for the purpose of trafficking and several weapons offences (possessing loaded firearm, possessing firearm without a licence, possessing firearm without registration certificate and being the occupant of a motor vehicle in which he knew there was a restricted weapon). He was sentenced to 4.5 years in prison.

"[A] warrantless arrest requires both a subjective and objective basis; the arresting officer must personally believe that reasonable and probable grounds for arrest exist, and those grounds must be justifiable from an objective point of view."

Alberta Court of Appeal

In addition to the s. 10(b) breach, the accused argued that his rights under ss. 8 and 10(a) were also violated. In his view, the evidence should have been excluded under s. 24(2). However, a majority of the Court of Appeal upheld the trial judge's ruling.

10 (a) *Charter* - reason

Under s. 10(a) "an individual who is detained must be advised in clear and simple language of the reason for the detention." It is the substance of what is said and what the accused can reasonably be supposed to understand, rather than the formalism of the precise words used, that matters in assessing whether s. 10(a) has been breached. In this case, the majority stated:

> A reasonable person, having been told by a peace officer that she smelled marihuana coming from the vehicle he was driving would understand the peace officer was beginning a criminal investigation into an offence involving marihuana. The officer herself was not in a position at this point in her investigation to even know the specific offence she was investigating although she did know it involved marihuana. [para. 23]

The accused's s. 10(a) rights were not infringed.

s. 8 *Charter* - search

Section 495(1)(b) of the *Criminal Code* permits a police officer to arrest without warrant "a person whom he finds committing a criminal offence." Here, the majority found this provision allowed the arrest:

> In our view, the peace officer would have been justified, pursuant to section 495(1)(b), to arrest the [accused] for possession on the basis of the smell of fresh marihuana (i.e. possessing a controlled substance) even before he exited the vehicle. ... [A] warrantless arrest requires both a subjective and objective basis; the arresting officer must personally believe that reasonable and probable grounds for arrest exist, and those grounds must be justifiable from an objective point of view.
>
> The trial judge found both bases. She found the peace officer personally believed she could make the arrest based on the smell of fresh marihuana coming from the vehicle in which the [accused] was the driver and sole occupant, and the [accused's] nervous behaviour, and further found given the peace officer's experience that these were reasonable and probable grounds for arrest. [references omitted, paras. 25-26]

Thus, the arrest was proper and not rendered unlawful either under s. 495(2) or by the officer asking a few further questions after the accused had exited the vehicle that were designed to give him the benefit of the doubt,

The majority also found that once the accused was arrested for possessing marihuana, the searches that followed were lawful:

> [S]earches incidental to arrest "must be truly incidental to the arrest in question". The test for whether a search is truly incidental to arrest is both subjective and objective. The police must have one of the purposes for a valid search incident to arrest in mind when the search is conducted, and the officer's belief that this purpose will be served by the search must be a reasonable one. Searches may be for the purposes of safety, to preserve evidence, or to find evidence to be used at trial.
>
> The peace officer in this case was searching to discover evidence that could be used at trial and her search was objectively reasonable given the smell of fresh marihuana and the marihuana given to the officer by the [accused]. Although her further questioning produced a second amount of marihuana, it would have been discovered upon a pat-down search to ensure

> officer safety. The additional evidence found by the officer would have resulted from her search even if no further questioning of the [accused] had occurred. [references omitted, paras. 28-29]

The warrantless searches were properly incidental to arrest and there were no s. 8 *Charter* breaches.

Exclusion of Evidence

The trial judge found there was about a 10 minute delay between the accused's initial detention and the advisement of his section 10(b) *Charter* rights. However, there was no nexus between that delay and the discovery of the evidence, which was obtained through lawful searches. The trial judge's s. 24(2) analysis was entitled to considerable deference and there was no basis to interfere with her ruling.

Having found the trial judge made no unreasonable findings or errors of law, the accused's appeal was dismissed.

A Second Opinion

Justice Berger, writing a dissenting opinion, found that the officer did not have the requisite objective grounds to justify arresting the accused for possession before he got out of the car. Plus, the questioning that followed was not preceded with compliance under s. 10 of the *Charter*. The failure of the police to afford the accused his s. 10(b) rights resulted in a s. 8 breach because he felt compelled to respond to the questions put to him. He had a right to refuse to participate in the officer's investigation and search for contraband. In Justice Berger's view, the foundation for the searches of the jacket, vehicle and tote flowed directly from these ss. 10(b) and 8 *Charter* violations.

A new s. 24(2) analysis favoured exclusion. Although trafficking in cocaine and possession of illegal firearms were serious offences, the *Charter* infringing conduct was serious while the impact on the accused's rights was profound. Justice Berger would have excluded the evidence, allowed the accused's appeal and set aside his convictions.

Complete case available at www.albertacourts.ab.ca

s. 10(b) BREACH RESULTS IN EXCLUSION OF HOSPITAL BLOOD DRAW

R. v. Taylor, 2013 ABCA 342

In the early morning hours, the accused failed to make a turn, rolled his vehicle and significantly injured three of his passengers. He was arrested for impaired driving causing bodily harm, read his *Charter* rights to counsel and told he would be provided with a telephone if he wanted to call a lawyer. He said he wanted to talk to one. A paramedic on scene determined the accused was ambulatory with no neural deficits, no difficulty communicating and no problematic speech. He was alert, not slurring and answered questions in an appropriate, normal manner. He made no medical complaints and was clear that he was not in need of further medical attention. But the paramedic, out of an abundance of caution, talked him into being transported by ambulance to the hospital.

A police officer at the scene travelled to the hospital in a separate vehicle to acquire evidence from the accused, including tracking his blood so a warrant could be obtained. The officer waited in the hospital hallway with the accused. He was laying on a stretcher for half an hour while waiting to see a doctor. No effort was made to permit access with counsel, despite the availability of the officer's cell phone. After the accused's blood was taken for medical purposes, the officer gave the blood demand and blood samples were drawn for that purpose. At no time was the accused afforded an opportunity to contact counsel while at the hospital. Police later obtained a warrant to seize the hospital blood for evidentiary purposes and sent it off for an analysis resulting in a BAC of 197mg%.

Alberta Court of Queen's Bench

The officer testified that there was a telephone wired in the cruiser as well as his personal cell phone, which he used sometimes to carry out his duties. He said he made a mistake in not making his cell phone available, either at the scene or the hospital. The

accused argued his s. 10(b) *Charter* right to counsel was violated when police failed to provide him with an opportunity to retain and instruct counsel without delay.

The judge found no such breach at the accident scene, the police having legitimate safety concerns rendering it unreasonable to provide cell phone access, whether in the police car or elsewhere. As for the hospital, the judge concluded that there was no reasonable opportunity to provide telephone access prior to the hospital blood draw. The accused was waiting (or receiving) emergency medical treatment. However, once the hospital blood sample was obtained, there was a s. 10(b) breach. The officer made a blood demand without taking steps to implement the accused's right to counsel. The Crown, however, did not tender the blood demand samples, instead relying on the hospital blood samples. Since the s. 10(b) breach was not linked to the production of the hospital blood samples, s. 24 (2) did not apply. The warrant was properly issued and the analysis of the hospital blood samples were admissible. A blood expert extrapolated the sample readings and concluded the accused's BAC would have been 147 to 227 mg% at the time of the accident. The accused was convicted on three counts of impaired driving causing bodily harm.

Alberta Court of Appeal

The accused submitted that the trial judge erred in not finding a *Charter* breach when the officer failed to facilitate access to counsel. Justices Berger and O'Brien agreed, holding that the officer could have made his cell phone available to the accused at the accident scene or in the hospital. In their view, the police failed to provide a reasonable opportunity to contact counsel without delay before the hospital blood draw. This was not a situation where it was impractical to provide access to a telephone. The accused was not in need of urgent medical care and was capable of and wanting to speak to a lawyer. He was not uncooperative or difficult to control. Providing access to a telephone would not have disrupted the scene or interfered with the police investigation. Nor was the lack of privacy an excuse. "The officers could surely have withdrawn a sufficient distance to provide an adequate measure of privacy while at the same time keeping the [accused] under observation," said the majority. Plus, the officer never suggested any concerns about officer safety or cleanliness as making it impracticable for him to provide access to a phone. Moreover, the officer admitted he failed to make his cell phone available. He said he had it with him and would have made it available had he thought to do so. Without the benefit of legal advice before the hospital blood draw, the accused was unable to exercise a meaningful and informed choice about whether he should consent to the hospital blood draw.

Timeline

1:25 - Accident
1:31 - Police on scene
1:41 - Arrest
1:43 - s. 10(b) Charter
1:50 - Paramedics on scene
2:19 - En-route to hospital
2:43 - Arrive at hospital
3:05 - Hospital blood draw
3:13 - Blood demand
4:53 - Blood demand draw

The majority also found the police participated in the collection of the hospital blood draw such that a s. 8 breach resulted. Although there was no doubt the hospital blood was to be used for medical purposes, it was also to be used for police purposes. The police deliberately delayed making a demand until after the hospital blood was drawn. As a consequence, the accused did not associate the hospital blood draw with measuring the alcohol in his blood. Thus, the hospital blood draw breached s. 8:

> [T]here is no denying that the blood draw was intended for the hospital's own purposes, yet it is equally apparent that the police intrusion as bedside attendants was strictly for the benefit of the police. In our view, there was on the part of medical personnel an unfortunate acquiescence in permitting agents of the state, the police, to be

> side-by-side with medical personnel engaged in a medical procedure. In so doing, there was a failure on the part of the hospital to comply with its "duty to respect a person's privacy". [para. 34]

The majority also found the warrant did not cure the s. 10(b) breach and the evidence was excluded under s. 24(2). The accused's appeal was allowed, his conviction quashed and an acquittal was entered.

A Different View

Justice Slatter, authoring a dissenting opinion, found there was no s. 10(b) breach because the circumstances at the accident scene and at the hospital precluded a reasonable opportunity to facilitate contact with counsel. This included a determination that there was no legal obligation on the officer to make her private cell phone available to the accused.

He also held the sample obtained by the hospital staff was for their own purpose. They were not colluding with the police in getting it. Thus, the police did not breach their implementational duty by not refraining from gathering evidence from an accused who expressed a desire to consult with counsel. "The Charter does not require the police to refrain from any other investigative activity until the detained person speaks to counsel, nor does it prevent third parties (such as hospital personnel) from carrying on their business, even if that might result in the creation of evidence," said Justice Slatter. "Doctors who are lawfully discharging their medical duties are not agents of the state, and their activities do not result in s. 10(b) breaches." There was no informational obligation on the police to advise the accused that he had the right to refuse medical treatment that might result in the creation of evidence. Nor was there a police duty to interfere with the work of the medical professionals or provide medical advice inconsistent with that given by the doctors. Justice Slatter would have upheld the warrant and, since the seizure of the hospital blood was not tainted by any *Charter* breach, dismiss the accused's appeal.

Complete case available at www.albertacourts.ab.ca

NO RESTRICTIVE REQUEST OR DEMAND: DETENTION DID NOT CRYSTALLIZE

R. v. Peterson, 2013 MBCA 104

A man called police after arriving home and finding his roommate dead, lying in blood-soaked sheets on the bed. Homicide detectives were interested in speaking to the accused after learning he was the last person to see the deceased alive. He was viewed as a person of interest and possibly a witness. He was not yet a suspect because police viewed him as the deceased's friend and had no reason to link him to the killing. They hoped he might be able to provide some information that would lead them to the next step in their investigation. After locating him outside a building at 5:31 pm, two detectives approached him, identified themselves as police, told him they hoped he would be prepared to help them with the investigation and asked if he would go to the police station with them. The accused readily agreed and seemed anxious to help. However, neither detective told him that the deceased had been murdered because, in their experience, using the word "murder" can frighten people, who then become reluctant to get involved. He was patted down, put in the back of the police car and his backpack and skateboard were placed in the trunk. During the drive to the police station, the accused was friendly, cooperative, polite, quite talkative, volunteered many details about his life and, at one point, asked how he could help with the investigation. He was told they would discuss that at the police station.

When they arrived at the police station, the accused was placed in a standard interview room. This room was used to interview suspects, persons of interest or victims. It was small, had minimal furniture (which was attached to the floor) and a door that locked from the outside. The accused was left alone for a period of time, but was given cigarettes and pizza, and taken to the washroom. At 8:16 pm, the detectives began to interview him. The accused offered many details about his relationship with the deceased, including buying crack cocaine from him and delivering drugs to other customers on a regular

basis. A detective asked whether the deceased was killed for his stash of drugs. The detective thought was an obvious question, given that the deceased was obviously a mid-level drug dealer. After a lengthy pause, the accused said, "No, he wasn't killed for drugs". The detective then asked why the deceased was killed. There was another lengthy pause and the accused said, "I fell asleep on his bed and when I woke up he was performing a sexual act". The detective then asked the accused "What?", to which he replied, "A blow job. I lost it and I grabbed a hammer that was near and hit him." The accused was upset, seemed embarrassed and started crying. When asked what he did next, the accused said that he grabbed his stuff and left. The accused was then arrested, advised of his right to counsel and subsequently charged with second degree murder.

Manitoba Court of Queen's Bench

The judge found the accused was not detained within the meaning of s. 10(b) of the *Charter* at any time before he said that he hit the deceased on the head with the hammer. He was free to leave at any time up until that confession. All that the detectives knew was that he was the deceased's friend and had been at the apartment the day before the body was found. They had no grounds to suspect or arrest him at any point before he confessed. They asked him to help and he was eager to do so. He was an adult and very comfortable with the officers. Talking to him was the next step in the investigation and their manner of approach was respectful, casual and very low key.

The pat down search, being transported in a locked car, having his backpack and skateboard taken and being placed in a stark, locked interview room were all safety and security measures that are part of modern police work. The judge held that a reasonable person living in any Canadian community today would recognize this. The accused's motion to exclude his statement from evidence was dismissed and a jury found him guilty of manslaughter. He was sentenced to nine years in prison, less 52 months for time served.

Manitoba Court of Appeal

The accused appealed, arguing he was detained, his s. 10(b) rights were violated and his statement was inadmissible. He contended he was psychologically detained when the police first picked him up to interview him after singling him out for a focussed investigation. Or, if he was not detained upon initial contact with police, he submits he was detained when the detectives asked him if the deceased was killed "for his stash." It was at this time he was now being asked pointed questions about his knowledge of the murder and he no longer remained merely "a person of interest." The Crown, on the other hand, suggested that the accused was never a suspect at any time before he confessed to hitting the deceased on the head with a hammer. Before that, he was always only a person of interest and possible witness who, police hoped, would provide some information in their investigation.

Detention

Justice Beard, writing the Court of Appeal's opinion, first reviewed the law regarding psychological detention and stated:

> [I]t is clear that not every interaction between the police and a member of the public will constitute a detention. For such an interaction to constitute a detention, there are two requirements:
> - the first requirement is that there must be a restrictive request or demand by the police to the member of the public; and
> - the second requirement, where there is no legal obligation to comply with that request or demand, focusses on the state conduct in the context of the surrounding legal and factual situation and how that conduct would be perceived by a reasonable person in the situation as it developed. [para. 38]

Here, there was no restrictive request or demand by the police when they first contacted the accused.

"The fact that the police ask pointed questions about the crime does not necessarily turn a person of interest into a suspect."

Accused's Arguments Why He Was Detained	Crown's Arguments Why Accused Not Detained

• He was a crack addict and had been singled out for a focussed investigation;
• The police were in possession of much information implicating him in the crime that they were investigating, including:
  • he may have been the last person to see the deceased alive;
  • his fingerprints were found at the crime scene;
  • police had information that he might have been involved in an intimate relationship with the deceased;
  • police used a covert surveillance team to locate him, rather than going to the residence and leaving a message or issuing a "be on the lookout" directive;
• When the officers approached him, they showed him their badges and agreed that he may have seen their guns;
• They took him to the police station rather than offering him the option of being interviewed in the police car or at another location;
• They did a pat-down search before putting him in the police car;
• They took his backpack and skateboard from him and locked them in the trunk of the police car;
• The accused was transported in the back of a police car, which can be opened only from the outside;
• He was interviewed in the locked room, where the furniture was bolted to the ground;
• He was held for several hours and, ultimately, arrested;
• He was not advised by the detectives that he was being interviewed regarding a murder;
• They did not advise him that they had found his fingerprint as the scene of the murder;
• They had his picture on the video surveillance camera at the apartment block;
• He was the last person seen with the deceased prior to his death.
	• He was a regular visitor to the apartment and had arrived there a long time (14 hours) before the deceased was discovered;
	• He was no more a suspect than the deceased's roommate and was the next step in the investigation;
	• There was no demand made of the accused. The detectives made a request that the accused accompany them and he agreed and told them that he wanted to help;
	• There was no evidence that the accused felt that he had no choice but to comply. He seemed relaxed, comfortable and forthcoming in the police car, even asking how he could help;
	• While the accused was singled out for focussed investigation, it was not because they thought he had anything to do with the murder, but because he was the next step in their investigation;
	• He received exactly the same treatment as the deceased's roommate, including being interviewed in the same room, and spent less time with the police than did the roommate;
	• The accused was clearly intelligent, articulate and informed; he was a grown man (then 29 years old), had worked as a telemarketer and there was no evidence that he was either unsophisticated or especially sensitive to the police;
	• The circumstances of the officers' contact with the accused and the manner in which he was taken to the police station were security or safety measures that are part of modern police work. The reasonable person in contemporary society would see them that way;
	• The detectives treated the accused as a witness throughout their dealings with him, and that he was not detained at any time before he was arrested.

The officers asked him if he could help with the investigation and he readily agreed. The test for detention is objective – being whether a reasonable person in the situation would conclude by reason of the state conduct that he or she had no choice but to comply. In this case, the accused did not testify. Although not essential to determining whether or not there was a psychological detention, an accused's testimony can be helpful in explaining the effect that police conduct had on him.

Furthermore, the accused was not detained at any time before the detectives asked him about the motive for the murder. "The police have an obligation to investigate crimes, and not every interaction with the police will amount to a detention, even when a person is under investigation for, or related to, criminal activity, is asked questions, or is physically delayed by contact with the police," said Justice Beard. "The fact that the police ask pointed questions about the crime does not necessarily turn a person of interest into a suspect." He continued:

> In this case, the purpose of the interview was to find out whether the accused could help the police solve the murder. In order to do so, it was necessary for the police to ask pointed questions about the murder to see if the accused had any helpful insights or information. When the accused disclosed facts to the detectives that led them to conclude that the deceased was a

"[T]he police have an obligation to investigate crimes, and not every interaction with the police will amount to a detention, even when a person is under investigation for, or related to, criminal activity, is asked questions, or is physically delayed by contact with the police."

mid-level cocaine dealer, it was reasonable, due to the high level of crime related to drug trafficking, for them to ask whether he was killed for the drugs. Given the accused's friendship with the deceased, this question did not implicate the accused in the killing, and the police were not thinking that it did. When the accused said no, the next question was whether he knew why the deceased was killed. The accused responded that he woke up and the deceased was performing a sex act, so the detective asked, "What?" Again, this was not an unreasonable question arising from the accused's answer, particularly because the answer did not suggest that the sex act involved the accused. [para. 53]

The accused's response - that the deceased was giving him a blow job, so he hit him with a hammer – was unexpected. The Court of Appeal upheld the trial judge's ruling that there had been no detention at any time prior to the accused's statement that he hit the deceased with a hammer. The accused's appeal was dismissed.

Complete case available at www.canlii.org

TARGET'S OWN WORDS PROVIDED REASONABLE SUSPICION: NO ENTRAPMENT

R. v. Gingras, 2013 BCCA 293

Suspecting the accused was involved in an attempted bombing of a print shop, police embarked on an undercover investigation. A police officer, posing as a shady South American businessman, broached the topic of money laundering with the accused Gingras. He told Gingras that he had a problem about what to do with the money generated by his business. Gingras said he knew of a scheme which used lottery tickets as a solution and boasted of laundering $40 million for a Filipino client. Gingras' business partner DiQuinzio was also introduced to the officer during a coffee shop meeting. The officer took up Gingras' invitation and gave him $25,000 USD, purportedly drug proceeds, to launder. This was followed by a second transaction involving $100,000 USD. On both occasions Gingras converted the money to Canadian funds less a fee. During these transactions, Gingras made statements of needing help bringing white powder from South America to Canada. Later, he again repeated that he and DiQuinzio wanted cocaine brought to Canada from South America. The officer agreed to deal with both men and provide 50 kilograms of cocaine at a price of $22,000 per kilogram, which they would then distribute. The accuseds were arrested after a down payment of $375,000 was made.

British Columbia Supreme Court

Gingras and DiQuinzio submitted they were entrapped. In rejecting this claim, the judge found that a target's own words could provide an officer with a reasonable suspicion the target was involved in crime. In her view, the police had a reasonable suspicion Gingras was involved in money laundering and, later, that both men were involved with drug trafficking. Thus, when the undercover officer offered the accuseds the opportunity to commit a crime, police had a reasonable suspicion to do so. There was no entrapment and no need to consider a stay of proceedings on this basis. Both men were convicted of conspiracy to traffic in cocaine and Gingras was also convicted of two counts of money laundering.

British Columbia Court of Appeal

The accuseds argued that the trial judge erred in rejecting their entrapment claim. Under the law of entrapment, the police must not offer a person the opportunity to commit a crime unless they have a reasonable suspicion that the person is already engaged in the criminal activity. Reasonable suspicion does not rise to the level of certainty nor to a belief based on reasonable grounds. But it is something more than a mere suspicion.

Gingras submitted that the police lacked the necessary reasonable suspicion before the first money laundering transaction. However, the Court of Appeal found the trial judge did not err in relying on Gingras' own words to the undercover officer when determining whether the police had the requisite reasonable suspicion:

> [I]n the language of the common law of contract, Mr. Gingras's approach to Officer A for money laundering was not an offer, but an invitation to treat – an indication of a willingness to enter into negotiations with a view to forming an agreement. Presumptively an invitation to treat should be enough to satisfy the police that the person is already engaged in the proposed criminal enterprise and the police can take things to the next stage in the form of an offer. That is what happened in this case when after Mr. Gingras's invitation Officer A offered Mr. Gingras the opportunity to launder US $25,000 in a trial run. However, I do not think it would be correct to say that the accused's invitation necessarily obviates entrapment. … [T]he doctrine of entrapment should focus on police conduct, not that of the accused. Having said that, it would take a fabulist such as Walter Mitty or a Baron von Munchausen to undermine the suspicious effect of an invitation by an accused to commit an offence. While Mr. Gingras may have puffed up his criminal prowess, he still

> presented as a plausible money launderer. [references omitted, para. 25]

Moreover, the fact Gingras exaggerated his self-report as a criminal did not require the police to conduct a subsidiary investigation to determine whether he had the capacity to launder money.

As for the offer to DiQuinzio, the trial judge did not err in finding that it too was based on reasonable suspicion. "Mr. Gingras was an informant whose reliability had been confirmed in two money laundering transactions by the time negotiations for the cocaine deal got underway," said Justice Donald. Further, the police did a background check on DiQuinzio that included, along with a dated criminal record, police intelligence implicating him in more current drug activity at a high level. This, in combination with Gingras's offer, suggested DiQunzio's rehabilitation was incomplete.

The accused's entrapment appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

CIRCUMSTANCES PROVE POSSESSION

R. v. B.L., 2013 SKCA 125

After receiving information to be on the lookout for a particular GMC Jimmy, two police officers located it and pulled it over. There were two occupants; a driver and a passenger (accused) sitting in the backseat. As one of the officers walked toward the Jimmy, it was put into gear and began to slowly pull away. The officer ran up beside the vehicle, banged on the window and removed his revolver from its holster. The driver of the Jimmy stopped immediately, put his hands in the air and looked toward the backseat. The passenger (accused) was breaching release conditions and was arrested. A package of white powder could be seen on the floor of the vehicle near where he had been seated. Under the passenger-side front seat, police found a plastic grocery bag containing four packages of cocaine, one of which was made up of a number of smaller bags of the drug. A small bag of cocaine, packaged in the same manner as the other small bags in the grocery bag, was later found in the accused's pocket. He also had $660, comprised mostly of $20 bills and some $50s. He was charged with possessing cocaine for the purpose of trafficking.

Saskatchewan Provincial Court

The judge found the Crown had proven possession (knowledge and control) of the drugs beyond a reasonable doubt. The grocery bag containing the drugs was shoved in from the backseat, as opposed to from the front seat, and was by the accused's right foot. He was physically closest to the drugs. As well, the packaging of the cocaine found in the accused's pocket was similar to the cocaine found under the seat. Finally, the cash found in the accused's possession was, as an expert said, consistent with the sale of drugs. The judge also noted that the driver of the Jimmy and the accused might have been in joint possession of the cocaine. The accused was convicted of possessing cocaine for the purpose of trafficking.

Saskatchewan Court of Appeal

The accused suggested that the guilty verdict was unreasonable. He said he was not the owner of the vehicle and it was the driver who began to pull away from the police. In his view, these facts suggested the cocaine belonged to the driver. Thus, a reasonable doubt about his guilt had been raised.

Chief Justice Richards, speaking for the Court of Appeal, disagreed. First, it was not the role of an appeal court to retry the case. The trial judge, acting judicially, could have reasonably reached a guilty finding in light of the trial evidence. In its view, the trial judge was entitled to find the accused guilty based on the following:

1. The location of the drugs found under the front seat near where his right foot would have rested while he rode in the back of the Jimmy.

2. The similarity in packaging between the cocaine found in his pocket and some of the cocaine found in the grocery bag stashed under the seat.
3. The significant amount of cash — made up of denominations consistent with drug trafficking — found on his person.
4. The packet of cocaine found on the floor of the Jimmy near where his feet had been positioned.

Just because he was not driving or did not own the Jimmy, and the driver began to pull away after being stopped by the police did not, individually or in combination, render the trial judge's decision unreasonable. The accused's appeal was dismissed and his conviction upheld.

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

DELAY IN PROVIDING COUNSEL JUSTIFIED: CIRCUMSTANCES DIRE

R. v. Sidhu, 2013 ONCA 719

A 58-year-old man was kidnapped from his home, apparently to recover the monetary value of drugs believed stolen by an associate of his son-in-law. Over the next few days he was forcibly held captive in a tiny space, beaten and held for ransom. He was denied essential diabetes medication and his family was terrorized with repeated threats by the kidnappers that they would beat, maim and kill the victim. They also threatened some family members and their children. The accused and another man were arrested by police shortly after they were seen at a pay-phone from which a ransom call was placed to the victim's family at 5:30 pm. The accused was held for several hours by police but was denied access to counsel, despite his request to speak to a lawyer. Police had feared that any contact with the outside world would alert the captors that police were now involved and cause them to make good on their threat to kill the victim. They proceeded to interrogate the accused for many hours, trying to ascertain the victim's whereabouts. But he steadfastly denied any involvement.

At 11:50 pm police called and spoke to one of the other suspected kidnappers, attempting to negotiate his surrender and the release of the abductee. Then, after the police executed a search warrant at the accused's home just before 1:00 am, his wife attended at the station. At 3:39 am she was permitted to speak to the accused. She begged him to cooperate. He was then allowed to speak to a lawyer at 3:42 am, some 8.5 hrs after the interrogation began. Despite his lawyer's advice not to say anything, he made an incriminating statement when the interrogation resumed. He admitted both knowledge of and involvement in the kidnapping, implicated other men and said he expected to receive between $10,000 - $15,000 for his role. Several hours later the victim was found at the side of the road by a passing motorist. He was alive, but badly injured. He had broken ribs, injuries to his knee, shoulder, and forehead, and pneumonia. The accused, with others, was charged with kidnapping.

Ontario Superior Court of Justice

The accused argued, among other things, that his right under s. 10(b) of the *Charter* was breached, therefore rendering his inculpatory statement inadmissible. The judge found the police had breached his right to counsel by, in part, denying access to a lawyer beyond what was justified. Although s. 10(b) guarantees an accused the right upon arrest or detention to retain and instruct counsel without delay and to be informed of that right, there are circumstances where the police may delay providing access to a lawyer and question the arrestee. Such cases, although rare, may arise where there are urgent or dangerous circumstances. Here, the judge described the situation as dire. "A man's life hung in the balance," said the judge. "The kidnappers were threatening not only to dismember the victim but also to harm [his] children." The police did not permit access to counsel out of concern for the victim's safety. They feared that any communication with counsel could tip off the captors and result in harm to the victim. However, the judge found the delay was too long. Once the police changed tactics and alerted a co-captor at about midnight to negotiate his surrender, the justification for an ongoing denial of counsel disappeared. In his view,

the lid had been "blown off the investigation" and any justification for denying access to counsel ended. The statement was admitted, however, under s. 24(2) and the accused, along with others, was convicted by a jury of kidnapping.

Ontario Court of Appeal

The accused appealed his conviction arguing, among other things, that the statement he made following his arrest should not have been admitted. But the Court of Appeal disagreed. "The trial judge fully appreciated the seriousness of the s. 10(b) Charter breaches," said Justice Gillese. "The trial judge found that exigent circumstances justified both a denial of the right to counsel and the continuation of police questioning up to approximately midnight." However, a s. 10(b) violation occurred when the police denied the accused access to counsel beyond the point where it could no longer be justified by an urgent concern for the abductee's life. There was no basis for interfering with the trial judge's findings and her s. 24(2) ruling was owed considerable deference. The conviction appeals were dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: Additional case facts taken from *R. v. Sidhu*, 2011 ONSC 2054.

GROUNDS TO ESTABLISH LINK MISSING: SEARCH WARRANT INVALID

R. v. Golschesky, 2013 SKCA 116

The police executed a search warrant under the *Controlled Drugs and Substances Act* at a residence. They seized approximately 10 pounds of marihuana, between $20-$30,000 cash and several items of drug paraphernalia. The suspect (Young) was arrested when she arrived during the course of the search. Later that day police received a call from a confidential source. The source knew about the search and told police that Young also kept some marihuana at a "stash house." The source provided another address and said more

Another Breach

The Ontario Superior Court in *Sidhu* also found a second *Charter* breach, described as "repugnant," when the detective "veered into forbidden territory" and undermined the lawyer-client relationship by denigrating defence counsel. Here's what the detective said:

Aren't lawyers great eh? Aren't lawyers great? Aren't they great?

...

Sure, they've got an important job don't they? How can a man look in the mirror day after day, day after day, knowing he had a man like you stand up and say to a judge who you have to respect; he's been up there he is doing a real public service.

...

But then this lawyer says to you, plead not guilty. I don't care if you did it just plead not guilty. It has nothing to do with, with religion or God or anything like that does it?

...

But think about it. Day after day, he does that. Rapists, murderers and kidnappers like yourself. Guys who have 40 calibre guns shoved down into their cars.

...

I know you were driving around with a 40 calibre loaded handgun in your car and you were going to do something like that.

And if the police showed up you were going to shoot one of my friends or shoot me so I couldn't go home to my kids. But the lawyer got up and said, plead not guilty to that. Where is the conscience there? There is none is there? There is none.

Like I told you, that Bernardo lawyer, let me know where the tapes are I will go in and steal them so the police don't find that evidence of you raping and murdering little girls. Tell me where that is and I will go and hide that.

And you want me to let you phone somebody? Think about that Sid. And my God if he has been sexually assaulted then what do we do? Because the last few cases I have dealt with the victims have been sexually assaulted as well. And you know it happens. That is all nice stuff.

Like I say, can you imagine, day after day after day a lawyer being able to say to his clients plead not guilty. Plead not guilty to that. I can get you off of that..."

The judge said this about the exchange:

"[The detective] not only maligned the accused's counsel, but the entire defence bar. In so doing he betrayed the very system he is sworn to uphold. Defence counsel play a vital role in the criminal justice system. If accused persons are persuaded they cannot trust their lawyers, the defence bar becomes ineffective; judges and juries can then have no confidence that police powers are being held in check, and will therefore be reluctant to convict even where the evidence warrants such a result.

In any case, lawyer bashing does not promote public confidence in the administration of justice, any more than police bashing does. No doubt within each of those vocations there is a small percentage of individuals with questionable ethics. But that does not entitle police to vent their frustrations to suspects facing serious criminal charges. However stressful the circumstances he was working under, [the detective's] prolonged denigration of the defence bar was a gross infringement of the accused's right to counsel. [paras. 124-125]

Although the judge found this to be "repugnant," it wasn't enough to render the statement inadmissible under s. 24(2).

marihuana could be found there. The source described the house as a "duplex" but was unsure in which unit the marihuana could be found.

Following further investigation, the police learned the accused owned the property. A search warrant was obtained which allowed "Suite A" of the premises to be searched. Nine police officers executed the warrant, first announcing their presence but then battering the main floor's door down. Police found the accused and, while sweeping through the main floor, saw marihuana and cash on a bed. The accused was arrested and given a copy of the search warrant. She then told police that the residence contained three separate living quarters; upstairs, main floor and basement. She said police were in the wrong place; "Suite A" was upstairs. Police broke through the locked door to the second level where they found a completely separate living space. In the upstairs apartment they found evidence of drug activity, including more than $5,000 cash, which they concluded belonged to Young. The police then returned to the accused's premises and searched it thoroughly, finding more marihuana, an electronic scale and other items. She was charged with possessing marihuana for the purpose of trafficking and possessing proceeds of crime.

Saskatchewan Provincial Court

The evidence at trial showed the accused owned the three-level structure which had a basement suite (rented by a tenant), main floor (where the accused resided) and a self-contained upstairs apartment (rented by Young). The judge found the search warrant lacked sufficient reasonable grounds upon which the issuing justice could have granted it. This resulted in a s. 8 *Charter* breach, the exclusion of evidence under s. 24(2) and acquittals on the charges.

Saskatchewan Court of Appeal

The Crown unsuccessfully argued that the trial judge erred in finding insufficient reasonable grounds to support the warrant. First, the Court of Appeal noted there was no link between Young and the accused that would allow a search of the accused's home to find drugs belonging to Young. Nor were there grounds establishing that the accused herself was a drug trafficker such that she was storing marihuana on her own premises. None of the information implicated the accused in the drug activities under investigation. Second, the home was a three unit structure and the police did not have grounds to search the main floor. "[The privacy expectations of an individual in his or her home] translate into an obligation on the person seeking to obtain a search warrant of a person's home—including in relation to an apartment or unit within a multiple family dwelling—to clearly set out reasonable and probable grounds for each unit to be searched," said Justice Jackson. In this case, all the known information placed the drugs in the "upstairs" apartment. Thus, with no known link between the accused and Young and the structure, the warrant to search the accused's dwelling could not have been issued. Although a reviewing judge is required to consider the totality of the circumstances and is not to deconstruct the information supporting a search warrant paragraph by paragraph, the trial judge in this case did not unfairly view the ITO or impermissibly deconstruct it. Finally, the search could not be saved as one conducted incidental to lawful arrest or under exigent circumstances. The trial judge's s. 24(2) ruling excluding the evidence was also upheld. The Crown's appeal was dismissed and the accused's acquittals upheld.

Complete case available at www.canli.org

"[The privacy expectations of an individual in his or her home] translate into an obligation on the person seeking to obtain a search warrant of a person's home—including in relation to an apartment or unit within a multiple family dwelling—to clearly set out reasonable and probable grounds for each unit to be searched."

LEGALLY SPEAKING:

s. 21(2) Criminal Code

Section 21 of the Criminal Code sets out ways in which a person may be liable for an offence, including common unlawful purpose. Section 21(2) states:

Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

This subsection "applies where one person commits an offence beyond the one with which the parties had originally planned to assist one another," said the Ontario Court of Appeal in *R. v. Cadeddu*, 2013 ONCA 729. "It imposes liability on the other person if that person knew or ought to have known that the offence committed would be a probable consequence of carrying out the original common unlawful purpose." There are three elements to this mode of liability:

(1) **agreement**: there must be an agreement between a principal and a party (or parties) to carry out an unlawful purpose. The unlawful purpose must be shared by all parties and must be different from the offence ultimately committed. A party to an offence under s. 21(2) does not need to share the same motives or desires as the principal, but only need to have in mind the same unlawful goal. Moreover, the agreement or common intention does not need to be formed in advance; it can arise at the time the offence is being committed.

(2) **offence**: commission of an incidental and different crime by another participant. The offence committed is one that the members of the original agreement did not set out to commit, but one that took place in the course of carrying out their original agreement or plan. Thus, one party to the common unlawful purpose must commit an offence that was not the offence intended by the parties, but is nonetheless related to the original unlawful purpose. The ultimate offence can, however, be very closely related to the common intent. For example, the common purpose can be assault and the ultimate offence can be aggravated assault. In addition, once there is evidence that two or more accused acted in concert, s. 21(2) can apply even if it is unclear which of the accused actually committed the offence (i.e. which was the principal).

(3) **knowledge**: foreseeability of the likelihood of the incidental crime being committed. Generally, a person will be liable under s. 21(2) if they knew or ought to have known that the offence committed by the principal was a probable consequence of their unlawful agreement. In determining what the person actually knew about the likelihood of another participant in the original unlawful plan committing the offence, the words, and conduct before, at the time and after the offence, is relevant. When assessing foreseeability, the standard is that of a reasonable person in the same circumstances.

REQUEST AN INVITATION, NOT A DEMAND: NO DETENTION

R. v. Bennight, 2012 BCCA 190

After calling for an ambulance, the accused arrived at a large, low income, social housing complex and let paramedics into his apartment. They found a woman. She appeared to be severely beaten and unconscious. Six police officers subsequently attended. They found the woman being treated in the apartment hallway and the accused inside his apartment with an ambulance supervisor. An officer asked the accused to leave his apartment and speak with him. At the officer's request, the accused provided his name and birth date. He said that he did not want to answer any questions and repeatedly said he had three medical degrees and two law degrees, and that the judiciary would have to be involved as well as internal affairs. The officer attempted to speak calmly and focus the accused's attention on the events of the evening. The accused was very loud, angry and agitated. He spoke rapidly and in a grandiose manner. At one point, a second officer intervened and had a heated verbal exchange with the accused. He took the accused by the shoulders and "forcibly removed" him from the elevator landing where EHS was working on the woman. During further conversation, the accused said that he saw "Phyllis" in the courtyard earlier in the day. She was wobbly and he brought her up to his apartment. Eventually she lost consciousness and blood was leaking out of her ear. He thought "Phyllis" had a head injury from falling. The apartment was "locked down" and an officer guarded the door.

Police decided to take the accused to the police station so he could be spoken to in a different setting. He was not arrested nor was he a suspect. He was viewed as someone who had information about how the woman was injured. When asked if he would go to the police station, he replied, "no problem". He was not told that he did not have to accompany the police nor was he told he was free to go at any time. He was not placed in handcuffs and

he walked, unassisted, beside the officers to the police cruiser. During the ride to the police station, he was quiet and peaceful. He was taken to the "soft" interview room and given coffee. He was relaxed and calm but refused to write anything down when asked questions. After consulting with his supervisors, the officer arrested the accused for assault causing bodily harm and advised him of his right to counsel. He spoke to Legal Aid. About two months later the victim died from her injuries and the accused was charged with second degree murder.

British Columbia Supreme Court

The judge found that the accused was not detained at the scene, nor did a detention crystallize when he was taken from his apartment complex to the "soft" interview room at police headquarters a few blocks away. "There was clearly no physical restraint or legal obligation," said the judge. "The situation, at least initially, was one in which the police were acting in a non-adversarial role. … In the circumstances, I am of the view that a reasonable person in [the accused's] position would conclude that the actions of the police in questioning him, including [the officer's] intervention, were not intended to restrain his liberty, but rather were aimed at facilitating the provision of emergency services, and furthering the sort of police investigation that a reasonable person would expect to be conducted in the circumstances. [The accused] was not in fact facing jeopardy, nor, in my view, had he passed into the police's effective control." Nor did the change in venue create a detention. A reasonable person would not conclude that the change of location to the police station from the housing complex was a detention. Accordingly, the accused was not detained until he was arrested. His statements to police prior to his arrest were admissible. A jury returned a verdict of guilty on the second degree murder charge.

British Columbia Court of Appeal

The accused argued that the trial judge erred in finding that he was not detained prior to his arrest. He submitted that the circumstances, including the brief physical restraint by the officer at his apartment plus his statement that he did not want to answer any questions, created a detention. Therefore, he was entitled to be advised of his right to counsel under s. 10(b).

Justice Bennett, writing the Appeal Court's decision, found the trial judge did not err. The police arrived in response to a 911 call and had an emergency on their hands. They attempted to speak to the accused - the 911 caller - and the most obvious source of potentially helpful information to further their investigation. The encounter between the intervening officer and the accused did not result in detention:

> [The intervening officer's] brief contact with [the accused] was designed to prevent him from interfering with the paramedics' ability to work. To find that a detention crystallized with this momentary contact would be to ignore the circumstances that immediately preceded and ensued. The physical contact followed a verbal confrontation in which each party was an equal belligerent. After moving [the accused] away from the paramedics, [the intervening officer] retreated and [the investigating officer] continued his attempts to calmly and quietly interview [the accused]. It cannot be said that [the accused] submitted or acquiesced in the deprivation of liberty and reasonably believed that the choice to do otherwise did not exist. [reference omitted, para. 57]

As for the change of venue, the accused was asked if he would accompany the officers to the police station. This request was found by the trial judge to be an invitation, not a demand. The accused had not demonstrated to the trial judge that he was detained on a balance of probabilities. Justice Bennett concluded that the "the trial judge considered all of the circumstances and the correct legal principles" in holding that the accused was not detained until the point of arrest. The accused's appeal was dismissed.

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

Editor's note: Leave to appeal this case to the Supreme Court of Canada was refused, [2012] SCCA No 408.

GRADUAL REVEAL OF EVIDENCE DID NOT RE-TRIGGER s. 10(b)

R. v. Richard, 2013 MBCA 105

Following a murder in which the deceased was found severely beaten, the accused was arrested and advised of his right to counsel and police caution. He requested to speak with counsel and police facilitated him with an opportunity to do so. Then, during an interview, the investigator progressively revealed evidence that police had gathered which implicated him in the murder. The evidence included intercepted conversations between the accused and his cousin where he admitted to the murder. As well, the investigator told him that his common-law wife had provided a statement to the police detailing his confessions to her about the murder. The following day, at the commencement of a second interview, he was told his cousin had provided a police statement respecting the murder. The accused then immediately agreed to speak with police about the incident and confessed.

Manitoba Court of Queen's Bench

The accused submitted that the progressive revelation of evidence constituted a "change in circumstances" such that he should have been re-advised of his right to counsel and provided a further opportunity to speak with a lawyer before his second interview. The judge found there was no s. 10(b) violation. In her view, progressively revealing information implicating the accused in this case did not constitute a change in circumstances obligating the police to provide him with another opportunity to speak with a lawyer.

Manitoba Court of Appeal

The accused again argued that he should have been re-advised of and provided another opportunity to exercise his s. 10(b) right. In his view, the progressive unveiling of evidence constituted an objectively observable change of circumstance as described by the Supreme Court of Canada in *R. v. Sinclair*, 2010 SCC 35 such that, despite already exercising his right to counsel, he should have been allowed a further reasonable opportunity to consult counsel. The Crown agreed that police revealed evidence in their possession during the interviews. However, the Crown submitted that this tactic did not amount to a material change in jeopardy such that a renewed right to consult a lawyer arose.

Justice Cameron, authoring the Court of Appeal's opinion, concluded the trial judge correctly found that the common police tactic of gradually revealing evidence, without more, did not engage a change in circumstances such that the accused was entitled to another opportunity to consult counsel. The purpose of s. 10(b) is to provide a detainee with legal advice respecting their rights, such as the right to decide whether or not to cooperate with police. There are, however, noted exceptions requiring the police to provide a detainee with an additional opportunity to consult counsel. These include (1) investigations where new or non-routine procedures involving the detainee are to be used, (2) an investigation that takes a new and more serious turn as events unfold which may make the initial advice no longer adequate, such as when the nature of the charges change and (3) situations where there is evidence to indicate that a detainee who previously waived his right to counsel may not have understood the right. But none of these applied in this case. The Court of Appeal stated:

> The jeopardy that [the accused] was facing remained the same throughout the entire interview process. He was charged with conspiracy to commit first degree murder and first degree murder. [The accused] clearly understood his right to remain silent throughout the entire interview process, thereby evidencing fulfillment of the purpose of s. 10(b) of the Charter. Quite simply, the facts of this case do not fall within any exceptions or new categories that would trigger a further opportunity to consult with counsel. [reference omitted, para. 58]

The police complied with s. 10(b) and the accused's appeal was dismissed.

Complete case available at www.canlii.org

THREAT NEED NOT BE CONVEYED TO INTENDED RECIPIENT

R. v. McRae, 2013 SCC 68

The accused was in a detention centre awaiting trial on several charges related to drug trafficking. While in custody he conspired with another inmate to attack the Crown prosecutor, a police officer and four witnesses. After finding out about this plan, investigators decided to place a listening device on another inmate. He told one inmate that he would rearrange the face of the Crown prosecutor and one of the witnesses because he thought that he was the one who snitched on him. He told another inmate that he had hired a private detective to find the Crown prosecutor's address and that once his trial was over he would kill the witnesses who had informed against him. He also asked this inmate to do what was necessary to find the address of the police officer involved in his case. As a result, he was charged under s. 264.1(1) (a) with several counts of knowingly conveying threats to cause death or bodily harm against the Crown prosecutor, the police officer and four witnesses.

Court of Quebec

The judge held that the fault element (**mens rea**) of the threatening offences had not been established. The words were not spoken by the accused with the intent that they would be conveyed to the subjects of the threats in an attempt to influence their actions. In his view, "the evidence d[id] not establish that the words used by the accused when addressing [the inmates] were intended to reach the ears of the possible or potential witnesses." Instead, the judge found the accused had intended to seek revenge once the trial was done and that he had uttered the words out of anger and frustration. He was acquitted.

Quebec Court of Appeal

The Crown's appeal was dismissed. The Court of Appeal agreed with the trial judge that the fault element had not been established. It also concluded that the prohibited act (**actus reus**) had not been proven because the words were uttered in a "closed circle" with an expectation of confidentiality and thus they could not instill fear in the subjects of the threats. Rather than intending to intimidate, the accused acted out of frustration and an intention to seek revenge. The words used were not a threat because they were not conveyed to their intended recipients nor did they cause anyone to be fearful or intimidated. The accused's acquittals were upheld.

Supreme Court of Canada

A further Crown appeal was successful. It was not necessary for the Crown to prove that the accused's threats were conveyed to their targets or that anyone was actually intimidated by them. Rather, the elements of the offence are: (1) the utterance or conveyance of a threat to cause death or bodily harm; and (2) an intent to threaten.

Uttering Threats: *Actus Reus* (Prohibited Act)

Justices Cromwell and Karakatsanis, speaking for the seven member unanimous Court, described the *actus reus* this way:

> The prohibited act of the offence is "the uttering of threats of death or serious bodily harm". The threats can be uttered, conveyed, or in any way caused to be received by any person. The question of whether words constitute a threat is a question of law to be decided on an objective standard. ...
>
> The starting point of the analysis should always be the plain and ordinary meaning of the words uttered. Where the words clearly constitute a threat and there is no reason to believe that they

"[T]he fault element of [uttering threats] is made out if the accused intended the words uttered or conveyed to intimidate or to be taken seriously. It is not necessary to prove an intent that the words be conveyed to the subject of the threat.

> had a secondary or less obvious meaning, the analysis is complete. However, in some cases, the context reveals that words that would on their face appear threatening may not constitute threats within the meaning of s. 264.1(1)(a). In other cases, contextual factors might have the effect of elevating to the level of threats words that would, on their face, appear relatively innocent. [references omitted, paras. 10-11]

And further:

> Thus, the legal question of whether the accused uttered a threat of death or bodily harm turns solely on the meaning that a reasonable person would attach to the words viewed in the circumstances in which they were uttered or conveyed. The Crown need not prove that the intended recipient of the threat was made aware of it, or if aware of it, that he or she was intimidated by it or took it seriously. Further, the words do not have to be directed towards a specific person; a threat against an ascertained group of people is sufficient [for example, threats against "police officers" generally, threats against "members of the black race" generally.]
>
> The reasonable person standard must be applied in light of the particular circumstances of a case. [references omitted, paras. 13-14]

The test, then, is not whether people actually felt threatened. Nor is it necessary to prove the threats were conveyed to their intended recipients or that anyone was in fact intimidated or made fearful. Instead, "the prohibited act of the offence of uttering threats will be made out if a reasonable person fully aware of the circumstances in which the words were uttered or conveyed would have perceived them to be a threat of death or bodily harm."

Uttering Threats: *Mens Rea* (Fault Element)

As for the *mean rea*, it is made out if "it is shown that threatening words uttered or conveyed 'were meant to intimidate or to be taken seriously'." The Court stated:

> It is not necessary to prove that the threat was uttered with the intent that it be conveyed to its intended recipient or that the accused intended to carry out the threat . Further, the fault element is disjunctive: it can be established by showing either that the accused intended to intimidate or intended that the threats be taken seriously.
>
> The fault element here is subjective; what matters is what the accused actually intended. However, as is generally the case, the decision about what the accused actually intended may depend on inferences drawn from all of the circumstances. Drawing these inferences is not a departure from the subjective standard of fault. [references omitted, paras. 18-19]
>
> ... ...
>
> To sum up, the fault element of the offence is made out if the accused intended the words uttered or conveyed to intimidate or to be taken seriously. It is not necessary to prove an intent that the words be conveyed to the subject of the threat. A subjective standard of fault applies. However, in order to determine what was in the accused's mind, a court will often have to draw reasonable inferences from the words and the circumstances, including how the words were perceived by those hearing them. [para. 23]

Even though the threats were conveyed in a so-called "closed circle," their confidential nature did not preclude a finding that both the *actus reus* and *mens rea* had been proven. It was not necessary to prove as part of the actus reus (**prohibited act**) that the threats were conveyed to their intended recipients or that anyone was actually intimidated by the threats. Nor is it necessary as part of the mens rea (**fault element**) to prove that the accused intended the threats to be conveyed to their intended recipients or that the accused specifically intended to intimidate anyone. "Threats are tools of intimidation and violence," said the Supreme Court. "As such, in any circumstance where threats are spoken with the intent that they be taken seriously, even to third parties, the elements of the offence will be made out."

Both the trial judge and the Court of Appeal made legal errors. The Crown's appeal was allowed, the accused's acquittals were set aside and a new trial was ordered.

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

BRITISH COLUMBIA: CANADA'S MOST EXPLOSIVE PROVINCE

According to data released by the Canadian Data Centre in 2013, Canada had a total of 185 explosive incidents in 2012. British Columbia ranked first among incidents, bombings, attempted bombings, improvised explosive device recoveries, hoax devices and explosives thefts.There were four deaths reported, two in British Columbia and two in Ontario.

The following definitions will help explain the incidents reported in the table below.

Incidents – The number of times Explosives Disposal Units were called to scenes involving the possible use of explosives.

Bombings – Explosions of devices created for non-authorized or criminal use.

Attempted Bombings – An explosion where one or more IEDs failed to function because of an unintentional defect in design or assembly.

Hoax Devices – A device constructed from inert or non-explosive components intended to resemble actual bombs.

Improvised Explosive Device (IED) – A bomb created for non-authorized use.

Recovered IEDs – Number of IEDs, that were recovered by Explosives Disposal Units. At one incident, one or more IEDs can be recovered.

Explosive Thefts – Incidents that involved reporting stolen explosives materials.

Explosive Recoveries – Recovered explosive materials that were armed, dumped, stolen or suspected to be connected with unlawful activities.

Source:
http://www.rcmp-grc.gc.ca/tops-opst/cbdc-ccdb/crim-use-usage-explo-eng.htm

Region	Incidents	Bombings	Attempted Bombings	Hoax Devices	Recovered IEDs	Explosive Thefts	Explosive Recoveries	Accidental Explosion
British Columbia	62	9	1	17	15	1	19	-
Alberta	18	2	-	1	3	-	12	-
Saskatchewan	20	3	-	2	2	-	12	1
Manitoba	-	-	-	-	-	-	-	-
Ontario	18	3	1	3	5	-	6	-
Quebec	37	1	-	6	4	-	26	-
New Brunswick	17	1	-	7	-	-	9	-
Nova Scotia	2	-	-	1	-	-	1	-
Prince Edward Island	-	-	-	-	-	-	-	-
Newfoundland	6	-	-	-	-	-	5	1
North West Territories	1	-	-	-	-	-	1	-
Yukon	4	-	-	-	-	-	4	-
Nunavut	-	-	-	-	-	-	-	-
Canada	185	19	2	37	29	1	95	2

DNA DATA BANK

Did you know as at November 30, 2013 there were ...

... **372,070** DNA profiles contained in the National DNA Data Bank (NDDB) of Canada. This includes DNA profiles from the Convicted Offenders Index and the Crime Scene Index.

... **281,364** DNA profiles contained in the Convicted Offenders Index. These biological samples are collected from convicted offenders.

... **90,706** DNA profiles contained in the Crime Scene Index. These samples are collected from crime scene exhibits containing biological evidence.

... **28,619** **Offender Hits**. This is a DNA Profile developed from Crime Scene evidence matching a DNA profile in the Convicted Offender Index. These cases include:

Offences	Total
Break and Enter	10,849
Sexual Assault	3,513
Robbery (armed)	3,254
Assault	2,219
Murder	2,018
Attempted Murder	639
Other	6,127

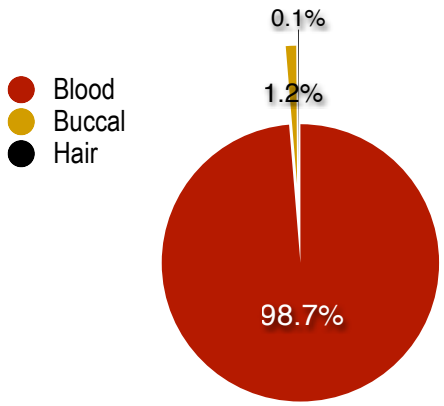
... **3,384** **Forensic Hits**. This is a DNA Profile developed from a crime scene matching another Crime Scene DNA profile in the Crime Scene Index.

In 2012/2013 there were **3,387** Offender Hits.

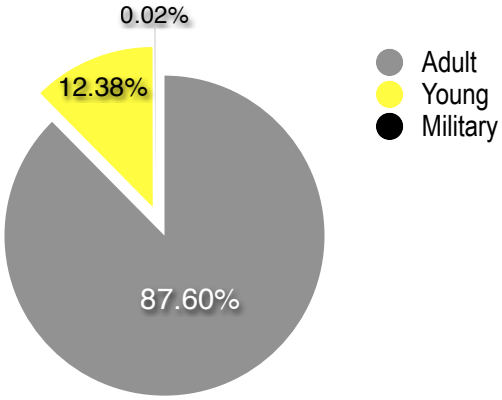
In 2012/2013 there were **395** Forensic Hits.

Types of bodily substances collected from convicted offenders and analyzed by the NDDB:

- **Blood** - using a sterile Lancet to prick the fingertip - **304,354** samples
- **Buccal** - rubbing a foam applicator inside the mouth to obtain skin cells - **3,725** samples
- **Hair** - pulling out six to eight hairs with the root sheath attached - **291** samples



The breakdown of convicted offender samples includes adult offenders (**255,375**), young offenders (**36,098**) and military offenders (**66**).

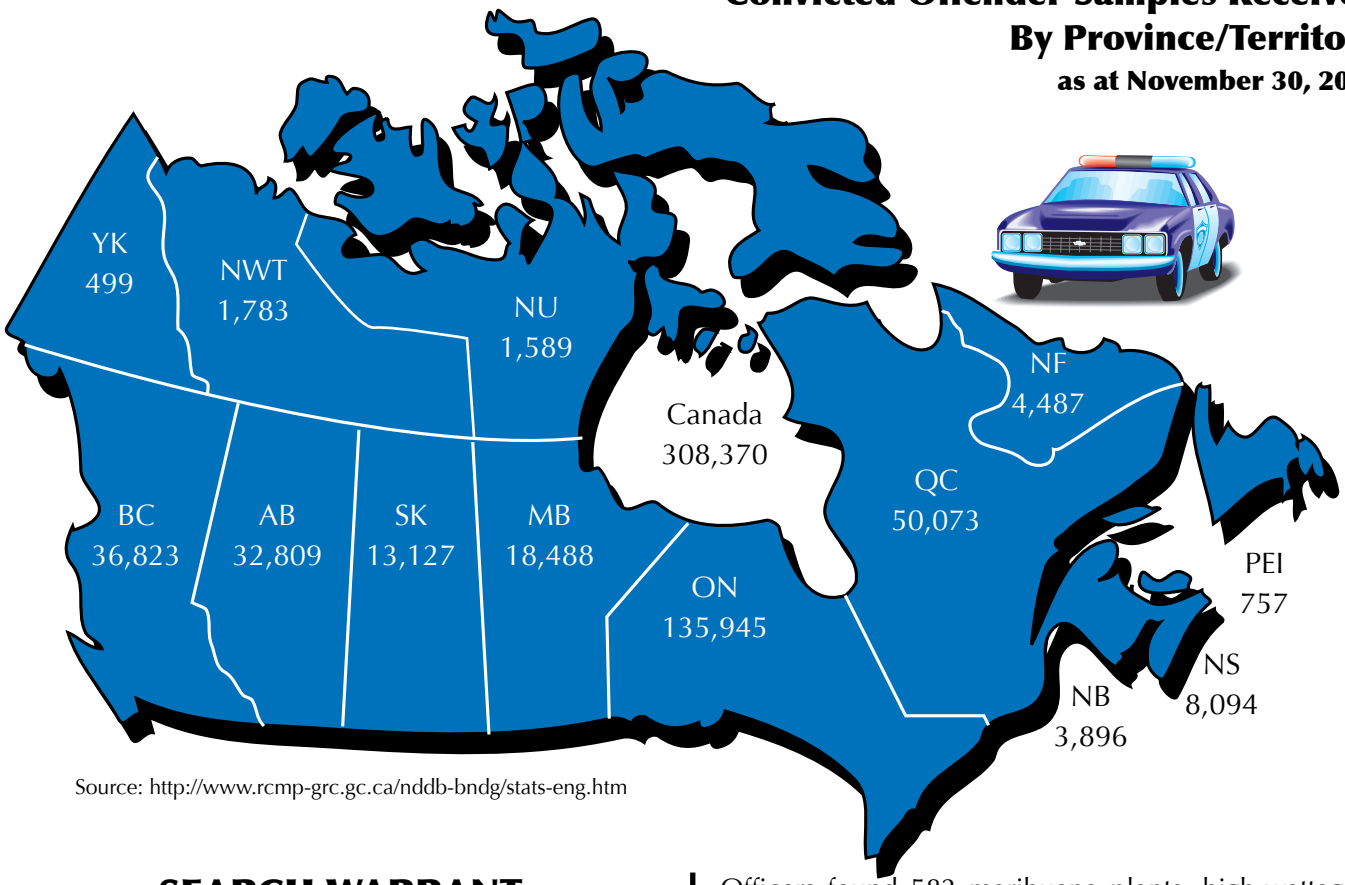


The NDDB receives **500** to **600** samples per week.

Sources:
Statistics for National DNA Data Bank available at:
www.rcmp-grc.gc.ca/nddb-bndg/stats-eng.htm
National DNA Data Bank of Canada - Annual Report 2012/2013 - Measuring Success available at:
www.rcmp-grc.gc.ca/pubs/nddb-bndg/ann-12-13/ann-12-13-eng.pdf

Convicted Offender Samples Received By Province/Territory

as at November 30, 2013



Source: http://www.rcmp-grc.gc.ca/nddb-bndg/stats-eng.htm

SEARCH WARRANT AMPLIFICATION EVIDENCE HAS LIMITS

R. v. Voong, 2013 BCCA 527

As a result of a drug investigation, a police officer prepared an Information to Obtain (ITO) a warrant to search a residence for an active indoor marihuana growing operation. The grounds were based on the odour of vegetative marihuana coming from the target residence, recent power consumption four and a half times higher than the average BC Hydro customer in the area, windows at the front of the residence were covered to prevent the escape of high intensity lights and there were previous *Controlled Drugs and Substances Act* investigations relating to the target residence, including a faint odour of marihuana smelled near the property three months earlier. A telewarrant was obtained and executed the following day by way of a hard entry. Officers found 582 marihuana plants, high-wattage lights and paraphernalia associated with growing marihuana. The accused was the registered owner of the house and only person present when the police arrived. He was charged.

British Columbia Provincial Court

The accused argued the search warrant's ITO, as **amplified** on review, did not provide sufficient reliable information to support its issuance. In his view, the information respecting the odour detected, power consumption comparison, window coverings and statements about previous investigations was either unreliable, erroneous, misleading, wrong or breached the duty of full, fair and frank disclosure. He suggested this information, when expunged from the ITO, rendered it deficient. Since the search was unlawful and breached s. 8 of the *Charter*, he wanted the plants and cultivation equipment seized by police excluded as evidence under s. 24(2).

The investigator, his supervisor, an expert (called by the defence) and a police expert (called by the Crown) testified in the voir dire. The judge only excised the BC Hydro reference and information about the specifics of the window coverings. However, he upheld the warrant on the basis of the remaining record as amplified on review. The faint odour of marihuana, efforts to conceal the escape of light from the basement windows (consistent with a grow operation), the earlier detection of marihuana odour and evidence of the hydro consumption was sufficient to support reasonable grounds. The accused was convicted of producing marihuana and possessing it for the purpose of trafficking.

British Columbia Court of Appeal

The accused appealed, submitting the search warrant should not have been upheld and the evidence ruled inadmissible under s. 24(2). The Crown, on the other hand, suggested that when the totality of the circumstances set out in the ITO, as amplified on review, was considered with common sense, there was sufficient information to establish a reasonable belief that went beyond mere suspicion.

The Court of Appeal first recognized the test for determining whether a search warrant was properly issued. "The test on review is whether a justice of the peace, assessing all the facts on a practical, non-technical and common sense basis, could have been satisfied there were reasonable grounds to believe marihuana would be found inside the residence," said Justice MacKenzie. In this case, the Court of Appeal found the trial judge was correct in some aspects but made errors in others:

"The test on review is whether a justice of the peace, assessing all the facts on a practical, non-technical and common sense basis, could have been satisfied there were reasonable grounds to believe marihuana would be found inside the residence.

☑ **Odour** – The trial judge's finding that the investigator detected the odour of vegetative marihuana as he walked past the driveway at the accused's 2.09 acre rural property was not unreasonable and open to her to make.

What is Amplification?

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

☒ **Power Consumption Comparison** – The power consumption document for an average dwelling in the area that was used to compare with the accused's residence was unreliable. The officer did not say anything about its reliability in the ITO and testified he took it from another member, "kind of a boilerplate." The document referenced was not published by BC Hydro as stated in the ITO and the officer knew nothing about it, except what it said. Furthermore, the "amplification" evidence provided by the police expert went beyond the permissible boundaries of such evidence. "Amplification is not a means to adduce additional information so as to retroactively authorize a search that was not initially supported by reasonable grounds," said Justice MacKenzie. Rather than the Crown re-examining an informant on matters arising in cross-examination, the Crown offered rebuttal evidence by a different witness. Plus, even had this evidence been elicited from the investigator

in either cross-examination or re-examination, it would have exceeded proper amplification.

Window Covering Facts and Opinion – In the ITO the investigator said that all eight of the windows facing the road were covered from inside the residence. However, at trial he admitted that he had an incomplete view as he was 75 metres away, seated in his police vehicle, using binoculars and looking through trees. He said he did not include this in the ITO but should have. He also agreed he did not notice two other large windows and one beside the door which were not covered (no coverings were found on them). When police executed the warrant they found some of the upper windows open and uncovered. The Court of Appeal found the information about all the windows being covered was misleading: it suggested a total blackout when that was not the case. The reference to the coverings of the eight windows at the front of the house to prevent the escape of light was removed from the ITO, along with the opinion attaching to it.

Information on Past Investigations – This information, including the prior smell of marihuana, did not contribute to reasonable grounds in the ITO. It was essentially disclosure.

Was the Search Warrant Valid?

With the power consumption comparison and window covering facts and opinion excised, and the information on past investigations amounting only to disclosure, all that remained was the "faint but definite smell of vegetative marihuana." It was transient and brief, described by Crown as a "whiff." When taken alone, a "whiff" of marihuana would not be sufficient to sustain the search warrant. The search was therefore unlawful and breached s. 8 of the *Charter*. When considering s. 24(2), the Court of Appeal excluded the evidence. Although the offences were serious and the evidence reliable and crucial to the Crown's case, the *Charter*-infringing police conduct amounted to a serious intrusion. It involved a "hard entry" to a residence, a battering ram to "breach" the back door and an arrest at gunpoint. The evidence was excluded.

The accused's appeal was allowed, his convictions were set aside and acquittals were entered.

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

Hearsay and Reasonable Grounds

In Voong, the British Columbia Court of Appeal commented on the use of hearsay in an officer's reasonable grounds assessment. It said this:

> *It is quite true, as the Crown says, that hearsay evidence communicated from one officer to another may contribute to establishing reasonable grounds. The fact evidence is hearsay does not bar its use to form grounds for a search. The question is whether the hearsay has been shown to be reliable, considering whether it is compelling, the source of the hearsay credible, and whether the information was corroborated. These factors do not form separate tests, but the "totality of the circumstances" must meet the standard of reasonableness.*
>
> *But it is not enough that the information, although it may be reliable hearsay, is "available" to the police generally as a corporate body. Rather, the information must be within the knowledge of the Informant himself when he obtains the warrant. In this case, it was not.*
>
> *... "[T]he police officer who must have reasonable and probable grounds for believing a suspect is in possession of a controlled drug is the one who decides the suspect should be searched. That officer may or may not perform the actual search. If another officer conducts the search, he or she is entitled to assume that the officer who ordered the search had reasonable and probable grounds for doing so....".*
>
> *Thus, the grounds to search must be held by the officer who makes the decision to search. By analogy in this case, the grounds to search had to be held by [affiant], who swore the ITO setting out his grounds and obtained the warrant.*
>
> [references omitted, paras. 61–64]

OFFICER'S DOUBT ABOUT IMPAIRMENT DID NOT UNDERMINE CONVICTION

R. v. Wilson, 2013 SKCA 128

A citizen observed a truck being driven erratically. He called police, followed it and reported its progress. The vehicle eventually pulled into a parking lot and stopped. The citizen continued down the street, made a U-turn but lost sight of the truck for a moment. When the police arrived shortly thereafter, they found the accused behind the wheel of the truck, seat belt fastened, brake lights on and engine running. The officer woke the accused, asked him to shut off the engine, step out and accompany her to the patrol car. His walk was slow and deliberate and he had difficulty with his coordination. When asked for his licence, the accused searched for his wallet but could not find it. The officer, however, could see a wallet in his pocket, removed it and retrieved the licence. She also smelled a "faint odour" of alcohol from the accused. He was arrested for impaired care and control, given his rights and a breath demand was made.

During questioning the accused said he had a couple cans of beer earlier at his sister's, a block away. But he denied driving. He said he came out to the vehicle to listen to music, being tired and under stress from work. The officer, began to doubt whether alcohol caused her concerns about the accused's driving, so he made an approved screening device demand. The accused blew a "fail." This confirmed the officer's earlier opinion and she followed through with the investigation, transporting the accused to the police station where he provided breath samples over the legal limit. As a result, charges of impaired operation and over 80mg% were laid.

Saskatchewan Provincial Court

The judge found the officer had reasonable grounds for the arrest and demand – both subjectively and objectively. However, the ASD demand was not made forthwith. It was done after the accused had already been arrested. The ASD test was excluded. As for the breathalyzer tests, they were not taken as soon as practicable. The judge found there was an unexplained inordinate delay. The certificate of analysis was also excluded. Thus, the accused was found not guilty on the over 80mg% charge. As for the impaired driving offence, the accused was convicted. The judge was satisfied that the evidence of the citizen combined with the arresting officer's evidence (absent the test results) was sufficient to prove guilt beyond a reasonable doubt. He was fined $1,000 with a $150 victim surcharge and suspended from driving for one year.

Saskatchewan Court of Queen's Bench

The accused argued, among other grounds, that the trial judge failed to address evidence that was inconsistent with impairment. In his view, the arresting officer's doubts about his impairment – which she addressed with the ASD – should have raised a reasonable doubt in the judge's mind as to his guilt. But the appeal judge disagreed stating, "The fact that [the officer] had a doubt does not necessarily translate into a doubt within the judicial mind." The trial judge had properly considered the evidence – the nature of the accused's driving, the physical indicia of impairment and the admission of alcohol consumption – in convicting. The accused's appeal was dismissed.

Saskatchewan Court of Appeal

The accused appealed again submitting, in part, that the trial judge erred by not having a reasonable doubt as to his impairment. He emphasized the fact that, after the arrest, the officer doubted her own assessment of his impairment by alcohol so much so that she made an illegal ASD demand upon him. Since the officer herself had a reasonable doubt about his impairment before she obtained the ASD results or the results of the breath tests at the police station, the trial judge should have had a reasonable doubt as well (since he was not allowed to consider those results). In was his contention that the trial judge erred by shifting the burden of proof to him to establish his innocence.

Justice Caldwell rejected the accused's argument. "What [the accused's] submission fails to recognise, however, is that his conviction on the impaired driving charge pivots not on the judgment of the arresting officer but rather on the weight of the whole body of evidence before the trial judge, which cogently supports the conclusion that he operated a motor vehicle while his ability to do so was impaired by alcohol," he said. "The trial judge was the trier of fact in this case and the views of the arresting officer as to what part of the evidence indicated did not preclude the trial judge from making findings of fact and drawing inferences of fact on the basis of the whole of the evidence which was before him. That is to say, I find no compelling reason to why the arresting officer's doubt in [the accused's] impairment by alcohol at the time of arrest should require the trial judge to have doubt in [the accused's] impairment by alcohol after he has heard all of the evidence of impairment and alcohol consumption adduced at trial." The evidence of the concerned motorist and the arresting officer, even without the ASD or Breathalyzer results, was sufficient. Justice Caldwell continued:

> A conviction for impaired driving will lie where there is sufficient evidence to conclude beyond a reasonable doubt that an accused has driven while his or her ability to operate a motor vehicle was impaired by alcohol or a drug. Here, the Crown had proven that [the accused] had admitted to having consumed alcohol, had driven aberrantly, and had exhibited deteriorated judgment or attention and a loss of motor co-ordination or control. All of this rationally supports a finding that [the accused's] ability to operate a motor vehicle was impaired by alcohol. [para. 41]

The trial judge considered the whole of the evidence (not including the ASD or breath tests) and did not improperly shift the burden of proof to the accused. The accused's appeal was dismissed and his conviction was upheld.

Complete case available at www.canlii.org

CHARTER TAINT MAY OR MAY NOT BE CLEANSED: DEPENDS ON CIRCUMSTANCES

R. v. Manchulenko, 2013 ONCA 543

After pulling a vehicle over shortly before 4:00 am, a police officer formed the opinion the accused's ability to operate the vehicle was impaired by alcohol. He was arrested for impaired driving, advised of his right to counsel and a formal demand for a breath sample was made. The accused confirmed he understood what the officer had told him and declined to invoke his right to counsel. He accompanied the officer to the police station where he declined to call a lawyer when asked by the officer in charge if he wished to do so. In the breathalyzer room, the qualified technician reiterated the accused's right to counsel. This time, the accused said he wanted to call a lawyer. The qualified technician simply took the accused to the telephone room and left him there for less than a minute. The accused did not contact a lawyer, instead stating "well, let's get this over with." He provided his first breath sample at 4:29 am. When he asked about the breathalyzer reading and what he should do next, he was taken back to the telephone room so that he could speak with a lawyer. He was not told the reading. He spoke to a lawyer, returned to the breath room and provided a second breath sample at 4:50 am. He was charged with impaired driving and over 80 mg%.

Ontario Court of Justice

Although the judge found there was no breach of the informational component of the *Charter*'s s. 10(b), he did rule there was a violation of the implementational component. Before taking the breath sample, the qualified technician failed to tell him that the police had a duty to hold off until a reasonable opportunity to exercise his right to counsel was provided. In her view, when the accused changed his mind about speaking to a lawyer, the police should have told him of his right to a reasonable opportunity to contact a lawyer and that police would not take any

statements or require him to participate in any potentially incriminating process until he had had that reasonable opportunity. As a result of the breach, the judge excluded the analysis of both breath samples under s. 24(2) of the *Charter*. Although the breath analysis was reliable and important to the Crown's case, the breach was serious and involved an intrusion into the accused's privacy and bodily integrity. The remaining evidence - the observations of the arresting officer, a videotape of the accused in the booking room and the observation report of the qualified technician – was insufficient to warrant a conviction. Both charges were dismissed.

Ontario Superior Court of Justice

The Crown challenged the trial judge's rulings arguing she erred in finding a s. 10(b) breach and in excluding the results of both breath tests. But the appeal judge disagreed and dismissed the Crown's appeal. He held that the police did breach s. 10(b) by failing to afford the accused a reasonable opportunity to exercise his right to counsel before administering the first breath test and by failing to hold off until the right had been exercised. As for the admissibility of the second breath sample, the appeal judge opined that the two breath samples could not be separated from each other. "Once there is a Charter breach and the accused was not afforded his s. 10(b) Charter rights, all the evidence from that point onward should be excluded," he said. "If the fundamental right against self-incrimination is infringed, all the evidence gathered from that point onward is tainted and is subject to be excluded under a s. 24(2) Charter analysis."

Ontario Court of Appeal

The Crown again contended that the appeal judge erred in agreeing that the results of both breath tests, especially the second one, should have been excluded. In the Crown's view, the appeal judge failed to distinguish between the first and second samples, in light of the exercise of the right to counsel between the two, such that the second breath sample could be considered as separate or independent from the first. The Crown submitted there was a "fresh start." The accused exercised his s. 10(b) rights and received legal advice after the first sample but before the second such that the second sample was not "obtained in a manner that infringed or denied" his *Charter* rights. The accused, while acknowledging the trial erred in failing to rule separately on the admissibility of the second breath sample, nevertheless suggested he reached the correct conclusion. There was a temporal and contextual connection between the samples, making them part of the same transaction or course of conduct which warranted exclusion.

Right to Counsel

Justice Watt, writing the Court of Appeal's decision, described the rights afforded under s. 10(b):

> The purpose of the right to counsel is to allow a detainee not only to be informed of his rights and obligations under the law but, equally, if not more importantly, to obtain advice about how to exercise those rights.
>
> Section 10(b) of the Charter has two components. The first, the informational component, requires and ensures that the detainee is advised of his or her rights to counsel. The second, the implementational component, requires that the detainee be given a reasonable opportunity to exercise his or her right to counsel, should she or he decide to do so. Implicit in the implementational component is a duty on the police to hold off questioning or requiring the detainee to participate in investigative procedures, or eliciting evidence until the detainee has a reasonable opportunity to consult counsel.
>
> The duties of the police under the implementational component of s. 10(b), however, are not absolute. Unless the detainee invokes the right to counsel and is reasonably diligent in exercising it, the correlative duties of the police to provide a reasonable opportunity for the detainee to exercise the right, and to refrain from eliciting evidence, will either not arise in the first place or will be suspended.
>
> When a detainee, diligent but unsuccessful in contacting counsel, changes his or her mind and

> decides not to pursue contact with a lawyer, s. 10(b) requires the police to explicitly inform the detainee of his or her right to a reasonable opportunity to contact counsel and of the police obligation to hold off in their questioning or otherwise eliciting evidence until then. What amounts to reasonable diligence in the exercise of the right to contact counsel depends on the context, and requires a fact-specific inquiry into all the circumstances. [references omitted, paras. 63-66]

Fresh Start - Cleansing a Charter Taint

Sometimes, when considered by itself, evidence appears to be free from any contaminants that would render it inadmissible. However, when looking at the evidence in context, it could be tainted by an earlier impediment to admissibility. For example, a confession may be sufficiently connected to an earlier involuntary confession that it too is considered involuntary. "The derived confessions rule excludes statements which, despite not being involuntary when considered alone, are sufficiently connected to an earlier involuntary confession to be rendered involuntary and hence inadmissible," said Justice Watt. "Each subsequent confession may be involuntary if the tainting features that disqualified the first continued to be present, or if the fact the first statement was made, was a substantial factor contributing to the making of the second or subsequent statement."

In this case of s. 24(2), it only applies to evidence where there has been a proven *Charter* breach and the evidence sought to be admitted was "obtained in a manner" from the breach. This "nexus" between the *Charter* violation and the acquired evidence may be temporal, contextual, causal or a combination of these. Sometimes police will try to insulate evidence from an earlier *Charter* breach by intervening with Charter compliant conduct. Nevertheless, there is no per se or bright line rule that will automatically immunizes a Charter taint. Nor is there a rule that automatically mandates exclusion of all evidence that follows a *Charter* infringement regardless of attempts by police to cleanse the taint. Instead, a case-specific analysis is required.

In this case, the appeal judge adopted a rule that all evidence obtained after the s. 10(b) infringement should be excluded. This was a mistake. He failed to undertake a case-specific analysis of all the circumstances in determining whether s. 24(2) was engaged. Further, the appeal judge did not consider whether the *Charter*-compliant consultation preceding the second sample was a "fresh start" thereby severing the second breath test from the earlier s. 10(b) breach and removing it from s. 24(2)'s reach. Finally, if the second sample was tainted by the earlier breach, the lower court should have conducted a discrete, case-specific s. 24(2) analysis in relation to the results of the analysis of the second sample.

Justice Watt concluded several errors were made respecting s. 24(2). The Crown's appeal was allowed, the accused's acquittals were set aside and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

JUDGE USED WRONG LENS TO VIEW POLICE CONDUCT: EVIDENCE EXCLUDED

R. v. Huynh, 2013 ABCA 416

A police officer saw a purple Dodge Dakota pick-up truck enter an out of the way and quiet parking lot, perform a "button hook turn" and park. The accused was driving and there was a female passenger seated behind the main bench seat. In less than three minutes, a male wearing a dark hoody and jeans entered the passenger side of the truck, remained for less than a minute, got out, put his hands in the pouch of his hoody and left the scene. The officer, an 11 year veteran at the time, had experience for several years working drug investigations, including undercover surveillance. The officer believed he had witnessed a pre-arranged drug transaction. He saw the men turn their bodies towards each other. Then, he saw them what appeared to be an exchange of some sort based on their arm and body movements while they were carrying on a short discussion. However, the

officer did not see their hands nor did he observe any actual transfer of any item. After the vehicle went mobile, a uniformed officer in a marked police vehicle was directed to stop the truck and arrest its occupants. A search of the truck incidental to arrest resulted in the seizure of cocaine and cash.

Alberta Court of Queen's Bench

During a *voir dire* the officer said, based on his experience, that he formed the opinion that a drug transaction had taken place in the motor vehicle and that the driver was in possession of narcotics for the purpose of trafficking. However, despite this testimony, the Crown conceded there were ss. 8 (unreasonable search) and 9 (arbitrary detention) *Charter* breaches. As for the evidence, the judge admitted it under s. 24(2). He found the officer had acted in good faith. The officer held an honest subjective belief that the accused was involved in criminal activity. Using the investigative detention criteria of a reasonable suspicion, the judge said it was a "close call" even though the Crown conceded the breaches. "On the whole of it, the impact of detaining the [accused] in the parking lot for a very short period of time while his motor vehicle was searched for the purposes of securing and preserving evidence, did not appear all that egregious," said the judge. So, although the breach and its impact on the accused's *Charter*-protected interests were serious, the very reliable evidence which was essential to the Crown's case outweighed its exclusion. The evidence was admitted and the accused was convicted.

Alberta Court of Appeal

The accused successfully appealed the trial judge's s. 24(2) decision to admit the evidence after he found ss. 8 and 9 *Charter* violations. The Court of Appeal held the trial judge was confused about the legal tests for detention and arrest. Rather than using the reasonable grounds test for arrest, he ultimately used reasonable suspicion as it applied to detention. Nor did his reasons contain any reference to the accused's arrest being unlawful. Had he used the proper test, he would not have found this case to be a "close call." Further, his reasons reflecting the seriousness of the *Charter* violation and its impact on the accused were limited to the police detaining him, not arresting him. "The trial judge mistakenly proceeded to consider only the law of unlawful detention when assessing the breaches under s. 24 (2)," said Chief Justice Fraser for the Court of Appeal. "In other words, the trial judge did not properly consider the seriousness of the unlawful arrest."

Since the judge erred in the applicable principles or rules of law, his s. 24(2) determination, which would usually be afforded deference, was assessed anew. First, the unlawful arrest and unreasonable search were serious *Charter* breaches that favoured exclusion. Second, the accused was not merely detained but was arrested and his vehicle searched. "He had a reasonable expectation of privacy in his vehicle, albeit at a reduced level from the privacy to be expected in one's home," said Chief Justice Fraser. "The impact was serious and likewise militates in favour of exclusion." Third, although the evidence was reliable and essential to the Crown's case (which favoured admission), this should not overwhelm the s. 24(2) analysis and render the other considerations favouring exclusion meaningless. "Not only did the trial judge minimize the seriousness of the Charter breaches by considering them only through the investigative detention lens, he also overemphasized the only factor weighing in favour of admission." After balancing the three s. 24(2) factors, the evidence was excluded, the accused's appeal allowed and an acquittal entered.

"He had a reasonable expectation of privacy in his vehicle, albeit at a reduced level from the privacy to be expected in one's home."

Complete case available at www.albertacourts.ab.ca

Editor's note: Additional case facts taken from *R. v. Huynh*, 2012 ABQB 378.

Note-able Quote

"Not the cry, but the flight of a wild duck, leads the flock to fly and follow." - Chinese Proverb

JIBC

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A minimum of two years of post secondary education plus a **minimum of five years** of progressive and specialized experience in working with the analysis of data and information. Applicants must also write a 500 – 1000 word essay on a related topic of their choice **OR**

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A survey course that introduces the student to the discipline of intelligence and provides the student with an understanding of how intelligence systems function, how they fit within the policymaking systems of free societies, and how they are managed and controlled. The course will integrate intelligence theory with the methodology and processes that evolved over time to assist the intelligence professional. The course will develop in the student a range of advanced research and thinking skills fundamental to the intelligence analysis process.

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The skill most appreciated by the intelligence consumer is the ability to communicate, briefly and effectively, the results of detailed analytic work. This course, through repetitive application of a focused set of skills to a body of information of constantly increasing complexity, is designed to prepare intelligence analysts to deliver a variety of intelligence products in both written and oral formats.

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Topics include: drug/terrorism/other intelligence issues, advanced analytic techniques (including strategic analysis, predicative intelligence etc.), collection management, intelligence sources, management theory (large organizations), attacking criminal organizations, crisis management, negotiation techniques, strategic planning, local/regional updates and briefing techniques.

Specialized Courses

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Intelligence Analysis

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This course explores the business processes involved in providing foreknowledge of the competitive environment; the prelude to action and decision. The course focuses on supporting decisions with predictive insights derived from intelligence gathering practices and methodologies used in the private sector. Lectures, discussions, and projects focus on the desires and expectations of business decision-makers to gain first-mover advantage and act more quickly than the competition.

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This course examines the nature and scope of financial crimes and many of the tools used by law enforcement in the preparation of a financial case. Included in this course is a detailed treatment of the following: laws which serve to aid in the detection and prosecution of these crimes, the types of business records available, types of bank records available, an examination of offshore business and banking operations, and the collection and analysis of this information, with emphasis placed on Net Worth and Expenditure Analysis. In addition, special treatment is given to the detection and prosecution of money laundering, various types of money laundering schemes, and the relationship of money laundering to terrorism.

Tactical Criminal Analysis

Tactical Criminal Intelligence
This course is an introduction to law enforcement terminology, practices, concepts, analysis, and intelligence. The course will introduce the student to the discipline of crime analysis and law enforcement intelligence through the study of the intelligence cycle and the intelligence determinants. The role and responsibilities of an analyst within each sub-topic will be addressed. Additionally, the utilization of analytical software will be introduced.

Analytical Methodologies for Tactical Criminal Intelligence
The course reviews the key requirements for intelligence in law enforcement and homeland security. The course focuses the use of advanced analytic methodologies to analyze structured and unstructured law enforcement data produced by all source collection. Students will apply these concepts, using a variety of tools, to develop descriptive, explanatory, and estimative products and briefings for decision-makers in the field.