JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

Photo: Harry De Jong

Canadian Police and Peace Officers' 38th Annual Memorial Service

September 27, 2015
Parliament Hill
Ottawa, Ontario

Le 38e service commémoratif annuel des policiers et des agents de la paix canadiens

Le 27 septembre 2015
Colline du Parlement
Ottawa (Ontario)

THE MEMORIAL LA COMMÉMORATION

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

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

See page 38 for BC's Memorial

Highlights In This Issue

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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 recent acquisitions which may be of interest to police.

Caffeinated learning: how to design and conduct rich, robust professional training.

Anne M. Beninghof.

San Bernadino, CA: Ideas for Educators, 2014.

HF 5549.5 T7 B46 2014

Conflict resolution [videorecording]: the skill that makes the difference.

Produced by Edge Training Systems; executive producer, Paul O'Keefe; directed and written by Tim Armstrong.

Port Perry, ON: Owen-Stewart Performance Resources [distributor], 2005.

1 videodisc (17 min.): sd., col.; 4 3/4 in. (DVD) + 1 CD-ROM

Helps participants become better managers of conflict so that they can build productive relationships in the workplace. Explains strategies for conflict resolution. Participants have an opportunity to learn and practice their conflict resolution skills in a variety of different ways.

HD 42 C66 2005 D2046

Consensus-oriented decision-making: the CODM model for facilitating groups to widespread agreement.

Tim Hartnett.

Gabriola Island, BC: New Society Publishers, 2011.

HM 746 H37 2011

Cool down: getting further by going slower.

Steve Prentice.

Mississauga, ON: J. Wiley & Sons Canada, 2007.

HD 69 T54 P723 2007

Developing teams: the leader's role: 20 tried and tested activities for promoting and maintaining team learning.

Caroline Love and Aileen Goodman.

Port Perry, ON: Owen-Stewart Performance Resources Inc., 2008.

Provides activities that are designed to develop team leaders who confidently lead team learning and development; and who are equipped with all the skills and knowledge they need to develop team building and whole team learning.

HD 66 L684 2008

I hear you: repair communication breakdowns, negotiate successfully, and build consensus ... in three simple steps.

Donny Ebenstein.

New York, NY: American Management Association, 2013.

HD 30.3 E24 2013

The infographic resume: how to create a visual portfolio that showcases your skills and lands the job.

Hannah Morgan.

New York, NY: McGraw Hill Education, 2014.

HF 5383 M674 2014

Introduction to the Canadian legal system.

Sasha Baglay.

Toronto, ON: Pearson, 2015.

KE 444 B27 2015

Leadership feedback [videorecording]: what employees want to tell you ... but don't.

Written & directed by Jack Donaldson; produced by Barbara Polansky.

Port Perry, ON: Owen-Stewart Performance Resources [distributor], 2014.

1 vidoedisc (17 min.): sd., col.; 4 3/4 in. (DVD) + 1 CD-ROM

CD-ROM contains leader's guide (PDF), participant worksheets (PDF) and PowerPoint file (PPT). Provides an honest look at what employees really think about their leaders and how that affects their work. The program illustrates 2 leaders: one ineffective and the other effective in 6 key areas of leader/employee interaction.

HF 5549.5 C6 L43 2014 D2048

ACCUSED BEARS BURDEN IN PROVING EXCEPTION TO BAIL CONDITIONS

R. v. Ali, 2015 BCCA 333

The British Columbia Court of Appeal has held that an accused, when charged with breaching his recognizance of bail, was required to establish that his actions fell within an exception to his house arrest condition. "Common law principles establish that a person charged with an offence under s. 145 (3) of the Criminal Code must prove an exception or an excuse on a balance of probabilities," said Justice Stromberg-Stein for the Court of Appeal. In other words, the Crown does not bear the onus of proving beyond a reasonable doubt the inapplicability of an exception to an accused's bail condition.

Complete case available at www.ontariocourts.on.ca

ALL EVIDENCE MUST BE CONSIDERED CUMULATIVELY, NOT IN ISOLATED PIECES

R. v. Chaing, 2014 ONCA 870

The Ontario Court of Appeal upheld a conviction for possessing marihuana for the purpose of trafficking after police found 26 lbs. of the drug in the trunk of a car driven by the accused. The issue on appeal was whether the Crown had proven beyond a reasonable doubt that the accused was aware of the marihuana in the trunk. In the accused's view, the trial judge had erroneously concluded that he had the required knowledge of the marihuana in the trunk.

But the Court of Appeal disagreed. The trial judge did not conclude the accused was guilty of possessing the marihuana in the trunk simply because he knew there was a small amount of marihuana in the car's console. Rather, the judge used the marihuana in plain view between the driver and passenger seats as part of the circumstantial evidence that the accused had knowledge of what was in the trunk; it was not determinative by itself. As well, the judge considered all of the evidence including the accused's behaviour before and after the stop in supporting the inference he knew about the marihuana in the trunk. Rather than taking a compartmentalized and isolated analysis of each strand of circumstantial evidence, the question of whether the criminal standard of proof had been met required an analysis of the cumulative effect of all of the evidence (each part of the evidence considered together).

Complete case available at www.ontariocourts.on.ca

BY THE BOOK:

Breach of Recognizance: ***Criminal Code***

s. 145(3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance, and every person who is bound to comply with a direction under subsection 515(12) or 522 (2.1) or an order under subsection 516(2), and who fails, without lawful excuse, the proof of which lies on them, to comply with the condition, direction or order is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

NO PRESUMPTION OF POSSESSION ON DRIVER

R. v. Degraw, 2015 ONCA 515

The Ontario Court of Appeal found a trial judge erred in telling a jury that "[a]n operator of a motor vehicle is presumed to be in possession and control of items in his car." In this case, the accused had been charged with occupying a motor vehicle with a firearm in it and possessing a loaded prohibited firearm. "There is no presumption of possession by a driver of items in his car," said the Appeal Court. Nevertheless, the convictions were upheld. The shotgun was in plain view near the accused and his passenger had left the car with the shotgun, brandished it during an assault and returned to the car with it. This was sufficient to affix the accused with knowledge of its presence.

Complete case available at www.ontariocourts.on.ca

CONSTELLATION OF FACTORS PROVIDE GROUNDS: ABOUT TO COMMIT ARREST LAWFUL

R. v. Sanghera, 2015 BCCA 316

The police initiated a project (code named Rebellion) to prevent drive-by shootings among rival groups including the Sanghera and Adiwal groups. The accused was a member of the Sanghera group. Acting on information that there were a number of rifles and handguns stored in a detached garage owned by the accused's mother, the police obtained a search warrant. No guns were located but multiple boxes of 9 mm and 40 caliber ammunition, a magazine for a 9 mm pistol and two sawed off butts from long guns were found. The lead investigator was present and it appeared to him that the at large sawed off long guns represented a significant danger to the public. Over the next few weeks there were several incidents that concerned the investigator. These included:

- An altercation between the accused and a member of the Adiwal group at a casino.
- Informer information that the accused's house had been shot at by a person driving by which was not reported to the police.
- Two shootings at homes belonging to Adiwal associates.
- Vehicles were seen by police circling around the Saghera residence in a suspicious fashion. Two vehicles were stopped and found to be driven by Adiwal group associates.
- The accused's cousin's girlfriend reported that two vehicles had attempted to box her in while she was driving a vehicle that both she and her boyfriend (the cousin) regularly drove. Source information revealed the cousin was upset about the incident and would retaliate.
- Informer information was received that the Sangheras were angry and wanted to "get" an Adiwal group member.
- Vehicles driven by an Adiwal group member and a member of the Sanghera group had a close encounter in a hotel parking lot. The lead investigator thought the presence of a marked police car in the area may have prevented an altercation.

During this time the police erected traffic barriers near some of the residences to make drive-by shootings more difficult.

The lead investigator then received informer information that the Sangheras were wearing ballistic vests and were armed. They were reportedly in "hunt mode". Although little was known about the source of the information, the investigator was later given the licence number of the vehicle being driven by the accused and determined it was a rental vehicle. Rental vehicles, in the investigator's experience, were often used to commit crimes. The police observed the vehicle being driven in a suspicious fashion. It was moving in a slow and methodical manner in a very specific area. It appeared to be "snaking" and apparently looking for a specific target.

Based on these observations and the background over time, the lead investigator believed that the Sangheras were in "crime mode" and were "going to potentially be conducting a shooting". The investigator decided the vehicle should be tactically taken down by ERT because there was a high chance of gun violence. The vehicle was slow to pull over and some of the occupants were seen to be moving in a manner consistent with them reaching around as if trying to hide something. ERT members approached with their guns drawn. The accused was wearing body armour and a fully loaded pistol magazine was seen on the front passenger seat. The occupants of the vehicle were placed in individual locked compartments in a police wagon. A police dog was used to sniff the vehicle. The dog indicated an interest in the glove box where two loaded handguns were found. The accused was then advised that he was under arrest and informed of his right to counsel. The vehicle was impounded and again searched which resulted in another handgun being found.

British Columbia Supreme Court

The judge found that all four occupants of the car had been placed under *de facto* arrest when they were stopped by police. These arrests were lawful under s. 495(1)(a) of the *Criminal Code* because the lead

investigator had "abundant reasonable grounds" to believe the occupants were "about to commit an indictable offence" (a shooting). Not only did the lead investigator have the necessary subjective belief, his belief was objectively reasonable. Thus, the occupants were not arbitrarily detained and there was no s. 9 *Charter* violation. The searches of the car were lawful as an incident to arrest and did not breach s. 8. "Searches for the overlapping purposes of obtaining evidence and ensuring officer and public safety were, indeed, truly incidental to the purpose of the arrests [the lead investigator] directed," said the judge. "The searches of the vehicle at the scene of the stop were lawfully incidental to arrest." The accused was convicted on three counts of possessing a loaded prohibited or restricted firearm and one count of being in a vehicle knowing that there was a firearm in it. He was sentenced to seven years in prison.

British Columbia Court of Appeal

The accused contended that his warrantless arrest was not lawful because there were not reasonable grounds for it. In his view, the lead investigator did not objectively have reasonable and probable grounds to arrest him. He argued that there were many shortcomings in the factors relied upon for the investigator's grounds. As a result, he submitted he was arbitrarily detained under s. 9 and the evidence obtained as a result of the searches incidental to his arrest should have been excluded under s. 24(2).

Justice Chiasson, speaking for the unanimous Court of Appeal, concluded that the accused was attempting to individually parse the ingredients of the lead investigator's belief. This was not the correct approach. Instead, no one factor by itself led to the decision for the arrest:

> Looking at the constellation of factors available to the lead investigator, I have no difficulty whatsoever concluding that his belief that the [accused] and his companions were in "crime mode" was reasonable objectively. Had he failed to act and violence ensued, he may very well have been open to criticism.
>
> All of the indicia available to the lead investigator suggested that the [accused] and his cohorts were set to do violence. The violence may have been contained between the two groups or it may have overlapped to affect innocent members of the public. The objective of Project Rebellion was to prevent such conduct. The facts showed an escalating risk of violence. The lead investigator acted reasonably and responsibly to avoid the realization of that risk. [paras. 53-54]

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

DENUNCIATION & DETERRENCE PRIMARY CONSIDERATIONS IN OPERATING CELLPHONE WHILE DRIVING: SENTENCE UPHELD

R. v. Ali, 2015 MBCA 64

A 49-year-old first time offender has had his sentence of nine months imprisonment and a three-year driving ban upheld by the Manitoba Court of Appeal. He had been convicted on two counts of dangerous driving causing bodily harm after he entered a busy downtown intersection against a red light while holding and talking on his mobile phone. He collided with another vehicle and careened sideways into two pedestrians. He also knocked down a traffic light pole and ended upside down on the sidewalk. The pedestrians were knocked unconscious and sustained significant injury. The panel of three appellate judges concluded that the sentence was not demonstrably unfit:

> Synchronously operating a motor vehicle and a hand-operated electronic device is dangerous and highly blameworthy conduct that can result in significant criminal consequences for otherwise law-abiding motorists. Simply put, mobile phones and other like gadgets do not belong in a driver's hand. The public interest requires motorists to resist the temptation to talk, text or otherwise become distracted to ensure that our streets do not resemble battlefields. Cases of dangerous driving, like this one, which result in significant injuries to a third party and are caused by a motorist being purposefully distracted because of use of a hand-operated electronic device, require that the primary

> sentencing considerations be denunciation and general deterrence even for sympathetic first-time offenders, with good driving records, who, like the [accused], are considered by probation services to be remorseful and a "very low risk to re-offend."

Complete case available at www.canlii.org

METAPHYSICAL POSSIBILITY DOES NOT RAISE A REASONABLE DOUBT

R. v. Laveck, 2015 ABCA 61

Police followed a stolen truck for several minutes. A man drove it and had a female passenger. Police lost the vehicle for two minutes but found it abandoned in an alley. There were no keys in the ignition and its steering column was broken so it could be started without a key. Walking nearby the alley's mouth were the accused and a woman. They resembled the two seen in the truck and were about a 20 second walk away from it. Police saw no-one else. A cyclist in the area saw two people leave the truck. He then rode around the block after seeing police converge in the area, but also saw no-one else around. The accused was subsequently convicted of possessing stolen property and dangerous driving.

On appeal, the accused argued that the police had not checked for suspects in all possible places around the area. It could have been possible, he suggested, that the police arrested the wrong couple. In the minute or two that the police lost the stolen vehicle, he contended that the offending couple disappeared from the scene and another innocent couple (he and the woman) appeared at the right time and place. The Alberta Court of Appeal rejected this possibility:

> [W]e view this as a case of interlocking circumstantial evidence. … The question for a trial judge is not whether any one piece of evidence could leave a reasonable doubt. The question is whether the cumulative effect of all that evidence leaves a reasonable doubt. [para. 6]

And further:

> It is metaphysically possible that in the relevant 100 feet or so, and during the relevant 20 seconds or so, one couple disappeared, and a similar-looking couple appeared. But the chance of that is so extremely remote that it does not constitute a reasonable doubt. [para. 14]

As for knowledge that the truck was stolen, the Court of Appeal concluded that this had been proven:

> Knowledge of the driver that the truck was stolen is easily inferred from the evident damage to the steering column and the starting system, the lack of keys, evading the police, and the tools possessed. [para. 16]

Complete case available at www.canlii.org

WILFUL BLINDNESS A SUBSTITUTE FOR FULL KNOWLEDGE

R. v. Chang, 2015 BCCA 62

The British Columbia Court of Appeal has confirmed a trial judge's conclusion that the accused's state of knowledge about the stolen nature of a motorcycle he claimed he had purchased from a third party owner had been proven beyond a reasonable doubt through the doctrine of willful blindness, even if his "fairy-tale-like story" was believable:

> Wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. [para. 25, reference omitted]

The accused said he had handed over all the money he had, plus some he had borrowed, without even test driving or starting the motorcycle. He said he met the seller at a gas station and later that day paid cash for the motorcycle at an apartment parking lot. He did not try to confirm that the vendor was the person entitled to sell the motorcycle and, while parked at the apartment, it had licence plates attached to it that were not registered to it or any other vehicle. Although the judge noted that there were individual pieces of evidence from which innocent inferences could be drawn, the evidence as a whole was proof beyond a reasonable doubt. The accused had "failed to inquire about whether the vendor of the motorcycle had stolen it because he did not want to know the truth."

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

FALSE INFORMATIONS A NULLITY

R. v. Awad, 2015 NSCA 10

The Nova Scotia Court of Appeal has reinstated a provincial court judge's ruling that informations against eight accused persons were a nullity because the officer who swore them did so falsely. The officer testified she swore before a JP that she had reasonable grounds to believe that individuals named in hundreds of informations had committed crimes. However, she actually had no knowledge whatsoever about the charges and therefore no reasonable grounds to believe that any criminal offence had been committed. Instead, she merely relied on her belief that whoever investigated the cases had the necessary reasonable grounds or that her superiors did.

After learning of this defect, eight individuals brought a motion before a Nova Scotia Provincial Court judge to quash the informations against them as being nullities. The judge found the officer swore a false information and in doing so misled the JP. He quashed the informations and did not allow them to be re-sworn so the current proceedings could continue. The Court of Appeal agreed:

> [I]t is just as much a failure to comply with the mandates of the Code for the informant to falsely swear before the proper judicial officer that she has reasonable grounds to believe a named individual has committed certain offences, as it is to have such a belief, but purport to swear to those matters before someone who is not a properly designated judicial officer. [para. 30]

And further:

> An information based on a false oath is just as much a nullity as if an informant swore an information before someone who is not a justice of the peace, or a crucial date is left out, or where the name of the informant is left blank. [para. 33, reference omitted]

The Crown could, however, institute new proceedings by having the informations re-sworn by an officer having the requisite grounds to do so.

Complete case available at www.canlii.org

JUDGE'S SELF DIRECTED RESEARCH A NO-NO

R. v. Bornyk, 2015 BCCA 28

The British Columbia Court of Appeal has set aside the acquittal of an accused on a break and enter charge after a judge did his own literature review. A police officer who was qualified as an expert in the identification, comparison and individualization of fingerprints identified a fingerprint found within the home of the break and enter as belonging to the accused. The judge then took it upon himself to read several articles that were critical of fingerprint analysis. These articles were not marked as exhibits, tested in evidence nor put to the fingerprint expert. But portions of the articles were replicated in the judge's reasons for acquittal. The judge also compared the latent print lifted from the home with the known print and found discrepancies.

The Crown appealed the acquittal arguing that the trial judge erred by relying on his own research and by engaging in his own unguided comparison of the latent print to the known print. The Court of Appeal found the trial judge did err. First, the judge could only rely on the evidence presented at trial unless judicial notice could be taken. "Judicial notice, of course, is limited to facts that are notorious or generally beyond debate, as in the assertion the earth is not flat, or are capable of immediate and accurate demonstration from readily accessible sources of indisputable accuracy, as in the assertion that New Year's Day in 2015 fell on a Thursday," said Justice Saunders, speaking for the unanimous Appeal Court. Here, the articles reviewed by the judge were commenting on forensic science and involved discussions on fingerprint analysis, including opinion. These were not matters for which the judge could take judicial notice and therefore he erred in embarking on his self-directed, independent research and considering the fruits of his investigation in his decision. In doing so, he compromised the appearance of judicial independence and assumed the role of advocate, witness and judge. Second, his own analysis of the

fingerprints, absent the assistance of an expert, was problematic:

> The very point of having an expert witness in a technical area, here fingerprint analysis, is that the specialized field requires elucidation in order for the court to form a correct judgment. While it may be desirable that a judge personally observe the similarities and differences between the latent point and known point, such examination should be guided by a witness so as to avoid the trier of fact forming a view contrary to an explanation that may be available if only the chance were provided to proffer it.
>
> The judge relied upon his own observation of what he said was a difference between the latent and known prints. The fingerprint witness however was never questioned on that area of the fingerprint. Whether this "difference" is forensically significant is speculation. This unassisted comparison had a material bearing on the verdict. [paras. 18-19, references omitted]

A new trial was ordered.

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

s. 127 NOT ULTRA VIRES: LEGISLATION CONSTITUTIONAL

R. v. Gibbons, 2015 ONCA 47

The Ontario Court of Appeal has upheld the constitutionality of s. 127 of the *Criminal Code*. This provision makes it a hybrid offence to, without lawful excuse, disobey a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order (other than the payment of money) unless a punishment or other mode of proceeding is expressly provided by law. "Act" is defined in s. 2 of the *Criminal Code* to include "an Act of the legislature of a province."

In this case, the accused breached an interlocutory injunction issued by an Ontario Court judge that prohibited anti-abortion protests within 60 feet of certain abortion clinics. She had leaflets and was carrying a 2-foot by 3-foot sign that said: "Why mom? When I have so much love to give." She stood on the sidewalk in front of a clinic and was warned by a sheriff to move outside the 60-foot buffer zone created by the injunction. Despite multiple warnings, she refused to move. The police were called and they too asked the accused to move. She again refused and was arrested and charged under s. 127.

At her trial, the accused argued that s. 127 was *ultra vires* (beyond the powers) Parliament because the section delegated part of the federal criminal law power to provincial legislatures. In its ruling, the Ontario Court of Appeal cited the Supreme Court of Canada in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, which stated:

> The distinction between creating the criminal law and engaging it is illustrated by consideration of s. 127 of the [Criminal] Code, which makes it an offence to disobey a lawful order made by a court of justice "or by a person or body of persons authorized by any Act to make or give the order". "Act" is defined (in s. 2 of the Code) to include "an Act of the legislature of a province". This means it is <u>always</u> a criminal offence to breach an order of a provincial tribunal, even if that tribunal is not authorized by provincial law to file the order as an order of the court. It is clear that the province is not enacting criminal law every time it empowers a tribunal to make orders which may not be filed with the court, even though it is a criminal offence to breach such an order; rather, the province has enacted non-criminal law, which is within its sphere of competence, and Parliament, acting within its sphere, has decided to make it a criminal offence to breach this provincial law. Similarly, the province is not enacting a new criminal law each time it provides that orders of a particular tribunal are to be enforced as a court order. Such a provision is non-criminal law; it is the common law which provides that breach of such an order may, in certain circumstances, be a criminal offence. [emphasis in original]

Section 127 was not unconstitutional. Parliament did not impermissibly delegate its federal criminal law power to provincial legislatures.

Complete case available at www.ontariocourts.on.ca

PROVINCIAL ARREST JUSTIFIES INCIDENTAL SEARCH

R. v. Guray, 2015 BCCA 183

After being flagged down by a taxi driver in the early morning hours, two police officers were told that the accused, a passenger, would not leave the cab. Police attempted to get the accused's attention and eventually assisted him out of the vehicle. He was arrested for being intoxicated in a public place under BC's *Liquor Control and Licensing Act* (*LCLA*). Police searched the accused's pockets and found a credit card with his name on it. They continued the search and also found approximately one-half gram of powder cocaine and ten and one-half grams of rock cocaine divided into 19 individually wrapped units. When arrested for possessing the drugs for the purpose of trafficking, the accused said he was feeing sick and his chest hurt. He was transported to the hospital for examination and, when discharged, taken to police cells where he was later released on a Promise to Appear when he was sober.

British Columbia Provincial Court

The accused argued that the police did not have sufficient grounds to arrest him under the *LCLA* for being intoxicated in a public place. As well, he submitted that the taxi was not a "public place" as defined in the *LCLA*. In his view, the arrest was unlawful and the search incidental to his arrest went beyond a pat down. He contended that the evidence ought to have been excluded under s. 24(2).

The judge found that the surrounding circumstances, plus the indicia noted by the officer, provided the necessary reasonable and probable grounds, both subjectively and objectively, for an arrest under the *LCLA*. This included the location (a downtown area with many bars and public houses), the time of day (shortly after the liquor establishments closed), and the officer's experience. As for the search, the judge found it was properly conducted as an incident to arrest. An officer testified that he was searching for evidence (such as alcohol), the accused's safety (items he could use to harm himself), officer safety (weapons and tools to facilitate escape) and identification. He also found the taxi was a "public place" since it had been rented out. The accused was convicted of possessing cocaine for the purpose of trafficking.

British Columbia Court of Appeal

The accused challenged the trial judge's rulings arguing he had erred in finding the taxi to be a "public place" under the *LCLA*. He opined that he only entered a public place when the police removed him from the taxi onto the sidewalk. As well, he contended that the police did not have the reasonable grounds necessary to arrest him since his symptoms of intoxication were equally consistent with illness. As for the search, he suggested it exceeded that which was permitted by law. After finding the credit card identifying the accused, the police were only looking for alcohol, escape tools and weapons. A less intrusive pat-down search for these items, rather than a pocket search, would have sufficed. As a consequence, he argued the evidence should have been excluded under s. 24(2).

BY THE BOOK:

BC's *Liquor Control and Licensing Act*

Public Place

s. 1 "public place" includes

(a) a place, building, passenger conveyance, boat or land to which the public resort or are permitted access, and

(b) a motor vehicle located on land to which the public resort or are permitted access;;

...

Drunkenness in Public Place

s. 41 (1) A person who is intoxicated must not be or remain in a public place.

(2) A peace officer may arrest, without a warrant, a person found intoxicated in a public place.

"There is no dispute that a police officer may arrest a person if the officer has reasonable grounds to believe the person is intoxicated. A police officer must subjectively believe the person is intoxicated in a public place and that belief must be objectively reasonable. Reasonable grounds requires more than suspicion but something less than proof on a balance of probabilities."

"Public Place"

"Public place" is defined in the *LCLA* as including "a motor vehicle located on land to which the public resort or are permitted access." Unlike the trial judge who found that the taxi was a public place because it had been rented out, the Court of Appeal found he had not "hired the taxi or become a 'fare' or, if he had, the fare had been terminated at the taxi driver's direction." Instead, the taxi was a "public place" because it was a motor vehicle to which the "public resort or are permitted access". In the Appeal Court's view, it was unnecessary to determine whether the taxi would have remained a public place if the accused had hired it to take him to a destination.

Removal from the Taxi

Even though the police had not yet decided to arrest the accused, he was removed from the taxi onto the sidewalk, a public place. As for this action, the Court of Appeal found the police were justified in detaining the accused and removing him from the taxi. Justice Harris, speaking for the Court of Appeal stated:

> It appears to me that the police officers were entitled to require [the accused] to get out of the taxi, even if at that time they had not decided that they subjectively had reasonable grounds to conclude that he was intoxicated in a public place. [The officer] explained that she made him leave the taxi because he was refusing to do so at the driver's request. She explained that the taxi was a commercial vehicle, that the owner or operator of the taxi had asked [the accused] to get out, he was not complying with that instruction, and the taxi driver had requested assistance. [The accused's] conduct falls within the definition of mischief contrary to ss. 430(c) and (d) of the [Criminal Code] since he was obstructing or interfering with the lawful use or operation of the taxi by the taxi driver. [para. 18]

Thus, the accused had been in a public place throughout his interaction with the police, both while in the taxi and on the sidewalk.

Arrest

Once the accused was out of the taxi the police completed their assessment of his condition. Section 41 of the *LCLA* allows the police to arrest a person found intoxicated in a public place. "There is no dispute that a police officer may arrest a person if the officer has reasonable grounds to believe the person is intoxicated," said Justice Harris. "A police officer must subjectively believe the person is intoxicated in a public place and that belief must be objectively reasonable. Reasonable grounds requires more than suspicion but something less than proof on a balance of probabilities."

As for whether there were reasonable grounds in this case, the Appeal Court found the officers were justified in making the arrest. "The question is whether, in the circumstances, the police officer's subjective belief was objectively reasonable," said Justice Harris. "I do not think that the police officer was required to rule out alternative explanations of [the accused's] apparent condition before the police officer's belief that he was intoxicated can be seen as being a reasonably held belief." The Court continued:

> The trial judge identified a number of factors that grounded her conclusion that the police officer had reasonable grounds to conclude that [the accused] was intoxicated. Those grounds included the smell of alcohol, his bloodshot and glassy eyes, his unresponsiveness to questions, his balance problems, the time of day and the location where he was found. [The officer] also described other factors underlying her subjective belief that he was intoxicated, each of which is capable of supporting the objective reasonableness of her belief. For example, she

> also referred to his unfocused eyes, his slow passive movements and his disheveled clothing. [The officer] formed the view that [the accused] was sufficiently intoxicated that he was incapable of looking after himself. On all of the evidence, that view strikes me as being objectively reasonable. [para. 23]

Search

The accused first submitted that the search of his pockets was unnecessarily intrusive because the police could have satisfied their objectives of searching for more alcohol, tools to assist escape or weapons by means of a pat down search, which would have been unlikely to yield the drug evidence. Second, the accused's semi-comatose condition precluded him from posing a concern for officer safety. Finally, the credit card identifying the accused had been found at the beginning of the search, before any drugs were found, thereby satisfying any concerns about his identity. In his view, the circumstances of the search needed to comply with the principles established for investigative detention in *R. v. Mann*, 2004 SCC 52.

In this case, however, the accused had been arrested and was not merely detained for investigation. Therefore, the power of search associated with arrest applied:

> It is not in dispute that, assuming the arrest to be lawful, the police officers were entitled to search [the accused] incidental to the arrest. The search must be conducted for a legitimate purpose proximate in time and place to the arrest in order to be truly incidental to it. The search must be in furtherance of a valid police objective connected to the arrest itself. That objective includes a search for evidence. The reasonableness of the search is to be considered objectively.
>
> The trial judge found that there were several objectively reasonable valid purposes justifying the search incidental to arrest. The most important of these included officer and public safety as well as [the accused's] own safety. The Crown contends further that the evidentiary search for alcohol or other intoxicants, including drugs, was independently sufficient to justify the pocket search. I agree.
>
> In my view, in all the circumstances, it was open to the judge to find that the search as conducted was objectively reasonable, and implicitly, that a simple pat-down search was therefore not all that could be justified in the circumstances. [paras. 25-27]

Since the arrest and search were lawful, it was unnecessary to consider s. 24(2) of the *Charter*. The accused's appeal was dismissed.

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

Grounds For Arrest

As found by the trial judge, the officer articulated the following grounds for her belief that the accused was intoxicated by drugs or alcohol and not able to care for himself:

- His appearance, demeanor and behaviour:
  - his eyes were wide open but glassy, red and unfocussed.
  - his movements were slow and passive.
  - his clothing was dishevelled.
- The faint smell of alcohol when she first dealt with him.
- He appeared unable to comprehend or unable to respond to verbal stimuli.
- The location – within the bar district of downtown Victoria.
- The time of day – approximately 3:30 a.m., after local bars have closed.
- The fact that it was very common for people to be intoxicated in the bar district of downtown at that time of day.
- The circumstances provided by the taxi driver – that he had just picked up the accused as a passenger and he would not or could not tell what his destination was and would not get out of the taxi.
- Her over 20 years as a member of the Victoria Police Department and nine years as an auxiliary member of the Royal Canadian Mounted Police.
- Her considerable experience, both professional and personal, dealing with people who are intoxicated by alcohol and/or drugs.

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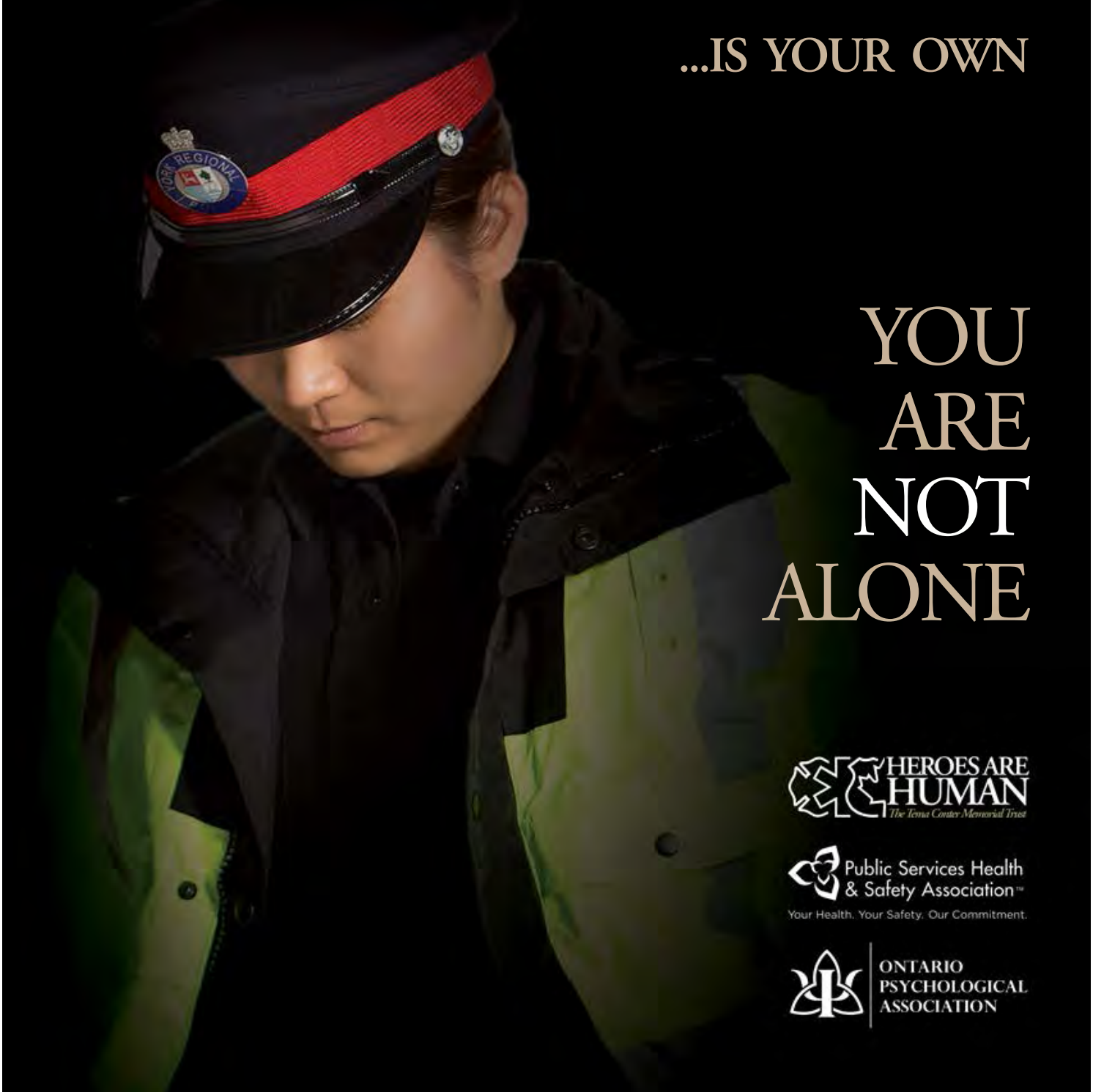

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'CLEARING SEARCH' NOT OBJECTIVELY REASONABLE

R. v. Ahmed-Kadir, 2015 BCCA 346

An apartment building manager called 9-1-1 after hearing a disturbance in the suite occupied by the accused and a woman. He told the 9-1-1 dispatcher that he could hear two voices, a male and a female. Two police officers were dispatched to the call as a domestic assault in-progress. The dispatcher informed the officers that the caller reported hearing a female voice crying and screaming "stop hitting me", and the sounds of slapping. When police arrived some four minutes later, the building manager directed the officers to the suite where they could hear a female screaming inside. When the officers knocked on the door and identified themselves as police, a female answered and stepped out into the hallway when asked to do so. The other officer entered the suite and asked for any persons inside to identify themselves. The accused came out of the bedroom and was arrested for assault. He was handcuffed, but not advised of his rights under s. 10(b) of the *Charter*. He was placed on the sofa in the living room. The officer then cleared the suite after conducting a quick check for other persons.

After speaking with his partner, the arresting officer removed the co-operative accused's handcuffs. The police were trying to determine whether an assault had in fact occurred. Four other police officers attended at the suite. Two remained in the hallway and two went inside. One of these officers recognized the accused as someone affiliated with a gang and "flagged as armed and dangerous". The accused was re-handcuffed behind his back and it was learned via police radio that he had a firearms prohibition. The accused was asked if there were drugs or firearms in the suite, and told he could turn them over without charges being laid. He replied he was not aware of any such items. A police wagon driver then arrived and walked into the suite. She looked around, including in the bathroom, the bedroom and the kitchen. In the kitchen she saw a "bong" and two clear bags on top of the refrigerator. One bag contained several balls of a black substance and the other contained a rock of a white substance. She believed these bags contained drugs packaged for trafficking. She then opened a closet, which was to her back, but no one was in it. The arresting officer, who was six feet tall, then checked the closet and looked into a bag on an upper shelf by standing on his toes. In the bag he observed a . 357 calibre Ruger revolver, which turned out to be loaded. He arrested the accused for possessing the drugs (26.6 grams of cocaine) and the handgun, and informed him of his right to counsel under s. 10(b). The female was also arrested when she said the drugs were hers. The accused's fingerprint and palm print were found on the handgun and on the bag in which it was found. He was charged with three firearm offences as well as possessing cocaine for the purpose of trafficking. The female was also charged with possessing cocaine for the purpose of trafficking.

British Columbia Provincial Court

The arresting officer testified he believed he had reasonable grounds to arrest the accused based on the screaming he had heard and unspecified information provided by the female. He said it was standard practice for the first officers on the scene to do "a quick clearance of the suite to make sure there's no other parties we're not aware of", and leaving it to other officers to do "a secondary safety search for other people." The officer who opened the closet said she did so "just to make sure that the suite was clear of any people", even though she did not speak to any of the officers already on scene nor had any information there were more than two people in the suite.

The accused argued that the warrantless searches that led to the seizure of the drugs and handgun were unreasonable and violated his rights under s. 8 of the *Charter*. In addition, he asserted that he was arbitrarily detained under s. 9 and that his right to counsel was infringed under s. 10(b).

The judge found breaches of both ss. 9 and 10(b). Although the accused's initial arrest was lawful, his detention became arbitrary when he was re-handcuffed because that detention was unconnected with the domestic assault investigation. He found

the police "simply wanted to keep an 'eye' on [the accused] upon some vague suspicion that [he] may be up to some improper activity." As for the right to counsel, the judge found there was no reason for police to delay providing the accused with the informational component of s. 10(b) from the time of the initial arrest for assault until the time of the second arrest in relation to the drugs and the handgun, some 20 minutes later.

The searches, however, were not unreasonable under s. 8. The judge found the initial entry by police into the suite was authorized because the officer was acting in the course of a duty, and the entry was a justifiable exercise of that duty. The judge found that "the common law duty of police officers to fully explore 911 calls" that involved potential domestic violence was reasonable in the circumstances. He also found the wagon driver's clearing search was reasonable in the circumstances and seeing the suspected drug bong and cocaine in the kitchen was simply incidental to that practice. Clearing the hallway closet was also a reasonable precaution as her observations of the suspected drug bong and cocaine would clearly heighten officer safety concerns. The judge also held the clearing searches were "justified" as incidental to the accused's arrest. As for the arresting officer looking into the bag, the plain view doctrine was inapplicable because peering up and into the bag did not satisfy the requirement of inadvertence. However, this action was nonetheless reasonable given the officer's "heightened safety concerns".

Despite the ss. 9 and 10(b) *Charter* breaches, the evidence was nevertheless admitted under s. 24(2). The breaches were unrelated to the discovery of the cocaine or the handgun and the officers did not act in bad faith. The accused was convicted of unlawfully possessing a loaded prohibited firearm, unlawfully storing it and possessing cocaine for the purpose of trafficking. The female was acquitted of the drug charge.

"It is clear the police have the power, at common law, to conduct warrantless searches to ensure their own safety and the safety of others."

British Columbia Court of Appeal

The accused challenged his convictions, in part, by asserting that the trial judge erred in finding that the warrantless searches did not breach s. 8 and in not excluding the evidence under s. 24(2). He argued there were three searches of the suite:

- The initial entry and clearing search by the arresting officer;
- The clearing search by the wagon driver, including the closet; and
- The closet and bag search by the arresting officer.

He agreed the first entry and clearing search were lawful, but submitted the further searches were not.

The Crown did not challenge the trial judge's conclusions with respect to the ss. 9 and 10(b) breaches, but contended it would be artificial to split the police action into three searches. In the Crown's view, the police engaged in a continuum of activity all of which was lawful under the "9-1-1 safety search doctrine."

Warrantless Safety Searches

The Court of Appeal acknowledged that the police can conduct a safety search of a residence. However, this power has its limits:

> It is clear the police have the power, at common law, to conduct warrantless searches to ensure their own safety and the safety of others. It is also clear the exercise of that power within the limits of the common law will not infringe s. 8 of the Charter. However, there is no separate search doctrine applicable to 9-1-1 calls. Rather, when in the course of responding to a 9-1-1 call the police conduct a warrantless search, the nature of the call will be a factor in determining whether that power was validly exercised. [para. 62]

Since the accused did not challenge the arresting officer's entry into the suite nor his initial arrest, the wagon driver's walk-through and looking into the rooms was reasonable. She was entitled to assist the

"[W]hen in the course of responding to a 9-1-1 call the police conduct a warrantless search, the nature of the call will be a factor in determining whether that power was validly exercised."

arresting officer and by being lawfully in the hallway she could look through open doors as she made her way to the living room. As for the "clearing search" of the bedroom, however, the wagon driver's belief that her actions were justified for reasons of officer safety was not objectively reasonable. Matters appeared under control. Although the police had been dispatched to the suite in response to a domestic-dispute complaint involving two parties, two officers were in the hallway outside the suite dealing with a woman and another officer was in the living room dealing with the accused. The Court of Appeal concluded these circumstances were insufficient to justify the wagon driver's safety search:

> This factual matrix does not support an objectively reasonable belief that a clearing search of the bedroom was necessary to ensure [the officer's] safety or the safety of others. Indeed, the information upon which she acted does not support an objectively reasonable suspicion there was someone hiding in the suite who posed a danger.
>
> I particularly reject the argument advanced by the Crown that upon entering the suite [the officer] was entitled to look into every closet or space in which she believed someone could hide. To accept that argument is to accept, for example, that the second wagon driver who arrived later was entitled to conduct another clearing search. I would also point out that the alternative reason given by [the officer] for why she went into the bedroom—"to make sure we had the number of parties accounted for"—does not bear scrutiny. She responded to a domestic-dispute complaint involving two people. Upon arrival, she found other officers dealing with a woman outside the suite and a man inside; the situation was under control. She did not speak with any of those officers to inquire whether there were any persons unaccounted for or whether there were any outstanding safety concerns. Given the nature of the complaint there was no objective basis for her to even suspect someone else might be present. [paras. 75-76]

As for opening the closet, the wagon driver did not explain why she believed someone who posed a threat could be hiding in it. She did not have an "objectively reasonable belief or suspicion that an examination of the inside of the closet was necessary to exclude a potential threat." The bedroom and closet search conducted by the wagon driver were unreasonable.

Since opening the closet door constituted an unreasonable search, the examination of the contents of the closet was also unreasonable. And, even if the closet door could be opened for safety purposes, it would still be unreasonable to look into the bag. Its contents were not in plain view. The arresting officer needed to stand on his toes to look in it. There was no reason provided by the officer why he was concerned about the bag's contents and why it was necessary to look inside it. "While he was interested in seeing what was in the bag, there is nothing in his evidence to connect that interest to safety concerns," said Justice Frankel. "He had no objective basis on which to believe or suspect the bag contained a weapon."

s. 24(2) of the Charter

The cocaine was admitted as evidence. It was found in plain view by an officer lawfully entitled to be in the suite and its discovery was unrelated to any of the other *Charter* breaches. The firearm, however, was excluded. "The importance of maintaining respect for Charter rights and ensuring that the justice system remains above reproach outweighs the collective cost of his acquittal," said Justice Frankel. "To admit the handgun in the face of the breaches that occurred here would send the message that when the charges are serious, individual rights count for little." As a consequence, the drug conviction was upheld but the accused's appeal concerning the two firearm charges was allowed, those convictions were set aside and acquittals were entered.

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

BC's MISSINGS PERSON ACT

BC's new *Missing Persons Act* (*MPA*) and *Regulations* (*MPAR*) recently became law. The main goal of this new legislation is to improve police access to information that may hold clues to a missing person's whereabouts. The law focuses on cases where a missing person hasn't been seen by, or in touch with, people who are normally involved in their lives. No evidence or proof of a criminal act is required. The legislation also focuses on vulnerable or at-risk persons whose safety and welfare are of concern because of their age, physical or mental capabilities, or the circumstances surrounding their absence. The legislation attempts to balance access to key information with privacy rights.

The *MPA* defines a "missing person", "person at risk" and "vulnerable missing person":

"missing person" means an individual whose whereabouts are unknown despite reasonable efforts to locate the individual and

(a) who has not been in contact with those persons who would likely be in contact with the individual, or

(b) whose safety and welfare are feared for given

(i) the individual's age,

(ii) the individual's physical or mental capabilities, or

(iii) the circumstances surrounding the individual's absence.

"person at risk" means an individual assessed, in accordance with the regulations, to be at risk.

"vulnerable person" means an individual

(a) for whom a committee has been appointed under the Patients Property Act,

(b) for whom a representation agreement under the Representation Agreement Act is in effect, or

(c) who is the subject of a support and assistance plan under section 53 or 56 of the Adult Guardianship Act.

In cases meeting these thresholds, police will be able to apply for a court order. When applying for a court order there is an application which must be completed by the police. The standard to be met for an order to be granted is ***"reasonable grounds to believe."***

Record Access Order

This order requires someone who has a missing person's records to provide police with access to them. The legislation sets out the scope of records a justice may order released, including telephone calls, text messages, video footage, photographs, and school, health, employment, financial and other relevant data.

Search Order

This order allows entry into a private home or other location where police believe a minor, vulnerable person or person at risk may be located.

Third Party Record Access Order

This order provides access to the records of a person last seen with, or believed to be in the company of, a missing minor, vulnerable person or person at risk.

Emergency Demand for Records By Police

When there is an emergency, such as a risk of serious bodily harm or death to a missing person, or a concern that records could be destroyed, the *MPA* authorizes police to directly demand access to records.

When a police officer serves an Emergency Demand for Records on a person, the officer must, as soon as practicable, file a report in Form 2 with the police force's officer in charge that sets out the circumstances in which the demand was made. Then, each year, the police force must prepare an annual report respecting emergency demands for records made which must include:

- the number of missing person investigations in which a demand was made;
- the total number of persons who were served with a demand; and
- any prescribed information.

In the event a person fails to comply with an Emergency Demand, a police officer may apply for a court order requiring compliance.

Applying for an Order

The Provincial Court of British Columbia has published a Practice Direction (CRIM 09) to set out the procedure for a police officer in making an *MPA* application:

1. MPA applications are heard by Judicial Justices (JJs).
2. Applications in person may be made at the Justice Centre or in a court locations in which JJs are normally resident or regularly preside in traffic court. This does not include circuit courts where there is no registry. JJs are considered available to hear applications in person during court sitting hours when not presiding in court, but not during scheduled breaks, lunch adjournments, or outside of court sitting hours.
3. Applications by fax may be made to the Justice Centre.
4. A police officer is instructed to telephone the Justice Centre to give advance notice that an application will be made.
5. Applications may not be referred to a judge without the approval of the applicable Regional Administrative Judge.

Disclosure of Information

The police may use information in a record accessed under the *MPA* only for the purpose of locating a missing person or a use consistent with that purpose. There are a number of limitations to the disclosure of this information.

Retention of Information

Under the *MPAR*, the police must ensure that copies of records provided during the missing person investigation are disposed of within 90 days after the date the missing person is located. However, copies of records may be retained if the missing person is found deceased, not located or for the purpose of a related criminal investigation.

Offences and Penalties

Persons who fail to comply with an order or Emergency Demand commit an offence. A person who fails to comply with the disclosure limitations also commits an offence. For individuals, the fine may be a maximum of $10,000 while a corporation can be fined a maximum of $25,000.

Other Provincial Missing Persons Acts

Alberta - *Missing Persons Act*
Nova Scotia - *Missing Persons Act*
Manitoba - *The Missing Persons Act*

Reference: *Missing Person Act protects vulnerable persons*.

PASSENGER PULLING PARKING BRAKE AMOUNTED TO MISCHIEF

R. v. McIlmoyle, 2015 ONCA 505

The Ontario Court of Appeal has upheld a conviction of mischief for an accused who grabbed a parking brake while the vehicle was in motion. The accused, along with his common-law wife, went to a party. After having too much to drink and arguing with his wife, he decided to leave and walk home. Being cold outside, the common-law wife called her daughter and persuaded her to drive down the street, pick up the accused and drive him home. When the daughter located the accused walking on the side of the road, she stopped her car and asked him to get inside. He initially refused but did so. As they drove, the two began to argue and the accused told her to stop the car so he could get out. She refused and continued to drive, avoiding traffic lights and stop signs. About a minute away from home, the accused reached over to the driver's side of the vehicle and pulled up on the parking brake. The car spun out and came to rest at the side of the road. The accused got out, pushed the car back onto the road and continued his walk home. No one was injured and the car was not damaged.

On appeal, the accused submitted that his conviction for mischief could not stand because the daughter was not in the lawful use of her motor

vehicle when the offence occurred. She was unlawfully confining him in her car, refusing to accede to his requests to leave the vehicle.

The Court of Appeal disagreed. "In our view, there was an adequate evidentiary basis upon which the trial judge could find that [the daughter] was lawfully operating her motor vehicle at the time the [accused] interfered with her operation of it by pulling the parking brake," said the Court of Appeal. It continued:

> The [accused] voluntarily entered the vehicle, well aware of [the daughter's] intention to drive him home. Following her mother's instructions, her purpose never changed. It is worth reminding that the offence of unlawful confinement, said to be the vitiating element here, requires that the confinement be for a significant period of time.
>
> It was open to the trial judge to conclude that Crown counsel had negated this offence, and thus established lawful operation, on the facts of this case. It is also arguable, though it was not advanced at trial, that [the daughter] was under a legal duty to continue her journey home because of the provisions of s. 217 of the Criminal Code and thus was not acting unlawfully in doing so. [reference omitted, paras. 10-11]

Complete case available at www.ontariocourts.on.ca

WEAPONS DANGEROUS DOES NOT SUPPORT USE CONVICTION

R. v. Andrade, 2015 ONCA 499

Following an altercation in a park with a group of young people, the accused went to his apartment, armed himself with an object that resembled a silver handgun and returned to a parking lot to confront the group. At the parking lot he threatened to kill one of the young men and struck him with the silver object. The accused went to trial on charges of possessing an imitation weapon dangerous to the public peace and using an imitation weapon while committing an indictable offence. The trial judge found the accused's actions went beyond mere possession of the imitation firearm and that he "used" it by pulling it from his pants, striking the young man and intimidating the other young people. Since his "use" of the imitation firearm occurred while he was committing the indictable offence of possessing it for a dangerous purpose, a conviction for using it while committing an indictable offence under s. 85(2) was entered.

The Ontario Court of Appeal overturned the "use" conviction ruling that a conviction for possessing a weapon for a purpose dangerous to the public peace under s. 88(1) of the *Criminal Code* (also known as weapons dangerous) could not constitute the predicate indictable offence necessary for a conviction of using an imitation firearm while committing an indictable offence under s. 85(2). The meaning of the word "uses" found in s. 85(2) requires more than mere possession. The "use" must facilitate the predicate offence. Thus, the offence of using an imitation (or real) firearm during the commission of an indictable offence requires a conviction for the specified indictable offence.

On a charge of weapons dangerous, the Crown must only establish that an accused possessed a weapon and that the purpose of that possession was one dangerous to the public peace. In this case, the accused took possession of the imitation weapon while in his apartment with the requisite intent, even before he revealed it to the group of young people. However, his conduct in beating the young man with the imitation weapon and intimidating others was not a "use" under s. 85(2).

> I conclude that the trial judge erred in law in finding that the impugned conduct of the [accused] (i.e. the use of the imitation weapon to beat [the young man] and to intimidate others) constituted a use under s. 85. This use did not facilitate the commission of the predicate indictable offence, which was complete when the [accused] took possession of the imitation weapon with the requisite intent. The trial judge found that this occurred when the [accused] was still in his apartment, before he ever revealed the imitation firearm to the group of young people. [para. 37]

The accused's conviction was under s. 85(2) was set aside.

Complete case available at www.ontariocourts.on.ca

ACCUSED HAD PRIVACY EXPECTATION IN COMMON AREAS OF CONDO BUILDING

R. v. White, 2015 ONCA 508

The police suspected that the accused, who owned and occupied a condominium unit in a 10-unit building, was involved with dealing drugs. He had become the target of a police investigation after they suspected a drug trafficker was using the accused's condominium unit as a stash house. A detective conducted three surreptitious entries into the common areas (stairways, hallways, and storage rooms) of the accused's condominium building without the knowledge of any of the residents and without prior consent:

- **First entry:** The detective entered the building by following a postal worker into the building through a door that was always locked. He then entered an unlocked storage room and observed the contents of a cage-like locker that corresponded to the number associated with the accused's unit. He saw a charcoal or carbon filter, a blower fan and a garden hose, among other things, which he considered could be used in a grow-op. He did not touch anything in the locker room, take photographs or video, or install any devices. He then went upstairs where he observed the accused's unit. He was in the building for about 20 minutes.

- **Second entry:** The detective entered the building through a locked stairwell door, which was insecure because it would not close properly. Once inside the building, he hid in a stairwell and saw a drug trafficker leave the accused's unit carrying a box. This trafficker was later observed transferring the box to a third person outside the building.

- **Third entry:** The detective stationed himself in the stairwell and observed the trafficker enter the accused's unit. He then overheard a conversation inside the unit and believed that it concerned a drug deal. He also heard what he thought was the sound of packing tape being removed from a roll. He saw the trafficker leave the unit with a box in his possession and deposit it into a minivan. The minivan was pulled over by the police and the box was found to contain 2,679.4 grams of marijuana and 166.6 grams of cocaine.

Using the information gathered from these entries, the police obtained a warrant to search the accused's condo. The judge who issued the warrant was not informed that the detective had entered the locked building without permission. When the warrant was executed, the police found 1.708 kgs. of cocaine, 6.86 kgs. of marijuana and 5.1 grams of crack cocaine. The accused was arrested and found to possess 0.4 grams of cocaine and $400 in cash. He was charged with possessing cocaine and marijuana for the purpose of trafficking, possessing cocaine, and possessing property obtained by crime.

Ontario Superior Court

The accused brought an application alleging a breach of his rights under s. 8 of the *Charter*. In his view, the three surreptitious entries and the subsequent search of his condo unit were unreasonable. The judge agreed, finding that the accused had a reasonable expectation of privacy in his condo and its common areas. The police infringed s. 8 by conducting the warrantless searches without statutory authority. Nor did the police have a constitutionally unrestricted right to trespass upon the private property in order to conduct the searches. The evidence obtained from the accused's condo unit was excluded under s. 24(2) and he was acquitted of possessing cocaine and marihuana for the purpose of trafficking along with possessing property obtained by crime. However, he was convicted of possessing cocaine based on other evidence obtained during the investigation.

"[T]he fact that a relatively large number of people may have access to a building's common areas need not operate to eliminate a reasonable expectation of privacy. "

Ontario Court of Appeal

The Crown appealed the accused's acquittals arguing that the trial judge erred in finding that he had a reasonable expectation of privacy in the common areas of the condo building. Thus, there was no s. 8 *Charter* breach. The Crown also submitted that the drugs should not have been excluded as evidence under s. 24(2).

Reasonable Expectation of Privacy

A reasonable expectation of privacy is determined having regard to all of the relevant circumstances in a particular case, including the considerations enumerated in *R. v. Edwards*, [1996] 1 S.C.R. 128:

- presence at the time of the search;
- possession or control of the property or place searched;
- ownership of the property or place;
- historical use of the property or item;
- the ability to regulate access, including the right to admit or exclude others from the place;
- the existence of a subjective expectation of privacy; and
- the objective reasonableness of the expectation.

The Court of Appeal rejected the Crown's "categorical proposition that 'residents of multi-unit dwellings do not have a reasonable expectation of privacy in the shared common areas of those buildings, and that police may conduct non-intrusive surveillance from these locations'." Under the Crown's view, the police would be granted virtually unfettered access to multi-unit dwellings. Instead, a "reasonable expectation of privacy is a context specific concept that is not amenable to categorical answers" and "a more nuanced, contextual approach is required." Justice Huscroft, speaking for a unanimous Appeal Court, stated:

s. 8 Charter
Everyone has the right to be secure against unreasonable search or seizure.

> If the police are entitled to climb through windows to gain entry to multi-unit residential buildings and, once inside, enter common areas such as storage rooms, hide in stairwells, and conduct surveillance operations for as long as they want on those who live there – all without a warrant – on the basis that those who live in these buildings have no reasonable expectation of privacy in the common areas, then the concept of a reasonable expectation of privacy means little. [para. 43]

And further:

> A resident may have possession or control of the common areas of a building to a greater or lesser extent. The size of a building may be a relevant consideration in determining reasonable expectations of privacy, as even in the context of a locked building protected by a security system it is reasonable to assume that the number of people that may be present in the common areas of the building will vary in accordance with the size of the building and its population. Ownership of the property may be of greater or lesser significance for the same reason. A resident of a large building with 200 units may have a lesser expectation of privacy than a resident of a small building with 2 apartments.
>
> In this case, the [accused] owned a unit in a relatively small building that [the detective] testified had only 10 units over four floors. The building was small enough that [the detective]

"If the police are entitled to climb through windows to gain entry to multi-unit residential buildings and, once inside, enter common areas such as storage rooms, hide in stairwells, and conduct surveillance operations for as long as they want on those who live there – all without a warrant – on the basis that those who live in these buildings have no reasonable expectation of privacy in the common areas, then the concept of a reasonable expectation of privacy means little."

had to hide, otherwise his presence as a stranger in the building might have been noteworthy. It was small enough that, from the stairwell, [the detective] could overhear conversations taking place in the [accused's] unit and identify specific sounds connected to activities going on in the apartment (such as the unrolling of packing tape). And, save for the malfunctioning north stairwell door, the building was always locked to non-residents.

Although the [accused] did not have absolute control over access to the building, it was reasonable for him to expect that the building's security system would operate to exclude strangers, including the police, from entering the common areas of his building several times without permission or invitation and investigating at their leisure. It was reasonable for him to assume that although access to the building's storage area was not regulated, it was not open to the general public. And it was reasonable for him to assume that people would not be hiding in stairwells to observe the comings and goings and overhear the conversations and actions within his unit.

In any event, the fact that a relatively large number of people may have access to a building's common areas need not operate to eliminate a reasonable expectation of privacy. It is one thing to contemplate that neighbours and their guests, all of whom may be strangers to another resident, might be present in the common areas of a building, but another to say that a resident has no reasonable expectation of privacy as a result. An expectation of privacy may be attenuated in particular circumstances without being eliminated. [paras. 45-48]

The Court of Appeal agreed with the trial judge that the accused, in this case, did have a reasonable expectation of privacy in the common areas of his condo building. Since he had a privacy expectation, the surreptitious entries into the building were searches for *Charter* purposes.

Were the Searches Reasonable?

A *Charter* compliant search must be authorized by law, the authorizing law must be reasonable and the search must be carried out in a reasonable manner. A warrantless search is presumptively unreasonable.

DISTINGUISHING CIRCUMSTANCES

The Ontario Court of Appeal distinguished White from two other cases in which no reasonable expectation was found when police entered apartment hallways. In those cases there was a single entry by police into the common hallways of apartment buildings in order to walk to a resident's door in the course of investigating complaints. The police conduct was much less intrusive than in White and neither resident owned the unit.

In R. v. Laurin (1997), 98 O.A.C. 50, the police received an anonymous complaint and entered an apartment building through unlocked doors for the purpose of knocking on a resident's door. Once inside the building, police smelled marihuana outside the accused's apartment. The Ontario Court of Appeal concluded that the police did not infringe on the accused's reasonable expectation of privacy by smelling marihuana in the hallway. The police were entitled to be in the hallway along with visitors, repair people and the landlord.

In R. v. Thomsen, [2005] O.J. No 6303 (S.C.J.), aff'd 2007 ONCA 878, the police were called by the property manager who reported a possible marihuana grow-op in a particular apartment. They entered the building through a locked door by following a tenant. Once inside, the police smelled marihuana in the hall outside the accused's apartment and heard a fan or droning sound coming from the apartment. The judge concluded that the accused id not have a reasonable expectation of privacy. He was not present at the time, had no right of possession or control or ownership of the hallway , there was no history of the use of the hallway that would exclude others, such as the police, the accused had no right to regulate access to the hallway, there was no evidence of a subjective expectation of privacy and there was no objective reasonable expectation of privacy.

Since there were no warrants authorizing the three surreptitious searches, they were *prima facie* unreasonable. There were no exigent circumstances nor were the police responding to a complaint. Nor could the searches be authorized under the implied invitation doctrine to enter common areas of the building to conduct non-intrusive investigative steps. "Although it is clear that the police, along with members of the public, have an implied licence to enter a property and knock on the door, this is for purposes of communicating with the resident," said Justice Huscroft. "In this case, the police did not use their implied licence to knock on the [accused's] door. On the contrary, the police did everything possible to conceal their presence in the building." The Court of Appel added:

> Even assuming that the police entered the building pursuant to an implied licence, the [accused] would have to establish that the searches were conducted reasonably. In my view, it would also fail at this step. [The detective]did not simply walk through the hallways of the building. He took advantage of defects in a security system in order to enter the building and conduct surveillance. He hid near the [accused's] unit in an attempt to eavesdrop or witness something. The building was so small and the insulation was so poor that he was able to overhear conversations and activities in the [accused's] unit from the stairwell. [para. 58]

Thus, the police were trespassers when they obtained evidence during the three visits to the condominium prior to obtaining a search warrant.

s. 24(2) of the Charter

The trial judge's exclusion of the evidence was upheld. First, the *Charter* breaches were serious and exacerbated by the detective's failure to inform the judge issuing the warrant in the ITO about the circumstances in which he obtained the evidence. Second, the impact of the breach on the accused's *Charter* rights was also serious, even though a reasonable expectation of privacy may be attenuated in the context of multi-unit buildings, where common areas including hallways, stairwells, and storage rooms are shared by the residents:

> In this case, the police overheard conversations and activities taking place within a unit by hiding in a nearby stairwell. The home is entitled to the greatest degree of protection from unreasonable search, and in my view, the police conduct in this case had a serious impact on the [accused's] privacy rights. [para. 66]

Finally, the trial judge's conclusion was entitled to deference. He found the long-term impact of admitting evidence obtained in the search of a dwelling house with an improperly obtained warrant would bring the administration of justice into disrepute.

The Crown's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

www.10-8.ca

FORCE JUSTIFIED TO GAIN COMPLIANCE WITH INSTITUTIONAL RULES

R. v. Nome, 2015 SKCA 73

The accused was being held in a remand unit at a Saskatchewan Correctional Centre where he was allowed to wear street clothing. As a result of a disruption in the remand unit, he was transferred to the medical unit where he was required to wear institutional coveralls, no exceptions. He was repeatedly told to put on the coveralls but refused to comply, making it clear that he was prepared to physically resist any attempt to force him to don the coveralls. He said there was no way he would be putting on the coveralls and also said, "If you are going to try to make me put them on there is going to be a fight." He also indicated that more than two corrections officers would be needed to put the coveralls on him. More correctional officers came to assist. A correctional supervisor gave him a direct order to put on the coveralls and said that if he refused, corrections officers would put the coveralls on for him. The accused told a female corrections officer to leave the area as there was going to be a physical altercation. After it was clear that the accused would not comply, corrections officers were told to put the coveralls on him.

When one of the correctional officers reached out with both hands to grab the accused's arm, the accused punched the officer in the mouth. The punch knocked the officer back and he tripped over the lip of a shower, fell back, and hit his head against the wall. During a struggle with the other corrections officers, the accused flailed his arms and legs and bit two officers. He ended up with a black eye, two missing teeth and miscellaneous bruises. He was subsequently taken back to the medical unit where he threatened a nurse by stating, "I'm going to smash your head in with a baseball bat." He was charged with several offences.

Saskatchewan Court of Queen's Bench

The judge found the corrections officers were entitled to use force on the accused. They were "peace officers" under s. 2 and had the authority to use force under ss. 25, 26, 27, 32, 35 and 37 of the *Criminal Code*. Saskatchewan's *Correctional Services Act* gave corrections officers custodial authority over offenders who were subject to rules and regulations. As for the policy relating to wearing institutional coveralls, the judge found this was reasonable for safety and security purposes. Safety for the inmate because it precluded the use of clothing or items associated with clothing from being used to harm oneself or others. Security for inmates and staff because it was unlikely that weapons could be hidden in the institutional coveralls without being noticed.

The accused had refused to comply with a reasonable order and the officer who reached out to grab him was in the lawful execution of his authority. When the accused punched the officer he escalated the situation such that the other correctional workers present were required and entitled to respond. The amount of force used was authorized, necessary and reasonable. The accused was convicted on two counts of common assault for biting two officers, assault causing bodily harm against the officer he punched and uttering threats against the nurse. He was designated as a dangerous offender and received an indeterminate sentence of imprisonment.

Saskatchewan Court of Appeal

The accused appealed his dangerous offender designation and his conviction for assault causing bodily harm, which was the predicate offence for the purpose of the dangerous offender application. He argued that the corrections officers did not have the authority to use force against him and therefore they were not in the lawful exercise of their duties when they attempted to use force against him. He contended that his refusal to don institutional coveralls was at most a Class C administrative offence under Saskatchewan's *Correctional Services, Administration, Discipline and Security Regulations*, which would result only in a disciplinary hearing and certainly not the use of force by corrections officers against him when enforcing the rule. Furthermore, he submitted there were no powers of arrest nor was reasonable force authorized for Class C offences. In his view, if the officers were not acting lawfully, self defence and consent to the altercation would need to be considered.

BY THE BOOK:

Use of Force: s. 25 Criminal Code

s. 25(1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(a) as a private person,

(b) as a peace officer or public officer,

(c) in aid of a peace officer or public officer, or

(d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

Lawful Force?

Under s. 2 of the *Criminal Code* a "peace officer" includes "a member of the Correctional Service of Canada who is designated as a peace officer pursuant to Part I of the Corrections and Conditional Release Act, and a warden, deputy warden, instructor, keeper, jailer, guard and any other officer or permanent employee of a prison other than a penitentiary as defined in Part I of the Corrections and Conditional Release Act." Under s. 25(1) a peace officer "who is required or authorized by law to do anything in the administration or enforcement of the law ... is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose."

In delivering the Court of Appeal's decision, Justice Herauf first concluded that a guard-inmate relationship had been established in this case. "[The

corrections officer] was a peace officer who had the power to provide a correctional service," he said. "Consequently, [he] had 'custodial authority' over [the accused]. Based upon his custodial authority, [the corrections officer] was entitled to use reasonable force to enforce orders and subsequently avail himself of the protection of s. 25."

Second, in deciding whether the force used was justified in the circumstances, "the Court should take into account the nature of the order made by the guard to the inmate, the nature of the inmate's disobedience, the consequences (both actual and potential) of the inmate's disobedience, the inmate's own circumstances, and the availability of alternatives to the use of force." Here, the force used was justified. The officer's attempt to grab the accused's arm was a reasonable use of force in the circumstances. It was a justified and appropriate response to the accused's refusal to wear the institutional coveralls provided to him.

Justice Herauf rejected the accused's submission that his refusal to comply with the directions of the corrections officers in this case could only result in a disciplinary hearing:

> Even though the breach of a rule by an inmate will more likely than not result in a disciplinary hearing, this cannot possibly foreclose the use of force by corrections officers when situations arise that require urgent attention for safety or security reasons, such as in this case. It would make no sense in view of the urgent safety and security issues mentioned above, to initiate potential disciplinary proceedings with the inherent delays associated with such a hearing. To do so would basically make the rule relating to wearing institutional coveralls in certain high risk units meaningless.

The correction officers were justified in using force and the force used was reasonable in the circumstances. The issues of self-defence and consent to fight did not need to be considered.

The accused's appeal against his conviction was dismissed and his dangerous offender designation was upheld.

Complete case available at www.canlii.org

MANNER OF SEARCH REASONABLE: NO-KNOCK BY ERT OK

R. v. Al-Amiri, 2015 NLCA 37

After receiving information from a reliable informer, police suspected the accused of receiving illegal drugs through the mail. A package addressed to his residence, but with a fictitious name, was intercepted by postal officials. The package was opened and found to contain 15,300 ecstasy pills. Police removed all the pills except three. They obtained a general warrant under s. 487.01 of the *Criminal Code* along with a tracking warrant to effect a controlled delivery of the package. The general warrant allowed a controlled delivery of the package and the securing of whatever residence the package ultimately entered until a search warrant under the *Controlled Drugs and Substances Act (CDSA)* could be obtained. The police believed a high risk entry by the Emergency Response Team (ERT) was needed because CPIC indicated the accused was "caution violent." Police also had information that he was known to carry two handguns, had threatened to shoot anyone who went to the police and was known to keep extra ammunition in his ball hat. He also had a teardrop tattoo on his face, which typically indicated in the criminal culture of having killed somebody.

Once an alarm sounded indicating the package had been opened, the ERT entered the residence pursuant to the general warrant using a "hard entry." They called out "police, search warrant", used a battering ram to open the front door and threw in a stun grenade that emitted two bangs in quick succession. Three suspects, including the accused, were arrested in various rooms of the home. They were ordered to lie on the floor at gun point, cross their feet and were handcuffed. ERT members were dressed in black uniforms with police shoulder flashes, black Kevlar ballistic vests with "POLICE" in white lettering on the front and back, helmets, and balaclavas, and were armed with sidearms and other automatic weapons. Once the residence was secured, all three suspects were turned over to drug section members and the ERT left the residence

within 10 minutes of making their entry. A search warrant was then obtained under s. 11 of the *CDSA*. Among other things, two individually wrapped grams of cocaine were found in the accused's bedroom. Money, score sheets and scales were also found in the house.

Newfoundland Supreme Court

The police testified that the stun grenade, a diversionary device, emitted about one million candle watts of light and 120 decibels of sound in two bangs. The flash and the sound were designed to disorient anybody in proximity to it so they could not react. By sensory overload, the thought process of those contemplating hostile action against the police would be disrupted. The effects would last only a few seconds.

The judge quashed the general warrant, finding that the accused's s. 8 *Charter* right to be secure against unreasonable search or seizure was breached because, in part, the police had not made full and frank disclosure of all relevant evidence by failing to inform the authorizing judge that they intended to make a hard entry. As well, the judge concluded that the manner in which the general warrant was executed was unreasonable. Police tactics were extreme. They used a forcible, hard entry by using a battering ram and a stun grenade, and were wearing riot gear while armed with automatic military style rifles. He also found the stun tactic interfered with the bodily integrity of a person which was not permitted under s. 487.01(2). The judge also found the accused's s. 7 *Charter* right to life, liberty and security of the person was violated by the manner of entry and because the police failed to obtain a Feeney warrant to arrest him. The evidence was excluded under s. 24(2), including the 4.5 kgs. of ecstasy pills, and the accused was acquitted.

Newfoundland Court of Appeal

The Crown appealed the accused's acquittal arguing, among other things, that the trial judge erred in quashing the general warrant. As well, the Crown contended that the manner in which the general warrant was executed was not unreasonable and that the police did not need an arrest warrant for the accused.

Interference with Bodily Integrity

Under s. 487.01(2), the general warrant provision shall not be construed so as to permit "interference with the bodily integrity of any person". The accused's submission that the hard entry by police involved such interference was without merit. "The general warrant did not purport to authorize interference with the bodily integrity of any person," said Justice Barry speaking for the unanimous Court of Appeal. "It merely dealt with the delivery of the post office package and the securing of the residence until such time as a search warrant could

BY THE BOOK:

General Warrant: s. 487.01 Criminal Code

s. 487.01 (1) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if

(a) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;

(b) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and

(c) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.

(2) Nothing in subsection (1) shall be construed as to permit interference with the bodily integrity of any person.

be obtained pursuant to section 11 of the CDSA." Furthermore, the onus was on the accused to establish interference with his bodily integrity which he failed to do:

> The alleged violation of [the accused's] Charter rights by the hard entry may be disposed of simply on the grounds that he has presented no evidence to establish that in the present case he in fact suffered any discomfort at all because of the manner in which the police entered the residence. We have only the general evidence of a police witness that the diversionary device used, a stun grenade or "flash-bang", was a two-bang device which emitted a bright light and made two very loud noises. The witness testified that generally the effect of the device was to disorient anyone in range of the device by creating a sensory overload and that the noise and light only lasts for seconds. [The accused] tendered no evidence which would demonstrate that he specifically suffered any actual interference with his bodily integrity. The general nature of the evidence regarding the effect of the diversionary device is not sufficient to prove a violation of his Charter rights. In any event, if we accept he was briefly disoriented, there is no evidence of any lasting impact or interference with bodily function or health beyond the de minimus range. Therefore, the facts in this case do not support a finding that the search under the general warrant was carried out in an unreasonable manner and should be invalidated because of noncompliance with subsection 487.01(2).
>
> That is not to say that a hard entry can never amount to execution of a general warrant in an unreasonable manner. It will depend upon the facts of each case. [paras. 51-52]

"On the manner of execution of the general warrant, the law in Canada requires that, except in exigent circumstances, police officers must make an announcement and a formal demand to enter before entering a dwelling to execute a search warrant."

Knock and Announce

The Court of Appeal described the knock and announce rule as follows:

> On the manner of execution of the general warrant, the law in Canada requires that, except in exigent circumstances, police officers must make an announcement and a formal demand to enter before entering a dwelling to execute a search warrant. ...
>
> The exigent circumstances recognized regarding this "knock and announce" rule include situations in which it is necessary to enter unannounced to prevent the loss or destruction of evidence, or for the safety of officers or the general public: [references omitted, paras. 46-47]

In this case, the trial judge erred in discounting or dismissing the evidence regarding the possible presence of weapons and the indications that the accused had an inclination toward violence. The reliable evidence that the police had concerning the possible possession of knives and guns by the accused and another suspect, and the CPIC "Caution Violence" warning provided sufficient evidence of exigent circumstances. This concern for officer safety justified a departure from the knock and announce rule and use of the battering ram.

Need to Disclose Manner of Entry

The Court of Appeal found that "the law does not require police to obtain prior authorization for a forcible entry even though they have the intent to

execute in this fashion before obtaining a general warrant." The trial judge erred in ruling that "the failure to disclose this intent was a basis for finding the general warrant was not lawfully issued." As noted in *R. v. Cornell*, 2010 SCC 31, judges are not to micromanage the police.

Need for a Feeney Warrant

There was no need for the police to obtain a Feeney warrant. "Feeney warrants under section 529 of the Criminal Code are only required where the police do not have other lawful authority to enter premises where an arrest is carried out," said Justice Barry. "In this case, the general warrant gave police the authority to enter any residence or other location where the package might be delivered. A Feeney warrant would be redundant in these circumstances since the issuing of the general warrant had already resolved the question of possible interference with privacy rights in favour of enabling police to preserve evidence of indictable offences."

s. 24(2) Charter

The Court of Appeal found, even if the accused's *Charter* rights were breached, the evidence was admissible under s. 24(2).

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

Complete case available at www.canlii.org

SENDER OF UNLAWFULLY OBTAINED TEXT MESSAGE MAINTAINED PRIVACY ON RECIPIENT'S PHONE

R. v. Pelucco, 2015 BCCA 370

Mr. Guray was stopped in a rental car after police saw him driving erratically and exceeding the speed limit. During the course of the traffic stop, the police developed a suspicion that Guray might have something dangerous or illegal in his trunk and searched it, despite his objections. A backpack inside the trunk smelled of cocaine and held $38,000 in cash. Guray was arrested and the vehicle was searched incidental to the arrest. A cell phone was located in a cup holder between the front seats. When the centre button was pressed on it, the phone displayed a series of text messages that appeared to relate to a planned purchase of one kilogram of cocaine. Believing that Guray was communicating with a drug supplier, an officer continued the text message conversation and arranged to meet the supplier in a parking lot.

When the police arrived at the parking lot, they saw the accused inside a vehicle holding a cellphone. He was arrested and his cellphone was seized. Police found a record of the text conversation on it. The accused's vehicle was searched and a one-kilogram brick of cocaine was found in the trunk, together with a flap of methamphetamine and a plastic bag containing a small amount of crack cocaine. The police then obtained a warrant to search the accused's home, which was also occupied by his parents. They were looking for more cocaine based on the text messages. Several pieces of evidence were seized, including a bag containing 280 grams of heroin, a money counter and a vacuum sealed bag containing $57,550 in cash from the main floor. The accused was charged with two counts of possessing a controlled substance for the purpose of trafficking (cocaine and heroin) and one count of simple possession (methamphetamine).

British Columbia Supreme Court

The judge found that the accused, as the sender of the text message, had a reasonable expectation of privacy in the messages just like Guray did. First, the judge inferred that the accused had a subjective expectation of privacy that his text messages with Guray were private. And second, he found that expectation to be objectively reasonable. He then went on to hold that the police did not have the right to search Guray's vehicle or his backpack and his arrest, based on evidence from these searches, was unlawful. The search and seizure of Guray's cellphone and reading the text messages was therefore unreasonable. Absent the text messages from Guray's cellphone, the police lacked the necessary grounds to arrest the accused and, therefore, the search of his vehicle was also unlawful. As for the search warrant, once the judge

"[I]t seems to me that the social norm is to expect that text messages remain private communications between the sender and recipient."

excised the illegally obtained evidence from the ITO he concluded the warrant was invalid. Thus, the search of the accused's residence was unreasonable under s. 8 of the *Charter* and the evidence was excluded. The accused was acquitted of the three drug charges.

British Columbia Court of Appeal

The Crown appealed the acquittals and sought a new trial, submitting that the trial judge erred in finding the accused's rights were violated by the search of Guray's cellphone. In the Crown's view, the accused, as sender of the text message, did not have a reasonable expectation of privacy in it. Once he sent it, he relinquished all control over the record of it and how it could be further disseminated when it reached the recipient's cellphone. Therefore, his *Charter* rights were not breached when the text messages he sent to Guray were read by police on Guray's cellphone. Although Guray's rights may have been breached because the police lacked authority for the search of Guray's cellphone, the Crown argued that the accused lacked standing to raise a *Charter* argument.

A Reasonable Expectation of Privacy

Justice Groberman, speaking for a two member majority, found the accused maintained a reasonable expectation of privacy in the text messages. In his view, control, by itself, was not determinative of the issue. The accused had a subjective expectation that his text message would be kept private. "Although the defence called no evidence to establish that expectation, the circumstances leave little room for any other conclusion," said Justice Groberman. "It would strain credulity to suggest that a reasonable person would have engaged in such a conversation if they thought that the messages would be shared with others."

As for whether the accused's belief that his conversation was private was objectively reasonable, the majority found it was. Objective reasonableness is not one of probability – whether the text messages would likely remain private. Rather, a normative assessment of reasonableness is required – "whether, in keeping with societal and legal norms in Canada, the sender of a text message should reasonably expect that the texts will remain private on the recipient's device":

> While there will be situations in which the content of the text message or the situation negative these ordinary expectations, it seems to me that the social norm is to expect that text messages remain private communications between the sender and recipient.
>
> It is true that once a text message has been delivered to the recipient, it will, as the Crown argues, cease to be under the exclusive control of the sender. With respect to the recipient's copy of the message, it is the recipient who will be in a position to keep it private or to disseminate it further. The sender, therefore, cannot have absolute confidence that the message will remain private. Much will depend on the nature of the message, the relationship between the sender and recipient, the character of the recipient, and the circumstances in which the message is received.
>
> These factors, however, do not necessarily impinge on the question of whether, for s. 8 purposes, the sender has a reasonable expectation of privacy in the message. A person's right to privacy does not depend on there being no reasonable possibility of an intrusion on that right. For example, a person who shares a home with others will, to a greater or lesser degree, surrender some privacy. In an intimate setting, there may, in fact, be a limited sphere of absolute privacy. Even in such a setting, however, the person retains a reasonable expectation that his or her private affairs will be free from state intrusion. A person's home remains his or her castle even if that castle is shared with family members or other residents.

> The Crown's position on this appeal – effectively that a sender never has a reasonable expectation that a message will remain private after delivered to a recipient's device – does not, in my view, comport with social or legal norms. A sender will ordinarily have a reasonable expectation that a text message will remain private in the hands of its recipient. [paras. 65-68]

And, even though the text conversation in this case was for a criminal purpose, that fact alone did not affect the reasonable expectation of privacy:

> Apart from criminality, there is nothing remarkable about the content or circumstances of the text conversation at issue in the case before us. Nothing in the situation suggests that the ordinary expectation that a text message exchange will remain private was displaced.
>
> [The accused] had a reasonable expectation that the text messages would remain private on Mr. Guray's cellphone. To be sure, he assumed the risk that Mr. Guray could disseminate the messages further. He was entitled, however, to expect that the police would not search the messages without authorization. When they did so, they violated his reasonable expectation of privacy. [paras. 70-71]

The accused's s. 8 rights were breached by the unlawful seizure of text messages from Mr. Guray's cellphone. The Crown's appeal was dismissed and the acquittals upheld.

Editor's note: The search and seizure in this case was conducted unlawfully by police. The majority distinguished this case from cases where a search was legally conducted, noting that "a person cannot have a reasonable expectation that messages on another's cellphone will remain private in the face of a lawful search of the device." So, had Guray's arrest been lawful and the search of the cellphone reasonable, then the accused would likely have been unsuccessful with his arguments.

"[A] person cannot have a reasonable expectation that messages on another's cellphone will remain private in the face of a lawful search of the device."

No Reasonable Expectation of Privacy

Justice Goepel, in dissent, reached a different conclusion. In his opinion, the sender of a text message does not have a reasonable expectation of privacy in that message after it reaches its intended recipient. He would not infer a subjective expectation of privacy for the accused nor did he find privacy objectively reasonable on the totality of the circumstances:

> [T]he privacy interest in a text message intentionally sent to other people to communicate information terminates at the time the message reaches the intended recipient(s).
>
> In my view, where a person voluntarily communicates information to a third party using a method of communication that creates a contemporaneous record and that message reaches its intended recipient, the autonomy interest underlying our s. 8 understanding of privacy is fully realized. This approach derives from the conceptual framework underpinning informational privacy in text messages in our s. 8 jurisprudence, i.e., the "wider notion of control over, access to and use of information, that is, 'the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others'". This view is predicated on an "assumption that all information about a person is in a fundamental way his own, for him to communicate or retain … as he sees fit".
>
> Where a person sends a text message, they have already made a preliminary decision on "when, how and to what extent information about them is communicated to others". The question is whether they have a continued claim as against the recipient on how he or she may use (and further communicate) the information to others. In the alternative, the question is whether a residual privacy right exists for information that is intentionally communicated to a third party and reaches its intended recipient.
>
> The expectation that one person would keep a communication wholly secret from all others becomes more or less reasonable depending on the relationship with that person. It would, in my view, be wholly unreasonable to find that it

> would be expected that a complete stranger would keep any and all information, no matter how personal or revealing, secret solely because it was sent to him or her by way of text message. This would amount to a conclusion that the medium itself creates an expectation of privacy. Such a finding would not be consistent with the s. 8 authorities, which recognize that the assessment must focus on the particular case in the totality of its particular circumstances.
>
> A person who – without any guarantee of confidentiality or indication from the recipient that the message will be kept confidential – communicates information has made an autonomous choice (i.e., determined for himself or herself) who, how and to what extent to communicate information to the fullest extent possible. Any further claim against a recipient is a claim that the sender can then determine who, how and to what extent the recipient will communicate information to further third parties, which interferes with the recipient's notional sphere of personal autonomy. Without a pre-existing obligation or arrangement that information will be kept confidential, it is wholly unreasonable to expect the information will be private. [refernces omitted, paras. 114-118]

And further:

> The immense storage capacity of computers and cellphones and their ability to generate information about the intimate details about a user's interests, habits, and identity that made it reasonable – even in cases where access or control was reduced or eliminated – to nevertheless reasonably expect privacy, do not arise in this case when one focuses solely on text messages that are voluntarily communicated and that have reached its intended recipient. [para. 133]

Since the accused did not have a reasonable expectation of privacy in the text messages stored on Guray's phone, the accused's Charter rights were not violated by the search of Guray's cell phone. Therefore, the accused could not challenge the admissibility of the text messages. Justice Goepel would have allowed the Crown's appeal, set aside the acquittals and order a new trial.

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

NO PRIVACY INTEREST IN CONDO'S COMMON AREA

R. v. Webster, 2015 BCCA 286

After arresting a woman for dial-a-doping, the police searched her cellular telephone. In it, police found two telephone numbers for a person called "Dru Boss Man", believed to be her drug supplier. Subscriber information revealed the names of two men and associated addresses. As a result of further investigation, the police obtained a production order under s. 487.012 of the *Criminal Code* requiring TELUS provide copies of text messages, including those sent and received from the woman's telephone number. Confidential source information and other follow-up information subsequently directed the police to a condominium unit where the lead investigator also happened to live. The lead investigator obtained a copy of a "Rental Information Report" containing the accused's address and telephone number from the property manager of the building. The telephone number was the same as the number for "Dru Boss Man" contained in the arrested woman's cellular telephone. It was also the same number for the name "Drew" as provided by the two informants. The investigator also reviewed the text messages obtained under the production order. He saw they were related to drug trafficking between the accused and the previously arrested woman.

Surveillance was set up at the accused's condo building after police received information that he would be receiving a drug delivery. After many hours of surveillance, police saw a white pickup truck pull up in front of the building. The accused came out, went to the driver's side of the vehicle and was given a plastic bag that contained white and brown bags. He went back into the building. The police followed and were let into the building by another resident. They arrested the accused in the elevator. The bags contained a white powdery substance believed to be cocaine and a hard yellowish substance believed to be crack cocaine. The total weight of the drugs was approximately one kilogram. Police then went to the accused's apartment where they believed a woman (his

girlfriend) was present. They removed her and secured the premises pending a search warrant application. The police obtained a warrant to search the accused's unit and found about 12 ounces of cocaine, three scales, a collection of "score sheets," an envelope containing $4500 cash, and identification, a tenancy agreement and other documents in the accused's name.

British Columbia Provincial Court

The accused argued that a number of his *Charter* rights were breached. These violations, according to the accused, included (1) the police needing a Part 6 authorization to "intercept" his text messages (a production order was not sufficient), (2) the police violated his privacy interests by entering the building, which was protected by a key or access code, (3) the police needed a Feeney warrant to arrest him in the elevator of his building, and (4) the police were not justified in making the warrantless entry into his condo after his arrest but prior to obtaining a search warrant.

As for the text messages, they were admissible. The judge ruled that they had not been intercepted such that a Part 6 authorization was required. Instead, a production order was sufficient to obtain the texts. They were stored records of communication – they had already been delivered to the recipient. The judge also concluded that the accused did not have a reasonable expectation of privacy in the common areas of his condo building. The officer, who also lived there, testified that "non-occupants of the building are routinely in the hallway of the complex." The common areas of the building "were fairly accessible to the public without a key or other means of entry or the permissions of owners." There was no expectation of privacy in the hallways of the building and a warrant was not required for the police "to enter the common areas of this complex and make observations." As for the necessity of a Feeney warrant (ss. 529-529.5 of the *Criminal Code*) to enter the building to arrest the accused in the elevator, the judge found the common areas of the complex were not part of the accused's dwelling area where a resident would have a reasonable expectation of privacy.

As to the need of an arrest warrant, it was unnecessary. The officer had the requisite reasonable grounds to effect the arrest under the warrantless arrest provisions of the *Criminal Code* because he believed the accused had committed an indictable offence. The entry into the accused's condo unit after arrest but prior to obtaining the search warrant was also justified. The police had exigent circumstances. They believed the accused's girlfriend was in the apartment and they needed to enter quickly to prevent the destruction of evidence. They entered the condo, removed the accused's girlfriend, and waited for the search warrant to be delivered to them before the search was commenced. The judge also rejected the assertion that the police themselves created the exigent circumstances by failing to get a warrant earlier than they did. There was no need for them to obtain a warrant earlier than they did and there was no evidence that they were trying to create exigent circumstances upon which to act. The accused was convicted of possessing cocaine for the purpose of trafficking.

British Columbia Court of Appeal

The accused appealed his conviction arguing the trial judge erred, in part, by finding that the text messages had been lawfully obtained by the police. He also suggested that the police breached his s.8 *Charter* rights when they entered his condo building to effect his warrantless arrest and that there were no exigent circumstances that justified the police entry into his residence without a warrant.

Historical Text Messages

The trial judge did not err in holding that a production order under s. 487.012 could be used to obtain historical text messages from a telephone company. There was no need for the police to use Part VI of the *Criminal Code* to obtain the texts. The police were not obtaining the prospective daily production of ongoing text messages from the telecommunications service provider such that it amounted to an "intercept." The police were not interjecting themselves in the communication process by seizing text messages after they were sent

[T]he issue is not how secure the building was, but how exclusive occupation of the common areas was. The evidence was that members of the public generally, and tradespeople in particular, regularly were in the common areas."

but before they were received. Rather, the text messages were historic, having already been sent, received and recorded. The police were seeking recorded information and that is what the production order sought to obtain. The Court of Appeal found the trial judge did not err in upholding the use of the production order to obtain the text messages in this case.

Common Areas

Justice Chiasson, speaking for the Court of Appeal, also agreed with the trial judge that the accused failed to establish a reasonable expectation of privacy in the common areas of the condominium complex. Thus, his rights were not violated when the police entered those areas of the building without a warrant. Although the building doors required a key or pass to open, this was not determinative of whether a reasonable expectation of privacy existed. "In my view, the issue is not how secure the building was, but how exclusive occupation of the common areas was," said Justice Chiasson."The evidence was that members of the public generally, and tradespeople in particular, regularly were in the common areas." He continued:

> I conclude that there was ample evidence to support the judge's finding that "common areas of this particular residential complex were fairly accessible to the public…." In my view, she was correct in concluding that the [accused] did not have a reasonable expectation of privacy in the common areas of the building and that a warrant was not required for the police to enter. [para. 77]

"[T]he [accused] did not have a reasonable expectation of privacy in the common areas of the building."

Warrantless Arrest

Even though he was arrested in the elevator, the accused contended that the police required a Feeney warrant to arrest him in the building. And, regardless of the location of the arrest, he suggested that the police should have first obtained a warrant because they had sufficient information to apply for one. The Court of Appeal disagreed and upheld the ruling of the trial judge. Sections 529 to 529.5 of the *Criminal Code* set out the procedure for obtaining a warrant to enter a "dwelling house" to arrest an occupant. "Dwelling house" is defined in the *Criminal Code* as "the whole or any part of a building … that is kept or occupied as a permanent or temporary residence…". The area in which the accused was arrested did not necessitate the police to first obtain a Feeney warrant. The common areas of the condominium complex were not part of the accused's dwelling "because they are generally accessible by the public and not the dwelling area where the resident has a reasonable expectation of privacy." Thus, the police were not required to obtain a Feeney warrant when effecting the arrest in the common area of a condominium complex.

As for the police obtaining a warrant because they had the grounds to apply for one, this submission

was also rejected. "The evidence was that having witnessed what they considered to be a drug transaction, the police concluded that the [accused] should be arrested while in possession of the drugs," said Justice Chiasson. "No consideration was given to letting him return to his apartment while the police waited to obtain a warrant."

Exigent Circumstances

Although s. 529.3 of the *Criminal Code* and s. 11(7) of the *Controlled Drugs and Substances Act*, authorizes the police to enter premises without a warrant if "exigent circumstances" make it impractical to obtain one, the accused argued that the police could not rely on "exigent circumstances" for entry if they created them. Again, the Court of Appeal agreed with the trial judge that there was no evidence that the police were trying to create exigent circumstances:

> [T]he judge reviewed the circumstances faced by the police. She rejected the contention that they created the need for immediate entry by not getting a warrant to arrest the [accused]. They believed the [accused] was a drug dealer. It was reasonable that evidence confirming this would be in his apartment. They understood that the [accused's] girlfriend was in the apartment and would be expecting him to be gone for only a short time. They were concerned she might dispose of evidence.
>
> The police had been preparing materials to support an application for a warrant for some time. They were faced with an active, unfolding crime and circumstances which they believed posed a risk that evidence in the [accused's] apartment might be destroyed. They did not in fact search the premises without a warrant. They secured it until the warrant was obtained. [paras. 89-90]

There were exigent circumstances justifying a warrantless entry into the accused's condominium unit.

The accused's appeal was dismissed.

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

NO PRIVACY INTEREST IN 'HIGHJACKED' ISP ACCOUNT INFORMATION

R. v. Caza, 2015 BCCA 374

A police detective was investigating a peer-to-peer network used for sharing child pornography files. Using the username and password of another man who had been arrested, the detective posed as the contact. On the account, the detective discovered a number of messages referencing child pornography from the username Paper123boy. The following day messages arrived from Paper123boy offering to share files which contained child pornography. The Internet Protocol (IP) address for Paper123boy was captured and it was determined that Shaw was the Internet Service Provider (ISP). A "law enforcement request" was sent to Shaw and the name and address of the IP user was provided. This IP address holder, Mr. Feltham, had briefly resided with the accused but cancelled his Shaw account when he moved out. The accused, who continued to reside at the address, then reinstated the account by fraudulently posing as Feltham, the original IP holder. The police prepared an information to obtain a search warrant (ITO) for the accused's residence and he was arrested. A search revealed a 500 gigabyte hard drive containing thousands of images and videos of child pornography. The accused was charged with several offences related to possessing and distributing child pornography and luring a person under the age of 16.

British Columbia Supreme Court

The accused sought to have the seized hard drive excluded as evidence arguing, in part, that the ITO was based on unlawfully obtained information. He submitted that the police required a warrant to obtain the IP subscriber information from Shaw. The judge, however, found that that the accused had no reasonable expectation of privacy in the subscriber information associated with the IP address. Thus, the request for the subscriber information was not a warrantless search and therefore not unreasonable.

"Lack of permission in the circumstances of this case is sufficient to render any subjective expectation of privacy [the accused] may have had objectively unreasonable."

Furthermore, even if there was a s. 8 *Charter* breach, the judge would have admitted the evidence under s. 24(2). The accused was convicted of possessing child pornography, transmitting or making available or distributing child pornography, and breach of his s. 810.1 recognizance.

British Columbia Court of Appeal

After the trial judge's ruling, the Supreme Court of Canada in *R. v. Spencer*, 2014 SCC 43 found that an accused had a reasonable expectation of privacy in his ISP information and a police request for this information amounted to a search under s. 8 of the *Charter*. The accused appealed his convictions arguing the trial judge erred in holding that he did not have a reasonable expectation of privacy in the ISP information.

Justice Stromberg-Stein, writing the Court of Appeal's judgment, agreed that the accused did not have a reasonable expectation of privacy in this case. Although it could be inferred that he had a subjective expectation of privacy, it was not objectively reasonable. Unlike the case in *Spencer*, the accused did not have permission to use Feltham's Shaw account.

> In my view Spencer is distinguishable. Although [the accused] had a direct interest in the subject matter of the search, including an informational privacy interest of anonymity in the subscriber information linking him to his particular, monitored Internet activity, and a territorial privacy interest resulting from his use of his home computer, and he may have had a subjective expectation of privacy, his subjective expectation was not objectively reasonable. [The accused] did not have the permission of Mr. Feltham to use his Shaw account and, in fact, fraudulently hijacked his Internet account. Lack of permission in the circumstances of this case is sufficient to render any subjective expectation of privacy [the accused] may have had objectively unreasonable. [para. 32]

The accused had no reasonable expectation of privacy in the subscriber information associated with the IP address which led to a search of his Internet activities in his own home. Since there was no *Charter* breach, a s. 24(2) analysis was unnecessary.

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

FAILURE TO FILE REPORT WITH JUSTICE BREACHED CHARTER

R. v. Garcia-Machado, 2015 ONCA 569

The accused crashed his vehicle into two trees. Both he and his front-seat passenger were seriously injured and transported to hospital. Hospital staff drew the accused's blood for medical purposes. The police, believing he was intoxicated, subsequently obtained a search warrant authorizing the seizure of his blood and hospital records relating to this medical treatment after the crash. The warrant also required the police to bring the seized items before the justice who issued the warrant or another justice "to be dealt with according to law." A toxicologist analyzed the blood and determined that the accused's BAC at the time of the crash was over 80mg% and that his level of intoxication would have impaired a person's ability to drive. He was then charged with impaired driving causing bodily harm and over 80mg% causing bodily harm some two months after the crash. A report to a justice, however, was not filed for about another seven weeks after the charges were sworn (15 weeks after the seizure)..

Ontario Court of Justice

The investigating officer testified he thought s. 489.1(1) of the *Criminal Code*, which requires a report to a justice be made "as soon as is practicable," was only operative when charges were laid. He said he did not know that the provision required him to report to a justice "as soon as is practicable" after the seizure.

The judge found that the accused had "a high expectation of privacy in the items seized, both of which contain a high level of personal and private information." He then went on to conclude that "the police failure to report to a justice as soon as practicable rendered the otherwise valid search unlawful and unreasonable, contrary to s. 8 of the Charter." He then excluded the evidence under s. 24 (2) and the accused was acquitted.

Ontario Court of Appeal

The Crown appealed the trial judge's decision arguing that the officer's failure to file a timely report to a justice under s. 489.1 (1), in relation to lawfully seized items, was not a s.8 *Charter* breach. The Court of Appeal rejected this submission, agreeing with the trial judge that the police breached the accused's rights.

Reporting to a Justice

The Appeal Court first noted that there were a number of conflicting cases concerning whether or not a failure to comply with s. 489.1(1) amounted to a breach of the *Charter*. Some cases support the view such a failure renders the continued detention of a seized item unreasonable while others support the view that failure to comply does not breach s. 8.

Associate Chief Justice Hoy, authoring the unanimous judgment, recognized that s. 489.1(1) "applies to both warrantless common law seizures and seizures pursuant to a warrant." He then went on to find that a s. 8 breach occurred when the officer failed to comply with the requirements of s. 489.1(1) by not making a report to a justice as soon as practicable. By failing to do so, the continued dentition of the seized item was unreasonable:

> If a peace officer fails to file a report under s. 489.1(1), the property seized is not subject to judicial supervision during the investigation under s. 490. The real importance of s. 489.1(1) is its link to s. 490. [para. 16]

And further:

> [I]t is clear that an individual retains a residual, post-taking reasonable expectation of privacy in items lawfully seized and that Charter protection continues while the state detains items it has taken. Sections 489.1(1) and 490 govern the continued detention by the state of the items seized and, I conclude, the requirement in s. 489.1(1) to report to a justice as soon as practicable plays a role in protecting privacy interests. The Constable's post-taking violation of s. 489.1(1) by failing to report to a justice for more than three months after seizure of the blood and hospital records compromised judicial oversight of state-detained property in which the [accused] had a residual privacy interest. It therefore rendered the continued detention unreasonable and breached s. 8. The fact that a person may have a diminished reasonable expectation of privacy after a lawful, initial police seizure and that in a particular case there may have been virtually no impact on that expectation will be important factors in the

BY THE BOOK:

Report by Peace Officer: s. 489.1 Criminal Code

s. 489.1 (1) Subject to this or any other Act of Parliament, where a peace officer has seized anything under a warrant issued under this Act or under section 487.11 or 489 or otherwise in the execution of duties under this or any other Act of Parliament, the peace officer shall, as soon as is practicable,

(a) where the peace officer is satisfied,

(i) that there is no dispute as to who is lawfully entitled to possession of the thing seized, and

(ii) that the continued detention of the thing seized is not required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding,

return the thing seized, ...; or

(b) where the peace officer is not satisfied as described in subparagraphs (a)(i) and (ii),

(i) bring the thing seized before the justice referred to in paragraph (a), or

(ii) report to the justice that he has seized the thing and is detaining it or causing it to be detained

to be dealt with by the justice in accordance with subsection 490(1).

analysis under s. 24(2) of the Charter. However, they will not render continued detention after a clear violation of the requirement in s. 489.1(1) to report to a justice as soon as practicable reasonable.

It is established law that in order to be reasonable, a seizure must be authorized by law. If seized property is detained without complying with s. 489.1(1), then its continued detention is not authorized by law. [references omitted, paras. 45-46]

And further:

[T]he requirement in s. 489.1(1) to report to a justice as soon as practicable plays a role in protecting an individual's residual, post-taking reasonable expectation of privacy. I therefore conclude that the Constable's clear failure to comply with that obligation breached s. 8.

One indicator of the privacy-related role of s. 489.1(1) is the fact that the form of the warrant authorizing the initial seizure required the peace officer to comply with s. 489.1(1) ("[T]his is to authorize and require you… to bring [the seized things] before me or some other justice to be dealt with according to law").

A second indicator is the substance of the provision itself. Section 489.1(1) requires a peace officer who wishes to detain a thing seized to bring the thing before a justice or report to a justice that he or she has seized the thing. It engages judicial oversight of state-held property in which privacy interests subsist. It also ensures that a record is made of what was actually seized. Such a record may be critical if a person seeks to assert that the initial seizure was overly broad or that the state does not need the item seized for its investigation.

A third indicator of the role of s. 489.1(1) is the nature of the rights s. 490 provides to individuals whose property has been taken. Two aspects of that section are particularly important.

First, s. 490(2) requires the state to give notice to the person from whom the detained thing was seized if the state wishes to obtain an extension beyond the initial three-month detention period. Notice gives the affected person the opportunity to argue that the nature of the investigation does not warrant further detention of the item seized. If the state does not need the item for the purpose envisaged when it seized it, and the state's continued detention of the property is not otherwise legally justified,[6] the individual's privacy interest should prevail. Moreover, notice under s. 490(2) may be the only way an affected individual learns exactly which items the state has taken. ....

[...]

A second important aspect of s. 490 is that it provides the lawful owner of the item seized, a person lawfully entitled to possession of the item seized, or the person from whom the item was seized the right to apply for return of the item ... . Return of the seized items reduces or eliminates the risk that the state will violate the person's residual privacy interest. ...

The recording of the items seized, the right to notice and the right to apply for return of things seized confer important protections on people whose items the state holds in detention. Compliance with s. 489.1(1) is the gateway to all of these protections. The [officer] failed to report to a justice for over three months after the blood and hospital records were seized. Effective judicial oversight of property in which the [accused] maintained a residual privacy interest was compromised. I conclude therefore that the Constable's clear failure to comply with the requirement in s. 489.1(1) that he report to a justice as soon as practicable breached s. 8 of the Charter. I leave for another day whether any other breach of s. 489.1(1) or any breach of s. 490 – even if so minor or technical as to have no real impact on the judicial oversight contemplated by the sections – would breach s. 8 of the Charter. [references omitted, paras. 48-55]

Admissibility

Despite the *Charter* breach, the Court of Appeal overturned the trial judge' exclusion of the evidence. He failed to consider a number of relevant factors in his s. 24(2) analysis. The evidence was admissible, the Crown's appeal was allowed, the accused's acquittal was set aside and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

2015 British Columbia Law Enforcement Memorial

Sunday, September 27, 2015 at 1:00 pm
Ceremony at the BC Legislature in Victoria, BC

Law Enforcement participants to form up in the 800 block of Wharf Street at 12:00 pm.

For further information call 250-592-2424 or email
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