ISSUES OF INTEREST

A Journal Devoted to Topical Policing and Legal Issues for Operational Police Officers in British Columbia

Vol. 49 No. 1 | Justice Institute of British Columbia - Police Academy | January, 1998

WARRANTLESS VEHICLE SEARCHES

Bill Pake, B.A. (Hons.) (Police Academy)

Introduction

Stopping a vehicle on the street is one of the most common activities in a patrol officer's day. From the most routine stop an officer may uncover a variety of other crimes. Given the way the *Charter* has been interpreted by the courts, police officers must be careful when making these stops, particularly when a search of the vehicle might become necessary. Any search of a vehicle may be deemed unconstitutional, especially if it is done without a warrant. The cases that have addressed the issue of vehicle searches are, in general, quite confusing. Although there are a few underlying principles that arise from the cases regarding vehicle searches, the validity of any search is always dependant on the facts of the particular case. The most recent Supreme Court of Canada decision on vehicle searches, *R. v. Belnavis*,[1] did admit evidence from a warrantless search. However, the police must be very cautious, since this case was very dependant on the facts. This article is intended to help police officers gain an understanding of how the courts decide if a warrantless vehicle search is lawful and whether or not any evidence obtained during the search will be admissible in evidence. With this knowledge, the police can properly take action on the street.

THIS ISSUE

Lawful Search Issues

In general, the courts address three issues when deciding whether or not a search is lawful under the *Charter*. First, did the accused have a *reasonable expectation of privacy*?[2] In making a determination with respect to privacy a court will consider the totality of the circumstances. If the accused is found *not* to have had a reasonable expectation of privacy, then there will have been no breach of the *Charter*.

If the accused *is* found to have had a reasonable expectation of privacy, the second question asked by the courts is whether the search itself was reasonable? In *R. v. Collins*,[3] the Supreme Court of Canada held that there are three elements that must be satisfied for a search to be reasonable:

1. the search must be authorized by law;
2. the law itself must be reasonable; and
3. the manner in which the search is carried out must be reasonable.

A warrantless search is considered to be *prima facie* unreasonable under s. 8 of the *Charter*.[4]

Finally, where a court finds that a search was not authorized by law, or that it is not reasonable for other reasons, the court will consider whether the evidence should be excluded under s. 24(2) of the *Charter*. The key factor in making this determination is whether or not the admission of the evidence would bring the administration of justice into disrepute. There are many factors that are taken into account in order to decide this question.

Facts of *Belnavis*

Belnavis was stopped for speeding by an O.P.P. officer and failed to produce her drivers licence and registration. While Belnavis and a teenage passenger were outside of the car, the officer ran computer checks on the car and Belnavis. While waiting for the computer queries, the officer spoke to another passenger in the car, Carol Lawrence, who was still sitting in the back seat. It was very crowded in the back seat, as there were several full garbage bags on the seat beside Lawrence. The bags appeared to be full of new clothing with the price tags still attached. Lawrence and Belnavis gave differing explanations to the officer as to the ownership of the bags. Given that Lawrence was cramped in the back seat and that there were conflicting stories as to the ownership of the clothing, the officer believed that there must be more clothing in the trunk. The officer opened the trunk and found five more bags full of clothing. Belnavis was arrested for outstanding warrants. The car was towed to the police station and the property seized. Belnavis and Lawrence were subsequently

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Publication:

This Journal is published four times a year (January, April, July, October). The annual subscription rate is $15. Rates and specifications for advertising are available from the Technical Assistant. Articles appearing herein do not necessarily express the views of the Justice Institute, Editor, Associate Editor, Editorial Board or the author's agency or employer. **(ISSN:0840-8254)**

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Submissions(750 - 1500 words) on topical operational issues are invited from police officers and individuals in associated professions or disciplines. Articles must be typewritten, double-spaced on letter size paper, quotations must be indicated, and references fully cited in endnotes. Diskette submissions in ASCII format (i.e. "Text Only") are preferred. The Editor reserves the right to alter articles to conform with publication requirements. Contributions not accepted for publication will not be returned to the author unless accompanied by a stamped, self-addressed envelope.

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MAKING A DIFFERENCE

by Paul Tinsley (Police Academy)

The Editorial Board and the Police Academy wish to congratulate Mr. R.J. (Bob) Hull on his retirement as Director of the Police Academy, Justice Institute of British Columbia (J.I.B.C.), and Associate Editor of *Issues of Interest*. Bob started out as a "poor farm boy from Saskatchewan" (as he always liked to say), and in 1956, at the mature age of 18 years, began his policing career with the Royal Canadian Mounted Police (R.C.M.P.). Bob served in many detachments across Canada, both large and small, from the east to the west. As Bob always had an interest in training, he served for five years at the R.C.M.P. Recruit Training Academy (Depot) in Regina, Saskatchewan, and another five years in advanced training at Fairmont Academy in Vancouver, British Columbia. In 1980, after 25 years with the R.C.M.P., Bob retired with the rank of staff sergeant and accepted a position as Program Director, Recruit Training, at the J.I.B.C., Police Academy. After a short term as Program Director, Bob was promoted to Deputy Director, and in 1995 was appointed as Director. For over 40 years, then, Bob has served the police community. In his 25 years in recruit and in-service training, Bob has had a profound influence on policing, and he will be greatly missed. At the Police Academy, Bob introduced a tradition at the recruit graduation ceremonies, which is a fitting metaphor for a very distinguished career. Bob would close the graduating ceremonies by introducing a ceremonial piece of music (often heard in the military), entitled "Sunset", by saying, "Let us all pause with the members of the graduating class and reflect upon their accomplishments and their future endeavors in the police service." Bob, you can now proudly reflect upon your many accomplishments in policing, and we wish you nothing but the best in the future.

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charged with possession of stolen property.

The Ontario Court (General Division) acquitted both accused. Crown appealed to the Ontario Court of Appeal,[5] where the acquittals were quashed and new trials ordered. This decision was appealed to the Supreme Court of Canada.

The S.C.C. Ruling in *Belnavis*

The Supreme Court of Canada looked at three issues. First, did Belnavis or Lawrence have a reasonable expectation of privacy with respect to the vehicle? Second, was the search reasonable? Third, if the search was contrary to the *Charter* should the evidence be excluded under s. 24(2) of the *Charter*?

With respect to privacy, the Court stated that a reasonable expectation of privacy in a vehicle will depend on "the totality of the circumstances." Belnavis was found to have had a reasonable expectation of privacy as she had possession and control of the vehicle and the owner had consented to her use of the car. Lawrence was found to have no connection to the vehicle beyond being a passenger in it. There was no evidence that she had any control or special privilege in relation to the vehicle. Thus, the Court found that she did not have a reasonable expectation of privacy in regard to the vehicle. Therefore, s. 8 of the *Charter* did not apply and Lawrence's appeal was dismissed.

Since Belnavis was found to have had a reasonable expectation of privacy, and the search of the vehicle was done without a warrant, the Court found that there *had* been a breach of her s. 8 *Charter* rights (*i.e.* a warrantless search is deemed unreasonable). However, in considering s. 24(2) the Court found that the officer did have reasonable and probable grounds to search the vehicle. The officer was found to have properly stopped the vehicle for speeding and could reasonably search it for registration documents when the driver could not produce any ownership information. The clothing was also in plain view when he opened the door to speak to Lawrence. The new clothing in the garbage bags, along with the conflicting stories of the Belnavis and Lawrence, gave the officer his reasonable and probable grounds to believe that the clothing was stolen. The Court found that a reasonable person would conclude that there may be more goods in the trunk and quoted the officer's cross-examination from trial that "[Lawrence] was crowded by the three garbage bags and that any more stolen property would of course be in the trunk and *it seemed logical in police work* to check the trunk" [emphasis original].[6]

With respect to the admissibility of the evidence, the Court also referred to the *Stillman*[7] test in that the evidence was not "conscriptive". The Court noted that "Evidence will be conscriptive when the accused, in violation of his *Charter* rights, is compelled to incriminate himself [or herself] at the behest of the state by means of a statement, the use of the body or the production of bodily samples."[8] On this basis, it was held that the admission of the evidence located in the vehicle would not render the trial unfair.

Further, in considering the seriousness of the breach in relation to Belnavis, the Court found that the vehicle was not stopped and searched arbitrarily, the breach itself was isolated and brief, it was in no way deliberate, wilful or flagrant, and the officer did objectively have, and subjectively believed he had, reasonable and probable grounds to conduct the search. The violation of Belnavis' *Charter* right was, therefore, little more than a technical one. In this case it was found that the administration of justice would not be brought into disrepute by the admission of the evidence. The appeal was dismissed and the order of the Court of Appeal directing a new trial was confirmed.

Discussion

Police officers working on the street should follow the *Belnavis* case with caution. It does *not* give blanket authorization to the police to search any vehicle that is stopped. The *Belnavis* decision is very much confined to the facts of the case. The starting point that must always be kept in mind is that warrantless searches are considered to be *prima facie* unreasonable under s. 8 of the *Charter*.[9] The courts have decided that where it is *feasible* to obtain prior judicial authorization to conduct a search, that authorization is a *precondition* for a valid search and seizure under s. 8.

There are a number of cases involving warrantless vehicles search where evidence has been excluded. One example is found in the British Columbia case of *R. v. Klimchuck*.[10] The accused was detained after he was seen by an Esso employee acting suspiciously around a gas station in the early morning hours. An R.C.M.P. officer found Klimchuck in a car a short distance up the road from the station. A C.P.I.C. query revealed that Klimchuck was suspected of having previously broken into vending machines using stolen keys. Klimchuk's vehicle was searched and a set of keys was found hidden behind a loose dashboard panel. At trial, the officer who detained Klimchuck stated that he did not have enough evidence to support a charge before the search was conducted. In this case the Crown was trying to convince the Court of Appeal to adopt the United States "automobile exception" for searches with a warrant (*i.e.* a warrant is not required to comply with the Fourth Amendment regarding a valid search and seizure). In the United States the courts recognized that requiring a warrant was not practical with respect to vehicle, vessel or aircraft searches because of their mobility. The Court of Appeal in *Klimchuk* refused to follow the U.S. exception regarding vehicle searches, asserting that it would give too much power to the police in relation to search and seizure. The Court found that the accused was arbitrarly detained and the keys were excluded from evidence. According to the Court, the only time a warrantless search of a vehicle could be conducted was if it was done under some statu-

tory provision where the law authorizing the search was also found to be reasonable.

In *R. v. Poirier*,[11] the accused was lawfully stopped by police for an offence under the provincial highway enforcement legislation. The accused's trunk was searched and illegal cigarettes were found. At trial the officer did not establish in his evidence the requisite reasonable and probable grounds for believing that evidence would be found in the trunk. In this instance, the Court found that there was no common law or statutory provision that would authorize a search of the trunk. Since the car was stopped for a motor vehicle offence, the officer could only search the car for items related to the car and driver (*e.g.* registration papers, drivers licence), unless there were further reasonable grounds for a broader search.

In *R. v. Jones*,[12] a vehicle was stopped by police because it was suspected that the driver was impaired. When the officer approached the vehicle he could smell cannabis coming through the driver's open window. The driver was detained for sobriety tests. His passenger was found in possession of marijuana. The driver was given a 24 hour drivers licence suspension and his vehicle was to be towed. The tow truck driver opened the trunk in order to access the shock absorbers. After closing the trunk, the officer asked him to reopen it. A substantial number of baggies of marijuana were found inside. The evidence was excluded under s. 24(2) of the *Charter*. The judge found that in order for a warrantless search to be deemed lawful there must be a "factual nexus" between the reason for the arrest or detention and the place searched. The Court decided that there was no connection between the drugs found on the passenger and the drugs found in the trunk. There were no reasonable grounds to believe that there would be drugs found in the trunk, simply because the passenger was in possession of drugs. The search was deemed unreasonable and the evidence was excluded.

There have been cases that have upheld a warrantless vehicle search. For example, *R. v. Stephens*[13] involved the robbery of a gas station at about 4 o'clock in the morning. The suspects were seen getting into a vehicle and driving away. A police officer set up a roadblock a short distance down the road from the robbery. Two suspects were subsequently stopped by the police (at gun point) and advised of the reason for the stop. When the officer asked to search the trunk, the suspects claimed not to have the key. The officer later found the key in the trunk lock. The officer opened the trunk and found a handgun and some cigarettes. Although the car was towed and a warrant was obtained later to further search the vehicle, the issue was whether the original search was lawful. The detention of the accused and the search of the vehicle were found to be justifiable based on common law. The Court found that the search was "reasonably necessary in order for the Sergeant to discharge his duty," it was unobtrusive and a reasonable interference with the freedom of the suspect. The evidence obtained was found to be admissible.[14]

In another armed robbery case, *R. v. Catroppa*,[15] a suspect vehicle was stopped shortly after a robbery, near the scene. Since a gun was allegedly used, the officer relied on s. 101(1) of the *Criminal Code* to justify a warrantless search of the vehicle. This section allows for a warrantless search of a vehicle where a police officer believes on reasonable grounds that an offence is being, or has been, committed against the provisions of the *Criminal Code* in relation to firearms. Again, given the circumstances of this vehicle stop and the statutory authority to search, the search was found to be reasonable and the evidence was admitted.

Finally, in *R. v. Smellie*,[16] the British Columbia Court of Appeal examined the issue of vehicle searches incidental to a lawful arrest. This particular case involved the stop of a vehicle and the subsequent arrest of the driver, a known drug dealer. Reliable source information along with certain observations by the arresting officers (of drug transactions) gave the officers the reasonable and probable grounds necessary to take action. The vehicle was searched incidental to the lawful arrest of Smellie, and the search was conducted in a reasonable manner (*e.g.* no unnecessary damage was done to the vehicle). The drugs were found in the vehicle when the officers removed a loose door panel while conducting the search. The Court concluded that "in searching a vehicle as an incident of arrest the police are entitled to at least search the interior of a vehicle as well as the trunk." [17] Further, the Court found that "the search of the interior of Mr. Smellie's automobile for the purpose of obtaining evidence which went no further than an examination of the area beneath the loose panel of the passenger door was reasonable in the circumstances."[18] As a result, the accused's rights under the *Charter* were not breached. The Court dismissed the appeal and upheld the conviction (application for leave to appeal to the Supreme Court of Canada was dismissed without reasons).

Conclusion

There are general principles that the courts follow when determining whether a vehicle search is lawful. In particular, courts will examine whether the person had a reasonable expectation of privacy (*Edwards*), whether the search was lawful pursuant to common law, statutory or judicial authority (*Southam*) and the reasonableness of the search (*Collins*). If a search is found to be in violation of s. 8 of the *Charter* the courts will examine several factors under s.24(2) of the *Charter* to determine whether the evidence located during a search will be admitted into evidence. As a general rule, conscripted evidence, regardless of whether it is real or testimonial, will result in an unfair trial and will be excluded (*Stillman*). Each case will be decided on the facts known to the officer at the time of the search. Although the *Belnavis* case may appear

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to give the green light to warrantless searches of vehicles, it must be followed with caution. While the Court did admit the evidence in *Belnavis*, there was a clear violation of s. 8 of the *Charter*. Officers conducting vehicle searches without a warrant must have the authority either by common law or statute to search, and be able to articulate their reasonable grounds and authority during testimony. Where it is feasible to get a warrant, the best course is to obtain one, unless there are exigent circumstances.

Endnotes

1. (1997), 118 C.C.C. (3d) 405 (S.C.C.).
2. *R. v. Edwards* (1996), 104 C.C.C. (3d) 136 (S.C.C.).
3. (1987), 33 C.C.C. (3d) 1 (S.C.C.).
4. *Hunter v. Southam* (1984), 14 C.C.C. (3d) 97 (S.C.C.).
5. (1996), 29 O.R. (3d) 321.
6. *Supra*, note 1 at para. 32.
7. *R. v. Stillman* (1997), 113 C.C.C. (3d) 321 (S.C.C.); see also, the Operational Notes below where this case is discussed in more detail.
8. *Supra*, note 1 at para. 36.
9. *Supra*, note 4.
10. (1991), 67 C.C.C. (3d) 385 (B.C.C.A.).
11. (1997), 116 C.C.C. (3d) 551(Quebec Court of Appeal).
12. [1996] B.C.J. No. 1815 (Q.L.) Chilliwack Registry No. 31828 (B.C.S.C.) January 8, 1996.
13. [1993] B.C.J. No. 3017 (Q.L.) New Westminster Registry No. X033070 (B.C.S.C.) July 7, 1993.
14. *Ibid.*, para. 29.
15. [1992] B.C.J. No. 469 (Q.L.) New Westminster Registry No. X030083 (B.C.S.C.) May 21, 1992.
16. (1994), 95 C.C.C. (3d) 9 (B.C.C.A.).
17. *Ibid.*, at para. 42.
18. *Ibid.*, at para. 47.

THE FEENEY WARRANT

Canada's Legislative Response to *R. v. Feeney*

Cpl. Sheila Sullivan, B.A., LL.B. (Police Academy)

History of the Legislation

On May 22, 1997, the Supreme Court of Canada ("SCC") handed down its ruling in the British Columbia murder case of *R. v. Feeney*.[1] The details of the case and the main thrust of the ruling were discussed in a previous edition of *Issues of Interest*.[2] Because of the implications of the *Feeney* decision, an application to delay the implementation of the decision was granted by the S.C.C. The federal government has now passed legislation to amend the *Criminal Code* to respond to the *Feeney* case effective December 18, 1997 (the "Amendments"). This article will briefly review the contents of the Amendments. Under the Amendments there will be two possible processes for obtaining authorization to enter a dwelling house to make an arrest.

Arrest Warrant with Entry

The first process provided under the Amendments will be where the arrest warrant itself will contain an authorization to enter the dwelling house (new s. 529). This could occur if at the time the arrest warrant is to be issued, there are reasonable grounds to believe the person named in the arrest warrant is within a specified dwelling house. If that is so, then the justice issuing the arrest warrant may include in the warrant an authorization to enter the dwelling house (Form 7 has been amended to take this into account). The officers executing the arrest warrant would be under the additional constraint that they may not enter that dwelling house unless at the time of execution of the warrant, they have reasonable grounds to believe that the person named in the arrest warrant is in the house.

Warrant to Enter

The second process under the Amendments is to obtain a warrant of entry under new s. 529.1. Under this section, a justice may issue a warrant of entry (new Form 7.1) authorizing the police to enter a specified dwelling house for the purpose of arresting a party (named or not) if the justice is satisfied that there are reasonable grounds to believe that:

(1) the person is or will be present in the dwelling house at the time of execution of the warrant, and

(2) either:

  (a) a warrant of arrest is in force, or

  (b) grounds exist to arrest the person under s. 495(1)(a) or (b), or any other federal statute.

Exigent Circumstances

The Amendments also provide for a warrantless entry into a dwelling house to arrest a person where exigent circumstances exist. There is a

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statutory definition of what constitutes exigent circumstances, including reasonable grounds to believe that entry is necessary to:

(1) protect any person from serious harm or death, or
(2) prevent the imminent loss or destruction of evidence.

The common law regarding hot pursuit into a residence still operates as another example of what would constitute exigent circumstances.

Proper Announcement

Proper announcement by a police officer of presence, authority and purpose prior to entry will continue to be required, unless there are reasonable grounds to believe that announcing entry will expose someone to imminent bodily harm or death (including the peace officers), or would result in the imminent loss or destruction of evidence.

Telewarrant

A telewarrant will be an option for a warrant to enter, and the provisions of s. 487.1 apply (*i.e.* the same procedure must be followed as for all other telewarrants).

Conclusion

This brief review covers only the highlights of the new Amendments. A Training Bulletin is available from the Legal Studies Section of the JIBC Police Academy. Please contact the Legal Studies Section of the JIBC Police Academy ((604) 528 - 5763 or (604) 528 - 5762) for more information.

Endnotes:

1. [1997] S.C.J. No. 49 (Q.L.) File No. 24752 (22 May 1997).
2. (July, 1997) 48:3 *Issues of Interest* I-6.

ARTICULABLE CAUSE:

POLICE COMMON LAW AUTHORITY TO DETAIN A SUSPECT ABSENT REASONABLE GROUNDS FOR ARREST

Detective Steven Ing, LL.B. (Victoria Police Department)

(Editor's Note: The following is a brief synopsis of an article by Steven Ing from the last issue in which his name was unfortunately omitted by the printer).

Synopsis

It is well-settled law that police powers are limited to those provided by statute or common law. The courts have also consistently recognized that a police officer's duty at common law includes the duties to prevent and investigate crime. Most officers will be familiar with the cases dealing with the random detention of motorists during "road blocks" or "checks stops" designed to detect impaired drivers.[1] These cases have held that detention of a motorist in those situations, although arbitrary, is justified as an ancillary police power (at common law) and is a reasonable limit on the right not to be arbitrarily detained under s. 9 of the *Charter*. However, these cases were decided within the context of police roadblocks, which are clearly intended to protect those who use the public roadways from the danger of impaired drivers.

Another type of detention (where an arrest is not made) arising out of the impaired driving cases is detention pursuant to a *breath demand*. However, this type of "detention" only arises out of a situation where there are *reasonable grounds* to believe an impaired driving offence has been committed, as a peace officer must have reasonable grounds to make the breath demand in accordance with section 254(3) of the *Criminal Code*.

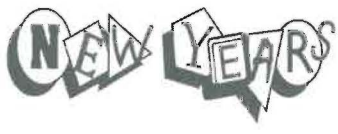
What is not clear from any of the "roadblock" cases is when any type of detention outside of an impaired driving scenario will be seen as authorized within a police officer's common law duties, and specifically, in a situation where reasonable grounds *do not* exist. Although it is clear that there is no statutory power at this time authorizing the detention of a suspect absent reasonable grounds to believe an offence has occurred, the decision of the Ontario Court of Appeal in *R. v. Simpson*[2] is particularly interesting with regard to the potential for "investigative detention". The case of *R. v. Lal*,[3] from the British Columbia Supreme Court, has also upheld a detention and search without a warrant based on "articulable cause." It is recommended that police officers and departments explore the developing articulable cause doctrine based on advice from their respective legal counsel.

Endnotes

1. See, *R. v. Ladouceur* (1990), 56 C.C.C. (3d) 22 (S.C.C.); *R. v. Hufsky* (1988), 40 C.C.C. (3d) 398 (S.C.C.); *R. v. Therens* (1985), 18 C.C.C. (3d) 481 (S.C.C.).
2. (1993), 79 C.C.C. (3d) 482 (O.C.A.).
3. (Dec., 1996) Van Reg. (B.C.S.C.).

The Staff of the JIBC, Police Academy wish you a very

HAPPY



OPERATIONAL NOTES

R. v. Stillman (1997), 113 C.C.C. (3d) 321 (S.C.C.)

Cst. Robert Kroeker, B.A. LL.B (Saanich P.D.)

Common law power to search incidental to arrest does not extend to search of individual for biological samples - taking of such samples constituting unreasonable search and seizure and violating accused's right to security of person - While in custody accused blew nose and threw tissue away - police recovered tissue from waste basket and sent for DNA analysis - accused having refused to consent to provide samples - search of waste basket and seizure of tissue unreasonable - Any evidence, real or testimonial, that could not be discovered but for conscription of accused not admissible at trial.

The accused, 17 year old William Stillman, was arrested in 1991 and charged with the murder of 14 year old Pamela Bischoff. The two had been partying outdoors with a number of teens near Oromocto, New Brunswick. Bischoff was last seen leaving with Stillman. Her body was found six days later in the Oromocto River next to a bridge near where she had last been seen. Bischoff died as a result of blows to her head. Semen was found in her vagina and a human bite mark had been left on her abdomen.

Seven days after Bischoff had last been seen alive, Stillman was arrested by police for the murder. He was taken to police headquarters and subsequently met his lawyer while in police custody. Stillman had been asked by police to provide hair samples for DNA analysis, teeth impressions and a statement. At the time there were no *Criminal Code* provisions allowing for the search of a person and the seizure of biological samples. Stillman's lawyer advised police that Stillman refused to consent to the taking of any samples or impressions and that he would not be providing a statement to police. Despite Stillman's lack of consent, and under threat of force, the police took samples from Stillman. Police collected scalp hair samples by passing a gloved hand through his hair as well as by plucking hairs. Stillman was made to pluck some of his own pubic hair. Plasticine impressions of his teeth were taken as well as buccal swabs and a sample of saliva.

Then the police interviewed Stillman for an hour. He did not make a statement, but sobbed throughout the interview. He asked to use the washroom and when he did so he blew his nose and threw the tissue into the garbage. The police recovered the tissue.

At trial, the case against Stillman relied heavily on the DNA and dental evidence. The trial judge found that the hair samples, teeth samples and buccal swabs were collected in a manner that violated Stillman's *Charter* rights, but despite the breach the evidence should be admitted. He found that the bodily samples were real evidence and existed independent of the *Charter* violation. Further, the police had the right to seize the samples as incident to arrest. The trial judge found that the recovery of the tissue was not a search and, thus, there was no violation of Stillman's rights in that regard.

Stillman was convicted of first degree murder. He appealed. The Court of Appeal of New Brunswick upheld the conviction. On appeal to the Supreme Court of Canada the conviction was overturned and a new trial ordered.

The majority (Lamer, C.J., La Forest, Sopinka, Cory and Iacobucci JJ.), found that the common law power to search incident to arrest did *not* permit the search for and seizure of biological samples. The seizure of the hair samples, teeth impressions, saliva and buccal swabs violated the accused's section 7 *Charter* right to security of the person and constituted an unreasonable search and seizure contrary to section 8 of the *Charter*. The majority ruled that the admission of the evidence would render the trial unfair and that it had to be excluded.

The majority went on to find that the seizure of the discarded tissue in the police station also infringed section 8. Where a person is *not* in *custody,* the police can normally collect and test a discarded item. Where a person discards an item it has been abandoned and that person no longer has an expectation of privacy in relation to the item. However, the situation is different where a person is in custody. When in custody, whether or not a person has abandoned a discarded item will depend upon the circumstances of the case. Here, the accused had refused to provide biological samples and the police were aware of that decision. The police could not seize the tissue without the consent of the accused. However, the tissue was admissible as evidence and the *Charter* breach was not a serious one and the police could and would have obtained a warrant to seize the tissue in any event.

In the course of this decision the majority entrenched a rule that unlawfully *conscripted evidence* (*i.e.* evidence that the accused is enlisted to participate in the discovery or collection of) both testimonial (*e.g.* statements) and real (*e.g.* biological samples), which affects the fairness of the trial, must always be excluded under section 24(2) of the *Charter.* The only exception is where the Crown establishes, on a balance of probabilities, that the impugned evidence would have been discovered by the police by an alternative non-conscriptive means or that its discovery was inevitable.

This is an unprecedented extension of the right against self-incrimination. No other common law jurisdiction has

extended the principle against self-incrimination to physical (or "real") evidence, except physical evidence that would not have been discovered but for the involuntary statement of the accused (commonly referred to in the U.S. as *the fruit of the poisonous tree* doctrine) . The rule remains firmly confined to testimonial evidence in Britain, Australia and the United States. However, here the majority has stated clearly that any evidence, be it testimonial or real, that would not have been discovered but for the unlawful participation of the accused in the discovery of that evidence, will affect the fairness of the trial and must be excluded.

R. v. Laurin (1997), 113 C.C.C. (3d) 519 (Ont. C.A.)

The police received an anonymous tip that the accused was growing marihuana in his apartment. Police officers went to the apartment complex. The accused's unit was on the ground level. The police went into the side yard of the apartment complex to look closely at the accused's window. One officer came within two inches of the window. Once there they observed that the window was covered from the inside, there was a bright light within the apartment and condensation on the window. The police officers then went into the public hallway of the apartment building and stood near the accused's door. There they noted the smell of marihuana. A search warrant was obtained and the accused's apartment was searched pursuant to the warrant. The police seized a marihuana plant, some cannabis resin and some growing equipment. The accused was charged with cultivation of marihuana and possession.

The trial judge found that the police had not breached the accused's right under section 8 of the *Charter* to be free from unreasonable search and seizure, and admitted the evidence.

On appeal, the Court found that while the accused had no right to exclude anyone from the side yard, nor did the police officers have any right to be there. The fact that the police came within two inches of the window and visually inspected the inside of the window infringed on the accused's reasonable expectation of privacy. The search of the window was unreasonable and that information was deleted from the Information to Obtain. Although this information was excised from the Information to Obtain sufficient facts remained to support the granting of the warrant. Despite the *Charter* violation and being excised from the Information to Obtain, the police observations of the window were admitted into evidence under section 24(2) of the *Charter*. The Court concluded "that exclusion of the evidence would have a greater negative effect on the reputation of the administration of justice than would its admission".

The Court of Appeal went onto find that the smelling of marihuana by the police in the public hallway outside of the accused's door was not a search. The police were entitled to be there and did not depend on the invitation of the accused. The accused had no reasonable expectation of privacy with respect to smells emanating from his apartment into the hallway.

Statutory Provisions

Bill C-17, the *Criminal Law Improvement Act*, S.C. 1997, came into force June 16, 1997 bringing with it the following important changes to the *Criminal Code*.

1. The list of offences for which wiretap authorizations may be obtained has been expanded (see section Part VI, s. 83, *Criminal Code*).
2. Section 487 has been amended to allow for the search of computer data bases and files. Further, s. 487(2.1) authorizes the use of printing and copying equipment present to facilitate such search and seizures.
3. Telewarrant provisions have been extended to General warrants (s. 487.01(7)), and to DNA warrants (s. 487.05(3)).
4. A new "Body Impression Warrant" has been created granting police authority to obtain "any handprint, fingerprint, footprint, foot impression, teeth impressions or other print or impression of the body or any part of the body" (see generally, s. 487.091).
5. The common law power to search without a warrant in "exigent circumstances" has been codified. Section 487.11 now authorizes a peace officer to search for and seize anything, without a warrant, that he could obtain a warrant for under ss. 487(1) or 492.1(1) but, due to exigent circumstances, it would be impracticable to obtain a warrant.
6. The common law "plain view" doctrine has been codified. Section 489(2) now permits a peace officer who is lawfully in a place pursuant to the execution of a warrant *or otherwise in the execution of duties* to seize anything that the officer believes on reasonable grounds was obtained through the commission of an offence, used in the commission of an offence, or is evidence of the commission of an offence. Offence, in relation to this statutory power, relates only to federal offences.

There have been several other amendements to the Criminal Code not covered here. A Training Bulletin is available from the Police Academy regarding some of these other amendments.