

*C A C P Traffic Symposium  
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*Recent Case-Law*

*Presented by*

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## CASES OF GENERAL APPLICATION

### ***R v Mann* 2004 SCC 52 investigative detention search for officer safety**

This case has probably had the biggest impact on front-line investigators than any other in the last three years. While the court found that there was in Canada an investigative detention it said that only a protective search was allowed.

As two police officers approached the scene of a reported break and enter, they observed M, who matched the description of the suspect, walking casually along the sidewalk. They stopped him. M identified himself and complied with a pat-down search of his person for concealed weapons. During the search, one officer felt a soft object in M's pocket. He reached into the pocket and found a small plastic bag containing marijuana. He also found a number of small plastic baggies in another pocket. M was arrested and charged with possession of marijuana for the purpose of trafficking. The trial judge found that the search of M's pocket contravened s. 8 of the *Canadian Charter of Rights and Freedoms*.

The police were entitled to detain M for investigative purposes and to conduct a pat-down search to ensure their safety, but the search of M's pockets was unjustified and the evidence discovered therein must be excluded.

#### HELD

Although there is no general power of detention for investigative purposes, police officers may detain an individual if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that the detention is reasonably necessary on an objective view of the circumstances. These circumstances include the extent to which the interference with individual liberty is necessary to the performance of the officer's duty, to the liberty interfered with, and to the nature and extent of the interference. At a minimum, individuals who are detained for investigative purposes must be advised, in clear and simple language, of the reasons for the detention. Investigative detentions carried out in accordance with the common law power recognized in this case will not infringe the detainee's rights under s. 9 of the *Charter*. They should be brief in duration, so compliance with s. 10(b) will not excuse prolonging, unduly and artificially, any such detention. Investigative detentions do not impose an obligation on the detained individual to answer questions posed by the police. Where a police officer has reasonable grounds to believe that his safety or the safety of others is at risk, the officer may engage in a protective pat-down search of the detained individual. The investigative detention and protective search power must be distinguished from an arrest and the incidental power to search on arrest.

In this case, the seizure of the marijuana contravened s. 8 of the *Charter*. The officers had reasonable grounds to detain M and to conduct a protective search, but no reasonable basis for reaching into M's pocket. This more intrusive part of the search was an unreasonable violation of M's reasonable expectation of privacy in respect of the contents

of his pockets. Moreover, the Crown has not shown on the balance of probabilities that the search was carried out in a reasonable manner.

The evidence should be excluded under s. 24(2) of the *Charter*. The trial judge erred in ruling the evidence inadmissible on the basis of trial unfairness because the marijuana was non-conscriptive, but his decision to exclude it was correct. The search went beyond what was required to mitigate concerns about the officer's safety and reflects a serious breach of M's protection against unreasonable search and seizure. When the officer reached into M's pocket, the purpose of the search shifted from safety to the detection and collection of evidence, and the search became one for evidence absent reasonable grounds. While a frisk search is a minimally intrusive search, the search of M's inner pocket must be weighed against the absence of any reasonable basis for justification.

At a minimum, individuals who are detained for investigative purposes must be advised, in clear and simple language, of the reasons for the detention. Investigative detentions carried out in accordance with the common law power recognized in this case will not infringe the detainee's rights under s. 9 of the *Charter*. They should be brief in duration, so compliance with s. 10(b) will not excuse prolonging, unduly and artificially, any such detention. Investigative detentions do not impose an obligation on the detained individual to answer questions posed by the police.

**Subject: *R v Nguyen* 2007 SKQB 84 pipeline vehicle search indicators  
cologne masking insufficient grounds**

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Evidence was excluded in this case where it appears that Pipeline training was made use of. This case involved a routine motor vehicle stop for speeding. During the stop the officer noted the following indicators:

¶ 6 Corporal Wilson testified that he became suspicious the accused were drug traffickers. He gave the following reasons:

- (a) Duy and David appeared to be nervous when stopped;
- (b) Their explanation as to how long they were to stay in Toronto did not appear to make any sense;
- (c) Even after Duy was only given a warning for an alleged speeding violation, he kept apologizing to the officer;
- (d) The smell of cologne permeated the vehicle.

Corporal Wilson testified that cologne was used by drug traffickers to mask the smell of marijuana. Although one of the accused said they played basketball together, there was a five year discrepancy in their ages.

¶ 7 For these reasons Corporal Wilson decided to detain all three accused for a drug investigation as he had formed the opinion that he had reasonable and probable grounds

upon which to arrest each of the accused and the usual police warnings were given. After Corporal Wilson requested backup assistance from the Broadview detachment, all three accused were arrested and the vehicle was searched. Nineteen pounds of marihuana was seized from four suitcases which were located in the vehicle.

¶ 8 Before the arrest there was no tangible evidence of drugs being located in the vehicle.

The judge reviewed the reasons provided by the officer and was not satisfied that there were sufficient grounds to arrest and search.

¶ 11 In the Saskatchewan case of *R. v. Harris*, 2005 SKQB 111; (2005), 260 Sask.R. 156 (Q.B.), the accused was stopped for driving a motorhome at an excessive speed on the highway. The accused appeared nervous, followed the officer to the police cruiser, asked about whether the officer worked out of a nearby town known for marihuana courier arrests, and had prior arrests involving marihuana. The motorhome was owned by a third party in British Columbia but was being driven to Ontario. The officer detained the accused for investigation. When the officer questioned the passenger, who gave answers not fully consistent with the accused's, the officer arrested the accused, searched the vehicle and found marihuana. At the trial, the accused applied to exclude the evidence obtained during the search. Justice Kyle granted the application, holding that the officer had bare grounds for investigative detention but lacked reasonable and probable grounds for the arrest and search.

¶ 12 This case is analogous to the case at bar although here, the arresting officer had even less grounds to arrest the accused than in the *Harris* case, *supra*. It is ironic that the investigating officer, Corporal Wilson, was the arresting officer in each case. Corporal Wilson conceded in cross-examination that he was aware of Justice Kyle's judgment as it was pronounced only a few days before this incident.

¶ 13 Viewed objectively, I can find no basis for reasonable cause. There was no smell of marihuana, the accused had no previous record, the fact that they were nervous and their story as to the reason for their journey does not, by itself, establish that reasonable and probable grounds existed. I therefore conclude that a reasonable person would, on the evidence, conclude that there were not reasonable and probable grounds to effect an arrest. I therefore find that the arrest was in breach of s. 9 of the *Charter* and therefore unlawful.

¶ 14 Having come to that conclusion, it follows that the searches were also unreasonable and a breach of s. 8 of the *Charter*.

The judge went on to find that the evidence out to be excluded because the officer acted in bad faith. The judge felt that the facts here were similar to those in *R v Harris R. v. Harris*, 2005 SKQB 111; (2005), 260 Sask.R. 156 (Q.B.), and as a result he shouldn't have resulted in the arrest:

¶ 18 With respect to the seriousness of the breaches, this involves an examination of the police conduct. I am not satisfied that Corporal Wilson acted in good faith. He was aware of the *Harris* decision, *supra*, which was analogous to the case at bar where the court said that the arrest was illegal. He did not attempt to obtain a search warrant after the vehicle was seized. I have concerns about an inquiry into a possible minor traffic violation where only a warning was given could result in an arrest and the laying of serious charges.

A more troubling aspect is that the judge was of the belief that a warrant ought to have been applied for.

¶ 10 Here the police had an opportunity to obtain a warrant but this procedure was not followed....

In B.C. the Court of Appeal has clearly ruled that a vehicle can be searched incidental to arrest even if there is time to obtain a warrant. See *R v Munro* 2005 BCCA 610 and *R v Condon* 2006 BCCA 318.

### **Subject: R v Hoyt 2006 ABQB 820 Jetway investigative detention questions asked not detained grounds to arrest**

This decision relates to the RCMP Jetway project at the Calgary Greyhound Bus Terminal. This is a technique that is being used in numerous transportation terminals across the country. The successful prosecution of these cases depends almost entirely of the ability of the offices to articulate their observations and apply them to their experience in the detection of crime. The prosecutor also needs an understanding of the process and preparation is very important.

The investigation netted approximately two kilograms of cocaine. The seizure of the cocaine followed the observation of a suitcase in an open space and a three to five minute conversation during which the police made observations respecting Mr. Hoyt.

Brief outline of some of the facts

¶ 3 On December 4, 2003, Constables Gary Michael Ritchie and Charles Woodman MacDonald were patrolling the Calgary Greyhound Bus Depot as part of Jetway. Jetway is an R.C.M.P. operation aimed at the interdiction of domestic transportation of controlled substances within transportation companies. The Jetway unit in Calgary is primarily involved in the domestic interdiction at the bus terminal, the airport and domestic transportation companies involved in the transportation of freight.

¶ 4 A bus from Vancouver arrived at the Calgary Bus Depot about 11:00 a.m. and the Constables observed the passengers disembarking from the bus. Constable Ritchie observed Mr. Hoyt walk from the bus garage through the doors into the main terminal. He made a mental note Mr. Hoyt was carrying a small backpack with a locked zipper.

## B. Luggage

¶ 5 It is routine practice for Jetway officers to observe the luggage and freight being transported across the country after passengers leave the bus garage. Constables Ritchie and MacDonald observed the luggage being held on racks before being transferred to an eastbound bus going to Winnipeg. A medium-sized, pullman-style Winner suitcase on the luggage racks caught their attention. Constable Ritchie noted the two temporary destination tags on the suitcase had minimal identification on them. Both tags had the name "Weir" on them with the destination spelled incorrectly as "Winnepeg". Constable Ritchie moved the suitcase so he could view it more closely and examine the identification label in its protective slot. He noted there was no name, address or phone number on the label. Constable Ritchie also noted the suitcase felt extremely light and appeared to be brand new. There was no unusual smell coming from the suitcase.

Constable Ritchie was wearing plain clothes when he presented his police badge to Mr. Hoyt, saying "Excuse me, sir, Excuse me, sir, Police officer here at the bus terminal. Could I talk to you for a second?" Mr. Hoyt made eye contact with Constable Ritchie and responded, "Sure. What's this about?" Constable Ritchie talked to Mr. Hoyt in an area between the front of the bus and the terminal wall. The terminal wall is a wall that separates the bus garage from the terminal and the passenger area inside the terminal. The distance between the front of the bus and the terminal wall is approximately ten feet.

Constable Ritchie engaged Mr. Hoyt in a conversation with respect to his trip. He asked to see Mr. Hoyt's bus ticket, saying he was under no obligation to show it. Mr. Hoyt presented the ticket with his right hand and Constable Ritchie observed his hand was trembling. Constable Ritchie observed the ticket was a regular fare from Vancouver to Winnipeg, the name on the ticket was "Weir", it was purchased at 5:43 p.m. on December 3, 2003, with a departure time of 6:30 p.m. the same day from Vancouver, and it was a one-way ticket. Constable Ritchie asked Mr. Hoyt for his name and Mr. Hoyt replied it was Chris Weir. Constable Ritchie then asked Mr. Hoyt to show identification, saying he was under no obligation to do so. Mr. Hoyt indicated he had none on him.

Constable Ritchie asked Mr. Hoyt the type of luggage he had travelling with him and testified at this time he noted Mr. Hoyt was becoming stressed and showing signs of nervousness as his right fist was clenched tightly on a pillow case and his left leg was vibrating. Mr. Hoyt stated besides the backpack and pillow he was holding he had a suitcase underneath the bus.

Constable Ritchie then informed Mr. Hoyt he was a police officer involved in attempting to track down people involved in the drug trade and he could not believe the number of people he has arrested for carrying drugs across the country. Mr. Hoyt replied, "Oh yeah. Well, I don't have any drugs. I don't even use drugs." According to Constable Ritchie, when he informed Mr. Hoyt he worked primarily in narcotics, there was an immediate change in Mr. Hoyt's face as it turned red. Constable Ritchie also observed Mr. Hoyt was still clenching his pillow. He asked Mr. Hoyt if he was sure he was not carrying any drugs, large quantities of money or firearms. Mr. Hoyt replied "no" to each of these

questions. Constable Ritchie made the following observations in concluding Mr. Hoyt was experiencing increased stress and nervousness:

Constable Ritchie asked to search Mr. Hoyt's backpack and pillow case, saying he was not obliged to show him. Mr. Hoyt replied, "No, I don't think so. I don't see any purpose in that. What makes you think I'm carrying drugs?" Ritchie replied "Based on my observations and experience as a police officer, I believe that you are displaying characteristics consistent with an individual transporting controlled substances, and I have formed the opinion that you have controlled substances in your possession. I am therefore placing you under arrest for possession of a controlled substance under the Controlled Drugs and Substances Act. Do you understand"

¶ 21 The following issues arise:

- a) Was Mr. Hoyt detained? If so, was he arbitrarily detained in violation of s. 9 of the *Charter*?
- b) If Mr. Hoyt was detained, were his ss. 10(a) and 10(b) *Charter* rights violated?
- c) Was there a search prior to the arrest and, if so, was it contrary to s. 8 of the *Charter*? Was the warrantless, post-arrest search an unreasonable search contrary to s. 8 of the *Charter*?
- d) Were Mr. Hoyt's s. 7 *Charter* rights violated?
- e) Should the evidence be excluded under s. 24(2) of the *Charter*?

22 Mr. Hoyt is the applicant and has the burden of establishing on a balance of probabilities there has been a breach of his *Charter* right or rights. If a *Charter* violation is established, Mr. Hoyt must establish under s. 24(2) of the *Charter* that on a balance of probabilities, having regard to all the circumstances, the admission of the evidence in question would bring the administration of justice into disrepute.

## THE CONCLUSIONS REGARDING DETENTION

¶ 27 When Constable Ritchie first approached Mr. Hoyt and asked to speak to him, Mr. Hoyt replied, "Sure. What's this about?" Before the conversation began, Mr. Hoyt had already been identified as the potential owner of the suitcase that caused Constables Ritchie and MacDonald to be suspicious. I accept Mr. Hoyt was in fact "free to go" at this point because, inter alia, Constable Ritchie did not have the requisite grounds to associate Mr. Hoyt with the suitcase. He had not asked Mr. Hoyt for his name. Mr. Hoyt smiled at Constable Ritchie and exercised a choice to speak with him. I find there was no psychological detention at this point in the conversation. There was also no physical detention at this point.

¶ 30 I find there was no physical detention arising from the positions of Mr. Hoyt and Constable Ritchie during their conversation. The conversation did not take place in an isolated area, it was in a public place and Mr. Hoyt admitted he was told he was free to go. Mr. Hoyt had an unimpeded exit route when he spoke with Constable Ritchie. Mr. Hoyt admitted in cross-examination he could have walked away from Constable Ritchie

and gone back inside the terminal. Mr. Hoyt was standing with his back towards the wall and was facing the bus during the conversation. The distance between the front of the bus and the terminal wall is approximately ten feet. Constable MacDonald was located out of sight, about eight to ten feet away, and had not at that point been identified to Mr. Hoyt

## GROUNDS TO ARREST

¶ 70 Constable Ritchie had reasonable and probable grounds to arrest Mr. Hoyt, including:

- (a) Mr. Hoyt was travelling from Vancouver, a source city for drugs being transported across Canada.
- (b) Mr. Hoyt's suitcase contained two luggage tags with minimal identifying information. Constable Ritchie testified that, frequently when dealing with a bag concerning controlled substances, the bag will contain more than one tag with a lack of detail.
- (c) Mr. Hoyt's suitcase was light in weight and it appeared to be brand new. Constable Ritchie testified that, when a person is transporting either controlled substances or large amounts of money, the suitcase used is often light and purchased brand new to avoid possible contamination.
- (d) Mr. Hoyt was carrying a backpack with a locked zipper, Constable Ritchie testified in his experience, in the Calgary Bus Depot, people do not usually bother to lock their carry-on bags.
- (e) Constable Ritchie testified the fact Mr. Hoyt's ticket was purchased at the last minute caused him some concern as a person involved in the transportation of controlled substances frequently purchases his or her ticket a short time before the bus leaves, typically within one hour of the time the bus leaves, in order to avoid detection at the point of departure. Here, the bus left around 6:30 p.m. and the ticket was purchased in Vancouver at 5:43 p.m., 47 minutes in advance. Constable Ritchie also stated it was somewhat unusual that it was a one-way ticket since Mr. Hoyt said he was going to visit his grandmother. Constable Ritchie testified this caused him some concern as most often a person involved in the transportation of controlled substances by bus will travel to the destination on a one-way ticket and fly back to the place of origin. Also, Mr. Hoyt's right hand was trembling when he presented Constable Ritchie with his ticket.
- (f) Mr. Hoyt denied he had identification on him.

¶ 71 Besides these six grounds, Constable Ritchie observed changes in Mr. Hoyt's demeanour throughout their encounter that objectively and subjectively strengthened his belief he had reasonable and probable grounds to arrest Mr. Hoyt. Mr. Hoyt admitted in cross-examination his demeanour may have changed throughout the encounter:

I think that the court's comments regarding the conduct of the officers are worthy of inserting them here.

¶ 92 Mr. Hoyt argues the Constables acted in bad faith. To the contrary, I do not think there is any evidence of bad faith and I find the Constables acted in good faith in carrying out their duties under Jetway. I find Constables Ritchie and MacDonald did not act arbitrarily in their decision to approach Mr. Hoyt and engage him in a conversation. After making observations relative to Mr. Hoyt's suitcase, they developed a planned course of action to speak with the owner of the suitcase. Based on their testimony, I find the Constables made every attempt to perform their duties under Jetway in a manner consistent with Mr. Hoyt's *Charter* rights. I reject Mr. Hoyt's position that the actions of the Constables were committed wholly with a cavalier disregard for his *Charter* rights.

¶ 93 I find that, if Mr. Hoyt's bus ticket was not returned, Constable Ritchie inadvertently withheld the ticket. The conversation transpired over a three to five minute period. Although the ticket should have been returned to Mr. Hoyt, very little time transpired between the time the ticket was arguably not returned and the time Mr. Hoyt was arrested. Once he had reviewed the ticket for the information he required, Constable Ritchie did not gain anything if he failed to return Mr. Hoyt's ticket. I find Constable Ritchie did not knowingly infringe Mr. Hoyt's *Charter* rights if he withheld Mr. Hoyt's ticket. If there was a *Charter* violation when the ticket was not returned, I find the violation was isolated, Constable Ritchie did not ignore a request for a *Charter* right from Mr. Hoyt and any violation did not amount to a significant departure from the requisite standard.

¶ 94 I find appropriate means were used in obtaining the evidence and the Constables were responding appropriately in the interests of the public. I reject Mr. Hoyt's position that other investigatory techniques were available and equally viable such as surveillance and corroboration. I do not see how surveillance or corroboration could have been used in this case to discover Mr. Hoyt had a large quantity of cocaine locked in his backpack.

## ***R v Aslam* 2006 BCCA 551 investigative detention search glove box for indicia of ownership**

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<http://www.courts.gov.bc.ca/Jdb-txt/CA/06/05/2006BCCA0551.htm>

In this decision released today the BCCA had to deal with a ruling of the lower court finding a proper investigative detention and a search of the glove compartment for I.D. the vehicle came to the attention of the officers because of the conduct of the driver and passenger, the way the vehicle was parked, the damage to one of the doors consistent with being broken into and finally that the registered owner was Asian and they were not.

### Facts

[3] At that point, the officers' reasons for detention were that the appellant and Truesdale were not Asian, which suggested that neither was the owner of the vehicle and they had refused to identify the owner of the vehicle. The manner in which they had parked the vehicle and immediately left it was unusual. Both the appellant and Mr. Truesdale appeared to be breathing heavily and sweating. Constable Tuininga went to the van, which was locked, and observed damage to the passenger door handle and the ignition cylinder. His opinion was that the van was stolen. He advised both the appellant and Mr. Truesdale that they were under arrest for possession of stolen property. Constable Tuininga then gave the appellant a "pat" search and found a key in his pocket. He returned to the van and used the key to open the passenger door with the intention of searching the glove box for additional information that might assist in locating the registered owner. When he opened the door he was met with an overwhelming smell of marihuana and concluded that there was a large quantity of it in the van. He noticed a duffle bag between the driver and passenger seats. He opened it and found packages of marihuana.

The court went on to find that in the circumstances there were adequate grounds for the investigative detention as in *R v Mann*:

[6] The appellant submits that his detention and arrest as well as the search were unlawful as they failed to establish a sufficient factual foundation to meet the test in *R. v. Mann* (2004). 185 C.C.C. (3d) 308 (SCC). An investigated detention requires reasonable grounds to suspect that a detainee is criminally implicated in the activity under investigation. The threshold is lower than the reasonable and probable grounds required for an arrest. The grounds for detention must be a reasonable suspicion determined objectively from the circumstances.

[7] The trial judge referred to *Mann* and concluded that the test for detention of reasonable grounds for suspicion was satisfied. He said:

[31] ... At the time the accused were detained, the circumstances known to the police included a computer check suggesting that neither of the individuals were the registered owner of the vehicle, the accused erratically parking the vehicle and departing from it immediately after the police vehicle executed a U-turn and activated its emergency equipment, and refusal by the suspects to identify the registered owner.

[8] In my view, it was open to the trial judge to conclude that the officers had reasonable grounds for an investigative detention in the circumstances he identified. The trial judge then concluded that Constable Tuininga's observations of the locked vehicle, namely the damage to the door handle and the ignition cylinder, together with the other circumstances, was reasonable and probable cause for the officer to conclude the van was stolen. It was sufficient to arrest the appellant. The "pat" search was a reasonable incident of that arrest.

Of particular interest are the findings relative to the intention to search the glove box for the purpose of finding "indicia of ownership"

[9] The entry of the vehicle without a warrant was also lawful to the extent of an intended search of the glove box for *indicia* of ownership. The trial judge relied *R. v. Caslake*, [1998] 1. S.C.R. 51, 121 C.C.C. (3d) 97 which supports the warrantless search of a vehicle incidental to an arrest for a limited purpose related to the purpose of the arrest. Here the intended search of the glove compartment was for the purpose of locating documents that would assist in determining ownership of the vehicle and relevant to the theft for which the appellant was originally arrested.

### **R. v. A.M.-ONCA April 28-06 Dog Sniffs in the School Context**

The trial judge Justice Hornblower excluded the evidence of illicit drugs found in a student's backpack at a Sarnia high school after concluding that the use of a drug detector dog to sniff the student's backback in the school gymnasium was a search in law and that the police did not have reasonable grounds to use the dog to sniff the backpack in the circumstances.

In his ruling, Justice Armstrong concluded that the police went to the school on November 7, 2002 and enabled a trained police dog to sniff at the personal effects' of an entire student body in a random police search. During the presence of the three police officers (Sarnia police and OPP) and the drug detector dog, students were confined to their classrooms for one and a half to two hours. Justice Armstrong held that the police had no information regarding a specific target area in the school and no information regarding particular persons to be searched. However, the school principal, who gave the police permission to search the school that day, indicated that it was 'pretty safe to assume' that drugs could be there. The police walked about the school premises with the sniffer dog, and later proceeded to the school gymnasium, where the dog indicated on one of the backpacks lying next to the wall. The dog handler gave the backpack to another

police officer, who physically searched it. Ten bags of marihuana and 10 magic mushrooms were among the items found. The student, A.M., was arrested.

In upholding the lower court decision, Justice Armstrong stated:

[62] This was a warrantless, random search with the entire school body held in detention. It was not authorized by either the criminal law or the *Education Act* and subsidiary school policies. The breach was serious. As the trial judge said:

To admit the evidence is effectively to strip A.M. and any other student in a similar situation of the right to be free from unreasonable search and seizure.

## **2. Was the dog sniff a search?**

[45] Constable Callander testified that they went to the school to conduct a “random search”. Constable McCutchen, who was the dog’s handler, agreed in cross-examination that he and the dog were engaged in a search. The Crown conceded that point. That concession foreclosed any further cross-examination on the issue. That said, I do not find it necessary in this case to decide whether the police activity prior to the search of the backpack constituted a search for s. 8 purposes. In my view, the dog sniff of A.M.’s backpack and the search of the backpack by Constable Callander constituted a search for the purposes of s. 8 of the *Charter*.

[46] I agree with the submission of counsel for the Canadian Civil Liberties Association that:

The dog is a necessary, direct, and integral part of the police officers’ search of the classrooms, gymnasium and backpacks. The dog is, in essence, a physical extension of its handler and is directly and immediately connected to the consequent physical search of the backpack.

[47] I am not persuaded that the judgment of the Supreme Court of Canada in *Tessling* is supportive of the Crown’s position that a dog sniff is not a search. In *Tessling*, the house of the accused was specifically targeted as a result of information that the accused was involved in a marijuana grow operation. I see a significant difference between a plane flying over the exterior of a building (on the basis of information received) and the taking of pictures of heat patterns emanating from the building, and a trained police dog sniffing at the personal effects of an entire student body in a random police search.

## **3. Was the dog sniff search reasonable?**

[49] The Crown takes the position that A.M.’s expectation of privacy in his backpack “was so significantly diminished as to be negligible.” With respect, I disagree. I agree with the submission of both counsel for A.M. and the Canadian Civil Liberties Association that a student’s backpack should be afforded at least the same degree of respect as an adult’s briefcase. ...

[50] Counsel for the Canadian Civil Liberties Association made the following submission with respect to a student's backpack in a school setting such as this:

A student's backpack is in effect a portable bedroom and study rolled into one. It will contain personal items such as journals, photos, letters, personal hygiene items, medication, clothing and school records. Backpacks are often in reality the only way for students to carry and use items that are personal and important to them. These items are shielded from view and access.

There are no contextual factors that diminish students' legitimate expectation of privacy, dignity, and autonomy in their backpacks. Students' expectation of privacy in their backpacks is objectively reasonable. Backpacks are not searched in the normal course of a school day, nor do students come to school expecting that their backpacks will be searched. The students did not consent to their backpacks being searched on November 7, 2002 and the Principal certainly could not consent on their behalf.

I agree with the above submission as it relates to the circumstances of this case.

[52] I pause here to observe that, in respect of a search by school authorities (on reasonable grounds), the same presumption does not apply: see *M.R.M.* at para. 50. However, I have already said that, in my opinion, this was a warrantless search by the police and therefore the presumption in *Hunter v. Southam* applies. As Cory J. said in *M.R.M.* at para 56:

**The usual standard, requiring prior authorization in the form of a warrant which is based upon information which provides reasonable and probable grounds, will continue to apply to police and their agents in their activities within a school. The modified standard for school authorities is required to allow them the necessary latitude to carry out their responsibilities to maintain a safe and orderly school environment. There is no reason, however, why police should not be required to comply with the usual standards, merely because the person they wish to search is in attendance at an elementary or secondary school.**

.....

#### **4. Was the search carried out in a reasonable manner?**

[57] To facilitate the search, the entire student population was detained in their classrooms for a period of one and a half to two hours. Although it was the principal who made the announcement to the student body to remain in the classrooms, it is my opinion that a review of the record indicates that he did so to accommodate the police search. There was no credible information to suggest that a search was justified. There were no reasonable grounds to detain the students. As Laskin J.A. said in *R. v. Calderon* (2004), 188 C.C.C. (3d) 481 at para. 69 (Ont. C.A.): "An officer cannot exercise the power to detain on a hunch, even a hunch borne of intuition gained by experience."

[58] The Supreme Court of Canada has held that there must be a clear nexus between the individual to be detained and a recent or on-going criminal offence. This position was articulated by Iacobucci J. for the majority of the court in *R. v. Mann*, [2004] 3 S.C.R. 59 at para. 34:

## DOG SNIFFS

### ***R v Madill* 2005 BCSC 1564 Pipeline indicators dog sniff Baulkham**

In this case the Roving Traffic Unit from Revelstoke stopped a speeding vehicle and after observing numerous indicators engaged Jack the dog. It is important to know that a large part of the success in this case was because there was excellent preparation of the witnesses by the prosecutor Glenn Verdurmen, who fully appreciated the nuances of such investigations. Cases where Pipeline and/or Jetway training has been put into practice requires an understanding by the prosecutor of all of the surrounding circumstances of the particular case but also how the officer goes about conducting the stops. Too often there is a lack of preparation and this can be fatal. An officer who may be following the law can be made out to be a cowboy/cowgirl if preparation has been lacking. Officers not only have to be good investigators they have to be good witnesses.

The prosecutor and officers in Madill were careful to enumerate 12 factors that led to the constellation of objectively discernable facts leading to the detention. The evidence was organized and the argument again hi-lited the cumulative effect of indicators. An officer and prosecutor have to be aware that the defence will be waving the *Calderon* and *Peardon* cases around and have to be prepared to meet the defence challenge head on. This was done in Madill.

The court went on at some length on valid infraction stops and criminal investigation stops. (See paragraphs 27-31)

At paragraph 32 the court said”

[32] I conclude that the traffic stop in this case was lawful. The additional aim of taking advantage of a legitimate traffic stop to take note of any clues of illegal transport of drugs did not in my view constitute the stop as one for the purposes of general investigation or turn it into an “unfounded general inquisition.” (from *Mellenthin*) The presence of the additional concern for matters other than *Motor Vehicle Act* matters should be dealt with in the manner suggested in *Brown v. Durham Regional Police Force*, namely by limiting police conduct after the stop.

In paragraphs 33-37 the court responded to the defence arguments of arbitrary detention and articulable cause.

[37] I agree with counsel for the accused that some of these indicators are neutral, whether taken individually or collectively, but I find that the several obvious and severe signs of nervousness, Mr. Madill’s eagerness to discuss his speeding, the non-abatement of nervousness when informed of the warning, the implausibility

of the cost of the one-way rental as part of a return trip to Winnipeg, and the results of the PIRS check indicating investigation in 2001 and 2002 under the **Controlled Drugs and Substances Act** are compelling. The entire constellation provided sufficient grounds to constitute articulable cause to detain for investigation under the **Controlled Drugs and Substances Act**.

### ***R v Binning* BCSC April 10-06 pipeline indicators dog sniff search incidental MANN issues detention**

This is another case involving officer Baulkham where the officers used their Pipeline training. Once again it is important to point out the extensive preparation on the part of the prosecutor and the officers. This enabled the court to analyze the totality of the circumstances with a proper factual underpinning.

The court accepted the use of indicators as well as commenting on the difficulties officers face when confronted with a matrix of facts and the impact of the Charter.

In the case the officer stopped a vehicle Sandhu-Singh for a traffic violation. As a result of observations the officers had reasonable grounds to suspect that the occupants might be involved with the commission of an offence and detained the occupants. They subsequently seized \$55,000 in cash. As a result of finding a passport and briefcase in that vehicle belonging to one Binning the officers were on the lookout for him and subsequently found him in another vehicle ahead of the Sandhu-Singh vehicle. Binning's vehicle with a trailer was stopped and searched after obtaining a warrant.

It is difficult to copy and paste all of the important passages so I will set out the issue and the paragraph numbers:

1. indicators paragraph(s)[19]
2. totality of the circumstances paragraph(s)[20]
3. an arrest for possession of proceeds was followed by a search incidental to arrest paragraph(s)[23-24]
4. dog sniff where money found proved positive paragraph(s)[25]
5. the grounds observed by the officers were sufficient for an investigative detention paragraph(s)[30-33]
6. Mr. Binning had a passport and a brief case in the Sandhu-Singh but there was nothing that indicated an expectation of the right of privacy of binning. paragraph(s)[44-48]. As a result Binning was found not to have standing to object to the search of the Sandhu-Singh vehicle;

7. the officers were on the lookout for a vehicle with Binning in it. After the Binning vehicle was stopped the officer advised it was for a traffic violation. This was a ruse. The court acknowledged that for safety purposes this might have been OK but that when it was obvious Binning was the driver and the other occupant were going to be detained they ought to have been advised of the reason for the detention and given the right to counsel. paragraph(s)[50-58]. The judge held that there was a failure to advise of the reason for the detention and a delay in allowing counsel to be consulted. The evidence was admitted under s.24(2) paragraph(s)[67 70-74];
8. There was 500 pounds of marihuana seized.
9. the judge admitted the evidence from all of the searches paragraph(s)[94-106].

The judge makes an interesting **comment that the events took less than a day and the Charter application took 12**. Hopefully you can read the copy and pasted paragraph from the reasons.

[9] The interaction between the police and the four accused in what might be described as a relatively straightforward drug investigation involving road side traffic stops leading to the seizure of \$100,000, 500 pounds of cannabis (marihuana), and 30 pounds of psilocybin has given rise to a panoply of *Charter* arguments advanced by the accused in the *voir dire* held to determine the admissibility of the evidence obtained by police. Although the police investigation lasted less than a day, the *voir dire* consumed some 12 days involving the hearing of evidence and counsels' submissions addressing the accuseds' rights provided by ss. 8, 9, 10, and 24 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

[10] I would not want the foregoing comments to be mistakenly construed as criticism of the counsel in this case. They performed their tasks with considerable and commendable intellect and energy to ensure trial fairness and the protection of their clients' rights as guaranteed under the *Charter*. My comments merely address the concern that the interpretation of *Charter* rights and how best they might be protected since the *Charter's* passage some 25 years ago, have somehow failed to provide those charged with enforcing the criminal law, particularly police officers, with a concise and succinct direction as to how they might perform their task while, at the same time, ensuring that they respect the *Charter* rights of those with whom they come into contact when enforcing the criminal law. The *Charter* requires restraints be placed on police actions, but the police deserve to know with clarity what those restraints are.

## **R v Lewis 2007 NSCA 2 Jetway stop detention dog sniff not challenged**

This case is very interesting because of what is not an issue (the dog sniff). Appeal by Lewis from his conviction for possession for the purpose of trafficking. Lewis was arrested at a train terminal after an RCMP dog sniffed a narcotic in his backpack, and after he was questioned by police with his consent, which allowed them to ascertain that he had a drug-related record. He was informed of his right to counsel after the arrest. Before he was able to phone counsel, a search of his backpack located cocaine. The trial judge held that there was no Charter breach in the arrest and search, and that Lewis had not been detained before the arrest. On appeal, Lewis contended that he had been detained prior to his arrest, and that this had triggered his right to counsel, with the result that the search violated sections 8 and 10(b) of the Charter.

**Held:** Appeal dismissed. Lewis' arrest was not illegal. It was based on reasonable and probable grounds - the dog's detection of a narcotic in the backpack of someone with a drug record. The subsequent search did not violate sections 8 or 10(b). Lewis was arrested for possession of a narcotic. The search was for the purpose of locating the narcotic. It was a search incidental to arrest, and not a search for an unrelated purpose. In all of the circumstances, which included the fact that there was no private phone at the train station, the police officers respected Lewis' right to a reasonable opportunity of access to counsel without delay.

## **R v Ta BCSC December 18-06 Revelstoke Registry 17010-2**

In this case the Associate Chief Justice of the BCSC allowed evidence of Cpl. Tim Baulkham based on a number of indicators. PSD Jack was also utilized and the judge had no difficulty admitting evidence supported by the dog sniff. Par. [11]

**second. I think that the search by the dog in these circumstances was not a search at all and certainly not one in law. The detection was in the rear of the vehicle, on the outside of the vehicle, in the free air about that part of the vehicle. I should, incidentally, conclude that the officer located the drug in the front seat of the vehicle on the floor after the dog was put back into the police van.**

## **R v Kang-Brown ABCA June 26-06 Jetway dog sniff not a search**

Brown was arrested in a bus depot following a conversation with a police officer and a sniff of his bag by a police dog. A large amount of cocaine was located in Brown's bag. The officer gave uncontradicted evidence his questions were given in a congenial, non-authoritative manner. He was in casual dress and no weapons were visible. He described

Brown's behaviour prior to and during the conversation as suspicious. Brown watched the officer and other passengers closely for no apparent reason, carried untagged luggage in an odd manner, and looked about him nervously. The trial judge found there was no detention. She also found there was no search, where the dog located drugs in Brown's bag, not on his person. The only issue at trial was the admissibility of evidence. Brown did not testify.

**HELD:** Appeal dismissed. The appeal court would not interfere with the judge's finding that there was no detention prior to the dog sniff and Brown's arrest. It was unlikely the dog smelled the heroin in Brown's clothes. There was no search and therefore no contravention of Brown's rights by the dog sniff. The officer acted in good faith in questioning Brown, given his suspicious behaviour. The steps the officer took prior to having the dog sniff Brown's bags, along with Brown's actions and manner, gave the officer reason to believe reasonable and probable grounds existed to have the dog sniff Brown's bag.

### **Gallant 2006 NBQB 114 Jetway evidence allowed dog sniff not a search**

¶ 37 Weighing all of the authorities on this issue, I believe the only conclusion one can reach is that the dog sniff in the circumstances of this case was not a search within section 8 of the *Charter*. As has been stated in the authorities, section 8 rights are personal rights. They protect people not places and this is more so with respect to public places.

¶ 38 One factor which has caused me concern is with respect to the fact that the duffle bag in question was on the shoulder of the accused. This certainly makes it different from being in the general luggage compartment of a bus. However, both Judge McKee and Madame Justice Romaine concluded that there was no personal disclosure in the dog sniff that affected the accused's dignity, integrity and autonomy. In addition, they concluded, in similar circumstances to those before this Court, that by bringing the luggage to a public transportation facility resulted in lessening his reasonable expectation of privacy.

¶ 39 In addition, the decisions of **Dinh/Lam** and **Buhay** dealt with the accused placing their luggage in lockers which distinguishes these cases from the one before this Court because this would heighten one's expectation of privacy as was suggested in **Wong** supra. In **Donovan**, Browne, J. concluded that the dog's aggressive behavior and the actions of the police constituted a search. Browne, J. felt "the invasion of personal space, the potential or possibility of physical contact or physical harm lead me to conclude that the search in this case was carried out by the dog. There is no evidence in the case before me that "Muddy" was violent, or there was risk of physical harm. The evidence was to the contrary. In addition the **Donovan** decision was well before the **Tessling** decision. I would therefore distinguish **Donovan**.

## **Taylor 2006 NLCA 41 dog sniff not a search courier distinguishes AM**

[30] In **Fry**, as in this case, the police had a basis to conduct an investigation regarding the contents of a specific package. They did not do a speculative sweep of all packages in the FedEx warehouse.

[31] Nor did the police in **Tessling** do a speculative sweep. Rather, they used FLIR technology (as an investigative tool) to look at heat emanating only from Tessling's house; informants had told them that Tessling had a marijuana "grow-op" there. The FLIR results, plus the information from informants, were used to obtain a warrant to search Tessling's house.

[33] The Ontario Court of Appeal in **R. v. A.M.** seems to suggest that a speculative sweep (at least in the circumstances of that case) offends s. 8 of the **Charter**. Having regard to the "totality of the circumstances" test, it is not readily apparent how this consideration fits within that framework.

## **R v Nguyen 2006 MBQB 120 motor vehicle dog sniff not a search indicators R v A.M. distinguished**

This is another case in an growing list where trial courts have ruled a "dog sniff" is not a search. The case arose as a result of a traffic stop at 2:25 PM for failure of the driver to wear a seatbelt. The officer observed a number of indicators:

1. lack of eye contact;
2. hand trembling and shaking when passing the licence to the officer. This was more than the usual nervous conduct of a stopped driver;
3. blankets and fast food wrappers that gave appearance the person was sleeping in the vehicle;
4. truck box liner longer than normal. It was also secured by numerous bolts. The officer had seen this type of securing a box on a prior marihuana seizure; and
5. the vehicle had a B.C. plate. B.C. was known to be a source of marihuana.

Based on experience the officer knew that persons transporting marihuana were concerned about the security of the load and did not want to leave the vehicle unattended. The officer suspected the occupants were transporting drugs. He decided to detain them but didn't advise them of any rights. He was concerned about officer safety and did not advise them of the change in basis of detention. He called for the drug handler and was waiting his arrival. He continued with checking the licence.

At 2:37 PM, after the dog arrived, he advised the occupants were being detained under the CDSA. The occupants were asked to exit the vehicle the male driver was subjected to a pat-down but female was not. The dog was walked around and indicated the presence of drugs by sitting down. The occupants were then arrested. The officer obtained a warrant despite the fact he believed he didn't need one.

In paragraph 18 the court ruled that the officer could detain the occupants based on reasonable grounds to suspect an offence was occurring. ( R v Mann)

In paragraph 21 the court ruled that the delay in notifying them of the detention for CDSA offence was reasonable for officer safety. The officer knew his fellow officer would arrive with the drugs shortly.

In paragraphs 25 to 31 the court stated that the officers didn't have the authority to search for evidence on an investigative detention. This focused on the "dog sniff" and whether that was a search or not. The court reviewed recent cases.

In paragraphs 26 to 36 the court addressed the recent case from the Ontario Court of Appeal in R v A.M. [2006] O. J. No. 1663. (I sent it out on April 29-06) The court distinguished this case from A.M. The court noted A.M. was a random search of an entire school, and the Crown conceded it was a search. The court also held that in A.M. the court didn't analyze the reasoning of the SCC in Tessling or comment on any of the cases dealing with "dog sniffs". Finally at paragraph 37 the court ruled that a dog sniff of the air emanating from a vehicle was not a search.

Bill  
William (Bill) C. West, Q.C.

## **OFFICER SNIFFS**

**Subject: FW: R. v. Rajaratnam 2006 ABCA 333 a dogless Jetway case suspicious actions smell of bounce sheets**

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Website

<http://www.albertacourts.ab.ca/jdb/2003-/ca/criminal/2006/2006abca0333.pdf>

Below you will find a summary by Jolaine Antonio and reference to the related paragraphs in today's decision. Of particular interest is the following comment:

- The smell of Bounce did not provide any biographical information. A sniff could reveal other personal information, but this fact alone does not make the search

unreasonable. "A reasonable person would know that strong odours commonly escape from bags ... Thus, even if a sniff can expose personal information, there could be no objectively reasonable expectation of privacy in these circumstances." (paras 50-51).

**From:** Antonio, Jolaine  
**Sent:** November 7, 2006 12:50 PM  
**To:** Davis-Barron, Sherri  
**Cc:** Mathews, Lisa; Brooks, John; Frankel, David  
**Subject:** Another Jetway conviction appeal dismissed

The Alberta Court of Appeal just issued its judgment in *R. v. Rajaratnam*, a dogless Jetway case.

The Appellant's behaviour drew the attention of two RCMP officers as he disembarked a Greyhound bus from Vancouver. The officers engaged him in a conversation. The Appellant's increasing nervousness heightened the officers' suspicions, but they still didn't think they had grounds to arrest. They ended the conversation, left the Appellant alone, and went over to a baggage trolley to smell the Appellant's bag. They detected a very strong odour of unused Bounce sheets. Based on their training and experience, they now felt they had grounds to arrest for trafficking. Upon arresting the Appellant, they searched his bag and found 2 kg of cocaine.

The Court of Appeal found no error in the Trial Judge's conclusions that there was no detention and no search, and that the officers did have sufficient grounds to arrest the Appellant. Some points of note include:

- The Appellant had argued, per *Mellenthin*, that a search began as soon as the RCMP began asking questions, particularly when they were asking to see the Appellant's ticket and ID. The Court found that *Mellenthin* is distinguishable (para. 18).
- Grounds for arrest must be assessed by reference to "a reasonable person in the position of the officer." In other words, "a judge is entitled to consider a police officer's training and experience in determining objective reasonableness." (paras. 22-25)
- The officers' sniff of the Appellant's bag did not intrude on a protected privacy interest (para. 29).
- The act of sniffing was not intrusive. "The fact a police officer employs the same normal human senses other people use does not make the activity sinister or invasive." (para. 46)
- The smell of Bounce did not provide any biographical information. A sniff could reveal other personal information, but this fact alone does not make the search

unreasonable. "A reasonable person would know that strong odours commonly escape from bags ... Thus, even if a sniff can expose personal information, there could be no objectively reasonable expectation of privacy in these circumstances." (paras 50-51).

**R. v. Omelusik, 2003 BCCA 319 Motor vehicle Articulate Cause Detention and Search Grounds Based on Smell of Marihuana Charter, Sections 8, 10, 24(2)**

Website <http://www.courts.gov.bc.ca/Jdb-txt/CA/03/03/2003BCCA319.htm>

MEMORANDUM TO: All Crown Counsel and Federal Prosecution Agents

FROM: S. David Frankel, Q.C. Senior General Counsel

**SUBJECT: Articulate Cause Detention and Search Grounds Based on Smell of Marihuana Charter, Sections 8, 10, 24(2)**

In **R. v. Omelusik**, 2003 BCCA 319, the Court dismissed a conviction appeal on charges of possession of cocaine and marihuana for the purpose of trafficking.

A vehicle driven by the accused was stopped for speeding. As the officer approached the vehicle he saw the accused holding a number of \$20 bills. The strong odour of fresh marihuana was detected coming from the vehicle. The accused was directed to step out of the vehicle, and was advised that he was under investigation for possession of marihuana. Upon checking the accused's waistband for weapons, the officer felt a soft object in the front pouch of the top he was wearing. It was removed, and turned out to be a bag of marihuana. At this point the accused was placed under arrest. A search of his person revealed three "decks" of cocaine.

Being of the view that the amount of marihuana in the pouch could not account for the smell the officer decided to search the front seat area of the vehicle. Through the open door he saw a clear plastic bag under the front seat. It was seized, and found to contain both cocaine and marihuana.

Although the accused had a cellular telephone he was not permitted to speak to his lawyer until about 30 minutes later, after he was taken to the jail.

The trial judge found no breaches of s. 8. With respect to ss 10(a) and (b), she held that the delay was inconsequential. The accused had not made any statements, and the police were not in a position to afford him privacy at the scene. In the alternative, the trial judge said that if there were Charter breaches, she nevertheless would have admitted the evidence.

With respect to the marihuana found on the accused, Donald J.A. held that, assuming without deciding that the officer should not have removed it from the pouch, the trial judge had not erred in ruling it admissible under s. 24(2). (para. 16)

With respect to s. 10(a), he found no breach. (para. 17)

Turning to s. 10(b), Donald J.A. stated that any delay in allowing the accused to call a lawyer did not show bad faith and, therefore, did not militate in favour of excluding the evidence. (para. 18)

Lastly, Donald J.A. rejected an argument that the officer did not have a basis for an investigative detention:

[20] Whether the smell of marihuana is enough for a lawful arrest, or in this case detention, depends on the circumstances: **R. v. Schulz** (2001), 159 B.C.A.C. 146, 2001 BCCA 601, and **R. v. Duong** (2002), 162 C.C.C. (3d) 242, 2002 BCCA 43 (leave to appeal dismissed [2002] S.C.C.A. No. 112 (Q.L.)). In the present case, the trial judge accepted Constable Kodak's evidence that the odour was of cut marihuana, not marihuana smoke, and that, together with the other circumstances, was sufficient, in my view, to justify detention. It followed that, for the officer's safety, he needed to search the appellant for weapons and, in the course of that, he came upon the drugs in the pouch which gave ample grounds for his arrest.

SDF:tim

## *LIQUOR CONTROL AND LICENSING ACT*

### **[RSBC 1996] CHAPTER 267**

#### **Liquor in motor vehicle**

**44** (1) In this section:

**"motor home"** has the same meaning as in the *Motor Vehicle Act*;

**"motor vehicle"** has the same meaning as in the *Motor Vehicle Act*, and includes an all terrain vehicle as defined in the *Motor Vehicle (All Terrain) Act*.

(2) Subject to subsection (3), a person must not drive or otherwise exercise control over the operation of a motor vehicle, whether or not it is in motion, while there is liquor in the person's possession or in the motor vehicle.

(3) Subsection (2) does not apply

- (a) if the liquor is in a container that is unopened and has an unbroken seal,
- (b) if the liquor is being transported or used in accordance with a licence issued under this Act, or
- (c) in any other case, if the motor vehicle
  - (i) is a motor home and the liquor is kept in a cabinet away from the driver's area,
  - (ii) is a station wagon or hatchback and the liquor is behind the rear seat, whether or not that seat is in an upright position,
  - (iii) is a pickup truck and the liquor is in an exterior compartment, a space designed for the carriage of baggage or parcels or any other location that is not readily accessible to any person in the motor vehicle,
  - (iv) is a motorcycle and the liquor is not readily accessible to the operator, or
  - (v) is not one referred to in subparagraphs (i) to (iv) and the liquor is in the trunk or space designed for the carriage of baggage or parcels.

### **Right to search**

**67** (1) A peace officer who, on reasonable and probable grounds, believes that liquor is, anywhere or on anyone, unlawfully possessed or kept, or possessed or kept for unlawful purposes may, subject to subsection (2), enter or search, or both, for the liquor where the peace officer suspects it to be, and may seize and remove liquor found and the packages in which it is kept.

(2) For the purposes of this section, a peace officer may without a warrant

- (a) search any person, and
- (b) enter or search, or both, anywhere except a residence.

(3) A person commits an offence if the person

- (a) obstructs or attempts to obstruct an entry or search by a peace officer under this section, or
- (b) refuses or fails to admit immediately a peace officer demanding entry anywhere under this section.

***R v Craig and MacNair* 2003 BCPC 0139 liquor based search Vehicle stop detention Charter warning evidence excluded.**

[17] The Crown asserts that the constables had a right to search pursuant to the authority of the **Liquor Control and Licensing Act** on the basis of the four sealed bottles of liquor in the box in the backseat and the one bottle described by Constable Grenier as being located in the front console.

[18] Section 67 of the **Liquor Control and Licensing Act** does give a peace officer the authority to search to seize liquor; however, the officer must have reasonable and probable grounds to believe that the liquor is unlawfully possessed.

[19] Section 44(2) of **Liquor Control and Licensing Act** provides that a person must not drive or otherwise exercise control over the operation of a motor vehicle, whether or not it is in motion, while there is liquor in the person's possession or in the motor vehicle but subsection (3) states:

Subsection (2) does not apply:

(a) if the liquor is in a container that is unopened and has an unbroken seal.

[20] In my view, the officers did not on the facts as proven on this voir dire have authority to search the vehicle pursuant to the provisions of the **Liquor Control and Licensing Act**.

[21] The evidence of Constable English with respect to the four bottles of liquor which were sealed and found in the backseat of the vehicle does not establish that that liquor was being carried in contravention of Section 44 of the **Liquor Control and Licensing Act**. The bottles were sealed according to the officer. The fact that they were in an open box, in my view, does not assist the Crown. There is no evidence that the box was a container in which liquor was kept in the sense that it was required to be unopened during carriage in a motor vehicle.

[22] The evidence is simply that there were four sealed bottles of liquor in a box in the backseat of that vehicle. In my view, that evidence does not establish that it was being possessed contrary to the provisions of Section 44 of the **Liquor Control and Licensing Act**.

[23] **As to the single bottle described by Constable Grenier in the front console, there is:**

**(a) no evidence that this was a liquor bottle; or**

**(b) if it was a liquor bottle, that there was anything in it.**

[24] The Crown also asserts that there was a right to search on the part of the officers pursuant to lawful detention and that there is a common law right to search upon a detention. The Crown argues that the minimum requirements referred to by the Saskatchewan Court of Appeal in **R. v. I.D.D.** (1987) 38 C.C.C. (3d) 289 at page 297 are met. Those requirements are as follows:

(1) that the vehicle be stopped or the occupants be detained lawfully;

(2) that the officer conducting the search have reasonable and probable grounds to believe that an offence has been, is being, or is about to be committed and that a search will disclose evidence relevant to that offence;

(3) that exigent circumstances, such as imminent loss, removal, or destruction of the evidence, make it not feasible to obtain a warrant;

(4) that the scope of the search itself bear a reasonable relationship to the offence suspected and the evidence sought.

[25] There is no doubt that this vehicle was stopped and the occupants detained lawfully. However, it is clear that the officers did not have reasonable and probable grounds to believe that an offence had been, was then being committed or was about to be committed, and it is certainly clear that there were no exigent circumstances which made it not feasible to obtain a warrant.

[26] The fact of the matter is that this vehicle was being impounded by the officer. I recognize that the British Columbia Court of Appeal in **R. v. Charlton** (1992) 27 W.A.C. 272 held that a search incidental to an arrest may occur before or after the formal arrest so long as the grounds required for the arrest exist prior to the search.

[27] In the case at bar, the problem that the Crown has is that the grounds did not exist prior to the search.

## EXPERT ISSUES

**Subject: *R v Butler* 2005 BCSC 1889 expert witness qualified no specialty training no such specialized programming available**

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Website

<http://www.courts.gov.bc.ca/Jdb-txt/SC/05/18/2005BCSC1889.htm>

This is an interesting case because it involves the qualification of a vet to give opinion evidence related to a field in which there is no training available. The vet had performed over 150 necropsies (cause of death) with no particular training. I know that there have been some instances where judges were very restrictive in the extent to which an officer could give expert evidence in drug cases. In some cases judges wanted to be able to point to a course that taught indicia of PPT. It has always seemed to me in our cases the best experts were those who had participated in all facets of investigations regarding a specific offence. This experience should be with respect to a sufficient number of investigations to enable one to conclude that there is some expertise. There is no mathematic formula. For the purposes of this e-mail I will not touch on other factors that contribute to achieving expertise on an issue.

I have included the whole decision as it is brief. I do wish to draw your attention to part of paragraph 5 that illustrates my point above:

[5] ..... I think an individual can give evidence as an expert, not based specifically on specialty courses which appear to be virtually non-existent in this field, but from the experience that he or she as an individual has encountered or has brought upon themselves with a view to improving their professional expertise.

DECISION

[1] **THE COURT:** Dr. Maricle is a veterinarian who has been practising veterinarian medicine since 1993, having graduated from the Western College of Veterinary Medicine at the University of Saskatchewan.

[2] Since commencing his practice, he has testified that he has performed some 150 necropsies, which is the term used to describe the determination of cause of death of an animal.

[3] He has had no specialty training in the performing of necropsies, but has further testified that, to his knowledge, there is no such specialized programming available. Dr. Maricle testified that he performed necropsies using the standards and the process that had been taught to him whilst attending the College of Veterinary Medicine.

[4] In addition to the courses that he took at university, he has further taken education during the upgrading and continuing education required in order to meet his professional standards.

[5] I am alive to the fact that he has not taken speciality courses in this area to become qualified as, for example, a medical doctor would become qualified as a pathologist and some as a forensic pathologist. I think an individual can give evidence as an expert, not based specifically on specialty courses which appear to be virtually non-existent in this field, but from the experience that he or she as an individual has encountered or has brought upon themselves with a view to improving their professional expertise. Dr. Maricle has testified that one of the reasons he performs necropsies is to assist him in the diagnosis of future problems with other animals. I do not think that can be discounted and I think he has to be given credit for that experience in determining his qualifications to give evidence as an expert.

[6] I find Dr. Maricle to be a veterinarian with an interest in performing necropsies and that that interest has led him to obtain a level of expertise perhaps greater than that encountered by other veterinarians. I find that he is qualified to give opinion evidence of a forensic nature as to the cause of death of animals.

[7] Having said that, the weight that is to be given to that evidence will, of course, depend on how that evidence is accepted or not accepted by the trier of fact.

**Subject: *R v Petavel* 2006 BCSC 1931 expert qualification training experience PPT**

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There are not many decisions dealing with the qualification of expert witnesses. There was a case *R v Baptiste* 2005 BCPC which caused some consternation because the judge had difficulties accepting the courses and training the expert had. It may well be that the evidence did not come out as favourable to the officer as it could have. The irony is that the more experienced officer was in *Baptiste* and the first time expert was in *Petavel*. This has all been clarified in the instant case of *Petavel*. The decision is not lengthy and I have set out the relevant portions. I would recommend that the expertise of the officer when being qualified include the categories set out below in paragraph 7.

The court goes on to distinguish *Baptiste*. Paragraphs 10-15 review and compare the analysis in *Baptiste*. The greatest concern arising from the reasons of Judge Takahashi in *Baptiste* was the conclusion by him that the officer hadn't taken a course on all fours with the area the officer was trying to be qualified in. This view taken at face value had the potential of prohibiting anyone from being qualified on PPT cases. In paragraph 14 in *Petavel* set out in full below, Judge Barrow comments on this point. He said:

“...I am not satisfied that in order to be admissible as expert evidence the subject matter of the proposed opinion need be based on a recognized or organized field of study in the manner suggested in *Baptiste*. When dealing, for example, with novel scientific theory or

something similar, considerations of that kind are of significant importance. The evidence here under consideration, however, is not of that sort. It is evidence of a criminal subculture, something not amenable to scientific study never mind peer review. It is necessarily evidence that it is general in nature....”

As Petavel is a BCSC decision it is hoped that the reasoning in Baptiste will not be followed.

#### EXPERIENCE OF THE OFFICER

¶ 7 The proposed expert is Constable Rowe, a six-year member of the Royal Canadian Mounted Police. For the last two years his service has been engaged almost exclusively in the investigation of drugs in the Kelowna area. He has taken several general investigation courses which had as a component of them content relating to drug investigations. More importantly, however, he has taken three courses over the past year which were focused exclusively on the investigation of drugs. In January 2006, he took a two-week course in drug investigation that covered a variety of topics, including drug jargon and slang, drug pricing and packaging, drug identification, undercover operations, and the handling of confidential informants. In March 2006, he took a course geared towards qualifying him to provide expert evidence of the kind it is proposed he give in this case. In May of 2006, he completed a three-week course that qualified him from the perspective of his employer to act in an undercover capacity in relation to the investigation of drug trafficking. In addition to this and at least as important as the officer's professional experience, he has been involved in over a 100 cocaine possession and trafficking investigations as well as a significant number of marihuana investigations. He has acted in an undercover capacity purchasing drugs at the street level. Further, he testified that he takes pride in the efforts he makes to talk to informants, witnesses, and accused who are involved in the drug culture with a view to informing himself about their habits and the nature of the drug business generally.

#### APPLICATION OF KNOWLEDGE AND EXPERIENCE TO THE FACTS OF THE CASE

COURT DISTINGUISHES *R v BAPTISTE* 2005 BCPC 491.

¶ 10 The remaining issue is whether the officer is a properly qualified expert in relation to the various subjects upon which his opinion will be sought. In that regard, it is argued that his expertise is the product of a combination of teaching provided primarily by the RCMP and his experience on the street. None of that, it is argued, qualifies him to opine about the rates of consumption of addicts generally. In support of this contention reference is made to the decision of Takahashi P.C.J. in *Regina v. Baptiste*, 2005 BCPC 491. Although not binding on this court I have reviewed the decision and considered the conclusion reached in it. I note firstly that the decision is distinguishable on its facts. The expertise of the officer there was described by Judge Takahashi in the following terms:

Constable McDermott has taken short courses given by the R.C.M.P. in which cocaine has been mentioned. There was no evidence the expertise of the instructors or of a scientific or statistical basis for their teachings.

Constable McDermott's expertise is mainly through enforcement, that is, by being personally involved, or by being involved as a supervisor in the arrests of persons who are either drug traffickers or drug users. Also, his experience includes conversations with other members of the force who conducted similar activities and conversations with drug traffickers and drug users.

¶ 11 While the experience of Constable Rowe is arguably similar to that of the expert being dealt with in *Baptiste*, his professional training is significantly more extensive.

¶ 12 The second point to be made in relation to *Baptiste* is more general. The court there was concerned, in addition to the lack of training by the officer, with another aspect of expert evidence. In particular, the judge held at para. 3 of his decision that:

The expertise must form part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge ....

¶ 13 It was in part this concern which led the Provincial Court judge to exclude the proposed evidence, at least as it related to how cocaine is diluted and the rate of consumption of cocaine by addicts. In this regard he concluded:

No effort appears to have been given to organize this body of information into an accepted or recognized reliable body of knowledge, except perhaps as accepted by the R.C.M. Police. There is no evidence that this body of knowledge was subject to criticism by peers or scientists or other academics.

¶ 14 I am not satisfied that in order to be admissible as expert evidence the subject matter of the proposed opinion need be based on a recognized or organized field of study in the manner suggested in *Baptiste*. When dealing, for example, with novel scientific theory or something similar, considerations of that kind are of significant importance. The evidence here under consideration, however, is not of that sort. It is evidence of a criminal subculture, something not amenable to scientific study never mind peer review. It is necessarily evidence that it is general in nature. That, however, does not render it inadmissible, although it may be an important consideration when dealing with the weight to be assigned to it in the context of any particular case. What a particular drug addict consumes may be relevant to determining the purpose for which particular quantities of cocaine are possessed in the manner I have set out above. It says nothing, however, about any specific drug addict, nor any specific individual in possession of crack cocaine.

¶ 15 The concerns raised about the extent of the officer's experience in training are matters that, in my view, properly go to weight. I am satisfied that Constable Rowe possesses the necessary expertise required and meets the threshold requirement for admissibility of expert opinion evidence.

***R v Bowman* BCPC March 29-05 qualified expert from same detachment and minor participant in the investigation**

The cutbacks in human and financial resources have cast a shadow over the expert witness field. The reality is that it is costly to have experts going around the province and waiting to be called as a witness. This case lets in some light. In this case the officer who was an expert witness also was from the investigating detachment and had some involvement with the investigation. He had some informant information, assisted in forming the execution plan, entered the house first and arrested and searched the accused. Despite this involvement the court qualified him as an expert and has allowed him to give expert testimony. Despite this decision, in any investigation where an expert is required, the officer in charge should make sure that the intended expert has minimal if any involvement in the investigation.

The court followed the Manitoba CA *R v Klassen* case which had cautioned that a court must be careful in these circumstances. The danger of course is that armed with knowledge of the case a witness may be influenced in his/her testimony. The court in *Bowman* was careful to point out that the opinion must be based on evidence that forms part of the case. Although this should be self evident I have come across expert reports recently based on hearsay and the record of the accused. An expert is another witness that the trier of fact has to assess in reaching a decision regarding the facts.

From: Glenn Verdurmen ]  
Sent: March 15, 2007 3:00 PM  
To: West, William  
**Subject: Cpl Tim BAULKHAM - Declared an "expert" In Drug Interdiction - SC Trial in Revelstoke on the 12th day of March, 2007 concerning *R. v. Tyler Robert Johnston*, PPT of cocaine (CDSA 5(2)).**  
Importance: High

Bill,

Cpl. Baulkham had a role in this particular investigation as after the police officers had gone into this drug house with a search warrant, Cpl. Baulkham came in with the dog that indicated on various places in the house. One of the places that was important was that there was a laundry basket full of money and the dog indicated with its nose inside the laundry basket.

In these particular circumstances, I took the opportunity to qualify Cpl. Baulkham as an expert and I proceeded to deal with qualifying Cpl. Baulkham as an expert with respect to investigator/handler for a narcotics detection K9 particularly with respect to how the K9 responds to narcotic scents and how the dog communicates its findings. Cpl. Baulkham was asked to file his curriculum vitae and he was thereafter asked questions about his

- a) training,
- b) the length of service in dog section,

c) experience and

d) number of times he has testified in Court. Questions were thereafter put to Cpl. Baulkham concerning the training of the police dog, ongoing training, the number of investigations, the record of accuracy and the breed of the dog. Jack number 606 and the certificates he has earned as a drug detection dog were also filed as exhibits.

After the examination in chief and cross-examination with respect to his expertise was concluded, the Associate Chief Justice Dohm ruled that Cpl. Baulkham was an expert with respect to narcotics detection dogs. The exact wording I would have to get from the transcript and that PSD “Jack” as an expert dog.

On its own volition, Associate Chief Justice Dohm also ruled that Cpl. Baulkham and the dog were experts with respect to detecting narcotics on currency.

Obviously all of the above seems to be of great significance to Cpl. Baulkham and others.

Glenn A. P. Verdurmen

## **TELEWARRANTS**

**MEMORANDUM TO: All Crown Counsel and Federal Prosecution Agents**  
**FROM: S. David Frankel, Q.C. Senior General Counsel**  
**RE: Charter, Section 24(2) Telewarrants Impracticability**

In *R. v. Porter*, 2007 BCCA 39, the Court, in upholding convictions on several weapons charges, held that the trial judge had not erred in admitting evidence seized under an improperly obtained telewarrant.

In the Information to Obtain the officer had stated there was “no on-call Justice of the Peace in Central Saanich”. While this was correct, at trial he testified a telewarrant was sought because of an administrative policy applicable to searches outside of Victoria.

In very brief oral reasons the trial judge held that although there were reasonable grounds for the warrant the impracticability requirement had not been met. Turning to s. 24(2) she stated that the admission of the evidence would not bring the administration of justice into disrepute.

In upholding this decision, Ryan J.A. stated:

[25] In my view, it was entirely reasonable for the trial judge to conclude that the police officer had both subjectively and objectively reasonable grounds to believe that the weapons in

question were somewhere on Mr. Porter's property. Nothing in the evidence suggests bad faith in the officer's actions in seeking a telewarrant. Thus, the only factor the trial judge had to consider in determining whether to exclude the fruits of the search was a technical breach of s. 8 in that the requirements of the telewarrant provisions were not satisfied. Otherwise, the evidence obtained was not conscriptive, reasonable and probable grounds existed for the search, and there was no bad faith on the officer's part. The breach was not serious; the offences were. The trial fairness and other factors in *R. v. Collins* (1987), 33 C.C.C. (3d) 1 were satisfied. Thus the appellant has failed to demonstrate any basis on which this court ought not to be appropriately differential in its review of the decision of the trial judge to admit the evidence.

SDF:tim

**Subject: *R v Nguyen* 2007 BCSC 335 telewarrant impracticability there never are any there they do not want to do them**

TO ALL B.C. AGENTS AND RCMP DISTRIBUTION

This is the most recent trial decision with respect to impracticability. It postdates the BCCA decision in *R. v. Porter*, 2007 BCCA 39 of January 17-07 but makes no reference to it. It also postdated the decision in *R v Cam & Phun*, 2007 BCPC 38 of February 01-07 and no mention is made of it either. These cases were not available when *Nguyen* was argued. It is interesting that the courts all came to the same conclusion. While the BCCA decision in *Porter* carries the most weight it demonstrates a movement away from the strict interpretation of the word "impracticability" that characterized earlier decisions.

The officer acknowledged that he didn't call the court to see if anyone was available to deal with warrant applications because his experience had shown it was futile. The evidence before the court regarding attempts in the past was as candid as one could ever see:

[11] The information to obtain the warrant ("ITO") was received at the Justice Centre in Burnaby at 3:25 p.m. In his ITO, Cst. Jordan stated that it was submitted by telecommunication: [...] because it is impracticable for the informant to appear personally because: There are no Judicial Justices of the Peace available in the jurisdiction.

[12] The evidence given in chief on this issue by Cst. Jordan included the following:

Q Why did you apply for the warrant via telecommunication?

A Because, My Lord, at the time, I felt that was the thing to do and I've never been able to have a judge or a judicial justice of the peace at the Abbotsford Provincial Courthouse hear one of my warrant applications. There's never been one available to do that.

Q All right. And did you actually try calling the Abbotsford Courthouse to see if there were any justices of the peace or judges available to hear your application in person?

A No, I did not.

Q And why not?

A Well, My Lord, because I have called over there many times previous and they have always turned me down. They always say that I have to go through the judicial justice of the peace and -- how can I put this -- at 7:00 in the morning, they're not all that friendly about it. They're -- like I got the impression they were saying, "Well, why are you bothering me with this? You know what the directive is." So I didn't phone over there on that occasion.

Based on the evidence of the officer the judge was satisfied that he had complied with the "impracticability" precondition of the Code. The judge went on to review the case law at the time and concluded:

[31] As a result of my review of these authorities, I conclude that the law is as follows:

1. In order to obtain a search warrant by telecommunication the informant must honestly believe that it would be impracticable to appear personally appear before a justice or provincial court judge.

2. "Impracticable" means something less than impossible and imports a large measure of practicality, what may be termed common sense.

3. The informant must have a reasonable basis for his or her belief.

4. The informant must set out in the information to obtain the warrant the circumstances that make it impracticable to personally appear.

5. In order to grant the warrant the authorizing justice must be satisfied that the information discloses reasonable grounds for dispensing with a personal appearance.

6. If the accused alleges a breach of his or her Charter rights based upon a search that is allegedly unlawful because a telewarrant does not comply with the requirements of s. 487.1 of the *Criminal Code*, the accused bears the onus of proving the violation on a balance of probabilities.

7. The failure on the part of the informant to make inquiries in itself is not fatal to the warrant unless the accused establishes on the amplified review either that the officer was deliberately misleading the authorizing justice, or that there was in fact an opportunity to appear in person before a justice, whether or not the officer was aware of it at the time.

8. Whether an information to obtain a search warrant contains sufficient material to meet the requirements of the *Criminal Code* is a finding of fact that will depend on the circumstances of each case.

9. The failure to inquire may be relevant if it affects the consideration of the sufficiency of the words used to communicate the officer's belief that it is impracticable to appear in person, i.e. it shows that there was no basis upon which the informant could believe the statement made in the ITO and the statement is therefore misleading.

[32] In this case, I am satisfied that Cst. Jordan honestly believed that it was impractical for him to appear in person because no judicial justice of the peace was available. His belief, while not founded upon inquiry on that particular incident, was based upon his history of inquiry on many occasions in the past on which he had consistently been told that no justice or judge was available and he was led to understand that he was to use the Justice Centre.

[33] The defence did not put forward any evidence to establish or suggest that a judicial judge or provincial court judge was in fact available on that occasion. Therefore, it is not necessary to consider the hearsay evidence of the Crown regarding the actual availability since the Crown has no onus to prove lack of availability.

[34] The absence of an available judicial justice or judge in Abbotsford is sufficient, in my view, to meet the test of impracticability set out in *Erickson*. There was no need for the officer to drive to the Justice Centre or search out a judge or judicial justice elsewhere in order to make a personal appearance.

Bill

William (Bill) C. West, Q.C.

## ***R v Cam & Phun*, 2007 BCPC 38 telewarrant impracticability directive of Chief Judge**

TO ALL B.C. AGENTS AND RCMP DISTRIBUTION

This case will be welcome news to the officers in Surrey and other locations where officers have had to deliver warrant material and wait without seeing a JJP while the warrant is issued. Personal attendance was actually not a meeting with a JJP but sitting and awaiting the issuance of the warrant.

Summary by S. David Frankel, Q.C. (as he then was)

In *R. v. Cam & Phun*, 2007 BCPC 38, Bowden P.C.J. upheld a telewarrant obtained by an officer in Surrey in connection with a marijuana grow operation investigation. The officer had contacted the Surrey Provincial Court Registry, and been advised that no J.J.P. was available that day. As a result, he made an electronic application to the Judicial Centre in Burnaby. The distance from the Surrey Detachment to Burnaby is 25 to 28 kilometres. In the officer's opinion driving to the Centre to apply for the warrant would have taken him two and one-half hours (round trip).

One of the objections to the "impracticability" requirement was that no inquiry had been made regarding the availability of a Provincial Court Judge in Surrey. In this connection the officer was not aware of the directive from the Chief Judge of the Provincial Court in March of 2005, directing that P.C.J.s are not to hear daytime applications for warrants, except those which are required to be dealt with by a Judge. Notwithstanding that the directive was not filed as an exhibit Bowden P.C.J. considered it, because it had been mentioned by defence counsel, and had been widely distributed to various agencies in the criminal justice system. His Honour held that the fact that the officer had not asked about a P.C.J. was not fatal, as the answer would have been "no" in any event: paras. 19 - 21.

Bowden P.C.J. also rejected an argument that the officer could have waited until a J.J.P. was available in Surrey. In this connection he noted that urgency / exigent circumstances are not a prerequisite to the use of the telewarrant provision.

### **PRACTICE DIRECTION OF CHIEF JUDGE BCPC**

[19] I note that in the Code, the term "justice" means either a provincial court judge or a justice of the peace. Before applying by telecommunication, Cst. Malhi inquired as to the availability of a justice of the peace in Surrey and was informed that none was available. He did not inquire about the availability of a provincial court judge. Although he was not aware of the chief judge's directive in March 2005, Cst. Malhi had complied with it in every respect. While it was not filed as an exhibit in these proceedings, I will refer to it because it was mentioned by defence counsel and it was widely distributed to various agencies involved in the criminal justice system, including the police.

[20] Of note, in the practice direction from the chief judge is that provincial court judges are not assigned to hear any daytime search warrant applications, except applications that the Code requires be heard by a judge or ones where there are issues of sensitivity or security involved and the one before the Court, in this case, is not such a warrant. In my view, it was not necessary for Cst. Malhi to inquire about the availability of a provincial court judge at the Surrey courthouse. Had he made such an inquiry, it is reasonable to conclude that he would have been informed of the practice directive from the chief judge.

[21] In my view, Cst. Malhi complied with s. 487.1(4) by including in the ITO a statement of the circumstances that made a personal appearance before a justice of the peace impracticable. That statement was amplified, to some extent, by Cst. Malhi's testimony as to the distance and travel time between the Surrey detachment and the Burnaby justice centre.

#### IMPRACTICABILITY OF PERSONAL ATTENDANCE

[22] By virtue of s. 487.1(5), I must also be satisfied that the ITO discloses reasonable grounds for dispensing with an Information presented personally and in writing. In this case, defence counsel submits that the circumstances did not make it impracticable for the police officer to appear in person. In determining the meaning of impracticable, I find the decision of the B.C. Court of Appeal in *R. v. Erickson*, [2003] B.C.J. 2982 to be instructive. Madam Justice Saunders considers the meaning of impracticable and says at paragraph 33:

It is reasonable to conclude that impracticable means something less than impossible and imports a large measure of practicality, what may be termed commonsense.

[23] In addition, the Court of Appeal found that as no justice of the peace was available in Kimberly and the nearest one was 30 kilometres away in Cranbrook, the impracticability of personal attendance on a justice of the peace had been made out.

[24] What is significant, in my view, about the Court of Appeal's approach is that the impracticability of the travel was considered from a commonsense standpoint. Using a similar approach in the case at bar, it is my view that travelling 28 kilometres from the Surrey detachment to the Burnaby justice centre would also be impracticable. From a commonsense standpoint, once it has been established by the police officer that a justice of the peace is not available at the Surrey courthouse, then the impracticability of a personal appearance is established because of the distance and travel time necessary for a personal appearance in Burnaby. Furthermore, I am not to substitute my view for that of the justice of the peace who issued the warrant and based on the reasons stated by Cst. Malhi in paragraphs 24 and 25, the justice of the peace could have properly issued a telewarrant.

William (Bill) C. West, Q.C.

## **POST SEIZURE PROCEDURES**

### ***R v Backhouse* Ont. C.A. - March 03-05 s.489.1 of the Criminal Code - duty to report seizures without warrant**

The Court of Appeal of Ontario released its reasons in the above captioned case on Wednesday, March 3, 2005. *Backhouse* provides a lengthy and comprehensive review of the search warrant provisions in s. 489.1 of the Criminal Code (see para 91 to 115). Paragraphs 91 to 115 should be considered a must read. The link to the decision is provided above.

Backhouse was arrested for murder. Police seized his clothing under the common law power to search incident to arrest. Backhouse was released shortly after his arrest due to lack of evidence but the police kept his clothing. The police did not file a Report to a Justice under s. 489.1 of the Code and sent his clothing for forensic analysis. He was later arrested and charged.

The Court of Appeal found that the failure to make a Report to a Justice rendered the continued detention of the clothing unlawful and potentially, although not necessarily, unreasonable within the meaning of s. 8 of the Charter. At paragraph 115 of the judgment, Rosenberg J.A. wrote:

Accordingly, in my view, s. 489.1 applied to the seizure of the appellant's clothing and that clothing should have been brought before a justice or a report should have been made to the justice in accordance with that section. The continued detention of the material seized was accordingly unlawful. It does not necessarily follow, however, that the continued unlawful detention violated the appellant's Charter rights. The initial search and seizure was lawful and complied with the Charter. I need not decide whether the subsequent failure to comply with s. 489.1 could render the initial lawful seizure unreasonable. [Emphasis added]

Police are required to file a Report to a justice under s. 489.1 of the Code when they seize property incident to arrest. After the Report to a Justice is filed, the detention of the property is governed by s. 490 of the Code. During the course of my search and seizure seminar the preponderance of officers' comments is that all seizures warranted or unwarranted are reported and the things detained. Please ensure *Backhouse* is communicated to investigators in your areas.

## **APPLICATIONS S.490 FORFEITURE**

***Canada (Attorney General) v. Acero* 2006 BCSC 1015 s.490 hearsay evidence not admissible. There must be affidavits from the sub-affiants.**

¶ 1 BENNETT J.:— The Crown has brought an application pursuant to s. 490(9) of the Criminal Code for the forfeiture of a total of \$102,215.00 in cash, which was seized with a warrant from a residential premises and a motor home. The preliminary issue which must be decided is whether hearsay evidence is admissible on such an application. Mr. Acero is serving a 12.5 year sentence in the United States as a result of drug offences, which the Crown say originated here and are relevant to the forfeiture application. Mr. Acero filed a written submission.

¶ 6 In *R. v. Mac* (1995), 97 C.C.C. (3d) 115 (Ont. C.A.) at para. 17, the Court held that the possession of items by a person is presumed to be lawful and that the possessor need not disprove taint or criminality by proof of a source or otherwise. The onus is on the Crown to prove unlawfulness beyond a reasonable doubt. That reasoning was adopted in *Attorney General for British Columbia v. Forseth* (1995), 99 C.C.C. (3d) 296 (B.C.C.A.) leave to appeal refused 104 C.C.C. (3d) vi. at paragraph 27. In that case, after allowing an appeal of an order made under s. 490(9) of the Criminal Code, the Court ordered a new trial.

**ADMISSIBILITY OF HEARSAY EVIDENCE**

¶ 7 The first issue I must decide is the exact nature of this hearing and whether hearsay evidence is admissible on this application. The case law across the country conflicts on this issue. In order to consider these questions it is useful to commence with basic principles.

¶ 10 Subject to an exception to the hearsay rule or what has become known as the "principled approach" to evidence, hearsay evidence is not admissible to prove the truth of its contents. This is the situation in any trial, whether civil or criminal.

¶ 11 The rationale for excluding out-of-court statements for the truth of the contents is that there are a number of dangers or risks which arise from the admission of this evidence. The main risk is the lack of contemporaneous cross-examination by the opposing party. In *R. v. B.(K.G.)*, [1993] 1 S.C.R. 740, Lamer C.J.C. described the traditional "hearsay dangers" at p. 764:

The court went on to thoroughly consider numerous cases from various courts in other provinces including B.C. The court concluded that hearsay was not admissible on s.490 applications. Because it was the first case on forfeiture and allowed hearsay evidence the court reviewed the decision of *R. v. Clymore* (1992), 74 C.C.C. (3d) 217 (B.C.S.C.). In *Clymore*, the court had an application pursuant to s. 462.38 of the *Criminal Code*. This application has been considered to be similar to an application pursuant to s. 490(9), as it is an application for forfeiture by the Attorney General when the items seized are

proceeds of crime or committed in respect to a designated offence and the person has died or absconded.

¶ 45 Recently, the Ontario Court of Appeal in *R. v. West*, [2005] 199 C.C.C. (3d) 449 (Ont. C.A.), specifically considered the issue of the admission of hearsay evidence in an application made pursuant to s. 490(9) and concluded, at paragraph 28, that the ordinary rules of evidence apply. The court found that there was nothing in the legislation to suggest that anything other than the ordinary rules of evidence applied. The Court referred to *Luther* and appears to adopt the reasoning in that case. The Court did not refer to the decision in *Clymore*; however, as *Clymore* is discussed at great length in the *Luther* decision, I assume the court was aware of the reasoning in *Clymore*.

The court went on to conclude that hearsay evidence was not admissible. The parameters for the evidence to be considered was set out in paragraph 58:

¶ 58 I see no reason why this proceeding cannot be made on the basis of a summary application. Affidavit evidence is admissible. Opinion evidence is admissible, provided it meets the rules in terms of service. I also see no reason why, if the Crown seeks to admit evidence of surveillance, the police officer who maintains the record for all of the officers cannot depose to a summary of surveillance reports. I am not suggesting that every officer who had Mr. Acero or others under surveillance must file an affidavit. These surveillance reports are signed off at the end of the day and in my experience, the surveillance officers have little, if any, recollection of the surveillance conducted, save what is part and parcel of their notes. However, in saying that, I have essentially concluding that the evidence is necessary and made in circumstances where there is a guarantee of trustworthiness, which of course is the basis on which evidence is admissible under the principled approach.

***R v Arana* (2005) 197 C.C.C. (3d) 452 (B.C.S.C.) the charter applies to s.490 forfeiture applications.**

**A portion of a paper prepared by Mark Erina<sup>1</sup> Counsel FPS Vancouver summarizes the impact of the Arana case.**

**Q: Does the Charter apply in a 490(9) hearing?**

**A: Yes, but be careful what you wish for.**

The answer to that question a few year years ago in British Columbia would have been no. There was a growing line of Provincial Court authority, starting with *R v. Janzen*<sup>2</sup>

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<sup>1</sup> The excerpt is reproduced with the consent of the author.

that held the Charter didn't apply. The law was taking a different direction in other parts of the country. The Alberta Court of Appeal held that s.8 of the *Charter* applied in *R v. Daley*.<sup>3</sup> The Supreme Court of Canada in *Raponi* left open the possibility that a justice hearing a 490(9) application was a court of competent jurisdiction to grant Charter relief. It is fair to say that most Crown felt it was only a matter a time before this "Charter free zone" would fall: that time came with the British Columbia Supreme Court decision in *R v. Arana*.<sup>4</sup>

The issue in *Arana* was whether the *Charter* applied to hearings under s.462.43 to dispose of property seized under a s. 462.32 special search warrant or restrained under s. 462.33. The Crown argued that the *Charter* didn't apply because the hearing was *in-rem* in nature where liberty was not at stake. The Crown urged the Court to follow the Provincial Court cases given the similarities between s.462.43 and 490(9) hearings. Baker J. disagreed:

Notwithstanding the learned opinions of my colleagues in the British Columbia Provincial Court, I am of the view that the reasoning in *Clymore*, *Daley*, *Laroche* and other decisions cited above should be followed, and that I should conclude that on a forfeiture application under the *Criminal Code*, a person affected by the seizure of goods, or restraint of goods, may seek to have evidence excluded on the grounds that a right or rights guaranteed by the *Charter* have been infringed.<sup>5</sup>

After *Arana* it is doubtful whether the Crown can successfully argue that the Charter doesn't apply in a 490(9) forfeiture hearing. There is no material difference between s.462.43 and 490(9) to distinguish the case. Other appellate courts have held that s. 8 of the *Charter* applies, as per *Daley*, and most recently, the Ontario Court of Appeal decision in *R v. West*.<sup>6</sup>

At the end of the day, it is open for the respondent whose s. 8 rights have been breached to apply for a remedy under s.24 (1) and/or exclusion of evidence under s. 24(2), but the respondent runs the risk in Provincial Court of the Court concluding that it has lost its' statutory jurisdiction over what it is persuaded was an unlawful seizure. In any event obtaining a remedy is another matter altogether.

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<sup>2</sup> (10 April 2001) Vancouver Registry 108542 (Prov. Ct.). See also *R v. Zamora* [2001] B.C.J. No. 2360 (Prov. Ct.) (Q.L.); *R v. Swain and Klee* (12July2002) Surrey Registry No. 114072 transcript - pg.8, ln.33 to pg. 10, ln.14 (Prov. Ct.); *The Attorney General v. Jimmy Ho* (24February2005) Surrey Registry No. 130933 at para. 71 (Prov. Ct.)

<sup>3</sup> (2001) 156 C.C.C. (3d) 225 (Alta. C.A.)

<sup>4</sup> (2005) 197 C.C.C. (3d) 452 (B.C.S.C.)

<sup>5</sup> *Ibid*, at para. 56

<sup>6</sup> [2005] O.J. No. 3548 (Ont. C.A.)

**Q: In considering whether the grant Charter relief, should the Court consider public policy concerns about letting a person benefit from his criminal conduct?**

**A: Yes - The Court should not return proceeds of crime to the criminal as doing so would bring the administration of justice into disrepute.**

In most (if not all) circumstances, public policy should bar restoration of the proceeds of crime. In *Arana*, Baker J. stated:

In this case, there is no possibility that Mr. Arana would be entitled to the return of the money, even if his rights were infringed at the time of the seizure. I do not intend to repeat the entire contents of Corporal Aranguiz's affidavit. It is sufficient to say that it establishes beyond a reasonable doubt that the money is the proceeds of crime, specifically the trafficking of narcotics.<sup>7</sup>

[64] In these circumstances, to return the money to Mr. Arana would constitute a windfall totally unjustified under any circumstances. Such an action would bring the administration of justice into disrepute. Mr. Arana is not entitled to the return of the funds, even if he could establish an infringement of denial of rights guaranteed to him by sections 8, 9 and 10 of the *Charter*.<sup>8</sup>

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<sup>7</sup> *Supra*, note 35 at para. 60

<sup>8</sup> *Supra*, note 35 at para. 64.