POLICE POWERS NEWSLETTER

JUSTICE MICHELLE FUERST, MICHAL FAIRBURN AND SCOTT FENTON

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1. DECISION TO EXCLUDE EVIDENCE OBTAINED BY WARRANTLESS SEARCH REVERSED ON APPEAL

The Facts: The accused, a 17 year old male, was charged with careless storage of a firearm, possession of a firearm without a licence, and related offences. The firearm was a loaded nine millimetre handgun, found along with two 12-round magazines, in the accused's bedroom at his mother's home.

At the relevant time, the accused's mother was away. His step-grandmother was staying in the house with him. The step-grandmother received a call from the accused's grandmother. The grandmother told the step-grandmother that the previous evening, the accused was overheard talking to his sister about a gun. The grandmother asked the step-grandmother to look in the accused's room to see if she could locate a gun there

The step-grandmother found the gun, wrapped in a sock, hidden in an air vent in the accused's bedroom. She told the grandmother of her discovery. The grandmother then called a local police officer. Eventually the accused's mother spoke with a sergeant whom she knew. The sergeant told her that he had concerns about public safety, and asked if there were any issues about him going to the house. She said that there were none. He told her that he would go to the house and get the firearm. She agreed it was important that the police retrieve it before the accused came home.

The officer went to the house without a warrant. He told the step-grandmother that he was there, with the mother's consent, to get the gun. The step-grandmother allowed him to enter the house and search the accused's bedroom, where he seized the firearm and the magazines from the vent.

At trial, the accused contended that the warrantless search was contrary to s. 8. The sergeant testified on the *voir dire* that he did not get a search warrant because he felt it was important for public safety reasons to get to the residence as quickly as possible, before the accused returned home and removed the firearm. Also, he believed that he had the consent of the homeowner (the accused's mother) to enter the house to retrieve the gun.

The trial judge found that the accused had a reasonable expectation of privacy in his bedroom and that neither his mother nor his step-grandmother had authority to consent to its search. Even if they did, they had not given informed consent, because they were not told that they could object to the search. Further, the circumstances were not exigent and the police could have obtained a search warrant. There was a s. 8 breach.

The trial judge decided that the evidence should be excluded under s. 24(2). The police officer took a shortcut and relied on his personal relationship with the accused's family to get apparent consent to search, instead of protecting the accused's *Charter* rights by obtaining either informed consent or a search warrant. The *Charter* breach was based on deliberate police action, and so fell at the high end of the seriousness continuum. The impact of the breach was significant, in that the police intruded into the accused's bedroom, in which he had a high expectation of privacy, and found potentially incriminating evidence. The evidence was reliable and critical to the prosecution's case, but admitting it would condone the police taking shortcuts and treating the *Charter* rights of some accused persons with less consideration than others.

The Crown appealed the accused's acquittals to the Manitoba Court of Appeal, on the basis that the trial judge erred in excluding the evidence of the gun and the magazines.

Held: Appeal allowed and a new trial ordered.

The appellate court reiterated that where a trial judge has considered the proper factors and has not made any unreasonable finding on a s. 24(2) determination, that determination is owed considerable deference on appeal.

The findings in this case, however, were unreasonable.

The police officer confined the search to the duct work in the accused's bedroom and did not search other parts of the room. The trial judge's conclusion that the accused had a high expectation of privacy in the venting system in his mother's house was not based on evidence and was not agreed with by the Court of Appeal. The accused had a minimal expectation of privacy in the location where he hid the items: duct work that was part of the general infrastructure of the house. The

officer did not take impermissible short cuts, but acted with the consent of the homeowner, who wanted the firearm removed from the residence. If the officer believed that a search warrant was necessary, he had ample grounds on which to obtain one. To exclude the evidence would bring the administration of justice into disrepute.

Commentary: The case is worthy of note in two respects. First, on the sometimes difficult question of a teenager's reasonable expectation of privacy in an area of the family home, the Manitoba Court of Appeal declined to infer such an expectation in the absence of evidence from the child and/or the parent. Second, the case exemplifies that a trial judge's decision whether to exclude evidence under s. 24(2) will be at risk of reversal notwithstanding that he or she followed the *Grant* analysis, where the appellate court disagrees with the conclusions the trial judge reached when applying the relevant factors.

***R. v. B. (T.W.)*, 2012 MBCA 7**

2. THE REQUIREMENT OF A CAUSAL CONNECTION BETWEEN THE *CHARTER* BREACH AND THE EVIDENCE SOUGHT TO BE EXCLUDED

Facts: The police received information that the accused confessed to killing the deceased, who had been reported missing by family members. The police began an investigation that involved the interception of the accused's private communications. In addition, undercover officers made contact with him. They developed a "Mr. Big" scenario, as a result of which the accused twice admitted to the undercover officers that he shot the deceased and burned the body at a particular location. The police went to that location and found fragments of bone and teeth, which were identified as those of the deceased. They also found shell casings that were later found to have been fired from a rifle seized at the accused's home.

At trial the accused brought a *Garofoli* application. The Crown conceded that the wiretap authorizations lacked investigative necessity, that the accused's s. 8 *Charter* rights were violated, and that the recordings of the intercepted communications should be excluded.

The accused also sought to exclude his two confessions to the undercover officers, on the ground that they were too proximate to the *Charter* violation.

The trial judge found that while there was a temporal connection between the ongoing interception of the accused's private communications and the confessions to the officers, there was an insufficient causal connection between the *Charter* breach and the confessions. He accepted the evidence of the officer in charge of the undercover operation that it would have proceeded without the interception of the accused's private communications, and that no use was made of the information from the intercepts other than to ensure officer safety and assess how the operation was running.

The trial judge ruled the confessions to the undercover officers admissible.

The accused appealed his conviction.

Held: The Alberta Court of Appeal agreed with the ruling of the trial judge.

On the issue of whether the evidence of the confessions was obtained "in a manner" that infringed or denied a *Charter* right, the Alberta Court of Appeal found no error by the trial judge. The appellate court rejected the argument that in *R. v. Wittwer*, 2008 SCC 33 the Supreme Court of Canada decided that a causal connection is not required between a *Charter* breach and a subsequent statement by an accused. While the Supreme Court of Canada concluded that the approach is a purposive and generous one that does not require a *strict* causal relationship between the *Charter* breach and the subsequent statement, it did not hold that *no* causal connection is required for exclusion. Rather, the test is whether the beach and the subsequent statement are part of the same transaction or course of conduct. The required connection may be temporal, contextual, causal or a combination of the three, but it is not sufficient for the connection to be remote or tenuous.

Commentary: The trial judge made his ruling before the decision in *Wittwer* was released. The Alberta Court of Appeal held that *Wittwer* did not alter previously established principles on the issue of causation.

The Court of Appeal also discussed, in *obiter*, the application of s. 24(2) principles. The Court drew a distinction between state conduct that is negligent or wilfully blind, and that which is a deliberate or wilful violation of an accused's *Charter* rights. It commented, however, that in neither instance can the state conduct be characterized as being in good faith.

***R. v. Mack*, 2012 ABCA 42`**

3. USE OF ACCUSED'S PRIOR STATEMENT MADE IN BANKRUPTCY PROCEEDINGS

The Facts: The accused was charged with fraud relating to an investment the complainant made with her. After the complainant contacted the police but before any charge was laid, the accused voluntarily filed for bankruptcy. She attended for examination as a bankrupt and was examined under oath, in accordance with the provincial bankruptcy legislation. In

that examination, she admitted receiving money from the complainant, and described using it to pay certain expenses.

At the fraud trial, Crown counsel sought to tender the accused's statement as part of its case, or at least to use it to cross-examine her if she testified. The accused objected and invoked s. 13 of the *Charter*.

Held: The Crown could use the statement to cross-examine the accused if she testified, but the statement could not be introduced as part of the Crown's case.

The statement made in the bankruptcy proceeding was a statement made in another proceeding. It follows from *R. v. Henry*, [2005] 3 S.C.R. 609 that the statement could not used as part of the Crown's case in-chief. Whether the statement could be used to cross-examine the accused if she testified depended on whether it was made under legal compulsion. The trial judge considered whether there was coercion in obtaining the statement, whether there was an adversarial relationship, the need to prevent unreliable confessions, and whether there was abuse of power.

The trial judge found that the fact the accused was examined under oath flowed from her voluntary decision to declare bankruptcy, and was not the result of coercion. Additionally, there was no adversarial relationship involved in the examination of her as a bankrupt, there was no incentive for her to provide false information at the examination because to do so is an offence under the governing legislation, and there was no abuse of state power involved in the obtaining of the statement. The prior statement made in the bankruptcy proceeding was given voluntarily. It could be used by the Crown in cross-examination of the accused if she chose to testify at her fraud trial.

Commentary: The decision is consistent with the public policy concern articulated by MacIntyre J. dissenting in *R. v. Dubois*, [1985] 2 S.C.R. 350, that individuals should be encouraged to come forward and give evidence even though there is a risk of self-incrimination, not only in court but in tribunal and other judicial and quasi-judicial proceedings

The trial judge suggested, however, that the result in this case might be different in part depending on the outcome of the appeal in *R. v. Nedelcu*, 2011 ONCA 143, presently on reserve at the Supreme Court of Canada. The issue in *Nedelcu* is whether the accused's evidence on his examination for discovery in a related civil action could be put to him in cross-examination at his criminal trial. The appellant Crown contends that evidence given on civil discovery is not compelled testimony and that the decision in *Henry* should apply to permit cross-examination on it at a subsequent criminal trial.

***R. v. Morris*, 2012 ONSC 1185**

4. SEARCHES OF CELL PHONES

Facts: At the time of his arrest for drug importation, the accused was carrying a cell phone in his pocket. The arresting officer seized it and immediately conducted what he called a "cursory search" of it. He did so because he wanted to know about people who might be meeting up with the accused or to whom the drugs were to be delivered, and additionally because he did not want evidence to be lost. He pushed the "send" button on the phone and a list of five recent calls appeared. He noted down the details of them. He pushed other buttons to try to retrieve recent text messages, but stopped because he was concerned about destroying evidence. In all, he spent five to seven minutes searching the contents of the phone.

One of the five recent calls the officer found was to a number later attributed to the co-accused's cell phone.

About two weeks later, another officer retrieved the phone from secure storage. Although no search warrant had been sought or obtained for the phone, the officer spent the whole day searching the phone numbers and text messages within it.

At trial, the accused contended that the search of his cell phone was contrary to s. 8 and that the evidence of its contents should be excluded. The Crown conceded that the second detailed warrantless search was unconstitutional, but argued that the original cursory search was lawful as part of search incident to arrest.

Held: The accused had a reasonable expectation of privacy in the contents of his cell phone. Although he did not testify on the *voir dire*, a subjective expectation of privacy was presumed. That expectation was objectively reasonable, even though the phone was not password protected, because there was no evidence that anyone else had access to the phone, much of the information stored in the phone was in the accused's native language, and the contents including a history of calls he recently made was core biographical information.

The seizure of the phone was part of a lawful search incident to arrest, because the officer had a reasonable belief that there was a prospect it would yield evidence of the offence. However, because of the heightened privacy interest in the contents of a cell phone, the police cannot look at those contents without a warrant, absent exigent circumstances. There were no exigent circumstances here.

Even if a cursory search of the phone was permissible, the police officer exceeded that limit in reviewing the call history of the phone, writing down all entries, then attempting to retrieve text messages.

The search of the phone breached s. 8.

The trial judge left the issue of exclusion or admission of the evidence obtained by the search to be decided at a later time.

Commentary: This decision adds to the expanding jurisprudence from trial courts on the issue of searches of cell phones. The trial judge found that any cell phone, regardless of its particular features, is akin to a computer in its capacity to contain information. He disagreed with the conclusion of a judge of concurrent jurisdiction in *R. v. Polius*, [2009] O.J. No. 3074 (S.C.J.) that police officers may conduct a cursory inspection of a cell phone that is seized incident to arrest. He did so on the basis that the police should be able to form the reasonable belief in the prospect that a phone will contain evidence of an offence without having to view its contents, and additionally because it is difficult to define the scope of a "cursory inspection". He distinguished *R. v. Manley*, 2011 O.J. No. 642 (C.A.), where the Ontario Court of Appeal approved of a cursory search of a cell phone to determine whether it belonged to the accused or had been stolen, as turning on its own particular facts.

In light of this decision, and the conflicting jurisprudence, police officers might well be confused about whether they can or cannot carry out cursory or limited searches of cell phones that are seized incident to arrest. It seems inevitable that the issue will be the subject of further, and perhaps more definitive, appellate court comment in the near future. For the time being, the advice of the Court of Appeal in *Manley* remains sound: the prudent course is to obtain a warrant where there are reasonable grounds to believe that a search of a cell phone seized on arrest will yield evidence of the offence.

***R. v. Liew*, 2012 ONSC 1826**

5. USE OF A PEER-TO-PEER NETWORK DOES NOT ENGAGE A REASONABLE EXPECTATION OF PRIVACY

The Facts: The accused was charged with possession of child pornography. He alleged that his s. 8 *Charter* rights had been violated when the RCMP in Kamloops applied for and were granted two search warrants to enter and search his home. Taken from his home were computers and related items. Child pornography was located on these devices.

The s. 8 *Charter* complaint arose out of the fact that the grounds supporting the search warrants for the accused's home relied almost exclusively upon information provided by an officer with the Toronto Police Service ("TPS"). That information was derived from a peer-to-peer ("P2P") network known as GigaTribe, which the accused belonged to. Typically, a P2P network connects a number of computers and permits access to and sharing of files designated by the computer user for that purpose. All it requires is a compatible P2P program to connect the computers together. Normally, everyone on the network can see the files that are designated for use by network users.

GigaTribe is a different form of P2P, in the sense that the sharing and transfer of files only occurs between those individuals who have chosen each other as "contacts". If a user has his or her GigaTribe account open, then any of that users' "contacts" may access the items identified for sharing. Those who have been accepted as contacts can simply click on thumbnails (small images) and download them to their own computers. Messages can be sent between contacts, but anonymity can stay intact as there is no requirement that anyone disclose their true identity. Once a contact is accepted, not only does the user have no control over who the contact is, but he or she has no control over how the contact secures his or her password for GigaTribe.

In this case, a TPS officer was able to determine that, through the medium of GigaTribe, an individual in the United States was trading child pornography with a Canadian. When Homeland Security arrested the Tennessee resident, they seized his computer and were able to obtain his password for GigaTribe. They provided the password to the TPS officer who then used it to access the GigaTribe account for the American resident. When the contacts were reviewed, Paper123boy was discovered. Stored messages on the GigaTribe account of the U.S. resident, suggested that Paper123boy was active in trading child pornography. The TPS officer then used this GigaTribe account to view Paper123boy's thumbnails open for viewing to his contact list. They contained child pornography.

The TPS officer searched for and found the internet protocol ("IP") address for Paper123boy. This is a numerical address assigned to a computer device that is active on the internet. Each Internet Service Provider ("ISP") has unique IP addresses. Anyone can determine, through a publicly accessible database, what ISP is associated with an IP address. In this case, the IP address came back to Shaw. When contacted by the TPS, and asked for a name and address associated to the IP address on the date it was used, this was provided. The name was later associated to a roommate of the accused who did not appear to be living with him any longer. The address was where the accused lived.

Held: There was no s. 8 breach either in accessing the Paper123boy information through GigaTribe or in gathering the customer name and address information through the service provider.

As it relates to the GigaTribe account, the trial judge determined that the accused had no reasonable expectation of privacy. While this particular account required the use of a contacts list, the evidence was that it is "extremely unlikely"

that anyone (including Paper123boy) would have any personal knowledge of who the contact was that they were dealing with, whether is was a man or woman, or even more than one person. In this case, there was no complaint that the TPS was using the password of the U.S. resident to access his GigaTribe account, but rather, that the password was used to allow the police to peer into Paper123boy's information made available to his chosen contacts. In the end, the trial judge determined that the TPS officer was "merely accepting the offer to download that had been extended by Paper123boy to an anonymous contact" and no reasonable expectation of privacy was engaged.

In relation to the accused's ISP having provided his customer name and address information to the police, in the absence of a search warrant, there was no s. 8 *Charter* interest engaged. The police made the request under the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*"), that permits private entities to provide "personal information" to the police in certain delineated circumstances. Pursuant to s. 7(3)(c.1)(ii) of *PIPEDA,* provided the police have identified their lawful authority to obtain the information and indicated that the disclosure is for the purpose of carrying out an investigation relating to the enforcement of a law in Canada, the private entity may release the information. The customer name and address information at issue here was obtained under a *PIPEDA* request rather than warrant.

Drawing on a long line of authority, the trial judge concluded that the accused had no reasonable expectation of privacy sufficient to engage a s. 8 interest and, as such, prior judicial authorization was not necessary. Among other things, the trial judge looked to the contract between Shaw and the holder of the account, which made clear that there was no reasonable expectation of privacy with regard to name and address information when and if the police made *PIPEDA* requests.

Commentary: This case is important for a few reasons. First, it reinforces the fact that the work of undercover police officers on the internet is largely protected because no one really knows who they are dealing with while working within that electronic environment. To this extent, it appears that anonymity on the internet has the effect of diminishing a reasonable expectation of privacy. The second reason this case is important relates to the finding that there is no reasonable expectation of privacy in the customer name and address information. This topic has received a significant amount of discussion in the last few years. Not long ago, the Saskatchewan Court of Appeal released two recent judgments with differing results on this topic: *R. v. Trapp* 2011 SKCA 143; *R. v. Spencer* 2011 SKCA 144, leave to appeal applied for [2012] S.C.C.A. No. 73. The Ontario Court of Appeal is currently under reserve on two cases pertaining to this issue: *R. v. Ward,* [2008] O.J. No. 3116 (Ct. Jus.); *R. v. Cuttell*, [2009] O.J. No. 4053 (Ct. Jus.). It is near inevitable that this issue will be considered at some point in the Supreme Court of Canada.

***R. v. Caza*, 2012 BCSC 525 (Sup. Ct.)**

6. SUPREME COURT OF CANADA STRIKES DOWN EMERGENCY WIRETAP PROVISION AND GIVES GUIDANCE ABOUT HOW TO APPROACH ELECTRONIC SURVEILLANCE IN URGENT CIRCUMSTANCES

Facts: Section 184.4 of the *Criminal Code* permits peace officers to intercept private communications without judicial authorization in certain urgent situations. In *R. v. Tse et al.,* the police used s. 184.4 to intercept private communications after they received a report from the daughter of an alleged kidnapping victim that she was receiving calls from her father and he was being held for ransom. About 24-hours after the police resorted to the use of the emergency wiretap provision, they applied for and received a judicial authorization to intercept private communications under s. 186 of the *Criminal Code.*

The accused succeeded in their constitutional challenge to s. 184.4 at trial. The trial judge concluded that s. 8 was breached by the absence of constitutional safeguards found elsewhere in other sections of Part VI of the *Criminal Code.* Among other things, the trial judge concluded that the provision failed constitutional scrutiny on the following bases: (1) there was no requirement that those who were intercepted under Part VI of the *Code* would be notified of that fact; and (2) there was no requirement that officers invoking s. 184.4 would report to a senior or independent officer or to the executive branch of the government or to Parliament. The provision was struck down. A different result was reached in *R. v. Riley* (2008), 174 C.R.R. (2d) 250 (Ont. S.C.J.), where the trial judge upheld the constitutionality of s. 184.4 by reading a notice provision into the scheme. The Crown sought and was granted leave to appeal directly to the Supreme Court of Canada in the *Tse* matter.

Held: Properly construed, the unanimous Court concluded that s. 184.4 strikes an acceptable balance between individual s. 8 *Charter* rights and the strong societal interest in preventing and intercepting serious harm. Despite this fact, the provision was struck down because of the statutory failure to require notice to those who have been intercepted. The declaration of constitutional invalidity was suspended for a 12-month period to provide Parliament with sufficient time to respond.

In terms of the balance of the provision, the Court provided helpful guidance on a number of issues, some of which are discussed below. The Court commented that true urgent circumstances are required before an officer can intercept without judicial authorization, in the sense that there must exist a reasonable apprehension of imminent and serious

harm, combined with the fact that a judicial authorization cannot be obtained with any reasonable diligence. While intercepting private communications in this context must be an effective means to prevent an unlawful act from occurring (or continuing), it need not be the only means available to law enforcement to achieve these ends.

If it becomes feasible or practicable for the police to seek a judicial authorization, they must do so. Each case is context specific and will dictate when it becomes feasible to seek judicial approval.

Importantly, only the private communications of the perpetrator or victim (or intended victim) of the serious harm may be intercepted. This includes aiders and abettors as parties to an offence under ss. 21 and 22 of the *Code.* Victim only includes the actual and intended victim of serious harm and not those who may suffer emotional loss if the threatened harm materializes. As such, the private communications of parents and family of an abducted child cannot be intercepted. Despite this fact, the Court was clear that the devices over which this group of people communicate may be live-monitored by the police in case the victim or perpetrator is in contact. Once the police have satisfied themselves that neither the victim nor alleged perpetrator(s) are part of a communication, the interception must stop.

Moreover, the Court spent some time discussing the scope of s. 188 of the *Criminal Code*. This provision allows for a 36-hour judicial authorization to intercept private communications. The Court concluded that the greater the availability for an authorization to go under s. 188, the more circumscribed the authority to proceed without an authorization under s. 184.4. An application under s. 188 does not require a written affidavit.

Commentary: This is an important judgment for the law enforcement community. While at first glance it appears that something has been lost to that community, in actual fact, the judgment is very helpful in defining the proper scope of this extraordinary police power. It should take little time and effort to correct the notice deficiency identified by the Court. Notice is already well embedded in s. 196 of the *Criminal Code* and operates in relation to ss. 186 and 188 authorizations. The next constitutional question will be whether s. 184.2 one-party consent wiretap authorizations require notice to be provided to those intercepted.

***R. v. Tse et al.,* [2012] SCC 16**

7. COMPUTERS AND CELL PHONE SEARCHED FOR "DOCUMENTATION" WHILE EXECUTING A HOME WARRANT FOUND TO BE CONSTITUTIONALLY ACCEPTABLE

Facts: The Crown appealed after critical evidence seized during the execution of a search warrant was ruled inadmissible at trial and the accused was acquitted of producing and possessing marihuana for the purpose of trafficking and theft of electricity. The two questions on appeal were whether the warrant provided sufficient reasonable grounds to permit for the search of documentation about ownership or occupancy of the place searched and, if so, whether it implicitly authorized the search for such "documents" within electronic storage devices.

The police executed a search warrant on a residential address that turned out to be a grow-operation. At the time, the police were investigating a theft of electricity charge. In the search warrant, they were permitted to seize "[d]ocumentation identifying ownership and/or occupancy" of the residence. There was no mention of searching electronic devices in the residence. While executing the warrant, the police came across two computers and a cell phone. They searched each for "documentation".

One of the computers was running and connected to a security system. The other computer was also turned on and open to MSN Messenger, Facebook, and an email account. Each of these programs were connected to the accused. The computer also contained a resume of the accused. A cell phone was located, which was found to contain pictures of the accused.

The trial judge ruled all of the evidence taken from the electronic devices, which connected the accused to the residence, was inadmissible on two bases: (1) there was insufficient evidence that any documentation would be located in the residence, from which ownership or occupancy could be inferred; and (2) the search of electronic devices must be specifically provided for in a search warrant before the police can engage in any like search. The trial judge relied upon *R. v. Morelli,* 2010 SCC 8 for this proposition. She excluded all of the evidence that came from the electronic devices.

Held: The British Columbia Court of Appeal noted that a s. 487 *Criminal Code* search warrant can be used for multiple purposes. Relying upon *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, the unanimous Court concluded that s. 487 warrants can be used to ascertain what happened, who did it, and whether the conduct is criminally culpable in nature. Here, the police were partially attempting to ascertain who was responsible by looking for documentation of ownership and occupancy. It was open to the issuing justice to draw an inference that there were likely to be document(s) inside the residential address that would assist in making this

link. The use of the term "documentation" was as specific as it needed to be, bearing in mind the context of the search and the fact that the police were involved in investigating who was in control of the residence.

In terms of the search of the electronic devices, the British Columbia Court of Appeal determined that the use of the term "documentation" in the search warrant permitted the search of any electronic devices for such items. Documents can exist in electronic format and, in fact, in the Concise Oxford English Dictionary, 11th ed. Revised (Oxford: Oxford University Press, 2006), "documents" includes "a piece of written, printed, or electronic matter that provides information or evidence, or that serves as an official record". The Court rejected that the search of electronic devices required any special type of rules: "I do not accept that the law governing search warrants needs special rules to deal with computers and similar devices". While executing a search warrant, if the police locate a device that is reasonably "expected" to contain an electronic version of what they have been authorized to search for under warrant, then they may examine the device for that purpose.

Commentary: This case seems to run against the trend of recent authority which has arguably treated computers and other electronic devices in a special manner, requiring independent rules of search. One such category of cases arise in the cell phone search context, where the search incident to arrest doctrine seems to have been largely rejected. This is an important decision that pushes back on the trend that treats electronic devices differently than the search of other areas and things. Importantly, the Supreme Court of Canada granted leave to appeal on June 4, 2012 and has tentatively scheduled the appeal for March 27, 2013. In addition to hearing this case, the Supreme Court is under reserve in *R. v. Cole*, [2011] O.J. No. 1213 (C.A.), leave granted [2011] S.C.C.A. No. 278, appeal heard May 15, 2012. *Cole* pertains to a warrantless search of a teacher's computer and electronic material that was provided to the police by his school board. These cases promise to be the next jurisprudential instalment about whether computers are so unique that they deserve "special" rules for engagement by law enforcement.

***R. v. Vu*, 2011 BCCA 536, leave to appeal granted [2012] S.C.C.A. No. 94**

8. AN ACCUSED DETAINED ON ONE SET OF CHARGES IS ALSO THE SUBJECT OF INVESTIGATIVE DETENTION ON ANOTHER MATTER GIVING RISE TO SECTION 10(A) *CHARTER* CONSIDERATIONS

Facts: The accused was charged with two counts of first degree murder. Along with another, he was alleged to have killed two men in his garage and then transported the bodies elsewhere. Shortly after their disappearance, the garage and vehicle allegedly used to transport the bodies were burned. The bodies were not located until about six-months later.

About a week after the victims went missing and the fires had been set, the police arrested the accused for possession of narcotics and stolen property. While in custody following his arrest on these matters, two officers interviewed him twice about a "missing persons investigation". They did not say that they were investigating murders. During the course of these interviews, among other things the accused was told that the police may find DNA of the missing men in the accused's vehicle, they presented him with dentures taken from the burnt SUV and suggested that they may be those of one of the missing people, and suggested that he was the "last guy to see [one of the missing men] alive". During the second interview he was assured that the police could charge someone with murder despite the absence of bodies. He was ultimately charged with the homicides in later January of 2009. He then provided a third statement.

At trial he sought to have each of the statements excluded. The first and second statements he said breached his s. 10(a) *Charter* rights on the basis that he was detained and investigated for the suspected homicides but not informed of this fact. In relation to the third statement, he said that there was a sufficient nexus between the first statements taken in breach of his s. 10(a) *Charter* rights and the third statement, that it should also be excluded.

Held: The trial judge concluded that the accused's s. 10(a) *Charter* rights were breached. While the interviewing officers testified on the *voir dire* that they did not believe they were investigating homicides at the time of the first two interviews, the trial judge rejected this evidence. She made the important observation that both a search warrant and one-party consent wiretap authorization had issued in the week leading up to the interviews and the predicate investigation for both judicial authorizations was murder. In the event that she was wrong about the officers' degree of knowledge about the homicide investigation, the trial judge concluded that other officers within the police service clearly believed that the victims had been murdered. According to the trial judge, "[i]t is this institutional knowledge that must set the standard for the necessary *Charter* warning." It is not open to the police to "sidestep constitutional obligations" by keeping "strategically placed officers uninformed". This is not acceptable as a deliberate strategy or as a result of systemic negligence.

Even though the accused was detained arising out of the charges relating to the lesser offences of possessing narcotics and stolen property, he was also being detained on suspicion in relation to homicides. Pursuant to *R. v. Suberu,* 2009 S.C.J. No. 33, he was entitled to be cautioned on the offence

of homicide whether he was arrested on reasonable grounds or simply detained on reasonable suspicion. This right would have been triggered even if the police did not necessarily possess reasonable grounds to believe that the victims had been murdered. His s. 10(a) rights were breached and the statements were ruled inadmissible.

In relation to the third statement, the trial judge concluded that there was an insufficient link to the earlier utterances to affect its admissibility.

Commentary: This is an interesting case in the sense that there was an investigative detention within the context of a more complete custodial detention. While s. 10(b) of the *Charter* does not form a significant plank of the judgment, it is the underlying reason for the need to provide accurate and meaningful information about the reason for detention under s. 10(a). Without such information, the right to counsel is rendered less meaningful in the sense that a person can only receive good legal advice where the extent of one's jeopardy is understood.

***R. v. Carter*, 2012 ONSC 94**

9. PHYSICAL ASSAULT OF ACCUSED AND WARRANTLESS SEARCH OF HOUSE LEADS TO EXCLUSION OF DRUG EVIDENCE

Facts: The accused were charged with trafficking and possession of controlled substances. An undercover officer arranged to purchase a large quantity of cocaine from one accused. They agreed to meet in a hotel room. When one accused arrived, he was pulled into the room by several officers, arrested and questioned. The police found nearly a kilogram of cocaine in his car parked outside. In a subsequent warrantless search of his home, they located another two kilograms of cocaine and other drugs. The police initially went to the residence to secure it as against the risk that drugs inside could be removed or destroyed. Once present, they entered the home without any authorization and conducted a full search for drugs and other evidence. A warrant later arrived.

The accused alleged that he was beaten by the police in the motel room. He denied being given the right to counsel and denied incriminating statements attributed to him in the officers' notes. He alleged that the subsequent search of his home was based on an invalid warrant and that, in any case, an unlawful warrantless search had preceded the issuance of the warrant. The accused brought an application for a stay of proceedings and, failing that remedy, for exclusion of the evidence pursuant to sections 7, 8, 10(b) and 24(2) of the *Charter*.

Held: After hearing the evidence of the accused and the relevant police officers, the Court concluded that the injuries sustained by the accused during his arrest were not consistent with the police testimony. The accused was found to have suffered mild to moderate bruises or scratches on his chest, neck, left cheek and right elbow, distinct and heavy bruising on his right shoulder and behind his left ear. The Court concluded that, while the accused had exaggerated the severity of the beating in his evidence, his injuries nevertheless independently supported that the use of force by the police went beyond what was required to secure a lawful arrest. In the result, the Court was satisfied that the arresting officers deliberately and unnecessarily injured the accused.

Turning to whether the Crown had satisfied its onus to establish that the statements of the accused were voluntary, the Court relied on the analysis set out in *R. v. Oickle*, [2000] 2 SCR 3; *R. v. Moore-McFarlane*, [2001] OJ No. 4646 (CA); and *R. v. Marshall*, [2005] OJ No. 3549 (CA). The Court found there were two factors that militated against the voluntariness of the statement. First, the police used violence to affect the arrest of the accused. Second, the police deliberately interrogated the accused without attempting to make any audio or video recording of the conversation. Thus, the Court could not safely conclude that any statement made by the accused was voluntarily.

Turning to the police search of the accused's home without a warrant, the Court referred to section 11(7) of the *Controlled Drugs and Substances Act,* which provided:

> "A peace officer may exercise any of the powers described in subsection (1), (5) or (6) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain one."

Subsections (1), (5) and (6) describe search powers. Thus, to fall within this authorizing legislation, two pre-conditions needed to be satisfied: (i) the conditions normally required for obtaining a warrant had to exist, (*i.e.*: there had to be reasonable grounds to believe there were drugs in the home); and (ii) there had to be exigent circumstances that made getting the warrant impracticable. Exigent circumstances required both a subjective belief of the police and an objective basis for that belief: *R. v. McCormack*, [2000] BCJ No. 143 (CA), paras. 17-25. The Court agreed that the exigent circumstances could not be of the police's own making.

On the facts of the case, the Court held that none of the conditions justifying a search without a warrant were met in the search of the accused's residence. The police did not have sufficient grounds upon which to obtain a search warrant. There were also not exigent circumstances that justified not seeking a warrant before entering and searching the home.

Had the police simply secured the premises and waited for a warrant to arrive (assuming grounds existed), a different outcome might have prevailed.

Turning to the issue of remedies, the Court found that the accused's *Charter* rights had been breached in three respects: first, the police used excessive force in arresting the accused and violated his section 7 rights; second, the police breached section 10(b) of the *Charter* in failing to provide the accused with the informational component of the right to counsel upon his arrest; and third, the police breached the accused's section 8 rights in connection with the warrantless search of the his residence.

Following *R. v. O'Connor*, [1995] 4 SCR 411, the Court rejected that this was one of the "clearest of cases" justifying a stay of the proceedings. Turning to section 24(2), however, the Court held that the search of the home of the accused was "a very serious breach" as it involved a deliberate and calculated decision by the police to circumvent the law and take matters into their own hands. The Court noted that the Crown had conceded that the police did not act in good faith.

The Court held that the search involved a "flagrant case of bad faith; not only did the officers collude on an illegal search, but those who testified on the *voir dire* all gave false evidence designed to mislead the Court." The Court held that those factors favoured exclusion of the evidence, particularly the drugs from the house. Applying the factors in *R. v. Grant*, [2009] 2 SCR 353, the seriousness of the *Charter* infringing state conduct, was determined to be high.

Turning to the second factors in *Grant,* involving the impact of the breach on the *Charter*-protected rights of the accused, the Court held that while the assault did not cause permanent injuries to the accused, the flagrant breaches of his *Charter* rights occasioned by the abusive arrest, the failure to comply with s. 10(b) of the *Charter* and the warrantless search of his residence, all pointed towards exclusion.

Balancing all of the factors, the Court concluded that all of the evidence seized from the home should excluded, as it was most closely associated with the reprehensible police conduct during the warrantless search and their subsequent false testimony on that issue. However, the Court refused to exclude the drugs and related evidence seized from the car.

Commentary

The result in this case is fact-driven. The trial judge made strong findings against the police after weighing conflicting evidence heard during the Charter *voir dire*. Those findings, in turn, permeated the Court's s. 24(2) analysis. The only analysis missing from the judgment related to the basis upon which the Court concluded that the drug evidence seized from the accused's car following the unlawful and abusive arrest of the accused was admissible In otherwise carefully reasoned analysis, the Court concluded that all the other evidence obtained by the police pursuant to the breaches should be excluded. The Court also held that the fact of the breaches of the *Charter* could be addressed in sentencing, should the accused be convicted in relation to the drugs found in the car.

***R.v. Dinh*, 2011 ONSC 5644**

10. EVIDENCE "OBTAINED IN A MANNER" THAT BREACHED ACCUSED'S CHARTER RIGHTS

Facts: The accused was the occupant of a residence located at Pemberton, B.C. The fire department and police were dispatched to investigate a possible house fire. The accused obstructed efforts by the fire department to gain access to the residence to determine whether there was a hazard inside. Eventually, he was placed under investigative detention and, later, arrested. The police then conducted a warrantless search of the residence. Apart from some evidence suggesting transient occupancy, the entirety of the home was given over to the production of marihuana. The Court held that the dedication of the home to the production of marihuana would have been evident immediately upon entry to even the most naïve observer.

In a prior ruling, the Court had concluded that the accused failed to establish that he had a reasonable expectation of privacy in the home. As such, the accused failed in establishing standing to directly attack the constitutionality of the warrantless search of the residence.

In this second ruling, however, the Court concluded that the arrest and post-arrest search of the accused's person violated his rights under sections 8 and 9 of the *Charter*. As the arrest was unlawful, the subsequent search of his person was not incidental to a lawful arrest, and violated his section 8 rights.

The issue was whether the subsequent search of the residence, for which the accused had no reasonable expectation of privacy, was nonetheless sufficiently causally and/or temporally related to the section 8 and 9 breaches related to his unlawful arrest, as to breath new life into the accused`s desire to seek exclusion of the evidence seized from the residence.

Held: Applying the law from *R. v. Therens*, [1985] 1 SCR 613, *R. v. Strachan*, [1988] 2 SCR 980 and *R. v. Goldhart*, [1996] 2 SCR 463, the Court reviewed the causal and temporal connections between the initial *Charter* breaches and the subsequent search of the residence. Applying the law to the facts, the Court found that the temporal connection "was so strong as to make the *Charter* breaches part and parcel of a single transaction". Accordingly, section 24(2) was engaged.

Applying the factors in *R. v. Grant*, 2009 SCC 32, as recently applied in *R. v. Cote*, 2011 SCC 46, however, the Court found that there was nothing in the behavior of the police that would warrant a finding that the breaches were deliberate or the product of a flagrant disregard for the accused's rights. While the Court held that the breaches occasioned by the unlawful arrest and search of the accused were not trivial, they did not "come close to approaching the seriousness of the flagrant violations which lead to the exclusion of the evidence in *R. v. Harrison* 2009 SCC 34".

Applying the second set of factors under *Grant*, the Court held that while the arrest of the accused was unlawful, his initial investigative detention was not. The accused's liberty interests were properly suspended pending further investigation of the existence of a marihuana grow operation on the premises. The failure of the police to turn their minds to whether they could have obtained a warrant based upon their initial lawful observations of the interior of the residence from the doorway, when they initially engaged with the accused, did not display a casual attitude toward or deliberate flouting of *Charter* rights. The Court held that the evidence would have been discoverable in any event of the unlawful arrest that followed the accused's lawful investigative detention.

Commentary:

The judgment contains a current summary of the law and principles regarding whether evidence is "obtained in a manner" that violated the *Charter*, as set out in *R. v. Therens*, [1985] 1 SCR 613, *R. v. Strachan*, [1988] 2 SCR 980 and *R. v. Goldhart*, [1996] 2 SCR 463 and also a helpful summary of the discoverability doctrine as it applies under section 24(2).

***R. v. Do*, 2012 BCSC 411**

11. REASONABLE EXPECTATION OF PRIVACY IN COMMERCIAL BANKING RECORDS

The Facts: The accused brought an application pursuant to sections 8 and 24(2) of the *Charter*, alleging that his right to be free from unreasonable search and seizure was violated when the police received various banking documents from the Bank of Montreal (BMO) and the Alberta Treasury Branch (ATB). The banking documents related to mortgage applications submitted by the accused, to BMO and ATB, to finance commercial properties associated to the accused. The accused argued that the receipt of this information by the police constituted a warrantless search, that the search was unreasonable, and that the evidence obtained as a result of the searches, should be excluded pursuant to s. 24(2) of the Charter.

BMO and ATB provided information to the police regarding mortgages with the accused to the RCMP in response to "comfort letters" written by the RCMP to BMO and ATB. The "comfort letters" were written by the RCMP to the institutions after the police became aware of possible criminal misconduct by the accused in relation to fraudulent activities regarding certain mortgages held by the accused.

A sergeant with the RCMP testified on the *voir dire* that the RCMP had reasonable grounds to believe that the accused had engaged in fraud. The sergeant testified that he did not believe that he needed a warrant, but rather could rely on s. 487.014 of the *Criminal Code* which stated that: "No production order is necessary for a peace officer or public officer enforcing or administering this or any other Act of Parliament to ask a person to voluntarily provide to the officer documents, data or information that the person is not prohibited by law from disclosing".

Relying on *R. v. Plant*, [1993] 3 SCR 281 and *R. v. Tessling*, 2004 SCC 67, the accused characterized the information sought by the police as "highly confidential" and including the "biographical core of personal information" of the accused which "reveals intimate details of the lifestyle and personal choices".

In contrast, the Crown argued that the accused did not have an objectively reasonable expectation of privacy in the documents sought by the RCMP from BMO and the ATB. First, the Crown argued that the mortgage information did not involve information that related to intimate details of personal choice and lifestyle regarding the accused. At best, it included mere identification evidence and some information on economic activity, a situation analogous to that discussed by the Ontario Court of Appeal in *R. v. D'Amour* (2002), 163 OAC 164.

The Crown also noted that much of the documentation did not even involve the accused, but rather were documents exchanged between different financial institutions. The Crown also argued that the financial institutions in the case, BMO and the ATB, were themselves the victims of fraud. The Crown relied upon the English case of *Tournier v. National Provincial and Union Bank of England*, [1924] 1 KB 461, at p. 473, which held that a bank may disclose information to third parties when that is in the public interest or necessary to protect the institution.

Held: The Alberta Court of the Queens Bench held that a search will be lawful where that search is authorized by statute. A search warrant, itself, is an example of a potential intrusion into a person's privacy that is authorized by legislation. In the case at bar, however, the information was requested by the RCMP and then provided voluntarily by the financial institutions. Section 47.014(2) of the *Criminal Code* deemed that whomever voluntarily provided information pursuant to s. 47.014(1) was authorized and justified as long as it was lawful for that person to provide the information.

After referring to s. 20 of the *Personal Information Protection Act*, SA 2003, c. P-6.5 and the principles discussed in *R. v.*

Gomboc, 2010 SCC 55, the Court held that the police were authorized to investigate alleged misconduct that offended the provision of the *Criminal Code,* such as mortgage fraud. On the other hand, disclosure of the mortgage information by the financial institutions was reasonable following the institutions' review of the mortgage documents which indicated that the institutions appeared to have been the target of a criminal mortgage fraud scheme.

The Court concluded, on a balance of probabilities, that the accused had no objectively reasonable expectation of privacy in the BMO and ATB mortgage documents and related financial institutions. The Court concluded that the mortgage related information provided by the institutions to the RCMP was not "biographical core data, revealing intimate and private information for which individuals rightly expect constitutional privacy protection". (*Plant*; *Tessling*; *Gomboc*, at para. 34).

The Court agreed with the Crown the accused had a reduced privacy interest in the information that disclosed criminal misconduct where the financial institutions were themselves the victims. The Court stated that to accept the accused's argument that BMO and the ATB could not voluntarily disclose the records, would leave the financial institutions in a conundrum "worthy of Catch-22". That is, once tipped off by a government official, a financial institution which had been the victim of a fraud could do nothing, paralyzed by the private nature of the fraudulent customer's personal information. That bank could "only sit, silent, and hope an external investigator persists with a search warrant or court order to disclose documents". Based on all of the factors summarized by the Court, the accused had no expectation of privacy in the records and, accordingly, the accused's s. 8 rights were not breached.

In any event of the Court's s. 8 analysis, the Court held that, if the s. 8 rights of accused were infringed, the Court would have not have excluded the evidence pursuant to s. 24(2) on the basis that inclusion of the evidence would not bring the administration of justice in disrepute (*R. v. Grant*, 2009 SCC 32).

Commentary: The case deals with the complex issue of when an accused may have an objectively reasonable expectation of privacy in commercial banking records. It is one of the few cases addressing the meaning and application of section 487.014 of the *Criminal Code*. It is also one of the few cases dealing with the principles established in *Tournier v. National Provincial and Union Bank of England*, [1924] 1 KB 461, that permit a bank to except itself from the contractual right of privacy existing between a bank and its customer, in order to permit the bank to voluntarily disclose ostensibly private banking information to third parties, including the police, when it is in the public interest or necessary to protect the best interests of the institution

***R. v. La*, 2012 ABQB 192**

12. FAILURE OF TRIAL JUDGE TO PROPERLY ASSESS S. 10(B) VIOLATION RESULTS IN REVERSAL OF ACQUITTAL

Facts: The respondent was charged with sexual assault and sexual interference of his wife's niece. Following his arrest at a remote worksite in the Northwest Territories, the RCMP read the accused's his rights to counsel under s. 10(b) of the *Charter* before being transported to the nearest RCMP detachment in Hay River, approximately a one hour drive away. At that time, the accused spoke privately with a legal aid lawyer by telephone. He also made a request to speak to his wife, which was denied. The accused was then interviewed by the police, during which he provided an inculpatory statement. The trial judge found the statement to have been obtained in violation of the respondent's right to counsel under s. 10(b) because of an unreasonable delay in transporting the accused to the police detachment to exercise his *Charter* rights. The trial judge also found that the police should have permitted the accused to call his wife.

Held: In reversing the acquittal, the Court of Appeal acknowledged that an appellate court will generally accept the factual findings of a trial judge unless there was palpable and overriding error. In this case, the trial judge's reasons revealed a number of unreasonable factual findings which put into question the trial judge's conclusion that the accused's *Charter* rights were violated.

The Court noted that the trial judge considered the police to have met the informational component of the right to counsel under s. 10(b) by advising the respondent of his rights on at least three occasions before taking his statement. However, the trial judge had found that the police fell short in the implementation of that right, even though the accused was provided an opportunity to speak to a lawyer. In essence, the trial judge determined that the respondent was not provided with enough assistance to properly understand and exercise his rights: *R. v. Evan*, [1991] 1 SCR 869 at para 44.

The Court of Appeal held that if the right to counsel is invoked, the police must provide the detainee with a reasonable opportunity to exercise the right, and must refrain from eliciting information until the right is exercised. However, there is a corresponding obligation on the detainee to exercise reasonable diligence in the exercise of his or her right to counsel, which may vary according to the context and the particular circumstances as a whole: *R. v. Sinclair*, 2010 SCC 35; *R. v. Willier*, 2010 SCC 37.

On the facts, the police advised the respondent as to his rights immediately upon his arrest. The accused affirmed his understanding of them, not only at the time of his arrest but also later, after exercising his right to counsel, at the outset of the recorded interview. The officers refrained from attempting

to elicit any information from the respondent until he was able to speak privately with a lawyer at the police station.

As a practical matter, the arrest occurred in a very remote area where there was neither cell phone service nor any landlines. There was no indication that a nearby community had appropriate resources to allow the accused to speak to counsel in private while under arrest, nor was there evidence to suggest that doing so would not further delay or otherwise infringe the accused`s rights. While it was clear to the officers that there would be some period of time following the accused's arrest before he could exercise his right to counsel in private, the police properly refrained from attempting to elicit any information from the respondent until after he had an opportunity to exercise his right to counsel.

In these circumstances, the Court held it was not unreasonable for the respondent to have to wait approximately one hour to contact counsel after he arrived at the police detachment in Hay River. That was the nearest place where the police could provide the accused with a list of duty counsel and be given the privacy required to speak with counsel.

That left the question of whether the accused`s right was breached when he was denied the opportunity to contact his wife. The Court acknowledged that a detainee should be permitted, as part of the exercise of the right to counsel, to communicate with a third party so long as the purpose of that contact is to retain or instruct counsel and there are no investigative sensitivities arising from the request: *R. v. Tremblay*, [1987] 2 SCR 435, *R. v. Oester* (1989), 97 AR 389 (QB), *R. v. Menard*, 2010 BCSC 1416, 11 BCLR (5th) 162.

Nonetheless, the Court held that a detainee must be duly diligent in exercising the right to counsel: *R. v. Johnston*, 2004 BCCA 148 BCAC 19, *R. v. Adams* (1989), 33 OAC 148, 49 CCC (3) (CA). It should not have fallen to the police to speculate on the reason why the accused wanted to contact his wife, unless there were special circumstances that required them to make inquiries: *R. v. Adams* (1989), 33 OAC 148, 49 CCC (3d) 100 (CA), *R. v. Kumric*, 2006 ONCJ 24, *R. v. Singh*, 2011 ONCJ 435. On the facts, the accused made one request to speak to his wife. He did not say that he required her assistance to obtain a lawyer. Thus, the request to speak to his wife was not factually tied to the accused`s efforts to exercise his rights under s. 10(b) of the *Charter*. The trial judge erred in surmising that it that the reason why the accused wanted to speak to his wife was for the purpose of getting her assistance in speaking to a lawyer.

Commentary: The case demonstrates the practical challenges that can arise in implementing s. 10(b) rights where an accused is arrested in a remote location. In this case, the Court of Appeal held that he police complied fully with the informational component of section 10(b) immediately upon the accused`s arrest and quite properly did not attempt to interview the accused until after he had a reasonable opportunity to exercise his s. 10(b) rights in compliance with *R. v. Sinclair*, 2010 SCC 35; *R. v. Willier*, 2010 SCC 37.

***R. v. J (KW)*, 2012 NWTCA 3**

One Corporate Plaza, 2075 Kennedy Road,
Scarborough, Ontario M1T 3V4
Tel: (416) 609-3800 from Toronto
1-800-387-5164 from elsewhere in Canada/U.S.
Internet: http://www.carswell.com
E-mail: www.carswell.com/email

Monday through Friday, 8:30 a.m. to 5:30 p.m.

Content Editor:
Product Development Manager: Graham Peddie