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— Police Powers—
Justice Michelle Fuerst, Michal Fairburn and Scott Fenton

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1. Perimeter Search of Residence is Violation of section 8

Facts: At approximately 1:30 a.m., police received a call that a dog had been barking incessantly at a particular residence since 10:00 p.m. The caller said he knew the occupant of the residence as "Shane", and that he thought he had moved out, as he had not been seen in a week.

Two officers attended at the scene and were able to see a dog in the living room. When their knocks at the front door did not receive a response, they proceeded around the side of the house and into the backyard. The officers knocked on the back door and, again, did not receive a response. There was a window opening in the backdoor, lacking glass and covered with a piece of cloth. One of the officers pushed on the cloth with his baton in order to see if anyone inside the house might need help. On doing so, the officers detected a strong odor of raw marihuana and observed a large sheet or tarp at the bottom of stairs leading to the basement. At this point, the officers suspected that there might be a grow operation at the residence.

The officers then conducted a perimeter search of the house. They observed that the hydro meter was spinning at a rapid rate; there was condensation build-up on one of the basement windows; and there were eight to ten black garbage bags, one of which was ripped open and appeared to contain dried marihuana leaves and dirt. As well, one of the officers observed a green garden house running into a

partially open basement window. The window was covered with a blind. Pushing aside the blind, the officer saw a bright orange heat lamp and a tarp stretching from floor to ceiling. A search warrant was obtained and police seized 109 marihuana plants and an array of grow operation equipment.

The accused challenged the validity of the warrants on the basis that the information to obtain was premised on an illegal search. A friend of the accused testified at trial. He said that the window to the backdoor of the residence was covered with plastic and securely duct taped in place on all 4 sides. He took a photo of the inside of the door a few days *after* the search, which revealed a plastic covering on the window and duct tape lifted on the lower side.

The accused alleged that the initial search of the residence was illegal, as the officers entered the residence by pushing on the plastic covering the window. As well, the officer's admission that he pushed aside the basement blind was not included in the information to obtain, and as such, the affiant failed to make full, frank and fair disclosure. The Crown conceded that an initial warrantless search did occur, but that it was authorized by law and conducted in a minimally intrusive manner.

Held: The initial search was authorized by law. There was no breach of s. 8.
The issue was whether the evidence relied upon by the affiant in the Information to Obtain ("ITO") the search warrants was the result of an illegal perimeter search and if so, whether that information should be excised from the ITO.

The Court held that officers lawfully initially attended at the property in response to an animal wellbeing call, in accordance with their duties under s. 25 of the *Police Services Act*. That said, all of their observations were made while the police were, in good faith, endeavoring to determine if the barking dogs were abandoned or otherwise whether anyone was home. Further, the evidence of the officers that the window was covered with a moveable cloth was accepted. It was reasonable for the officers to push aside the covering over the window to check on the barking of the dogs and to determine if there might be someone in distress.

Once the officers formed the suspicion that the residence was a grow operation, however, it was unreasonable for the officers to continue to inspect the property while on its perimeter, including pushing aside the blinds covering the basement window. Such conduct was contrary to the accused's s. 8 rights as discussed in *R. v. Kokesh*, [1990] 3 S.C.R. 3. Accordingly, the observations made as a result of the perimeter search must be excised from the information to obtain, in accordance with the authority of *R. v. Wiley*, [1993] 3 S.C.R 263 and *R. v. Plant*, [1993] 3 S.C.R. 281. Notwithstanding those excisions, the Court ruled that there remained sufficient evidence in the ITO to establish reasonable grounds necessary for the warrant to issue.

Alternatively, the Court held that, if there was a breach of s. 8, the evidence should not be excluded under s. 24(2) after applying the factors from *R. v. Grant*, 2009 SCC 32. Police attended at the residence in response to the animal wellbeing call, not a drug investigation; they were lawfully on the premises in question. Pushing aside the backdoor window covering was a minimally intrusive step in the execution of their lawful duties.

Commentary: This case represents the application of the well-known principles in *Kokesch, Wiley* and *Plant*. It was important to the trial judges' reasoning that the police were not engaged in a drug investigation when they first attended at the residence. The attendance at the front, side and back of the house was a minimally intrusive step in responding to the animal wellbeing call. However, once the circumstances changed and officers began to suspect that the house was a grow operation, they should have stepped away from the scene rather than continue to conduct a warrantless search while on the defendant's private property. However, the observations that they made prior to that time were lawfully obtained and were sufficient to sustain the warrant.

R. v. Markus (2013), 2014 MBQB 104, 2013 CarswellMan 778 (Man. Q.B.)

2. Admission of Alcohol Consumption at the Roadside Sufficient to Ground Reasonable Suspicion

Facts: The appellant played in a golf tournament and consumed alcohol over the course of the day. He then left the golf course in his Corvette, accelerating the vehicle on a paved rural road in a manner that caused it to fishtail, cross the yellow line and then collide with a car traveling in the opposite direction. The driver of the oncoming car was killed and the passenger airlifted to the hospital. On arriving at the scene, officers did not observe any indicia of impairment though the appellant appeared to be in shock and was referred to EMS personnel at the scene. Approximately 30 minutes later, one officer asked the appellant if he had anything to drink that day, to which he received a positive response. The officer formed the belief that the appellant had alcohol in his system and made a demand that the appellant provide a breath sample to an approved screening device in accordance with s. 254(2) of the*Criminal Code*. The appellant was placed in the back seat of the police car and, in the close quarters of the car, the officer was able to detect the faint odor of alcohol. The ASD registered a fail, and the appellant was transported to the nearest RCMP detachment where he provided two breathalyzer samples that exceeded the legal limit. Later, he was charged with over .80 and impaired driving causing death.

The trial judge found that the officer had a subjective belief that the appellant had alcohol in his body, based on the appellant's statement at the scene that he had consumed some alcohol earlier in the day, but that the officer's belief was not objectively reasonable, as the admission provided little detail about the quantity or timing of consumption. Absent other indicia, the trial judge found that the admission was not sufficient to lead a reasonable person to conclude that the appellant had alcohol in his body. However, the trial judge admitted the breathalyzer results under s. 24(2). The appellant was eventually convicted of impaired driving causing death, in part, on expert extrapolation evidence called by the Crown with respect to the appellant's impairment at the time of the crash.

The appellant appealed on several grounds, including that the breathalyzer results should not have been admitted into evidence.

Held: Appeal dismissed.

The main issue on appeal concerned whether the ASD demand was made in accordance with s. 254(2) of the *Criminal Code* and the prevailing case law, including: *R. v. Bernshaw*, [1995] S.C.R. 254

and *R. v. Woods*, 2005 SCC 42. The Court of Appeal held that when a driver admits to having consumed alcohol, but provides no clarification as to the quantity or timing of consumption, the admission alone will be sufficient to ground an objectively justifiable, reasonable suspicion. As noted in *R. v. Gilroy* (1987), 79 A.R. 318 (C.A.), the test for reasonable suspicion in s. 254(2) is based on consumption alone, not its amount or its effects. Police are not required to inquire into the history of alcohol consumption with the driver at the roadside. The test for reasonable suspicion has both subjective and objective elements: *R. v. Chehil*, 2013 SCC 49 and *R. v. MacKenzie*, 2013 SCC 50. The Court reviewed a number of authorities that have suggested that an admission of consumption alone will not necessarily be sufficient to ground reasonable suspicion: see *R. v. Hnetka*, 2007 ABPC 197 and *R. v. Hansen*, 2010 ABPC 195. The Court rejected those authorities holding that to require peace officers to conduct roadside calculations of likely current impairment, based on the timing of prior consumption and the application of hypothetical elimination rates, was unrealistic and impractical (see: *R. v. Dunn; R. v. Bouvier*, 2007 ABPC 160 and *R. v. Ishmael*, 2012 ABCA 282).

Commentary: This case represents the Alberta Court of Appeal's final word on the issue as to whether a driver's admission of consumption at the roadside prior to driving a vehicle will constitute reasonable suspicion to ground an ASD demand under s. 245(2) of the *Criminal Code*. Given the low standard for reasonable suspicion, as recently re-confirmed by the Supreme Court in *R. v. Chehil*, 2013 SCC 49 and *R. v. MacKenzie*, 2013 SCC 50, the Court's decision is not surprising.

R. v. Flight (2014), 2014 CarswellAlta 850, 2014 ABCA 185 (Alta. C.A.)

3. Failure to Follow Directions Justified a Protective Mann Search

Facts: A blue Mazda passed an unmarked RCMP vehicle travelling 153 km/h in a 100 km/h zone. The officer was on patrol with his sniffer dog. The male accused was driving with a female passenger. The officer gave pursuit and stopped the car. The officer advised the accused driver that, as a result of driving at excessive speed, the car would be impounded for seven days pursuant to the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. The location of the traffic stop was on a desolated stretch of highway. The officer obtained the accused's license and registration, following which he returned to his squad car. The officer ran a check for safety concerns and outstanding warrants. He testified that this was part of his routine practice. He then learned that there were two police files within the last year in which the accused had allegedly "been involved" with cocaine. In one of the files, it recommended that the accused be charged. He testified that at that point, he "became alive" to potential officer safety concerns as he was aware that persons involved in drugs often carried weapons.

While the officer was still in the vehicle processing the tickets, the accused exited the car and sat on the concrete barrier alongside the highway. He did not go to the bathroom or light a cigarette. The officer testified that he found these actions unusual. The female passenger opened her door, but remained inside. The accused then stood up and walked to the open passenger door, turning his back to the officer.

The officer approached the vehicle and the accused sat down again on the concrete barrier. The officer observed the female passenger tucking a folded five dollar bill into her bra. When she reached for her identification, it fell out onto the roadside and she placed her foot on top of it. After a few

seconds, the officer asked her to remove her foot and he picked up the five dollar bill which was empty. On returning it to the passenger, the officer observed balls of tinfoil inside her bra and asked her to remove them. The officer observed that they were burnt, and placed the passenger under arrest for possession.

At this point, the accused reached inside his jacket pocket. He was asked to keep his hands in view and pulled his hand out. The officer turned back to the passenger, and again, the accused placed his hand inside his jacket pocket. Again, the officer asked him to keep his hands in view. This exchange occurred a third time. The female passenger then lifted her shirt and bra, exposing her breasts to the officer. At this point, the officer determined that he had sufficient safety concerns and decided it was necessary to determine what was in the accused's pocket to ensure that he was not carrying a weapon. He located a rigid cigar case, containing what appeared to be powder cocaine. The accused was also placed under arrest for possession. A subsequent search of the vehicle incident to arrest revealed a duffle bag containing 1 kg of cocaine.

On the *Charter* application, the accused argued that the officer did not have valid safety concerns to conduct a pat-down search and alleged that his rights under ss. 8 and 9 of the *Charter* were infringed.

Held: Application dismissed.

The trial judge accepted that the officer conducted the pat-down for the *bona fide* purpose of ensuring his own safety, noting that if the officer wished to engage in a drug investigation, he could easily have deployed his sniffer dog (but did not). Following the authorities of *R. v. Mann*, 2004 SCC 52 and *R. v. Williams*, 2013 ONCA 772, *R. v. Thibodeau*, 2007 BCCA 489 and *R. v. Crocker*, 2009 BCCA 388, the trial judge was not prepared to second-guess the officer as to his need to conduct a pat-down search of the accused for the purpose of ensuring his safety. Indeed, there were objectively verifiable safety concerns including the desolate portion of the highway where the stop was conducted and the unusual conduct of the accused and passenger, including the passenger's attempt to distract the officer by exposing her breasts to him. Moreover, the search was reasonably conducted, limited to that which was necessary to ensure his safety.

The search was limited in fashion to one focused on safety considerations. When the officer located a hard object in the accused's pocket, the officer was justified in removing and inspecting the item. The discovery of the cocaine was thus made while the officer was lawfully conducting a *Mann*-authorized officer protective search (see, *R. v. Greaves*, 2004 BCCA 484 and *R. v. Duong*, 2006 BCCA 325.). Once the drugs were found, the officer had reasonable and probable grounds to arrest the accused and, thereafter, the further searching of the vehicle was justified as a search pursuant to arrest (*R. v. Bracchi*, 2005 BCCA 461, *R. v. Besharah*, 2010 SKCA 2, and *R. v. Belnavis*, [1997] 3 S.C.R. 341.).

Commentary: This case illustrates an appropriate level of deference to a police officer's determination of when there exist sufficient safety concerns to necessitate a protective search. On both a subjective and objective basis, there were grounds to conduct a limited officer-protective search. The trial judge was not troubled by the officer's testimony that his safety concerns were first triggered by the accused's police check indicating a connection to a cocaine investigation, which is not surprising,

given the accused's refusal to keep his hands in plain view at the roadside and the unusual attempt to distract the officer.

R. v. Jordan (2014), 2014 BCSC 883, 2014 CarswellBC 1366 (B.C. S.C.)

4. Evidence Obtained as a Result of Warrantless Search of "Spy Pen" Camera Not Excluded

Facts: A teacher at a secondary school began to have suspicions that a fellow teacher, the accused, was secretly video-recording female students with a "spy pen". The teacher took his concerns to the principal, who observed the accused talking to female students and holding a pen in such a way that a red light could be observed. The principal contacted the Superintendent of the Board of Education who, in turn, advised that the principal should seize the pen. Arrangements were made for a union representative to attend. The principal advised the accused that concerns had been raised with respect to his pen and asked that it be handed over. The accused denied that he had the pen. The principal advised that he saw the accused put it in his pocket. The accused handed over the pen. After advising the principal to seize the pen, the Superintendent called the police. The Superintendent did not review its contents beforehand. The seized pen was then turned over to the police, who attempted to interview the accused with respect to the contents of the pen. On the advice of counsel, he refused to answer any questions.

The detective involved in the investigation testified that, at that point, he believed the investigation to be at a standstill. He testified that he did not believe that he had grounds to obtain a search warrant to examine the contents of the spy pen, and believed that he had no choice but to preview the contents of the camera pen without a warrant.

A "cursory" search revealed several active video files, including video of a female student in which the camera pans from her face down to her breasts several times. The detective then sought, and obtained, a search warrant to search the pen. It was found to contain 17 active movies, recording 30 different individuals, 27 of whom were students at the secondary school. The videos showed the students faces and breasts. Subsequent warrants to search the accused's home did not reveal any further evidence.

Held: While the cursory search of the camera pen was unreasonable and contrary to s. 8 of the *Charter*, the evidence was not excluded under s. 24(2).

The officer's "cursory" search of the camera pen was a violation of s. 8 of the *Charter*. While the camera was lawfully in the possession of the police, the accused was not under arrest, distinguishing this case from rulings in *R. v. Polius*, [2009] O.J. No. 3074 (S.C.J.), *R. v. Fearon*, 2013 ONCA 106 that dealt with the search of cellular phones pursuant to lawful arrests. Indeed, the doctrine of search pursuant to arrest was not legally available to the officer to justify even a cursory search of the pen without a warrant. The police did not have grounds to arrest the accused at the time the search was conducted. Nor were there any exigent circumstances justifying the search as the accused had been suspended from teaching.

The officers testified that "no investigation at all was done prior to the preview of the videos". While the detective testified that he was of the view that the camera had been provided "voluntarily" by the accused, that conclusion was held to be unreasonable. Had the detective investigated the seizure of the camera pen, he would have determined that it was not given over on consent. Further, following the Supreme Court's decision in *R. v. Cole*, 2012 SCC 53, it was clear that a third party (*i.e.*, the school principal or superintendent) could not lawfully consent to a search in which an individual could demonstrate a reasonable expectation of privacy. In this case, the pen was the exclusive property of the accused, albeit he was using it while working on school property.

Applying the factors from *R. v. Grant*, 2009 SCC 32, the Court concluded that the evidence should not be excluded under s. 24(2). The conduct of the police was not deliberate or flagrant; the law with respect to cursory searches of peripheral computer devices was unsettled at the time of the initial investigation. The officer believed wrongly, but in good faith, that he was entitled to conduct a cursory search of the pen. The "spy pen" was only a camera and storage device and was not akin to a smart phone or computer, the latter of which may contain a vast array of personal information. Further, its surreptitious use in the school leads to a reduced expectation of privacy. The impact on the *Charter*-protected interests of the accused was negligible.

Commentary: This judgment considers how the rules in *Cole* continue to limit the police in conducting warrantless searches of items seized by school boards in which the person from whom the item is taken has a residual interest of privacy in the thing seized. One could be forgiven for viewing the Court's assignment of good faith to the officer's warrantless search of the contents of the spy pen to be charitable. *Cole* was already decided and was good law at the time of the search. Further, the officer's purported reliance on*Polius* and/or *Fearon* to conduct a warrantless cursory search of the contents of the pen was decidedly wrong since (as the officer knew) the accused had not been arrested or charged with any offences. Moreover, the officer lacked reasonable grounds to believe there were inappropriate images on the spy pen such that, had he tried, he could not have obtained a warrant. In the result, the Court rewarded the police for breaching the accused's rights by allowing the introduction of evidence that, on the facts, the police could not have lawfully obtained.

R. v. Jarvis (2014), 2014 CarswellOnt 6319, 2014 ONSC 1801, A.J. Goodman J. (Ont. S.C.J.)

5. Police must Give section 10(b) Rights before Executing Warrant to Look at Sensitive Body Part

Facts: The appellant was accused of repeatedly sexually assaulting his stepson and inviting his stepdaughter to touch him for a sexual purpose. He was convicted at trial, partly because of the victims' evidence that the appellant had a small flap of excess skin over his anus.

After his arrest and release but before trial, the police had obtained a general warrant under s. 487.01 of the *Criminal Code*authorizing them to view and photograph the appellant's anus. He argued that the police had violated his right under s. 10(b) of the*Charter* by failing to advise him of his right to counsel and to give him an opportunity to consult with counsel before the anal examination. He also argued that police had violated s. 8 of the *Charter* by requiring him to spread his buttocks so that his anus

could be viewed and photographed, a step which, he argued, the general warrant's language did not authorize.

Held (Doherty, van Rensburg, and Benotto JJ.A.): The appeal was dismissed. Although the police had violated s. 10(b), they had not violated s. 8, and the evidence was admitted under s. 24(2).
The appellant had been detained during the examination, since police took him to have the procedure done at a hospital. So the s. 10(b) right arose.

The trial judge had found that the appellant "knew his rights", in particular that he did not have to speak to the police, and that this relieved the police from complying with s. 10(b). Doherty J.A. disagreed: a detained person's rights cannot detract from the constitutional obligation of the police to inform him of his right to counsel. Knowledge of one's rights may have some relevance to the s. 24(2) inquiry. In any event, the more relevant legal advice was not about his ability to remain silent, but regarding his obligation to comply with the warrant and the extent of the police powers confronting him.

Doherty J.A. held that, while the execution of a search warrant does not have to be interrupted while a person speaks with a lawyer, the s. 10(b) right must still be given at the outset if there is detention or arrest. Further, in this case, there was no practical reason to proceed with the search before the appellant could consult with counsel. The evidence in question could not deteriorate or be destroyed. The Crown's argument focused on *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310. There the Supreme Court set out certain circumstances in which a detained person, having consulted with counsel at the outset, may require a second consultation. The Crown argued that the appellant had received his right to counsel when he was first arrested and that the execution of the anal warrant did not require a second consultation. Doherty J.A. disagreed: first, *Sinclair* sets out the s. 10(b) rules governing single detentions. Here, the appellant's consultation with his lawyer on arrest preceded the examination by many months, and the original lawyer could not have anticipated the anus warrant or advised adequately on it. Second, in any event, *Sinclair* itself says that a second consultation will be required where the police employ "non-routine procedures, like participation in a line-up or submitting to a polygraph". The anus warrant, Doherty J.A. remarked, was "about as far from a 'routine procedure' as one could get".

Doherty J.A. also held that it was irrelevant to the s. 10(b) obligation that the accused had no legal choice about whether to cooperate in the examination. A detainee is entitled to legal advice "even if that advice left him with few, if any, options other than compliance".

Finally, on s. 8 of the *Charter*, Doherty J.A. concluded that no violation had occurred when the police officer required the appellant to "spread his buttocks so she could get a clear view of his anal area". Doherty J.A. held that the spreading was necessary to accomplish the search: "Setting aside intrusive measures that could compromise bodily integrity and, therefore, exceed the scope of a general warrant, I regard the authority to view a part of a person's body as necessarily including positioning or bodily movements so as to allow a full viewing."

Under s. 24(2), Doherty J.A. held that the evidence was not causally connected to the s. 10(b) breach. The police conduct was less serious, since it was an isolated *Charter* breach and the police made a good faith mistake about the scope of the s. 10(b) right. The impact on the accused was also less

serious, since the evidence gathered would have been the same even if s. 10(b) had been scrupulously followed. No incriminating statements resulted. Finally, society's interest in an adjudication on the merits strongly favoured the admission of the evidence.

Commentary: This case involves an unusual deployment of a s. 487.01 general warrant, which can authorize police to "use any device or investigative technique or procedure or do any thing described in the warrant". There must be no other provision that would allow police to perform the technique, use the device, or do the thing. Doherty J.A. explains that the language in warrants must be read to include what is necessarily incidental to the thing authorized.

Note that s. 487.01(2) stipulates that "nothing in subsection (1) shall be construed as to permit interference with the bodily integrity of any person". The defence originally argued that the anal examination violated s. 487.01(2), but this argument was not pursued on appeal in light of case law such as *R. c. R.H.-G.*, 2005 QCCA 1160 (C.A. Que.). The case also provides a pithy recapitulation of the principles of s. 10(b) and search warrants. It is important to recall that the s. 10(b) right must be respected even if the suspect has no legal choice about what to do, and even if he knows his legal rights. Doherty J.A. makes very clear that those considerations may be relevant under s. 24(2), but should not be considered by the police in deciding whether to go through the s. 10(b) process with a detainee.

R. v. H. (T.G.) (2014), 2014 CarswellOnt 8433, 2014 ONCA 460 (Ont. C.A.)

6. Police may Not Perform Full Downloads of Phones Seized Incident to Arrest

Facts: In a police investigation of a kidnapping, the appellant was arrested twice in 2006. During each arrest, a BlackBerry device was seized. The first device was submitted for analysis in 2006 but the analysis could not be performed until 2008 because it was password-protected. The second device was analyzed in 2006. At trial, the Crown sought to rely on messages from both devices. No search warrant was ever sought.

The appellant conceded that a cursory search of a smartphone could be done without a warrant, but argued that the more intensive and intrusive search that occurred required a warrant. The intervener, the BC Civil Liberties Association, went further and argued that a warrant was required even for a cursory search.

Held (Bauman C.J.B.C., Levine and Neilson JJ.A.)**:**The downloads violated s. 8; without a warrant, police cannot perform full downloads of smartphones or cellphones seized incident to arrest. The Court declined to decide whether cursory searches could be done without a warrant, since the search that occurred was not cursory.

Levine J.A. began by summarizing the law of search incident to arrest from *Cloutier v. Langlois*, [1990] S.C.R. 158 and *R. v. Caslake*, [1998] 1 S.C.R. 51. Notably, such searches must be truly incidental to the arrest, and a delay in searching will give rise to an inference that the search is not truly incidental to the arrest. Levine J.A. observed that the Supreme Court of Canada has restricted search incident to arrest where it would otherwise interfere with special interests: *R. v. Stillman*, [1997] 1 S.C.R. 607 (seizure of bodily substances) and *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679 (strip searches).

Levine J.A. discussed the prior case law dealing with the search of cell phones incident to arrest. Two lines of cases took different approaches. One, stemming from *R. v. Giles*, 2007 BCSC 1147, and tending to hold sway in western Canada, held that cell phones could be searched incident to arrest and no special rule applied. The other, flowing from *R. v. Polius* (2009), 196 C.R.R. (2d) 288 (Ont. S.C.J.) and tending to find more favour in Ontario, held that cell phones were different from other receptacles that might be searched incident to arrest, both in the amount of information they could hold, and in the nature of that information.

Next, Levine J.A. took note of more recent cases from the Supreme Court of Canada, not involving cell phones, articulating the high expectation of privacy that people have in computers and related devices (*R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657). Finally, she considered two Ontario Court of Appeal decisions, *R. v. Manley*, 2011 ONCA 128 and *R. v. Fearon*, 2013 ONCA 106, 114 O.R. (3d) 81. Neither of those cases pronounced definitively on the application of search incident to arrest to smart phones, but *Fearon* has been appealed to the Supreme Court of Canada, and the decision is under reserve.

Levine J.A. concluded that "downloading the entire contents of a cell phone or smartphone . . . seized on the arrest of the accused, after some delay, without a search warrant, can no longer be considered valid under s. 8 . . . The highly invasive nature of these searches exceeds the permissible scope for a warrantless search authorized under the common law as a search incident to arrest."

She held that the delay of more than two years in examining the first device itself shows that the search was not truly incidental to the arrest. Nothing prevented the police from obtaining a warrant. Finally, she did not consider the intervener's position on cursory searches, since it did not arise on the facts. Ultimately, Levine J.A. admitted the evidence under s. 24(2).

Commentary: The last word in this legal debate will surely come with the Supreme Court's decision in *Fearon*. However the B.C. Court of Appeal's decision here is still notable because of its unequivocal character and because it comes from Western Canada, where previously the contrary doctrine of *Giles* had prevailed.

Levine J.A. could be unequivocal partly because this case presented unusually clear facts. First, the search took place two years after the arrest. Second, the search was a full forensic examination rather than the kind of cursory search that *Manley* and *Fearon* had struggled with. In the crucial sentence, Levine J.A. framed her conclusion in terms of "downloading the entire contents", and "some delay". Perhaps the real issue for the Supreme Court is whether "cursory" should define the allowable scope of a search of a smartphone incident to arrest, and if so, what "cursory" actually means. The concept is almost notoriously difficult to understand and apply with clarity.

R. v. Scott (R. v. Mann) (2014), 2014 CarswellBC 1708, 2014 BCCA 231 (B.C. C.A.)

7. Police cannot Obtain Internet Subscriber Information without a Warrant

Facts: The appellant downloaded child pornography using the file-sharing program LimeWire. This meant that the files he shared could be viewed and downloaded by other users of the program, and that his IP address could be viewed as associated with those files.

A police officer searched for anyone sharing child pornography in this manner, and obtained, among others, the appellant's IP address. He then used internet search tools to determine that the appellant's IP address was likely located in Saskatoon. He browsed the appellant's shared folder and saw a large quantity of what appeared to be child pornography.

Investigators then made a written "law enforcement request" to the internet service provider associated with the IP address, Shaw, for the name, address, and phone number of the subscriber (the appellant's sister, with whom he lived). This request was purportedly made under s. 7(3)(c.1)(ii) of the *Personal Information Protection and Electronic Documents Act (PIPEDA)*. With this information, police obtained a search warrant for the appellant's home, and seized his computer. The ensuing computer search revealed a large quantity of child pornography.

Held: The police request for the subscriber information violated the appellant's s. 8 rights. However, the child pornography was admitted under s. 24(2).

First, Cromwell J. held that the appellant had a reasonable expectation of privacy in the subscriber information. He held that it did not matter that the appellant was not the subscriber himself: "He had access to the Internet with the permission of the subscriber and his use of the Internet was by means of his own computer in his own place of residence."

Defining the subject matter of the search and its true impact on the appellant was important. The Crown tried to define this narrowly — it was just the name, address, and telephone number. Cromwell J. disagreed, drawing by analogy from cases such as *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67; *R. v. Kang-Brown*, 2008 SCC 18; and *R. v. Gomboc*, 2010 SCC 55: one must look "at not only the nature of the precise information sought, but also at the nature of the information that it reveals." Here, the subscriber information revealed the *source* of a pattern of hitherto anonymous Internet activity.

Cromwell J. placed substantial emphasis on the importance of Internet anonymity. He held that anonymity is an important element of the concept of privacy, defining it as "permit[ting] individuals to act in public places but to preserve freedom from identification and surveillance".

Next, Cromwell J. considered the contractual and statutory provisions applying to the appellant and police. The Shaw Joint Terms of Service were, in Cromwell J's view, "confusing and equivocal" on the disclosure of IP addresses. He thought the same of the *PIPEDA*provisions, which permitted disclosure to law enforcement that requests information and states its "lawful authority". Cromwell J. found this provision circular and held that it could not itself weigh against the existence of a reasonable expectation of privacy. He understood "lawful authority" in *PIPEDA* to mean something less than a subpoena or warrant but more than a bare request by law enforcement.

Then Cromwell J. considered s. 487.014 of the *Criminal Code*, which provides that "no production order is necessary for a peace officer . . . to ask a person to voluntarily provide to the officer documents, data or information that the person is not prohibited by law from disclosing." The Crown argued that this provision, combined with s. 7(3)(c.1)(ii) of *PIPEDA*, authorized the search. Cromwell J.

disagreed. Section 487.014 does not create search or seizure powers; it is a declaratory provision that confirms the existing common law powers of the police to make inquiries. But the information about which they inquire cannot be subject to a reasonable expectation of privacy.

However, under s. 24(2), Cromwell J. held that the evidence should not be excluded. The police believed that they were obeying the law, and two lower courts agreed with them. While the impact of the search on the appellant's privacy was significant, the balance was tipped by society's interest in adjudicating the charges on their merits. The offences were serious and the Crown's case depended on the evidence, which was reliable.

Commentary: Cromwell J. and the rest of the Supreme Court have resolved many long-running debates in this area of law. Does a person other than the subscriber have a reasonable expectation of privacy in Internet information? Does subscriber information reveal sufficient personal information to be protected by s. 8? How do contractual terms of service, often self-contradictory and vague, impact the s. 8 inquiry? What about *PIPEDA* and s. 487.014, themselves somewhat cryptic? Cromwell J. cuts through several of these thorny debates and performs an analysis that is at once clear and sensitive to the realities of Canadians' expectations about their online activities and information.

One interesting point that remains is what might be called the "state agency" point. Cromwell J. says that, once it is decided that there is a reasonable expectation of privacy over this information, it follows that there was a search for s. 8 purposes. However, a search only occurs where the state *intrudes* on a reasonable expectation of privacy: *R. v. Evans*, [1996] 1 S.C.R. 8. Cromwell J. tells us that, if the service provider had unilaterally reported that one of their subscribers was sharing child pornography, "entirely different considerations may apply" because a different exception exists in *PIPEDA* (s. 7(3)(d)).

But what if the police made a "blanket" request to the ISP that they report any such person? Would there be sufficient state action in any particular case to engage s. 8? Finally, *Spencer* has likely put an end to what had been something of a cottage industry of "PIPEDA requests", otherwise known as "Law Enforcement Requests" [LERs] to ISPs in child pornography investigations. They will probably be replaced by production orders.

R. v. Spencer (2014), 2014 SCC 43, 2014 CSC 43, 2014 CarswellSask 342, 2014 CarswellSask 343 (S.C.C.)

8. United States Supreme Court Concludes that the Search Incident to Arrest Doctrine does Not Apply to Cell Phones

Facts: Riley was driving in a car with expired tags. His license had also expired. After his arrest, the car was searched and a handgun was found. When Riley was searched incident to arrest, a Smart Phone was found in his pocket. It was searched at the scene of the arrest and back at the station. Evidence related to a shooting was found on the phone. The evidence was extracted and used at Riley's trial.

Wurie was observed selling drugs from a car. He was arrested and his flip phone was seized. The police were able to ascertain his home address from incoming calls on the phone. They attended that address with a warrant and located guns and drugs.

Both cases raised the issue of admissibility of evidence from cell phones seized incident to arrest.

Held: Chief Justice Roberts concluded that the search incident to arrest doctrine does not apply to cell phones seized at the time of arrest.

The Court reviewed the search incident to arrest doctrine in detail, finding that it has historically allowed for the seizure of things in and around the arrested person, for reasons of officer/public safety, preventing escape, collecting evidence and preventing the destruction of evidence. Provided an officer can offer a reason for searching that arises out of one of these rationales, then no additional justification is needed for searching incident to arrest.

The Court considered the search incident to arrest doctrine in the context of searching a cell phone. Chief Justice Roberts observed that cell phones are now so common, that a visitor from "Mars" would likely consider them to be part of the human anatomy. He made the practical observation that cell phones cannot be used as weapons and, as such, officers are left with searching them for purposes of evidence and to prevent the destruction of evidence.

As it relates to the destruction of evidence, Chief Justice Roberts further noted that there are ways to secure against that occurring. While there is some evidence that remote wiping of cell phones can occur, the Court emphasized that officers can prevent this from happening by simply disconnecting the phone from the network (often done by simply removing the battery), or by placing it in what is known as a Faraday bag. If neither of these options are available, the exigent circumstances doctrine remains available for searching in circumstances where there is a legitimate concern about the unavoidable destruction of evidence on the phone.

The Court held that cell phones are materially and completely distinguishable from all other things that have been subject to the search incident to arrest doctrine in the past. Suggesting that they are "materially indistinguishable" from searches of other types of physical evidence is like suggesting that "a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together."

The Court observed some interesting facts. Cell phones are carried by 90% of adult Americans today and, Smart Phone users report having their phones within 5 feet of them at "most times". Neither cell phones nor Smart Phones are like anything else because they store such a vast and varied amount of information. Ultimately, the Court concluded that they are both quantitatively and qualitatively different from anything else that has come before.

Bearing in mind the amount of information they hold, and the privacy interests engaged, the Court determined that search warrants are required before cell phones can be searched. Quite simply, the search incident to arrest doctrine does not apply in this context.

Commentary: This is a profoundly important decision. For the first time, the United States Supreme Court has recognized the difference between cell phones and other items searched incident to arrest. Cell phones can carry all manner of information that an individual simply could not carry when functioning in a non-digital environment. So, for instance, where an arrested individual may have had a picture on them in the past, and perhaps even a calendar, a small cell phone could contain calendars, tape recorders, libraries, diaries, photo albums, private communications and the like. It was both the quantity and the quality of the information that cell phones can contain that impressed the Court that it was time for a change.

It will be important to see how this issue plays out in the Supreme Court of Canada. The Court is currently under reserve in *R. v. Fearon*, 2013 ONCA 106, under reserve [2013] S.C.C.A. No. 141. Bearing in mind the Court's prior dicta in cases like *R. v. Morelli*, 2010 SCC 8 and *R. v. Vu*, 2013 SCC 60, discussed in detail in prior issues of the Police Powers Newsletter, all indications are that the Supreme Court will follow the path forged by the United States Supreme Court on this important issue. *Riley v. California; US v. Wurie*, 573 U.S. 2014 (U.S., 2014)

9. No Charter Breach where Accused Refused Telephone Contact with Counsel

Facts: The accused, a 20-year-old male, was arrested for assault causing bodily harm, sexual interference and other offences related to his romantic relationship with a 14-year-old girl. He was given his right to counsel and offered the opportunity to speak by telephone with duty counsel. The police told duty counsel that the accused would be held overnight and taken to court the next morning. The accused spoke with duty counsel for about 10 minutes. At the conclusion of the telephone conversation, the officer asked the accused if he was satisfied with the call. The accused said that he was. The accused became angry when he was told that he would be fingerprinted. The police chose to defer the taking of the fingerprints until the next day. The accused was placed in the cells, without being questioned by the police. He was offered refreshment and allowed to sleep through the night. The next morning, the accused was taken to an interview room. His conversation there with the officer was recorded. The officer confirmed that the accused had spoken with duty counsel the night before. He was told of the charges he was facing, and that he had the right to speak to a lawyer. The officer asked if he wanted to do so. The accused replied affirmatively. When offered a lawyer of his choice or duty counsel, he said that duty counsel was fine. The officer took him to another room and told him that he would get a telephone so that he could speak to duty counsel in private. The accused responded that he would rather speak to the lawyer in person, because over the telephone really did not help. The officer told the accused that the opportunity to speak to a lawyer was by telephone. The accused said that there was no point in doing so, as it did not help. He did not expand on this comment. The officer took the accused back to the interview room without contacting duty counsel. The accused gave a statement.

At trial, the accused sought the exclusion of the statement, arguing that the informational component of s. 10(b) of the *Charter* was breached because the officer misinformed him when he restricted him to speaking with counsel by telephone.

Held: Application dismissed.

The trial judge noted that the obligation of the police under s. 10(b) is to ensure that a detainee is advised of his right to counsel and given a reasonable opportunity to exercise that right, so that he can make a decision whether to cooperate with the police investigation or not. He found that the accused was given his right to counsel the night before he made the statement and that he spoke to duty counsel, albeit briefly. The next morning the accused was again advised of his right to counsel, and told that he could call any lawyer he chose. The accused was aware of his right to contact counsel and of his right to remain silent. He chose not to pursue telephone contact with a lawyer, and elected to speak with the officer.

The trial judge concluded that the police satisfied both the informational and implementational components of s. 10(b). There was no breach of the *Charter*.

Commentary: This case illustrates that difficult situations can arise in response to the giving of the s. 10(b) right. The response of detainees to hearing the right is not always an unqualified "yes" or "no", and often requires the police to make judgment calls about appropriate next steps.
Here, the trial judge observed that the accused "apparently was not pleased" with the advice he received from duty counsel the night before. The trial judge did not explicitly say so, but it seems he found the police responded to this apparent dissatisfaction appropriately by offering the accused an opportunity to speak with any lawyer he chose by telephone the next morning, before the interview began. Again, while the trial judge did not explicitly say so, it appears that he found the mere fact the accused was not satisfied with the advice he received earlier by telephone did not entitle him to an in-person consultation with counsel at the police station.

Query whether the result would have been different had the accused been more explicit about the nature of his dissatisfaction with the advice received over the telephone.

R. v. Duberry (2013), 2013 CarswellBC 4102, 2013 BCSC 2514 (B.C. S.C.)

10. Inducement Related to Third Party Renders Statement Inadmissible

Facts: The accused was arrested for sexually assaulting his daughter. He was interviewed by a police officer for over an hour. In the course of the interview, the officer said that the complainant needed help, and that depended upon the accused admitting that he had sexually assaulted her. The accused made increasingly incriminating statements during the interview.

At trial, the defence contended that the statement was not voluntary because it was the product of an inducement. The trial judge found that the statement was the product of an inducement to secure help for the accused's daughter, and that that seed was planted early by the officer and used throughout the interview. The trial judge concluded that the accused ended up making the statement just to get it over with and get help for his daughter. The trial judge termed the officer's words as a clear message to the accused to confess and his daughter could get help and move on, otherwise if he did not confess she would not. The trial judge excluded the statement. The accused was acquitted.
The Crown appealed the acquittal.

Held: Appeal dismissed.

The Ontario Court of Appeal reiterated that the fact an officer made an inducement of some kind does not, therefore, render a statement inadmissible. But, an inducement, even one concerning a third person, can be sufficient to render a statement inadmissible even in the absence of compulsion. It is the strength of the inducement having regard to the particular accused and his or her circumstances that matters.

Commentary: This short decision is worthy of note because it is an example of circumstances where an inducement related to a third party can render a confession inadmissible. The nature of the relationship between the accused and the third party will be a significant consideration in the analysis, as will the circumstances surrounding the making of the statement.

R. v. M. (M.S.) (2014), 2014 ONCA 441, 2014 CarswellOnt 7489 (Ont. C.A.)

11. Failure to Record Interactions with Accused did Not Cast Doubt on Voluntariness of Statement

Facts: The accused was ordered extradited to Canada on a charge of murder. About a month before police officers returned the accused to Ontario, a lawyer contacted them to advise that he represented the accused. Just before the accused's return to Canada, the police contacted the lawyer's office and, on learning that he was away, left word that he could expect a telephone call from the accused on the scheduled return date.

When the police arrived in Florida, the lead investigator gave the accused his right to counsel. The officer telephoned the accused's lawyer's office and was told the lawyer was "not right here". The officer took from those words that the lawyer would be available momentarily. The officer gave the telephone to the accused and left the room so that the accused could speak in private. When the call ended, the accused gave no indication as to whether he had in fact spoken with his lawyer.
The accused and the officers flew back to Ontario that day. After the plane landed, the officers took the accused to a police station to question him. They later testified that the interview was not recorded, at the accused's request. He was then taken to the jurisdiction where he would be tried. There he was offered an opportunity to speak to counsel, but declined.

The next day, the police questioned the accused again. The interview was not recorded. The lead investigator told the accused that he had already given evidence against himself as a party to the murder. The accused was taken to court and remanded into custody.

The following day, the accused called the police and said that he wanted to make a full statement about the killing. When the lead investigator asked if he had spoken to his lawyer, the accused said that he did not need a lawyer "to point his moral compass". The next day the police met with the accused at the detention centre. They gave him an opportunity to speak with counsel, but he declined. He gave a confession, which was recorded on videotape. In the course of the confession, he said that he had had trouble sleeping, and hoped that he would be forgiven for telling the truth.

The trial judge ruled the accused's videotaped confession voluntary, and found no breach of s. 10(b) of the *Charter*.

The accused was convicted and appealed, arguing that the confession was not proven voluntary beyond a reasonable doubt because his interactions with the police were not all recorded, and that his s. 10(b) right was violated because the lead investigator failed to facilitate his access to counsel.

Held: Appeal dismissed.

The Ontario Court of Appeal noted that the trial judge accepted the evidence of the officers that they did not record their interactions with the accused where it was not feasible to do so or where the accused asked that they not do so. The officers explained that they had since abandoned the practice of turning off recording equipment at the accused's request. The Court of Appeal accepted that the police acted reasonably and did not deliberately set out to interrogate the accused without giving any thought to the making of a reliable record. This was not a case where the failure of the police to record their interactions with the accused raised questions about the voluntariness of the accused's statement.

With respect to s. 10(b), the Court of Appeal noted that the trial judge found that the lead investigator had a reasonable belief that the accused spoke to his lawyer on the telephone from Florida. The Court of Appeal emphasized that the accused led no evidence on the *voir dire* to establish that he had not done so. He had the unique ability and indeed, obligation, to adduce that evidence. Without it, there was no basis upon which to conclude that the police deprived the accused of his right to counsel.

Commentary: The Ontario Court of Appeal distinguished this case factually from that of *R. v. Moore-McFarlane* (2001), 56 O.R. (3d) 737 (C.A.), where the Court addressed the importance of police officers recording interrogations of accused persons. The Court did, however, reiterate that the failure of the police to record their interactions with an accused may raise questions about the voluntariness of the accused's statement. In particular, the Court signalled that the explanation that the accused did not want the interaction recorded may not be an acceptable rationale for the absence of a recording of the interview.

R. v. Williams (2014), 2014 ONCA 431, 2014 CarswellOnt 7135 (Ont. C.A.)

12. Breach of Right to Counsel does Not Result in Exclusion of Breathalyzer Results

Facts: The accused's truck was involved in a collision with a car. Three passengers in the car suffered significant injuries. After the accused admitted to officers at the scene that he was the driver of the truck, he was told that he was under investigative detention for dangerous driving and possibly impaired driving. He was put in the back of a police car. He was not given his right to counsel. About 12 minutes later, while still at the scene, the accused was arrested and given his right to counsel. He asserted his right to counsel, but was told that he could not contact his lawyer then because of privacy concerns.

The arresting officer asked another officer to check whether he smelled alcohol on the accused. The second officer opened the door of the police cruiser and asked the accused questions. He could not smell alcohol on the accused's breath.

About 30 minutes after his arrest, the accused was taken to a police station to provide a video statement. The officer smelled alcohol on the accused's breath and told this to the accused. The accused said that he wanted to contact his own lawyer. He was permitted to do so and left a message. A few minutes later, he called duty counsel and spoke to someone. He then took the roadside screening test and failed. The officer read him the breathalyzer demand and told him of his right to call counsel. The accused again spoke to duty counsel. After that, he asked to call a particular set of lawyers and was given that opportunity. The breathalyzer was administered. The accused registered readings of 110 and 100.

At trial, the defence contended that the police committed numerous Charter breaches, and that any statements made by the accused as well as the breathalyzer results should be excluded.

Held: Application granted in part.

The trial judge found that the accused was placed under investigative detention at the scene without being informed of his right to counsel. The police violated the informational and implementational aspects of s. 10(b), up to the point when the accused was arrested. They then failed to allow him access to counsel in a timely fashion, as he was not able to contact a lawyer until one hour and fifteen minutes after his detention began. There was no reason why he could not have been brought to the police station sooner than he was. However, once at the station the police facilitated his contact with counsel and did not further breach his rights.

With respect to s. 24(2), the trial judge held that any statements made by the accused after his detention and before he spoke to counsel should be excluded, but not the breath sample results. She found that there was a distinction between what happened before the accused arrived at the station, and what occurred after that point in time. She concluded that the breathalyzer results were not obtained in violation of the accused's *Charter* rights.

Commentary: This case illustrates the need under s. 24(2) for the applicant to establish a link between any *Charter* breach and the obtaining of the particular evidence. Absent such a link, even where a *Charter* breach is flagrant, the evidence was not "obtained in a manner" that infringed or denied any *Charter* right and so will not be subject to exclusion.

R. v. Rowson (2014), 2014 CarswellAlta 907, 2014 ABQB 79 (Alta. Q.B.)