



FACULTY OF LAW
University of Lund

Emma Broddesson

When the Swedish police ring the
doorbell, are their Canadian
colleagues already in the hallway?

-A study of Swedish and Canadian
search and seizure law

Master thesis
20 points

Per Ole Träskman

Criminal procedure law, Comparative law

Fall 2006

Contents

SUMMARY	1
PREFACE	2
ABBREVIATIONS	3
1 INTRODUCTION	4
1.1 Purpose	4
1.2 Method and material	5
1.3 Limitations	5
1.4 Disposition	6
2 SWEDISH LAW	7
2.1 Principles governing the authorities in the exercise of their duties	8
2.2 The rule of free sifting of evidence	8
2.2.1 <i>The principle of immediateness</i>	9
2.2.2 <i>The best evidence rule</i>	9
3 THE INSTRUMENT OF GOVERNMENT (RF)	12
3.1.1 <i>The principle of necessity</i>	12
3.1.2 <i>The principle of purpose</i>	13
3.1.3 <i>The principle of proportionality</i>	13
3.2 European Convention of Human Rights	13
3.2.1 <i>Means of compulsion</i>	14
4 THE PARLIAMENTARY OMBUDSMEN (JO)	15
4.1 Powers and sanctions	15
4.1.1 <i>Misuse of office</i>	16
4.1.2 <i>JO 1993/94 p. 43</i>	17
5 TORT LAW	19
6 SEARCH AND SEIZURE	21
6.1 Searches of premises	21
6.2 Authorization to obtain a warrant	23
6.2.1 <i>Court order</i>	23
6.2.2 <i>Warrant from the prosecutor or investigation leader</i>	23

6.2.3	<i>Exigent circumstances 28:5 RB</i>	24
6.3	Anonymous tips	24
6.4	The codified principle of proportionality	25
6.5	Right to be present and record of the search and seizure	25
7	COMMON LAW	27
7.1	Canadian Law	27
7.2	Evidence Law	28
8	THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS	30
8.1	Remedies for a Charter breach	30
8.2	Exclusion of evidence	31
8.2.1	<i>The test for exclusion</i>	32
8.2.1.1	The fairness of the trial	32
8.2.1.2	The seriousness of the breach	33
8.2.1.3	Effect of an exclusion	33
8.3	The Charter's impact on the criminal justice system	34
9	SECTION 8 OF THE CHARTER	37
9.1	Reasonable expectation of privacy	37
9.2	The reasonableness of the search	38
9.2.1	<i>Authorized by law</i>	38
9.2.1.1	Exigent circumstances	39
9.2.2	<i>Is the law reasonable?</i>	40
9.2.3	<i>The manner</i>	41
10	SEARCH AND SEIZURE	43
10.1	Statutory powers	43
10.2	How to obtain a warrant	43
10.2.1	<i>Reasonable and probable grounds</i>	44
10.2.1.1	Tips from informants	45
10.3	Execution of a warrant	46
10.4	Warrantless searches	47
11	POLICE TRAINING	48
12	ANALYSIS	49
12.1	RF and the Charter	49
12.2	Written warrants	51
12.2.1	<i>Grounds to obtain a warrant in the two systems</i>	52

12.3 Exigent circumstance in the two countries	52
12.4 Concluding remarks	53
SUPPLEMENT A	55
BIBLIOGRAPHY	56
TABLE OF CASES	59

Summary

This thesis aims at presenting the differences and similarities between the Swedish and Canadian legal system, by means of search and seizure regulations. In doing this I hope to provide the readers, whether it is a Swede or a Canadian, with a perspective on their own legal system. In the limited time and space offered for the completion of this thesis, I had to choose one specific area of law to research. The focus is on the regulations regarding searches of homes and the consequences of unlawful searches. In order to help the reader understand the differences and similarities it has been necessary to include an overview of the two legal systems. The title of my thesis acquired its name because of the common misconception that Canadian police are identical to their American colleagues regarding their view on crime prevention. There are many cases of the Canadian police making mistakes we may not see in Sweden, but on the other hand, there is an incentive in Canada to look for the mistakes the police make because of the possible exclusion of evidence.

The biggest difference is the Swedish and Canadian view on what should be the consequences of unlawful searches. In Sweden, citizens who have been treated unfairly or wrongly by the public authorities can complain to the Parliamentary Ombudsmen, JO. Every year JO receives about 6 000 complaints and reviewing the complaints is the main task of each of the JO. JO only reviews the manner in which decisions and judgements are made and JO cannot change a decision or judgement. In the majority of cases, an inquiry ends with criticism from JO and even though it is not binding to the public authorities, in most cases it will have an effect, such as improved staff training or a change of procedures. A public authority employee can be charged with misuse of office. Every year JO charge one or two employees with misuse of office. Swedish citizens can also sue for damages under tort law. However, there are no specific remedies available to the accused not to have the unlawfully obtained evidence excluded at the trial.

In Canada, the question of unlawful or unreasonable searches is an area of law that has undergone big changes since the enactment of the Canadian *Charter of Rights and Freedoms*. The *Charter* provided the courts with a possibility to exclude evidence if it had been obtained in violation of the *Charter*. It is not sufficient that evidence has been found due to an unreasonable search, there are a number of tests to pass in order to exclude evidence at the trial. If an exclusion of evidence would bring the administration of justice in disrepute, the evidence should not be excluded. The more serious the violation is, the greater the risk of the evidence being excluded at trial.

Preface

When I started law school I did not know how intrigued I would be with law, sometimes it has been difficult but most of the time I enjoyed learning more about the subject I have become to like so much. However, had it not been for the support of my parents I would not be where I am today. They have always let me find my own path in life and supported it no matter what it might be. Moreover, without the “girls”, you know who you are, all the years at Juridicum would not have been as fun. The Monday coffees with Julia Damerau have been an inspiration to finishing this thesis. I would also like to thank my mentor Ulrika Geijer and my friend Emma Lundgren for taking the time to read my thesis and giving me valuable advice. Finally, Professor Michael Code at University of Toronto, for being such a great inspiration and helping me realize just how much I like criminal law.

Emma Broddesson
Lund, December 2006

Abbreviations

J.	Justice
JO	Justitieombudsmannen
RB	Rättegångsbalken
RF	Regeringsformen
Para	paragraph
s.	section
HD	Högsta domstolen (Supreme Court of Sweden)
SCC	Supreme Court of Canada

1 Introduction

After spending a year at the University of Toronto in Canada, I was intrigued by how different the Swedish and Canadian legal systems are. In writing this thesis, I wanted to sort out my own thoughts as well as providing both Swedes and Canadians with a perspective on their own legal system by means of search and seizure law. The focus of the thesis is on the consequences of unlawful searches.

Many people may believe that the Canadian and Swedish societies are similar and even if they are, there are differences in the countries' legal systems. Canada is a common law country and Sweden is a civil law country. The content of the law might be similar; but the creation of a statute is different in a common law jurisdiction. In the area of criminal law, there are large differences. One of the pillars in a common law jurisdiction is evidence law and the jury system, which is something that rarely exists in a civil law jurisdiction.

In all countries, there are regulations for the police to obey in the course of their duties, and if an officer goes outside the scope of the law, there have to be consequences. In Canada, the *Charter of Rights and Freedoms* has had a great impact on the criminal justice system. Thanks to the *Charter*, a person can at his or her trial move for an exclusion of the evidence gained, if he or she has been subjected to a search contrary to the *Charter*. The citizens' rights are valued high, even though this may lead to the exclusion of important evidence and a person who obviously is guilty may be acquitted.

Sweden is at the other end of the spectra, due to the fact of the rule of free sifting of evidence; the exclusion of illegally obtained evidence is not possible. There is nothing to prevent a prosecutor from using the evidence gained by a police officer actually breaking into the accused house and stealing evidence. The officer will be subjected to a preliminary inquiry and can face charges for misuse of office. The accused can complain to the Parliamentary Ombudsman but there is no real benefit for the accused.

1.1 Purpose

My thesis aims at displaying the differences between the Swedish and Canadian search and seizure regulations in the two countries. In doing this I hope to offer the reader a perspective on how his or her own legal system functions. I want to highlight the pros and cons in both systems and intend to do this by attempting to answer the following questions.

- Both the Canadian *Charter* and the Swedish Instrument of Government are intended to protect its citizens' from arbitrary interventions by the state, but in practice they are applied differently in the two countries, what are does differences? On the other hand, is

the Swedish Instrument of Government too weak? Does it offer sufficient protection for the Swedish citizens? Alternatively, does the Canadian *Charter* go too far in ensuring the rights of the accused?

- What are the differences and similarities in the search and seizure regulations in the two countries? Does a warrant in Sweden look the same as a warrant in Canada? Are there aspects of the Canadian justice system that Sweden could learn from, and the other way around?
- When the Swedish police ring the doorbell, are their Canadian colleagues already in the hallway?

1.2 Method and material

I have used two methods in this thesis, mainly the traditional legal dogmatic method, involving studies of case law, legal literature and other relevant sources of law. I have also used a comparative method to compare the Swedish legal system and the common law system in Canada and illuminate the differences by means of unlawful searches.

The citations have been made accordingly to *The Bluebook* (a uniform system of citation, Harvard Law Review Ass. 2005), a book used at North American law schools, with a few adjustments to better fit the purpose of this thesis. For sources without any rules in *The Bluebook*, I have used the Swedish way to cite those sources. The translations of the Swedish statutes are from the Swedish Government Offices website¹ and have no official legal status but I found it useful in order to know how to translate Swedish legal expressions. The material used for the Swedish part of the thesis have been relevant statutes and their preparatory work as well as comments made by legal scholars regarding their interpretation. JO's annual reports have also been used to a great extent.

The website of the Canadian Legal Information Institute has been of great help to find both codified law and case law.² Since the access to literature on Canadian law is limited at the University of Lund I have relied on a few books most of which are my own. Especially *Understanding Section 8* have been of great assistance, but the main material used is of course case law. In order to find the relevant case I have both used the books and notes from a Criminal Procedure class I took in Toronto in the spring of 2006.

1.3 Limitations

Because of the limited time and space for this thesis it has not been possible to cover all aspects of 'basic' Swedish and Canadian law. I do not intend to

¹ <http://www.sweden.gov.se>

² <http://www.canlii.org/>

provide the reader with an in-depth description of both countries systems. However, an overview of the basic features of both legal systems is necessary in order to grasp the existing differences. For the purpose of this thesis, only searches of residential homes will be included due to lack of space. It has been necessary to touch upon other areas to better illuminate the search and seizure regulations.

1.4 Disposition

The thesis has two parts, a Swedish and a Canadian. Chapter 2 is an introduction to Swedish law with fundamental principles and the free sifting of evidence. Chapter 3 concerns the Instrument of Government, part of the Swedish Constitution. Chapter 4 deals with the Parliamentary Ombudsmen. While chapter 5 is a brief overview of the tort law of concern to this subject. Chapter 6 is the end of the Swedish part of the thesis and it deals with search and seizure law in Sweden. Chapter 7 introduces the reader to the Canadian common law as well as its evidence law. Chapter 8 deals with the Canadian *Charter of Freedoms and Rights* as well as the possibility to exclude evidence. Chapter 9 concerns the search and seizure section of the *Charter*, section 8. Chapter 10 is the end of the Canadian part and deals with search and seizure law. Chapter 11 is a brief overview of the police training in the two countries. Finally, chapter 12 is the analysis, displaying the pros and cons of the two countries' systems.

2 Swedish Law

In medieval time Swedish law was under the influence of both German and the Canon law of the Catholic Church. As the medieval codes were not well fitted for the purposes of developing the Swedish state, a new era of foreign influence and reform began in the 17th century. Amongst the contributors were France and the Netherlands. The national Code of Sweden dates back to 1734 and it is still formally in force. However, most of the “books” it consist of have been completely renewed.³ The Code of Judicial Procedure⁴, RB, encompasses both civil and criminal procedure, dates back to 1942. RB is founded on a number of fundamental principles, intended to guarantee the best preconditions for the free examination of evidence and the protection of the rights and freedoms of the citizens.⁵ Swedish law is a system where the statute law prevails. Every year the large book called Sveriges Rikes Lag is published which encompasses the most important statutes and it is a vital tool for any Swedish lawyer.⁶ The Swedish Constitution is really four different acts, the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. In order to make amendments to one of them, two different sets of Parliament have to vote in favour of the change. Resulting in that there has to be an election in between and Sweden has an election every fourth year.⁷

The creation of a statute in Sweden normally begins with appointing a commission to investigate the proposal more carefully. The report of the commission is then published in Statens Offentliga Utredningar⁸ The Minister concerned then invites a number of bodies, courts, organizations, unions, faculties of law etc. having an interest in the legislations to comment on the report. The office of the Minister then makes a new draft based on the initial report and the comments; the *proposition* (government bill) which is then passed along to Parliament and a parliamentary committee. The last document in the line is the opinion of the committee. The preparations of laws are very elaborate and serve as a source of law in Sweden. The purpose of the preparatory work of the legislation in question is to help interpret the law once it is in force.⁹

At a criminal trial in the courts of first instance, *tingsrätter*, the bench consist of a professional judge and three elected lay judges. The lay judges are not to be seen as jurors, they are members of the court and their votes are worth as much as the professional judge. Naturally, the professional judge has a strong position because of his or her legal knowledge, and in the

³ Stig Strömholm (editor), *An introduction to Swedish law*, 31-32, Norstedts Förlag, 1991

⁴ Rättegångsbalken [RB] [Code of Judicial Procedure] (Swed.).

⁵ The Swedish Judiciary - a Brief Introduction, 23-24, Ministry of Justice. 2000

⁶ Id. at 34-35

⁷ Regeringsformen [RF] [Instrument of Government] 8:5 (Swed.).

⁸ Public inquiries of the State, SOU

⁹ Strömholm, supra note 3 at 36-38

majority of cases, the four members of the court agree. However, it is the professional judge who writes the judgement.¹⁰

2.1 Principles governing the authorities in the exercise of their duties

In the Instrument of Government (RF)¹¹ there are three codified principles, which shall be applied when the public authorities exercise their duties.

1) *The principle of legality* - In the very first section of RF one finds the principle of legality. Public power shall be exercised under the law. By reading the statutes, a Swedish citizen shall be able to know that the authorities may intervene in some way in specific situations. Such an action by the authorities shall never be arbitrary.

2) *The principle of equality* - The principle of everyone's equality before the law is expressed in 1:2 RF. Public power shall be exercised with respect for the equal worth of all and the liberty and dignity of the private person.

3) *The principle of objectivity* - This principle is found in 1:9 RF and states that courts of law, administrative authorities and others performing tasks within the public administration shall have regard in their work to the equality of all before the law and shall observe objectivity and impartiality.

When conducting a preliminary inquiry in Sweden the prosecutor is obligated not only to investigate circumstances which are against the suspect but also circumstances which are in favour of the suspect. Any evidence in favour of the suspect shall be preserved.¹² Three additional principles have been formed in the courts when means of compulsion¹³ are used and those are the principle of need, the principle of purpose and the principle of proportionality. These three principles are further discussed in chapter 3.

2.2 The rule of free sifting of evidence

The existing evidence law in Sweden consists of the principle of free sifting of evidence. Instead of giving the judge the discretion of excluding evidence like in Canada, a Swedish judge must instead assess the weight of the evidence. There are in theory no limits as to which evidence is admissible in a trial in Sweden. A rule of free sifting of evidence is embedded in the Code of Judicial Procedure 35:1 RB, but it is hard to understand this from the text itself that simply states that the court shall after evaluating everything that has occurred in the trial decide what has been proved in the case.¹⁴ There are however several principles which govern the free sifting

¹⁰ Id. at 39

¹¹ Regeringsformen [RF] [Instrument of Government] (Swed.). See further discussion under chapter 3

¹² Rättegångsbalken [RB] [Code of Judicial Procedure] 23:4 (Swed.).

¹³ See further discussion under 3.4.1

¹⁴ Per-Olof Ekelöf, Robert Boman, *Rättegång fjärde häftet*, 21, Norstedts Juridik, 6th ed. 1992

of evidence. According to 35:7 RB the court can reject evidence considered to be unnecessary or of no importance to the case. If the evidence can be presented at lesser trouble or cost, the court can reject it.

2.2.1 The principle of immediateness

A judgement can only be based on what has occurred during the main hearing of the case.¹⁵ If one of the parties wants the court to be able to include certain evidence it has to be brought before the court at the trial. It is not sufficient to include it in the preliminary inquiry report which is sent to the court before the trial.¹⁶ The principle of immediateness also results in a prohibition for the acting judge to use his ‘private knowledge’. This expression aims at relevant facts which the judge know not because he has obtained the knowledge during the course of his work but he has in fact obtained this knowledge outside the course of his duties as a judge. Ekelöf uses the example of a judge who every day walks past a construction site and then ends up finding a case concerning the construction on his or her desk. The judge is not allowed to use any possible information he or she knows because he or she has been walking past the site.¹⁷ However, circumstances of common knowledge do not have to be brought before the court at the trial.¹⁸ An example of this would be when the issue is a driving offence, were the court base their judgement on the circumstance that the road in question is heavily trafficked at that time of day without the court having to go and see for themselves.

2.2.2 The best evidence rule

If one source of evidence can be used in several different ways, the evidence guaranteeing the most reliable evidence should be used. The chain of proof should be as short as possible.¹⁹ If a witness A observes a crime being committed and then tells B exactly what happened, B can be a witness at the trial, but according to the best evidence rule the court should hear A because that is the shorter chain of proof. It is preferable if a witness can be questioned at the trial in person, instead of reading a previous statement made by the witness. This being said, there is nothing in Swedish law to prevent a hearsay witness. If it is inconvenient for a witness to attend the proceedings at the court, the witness can be questioned by telephone during the trial, 46:7 para 2 RB. A telephone interview may affect the weight of the evidence because it is harder to assess a person’s credibility when the Court cannot observe the person. In addition, if there is a question of identity, the witness cannot identify the suspect over the phone.²⁰

¹⁵ Rättegångsbalken [RB] [Code of Judicial Procedure] 17:2 and 30:2 (Swed.).

¹⁶ Ekelöf 4, supra note 14 at 21

¹⁷ Ekelöf 4, supra note 14 at 22-23

¹⁸ Rättegångsbalken [RB] [Code of Judicial Procedure] 35:2 1 paragraph (Swed.).

¹⁹ Ekelöf 4, supra note 14 at 27

²⁰ Ekelöf 4, supra note 14 at 29

35:14 RB governs rules regarding written or phonetic depositions to a prosecutor or the police authorities and when it may be used as evidence at the main hearing. The depositions can only be presented as evidence if one of three exceptions is applicable. 1) If prescribed by law. 2) If it is not possible for the witness to be heard at or outside of the main hearing. For example if the witness has died. 3) If the cost and trouble of questioning the witness at or outside the main hearing does not outweigh the importance of the statement. Examples of this would be an affidavit stating the value of damaged property. Another circumstance when it is applicable is when questioning police officers in routine cases. The officer does not normally remember exactly what occurred and is left with his or her notes. Nevertheless, according to Ekelöf, the Court should call the officer to ensure the right to cross-examination, following the recommendation by the European Court of Human rights.²¹

If the witness deviates from what he or she said in the preliminarily investigation or refuses to speak, the prosecutor or defence (depending on who called the witness) can read aloud from the written deposition and ask if what the person said in their deposition was not true. If the witness again refuses to speak or denies the truth, the deposition will be used instead.²² Every kind of evidence may be allowed in the Swedish judicial system as long as the evidence is of value to the trial. If the police would gain evidence through illegal wiretapping, it does not prevent the prosecution from using it at a trial, but it affects the weight given to the evidence. It may however result in consequences for the police officer or the prosecutor.²³

There are some exceptions to the rule of free evidence. 2:5 RF states that every citizen is protected against any sort of medical influence to force or stop a statement being made. This section includes methods such as lie detectors, torture and hypnosis. It is always possible for Parliament to legislate exceptions to RF but it has not used this power so far in regards to 2:5 RF.²⁴

In a case from 2003, the Supreme Court dealt with a case of excess information from a wiretap. When the police conducted wiretaps on the suspects' cell phones in order to gain information on suspected drug offences, instead information on up-coming weapon deals was received. The persons involved in the weapon deals were prosecuted and at the trial, the defence moved for a motion of exclusion of the evidence obtained from the wiretap. According the HD, the lack of a positive regulation of the use of excess information does not affect the weight of the evidence, at least not if the wiretap itself was authorized by law.²⁵ The accused invoked the European Convention For Protection of Human Rights and Freedoms (hereinafter the European Convention of Human Rights) art. 6 and 8. The

²¹ Ekelöf 4, supra note 14 at 31-32

²² Ekelöf 4, supra note 14 at 32

²³ Ekelöf 4, supra note 14 at 246

²⁴ Ekelöf 4, supra note 14 at 245

²⁵ Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2003-05-08 p.323 (Swed.). at 336-337

HD rebutted this by citing cases²⁶ from the European Court of Human Rights where the Court has stated that the sort of investigations allowed to be presented in the courts should be decided by the national legislation and even evidence obtained in a way, not consistent with the Convention is admissible. The evidence in this case was ruled admissible and the accused were convicted.²⁷

²⁶See *Schenk v. Switzerland* 25 Feb. 1988, A-140 , *Khan v. United Kingdom*, 12 May 2000, *P.G. and J.H. v. United Kingdom*, 25 Sep. 2001

²⁷ *NJA* 2003-05-08 p.323, *supra* note 25

3 The Instrument of Government (RF)

The Instrument of Government²⁸ is one of the four fundamental laws which constitute Sweden's Constitution. The second chapter of RF encompasses the fundamental rights and freedoms. S.6 states that every citizen shall be protected in his relations with the public institutions against body searches, house searches and other such invasions of privacy. This protection of fundamental rights and freedoms is however, limited in 2:12 RF stating limitations are allowed if they are prescribed by law. The limitations can only be imposed if such limitations would be acceptable in a democratic society. The restriction of rights can never go outside what is necessary, having regard to the purpose which occasioned it. No restrictions may be imposed solely based on a political, religious, cultural or other such opinion.

The purpose of the restrictions of the rights and freedoms should be clearly defined in the statute restricting the constitutional right. In order not to risk a decision maker be given a discretion if the constitutional right should be upheld or not. To ensure a uniform and predictable application of the regulations the statute cannot be vague.²⁹ The interpretation of statutes limiting the citizens' constitutional rights has to be restrictive.³⁰ There are three principles that should constantly be at the back of the mind of an official decision maker; the principle of necessity, the principle of purpose and the principle of proportionality.

3.1.1 The principle of necessity

A public institution can only use means of compulsion if there is no other way of solving the problem. The means used has to be necessary as well as effective in reaching the desired result. The intervention shall cease as soon as the purpose is reached or when it is clear that the result cannot not be achieved. If there is a choice of different actions, the one that would cause the least infringement of the person's rights should be used.³¹ A police officer should not be able to use means of compulsion simply because it makes his or her job easier.³² The authorities may only use means of compulsion when there is an evident need and no less intruding measure would be sufficient.³³

²⁸ RF, supra note 7

²⁹ Per-Olof Ekelöf, Torleif Bylund, Robert Boman, *Rättegång tredje häftet*, 28-29, Norstedts Juridik, 6th ed. 1994

³⁰ Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1996-10-17 p 577 (exactly at 581)

³¹ Statens Offentliga Utredningar [SOU] 1984:54, *Tvångsmedel, anonymitet, integritet*, Betänkande av tvångsmedelkommittén, [government report series] (Swed.). 77-78

³² Id. at 79-80

³³ Proposition [Prop.] 1988/89:124, [government bill] 26, Om vissa tvångsmedel

3.1.2 The principle of purpose

A mean of compulsion may never go outside what is necessary to achieve the purpose of the regulation. 2:12 RF encompasses a principle of purpose, any legislation originating from an exception from the rights and freedoms in 2:6 RF should clearly state for which purposes the legislation may be applied. As soon as an official decision maker use legislation restricting a citizen's rights and freedoms it is mandatory to examine if the purpose is one of the purposes the statute was intended to be applied to. If it is not one of the legislated purposes, the decision maker cannot use it, because of the principle of legality. In addition, the mean of compulsion cannot be used for another purpose than the one it was intended for when the decision was made. If the police obtain a warrant to search for a stolen TV, they cannot use the same warrant to search for financial statements.³⁴ In general, the statutes stipulate what the purpose of the mean of compulsion is. The police can only hold a person in custody, if intended minimize the risk of the detainee absconding, obstructing the investigation or continuing to commit crimes.³⁵ If means of compulsion are used for any other purpose, it can result in responsibility for wrongful exercise of public authority.³⁶

3.1.3 The principle of proportionality

The damage caused to the individual must be in proportion to what is believed to be gained by means of compulsion. The principle of proportionality is often codified. One example is 28:6 RB³⁷, stating that inconvenience or damage occurring incident to searches of premises should be avoided to the greatest extent practicable. In general, infringements of property or economical interests are considered less serious than an infringement of a person's freedom or integrity.³⁸

3.2 European Convention of Human Rights

Besides the protection Swedish citizens' obtain through RF, a number of conventions to which Sweden is a party, also protects them. The European Convention of Human Rights from 1950 is the one of greatest importance. It was implemented in Swedish law in January 1995³⁹. Unlike many conventions, the European Convention of Human Rights actually has a Court for the citizens to turn to and this adds to the importance of the Convention.⁴⁰ Art. 8.1 of the Convention guarantees the protection of a

³⁴ SOU 1984:54, supra note 31 at 76-77

³⁵ Rättegångsbalken [RB] [Code of Judicial Procedure] 24:1 (Swed.).

³⁶ Prop. 1988/89:124, supra note 33 at 26-27

³⁷ The other codified principle is found in 28:3a and both of these will be discussed at further length below at 6.4

³⁸ Ekelöf 3, supra note 29 at 30

³⁹ through SFS 1994:1219

⁴⁰ Ekelöf 3, supra note 29 at 30-31

person's privacy, family life, home and correspondence. It can be limited under art 8.2 by official institutions by virtue of law but only if it would be necessary in a democratic society respecting for example state safety and prevention of crimes.

A search of a person's house limits a person's right to protection of his or her home. The protection mainly aims at protecting the home of a person, the apartment or house where the person actually lives. After the implementation, the Government assigned a committee to investigate if RB was consistent with the European Convention. The committee found it to be consistent.⁴¹ The sections found in the 28th chapter of RB were found to be under the limitation in Art 8.2 and are, therefore, in accordance with the European Convention. The European Court of Human Rights has given the Convention states party to the Convention a wide discretion to decide the reasonable balance between the state's interest and that of the individual.⁴²

3.2.1 Means of compulsion

The definition of means of compulsion are those direct actions against a person or property which are undertaken in the exercise of the public authorities which results in some form of intrusion of a person's legal rights. The actions shall also aim at achieving a certain result and evident and noticeable effects for the person affected. Simply gathering information is not to be considered a mean of compulsion, since it has no evident or noticeable effects. Examples of actions constituting means of compulsion are search and seizure, arrest and detainment.⁴³

⁴¹ Statens Offentliga Utredningar [SOU] 1995:47, *Tvångsmedel enligt 27 och 28 kap. samt Polislagen*, Slutbetänkande av Polisrättsutredningen [government report series] (Swed.). 80

⁴² SOU 1995:47, *supra* note 41 at 80-81

⁴³ *Id.* at 137-139

4 The Parliamentary Ombudsmen (JO)

The institution of ombudsmen has existed in Sweden since 1809 when Parliament saw it fit to have an institution independent of the king to ensure the obedience of the laws and statutes. JO is the abbreviation commonly used for the Parliamentary ombudsmen⁴⁴ which encompasses the office of the JO as well as each individual JO. Each JO is elected individually by Parliament for a period of four years and can be re-elected. It is not a requirement but all besides the very first JO, has had legal training. Sweden has four JOs at the present, each responsible for a different area. The chief JO has the administrative responsibility and decides which areas the others are responsible.⁴⁵

The main task of the JO is to supervise the courts of law, public authorities and their employees to ensure they follow the law, statutes and fulfil the obligations entrusted to them. Each year, JO submits an annual report to the Standing Committee on the Constitution and the committee writes its own report and submits it to Parliament. There are three ways to start an inquiry for JO, 1) complaints from the public, 2) if initiated by one of the ombudsmen⁴⁶ or 3) from one of the inspections of the public authorities. Every year JO receives around 6 000 complaints and reviewing complaints is the main task for each ombudsman.⁴⁷

A complaint can be made by anyone feeling a public authority, an official employee of the civil service or local government, has treated them unfairly or wrongly. The complainant does not need to be a Swedish citizen or of a certain age. Neither does the complainant have to have been affected personally, as long as the complaint is not made anonymously. The complaint has to be made within two years. JO does not review the content of judgements and decisions, simply the way they were made. JO can never change a judgement or decision.⁴⁸

4.1 Powers and sanctions

JO receives its powers from The Riksdags Act with Instructions for the Parliamentary Ombudsmen.⁴⁹ When JO finds that an authority or an official,

⁴⁴ Direct translation Ombudsmen of Justice

⁴⁵ http://www.jo.se/Page.aspx?MenuId=12&ObjectClass=DynamX_Documents&Language=en 2006-10-30 General Information

⁴⁶ For example after reading about a matter in the newspapers.

⁴⁷ http://www.jo.se/Page.aspx?MenuId=12&ObjectClass=DynamX_Documents&Language=en 2006-10-30 General Information

⁴⁸ http://www.jo.se/Page.aspx?MenuId=13&ObjectClass=DynamX_Documents&Language=en 2006-09-27 How to complain

⁴⁹ Lag med instruktion för Riksdagens ombudsmän (Svensk författningssamling [SFS] 1986:765) (Swed.).

has applied a statute incorrectly, JO has several sanctions available. The most commonly used is JO using his authority to express an opinion and criticizes an action made by an authority or an official. If JO feels the action was in conflict with law or was improper in some other respect, it is referred to as an admonition. An admonition is not a punishment as such and there is no obligation for the decision maker to comply with the opinion of JO. In reality though, an admonition often reaches the media and this will often result in an effect, such as staff training or a change of procedures. Adjudication may include advisory statements to ensure uniform and appropriate application of laws.⁵⁰

JO can also act as a special prosecutor in bringing cases against officials who have failed to observe requirements for his or her post or task or has committed a criminal act. Criminal investigations and prosecution are rare, but if does occur, the penal provision of misuse of office is of significance. JO may use disciplinary measures against officials such as an admonition or a salary reduction. Another important responsibility for JO is to ensure that any deficiencies in the legislation are remedied.⁵¹ JO and the Prosecutor General both supervise the prosecutors. JO is an extraordinary institution to ensure the conformity with RF and protect the Swedish citizens' rights. JO shall not concern itself with areas under the supervision of other public institutions. The Prosecutor General has the day-to-day supervision of the management of reports made against prosecutors.⁵²

4.1.1 Misuse of office

The Swedish Penal Code contains the crime, misuse of office, an offence applicable to the employees at public authorities. If an employee in the exercise of public authority intentionally or through carelessness disregards his or her duty, the employee shall be sentenced for misuse of office.⁵³ If the crime has been committed intentionally and is regarded as gross, a more severe punishment shall be imposed. In deciding if a crime is gross the court shall pay special attention to if it was a serious abuse of the employee's position or whether the crime caused serious harm to an individual or the public sector, finally the court shall look at whether the person obtained a substantial improper benefit. Neither of the previous provisions applies if the crime is subject to punishment under the Penal Code or some other law.⁵⁴ The case law for this section mainly concerns cases of unlawful detention. For example, a guard on command received a message from the prosecutor of a revoked order for arrest but the arrestee remained detained for another 24 hours unlawfully.⁵⁵ Considering the fact that JO receives

⁵⁰http://www.jo.se/Page.aspx?MenuId=23&MainmenuId=12&ObjectClass=DynamX_Documents&Language=en 2006-09-29 Powers and Sanctions

⁵¹http://www.jo.se/Page.aspx?MenuId=23&MainmenuId=12&ObjectClass=DynamX_Documents&Language=en 2006-09-29 Powers and Sanctions

⁵² Konstitutionsutskottet [KU] [Constitutional committee] 1975/76:22 p 48

⁵³ Brottsbalken [BrB] [Criminal Code] 20:1 1st para (Swed).

⁵⁴ Brottsbalken [BrB] [Criminal Code] 20:1 2nd and 3rd para (Swed).

⁵⁵ Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1992-06-02, p. 310 (Swed.).

around 6 000 complaints a year, often not more than one or two result in prosecution.⁵⁶ In a case reviewed by JO in 1989 the head of a prosecution authority was found to be guilty of misuse of office after authorizing a search without having sufficient legal grounds. Since the JO believed no other form of punishment than fines would be imposed, he abstained from prosecuting in this case. It is possible if no substantial individual or public interest are disregarded. In this case JO did not feel that such interest would be disregarded.⁵⁷ Should it not be in the interest of the public protected against unlawful searches? This sends mixed signals to the public; the public authorities can make unlawful searches as long as they are not too serious.

4.1.2 JO 1993/94 p. 43

In JO 1993/94 p. 43 a police officer was convicted for the unlawful search. S. was having dinner when someone started pounding on his door and yelling: “open up, it is the police”. After looking through the peephole in the door, seeing three police officers armed with sub machine guns, S. opened the door with his arms raised. S. was handcuffed and forced to lay in the stairwell facing the wall. He was not informed why the police was there or why he was handcuffed. After 10-20 minutes, the police informed him that they had received an alarm there had been shooting going on in his apartment. His neighbour A. had called the police to report that she had heard two revolver shots coming from S’s apartment. The only check-up made was to a binder with names of persons known to make false alarms and a list of the residents of the apartment building in question. A. was not one of the known persons making false alarms and she lived in the building in question. The guard on command was informed and he sent six police officers to the address. They did not find anything unusual in the stairwell it was quiet. Neither A. nor the other neighbours were contacted to obtain further information on the matter. Another 14 police officers were called to the scene and at this stage superintendent Arne Björk had taken over the command. When the police went into the apartment, they found weapons locked in a weapon rack but no evidence of any of the weapons having been used or of a shooting. After this the neighbours and A. were interviewed and it was only A. who had heard a shooting and it was likely she had made it up.

JO decided to investigate the matter after reading about it in a local newspaper. After questioning the officers involved he decided to start a preliminary investigation regarding misuse of office. JO found no circumstance verifying A’s information. Björk himself did not talk to A. but based his decision on what the person who answered the phone had told the guard on command. There was no way of knowing whether the sound A. heard had actually been revolver shots. When Björk and the officers were questioned, none of them could state which type of crime they were

⁵⁶ JOs ämbetsberättelser [Yearly reports] 1996 until today

⁵⁷ JO 1991/92 p 44 (exactly at 48)

investigating. Björk has acted carelessly when he did not verify the information received from A and was prosecuted for misuse of office.

Gävle Tingsrätt⁵⁸ found that Björk had made a hasty decision. What was at issue here was two interests weighed against each other; the individual's right to protection of life and property against citizen's protection against arbitrary exercise of public authority. In this case the sound A had heard could easily have been something other than a gun shot, the apartment building was right on a busy street. Besides, it is close to impossible to determine exactly the origin of a sound in an apartment building if there is an empty stairwell in between. If calls had been made to the neighbours, or even S, the matter would probably have been resolved over the phone according to the Court. The Court found Björk guilty of misuse of office and sentenced him to pay fines.

Björk appealed to Hovrätten för Nedre Norrland⁵⁹ and based his defence on 21§ of Polislagen,⁶⁰ which gives police officers the authorization to go into a house or a room if there is reason to believe someone inside is deceased, unconscious or unable to call for help. The court did not accept his defence since they believed the extent of the operation showed that the police did not view it as a 21§ situation. After Björk came to the scene and was informed that the building was quiet, he should have verified the information from A before going in to S's apartment. His carelessness was not petty and he was again convicted for misuse of office but the fines were reduced because of the pressing situation he was in.

⁵⁸ Court of first instance

⁵⁹ Court of Appeal for Lower Norrland

⁶⁰ Polislag (Svensk författningssamling [SFS] 1984:387) (Swed.).

5 Tort law

The Swedish Tort Act contains a section granting the citizens a right to receive damages for personal injuries, material damage or economical damage caused by the fault or neglect of the government or the municipality in the exercise of their public authority. If by the fault or neglect, during the exercise of public authority, a person's rights to freedom, peace and honour are seriously infringed according to criminal law, the government or municipality shall compensate for the damages.⁶¹ A conviction for misuse of office is not necessarily viewed as such a serious infringement for the Tort Act to be applicable.⁶² The action has to be a serious infringement of the person's rights, it is not enough if the action is uncomfortable and disparaging. If an action is discriminatory, it will instead result in a possible compensation from the discrimination legislation.⁶³ In a recent case from the Supreme Court concerning the infringement of a person's right to trial within reasonable time according to the European Convention, a compensation for loss of income and nominal damages were imposed.⁶⁴ The Tort Act is applicable unless there is a more specific statute.⁶⁵

When a citizen claims damages from the government because of a faulty decision it is the Chancellor of Justice (JK) who represents the government's interests and decides if damages should be awarded or not.⁶⁶ There is a specific statute for damages arising from unlawful detention or other means of compulsion⁶⁷ granting a person damages. It is sufficient with an unlawful detention or the unlawful use of means of compulsion for damages to be awarded. Each person experiences an unlawful detention differently. Compensation for suffering is not awarded automatically but after a discretionary estimation of the level of suffering in each specific case.⁶⁸ The unlawful detention or unlawful use of the mean of compulsion has to be what caused the damages. For example, damages caused to a person because of the crime suspicion are outside the scope of this statute.⁶⁹ Compensation shall be awarded for personal injuries and material damages caused by force unless the person affected behaved in a way making it necessary for the police to use force.⁷⁰ It is not a regulation often used but in a couple of cases JK has awarded the claimant damages. In a case from 2004, an individual received compensation for damages caused to his

⁶¹ 3 ch. 2§ and 2 ch. 3§ Skadeståndslagen (Svensk författningssamling [SFS] 1972:207) (Swed.).

⁶² Nytt Juridiskt Arkiv [NJA] [Supreme court] 1977-02-24 p 43

⁶³ Bertil Bengtsson, Erland Strömbäck, *Skadeståndslagen en kommentar*, 104, Norstedts Juridik AB, 2 ed. 2006

⁶⁴ Nytt Juridiskt Arkiv [NJA] [Supreme court] 2005-06-09 p 462 (Swed.).

⁶⁵ 1 ch. 1§ Skadeståndslagen (Svensk författningssamling [SFS] 1972:207) (Swed.).

⁶⁶ www.jk.se 2006-10-17 under Allmänt

⁶⁷ Lag om ersättning vid frihetsberövande och andra tvångsåtgärder (Svensk författningssamling [SFS] 1998:714) (Swed.).

⁶⁸ Proposition [Prop.] 1974:97 p 72 [government bill] (Swed.).

⁶⁹ JK 2001-05-08 Dnr 45-01-41

⁷⁰ Frihetsberövande lagen, supra note 67 at 8§

furniture during a search of his apartment.⁷¹ A decision from JK cannot be appealed, if the claimant is not satisfied with the decision he or she can sue for damages at the court of first instance.⁷²

⁷¹ JK 2004-01-21 Dnr 1219-03-40

⁷² www.jk.se 2006-10-17 Under Frihetsberövande

6 Search and Seizure

The 28th chapter of RB distinguishes between two different forms of searches, the searches for a person and searches of premises. For the purpose of this thesis, only searches of premises will be included due to lack of space. The rules in the 27th chapter of RB concerns decisions to seize objects such and a decision to seize can only be made when it is known that the object in question is available to seize. There shall be no need to search for the object. If a search is necessary, the police need to obtain a warrant for a search according to the 28th chapter of RB.⁷³

6.1 Searches of premises

The general regulation for searches of premises is the very first section of RB's 28th chapter. 1st paragraph: *"If there is reason to believe that an offence punishable by imprisonment has been committed, houses, rooms, or closed storage spaces may be searched to look for objects subject to seizure or to detect other information of potential importance to the inquiry of the offence."*

If the prerequisites in the first paragraph are fulfilled, the search may be undertaken at the premises of the suspect. Legal scholars have debated if a prerequisite for a search under the first paragraph is that the person exposed to the mean of compulsion has to be reasonably suspected. Since there is no consensus it resulted in the acquittal of a police superintendent in one of the rare case brought to the courts by JO, even though the Court stated that the police superintendent did not objectively have sufficient grounds for a search because there was no person reasonably suspected of the crime. Due to the interpretation difficulties for the superintendent, the Court did believe the superintendent could be considered being careless, and he was acquitted.⁷⁴ If a person is not reasonably suspected for a crime, the 2nd paragraph of 28:1 RB applies, see below.

It is not necessary that the crime has been verified, but it is sufficient to have reason to believe it has been committed. The person in charge of the investigation shall ensure that the grounds are substantial before obtaining a search warrant. It is not sufficient that he or she has a subjective belief.⁷⁵ For example, after questioning the suspect and verifying his statement or asking a witness or the victim the question of the need or contents of a possible search warrant should be easier to decide. A search may be used to investigate circumstances, which can be of importance to properly investigate the crime believed to have happened, for example to investigate a crime scene to find out who committed the crime. The main purpose may

⁷³ Gösta Westerlund, *Straffprocessuella tvångsmedel*, 124, Bruun, 2nd ed. 2005

⁷⁴ JO 1998/99 p 59 (exactly at 61)

⁷⁵ Westerlund, *supra* note 73 at 127

never be to obtain information about a crime other than the crime the warrant was granted for.⁷⁶ In a case reviewed by JO the police obtained a warrant to search the premises of a book café regarding an assault. What they were really searching for, and the objects they seized concerned the murder investigation of Sweden's former Prime Minister. The JO questioned what use a search of the book café could be to an investigation of assault. The JO reached the conclusion that the warrant was not authorized by law. Since it was not possible to establish who was to be held responsible for authorizing the search, the JO chose not to proceed with the matter.⁷⁷

Another prohibited use of a search is to use it as a general check up of the suspect to see if he or she can be suspected for further criminal acts.⁷⁸ JO has commented, and approved of, cases when a suspect has been found with goods suspected to be stolen and it has been believed that the suspect possess more stolen goods. In cases such as this, a search may be undertaken to search for more stolen goods.⁷⁹ Even if the house is unlocked, the rules regarding search and seizure applies.⁸⁰

28:1 2nd paragraph RB - In order to perform a search at the premises of a person other than the suspect, the offence has to have taken place there, the suspect was apprehended there or extraordinary reasons indicate that the search will reveal an object subject to seizure or other information concerning the offence. The other person does not necessarily have to be an innocent person but it can be another person of a lower degree of suspicion.⁸¹ There has to be a tangible reason to assume that objects that may be seized will be found at the place of the search. Searches cannot be undertaken at person's premises simply due to the common perception that this certain group of people are more prone to criminal activity.⁸² The question if the search should be undertaken at the suspect's home or someone else's may at times be hard to decide. According to JO, the suspect needs to have, unlimited access to the other person's premises and it should be fairly certain that he uses this right to justify a search there.⁸³

28:1 3rd paragraph RB - It is never sufficient to justify a search of person's premises on the grounds of a suspect's consent unless the suspect personally initiated the request for the search. This regulation is applied strictly, there may never be a search conducted based on the consent of the suspect. The possibility of conducting a search initiated by a request of the suspect should be interpreted narrowly. The requirements to use this exception has not been specified but according to Ekelöf the search need to concern an offence punishable by imprisonment and that the request is made

⁷⁶ Peter Fitger, Rättegångsbalken 1, 2nd book, 28:4-5 (supplement 15, August 1994) looseleaf, Norstedts Juridik

⁷⁷ JO 1988/89 p 47 (especially 53-54)

⁷⁸ Fitger, supra note 76 at 28:4-5 (supplement 15, August 1994)

⁷⁹ JO 1988/89 p 60 (exactly at 67) and JO 1990/91 p 63 (exactly at 67)

⁸⁰ Fitger, supra note 76 at 28:5-6 (supplement 15, August 1994)

⁸¹ Ekelöf 3, supra note 29 at 71

⁸² Fitger, supra note 76 at 28:8 (supplement 43, April 2004)

⁸³ JO 1985/86 p 151 (exactly at 155)

spontaneously. The third paragraph should be equally applied to other persons besides suspects.⁸⁴

If a police officer questions a person in his or her home there is nothing to prevent the officer making observations of possible importance to the investigation. However, one must always distinguish an observation from a proper search.⁸⁵ According to JO, it is not consistent with the purpose of questioning to conduct a questioning in a person's home simply because one believes it will result in discovering a specific object.⁸⁶

6.2 Authorization to obtain a warrant

There are three different groups of persons who can authorize a search. 28:4 RB gives this power to the investigation leader (who can be a police officer), the prosecutor or the court. The police authority leads the preliminary investigation when the crime concerned is of simple nature. The prosecutor will, however, step in when a question of the use of means of compulsion according to chapters 24-28 RB arises. Excluded are search and seizures of a simple nature where the police can continue to act as the investigation leader.⁸⁷

6.2.1 Court order

If the search is likely to be extensive or cause extraordinary inconvenience to the person whose premises are to be searched, the Court shall make the order for a warrant unless the delay would entail risk. These prerequisites are intended to be used in circumstances such as a search in a bigger store, a hotel or an office.⁸⁸ It is more than 60 years since the working committee exemplified scenarios when a search warrant required a court order. The regulation should nowadays also include situations when especially important integrity interest are weighed against what could be obtained by a search, for example newspapers, churches and offices of lawyers. If the search would cause extraordinary inconvenience, such as a search of a government office, it should not be undertaken without a court order.⁸⁹

6.2.2 Warrant from the prosecutor or investigation leader

The search does not need to be conducted by the prosecutor but can be delegated to a police officer. This does not free the prosecutor of the responsibility; it is his or her responsibility that the police officer receives

⁸⁴ Ekelöf 3, supra 29 note at 75

⁸⁵ Fitger, supra note 76 at 28:9 (supplement 46, March 2005)

⁸⁶ see JO 1971 p 93 and 1990/91 p 80

⁸⁷ Rikspolisstyrelsens föreskrifter och allmänna råd om ledning av förundersökning i brottmål, RPSFS 2005:11, FAP 403-5, §4 and §8

⁸⁸ NJA II 1943 p. 371 Processlagsberedningen

⁸⁹ Fitger, supra note 76 at 28:16 (supplement 28, February 1999)

sufficient instructions, especially at larger operations.⁹⁰ In practice, there is no real form of the order from the prosecutor. JO has stated that it is not mandatory to have a written warrant since JO believed it not to be necessary.⁹¹ However, in exceptional cases there may be a written order. It is more convenient if there is a written warrant to show the person when conducting the search. Written orders are preferred when there are limitations to the warrant, such as a warrant to search for stolen goods at a journalist's house which should state that written material is not included in the warrant.⁹² In practice, the police call the prosecutor and obtain a warrant over the telephone.

6.2.3 Exigent circumstances 28:5 RB

There is a possibility for a police officer to perform a search without a warrant if 28:5 RB applies. This section stipulates that if a delay would entail risk, a police officer may search the premises without obtaining a search order from one of the persons in 28:4 RB. Delay entailing risk is a term commonly used in regards of means of compulsion, but it has not been legally defined. Neither is it defined in the preparatory work of the legislation. A reasonable definition would be that if the action was not taken immediately, the whole purpose behind the action will be lost. Every case is unique and no exact definition could be feasible.⁹³ Considering the means of communication available today the situations when an officer cannot obtain an authorization of the investigation leader or the prosecutor should be limited to cases of urgent nature, when there is no time to explain the whole situation.⁹⁴

6.3 Anonymous tips

A search and seizure warrant based on an anonymous tip should be handled with care and needs to be supported by further investigations.⁹⁵ One of the risks with anonymous informants is that the informant cannot be charged with false accusation. Under no circumstance should it be easier to obtain a warrant for a search if the informant is anonymous.⁹⁶ The police may obtain further information through surveillance or by some other way in order to reach up to the sufficient level of suspicion to use a mean of compulsion.⁹⁷ As stated above under 4.1, it is rare that JO proceeds with a prosecution for misuse of office and JO 1988/89 p 68 is an example of this. The suspect's home was searched after an anonymous tip at 23.40 at night. The crime in question was illicit distilling and the anonymous tip came from a neighbour. JO did not find sufficient grounds for the police superintendent to authorize

⁹⁰ Fitger, supra note 76 at 28:17 (supplement 28, February 1999)

⁹¹ JO 1969 p 87 and later JO 1975/76 p 132

⁹² Fitger, supra note 76 at 28:17 (supplement 28, February 1999)

⁹³ Westerlund, supra note 73 at 19

⁹⁴ Prop 1988/89:124, supra note 33 at appendix 8, 121

⁹⁵ See for example JO 1988/89 s 68 (exactly at 69)

⁹⁶ JO 1991/92 p 44, supra note 57 at 47

⁹⁷ Fitger, supra note 76 at 28:5 (supplement 15, August 1994)

the search, there was no real circumstance supporting the evidence of the neighbour. Neither did JO find a special reason for conducting the search between 21.00 and 06.00. Even though JO criticism is grave, he did not proceed with a charge because he could not disregard the superintendent's conviction that the anonymous tip was correct.

6.4 The codified principle of proportionality

There are two important sections guiding the prosecution and the police in regards of search and seizure. First, there is 28:3a RB stipulating;

“A search of premises may be ordered only if the reasons for the search outweigh the consequent intrusion or other detriment to the suspect or to another adverse interest.”

This section embodies one of the most important fundamental principles of Swedish law, the principle of proportionality. There are several comments made by JO regarding this section but they mainly concern searches of other premises than homes.⁹⁸

The principle of proportionality for the execution of the search warrant is found 28:6 RB. The police may not cause unnecessary inconvenience and should avoid harm to the greatest extent possible. A room or storage may only be opened with force if necessary and should be closed appropriately after the search has been completed. Unless there are special reasons, a search may not be undertaken between 9 p.m. and 6 a.m. Both the principle of proportionality and the principle of necessity are also found in the Police Act.⁹⁹ A police officer shall only intervene in a way justifiable in view of the object and other circumstances. If he or she has to use force, the form and level of the force used shall be limited to that required to achieve the intended result. A police officer must have explicit statutory support for an intervention infringing any of the basic rights and freedoms granted under the second chapter of RF. When conducting a search the police should try not to draw unnecessary attention to the premises.¹⁰⁰

6.5 Right to be present and record of the search and seizure

28:7 1st paragraph RB states that when it is possible the officer conducting the search shall have a reliable witness present during the search. If the officer has done what he could to commission a witness and have not found one, it does not stop him from conducting the search.¹⁰¹

⁹⁸ Fitger, supra note 76 at 28:14 (supplement 28, February 1999)

⁹⁹ 8 § Polislagen 1984:387 (Swed.).

¹⁰⁰ Fitger, supra note 76 at 28:20 (supplement 28, February 1999)

¹⁰¹ Fitger, supra note 76 at 28:21 (supplement 28 February 1999)

According to 28:7 2nd paragraph RB the person whose premises are being searched or if this person is absent members of his or her household, shall be given the right to observe as well as having a witness present unless the search would be delayed by it. When neither of these persons are present, the person whose premises are being searched must be notified of the search as soon as possible without detriment to the investigation.

In a case reviewed by JO, a common law partner of the suspect informed the police that she wanted to call her mother to enable her to be a witness she was refused this right. Despite the fact that the mother lived close by and could come with short notice. The police received critic but it did not result in anything besides the criticism.¹⁰² The principle rule is that the suspect should not be removed from his or her home when the search is conducted and if there is a warrant for his or her arrest it should not be executed until the search is completed. There are of course exceptions such as when the crime in question is domestic violence and the suspect keeps abusing his partner verbally. If neither the suspect nor members of his household were present during the search, the suspect shall be informed of the search as soon as the information will no longer harm the ongoing investigation.¹⁰³

A record shall be kept of the search, stating the purpose of the search and describing what the search revealed. Upon request, a person whose premises have been searched is entitled to receive a record of the search, stating the offence under investigation.¹⁰⁴ Even if the search is fruitless, a record shall always be made.¹⁰⁵ The record should state which police officer or prosecutor authorized the warrant.¹⁰⁶ The reasons behind the measures taken should also be included in the record.¹⁰⁷ JO has made comments on the importance of including the crime the search is supposed to be conducted for. In order to ensure that a search is not conducted to discover new crimes. If during the search, objects are found giving rise to a suspicion for another crime, the search may go on concerning the new crime but the record must entail the new circumstance that have arisen.¹⁰⁸

¹⁰² JO 2003/04 p 91

¹⁰³ Westerlund, supra note 73 at 138-139

¹⁰⁴ Rättegångsbalk [RB] [Code of Judicial Procedure] 28:9 (Swed.).

¹⁰⁵ Fitger, supra note 76 at 28:22b (supplement 28 February 1999)

¹⁰⁶ JO 1988/89 p 47, supra note 77 at 55

¹⁰⁷ Id. at 52

¹⁰⁸ JO 1956 p 78 (especially p 95-96)

7 Common Law

The common law originates from England and the time of William the Conqueror (11th century). The common law, was believed to be the body of law common to the entire country. It was handed down from generation to generation and local nobles and landowners ran the administration.¹⁰⁹ The law of precedent is the foundation of common law. All judges must follow the decisions made in earlier cases by other judges of equal or higher standing if the case concern similar circumstances. One advantage of case law (as common law is often referred to) is its elasticity; a court can change the law to reflect changing circumstances without having to go through Parliament to create a new law. A disadvantage often mentioned is that common law often makes it hard to establish exactly what the law is, making it difficult for an overview of the law in a certain area. In a normal trial situation, both parties will present cases supporting their point of view and it is then up to the judge to decide, by means of fine distinction, which cases apply to the case at the bar.¹¹⁰

7.1 Canadian Law

In Canada, the federal Parliament based in the capital of Ottawa has the power to form laws in all matters except those expressly under the jurisdiction of the provinces. The Constitution Act from 1867¹¹¹ specifies 29 areas under s. 91, exclusively of federal concern, criminal law is among those. The federal Parliament in Ottawa consists of two houses, the House of Commons and the Upper House, the Senate. In order to pass an Act of Parliament, the Bill must be approved by both houses. The federal legislation is found in the Revised Statutes of Canada (R.S.C.) of 1952 and the annual additions to them.¹¹² In 1982, Canada's second Constitution Act¹¹³ was enacted, encompassing the *Canadian Charter of Rights and Freedoms*. The Charter has had a great impact on the criminal justice system in Canada and it will be discussed at further length below, in chapter 8.

The sources of law in Canada are the common law, the statute law and the Constitution. The Constitution is the supreme law of Canada and any law inconsistent with the Constitution, is to the extent of the inconsistency, of no force or effect.¹¹⁴ If there is a conflict between a statute intended to codify the case law and the actual case law, the statute overrules the case law.

¹⁰⁹ F.A.R. Chapman, *The law and You, A Layman's Guide to Canadian Law*, 12, McGraw Hill Company of Canada Limited, 1970

¹¹⁰ *Id.* at 16

¹¹¹ *The Constitution Act*, 1867 (U.K.), 30 &31 Victoria, c. 3

¹¹² Chapman, *supra* note 109 at 17-18

¹¹³ Part I of the *Constitution Act*, 1982, Being schedule B to the *Canada Act* 1982 (U.K.), 1982, C. II

¹¹⁴ *Id.* at s. 52 (1)

However, if there is an area which is not covered by the codification the case law should be followed.¹¹⁵

A trial in Canada is adversarial; the two parties to the trial are responsible to introduce evidence. The role of the judge is to remain passive during the trial and make the ultimate finding of fact and should never investigate, but base the judgement on the two positions put before him or her. The judge is believed to be less biased if he or she plays a less active role in the trial, it is rare for a Canadian judge to get involved and ask questions to witnesses or the accused.¹¹⁶ There are two types of offences in Canada, summary and indictable. The indictable offences are the more serious offences, with a higher penalty and different court procedures. There are three categories of indictable offences, were the most serious are tried at the Superior court by a judge and jury. The least serious are within the jurisdiction of the Provincial court and tried before a judge alone. The majority of the indictable offences fall within the third category, were it is left up to the accused to chose if he or she wants to be tried before a judge alone or a judge and a jury.¹¹⁷ A jury in Canada is composed of persons without legal training, randomly selected amongst the citizen in the territorial jurisdiction of the court. The jury resolves questions of fact, did the accused commit the offence charged with or not. Once the jury has found a person guilty, the judge decides on the sentence.

7.2 Evidence Law

The fundamental rule of the law of evidence is that everything that is relevant to a fact at issue is admissible unless there is a legal reason for excluding it. There are two forms of relevance, factual and legal. When determining if the evidence is factual relevant the court asks, does the evidence make the fact at issue more or less likely to be true? Legal relevance concerns whether the fact, which the party is trying to prove, is the one at issue in the case.¹¹⁸ According to Canadian law, the question of admissibility of evidence is a question of law and shall be determined by the judge. In cases were there is a jury, the jury resolves questions of fact. The jury does not have to report on how they reached the verdict, simply state if the accused is guilty or not guilty of the charges.¹¹⁹

There are five main reasons for excluding relevant evidence:

- 1) Admitting the evidence may distort the fact-finding mission of the court. The concern is that certain types of evidence may cause the trier of fact to reason irrationally or improperly. An example is the

¹¹⁵ Chapman, supra note 109 at 19

¹¹⁶ Ronald J. Deslie, Don Stuart, *Learning Criminal Procedure*, 523, Thomson Carswell, 2003

¹¹⁷ Id. at 5

¹¹⁸ Hamish Stewart, *Evidence A Canadian casebook*, pp. 4-5 Emond Montgomery Publications Limited, 2006

¹¹⁹ Id. at 12

rule that the prosecution cannot lead evidence of the accused's bad character.¹²⁰

- 2) If the evidence may unnecessarily prolong the trial or confuse the issues. The most notable rule deriving from this concern is the collateral facts bar. It prevents a party to prove a witness is lying about issues irrelevant to the matter at hand.¹²¹
- 3) It may undermine some other important value other than fact finding. Evidence obtained in violation of the *Charter* is generally inadmissible.¹²²
- 4) The manner in which it was acquired or presented may be inconsistent with the trial process. All the evidence have to be put before the court by the parties, the jury is not permitted to make their own investigations.¹²³
- 5) Probative value vs. prejudicial effect. Evidence is probative if it proves something relevant to the issue of the case. If the probative value is low and the prejudicial effect high, the evidence may be deemed inadmissible. The question of probative value and prejudicial effect can for example, arise when the prosecutor wants to introduce evidence of the accused previous conduct, in order to prove a tendency towards committing the crime charged. The probative value vs. the prejudicial effect is the final test to be passed in order to get the evidence admitted.¹²⁴

Since the witness's credibility is so important, one of the most important rules of evidence in Canada is the rule preventing hearsay. Hearsay can be defined as an out-of-court statement offered for the truth of its content. The truthfulness and accuracy of the person whose words are spoken by another person cannot be tested by means of cross-examination and it will leave the jury wondering not only about the witness credibility but also about the declarant's. There are many exceptions to the general rule against hearsay and statements may be admitted despite being hearsay statements. If a piece of evidence has a hearsay and a non-hearsay part the judge will balance the probative value and prejudicial effect. If admitted, the judge will instruct the jury to ignore the hearsay component.¹²⁵ The law of evidence is a complex area of law and hard to grasp for a person educated in a civil law jurisdiction.

¹²⁰ Id. at 5

¹²¹ Id.

¹²² Id. at 6

¹²³ Id.

¹²⁴ Id.

¹²⁵ Id. at 131

8 The Canadian Charter of Rights and Freedoms

In the time before the *Charter*, Parliament enacted the criminal laws that were enforced by the police and prosecutors and the courts reluctantly recognized the rights of the accused. The enactment of the *Charter* in 1982 brought new rights to the accused and changed the criminal justice system.¹²⁶ The goal of the *Charter* is to protect the individual from unwarranted intrusions by the state as well as protecting the individuals and the state from crime.¹²⁷ The *Charter* guarantees fundamental rights such as freedom of religion, belief and expression, democratic rights such as the right to vote, mobility rights, equality rights and legal rights such as the rights for the accused. These rights can only be limited according to the very first section of the *Charter*: “*within reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*”¹²⁸

8.1 Remedies for a Charter breach

Because of the *Charter*, the Canadian courts are concerned with how the evidence was obtained. The remedies available under the *Charter* are found in s. 24, which reads as follows:

24(1) “*Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*”

(2) “*Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.*”

S. 24 is only applicable once a *Charter* violation has been established. It is under the court’s discretion to award the appropriate remedy for the *Charter* violation. The most frequently sought is the exclusion of evidence. The other remedies available to the court are a stay of proceedings, an award of costs or damages or a reduction of sentence. The applicant has the burden of proof to establish that the evidence was obtained unlawfully and that it should be excluded.¹²⁹ An objection of a *Charter* violation should be made in a pre-trial motion and the evidence in support of the motion should be

¹²⁶ Kent Roach, *Due Process and Victim’s Rights: The New Law and Politics of Criminal Justice*, 3, University of Toronto Press, 1998

¹²⁷ Susanne Boucher and Kenneth Landa, *Understanding section 8: Search, Seizure, and the Canadian Constitution*, 1, Irwin Law Inc. 2005

¹²⁸ *The Constitution Act 1982*, supra note 113 at s.1

¹²⁹ Boucher and Landa, supra note 127 at 5

heard in a *voire dire* (outside the trial). If it is a jury trial and the jury heard the evidence in question it could result in a mistrial.¹³⁰ In *R.v. Kutynec*¹³¹ it was established that the trial judge can refuse to review the application of the accused to exclude evidence obtained pursuant to a search and seizure if he or she did not give timely notice. The accused has to make his or her application under s. 24 of the *Charter* to the *court of competent jurisdiction*. In *R.v. Mills*¹³² the Supreme Court held that in order to be a court of competent jurisdiction the court must have:

- 1) jurisdiction over the person;
- 2) jurisdiction over the subject matter; and
- 3) jurisdiction to grant the remedy.

8.2 Exclusion of evidence

As stated above, the remedy most often sought is the exclusion of evidence.¹³³ According to the wording of the section, evidence can be excluded if it was obtained in a manner that infringed the *Charter*. The Supreme Court has analysed the meaning in many cases. It has now been established that it is sufficient with a temporal link between the violation and the evidence obtained, or a casual connection between the two, to trigger an application of s. 24(2) of the *Charter*. This is especially the case when the *Charter* violation and the discovery of the evidence occurred in one single transaction.¹³⁴ In *R.v. Plant*¹³⁵ the police conducted an illegal perimeter search of the property and included the information gained from it in the warrant application. Upon searching the home, the police found marijuana. The Supreme Court did not find the search itself unreasonable but the perimeter search was an integral part in a series of investigative tactics, which lead to the discovery of the evidence. The perimeter search was sufficiently connected to the search of the home to trigger s. 24(2) of the *Charter*. However, in the end the evidence was not excluded, because in general “real” evidence¹³⁶ does not tend to bring the administration of justice into disrepute.

When deciding if evidence was “obtained in a manner” infringing the *Charter*, the courts may also look at the type of evidence concerned. *R.v. Goldhart*¹³⁷ concerned the testimonial evidence from a witness obtained in connection to an unreasonable search of a marijuana grow-operation. One of the persons inside the building pleaded guilty and testified against his friends. The defence for the other accused made a motion to have the testimony excluded, since the police had only found the witness because of the illegal search. The Supreme Court held that the connection between the

¹³⁰ Boucher and Landa, *supra* note 127 at 263

¹³¹ *R.v. Kutynec* (1992), 70 C.C.C. (3d) 289 (Ont. C.A.)

¹³² *R.v. Mills* (1986), 26 C.C.C. (3d) 481 (S.C.C.) at 515

¹³³ Boucher and Landa, *supra* note 127 at 270

¹³⁴ *R.v. Strachan* (1988), 46 C.C.C. (3d) 479 (S.C.C.)

¹³⁵ *R.v. Plant* (1993), 84 C.C.C. (3d) 203 (S.C.C.)

¹³⁶ Real evidence include weapons and drugs.

¹³⁷ *R.v. Goldhart* (1996), 107 C.C.C. (3d) 481 (S.C.C.)

search and the witness' decision to testify was too remote to warrant an exclusion of evidence. The witness' decision to testify was voluntary.

8.2.1 The test for exclusion

The test for exclusion was formed in *R.v. Collins*¹³⁸. It was held that s. 24(2) of the *Charter* is not a remedy for police conduct; its purpose is to prevent further disrepute. A further disrepute would be the admission of evidence depriving the accused of the chance to a fair hearing, or from judicial condonation of unacceptable conduct by the police or prosecution. The Supreme Court articulated three factors to be considered in determining exclusion:

- 1) the effect of admission of the evidence on the fairness of the trial;
- 2) the seriousness of the *Charter* violation; and
- 3) the possibility that excluding the evidence would bring the administration of justice into greater disrepute than admitting it.

8.2.1.1 The fairness of the trial

Trial fairness has a narrow meaning and refers to uses of evidence that would force the accused to implicate him or herself in a crime. If admitting the evidence in any way will make the trial unfair, it will generally be excluded. The courts are concerned with the nature of the evidence obtained and the nature of the right violated and not to such a great extent the manner in which the right was violated.¹³⁹ If the admission of evidence as a result of a *Charter* violation lead to the accused conscripting him or herself against their will, the evidence will generally be excluded without considering the other *Collins* factors. The distinction between conscriptive and non-conscriptive evidence is of great importance since it is only conscriptive evidence that could affect the fairness of the trial. In order to classify the evidence the courts look at the manner in which the evidence was obtained.¹⁴⁰ Conscriptive evidence is: "when an accused, in violation of his *Charter* rights, is compelled to incriminate him or herself at the behest of the state by means of a statement, the use of the body, or the production of bodily samples".¹⁴¹ "Real" evidence is not normally considered to be self-incriminatory but can be conscriptive if it was discovered as a result of other conscriptive evidence.¹⁴² An example of this derives from *R.v. Burlingham*¹⁴³, the police obtained a statement from the accused in violation of his right to counsel. The conscriptive statement led to the discovery of a gun at the bottom of a frozen river. Even though the gun was "real" evidence, it was treated as conscriptive evidence because it would not have been discovered had it not been for the conscripted statement.

The admission of conscriptive evidence will render the trial unfair, unless it can be shown on a balance of probabilities that the evidence would have

¹³⁸ *R.v. Collins* (1987) 33 C.C.C. (3d) 1 S.C.C.

¹³⁹ *Id.*

¹⁴⁰ *R.v. Stillman* (1997), 113 C.C.C. (3d) 321 (S.C.C.)

¹⁴¹ *Id.* at 353

¹⁴² *Id.* at 359

¹⁴³ *R.v. Burlingham* (1995) 97 C.C.C. (3d) 383 (S.C.C.)

been discovered by alternative non-conscriptive means.¹⁴⁴ The prosecutor has two ways to show that the evidence would have been discovered without the conscriptive evidence, either from an independent source or because of constitutionally valid investigations.¹⁴⁵ Non-conscriptive evidence is therefore evidence where the accused was not compelled to assist the police in discovering the evidence. Once the judge has established the evidence to be non-conscriptive, he or she should move to consider the two remaining *Collins* factors.¹⁴⁶

8.2.1.2 The seriousness of the breach

The seriousness of the breach involves an assessment of the nature and extent of the violation as well as the motives behind the act. The courts will look at the totality of circumstances.¹⁴⁷ In order to decide the gravity of the breach the courts need to consider a number of factors deriving from case law of the Supreme Court.¹⁴⁸

- Was the violation committed in good faith or was it deliberate?
If a violation is committed in good faith the breach is rendered less serious.¹⁴⁹
- Was the violation serious or merely of a technical nature?
The level of privacy a person can expect will affect the seriousness of the breach. The higher level of privacy, the more likely the evidence will be excluded by the court.¹⁵⁰ If the police acted on a warrant appearing to be valid, this mitigates the seriousness of the breach.¹⁵¹
- Was the violation motivated by a situation of urgency or necessity?
If the breach was made in order to prevent the loss or destruction of evidence it may not be considered serious.¹⁵²
- Were there other investigative means the police could have used instead? If there were other investigative means available, which would not render a *Charter* violation, it makes the breach more serious.¹⁵³

8.2.1.3 Effect of an exclusion

What is at issue under the third branch of the *Collins* test is if the exclusion of evidence would bring the administration of justice into greater disrepute than admission. Normally, this branch is only considered in cases concerning non-conscriptive evidence.¹⁵⁴ The factors generally looked upon are how serious the offence is and the importance of the evidence to the prosecutor's case. The more serious the offence is, the more likely it would

¹⁴⁴ *R.v. Stillman*, supra note 140

¹⁴⁵ *Boucher and Landa*, supra note 127 at 278

¹⁴⁶ *R.v. Stillman*, supra note 140

¹⁴⁷ *Boucher and Landa*, supra note 127 at 282

¹⁴⁸ For example *Collins* note 138 and *R.v. Silveria* (1995), 97 C.C.C. (3d) 450 (S.C.C.)

¹⁴⁹ *R.v. Therens* (1985) 18 C.C.C. (3d) 481 (S.C.C.)

¹⁵⁰ *Boucher and Landa*, supra note 127 at 87

¹⁵¹ *R.v. Plant*, supra note 135

¹⁵² For example *Therens* note 149

¹⁵³ *Boucher and Landa*, supra note 127 at 286

¹⁵⁴ *Boucher and Landa*, supra note 127 at 287

bring the administration of justice into disrepute.¹⁵⁵ The less serious the *Charter* breach is, the greater likelihood of harm to the reputation of the administration of justice if the evidence is excluded.¹⁵⁶ In cases when the evidence is necessary to prove the accused's guilt, it is more likely to admit the evidence, especially when the *Charter* breach is minor and the evidence is reliable.¹⁵⁷ On the other hand, if the breach is serious and an obvious disregard for constitutional procedures, the courts are more likely to find that the admission would bring the administration of justice into disrepute.¹⁵⁸ It is the reputation of the overall administration of justice which is the main concern when the courts decide the effect of the exclusion of evidence.¹⁵⁹

8.3 The Charter's impact on the criminal justice system

In the first decade after the enactment of the Charter, the Supreme Court of Canada and the defence lawyers were seen as setting out an obstacle course of due-process rights to hinder the efforts of the police, prosecutors and Parliament to find and convict the guilty. Despite this, the prison population in Canada increased in the late 80's.¹⁶⁰ The view of the Supreme Court after the enactment of the *Charter* was that the protection of the rights of the accused would protect the rights of all Canadians. In Canada, most charges do not reach the trial stage, but result in a guilty plea and/or a withdrawal of the charges by the prosecutor. Motions for alleged violation of the accused's *Charter* rights can have the effect that the focus of the trial will be on possible *Charter* violations and the question of guilt or innocence will be somewhat forgotten.¹⁶¹

Just a week after the *Charter* had come into force, Therens¹⁶² crashed into a tree with his car. The police rightfully took a breathalyser test of Therens and the alcohol level was over the legal limit. He did not ask to see a lawyer; if he had, the lawyer would most likely have informed him that not providing breathalyser is a serious offence. The police arrested him and obtained solid evidence of his factual guilt. The prosecutor laid the charge and everyone was expecting a guilty plea from Therens. Instead, he raised one of the first *Charter* objections in Canada to go all the way to the Supreme Court. His lawyer had noticed that the officers had not informed his client of his s. 10(b) right to retain and instruct counsel without delay. The trial judge excluded the breathalyser and acquitted Therens. The prosecutor appealed to the Supreme Court of Canada. The SCC refused to limit the right to counsel warnings only to those who were placed under arrest. An admission of the breathalyser would bring the administration of

¹⁵⁵ *R.v. Collins*, supra note 138

¹⁵⁶ *R.v. Belnavis* (1996), 107 C.C.C. (3d) 450 (S.C.C.)

¹⁵⁷ For example *Collins* note 138 and *Belnavis* note 156

¹⁵⁸ Boucher and Landa, supra note 127 at 288

¹⁵⁹ *Id.* at 287

¹⁶⁰ Roach, supra note 126 at 3

¹⁶¹ *Id.* at 11

¹⁶² *R.v. Therens*, supra note 149

justice into disrepute. The court feared if the evidence was admitted it “would be to invite police officers to disregard the *Charter* rights of the citizen...”¹⁶³ in addition to stripping Theren’s right to counsel of any meaning.

One of the post-*Charter* cases which received much attention was *R.v. Askov*¹⁶⁴. Askov was charged with a number of offences including extortion and weapon offences. He was arrested in November 1983 and was committed for trial in September 1984 and the case was not heard until September 1986 were his defence lawyers argued a stay of proceedings because of the twenty-three month delay between committal and trial as a breach of Askov’s 11(b) *Charter* rights to a trial within a reasonable time. The trial judge stayed the case and the Ontario Court of Appeal reversed the stay but the SCC restored the stay of proceedings. In the SCC judgement the Court had collected data of the average time it took for trial to commence in Montreal and it was three months. The Court then added the factor of special circumstance and reached the conclusion that a trial should commence within six to eight months.

The courts followed the SCC guidelines literally. In the five months following the *R.v. Askov* decision 30 000 charges were stayed or withdrawn by prosecutors and in total 51 791 charges resulted in a stay and this does not include summary offences. It was not 51 791 accused who received a stay of proceedings or a withdrawn charge, since most were charged with several offences. Some of the charges would have been withdrawn anyway because of lack of evidence or plea bargains.¹⁶⁵ This case serves as a good example of how much influence both the *Charter* and the Supreme Court has had on the Canadian criminal justice system.

After the enactment of the *Charter*, the most contested area of law was search-and-seizure law. The constant ‘battle’ between due-process and crime control especially concerned different approaches to rights and remedies. Parliament did its best to respond to the Court’s due-process decisions in striking down warrantless searches.¹⁶⁶ As early as 1984 the Supreme Court created a presumption that all warrantless searches were unreasonable.¹⁶⁷ The justices had to determine if there was probable cause for the search and could not rely on the police expertise even if the search had resulted in reliable evidence of the crime.¹⁶⁸ While the SCC introduced a quasi-absolute exclusionary rule to expand the right against self-incrimination, it was reluctant to exclude the evidence obtained from a simple search-and-seizure violation.¹⁶⁹ For a number of years the rule guiding the courts was from *R.v. Collins*¹⁷⁰, the admission of real evidence

¹⁶³ Id. at 662

¹⁶⁴ *R.v. Askov* (1990) 59 C.C.C. (3d) 449 (S.C.C.)

¹⁶⁵ Roach, supra note 126 at 92

¹⁶⁶ Roach, supra note 126 at 69

¹⁶⁷ *Hunter et al. v. Southam Inc.* (1984) 14 C.C.C. (3d) 97 (S.C.C.)

¹⁶⁸ Roach, supra note 126 at 70

¹⁶⁹ Roach, supra note 126 at 76-77

¹⁷⁰ *R.v. Collins*, supra note 138, further discussion under 9.2

existing prior to the violation should not normally affect the fairness of the trial or not trigger a presumption of exclusion. It was the self-incriminating evidence that concerned the Court at this time and not “real” evidence. At the start of the 1990’s the Court slowly began to change the rule that “real” evidence did not affect the fairness of the trial.¹⁷¹ The fair-trial test has been restricted to cases where the evidence would not have been found without the participation of the accused. However in most cases evidence arising from a search-and-seizure violation will only be excluded if the seriousness of the violation outweigh the seriousness of the charge.¹⁷²

¹⁷¹ Roach, *supra* note 126 at 77

¹⁷² *Id.*

9 Section 8 of the Charter

According to s. 8 of the *Charter*: “Everyone has the right to be secure against unreasonable search and seizure.”¹⁷³

The section offers no clarification as to what constitutes a search. It was left up to the Supreme Court to provide a definition. The issue has arisen in several cases and in *R.v. Wise*¹⁷⁴ it was defined as: “It is clear that s. 8 of the *Charter* guarantees a broad and general right to be secure from unreasonable search where the person who is the object of the search has a reasonable expectation of privacy. [...] If the police activity invades a reasonable expectation of privacy, then the activity is a search.” To establish a breach of a person’s s.8 rights, the accused has to prove that he or she had a reasonable expectation of privacy and that this expectation was breached. Section 8 offers a protection of a person’s independent privacy interests and not property rights.¹⁷⁵ In a fairly early Charter case, *Hunter v. Southam*¹⁷⁶, Cory J. made it clear on behalf of the SCC that s. 8 protects people and not property and “it guarantees a broad and general right to be secure from unreasonable search and seizure.”¹⁷⁷

9.1 Reasonable expectation of privacy

The questions remains how one does establish a reasonable expectation of privacy. In *R.v. Edwards*¹⁷⁸ the SCC took upon themselves to establish guidelines on how to determine what constitutes a reasonable expectation of privacy. It can only be determined by a multifactor analysis of the totality of circumstances. The factors to be considered include if the accused was present at the time of the search, the possession of the property, ownership of the property, the historical use of the property, ability to regulate access to the property, the existence of a subjective expectation of privacy and the objective reasonableness of that expectation. Once a reasonable expectation of privacy has been established on the totality of circumstance, the court will review if the manner in which the search was conducted was reasonable.¹⁷⁹ The facts of *R.v. Edwards* were if Edwards had a reasonable expectation of privacy at his girlfriend’s apartment. After a warrantless search of the girlfriend’s apartment, the police seized drugs and the question was if the evidence was admissible at Edwards’ trial. Despite the fact that Edwards had a key to the apartment and kept some personal belongings there, he was according to the Supreme Court “not more than an especially privileged guest”. The result of *R.v. Edwards* is that an applicant who wants

¹⁷³ *The Constitution Act*, 1982, supra note 113 at s. 8.

¹⁷⁴ *R.v. Wise* (1992), 70 C.C.C. (3d) 193 (S.C.C.) at 219

¹⁷⁵ *Boucher and Landa*, supra note 127 at 26-27

¹⁷⁶ *Hunter et al. v. Southam Inc.* supra note 167

¹⁷⁷ *Id.* at 107

¹⁷⁸ *R.v. Edwards* (1996), 104 C.C.C. (3d) 136 (S.C.C.)

¹⁷⁹ *Id.* at 150-151

to exclude evidence has the burden of proof to show that he or she had a subjective expectation of privacy and that this expectation is objectively reasonable in the totality of circumstances.¹⁸⁰ In order to have standing to challenge the legality of a search the accused has to establish that his or her personal right to privacy has been violated.¹⁸¹

The Supreme Court has not limited what qualifies for privacy protection to the home but has instead extended it to privacy interests in the body, the office, vehicles, and documents. The SCC has found a privacy interest in the majority of things a person wants to keep confidential from others.¹⁸² The individual's expectation of privacy increases the more confidential and sensitive the information is and the level of tolerance for intrusions by the state decreases correspondingly.¹⁸³ The breach is deemed more serious if a person has an increased expectation of privacy.¹⁸⁴ In light of recent cases from the Supreme Court, Boucher and Landa believes it likely that a court will find a violation of privacy for an illegal entry onto private property not considering the location of the property. Previously it was believed that certain areas of the home enjoyed a reduced level of privacy, for example the backyard.¹⁸⁵

9.2 The reasonableness of the search

To determine if a search is reasonable the court has to balance the interest of the state against the individual's privacy interests. In order to decide if a search is unreasonable one has to know what makes a search reasonable.¹⁸⁶ The primary legal tests derives from, *Hunter v. Southam*¹⁸⁷ and *R.v. Collins*¹⁸⁸. In *R.v. Collins* the SCC established "the *Collins* test". A search is reasonable under s. 8:

- 1) If the search is authorized by law.
- 2) If the law authorizing the search is reasonable.
- 3) The manner in which the search is carried out is reasonable.¹⁸⁹

Hunter v. Southam mainly concern if the law itself is reasonable.

9.2.1 Authorized by law

In order to conduct a search in accordance with s. 8 of the *Charter*, the state must have specific legal authorization, either from a statute or the common law. The courts have to start by looking at whether the legal prerequisites for a search were fulfilled before moving on to the second and third stages

¹⁸⁰ Boucher and Landa, supra note 127 at 34

¹⁸¹ *R.v. Pugliese* (1992), 71 C.C.C. (3d) 295 (Ont. C.A.) at 300-301

¹⁸² Boucher and Landa, supra note 127 at 35

¹⁸³ See for example *R.v. Dersch* (1993), 85 C.C.C. (3d) 1 (S.C.C.) at 13-14

¹⁸⁴ *R.v. Belnavis*, supra note 156 at 424

¹⁸⁵ Boucher and Landa, supra note 127 at 67-68

¹⁸⁶ *Id.* at 89

¹⁸⁷ *Hunter v. Southam*, supra note 167

¹⁸⁸ *R.v. Collins*, supra note 138

¹⁸⁹ *Id.* at 14

of the Collins test.¹⁹⁰ A search can be authorised not only by the Criminal Code but also from specific statutes, tailored for specific situations, for example the Controlled Drugs and Substances Act.¹⁹¹ In order to broaden the common law for police action, the Canadian courts rely on an English Court of Appeal case from 1963, *R.v. Waterfield*¹⁹² establishing a test to determine if the police activity falls within the common law powers.

- First, does the activity fall within the general scope of police activity?
- Second, does the conduct involve an unjustifiable use of powers associated with the duty?

The two branches of the *R.v. Waterfield* test has been adopted and expanded in several cases in Canada¹⁹³. In *R.v. Dedman*¹⁹⁴ Le Dain J. held that the second branch should be read as to include an element of necessity. It was necessary for the police to infringe the individual's right in order to be able to carry out their duty. The test is mostly used to extend the police powers for warrantless searches when there are exigent circumstances.

9.2.1.1 Exigent circumstances

For exigent circumstances there is s. 487.11 of the Criminal Code. When there is no time to obtain a warrant the police can search without one. They have to be able to prove the grounds under s. 487(1)¹⁹⁵ but they simply did not have enough time to obtain a warrant in advance. A warrantless search cannot be justified solely based on exigent circumstances. Exigent circumstances are a precondition to exercise a statutory or common law power to search without a warrant. The existence of such circumstances may mitigate the seriousness of the breach when a motion to exclude the evidence is made under s. 24(2) of the *Charter*.¹⁹⁶ Some of the categories recognized for when warrantless searches are accepted because of exigent circumstances include:

1) When there is a need to secure and preserve evidence and it would be impracticable to leave the scene to obtain a warrant. It has to be one of the circumstances in s. 487.1 of the Criminal Code, s. 11(7) of the Controlled Drugs and Substances Act or a recognised common law power.¹⁹⁷ An example of this is *R.v. Duong*¹⁹⁸ from the British Columbia Court of Appeal. The police was in the neighbourhood to investigate a home invasion when the officer smelled burning marijuana which lead them to believe there was a grow-operation. They knocked on the door, arrested Duong, and observed evidence being in process. One of the officers remained at the premises

¹⁹⁰ Boucher and Landa, supra note 127 at 90-91

¹⁹¹ Controlled Drugs and Substances Act, 1996, C.19 [CDSA]

¹⁹² *R.v. Waterfield*, [1963] 3 All E.R. 659, [1964] 1 Q.B. 164 (C.C.A.)

¹⁹³ See for example *R.v. Godoy* (1998), 131 C.C.C. (3d) 129 (S.C.C.) and *R.v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.)

¹⁹⁴ *R.v. Dedman* (1985), 20 C.C.C. (3d) 97 (S.C.C.)

¹⁹⁵ See further below in chapter 10

¹⁹⁶ Boucher and Landa, supra note 127 at 100

¹⁹⁷ Id.

¹⁹⁸ *R.v. Duong*, (2002), 162 C.C.C. (3d) 242 (B.C.C.A.), leave refused [2002] S.C.C.A. No

112

while the other went to obtain a warrant. The court found that the circumstances were sufficiently exigent.

2) When there is a risk to the safety of the public or police officers. In *R.v. Golub*¹⁹⁹, a case from the Ontario Court of Appeal, the police had received information from a third party that Golub had an Uzi submachine gun and he had threatened the informant and Golub was distraught. The police arrested Golub outside his apartment; the police then conducted a search and found a loaded rifle. Doherty J. held that it was in accordance with s. 8 since it was a search incidental to arrest. He did note that a warrantless search in a home is generally prohibited, unless there are exceptional circumstances compelling the law enforcement interest to override the individual's right to privacy. In the case at the bar, the police were concerned with their safety and wanted to assure that there was nobody in the apartment in possession of the gun.²⁰⁰

3) The common law duties of the police include the protection of life. Situations when exigent circumstance can arise are emergency calls; the police have a duty to protect the life of the citizens. The leading case on this exception to warrantless searches is *R.v. Godoy*²⁰¹. The Supreme Court applied the *Waterfield* test²⁰² to decide if the police had lawful authority to enter the home despite the fact that the person answering the door said that "nothing was wrong". In cases when there is no other way for the police to verify the interests of the caller than to forcibly enter the home it is authorized under common law because it is within the general scope of the police duties and it does not involve unjustifiable use of powers.

4) Warrantless entries to homes in cases of "hot pursuit". The Supreme Court preserved the right to the "hot pursuit" exception in *R.v. Feeney*²⁰³ and held all other entries into private homes as violations of s.8 of the *Charter*.

9.2.2 Is the law reasonable?

The law has to have a valid purpose and once this has been determined, the reasonableness of the effects of the law can be assessed.²⁰⁴ As stated above, the test to determine the balance of the competing interests was established by the Supreme Court in *Hunter v. Southam*²⁰⁵. Three minimum requirements need to be fulfilled for a search power to be constitutional.

1) **Prior authorization** - To perform a search the police must obtain prior authorization. A warrantless search is prima facie unreasonable and the prosecutor has the onus to rebut the presumption. In *Hunter v. Southam*, the

¹⁹⁹ *R.v. Golub*, (1997), 117 C.C.C. (3d) 193 (Ont. C.A.)

²⁰⁰ *Id.* at 213

²⁰¹ *R.v. Godoy*, supra note 193

²⁰² More under 9.2.1

²⁰³ *R.v. Feeney*, (1997), 115 C.C.C. (3d) 129 (S.C.C.)

²⁰⁴ *Boucher and Landa*, supra note 127 at 95

²⁰⁵ *Hunter v. Southam*, supra note 167 at 109-110

court clarified that a retroactive authorization does not meet the standard in s. 8, simply because it would not prevent unreasonable searches.

2) **Impartial judicial officer** - The person giving the prior authorization has to be an impartial judicial officer. It does not have to be an actual judge, but a person capable of being independent, neutral and impartial.

3) **Reasonable and probable grounds** - The police officer must have reasonable and probable grounds to believe a crime has been committed and that there is evidence to be found at the premises. These grounds should be presented under oath to the impartial judicial officer.

In *R.v. Baron*²⁰⁶ the SCC added a discretionary power for the judicial officer to decline to issue a warrant to enable him or her to balance the competing interests identified in *Hunter v. Southam*. In later cases, the Supreme Court has confirmed that there are cases not meeting the criteria in *Hunter v. Southam*. The situations concerned are when exigent circumstances exist, when the individual enjoys a lower expectation of privacy, where other interest than law enforcement are protected in conducting the search, when the search is minimally intrusive or when a more restrictive approach to reasonableness is required.²⁰⁷

9.2.3 The manner

If the search is carried out in an unreasonable manner, it violates s. 8 of the *Charter*.²⁰⁸ To determine if a search was conducted in a reasonable manner the courts look at the conduct of the officials involved in the search. Even possible violations to the rights of a third party may lead to finding a search unreasonable. A violation of other Charter rights may also affect the manner in which the search was carried out. The rights concerned are the right to counsel under s. 10(b) of the *Charter* and the right to life, liberty and security of the person under s. 7 of the *Charter*.²⁰⁹ The s. 7 violation is more closely linked to the “physical way in which the search is carried out”²¹⁰ while a s. 10(b) violation should in most cases be considered separately unless the violation is closely connected with the conduct of the search.²¹¹ In *R.v. Genest*²¹² the police had obtained a search warrant to search Genest’s property for drugs but he was charged with possession of illegal and restricted weapons. Despite the fact that the warrant contained defects it was not what made the Supreme Court exclude the evidence under s. 24(2) of the *Charter*. What concerned the court, and made the violation of s. 8 serious, was the manner in which the search was carried out. Without warning, the police used a wooden pole to force the door open. Even though the exclusion of the evidence would lead to an acquittal, the SCC found the violation so serious, it would bring the administration of justice in disrepute

²⁰⁶ *Baron v. Canada*, (1993), 78 C.C.C. (3d) 510 (S.C.C.)

²⁰⁷ Boucher and Landa, supra note 127 at 99

²⁰⁸ *R.v. Collins*, supra note 138

²⁰⁹ Boucher and Landa, supra note 127 at 139-140

²¹⁰ *R.v. Debot*, (1989), 52 C.C.C. (3d) 193 (S.C.C.) at 200

²¹¹ Boucher and Landa, supra note 127 at 142

²¹² *R.v. Genest* (1989), 45 C.C.C. (3d) 385 (S.C.C.)

to admit it. If the police use excessive force or if there is no prior announcement before entering an individual's home it makes the search unreasonable unless the police can offer some evidence that it was reasonable to act like they did in the specific circumstances. The police have been known to have a blanket policy for a "no-knock" when conducting searches for drugs; this is not justified under the *Charter*.²¹³ The existing "knock and announce" policy is discussed at further length under 10.3.

²¹³ Boucher and Landa, *supra* note 127 at 139

10 Search and Seizure

An officer must be found to have reasonable grounds to search before the overall reasonableness of the search is considered on the totality of circumstances. Search-and-seizure law is all about law enforcement vs. privacy values. It is an area of law which is mainly codified and almost all law is found in the Criminal Code²¹⁴. Today most common law powers have been replaced by statute. The two still in force are search incident to arrest and ancillary powers doctrine. They mainly concern body searches and is not of relevance to this thesis.

10.1 Statutory powers

In Canada, the search and seizure powers are largely conferred by statute unlike many other areas of law. The statutory powers have to comply with s. 8 of the *Charter*.²¹⁵ The heart of the search-and-seizure law in the Criminal Code is s. 487 and the section has four characteristics:

- 1) The prior authorization regime. The police has to obtain a warrant issued out of a court.
- 2) The person issuing the warrant has to be a judicial person, a justice independent of the Government.
- 3) The application of the warrant has to be based on sworn evidence. The sworn evidence is in the form of a written affidavit from the police officer requesting the warrant.
- 4) The justice has to be satisfied that there are reasonable grounds to believe there *is* evidence to be found and reasonable grounds to believe it *will* afford evidence of an offence.

A warrant under s. 487(1) to search premises does not give the police any right to search persons within the premises under the same warrant. The old common law rule of the plain view doctrine is now codified in s. 489, giving police the power to seize objects not specified in the warrant.

10.2 How to obtain a warrant

Even if the rule is that a warrant must have judicial approval, it does not mean an adversarial hearing in an open court before a judge. In practice, a justice issues the warrants. A justice can be a justice of the peace or a provincial court judge. Most warrants are granted and they are often granted without sufficient attention to whether probable cause was established or an adequate definition of which items to be seized.²¹⁶

When it would be impracticable for the police go and see a justice to obtain a warrant they can get a telewarrant, authorized by s. 487.1. The officer has

²¹⁴ Criminal Code, R.S.C. 1985, c. C-46 Part 15

²¹⁵ Deslie and Stuart, *supra* note 116 at 64

²¹⁶ Roach, *supra* note 126 at 86

to submit the information on oath by means of telephone and it has to be recorded. The information has to include the circumstances why the officer cannot appear personally, statement of the offence, the place to be searched and the items alleged to be liable to seizure and the officer's grounds for believing the objects will be found.²¹⁷ According to Professor Code the police rarely use this provision, they arrest someone and search incident to arrest instead. However, the scope of searches incident to arrests are limited and is normally used to shortly detain a person and making sure the evidence is secure before an officer goes and gets a warrant.²¹⁸ The police cannot enter private property without a warrant in order to obtain evidence against the resident. Accordingly, the police cannot enter a home in order to make secure and preserve evidence until they can obtain a warrant. Both situations constitute a violation of privacy and a breach of s.8.²¹⁹ Unless one the accepted exigent circumstances are applicable.²²⁰

10.2.1 Reasonable and probable grounds

In *Hunter v. Southam*²²¹ the Supreme Court held that reasonable and probable grounds to be the minimum standard of belief required for the search to be viewed as reasonable. There is no exact definition of what constitutes reasonable and probable grounds but in *Hunter v. Southam* Dickson J. set out a working definition: "The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point *where credibility based probability replaces suspicion*".²²² Reasonable and probable grounds have to be supported both subjectively and objectively. The officer has to believe that he or she has reasonable and probable grounds and the authorizing or reviewing court must find this belief to be objectively reasonable.²²³ Each officer does not need to have subjective belief, it is sufficient to rely on the belief of the officer ordering the search. Reasonable and probable grounds may not only be based on lawfully obtained information but can include information which may not be included in a trial as evidence of guilt, such as a hearsay statements or the reputation of the suspect.²²⁴ The Canadian courts have accepted the smell of illegal substances as *part* of the grounds for a search.²²⁵ A danger is that as in Doherty J.A. observed in *R.v. Simpson*²²⁶ "subjectively based assessments can too easily mask discriminatory conduct based on such irrelevant facts as the detainee's sex, colour, age, ethnic origin or sexual orientation."

²¹⁷ Criminal Code, supra note 214 at s. 487.1(4)

²¹⁸ Telephone interview with professor Michael Code at the Faculty of Law at University of Toronto, +1 416-978-2677, 2006-11-24, 17.09-17.21

²¹⁹ *R.v. Silveira*, supra note 148

²²⁰ See under 9.2.1.1

²²¹ *Hunter v. Southam*, supra note 167

²²² *Id.* at 114 (my emphasis)

²²³ Boucher and Landa, supra note 127 at 150

²²⁴ *Id.* at 152-153

²²⁵ *Id.* at 158

²²⁶ *R.v Simpson*, supra note 193 at 202

In *R.v. Golub*²²⁷ the police had received information from a witness that Golub had an uzi machinegun. Upon going to the apartment building, they interviewed the witness further and evacuated the building and then they called Golub and asked him to come outside, which he did eventually. In the case at the bar there was not much corroboration by the police but according to SCC the level of corroboration needed is decided by what is reasonably permitted by the circumstances. When an officer assesses the probable and reasonable grounds in the field he or she cannot be expected to hold the same standard as a justice assessing possible grounds for a warrant.

10.2.1.1 Tips from informants

When the police receive information from one of its informants they have to ensure it is reliable to be able to use it as part of the grounds for a search. In *R.v. Debot*²²⁸ Wilson J. set out three concerns to be addressed in determining if the a warrantless search by the police was justified.

- First, was the information predicting the commission of a criminal offence compelling?
- Second, if the information originates from a source outside the police force, was the source credible?
- And third, was the information corroborated prior to deciding to conduct the search?

A weakness in one area may be compensated by strengths in the other two. The Supreme Court has confirmed that this assessment on the “totality of circumstances” is applicable to warranted searches as well.²²⁹

In deciding if a tip is compelling and credible, the courts have set out a number of factors. These include if the degree of detail of the tip, the suspect’s past record and reputation, the informants history with the police and the informants criminal record.²³⁰ Not every detail of the tip has to be corroborated but the heart of the tip must be.²³¹ If the tip is from an anonymous informant then it can be *part* of the reasonable and probable grounds if it is reliable and corroborated even more than information from a known informant.²³² In *R.v. Lewis*²³³ the police had received an anonymous tip that a large man named Lewis and a two year old boy would be flying on flight 3000 to Edmonton the following day and that Lewis would be carrying a bottle of wine or rum containing cocaine. On two previous occasions, cocaine had been found concealed in rum bottles. The next the day the police observed a man and a young boy at the check in counter for the Edmonton flight matching the description. They took him aside and informed him of the drug investigation. He allowed them to search his bag and they found cocaine concealed in a rum bottle. In the Ontario Court of Appeal, Doherty J.A. explained that it is not sufficient to confirm innocent

²²⁷ *R.v. Golub*, supra note 199

²²⁸ *R.v. Debot*, supra note 210

²²⁹ *R.v. Garafoli* (1990), 60 C.C.C. (3d) 161 (S.C.C.)

²³⁰ Boucher and Landa, supra note 127 at 155

²³¹ *R.v. Debot*, supra note 210

²³² Boucher and Landa, supra note 127 at 155

²³³ *R.v. Lewis* (1998), 122 C.C.C. (3d) 481 (Ont. C.A.)

and commonplace conduct from an anonymous tip to provide the police with probable and reasonable grounds to search. Despite the fact that there had been a breach of s.8 of the *Charter*, the cocaine passed the s.24(2) of the *Charter* test for exclusion because it was non-conscriptive evidence and it had not been discovered as a result of obtaining other conscriptive evidence.

10.3 Execution of a warrant

The police cannot use whatever investigative techniques they wish, the order of the warrant limits the techniques available as well as the limitations imposed under common law and constitutional considerations.²³⁴ As stated above the Canadian law prescribes a prior judicial authorization regime for search and seizure.²³⁵ However, there is reason to believe a proportion of the investigative orders are issued without sufficient bases or that the order itself is deficient in its scope or drafting. A study conducted in Toronto in 1999²³⁶ shows that there were frequent procedural and substantive errors in the random applications for and warrants studied. Section 29 of the Criminal Code places a duty on the police executing a warrant to have the warrant with him or her when it is feasible and to produce it if requested to do so. If the warrant is a telewarrant the officer must as soon as it is practicable give a fax with the warrant to a person present and in control of the place.²³⁷ According to s. 488 of the Criminal Code a warrant under s. 487 or s. 487.1 shall be executed by day, unless the justice is satisfied that there are reasonable grounds to execute the warrant by night. These grounds are included in the information and the warrant authorizes that it may be executed by night.

From common law a “knock and announce” policy is applicable to all searches, with or without warrants except for exigent circumstances. The police must announce their presence by ringing the doorbell or knock on the door, identify themselves as law enforcement police officers, state their lawful reason for entering and request permission to enter. Only if permission is denied may they enter without permission.²³⁸ In *R.v. Feeney*²³⁹ the knock and announce policy was imported as a requirement for a reasonable search under s. 8 of the *Charter*. Accordingly, if there are no exigent circumstances and the police do not announce their presence it may render the search unreasonable. Situations acknowledged as exigent include fear of safety for persons within the premises, possible destruction of evidence and at times concerns for officer’s own safety.²⁴⁰ A case discussed above *R.v. Genest*²⁴¹, concerns both the lack of announcement as well as

²³⁴ Boucher and Landa, supra note 127 at 189

²³⁵ *Hunter v. Southam*, supra note 167

²³⁶ C. Hill, S. Hutchinson, and L. Pringle, “*Search Warrants: Illusion or Protection*” (1999), 28 C.R. (5th) 89.

²³⁷ *Criminal Code*, supra note 214 at s. 471.1(7)

²³⁸ Boucher and Landa, supra note 127 at 195

²³⁹ *R.v. Feeney*, supra note 203 at para 50

²⁴⁰ *R.v. McAllister*, [2000] B.C.J. 963 (S.C.)

²⁴¹ *R.v. Genest*, supra note 212

excessive use of force. Which was discussed at great length in *R.v. Genest*. The police is authorized to use force if required to ensure officer safety as long as the force is both subjectively and objectively reasonable. The evidentiary onus is on the police to justify the use of force and its extent in the circumstances of the case at the bar. In *R.v. Genest* the Court found that even though the force used by the police objectively was reasonable, the officers did not emphasize the facts motivating the use of force.²⁴² Since the officers themselves did not provide the court with a justification of the use of force, it was not reasonable.

10.4 Warrantless searches

In reality, the majority of warrantless searches are prima facie unreasonable, if the accused can show that the state conducted a search without a warrant the onus is on the prosecution to demonstrate that the search was in fact reasonable.²⁴³ There are exceptions in the Criminal Code in respect of specific offences such as impaired driving; s. 339(3) and weapons; s. 199(2). Moreover, there are recognized exceptions authorized by common law. The four recognized exceptions are: searches on consent, searches conducted incident to arrest, searches incidental to investigative detentions and seizures authorized under the plain view doctrine. The only one of relevance to this thesis is searches on consent. The core of search and seizure law is a non-consensual interference by the state with an individual's privacy. If the individual consents to a search, it falls outside the scope of s. 8 of the *Charter*.²⁴⁴ In *R.v. Wills*²⁴⁵ the Ontario Court of Appeal, explained how crucial it is to ensure that the consent was genuine. The prosecution bears the onus to demonstrate that the person waiving his right was informed. Doherty J.A. also set out criteria as to what constitutes an informed consent.

- An implied or expressed consent was given.
- The giver of the consent had the authority to do so.
- It was voluntary, not given because of police oppression, coercion or other external conduct.
- The person giving the consent was aware of the nature of the police conduct he or she was being asked to consent to and was aware of the right to refuse.
- The giver of the consent also knew the potential consequences it.

²⁴² Such as dangers dogs were present as well as the fact that the home was a well-known Hells Angels hangout.

²⁴³ *Hunter v. Southam*, supra note 167

²⁴⁴ *Boucher and Landa*, supra note 127 at 220-221

²⁴⁵ *R.v. Wills* (1992), 70 C.C.C. (3d) 529 (Ont. C.A.)

11 Police Training

In Sweden the police training constitutes of four fulltime semesters²⁴⁶ and one semester of work experience at a police authority. The training does not stop there, further training sessions are regularly carried out. The education at the police academy is problem orientated; examples and problems arising in a police officer's day-to-day work are used in the lessons. A number of different subjects are integrated throughout the education. Subjects such as law, behavioural science, police knowledge as well as more practicable subjects such as driving, learning to use a weapon and dealing with conflicts are all part of the education.²⁴⁷ The correct applications of the legal principles are important in a police officer's work. During the first semester, the students are introduced to the principle of legality, to right from the start know that as a police officer they cannot do anything unless it is prescribed by law. The remaining of the legal principles are in focus the second semester. Throughout the education on the means of compulsion, the teachers make the students aware of the fact that the use of a mean of compulsion is a limitation of both RF and the European Convention. The rules concerning search and seizure arise for the first time in the second semester for simple crimes. The following semester provides the students with in-depth training on search and seizure regulations. Theory as well as practise is integrated in the education. This form of training makes it quite natural that questions such as what the consequences would be if the student makes a mistake. For example, if the student had conducted a search when there was no exigent circumstances, such as those intended in 28:5 RB. In the fourth and last semester, the students receive education on the crime of misuse of office.²⁴⁸

The basic police training in Canada is five months to get the new police officers out on the streets. There is an ongoing training of the officers with speciality courses as they advance within the service. It is hard to give an in-depth description of the police training because there are both federal, provincial and city police forces. The officers who write the search warrant affidavits are nowadays well trained and the affidavits they submit to the impartial justice are carefully written, stating the grounds and why they are reasonable and probable. The more serious the offence or the more extensive the search is, a senior officer especially trained in writing warrants, writes the warrant affidavit. The enactment of the *Charter* has resulted in a substantially improved search and seizure law in Canada. The warrants are better now, more carefully prepared and they have to be in order to qualify as being reasonable under s.8 of the *Charter*.²⁴⁹

²⁴⁶ 20 weeks per semester

²⁴⁷ <http://www.polisen.se/inter/nodeid=3412&pageversion=1.html> 2006-10-11

²⁴⁸ Telephone interview with Peter Skoglund responsible for the legal training at the Police Academy in Växjö. 0470-708373, 2006-10-17 12.29-12.37

²⁴⁹ Telephone interview with Professor Michael Code of the Faculty of Law at University of Toronto, +1 416-978-2677, 2006-11-24 17.09-17.21

12 Analysis

When the Swedish police wait at the doorbell, are their Canadian colleagues already in the hallway? I chose this title because I believe it is a common misconception that Canada and the United States are identical in terms of their attitudes towards crime prevention. Why would the Canadian police ignore the rules when it may result in the exclusion of evidence? Would not the Swedish police have more to gain by not ringing the doorbell, since their evidence is admitted even if they ignored the regulations? There is an incentive in Canada to discover mistakes made by the police since it may benefit the accused and the defence counsels always make sure there are no possible *Charter* violations when preparing the defence. I do not think a Swedish counsel hardly ever consider possible violations of his or her client's RF rights.

Canada has a policy of "knock and announce", they have to announce their presence and that would make it more likely that the Canadian police ring the doorbell. The Canadian police used to have a blanket police for "no-knock" when conducting searches for drugs; but according to the Supreme Court of Canada, it is not justified under the *Charter*. In Sweden, the police will ring the doorbell unless it is believed to damage their chances of obtaining evidence. If they have a warrant to search an apartment for drugs, they normally call the landlord of the building and make an appointment with him or her to let them in to the apartment, instead of ringing the doorbell.

12.1 RF and the Charter

It is interesting to note that the wording of 2:12 2nd paragraph RF and s.1 of the *Charter* are almost identical. Deviations from the rights and freedoms can only be made if prescribed by law and the limitations are acceptable in a democratic society. Sweden and Canada share the same ground but have different approaches to which limitations are acceptable in a democratic society.

In my point of view after writing this thesis and after attending a number of classes in Canadian criminal law, I believe the Swedish RF to be somewhat weak. A Constitution ensuring the protection of the citizens of the Sweden against basic human rights and freedoms should contain some sort of remedies for the citizens. If a Swedish citizen's rights and freedoms are violated the option available is to make an application to JO. As we have seen in the small area of unlawful searches of a person's home in Sweden, the application to JO normally results in critic to the prosecutor or the police. A critic they can choose not to act upon, since JO's critic is not in any way binding to the public authority concerned. Resulting in the remedy available to the Swedish citizens is that they have to pay by means of taxes to have an inquiry made if their right was violated or not. Even if their right

was violated according to JO, that is the end of the story. They get a decision that their right was violated but besides that, nothing. However, there is a possibility under tort law to receive damages if the public authorities have abused their powers, but it is not common. On the other hand, the reason might be that there really are not any cases serious enough to award damages. The exclusion of evidence only protects the accused and offers no remedies for the plaintiff or other persons who may have been subjected to unlawful searches. Under tort law, everyone is protected and may be rewarded damages, and everyone has standing at JO.

With the enactment of the Canadian *Charter*, the Canadian citizens' protection against arbitrary state interference was strengthened. The remedies available under the *Charter* are open to those affected by the violation and when the violation concerns a search and seizure violation, it may affect the trial of the accused. One might ask oneself if the criminal trial is the right forum to discipline the police. The offence misconduct of officers executing process is found in section 128 of the Criminal Code but from what I can gather from case law, it is a provision rarely used. Would it not be more appropriate if the police officer making the mistake suffered the consequences? In the end, it is the victims of the crime who suffer, if their perpetrator gets off on a technicality. However, as Lamer J. expressed it in *R.v. Collins*, s. 24(2) of the *Charter* is not intended to be a remedy for police misconduct. "The purpose of s. 24(2) is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. The further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies."²⁵⁰

The Court wants to dissociate itself from the conduct of the police and may therefore exclude evidence when there is a fear that the administration of justice would be brought in disrepute. It is not easy to exclude evidence because of a *Charter* violation, there are numerous cases where a breach has been established when the Court has not excluded the evidence. The administration would be brought in further disrepute if the evidence was excluded. The overall confidence in the criminal justice system is what the Court wants to protect. It may sound harsh that an accused who was found with drugs can get acquitted if the drugs were found because of a *Charter* violation. In cases, such as this, the drugs may be excluded if the police used methods contrary to the *Charter* to find the drugs when they could have used lawful methods. It is harder to exclude real evidence than self-incriminated statements. In reality, the police have to do something flagrant to exclude the evidence because of a search-and-seizure violation. However, real evidence does get excluded, and I am not convinced that letting an obviously guilty accused walk out of the courtroom a free man, is the best way to ensure the public's confidence in the criminal justice system. However, it may be necessary to ensure that the Canadian police do their job

²⁵⁰ *R.v. Collins*, supra note 138 at 16

correctly, since the basic police training in Canada is considerably shorter than in Sweden. Another risk with the strong rights given to the accused in the *Charter* is that the defence lawyers can be more concerned with finding a *Charter* violation than focusing on how to defend their client in the best possible way. The Court have to be careful not to let the trial turn into a trial of possible *Charter* violations instead of determining if the accused is guilty or not of the crime charged.

12.2 Written warrants

In Sweden when the police knock on the door, they do not have a piece of paper to show why they are there and what they are authorized to do. Peter Skoglund said that many people do in fact ask if the police do not a piece of paper stating why they have the right to search the house or apartment. In addition, JO receives complaints every year from people who question why the police did not have a paper warrant with them. The Constitution, and more specifically RF, protect Swedish citizens from house searches and can only be infringed if authorized by law. It seems extraordinary that when the public authorities exercise this right, there is no need to have a written order. There is a great deal of trust entrusted in the Swedish police officers. They are only human, and humans make mistakes, would it not better if the police officer actually had a piece of paper in his or her hand stating exactly what the purpose of the search is? Especially since the right to be protected against house searches is protected under RF. There are 43 prosecution authorities in Sweden and as a result there are not a prosecutor in every city were there is a police station. It would be inefficient and impractical if the police officer had to go personally to obtain a written warrant. I do not believe we have to fear that a prosecutor grant warrants on weak grounds since they are liable for any mistakes made during the execution of the warrant. It is also the prosecutor who has to stand before the court and defend a bad warrant. Besides, because of the low number of search warrants which have been criticised, the Swedish police seem to follow the instructions given by the prosecutor.

I can relate to why the issuing of warrants has to be done in the way they are done in Canada, with an impartial judicial person granting the warrants on sworn evidence. Because of the *Charter*, it is necessary. Since a possible violation of the *Charter* can result in the exclusion of evidence, it would not be feasible if the police themselves determined the limits to the warrant. They need specially trained police officers in charge of writing the warrants, a junior officer simply cannot have enough knowledge of search and seizure regulations. Since the basic training of Canadian police officers is much shorter than the Swedish this might have something to do with the fact that the Canadian police do make mistakes in the execution of warrants. However, it seems to be that the junior officers out of training are put out on the streets to make the community feel safer and are not involved in searches of suspect's homes. It is interesting to note that Professor Michael Code believes the police has almost become too good at writing warrant

affidavits, the affidavits tend to contain more than is necessary to show reasonable and probable grounds.

A Canadian warrant provides a time parameter for the execution of the warrant. In Canada, an impartial justice grants the warrant on a specific number of circumstances and a time limitation is necessary since the circumstances may change. In Sweden, the investigation leader grants the warrant and he or she should therefore (at least in theory) know as soon as the circumstances change. As a result, it is not necessary to have a time parameter in Sweden.

12.2.1 Grounds to obtain a warrant in the two systems

In Sweden, there must be reason to believe an offence punishable with imprisonment has been committed. The premises of a person reasonably suspected of the crime may be searched to look for objects and to detect information of potential importance to the crime. A warrant is always granted for a specific offence. In Canada, the police has to obtain a warrant issued out a court, by a judicial person and the application has to be based on sworn evidence. The justice has to believe on reasonable grounds, that there is evidence to be found and that this evidence will afford evidence of the offence. A warrant to search a person's home does not give the police any authorization to search any persons present.

One of the differences with the grounds to obtain a warrant in the two systems is that in Sweden the police does not have to believe on reasonable grounds that there is evidence present it is sufficient to have reason to believe that an offence punishable with imprisonment has been committed. If the offence is not punishable with imprisonment, the Swedish police cannot search a person's home. In Canada, on the other hand, there is no limitation of what sort offence the warrants concern, it is the same procedure no matter how serious the offence is and there does not have to be a person suspected for the offence to obtain a warrant.

12.3 Exigent circumstance in the two countries

The interests at stake are the same in the two countries, crime prevention vs. personal integrity. Exigent circumstances under Swedish law are situations when a delay of the search would entail risk. There is no legal definition of what constitutes a delay entailing risk but according to Gösta Westerlund a reasonable definition would be that the purpose of the action would be lost if the action was not taken immediately. Possible scenarios could be if there is a fear for destruction of evidence or safety reasons. The 21§ of the Police Act gives the police the right to enter if there is reason to believe a person is deceased, unconscious or unable to call for help. I presume the police has a well-established practice which situations the police can do a warrantless

search due to exigent circumstances. Since warrants in Sweden are authorised over the phone with no need of a record, in the majority of situations the police should have time to obtain a warrant.

In Canada, the Criminal Code s. 487.11 gives the police the right to search premises even without a warrant if it would be impractical to leave the scene in order to obtain a warrant. The grounds for obtaining a warrant have to exist. The Supreme Court has accepted four situations when the police can perform warrantless searches, the need to secure and preserve evidence, when there is a risk to public or officer safety, respond to an emergency call and cases of hot pursuit. The Canadian exigent circumstances are regulated and the case law provides the police with numerous examples of what constitutes exigent circumstance. I believe both countries use exigent circumstances in similar situations, it is just harder for persons outside of the police force to know about the sort situations the Swedish police view as exigent circumstances. One difference seems to be that in Sweden, it is enough with the existence of an exigent circumstance but in Canada, the exigent circumstance is just a precondition to make the search reasonable, in addition, the grounds to obtain a warrant have to exist.

12.4 Concluding remarks

JO could learn from the Supreme Court of Canada and take a stronger stand against unlawful actions by Swedish authorities. As an example, JO's view in JO 1991/92 p 44²⁵¹ where he abstained from prosecuting because he did not believe any substantial individual or public interest was disregarded. Is it not a textbook example of when both the individual and the public interest are disregarded? RF 2:6 protects us against searches of our houses and when a public authority disregards this right, it certainly is in the individual concerned and the public interest to have this person punished. It may lead citizens to believe it is irrelevant if an unlawful search has been conducted or not since JO abstains from prosecuting. It affects the overall confidence in the criminal justice system when a citizen's RF right is violated and JO abstains from prosecuting.

In another case from JO, "the apartment shots"²⁵², the whole situation could easily have been avoided if a more careful check up of the information had been made. In some ways it is comparable to *R.v. Golub*²⁵³ where the police received a call about a person who had an uzi machinegun, they contacted the informant and then the neighbours, before they evacuated the building. They even called Golub and requested him to come outside so they could arrest him. The Swedish police could have done all of the above but instead they went out of their way not to check the information they had received. Especially noteworthy is that upon being asked what offence they were investigating Björk could not state what it had been.

²⁵¹ See above under 4.1.1

²⁵² JO 1993/94 p 43

²⁵³ *R.v. Golub*, supra note 199

The Canadian Criminal Code is very detailed and does not leave much room for interpretation. The Canadian Parliament wants to ensure that the courts cannot interpret the statutes as they wish but are bound by the intentions of Parliament. Because of the preparatory work in Sweden being a source of law, Parliament does not have such detailed statutes. The interpretations they wish the courts to use are found in the preparatory work and can be quite explicit.

Finally, evidence law is necessary in a common law jurisdiction because of the jury system. We would not find it appropriate to have our nämndemän determining guilt if we did not have a judge instructing them how to properly assess and weigh evidence. I do however, worry that evidence obtained in an illegal manner by the police can be admitted at the criminal trial. In my research, I have however, not found evidence of the Swedish police, using illegal methods simply because they know the evidence can be admitted at the trial despite being obtained in an illegal manner. Let us hope the Swedish police force stand on the solid moral ground we believe them to do. To conclude as it turns out in reality, the Canadian police ring the doorbell while their Swedish colleagues are already in the hallway.

Supplement A

Questions asked to Peter Skoglund:

Is search and seizure a topic that only arises in one semester?

Do the students get a chance to use the theory in practice?

What sort of training do the students receive on the important legal principles?

On RF and the European Convention?

Are the students aware of the consequences of making an unlawful search?

Questions asked to Professor Michael Code:

In reality do the police have to do something flagrant to exclude the evidence because of a search and seizure violation?

What is the police training like?

What is your opinion on how the police methods has changed since the enactment of the *Charter*?

Bibliography

Literature

- Bertil Bengtsson, Erland Strömbäck**, *Skadeståndslagen en kommentar*, 104, Norstedts Juridik AB, 2 ed. 2006
- Susanne Boucher and Kenneth Landa**, *Understanding section 8: Search, Seizure, and the Canadian Constitution*, Irwin Law Inc. 2005
- F.A.R. Chapman**, *The law and You, A Layman's Guide to Canadian Law*, McGraw Hill Company of Canada Limited, 1970
- Ronald J. Deslie, Don Stuart**, *Learning Canadian Criminal Procedure*, 64, Thomson Carswell, 2003
- Per-Olof Ekelöf, Torleif Bylund, Robert Boman**, *Rättegång tredje häftet*, 28-29, Norstedts Juridik, 6th ed. 1994
- Per-Olof Ekelöf, Robert Boman**, *Rättegång fjärde häftet*, 21, Norstedts Juridik, 6th ed. 1992
- Peter Fitger**, Rättegångsbalken 1, 2nd book, looseleaf, Norstedts Juridik
- Kent Roach**, *Due Process and Victim's Rights: The New Law and Politics of Criminal Justice*, University of Toronto Press, 1998
- Hamish Stewart**, *Evidence A Canadian casebook*, Emond Montgomery Publications Limited, 2006
- The Bluebook**, *A Uniform System of Citation*, Harvard Law Review Ass. 2005
- Gösta Westerlund**, *Straffprocessuella tvångsmedel*, 124, Bruun, 2nd ed. 2005

Legislation

Canada

- Part 1 of the *Constitution Act*, 1982, Being schedule B to the *Canada Act* 1982 (U.K.), 1982, C. II, s. 8.
- The Constitution Act*, 1867 (U.K.), 30 & 31 Victoria, c. 3
- Controlled Drugs and Substances Act, 1996, C.19 [CDSA]
- Criminal Code*, R.S.C. 1985, c. C-46 Part 15

Sweden

- Brottsbalken [BrB] [Criminal Code] 1962:700 (Swed).
- Lag om ersättning vid frihetsberövande och andra tvångsåtgärder (Svensk författningssamling [SFS] 1998:714) (Swed.).
- Lag med instruktion för Riksdagens ombudsmän (Svensk författningssamling [SFS] 1986:765) (Swed.).
- Polislag (Svensk författningssamling [SFS] 1984:387) (Swed.).
- Regeringsformen [RF] [Instrument of Government] 1972:152 (Swed.).
- Rättegångsbalken [RB] [Code of Judicial Procedure] 1942:740 (Swed.).
- Skadeståndslagen (Svensk författningssamling [SFS] 1972:207) (Swed.).

Public Documents

Propositions

Proposition [Prop.] 1988/89:124, [government bill] Om vissa tvångsmedel (Swed.).

Proposition [Prop.] 1974:97 [government bill] (Swed.).

NJA II 1943 p. 371 Processlagsberedningen

SOU

Statens Offentliga Utredningar [SOU] 1995:47, *Tvångsmedel enligt 27 och 28 kap. samt Polislagen*, Slutbetänkande av Polisrättsutredningen [government report series] (Swed.).

Statens Offentliga Utredningar [SOU] 1984:54, *Tvångsmedel, anonymitet, integritet*, Betänkande av tvångsmedelkommittén, [government report series] (Swed.).

Statens Offentliga Utredningar [SOU] 1938:44 *Processlagberednings förslag till ny rättegångsbalk II*, [government report series] (Swed.).

Konstitutionsutskottet [KU] [Constitutional committee] 1975/76:22

Public authority decisions

JK 2004-01-21 Dnr 1219-03-40

JK 2001-05-08 Dnr 45-01-41

JO 2003/04 p 91

JO 1998/99 p 59

JO 1993/94 p 43

JO 1993/94 p 92

JO 1991/92 p 44

JO 1990/91 p 63

JO 1988/89 s 68

JO 1988/89 p 60

JO 1988/89 p 47

JO 1985/86 p 151

JO 1969 p 87

JO 1975/76 p 132

Other sources

C. Hill, S. Hutchinson, and L. Pringle, “*Search Warrants: Illusion or Protection*” (1999), 28 C.R. (5th) 89.

The Swedish Judiciary - a Brief Introduction, brochure published by the Ministry of Justice, 2000

Rikspolisstyrelsens föreskrifter och allmänna råd om ledning av förundersökning i brottmål, RPSFS 2005:11, FAP 403-5

Internet sources

The website of Canadian Legal Information Institute at <http://www.canlii.org/> last visited 2006-12-06

The website of the Government Offices of Sweden at <http://www.sweden.gov.se> last visited 2006-12-06

The website of the Chancellor of Justice at www.jk.se last visited 2006-12-06

The website of the Parliamentary Ombudsmen at <http://www.jo.se/> last visited 2006-12-06

The Swedish police website at <http://www.polisen.se/inter/nodeid=3412&pageversion=1.html> last visited 2006-12-06

Interviews

Telephone interview with Peter Skoglund responsible for the legal training at the Police Academy in Växjö. 0470-708373, 2006-10-17 12.29-12.37

Telephone interview with Professor Michael Code at the Faculty of Law at University of Toronto, +1 416-978-2677, 2006-11-24, 17.09-17.21

Table of Cases

Canada

R.v. Askov (1990) 59 C.C.C. (3d) 449 (S.C.C.)
Baron v. Canada, (1993), 78 C.C.C. (3d) 510 (S.C.C.)
R.v. Belnavis (1996), 107 C.C.C. (3d) 450 (S.C.C.)
R.v. Burlingham (1995) 97 C.C.C. (3d) 383 (S.C.C.)
R.v. Collins (1987) 33 C.C.C. (3d) 1 S.C.C.
R.v. Debot, (1989), 52 C.C.C. (3d) 193 (S.C.C.)
R.v. Dedman (1985), 20 C.C.C. (3d) 97 (S.C.C.)
R.v. Dersch (1993), 85 C.C.C. (3d) 1 (S.C.C.)
R.v. Duong, (2002), 162 C.C.C. (3d) 242 (B.C.C.A.)
R.v. Edwards (1996), 104 C.C.C. (3d) 136 (S.C.C.)
R.v. Feeney, (1997), 115 C.C.C. (3d) 129 (S.C.C.)
R.v. Garafoli (1990), 60 C.C.C. (3d) 161 (S.C.C.)
R.v. Genest (1989), 45 C.C.C. (3d) 385 (S.C.C.)
R.v. Godoy (1998), 131 C.C.C. (3d) 129 (S.C.C.)
R.v. Goldhart (1996), 107 C.C.C. (3d) 481 (S.C.C.)
R.v. Golub, (1997), 117 C.C.C. (3d) 193 (Ont. C.A.)
Hunter et al. v. Southam Inc. (1984) 14 C.C.C. (3d) 97 (S.C.C.)
R.v. Kutynec (1992), 70 C.C.C. (3d) 289 (Ont. C.A.)
R.v. Lewis (1998), 122 C.C.C. (3d) 481 (Ont. C.A.)
R.v. McAllister, [2000] B.C.J. 963 (S.C.)
R.v. Mills (1986), 26 C.C.C. (3d) 481 (S.C.C.)
R.v. Plant (1993), 84 C.C.C. (3d) 203 (S.C.C.)
R.v. Pugliese (1992), 71 C.C.C. (3d) 295 (Ont. C.A.)
R.v. Silveria (1995). 97 C.C.C. (3d) 450 (S.C.C.)
R.v. Simpson (1993), 79 C.C.C. (3d) 482 (Ont. C.A.)
R.v. Stillman (1997), 113 C.C.C. (3d) 321 (S.C.C.)
R.v. Strachan (1988), 46 C.C.C. (3d) 479 (S.C.C.)
R.v. Therens (1985) 18 C.C.C. (3d) 481 (S.C.C.)
R.v. Wills (1992), 70 C.C.C. (3d) 529 (Ont. C.A.)
R.v. Wise (1992), 70 C.C.C. (3d) 193 (S.C.C.) at 219

England

R.v. Waterfield, [1963] 3 All E.R. 659, [1964] 1 Q.B. 164 (C.C.A.)

Sweden

Nytt Juridiskt Arkiv [NJA] [Supreme court] 2005-06-09 p. 462
Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2003-05-08 p.323
Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1996-10-17 p. 577
Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1992-06-02, p. 310

European Court of Human Rights

Khan v. United Kingdom, 12 May 2000,
Niemietz v. Germany, 1992-12-15, ser. A nr. 251-B
P.G. and J.H. v. United Kingdom, 25 Sep. 2001

Schenk v. Switzerland 25 Feb. 1988, ser. A nr 140