

February 27, 2013

A Charter Right to Search Google™*

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Decision considered:

R v McKay, [2013 ABPC 13](#)

The Internet has transformed society in so many ways. Even the ways we find information and the sources we rely upon have been fundamentally transformed. It appears our legal systems need to adapt to this new reality.

In *R v McKay*, [2013 ABPC 13](#) (CanLII) the Alberta Provincial Court had the occasion to consider these issues in the context of a charge under the Criminal Code. The accused had been pulled over, a breathalyzer was applied and then he was taken to the police station. At the police station he was given a toll free number, to the Yellow Pages and the 411 service.

The accused made a toll free call but was not satisfied with it and did not realize he still had a right to counsel. After further testing was done on the accused he was charged under s. 253(1) (a) and 253(1) (b) of the Criminal Code.

In a *voir dire* proceeding the accused alleged a breach of his rights under Sections 7, 8 and 10 of the Charter of Rights and Freedoms and specifically that he was not given a reasonable opportunity to exercise his right to counsel and that the accused was not provided with a full range of resources and access to sources of information which reasonably were or ought have been made available to him to contact a lawyer, including internet access.

In assessing the evidence before the Court Judge Lamoureux stated:

We are at an unprecedented time in human history. The real world exists parallel to and in tandem with the virtual world. It is uncontroverted that the vast majority of individuals born after the year 1980 first look to the virtual world for information, for education, for access to services, before they consider access to anachronistic services such as paper telephone directories and numbers posted on a wall. The computer generation considers the internet, the cell phone, the iPad, the Smartphone, essential partners in daily life. The average 19 year old looks to Google as a source point for much of the information necessary to carry on daily life. Google mapping, driving motor vehicles with the assistance of Google, access to restaurants, access to medical care, access to Universities and educational information, and access to lawyers, along with millions of other items of information are all contained on the metasource – Google. Indeed Google seeks as one of its missions to become the source of original information for the world.

So what happens when a 19 year old is arrested and has never faced the prospect of trying to get legal advice before providing potentially incriminating evidence to a police officer? This Court takes judicial notice that the average 19 year old will look to the internet for information to get legal advice before checking White Pages, Yellow Pages or 411. In fact the accused himself has testified that he did not at the material time, even know what 411 was.

The evidence before the Court was that the 19 year old accused's primary means of seeking information on services he did not know was to use the Google™ search engine. The evidence showed that had the accused had access to the internet and done a search he would have come up with the names of numerous experienced top Calgary criminal defense lawyers including addresses, telephone numbers, email addresses and other educational information concerning the services they provide. The Court also noted that the information on Google™ may be more current and more detailed than a name and a phone number in the Yellow Pages, the White Pages, 411 or the toll free number.

The Honourable judge found at s. 10(b) Charter breach had been established. She stated:

S. 10(b) of the Charter impresses both informational and implementational duties on police who arrest or detain an individual. The informational duty was satisfied in this case. The implementational is indeed two fold as the Crown indicates in its excellent written Brief. The first implementational duty is “to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstance)”. *R. v. Bartle*, [1994 CanLII 64](#) (SCC), (1994) 92 CCC (3d) 289 (SCC), at 301. The second implementational duty is to “refrain from eliciting from the detainee until he or she has had a reasonable opportunity (again except in cases of urgency or danger).” *R. v. Bartle, supra*.

The Court noted that the question of what is a reasonable opportunity is contextual and fact specific. In this case and with this young tech savvy accused the Court found that:

[the] accused was not given a reasonable opportunity to exercise his right to access a lawyer, by failure of the police to provide concurrent access to the internet along with 411, the toll free number and the paper telephone directory. In the year 2013 it is the Court’s view that all police stations must be equipped with internet access and detainees must have the same opportunities to access the internet to find a lawyer as they do to access the telephone book to find a lawyer.

So, the transformative changes of the internet and the coming of age of an internet savvy generation will affect traditional approaches of how an accused can exercise her or his Charter rights.

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