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<p>CRIMINAL PRACTICE MANUAL A Practical Guide to Handling Criminal Cases Release No. 3, April 2024</p>

This manual will assist the criminal law practitioner, whether defence counsel, Crown counsel, judge or law enforcement officer, with a quick understanding and approach to frequently encountered problems. Topics covered include statutory interpretation, investigation, rights and powers; the trial process — from investigation to trial; evidence, legislative compliance with the Constitution, and appeals.

This release features updates to Chapter 1 Commission of the Alleged Offence, Chapter 2 Investigation: Rights and Powers, Chapter 3 The Trial Process — From Investigation to Trial, Chapter 4 Evidence, and Chapter 5 Remedies.

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Case Law Highlights

- **Investigation: Rights and Powers — Powers of the State — Power of Search or Seizure — The Section 8 Protection — The Privacy Interest:** The accused lost control of his vehicle and crashed. One passenger died and other passenger was injured. The police had the vehicle searched for the Airbag Control Module (ACM) without a warrant. A warrant was later obtained for downloading the data from the ACM. The trial judge found a breach of s. 8 of the *Charter* and imposed a s. 24(2) *Charter* remedy of exclusion of the ACM and its data, thus acquitting the accused. In dismissing the Crown's appeal, the Court found it was reasonable to accept that the expectation of privacy in a vehicle's interior extended to the ACM. There was a presumptive violation of s. 8, and the Crown did not rebut this presumption. The trial judge concluded correctly that the Crown failed to establish that the search and seizure was authorized by law. When the police engage in criminal investigation they cannot enter and conduct a warrantless search of the interior space where a person enjoys a reasonable expectation of privacy, whether that be at home, office, or vehicle, in hope of discovering evidence. The police did not have the accused's consent, did not have a warrant, did not have reasonable grounds to believe that a crime had occurred, did not have exigent circumstances, and were merely searching for evidence of a possible crime: *R. v. Genge*, 2023 NLCA 35, 2023 CarswellNfld 300 (N.L. C.A.).
- **The Trial Process — From Investigation to Trial — The Trial — Voir Dire; Evidence; Verdict; Motions — Crown's Closing Address:** The accused was convicted of an historical sexual assault and sexual interference against his stepdaughter. On appeal it was held that in closing submissions to the jury, Crown counsel should not have recounted an anecdote about a personal childhood memory that had no connection to the evidence. Nonetheless, it was determined that Crown counsel's improper anecdote did not render the accused's trial unfair. At issue before the jury was veracity and accuracy of complainant's memory of events relating to sexual assaults she allegedly suffered as child. While improper comments of Crown counsel were potentially serious as they touched on core issue at trial, the context of the anecdote considerably limited its prejudicial effect. The anecdote was not about the offence or about conduct comparable to the substance of allegations at issue and was not a prominent feature of the Crown's closing address. Failure of defence counsel to object to the anecdote, while not dispositive, was a factor to be considered in measuring the impact on trial fairness on

appeal. Trial judge cautioned the jury not to consider what counsel said as evidence. Trial judge's observation that jury members should use their "common sense understanding of how memories operate" was consonant with idea that, although improper, Crown's anecdote should be read in that light. Nothing suggested that charge did not achieve its purpose to properly equip jury in circumstances of trial to decide case according to law and evidence: *R. v. B.E.M.*, 2023 SCC 32, 2023 CarswellAlta 3066 (S.C.C.).

- **Remedies — Charter Remedies: Sections 24(1) and 24(2) — Section 24(2) — Excluding Evidence — The Test for Exclusion — Seriousness of Breach:** An unlawful arrest that is a consequential breach must be factored into the first and second stages of the s. 24(2) analysis, but is unlikely to significantly impact the overall seriousness of the *Charter*-infringing state conduct. When additional rights and breaches of those rights are factored into the s. 24(2) analysis, there will necessarily be a more significant impact on the accused that is therefore relevant to the analysis. where a court finds that an arrest is made in breach of the *Charter*, it will be necessary to consider such a breach in the s. 24(2) analysis, including the impacts on the accused's *Charter*-protected interests. Having determined that the arrests and the incidental searches constituted breaches of ss. 8 and 9 of the Charter, those breaches must be factored into the s. 24(2) analysis: *R. v. Zacharias*, 2023 SCC 30, 2023 CarswellAlta 2950 (S.C.C.).

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