CRIMINAL LAW CORNER:
Case Summary and Comment on *R v Major*, 2022 SKCA 80

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Everyone has the right to be secure against unreasonable search or seizure. Except not everyone is secure against the seizure of the airbag control module (the "ACM") and the accessing of the Event Data Recorder (the "EDR") from a vehicle when the vehicle has been lawfully seized or is the process of being seized as there is no reasonable expectation to territorial privacy. Further, there is no reasonable expectation to informational privacy with respect to the ACM and EDR data as it reveals nothing personal about an individual. However, to admit into evidence EDR data and the output of the data created by the Bosch Crash Data Retrieval software (the "CDR") requires an expert to ensure threshold reliability is met.

The accused drove his truck through a highway intersection and struck a semi truck. Three of his passengers died and the other three suffered serious injuries. The police seized the ACM and accessed data from EDR using the CDR without consent and without a warrant. The accused was charged with dangerous driving and criminal negligence offences. After a trial by judge and jury, he was convicted of all the offences in relation to each of the six victims. The convictions were overturned on appeal.

ACM and EDR Data and Section 8 of the *Charter*

The accused asserted that the police breached his section 8 *Charter* rights in two ways:

(a) By entering his vehicle and removing the ACM; and
(b) By accessing and imaging the data contained on the EDR.

Justice Tholl, writing for the majority, found that this is an issue of territorial and informational privacy – intrusions into private homes or vehicles, and the control of how, when, and what information about them is made available to others.

There are two lines of authorities concerning the reasonable expectation of privacy afforded to ACM and EDR data.

The first line of cases follow *R v Hamilton*, 2014 ONSC 447 [*Hamilton*] – there was a reasonable expectation of privacy with respect to the interior of the vehicle and the data in the ACM because (1) the owner of the vehicle owned the subject matter, (2) the accused knew it existed and believed the police needed consent or a warrant to access it, (3) the accused had a direct interest in the data and intended it to be private, (4) the reconstructionist trespassed when entering the vehicle, (5) there was a high expectation of privacy given what the data revealed, the reasons it was collected, and how it was to be used, and (6) the data was qualitatively different from what could be observed by a member of the public and is not in public view. The court rejected the argument from the Crown that an accident negates privacy, noting that then the police would be able to search all vehicles in a collision without limit.

The Court of Appeal explained that several cases from Ontario and Alberta have since held that the police can only enter a vehicle and access the EDR data either with the consent of the owner or with a warrant (*R v*

> **... As for informational privacy, the data revealed no personal identifiers or details at all and was not invasive of the accused's life because it was anonymous mechanical driving data.**

Glenfield, 2015 ONSC 1304 [*Glenfield*]; *R v Attard*, 2020 ONCJ 108; and *R v Yogeswaran*, 2021 ONSC 1242 [*Yogeswaran*]).

However, Justice Tholl made it clear that in *Yogeswaran*, the court explained that they would take a different approach from *Hamilton*, *Glenfield*, and *R v Fedan*, 2016 BCCA 26 [*Fedan*] leave to appeal to SCC refused, to conclude that s. 8 was infringed upon as neither Hamilton nor *Glenfield* had the vehicle seized pursuant to s. 489(2) of the *Criminal Code*. The court stated that where a vehicle has not been seized, the owner or driver enjoys a reasonable expectation of privacy in the vehicle, which automatically engages their s. 8 *Charter* rights. Thus, once those rights are engaged, it did not matter whether the accused maintained an informational privacy interest in the subject evidence. Similarly, *R v Patterson*, 2020 ONCJ 536 concluded that a lawful seizure of a vehicle extinguishes a territorial privacy interest, but informational privacy in the EDR data survives such.

In *Fedan*, the court declined to follow *Hamilton* concluding that no informational privacy interest could exist at all in the ACM's data since no information could be gleaned from that device that revealed any intimate details about the accused or any person driving the vehicle. The vehicle had been seized pursuant to section 489(2) of the *Criminal Code* so there was no territorial issue.

Justice Tholl turned to his own analysis:

(c) **Subject matter of the search and seizure** – the data from the EDR and the ACM were the subject matters;

(d) **Interest in the subject matter** – the interest was weak at the point of search and seizure because the vehicle was on the side of the road in a state complete destruction, was seized or going to be seized, and the accused had no idea that the subject matter existed;

(e) **Subjective expectation of privacy** – absent evidence to the contrary, the accused is presumed to have a subjective expectation to privacy with respect to the subject matter;

(f) **Objectively reasonable expectation of privacy** – The claim to territorial privacy was weak. The state of the vehicle, the loss of control over it (as it was going to be seized or had already been), the nature of the ACM as a mechanical safety component installed by the manufacturer, and the focused task by the officer in locating and removing the ACM did not support the existence of objectively reasonable territorial privacy.

As for informational privacy, the data revealed no personal identifiers or details at all and was not invasive of the accused's life because it was anonymous mechanical driving data. The accused could not have wanted to keep his manner of driving private given that there were other occupants of the vehicle, and he was using public roadways. The accused could not have reasonably intended that information related to the last five seconds of his vehicles various mechanical and electronic components immediately before a catastrophic collision would be private.

Justice Tholl elected to follow the reasoning in *Fedan*. Ultimately, on the standard of correctness, Justice Tholl found that the search and seizure was not a violation of section 8 of the *Charter*.

Admissibility of Evidence Generated from the EDR Data

Justice Tholl found that the CDR output was precisely the type of computer-generated information that requires expert evidence to establish threshold reliability of the generating technology and the resultant output.

The Bosch CDR software is not commonplace such as Microsoft Excel or well-accepted technology like a photocopier or iPhone. Lay people understand these technologies and they feel comfortable with their reliability based on their routine usage. The EDR data is created using a process unknown to the average person, is not accessible by an owner of the vehicle or their mechanic, and can only be extracted with highly specialized third-party software. In this case, there was no evidence as to how the data was gathered, what margin of error might exist, what circumstances could influence its accuracy, whether the EDR component recorded information accurately, and anomalies found in the EDR data were not explained.

The EDR data and CDR output did "not fall into a category where sufficient indicia of reliability exist on the face of the item of technology such that it can be admitted into evidence without additional evidence that establishes its reliability" (para 91). A properly qualified expert was required for the CDR output to be admitted and therefore, it was an error to admit this evidence without establishing its reliability.

The Significance of the Error

The evidence of a speed of 137 km/hr, whose only source was the CDR output, was a key feature in this trial. It formed the pivotal basis for the report, speed was frequently referred to in the questions posed to the witnesses, and included in the charge to the jury.

Convictions were reversed and a new trial was ordered. ⚖