

Giving 'til it Bleeds: Blood Evidence in Driving Cases

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Blood, Sweat and Tears

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I. INTRODUCTION

From a practical point of view, most blood sample cases involve a police demand for blood samples after an accident, or some sort of a seizure by the police of hospital blood analysis records and/or blood samples taken by the hospital for medical purposes. Warrants or production orders to obtain hospital blood samples and hospital records have become more commonplace in recent years, even in cases where police-compelled blood samples have already been created.

I wish to thank Tim Foster for granting permission to use his 2006 LESA paper (Cst. Dracula's Impaired Investigation: He Wants Your Blood) as the foundation for this paper, and Jim Edgett of my office for general assistance in its preparation.

The purpose of this paper is to set out a brief overview of the relevant statutory provisions, together with some useful references to provide the practitioner with some initial guidance in litigating these cases.

First and foremost, the taking of blood samples is a significant intrusion on the physical integrity of the accused, and as such, the Crown must strictly comply with the authorizing legislation: **R. v. Pavel** (1989) 53 C.C.C. (3d) (Ont. C.A.). The taking of blood samples without proper authority is an unreasonable search contrary to s. 8 of the **Charter**, and until recently would generally have resulted in exclusion of evidence pursuant to s. 24(2) of the **Charter**: **R. v. Pohoretsky** (1987), 333 C.C.C. (3d) (S.C.C.) Post- **Grant** ([2009] S.C.J. No. 32), it remains unclear if this trend has changed.

The "warrant to obtain blood sample" (s. 256) will be dealt with first, as it provides a useful background against which the s.254 (3) demand and hospital seizures can be viewed, since these procedures are seen as "less intrusive".

II. WARRANTS TO OBTAIN BLOOD SAMPLES: CRIMINAL CODE SECTION 256

For some reason, these are relatively rare. If the accused is conscious, the police generally make a blood demand under s. 254(3) of the **Criminal Code**. If the accused is not conscious, the police generally just seize the blood samples taken by the medical personnel and/or the hospital blood analysis records pursuant to an ordinary search warrant or production order under s. 487 of the **Code**. This latter procedure is seen as being less intrusive. It is also not uncommon for the police to seek to obtain blood samples pursuant to a demand under s. 254(3) and then later also seize the hospital blood samples, as mentioned above.