JIBC

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

IMPAIRED DRIVING OFFENCES UP

According to its recently released report, Statistics Canada says over 90,000 impaired driving incidents were reported by Canadian police in 2011, about 3,000 more than the previous year. That's 2% higher than in 2010 and represents the fourth increase in the last five years. British Columbia had the most incidents of impaired driving followed by Ontario, Alberta and Quebec, while Nunavut had the least.

In 2010/2011 there were just over 48,000 cases completed in Canadian Courts where impaired driving was the most serious offence. This was 12% of all adult cases, the highest proportion of any offence. During this same period, 84% of impaired driving cases resulted in a guilty finding. This was 20% higher than the 64% finding of guilt in completed criminal cases generally.

Fewer convicted impaired drivers went to jail, however. About 8% of guilty impaired drivers were sentenced to custody. This is down from 14% a decade earlier. The average jail sentence for impaired driving was 33 days. In Prince Edward Island, 93% of adult impaired drivers were sentenced to custody but the median sentence was the lowest in the country at five days (except for Nunavut where no-one was given a jail sentence). Those convicted in Quebec were given the longest median sentence of 60 days.

Source: Statistics Canada, "Impaired driving in Canada, 2011", catalogue no. 85-002-X, released January 10, 2013.

Police Reported Impaired Driving Incidents

Area	Number	Rate change 2001 > 2011	% sentenced to custody	Median sentence length
BC	18,835	+49%	4%	30 days
ON	17,326	-28%	6%	30 days
AB	17,001	+4%	7%	30 days
QU	16,820	-18%	11%	60 days
SK	7,229	+2%	13%	34 days
MB	4,031	+7%	5%	data unavailable
NS	3,097	+16%	7%	30 days
NB	2,233	-9%	8%	30 days
NF	1,849	+69%	19%	30 days
PEI	719	+23%	93%	5 days
NWT	639	+58%	16%	30 days
YK	327	+1%	17%	45 days
NU	171	+16%	0%	-
Total	90,277	+2%	8%	33 days

See page 35

TEN EIGHT TURNS THIRTEEN

"In Service: 10-8" is now into its 13th year of publication. It started in 2001 and has become a popular read among Canada's law enforcement community, with readers in all of Canada's provinces and territories. With over thirteen hundred email subscribers, many of which share the newsletter with others in their organizations, we are also proud to say that it is read in countries that extend beyond Canada's borders. In Service has readers in the United States, Japan, Uganda, Kenya and Haiti!

Highlights In This Issue

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Unless otherwise noted all articles are authored by Mike Novakowski, MA, LLM. The articles contained herein are provided for information purposes only and are not to be construed as legal or other professional advice. The opinions expressed herein are not necessarily the opinions of the Justice Institute of British Columbia. "In Service: 10-8" welcomes your comments or contributions to this newsletter. If you would like to be added to our electronic distribution subscribe at:

www.10-8.ca

JUSTICE INSTITUTE of BRITISH COLUMBIA LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

The Justice Institute of British Columbia Library is an excellent resource for learning. Here is a list of it's most recent acquisitions which may be of interest to police.

Alone together: why we expect more from technology and less from each other.
Sherry Turkle.
New York, NY: Basic Books, c2011.
HM 851 T86 2011

Beyond learning by doing: theoretical currents in experiential education.
Jay W. Roberts.
New York, NY: Routledge, 2012.
LB 1027.23 R63 2012

Brain rules: 12 principles for surviving and thriving at work, home, and school.
John Medina.
Seattle, WA: Pear Press, 2009, c2008.
QP 376 M43 2009

Conflict 101: a manager's guide to resolving problems so everyone can get back to work.
Susan H. Shearouse.
New York, NY: American Management Association, c2011.
HD 42 S54 2011

Continuing education in BC's public post-secondary institutions.
Bob Cowin.
[New Westminster, BC: B. Cowin, 2010.
Presents a summary of key dates and changes in continuing education in BC from 1900 to 2010, with a particular focus on post-secondary institutions.
LA 418 B7 C693 2010

Critical thinking, thoughtful writing: a rhetoric with readings.
John Chaffee, Christine McMahon, Barbara Stout.
Boston, MA: Wadsworth Cengage Learning, c2012.
PE 1408 C395 2012

First Nations 101.
Lynda Gray.
Vancouver, BC: Adaawx Publishing, 2011.
E 78 C2 G724 2011

How to talk so people listen: connecting in today's workplace.
Sonya Hamlin.
New York, NY: Collins, c2006.
HF 5718 H284 2006

The mobile academy: mLearning for higher education.
Clark N. Quinn.
San Francisco, CA: Jossey-Bass, c2012.
LB 2395.7 Q56 2011

Seeing systems: unlocking the mysteries of organizational life.
Barry Oshry.
San Francisco, CA: Berrett-Koehler Publishers, c2007.
HM 701 O855 2007

Street-level bureaucracy: dilemmas of the individual in public services.
Michael Lipsky.
New York, NY: Russell Sage Foundation, c2010.
HV 41 L53 2010

Thinking through crisis: improving teamwork and leadership in high-risk fields.
Amy L. Fraher.
New York, NY: Cambridge University Press, 2011.
HD 49 F734 2011

Unmasking the face: a guide to recognizing emotions from facial clues.
Paul Ekman and Wallace V. Friesen.
Cambridge, MA: Malor Books, 2003.
BF 637 C45 E38 2003

VERY MODEST RESTRAINT NOT A DETENTION: RIGHT TO COUNSEL NOT TRIGGERED

R. v. Munkoh, 2012 ONCA 865

Following the arrest of a robbery suspect and his detention in custody, police executed a warrant to search for the fruits of the robbery at his home where he lived with other family members (parents, brothers and sisters). Police knocked on the door, presented the warrant and were admitted into the residence. The three occupants at the time of entry were cooperative. Police secured the premises, locking two pit bulls in a basement washroom. The occupants were escorted to the living room/dining room area of the house. They were not restrained in any way, but were not permitted to roam about the house during the search and a police officer remained with them to ensure that they did not do so. The accused - a brother of the robbery suspect - was asked about the layout of the home, including the location of his brother's bedroom. He said he shared a bedroom in the basement with his brother (the robbery suspect) and explained where it was located. Police went to the shared bedroom, noted there were two beds, and searched it, finding three digital scales, cash and a boxing glove nailed to the wall. The glove contained crack cocaine in clear plastic wrap. The accused was handcuffed, arrested for possessing cocaine for the purpose of trafficking (PPT) and read his right to counsel. He subsequently provided other statements and utterances, including admissions that the cocaine was his. He was charged with PPT.

Ontario Superior Court of Justice

The trial judge admitted into evidence several of the statements and utterances made by the accused, finding there were no *Charter* breaches. In particular, the judge concluded that the accused was not detained when the police entered his residence. Therefore, there was no requirement at that time for the police to advise him of his right to counsel under s. 10(b) of the *Charter* nor provide him with a reasonable opportunity to call a lawyer. Even though his freedom of movement was curtailed, it was not sufficient to trigger the right to counsel. The judge stated:

> There is no doubt that the police placed some degree of restraint on the movements of the accused and his siblings when they entered the house to conduct a search. They did not allow the occupants to enjoy free movement in the house during the search to ensure the safety of the officers and the occupants, and to ensure that no one tampered with any evidence that might be in the premises. It is both reasonable and lawful for the police to do so. But the restraint went no further than that. The occupants were neither removed from the premises nor physically restrained. The interference with their liberty was very modest. While there was some dispute in the evidence about whether or not they were free to leave the house, the fact is that they did not want to leave while their home was being searched, and the police simply did not turn their minds to the question. As I have said, the restraint placed on them was modest, and was in no way linked to any thought that they were implicated in any crime.
>
> Not every insignificant interference with liberty amounts to a detention for purposes of s. 10 of the Charter. The restraint on liberty here involved no significant physical or psychological restraint. The occupants of the residence were not detained during the search by virtue of the fact that they were temporarily deprived of the right to wander about their home. [reference omitted]

Nor was the accused detained when the detective asked him about the layout of the home. "The questioning was not directed at the accused's involvement in any offence, but instead was undertaken to permit the police to limit their search, at least initially, to the room in the house where the stolen property would most likely be found," said the judge. "[The police] did not suspect that [the accused] was implicated in the robberies, and they had no reason to suspect that they were going to find cocaine." Thus, there was no obligation on police to comply with s. 10(b) before asking him about the location of his brother's bedroom. The accused's statement identifying the room he shared with his brother was admissible and he was convicted

Ontario Court of Appeal

The accused again challenged the admissibility of his statements. The Ontario Court Appeal, however, rejected his arguments. "We are satisfied that it was open to the trial judge to find that the [accused] was not detained during the early part of the search of the house," said the Court. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: Case facts taken from *R. v. Munkoh*, 2010 ONSC 2253.

OFFICER'S EXPERIENCE RELEVANT IN DETERMINING REASONABLE GROUNDS

R. v. Wilson, 2012 BCCA 517

A police officer, whose patrol duties involved drug investigations and speaking frequently with addicts, received information from a barber that there was increased drug activity near his shop in Vancouver's Downtown Eastside. He also learned from two unnamed drug addicts that drugs were being sold near a slushie machine located close to the front door of a convenience store near the barbershop. At about 9:15 pm, the officer and his partner approached the convenience store and, looking through a window, saw the accused standing by the slushie machine holding open a black flat leather pouch. A woman held out cash to the accused, who put his hand in the pouch. An older, disheveled man, who appeared to be a drug addict, stood to the left of the accused. Believing he was observing a drug transaction, the officer entered the store, announced police presence and arrested the accused for possessing narcotics for the purpose of trafficking (PPT). He was searched incidental to arrest and 10 flaps of heroin and five "rocks" or pieces of crack cocaine were found in the pouch. The accused also had a drug scale and $74.75 in cash. He was charged with PPT heroin and cocaine.

British Columbia Provincial Court

The accused sought to have the evidence excluded, submitting the police lacked reasonable grounds to arrest and search him and thereby breached his rights under ss. 8 (unreasonable search) and 9 (arbitrary detention) of the *Charter*. The trial judge, however, found the arrest lawful under s. 495 of the *Criminal Code*. First, the arresting officer subjectively had grounds to believe he had seen a drug transaction take place. Second, the totality of the circumstances established objectively reasonable grounds for that subjective belief. The police received tips and saw a woman holding out money to the accused. He was then seen reach into a black leather pouch. The people were not near the cash register and a person with the appearance of a drug addict was standing nearby. Plus, in the officer's experience he had previously seen drug sellers carry drugs in leather pouches. The judge stated:

> The fact that the information they had prior to making their observations about a specific convenience store and a specific place in that convenience store, that being the slushie machine, is relevant. The fact that the officers have seen on previous occasions drug sellers or drug possessors carrying their drugs in leather pouches, like change purses, the officer said that he had seen that on at least 20 previous occasions. The fact that he saw a person facing [the accused] and reaching out with her hand with money in it and him reaching into his pouch, those are relevant factors. The fact that they were all distanced by some 18 feet from where the cash register and so on was is also consistent with them not being in there for the purpose of buying something from the store. Then the second male ... was standing right there and exhibiting symptoms and an appearance familiar to the officer of a drug-addicted person in that area. All, in my view, taken in totality, provide an objective basis, a reasonable basis for the officer's belief that he was witnessing a drug transaction.

Thus, a reasonable person standing in the shoes of the officer would have concluded reasonable grounds existed. The search that followed was therefore incident to arrest. The accused was convicted.

British Columbia Court of Appeal

The accused appealed the trial court's ruling, arguing the judge erred in relying on the arresting officer's personal experience in determining whether the necessary objective grounds for arrest existed. Furthermore, he also disagreed that there were objectively reasonable grounds in any event.

Personal Experience

Under s. 495(1)(a) of the *Criminal Code* a peace officer is authorized to arrest a person without a warrant if they believe, on reasonable grounds, that the person has committed or is about to commit an indictable offence. The accused submitted that an officer's experience should only be relevant in establishing whether there were subjective grounds for an arrest, not whether such grounds were objectively justified. He suggested that when experience is considered as part of the objective component, it increases the opportunities for racial-profiling and renders the warrantless arrest power unconstitutional. In his view, the "reasonable person" test for the objective component should be a "reasonable police officer" placed in the factual circumstances of the arresting officer, void of considering the officer's person experience.

> "[The Supreme Court of Canada] articulated the reasonable person test as 'a reasonable person standing in the shoes of the police officer' and 'a reasonable person placed in the position of the officer'."

The British Columbia Court of Appeal rejected these arguments. The Supreme Court of Canada and other appellate courts have repeatedly held that there is a two-part test for considering whether an officer has reasonable grounds to justify a warrantless arrest. First, the arresting officer must subjectively have reasonable grounds for the arrest. Second, those grounds must also be justifiable from an objective point of view. This objective component requires a consideration of whether a reasonable person standing in the shoes of the police officer would also conclude that there were reasonable grounds for the arrest. An arresting officer's personal experience has consistently been held to be a relevant consideration as to whether the officer's subjective belief to arrest is objectively justified. "In my view, ... the [Supreme Court of Canada] articulated the reasonable person test as 'a reasonable person standing in the shoes of the police officer' and 'a reasonable person placed in the position of the officer'," said Justice MacKenzie for the Court of Appeal. "The use of the definite, rather than the indefinite article, signals the arresting officer's personal experience and training are relevant to whether there were objective grounds to arrest under s. 495 of the Criminal Code."

Objective Grounds

The accused submitted that, even considering the officer's experience, there were not sufficient objective grounds to arrest him. But this argument was also dismissed. The tips received by the officer and his observations at the convenience store supported a finding that there were objectively reasonable grounds for the arrest. The information described drug transactions at the convenience store. Although the tips were from unproven sources, their lack of reliability was offset by the specificity of the information and the conformity of the officer's observations at the convenience store to the information. The trial judge correctly found the officer had the subjective grounds to arrest which were objectively reasonable. The arrest and incidental search were lawful and the drugs were admissible.

The accused's request for a five judge panel to hear his appeal was denied and his appeal was dismissed.

Complete case available at www.courts.gov.bc.ca

Note-able Quote

"Follow your passion. Stay true to yourself. Never follow someone else's path unless you're in the woods and you're lost and see a path. By all means, you should follow that." - Ellen Degeneres

STOP NOT MOTIVATED BY LEGITIMATE TRAFFIC CONCERN: DETENTION ARBITRARY

R. v. Gonzalez, 2012 ONCA 861

A uniformed police officer with Ottawa's specialized "Guns and Gangs" Direct Action Response Team (DART), a unit tasked with the enforcement and intervention of firearm related offences as well as any crimes involving gangs, saw what he regarded as a suspicious vehicle in an area known to him for potential gang activity. Although it was not part of his regular duties to do traffic patrol or respond to regular dispatch calls, he could make stops under Ontario's *Highway Traffic Act* (*HTA*), respond to crimes he witnessed in progress, such as impaired driving, or intervene if specifically requested to do so. The officer recognized the car, which was being driven normally, as being one he did a traffic stop on about three weeks earlier. On that occasion he had checked the driver for a licence and the vehicle's insurance and licence plates, found nothing abnormal at the time and sent the driver (who was not the accused) on his way. Later, the officer learned the car was a rental vehicle owned by a "shady" business.

The officer activated his lights, radioed in the stop and pulled the vehicle over in a parking lot, blocking it in a stall. The accused immediately opened his car door, got out and appeared to be looking around with a view to running. The officer quickly walked up to the accused who was leaning back into the car. The officer grabbed the accused by the back of his coat and pulled him out. He could not produce documentation so the officer attempted to confirm his identity on the police computer. Four other DART officers arrived to assist. One of those officers, while walking around the accused's vehicle, shone a flashlight in through the open driver's door, spotting the end of a pistol barrel protruding from under the driver's seat. The accused was arrested for "possession of a firearm", cautioned and given his right to counsel. He was subsequently charged with five gun-related offences.

Ontario Superior Court of Justice

The officer testified he stopped the car to see if the driver was actually licensed and also because he spotted a crack in the rear bumper. He said the crack made him suspicious that the car might have been involved in a hit and run accident or perhaps an unreported collision. The accused argued that he had been arbitrarily detained under s. 9 of the *Charter* during the roadside vehicle stop. The judge agreed, disbelieving the officer's claim that he stopped the car to enforce the *HTA*. Instead, the judge ruled that the officer stopped the vehicle because he associated it with gang related criminal activity but had no reasonable or probable cause to believe the accused was engaging in such activity. The officer was acting on nothing more than a mere suspicion. All he knew was that the car belonged to a "shady" rental agency which sometimes rented its cars to gang members. "There was nothing unlawful or suspicious about the manner in which the accused was operating the car prior to the stop, and the professed concerns about the cracked bumper being related to an unreported accident or hit and run incident were mere speculation," said the judge. "The accused's car was stopped and very quickly surrounded by three police vehicles and five uniformed officers who do not engage in traffic enforcement as any part of their regular duties."

Similarly, the judge rejected the officer's assertion that he stopped the vehicle to ensure that its driver was licensed. "Any interest in the accused's driver's license was directed, I find, to the purpose of investigating his potential involvement in gang related criminal activity," said the judge. "This was not an instance where the police had a legitimate dual purpose (*HTA* enforcement and investigating crime)." Nor was it an investigative detention at common law because there was no articulable cause that the accused was criminally implicated in any particular criminal incident or event that was under investigation. Since the accused was not lawfully stopped under the *HTA* nor for the purpose of investigating potential gang related criminal activity based on reasonable cause for such a detention, the accused was arbitrarily detained under s. 9. The

handgun was subsequently excluded as evidence under s. 24(2) and acquittals followed on the firearm charges.

Ontario Court of Appeal

The Crown appealed the acquittals, arguing the trial judge erred in finding an arbitrary detention. In the Crown's view, the trial judge improperly considered the arrival of other DART officers to reject the detaining officer's evidence. The Crown also suggested that the judge mistakenly held that a valid *HTA* stop required some articulable cause relating to the driver's own conduct and failed to consider the totality of the evidence before making a factual finding that traffic safety was not a purpose for the stop. The Ontario Court of Appeal, however, did not accept these submissions.

A trial judge's determination as to the purpose of a traffic stop is a finding of fact that is not subject to judicial review. In this case, the number and role of the police during the roadside stop and the totality of the evidence were such factual issues. Even so, the trial judge did consider the totality of the evidence and, having done so, disbelieved the police officer's testimony. Further, "the trial judge did not suggest that the police needed an articulable cause in order to make an HTA stop," said the Court of Appeal. "Rather, the trial judge reviewed the evidence and concluded that the stop was not made for an HTA purpose but rather was a pretext because of suspicions of gang-related criminal activity." As for s. 24(2) and the admissibility of the evidence, the Court of Appeal found no basis for interfering with the trial judge's decision. The Crown's appeal was dismissed and the accused's acquittal was upheld.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

"You may not realize it when it happens, but a kick in the teeth may be the best thing in the world for you." - Walt Disney

COMPELLING TIP FROM RELIABLE INFORMER PROVIDED REASONABLE GROUNDS

R. v. Noorali, 2012 ONCA 589

At about noon a detective met with a carded confidential informant who had provided information in the past. The source said that a male, described as brown, perhaps Guyanese, 5'10" tall, 160 lbs, with a goatee, would arrive at a mall's parking lot later that afternoon in a four-door, older-model gold Toyota Camry with dark tinted windows and a licence plate of ANEV 261. The source also stated that a loaded firearm would be inside the vehicle. A detective attended the mall area and at 3:30 pm saw a Camry turn into the parking lot. There were two occupants and the vehicle matched the description provided including the licence plate number. A "high-risk takedown" was initiated. The vehicle was boxed in and its driver (the accused) and passenger were arrested for possession of a firearm. The Camry was searched and a Browning 9 mm machine pistol, two over-capacity magazines (one loaded), ammunition, marihuana, powder cocaine, crack cocaine and a scale were found in the trunk. The accused was charged with several crimes, including firearm, ammunition and drug related offences.

Ontario Superior Court of Justice

The accused sought to have all of the evidence found in the trunk excluded under s. 24(2) of the *Charter*, suggesting it was obtained in a manner that breached the search and seizure provisions found in s. 8. The trial judge recognized that "a police officer who makes an arrest or conducts a search at the request or direction of a fellow officer need not personally be in possession of reasonable and probable grounds for the arrest or search so long as those grounds are in the hands of the officer making the request or giving the direction." So in this case, although the detective did not participate in the takedown he "pulled the trigger" on it and the arrest would be lawful if he possessed the necessary grounds.

The judge found the detective not only had the necessary subjective belief that the accused was in possession of a firearm but that it was also objectively reasonable based on the totality of the circumstances. First, the information was compelling. The source provided specific details about the make, model, color, vintage and licence plate number of the suspect vehicle. He also said it had four doors and tinted windows and provided a specific location to which the vehicle would be driven and a specified time frame within which this was going to occur. He also said that there would be a firearm within the vehicle. Second, the informant was credible. He was not an untested, anonymous informant, but a "carded" confidential source who had provided information in the past on at least two prior instances that led to successful seizures of illicit items, including a firearm. Finally, the information was corroborated. As predicted by the source, a specific motor vehicle arrived at a specific location within a specific time frame. "[The detective] was entitled to regard those circumstances as corroborative notwithstanding that the corroboration did not relate specifically to whether there was a firearm in the motor vehicle," said the judge. "The specificity of the information provided by the confidential source, the past history of the source as a reliable informant and the confirmation afforded when the specific vehicle described by the source was seen doing precisely what the source said it would be doing at the predicted time and place furnished [the detective] with objectively reasonable grounds for his belief." The arrest was lawful and the search that followed was reasonable as incident to arrest. The accused was convicted and sentenced to 8 ½ years in prison less 33 months pre-trial custody, prohibited from possessing firearms and ordered to give a DNA sample.

Ontario Court of Appeal

The accused submitted, among other grounds, that the trial judge erred in finding that the search was reasonable. But the Ontario Court of Appeal disagreed. The trial judge correctly applied the law. The detective had the vehicle's licence number from the confidential informer, the detail in the tip was compelling and the informer was reliable. The accused's appeal from conviction was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: Case facts taken from *R. v. Noorali*, 2010 ONSC 2558, 2010 ONSC 3747.

YCJA TAINT RENDERS SUBSEQUENT STATEMENT INADMISSIBLE

R. v. M.D., 2012 ONCA 841

Following his arrest for a robbery, the teenage accused was taken to the police station where he was booked and lodged in an interview room. He had been advised of his right to counsel and his mother was notified. Two detectives entered the interview room intending to build a rapport and see whether the accused wished to give "his side of the story." There was no video equipment in the room so police only took notes about the discussion, which lasted about 12 minutes. During this interview the police did not comply with the requirements of statement taking under s. 146 of the *Youth Criminal Justice Act* (*YCJA*). The accused made some admissions about the robbery and the interview ended with a question, "do you want to tell us this on video?" He was left in the interview room for an hour, then moved to another room with recording equipment where he was interviewed for a second time by the same officers.

Before this interview the police again explained the offences, told the accused he could go to a detention centre if convicted and informed him he could be sentenced as an adult to a maximum term of imprisonment for life. He was read, explained and said he understood his rights under the *YCJA*. The officer confirmed that they had earlier talked and that the accused had expressed an interest in providing a statement. He was never told during the second interview that he should not be influenced by the fact he earlier spoke to police or that the first statement was inadmissible. During questioning an inculpatory recorded statement was obtained.

Ontario Court of Justice

At trial both detectives agreed that they had not complied with the requirements of s. 146 of the *YCJA* when they first interviewed the accused. The Crown, however, only sought to have the second statement entered as evidence. In its view, the videotaped interview was voluntary, complied with s. 146 and was untainted by the earlier voluntary statement. Any taint from the first statement was remedied at the outset by a full explanation and confirmed understanding of each of the s. 146(2) requirements. The accused, on the other hand, contended that the non-recorded first interview was not voluntary and tainted the second interview. In his view, the time period between the two interviews was brief, the same officers were involved, the second interview referenced the first one and was simply a continuation of it. It should have been excluded.

The trial judge found the first statement voluntary but not compliant with s. 146, which would have rendered it inadmissible had it been tendered as evidence. But she also concluded that the videotaped second interview would have taken place even if the first interview had not occurred. Neither the making of the first statement nor its non-compliance with s. 146 rendered the videotaped second interview inadmissible. The videotaped interview began with a lengthy discussion and confirmed the accused's understanding of the s. 146 requirements. He wanted to give his side of the story, an intention evidenced by his demeanour during the second statement. A conviction for robbery followed.

Ontario Court of Appeal

The accused argued that the videotaped interview should not have been admitted as evidence. In his view, the derived confessions rule requires that subsequent statements of an accused made after an earlier inadmissible statement should too be ruled inadmissible if there was a sufficient connection between the statements and a failure to extinguish the taint of the first statement from the making of the second one. Justice Watt, speaking for the Ontario Court of Appeal, agreed.

Derived Confessions Rule

The derived confessions rule was originally developed in relation to a confession's voluntariness requirement at common law. However, today the rule has a more general application and applies where a subsequent statement sought to be admitted is sufficiently connected to an earlier inadmissible statement. In addition to the voluntariness rule, inadmissibility could arise from contaminants such as constitutional infringements (eg. s. 10(b) of the *Charter*) or a failure to comply with the requirements for taking a young person's statement under s. 146. But not all tainted confessions will be excluded irrespective of the degree of their connection to the prior inadmissible statement. In deciding whether a subsequent statement will be excluded, a judge must examine all of the relevant circumstances in determining the degree of connection (or taint) between the two statements. These factors include:

- the time span between the statements;
- advertence to the earlier statement during questioning in the subsequent interview;
- discovery of additional information after completion of the first statement;
- the presence of the same police officers during both interviews; and
- other similarities between the two sets of circumstances.

Justice Watt explained it this way:

> The application of these factors will render a subsequent statement involuntary if either the tainting features that disqualified the first continue to be present, or if the fact that the first statement was made was a substantial factor that contributed to the making of the second statement. It will generally be easier to establish that tainting affected the first when both these conditions are present. In the end, however, what matters most and mandates exclusion is that the connection is sufficient for the second to have been contaminated by the first.
>
> The inquiry required when the derived confessions rule is invoked to exclude a subsequent statement is essentially a causation inquiry that involves a consideration of the

> temporal, contextual, and causal connections between the proffered and earlier statements. The inquiry is a case-specific factual inquiry. [references omitted, paras. 55-56]

In this case, the trial judge found the first statement voluntary and the accused did not attempt to demonstrate there was a constitutional violation, such as s. 10(b). The trial judge did, however, err in applying the derived confessions rule as it related to non-compliance with s. 146(2)(b) of the *YCJA*. "The error in this case consisted of a failure to consider all the relevant circumstances in the application of the derived confessions rule," said Justice Watt. "Taken as a whole, the evidence disclosed that the tainting features that disqualified the first statement from admission continued to be present during the second and that the fact the first statement had been made was a substantial factor that contributed to the making of the second that was little more than a continuation of the first." The Court of Appeal continued:

> The first interview concluded with a question from [a detective] about whether the [accused] wanted to tell the police about the robbery on video. The [accused] agreed. Immediately after completing his s. 146(2)(b) advice at the start of the second interview, [the detective] reminded [the accused] of his offer and the interview proceeded. The same officers conducted both interviews without [the accused] having any contact with anyone else in the hour that separated the two interviews.
>
> The trial judge does not appear to have considered the effect of [the detective's] failure to tell [the accused] about the inadmissibility of the prior statement at the outset, indeed at any time during the second interview. This admission left [the accused], a 14-year-old grade 9 student, with an incomplete understanding of his jeopardy when deciding whether to speak or remain silent. In the circumstances of this case, such advice was necessary to dispel the taint associated with the first interview. Its absence cemented the connection between the two statements. In a similar way, the failure to advise [the accused] that, in deciding whether to speak a second time, he should not be influenced by the fact that he had talked to the police earlier, or by what he had said then, was an essential factor that required, but did not receive consideration in the admissibility decision. [paras. 75-76]

The trial judge failed to properly apply the derived confessions rule when she admitted the accused's videotaped police interview as evidence. The accused's appeal was allowed, the videotaped interview was inadmissible, the conviction set aside and a new trial was ordered.

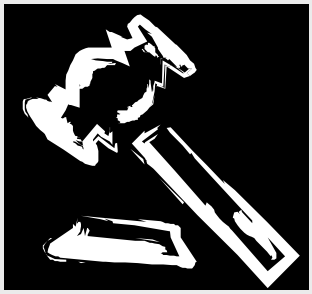
Complete case available at www.ontariocourts.on.ca

Derived Confessions Rule

- A second (or subsequent) statement made after an earlier inadmissible statement will also be inadmissible provided there is a sufficient connection between the two statements by:
  1. the tainting features that disqualified the prior statement continuing to be present, or
  2. the first statement was a substantial factor that contributed to the making of the second statement.
- Contaminants that can taint a second statement include:
  - ✳ **lack of voluntariness** (under the common law confessions rule)
  - ✳ **constitutional infringement**, such as s. 10(b) of the *Charter* where admissibility will be determined under s. 24(2)
  - ✳ **non-compliance with s. 146(2)** of the *YCJA*
- In determining whether there is a sufficient connection for a second statement to be contaminated by the first, a fact-based assessment is used. This inquiry involves:
  - temporal connection
  - contextual connection
  - causal connection

LEGALLY SPEAKING:

Common Law Confessions Rule



"The confessions rule is concerned with voluntariness, broadly defined. The application of the confessions rule is contextual, requiring a trial judge to take into account all relevant circumstances in order to determine whether the prosecution has established the voluntariness of the confession beyond a reasonable doubt.

Recording police interviews of persons suspected or accused of crime can be of inestimable value in assessing their voluntariness at trial. Video recordings permit the trial judge to be an ear and eyewitness to the interview tendered for admission." - Ontario Court of Appeal, Justice Watt in *R. v. M.D.*, 2012 ONCA 841 at paras. 39-40, 42.

INTERVIEWEE AWARE OF CONSEQUENCES: STATEMENT ADMISSIBLE

R. v. D.M., 2012 ONCA 894

The police received a complaint from the Children's Aid Society (CAS) that the accused had sexually abused his step-daughter. The police officer assigned to investigate the incident called the victim but she refused to make a formal complaint. Nonetheless, the officer wanted to speak to the accused and left a message at his home, which was not returned. About a month later the accused was stopped for speeding by a different officer and was asked to attend the police station to meet with the investigator. After arriving at the police station the accused was taken to a small interview room and told he was not obliged to see the officer or remain at the station, and did not need to answer any of her questions. No right to counsel warning was given. The officer told the accused that a report of inappropriate touching was made to CAS but the victim had not complained to police. He went on to admit that he had "touched" the victim "five or six times" about four years earlier, that the matter had been addressed by the family and police need not be involved. He refused to provide any details about the touching and said he did not see why he needed to answer police questions. The interview lasted 25 minutes and concluded with the officer saying the investigation was "closed" unless the victim changed her mind and gave a statement. The victim did change her mind and the accused was charged.

Ontario Superior Court of Justice

At trial the police investigator testified she hoped to obtain a confession from the accused about the allegation of sexual assault she was investigating. But she did not believe that there were sufficient grounds to lay a charge or consider him detained so she did not advise him of his right to counsel under s. 10(b) of the *Charter*. The accused also testified, stating he did not want to meet with the officer and found the interview to be intimidating. He said that he acknowledged he had touched the victim five or six times because he believed the police investigation was related to the CAS complaint and it was in his best interests to cooperate and be consistent.

The trial judge ruled that the accused's statement was voluntary and admissible. The interview was not conducted in an atmosphere of oppression, as the accused was permitted to attend and leave the station on his own. The officer told the accused he did not have to remain or answer her questions and he was well aware of his right to refuse to co-operate with the investigation. Finally, the accused's statement to the police was not tainted by his previous statement to the CAS. He said the same thing to the CAS and police for consistency. The accused was convicted of several sex-related crimes and sentenced to five years in prison.

Ontario Court of Appeal

The accused appealed his conviction arguing, among other grounds, that the trial judge erred in applying the common law confessions rule. In his view, the "voluntariness" of a confession has two elements: (1) a knowing waiver of the right to silence and (2) knowledge of the consequences of speaking to the police. So although he was cautioned on his right to silence and knowingly waived that right, he was not told and was unaware of the consequences of speaking to the police – what he said could be used against him in a criminal prosecution. He thought that the police interview was a continuation of the CAS investigation into the safety of his other children and he did not appreciate that his admissions to police were made in the context of a criminal investigation about the sex abuse allegations.

Justice Laskin, delivering the unanimous Court of Appeal judgement, first noted that the accused was not under arrest or detained when interviewed by police and thus his *Charter* rights were not triggered. However, he was a suspect in a criminal investigation when interviewed and therefore the common law confessions rule applied. "The confessions rule requires the Crown to demonstrate beyond a reasonable doubt that a confession made by a suspect to a person in authority, such as the admission in this case, was voluntary," said Justice Laskin. "Voluntariness is not only concerned with whether the accused's confession was induced by threats or promises; it is a broader concept focused on the protection of an accused's rights and fairness in the criminal process. A court must, therefore, consider all the circumstances in which the accused spoke to determine whether a statement given to a police officer was made voluntarily."

Even assuming that not being aware of the consequences of speaking to the police is a relevant circumstance in assessing voluntariness, the accused in this case was fully aware of the consequences of speaking to the police. Justice Laskin stated:

> The [accused] is an intelligent and highly-educated man. [The officer's] line of questioning at the police station was not misleading; she confronted the [accused] directly with [the victim's] allegations. He knew what the police were investigating.
>
> The [accused] also appears generally knowledgeable about the potential legal consequences of his actions. After he was interviewed by the CAS, for example, he consulted a lawyer. And the most telling evidence that he was aware of the consequences of speaking to the police was his refusal to provide [the officer] with details of the touching, instead telling her he did not see why he needed to answer her questions. [paras. 45-46]

Furthermore, what the accused told police was what he already acknowledged to the victim and the CAS worker. Any error the trial judge made in admitting the statement to police was harmless since the accused's other acknowledgments of his wrong doing were admissible at trial.

The accused's appeal against conviction was dismissed, but his sentence was reduced from five years in prison to four years.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

"Success is not final, failure is not fatal: it is the courage to continue that counts." - Winston Churchill

"The confessions rule requires the Crown to demonstrate beyond a reasonable doubt that a confession made by a suspect to a person in authority ... was voluntary. ... A court must, therefore, consider all the circumstances in which the accused spoke to determine whether a statement given to a police officer was made voluntarily."

DETENTION CRYSTALIZED AFTER REASONABLE SUSPICION FORMED

R. v. Gray, 2012 ONCA 687

At about 4:15 am two plain clothes police officers were investigating a possible stolen vehicle at a hotel when they learned that a man and his friend were robbed of $1,500 and a necklace. The suspects were described as three males; one white and two black. The man provided a general description of the perpetrators' clothing and hairstyle. Police then called the complainant's friend on a cell phone and was told that two of the robbers were walking about two blocks away. The officers immediately responded to that area and located two black males, including the accused. The men matched the description of the perpetrators and the officers stopped them. They told the accused they were police officers investigating an incident, asked him to keep his hands out of his pockets and requested he identify himself.

The accused provided a name that the officers learned was false and he was arrested for obstructing police, handcuffed, advised of his right to counsel and cautioned. Further inquiries revealed he was on bail with conditions not to possess non-prescribed drugs or cell phones and had a no-go to the city. When he was searched police found two cell phones and $1,775 cash, separated into three bundles. He was placed in the police car and observed to shake three baggies of crack cocaine from his pant leg. The accused was charged with obstructing police, breaching his recognizance, possessing proceeds of crime and possessing cocaine for the purpose of trafficking.

Ontario Court of Justice

The accused contended that he was arbitrarily detained by police and was not advised of the reason for his detention nor of his right to counsel when stopped. The search, he maintained, was unreasonable and in breach of his s. 8 *Charter* rights. In his view, the police had no lawful reason to detain him and to ask him for identification. He claimed the police lied about the reason for the stop and were not investigating a robbery. He suggested they only stopped and questioned him because he was a black man walking down the street in the middle of the night, using the robbery investigation as a ruse. The trial judge, however, rejected the submission that the officers fabricated a description of two black males to justify stopping the accused and his friend.

As for the arbitrariness of the detention and the triggering of s. 10 *Charter* rights, the judge concluded that the accused was not immediately detained when the police got out of their car and confronted him. "Whether a person is detained is an objective determination, made in light of all of the circumstances of the case," said the judge. In this case, the judge found that the accused was not detained when police initially stopped, conversed with and asked him for identification. Rather, a detention materialized only after the officer became suspicious that the accused was providing a false name and thereby obstructing him. At that point, however, the officer's suspicion that a false name was given was reasonable and the accused's detention for the purpose of investigating his true identity was justified and not arbitrary. The judge stated:

> I am also mindful that police investigations are fluent and often take new directions. What began as an investigation into a possible stolen car evolved into an investigation of a robbery, which was then overtaken by an investigation into an obstruction of police and breach of recognizance. I am satisfied that the officers were at all times acting within their lawful duties and did not arbitrarily detain the accused.

But the judge held that the accused's rights under s. 10 of the *Charter* were breached. He was never told why he was being detained or advised of his right to counsel until his arrest. The evidence, however, was ruled admissible under s. 24(2).

Ontario Court of Appeal

The accused appealed the trial judge's *Charter* ruling, asserting that he was detained before he verbally identified himself under a false name to the officer and the trial judge erred in

concluding otherwise. But the Court of Appeal disagreed, finding there was ample evidence for the trial judge's decision and no basis for interfering with her fact finding. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: Case facts taken from *R. v. Gray*, 2010 ONCJ 629.

ASSUMING BREACH, EVIDENCE ADMISSIBLE: OFFICER HAD LEGITIMATE SAFETY CONCERN

R. v. Bashir, 2012 ONCA 793

A police officer stopped at a restaurant to buy a sandwich at about 7 pm and noticed an unoccupied red Ford Focus parked illegally. Half of it was on the sidewalk and its motor was running. When the officer went into the restaurant and got in line behind the accused and his two friends, they stopped talking. The officer could smell alcohol on them and noticed the accused, who had a large bandage on his face, leave suddenly without his friends. The officer was suspicious that he had driven off alone and wanted to make sure that he was not driving under the influence of alcohol. As he drove in the vicinity of the restaurant looking for the Ford Focus, he saw its brake lights flashing a short distance nearby and felt it was trying to avoid him. He pulled in behind it and the accused was in the driver's seat. The accused suddenly got out and went towards the officer. He was belligerent and used expletives. The officer began to suspect the accused might be suspended or not permitted to have the vehicle. When asked to produce a licence and whether the vehicle was his, the accused responded with further expletives saying it was not his car, that he did not know anything about it, and that the accused could tow it if he wanted. He stated: "I ain't telling you my name" "you did not see shit" and "fuck you." At this point, backup was summoned.

After the accused refused to identify himself or take his hands out of his pockets, the officer advised him that he was being detained for investigation in connection to the car he had been driving. He was handcuffed and placed in the police car where the officer tried to read him his rights, but was spoken over. Open alcohol containers were visible in the car and an odour of alcohol emanated from its interior through an open window. Police searched the car under s. 32 of Ontario's *Liquor Licence Act* (*LLA*) and found a loaded handgun under a t-shirt in a cloth bag. The bag, similar to those sold at grocery stores with two wide handles and an open mouth which could not be sealed or clasped, was in plain view on the back seat. Numerous firearm-related charges were laid against the accused.

Ontario Court of Justice

The accused argued, in part, that this was a pretext stop, a misuse of Ontario's *Highway Traffic Act* (*HTA*) powers to pursue a criminal investigation, and was therefore arbitrary under s. 9 of the *Charter*. In his view, there were no grounds for arrest. He also suggested that the power of search under the *LLA* could not justify the search of the cloth bag. Furthermore, he contended that the *HTA* powers were merely a ruse to justify targeting him when the officer did not have proper grounds but merely an unfounded suspicion.

The trial judge concluded that the accused was lawfully detained. This was not a random stop but an investigation properly made into whether the accused might be driving while impaired, a suspended driver or might be in possession of a stolen vehicle. The detention was based on the officer smelling alcohol on the accused and his suspicious behaviour in leaving the restaurant without his companions, driving a short distance from the restaurant and then parking partially on the sidewalk and flashing his brakes lights. An investigative detention commenced once the accused was told that he would be restrained and refused to remove his hands from his pockets. This refusal gave rise to an appropriate concern for officer safety.

The search of the vehicle after the accused was detained was also reasonable. The *LLA* makes it an offence to operate a motor vehicle, whether it is in motion or not, with open alcohol in it and permits police to enter and search. Police saw open alcohol,

as well as red plastic cups, within the driver's reach and smelled alcohol from outside the car. When searching the car, a heavy cloth bag was searched, although outside the reach of any driver. It was during this that police discovered the handgun. "Given the large amount of alcohol found in the car, police were entitled to look into the cloth grocery bag, and look beneath the visible t-shirt because of the weight of the bag," said the judge. "We now know that the weight came from a handgun and not a bottle of alcohol."

This was not a random search, but a lawfully authorized warrantless one made after open bottles of liquor were seen. Having found bottles of liquor in other parts of the vehicle, it was reasonable to believe that further alcohol might be found in the bag, particularly because of its weight. And, even if the accused's *Charter* rights were breached, the trial judge would have admitted the evidence under s. 24(2). He was convicted of several firearm-related offences and sentenced to six years in prison, less five months spent in pre-trial custody.

Ontario Court of Appeal

The accused argued that his detention for investigation was unlawful, breached s. 9 (arbitrary detention) and should have resulted in the exclusion of the loaded handgun as evidence under s. 24(2). This submission, however, was rejected by the Court of Appeal. Assuming, without deciding, that the accused's s. 9 rights were breached and there was a sufficient link or nexus between that breach and the search of the vehicle, the trial judge did not err in admitting the evidence. First, the officer acted in good faith. "Even if there were insufficient grounds to suspect the [accused] of a specific offence, his behaviour clearly gave rise to a legitimate concern regarding officer safety that required some defensive action," said the Court of Appeal. Second, if a s. 9 breach occurred, it had a minimal impact upon the accused's Charter-protected interests. "There was only a temporal connection between the investigative detention and the search of the vehicle," the Court stated. "The [accused] effectively abandoned any interest in the vehicle. He was not the owner, he told the officer that he was not the driver and he invited the officer to have the vehicle towed away. The officer was entitled to look into the window of the vehicle and when he saw open bottles of alcohol, he was entitled to search the vehicle pursuant to s. 32(5) of the [LLA]." Finally, the evidence was reliable and society had a strong interest in an adjudication of these serious offences involving a loaded handgun. The accused's appeal against conviction was dismissed and his six year sentence was upheld.

Complete case available at www.ontariocourts.on.ca

Editor's note: Case facts taken from *R. v. Bashir*, 2010 ONCJ 317.

BY THE BOOK:

S. 32(5): Ontario's *Liquor Licence Act*

Search of vehicle or boat

A police officer who has reasonable grounds to believe that liquor is being unlawfully kept in a vehicle or boat may at any time, without a warrant, enter and search the vehicle or boat and search any person found in it.

CUMULATIVE EFFECT SUPPORTS GROUNDS FOR ARREST

R. v. West, 2012 NSCA 112

Following a robbery at a Bank of Montreal, police received a 911 call at about 9:20 am describing the robber as a six foot tall slender male. It was also subsequently learned that a white Intrepid automobile may have been involved. A tow truck company owner alerted police that a white Intrepid had left the road and was being towed from the ditch. He told police that he thought the car may have been involved in a robbery. A police officer came upon the tow truck with the white Intrepid and saw the accused, a known bank robber. He was approximately six feet tall and 160 pounds. The officer took no action at that time, followed them and called for backup. At 11:55 am the police stopped the tow truck and identified the accused as the driver of the Intrepid. But he was not told why he was being stopped. The accused assented to a search of the vehicle but nothing connected to the robbery was found. After some discussion among the officers, the accused was arrested on suspicion of bank robbery at 12:30 pm and advised of his right to counsel. He subsequently gave an inculpatory statement and was charged with several offences related to the robbery.

Nova Scotia Supreme Court

The accused argued, among other grounds, that he was arbitrarily detained under s. 9 of the *Charter* when he was stopped and arrested, and denied his rights under s. 10(a). The trial judge ruled that the accused had been detained when the tow truck in which he was a passenger was stopped at 11:55 am. But the detention was not arbitrary. Under s. 495(1)(a) of the *Criminal Code* all the police needed to demonstrate was reasonable grounds. It was not necessary to establish a *prima facie* case for conviction. Here, not only did the police officer personally believe he had reasonable grounds to arrest, those grounds were objectively established. "I find the cumulative effect of the various factors, including [the accused] generally matched the description of the robber, [he] was driving a white Intrepid, a vehicle thought to be involved in the robbery, the police knowledge of [him], gave the police reasonable and probable grounds to arrest," said the judge.

As for s. 10(a), the judge concluded that the accused's rights had been breached. The accused had not been informed of the reason for his detention at the time the tow truck was stopped. However, since no evidence had been obtained during this time, there was no evidence to exclude under s. 24(2). The accused, when arrested, was then advised of the reason for the arrest and of his right to counsel. The police complied with the informational component of 10 at this time. The accused was convicted.

Nova Scotia Court of Appeal

The accused again argued, among other things, that he was arbitrarily detained. In his view, he was detained and arrested because he was a known criminal. But the Court of Appeal disagreed, finding the evidence supported objectively substantiated reasonable grounds to detain and arrest. The accused's appeal was dismissed.

Complete case available at www.courts.ns.ca

CRIMINAL CODE DOES NOT CREATE ARMED ROBBERY OFFENCE

R. v. Moore, 2012 ONCA 770

The accused presented a false driver's licence at a car dealership and went for a test drive with a car salesman. He stopped the vehicle on the side of the highway and told the salesman to "get the fuck out of the car". The salesman claimed the accused had a pistol and pointed it at him. He was terrified by these events and turned his head to look out the window. The accused was charged with several offences including robbery. It alleged he "did, while armed with a firearm, to wit: a handgun, rob [the salesman], contrary to Section 344 of the *Criminal Code*.

Ontario Superior Court of Justice

The trial judge was not satisfied beyond a reasonable doubt that the accused was carrying a handgun or that he pointed it at the salesman. "While I do not doubt [the salesman's] sincerity, he is not familiar with guns and saw and heard something only fleetingly," said the judge. "Out of great fear for his safety, he quickly turned his head away from [the accused] toward the window. The accused was acquitted of the robbery charge, but convicted of seven other offences related to the incident.

Ontario Court of Appeal

The Crown appealed the accused's acquittal submitting that the trial judge erred by finding that the *Criminal Code* creates an offence of "armed robbery" and that the use of a firearm was an essential element to the robbery charge. The Court of Appeal agreed:

> The Criminal Code does not, in fact, create an offence of armed robbery. Section 343 of the Criminal Code creates the offence of robbery and describes the four ways in which robbery may be committed. A count that charges robbery and refers to s. 344, the punishment provision, does not specify a particular mode of committing robbery nor limit the basis upon which the Crown may prove the substantive offence of robbery. [para. 6]

The inclusion of the words "while armed with a firearm, to wit: a handgun" puts an accused on notice that, if convicted of a robbery and it's proven a firearm was used, a minimum mandatory punishment of four years imprisonment applies.

The Crown could prove a robbery under one of the four ways described in s. 343. Then, if the Crown wanted to engage the s. 344 minimum mandatory punishment it would need prove for sentencing purposes that the accused used the firearm in the commission of the robbery within any definition of s. 343. The trial judge erred in finding the accused not guilty of the robbery as charged, his acquittal was set aside and a new trial was ordered.

"The Criminal Code does not, in fact, create an offence of armed robbery. Section 343 of the Criminal Code creates the offence of robbery and describes the four ways in which robbery may be committed."

Complete case available at www.ontariocourts.on.ca

Editor's note: Case facts taken from *R. v. Moore,* 2010 ONSC 6414.

DANGEROUS PURPOSE PROVEN: NO EVIDENCE ATTACK UNAVOIDABLE

R. v. Sakebow, 2012 SKCA 84

Police were looking for the accused as a parle violator. There was a parole suspension warrant out for him and a vehicle associated to him was seen at about 3:30 am. The officer activated his lights and the vehicle slowed but continued driving. He observed the driver lean forward and thought he might be placing something out of view. The vehicle stopped and the accused was arrested. He was wearing an armoured vest with an RCMP crest sewn on it. Police looked under the driver's seat and found a fully loaded .22 calibre semi-automatic handgun while 50 rounds of ammunition were found in the glove box. The accused was charged with several crimes including possessing a weapon (the handgun) for a purpose dangerous to the public peace under s. 88 of the *Criminal Code*.

Saskatchewan Court of Queen's Bench

At trial the accused was acquitted of the possession for a dangerous purpose charge. The judge concluded that the accused possessed the handgun for self-defense. He was sentenced to eight years imprisonment, less time served, for the other charges he faced.

Saskatchewan Court of Appeal

The Crown's appeal of the accused's acquittal was allowed. Although the Supreme Court of Canada in *R. v. Kerr*, 2004 SCC 44 held that possession of a weapon for self-defence is not possession of a weapon for a purpose dangerous to the public peace if there is evidence that the perceived attack was unavoidable, there was no such evidence of an unavoidable attack. Here, the trial judge erred by holding that the accused's possession of the weapon for a self-defence purpose led to the legal conclusion he did not possess the weapon for a purpose dangerous to the public peace. "An examination of all of the evidence including the nature of the weapon and the circumstances under which it was possessed leads to the inescapable inference the weapon was possessed for a purpose dangerous to the public peace," said Justice Herauf. The accused's acquittal was set aside and a conviction under s. 88 of the *Criminal Code* was entered. The case was remitted to the trial judge to impose a fit sentence.

Complete case available at www.canlii.org

Editor's note: Case facts taken from *R. v. Sakebow*, 2012 SKQB 81.

OBSTRUCTING JUSTICE REQUIRES SPECIFIC INTENT

R. v. Yazelle, 2012 SKCA 91

The accused and his companion reported an impaired driver to police. Acting on this information, the police arrested the driver for impaired driving and driving while over 80mg %. At the impaired trial the Certificate of Analyses of the driver's blood-alcohol content was excluded. Since the arresting officers had not witnessed any aberrant driving, the Crown called the accused and his companion as eyewitnesses to the driving. The accused, however, refused to be sworn or to testify. He said he understood that tipsters who report impaired drivers were to remain anonymous, that Crown had a written statement from his companion and that his companion was scheduled to testify.

LEGALLY SPEAKING:

Possess Weapon for Dangerous Purpose & Self Defence

"In my view, the crucial issue in those cases where the accused person is found to have possessed a weapon for a defensive purpose is whether or not the attack which the accused purported to thwart was avoidable. Thus, only where the attack is completely inescapable is possession of a weapon to thwart the attack not possession for a purpose dangerous to the public peace. To the contrary, the purposeful act then constitutes an abatement of a danger to the public peace, namely, an attack on one's self. Many indicia will be relevant to the determination of avoidability, including, inter alia: location, atmosphere, nature of the threat, imminence of the danger, and actual use. " - Supreme Court of Canada, Justice Major in *R. v. Kerr*, 2004 SCC 44 at para 38.

... ...

"In my opinion, under s. 88(1) an accused who otherwise satisfies the requirements of the offence should be excused from criminal liability where the possession of a weapon is necessary for defending himself. The usual limits on the common law defence of necessity apply. First, the defence of necessity is limited to situations of clear and imminent peril. Thus, necessity would not excuse the possession of a weapon simply because the accused lived in a high-crime neighbourhood or finds himself among a dangerous prison population. Second, the act must be unavoidable in that the circumstances afford the accused no reasonable opportunity for a legal way out, such as escaping or seeking police protection. Finally, the harm inflicted must be less than the harm sought to be avoided." - Supreme Court of Canada, Justice Lebel in *R. v. Kerr*, 2004 SCC 44 at para 94.

Further, the accused, who was a then-incarcerated offender, feared for his personal safety if he were to testify. He was charged with attempting to obstruct justice under s. 139(2) of the *Criminal Code*.

Saskatchewan Provincial Court

The judge found that the accused had not refused to testify for the purpose of derailing the criminal proceedings against the alleged impaired driver. He concluded that the Crown had failed to prove beyond a reasonable doubt that the accused had the specific intent to obstruct, pervert or defeat the course of justice based on the evidence. The accused was acquitted.

Saskatchewan Court of Appeal

The Crown appealed the acquittal suggesting that the accused intended not to testify and the only inference available from this was that he intended to obstruct, pervert or defeat the course of justice. The Crown also contended that the trial judge conflated motive and intent and therefore improperly concluded that a specific intent to obstruct had not been proven. In its view, the accused's desire to preserve his own safety, while motivating his refusal to testify, did not negate his intent to obstruct justice.

The Court of Appeal rejected the Crown's arguments. "The offence of attempting to obstruct justice pursuant to s. 139(2) of the Criminal Code is a substantive offence and one of specific intent," said Justice Caldwell for the unanimous Court of Appeal. "The Crown must also prove that [the accused] subjectively intended to obstruct, pervert or defeat the course of justice." So although there was no doubt the accused committed the *actus reus* of the offence under s. 139(2), the *mens rea* required proof on an intention to obstruct justice, not just an intention to do an act that had the effect of obstructing justice. The trial judge acknowledged the accused's likely motive for refusing to testify (fear for his safety) but had a reasonable doubt as to whether the accused had the specific intent to obstruct the course of justice by refusing to testify. The trial judge understood the subjective nature of the *mens rea* for s. 139(2) and did not err. The Crown's appeal was dismissed.

Complete case available at www.canlii.org

REASONABLE PERSON WOULD BELIEVE NO CHOICE BUT TO COOPERATE: DETENTION FLOWS

R. v. Berner, 2012 BCCA 466

On a warm, clear, sunny day the accused drove her vehicle into a car parked on the shoulder of a road and then struck a woman and a four year old child standing nearby feeding a horse. The child was killed, the woman seriously injured and the occupants of the parked car received minor injuries. The road was straight and flat and visibility was good. Local residents helped the accused out of her vehicle and escorted her across the street where she sat down on the curb. A bystander pointed out the accused as the driver to one of the first police officers to arrive just after 5:00 pm. The officer briefly spoke to the accused. She said her car veered out of control, left the road and careened into the parked car and the people standing off the roadway. Despite not smelling alcohol, the officer asked the accused if she had anything to drink prior to driving because there was no apparent cause to the accident. The accused answered no. The officer, wanting to speak to other witnesses, told the accused to "stay there, I'll be back." At 5:10 pm the officer decided to move the accused to the backseat of her police vehicle because (1) it would be more comfortable waiting in the air-conditioned police car and she would be more easily located for medical attention, (2) it was safer as emergency vehicles moved about the scene and (3) she could be interviewed about the cause of the accident.

The officer placed her hand in the small of the accused's back, assisted her to stand and escorted her to the police vehicle by safely steering her around emergency equipment. The officer opened the police car's rear door and told the accused to have a seat. The officer closed the door and then

assisted air ambulances landing. At 5:25 pm the officer returned to the police car, opened the door, pulled out an audio recorder and took a two-minute statement, asking several questions. No odour of liquor was detected and the officer had to attend to another duty. She closed the rear door again and returned at 5:40 pm, this time asking the accused whether she had consumed any alcohol at all that day. She said she had consumed two glasses of wine at 2:00 pm. The officer immediately formed the suspicion that the accused had alcohol in her body at the time of the accident, gave the approved screening device (ASD) demand at 5:44 pm and took a sample of breath, which resulted in a fail reading. The officer then formed a belief that the accused had operated her motor vehicle within the previous three hours while impaired by alcohol. She was assessed by paramedics, then arrested at 5:52 pm and advised her of her right to counsel under s. 10(b) of the *Charter*. A breath demand followed at 5:55 pm and, after accessing counsel at 7:30 pm, the accused provided two breath samples at 7:58 pm and 8:21 pm of 60 mg% and 40 mg% respectively. She was subsequently released without charge but, following further investigation, was charged with impaired and dangerous driving causing death and impaired and dangerous driving causing bodily harm.

British Columbia Provincial Court

The trial judge admitted as evidence the accused's statement made to the officer while in the police vehicle that she had consumed two glasses of wine at 2:00 pm that day. The judge concluded that there was no detention, either physically or psychologically, until the roadside demand was read and therefore no requirement for giving her rights under s. 10(b). In any event, the questions asked were part of a "pre screening" process and the answers about alcohol consumption were only admissible to prove the grounds for the officer's suspicion.

The officer testified she would not have suspected the presence of alcohol absent this admission of consumption. The officer never detected an odour of alcohol on the accused, never observed difficulty in her walking, talking, or producing identification and her eyes were not red or watery. The officer's suspicion was grounded on the temporal proximity between the admitted consumption, the collision and the absence of any obvious explanation for it. The judge found that the admission of consuming two glasses of wine three hours before the accident along with her apparent poor driving were sufficient to provide the officer with a reasonable suspicion to give the ASD demand. The Crown called other witnesses, including an expert in breathalyzer testing, and the accused was convicted.

British Columbia Court of Appeal

The accused argued, among other things, that the statement she made about consuming the two glasses of wine was inadmissible. In her view, when she was placed in the police car she was detained (both physically and psychologically). This detention was both arbitrary and required that she be advised of her right to counsel under s. 10(b) before questioning. She contended that the statement, which was used by the officer to formulate a suspicion that she had alcohol in her body and led and to the subsequent ASD fail, should have been excluded under s. 24(2).

Detention

The Court of Appeal rejected the argument that the accused was **physically** detained since she wanted to leave the police car but could not do so because the doors were locked. This was a finding of fact made by the trial judge which was entitled to deference. However, the Court of Appeal concluded the accused was **psychologically** detained. A reasonable person in her circumstances would conclude by reason of the officer's conduct that there was no choice but to comply with going to the police car and cooperating in the investigation. Justice Ryan, speaking for the Court of Appeal, stated:

> I am not persuaded that the trial judge fully examined the question of detention from the aspect of a person in [the accused's] position. [The accused], the driver, was the only person on the scene to be taken to the police car

"[T]he police officer only developed the grounds to reasonably suspect that the [accused] had alcohol in her body when [she] answered the officer's questions in the police car at least half an hour after she had accompanied the officer to the car. Thus the initial engagement of [the accused] was not in the context of a roadside screening demand, but as part of [the officer's] investigation of the accident."

> to await medical care. While in the vehicle [the officer] told [the accused] that she would be taking a recorded statement from her. [The officer] took out her recorder and began her interview while standing outside the passenger door to the vehicle. The trial judge considered the questions [the officer] asked to be "of a general nature". They were, in the sense that the officer was attempting to find out what had caused the accident. However, the officer began her interview with [the accused] by identifying the file number attached to the investigation and then asked [the accused] to tell her what had happened while she recorded the conversation. It seems to me that if the trial judge had asked what a reasonable person in [the accused's] position would make of the situation, he would have reached the conclusion that the reasonable person would believe that he or she was required to co-operate with the police and answer the questions. [para. 65]

Right to Counsel

Where a police officer reasonably suspects that a driver has alcohol in their body and has driven within the preceding three hours, the officer may make a demand pursuant to s. 254(2) of the *Criminal Code*. When this demand is made, the driver is detained within the meaning of ss. 9 and 10(b) of the *Charter* but the driver is not entitled to be advised of their rights before they provide a breath sample. This suspension of the right to counsel is a reasonable limit demonstrably justified under s. 1 due to the operational requirements of the roadside screening provisions under s. 254(2). A failure on a roadside screening test will then provide grounds for a breathalyzer demand under s. 254(3). But the question asked in this case was not part of the pre-screening process. Instead it was to further the accident investigation. Justice Ryan put it this way:

> [I]f [the officer] had arrived on the scene of the accident and had immediately found [the accused] to be exhibiting signs of intoxication, it would have been within the scope of her duties to make inquiries of [the accused's] alcohol consumption and to make the roadside screening demand without advising [the accused] of her right to counsel.
>
> In the case at bar, the police officer only developed the grounds to reasonably suspect that the [accused] had alcohol in her body when [she] answered the officer's questions in the police car at least half an hour after she had accompanied the officer to the car. Thus the initial engagement of [the accused] was not in the context of a roadside screening demand, but as part of [the officer's] investigation of the accident. [paras. 53-54]

Since the accused was psychologically detained, she should have been advised of her right to counsel before the tape recorded statement was taken.

Admissibility

Despite the *Charter* breach, the Court of Appeal admitted the accused's statement of alcohol consumption for the purposes of the determining whether the officer had a reasonable suspicion to demand a roadside screening test. In turn, the trial judge did not err in finding that the officer's subjectively held suspicion that the accused had alcohol in her body at the time of accident was objectively justified.

The accused's appeal was dismissed and her conviction upheld.

Complete case available at www.courts.gov.bc.ca

REASONABLE SUSPICION STANDARD IS LOW: ROADSIDE DEMAND REASONABLE

R. v. Ishmael, 2012 ABCA 282

After the accused was involved in a motor vehicle collision he called the police. He told the investigating officer that he had a beer with dinner about 4½ hours earlier. The officer read the roadside screening demand under s. 254(2) of the *Criminal Code*, but the accused unsuccessfully attempted to provide a sample. He was charged with failing to comply with a demand.

Alberta Provincial Court

The officer testified that the accused staggered when he walked and had a strong smell of alcohol on his breath but this evidence was rejected. The judge concluded that the only evidence supporting the officer's suspicion was the accused's admission of consuming a beer approximately 4½ hours before the accident. This, the judge ruled, was insufficient to ground a reasonable suspicion of alcohol in the body. Although the officer subjectively had a reasonable suspicion that the accused had alcohol in his body, there was no objective basis for that belief. The accused was acquitted of failing to provide a breath sample.

Alberta Court of Queen's Bench

The Crown successfully appealed the acquittal, arguing that the trial judge erred in finding that an admission of alcohol consumption was an insufficient objective basis for a reasonable suspicion that the accused had alcohol in his body. "In my view, the authorities have also established that an admission of alcohol consumption, at least in circumstances of the nature before the learned trial judge, is sufficient to support a reasonable suspicion of alcohol in someone's body without requiring investigation into timing, quantity, or behavioural effects," said the appeal judge. However, he also found it unnecessary to determine how long since the last drink would render this proposition an absurdity. The accused's acquittal was set aside and a conviction was entered.

Alberta Court of Appeal

The accused then applied for leave to appeal from the Court of Queen's Bench decision. He questioned whether an admission to the recent consumption of alcohol was sufficient to ground a reasonable suspicion that an accused has alcohol in their body within the meaning of s. 254(2) to the preclusion of other objective factors including the temporal element of the recent consumption.

Justice Rowbothan denied leave to appeal, finding the law was well settled in this area. Section 254(2) permits a police officer to make a roadside breath demand if the officer reasonably suspects that a driver has alcohol in their body and has driven within the preceding three hours. Reasonable suspicion has both a subjective and objective component. As for the objective component, Justice Rowbothan stated:

> The law on this issue is well settled. ... [A]n admission of consumption of alcohol is sufficient to meet the objective part of the test under s 254(2). It is unnecessary to analyze the behavioural consequences. Numerous Court of Queen's Bench decisions have ... found that other evidence about timing or amount of consumption need not be pursued to support this proposition.
>
> This line of cases confirms that the threshold of reasonable suspicion under s 254(2) is low. Police officers should not be required to enter into expert-type analyses regarding how much alcohol would be in a person's body based on the amounts and timing of the consumption.

"[T]he threshold of reasonable suspicion under s 254(2) is low. Police officers should not be required to enter into expert-type analyses regarding how much alcohol would be in a person's body based on the amounts and timing of the consumption."

> There are simply too many factors which can affect these conclusions including a person's height, weight, food consumption, size of drink, and alcohol concentration. Furthermore, entering into this type of questioning would only prolong and complicate the episode of detention and potential search imposed upon motorists. [references omitted, paras. 11-12]

Justice Rowbotham concluded that the appeal judge correctly followed the law.

Complete case available at www.albertacourts.ab.ca

LAW RESPECTING ARRIVING TRAVELLERS APPLIES TO PEOPLE LEAVING CANADA

R. v. Nagle, 2012 BCCA 373

The accused checked her luggage at the Vancouver's International Airport, passed through security and waited in the international departures lounge to board a flight for Japan. At 12:13 pm a roving Border Services Officer asked her to step aside from a lineup and place her purse on a shelf. He had positioned himself behind an airline employee who was checking passengers' boarding passes and identification. The officer had seen the accused present her documents and he wanted to determine whether she had complied with the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (*PCMLTFA*). The *PCMLTFA* requires persons departing Canada to report if they are in possession of currency valued at $10,000 or more. She said she only had $1,200 with her and that's all the officer found when he searched her purse. While searching, he continued to ask various questions about her ticketing, routing, occupation and travel plans. As a result of her answers, the officer became suspicious that she might be trafficking in drugs.

At 12:18 pm he told her that she was detained and advised her of the right to silence and her s. 10(b) *Charter* right to retain and instruct counsel, including the availability of duty counsel. The accused confirmed that she understood but did not wish to speak to lawyer. She was removed from the flight and her luggage was taken off the airplane. She was escorted to the secondary examination area where an x-ray of her suitcases revealed just over one kilogram of concealed methamphetamine concealed. A $500 Western Union receipt with the last name of a person reputedly involved in criminal gang activities was also found in her purse. The accused was arrested and again advised of her right to counsel. She spoke to duty counsel and a personal search under s. 8 of the *Customs Act* (*CA*) followed, but nothing more was found. She was charged with possessing methamphetamine for the purpose of trafficking and possession for the purpose of exportation from Canada under the *Controlled Drugs and Substances Act*.

British Columbia Provincial Court

The trial judge determined that the accused's *Charter* rights had been violated. He found she had been psychologically detained when the border services officer made the request for her to step aside and put her purse on the shelf. At that point she was under his direction and control and should have been advised of her rights under ss. 10(a) and (b). However, she was not advised of these rights until after she had given incriminating answers that led to the formation of the officer's reasonable

BY THE BOOK:

S. 16(2): *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*

An officer may, in order to determine whether there are, in baggage, currency or monetary instruments that are of a value equal to or greater than the amount prescribed for the purpose of subsection 12(1) and that have not been reported in accordance with that subsection, search the baggage, examine anything in it and open or cause to be opened any package or container in it and direct that the baggage be moved to a customs office or other suitable place for the search, examination or opening.

suspicion. The judge also concluded this detention was arbitrary. Furthermore, the judge called the search a "trolling expedition." Since the search of the luggage resulted from the information obtained in violation of her *Charter* rights, the luggage search was also unreasonable. The evidence was excluded under s. 24(2) and the accused was acquitted.

"Border crossings are not Charter-free zones. Border officials must be alive to the rights of travellers under Canadian law."

British Columbia Court of Appeal

The Crown argued that the accused was not detained under the *Charter* when she was asked to step aside and place her purse on the shelf. In its view, the accused was detained for constitutional purposes only when she was formally advised of such and steps were taken to remove her luggage from the airplane. Prior to that point, the Crown submitted that the accused was merely subjected to the permissible routine border screening processes which do not engage ss. 9 or 10 of the *Charter*. Further, s. 8 was not engaged when her purse was searched because she did not have a reasonable expectation of privacy as an international traveller at a border crossing. In any event, the examination of the purse was authorized by the *PCMLTFA* and there were reasonable grounds to support a luggage search under s. 99(1)(e) and (f) of the *CA*.

Border Context

Justices Chiasson and Bennett, writing the Court of Appeal's opinion, first found that the law respecting the detention and search of travelers applicable to those "entering" Canada also applied to those "leaving" Canada. They concluded that "the liberty interest and expectation of privacy of travellers is reduced at border crossings regardless whether they are arriving, in-transit or departing." Thus, routine screening procedures, such as questioning and searching baggage, equally apply to enforcing the law with respect to passengers leaving Canada without engaging constitutional rights as they do to those arriving in or in transit through Canada. The application of this general principle, however, will be determined on a case-by-case basis since circumstances will vary.

Detention?

When the accused was initially stopped and questioned she had not been detained in the constitutional sense. This was merely part of routine screening procedures by border officials. "[The officer's] questions and investigation had not yet gone beyond routine screening procedures in a way that would engage [the accused's] constitutional rights," said the Court of Appeal. Since she was not detained there was no obligation for the officer to inform her of her right to counsel.

Purse Search

The officer's initial questioning and examination of the purse was to determine whether she was required to file a report under the *PCMLTFA*. The search of the purse was a routine search and, in the context of crossing a border, again part of the routine screening procedure. An international traveller has a significantly reduced expectation of privacy and has no constitutional right to be free from the search of bags, purses, luggage or a pat down when they decide to cross a border. Furthermore, the officer was also authorized to examine the contents of the purse under s. 16(2) of the *PCMLTFA*. The search of the accused's purse was not a s. 8 breach. The Court of Appeal concluded:

> In our view, prior to formally detaining and advising her of her rights, [the officer] did not violate [the accused's] Charter rights by questioning her and looking through her purse. With the information at hand it was reasonable for him to detain her and for her luggage to be searched. The evidence to support that detention and the search and the evidence found as a result of the search was admissible. [para. 79]

And further it added:

> Border crossings are not Charter-free zones. Border officials must be alive to the rights of travellers under Canadian law. While border

> officials have a right to make routine inquiries as part of the screening process, once border officials have "assumed control over the movement of [a traveller] by a demand that had significant legal consequences" the person is detained and must be apprised of his or her rights and afforded an opportunity to contact counsel. At that point, constitutional rights are fully engaged. [reference omitted, para. 81]

Since there were no *Charter* breaches, there was no need to conduct an admissibility analysis under s. 24(2). The Crown's appeal was allowed, the accused's acquittal was set aside and a new trial was ordered.

Complete case available at www.courts.gov.bc

VIOLENCE OCCURRED AFTER THEFT COMPLETE: s.343(a) ROBBERY NOT PROVEN

R. v. Jean, 2012 BCCA 448

While a man was withdrawing $40 from his account in an ATM cubicle, the accused reached across, grabbed the two $20s as they dropped out from the machine and made a run for the door. The man blocked the door and a struggle ensued. He brought the accused back inside the cubicle, hitting him three or four times with his fist. The accused tried unsuccessfully to strike the man back. Police arrived and arrested the accused, who was found clutching $40 in his hand when he was booked into jail. He was charged with robbery under s. 343(a) of the *Criminal Code*.

> "Robbery within the meaning of s. 343(a) ... requires the use of violence or threats of violence in the course of, and for the purpose of, taking whatever it is that is being stolen. In other words, the violence or threat must occur before or contemporaneously with the theft."

British Columbia Provincial Court

At trial a series of photographs taken by a video surveillance camera at the ATM enclosure was used as evidence, along with the witness, police and jail guard testimony. The judge concluded that the accused's action fell squarely within the definition of robbery under s. 343(a), which reads, "Everyone commits robbery who (a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property." He was convicted.

British Columbia Court of Appeal

The accused argued, in part, that there was no evidence that he used violence or a threat of violence for the purpose of overcoming resistance to the theft. In his view, when the victim turned around and tried to recover the money the theft was complete. Any force or violence he then used was for the purposes of effecting escape, not for the purposes of effecting the theft or overcoming resistance to the theft. He submitted that the violence under s. 343(a) is limited to the time of the stealing, not afterwards. The Crown, on the other hand, suggested that the accused used a threat of violence in an effort to complete the theft he had begun when he seized the money. The Crown saw the activity in the ATM enclosure as one continuing transaction.

Chief Justice Finch, delivering the Court of Appeal judgement, agreed with the accused. Under s. 343, robbery may be committed in one of four ways. Here, the accused was charged under s. 343(a). "Robbery within the meaning of s. 343(a) therefore requires the use of violence or threats of violence in the course of, and for the purpose of, taking whatever it is that is being stolen," said Chief Justice Finch. "In other words, the violence or threat must occur before or contemporaneously with the theft."

The Court of Appeal found the "theft" was complete at the time the victim tried to stop the accused from leaving the ATM enclosure. Thus, whatever force the accused used was not to "prevent or overcome" the

victim's resistance to the stealing, but to carry out an escape after the theft had already occurred. Section 343(b), on the other hand, refers specifically to the use of violence either immediately before or immediately after the theft. The Crown, however, did not charge under s. 343(b). In finding there was no evidence support the robbery as charged under s. 343(a), Chief Justice Finch stated:

> The fact that the physical exchange between [the victim] and the [accused] occurred within a very short time after the money was taken does not bring the theft within the ambit of s. 343(a) so as to constitute robbery. The money was stolen without the use of violence or threats. [The victim] had no opportunity to resist the stealing because he was taken completely unawares. His use of force, and the [accused's] response, came in the course of [the victim's] attempting to prevent the [accused'] escape. [para. 42]

The accused's appeal was allowed and a conviction for the included offence of theft under $5,000 was substituted.

Complete case available at www.courts.gov.bc

BY THE BOOK:

s. 343 *Criminal Code*: Robbery

Every one commits robbery who

(a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;

(b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;

(c) assaults any person with intent to steal from him; or

(d) steals from any person while armed with an offensive weapon or imitation thereof.

RANDOM STOP IN PRIVATE PARKING AREA ARBITRARY

R. v. Lux, 2012 SKCA 129

Two police officers on routine patrol randomly stopped a vehicle in a private parking area adjacent to a hotel. They wanted to check for the driver's licence and vehicle registration. The driver was escorted to the police car and asked some questions, including whether she had recently consumed any alcohol. After she said she had, an officer advised her that he suspected she had alcohol in her body and demanded a sample of her breath under s. 254(2) of the *Criminal Code* for analysis into a roadside screening device. The accused went through the motions of providing a sample but failed to produce a suitable one. She was charged with failing provide a breath sample.

Saskatchewan Provincial Court

The judge concluded that Saskatchewan's *Traffic Safety Act* (*TSA*), including s. 209.1, did not apply to private parking areas and, therefore, "the police did not have authority to detain and question the motorist." The police breached the accused's s. 9 *Charter* right to be free from arbitrary detention and the evidence obtained that would otherwise justify a legal demand for a roadside breath sample was excluded under s. 24(2). The accused was acquitted.

Saskatchewan Court of Queen's Bench

On appeal by Crown, a Queen's Bench judge ruled that s. 209.1 does authorize a peace officer to conduct a random stop in a private parking area and require the detained driver to provide information concerning their sobriety. "There is no limitation found in s.

209.1 as to where a motor vehicle must be operating before it can be stopped, only that it is being operated," said the appeal judge. "In my opinion, the object of the legislation was to reduce or prevent accidents caused by drinking and driving." The accused's detention did not infringe s. 9. The Crown's appeal was allowed, the accused's acquittal was set aside and the matter sent back to Provincial Court for a new trial.

Saskatchewan Court of Appeal

The accused challenged the Queen's Bench ruling, arguing s. 209.1 did not authorize peace officers to randomly stop and detain a driver operating a vehicle on a private parking area for the purpose of checking for a driver's licence, vehicle registration or driver sobriety. The Saskatchewan Court of Appeal agreed, finding the Queen's Bench judge misinterpreted s. 209.1.

"In my view, s. 209.1 falls far short of establishing by clear words or clear implication that peace officers are entitled to conduct random stops anywhere on private property used as a parking area, where there is no basis to believe the driver is committing any infraction or poses a threat to public safety, or evidence or reason to believe that peace officers would be significantly hampered in performing their

"s. 209.1 falls far short of establishing by clear words or clear implication that peace officers are entitled to conduct random stops anywhere on private property used as a parking area, where there is no basis to believe the driver is committing any infraction or poses a threat to public safety, or evidence or reason to believe that peace officers would be significantly hampered in performing their duties if they waited until a vehicle exited from a private parking area onto a highway."

BY THE BOOK:

s. 209.1 *Saskatchewan's* **Highway Safety Act**

Authority of peace officer to stop and request information

209.1(1) A peace officer may require the person in charge of or operating a motor vehicle to stop that vehicle if the peace officer:

(a) is readily identifiable as a peace officer; and

(b) is in the lawful execution of his or her duties and responsibilities.

(2) A peace officer may, at any time when a driver is stopped pursuant to subsection (1):

(a) require the driver to give his or her name, date of birth and address;

(b) request information from the driver about whether and to what extent the driver consumed, before or while driving, alcohol or any drug or other substance that causes the driver to be unable to safely operate a vehicle; and

(c) if the peace officer has reasonable grounds to believe that the driver has consumed alcohol or a drug or another substance that causes the driver to be unable to safely operate a vehicle, require the driver to undergo a field sobriety test.

(3) No person in charge of or operating a motor vehicle shall, when signaled or requested to stop by a peace officer pursuant to subsection (1), fail to immediately bring the vehicle to a safe stop.

(4) No person in charge of or operating a motor vehicle shall fail, when requested by a peace officer, to comply with the requests of a peace officer pursuant to subsection (2).

"s. 209.1 does not authorize peace officers to conduct random stops for traffic safety purposes on private parking areas. Consequently, the subject random stop constituted an arbitrary detention that infringed the [accused's] s. 9 rights"

duties if they waited until a vehicle exited from a private parking area onto a highway," said Chief Justice Klebuc, speaking for the Saskatchewan Court of Appeal. "In sum, I conclude that s. 209.1 does not authorize peace officers to conduct random stops for traffic safety purposes on private parking areas. Consequently, the subject random stop constituted an arbitrary detention that infringed the [accused's] s. 9 rights."

The Court of Appeal, in looking at all of the factors under s. 24(2), also excluded the conscripted evidence obtained by police during the accused's detention. Although the officer "did not act in bad faith, he ought to have known that he was not entitled to detain the [accused] and check for a driver's licence or vehicle registration, neither of which was required to operate a vehicle off highway on a private parking area," said Chief Justice Klebuc. Furthermore, there was nothing unusual about the accused's driving. The officer could have waited until she drove onto a highway if that is what the accused chose. In balancing these factors, along with others, the Court of Appeal found the nature of the breaches and the manner in which they infringed on the accused's privacy and freedom outweighed the interests of the public in having a trial on its merits.

The accused's appeal was allowed, the evidence was excluded and an acquittal was entered.

Complete case at www.canlii.org

Meaning of "Highway"

It is important to note that the meaning of "highway" in some provincial traffic legislation does not include private parking areas while in some provinces it is included.

Saskatchewan's *Traffic Safety Act* excludes private parking areas within the meaning of a "highway":

> *"highway" means a road, parkway, driveway, square or place designed and intended for or used by the general public for the passage of vehicles, but does not include any area, whether privately or publicly owned, that is primarily intended to be used for the parking of vehicles and the necessary passageways on that area.*

Compare that to Alberta's *Traffic Safety Act* which includes private parking areas within the meaning of highway:

> *"highway" means any thoroughfare, street, road, trail, avenue, parkway, driveway, viaduct, lane, alley, square, bridge, causeway, trestleway or other place or any part of any of them, whether publicly or privately owned, that the public is ordinarily entitled or permitted to use for the passage or parking of vehicles ...*

In British Columbia, the meaning of highway is defined in s. 1 of the *Motor Vehicle Act*. It too, like Alberta, appears to include private parking areas:

> *"highway" includes*
> *(a) every highway within the meaning of the Transportation Act,*
> *(b) every road, street, lane or right of way designed or intended for or used by the general public for the passage of vehicles, and*
> *(c) every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited,*
> *but does not include an industrial road.*

Note-able Quote

"Coming together is a beginning; keeping together is progress; working together is success." - Henry Ford

"There can be no doubt that the unusual behaviour of the [accused] at the pub would impress upon the reasonable person that the [accused] was drunk. ... Such factors are, of course, capable of more than one interpretation, but absent evidence to the contrary, may properly be relied upon to found a conviction when married to other indicia of impairment, such as fish-tailing, speeding and collision."

UNUSUAL BEHAVIOUR SUPPORTS IMPAIRMENT INTERPRETATION

R. v. Startup, 2012 ABCA 356

The accused was involved in a single vehicle accident after leaving a neighborhood pub. The pick-up truck he was driving veered out of control on the snowy and icy roads, crossed the opposite lane of travel, and smashed head-long into a cement block retaining wall. A passenger in his vehicle, who was not wearing his seatbelt, was seriously injured when his head struck the windshield. After the collision the accused walked back to his residence and the police were called. He was charged with several offences including impaired driving causing bodily harm.

Alberta Provincial Court

The Crown's principal witness was the accused's passenger. He testified that the accused consumed alcohol over the course of the evening and that he had danced alone at the pub when no one else was dancing, was loud and arrogant, was getting in other people's faces and making a fool of himself. He also said the accused's driving was "erratic", "with no concern to anybody", "fish-tailing" and "all over the road." He claimed the accused was speeding excessively and over-steering, which led to the fish-tailing. The trial judge noted that there was an absence of physical indicia of impairment, such as an odour of alcohol on the accused's breath, bloodshot eyes, slurred speech, diminished motor skills, or other signs of impairment generally relied upon by police officers who testify in such prosecutions. But there was evidence of the accused's abnormal behaviour that the judge found could only be attributed to impairment by alcohol. As the judge observed, there was "no external evidence, other than the ability of the Accused being impaired by alcohol, that could explain the Accused's manner of driving, and collision that resulted in the [passenger] sustaining serious bodily harm." He was convicted, among other crimes, of impaired driving causing bodily harm.

Alberta Court of Appeal

The accused submitted that his "obnoxious" behaviour - being loud and loathsome - was consistent with a character flaw and other rational explanations other than impairment by alcohol. In his view, the trial judge erred in finding that his abnormal behaviour could only be attributed to his impairment by alcohol. But the Court of Appeal rejected this contention:

> There can be no doubt that the unusual behaviour of the [accused] at the pub would impress upon the reasonable person that the [accused] was drunk. The indicia of the [accused's] impairment in this case is in many ways no different than the indicia generally relied upon by law enforcement and the courts in that which can be described as the "usual" impaired driving case, namely, bloodshot eyes, slurred speech, lack of balance, etc. Such factors are, of course, capable of more than one interpretation, but absent evidence to the contrary, may properly be relied upon to found a conviction when married to other indicia of impairment, such as fish-tailing, speeding and collision. Put another way, such uncontradicted evidence does not command appellate interference. In context, it is the only reasonable inference to draw. [para. 9]

The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

ARREST GROUNDS REQUIRES MORE THAN REASONABLE SUSPICION OR HUNCH

R. v. Shinkewski, 2012 SKCA 63

After a previously reliable informant provided a tip to police that a shipment of cocaine and marihuana would arrive at a residence on a specific day, the police set up surveillance on the home. After some activity was observed involving a few vehicles arriving at the home and then leaving, the sergeant in charge of the investigation believed the anticipated drug delivery had been carried out. Later, police saw two vehicles arrive at the residence and depart shortly thereafter. Then, a third vehicle registered to the accused arrived, stayed for about four minutes and left. The sergeant was aware that the accused had been implicated by three previous informants in marihuana trafficking, but he did not know the specific details, currency or reliability of these tips. Nevertheless, the sergeant, on the basis of the latest informant's tip and other known information, believed he had reasonable grounds to believe the operator of the accused's vehicle had taken possession of a controlled substance. He directed the surveillance team to stop the vehicle, arrest its occupants for possession of a controlled substance and search them and the vehicle for drug evidence. The vehicle was stopped, the accused was arrested for possession of a controlled substance, and police found four one-half pound bags of marihuana in the vehicle. The accused was charged with possessing marihuana for the purpose of trafficking.

Saskatchewan Provincial Court

The accused challenged the admissibility of the marihuana, arguing he was unlawfully arrested and therefore his s. 9 *Charter* right to be free from arbitrary detention was violated. Furthermore, he submitted that the search incident to that unlawful arrest was also a *Charter* breach under s. 8 (unreasonable search). The judge found that the sergeant arguably possessed reasonable grounds to suspect criminal activity but not reasonable grounds to believe the accused had committed an indictable offence. Therefore, the arrest under s. 495(1)(a) of the *Criminal Code* was unlawful. The search of the vehicle incident to that unlawful arrest was unreasonable and the marihuana was excluded as evidence under s. 24(2). The accused was acquitted.

Saskatchewan Court of Appeal

The Crown appealed the accused's acquittal contending the trial judge erred in ruling that the sergeant did not have reasonable grounds to make the arrest under s. 495. Then, if the arrest was lawful, a search incidental to that arrest would be reasonable and therefore no s. 8 breach would flow.

Arrest

The police may arrest a person without a warrant under s. 495(1)(a) if the arresting officer has reasonable grounds to believe the subject of arrest has committed or is about to commit an indictable offence. This is a mandatory condition precedent to a valid exercise of the s. 495(1)(a) arrest power. Justice Caldwell, authoring the unanimous judgment, described the "reasonable grounds to believe" standard as follows:

> (a) an arresting officer must subjectively hold reasonable grounds to arrest and those grounds must be justifiable from an objective point of view – in other words, a reasonable person placed in the position of the arresting officer must be able to conclude there were indeed reasonable grounds for the arrest;
>
> (b) an arresting officer is not required to establish the commission of an indictable offence on a balance of probabilities or a prima facie case for conviction before making the arrest; but an arresting officer must act on something more than a "reasonable suspicion" or a hunch;
>
> (c) an arresting officer must consider all incriminating and exonerating information which the circumstances reasonably permit, but may disregard information which the

officer has reason to believe may be unreliable;

(d) a reviewing court must view the evidence available to an arresting officer cumulatively, not in a piecemeal fashion; and

(e) "...the standard must be interpreted contextually, having regard to the circumstances in their entirety, including the timing involved, the events leading up to the arrest both immediate and over time, and the dynamics at play in the arrest"; and, context includes the experience and training of the arresting officer. [references omitted, para. 9]

Further, it was important to note that the sergeant was not required to pause and confirm the details, currency or reliability of the information tying the accused to the three previous marihuana trafficking instances. He was entitled to rely on his imperfect recollection. But, if he had reason to believe the tips were unreliable or stale-dated at the time he was determining whether he had sufficient grounds for an arrest, he would have been required to disregard them or accord them less weight in his determination. As the Court stated:

> [T]he standard of "reasonable grounds to believe" does not require that an arresting officer ensure there has been "informed consideration" of all the information available at the time of arrest before the officer may lawfully effect an arrest. The standard simply requires the arresting officer to consider all incriminating and exonerating information which the circumstances reasonably permit. [para. 16]

In this case, the accused was merely a target of opportunity. "The evolving circumstances of the surveillance and arrests which flowed from it did not reasonably permit a prolonged investigation of the factors giving rise to [the sergeant's] determination that there were reasonable grounds to arrest the operator of [the accused's] vehicle," said Justice Caldwell. "Rather, the circumstances called for [the sergeant] to conduct a direct and honest assessment of all of the facts known to him at that time, whether incriminating or exonerating." Thus, a court must conduct "its assessment of the objective reasonableness of the grounds for arrest from the retrospective viewpoint of a reasonable person placed in the position of the arresting officer. Where the circumstances of arrest do not reasonably permit the arresting officer to inquire into the veracity of the information which formed the basis of the grounds for arrest, the law similarly does not permit judicial consideration of any evidentiary shortcomings which might come to light or be discovered post-arrest. An otherwise lawful arrest is not invalidated by the ex post facto discovery of deficiencies or defects in the information upon which the police have relied to effect the arrest unless, in the circumstances at play in the arrest situation, the police could reasonably have made inquiries which would have led to the discovery of the deficiencies or defects." The trial judge erred by considering an irrelevant factor (the actual reliability and currency of information was not known to the arresting officer at the time of arrest) in assessing the reasonableness of the grounds for arrest. The Court of Appeal found there were reasonable grounds to believe the accused had committed an indictable offence:

> ... I make the following observations from the jurisprudence:
>
> (a) information from a reliable source informing of a forthcoming delivery of cocaine and marihuana to a specific individual at a specific residence at a specific time by a courier arriving from a specific city;
>
> (b) the arrival of a vehicle consistent with the courier vehicle described by the informant at the identified residence on the day predicted, suggesting that the anticipated drug delivery had occurred;
>
> (c) shortly thereafter, the arrival at the target residence of a number of vehicles, including one registered to [the accused], each of which remained for only a short period of time; behaviour which, in [the sergeant's] experience as a drug investigator, was consistent with individuals picking up or purchasing drugs; and
>
> (d) [the accused] had been named in three separate tips as someone involved in marihuana trafficking.
>
> While the list is short, the standard of "reasonable grounds to believe" is not met by the number of grounds articulated by the arresting officer; rather, it is the cumulative

> weight of the grounds articulated which, on an objective basis and when considered in context, must tilt the balance from "mere suspicion" to a "reasonable suspicion" and then to "reasonable grounds to believe" an individual has or is about to commit an indictable offence. [references omitted, paras. 20-21]

So, while the objective factors in this case were not overwhelming, the list of factors articulated by the sergeant were such that their constellation would cause a reasonable person, standing in the sergeant's shoes, to reasonably believe that the operator of the accused's vehicle was unlawfully in possession of a controlled substance. The arrest was therefore lawful.

Search

Warrantless searches are prima facie unreasonable. The police power to search incidental to arrest, however, is an established exception to this general rule. If the accused's arrest was lawful - made in accordance with a lawful exercise of police power - the search of his vehicle would be reasonable. The accused conceded as much. Thus, the marihuana was admissible and there was no need to consider s. 24(2).

The Crown's appeal was allowed, the accused's acquittal was set aside and a new trial was ordered.

Complete case available at www.canlii.org

OFFICER CAN RELY ON INFERENCES TO JUSTIFY FINDS COMMITTING ARREST

R. v. Boyd, 2013 BCCA 19

A police officer working a roadblock screening for impaired drivers stopped a car driven by the accused, its lone occupant. The officer, standing next to the open driver's door window, asked the accused if he had anything to drink that evening and detected the smell of freshly burnt marihuana. He immediately placed the accused under arrest for possession of marihuana. The accused was searched and police found four small plastic baggies containing 0.5 grams of cocaine each and a cell phone. He was then arrested for possessing cocaine for the purpose of trafficking and charged with that offence.

British Columbia Provincial Court

The officer testified that he had on several occasions previously smelled burnt marihuana which he described as a very distinctive smell, different from vegetative marihuana. He characterized the odour as strong, leading him to believe it had been smoked within 15 minutes prior to the stop. The officer also said he had conducted at least 30 investigations during traffic stops where he detected the odour of burnt or burning marihuana and made many drug seizures (marihuana and contaminated paraphernalia) incidental to arrest.

The trial judge found the accused's arrest for possession of marihuana was unlawful. Possession of marihuana in these circumstances could only amount to a summary offence for which the officer would be required to find the offence being committed - s. 495(1)(b) *Criminal Code*: "A peace officer may arrest without warrant ... a person whom he finds committing a criminal offence."

In the judge's view, the smell of burnt marihuana alone was insufficient to justify the conclusion that the accused was in possession of marihuana at the time. The officer did not see any marihuana nor did he see the accused engaged in any act from which actual possession could properly be inferred. "The reasonable inference to be drawn from the smell of burnt marihuana, whether one estimates the burning to have taken place in the immediate past or hours previously, is that the marihuana which was the source of that smell no longer exists," said the judge. "It has been consumed by fire. In my view, it would be unreasonable, as a matter of both law and logic, to draw an inference of present possession from nothing more than evidence of past possession." Since the arrest was unlawful, the search incident to that arrest was unreasonable under s. 8 of the Charter, the cocaine was excluded under s. 24(2), and the accused was acquitted.

"[I]t seems to me that a peace officer could legitimately arrest a person if it is apparent that an offence is being committed by such person. This requirement has both subjective and objective components. A peace officer exercising the arrest power must provide some sensible reason for believing an offence was being committed by the person arrested."

British Columbia Court of Appeal

The Crowns challenged the accused's acquittal. The Court of Appeal first examined whether the power of arrest for a summary only offence requires an officer to actually see an offence being committed or whether it is enough that an officer observes facts from which an inference may be drawn that an offence is being committed. Justice Hall, delivering the Appeal Court's unanimous opinion, found an officer can rely on inferences arising from observed facts:

> [I]t seems to me that a peace officer could legitimately arrest a person if it is apparent that an offence is being committed by such person. This requirement has both subjective and objective components. A peace officer exercising the arrest power must provide some sensible reason for believing an offence was being committed by the person arrested.
>
> ... I take the word "apparent" to require an objectively sensible apprehension by the arresting officer that an offence is being perpetrated by the person arrested. [paras. 6-7]

So in this case, was the odour of burnt marihuana by itself sufficient to provide a lawful basis for arrest under s. 495(1)(b)? In answering the question, the Court of Appeal made clear that all of the relevant circumstances must be considered. If those circumstances objectively support an inference that criminal activity is occurring, a judge will be entitled to find an arrest justifiable under s. 495(1)(b). Here, however, different judges could have reached different conclusions about the adequacy of the arrest since the grounds - burnt odour plus officer experience - were close to the line. The decision of the trial judge was therefore entitled to deference and the acquittal was upheld.

The Court of Appeal also noted a difference between the odour of vegetative marihuana, which indicates the actual drug substance is being detected, and the odour of burnt marihuana, which merely indicates that some marihuana has been consumed by fire. Justice Hall also twice cited the case of *R. v. Webster*, 2008 BCCA 458 where it was stated that the odour of freshly-smoked marihuana emanating from a vehicle objectively supported, at a minimum, a reasonable suspicion that the driver and/or passenger were then engaged in possessing marihuana. So it appears that the dour of burnt marihuana will at least support an investigative detention.

Complete case available at www.courts.gov.bc.ca

What The Judge Couldn't Consider

Because the officer immediately arrested the accused upon smelling the odour of burnt marihuana, what followed the arrest could not be used as grounds to support it.

After the accused was directed to move his vehicle to a parking lot a short distance away so as not to impede traffic, the officer noted he accelerated his vehicle more quickly than was necessary. Once the vehicle was parked, the accused appeared to be moving around inside the vehicle very quickly "as if he were trying to conceal or attempting to retrieve something." The officer described these movements as "not typical" of those by persons who are the subject of traffic stops and are trying to retrieve driver's licences or other papers.

When the accused was told to get out of his vehicle, he put one hand into the hood of his jacket, a movement which caused the officer to believe he had put something into the hood. In fact, the hood was where the officer found the four plastic baggies containing cocaine. - *R. v. Boyd*, 2011 BCPC 137

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British Columbia Association of Chiefs of Police

April 7 - 9, 2013

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Conference Location

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Important Dates

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- Main Plenary Sessions - April 8 & 9, 2013
- Trade Show - April 8 & 9, 2013

The Service of Policing: Meeting Public Expectation

www.policeleadershipconference.com

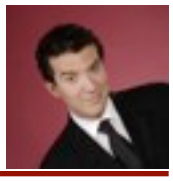
2013 ★ POLICE LEADERSHIP CONFERENCE

British Columbia Association of Chiefs of Police

POLICE LEADERSHIP CONFERENCE 2013

British Columbia Association of Chiefs of Police

Speakers include



Rick Mercer chronicles, satirizes and ultimately celebrates all that is great and irreverent about this country. Known as "Canada's Unofficial Opposition," Mercer is our most popular comic, a political satirist who knows exactly what matters to regular Canadians and what makes them laugh. Born in St. John's, Newfoundland, Mercer has won over 25 Gemini Awards.

Clarence Joseph Louie, first elected as Chief of the Osoyoos Indian Band in December 1984, has consistently emphasized economic development as a means to improve his people's standard of living. Under his direction (20+ years), the Band has become a multi-faceted corporation that owns and manages nine businesses and employs hundreds of people.

Craig Kielburger co-founded, with his brother **Marc**, Free The Children in 1995 at only 12 years of age. Today, he remains a passionate full-time volunteer for the organization, now an international charity and renowned educational partner that empowers youth to achieve their fullest potential as agents of change.

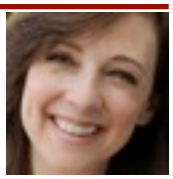
Wendy Mesley is a regular contributor to CBC News: The National, CBC Television's flagship news program, appearing throughout the week in a regular segment that asks provocative questions about the news stories Canadians are talking about. She also contributes to CBC News: Marketplace, CBC Television's award-winning prime-time investigative consumer show.

Richard Rosenthal was appointed BC's first Chief Civilian Director of the Independent Investigations Office on January 9, 2012. He has extensive experience in civilian oversight of law enforcement having served for 15 years as deputy district attorney for Los Angeles County, where he worked on various assignments.

Ian McPherson is a Partner, Advisory Services with KPMG in Toronto and the former Assistant Commissioner of Territorial Policing at the Metropolitan Police Service in London, UK. Ian is with KPMG's Global Centre of Excellence for Justice and Security, leading its work throughout North America.

Major-General (ret'd) **Lewis MacKenzie** is considered the most experienced peacekeeper on the planet. MacKenzie has commanded troops from dozens of countries in some of the world's most dangerous places. In Sarajevo, during the Bosnian Civil War, he famously managed to open the Sarajevo airport for the delivery of humanitarian aid.

Dr. John Izzo has devoted his life and career to helping leaders create workplaces that bring out the best in people, plus discover more purpose and fulfillment in life and work. For over 20 years, he has pioneered employee engagement, helping organizations create great corporate cultures and leading brands through transformations that create both customer and employee loyalty.



In an increasingly social world, **Susan Cain** shifts our focus to help us reconsider the role of introverts - outlining their many strengths and vital contributions. Like *A Whole New Mind and Stumbling on Happiness*, Cain's book, *Quiet: The Power of Introverts In a World That Can't Stop Talking*, is a paradigm-changing lodestar that shows how dramatically our culture has come to misunderstand and undervalue introverts.

ON-DUTY DEATHS DROP

On-duty peace officer deaths in Canada rose by two last year. In 2012 five peace officers lost their lives on the job as reported by the Officer Down Memorial Page.

Once again motor vehicles, not guns, posed the greatest risk to officers and continue to do so as the last 10 years suggest. Since 2003, 25 officers have lost their lives in circumstances involving vehicles, including automobile and motorcycle accidents (18), vehicular assault (5), and being struck by a vehicle (2). These deaths account for 45% of all on-duty deaths, which is more than twice the next leading cause of gunfire (13) in the same 10 year period. On average, six officers lost their lives each year during the last decade, while 2005 had the most deaths at 11.

Source: http://canada.odmp.org [accessed February 1, 2013]

2012 ROLL OF HONOUR

Constable Derek Pineo
Royal Canadian Mounted Police
End of Watch: July 20, 2012
Cause of Death: Automobile Accident

Community Peace Officer Rod Lazenby
Municipal District of Foothills
End of Watch: August 10, 2012
Cause of Death: Assault

Constable Katia Hadouchi
Sûreté du Québec
End of Watch: September 26, 2012
Cause of Death: Automobile Accident

Constable Donovan Lagrange Pineo
Sûreté du Québec
End of Watch: October 6, 2012
Cause of Death: Struck by Vehicle

Constable Adrian Oliver
Royal Canadian Mounted Police
End of Watch: November 13, 2012
Cause of Death: Automobile Accident

"They Are Our Heroes. We Shall Not Forget Them."

2012 Average Tour: 11 years 7 months
2012 Average Age: 30
2012 Deaths by Gender: female - 1
male - 4
2011 Deaths by Cause:
- **automobile accident - 3**
- **struck by vehicle - 1**
- **assault - 1**

2012 Deaths by Province:
- **Alberta - 1**
- **British Columbia - 1**
- **Quebec - 2**
- **Saskatchewan - 1**

Last 10 years by Gender:
- **female - 6**
- **male - 49**

Canadian Peace Officer On-Duty Deaths (by cause & year)

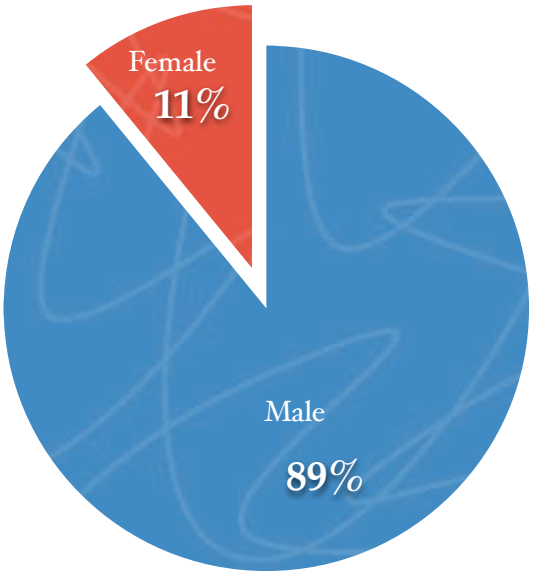
Cause	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	Total
Aircraft accident								2		2	**4**
Assault	1								1		**2**
Auto accident	3		3	3	1		1	2	1	3	**17**
Drowned			1					1			**2**
Duty related illness							1				**1**
Gunfire			1			3	3	5	1		**13**
Heart attack					1			1	2		**4**
Motorcycle accident										1	**1**
Natural disaster			2								**2**
Stabbed				1					1		**2**
Struck by vehicle	1	1									**2**
Vehicular assault		2				1	1		1		**5**
Total	**5**	**3**	**7**	**4**	**2**	**4**	**6**	**11**	**7**	**6**	**55**
Female	1	0	1	1	0	0	1	1	1	0	6
Male	4	3	6	3	2	4	5	10	6	6	49

POLICE ASSAULTS

According to a Statistics Canada report, *"Police-reported crime statistics in Canada, 2011,"* assaulting a police officer dropped (-26%) from 2010 to 2011. In 2011 there were 11,943 assault police officer offences compared to 15,913 the previous year. However, from 2001 to 2011, assaults against police have risen 31%. This increase may be attributable to new offences of assault with weapon/CBH to a peace officer and aggravated assault against peace officer which were recently added to the *Criminal Code*. These offences would have previously been reported under the general assault with weapon/CBH or aggravated assault provisions. For other assaults in 2011, there were 172,770 reports of common assault (level 1), 50,184 assaults with a weapon or bodily harm (level 2) and 3,486 offences of aggravated assault (level 3).

Source: Statistics Canada, 2012, "Police-reported crime statistics in Canada, 2011", Catalogue no. 85-002-X,released on July 24, 2011.

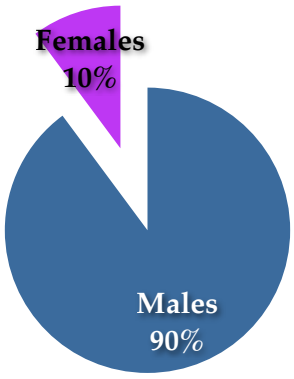
On-Duty Deaths 2003-2012 by Gender



U.S. ON-DUTY DEATHS INCREASE

During 2012 the U.S. lost 128 peace officers, down 47 from 2011. The top cause of death was gunfire (48) followed by automobile accidents (25), vehicular assault (11) and heart attack (7).

Texas lost the most officers for the sixth consecutive year at 11 - followed by the U.S. Government (9), Georgia (7), Colorado (6), North Carolina (6), Florida (5), Louisiana (5), Maryland (5), New York (5), Pennsylvania (5) and Puerto Rico (5). The average age of deceased officers was 41 years while the average tour of duty was 11 years and 11 months service. Men accounted for almost 90% of officer deaths while women made up 10%.



Source: http://www.odmp.org/year.php [accessed February 23, 2013]

U.S. Peace Officer On-Duty Deaths		
Cause	**2012**	**2011**
911 relatd illness	1	6
Aircraft accident	3	1
Animal related	-	1
Assault	1	5
Automobile accident	25	36
Drowned	-	4
Duty related illness	4	7
Explosion	-	1
Fall	2	-
Gunfire	48	67
Gunfire (accidental)	2	5
Heart attack	7	12
Heat exhaustion	1	1
Motorcycle accident	5	5
Stabbed	5	2
Struck by vehicle	6	4
Training accident	2	1
Vehicle pursuit	5	4
Vehicular assault	11	12
Weather/natural disaster	-	1
Total	**128**	**175**

"It Is Not How These Officers Died That Made Them Heroes. It Is How They Lived."

Inscription at the National Law Enforcement Officers Memorial, Washington, D.C.

U.S. On-Duty Deaths by Year (2002-2011)											
Year	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	Total
Deaths	128	175	176	140	153	202	161	165	166	150	1,681
Avg. age	41	41	42	40	40	40	38	39	40	38	
Avg. tour	11 yrs. 11 mos.	13 yrs. 4 mos.	12 yrs. 1 mos.	11 yrs. 11 mos.	11 yrs. 10 mos.	11 yrs. 4 mos.	11 yrs. 4 mos.	11 yrs. 1 mos.	12 yrs. 10 mos.	10 yrs. 5 mos.	
Female	13	11	9	3	13	9	9	5	9	6	87
Male	115	164	167	137	140	193	152	160	157	144	1529

REASONABLE GROUNDS: OFFICER TRAINING & EXPERIENCE COUNT

R. v Phung, 2013 ABCA 63

After receiving two tips that an Asian male was engaged in drug dealing, surveillance was set up on the accused and a police officer believed he saw him engage in a drug deal. He was arrested and, as an incident to that arrest, a search followed. Police found a bag of powder cocaine, a bag of crack cocaine and a cell phone on the accused. In his car they located four bags of marijuana, four cell phones, bear spray and a large kitchen knife. Police also obtained search warrants for two residences linked to the accused and recovered bags of marijuana, ecstasy pills, cash, body armour, weapons, cocaine and weigh scales. He was charged with several crimes, including drug and weapons offences.

Alberta Court of Queen's Bench

The judge concluded that the police officer's observation by itself was insufficient to provide reasonable grounds for the arrest. However, in combination with the informer tips and the officer's experience the standard had been met. She concluded that the officer had the necessary subjective belief and that his grounds were objectively reasonable. The arrest was lawful and the search incidental to that arrest was reasonable. The evidence was admissible and the accused was convicted of several offences.

Alberta Court of Appeal

The accused challenged the admissibility of the evidence against him, arguing the police did not have reasonable grounds to arrest him thereby breaching his s. 9 *Charter* rights. As well, he suggested that the incidental search was unreasonable under s. 8. In his view, the evidence should have been excluded under s. 24(2).

Reasonable Grounds

In order for a search incidental to arrest to be reasonable the arrest itself must be lawful. Under s. 495(1)(a) of the *Criminal Code* an arrest requires reasonable grounds. The Alberta Court of Appeal noted that the characteristics of reasonable grounds is an area of law that has been thoroughly plowed, citing a number of points:

- The arresting officer must
    1) subjectively have reasonable grounds to make the arrest; and
    2) those grounds must be justifiable from an objective point of view.
- The existence of objectively reasonable grounds for arrest requires that a Court consider whether a reasonable person would find reasonable and probable grounds for arrest.
- The reasonable person is "in the shoes" of the police officer, and can take into account the officer's training and experience.
- The "reasonable grounds" standard has been described as "the point where credibly-based probability replaces suspicion" and has been characterized in terms of "reasonable probability."
- Reasonable grounds is a standard higher than a reasonable suspicion but less than a prima facie case. Reasonable suspicion, by contrast, exists where there is "a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation."
- The totality of the circumstances must be considered, including the sufficiency of the informer tips, which were more than mere rumour or gossip.
- It is not the roll of an appeal "court to engage in precise margin definition regarding the interpretation of physical movements by trained police officers."

"[T]he reasonable person is 'in the shoes' of the police officer, and can take into account the officer's training and experience."

Here, the police had both informant tips and an observed transaction. The Court of Appeal found no error in the trial judge's conclusion that there were reasonable grounds to arrest the accused. There were no ss. 8 or 9 *Charter* breaches and no taint from the arrest to the content of the Informations to Obtain the search warrants for the residences. The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

SEARCH FOR EVIDENCE OF OTHER BREACHES INCIDENT TO ARREST VALID

R. v. Sesay, 2013 MBCA 8

A police officer initiated a traffic stop on a vehicle driven by the accused after seeing it run through a stop sign. He pulled the SUV over in a parking lot with the intention of issuing a traffic offence notice. The accused had a passenger with him. The officer asked for identification and registration and a computer check in the police car revealed the accused was flagged as a "known gang member," "armed and dangerous," a "suspected drug dealer" and had been known to be "violent or assaultive." The officer called for back-up and two additional units with two officers in each arrived, parking in such a fashion as to effectively box in the SUV. The accused was given his documents back and handed a ticket. The passenger was then asked to identify himself. He provided identification and the two men were asked to remain in the vehicle. The officer returned to the police car and checked the passenger on the computer, finding he was currently on bail for drug trafficking with conditions, including a requirement that he produce a copy of his undertaking upon police request and not possess drugs or electronic communication devices, such as cell phones, pagers or Blackberries. The passenger, when asked, was unable to produce a copy of his undertaking. He was asked to step from the vehicle, arrested, searched and read his rights. He was then handcuffed and seated on the curb.

The accused, who was now speaking to his lawyer on his phone, got out of the SUV, locked the doors and refused to provide the keys so the police could search it. The police wanted to search it for any weapons, cell phones or other items prohibited by the undertaking as an incident to the passenger's arrest. The accused eventually relented, produced the keys and a search was conducted. Two cell phones were found: one on the inside of the passenger door and one in the central console between the passenger and driver's seat. Police also found a gum container on the slider rail of the passenger seat nearest the passenger door. The gum container had 24 individually foil-wrapped packages of crack cocaine in it. The accused was arrested, given his rights, cautioned and handcuffed. He was searched, found to have $320 in cash in his right front pocket and was subsequently charged with possessing cocaine for the purpose of trafficking and possessing proceeds of crime under $5,000.

Manitoba Court of Queen's Bench

The trial judge concluded that the accused was not unlawfully detained. She found the traffic stop was lawful and the accused was merely delayed because of his passenger's arrest. Furthermore, the officer's stated reasons for searching the vehicle, including a concern for officer safety, were reasonable in the circumstances. As well, the search was reasonably conducted and lawful as an incident to the passenger's arrest. The accused's arrest, she held, did not occur until the discovery of the gum container and its contents. His arrest was therefore lawful.

"I am satisfied both subjectively and objectively that [the officer] had reasonable grounds to detain and arrest [the accused] when he did, in light of the drugs that were found in the car and all the other information he had and his detention was not arbitrary," said the judge. "His reasons for doing so were clearly articulated and can easily be inferred from all of the circumstances in full conformity with the law." The evidence was admitted and the accused was convicted on both charges. He was sentenced to three and a half years in prison, less six months time served, but consecutive to a two year sentence he was currently serving for another drug offence.

Manitoba Court of Appeal

The accused argued, among other grounds, that the search incidental to the arrest of his passenger was unlawful and unreasonable in its scope. In his view, the search to protect and discover evidence related to the breach of undertaking was unnecessary. The passenger had told the officer he did not have his undertaking with him, which provided all the necessary evidence for laying a breach of undertaking charge. Further, he suggested safety was not an issue since the scene was secure, he was out of the vehicle and his access to it could be restricted. Moreover, the passenger was under arrest, removed from the vehicle, placed on the curb and searched.

Search Incident to Arrest

Justice Monnin, delivering the Court of Appeal's opinion, cited a useful summary from British Columbia's top court (*R. v. Majedi*, 2009 BCCA 276) on the principles governing search incident to arrest:

- Officers undertaking a search incidental to arrest do not require reasonable and probable grounds; a lawful arrest provides that foundation and the right to search derives from it;

- The right to search does not arise out of a reduced expectation of privacy of the arrested person, but flows out of the need for the authorities to gain control of the situation and the need to obtain information;

- A legally unauthorized search to make an inventory is not a valid search incidental to arrest;

- The three main purposes of a search incidental to arrest are: one, to ensure the safety of the police and the public; two, to protect evidence; three, to discover evidence;

- The categories of legitimate purposes are not closed: while the police have considerable leeway, a valid purpose is required that must be "truly incidental" to the arrest;

- If the justification for the search is to find evidence, there must be a reasonable prospect the evidence will relate to the offence for which the person has been arrested;

- The police undertaking a search incidental to arrest subjectively must have a valid purpose in mind, the reasonableness of which must be considered objectively.

The Manitoba Court of Appeal found the vehicle search was justified as an incident to arrest for safety and evidence reasons, both legitimate purposes for exercising this search power. Although officer safety may not have been the primary reason for the search of the vehicle after the passenger's arrest, it was a relevant factor. "The fact that he was operating under the premise that he had been warned that the accused was a gang member, armed and dangerous and known for violent and aggressive behaviour, are all factors which would support, in an objective fashion, a decision to embark on a further search of the vehicle to look for prohibited weapons and ensure his security as well as that of the other officers," said Justice Monnin. "That it was not a primary factor does not take away that it was one aspect of his reasons for performing the search."

As well, the passenger was arrested for breach of undertaking, an undertaking that had different facets. Since the passenger did not have his undertaking with him it was open to the officer "to seek further evidence of a breach of the same undertaking." It was not outside the scope of searching as an incident to arrest for a breach of one of the undertakings condition to search the vehicle for evidence with respect to a possible breaches of other conditions arising from the same undertaking.

The search incidental to arrest was made for valid reasons and was performed reasonably. It was therefore lawful and the accused's appeal was dismissed.

Complete case available at www.canlii.org

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