JIBC

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

IN MEMORIAM

On Thursday February 21, 2013 57-year-old Newfoundland and Labrador Fish & Wildlife Officer Howard Lavers drowned after his snowmobile broke through pond ice near Blue Mountain. He and two other officers were patrolling the area when the ice broke and all three officers fell into the water. The other two officers were able to get back onto the ice but were unable to rescue Officer Lavers from the water. An RCMP dive team recovered Officer Lavers' body the following day.Officer Lavers had served with the agency for 30 years.

On Saturday March 2, 2013 27-year-old Kativik Regional Police Force Constable Steve Dery was shot and killed after he and another constable responded to a domestic violence call in Kuujjuaq, Quebec, at about 9:30 pm. The male subject opened fire on both constables as they exited their patrol car, fatally wounding Constable Dery and wounding the other constable.

On Thursday March 14, 2013 26-year-old Guelph Police Service Constable Jennifer Kovach was killed when her patrol car collided with a transit bus shortly after 12:30 am. She was responding to assist at another call when her patrol car crossed the center line and collided with the bus. She was transported to Guelph General Hospital where she succumbed to her injuries.

Source: Officer Down Memorial Page available at www.odmp.org/canada

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

inscription on Canada's Police and Peace Officers' Memorial, Ottawa

The Psychopathy of an Active Shooter: Profiling, Predicting, Preventing, Responding...
Dedicated to all Victims, Survivors and Responders

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Highlights In This Issue

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Upcoming Conferences

Police Victim Services of British Columbia Symposium
May 2-4, 2013
Delta Grand Okanagan Resort & Conference Centre
Kelowna, British Columbia

2013 NWGIA Spring Gang Conference
May 20-24, 2013
Northern Quest Resort & Casino
Airway Heights, Washington

Canadian Identification Society Annual Educational Conference
September 23-26, 2013
Vancouver, British Columbia

24th Annual Problem-Oriented Policing Conference
October 7-9, 2013
Dayton Convention Center
Dayton, Ohio

The Psychopathy of An Active Shooter: Profiling, Predicting, Preventing, Responding
November 6, 2013
JIBC
New Westminster, British Columbia

see page 30

Graduate Certificates
Intelligence Analysis
or
Tactical Criminal Analysis
www.jibc.ca

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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 its most recent acquisitions which may be of interest to police.

Bully proof [videorecording]: classroom confidential.

Toronto, ON: Canadian Broadcasting Corporation, [2012] : CBC Learning [distributor]

1 videodisc (ca. 45 min.): sd., col.; 4 3/4 in.

Originally broadcast as part of the CBC television series Connect with Mark Kelley on June 2, 2012.

Special features: additional interviews: Are bullies and victims so different? (Christina); After the bell (Kahlan); Bullying online (Shaheen Shariff); Legacy of bullying (John Amaechi); Sticks & stones (Emily Bazelon).

One in three Canadian students from grade 7 to 12 are victims of bullying. The numbers speak for themselves, but who are the faces behind the statistics? While on location at a Quebec high school [Hadley Junior High School/Philemon Wright High School], the Connect team sets up a "Bully Booth" where students and teachers privately share their personal experiences with bullying.

LB 3013.34 C3 B858 2012 D1543

Conflicts in the workplace [videorecording]: sources & solutions.

Kantola Productions.

Mill Valley, CA: Kantola Productions, c2010.

1 videodisc (17 min.): sd., col.; 4 3/4 in. (DVD).

There will always be conflict in the workplace. The secret is learning to manage it successfully. This program acknowledges common sources of workplace conflicts, and then explains specific techniques for resolving them.

HD 42 C68 2010 D1545

Diversity, culture and counselling: a Canadian perspective.

Honoré France, María del Carmen Rodríguez, Geoffrey Hett.

Calgary, AB: Brush Education, c2013.

BF 637 C6 F723 2013

Engage: the trainer's guide to learning styles.

Jeanine O'Neill-Blackwell.

San Francisco, CA: Pfeiffer, c2012.

LB 1027.47 O64 2012

Interviewing as qualitative research: a guide for researchers in education and the social sciences.

Irving Seidman.

New York, NY: Teachers College Press, c2013.

H 61.28 S45 2013

Jolts!: activities to wake up and engage your participants.

Sivasailam "Thiagi" Thiagarajan, Tracy Tagliati.

San Francisco, CA: Pfeiffer, c2011.

The landscape of qualitative research.

editors, Norman K. Denzin, University of Illinois, Urbana-Champaign, Yvonna S. Lincoln, Texas A&M University.

Thousand Oaks, CA: SAGE Publications, 2013.

H 62 L274 2013

Making the brain/body connection: a playful guide to releasing mental, physical & emotional blocks to success.

Sharon Promislow; illustrations by Cathrine Levan.

Vancouver, BC: Enhanced Learning and Integration, Inc., c2005.

BF 161 P75 2005

The new supervisor: lead with confidence.

Wil McKnight and Elwood N. Chapman.

Rochester, NY: Azxo Press, c2010.

HF 5549.12 C438 2010

Office ergonomics safety guide.

Hamilton, ON: Canadian Centre for Occupational Health and Safety, 2011.

TA 166 O43 2011

Presentation zen: simple ideas on presentation design and delivery.
Garr Reynolds.
Berkeley, CA: New Riders, c2012.
HF 5718.22 R49 2012

Racism in Canada.
Vic Satzewich.
Don Mills, ON; New York, NY: Oxford University Press, c2011.
FC 104 S289 2011

The secrets of facilitation: the SMART guide to getting results with groups.
Michael Wilkinson.
San Francisco, CA: Jossey-Bass, c2012.
HM 751 W557 2012

Social research method: qualitative and quantitative approaches.
H. Russell Bernard.
Los Angeles, CA: SAGE Publications, c2013.
H 62 B439 2013

Surviving survival: the art and science of resilience.
Laurence Gonzales.
New York, NY: W.W. Norton, c2012.
BF 698.35 R47 G66 2012

The winning factor: inspire gold-medal performance in your employees.
Peter Jensen.
New York, NY: American Management Association, c2012.
HF 5549.5 C53 J46 2012

Work it out: using personality type to improve team performance.
Sandra Krebs Hirsh & Jane A.G. Kise.
Mountain View, CA: Davies-Black Pub., c2006.
HD 42 H57 2006

Writing exceptional policies and procedures.
Stephen B. Page.
Westerville, OH: S. Page/Process Improvement Pub., c2009.
HF 5718.3 P3445 2009

CELLPHONE SEARCH UPON ARREST OK

R. v. Fearon, 2013 ONCA 106

A flea market jewellery stall operator was packing her merchandise into her car when she was robbed by two men, one of them pointing a handgun. The men grabbed the jewellery, valued between $10,000 and $40,000, and fled. Based on a description provided by a witness, police suspected the accused may have been involved. He was subsequently arrested for robbery while armed with a firearm, cautioned and advised of his right to counsel. When patted down police located a cellphone. An officer turned it "on", manipulated its key pad and discovered photographs of a gun and cash as well as an incriminating draft text message which read, "We did it were the jewlery at nigga burrrrrrrrr". At the police station the draft text message was saved and, as the investigation progressed, additional checks of the phone were made throughout the night and the next morning. In the lead investigator's experience, cellphones found in similar circumstances contain text messages sent between co-accuseds that would assist police in recovering stolen property and apprehending suspects. Many months later, an officer involved in the investigation believed that a search warrant was required to download the contents of the cellphone and therefore applied for and obtained a warrant to re-examine the phone for the photos and text message. The accused was charged with armed robbery and several related offences.

Ontario Court of Justice

The accused contended that the search of his cellphone and the retrieval of the photographs and text message exceeded the search incident to arrest power, breaching s. 8 of the *Charter* and rendering the evidence inadmissible under s. 24(2). In his opinion, the expectation of privacy in the contents of a cellphone is so high that a warrant is required before its contents can be examined. The judge, however, disagreed. In her view both the search at the scene

of the arrest and later at the police station were lawful. She found that there was a reasonable prospect of securing evidence related to the offence for which the accused was arrested. It was reasonable for the investigator to believe that the accused may have been communicating through the cellphone before, during or after the robbery with other perpetrators or with third parties. The search at the arrest scene was brief and cursory and there was no suggestion that it was an expansive or abusive search.

As for the searches of the cellphone during the night and early morning hours of the next day, they too were lawful as an incident to arrest. "Although considerable time and distance had passed from the search at the scene, it was not significant because the searches of the cellphone phone at the station were closely connected to the search at the scene," she said. "The searches at the station were essentially an extension of the search at the scene." In this case, the judge ruled that "the information stored is not so connected to the dignity of the person that this court should create an exception to the police ability to search for evidence when truly incidental to arrest and carried out in a reasonable manner." She also considered s. 24(2) in the event she was wrong in her s. 8 analysis and would have admitted the evidence anyway. The accused was convicted of robbery and was sentenced to six years in prison.

Ontario Court of Appeal

The accused again submitted that the search of the cellphone was not lawfully conducted as an incident to his arrest and infringed his s. 8 rights. He argued that there should be a cellphone exception to the doctrine of search incident to arrest. In his view, the warrantless search of the contents of a cellphone incident to arrest (except for a cursory examination to see if it contains evidence of the alleged crime) is prohibited by s. 8 except in exigent circumstances. He opined that the police should have applied for a search warrant after the pat down search produced the cellphone or, at the very least, after conducting the cursory examination of its contents when the photos and text message were discovered. Furthermore, he contended that the trial judge erred by admitting the incriminating text and picture produced from the cellphone under s. 24(2). The Crown, on the other hand, suggested that cellphone examinations fall properly within the ambit of the common law power of search incident to arrest and no "exception" for cellphones ought to be carved out of this search doctrine. Furthermore, the Crown argued that the trial judge's s. 24(2) analysis was correct.

Three interveners also took positions on this issue. The Canadian Civil Liberties Association submitted that cellphones should be excluded from warrantless searches incident to arrest, absent exigent circumstances. The Criminal Lawyers' Association would permit a cursory examination of a cellphone to determine if it contained relevant evidence, then the examination should cease and a search warrant obtained. The Director of Public Prosecutions of Canada submitted that there should be no cellphone exception.

Searching Incident to Arrest

For a search to be lawful as an incident to arrest there must be some reason related to the arrest for conducting the search at the time it is carried out, such as protecting police, protecting evidence or discovering evidence. The police do not need reasonable grounds they will find anything but their reason for searching must be objectively reasonable.

Was the belief by police that a cellphone search would yield evidence of the robbery reasonable?

Justice Armstrong, writing the Court's unanimous judgment, found the trial judge did not err in concluding that the police reasonably believed that an examination of the cellphone contents would yield relevant evidence:

> The [accused] was arrested about three hours after the robbery. The police had information that the [accused] had acted with a second person and that a third person was involved in the stashing of the stolen jewellery. There was therefore a potential for communication among

> the three suspected participants. In addition, the police had a legitimate concern about the location of the gun and the stolen jewellery. Any communication among the three suspects could lead to the discovery of one or both. In respect of the photographs found in the cell phone, the police knew from experience that robbers will sometimes take photos of the stolen property and even of themselves with the loot. [para. 47]

Did the cellphone search go beyond the permissible limits of a search incident to arrest?

Here, the Court of Appeal found the initial search upon arrest was valid. Justice Armstrong stated:

> I cannot conclude, in the circumstances of this case, that the original examination of the contents of the cell phone fell outside the ambit of the common law doctrine of search incident to arrest. Apparently, the cell phone was turned "on" and it was not password protected or otherwise "locked" to users other than the [accused]. The police officers had a reasonable belief that they might find photographs and text messages relevant to the robbery. The initial search at the time of the arrest involved a cursory look through the contents of the cell phone to ascertain if it contained such evidence. [para. 57]

The subsequent searches of the cellphone at the police station were more difficult for the Court to analyze:

> Arguably, those examinations went beyond the limits for a search incident to arrest. In my view, the proper course for the police was to stop the examination of the contents of the cell phone when they took the [accused] to the police station and then proceed to obtain a search warrant. [A detective] agreed that there was no urgency to search through the cell phone. There is no evidence that it would have been impracticable to appear before a justice to obtain a search warrant in the usual manner. If it was impracticable for an officer to appear before a justice to obtain a search warrant, the police could have proceeded to obtain a telewarrant under s. 487.1 of the Criminal Code. That said, the trial judge concluded that the examination of the contents of the cell phone at the police station were connected to the search at the scene of the arrest. Although some time and distance had passed from the arrest, the trial judge found that the police were still looking for evidence of the location of the jewellery and the gun as well as for contacts among the parties to the offences. These were findings of fact made by the trial judge. While I would have come to a different conclusion, I cannot say that these factual findings reflect palpable and overriding error.
>
> There is also another observation to make about the search of the cell phone at the police station. No additional evidence appears to have been discovered by the police and none was tendered in evidence from that search. [paras. 58-59]

In the end however, the Court of Appeal concluded that the trial judge did not err in finding the examination of the cellphone's contents at the time and place of arrest and later at the police station were within the ambit of the common law doctrine of search incident to arrest.

Carving Out An Exception

Justice Armstrong refused to carve out a cellphone exception to the common law power of search incident to arrest, at least on the facts of this case, finding it neither necessary nor desirable to do so:

> In this case, it is significant that the cell phone was apparently not password protected or otherwise "locked" to users other than the [accused] when it was seized. Furthermore, the police had a reasonable belief that it would contain relevant evidence. The police, in my view, were within the limits of Caslake to examine the contents of the cell phone in a cursory fashion to ascertain if it contained evidence relevant to the alleged crime. If a cursory examination did not reveal any such evidence, then at that point the search incident to arrest should have ceased.
>
> ... There was no suggestion in this case that this particular cell phone functioned as a "mini-computer" nor that its contents were not "immediately visible to the eye". Rather,

> because the phone was not password protected, the photos and the text message were readily available to other users.
>
> If the cell phone had been password protected or otherwise "locked" to users other than the [accused], it would not have been appropriate to take steps to open the cell phone and examine its contents without first obtaining a search warrant. [paras. 73-75]

Even if there was a s. 8 breach, the trial judge's s. 24(2) analysis was not in error. The accused's appeal was dismissed. It is worth noting that Justice Armstrong suggested that perhaps some future case may produce such facts that would lead the court to carve out a cellphone exception to the power of search as an incident to arrest.

Complete case available at www.ontariocourts.on.ca

OFFICER SAFETY JUSTIFIES CONTROLLING VEHICLE OCCUPANTS

R. v. Johnson, 2013 ONCA 177

Toronto Anti-violence Initiative Strategy (TAVIS) officers, responsible for providing high-visibility uniform policing, saw a Chevrolet Cobalt stop partially in a traffic lane and partially on the boulevard in an area that regularly experienced a spike in summer violence. As the car left, a passenger in the backseat yelled "Southside." The officers pulled the vehicle over but its driver did not have his G1 licence with him (a graduated licence requiring he be accompanied by a fully licensed driver). A front passenger was not fully licenced. While traffic tickets for unaccompanied driver, failure to surrender a licence and having no current licence plate tag were being written up for the driver, a second officer directed the accused (a rear passenger) to keep his hands on the back of the driver seat where he could see them. The officer was curious why the accused had yelled "Southside", but did not ask him about it. The conversation that followed was cordial, polite and respectful. The accused identified himself, provided his date of birth and gave his address. A CPIC query was inconsequential. The officer then noticed the end of a gun sticking out from a backpack on the seat next to the accused. The officer reached into the car, took the bag and found a loaded semi-automatic handgun along with other items including an inhaler with the accused's name and date of birth on it. The accused was arrested, given him his right to counsel and subsequently charged with several offences.

Ontario Superior Court of Justice

The accused argued that his rights under ss. 8, 9 and 10(b) of the *Charter* had been breached and the evidence was inadmissible under s. 24(2). But the trial judge rejected this view. He found that the car was lawfully stopped by police, even though they had two sets of interests: (1) *Highway Traffic Act* (*HTA*) offences and (2) curiosity as to why the accused yelled out "Southside". The judge also proceeded on the basis that passengers are not automatically detained upon an *HTA* stop. The interaction between the police and the accused was cordial and brief, and the temporary restriction on his movements did not render the encounter a detention. The requirement that the accused put his hands on the top of the car seat in front of him during this period of time was a routine act to protect the safety of officers. The judge stated:

> This type of routine concern for police officer safety, objectively viewed, does not result in a finding of detention. A reasonable person informed of all the circumstances would understand that the officer is taking a routine safety precaution in an area of the city that, according to the evidence in this case, historically saw a spike in violence in the summer months.

The extended amount of time the accused was required keep his hands in view was due to the time it took for the three *HTA* infractions to be documented. However, the CPIC check of the accused was an unlawful search. This search, however, did not turn the delay into a detention, result in any additional police interest in the accused nor lead to the finding of the handgun. Despite the s. 8 *Charter* breach, the gun was admitted as evidence

"If a person obeys a police command on the basis that he or she believes there is no alternative, that person is detained for the purposes of ss. 9 and 10 of the Charter."

under s. 24(2) and the accused was convicted of several firearm offences and sentenced to nine years in prison.

Ontario Court of Appeal

The accused challenged the trial judge's ruling, submitting he was detained and that the evidence was inadmissible.

Was there a Detention?

Justice Epstein, writing for himself and another judge, found the accused was detained when he was asked to put his hands on the back of the seat in front of him. "A person can be restrained physically or psychologically. Either amounts to detention," he said. "If a person obeys a police command on the basis that he or she believes there is no alternative, that person is detained for the purposes of ss. 9 and 10 of the Charter."

In assessing whether an individual was psychologically detained a court will look at the circumstances giving rise to the encounter, the nature of the police conduct and the particular characteristics of the individual. In this case, Justice Epstein found it unnecessary to decide whether passengers are automatically detained upon an *HTA* stop. Instead, he concluded that the accused was detained when he was directed to put his hands on the seat in front of him:

> Significantly, [the accused] was not merely asked to keep his hands visible; he was directed to put his hands on the seat in front him – in a fixed place. It was clear that [the accused] could not obey [the officer's] command to keep his hands on the seat and at the same time, open the car door, get out and walk away. [The accused] was effectively instructed to stay put. [para. 39]

And further:

> [V]iewed objectively, [the accused] would reasonably believe that he was not free to move his hands off the seat in front of him. [The accused] would reasonably believe he was not free to get out of the car and walk away. Indeed, [the accused] would almost undoubtedly have aroused the police officers' suspicions had he tried to leave, since that would necessarily involve disobeying [the officer's] direction to keep his hands on the seat. It follows that [the accused] was under psychological restraint at least from the point when [the officer] ordered him to keep his hands on the car seat in front of him. [para. 41]

This detention, however, was not arbitrary. "Officer safety is a valid reason to take reasonable steps to control the vehicle," said Justice Epstein. Furthermore, the accused's s. 10(b) rights were not breached. "It is well-established that lawful detention arising out of an HTA matter does not engage a person's rights set out in s. 10(b) of the Charter."

Unreasonable Search

Assuming the accused's s. 8 *Charter* rights were breached when the officer, without lawful authority, asked him for information necessary to conduct a CPIC check while detained, the trial judge made no error in admitting the gun under s. 24(2). The accused's appeal against conviction was dismissed and his sentence was upheld.

"Officer safety is a valid reason to take reasonable steps to control the vehicle."

A Slightly Different View

Justice Doherty would also dismiss the appeal. He saw no reason to review the trial judge's finding that the accused was not detained and, even if he was, it was not arbitrary and did not engage s. 10(b) rights. As well, assuming that police questioning was an unlawful search that violated s. 8, he agreed that the trial judge did not err in admitting the gun as evidence.

Complete case available at www.ontariocourts.on.ca

WARRANTLESS SEARCH OF WORKPLACE COMPUTER UNREASONABLE

R. v. McNeice, 2013 BCCA 98

An elementary school principal was suspected of accessing and downloading child pornography from an IP address associated with the home where he was the only male resident. The police obtained and executed a search warrant at his home and seized two computers – a desktop containing child pornographic images in its recycle bin and a laptop with no incriminating evidence. As for the accused's school laptop, the police had insufficient grounds for obtaining a warrant to search it. It was assigned to him for his exclusive use and was located in his office at the elementary school. Police asked the school district Superintendent for the laptop, which was turned over and its hard drive searched. Using special software, police found more than 100 images of child pornography on temporary Internet files in the recycle bin. The accused was charged with possessing and accessing child pornography.

British Columbia Provincial Court

The trial judge found the computer was owned by the school district, had been assigned to the accused for his exclusive use and he was not prohibited by school board policy from using the laptop for personal purposes. But the judge concluded the accused did not have a reasonable expectation of privacy. There were no personal files on the computer hard drive, no password protection and the computer was accessible to janitorial staff, the school secretary, and senior administrators. As well, his browsing history was effectively abandoned when he deleted the cache of temporary internet files on it. Moreover, even if he had a subjective expectation of privacy, it was not objectively reasonable. "In the totality of circumstances, I conclude that if it could be found that the accused probably had a subjective expectation of privacy in the deleted cache of temporary Internet files on the School District laptop, there is not a preponderance of evidence establishing that such an expectation would be objectively reasonable," the judge said. The evidence was admissible and the accused was convicted of accessing child pornography, while the possession charge was dismissed.

British Columbia Court of Appeal

The accused argued that the trial judge erred in holding that he did not have a reasonable expectation of privacy, either subjectively or objectively, in the school district's laptop and its informational contents. The warrantless search by police, he suggested, was a violation of his s. 8 *Charter* rights even though the school district consented to the search. In his view, the evidence obtained from the school issued computer should have been ruled inadmissible under s. 24(2).

Reasonable Expectation of Privacy

Chief Justice Finch, speaking for the unanimous Court of Appeal, found the accused did have a reasonable expectation of privacy in the deleted pornographic image files, both subjectively and objectively.

Subjectively, the accused had an expectation of privacy in the deleted files. Rather than abandoning the internet files through deletion – which the trial judge found was analogous to dumping physical garbage – it was "more consistent with an intention on the part of the user to destroy the information, or at least to conceal it from view by anyone else, including himself." As for there being no password protection and therefore no steps to hide or hinder access to these personal files, Chief Justice Finch concluded "the act of deleting the files in itself can

"[T]he deletion of the files was more consistent with an intention to conceal, and thus to maintain a privacy interest, than it is with the idea of 'abandonment', and an intention to give up a privacy interest."

be seen as a very deliberate step towards preventing others from access to 'personal files'." Moreover, the School District had no policy prohibiting the use of the laptop computer for personal purposes.

The subjective expectation of privacy was also **objectively** reasonable. The school board had no policy expressly prohibiting the accused from using the laptop for personal purposes and the deletion of the files had the same practical effect of prohibiting access by others like password protection. And again, the Court noted, "the deletion of the files was more consistent with an intention to conceal, and thus to maintain a privacy interest, than it is with the idea of 'abandonment', and an intention to give up a privacy interest." Furthermore, the nature of the information was connected to his biographical core; it contained private information as to his interests, likes and propensities.

Thus, the search of the files by police, without a warrant, was a breach of the accused's s. 8 right to be secure against unreasonable search and seizure.

Admissibility

Despite the s. 8 breach, the evidence was admissible under s. 24(2). Although the impact of the violation on the accused's *Charter* protected interests was significant, the breach was in the mid to low range of seriousness. As well, society's interest in adjudication of the case on its merits – an elementary school principal holding a position of trust accessing child pornography – favoured admission of the evidence. Balancing these considerations, the Appeal Court concluded that the admission of the unlawfully seized evidence would not bring the administration of justice into disrepute.

The accused's appeal was dismissed.

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

Note-able Quote

"Before you are a leader, success is all about growing yourself. When you become a leader, success is all about growing others." - Jack Welch

Defence Arguments for Privacy

SUBJECTIVELY

- Deletion of the laptop's temporary Internet files did not constitute abandonment.
- Deletion was more consistent with a wish to keep the information private.
- The act of deleting the temporary Internet files was the equivalent of protecting them with a password.
- The laptop was assigned only to the accused.
- It was kept in his office which was usually locked when he was not there.
- No one else had permission to use it.
- Even though other persons – janitorial staff, the school board secretary, and senior district administrators – could have accessed the laptop sitting on his office desk, none of them would have been able to access the deleted browsing history.
- The deleted temporary Internet files were personal, as were the e-mails forwarded from his home account.

OBJECTIVELY

- The information on the laptop, having been deleted, was not in public view.
- The files had not been abandoned.
- The files were confidential, even if on a school district laptop.
- The police file recovery technique was intrusive.
- The search revealed intimate details about his lifestyle.

Crown Arguments Against Privacy

SUBJECTIVELY

- The laptop was not a personal computer, but a work computer owned by the school district.
- There was no password on the computer.
- The deletion of the files, while not completely analogous to other situations of abandonment, demonstrated the accused's desire to distance himself from the files and amounted to a relinquishing of control of the files similar to abandonment.

OBJECTIVELY

- The accused knew that his Internet use was monitored while at school
- He would reasonably have known that he was publicly accountable for web use on a school laptop.

PASSENGER'S DETENTION NOT TRIGGERED ON VEHICLE STOP

R. v. Habrada-Walters, 2013 SKCA 24

Two police officers pulled a vehicle over to investigate suspicious activity at 3:00 am. They had observed the accused, a passenger, yelling from a vehicle at two women walking on the sidewalk. He was asking them to come along. The women told police they were fine but that they did not want to enter the vehicle. The women then left. The officers believed a criminal harassment investigation was worthwhile and, at minimum, the vehicle occupants should be identified. One officer told the the driver he was stopping the vehicle to investigate what was going on with the girls and asked to see a driver's license and registration. A second officer spoke to the accused, asked him what was happening and was told by the accused it was "not a crime to talk to girls". When asked for identification, the accused said "I don't have to give you my name." The accused was fidgety, nervous and would not look the officer in the eye. It appeared he was trying to conceal two cellphones; a white and blue one beneath his leg with his left hand and a black one into the map portion of the door panel with his right hand. When asked why he was trying to conceal the black phone, the accused said he found it at the 7-Eleven and was taking it back. He was reluctant to provide the black phone when asked, but when told he had no choice turned it over to police. The officer then asked him to step out of the vehicle. The officer opened up the phone to determine ownership and saw a text message which he interpreted as a reference to cocaine.

The police then received information from dispatch that the vehicle had been involved in a hit-and-run, its occupants refusing to give their names at the scene of an accident and offering or commenting about drugs to the other party to the accident. Police looked at the front of the car and saw minor scratches on the front bumper. Both men were arrested for hit and run, as parties to the offence, placed in the back of the police car, cautioned and advised of their right to counsel. Police found $290 on the accused after searching him and answered seven calls on his cellphone, each one related to a request for drugs. The men were advised that their jeopardy had changed and they were now under investigation for drugs. A drug dog was called and indicated in the trunk and on the dash, but no drugs were found. The accused was strip searched at the police station and 12.5 grams of cocaine was found in a large sandwich bag. He was charged with possessing cocaine for the purpose of trafficking.

Saskatchewan Court of Queen's Bench

The police said there were no traffic safety reasons for the stop and the judge found its main purpose was to identify the vehicle's occupants with a view to running them on police databases. He found it was unnecessary to decide whether the accused, as a passenger, had been detained when the vehicle was stopped. Instead, he concluded that the accused was detained when told to hand over the cellphone and step out of the vehicle. This detention, however, was not lawful. The police had not observed a crime, there was no complaint involving the men in the car and the women stated they were fine. Nor was there a problem with males in a vehicle accosting females on city sidewalks. There was no objective basis for concluding the accused or driver were about to commit a crime. The detention was therefore arbitrary.

This arbitrary detention, which occurred before the receipt of the hit-and-run information, resulted in the drugs being found and the subsequent charge. There was a chain of causation from the original detention, obtaining the hit-and-run information, arrest, cellphone seizures, answering them, the strip search, through to the charge. The decision to arrest for hit-and-run was subjectively believed to be true and an objectively reasonable conclusion. As for answering the cellphone, it could not be known at the time it was answered that there was no nexus between it and the hit-and-run arrest. The police were therefore entitled to seize the cellphones pursuant to the hit-and-run arrest and answer them. Despite the arbitrary detention, the evidence was nonetheless admitted under s. 24(2) and the accused was convicted of possessing cocaine for the purpose of

trafficking. He was sentenced 2 years less a day in jail and a DNA order and firearms ban was imposed.

Saskatchewan Court of Appeal

The accused challenged the trial judge's ruling on many grounds, including:

- he was unlawfully detained at the moment that the police stopped the vehicle;
- the unlawful detention created s. 10(a) and (b) *Charter* breaches;
- the continuing conversation breached s. 8 of the *Charter*;
- the decision to arrest was not objectively reasonable; and
- answering the cellphone was improper.

Detention?

Justice Ottenbreit, writing the Court of Appeal's judgment, found the trial judge did not err in finding there was no detention upon the initial stop of the vehicle. "It is not improper for police, provided that they are in the exercise of their general police duties, to make general inquiries of individuals or seek to identify individuals but whether a detention occurs and whether it is justified depends on the circumstances of the case," he said. As for investigative detention, there must be at least the suspicion of recent or ongoing criminal offences. Here, the trial judge was correct to find that there was no objective basis for suspecting or concluding the parties in the car had or were about to commit a crime and therefore an investigative detention on the accused to discuss the incident involving the women and obtain identification was not justified.

The accused, however, was not detained, either physically or psychologically, until he was "told he had no choice but to hand over the cellphone and to step out of the vehicle," said Justice Ottenbreit. "The interaction was, up to that point, a 'delay' or 'kept waiting' in an attempt to obtain identification information from [the accused] by co-operation, which [the accused] pointed out he was under no obligation to provide." Thus, absent a reasonable suspicion of criminal activity, an arbitrary detention occurred when the accused was told to hand over the cellphone and step from the vehicle.

s. 10 Charter?

Under s. 10 of the *Charter* "Everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefor [and] (b) to retain and instruct counsel without delay and to be informed of that right." In this case, the trial judge did not determine whether the accused's s. 10 rights were violated. The Court of Appeal found that since the accused was not detained when the vehicle was first stopped neither s. 10(a) or (b) were triggered at that point. When the accused was detained, albeit arbitrary (asked to hand over the cellphone and step out of the vehicle) he was aware that the police were investigating what was going on with the girls and the reason for the police inquiries. Further, even if he did not properly receive his s. 10(a) rights, the arrest for the hit-and-run was almost concurrent with the arbitrary detention and he was, minutes later, informed of the reasons for arrest. Thus, any s. 10(a) breach respecting the arbitrary detention mattered little in the s. 24(2) analysis.

As for s. 10(b), the investigative detention gave rise to the right to instruct counsel without delay and there is no temporary suspension of this right in cases of short investigative detentions. No such rights were given when the accused stepped from the vehicle for the criminal harassment investigation. Events, however, were moving rapidly forward and

"It is not improper for police, provided that they are in the exercise of their general police duties, to make general inquiries of individuals or seek to identify individuals but whether a detention occurs and whether it is justified depends on the circumstances of the case."

within minutes the purpose of the detention had changed to a hit-and-run, the accused was arrested and he was informed of his right to counsel. Justice Ottenbreit found the breach only a technical one. "Although the trial judge erred when he failed to find a s. 10(b) Charter breach, that error is of little consequence," he said. "There were no statements taken from [the accused] to which any s. 10(b) breach could be referable. That breach likewise had no nexus with the drugs which were found and which [the accused] sought to have excluded."

s. 8 Charter?

The conversation between the officer and the accused before detention was no more than a discussion. The only cellphone initially taken by police prior to arrest was the phone the accused said he found. The trial judge ruled he had no reasonable expectation of privacy in it. The accused told police he had found the phone and was taking it back to where he found it. He was not the owner and his intention was to disclaim control of it. There was no s. 8 breach in the officer receiving the phone.

Grounds for Arrest?

The trial judge properly determined that the police officer's decision to arrest the accused on the basis that they might be the same two individuals who had been involved in the hit-and-run was objectively reasonable. "The police had received information that the same vehicle with two people in it had been involved in a hit-and-run," said the Appeal Court. "The officers saw damage to the stopped vehicle. It is indeed a reasonable conclusion that there was a likelihood that these were the same two individuals that were in the vehicle earlier that evening."

Nexus between hit-and-run arrest and answering the cellphone?

Once the accused was arrested, the cellphones were taken as an incident of arrest. The absence of a nexus between the arrest for hit-and-run and answering the cellphones could not be known when they were answered. Accordingly, the police could answer calls coming to the cellphones following the arrest. As well, the answering of the cellphone did not intrude into its informational contents.

Admissibility

The trial judge did not err in admitting the evidence, even if the technical violations of s. 10(a) and (b) rights were also considered. The accused's appeal was dismissed and his conviction upheld.

Complete case available at www.canlii.org

NO DETENTION AT TIME GROUNDS FORMED: s. 10(b) RIGHTS NOT TRIGGERED

R. v. MacMillan, 2013 ONCA 109

A police officer was dispatched to a boating accident at about 5:30 pm. On arrival he saw a body covered with a sheet on the shore and two people at the end of the dock. One was being attended to by a paramedic and the accused, a young woman, was sitting. The officer approached the accused, who appeared distraught and crying, and attempted to comfort her. During a three to four-minute conversation, the officer detected an odour of alcoholic beverage on her breath. She said she had four drinks and was driving the boat. At 5:50 pm the officer formed a reasonable suspicion that the accused had alcohol in her body and had operated a vessel within the preceding three hours, sufficient to give the officer grounds to make an approved screening device (ASD) demand under s. 254(2)(b) of the *Criminal Code*, but he chose not to. Instead, he left the accused and went to deal with other people arriving at the scene.

In the meantime, the accused fainted and the paramedics took her to the ambulance. The officer took an ASD from his cruiser, entered the ambulance, read the ASD demand at 6:19 pm and demonstrated how she was to provide a sample. The accused became very upset, began to cry and the officer did not seek a breath test at that time, instead preferring to wait and ensure she was medically fit. The officer left the scene with the accused in an ambulance at 6:46 pm and arrived at the hospital at 6:51 pm. At 7:06 pm the emergency room physician finished the accused's examination and said she was medically fit to provide a sample of her breath. At 7:16 pm the accused provided a breath sample and

registered a fail. At 7:18 pm she was arrested for "over 80" causing death, informed her of her right to counsel and spoke to a lawyer at 7:32 pm. At 8:05 pm the doctor cleared her to leave the hospital and she arrived at the police station at 8:14 pm. She subsequently provided two breath samples of 170mg % each at 8:24 pm and 8:42 pm. She was charged with operating a vessel over 80mg% causing death and impaired operation causing death.

Ontario Superior Court of Justice,

The trial judge concluded that the accused's *Charter* rights were violated as a result of two delays; a **pre-demand** delay (in making the ASD demand) and **post-demand** delay (in facilitating the ASD test). The judge concluded that the accused was detained as soon as the officer formulated the necessary grounds to make the ASD demand at 5:50 pm and she would not been allowed to leave. The demand was required to be made forthwith, but it wasn't made until 6:19 pm. The judge found this pre-demand delay was not justified. Since there was no objective basis for suspending the taking of the breath sample, there was no basis for not giving the accused her s. 10(b) rights. The judge also ruled that the post-demand delay was not justified. Since there was non-compliance with s. 254(2), the accused's *Charter* rights under ss. 8, 9 and 10(b) were breached as a result of the two delays. The unconstitutionally obtained results of the breath tests were excluded under s. 24(2) and the accused was acquitted.

Ontario Court of Appeal

The Crown appealed the accused's acquittal to the Ontario Court of Appeal. It submitted that the trial judge erred in holding that the accused was detained before the demand was made and the demand, if it had to be made when the officer formed his grounds, was still valid. A delay was justified because the officer had to attend to other people arriving at the scene and get the ASD from his car, power it up and explain its use.

R. v. MacMillan Timeline		
Time	Activity	
5:30 pm	call dispatched	
5:50 pm	reasonable suspicion formed	pre-demand delay
6:19 pm	ASD demand made	
6:46 pm	left for police station in ambulance	post-demand delay
6:51 pm	arrived at hospital	
7:06 pm	doctor finished examination	
7:16 pm	ASD sample fail	
7:18 pm	arrested, right to counsel advisement	
7:32 pm	spoke to lawyer	
8:05 pm	left for hospital	
8:14 pm	arrived at police station	
8:24 pm	first breath sample 170mg%	
8:42 pm	second breath sample 170mg%	

Temporal Limits

The validity of a s. 254(2) demand involves consideration of temporal requirements. First, the officer must have reasonable grounds to suspect that the person "has alcohol" in their body when the demand is made and that the person was operating the vessel within the preceding three hours. In addition, there are temporal limits that relate to both the timing of the demand and the timing of the test.

Timing of Demand

When a motorist is required to comply with a screening demand under s. 254(2), they are detained within the meaning of s. 10(b). However, requiring compliance with the demand before advising the detainee of their right to counsel and providing an opportunity to consult with a lawyer is a reasonable limit within the meaning of s. 1 of the *Charter*. Generally, cases involving the interplay between s. 254(2) and s. 10(b) have been in the context of a motorist being detained, either when pulled over by police or by reason of the demand itself. In those

cases, where a detention has occurred, the "forthwith" requirement requires the demand be made as soon as the officer has formed the requisite grounds to make it. Without this immediacy requirement, s. 254(2) would not pass *Charter* scrutiny. However, in cases where the suspect has not been detained (as here), Justice Rosenberg was of the view that greater flexibility with the forthwith requirement could be tolerated between the forming of the grounds and the making of the demand.

In this case, Justice Rosenberg found the trial judge erred in holding that the accused was detained from the moment the officer had the grounds to make the demand and therefore was required to make the s. 254(2) demand immediately upon forming the reasonable suspicion:

> I agree with the [Crown] that the trial judge erred in holding that the [accused] was detained before the demand was made. Before the demand was made, the [accused] was not physically restrained nor under any legal obligation to comply with a restrictive demand or direction. [E]ven where a person is under investigation for criminal activity and is asked questions, the person is not necessarily detained. In the absence of a legal obligation to comply, detention arises where a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply. [para. 36]

"Until the demand was made, the psychological detention did not materialize. ... "[I]t is not until the officer's subjective intent is accompanied by actual conduct that the intent becomes relevant for constitutional purposes."

In this case there was no evidence that the accused was detained before the officer made the demand. Just because he would not have let her leave if she had tried does not mean that she was detained. "Until the demand was made, the psychological detention did not materialize," said the Court of Appeal. "[I]t is not until the officer's subjective intent is accompanied by actual conduct that the intent becomes relevant for constitutional purposes." Since there was no detention, the accused's ss. 9 and 10(b) rights were not violated before the demand was made. The forthwith requirement should have been applied flexibly. The 29-minute delay between the formation of the suspicion and the demand was reasonably necessary and the demand complied with the forthwith requirement. There were exigent circumstances at the scene. The arresting officer was dealing with the arrival of distraught friends and family members, and the accused was unconscious for an uncertain length of time.

Timing of Test

Since s. 254(2)(b) requires the vehicle operator to forthwith comply with the demand, it follows that the officer must also be in a position to facilitate compliance forthwith. This forthwith requirement flows from the making of the demand, not from when the officer had the grounds to make it. The officer delayed the taking of an ASD sample at the hospital for 57 minutes from the time the demand was made at the scene. Although he wanted to ensure the accused was medically fit before proceeding with the sample, the officer could provide no justification for not affording her the right to counsel. As the trial judge found, there was no reason not to give the accused her s. 10(b) rights even if the officer had good reason to hold off requiring her to comply with the demand by waiting to see if she was medically fit. The Court of Appeal agreed that the accused's s. 10(b) rights were infringed and that the delay in facilitating the ASD sample while the accused was detained rendered the demand invalid under s. 254(2). The "forthwith" criterion had not been met. Thus, the subsequent s. 254(3) demand was also invalid.

Admissibility

The Court of Appeal found the trial judge made two errors in deciding *Charter* breaches. First, he erroneously concluded that the accused was detained from the moment the officer formed the grounds to make the ASD demand and also in holding that the demand was not made forthwith. These errors tainted the trial judge's s. 24(2) findings and, in rebalancing the various factors, the evidence was admissible. The Crown's appeal was allowed, the accused's acquittals were set aside and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

CREDIBILITY UNDERMINES 'SAFETY' SEARCH: EVIDENCE EXCLUDED

R. v. Nartey, 2013 ONCA 215

Shortly after midnight two police officers observed a vehicle exit the parking lot of a notorious strip bar and fail to come to a complete stop before making a turn at a red light. After pulling the vehicle over some distance after the red light, the driver (accused) was asked for his licence, registration and insurance. As a ticket was being written, the officers received information by computer that the accused had been convicted of possession for the purpose of trafficking, had two firearm prohibitions and was associated to a street gang. They also saw movement in the car which, combined with the accused's patronage of the strip bar and his record, caused the senior officer to have concern for their safety. Both officers immediately got out of their cruiser, approached the vehicle, asked the accused to step out and patted him down for weapons. No weapons were found but the senior officer felt what he believed to be a large wad of cash in the accused's pocket. The senior officer then decided to search the vehicle, noticing Bounce dryer sheets sticking out of the vents, four air fresheners hanging in the vehicle, and the smell of fresh, unburned marijuana. The accused was arrested for a s. 4(1) of the *Controlled Drugs and Substance Act* offence, the vehicle was further searched and a half pound of marijuana and two loaded guns were found in the locked glove compartment. Later, two bags of crack cocaine were discovered on the accused.

Ontario Court of Justice

At trial the senior officer said the accused reached into the back seat, grabbed a small black duffle bag, placed it in the front passenger seat and then appeared to rifle through the bag. When the accused then tossed the bag into the back seat, it looked less full and less heavy. This black bag, however, was not in the photos of the vehicle or its contents taken after the arrest, nor was it an exhibit at trial. The judge did not accept the senior officer's testimony regarding the black bag and rejected his evidence that the pat down search and subsequent search of the vehicle were motivated by concerns for officer safety. The judge concluded that the *Highway Traffic Act* stop, even if validly made for rolling through the red light, became an improper and unjustified investigative detention once the officers received the information with respect to the accused on their computer. In the judge's view, the officers embarked on a "fishing trip". The pat down search and subsequent vehicle search were unlawful and the evidence was excluded under s. 24(2). The judge found that the senior officer had attempted to tailor his evidence to fit a pattern which would have been allowed by the courts. Plus, the judge also commented that he was not persuaded that the accused had in fact made a rolling stop. He was acquitted.

Ontario Court of Appeal

The Crown challenged the accused's acquittals arguing, in part, that the trial judge made mistakes that tainted his entire *Charter* analysis. But the Court of Appeal disagreed. In this case, the trial judge found that the Crown had failed to discharge the onus of justifying the warrantless searches on the ground of officer safety. The judge made credibility findings in assessing the officers' evidence in relation to the grounds offered for the searches. He doubted all of the officers' evidence, including their evidence that the driver had made a rolling stop at a red light. But he did not find as fact that the rolling stop had not occurred. The trial judge made no error of law and the Crown's appeal against the accused's acquittal was dismissed.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

"The most dangerous leadership myth is that leaders are born-that there is a genetic factor to leadership. That's nonsense; in fact, the opposite is true. Leaders are made rather than born." - Warren Bennis

REASONABLE GROUNDS: OFFICER ENTITLED TO DRAW INFERENCES

R. v. Jacob, 2013 MBCA 29

As a result of an impaired driving Checkstop program police pulled over a car at about 2:20 am after they saw it exit a parking lot, signal to turn right but instead go straight ahead. Once the tinted driver's window was opened, no one was in the driver's seat. Instead, the accused was sitting in the front passenger seat. He claimed that the driver had left the vehicle and gone to a bar to get one of their friends. The accused smelled of alcohol, his eyes were "glossy" and his speech was slightly slurred. The officer made a demand for a roadside screening test and took the accused to the Checkstop van so a test could be administered by an officer qualified to perform one. The accused failed the test and was arrested for driving over 80mg%. A demand for a breathalyzer sample followed. The accused refused, stating, "You know that I am drunk, I know that I am drunk, but I was not even driving." No breath sample was provided and the accused was charged with refusal and driving while disqualified.

Manitoba Provincial Court

The investigating officer testified that when the roadside screening demand was made he suspected that the accused was impaired, but did not believe there were reasonable grounds to make a breathalyzer demand. He also said he understood that a failure of the screening test meant the accused had been driving with a blood alcohol level over .08. The judge, however, found there was no evidence that the device was approved. The investigating officer never identified it as an approved device nor did the officer administering the breath test provide evidence. The judge concluded that the Crown must prove that the screening device was an approved device before the officer could rely on its results in forming the reasonable grounds required to make a breathalyzer demand. With no evidence that the device was approved, the judge ruled the test results (ASD failure) inadmissible for the purposes of forming the officer's reasonable grounds for making the breath demand. Since the officer did not have grounds for the breath demand the accused was acquitted of refusing to provide a breath sample.

Manitoba Court of Queen's Bench

The appeal judge found it was not necessary that the Crown prove by testimony that the device used was an approved device before the police could rely on the test results in forming reasonable grounds to make the breath demand. Instead, a court must determine whether the police officer had reasonable grounds to make the demand based on all of the facts known to him and reasonable inferences drawn therefrom, including a screening test result communicated to him by another officer. The police officer must only exclude from consideration those facts that the officer finds unreliable or deficient (eg. the officer was aware that a deficiency in the screening device or in the manner in which it was being used would render unreliable results). Here, the appeal judge reviewed the facts known to the investigating officer and concluded that, when all of those facts were put together and viewed objectively from the perspective of a reasonable person, there was sufficient information to make the breathalyzer demand. A court could infer that the screening device had been approved because it was provided by the police department and the officer was "entitled to assume that his superiors have arranged to screen drivers using appropriate equipment." The accused's acquittal was set aside and a new trial was ordered.

Manitoba Court of Appeal

The accused again attacked the grounds for the breath demand, arguing that the officer did not have subjective grounds to make it and that there would not have been objective grounds to do so without the results of the screening test. In his view, an officer is not entitled to rely on the results of a screening device if it is not approved under the *Criminal Code* unless there is other evidence proving that it is reliable. He also

suggested the officer could not have inferred that the screening device had been approved. The Crown, on the other hand, opined that the reasonable grounds required for making a proper breathalyzer demand can be based on facts and information available to the police officer and on inferences drawn by them. It suggested that the Crown need not establish that the device was approved but only that the officer believed that it was and that the belief was objectively reasonable. In this case, the Crown submitted that the officer had the requisite subjective belief in the screening test's reliability - he made an arrest after the test - and that his belief in making the breath demand was objectively reasonable.

Reasonable Grounds

A police officer must have reasonable grounds to believe that an accused has committed an offence under s. 253 of the *Criminal Code* to make a breathalyzer demand under s. 254(3). A screening device test is an investigatory tool that assists police in furnishing the necessary reasonable grounds. Such a test can be administered by police if they have a reasonable suspicion that the driver has alcohol in their body. A fail result, in proper circumstances, can provide sufficient reasonable grounds to justify a breathalyzer demand. But a fail result on a screening device, unlike a breathalyzer test which precisely determines the driver's alcohol level, is not subject to criminal liability. It is not evidence of impairment. "It is a screening test to be used by a police officer, together with whatever other information he or she has, to determine whether there are reasonable grounds to believe that the driver was impaired and, on that basis, to make a breathalyzer demand," said Justice Beard, authoring the Court of Appeal's opinion. "As such, the result of the screening test is subject to the same rules of admissibility and use for that purpose as is other information gathered by an officer, including hearsay evidence."

"The standard of proof for reasonable grounds to believe ... is not a high or overly onerous standard. While the officer needs to show more than a suspicion, the reasonable grounds standard is less than that of a prima facie case or proof on a balance of probabilities or proof beyond a reasonable doubt."

Justice Beard described the reasonable grounds standard this way:

> There are two components to reasonable grounds – an objective one and a subjective one. Both ss. 254(3) and 495(1) require that a police officer subjectively have an honest belief that the accused has committed the offence and that objectively there must be reasonable grounds for that belief. ...
>
> The law is that, in determining whether the officer had reasonable grounds to make the breathalyzer demand, the court is required to take into account the totality of the circumstances known to the officer. [references omitted, paras. 25-26]

And further:

> [A] police officer can draw the facts on which he relies to form his reasonable grounds from many sources, including informants, other police officers and citizens who call the police to report an offence, because reasonable grounds can be based on information received from third parties without infringing the hearsay rule. Further, the police officer is entitled to reject or discard information that he has good reason to believe is unreliable ... and to draw inferences from the facts that he accepts.
>
> The standard of proof for reasonable grounds to believe, being a reasonable belief that an offence has been committed, is not a high or overly onerous standard. While the officer needs to show more than a suspicion, the reasonable grounds standard is less than that of a prima facie case or proof on a balance of probabilities or proof beyond a reasonable doubt. [references omitted, paras. 33-34]

The Court of Appeal concluded these rules regarding reasonable grounds apply equally to the facts and circumstances requiring an accused have care and control of a vehicle as they do to whether the

screening device used was approved. He again summarized the standard as follows:

- there are two components to reasonable grounds – whether the police officer had a subjective belief, honestly held, that he had reasonable grounds to arrest or to demand a breath sample and whether a reasonable person in the position of the police officer would conclude that there were reasonable grounds for the arrest or the demand;

- in weighing the evidence, the court should take into account the totality of the circumstances known to the police officer and should not examine and test each piece of evidence and each factor individually;

- the question is not whether the facts, circumstances and inferences ultimately prove to be true, but whether it was reasonable for the police officer to believe, at the time, that the facts and circumstances were true, to draw the inferences that were drawn and to rely on them at the time of the arrest or the breathalyzer demand;

- the standard of proof for reasonable grounds to believe is not high or particularly onerous – it has been referred to as "credibly-based probability," which, on a spectrum of proof, is higher than a reasonable suspicion that an offence has been committed, but lower than proof on a balance of probabilities (the civil standard) or proof of a prima facie case. [para. 35]

In this case, the trial judge erred by holding that the police officer could only rely on the screening test results in formulating reasonable grounds for making the breathalyzer demand if the Crown proved that the screening device used was approved. Instead, the trial judge should have asked whether the officer subjectively had an honest belief that he had sufficient grounds to make the breathalyzer demand and whether that subjective belief was reasonable based on all of the facts and information known at the time that the breathalyzer demand was made.

Unless the judge found the officer did not honestly believe that the results were reliable or that his belief was unreasonable based on the facts of the case, the fail result should not have been excluded. The accused's appeal was dismissed and the order of a new trial was upheld.

Complete case available at www.canlii.org

SIDEBAR

The Court of Appeal highlighted the following facts and circumstances that were known to the officer in relation to the reliability and use of the screening test results on the question of whether there were reasonable grounds to make the breathalyzer demand:

- **The officer operating the screening device was trained to perform the screening test.**
- **Police were working as part of a roadside Checkstop program.**
- **The officer operating the screening device was in a police Checkstop van.**
- **The officer operating the screening device was called over to perform a roadside screening test.**
- **The accused entered the police van and, very shortly after, the officer operating the screening device advised that the accused had failed the ASD test, which the investigating officer believed was an "alcohol screening device" test.**
- **The investigating officer believed that a failure meant that the accused had been driving with a blood alcohol level in excess of .08.**

"[The investigating officer] clearly inferred from this that the screening test results were reliable and that he could rely on them in making the breathalyzer demand," said Justice Beard. "There was no evidence of any facts known to him that should have led him to believe, or to be concerned, that the screening device used for the test was not approved, was not reliable, or was not functioning properly."

NEW & LESS SERIOUS TURN DID NOT RE-TRIGGER RIGHT TO COUNSEL

R. v. Paulin, 2013 NBCA 15

Police obtained a warrant to search the accused's residence in relation to the offences of possessing marihuana and methamphetamine for the purpose of trafficking. At the time the warrant was executed, police explained it to the accused and read him his right to remain silent and right to counsel. He said he understood his rights. Police seized marihuana from a pocket of the accused's jacket and about 300 bottles of beer found in the residence. The accused was arrested for possessing marihuana for the purpose of trafficking and again informed of his rights, including the right to counsel. When asked if he wanted to speak to a lawyer he replied "not now". He was then informed that if he changed his mind, he need only tell a police officer and he would then be able to speak to a lawyer. He was transported to the police station where he was again informed of his right to silence and his right to counsel. He said "not right now" and "I want to speak with someone later" in response. Again it was explained that if he wanted to speak to a lawyer, he only need ask and the recording would be stopped to allow him to do so. He then made an inculpatory statement. The accused was charged with possessing marihuana for the purpose of trafficking. He was also given a ticket for violating s. 132 of New Brunswick's *Liquor Control Act* but it was later withdrawn by the Crown.

New Brunswick Provincial Court

The accused argued that his statement was obtained in breach of s. 10(a) (reason for arrest) and s. 10(b) (right to counsel) of the *Charter* because he did not know, at the time it was provided, that he was being investigated for the alcohol found in his residence. The interrogating officer admitted that he did not limit his questions to possession of marihuana for the purpose of trafficking. He said he questioned the accused about the large quantity of liquor found even though he was not informed about the alcohol investigation. The officer also said the liquor line of questioning, which he felt was secondary to the main scope of the investigation, only took place after the questioning concerning the marihuana possession. The trial judge accepted the accused's submission and excluded the statement because of the failure by the police to inform him they were also investigating the alcohol related offence. In the judge's view, an accused must know exactly what charges or jeopardy they face so as they can make a proper decision whether or not to speak to a lawyer. The accused was acquitted.

BY THE BOOK:

s. 132 New Brunswick's *Liquor Control Act*

Except as provided by this Act or the regulations, no person shall, within the Province, by himself, his clerk, employee, servant or agent, expose or keep for sale, or directly or indirectly or upon any pretence or upon any device, sell or offer to sell, liquor.

New Brunswick Court of Appeal

The Crown appealed the accused's acquittal suggesting the trial judge erred in finding ss. 10(a) and (b) *Charter* violations. The Crown submitted that the accused did understand the extent of his jeopardy and that his waiver was valid. On the other hand, the accused asserted that he was not informed prior to providing his statement that an investigation would be conducted in relation to the alcohol. Therefore his decision to waive his right to counsel was not fully informed. In his opinion, he should have received yet another warning regarding the right to counsel when the investigation shifted from "marihuana" to "alcohol." The officer's failure to do so breached his rights under s. 10(b), which in turn invalidated the initial waiver of his right to counsel that was given when the investigation dealt exclusively with marihuana.

"The detained person must know 'generally' the jeopardy being faced and be able to appreciate the consequences of deciding for or against counsel. The suspect need not know the exact charges or 'exactly what he is faced with'."

Justice Bell, authoring the unanimous Court of Appeal judgment, found that not every change in jeopardy will require the police to provide a further opportunity for the arrestee to consult with counsel. Instead, the change in jeopardy must be fundamental, taking a new and more serious turn, before triggering the requirement that police renew or again advise a suspect of their right to counsel. Concerning the extent to which information must be given pursuant to s. 10(a), the Court of Appeal stated:

> The detained person must know "generally" the jeopardy being faced and be able to appreciate the consequences of deciding for or against counsel. The suspect need not know the exact charges or "exactly what he is faced with" as suggested by the trial judge. In this case, it is evident the [accused] knew the seriousness of the charge against him (possession of marihuana for the purpose of trafficking): the warrant was read to him when the search began; he witnessed the seizure of the bags containing a green substance (later identified as marihuana); he was arrested and informed of the reason therefor; he was taken to the police station; he was placed in an interrogation room; and he would be presumed to know that the potential sentence, should he be found guilty, could include incarceration for an extended period of time. [para. 19]

And further:

> An offence under the Liquor Control Act is without doubt different from the offence of possession of marihuana for the purpose of trafficking. It remains to determine, before deciding whether a second caution was necessary, whether such an offence is more serious. It is obvious that a regulatory offence punishable under s. 56(5) of the Provincial Offences Procedure Act ..., as a category E offence by a fine (up to a maximum of $5,200.00) cannot be considered a "more serious" offence than one of possession of marihuana for the purpose of trafficking. For an amount of marihuana not exceeding three kilograms, s. 5(4) of the Controlled Drugs and Substances Act carries a punishment of imprisonment for a term of up to five years less a day and a criminal record, which, of course, precludes full participation in Canadian society. The [accused] was aware of the seriousness of the offence with which he was charged and for which he was given the initial police caution. He was also aware that he was never suspected of a different and more serious offence. [para. 24]

Justice Bell concluded that the initial caution was sufficient because "the investigation did not take a new and more serious turn as a result of the questions concerning the alcohol [and the officer] did not have a duty to restate the [accused's] right to counsel." Since there were no ss. 10(a) or (b) breaches, there was no need to conduct an analysis under s. 24(2). The trial judge erred when she found that the police had a positive duty to repeat the police caution when the investigation took a new and less serious turn, the Crown's appeal was allowed, the accused's acquittal quashed and a new trial was ordered.

Complete case available at www.canlii.org

BY THE BOOK:

s. 10(a) & (b) Charter

Everyone has the right on arrest or detention

a) to be informed promptly of the reasons therefore;

b) to retain and instruct counsel without delay and to be informed of that right; ...

ALTHOUGH DETENTION UNLAWFUL, RESISTANCE EXCESSIVE: GUN ADMITTED

R. v. Blackwood, 2013 ONCA 219

Two police officers stopped a car after observing its driver make an illegal right-hand turn. The accused, a passenger, was asked for and provided his Ontario health card for identification. The officer recognized the accused from a previous experience and had seen his name on a bulletin at the police station as a known offender who could be armed or dangerous. He was permitted to undo his seatbelt but was asked to keep his hands in view. A computer check revealed a Caution for the accused. He was to be considered violent, an escape risk, known to carry prohibited firearms and the subject of a no contact order. He was fidgety, began to sweat profusely and was wearing jeans and two shirts even though it was a very hot day. He was directed to step from the vehicle and escorted to the back of the car so he could be asked a few questions to clarify the information police had about him. When he was asked if he had any weapons, the accused pushed the officer causing him to lose his balance, a physical altercation ensued and the accused was arrested. He was searched and police found a loaded handgun tucked in his waistband. He was subsequently charged with numerous firearm-related, assaulting police and resisting arrest offences.

Ontario Superior Court of Justice

There was conflicting versions of what happened. The accused said he did nothing more than swat at the officer's arm when told to put his hands on the car. The police denied this, instead saying the accused pushed one officer so hard he lost his balance, leading to the altercation that followed. The judge concluded that the police had the right to stop the vehicle for the observed *Highway Traffic Act* offence. The request for identification was part of a general inquiry and no physical or psychological detention occurred at this point. The directive to the accused to keep his hands where they could be seen was precautionary in nature and did not trigger a detention. However, the officer's further directive for the accused to exit the car, go to its rear and keep his hands in front of him constituted detention. The judge found the accused's removal from the vehicle was unlawful and breached s. 9 of the *Charter* because it was not based on a reasonable suspicion of any crime.

It was not reasonable, however, for the accused to push the officer so hard that he lost his balance. Although individuals are allowed to use reasonable force to resist an unlawful detention, the accused's actions were offensive, not defensive, and he used more force than necessary to resist, having gone beyond what was reasonable in the circumstances. The search that followed did not breach s. 8 of the *Charter*. It was not unreasonable having been conducted in exigent circumstances following the assault on the officer. Further, there was no s. 10(b) *Charter* breach as the accused had been detained for only a few seconds and the police had no opportunity to advise him of his right to counsel because of the physical altercation. The judge found the handgun was not obtained as a result of the s. 9 *Charter* violation and, even if it was, its admission under s. 24(2) would not bring the administration of justice into disrepute. The gun was admitted as evidence and several gun-related and assault/resist convictions were entered.

Ontario Court of Appeal

The accused appealed his convictions arguing his rights under ss. 8, 9 and 10(b) of the *Charter* were breached such that the evidence that he was carrying a loaded firearm should have been excluded under s. 24(2). But the Court of Appeal disagreed, finding the trial judge did not misapprehend the evidence nor fail to give adequate reasons to explain why she rejected the accused's evidence.

First, the trial judge found that the police arbitrarily detained the accused. Any arguments in this regard about the implausibility of the officers' evidence

could not succeed since the trial judge found in his favour on the s. 9 *Charter* issue. Second, the trial judge considered the conflicting evidence given by the accused and the police officers before holding that the accused, although arbitrarily detained, used excessive force in reacting to the unlawful detention. The trial judge explained why she preferred the evidence of the two police officers and her reasons for doing so were not based upon any misapprehension of the evidence. The Court of Appeal noted its role was not to retry this aspect of the case. Third, the trial judge found that the police had no opportunity to advise the accused of his right to counsel as it was a matter of seconds between the time he stepped out of the car and the time the altercation broke out. This finding was not unsupported by the evidence nor did it reveal any error of law. Finally, the Court of Appeal saw no error in the trial judge's conclusion that in any event, the evidence of the loaded firearm should not be excluded pursuant to s. 24(2). The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's Note: Additional case facts taken from *R. v. Blackwood*, [2009] O.J. No. 5393, *R. v. Blackwood*, 2010 ONSC 1360, *R. v. Blackwood*, 2010 ONSC 6141,

LEGITIMATE CRIMINAL INVESTIGATORY INTEREST DID NOT TAINT STOP

R. v. Morris, 2013 ONCA 223

Shortly after midnight two police officers on general patrol were checking licence plate numbers on cars they saw driving. Nothing of interest was noted and no cars were stopped. When the licence plate of a black Honda Civic with tinted windows was checked, a CPIC hit flagged the registered owner with "Caution," "armed and dangerous," "violent" and "domestic violence". The car was pulled over and both officers detected a strong, pungent smell of fresh marijuana, providing them with what they believed were reasonable grounds to arrest the driver (accused) for possession of marijuana. The accused was asked for his driver's licence, ownership and insurance papers. When asked if he had been smoking marijuana that night and whether he had any in the car, the accused said, "[t]o be honest, I smoked a joint." The accused was arrested for possessing marijuana, read his rights and the car was searched. A hidden compartment at the base of the gearshift was searched and crack cocaine, fresh marijuana and a loaded handgun was discovered in it.

Ontario Superior Court of Justice

At trial the lead officer testified that the car would not have been stopped but for the CPIC "Caution". However, he also said that under s. 216(1) of Ontario's *Highway Traffic Act* (*HTA*) he could only ask the driver for his driver's licence, proof of ownership and insurance documentation, and that he did not intend to go beyond that authority. Police also said that the smoking of a joint could not account for the smell of marihuana that was detected since the odour was of fresh, rather than burned, marihuana. Plus, the accused did not appear impaired nor was there any smoking paraphernalia noticed. The trial judge believed the officers, finding them to be "very candid, credible and reliable witnesses."

The judge concluded that the police had *HTA*-related reasons for pulling the car over. The stop was not a ruse such that its arbitrariness could not be saved by s. 1 of the *Charter*. "They intended to check the driver's licence, ownership and insurance documentation and did so," said the judge. "They did not, at the time they stopped the car, intend to search the car or to do anything beyond the scope of their authority pursuant to the *HTA*. They had, in my view, the requisite subjective motivation." Hence, the presence of a dual *HTA*/criminal investigatory purpose did not invalidate the lawfulness of the stop. The strong smell of fresh marihuana then provided reasonable grounds for the accused's arrest and the search that followed was proper as an incident of that arrest. Although there were no s. 9 (arbitrary detention) or s. 8 (unreasonable search) *Charter* breaches, the judge did find a s. 10(b) violation when the police failed to inform the accused of his right to counsel and asked questions about drugs

when they had reasonable grounds for arrest. This breach was described as relatively minor and did not warrant the exclusion of evidence. The accused was convicted of several firearms related offences and sentenced to 50 months in prison.

Ontario Court of Appeal

The accused challenged the trial judge's finding that police had a valid *HTA* reason to stop his car. In his view, the asserted *HTA* purpose to check documents was merely a pretext for an unauthorized stop and search for evidence of criminal activity. He also argued that the police did not have reasonable grounds to believe that he possessed marijuana.

The Stop

The Court of Appeal found the trial judge accepted the evidence of the police officers and did not err in holding that a legitimate criminal investigatory police interest beyond highway safety concerns did not taint the lawfulness of the stop as long as the police did not infringe upon the accused's liberty or security interests beyond what s. 216(1) permitted. It stated:

> In her careful reasons, the trial judge found as a fact that the police officers had a dual purpose in stopping the [accused's] vehicle.They candidly admitted that the reason they stopped the [accused] was that a CPIC check of the licence plate number produced a "caution" in relation to the registered owner, followed by "armed and dangerous", "violent", and "domestic violence". The lead officer testified that he wanted to verify the driver's documentation pursuant to the HTA. Both officers testified that they understood that they were under constraints in conducting such a stop and that if the HTA documents were in order, they would have to allow the [accused] to go on his way.
>
> ... She concluded that the officers had a valid HTA-related reason for stopping the car, that their intention was to check the driver's licence, ownership and insurance documentation, and that at the time they stopped the car they did not intend to search it or do anything beyond what was permitted by the HTA. The trial judge further found that this remained their intention until the point at which they detected the odour of fresh marijuana emanating from the car. ... [paras. 5-6]

Here, it was open to the trial judge to find that the stop remained lawful for regulatory purposes despite the additional criminal investigative interest.

The Arrest

The trial judge found that the smell of fresh marihuana provided reasonable grounds to arrest the accused and search him and the vehicle as an incident of the arrest. Although previous court cases have cautioned against placing undue reliance upon "smell" evidence, the Court of Appeal noted that "there is no legal barrier to the use of such evidence." The trial judge's conclusion that the arrest was lawful and the search that followed reasonable was upheld.

s. 10(b) Charter

The Court of Appeal agreed that the breach of s. 10(b) was relatively minor and that there was no nexus between it and the discovery of the evidence. Furthermore, the Crown did not rely on anything said by the accused to justify the search. The trial judge properly considered the s. 24(2) admissibility factors in concluding that the evidence should be admitted.

The accused's conviction appeal was dismissed.

Editor's note: Additional case facts taken from *R. v. Morris*, 2011 ONSC 5142

Note-able Quote

"The challenge of leadership is to be strong, but not rude; be kind, but not weak; be bold, but not bully; be thoughtful, but not lazy; be humble, but not timid; be proud, but not arrogant; have humor, but without folly." - Jim Rohn

SUPREME COURT TAKES LONGER TO DECIDE CASES

In the "Supreme Court of Canada - Statistics 2002 to 2012" the workload of Canada's highest Court was reported. In 2012 the Supreme Court heard 78 appeals, up from 70 in 2011 and 65 in 2010. The most appeals heard in the last 10 years was in 2005 when 93 were brought before the Court. The lowest number of appeals heard in a single year during the last decade was 53 in 2007.

Case Life Span

The time it takes for the Court to render a judgment from the date it hears a the case rose slightly to 6.3 months from 6.2 months in 2011. Overall it takes 18.7 months, on average, for the court to render an opinion from the time an application for leave to hear a case is filed. This is down slightly from the previous year (19.0 months). The shortest time within the last 10 years for the Court to announce its decision after hearing arguments was 4.0 months in 2004 while the longest time was 7.7 months in 2010.

Applications for Leave

In 2012 there were 557 applications for leave to appeal a decision of a lower court, meaning a party sought permission for a case to be heard from a three judge panel. Ontario was the source of most applications for leave at 156 cases. This was followed by Quebec (150), British Columbia (70), the Federal Court of Appeal (64), Alberta (46), Saskatchewan (19), Nova Scotia (16), New Brunswick (14), Manitoba (10) Newfoundland and Labrador (6), Prince Edward Island (5) and the Northwest Territories (1). No applications for leave came from Nunavut or the Yukon. Of the 557 leave applications, 65 or 12% were granted while 47 were pending. Of all applications for leave, 28% were criminal and 72% were civil.

Appeals Heard

Of the 78 appeals heard in 2012, Ontario had the most of any origin at 24. This was followed by Quebec with 15 and British Columbia (14), the Federal Court of Appeal (10), Alberta (4), Nova Scotia (4), Manitoba (3), New Brunswick (2) and Saskatchewan and Newfoundland and Labrador , each with one. No appeals originated from New Brunswick, Northwest Territories, Prince Edward Island, Yukon or Nunavut.

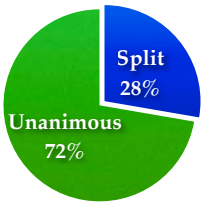
Of the appeals heard in 2012, 50% were civil while the remaining 50% were criminal. Ten percent (10%) of the criminal cases dealt with *Charter* issues, down slightly from 12% in 2011.

Fifteen (15) of the appeals heard in 2012 were as of right. This source of appeal includes cases where there is a dissent on a point of law in a provincial court of appeal.

The remaining 63 cases had leave to appeal granted.

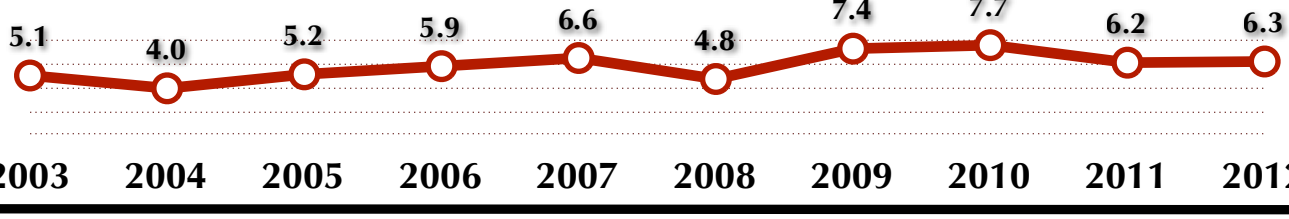
Appeal Judgments

There were 83 appeal judgments released in 2012, up from 71 the previous year. Only eight decisions last year were delivered from the bench while the remaining 75 were delivered after being reserved. Thirty-one (31) appeals were allowed while 52 were dismissed. In terms of unanimity, the Court agreed on 72% of its cases. This is down slightly from 75% the previous year. For the remaining 28% of judgments released in 2012 the Court was split.



Source: www.scc-csc.gc.ca

Average Time Lapses (in months) between hearing and judgment



SHIFT IN INTERVIEW JEOPARDY REQUIRES NEW ADVISEMENT OF RIGHTS

R. v. D.T., 2013 ONCA 166

The 16-year-old accused was arrested by police in the early morning hours after he was stopped driving a car that he admitted was stolen. Three other youths were arrested in a second stolen vehicle nearby. The accused was read his right to counsel and young person's warning. He was transported to the police station where a second officer prepared to take a videotaped statement from him. She advised him of his right to counsel, his right to consult a parent or other adult, his right to say nothing, and his right to have a parent present when making a statement. The accused confirmed that he understood, said he did not want his mother present during the interview and that he wanted to make a statement. At the beginning of the interview the accused was advised that he was charged with possession of stolen property under $5,000. Most of the interview focussed on the two stolen cars and the accused admitted his role in their thefts. Near the end of the interview, he was asked questions about the contents of the stolen cars. As these questions progressed, he admitted that he had broken into a private home, stole marijuana from a freezer and intended to sell it. The accused was subsequently charged with stealing two vehicles, break and enter, the theft of marijuana and possessing it for the purpose of trafficking.

Ontario Court of Justice

The accused sought to have his statement made to police excluded because, it was suggested, he was not given a reasonable opportunity to exercise his right to retain and instruct counsel and to have a parent present, without delay, in privacy, without interruption; was not fully and properly informed and in a timely fashion of all of his rights with respect to retaining and instructing counsel, in order to afford him a full understanding of his rights; and was required to

BY THE BOOK:

s. 146 Youth Criminal Justice Act

...

(2) No oral or written statement made by a young person who is less than eighteen years old, to a peace officer or to any other person who is, in law, a person in authority, on the arrest or detention of the young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offence is admissible against the young person unless

(a) the statement was voluntary;

(b) the person to whom the statement was made has, before the statement was made, clearly explained to the young person, in language appropriate to his or her age and understanding, that

(i) the young person is under no obligation to make a statement,

(ii) any statement made by the young person may be used as evidence in proceedings against him or her,

(iii) the young person has the right to consult counsel and a parent or other person in accordance with paragraph (c), and

(iv) any statement made by the young person is required to be made in the presence of counsel and any other person consulted in accordance with paragraph (c), if any, unless the young person desires otherwise;

(c) the young person has, before the statement was made, been given a reasonable opportunity to consult

(i) with counsel, and

(ii) with a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person, as long as that person is not a co-accused, or under investigation, in respect of the same offence; and

(d) if the young person consults a person in accordance with paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

...

(4) A young person may waive the rights under paragraph (2)(c) or (d) but any such waiver

(a) must be recorded on video tape or audio tape; or

(b) must be in writing and contain a statement signed by the young person that he or she has been informed of the right being waived.

provide information or evidence to incriminate himself prior to being able to exercise his opportunity to consult counsel.

The judge, however, ruled the statement admissible. He found that the accused's rights were complied with in each and every fashion, that he understood those rights and was given a number of opportunities to contact counsel, but declined. He also fully understood that he could have his mother or another adult present, but again declined. Furthermore, the judge held that the accused had a full operating mind, was aware of his right to remain silent and nonetheless he chose to give a statement. The accused was convicted of break and enter, possession of marijuana for the purpose of trafficking and theft under $5,000. He was sentenced to probation for 18 months.

Ontario Court of Appeal

The accused submitted, in part, that the trial judge erred in admitting his statement because police did not comply with s. 146 of the *Youth Criminal Justice Act* (*YCJA*) (the caution given to police was insufficient). He also argued his s. 10(b) *Charter* right was breached because of the increased jeopardy he faced. He suggested that during his statement a further caution was required once he started to speak about additional offences that were not the subject of the original police investigation.

Under s. 146 of the YCJA there are a number of requirements for the admissibility of a statement by a young person. Justice MacPherson stated:

> These requirements incorporate common law voluntariness and Charter s. 10(b) protections, in addition to special protections for young persons, such as the rights to have counsel present, to consult a parent, and to have a parent present when making a statement. These are ... "a complimentary set of enhanced procedural safeguards... which governs the admissibility of statements made to persons in authority by young persons who are accused of committing offences." Compliance with these safeguards must be established on the standard of proof beyond a reasonable doubt. [references omitted, para. 18]

In this case, the Court of Appeal found the officer "demonstrated model compliance with her obligations under s. 10(b) of the Charter and ss. 146(2) and (4) of the YCJA" and the statement was not inadmissible on this basis:

> [The officer] advised the [accused] of his right to counsel, his right to consult with his mother, his right to say nothing, and his right to have his mother present during the interview when making a statement. Because the [accused's] mother was present in the police station, [the officer] took special care to ensure that the [accused] understood her availability for consultation and support if the [accused] so desired.
>
> [The officer] also complied with the requirement that police officers both provide proper advice to young people about their rights and make reasonable efforts to ensure that the young person in fact understood those rights. After providing information about the various rights, [the officer] consistently asked simple follow-up questions that required the [accused] to respond in a way that demonstrated whether he understood his rights and his options. [reference omitted, paras. 19-20]

Change of Jeopardy

When the accused was interviewed the only charge recorded on the Statement of a Young Person form and told to him was possession of stolen property under $5,000. The interview, for some time, then continued only with questions and answers about the two stolen vehicles. Near the end the interview, however, the officer began to ask questions about the contents of the cars. When she mentioned several iPods, the accused said he had stolen the black one from a house. The interview then continued for several minutes with questions being

"[The accused's] jeopardy changed noticeably. He started to talk about crimes that were both different and potentially more serious than that with which he had already been charged."

asked about the break in, the theft of the substantial quantity of marihuana from the house and his intention to sell it.

The accused argued that when the interview shifted from the stolen vehicles to the break and enter of the home and theft of marijuana, his jeopardy increased, both quantitatively (more potential criminal charges) and qualitatively (more serious charges) such that the police were required to re-advise him of his rights.

The Court of Appeal agreed. Citing an earlier decision, Justice MacPherson noted there are times where the police have a duty to re-advise a detainee of their rights during an interview/statement. This occurs "if they want to ask questions that go beyond an exploratory stage in connection with a related but significantly more serious offence, or a different and unrelated offence. This obligation to re-advise applies even where, as here, the detainee brings up the other offences."

Furthermore, Justice MacPherson found that the enhanced procedural safeguards of s. 146 of the YCJA "strongly support a similar analytical framework."

> In my view ... the [accused's] jeopardy changed noticeably. He started to talk about crimes that were both different and potentially more serious than that with which he had already been charged. In short order, he introduced, at a minimum, the following crimes: break and enter of a private dwelling, theft of an iPod and marijuana, possession of marijuana, and possession for the purpose of trafficking. Once all of this information was on the table, ... [the officer] had a duty to recognize that ... there was a real potential for the focus of the criminal investigation "to shift and broaden". [para. 31]

Here, the officer continued to ask questions that "went well beyond being exploratory; they were patently investigatory." She questioned the accused on details about the break and enter, theft of the marijuana and the reason for stealing it (to sell it). The officer should have stopped the interview, carefully re-advised the accused of his rights under s. 10 of the *Charter* and s. 146(2) of the YCJA, ensured again that he understood his rights and properly waived them. Then, if the accused still wanted to make a statement, the officer could question him about these new and more serious offences. SInce this did not occur, the portions of the accused's statement related to the break and enter and theft of marihuana were excluded. His convictions for break and enter and possessing marihuana for the purpose of trafficking were set aside and a new trial was ordered on these charges.

Complete case available at www.ontariocourts.on.ca

LEGALLY SPEAKING:

Reiterating Right To Counsel

"Considering the purpose underlying s. 10(b) and its fundamental importance in maintaining the fairness of the criminal investigatory process, I think it is appropriate to decide close cases in favour of the reiteration of the s. 10(b) rights. The police should be encouraged to readvise detainees of the right to counsel when the focus of an investigation begins to shift or broaden. The administration of criminal justice is better served by a restatement of the detainee's s. 10(b) rights which is a little early than one which is too late to serve its intended purpose. Once the police have a realistic indication that a detainee may incriminate herself in a different and unrelated offence, the police should, if they wish to pursue that area of investigation, reiterate the detainee's right to counsel and connect that right to the new allegations." - Ontario Court of Appeal Justice Doherty in *R. v. Sawatsky* (1997), 35 O.R. (3d) 767.

OFFICER HAD SUBJECTIVE/ OBJECTIVE GROUNDS TO OPEN BAG INCIDENTAL TO DETENTION

R. v. Shaw, 2013 ONCA 37

At 3:45 am police received a 911 call from an apartment's resident reporting gun shots in the building. There was no description of any suspects. Two police officers immediately attended the lobby, but there was no one else present. Shortly thereafter, the accused crounded a corner in the lobby. He appeared startled, moved to turn away and put his hands in his pockets. The officers asked him some questions about where he was coming from and what he was doing, but were not satisfied by the answers given and thought the accused was being evasive. His answers were vague, he smelled of alcohol and confirmed he did not live in the building. He was fidgeting with his jacket, his hands reaching in and out of his pockets. A sergeant also arrived on scene to assist. All three officers were concerned that the accused may have been involved in the reported gun shots and that he may be armed. When the accused turned away and reached toward his right pocket, the officers responded instantaneously, one grabbing his right wrist and one grabbing his right hand.

When the accused's hand emerged from his pocket, he was holding something black. The object, an opaque pouch with a zipper, measured about three to four inches by three to four inches and contained something hard and round, approximately the size of a golf ball. The officer who opened it thought the bag may still contain a weapon, although not one of traditional form or size. The sergeant believed that until the bag was opened, he could not rule out the possibility of a weapon being inside. The third officer testified that once the pouch was exposed it was clear that it was not a gun, but that it may be drugs. The bag contained a solid rock of cocaine weighing 20 grams. The accused tried to grab the drugs and resist his arrest for possessing it. He was taken into custody and also had money, two cellphones and keys that led to the discovery of a prohibited loaded semi automatic gun in his vehicle.

Ontario Superior Court of Justice

The trial judge found that the police, in all of the circumstances, had reasonable grounds to detain the accused before he turned away and reached toward his pocket. When the officers observed him make a move to turn away and simultaneously reach toward his right pocket, they thought he was going for a gun and physically restrained him by grabbing his right forearm and hand. The judge concluded this physical detention was entirely appropriate. It was both objectively and subjectively justified and was not arbitrary. As for the search, the judge found the police were entitled to open the bag and were not obliged to return it to the accused unopened. Two officers - the one holding the bag and the sergeant - testified that until the black bag was opened, they could not rule out the possibility that it contained a weapon. Another officer not holding the bag stated that as soon as he saw the bag he knew it was not a weapon. "I accept the evidence of [the officer], who was holding the bag, that until he looked inside, he was not satisfied that it did not contain a weapon," said the judge. "Although the small bag could not contain a traditional gun as we know it, it was reasonable to open the bag to ensure it did not contain a weapon." The evidence was admitted and the accused was convicted by a jury.

Ontario Court of Appeal

The accused argued that the police did not have reasonable grounds to open the black bag and their pat-down search went beyond what an investigative detention authorizes. In his view, a pat down search may have been justified but when the bag was seized it should not have been opened. Thus, its searchwas unreasonable. The Court of Appeal, however, disagreed. The trial judge accepted the seizing officer's evidence and found he had, both subjectively and objectively, reasonable grounds to open the bag because of a concern it may have contained a weapon. The accused's appeal against his conviction was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: Additional case facts taken from *R. v. Shaw*, 2010 ONSC 282.

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John-Michael Keyes, Executive Director, The "I Love U Guys" Foundation

Mr. Keyes shares details of the Keyes family response to the tragic killing of his daughter, Emily at Platte Canyon High School (2006). Deliberate decisions about handling national and local media, finances, donations, community healing, support people and organizations, the creation of The "I Love U Guys" Foundation and more. Mr. Keyes outlines not just the immediate aftermath and response, but events that occurred in the years that followed. The narrative tells how The Standard Response Protocol was developed, describes how it works, and why it is fast becoming a standard in many schools and districts.

Sgt. A.J. DeAndrea, Arvada (CO) Police Department Jeffco Regional SWAT (Retired)

Sgt. DeAndrea was Entry Team Leader at Columbine High School (1999) and Team Leader during the Bulldozer Incident in Granby, CO (2004). He helped devise and execute the tactical plan for the Hostage Rescue at Platte Canyon High School (2006). Again in 2006 he was the Team Leader during an Officer Rescue where over thirty rounds were fired. Sgt. DeAndrea was the Patrol Supervisor and Entry Team Leader during the Youth With a Mission shootings (2007). This was an active shooting at a youth mission training center where four young adults were shot, two of whom died.

J. Kevin Cameron, M.Sc., R.S.W.

J. Kevin Cameron is a Diplomat with the American Academy of Experts in Traumatic Stress and a Board Certified Expert in Traumatic Stress. In concert with the Royal Canadian Mounted Police, Behavioral Sciences Unit, he developed Canada's first comprehensive, multidisciplinary threat assessment training program and currently serves on the Canadian Threat Assessment Training Board. He also trains crisis response teams nationally and internationally and consults with schools and communities impacted by trauma.

Wednesday, November 6, 2013 8:00am to 5:00pm
(Registration 7:30am - 8:00am)
Justice Institute Of British Columbia
715 McBride Boulevard, New Westminster, BC

Pre-registration is required
$180.00 (by Sept. 30, 2013) ♦ $230.00 (after Oct. 1, 2013)
For additional information, visit our website at www.bcledn.net

The BC Law Enforcement Diversity Network is a sub-committee of the British Columbia Association of Chiefs of Police with representation from the following participating agencies

ONLINE GRADUATE CERTIFICATE PROGRAMS
INTELLIGENCE ANALYSIS | TACTICAL CRIMINAL ANALYSIS

Foundational Courses:

- Intelligence Theories and Applications
- Advanced Analytical Techniques
- Intelligence Communications

Specialized Courses:

- Competitive Intelligence
- Analyzing Financial Crimes
- Tactical Criminal Intelligence
- Analytical Methodologies for Tactical Criminal Intelligence

Entrance Requirements:

Proof of completion of bachelor degree; OR

A minimum of two years of post secondary education plus a minimum of five years of progressive and specialized experience in working with the analysis of data and information. Applicants must also write a 500 – 1000 word essay on a related topic of their choice OR

Applicants who have not completed a minimum of 2 years post-secondary education must have eight to ten years of progressive and specialized experience in working with the analysis of data and information (Dean/Director discretion). Applicants are required to write a 500-1000 word essay on a related topic of their choice.

For detailed requirements please visit the JIBC Website.

Justice Institute of British Columbia, Canada | www.jibc.ca |graduatestudies@jibc.ca

JIBC

Foundational Courses

(students enrolled in either graduate certificate are required to complete the foundational courses)

Intelligence Theories and Applications

A survey course that introduces the student to the discipline of intelligence and provides the student with an understanding of how intelligence systems function, how they fit within the policymaking systems of free societies, and how they are managed and controlled. The course will integrate intelligence theory with the methodology and processes that evolved over time to assist the intelligence professional. The course will develop in the student a range of advanced research and thinking skills fundamental to the intelligence analysis process.

Intelligence Communications

The skill most appreciated by the intelligence consumer is the ability to communicate, briefly and effectively, the results of detailed analytic work. This course, through repetitive application of a focused set of skills to a body of information of constantly increasing complexity, is designed to prepare intelligence analysts to deliver a variety of intelligence products in both written and oral formats.

Advanced Analytical Techniques

Topics include: drug/terrorism/other intelligence issues, advanced analytic techniques (including strategic analysis, predicative intelligence etc.), collection management, intelligence sources, management theory (large organizations), attacking criminal organizations, crisis management, negotiation techniques, strategic planning, local/regional updates and briefing techniques.

Specialized Courses

(students enrolled in either graduate certificate are required to complete the foundational courses)

Intelligence Analysis

Competitive Intelligence
This course explores the business processes involved in providing foreknowledge of the competitive environment; the prelude to action and decision. The course focuses on supporting decisions with predictive insights derived from intelligence gathering practices and methodologies used in the private sector. Lectures, discussions, and projects focus on the desires and expectations of business decision-makers to gain first-mover advantage and act more quickly than the competition.

Analyzing Financial Crimes
This course examines the nature and scope of financial crimes and many of the tools used by law enforcement in the preparation of a financial case. Included in this course is a detailed treatment of the following: laws which serve to aid in the detection and prosecution of these crimes, the types of business records available, types of bank records available, an examination of offshore business and banking operations, and the collection and analysis of this information, with emphasis placed on Net Worth and Expenditure Analysis. In addition, special treatment is given to the detection and prosecution of money laundering, various types of money laundering schemes, and the relationship of money laundering to terrorism.

Tactical Criminal Analysis

Tactical Criminal Intelligence
This course is an introduction to law enforcement terminology, practices, concepts, analysis, and intelligence. The course will introduce the student to the discipline of crime analysis and law enforcement intelligence through the study of the intelligence cycle and the intelligence determinants. The role and responsibilities of an analyst within each sub-topic will be addressed. Additionally, the utilization of analytical software will be introduced.

Analytical Methodologies for Tactical Criminal Intelligence
The course reviews the key requirements for intelligence in law enforcement and homeland security. The course focuses the use of advanced analytic methodologies to analyze structured and unstructured law enforcement data produced by all source collection. Students will apply these concepts, using a variety of tools, to develop descriptive, explanatory, and estimative products and briefings for decision-makers in the field.