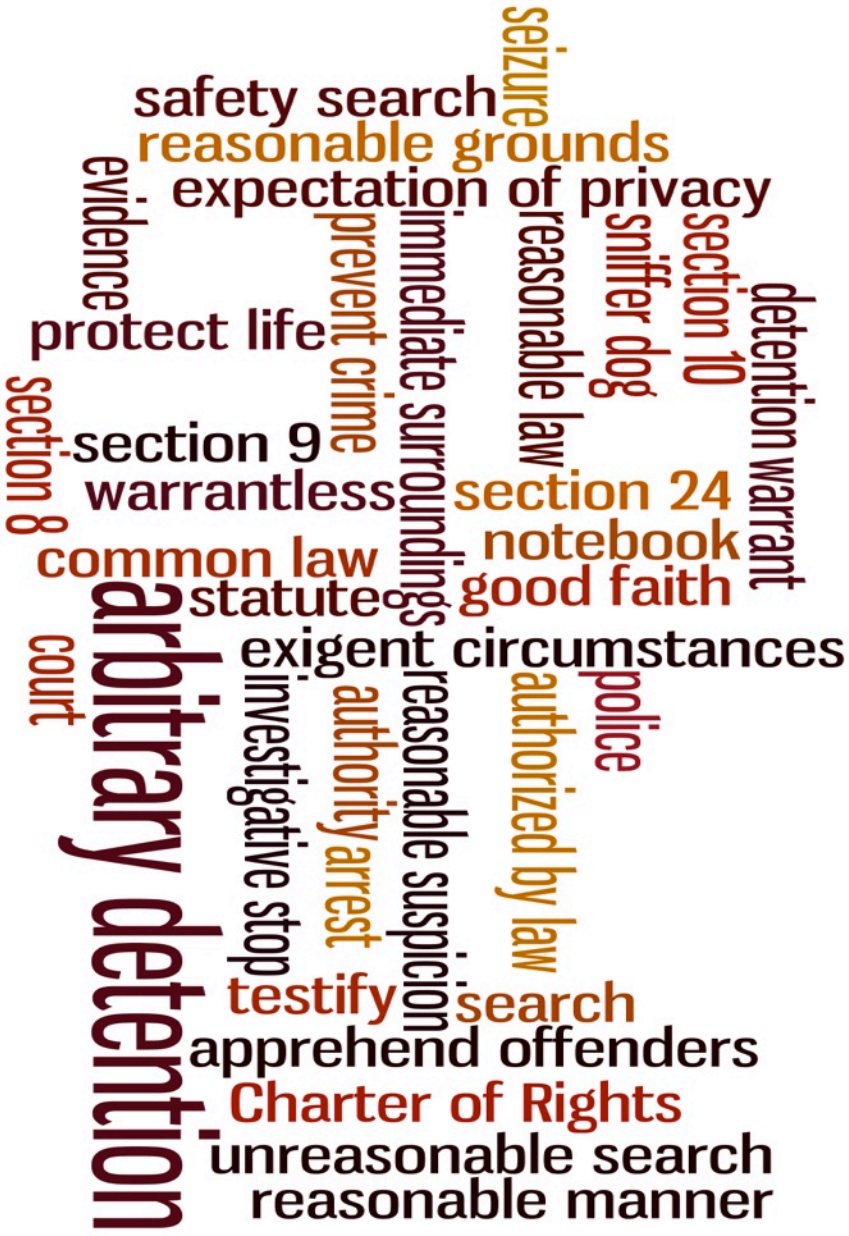
JIBC

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.



The Psychopathy of an Active Shooter: Profiling, Predicting, Preventing, Responding...

Dedicated to all Victims, Survivors and Responders

see page 38

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Upcoming Conferences

The WAVR-21:
A Scientifically-Based Instrument for Assessing Workplace Violence Risk
September 10-11, 2013
JIBC
New Westminster, British Columbia

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

34th Canadian Congress on Criminal Justice
October 2-5, 2013
Vancouver, British Columbia

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

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

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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.

The basics of project evaluation and lessons learned.

Willis H. Thomas.

Boca Raton, FL: CRC Press, c2012.

HD 69 P75 T477 2012

BIFF: quick responses to high conflict people: their personal attacks, hostile email and social media meltdowns.

Bill Eddy.

Scottsdale, AZ: HCI Press, c2011.

BF 637 I48 E33 2011

Blended learning in higher education: framework, principles, and guidelines.

D. Randy Garrison, Norman D. Vaughan.

San Francisco, CA: Jossey-Bass, c2008.

LB 2395.7 G365 2008

The charisma myth: how anyone can master the art and science of personal magnetism.

Olivia Fox Cabane.

New York, NY: Portfolio/Penguin, 2012.

BF 698.35 C45 C33 2012

Communication counts [videorecording]: speaking and listening for results.

CRM Learning; directed by Timothy Armstrong; written by Sara Judson Brown.

Carlsbad, CA: CRM Learning, c2012.

1 videodisc (19 min.): sd., col.; 4 3/4 in. (DVD) + 1 CD-ROM.

CD-ROM contains reproducible participant worksheets on PDFs.

Accompanying leader's guide "provides suggestions for group training, including one idea that allows your training audience to interact with the video; as the video's characters complete the final quiz in their training course, your trainees are able to answer the same questions (before they see how the video's characters respond).

HF 5549.5 C6 C66 2012 D1586

Effective apology: mending fences, building bridges, and restoring trust.

John Kador.

San Francisco, CA: Berrett-Koehler Publishers, 2009.

BF 575 A75 K34 2009

Essentials of contemporary management.

Gareth R. Jones et al.

Whitby, ON: McGraw-Hill Ryerson, c2010.

HD 31 E79 2010

The geometry of fear: an environmental perspective on fear and the perception of crime.

by Valerie Spicer.

Burnaby, BC: Simon Fraser University, 2012.

HV 6793 C2 S643 2012

The H factor of personality: why some people are manipulative, self-entitled, materialistic, and exploitive - and why it matters for everyone.

Kibeom Lee and Michael C. Ashton.

Waterloo, ON: Wilfrid Laurier University Press, c2012.

BF 698.3 L43 2012

Harder than I thought: adventures of a twenty-first century leader.

Robert D. Austin, Richard L. Nolan, Shannon O'Donnell.

Boston, MA: Harvard Business Review Press, c2013.

HD 57.7 A849 2013

HR manager's guide to background checks and pre-employment testing.

Adrian Miedema, Christina Hall.

Toronto, ON: Carswell, 2012.

HF 5549.5 E429 M44 2012

An introduction to systematic reviews.

edited by David Gough, Sandy Oliver, James Thomas.

London; Thousand Oaks, CA: Sage, 2012.

H 62 I587 2012

A manual for writers of research papers, theses, and dissertations.

Chicago Style for students and researchers / Kate L. Turabian ; revised by Wayne C. Booth, Gregory G. Colomb, Joseph M. Williams, and the University of Chicago Press editorial staff.

Chicago, IL; London: University of Chicago Press, 2013.

LB 2369 T87 2013

Mastering presentations: be the undisputed expert when you deliver presentations (even if you feel like you're going to throw up).

Doug Staneart.

Hoboken, NJ: Wiley, c2013.

HF 5718.22 S738 2013

Meeting management challenges [videorecording]: part 1.

Mississauga, ON: RG Training Resources, 2012.

1 videodisc (11 min.): sd., col.; 4 3/4 in. (DVD).

Every workplace, no matter how successful, has to deal with difficult situations. But what are the most effective ways of responding to employe issues? This presenter-led program guides audiences through a range of dramatic scenarios, which include personal interviews with key characters,who describe their thoughts and feelings as the story unfolds. This is an ideal resource for any business or manager wanting greater insight into their employees and the various strategies for dealing with difficult situations.

HF 5549.5 C6 M448 2012 pt. 1 D1578

Meeting management challenges [videorecording]: part 2.

Mississauga, ON: RG Training Resources [distributor], 2012.

1 videodisc (11 min.) : sd., col. ; 4 3/4 in. (DVD).

Workplaces are fast-paced, challenging and diverse environments that can create conflict and misunderstanding. Successful resolution of problems with colleagues is a vital aspect of good management. This fly-on-the-wall style dramatization takes viewers through ways to deal with the following: unreasonable demands; individuals who aren't team players; speaking without thinking; and dealing with poor job performance.

HF 5549.5 C6 M448 2012 pt. 2 D1579

Pedagogy of the oppressed.

Paulo Freire; translated by Myra Bergman Ramos; with an introduction by Donald Macedo.

New York, NY: Continuum, c2000.

LB 880 F73 P4313 2000

The privacy advocates: resisting the spread of surveillance.

Colin J. Bennett.

Cambridge, MA; London: MIT Press, 2010.

JC 596 B46 2010

The sketchnote handbook: the illustrated guide to visual note taking.

by Mike Rohde.

San Francisco, CA: Peachpit Press, c2013.

LB 2395.25 R64 2013

Supporting students for success in online and distance education.

Ormond Simpson.

New York, NY: Routledge, 2012.

LC 5800 S55 2012

Threat detector [videorecording]: your role in preventing workplace violence.

StoneArch Creative.

Irvine, CA: Learning Communications, c2010.

1 videodisc (17 min.): sd., col. with b&w sequences; 4 3/4 in. (DVD) + 1 CD-ROM.

This program defines threatening behavior and takes a look at red flag behaviors in the workplace. Viewers will be given a chance to test their own "threat detector" capabilities. The accompanying CD-ROM contains a facilitator guide.

HF 5549.5 E43 T47 2010 D1580

'SMART'PHONE DATA DUMP ONE MONTH AFTER ARREST UNREASONABLE

R. v. Hiscoe, 2013 NSCA 48

The accused was arrested for possessing a controlled substance for the purpose of trafficking. While under surveillance, police saw an exchange between him and the driver of another vehicle. They found cash in the other driver's vehicle and a bag of cocaine on the ground between the two vehicles. During the arrest procedure a police officer seized the accused's "smart" cell phone which was on the driver's seat of his car. It was not password protected. The officer opened the cell phone and conducted a cursory review of recent text messages. Later that evening, the officer again looked at the texts and transcribed them. Then, about a month later, the officer took the cell phone to the Technological Crime Unit and the entire contents of the cell phone were downloaded and placed on a DVD. This information included a contact list, phone logs, a record of calls to and from the cell phone, the content of incoming and outgoing text messages, and half a dozen photographs. The accused was charged with possessing cocaine for the purpose of trafficking.

Nova Scotia Provincial Court

The police officer testified that he seizes cell phones of people arrested for drug trafficking because the phones will often contain score sheets, records of drug debts, contacts of other persons, text messages and phone calls in the time leading up to the offence. This information can indicate the negotiation of drug prices and amounts, meeting places and other details, which can be time sensitive as they may disclose possible stash or weapon locations. The officer also explained that information on cell phones can be deleted remotely. But he agreed there were no exigent circumstances preventing him from getting a search warrant before he transcribed the messages. Rather, he felt he did not need to get a warrant. The accused argued that the searches of his cell phone were unreasonable, exceeded the scope of the power to search incident to arrest and that any evidence of the cell phone contents ought to be excluded under s. 24(2) of the *Charter*.

The judge found the examination of the cell phone on arrest to view the recent text messages and the later transcribing of those messages that same day were within the lawful scope of the police authority to search incident to the accused's arrest for possession of a controlled substance for the purpose of trafficking. Those searches did not violate s. 8 of the *Charter* and the evidence retrieved at those times was admissible. The complete content download or "data dump," however, did go beyond the scope of a search incident to arrest, breached s. 8 and was excluded. In the judge's opinion, the one month delay in searching the cell phone significantly reduced any connection with the arrest. Further, he found the police made no effort to limit or focus their search in the separate locations within the cell phone. Instead, a full "data dump" was done for the purpose of furthering their investigation, not as a search incident to arrest. After limiting himself to the evidence of the admissible text messages, the judge acquitted the accused of the trafficking related charge, but entered a conviction on the lesser and included offence of simple possession.

Nova Scotia Court of Appeal

The Crown appealed the trial judge's s. 8 ruling on the data dump because, in its view, had the excluded evidence been admitted the accused may not necessarily have been acquitted of the trafficking charge. The Crown asserted that once the police lawfully seized the cell phone incident to arrest, they lawfully possessed all the information contained in it and could search it without a warrant and without restriction. The Crown suggested in its factum:

> Where the police lawfully arrest a person for an offence, and seize the arrestee's smartphone or other device in the reasonable expectation of finding evidence of the offence, the power to search incident to arrest includes the ability not only to seize and conduct a cursory examination of the smartphone but also the ability to later perform a more detailed retrieval of its contents. A further

search warrant is not required. The important limiting factor is that any examination of data - cursory or otherwise - must truly be authorized by the original power of search incident to arrest: namely, in pursuit of a reasonable basis to believe that the examination will afford evidence of the original offence.

Justice Oland, authoring the Nova Scotia Court of Appeal's decision, concluded that the warrantless and complete content download or "data dump" of the cell phone did infringe the accused's s. 8 rights because it went beyond the scope of a search incident to arrest. In doing so, Justice Oland first examined search incident to arrest and identified the following points:

- s. 8 of the *Charter* protects individuals from unjustified state intrusions upon their privacy.
- Warrantless searches are presumptively unreasonable.
- The Crown has the burden of showing that, on a balance of probabilities, a warrantless search was reasonable = authorized by law + the law itself is reasonable + the manner in which the search was carried out is reasonable.
- The common law power of search incident to arrest is a well-recognized exception to the warrantless search presumption. Such searches do not require prior judicial authorization.
- Searches incident to arrest are subject to limitations. The search must have a valid objective (ensuring the safety of the police and public, preserving evidence or discovering evidence) and be truly incidental to the arrest. Although police do not need reasonable and probable grounds to search, they must have some reason related to the arrest for conducting a search.
- Delay and distance between the arrest and search do not automatically preclude a search from being incidental to arrest provided the police offer a proper explanation for the delay or distance.

He then noted there were three different views on searches of cell phones following arrest:

1. the police cannot make even a cursory inspection of the cell phone without a warrant;
2. the police can examine the entire contents of the cell phone so long as they are genuinely looking for evidence of the offence and have a reasonable basis to believe they will find it; or
3. the police can only make a cursory warrantless inspection of the cell phone. Any examination beyond a cursory examination exceeds the power of search incident to arrest and a search warrant should be obtained.

In this case, the Court of Appeal concluded the trial judge did not err. He legitimately considered the substantial delay between arrest and search (a month) as a factor in deciding whether the search was incident to arrest is lawful. "Although the temporal separation is a rebuttable presumption, at trial the Crown presented no evidence whatsoever explaining the delay in examining the cell phone further," said Justice Oland. As well, the trial judge properly inferred that there was a heightened expectation of privacy in the smartphone, given the variety and breadth of information that can be stored in it. Here, the police made no effort to limit the scope of their search of the cell phone, instead doing a full content download which even captured over a dozen messages that came to the phone after it was

Side Bar:
Passwords and Protection Features

Justice Oland noted that password protection, if engaged, would not be a significant factor nor conclusive in determining whether a search warrant would be required to search a cell phone. "While the presence or absence of a password or lock may be another relevant factor in determining whether a search incident to arrest is lawful or within its proper parameters, in my view it should not be determinative," he said. "Whether such a security feature exists or is turned on is not substantively helpful in determining the privacy interests of the accused in the contents of his cell phone, nor the propriety of a police search. Just because a password is not on at the very moment the police seize a cell phone cannot mean that the state is welcome and free to roam through its contents."

seized. The trial judge was aware of the compartmentalization of information on a cell phone and the problems of over seizure. He emphasized that police did not try to minimize or focus the search. Rather, they simply retrieved the full contents of the smartphone. This was all done even though the police said that there were no exigent circumstances. The warrantless full content download of the accused's cell phone breached s. 8 of the *Charter* and the accused's appeal was dismissed.

Complete case available at www.canlii.org

CONTINUITY CRITICAL: POSSESSION CHARGE NOT PROVEN

R. v. Panrucker, 2013 BCCA 137

The accused was booked into police cells on December 22, occupying cell 5. On December 29 he left the cell to take a shower. A prison guard searched the cell and discovered a plastic bag containing cocaine underneath the mattress. He was charged with possession under the *Controlled Drugs and Substances Act*.

British Columbia Provincial Court

Since the drugs were not found in the accused's actual possession the Crown relied on circumstantially proving constructive possession – s. 4(3)(a)(ii) of the *Criminal Code*. The judge found the guard to be "very careful and conscientious," "meticulous in doing his job," and "scrupulous in searching a cell once the occupant has left even temporarily." The judge was satisfied that the accused was the sole occupant of cell 5 and the only reasonable inference from the evidence was that the cocaine found was in his control and knowledge. He was convicted of possessing the cocaine.

British Columbia Court of Appeal

The accused's conviction was set aside and an acquittal was entered. The Crown conceded on appeal that the trial verdict was unreasonable. Here, knowledge and control of the drugs was not the only rational inference that could be drawn from the admissible evidence.

The guard testified that the accused was the only inmate resident in cell 5 for the week, but he only worked at the jail for 2 ½ days. He also said he cleaned and searched the cell the day before the accused's arrival, however he was not on duty when the accused was booked into cells. Nor did he have any personal information about what may have happened in the cell between the time he cleaned it and the accused's arrival. The guard could also not say whether the accused spent his entire time in cell 5 or whether anyone else was in it when he was not on duty.

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

REASONABLE INFERENCE MAY BE TAKEN FROM INFORMATION

R. v. Murray, 2013 ONCA 173

Police received a 911 call about a single vehicle accident in the early morning hours. They found an overturned vehicle on its roof, badly damaged and in a ditch. Two occupants were trapped in it. The accused was hanging from his seatbelt in the driver's seat and his injured 90-year-old mother was hanging upside down from her seatbelt in the front passenger seat. The accused was extricated from the vehicle and transported to the hospital along with his mother. A police officer also attended the hospital to continue the investigation. Samples of the accused's blood were taken for medical purposes at the hospital. The police subsequently obtained a search warrant for the production of the hospital's medical records that revealed the analysis of the accused's blood alcohol concentration (BAC). Test results revealed his BAC at the time of the accident was somewhere within the range of 240mg% and 395mg%. He was charged with impaired driving causing bodily harm, driving over 80mg% causing bodily harm and dangerous driving.

Ontario Superior Court of Justice

The accused argued, among other grounds, that the search warrant obtained for the production of medical records should be quashed. In part, he suggested the officer failed to set out reasonable grounds in the Information to Obtain (ITO). Furthermore, he asserted that his BAC could not be used to prove the charges because the capability, accuracy and reliability of the hospital testing equipment had not been established. The hospital lab technician only testified that her job was to analyze the specimens, run the machines and report to the doctor. She did not provide evidence about the type of instrument used to analyze the samples nor any details about its maintenance or the safeguards in place.

The judge dismissed both of these submissions. First, he found the warrant was properly issued. Second, he found the test results were accurate and reliable on the criminal standard of proof (beyond a reasonable doubt):

> In assessing how much weight I am to place on the test results, I am compelled to consider not only the fact that the testing was conducted by a qualified technologist, but also the fact the laboratory in which the testing equipment was located and in which the testing and analysis was performed was in a large urban hospital. This laboratory was designed to service doctors and other trained medical professionals. It is implicit that these medical professionals were prepared to rely on the laboratory results to make their decisions, decisions which impact the health, and sometimes the life of hospital patients. It is also implicit that a laboratory which is designed and operated for these purposes will use reliable and well maintained and calibrated equipment.

The accused was convicted of all three charges.

Ontario Court of Appeal

The accused appealed his convictions contending the search warrant was invalid since there was nothing in the ITO to indicate that the hospital would test or had tested his blood's BAC. The Court of Appeal, however, disagreed. It found such facts could be inferred from the evidence:

> In our view, the details of the incident recited in the information to obtain, including evidence that alcohol was present in the vehicle, the behaviour of the [accused] and the fact that the [accused's] breath smelled of alcohol, when combined with his presence at the emergency department for treatment, were sufficient to provide a basis for a reasonable inference that the hospital would test the [accused's] blood for alcohol as a matter of course in determining how best to treat him medically. [para. 4]

The accused again suggested that the evidence of the lab's BAC tests results should not have been admitted nor given any weight because the hospital lab technician provided no details about the equipment used or its reliability. The Court of Appeal found the trial judge did not err in deciding this issue, citing Wigmore on Evidence, vol. 2 (Chadbourn Rev., 1979), s. 665(a), at pp. 917-19:

> The use of scientific instruments, apparatus, formulas, and calculating tables, involves to some extent a dependence on the statements of other persons, even of anonymous observers. Yet it is not feasible for the professional man to test every instrument himself; furthermore he finds that practically the standard methods are sufficiently to be trusted. Thus, the use of an X-ray machine may give correct knowledge, though the user may neither have seen the object with his own eyes nor have made the calculations and adjustments on which the machine's trustworthiness depends. The adequacy of knowledge thus gained is recognized for a variety of standard instruments. In some instances the calculating tables or statistical results are admitted directly, under an exception to the hearsay rule. [Citations omitted.]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's Note: Additional case facts taken from R. v. Murray, 2011 ONSC 3735, 2011 ONSC 2537.

SHARING CRA DOCUMENTS OK

Brown v. Canada, 2013 FCA 111

Police officers executed a *Controlled Drugs and Substances Act* (*CDSA*) search warrant at the accused's residence. The warrant was based on allegations that the accused was engaged in cocaine trafficking. The warrant authorized the seizure of, among other things, proceeds of crime, illegal drugs, financial documents and other relevant information. No one was home at the time the warrant was served. Police seized 13.6 grams of crack cocaine, a cellular phone, tax records and other documents belonging to the accused. He was charged with trafficking but the case did not proceed to trial. The charge was dropped for lack of evidence. In the meantime, police had shared the documents seized with officials of the Canada Revenue Agency (CRA) and reassessments were made under the *Income Tax Act* (*ITA*) for several taxation years. Undeclared income was added to each taxation year and gross negligence penalties imposed.

Tax Court of Canada

Brown appealed the reassessments arguing that his s. 8 *Charter* rights were violated when the police forwarded copies of the documents seized under the *CDSA* warrant to the CRA. An investigating officer explained that it was common practice for police to give the CRA information obtained on persons charged with trafficking or other illegal business activities because these individuals often do not report such income for fear of prosecution for their crimes.

The judge ruled that since it was permissible under the *Charter* for a CRA officer to pass on documents properly obtained in the course of an audit to officials later carrying on a criminal investigation (*R. v. Jarvis*, 2002 SCC 73), it was equally permissible for police to share information with CRA auditors. The documents passed from the police to the CRA were therefore admissible for audit purposes. Brown's appeal from reassessment was dismissed.

Federal Court of Canada

Brown appealed the Tax Court of Canada's decision, asserting once again that the documents should not have been accepted into evidence. Justice Dawson, delivering the judgment for the Federal Court of Appeal, disagreed albeit for different reasons. In this case, the search and seizure was lawful. The police were authorized by a valid warrant, which had not been challenged. Brown did not have a reasonable expectation of privacy (subjectively or objectively) over the seized documents such that the police were required to maintain their confidentiality. Subjectively, Brown said the seized documents should have been returned to him so the CRA could ask him to turn them over. This evidence was inconsistent with any subjective expectation of privacy. Objectively, taxpayers are obliged to keep records and to produce them during an audit. Since Brown failed to demonstrate a reasonable expectation of privacy in the seized documents, his s. 8 rights were not breached and the documents were correctly received into evidence.

Complete case available at www.canlii.org

CRA Reassessments & Penalties

How much undeclared income was added to Brown's taxation years?

2004 = $20,715
2005 = $116,992
2006 = $26,405
2007 = $31,296

What were the gross negligence penalties that were imposed?

2004 = $1,620
2005 = $15,544
2006 = $4,036
2007 = $2,959

R. v. Brown, 2012 TCC 251

Jurisprudence Jolt

IN BRIEF: This section provides a peek of what's happening in appeal courts across the country.

Supreme Court of Canada

UTTERING THREATS: RECIPIENT NEED NOT TAKE IT SERIOUSLY

The accused was charged with uttering threats to cause bodily harm after he spoke to his ex-girlfriend on the phone. He repeatedly told her he would kill her if she went forward with the planned abortion of their child. He was incarcerated at the time and the ex-girlfriend testified she was not intimidated nor fearful as he had frequently talked this way. The accused was acquitted after a Manitoba Provincial Court trial judge was not satisfied beyond a reasonable doubt the accused intended that his words would intimidate or be taken seriously. The Manitoba Court of Appeal dismissed a Crown appeal.

On further appeal to the Supreme Court of Canada, the acquittal was upheld by a 4:3 margin. The Court noted the essential elements of uttering threats under s. 264.1 (1)(a) of the *Criminal Code*:

1. **ACTUS REUS** - the uttering of threats of death or serious bodily harm; and

2. **MENS REA** - the words spoken or written as a threat to cause death or serious bodily harm were meant to intimidate or be taken seriously.

The majority agreed that the Crown did not need to prove that the recipient of the threat felt intimidated or took it seriously. Instead, all that needed to be proven was that the accused intended them to have that effect. However, the trial judge still needed to be satisfied the necessary mens rea was present. The judge never said she was acquitting the accused solely because the recipient of the threats did not take them seriously. Instead, she was left with a reasonable doubt on the accused's mens rea. There was no error in entering an acquittal.

The minority would have allowed the appeal, entered a conviction and remitted the matter back to Provincial Court for sentencing. In its view, the trial judge erred in making the threat recipient's perception the determinative factor. Rather than asking what a reasonable person would objectively perceive, the judge asked what the recipient herself perceived. - **R. v. Obrien, 2013 SCC 2.**

Supreme Court of Canada

VEHICLE FORFEITURE ORDERED FOR IMPAIRED DRIVING OFFENCE

The accused pled guilty to impaired driving in the Court of Quebec. He was sentenced to 12 months imprisonment and was prohibited from driving for five years. The Crown also sought forfeiture of the truck he was driving at the time of his arrest because it was offence-related property under the *Criminal Code*. But the trial judge refused to order forfeiture. In his view, after considering the objectives and principles of sentencing, the accused had demonstrated that the impact of the forfeiture would be disproportionate under s. 490.41(3) of the *Criminal Code*. The Quebec Court of Appeal found the trial judge erred in considering the accused's sentence when deciding whether the vehicle would be forfeited, but nonetheless dismissed a Crown appeal. It found the trial judge properly considered the accused's personal circumstances in weighing the impact of the forfeiture order.

The Supreme Court of Canada, however, allowed a further Crown appeal and ordered the vehicle forfeited. Under s. 490.41(3) a court may decide not to order forfeiture if the impact of the order would be disproportionate to (1) the nature and gravity of the offence, (2) the circumstances surrounding the commission of the offence and (3) the criminal record, if any, of the offender. The unanimous Supreme Court concluded that the impact of forfeiture was not disproportionate. The trial judge erroneously emphasized the accused's personal circumstances and failed to give appropriate weight to his criminal record, which included five convictions for alcohol related driving offences and three breaches of probation or undertaking. - **R. v. Manning, 2013 SCC 1**

Personal Circumstances?

Just what were Manning's personal circumstances that the trial judge erroneously overemphasized in finding the vehicle forfeiture disproportionate?

- he lived on social assistance
- he was unemployed
- the vehicle (valued at $1,00) was his sole asset
- he had no income to procure a new vehicle
- he needed a vehicle to obtain food and clothing or to get to the hospital (he and his spouse had health problems)
- he lived with his spouse in a motel room
- he had no financial resources to take a taxi
- the only means of transport was to ask a friend to drive his truck

See R. v. Manning, 2011 QCCA 900

British Columbia Court of Appeal

REASONABLE GROUNDS TO BE VIEWED IN TOTALITY, NOT PIECEMEAL

Police obtained two wiretap authorizations to intercept private communications. The judge granted the authorizations on the basis of a chronologically organized 167 page affidavit, which included references to undercover drug transactions, source information and surveillance evidence. The trial judge refused an application by the defence to cross-examine the affiant and the accused's arguments on the facial invalidity of the warrant were rejected. Convictions for conspiracy to traffic in cocaine and methamphetamine, trafficking and possession of a restricted weapon followed.

The accused appealed his convictions arguing, among other grounds, that the affidavit failed to provide reasonable grounds for the issuance of the wiretap authorizations. The British Columbia Court of Appeal acknowledged that, as part of the key requirements for a wiretap authorization, the affidavit must establish that there are reasonable grounds to believe that an offence has been committed or is being committed and that the authorization sought will afford evidence of that crime. As for reasonable grounds, the question for a reviewing judge is not whether they would have granted the order, but whether there was any basis on which the issuing justice could have done so. In other words, the reviewing judge does not stand in the place of the judge signing the authorization, but should only set the authorization aside if there is no basis on which it could be sustained. In reviewing the affidavit, the judge is to examine the "totality of the circumstances," not assess the evidence in a piecemeal fashion. In this case, Justice Ryan found the affidavit contained sufficient facts capable of supporting a reasonable belief. The trial judge properly held that the informant information in the affidavit contained sufficient indicia of reliability to have formed part of the grounds relied upon in support of the authorization. "Viewed in totality, the informant information was sufficiently detailed, reliable, and corroborated to have been considered by the authorizing judge," she said. - **R. v. MacNeil, 2013 BCCA 16.**

CASE QUOTE

"Where the grounds are based in whole or in part on information from an informant, the Court must consider the 'totality of the circumstances' to determine whether the informant information was sufficiently reliable to have formed part of the grounds to support the authorization or warrant. Under this approach the Court must consider: (i) the extent to which the information predicting the criminal offence is compelling, i.e., the extent of detail provided; (ii) the credibility or reliability of the source; and (iii) the extent of corroboration. These are not separate tests but rather factors to be evaluated as part of the 'totality of the circumstances'. Weaknesses in one area may be overcome by strengths in the others." - R. v. MacNeil at para. 52.

British Columbia Court of Appeal

CIRCUMSTANTIAL EVIDENCE ANALYZED AS A WHOLE, NOT AS INDIVIDUAL PIECES

The accused was a passenger in a vehicle stopped by police during a roadblock. While obtaining the driver's license and vehicle registration, police smelled marihuana coming from the vehicle and arrested the occupants. The accused was carrying a brown paper bag containing $7,780 underneath his sweater and $717 was found in his wallet. Another $5,000 was found in a backpack behind the front passenger seat. Silver vacuum sealable bags, often used for packaging marihuana, were also found in the vehicle. A drug detention dog subsequently alerted on the money. At trial a police

officer provided an expert opinion that the manner in which the money was bound was consistent with how drug traffickers handle it. The accused contended that his possession of the $7,780 was capable of an innocent explanation, such as when he told officers he had the cash to buy a car. But he was convicted of possessing proceeds of crime anyway.

The accused challenged his conviction to the British Columbia Court of Appeal, suggesting the verdict was unreasonable and not supported by the evidence. But the Appeal Court disagreed. Although the Crown must prove that the property seized was proceeds of crime and that the accused had knowledge of its character, it need not prove it by direct evidence, but may do so through circumstantially. The test for circumstantial evidence is that the trial judge must be satisfied beyond a reasonable doubt that the accused's guilt is the only reasonable inference to be drawn from the proven facts. Each piece of evidence is not to be analyzed separately and out of context. Instead, the correct approach is to consider the whole of the entire body of admissible evidence rather than identifying each piece of evidence and offering some other explanation for it. Here, the trial judge applied the correct legal test, explained the evidence she accepted and relied upon, did not speculate on possible explanations and concluded that the evidence supported a finding of guilt beyond a reasonable doubt. The accused's appeal was dismissed. - **R. v. Carpio, 2012 BCCA 484.**

OLD SCHOOL: CASE QUOTE

"It is true that a man is not called upon to explain suspicious things, but there comes a time when, circumstantial evidence having enveloped a man in a strong and cogent network of inculpatory facts, that man is bound to make some explanation or stand condemned." - R. v. Jenkins (1908), 14 C.C.C. 221 (B.C.C.A.) at p. 230.

Ontario Court of Appeal

IN-DOCK IDENTIFICATION TO BE GIVEN LITTLE, IF ANY, WEIGHT

The accused was convicted by a jury in the Ontario Superior Court of Justice on two counts of robbery after an assailant, armed with a gun, entered a car rental establishment and stole $2,500 from the owner and $50 from a customer. The assailant had kicked in the door, pointed a gun at each of the victims, took their money and left. The entire event took about two minutes. At trial, both victims testified they had briefly seen the assailant on a previous occasion about two months before the robbery when he came in to rent a car. At that time neither victim assisted the man with a real transaction and the owner had no memory of observing anything unusual about the man's appearance, such as the condition of his teeth, visible scars or tattoos. He merely described him as a 5'8", "black guy." The owner pulled the man's rental file, viewed a copy of the accused's health card and identified his picture as being the assailant. Both victim's also provided in-dock identification. The accused was sentenced to 10 years in prison

The accused appealed his conviction suggesting the trial judge did not adequately charge the jury with respect to eyewitness identification. Justice Epstein, delivering the Ontario Court of Appeal judgment, agreed. There are dangers inherent in eyewitness identification evidence. "It is essential to recognize that it is generally the reliability, not the credibility, of the eyewitness' identification that must be established," said Justice Epstein. "The danger is an honest but inaccurate identification." A judge must instruct a jury to consider the frailties of eyewitness identification and consider such things as:

1. Was the suspect known to the witness?
2. What were the circumstances of the contact during the commission of the crime including whether the opportunity to see the suspect was lengthy or fleeting?
3. Was the sighting by the witness in circumstances of stress?
4. Was the witnesses' description of the assailant generic or vague, or was it a detailed description that included references to distinctive features?

The charge to a jury must include a caution that in-dock or in-court identification is to be given negligible, if any, weight.

In this case, the witnesses only had a few minutes to observe their assailant under highly stressful circumstances - facing a man at close range pointing a gun at them. Their descriptions were generic and neither witness noticed any distinctive features - the accused had two permanent gold front teeth, a 7" scar on his jaw and a 3.5 cm tattoo on his left hand. There was also no physical evidence - no surveillance

footage, no DNA, no fingerprints. The trial judge did not adequately instruct the jury on eyewitness evidence and their duty to scrutinize it with considerable care. The convictions were quashed and acquittals entered. - **R. v. Jack, 2013 ONCA 80**

CASE QUOTE

"'[E]yewitness identification evidence has taught us to use discriminating scrutiny for badges of unreliability.' One such 'badge' is whether a witness' description of the suspect fails to include mention of 'a distinctive feature of the accused'." - R. v. Jack at para. 29 citing R. v. Gonsalves (2008), 56 C.R. (6th) 379 (Ont. S.C.J.)

Alberta Court of Appeal

FINDING OF UNCONSTITUTIONALITY DID NOT REPEAL CDSA PROVISIONS

The accuseds were convicted in the Alberta Court of Queen's Bench of possessing and producing marihuana. But they challenged their findings of guilt to the Alberta Court of Appeal by suggesting that the provisions under the *Controlled Drugs and Substances Act* (*CDSA*) for which they were charged were not in force because of inadequacies in the *Regulations*.

First, they argued that since some courts had found constitutional flaws in the medical marihuana provisions in the past, Parliament was required to re-enact the *CDSA* provisions. In their opinion, court decisions that previously declared the medical exemptions for marihuana possession unconstitutional effectively repealed the *CDSA* sections that created the offence of marihuana possession and the passage of the new *Regulations* did not revive them. Because Parliament had never re-enacted the *CDSA*, they suggested there was no existing offence for which they could be charged. The Court of Appeal disagreed. "The finding of constitutional invalidity because of the inadequacies in the Regulations did not result in any repeal of the CDSA," it said. "That statute may have been unenforceable in some provinces for a short period of time with respect to those with relevant medical problems, but when the identified inadequacies were remedied by the new Regulations, any constitutional problem disappeared. It was not necessary for Parliament to re-enact the CDSA."

Second, their suggestion that their constitutional rights were impaired because the medical exemption application process is bureaucratic, frustrating, complex, plagued by delay and inconvenient was also without merit. "The Charter is there to protect the fundamental rights of Canadians," said the Court. "Mere administrative inconvenience, or the wish to be free from government regulation, does not entitle the [accuseds] to pick and choose which statutes will be binding on them." It was also noted that one of the accuseds subsequently obtained a licence which showed that the bureaucratic obstacles were not insurmountable. Finally, the assertion that it is burdensome to obtain a medical exemption and difficult to find a physician to support a need for medical marihuana was also rejected. "There is no free standing Charter right to a lifestyle involving the recreational consumption of marihuana, nor is there any right to self-medicate." The onus was on the accuseds to prove that they were entitled to an exemption by successfully applying for a permit under the *Regulations* or providing a court with sufficient facts and valid legal arguments to show that they were otherwise entitled to an exemption. It was not sufficient that they only assert a medical need to obtain a constitutional exemption. They failed to meet their onus and their appeals from conviction were dismissed. - **R. v. Voss, 2013 ABCA 38**

CASE QUOTE

"[T]here is no free standing Charter right to a lifestyle involving the recreational consumption of marihuana, nor is there any right to self-medicate."" - R. v. Voss at para. 8 citing R. v. Malmo-Levine, 2003 SCC 74.

Alberta Court of Appeal

OFFICERS' TESTIMONY ABOUT VIDEO OBSERVATIONS ADMISSIBLE

Where an original video recording or a copy was unavailable at trial, photographs made from the video and the police evidence of what was seen on it were admissible at the accused's robbery trial. Security cameras had captured three suspects on video and photographs were made from it. At the accused's Alberta Provincial Court trial the judge admitted the photos and allowed the officers to testify as to what they observed in the video. The accused was convicted but appealed, arguing the trial judge erroneously admitted the photos and police evidence.

The Alberta Court of Appeal found "the best evidence rule does not preclude the admission of viva voce evidence of persons who observed the video." The best evidence rule recognizes that real evidence is usually more reliable than human evidence. However, how much weight the judge gives to the evidence and its reliability will vary. So in this case, the judge was entitled to admit the testimonial evidence of what the police officers observed in the video and give it the appropriate weight. As for a photograph, it "is admissible in evidence if it accurately represents the facts, is not tendered with the intention to deceive and is verified on oath by a person capable to do so." Here, the trial judge properly found the officer's testimony satisfactorily proved the accuracy and fairness of the photographs. - **R. v. J.S.C., 2013 ABCA 157**

CASE QUOTE

"The best evidence rule provides an admonition that real evidence is usually more reliable than human evidence. ... In our view the best evidence rule does not preclude the admission of viva voce evidence of persons who observed the video" - R. v. J.S.C. at paras. 14-16.

British Columbia Court of Appeal

CELL PHONE CALL ADMISSIBLE AS CIRCUMSTANTIAL EVIDENCE OF DRUG POSSESSION

After the accused was arrested for possessing cocaine for the purpose of trafficking, police searched the van he was driving and found cocaine, a digital scale, paper flaps and a cell phone. Shortly thereafter, the phone rang and an officer answered it. A female asked for "Rick" and said she wanted to "trade a recently stolen bicycle for 1 gram of soft." At trial in British Columbia Provincial Court the judge found the telephone conversation was inadmissible as circumstantial evidence to establish that the accused possessed the cocaine since no voir dire had been held. The accused was nevertheless convicted of possessing cocaine for the purpose of trafficking on the basis of the remaining evidence.

While the accused appealed his conviction, the Crown argued that the trial judge erred in ruling the cellphone conversation inadmissible. Justice Neilson, writing the British Columbia Court of Appeal's decision, found the judge did err in excluding the conversation. Drug purchase calls are admissible as circumstantial evidence of drug possession, such as knowledge of the presence or purpose of the drugs. In the Court of Appeal's view, the cell phone conversation was "properly admissible as circumstantial evidence without the necessity of a voir dire, and she should have considered it in determining whether the Crown had established [the accused] knew the cocaine was in the van." - **R. v. Graham, 2013 BCCA 75.**

Ontario Court of Appeal

CROWN MUST PROVE STATEMENT GIVEN TO POLICE WAS VOLUNTARY

The Crown bears the burden of proving that a statement to police is voluntary beyond a reasonable doubt. Although this does not require a verbatim record of the interaction between an accused and the police on the voir dire, an incomplete or inaccurate record or notable inconsistencies in the officers' testimony may raise a reasonable doubt about the voluntariness of a statement. On charges of accessing and possessing child pornography, the Ontario Court of Justice was not satisfied that the evidence of the police officers accurately or completely set forth the sequence of events or the details of the encounter. Furthermore, the judge explained that the police "had complete control over the pace of the investigation, where and when it would proceed, who would be involved and what equipment or aids would be utilized." The accused's statements made before and after his arrest were excluded and he was acquitted.

The Ontario Court of Appeal upheld the trial judge's findings. "The quality of the record was something entirely within the power of the authorities to determine, in circumstances fully orchestrated by the police," said the Appeal Court. "Given that the officers were operating in a relatively controlled environment where they knew in advance that an important conversation with a suspect was about to occur, the trial judge concluded that it was reasonable to expect that they would take reasonable steps to protect the integrity of the record. He found that was not done." Since the trial judge could not be satisfied that the statements were voluntary – made without threats, promises or inducement – there was no basis to interfere with his decision. The Crown's appeal was dismissed. - **R. v. Blain, 2013 ONCA 224**

Ontario Court of Appeal

POSSESSION CONVICTIONS SUPPORTED BY CIRCUMSTANTIAL EVIDENCE

The accused was convicted in the Ontario Court of Justice of possessing cocaine for the purpose of trafficking, marihuana possession and possessing proceeds of crime after police found drugs and money in the car he was driving. Police found 35 grams of cocaine, a baggie of marihuana, $775 and two cell phones in the centre console next to the driver's seat. Two cell phone charger cords were also clearly visible in the car. The trial judge rejected the evidence of a defence witness that he had temporarily loaned his rental car to the accused, a man he barely knew. The witness, an admitted drug dealer, essentially claimed ownership of the drugs and money and said the accused did not know they were in the vehicle. The judge found that the quantity and value of the seized drugs made it inconceivable that they would be casually entrusted, by an admitted drug dealer, to someone who did not know what was in the vehicle. Along with other evidence, the judge went on to hold that the accused knew the drugs and money were in the vehicle and possession had been proven.

On appeal, the convictions were upheld. Possession requires proof that the accused had knowledge of and control over the contraband in the car. But suspicion of guilt, by itself, is insufficient to establish knowledge of the drugs and money to the requisite criminal standard of proof. Here, the Ontario Court of Appeal rejected the accused's argument that his mere proximity to the concealed drugs and money was the reason he was convicted. Although the Crown's case was not overwhelming, the trial judge's conclusion that the accused had knowledge of the contraband was firmly anchored in a cumulative view of the evidence and the only rational inference in all the circumstances."The evidence at trial established a constellation of factors that, taken together, support the inference of knowledge by the [accused] of the presence of drugs and cash in the car he was driving," said the Court of Appeal. "Moreover, when the car was in fact stopped, the [accused] was using his cell phone, which then rang continuously during the interval when he was detained by the police at the roadside (10 missed calls were recorded). This is consistent with individuals seeking to engage in drug transactions. In addition, two cell phone charger cords were clearly visible in the vehicle, and accessible to the [accused], on the centre console next to the driver's seat." The convictions were properly supported by an evidentiary foundation and the accused's appeal against conviction was dismissed. - **R. v. Bryan, 2013 ONCA 97**

CASE QUOTE

"The evidence at trial established a constellation of factors that, taken together, support the inference of knowledge by the [accused] of the presence of drugs and cash in the car he was driving." - R. v. Bryan at para. 10.

Ontario Court of Appeal

DETENTION NOT TRIGGERED JUST BECAUSE SUSPECT QUESTIONED

At his trial in the Ontario Superior Court of Justice on child pornography and weapons charges, the accused made a *Charter* application to exclude two statements he made to the police. His first statement (answers to brief police questions) was made before his arrest in an office at the store where he was an employee and before being advised of his *Charter* rights. He made a second statement in the police station after arrest and after being advised of his *Charter* rights. The trial judge found the accused was not detained when he gave his first statement and was not entitled to receive a s. 10(b) warning. The second statement was made after appropriate *Charter* warnings were provided and was also admissible. He was convicted of making child pornography available, possessing and accessing it, and possession of a prohibited weapon.

His appeal to the Ontario Court of Appeal was dismissed. The Court of Appeal concluded that the trial judge applied the correct analytical framework for determining whether there was a detention. "In our view, the trial judge was entitled to find on a balance of probabilities that the [accused] was not detained," said the Court of Appeal. "His decision was premised on the absence of specific hallmarks of detention (e.g. the police did not say that the [accused] could not leave the store office), the [accused's] concession that he knew it was possible for him to go, and the [accused's] strong motive for speaking, namely, to make sure that his brother was not implicated in his criminal activity." Just because a person is under investigation for criminal activity and is asked questions, doesn't mean they are necessarily detained.

Since the accused's attack on the admissibility of his police station statement was contingent on the inadmissibility of his first statement (and the asserted taint that flowed), there was no basis for further argument. The accused's appeal against his conviction was dismissed. - **R. v. England, 2013 ONCA 237**

Ontario Court of Appeal

CORROBORATED INFORMATION COMBINED WITH OTHER EVIDENCE JUSTIFIES WARRANT

Police obtained a warrant to search the accused's home under s. 11 of the *Controlled Drugs and Substances Act*. The ITO included information from a first time, non-coded, confidential informer who did not want to testify or have his identity known because of a belief that serious harm could come to him or family members. The affiant personally met with the informer and questioned him at length regarding his knowledge of illicit drugs, the methods of packaging those drugs, street pricing, drug terminology and methods of ingestion. The affiant found the informer quite knowledgeable and successfully corroborated information provided through the use of background checks, records checks, personal knowledge and physical surveillance. When the warrant was executed 177 grams of powder cocaine and $12,135 in cash was recovered. As a result, the accused was charged with cocaine and proceeds of crime offences. The Ontario Superior Court of Justice found there was sufficient information provided in the ITO to allow the authorizing judge to issue the warrant. The accused was convicted of possessing drugs for the purpose of trafficking and possession of proceeds of crime.

The accused then challenged the search, arguing the information contained in the ITO was insufficient to justify the warrant. Ontario's top court, however, concluded that the information was sufficient. "The information provided by the confidential informant was corroborated by the police in many details," said the Court of Appeal. "When combined with the drug-related conversation that ensued when the police called the cell phone number the informant had provided and the extensive surveillance evidence indicating activity by the [accused] highly suggestive of hand-to-hand drug trafficking, the ITO was sufficient to provide reasonable and probable grounds necessary for the issuance of the warrant." - **R. v. Bouchard, 2013 ONCA 229**

Ontario Court of Appeal

POSING AS SPIRITUAL ADVISER NOT A DIRTY TRICK

Several people were convicted of first degree murder after a man was shot several times near his car in a parking lot. Key evidence against the accused included video and audio tapes taken while incriminating statements were made to an undercover police officer posing as an Obeah spiritual advisor. A judge of the Ontario Superior Court rejected the accuseds' argument that this method of obtaining statements constituted a "dirty trick" and that their admission into evidence would constitute an abuse of process. In the judge's view, the police conduct would neither shock the conscience of the community nor bring the administration of justice into disrepute.

The Ontario Court of Appeal upheld the trial judge's ruling, holding that the statements should not be excluded under the dirty tricks doctrine nor as a result of a s. 7 *Charter* breach. Under the common law there are circumstances in which a statement of an accused "ought to be excluded because the conduct of the police is so egregious that admitting the evidence would bring the administration of justice into disrepute or is so appalling as to shock the conscience of the community." However, the threshold for finding that a police investigative technique rises to the level of a dirty trick requiring the exclusion of evidence is high. In this case (1) the accuseds were not in custody when the statements were made, (2) the Obeah spiritual adviser, as an undercover officer, was not a person in authority, (3) the accuseds communicated not to fulfill a religious purpose or spiritual need but to use the advisor's powers to thwart the police and allow them to escape prosecution and (4) admitting the statements would not shock the community's conscience nor bring the administration of justice into disrepute. Finally. s. 7

CASE QUOTE

"Deceit on its own is not enough to constitute a dirty trick. The behaviour must be so egregious that it shocks the conscience of the community. In other words, the public would be outraged that police were engaging in such behaviour, even in the pursuit of criminals." - R. v. Welsh at para. 94.

of the *Charter* had no application since the accuseds were not detained when the statements were made. The police operation in this case did not constitute a "dirty trick" nor breach s. 7. - **R. v. Welsh, 2013 ONCA 190**

British Columbia Court of Appeal

EVIDENCE ADMISSIBLE DESPITE CHARTER BREACHES

The police obtained a search warrant for a premises rented by the accused in a business office and warehouse complex. They approached, announced their presence and detained him. A search turned up more than 400 growing marihuana plants. The accused was then arrested, advised of his right to counsel and transported to the police station where he provided a statement. He argued before a British Columbia Supreme Court judge that the evidence was inadmissible under s. 24(2) of the *Charter* because, among other reasons, he was not advised of his right to consult counsel in a timely manner upon arrest. The judge found two s. 10 (b) *Charter* breaches. First, there was an 11 to 14 minute delay in advising the accused of his right to counsel after he was detained. Second, although the police officer advised the accused that he could contact counsel by cell phone, the police did not offer him the ability to do so in private in the police car. The judge excluded keys and other evidence provided by the accused at the scene and later at the police station but refused to exclude evidence obtained in the execution of the search warrant. He was convicted of producing marihuana and possession for the purpose of trafficking.

He appealed his convictions arguing, in part, that the evidence of the grow operation ought to be excluded on the basis of the s. 10(b) violations. But the British Columbia Court of Appeal upheld the trial judge's ruling. The trial judge considered the proper factors, did not make any unreasonable findings and his decision in determining that the admission of the evidence would not bring the administration of justice into disrepute was owed considerable deference. The accused's appeal was dismissed. - **R. v. Camacho, 2013 BCCA 68**

Note-able quote

"The jury consists of twelve persons chosen to decide who has the better lawyer." - Robert Frost

Charter Breaches?

What were the *Charter* violations as found by the trial judge?

- **s. 10 (a)**: The accused was not advised promptly of the reasons for his initial detention. There was a six minute delay between his detention and when he was given a copy of the search warrant, it was read to him and explained that he was detained for purposes of "the execution of the warrant".
- **s. 10(b):** He was not advised "without delay" of his right to retain and instruct counsel. A further six or seven minute delay occurred between when he was informed of the reason for detention and advising him of the right to counsel;
- **s. 10(b)**: He was not afforded an opportunity to contact counsel using a phone available at the scene with as much privacy as could be afforded to a co-operative accused in the backseat of a police car; and
- **s. 10(b)**: He was asked questions about his identity and for keys to the premises which the police wished to search before he had an opportunity to exercise his asserted desire to speak to a lawyer.

R. v. Camacho, 2011 BCSC 175.

CASE QUOTE

"As a general proposition, there is no justification for refusing access to counsel until the suspect is returned to the police station. Exigent circumstances may make that reasonable in a particular case but there were no such circumstances here. Further, there is no reason why [the accused] could not have had the privacy that the backseat of a police car affords.." - R. v. Camacho, 2011 BCSC 175 at para. 44.

Alberta Court of Appeal

COMPLAINANT NOT PERSON IN AUTHORITY

The Alberta Court of Appeal has upheld a trial judge's ruling that neither the complainant of a sexual assault nor her boyfriend were persons in authority under the common law confessions rule because there was no evidence they were connected to the police or prosecution. Following the assault, the accused made three statements: the first was to the complainant's boyfriend

(his roommate); the second to the complainant and her boyfriend; and the third to the police the following day. The trial judge determined that the confessions rule did not apply to the statements made to the boyfriend or the complainant as they were not persons in authority. In the judge's view, it was not enough for the complainant or her boyfriend to have a basic power to influence proceedings by pressing charges. However, she exercised her discretion to exclude these statements on the ground of trial fairness. She admitted into evidence the statement to the police. The accused was convicted of sexual assault.

The Court of Appeal agreed that the statements to the complainant and her boyfriend were not made to persons in authority. "While the [accused] may have believed that the complainant had the ability to influence the proceedings against him, in the sense that she could decline to report the incident to the police and ensure that proceedings were never initiated, there was no indication that the [accused] believed the complainant was connected to the police or the prosecution," said the Court of Appeal. "In fact, he did not know at that time that the incident had even been reported, and the complainant testified that he specifically asked her not to contact the police. The [accused] did not testify on the voir dire, so there was no direct evidence that he believed her to be a person in authority, and the balance of the evidence did not compel that inference". The accused had failed to meet his evidential burden of establishing that he reasonably believed that the complainant was connected to the state. Similarly, there was no evidence of any collaboration between the boyfriend and police. As for the statement to police, it was not tainted by the inducements given by the complainant and her boyfriend. There was a gap between the statements, they were made to different people and, at the beginning of the interview, the detective told the accused that any inducements not to report the offence to police were no longer operative. The accused's appeal was dismissed. - **R. v. Glessman, 2013 ABCA 86**

CASE QUOTE

"Under the common law confessions rule, the accused must be able point to some evidence showing that the receiver of the statement was a person in authority. If that is done, the Crown must demonstrate, beyond a reasonable doubt, that the statement was voluntary. However, voluntariness does not become an issue if the receiver of the statement is not a person in authority. ... The confessions rule requires that a statement be made to persons in authority for the purpose of controlling coercive state conduct. For this reason, the term "person in authority" usually applies to "those persons formally engaged in the arrest, detention, examination or prosecution of the accused". - R. v. Glessman at para. 8-9, references omitted.

Nova Scotia Court of Appeal

ESSENTIAL FEATURE OF SEXUAL ACT REQUIRES CONSENT

The accused, fearing his intimate partner might leave him, decided to surreptitiously sabotage their birth control method. By poking holes in the condoms they used, he hoped that his partner would get pregnant and she would then continue the relationship. She did get pregnant and ended up aborting the baby. The accused was convicted in Nova Scotia Supreme Court of sexual assault and sentenced to 18 months in jail. The judge found the complainant did not consent to having unprotected sex. The accused knew full well that she did not want to become pregnant and she insisted he wear a condom for that very reason.

A panel of five Newfoundland Court of Appeal judges agreed that .Under s. 273.1(1) of the *Criminal Code*, consent means "the voluntary agreement of the complainant to engage in the sexual activity in question." Just what is meant by the words "the sexual activity in question?" Was the sexual activity in question simply sexual intercourse as the accused argued, to which the complainant did give consent? Or was the sexual activity in question unprotected sexual intercourse as the Crown argued, which the complainant did not give consent? By a 4-1 majority, the Court of Appeal concluded that consent under s. 273.1(1) requires the alleged victim to be fully aware of the exact nature of the proposed sexual activity. "If there is no consent to an essential feature of the sexual act itself, there can be no consent to 'the sexual activity in question' pursuant to s. 273.1," said Chief Justice MacDonald. "It is clear that protected sex was an essential feature of the proposed sexual act and an inseparable component of [the complainant's] consent." The accused's appeal was dismissed and his conviction and sentence were upheld. - **R. v. Hutchinson, 2013 NSCA 1.**

Note-able quote

"Make crime pay. Become a lawyer." - Will Rogers

POLICING ACROSS CANADA: FACTS & FIGURES

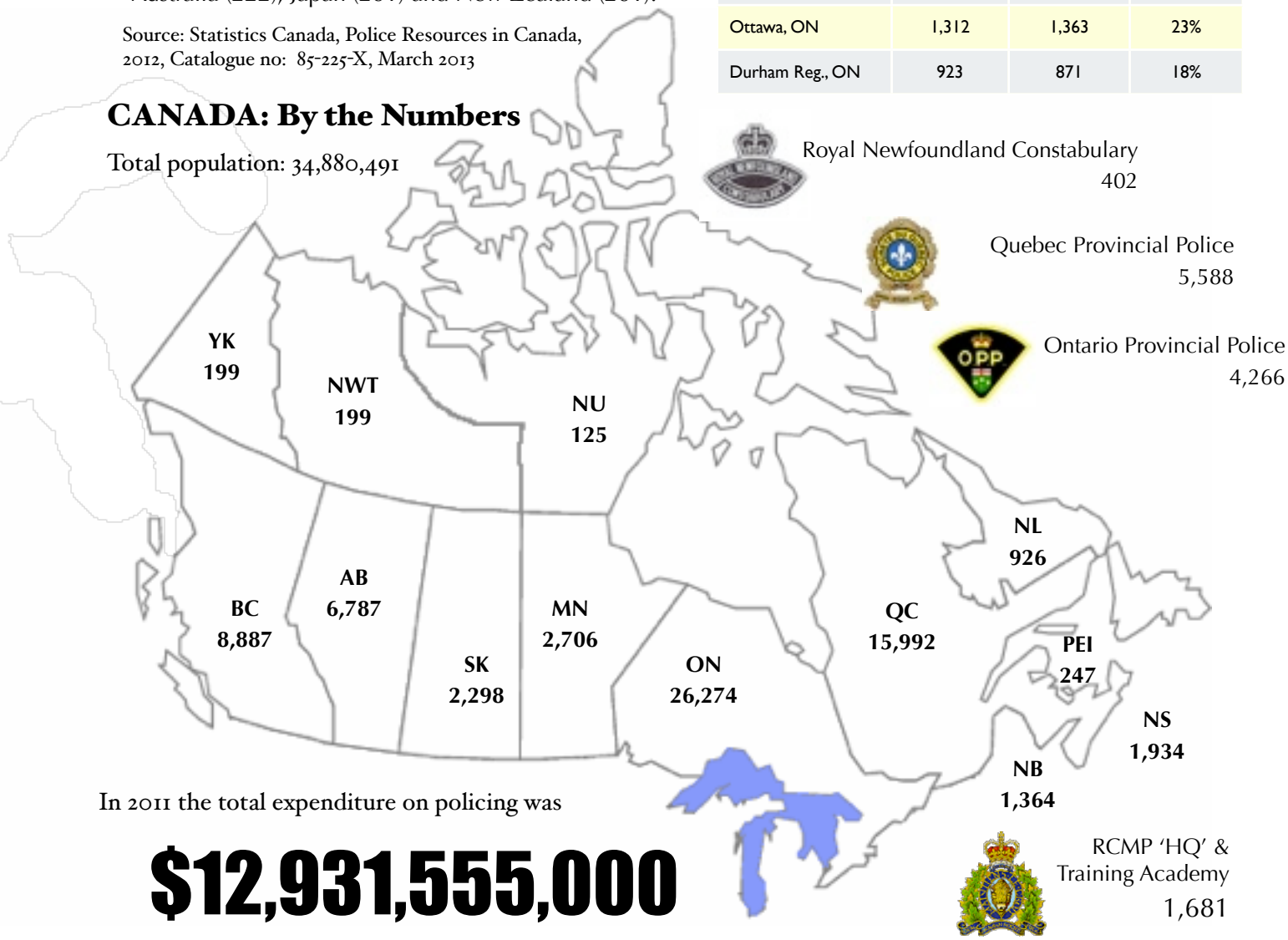
According to a report released by Statistics Canada, there were 69,539 active police officers across Canada in 2012 - a slight increase of 115 over 2011. This was the ninth consecutive year of growth. Ontario had the most police officers at 26,274, while the Yukon had the least at 119. With a national population of 34,880,491, Canada's average cop per pop rate was 199 police officers per 100,000 residents. This rate was lower than Scotland (337), England and Wales (244), the United States (238), Australia (222), Japan (201) and New Zealand (201).

Source: Statistics Canada, Police Resources in Canada, 2012, Catalogue no: 85-225-X, March 2013

Canada's Largest Municipal Police Services 2012			
Service	Officers		% Female
	Actual	Authorized	
Toronto, ON	5,568	5,574	19%
Montreal, QC	4,480	4,597	31%
Calgary, AB	1,975	1,960	15%
Peel Reg., ON	1,911	1,937	17%
Edmonton, AB	1,603	1,647	19%
Winnipeg, MN	1,472	1,441	14%
York Reg., ON	1,454	1,495	18%
Vancouver, BC	1,352	1,327	22%
Ottawa, ON	1,312	1,363	23%
Durham Reg., ON	923	871	18%

CANADA: By the Numbers

Total population: 34,880,491



Royal Newfoundland Constabulary
402

Quebec Provincial Police
5,588

Ontario Provincial Police
4,266

RCMP 'HQ' & Training Academy
1,681

In 2011 the total expenditure on policing was

$12,931,555,000

CMA Police Officers & Crime Severity Index		
CMA	Officers-2012	Crime Severity Index-2010
Toronto, ON	10,023	54.9
Montreal, QC	6,986	80.9
Vancouver, BC	3,950	94.5
Calgary, AB	2,081	65.8
Edmonton, AB	1,928	89.4
Winnipeg, MN	1,517	107.2
Ottawa, ON	1,402	57.9
Hamilton, ON	1,129	65.2
Quebec, QC	998	52.2
Kitchener-Cambridge-Waterloo, ON	802	62.9
London, ON	769	79.0
St. Catherines-Niagara, ON	737	60.7
Halifax, NS	698	87.4
Windsor, ON	589	62.5
Victoria, BC	552	71.3
Saskatoon, SK	497	118.7
Gatineau, QC	435	63.6
Regina, SK	422	124.5
St. John's, NL	336	93.3
Barrie, ON	313	58.3
Abbotsford-Mission, BC	262	87.9
Greater Sudbury, ON	262	78.9
Sherbrooke, QC	250	60.7
Brantford, ON	245	92.2
Kingston, ON	234	59.5
Thunder Bay, ON	228	107.3
Kelowna, BC	206	97.4
Saint John, NB	195	79.2
Guelph, ON	194	47.0
Peterborough, ON	189	62.2
Trois-Rivieres, QC	189	67.9
Saguenay, QC	179	71.1
Moncton, NB	145	68.8

GENDER

There were 13,838 female officers in 2012 accounting for 19.9% of all officers, or roughly 1 in 5. This is up from 17.9% in 2006, 14.5% in 2001, 10.4% in 1996, 7.0% in 1991, 3.9% in 1986, and 2.2% in 1980. Quebec had the highest percentage of women (23.9%) while the Yukon had the least (12.6%). The RCMP HQ and Training Academy were 22.4% female.

Area	% Female
QC	23.9%
BC	21.3%
NL	19.1%
ON	18.7%
SK	18.5%
AB	17.3%
NS	16.8%
PEI	17.0%
NB	15.6%
MN	15.4%
NU	12.8%
NWT	13.1%
YK	12.6%

The number of women in all ranks continued to rise. Senior officers were 9.9% female, more than doubling over the last ten years. Non-commissioned officers were 16.4% female, also more than twice the percentage from a decade ago. Constables were 21.8% female. This is a slight increase over last year.

Overall, the representation of women in policing continues to increase. In 2012 the number of women increased (+234) while the number of male officers decreased (-119).

OTHER FA$T FACT$

- Police expenditures rose for the 17th consecutive year, more than doubling since 1994;
- Costs for policing translates to $375 per Canadian;
- Among provinces, Ontario spent the most on policing ($4,326,213,000) followed by Quebec ($2,390,042,000), British Columbia ($1,434,524,000), Alberta ($1,224,920,000) and Manitoba ($395,745,000). The Yukon ($26,231,000), Prince Edward Island ($32,024,000), Nunavut ($42,636,000) and the Northwest Territories ($50,918,000) spent the least

Based on total expenditures on policing in 2011.

RCMP

The RCMP had the largest presence in British Columbia with 6,270 officers, followed by Alberta (2,810), Ontario (1,469) and Saskatchewan (1,265).

Canada's Largest Municipal RCMP Detachments 2011			
Service	Officers		% Female
	Actual	Authorized	
Surrey, BC	615	641	20%
Burnaby, BC	299	278	25%
Richmond, BC	228	227	21%
Kelowna, BC	154	157	25%
Wood Buffalo, AB	150	158	26%
Coquitlam, BC	149	144	26%
Nanaimo, BC	145	139	19%
Codiac Region, NB	142	131	19%
Red Deer, AB	128	151	29%
Langley Township, BC	127	127	27%
Kamloops, BC	127	122	24%
Prince George, BC	124	127	25%
Chilliwack, BC	108	103	33%

According to Statistics Canada, the majority of RCMP officers provided provincial police services (6,830). This was followed by RCMP municipal policing (5,117) and federal policing (4,447). Another 1,681 officers were involved in RCMP Headquarters and the Training Academy.

RCMP On-Strength Establishment as of September 1, 2011	
Rank	**# of positions**
Commissioner	1
Deputy Commissioners	9
Assistant Commissioners	25
Chief Superintendents	51
Superintendents	186
Inspectors	440
Corps Sergeant Major	1
Sergeants Major	3
Staff Sergeants Major	16
Staff Sergeants	942
Sergeants	2,140
Corporals	3,672
Constables	11,717
Special Constables	78
Civilian Members	3,760
Public Servants	6,194
Total	**29,235**

Source: www.rcmp-grc.gc.ca/about-ausujet/organi-eng.htm

RCMP Officers by Level of Policing - Canada 2012 (numbers do not include 1,681 members at HQ & Training Academy)														
Level / Region	BC	AB	SK	MN	ON	QC	NB	NS	PEI	NL	YK	NWT	NU	Total
Municipal	3,472	1,060	122	190	-	-	202	62	9	-	-	-	-	5,117
Provincial	1,825	1,331	855	649	-	-	526	744	105	412	94	176	113	6,830
Federal	811	359	245	199	1,377	964	151	194	25	86	17	13	6	4,447
Other	162	60	43	34	92	46	32	43	10	26	8	10	6	572
Total	6,270	2,810	1,265	1,072	1,469	1,010	911	1,043	149	524	119	199	125	16,966

The RCMP is Canada's largest police organization. As of September 1, 2011 the force's on-strength establishment was 29,235. This includes 19,203 police officers, 78 special constables, 3,760 civilian members and 6,194 public servants.

The RCMP is divided into 15 Divisions with Headquarters in Ottawa. Each division is managed by a commanding officer and is designated alphabetically.

RCMP DIVISIONS		
Region	Division	Area
Pacific	E	British Columbia
	M	Yukon Territory
North West	D	Manitoba
	F	Saskatchewan
	G	Northwest Territories
	V	Nunavut Territory
	K	Alberta
	Depot	Regina, SK
Central	A	National Capital Region
	O	Ontario
	C	Quebec
Atlantic	B	Newfoundland
	H	Nova Scotia
	J	New Brunswick
	L	Prince Edward Island

Source: www.rcmp-grc.gc.ca/about-ausujet/organi-eng.htm

FAMILY VIOLENCE FAST FACTS

- In 2011, police reported 97,500 victims of intimate partner violence.
- 80% of spousal violence victims were female.
- Violence against dating partners was 1.6 times greater that spousal violence.
- Highest rates of family violence were recorded in Saskatchewan and Manitoba. The lowest rates were recorded in Ontario, PEI, Nova Scotia and BC.
- 77% of the 344 murder-suicides in Canada between 2001-2011 involved at least one victim related to the accused.
- Shooting (53%) was the most common cause of death in spousal murder-suicides. Stabbing followed at 22%.
- Risk of spousal homicide was elevated after separation from a legal marriage.
- Majority of intimate partner violence victims were physically assaulted.
- Common assault was the most frequently occurring offence.

Source: Statistics Canada, Family violence in Canada: A statistical profile, 2011, Catalogue no: 85-002-X, June 2013

ALL CIRCUMSTANCES TO BE CONSIDERED IN s. 10(b) ANALYSIS

R. v. Adamiak, 2013 ABCA 199

Following a police investigation, the accused was arrested during a traffic stop at 1:30 pm for possessing drugs for the purpose of trafficking. He was read the standard *Charter* caution and was asked if he understood. He said he did, but answered "No" when asked whether he wanted to call a a lawyer. He was then told that he might be charged with possession for the purpose of trafficking and that he was not obliged to say anything, but if he did it might be used in evidence against him. He was transported to the police station and was locked in a small cell. He never asked to use a telephone or contact a lawyer. After the police executed a search warrant at 10:00 pm at his home, he was given a telephone and told he could call a lawyer. The first number he called did not work but the second time he reached someone, speaking for about 10 minutes. Telephone books, a legal aid poster and lists of lawyers were located in the holding area outside the cell where the telephones were located. At about 11:30 pm the accused was taken to an interview room and asked if he had spoken with a lawyer. He said, "No. I just really wanted to talk to my girlfriend." He acknowledged he had been given the opportunity to call someone and was again Chartered and asked if he wished to call a lawyer. He replied, "At this moment no." A 25 minute audio/video taped interview was conducted and he gave an inculpatory statement. At the accused's home police found, among other items, an insulated cooler containing 793 grams of marihuana in six separate bags along with a digital scale. He was charged with possessing marihuana for the purpose of trafficking.

Alberta Provincial Court

The judge ruled that the accused's s. 10(b) *Charter* right to retain and instruct counsel without delay had been violated. She found that regardless of what happened at the time of the accused's arrest when he was given his s. 10(b) rights and chose not to exercise them at that point, the accused's response some 10 hours later at the beginning of the interview was equivocal - it was not a clear waiver or denial of the right to counsel. The officer should have gone further, determined the accused's understanding of his rights and ensure that it was a clear refusal or waiver of the right to counsel. The judge then excluded the accused's statement under s. 24(2) and he was acquitted.

Alberta Court of Appeal

The Crown asserted that the trial judge was in error when she found the s. 10(b) *Charter* breach. In its view, the police fulfilled their s. 10 (b) duties and the accused made no effort to assert his right to counsel nor provide evidence that he did not understand his rights.

The Court of Appeal first recognized three obligations imposed on police under s. 10(b):

1. the duty to inform a detainee of his right to counsel (**INFORMATIONAL**);

2. if a detainee has indicated a desire to exercise this right, a duty to provide the detainee with a reasonable opportunity to exercise the right (**IMPLEMENTATIONAL**); and

3. the duty to refrain from eliciting evidence from the detainee until they have a reasonable opportunity to consult (**IMPLEMENTATIONAL**).

Once the police have complied with s. 10(b) by promptly advising the detainee of their right to counsel without delay, the second and third implementational duties are not triggered unless and until a detainee indicates a desire to exercise their right to counsel. The detainee must also be reasonably diligent in exercising their right. If they are not, the correlative duty on the police to provide a reasonable opportunity and to refrain from eliciting evidence will either not arise in the first place or will be suspended. Section 10(b) rights may be waived but the standard for proving a waiver will be high, especially when the waiver is implicit.

In this case, the trial judge focussed exclusively on the accused's interaction with the police immediately before he gave an inculpatory statement. Instead, she should have examined the totality of the circumstances in assessing whether s. 10(b) was breached, including from the time of his initial arrest until he gave the inculpatory statement:

> Among other things, the trial judge needed to take account of the Charter warning given to the [accused] at the roadside; his assurance to the arresting officer that he understood his rights and did not wish to contact a lawyer; his later access to and use of a telephone after being told that he could call a lawyer; whether his jeopardy had changed between the original caution and the later one; and his acknowledgment to the interviewing officer that he had been given the chance to call a lawyer.
>
> Although the trial judge found as a fact that the [accused] made an equivocal statement when asked, immediately before the interview, whether he wished to contact a lawyer, not every equivocal statement necessarily leads to a breach of section 10(b). The totality of the circumstances must be considered. [paras. 27-28]

The trial judge failed to conduct a complete analysis on the s. 10(b) issue and her application of s. 24(2) was flawed. The Crown's appeal was allowed and a new trial was ordered.

Complete case available at www.albertacourts.ab.ca

NO OPPORTUNITY TO COMPLY WITH s. 10(b): OVERHEARD CONVERSATION ADMISSIBLE

R. v. Abdullah, 2013 ONCA 372

Following the accused's arrest for several offences arising out of the search of his home, including possessing a handgun, he was advised of his right to counsel by the investigating detective while in police cells. He asserted his right to counsel, indicating that he wished to speak to his lawyer and identified his lawyer by name. However, within seconds he began a conversation with the person in the next cell as the detective was leaving the cellblock to arrange access to a lawyer. The detective stopped, listened and made notes of the very brief conversation, which was potentially inculpatory. After listening to and recording the statement, the detective interviewed another person involved in the same investigation and then began his efforts to locate the accuseds's lawyer some 20 to 25 minutes after he asserted his s. 10(b) *Charter* right. Those efforts failed. The detective then spoke to the accused again and offered to arrange for him to speak to another lawyer. Eventually, the accused waived his right to counsel and provided a videotaped statement to the police.

Ontario Superior Court of Justice

The trial judge ruled the videotaped statement admissible but excluded the statement made to the other prisoner as recorded by the detective. He held that the detective delayed affording the accused the opportunity to exercise his right to counsel for no valid reason and the delay was therefore not reasonable. The accused's right under s. 10(b) was breached and the evidence was excluded under s. 24(2). "[I]nstead of doing what he should have done, and do what is necessary to find counsel for the accused, [the detective] made a conscious decision to delay the implementation of the right to counsel for the purposes of doing other things, interviewing a third party and, of course, also eavesdropping to obtain incriminating evidence," said the judge. The accused was acquitted.

Ontario Court of Appeal

The Crown's challenge of the trial judge's *Charter* ruling on the s. 10 (b) breach was successful. Of the three obligations imposed on the police under s. 10(b), the one at issue in this case was the police duty to provide the detainee with a reasonable opportunity to exercise his right to retain and instruct counsel without delay. Here, the detective listened to and recorded notes of the brief conversation between the accused and the other

prisoner before leaving the cell area. "The statement was made by the [accused] to the other prisoner before the detective had any possible opportunity to comply with the request for counsel," said the Court of Appeal. "Even if the brief 20-25 minute delay after the officer left the cell area could engage s. 10 (b) concerns, that time period is irrelevant to whether there was a breach at the time the officer listened to and made notes of the statement. There was no breach of s. 10(b) at that point in time." It added:

> In summary, it could not be said that at the point in time when the statement was overheard by the police officer there had been any failure to provide a reasonable opportunity to consult with counsel. The [accused's] belief that his statement to the other prisoner was not being overheard by the police had no relevance to whether the police had complied with their obligation under s. 10(b). [para. 9]

Moreover, the statement came as a surprise to the detective and there could be no suggestion that it was in any way elicited by the detective. Had the statement been admitted, the verdict may have been different so the acquittals were quashed and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

REASONABLE GROUNDS DOES NOT REQUIRE 50% STATISTICAL PROBABILITY

Allen v. Alberta, 2013 ABCA 187

A patrol officer arrested a man in the alley behind a hotel for possessing a controlled substance after finding him smoking a marijuana cigarette. He was handcuffed and the officer tried to frisk him but he was uncooperative. He was then transported to a nearby police station where he was directed to remove his clothing down to his underwear. The officer wanted to see if the man was in possession of any more drugs. The man complied and the officer searched his clothing for more drugs. The man was released from custody without any charges being laid and later complained about police conduct. As a result, the officer was charged with two disciplinary offences including unlawful or unnecessary exercise of authority for unnecessarily detaining, transporting and conducting a modified strip search.

Presiding Officer

At the officer's hearing, the Presenting Officer alleged the strip search was unlawful because there was insufficient information upon which to justify it. In his view, the officer did not have reasonable and probable grounds to believe the person was in possession of weapons or evidence and, in the alternative, simple possession of marihuana is too minor an offence to justify a strip search. The officer, on the other hand, argued that the only reason a strip search occurred was because the complainant refused to cooperate with a simple frisk search. He opined that he should not have to give up a reasonable search just because the man would not cooperate. Furthermore, the officer suggested that the search was a "modified" strip search because he did not intend to expose the complainant's private areas.

The Presiding Officer found that there was no justification for taking the complainant to the police station for a more intensive search. In his view, once the complainant was handcuffed in the alley behind the hotel, he was under sufficient police control to conduct the limited type of frisk search that was warranted by the circumstances of this arrest. He concluded that the search was a "strip search," regardless of the officer's subjective intention not to inspect the complainant's private parts, and a higher level of justification was required for the greater invasion of privacy resulting from a strip search. The Presiding Officer concluded that the officer may have had a suspicion the complainant possessed more drugs but he did not have reasonable and probable grounds. While a frisk search upon arrest was reasonable, the further strip search at the station was not. The disciplinary offence of unlawful or unnecessary exercise of authority was substantiated.

Law Enforcement Review Board

The officer appealed the Presiding Officer's decision to Alberta's Law Enforcement Review Board arguing he erred in his interpretation of what constituted a "strip search," and what was required to show reasonable and probable grounds. However, the Board agreed this was a strip search and calling it a "modified" strip search didn't matter. It also agreed that "mere suspicion" was insufficient to support a search and, while the officer had "possible" grounds, he did not have "probable" grounds. The Presiding Officer's decision was upheld.

Alberta Court of Appeal

The officer then appealed the Law Enforcement Review Board's decision arguing several grounds, including whether this was a strip search and whether objective probability of finding drugs was required in order to conduct the search.

Was this a strip search?

The Court of Appeal noted that personal searches are generally divided into three categories: frisk, strip and cavity. These analytical descriptions, however, are not distinct watertight compartments or categories. The Court stated:

> Even within these categories, there are degrees of intensity. A frisk search can be superficial, or can involve the touching of sexually sensitive parts of the body. A strip search can be more or less invasive, depending on how much, and which, clothing is removed.
>
> How the intensity of a search is measured does not depend on the subjective intention of the searcher. In other words, it is not necessary to show that the searcher intended to visibly inspect the subject's private parts in order to have a "strip search". Some viewing of the body of the person is inevitable whenever clothing is removed, and the consequent invasion of privacy and personal dignity is the same regardless of the intentions of the searcher. Obviously if the search arose from some sort of lascivious motivation it would be unreasonable, but ... strip searches are generally viewed as unpleasant by the police officers conducting them.
>
> The key issue when measuring the acceptability of police conduct is to determine the reasonableness of the search, not to attempt to place it in any rigid category. A search is reasonable when it is authorized by law, and it is carried out in a reasonable fashion. The police have an established common law right on arrest to conduct a search for weapons and evidence. However, the method by which the search is conducted must also be reasonable. Sometimes it will be reasonable to conduct a strip search, and sometimes it will not, and when a strip search is reasonable it must be conducted in a reasonable way, and at a reasonable time and place. The intensity of any search, whether it be a frisk search or a strip search, must also be reasonable. Reasonableness must be assessed having regard to all of the facts, including the seriousness of the crime, the level of risk the police and public are exposed to, and any other factors. The intensity and manner of conducting the search must be proportionate to the circumstances. [references omitted, paras. 17-19]

"Sometimes it will be reasonable to conduct a strip search, and sometimes it will not, and when a strip search is reasonable it must be conducted in a reasonable way, and at a reasonable time and place. The intensity of any search, whether it be a frisk search or a strip search, must also be reasonable."

Here, the search could fairly be described as a "modified strip search." While it fell more closely into the analytical category of a strip search as defined in *R. v. Golden*, 2001 SCC 83, it did not involve total disrobement. "The complainant was not required to remove all of his clothes, but he was left with only his underwear on," said the Court. "One can therefore envision both more intensive and less intensive strip searches than occurred in this case." But whether or not the Presenting Officer had proven on a balance of probabilities that this type or

intensity of search was unnecessary, did not only depend on how the search was categorized:

> In this case [the officer] had a choice. He could have conducted a more intensive frisk search, which would have involved a sustained touching of the complainant's body while searching his clothing. Alternatively, he could have proceeded as he did, and have the complainant remove his outer clothing at the police station. This enabled [the officer] to search the clothing without touching the complainant. There was a trade off between actual touching and the exposure resulting from the removal of clothing. On this issue, the views of the person to be searched would be relevant. There were other relevant factors, such as the location of the arrest, the seriousness of the charges, and the rest of the factual context. The essential question was whether the Presenting Officer had proven on a balance of probabilities that the choice made by [the officer] was unreasonable, making the search an unnecessary exercise of authority. If the merits and disadvantages of each choice were roughly balanced, it would not necessarily have been unreasonable for [the officer] to choose to proceed as he did, even if the Presiding Officer or the Board may have made a different choice. [para. 23]

Did the search require objective probability?

The second question the Alberta Court of Appeal addressed was whether the search required advance objective probability of finding narcotics and if it did, whether that meant greater than a 50% statistical probability. In this case, the Court found that both the Presiding Officer and Law Enforcement Review Board erred in assuming that the officer had to demonstrate there was a probability he would find further drugs:

> [T]he arresting officer must subjectively believe he has grounds, and that subjective belief must be objectively justifiable. "Reasonable and probable grounds" therefore explores whether the arresting officer's subjective belief that there was a probability (beyond mere suspicion) that he would find further evidence was reasonable, even if it was not demonstrably statistically probable, and even if a reviewing court or tribunal (with the benefit of hindsight and careful reflection) might not agree. [reference omitted, para. 27]

The officer in this case subjectively believed that a search was warranted. The issue then became whether the Presenting Officer had proven on a balance of probabilities that an informed objective bystander would consider it unreasonable for the officer to hold that belief. For greater clarity, 'the police do not have to show an 'objective probability', nor a '50% statistical probability', in order to establish reasonable and probable grounds":

> The real question was whether the Presenting Officer had proven on a balance of probabilities that the search was unreasonable. That involved proving that it was objectively unreasonable for [the officer] to believe that the search was a reasonable thing to do. The objective component of the test is not that it is probable that drugs, weapons or other evidence will be found, but rather that it is objectively reasonable to go looking. [para. 31]

Since the Law Enforcement Review Board erred in deciding that "reasonable and probable grounds" required a probability of finding more drugs, the officer's appeal was allowed and the matter was remitted back to the Board for reconsideration. "The background issue was whether a search of this intensity was unnecessary, not whether the search qualified in the abstract as a 'strip search'," said the Court. "Considering all the circumstances, the search may have been reasonable and necessary even if there was not an objective probability that more drugs would be found."

Complete case available at www.albertacourts.ab.ca

"Reasonable and probable grounds" therefore explores whether the arresting officer's subjective belief that there was a probability (beyond mere suspicion) that he would find further evidence was reasonable, even if it was not demonstrably statistically probable, and even if a reviewing court or tribunal (with the benefit of hindsight and careful reflection) might not agree.

"[T]he objective reasonableness of grounds must be determined on the totality of the circumstances and is a question to be assessed from the point of a reasonable person with the officer's experience, training, knowledge and skills."

REASONABLE GROUNDS VIEWED THROUGH OFFICER'S LENS

R. v. Moore, 2012 BCCA 400

Police received a complaint from a local store manager of increased drug activity in the area around a Sky Train Station. The activity described was consistent with the investigating officer's own experience, which was considerable (300+ drug investigations), concerning the manner in which dial-a-dope drug trafficking occurs. Surveillance was conducted in the area on two separate occasions and activity consistent with dial-a-dope drug trafficking was observed. Pedestrians were seen to enter a car, stay a short time, exit and leave the area or return to the Sky Train station. On one occasion, police stopped a person believed to be a buyer. They said they had purchased drugs from someone in a vehicle.

On the final day of surveillance two police officers in an unmarked police car were approached by a man within minutes of their arrival in the area. The man tried to enter the police car. When he could not enter, he asked the officers what they were selling, indicated he would wait for his "regular guy", and asked the officers for their number so he could buy from them in the future. He then returned to a spot next to the stairs at the Sky Train station. About 10 minutes later the man approached a Volvo that had just arrived in the area. The man entered the front passenger seat. The lead investigator directed an arrest and the surveillance team moved in and arrested the vehicle occupants. Police seized two $20 bills from the accused's lap and 41 pieces of rock cocaine from a prescription pill box in the centre console. A cell phone, which rang continuously, and a black purse with $150 was also seized. He was charged with trafficking offences.

British Columbia Provincial Court

The accused argued that the police did not have the requisite subjective and objective grounds to arrest him and therefore the contemporaneous search of his vehicle and seizure of cocaine violated his right to be secure against unreasonable search and seizure under s. 8 of the *Charter*. The judge found the officer subjectively believed he had the grounds to make the arrest, but lacked the objective grounds such that there was a s. 8 breach. In his view, there were insufficient grounds to conclude the driver of the Volvo was a drug dealer such that a drug transaction had occurred or was about to occur. However, the judge held the officer had sufficient grounds for an investigative detention, thus the accused' rights under s. 9 of the *Charter* were not infringed. In his s. 24(2) analysis on the s. 8 breach, the judge admitted the evidence. The officer held an honest belief that he had reasonable grounds to direct an arrest and acted in good faith. There were grounds for an investigative detention and the search was conducted reasonably. The accused was convicted of trafficking in cocaine and possessing cocaine for the purpose of trafficking.

British Columbia Court of Appeal

The accused contended that the judge erred in finding he had not been arbitrary detained under s. 9 of the *Charter*. Furthermore, he argued the judge erred in his s. 24(2) analysis. The Crown, on the other hand, submitted that the arrest was objectively reasonable and, in any event, the evidence was properly admitted.

Arrest

For an arrest to be lawful, the arresting officer must have a subjective belief that an indictable offence has been or is about to be committed, and the grounds for their belief must be objectively

reasonable. As for whether the objective test has been met, "the objective reasonableness of grounds must be determined on the totality of the circumstances and is a question to be assessed from the point of a reasonable person with the officer's experience, training, knowledge and skills." Here, objective reasonableness was to be viewed from the perspective of "a reasonable person standing in the shoes of [the officer] with his considerable experience in drug investigations, his training, his knowledge and his skills." Justice Saunder's also noted:

> Each case must be determined on its own facts, considering the extent of the police's direct knowledge, the extent and duration of their observations, the nature of the complaint, the events and timing of the transaction, other sources of information and such other relevant factors as may be present. [para. 19]

In this case, the Court of Appeal found it was objectively reasonable for police to conclude the man's conversation with them concerned the purchase of drugs and that he was waiting for his regular supplier of drugs. "Further, the nature of the encounter indicated a purchaser seeking to buy drugs from a mobile dispenser, consistent with a dial-a-dope transaction," said Justice Saunders "On this event, in my view, it was objectively reasonable for [the officer] to form the conclusion that the next vehicle that the man got into was probably his regular dealer." Then, when then accused's Volvo arrived, the man's "behaviour was consistent with behaviour in dial-a-dope transactions, was consistent with behaviours seen at the Sky Train station during the surveillance, and was consistent with this individual's approach to the two police officers when he had attempted to enter their vehicle before engaging the conversation about purchasing drugs."

Finally, the lead investigator's decision to instruct his surveillance team to stop the next vehicle that the man entered did not indicate an arbitrariness that contradicted the existence of objectively reasonable grounds for arrest. In Justice Saunder's view, this evidence required a sensible review:

> It would be nonsensical to consider that [the officer's] decision, and instruction, were to be applied literally without consideration of the reasonableness of the next vehicle being one involved in a dial-a-dope transaction. As we know, the next vehicle was not, for example, an ambulance or marked police car, but rather a vehicle much like those observed during the surveillance. Indeed, it was a grey Volvo similar to one observed the preceding day. [para. 19]

The accused's Charter rights had not been violated by his arrest and the subsequent search of his vehicle and seizure of cocaine was lawful. The accused's appeal was dismissed.

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

ARRESTEE WAIVED RIGHT TO COUNSEL: NO s. 10(b) BREACH

R. v. Quesnelle, 2013 ONCA 180

After the accused was arrested at his laundry shop for sexual offences and robbery, he was advised of his right to counsel and cautioned that anything he said could be used against him in court. He said he would like to speak to a lawyer. In the police car while being transported to the police station he was again advised of his right to counsel and cautioned. Again, he reiterated his desire to speak to counsel. Upon arrival at the police station, he was advised that he could call a lawyer of his choice or speak to Duty Counsel for free. This time he said he just wanted to speak to the investigating detective. Then at the outset of a videotaped interview, the detective again told the accused he could call his lawyer or, if he didn't have one, could call legal aid or duty counsel. A discussion they ensued about whether he was only arrested or charged with a crime. He said this, "If I've just been arrested for this crime ... I have no problems talking with, if you're charging me with it I want to speak to a lawyer please." The detective replied, "At this stage of the game you've just been arrested." The accused then declined a further opportunity to speak to counsel and provided a statement.

Ontario Superior Court of Justice

Although he had been advised four times of his right to counsel and cautioned that anything he did say could be used against him in court, the accused argued that he asked to speak to counsel twice before giving his statement and was denied the opportunity to exercise that right. He submitted that police encouraged him to speak to them before he had a chance to speak to a lawyer. The Crown, on the other hand, contended that the accused had been read his right to counsel and cautioned four times before giving his videotaped statement. He was fully aware that any statement could be used against him in court and confirmed the waiver of his right to counsel at the outset of the videotaped statement. The judge concluded there were no promises or inducements made and the accused was well-aware of his right to speak to counsel before he said anything to police. He waived his right to counsel in favour of his immediate desire to speak without regard for the consequences. There was no s. 10(b) breach, the statement was admissible and the accused was convicted on two counts each of sexual assault and assault.

Ontario Court of Appeal

The accused argued, among other grounds, that the trial judge erred in admitting his statement. The Ontario Court of Appeal, however, held that the trial judge considered the relevant circumstances and properly applied the law in determining whether the statement was admissible. The Appeal Court also found it worth noting that the accused was videotaped saying he did not need to speak to a lawyer so long as he had only been arrested, not charged. This ground of appeal was dismissed but the accused's conviction appeal was allowed on other grounds.

Complete case available at www.ontariocourts.on.ca

CROWN BEARS BURDEN OF ESTABLISHING STATEMENT'S VOLUNTARINESS

R. v. Wilkinson, 2013 SKCA 46

As a result of a drug trafficking investigation, the police stopped the accused's vehicle and questioned him at roadside. He admitted to possessing marijuana and his vehicle was searched. A small bag of marijuana was found in plain view. He was arrested, transported to the police station and searched. A baggie containing one ounce of cocaine was found hidden in his sock. He contacted legal aid and then, about 17 1/2 hours after his arrest, he was interviewed. During his statement he admitted that he intended to sell the cocaine. He was charged with possessing cocaine for the purpose of trafficking.

Saskatchewan Provincial Court

The trial judge concluded that the Crown had failed to discharge its burden in proving that the accused's statement was voluntary beyond a reasonable doubt. The judge noted that the Crown had not called any evidence regarding the interaction between the police officers and the accused during the 17 1/2 hour gap between his arrest and the recording of his statement.

The Crown failed to establish a sufficient record of the interaction between the accused and police as to eliminate any reasonable doubt about the voluntariness of the statement. Thus, the accused's statement was excluded. The trial judge then ruled that the Crown had not established beyond a reasonable doubt the possession of the cocaine was for the purpose of trafficking. However, the accused was nonetheless convicted of the lesser but included offence of simple possession.

"[A] statement is not admissible if it is made under circumstances that raise a reasonable doubt as to its voluntariness. ... It is further well-established that the Crown bears the burden of proving beyond a reasonable doubt the admissibility, or voluntariness, of a statement."

Saskatchewan Court of Appeal

The Crown argued that the trial judge erred in excluding the accused's statement. In the Crown's view, it was not required to produce evidence of everything said to or done in the presence of the accused in order to meet its burden of proving voluntariness.

Voluntariness

Justice Caldwell, delivering the opinion of the Saskatchewan Court of Appeal, described the common law confessions rule this way:

> [A] statement is not admissible if it is made under circumstances that raise a reasonable doubt as to its voluntariness. Accordingly, a trial judge must "strive to understand the circumstances surrounding the [statement] and ask if it gives rise to a reasonable doubt as to the [statement's] voluntariness." It is further well-established that the Crown bears the burden of proving beyond a reasonable doubt the admissibility, or voluntariness, of a statement. This means it is incumbent on the Crown to show affirmatively that an accused was properly treated and not questioned outside the context of the taking of the statement in question. In practical terms, the Crown must place before the trial judge all relevant circumstances surrounding the taking of the statement so that the trial judge, having all of the facts, can form his or her own opinion as to whether the statement was free and voluntary. [references omitted, para. 11]

In this case, although "the Crown is not required to call each and every officer who had contact with an accused", there were two particular gaps in the evidence. First, the officer transporting the accused from the place of arrest to the police station was not called. Second, there was no evidence as to how the accused's call to legal aid was facilitated nor any evidence as to what had been said by persons in authority to him during this interaction. Without evidence during the time police clearly had some significant interaction with the accused, the trial judge was unable to conclude, beyond a reasonable doubt, that the Crown had met its onus (proving that no threat, promise, inducement or coercive tactic was used by any person in authority to undermine the voluntariness of the statement). "The judge could not be expected to give the benefit of the reasonable doubt arising from the clear gaps in the evidentiary record to the Crown," said Justice Caldwell. The trial judge did not err in holding the Crown had not met its burden of proof or in excluding the statement from evidence. The Crown's appeal was dismissed.

Complete case available at www.canlii.org

PHYSICAL SEARCH MAY ACCOMPANY DRUG DOG HIT

R. v. Frieburg, 2013 MBCA 40

While surveilling a residence, police saw the accused park a Dodge Charger across the street from it at 11:45 pm. She and two men got out and went into the residence, leaving about 35 minutes later in a Chevrolet Cavalier registered to her mother. At about 2:00 am police obtained a search warrant for the residence. Before the warrant was executed, police located and stopped the Cavalier at 3:00 am, one mile from the residence. The accused was arrested for possessing drugs for the purpose of trafficking and advised of her rights. Police seized keys to both the Cavalier and the Charger from her and she was transported to a correctional centre. A police dog attended and did a sniff search around the Cavalier, indicating positive for drugs. Five cell phones, $845 and a can of bear spray were found and seized, but no drugs were located. A warrant was served on the residence at 3:25 am and a half pound of marijuana, two digital scales, three cell phones, score sheets and other drug paraphernalia were found in the house. At about 4:00 am, a sniff search of the Charger parked on the street was conducted. It had air fresheners on the rear-view mirror and Bounce dryer sheets in the air vents. This suggested the possible presence of illegal drugs. When the sniffer-dog indicated the presence of drugs, the Charger was unlocked using the keys seized from the accused and a search turned up 850 ecstasy pills in the trunk.

Manitoba Court of Queen's Bench

The judge found the Charger was not being operated by the accused at the time of the arrest and the search occurred long after it. The search of the Charger was not incidental to arrest, infringed s. 8 of the Charter and the evidence of the ecstasy found was excluded as evidence under s. 24(2). The accused was acquitted of possessing the ecstasy for the purpose of trafficking.

Manitoba Court of Appeal

The Crown appealed the accused's acquittal arguing that the judge erred in finding that the search of the Charger breached s. 8 of the *Charter* rights and in excluding the evidence. Among the Crown's grounds of appeal, the alleged mistakes made by the trial judge included issues concerning searches incidental to arrest, privacy expectations and whether the search of the Charger was lawful.

Search Incidental to Arrest

The Crown argued that the search of the Charger was lawful as an incident to the accused's arrest at 3:00 am. But Justice Beard, writing the Court of Appeal's decision, found the arrest was not lawful, a prerequisite to a valid search incident to an arrest. A warrantless arrest under s. 495(1) of the *Criminal Code* imparts a two part test. "The first part of the test requires a subjective, personal belief on the part of the arresting officer that there were reasonable grounds for the arrest and the second part requires objective justification for the subjective belief" said Justice Beard. "In other words, a reasonable person in the place of the arresting officer must be able to conclude that there were reasonable grounds for the arrest."

In this case, the officers had obtained a search warrant and, while waiting to execute it, decided to look for the accused. When she was located, her car was stopped and she was arrested. But officers testified that the operative reasons for the arrest were to optimize officer safety by keeping people away from the residence, prevent the destruction of evidence and facilitate the search warrant. These were not valid justifications for an arrest. Justice Beard stated:

> Neither officer stated that the reason for the arrest was that he, personally, believed that there were reasonable grounds to believe that the accused had committed an indictable offence or an offence under the CDSA. Both indicated that the reason for the arrest at that particular time was to keep her away from the residence for optimal officer safety during the search of that residence. That is not a valid reason for an arrest. [the officer] suggested that another reason for the arrest was to prevent the destruction of evidence. The preservation of evidence is also not a valid reason to arrest, if there is no proof that the officer had the required subjective grounds at the time of the arrest to make the arrest. [para. 23]

Nor would the Court of Appeal infer that the officers had the required subjective belief because police had obtained a search warrant, which would require a judicial justice be satisfied that there were reasonable grounds to believe that an offence had been committed. There was no evidence as to the officers' understanding of the relationship between obtaining a search warrant and making an arrest. The issuing of a search warrant did not justify arresting the accused and lodging her at the correctional institute. The trial judge's conclusion that the personal belief of the police to arrest the accused was based on the authority of the CDSA search warrant, rather than using the warrant as grounds for the arrest, was a factual finding that was not disturbed by the Court of Appeal:

> In this case, the issue is not whether the officers understood the law, but what they subjectively, that is, personally, believed. The law is clear that the officer must have a subjective belief that there are reasonable grounds to make the arrest. The officers, although prompted, did not give that testimony. This is not a mistake of law, but a lack of evidence. The search warrant cannot fill that evidentiary gap, in the face of the officers' testimony of their reason for the arrest and the trial judge's finding of fact in that regard .

> For these reasons, I would find that the arrest of the accused at 3:00 a.m. was not a lawful arrest and, therefore, I would have found that the search of the Dodge Charger on the basis that it was a search incidental to a lawful arrest at 3:00 a.m. was an unreasonable search, contrary to s. 8 of the Charter. [paras. 28-29]

Justice Beard also rejected the notion that the search was incidental to arrest because at the time the police conducted the search they had reasonable grounds to arrest the accused immediately before searching the Charger. In some cases, a search incidental to arrest can precede the arrest if the grounds to arrest exist at the time of the search. In this case, however, the search and the arrest did not occur at the same location, as part of the same transaction nor did the arrest immediately follow the search. The accused was arrested driving the Cavalier an hour before the search of the Charger, which was parked about a mile away from the arrest location. So although the search of the Charger was carried out for a valid purpose connected to arrest, it was not within the accused's "immediate surroundings." Justice Beard concluded:

> In summary, to be a lawful search incidental to arrest, the search must be incidental to the arrest. The search of the vehicle parked on a street and located a mile away from the location of the arrest, in the circumstances of this case, was not a search of the "immediate surroundings" of the arrest location and, as a result, was not a search incidental to the arrest. Thus, I would have found that the search of the Dodge Charger on the basis that it was a search incidental to, but preceding, a lawful arrest was an unreasonable search that breached s. 8 of the Charter. [para. 52]

Sniffer-dog Searches

The police may use a dog to sniff for drugs without a warrant provided they have reasonable grounds to suspect the presence of contraband at the place or on the person to be searched. In this case, the trial judge concluded that the police had the requisite suspicion to deploy the sniffer-dog to search the Charger. The issue for the Court of Appeal was whether police had the common law authority to proceed with a physical search of the area indicated by the dog without obtaining a search warrant. Here, the area to be searched was a locked and alarmed private vehicle (Charger) parked on a public street. Justice Beard concluded that the common law principles for warrantless sniffer-dog searches includes "police authority to physically search the area indicated positive for drugs (or other items, such as explosives, depending on the dog's training) by the sniffer dogs without a warrant as being an appropriate extension of the common law regarding police powers to conduct a warrantless search for the purpose of criminal investigations." And these common-law sniffer dog searches are not limited to situations of urgency. She continued:

> "[T]he common law permits the police to do a physical search of the area indicated positive by the sniffer-dog for the item indicated by the sniffer-dog, in this case, drugs, without the police obtaining a search warrant. This physical search is not limited to those situations where there is evidence of imminent danger of loss, removal, destruction or disappearance of any evidence that might be found."

> [T]he common law permits the police to do a physical search of the area indicated positive by the sniffer-dog for the item indicated by the sniffer-dog, in this case, drugs, without the police obtaining a search warrant. This physical search is not limited to those situations where there is evidence of imminent danger of loss, removal, destruction or disappearance of any evidence that might be found. Thus, I find that the trial judge erred in law when he found that the physical search of the trunk was a breach of the accused's s. 8 rights because it was a warrantless search and "[t]here was an absence of evidence of imminent danger of the loss, removal, destruction or disappearance of any evidence that might be found in the Charger." [para. 95]

And further:

> In this case, the police were lawfully present at the Dodge Charger, in that the Dodge Charger was parked on a public street and the police were not required to trespass on private property to access it. The search of the Dodge Charger was not random or arbitrary, in that the police were executing a search warrant at 828 Dennis Street, the Dodge Charger was parked in front of, and across the road from, 828 Dennis Street, and there was evidence to link it to that address.
>
> The police had a reasonable suspicion that there were drugs in the Dodge Charger, so they were authorized to conduct a common law sniffer-dog search. Upon the dog making the positive indication at the trunk, the police were authorized to do a physical search of that area without obtaining a warrant.
>
> Finally, upon opening the trunk, the police found a package. The positive indication by the sniffer-dog, together with the information that formed the reasonable suspicion leading to the deployment of the dog, provided the reasonable grounds under s. 489(2) for the police to seize the package. [paras. 98-100]

The search of the Charger's trunk was reasonable, the seizure of the package found therein was lawful and no s. 8 *Charter* infringement occurred. The evidence was admissible and the trial judge erred by excluding it under s. 24(2). The Crown's appeal was allowed and a new trial was ordered.

Complete case available at www.canlii.org

BY THE BOOK:

Power of Seizure: ***Criminal Code***

s. 489(2) Every peace officer … who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds … (c) will afford evidence in respect of an offence against this or any other Act of Parliament.

DETENTION: OFFICER'S NON-COMMUNICATED INTENTIONS NOT RELEVANT

R. v. Koczab, 2013 MBCA 43

The accused, while driving his vehicle from British Columbia to Ontario, was pulled over for speeding in Manitoba. The police officer, after requesting a driver's licence and registration, noticed the vehicle was registered to the accused in British Columbia but his driver's licence was issued in Ontario. When questioned about the different addresses the accused replied that he worked in the movie industry and lived at both places. This explanation seemed familiar to the officer. A routine police check revealed that the accused had been fingerprinted in the past for theft and drug charges, but his record showed only one criminal conviction for theft. The officer went back to the accused's vehicle, returned his documents, gave him a verbal warning for speeding and told him that he was free to go. Only 10 minutes had elapsed since the beginning of the traffic stop.

The police officer then, believing he may have stopped the accused on a prior occasion, asked him if he would mind answering a few questions. The accused replied, "Yeah go ahead." The officer asked a series of questions which led him to ask what the accused had in his back seat. He replied that he had a couple of suitcases but denied that there was any liquor, drugs or large amounts of cash in the vehicle. When asked "So what's in the suitcases?" the accused said, "Clothes, do you want to see?" The officer said "Sure." After a brief exchange, the accused, without prompting, opened the back door and the suitcases. The officer did not search the suitcases, but noticed that the carpet had been altered near the back seats. This caused the officer to think that there might be a hidden compartment. The officer had considerable experience in detecting and locating such compartments. He had personally investigated and discovered hidden compartments in approximately 50 other cases. He told the accused "I just have to go to my car for a minute," did so and called for back-up. The officer intended to arrest the

accused but, before doing so, decided he would give the accused an opportunity to provide an innocent explanation for the altered carpet. He went back to the accused and asked him the following three questions:

1. Have you had any bodywork done to the vehicle? Answer: No
2. Have you had any panels removed? Answer: No
3. Do the back seats fold down? Answer: Yeah, I'll show you.

Without being asked, the accused proceeded to fold the back seats forward and the officer noticed more damage to the carpet and smelled the strong odour of fresh silicone, a product the officer knew was not used in factory vehicle installations. Believing the fresh smell of silicone indicated the recent use to create a sealed hidden compartment that may contain drugs, the officer arrested the accused for drug possession and advised him of his right to counsel. A vehicle search incidental to arrest revealed 17 one-kilogram bricks of cocaine in a silicone-sealed hidden compartment underneath the backseat. The officer returned to the accused, arrested him for cocaine trafficking and re-advised him of his rights. He was again given his right to counsel but declined to contact anyone.

Manitoba Court of Queen's Bench

The trial judge concluded that the officer detained the accused before he asked the three questions. In his view, the accused was detained when the officer formulated his intention to arrest, said he would be back in a minute, returned to his car, called for back-up and came back to the SUV to ask the first question. The detention did not breach s. 9 of the *Charter* because the judge concluded the officer had reasonable grounds to suspect the accused was a drug courier before he called for back-up. However, since the accused was detained before the officer asked him the last three questions, his rights under s. 10 were breached. He had not been advised of the reason for his detention (s. 10(a)) nor was he told of his right to counsel before answering the questions (s. 10(b)). The cocaine was excluded as evidence under s. 24 (2) and the accused was acquitted of trafficking and possession for the purpose of trafficking.

Manitoba Court of Appeal

The Crown appealed the acquittal arguing, in part, that the trial judge erred in finding that the accused had been psychologically detained by the police and therefore was entitled to be advised of his s. 10(b) rights before being asked the last three questions.

A person is detained such that Charter rights are triggered if they can demonstrate that they had been subject to significant psychologically restraint in the circumstances. The test to determine whether the there has been "significant" psychological restraint is whether the police conduct would cause a reasonable person in the accused's circumstances to conclude that they were not free to go and had to comply with the police direction or demand. This approach to determining detention has been described as "claimant" or "detainee-centered objective analysis." Since the test is detainee-centered, the significance of the officer's non-communicated mindset if largely removed. Factors to consider include the circumstances giving rise to the encounter, the nature of the police conduct and the particular characteristics or circumstances of the individual.

Here, the Crown submitted that the trial judge erred in considering the officer's non-communicated thoughts and intentions to arrest the accused in the detainee-centered objective analysis. The accused, on the contrary, suggested that the trial judge correctly applied the proper legal test. Justice Chartier, authoring the Manitoba Court of Appeal's majority opinion, concluded that the trial judge's finding of detention was based on the following facts:

1. the officer's non-communicated belief that he was going to arrest the accused;
2. the officer's implied direction or order to the accused that he was not to leave;

3. the officer's return to his car;

4. the officer's non-communicated call for back-up; and

5. the officer's non-communicated intention to come back and to ask the accused more questions to see if there was an innocent explanation.

The problem with this, the majority noted, was that facts 1, 4 and 5 (the officer's intentions or thoughts) would not have been known to the accused because they had not been communicated to him and therefore were irrelevant in a detainee-centered objective analysis. Fact 3 was neutral while fact 2 - the implied direction - had to be accepted on appeal. Thus, the trial judge improperly overemphasized the officer's non-communicated intent in concluding there had been a detention. Justice Chartier put the detainee-centered objective approach this way:

> [T]the test to determine whether the accused has demonstrated the required "significant" psychological restraint is whether the police conduct would cause a reasonable person in the accused's circumstances to conclude that the accused was not free to go and had to answer the questions posed by the officer when he returned from his car. In essence, a trial judge is to evaluate the overall situation as it would be perceived by a reasonable person standing in the shoes of the accused, having regard to the following: to what that person would have said, heard, seen, thought or done; to the officer's words or actions which would have been heard or seen by the accused; to any relevant facts surrounding the encounter; and to the accused's personal circumstances. [para. 44]

So then, with the remaining facts, would a reasonable person, standing in the shoes of the accused, believe he was detained. The majority didn't think so. Although not fatal to a determination of detention, the accused chose not to testify therefore there was no evidence as to how he regarded, understood or interpreted the interaction with police. Using the testimony of the officer the majority concluded:

- **Circumstances of the Encounter**. The accused was handed back his documents, told he was free to go, asked whether he would agree to answer a few questions and did consent to answer them. The officer's words, "I just have to go to my car for a minute" - characterized by the trial judge as an implied direction - were clearly not an order not to leave. There was no evidence that the officer made a gesture, such as lifting his index finger to indicate that the accused should wait, or that the the officer's words were expressed in an authoritative tone of voice. More than just the words the officer chose was needed. And throughout the encounter, the accused was relaxed, composed and cooperative, opening the back door as well as the suitcases, and inviting the officer to look into his suitcases and behind the rear seat, all on his own initiative. At no time during the encounter did the accused's level of cooperation, conversation or interaction with the police change.

- **Nature of the Police Conduct**. There was no physical contact between the officer and the accused and there interaction was polite and cordial. No voices were raised and there was no evidence that any form of intimidation or coercion was used. The duration of the encounter was relatively short: 14 minutes had elapsed from the time the accused was told he was free to go until the time of arrest. The officer always confirmed that the accused was letting him ask further questions and was letting him look into the trunk of the car. It was made clear to the accused, at least inferentially, that he had a choice in the interaction and his consent and cooperation were given each step of the way.

- **Circumstances of the Accused**. He was 29 years old and seemed confident and relaxed. There was no evidence that he was in any way intimidated by the conduct of the police or by the situation nor any suggestion that he was under any form of duress or compulsion to comply. Instead, he was the one encouraging the officer to look inside his vehicle and at his personal belongings. There was nothing to show that the accused's compliance and cooperation with the officer was anything but voluntary.

Had the trial judge considered the facts using the correct detainee-centered objective approach and not improperly focussed on the officer's non-communicated intent there would not have been a finding of a psychological detention. Thus, the trial judge's conclusion of a detention was unreasonable and not supported by the evidence. There was no s. 10 *Charter* breach and, even if there was, the majority would have ruled the evidence admissible under s. 24(2). Since an acquittal would not necessarily have followed had the trial judge properly applied the law, the Crown's appeal was allowed and a new trial was ordered.

A Second Opinion

Justice Monnin, in dissent, concluded that the trial judge did not err in finding that the accused had been psychologically detained and that his s. 10 rights had been breached:

> In my view, a reasonable person, having been questioned aggressively on issues relating to drug convictions and whether he was currently involved in drug trafficking, having previously been told he was free to go, but then indirectly told to stay where he was, would likely conclude that he was not free to go and had to comply with that directive. It would take a brave soul in the circumstances to defy the state actor and go merrily on his way. He would, no doubt, soon be involved in a police chase. [para. 93]

He also would not have interfered with the trial judge's ruling on the exclusion of evidence under s. 24(2).

Complete case available at www.canlii.org

Canadian Forces Military Police National Motorcycle Relay Ride

Once again, Military Police, volunteers, and civilian supporters of our troops are gearing up for the 5th Annual Military Police National Motorcycle Relay Ride, which is due to hit the open road in St. John's, NL on August 2.

On April 23, Major Bob Edwards, the 2012 Ontario Ride Captain, accompanied by other riders, presented a $75,000 cheque to the Children's Wish Foundation and the Military Police Fund for Blind Children. These funds were raised during the 2012 coast-to-coast ride, which set a new record for the ride's fundraising initiatives.

"We are extremely proud of the significant contribution made by the MPNMRR to the Military Police Fund for Blind Children," said L/Col. Gilles Sansterre, Chair of the fund, "The lives of many visually impaired children across this country are enriched by this generous donation."

The MPNMRR is the longest annual motorcycle relay in the world with our National Riders covering in excess of 10,000 kilometers during the event. On August 2, the 5th Annual MPNMRR kicks off on "The Rock" where motorcycle enthusiasts will roll their throttles out of St. John's, NL and will visit all of the major military establishments across Canada, arriving in beautiful Victoria, BC on August 25. Courageous riders will also venture south from the frigid conditions of the Northwest Territories for the second year in a row, riding a whopping 3,459 kilometers.

Since riders rolled out of St John's, NL for the first ride in 2009, over $170,000 has been raised for numerous charities. This year funds raised will support the Military Police Fund for Blind Children nationwide and the Children's Wish Foundation in select provinces.

Lamont French, the MPNMRR National Chairperson, has been involved in the ride since its initial launch in 2009 and is very passionate about fundraising for kids stating, "The privilege of paying it forward to children is an honour."

Join the 5th Annual Military Police National Motorcycle Relay Ride, as it rolls through your area between August 2 and 25. All motorcycle enthusiasts are welcome to participate, whether it is as a national, provincial or local rider. For more information on the ride, how to register, become a sponsor, donate, or participate in our online auctions, visit the MPNMRR website at: www.mpnmrr.ca. For more information on the charities the MPNMRR represents, visit www.mpfbc.com and www.childrenswish.ca.

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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
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Pre-registration is required
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