JIBC

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

IN SERVICE: 10-8 GOES GLOBAL

"In Service: 10-8" is now in its 14th year of publication. It started in 2001 and has become a popular read among Canada's law enforcement community, with readers in all of Canada's provinces and territories. Many of our email subscribers share the newsletter with others in their organizations. We are also proud to say that it is read in locations that extend beyond Canada's borders. If you would like to be a regular subscriber to this newsletter sign up at:

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Locations where "In Service: 10-8 " is read.

Highlights In This Issue

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Upcoming Events

Human Source Management

This course will equip participants with the basic skills required and the best practices to follow associated to the recruitment and handling of informants and agents. It includes preparation of judicial authorizations utilizing informant/agent information, as well as policy and how to effectively report on information delivered from these assets.

June 23-26, 2014 (Victoria)

September 16-19, 2014

JIBC Police Academy Advanced Training

www.jibc.ca/course/POLADV715

Note-able Quote

"Safety searches will typically be warrantless, as the police will generally not have sufficient time to obtain prior judicial authorization for them."

see page 18

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.

David and Goliath: underdogs, misfits, and the art of battling giants.

Malcolm Gladwell.

New York, NY: Little, Brown and Company, c2013

BF 503 G53 2013

Demonstrating emotional intelligence.

[videorecording]. produced & distributed by StressStop.com; written & directed by James E. Porter.

Norwalk, CT: StressStop.com, c2011.

1 videodisc (18 min.): sd., col.; 4 3/4 in. (DVD).

Based on the books Emotional intelligence and Social intelligence by Daniel Goleman.

Special features: Q & A with Daniel Goleman; the making of EI. Teaches the viewer the subtle art of reading facial expressions, as well as the ease to which emotions are transferred from one person to another. Focuses specifically on how the emotions of sadness, happiness, surprise,disgust, fear and anger can be read and then transferred to others.

BF 576 E46 2011 pt.2 D1784

Emotional intelligence & optimal performance.

[videorecording]. produced & distributed by StressStop.com; written & directed by James E. Porter.

Norwalk, CT: StressStop.com, c2011.

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

Based on the books Emotional intelligence and Social intelligence by Daniel Goleman.

Special features: Q & A with Daniel Goleman; the making of EI; 30 minute PowerPoint Presentation (PPS); participant handout (Microsoft Word). Teaches the viewer to identify optimal amount of stress in themselves, which is one of the five key emotional intelligence skills needed to stay highly motivated and engaged. Other strategies include learning how to overcome overly negative thinking such as worry, recovering quickly from emotional episodes, and how to handle disturbing emotions in yourself, your coworkers, and your supervisors. The film presents the strategy for addressing these issues as a five-step program. Steps include promoting self-awareness, self-regulation of the nervous system, challenging overly-negative thoughts and worries, recovering quickly from emotional episodes, and responding empathically.

BF 576 E46 2011 pt.3 D1785

No excuses: how you can turn any workplace into a great one.

Jennifer Robin, Michael Burchell.

San Francisco, CA: Jossey-Bass, c2013

HD 58.7 R625 2013

Primal leadership: unleashing the power of emotional intelligence.

Daniel Goleman, Richard Boyatzis, Annie McKee.

Boston, MA: Harvard Business ReviewPress, 2013.

HD 57.7 G664 2013

Understanding emotional intelligence.

[videorecording] produced & distributed by StressStop.com; written & directed by James E. Porter.

Norwalk, CT: StressStop.com, c2011.

1 videodisc (12 min.): sd., col.; 4 3/4 in. (DVD) + CD-ROM (digital; 4 3/4 in.)

Accompanying CD entitled: Relax: six techniques to lower your stress. Based on the books Emotional intelligence and Social intelligence by Daniel Goleman. Special features: Q & A with Daniel Goleman; the making of EI; 30 minute PowerPoint Presentation (PPS); participant handout (Microsoft Word). Teaches the viewer three basic strategies for handling stress with emotional intelligence: Becoming aware of emotions, self-regulating emotions, and recognizing and empathizing with the emotions in others.

BF 576 E46 2011 pt.1 D1783

DESPITE CHARTER BREACH EVIDENCE ADMISSIBLE

R. v. Wright, 2013 ONCA 778

During a police wiretap, officers heard communications between the accused and another man (Lewis) indicating that the accused might have a firearm in one of two cars, a Honda or a Lexus. About an hour later a detective located the two cars in the parking lot of a club. He briefed other officers in the area that there was reliable information of a firearm in one of the two vehicles. Although the detective described the vehicles including their license plate numbers, he did not pass on the names of the two suspects nor did he say the source of the information was a wiretap. The officers understood that they were to stop the two cars to try to determine if there was a firearm but had no direct order to search. The Lexus, driven by Lewis, was stopped but eventually let go. The Honda was also stopped almost immediately after the Lexus. An officer smelled liquor on the driver's breath. He was administered a screening test, registered a "warn" and received a 12-hour license suspension. The accused, a passenger in the Honda, was identified and checked on the police database. Information suggested he was to be considered "armed and dangerous".

Since the accused also had a suspended driver's license, the car was to be impounded. His demeanor and attitude changed once he learned the car was being towed and an officer inadvertently opened the trunk when the release button was hit while the keys were removed from the ignition. The accused became very nervous and made a point of saying the car was his girlfriend's, he did not know what was in it and that nothing in it belonged to him. The officers decided they had reasonable and probable grounds to search the vehicle. In the trunk officers found a handgun inside a black shoulder bag wrapped in some shirts. The officers never, however, considered whether there were exigent circumstances requiring an immediate search.

BY THE BOOK:

Weapons Search: ***s. 117.02 Criminal Code***

s. 117.02 (1) Where a peace officer believes on reasonable grounds

(a) that a weapon, an imitation firearm, a prohibited device, any ammunition, any prohibited ammunition or an explosive substance was used in the commission of an offence, or

(b) that an offence is being committed, or has been committed, under any provision of this Act that involves, or the subject-matter of which is, a firearm, an imitation firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance,

and evidence of the offence is likely to be found on a person, in a vehicle or in any place or premises other than a dwelling-house, the peace officer may, where the conditions for obtaining a warrant exist but, *by reason of exigent circumstances, it would not be practicable to obtain a warrant*, search, without warrant, the person, vehicle, place or premises, and seize any thing by means of or in relation to which that peace officer believes on reasonable grounds the offence is being committed or has been committed.

Ontario Superior Court of Justice

The judge concluded, based on the totality of the circumstances, that the officers had reasonable and probable grounds to search the car. These grounds included the reliable information about a gun, and the accused's change in demeanor and attitude once the trunk was opened and the car was going to be towed. The judge found the search of the vehicle's trunk was justified under s. 117.02 of the *Criminal Code*, although he did not consider whether there were exigent circumstances permitting the officers to search without a warrant. The judge

"Gun violence and gun possession are matters of serious concern in our society."

found the search was not unreasonable under s. 8 of *Charter*. And, even if there was a s. 8 breach, the judge would admit the gun as evidence under s. 24 (2). The accused was convicted of possessing a weapon for a dangerous purpose, unauthorized possession of a firearm in a vehicle and careless transport of a restricted weapon.

Ontario Court of Appeal

The accused appealed his convictions arguing the trial judge erred in concluding the search of the trunk was reasonable. Furthermore, if his rights were breached, he submitted that the evidence should have been excluded under s. 24(2).

The Court of Appeal found it unnecessary to decide whether there was or was not a s. 8 *Charter* violation. The gun was properly admitted under s. 24 (2):

1. The officers acted in good faith. "They did not decide to search the vehicle until they had developed the requisite reasonable and probable grounds in light of unfolding events at the scene of the vehicle stop," said the Court of Appeal. "They knew they did not have reasonable and probable grounds when they first stopped the Honda, and were only satisfied that these grounds developed once the [accused] (a) became noticeably concerned about the police taking the car, and (b) began to dissociate himself from the car and its contents. Although the officers should have but did not advert to the existence of exigent circumstances or to officer or public safety, if that failure caused a breach of s. 8, it still places the seriousness of the Charter–infringing conduct at the lower end of the spectrum on this occasion." **SERIOUSNESS**

2. The impact of the breach on the accused's expectation of privacy was relatively low in the specific circumstances of this case. "A person's expectation of privacy in his (or his partner's) vehicle is less than in his residence," said the Appeal Court. "In this case, the vehicle was about to be towed to the police station under the statutory authority of s. 48(11) of the Highway Traffic Act..., which permits the police to impound a vehicle where the driver fails the roadside test. ... [T]he right to impound a vehicle also includes the right to inventory its contents. This further reduces the expectation of privacy when a vehicle is driven on the roads." **IMPACT**

3. "Gun violence and gun possession are matters of serious concern in our society. A loaded firearm is also reliable evidence and was essential to prove the Crown's case." **MERITS**

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

REASONABLE SUSPICION INVOLVES POSSIBILITIES, NOT PROBABILITIES

R. v. Williams, 2013 ONCA 772

At about 7:25 pm a Major Crime Unit investigator answered an anonymous telephone call. The caller said that a person was walking near a housing complex with a gun. He was described as a black man, 5' 8", baby faced, with his hair in dreadlocks and wearing a black t-shirt and jeans. The caller hung up when asked for their name. The housing complex was a short distance from the police station and was well-known to officers. The area was referred to as a "stovetop" - a place where crack cocaine is often cooked on top of a stove. The police had been frequently called to this complex about ongoing problems with drugs and guns, including shootings. The information about the anonymous call was immediately passed on to other members of the Major Crime Unit. They responded to the area within minutes and noticed a group of people. One individual in the group matched the description of the man with the gun but his face was not initially visible.

Two officers approached the accused, identified themselves as police officers and said they were investigating a weapons offence. One of the officers asked "Are you armed?" The accused did not answer the officer's question. Instead, he "bladed" – turned to his side – in a manner the officer considered evasive. The other people who were with him did not react in the same way. One of the officers also noticed the accused make a movement towards the area of his waist. The accused was told to put his hands up and to turn around. But he did neither. Two officers took control of the accused by his arms. He resisted, causing the police to consider their safety, as well as that of the public, to be at risk. An officer lifted the accused's baggy t-shirt and saw a gun butt protruding from the waistband of his pants. He yelled "gun, gun, gun". The accused was subdued, handcuffed, and placed under arrest. The handgun was a fully loaded .45 calibre semi-automatic. He was arrested and a search incident to his arrest resulted in the recovery of a small amount of marihuana.

Ontario Superior Court of Justice

The accused argued that he was arbitrarily detained under s. 9 of the *Charter* because neither the anonymous tip nor anything that occurred during the police encounter amounted to the reasonable suspicion required to justify an investigative detention. The judge agreed, in part, finding that the information provided in the anonymous tip could not, on its own, justify an investigative detention. However, the tip along with what occurred as the officers spoke to the accused was sufficient to provide a reasonable suspicion that he committed an offence. Thus, the investigative detention that followed was justified. Then, once the gun was seen, the officers had reasonable grounds to make the arrest. As for the search, it was not unreasonable under s. 8 of the *Charter*. Although lifting the t-shirt was not a pat-down, it was less invasive than one and conducted out of concern for officer or public safety. Finally, even if there were *Charter* breaches, the judge would have admitted the gun and marihuana under s. 24 (2). The accused was convicted of several offences related to the possession of the handgun and the marihuana.

Ontario Court of Appeal

The accused reargued that he had been arbitrarily detained when approached by police. In his view, the tip did not amount to a reasonable suspicion nor did the subsequent events that followed since his responses were ambiguous and consistent with exercising his right to silence. Plus, he submitted that he was not merely detained for investigation but subjected to a de facto arrest without the necessary reasonably grounded belief that he committed an offence. Furthermore, the accused contended the search in this case exceeded a pat-down search and was more akin to a strip search. The search, he suggested, was therefore unreasonable and a s. 8 breach.

Investigative Detention

The Court of Appeal first explained the police authority of investigative detention:

> Police may detain a person for investigative purposes if they have reasonable grounds to suspect that the person is connected to particular criminal activity and that such a detention is reasonably necessary in the circumstances. The standard – "reasonable grounds to suspect" – involves possibilities, not probabilities. We must take care not to conflate the test for reasonable suspicion with the more exacting standard of reasonable belief.
>
> A reasonable suspicion entails more than a sincerely held subjective belief, for that is mere suspicion. A reasonable suspicion is a suspicion grounded in "objectively discernible facts, which could then be subjected to independent judicial scrutiny".

"A reasonable suspicion entails more than a sincerely held subjective belief, for that is mere suspicion. A reasonable suspicion is a suspicion grounded in 'objectively discernible facts, which could then be subjected to independent judicial scrutiny'."

> To determine whether the reasonable suspicion standard has been met, a reviewing court must examine the totality of the relevant circumstances. This examination is not some scientific or metaphysical exercise. Common sense, flexibility, and practical everyday experience are to be applied through the eyes of a reasonable person equipped with the knowledge, training, and experience of the investigating officer. The standard of reasonable suspicion is not frustrated simply because the factors urged in support may also give rise to an innocent explanation. In the end, if the facts objectively indicate the possibility of criminal behaviour in light of the totality of the circumstances, the objective component of the reasonable suspicion standard has been satisfied.
>
> Any elements or factors considered as part of a "reasonable suspicion" analysis must respect Charter principles. Nor should the exercise of Charter rights, such as the right to remain silent or to walk away from questioning made outside the context of a detention, provide grounds for reasonable suspicion. Yet some factors, including flight from the police, may give rise to reasonable suspicion on their own. Even if a factor cannot on its own support reasonable suspicion, reasonable suspicion may be established when the same factor is simply one of a constellation of factors. The actions of a person after an initial encounter with the police are part of the circumstances to be considered in deciding whether the reasonable suspicion threshold has been crossed. [references omitted, paras. 22-25]

In this case, the tip was an important part of the reasonable suspicion analysis. "The tip was current, described the nature of the offence being committed, and contained sufficient particulars of the suspect to enable police to immediately focus on the [accused] when they arrived minutes later," said the Court of Appeal. "In our view, the combination of the anonymous tip and what occurred when the [accused] encountered the police was capable of supporting a reasonable belief that the [accused] might be connected to a gun crime as reported by the anonymous caller. Nothing more was required."

Search

During an investigative detention, the police may sometimes conduct a pat-down search of the detainee. However, in this case, the police lifted the accused's baggy t-shirt. Although, strictly speaking, this was not a pat-down search, it was arguably less intrusive than one. "To characterize what occurred here as unreasonable is to sacrifice substance for form," said the Appeal Court. "In no sense could this search be characterized as the functional equivalent of a strip search."

Admissibility of Evidence

Since the accused had failed to demonstrate that the evidence – the gun and marihuana – was obtained in a manner that breached his rights under either ss. 8 or 9 of the *Charter*, s. 24(2) did not apply. In any event, the trial judge properly applied s. 24(2) if she was wrong in finding no *Charter* infringements.

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

POLICE BEATING RESULTS IN STAYED CHARGES

R. v. Singh, 2013 ONCA 750

The accused was arrested for robbery at his workplace several months after a copper wire heist. Another man was also arrested. An employee had been bound with zip ties and duct tape, and was threatened with a handgun. Copper piping worth $350,000 was loaded into a vehicle with a forklift. After the robbers left the employee freed himself and called 911. The accused was taken to the police station where he said he had been beaten by police on three separate occasions over an extended period of time before giving a statement.

First, he was placed in an interrogation room, strip searched and left alone. About 15 minutes later the officers returned and began questioning him but he denied any involvement, including knowing his co-accused (which was not true). An officer responded

violently to these denials, attacking the accused for up to two minutes. While pinned against the wall, the accused was struck on the back and kneed in the ribs. The officers left, but sometime later returned and again responded with force after the accused said he knew nothing about the robbery. His neck was grabbed, throat squeezed, head slammed against the wall and he was punched. Police demanded that he tell them what happened in the robbery. A detective said, "Tell them something, tell them anything or else they're going to come back." Receiving no response, the detective left. On the third occasion the officers opened the door with the accused's co-arrestee between them. The door then closed and he was left alone again. Later, the officers returned to the interrogation room. After denying he was lying about the robbery, he was again beaten. He was hit on the back of the head many times and begged the officers to just kill him. The officers then left the room, while one returned alone an hour later saying, "I am sorry for what I did to you. It's part of my job." After the apology, the accused was given food, water and a towel to clean himself up. He continued to deny having anything to do with the robbery during a video statement. Ten days later, after his release, he visited his family doctor.

Ontario Superior Court

The accused's co-accused was also beaten and the Crown voluntarily sought a stay of proceedings on his charges. He required medical attention and X-rays subsequently revealed that he had a fractured rib. As for the accused's charges, they proceeded and he was convicted of armed robbery and forcible confinement. The Crown did not contest the beating allegations, calling no evidence to refute them. The judge recognized the egregious nature of the police misconduct and described it as "thoroughly reprehensible behavior on the part of those acting on behalf of the state." However, she concluded the beatings did not warrant a stay under s. 24(1) of the *Charter* in the circumstances. The police brutality had not affected trial fairness, the injuries did not result in serious harm and the charges were very serious. She also concluded that there were very few cases in Canadian jurisprudence where a stay had been imposed solely as a remedy for police brutality. The judge did, however, reduce the accused's sentence by one year in consideration of the police misconduct. He was sentenced to 5 ½ years.

Ontario Court of Appeal

The accused argued that the police misconduct was so egregious that a stay of conviction was warranted. The Court of Appeal agreed. "Canadian society cannot tolerate – and the courts cannot permit – police officers to beat suspects in order to obtain confessions," said Justice Blair. "Yet, sadly, that is precisely what happened in this case. One of the two police officers who participated in the beatings apparently thought, as he said, that 'it's part of [his] job' to do so. It is not." In a footnote to its ruling, the Court of Appeal stated "the conduct in this case might well be characterized as 'torture' as that term is defined in s. 269.1(2) of the Criminal Code."

Stay

Although a stay of proceedings under s. 24(1) is usually rare when trial fairness is not an issue, this was one such case were a stay was warranted under the residual category. The residual category permits judicial discretion in granting a stay, even where trial fairness is not at issue, if (1) "the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" and (2) "no other remedy is reasonably capable of removing that prejudice." In this case, the trial judge failed to "direct her mind to the nature of the police misconduct in the context of its potential systemic ramifications and the need to consider its impact upon the integrity of the judicial process":

> The serious nature of the charges in question, the absence of trial fairness issues, and the nature of the injuries inflicted are all important factors in the balancing exercise that leads to the grant or refusal of a stay of proceedings. None is controlling, however, where – as here – the conduct involved goes to the heart of the integrity of the justice system. …

"Canadian society cannot tolerate – and the courts cannot permit – police officers to beat suspects in order to obtain confessions. Yet, sadly, that is precisely what happened in this case. One of the two police officers who participated in the beatings apparently thought, as he said, that 'it's part of [his] job' to do so. It is not."

> What occurred here was not a momentary overreaction by a police officer caught up in the moment of a difficult interrogation. What occurred here was the administration of a calculated, prolonged and skillfully choreographed investigative technique developed by these officers to secure evidence. This technique involved the deliberate and repeated use of intimidation, threats and violence, coupled with what can only be described as a systematic breach of the constitutional rights of detained persons – including the denial of their rights to counsel. It would be naïve to suppose that this type of egregious conduct, on the part of these officers, would be confined to an isolated incident.
>
> The courts must not condone such an approach to interrogation. Real life in the police services is not a television drama. What took place here sullies the reputations of the many good officers in our country, whose work is integral to the safety and security of our society. [42-44]

In addition, the police refused to respond to the allegations. An internal investigation was stopped when the victims were unwilling to cooperate. Further, no charges, disciplinary measures or other consequences flowing from the investigation were reported to the court. In granting the stay, Justice Blair stated:

> Balancing all of the competing interests at play in contemplating a stay of proceedings – the seriousness of the offence and society's interest in upholding a conviction, the integrity of the justice system, and the nature and gravity of the violation of the [accused's] rights – I am satisfied that a stay is warranted and should have been imposed. The state misconduct was a flagrant breach of the [accused's] Charter-protected rights. The prolonged and grave nature of the beatings, and the careful choreography underlying them, suggest a pattern of misconduct on the part of [the officers] that has systemic implications. That similar assaults were committed against the [accused's] co-accused reinforces this concern.
>
> [A] stay of the convictions is necessary "to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in the future." [para. 48-49]

The accused's appeal was allowed and a stay of convictions was entered.

Complete case available at www.ontariocourts.on.ca

NO RIGHT TO LAWYER BEFORE COMPLETING POLICE NOTES

Wood v. Schaeffer, 2013 SCC 71

Two men were shot and killed by police in separate incidents. In both cases the men failed to comply with police commands to drop their knives and they were shot after they advanced on police. During the subsequent investigations into the shootings by Ontario's Special Investigations Unit (SIU) - the investigating body of fatal police shootings - the involved officers were instructed by senior officers not to write any notes until they had spoken to a lawyer. Under a provincial regulation, both subject and witness officers are required to complete their notes on an incident in accordance with their duty. The regulation, however, also provides all officers with an entitlement to consult legal counsel and to have counsel present during their SIU interviews. In both cases, charges were not brought against the officers by the SIU.

Ontario Superior Court of Justice

The families of the two deceased brought an action seeking judicial interpretation of Ontario's *Police Services Act* and its regulations governing the conduct of SIU

BY THE BOOK:

Ontario's Police Services Act: ***Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit***

s. 7 (1) Subject to subsection (2), every police officer is entitled to consult with legal counsel or a representative of a police association and to have legal counsel or a representative of a police association present during his or her interview with the SIU.

... ...

s. 9 (1) A witness officer shall complete in full the notes on the incident in accordance with his or her duty and ... shall provide the notes to the chief of police within 24 hours after a request for the notes is made by the SIU.

... ...

(3) A subject officer shall complete in full the notes on the incident in accordance with his or her duty, but no member of the police force shall provide copies of the notes at the request of the SIU.

investigations, including whether the legislative scheme permits officers to consult with counsel before completing their notes. The judge allowed a motion brought by the officers to strike the application on procedural grounds and, therefore, the issue was not litigated.

Ontario Court of Appeal

The families challenged the Superior Court's ruling. The Court of Appeal concluded that the regulations did not permit police officers to speak with a lawyer for the purpose of assisting them in completing their notes. In its view, the assistance of a lawyer in preparing notes would be inconsistent with the purpose of a police officer's notes and their duty to prepare them. Any legal advice would be geared towards the officer's own self-interest or the interests of their colleagues rather than the public's interest. However, the Court of Appeal did find officers were entitled to basic legal advice before completing their notes regarding the nature of their rights and obligations in connection with the SIU investigations.

Supreme Court of Canada

The officers then appealed to the Supreme Court of Canada contending that their entitlement to counsel was not limited to mere basic legal advice. The SIU Director also appealed, suggesting officers were not even entitled to basic legal advice before completing their notes. The families and the OPP Commissioner, on the other hand, felt the Ontario Court of Appeal got it right. The question for the Supreme Court was whether the regulation entitled officers involved in SIU investigations to speak with a lawyer before completing their notes and the scope, if any, of such an entitlement.

Majority

A six member majority made clear that this case addressed the scope of an officer's entitlement to counsel flowing from a regulatory provision. Unlike ordinary citizens who, at common law, generally may consult with counsel as and when they see fit, the police officers were not acting in their capacity as ordinary citizens but in their professional capacity as police officers. "So long as police officers choose to wear the badge, they must comply with their duties and responsibilities under the regulation, even if this means at times having to forego liberties they would otherwise enjoy as ordinary citizens," said Justice Moldaver. The regulation governs situations where officers have been involved in an incident resulting in serious injury or death and comprehensively sets out their rights and duties, including their entitlement to counsel.

Note-making

The majority concluded that the regulations did not entitle officers to consult with counsel before they had completed their notes - either to get assistance in preparing them or to obtain "basic legal advice." The argument that the regulations did provide a freestanding entitlement to consult counsel at the note-making stage was rejected because it was

"So long as police officers choose to wear the badge, they must comply with their duties and responsibilities under the regulation, even if this means at times having to forego liberties they would otherwise enjoy as ordinary citizens."

inconsistent with (1) the dominant purpose of the legislative scheme, (2) the legislative intent behind the regulation and (3) an officer's duty to make notes.

1. **Legislative Purpose.** The civilian SIU and the purpose of the legislative scheme was created to address the public's confidence in police investigations into fatal police shootings. Having the police investigate themselves bore the appearance that investigations were not impartial and police were protecting their own. Allowing officers to consult a lawyer at the note-making stage would add to this appearance. "A reasonable member of the public would naturally question whether counsel's assistance at the note-making stage is sought by officers to help them fulfill their duties as police officers, or if it is instead sought, in their self-interest, to protect themselves and their colleagues from the potential liability of an adverse SIU investigation," said Justice Moldaver. "Public trust in the police is, and always must be, of paramount concern. This concern requires that officers prepare their notes without the assistance of counsel. Consultations with counsel during the note-making stage are antithetical to the very purpose of the legislative scheme."

2. **Legislative Intent.** The legislative history of the regulation demonstrated that the provisions were never meant to provide an entitlement to consult counsel at the note-making stage. The recommendations that led to the legislation never mentioned the role of counsel at the note-making stage. The government's knowledge that there was a practice of officers consulting counsel prior to preparing notes and not amending the regulation to forbid the practice did not change the legislature's intent.

3. **Duty to Make Notes.** Allowing an officer to talk to a lawyer and obtain legal advice before preparing their notes conflicts with a police officer's duty to prepare accurate, detailed and comprehensive notes as soon as practicable after an incident. In the Court's view, expanding the right of consultation to the note-making stage would create the real risk that an officer's notes will shift - either overtly or subtly - away from their public duty to make accurate, detailed notes about what happened and move toward their private interest in justifying or explaining why it happened. "The purpose of notes is not to explain or justify the facts, but simply to set them out," said Justice Moldaver. "An officer's notes are not meant to provide a 'lawyer-enhanced' justification for what has occurred. They are simply meant to record an event, so that others — like the SIU Director — can rely on them to determine what happened."

"The purpose of notes is not to explain or justify the facts, but simply to set them out. An officer's notes are not meant to provide a 'lawyer-enhanced' justification for what has occurred."

The Supreme Court recognized that police officers involved in a traumatic event may need to speak to someone before completing their notes. The regulation, however, prevents officers from speaking to counsel, not doctors, mental health professionals or uninvolved senior police officers before writing up their notes. And, of course, once officers have completed their notes and filed them with their chief, they are free to talk to a lawyer.

In conclusion, the majority found that police officers are not permitted to have the assistance of counsel in the preparation of their notes nor are they entitled to receive basic legal advice as to the nature of their rights and duties prior to completing their notes. As a result, the SIU Director's appeal was allowed while the officers' appeal was dismissed.

A Different View

Three justices agreed that it was inconsistent with an officer's duty to complete independent, timely and comprehensive notes if they sought legal advice which would influence the contents of those notes. "Police officers should not be allowed to consult about the drafting of the notes themselves where such consultation affects the independence of notes," said the minority. "The contents and drafting of the notes should not be discussed with counsel. The drafting should not be directed or reviewed by counsel. The notes must remain the result of a police officer's independent account of the events." However, the minority opined that access to a lawyer should not be limited altogether. Rather, in its view, police officers should be allowed to talk to counsel to obtain basic legal advice, not about the content of notes, but about the steps and procedures of an SIU investigation. The minority would have upheld the Ontario Court of Appeal's decision and dismissed all appeals.

Complete case available at www.scc-csc.gc.ca

QUESTIONING WAS INVESTIGATIVE, NOT AN OPPORTUNITY TO COMMIT CRIME

R. v. Ralph, 2014 ONCA 3

The police received a tip about a person using a particular telephone number to sell drugs. An undercover officer called the number and left a message for the person to call him back. Forty-one minutes later a male called back and had a conversation with the officer (see text box). As a result of the conversation, the undercover officer met with the accused later that night and purchased 1.6 grams of cocaine. The officer then met with the accused on several more occasions, purchasing increasingly larger amounts of crack and powder cocaine. The accused also offered to sell a firearm to the officer. When the accused was arrested the police seized a quantity of cocaine.

TELEPHONE CONVERSATION

Here is the exchange when the accused called the officer back:

Officer: *Hello?*

Accused: *You called me and left a message.*

Officer: *Yeah, what's going on?*

Accused: *Who's this?*

Officer: *[gives his undercover name].*

Accused: *Okay, how'd you get my number?*

Officer: *I was at Jane and Finch and a kid said that if I want anything to call this number and this guy would link me up ... I need product [meaning I'm looking to buy drugs.]*

Accused: *Okay, so what are you looking for? What do you need?*

Officer: *I need a half [meaning one half of an eight-ball of crack cocaine.]*

Accused: *Okay, the small thing, that's it?*

Officer: *Yeah, hard, white [meaning crack cocaine] ... where are you?*

Accused: *I'm at Weston Road. Meet me at Scarletwood.*

Officer: *I'll call you back at 7:30. How much?*

Accused: *A bill [meaning $100.]*

Officer: *What's your name?*

Accused: *Blacus.*

Ontario Superior Court of Justice

The accused was convicted on multiple charges of trafficking in cocaine, possession of the proceeds of crime, possessing cocaine for the purpose of trafficking and offering to transfer a firearm. However, he argued that the charges should have been stayed because he was entrapped. But the judge disagreed, finding there was no entrapment. In the judge's view, the anonymous telephone tip by itself was not enough to generate a reasonable suspicion the accused was a drug trafficker. The police, however, were nonetheless permitted to pursue the tip by calling the number to investigate and confirm information as long as they did not offer an opportunity to commit a crime until they had a reasonable suspicion. In this case, the officer's comment - "I need product" - did not amount to providing the target with an opportunity to commit the crime of trafficking. Rather it was investigative in

nature. The opportunity to commit a crime occurred later when specific drugs were solicited and an order for drugs was placed (ie. when the officer said he needed "a half-ball"). The accused failed to establish on a balance of probabilities that the police did not have a reasonable suspicion that he was a drug dealer when the opportunity to commit the crime was offered. He was sentenced to three years in prison.

Ontario Court of Appeal

The accused argued, among other things, that the trial judge erred in finding that he was not entrapped. He submitted that the police did not have a reasonable suspicion before giving him an opportunity to commit an offence and therefore he was subject to random virtue testing. In his view, the opportunity to commit an offence occurred when the officer said: "I was at Jane and Finch and a kid said that if I want anything to call this number and this guy would link me up ... I need product." At this point, he contended the officer did not have a reasonable suspicion that he was involved in drug trafficking.

Justice Rosenberg, writing the Court of Appeal's opinion, agreed with the trial judge. The officer's statement, "I was at Jane and Finch and a kid said that if I want anything to call this number and this guy would link me up ... I need product," was part of the investigation rather than an opportunity to commit a crime. "[I]t was a legitimate investigative step," said Justice Rosenberg. "When the [accused] responded as he did, this response together with the anonymous tip was ... sufficient to provide the officer with reasonable suspicion and justify the further statements from the officer. This was not a case of random virtue testing and entrapment was not made out."

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

"If you think you can do a thing or think you can't do a thing, you're right." - Henry Ford

WAITING FOR UNLAWFUL TOW: SAMPLES NOT TAKEN AS SOON AS PRACTICABLE

R. v. Wetzel, 2013 SKCA 143

After receiving a tip about the manner in which a van with a trailer was being driven, the police pulled it over. The accused stopped the vehicle "partially" in a bus stop. A breath sample was demanded at 11:55 pm and the officers waited 35 minutes with the accused for a tow truck to arrive. After the tow truck arrived the officers waited an additional 12 minutes while the van was hauled away. The accused was taken to the police station where breath samples were obtained at 1:25 am (140mg%) and 1:50 am (130mg%). He was charged with driving while over 80 mg%.

Saskatchewan Provincial Court

Among other things, the trial judge found the first breath sample was not taken "as soon as practicable" under the *Criminal Code*. Although the police offered several reasons why the vehicle was towed, the judge found the true reason was because it was the officer's practice to do so whenever he arrested a possible impaired driver. In other words, the 35 minute delay resulted from the officer's general policy to always call a tow truck when dealing with impaired drivers regardless of the circumstances. "I can think of no rationale for a blanket policy of that nature; indeed, none was offered," said the judge. "Whether or not this is simply [the officer's] own way of punishing drivers he considers to be impaired, it is not appropriate, nor is it lawful."

Since the tow was unlawful, it was not reasonable to wait 35 minutes for the tow truck to arrive. Therefore, the breath tests were not taken as soon as practicable. The *Criminal Code* presumption of identity under s. 258(1)(c)(ii) could not be relied upon and the accused was acquitted.

Saskatchewan Court of Queen's Bench

The Crown appealed the acquittal arguing, among several grounds, that the trial judge erred in holding that the breath samples were not taken as soon as practicable. The appeal judge agreed, finding the trial judge made a legal mistake in concluding that towing the accused's vehicle from the bus stop was not lawful. The trial judge did not consider that the vehicle was parked "partially" in a bus stop and therefore constituted a hazard within the meaning of s. 280(1)(a)(ii) of Saskatchewan's *Traffic Safety Act* (*TSA*). A conviction was entered and the matter remitted to the trial judge for sentencing.

Saskatchewan Court of Appeal

A further appeal, this time by the accused, was successful. A majority of the Court of Appeal found it was open to the trial judge to conclude from the officer's evidence that the tow truck was called because he had a general policy to do so with impaired drivers. The appeal judge erred in ruling that the tow truck was called because the van and trailer were parked in a bus stop. The Crown also asserted that even if a blanket policy of always calling a tow truck was the reason to do so, calling a tow truck could still be legal under the *TSA*. But this position was rejected. Justice Jackson stated:

> Section 280(1)(a)(ii) of The Traffic Safety Act permits a peace officer, without warrant, to seize any vehicle or combination of vehicles "that the peace officer has reasonable grounds to believe" constitutes a hazard. Since the trial judge rejected [the officer's] evidence that he called the tow truck because it was in the bus stop, and I have concluded that his finding in that regard is supported by the evidence, no foundation existed for the summary conviction appeal court judge to conclude that [the officer] had reasonable grounds to believe that the vehicles constituted a hazard under s. 280(1)(a)(ii) of The Traffic Safety Act.

Since the officer did not have the necessary grounds, a court could not fill the gap.

BY THE BOOK:

Saskatchewan's *Traffic Safety Act: s. 280*

s. 280 (1) A peace officer, without warrant, may:

(a) seize any vehicle or combination of vehicles that the peace officer has reasonable grounds to believe:

(i) is being driven in contravention of this Act or the regulations; or

(ii) is parked on a highway at a place, or in a manner, that constitutes a hazard to other users of the highway; and

(b) retain the vehicle in the peace officer's possession or store the vehicle or combination of vehicles in a suitable place.

A Different View

Justice Ottenbriet disagreed with the majority on this point. In his view, three explanations for why the van and trailer had been towed were provided by the officer including the fact they were in a bus stop. Since the trial judge did not explore whether the presence of the vehicles in the bus stop constituted a hazard within the meaning of s. 280(1) and therefore provided a lawful basis for the tow, he did not properly consider whether the breath samples were taken as soon as practicable. But the appeal judge did, finding there was a lawful basis for the tow and rightly concluded that the delay did not, for that reason, result in the accused's breath samples not being taken as soon as practicable. "In this case, there was a reasonable explanation for the delay based on a lawful seizure of the vehicles," said Justice Ottenbreit. "The delay of 35 minutes was not unreasonable in itself. The tests were taken within a reasonably prompt time under the circumstances."

The accused's conviction appeal was allowed and his acquittal restored.

Complete case available at www.canlii.org

ON-DUTY DEATHS RISE

On-duty peace officer deaths in Canada rose by one last year over 2012. In 2013 six peace officers lost their lives on the job as reported by the Officer Down Memorial Page.

Once again motor vehicles, not guns, posed the greatest risk to officers and continue to do so as the last 10 years suggest. Since 2004, 24 officers have lost their lives in circumstances involving vehicles, including automobile accidents (16), vehicular assault (6) and being struck by a vehicle (2). These deaths account for nearly 44% of all on-duty deaths, which is much higher than the next leading cause of gunfire (14) in the same 10 year period. On average, 11 officers lost their lives every two years during the last decade, while 2005 had the most deaths at 11.

Source: http://canada.odmp.org [accessed February 1, 2014]

2013 ROLL OF HONOUR

Fish & Wildlife Officer Howard Lavers
Newfoundland & Labrador Fish and Wildlife Enforcement Division, NL
End of Watch: February 21, 2013
Cause of Death: Drowning

Constable Steve Dery
Kativik Regional Police Force, QC
End of Watch: March 2, 2013
Cause of Death: Gunfire

Constable Jennifer Kovach
Guelph Police Service, ON
End of Watch: March 14, 2013
Cause of Death: Automobile Accident

Conservation Officer Justin Knackstedt
Saskatchewan Environment & Resource Management, SK
End of Watch: May 31, 2013
Cause of Death: Vehicular Assault

Constable John Zivcic
Toronto Police Service, ON
End of Watch: December 2, 2013
Cause of Death: Automobile Accident

Constable Michael Pegg
York Regional Police Service, ON
End of Watch: November 29, 2013
Cause of Death: Training Accident

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

2013 Average Tour: 15 years 4 months
2013 Average Age: 33
2013 Deaths by Gender: female - 1
male - 5
2013 Deaths by Province:
- **Ontario - 3**
- **Quebec - 1**
- **Saskatchewan - 1**
- **Newfoundland & Labrador - 1**

2013 Deaths by Cause:
- **automobile accident - 2**
- **vehicular assault - 1**
- **gunfire - 1**
- **drowning - 1**
- **training accident - 1**

Last 10 years by Gender:
- **female - 7**
- **male - 48**

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

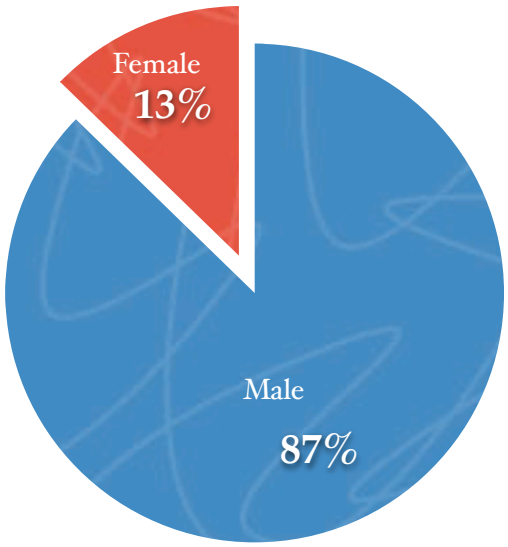
Cause	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	Total
Aircraft accident									2		**2**
Assault		1								1	**2**
Auto accident	2	3		3	3	1		1	2	1	**16**
Drowned	1			1					1		**3**
Duty related illness								1			**1**
Gunfire	1			1			3	3	5	1	**14**
Heart attack						1			1	2	**4**
Natural disaster				2							**2**
Stabbed					1					1	**2**
Struck by vehicle		1	1								**2**
Training accident	1										**1**
Vehicular assault	1		2				1	1		1	**6**
Total	**6**	**5**	**3**	**7**	**4**	**2**	**4**	**6**	**11**	**7**	**55**
Female	1	1	0	1	1	0	0	1	1	1	7
Male	5	4	3	6	3	2	4	5	10	6	48

POLICE ASSAULTS

According to a Statistics Canada report, "*Police-reported crime statistics in Canada, 2012*," assaulting a police officer dropped (-8%) from 2011 to 2012. In 2012 there were 10,612 assault police officer offences compared to 11,424 the previous year. However, from 2002 to 2012, assaults against police have risen 12%. This increase may be attributable to offences of assault with weapon/CBH to a peace officer and aggravated assault against a peace officer being added to the *Criminal Code* during this time period. These offences would have previously been reported under the general assault with weapon/CBH or aggravated assault provisions. For other assaults in 2012, there were 169,996 reports of common assault (level 1), 49,537 assaults with a weapon or bodily harm (level 2) and 3,968 offences of aggravated assault (level 3).

Source: Statistics Canada, 2013, "Police-reported crime statistics in Canada, 2012", Catalogue no. 85-002-X,released on July 25, 2013.

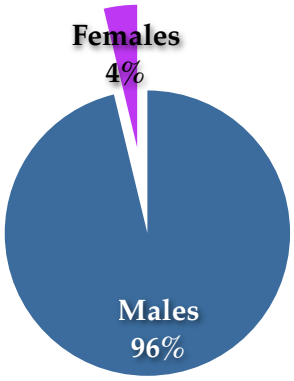
On-Duty Deaths 2004-2012 by Gender



U.S. ON-DUTY DEATHS INCREASE

During 2013 the U.S. lost 113 peace officers, down 11 from 2012. The top cause of death was gunfire (31) followed by automobile accidents (26), heart attack (16) and being struck by a vehicle (8).

Texas lost the most officers for the seventh consecutive year at 13 - followed by the U.S. Government (11), California (10), Mississippi (7), New York (7), Arkansas (6), Louisiana (5), Florida (4), Illinois (4), Alabama (4), Georgia (3), Michigan (3) and Pennsylvania (3). The average age of deceased officers was 42 years while the average tour of duty was 13 years and 10 months. Men accounted for 96% of officer deaths while women made up 4%.



Source: http://www.odmp.org/year.php [accessed February 23, 2014]

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

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

U.S. Peace Officer On-Duty Deaths		
Cause	**2013**	**2012**
911 relatd illness	1	4
Aircraft accident	1	3
Assault	-	1
Automobile accident	26	21
Boating Accident	1	-
Bomb	1	-
Drowned	2	-
Duty related illness	1	3
Electrocuted	1	
Fall	4	2
Fire	1	-
Gunfire	31	47
Gunfire (accidental)	2	2
Heart attack	16	6
Heat exhaustion	-	1
Motorcycle accident	4	5
Stabbed	2	5
Struck by vehicle	8	6
Training accident	2	1
Vehicle pursuit	4	5
Vehicular assault	5	11
Total	**113**	**123**

U.S. On-Duty Deaths by Year (2004-2013)											
Year	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	Total
Deaths	113	124	177	177	140	154	203	161	165	166	1580
Avg. age	43	41	41	42	40	40	40	38	39	40	
Avg. tour	14 yrs. 0 mos.	12 yrs. 1 mos.	13 yrs. 4 mos.	12 yrs. 2 mos.	11 yrs. 11 mos.	11 yrs. 11 mos.	11 yrs. 5 mos.	11 yrs. 5 mos.	11 yrs. 1 mos.	12 yrs. 10 mos.	
Female	4	12	11	10	3	13	9	9	5	9	85
Male	109	112	166	167	137	141	194	152	160	157	1495

SAFETY SEARCH SANCTIONED

R. v. MacDonald, 2014 SCC 3

A condominium building's concierge received a noise complaint one evening about loud music coming from the accused's unit. The concierge went to the unit, heard the loud music and knocked on the door. He received no response but, just as he was about to leave, saw guests leaving the unit and saying good night. After being asked to turn the music down the accused refused and swore at the concierge. Police were contacted and attended to address the noise complaint. A constable went to the accused's unit with the concierge, knocked and asked the accused to turn his music down or off. The accused swore at the officer and slammed the door shut.

The constable contacted her sergeant. He arrived about 30 minutes later and went to the unit. The sergeant knocked and kicked at the door, identifying himself as police. Five minutes later the accused partially opened the door only about 16 inches, enough to see the right side of his body and face. The sergeant noticed something "black and shiny" in the accused's right hand. It was in a shadow and partially hidden by his right leg. The sergeant believed it might be a knife and twice asked what was behind the accused's leg, gesturing toward it with his hand. When the accused did not respond, the sergeant wanted a better look. He pushed the door open a few inches further, saw it was a handgun, yelled "gun!" and forced his way into the condo. After a struggle the accused was disarmed and found to have a loaded 9mm Beretta which was registered to him at his home in Alberta. He was charged with several offences including careless handling, possessing a weapon for a dangerous purpose and unauthorized possession of a loaded restricted firearm.

Nova Scotia Provincial Court

The judge found that the police action in pushing the door open a few inches to determine what the accused was holding was justified in the interests of officer safety. In his view, an officer is permitted to enter a home to ensure his or her safety, particularly when the intrusion is minor. There was no *Charter* breach and the accused was convicted of *Criminal Code* sections 86(1), 88(1) and 95(1), sentenced to three years in prison, his gun was forfeited and a weapons prohibition was imposed.

Nova Scotia Court of Appeal

The accused appealed his convictions arguing, among other things, that the trial judge erred by failing to find a *Charter* breach when police entered his home. A majority of the Appeal Court disagreed. In its opinion the police have a common law power to search without a warrant where their safety or the safety of the public is at stake provided they had no other feasible, less intrusive alternative and the search is carried out in a reasonable manner. Here, the police acted lawfully in approaching the accused's door to deal with a noise complaint. The sergeant acted reasonably in pushing the door open to see what the accused was hiding. By that time it was too late to retreat or issue a noise violation ticket.

Justice Beveridge, writing a dissenting opinion, concluded that the sergeant breached s. 8 of the *Charter* by pushing the door open further and extending his hand into the accused's home. In his view, the sergeant did not have reasonable grounds to believe that his safety, or the safety of others, was at risk and his search in pushing open the door was not reasonably necessary in the circumstances. Instead, the sergeant was acting on something akin to a suspicion or hunch. Justice Beveridge would have excluded the firearm as evidence, set aside the convictions and directed acquittals on all weapons charges.

Supreme Court of Canada

The accused further appealed, again arguing that the police action in pushing the door open was an unreasonable search and therefore the firearm should have been excluded as evidence under s. 24 (2). The Supreme Court of Canada unanimously agreed that the police did not breach s. 8 of the *Charter*, but were split (4:3) on the route to get there.

Majority

Justice Lebel, writing a four judge majority opinion, found the actions of the sergeant did amount to a search. People have a strong expectation of privacy in their homes. Although the police have an implied licence to approach the door of a residence and knock, if they exceed the conditions of the licence their actions constitute a search. The police were within the conditions of implied licence when they went to the accused's door and knocked (and even kicked at it) to tell the occupant to turn down the music. However, the police exceeded the implied licence waiver when, after the accused opened the door, they pushed it further open. This action constituted an intrusion upon the accused's reasonable privacy interest in his dwelling - a search. Even though the officer only pushed the door open slightly further, police could now see more of the interior of the unit which potentially revealed any number of things about the accused.

Justice Lebel termed the type of action by police in this case as a "safety search" - a reactionary measure to eliminate threats to the safety of the public or the police. He described it as a "physical search that could uncover a broad array of information about an individual."

Safety Searches

"Although such searches may arise in a wide variety of contexts, they will generally be unplanned, as they will be carried out in response to dangerous situations created by individuals, to which the police must react 'on the sudden'," Justice Lebel said.

> "[S]afety searches will typically be warrantless, as the police will generally not have sufficient time to obtain prior judicial authorization for them. In a sense, such searches are driven by exigent circumstances."

A warrantless search will be reasonable if it is authorized by a reasonable law and is carried out in a reasonable manner. In this case, the majority found that "the duty of police officers to protect life and safety may justify the power to conduct a safety search in certain circumstances. At the very least, where a search is reasonably necessary to eliminate an imminent threat to the safety of the public or the police, the police should have the power to conduct the search." This power to search, however, is not unbridled. To exercise this power, a police officer requires reasonable grounds to believe that there is an imminent threat to the safety of the public or the police before a safety search will be deemed reasonable. Police must have more than a hunch or a vague concern for safety. They must act on objectively verifiable circumstances.

In this case, the majority found the officer had "reasonable grounds to believe that there was an imminent threat to the safety of the public or the police and that the search was necessary in order to eliminate that threat." The accused had his hand behind his leg, was clearly holding a "black and shiny" object which could have been a weapon, and refused to answer or to provide any explanation when twice asked what he had behind his back.

As for the manner of a safety search, it must be conducted reasonably. It must not exceed what is required to search for weapons and must be reasonably necessary to eliminate any threat in light of the totality of the circumstances. Here, the officer did no more than was necessary by pushing the door open further to see what the accused had behind his leg. He had twice asked what the accused had in his hand but received no answer. "In these circumstances, it is hard to imagine a less invasive way of determining whether [the accused] was

"The duty of police officers to protect life and safety may justify the power to conduct a safety search in certain circumstances. At the very least, where a search is reasonably necessary to eliminate an imminent threat to the safety of the public or the police, the police should have the power to conduct the search."

concealing a weapon (and thereby eliminating any threat in that regard)," said Justice Lebel. This search was reasonable, there was no s. 8 *Charter* breach and no need to consider s. 24(2).

Minority

A three member minority agreed that there was no s. 8 *Charter* violation, but found the test should be reasonable grounds to "suspect" an individual was armed and dangerous rather than reasonable grounds to "believe". The minority was quite critical of this distinction going so far as to state:

> We should be clear about the consequences of the majority's decision: officers are deprived of the ability to conduct protective searches except in circumstances where they already have grounds to arrest. As of today, officers are empowered to detain individuals they suspect are armed and dangerous for investigatory purposes, but they have no power to conduct pat-down searches to ensure their safety or the safety of the public as they conduct these investigations. In our view, a police officer in the field, faced with a realistic risk of imminent harm, should be able to act immediately and take reasonable steps, in the form of a minimally intrusive safety search, to alleviate the risk. [at para. 91]

The accused's appeal on the s. 8 *Charter* issue was dismissed.

Complete case available at www.scc-csc.gc.ca

SIGN BARRING POLICE DID NOT CREATE PRIVACY EXPECTATION

R. v. Felger, 2014 BCCA 34

The accused Felger owned and operated a store that sold a variety of marihuana-related products. On the store window, adjacent to the door, the accused posted a sign which read: "No Police Officers Allowed In The Store Without A Warrant. Especially Badges #315 & 325." His lawyer also wrote a letter to the local police chief instructing that no police officers were permitted to enter the store without a warrant. The chief wrote back, asking the lawyer to clarify with his client that the police do not always need a warrant to enter a premises.

Acting on information that marihuana was being sold to minors at the store, undercover police officers entered it and subsequently bought marihuana on five separate days. They also saw other individuals buy marihuana. The accused was charged with six counts of trafficking and one count of possession for the purpose of trafficking. A female employee Healy was jointly charged with three counts of trafficking.

British Columbia Supreme Court

The judge concluded that the actions of the undercover officers breached the accuseds' s. 8 *Charter* rights and excluded the evidence. This evidence included the information that marihuana could be purchased by the public, the purchased marihuana itself and various observations, such as the smell of burned marihuana, and the accuseds weighing marihuana and retrieving it from the back of the store. In the judge's view, Felger, as lessee, had the right to exclude any person or persons from the premises unless they had some lawful authority to enter. The employee also had the right to enforce her employer's policies regarding who could and could not enter the store. By posting a sign and sending a letter to the police department, Felger had limited the implied waiver to enter the retail store and maintained his privacy rights with respect to police officers. Explicitly barring the police made their subsequent entry and observations within an intrusion into the accuseds' reasonable privacy interests. They were acquitted.

British Columbia Court of Appeal

The Crown argued that the actions of the police did not breach any objectively reasonable expectation of privacy that the accuseds had in the business premise and that the trial judge erred in so finding. In the Crown's view, the accuseds extended an invitation to the public to enter the store, which included undercover officers posing as members of the public. Further, even if there was a *Charter* breach, the Crown suggested the evidence should have been admitted under s. 24(2). The accuseds, on the other hand, submitted that an individual could preserve a general prohibition against police, uniformed or undercover, from entering private property without permission (or without some other lawful authority).

Justice Garson, authoring the Court of Appeal's opinion, concluded that a person cannot create a privacy interest under s. 8 in a publicly accessible retail establishment by posting a sign prohibiting entry by police officers. A reasonable expectation of privacy is to be determined on basis of the totality of the circumstances and involves both subjective and objective aspects.

Although the accuseds had a subjective expectation of privacy respecting the information the police intended to obtain - whether marihuana was being sold in the store - their subjective intention to exclude all police officers was not objectively reasonable. The retail premises was open to the public and the expectation of privacy in a publicly accessible store during business hours was lower than in a dwelling place. Further, the tort of trespass or a proprietary interest in the property did not necessarily establish a reasonable expectation of privacy. These were merely factors that might be relevant in considering the circumstances as a whole.

As well, the information the police wanted to obtain was accessible to any member of the public who sought it out. Finally, the accuseds freely and readily engaged in conversation about drug transactions on five different days when the undercover officers attended the store and purchased drugs. During this time the police made various observations about the store, the accuseds and other patrons. The police were not intrusive and did not seek nor obtain any information that was not already available to the public. "The question of the reasonableness of the expectation of privacy also incorporates a balancing of societal interests in privacy with the legitimate interests of law enforcement," said Justice Garson. "In my view, in balancing those societal interests, an objectively reasonable expectation of privacy in a retail store could not be achieved simply by posting a sign excluding law enforcement officers." She continued:

> This would give too much weight to the subjective aspect of the s. 8 analysis. Privacy for the purposes of s. 8 must be assessed on an objective basis: would an objective observer construe the activities as being carried out in a private manner? In this case, and considering that s. 8 "protects people not places", the overwhelming evidence is that the activity of selling drugs was done in a public setting. There is an element of artifice in the [accuseds'] claim to privacy in a place in which they were publicly and brazenly selling marihuana, conduct that is currently unlawful. [para. 50]

The accuseds did not have a reasonable expectation of privacy in conducting business at the store, regardless of whether or not police officers had been excluded from the premises. Since there was no reasonable privacy interest, there was no need to consider whether any search or seizure was reasonable. The Crown's appeal was allowed, the accuseds' acquittals were set aside and a new trial was ordered.

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

"[T]he reasonableness of the expectation of privacy also incorporates a balancing of societal interests in privacy with the legitimate interests of law enforcement. ...[I]n balancing those societal interests, an objectively reasonable expectation of privacy in a retail store could not be achieved simply by posting a sign excluding law enforcement officers."

COMMISSIONER MAY SWEAR ITO, JP TO ISSUE WARRANT

R. v. D.G., 2014 ONCA 75

A police detective conducting an internet investigation formed reasonable grounds to believe that an IP address was involved with accessing, sharing and possessing child pornography. He located the physical address associated to the IP address and prepared an Information to Obtain (ITO) a s. 487 *Criminal Code* search warrant. Following procedures established in his jurisdiction (Kitchener, Ontario), he swore the ITO before a commissioner for taking oaths who was also employed by the detective's police service. The warrant materials were then taken to the courthouse, left with a court clerk and a Justice of the Peace (JP) subsequently signed the warrant based on the materials sworn before the commissioner. A search warrant was signed, executed and the accused was subsequently charged.

Ontario Court of Justice

Th accused suggested that the search warrant application did not comply with the *Criminal Code* search warrant requirements and was therefore not a valid search warrant. The resulting search was therefore unreasonable under s. 8 of the *Charter*. In his view, s. 487 requires the ITO be sworn before the issuing JP or, at the very least, before any other JP. But the judge disagreed, concluding that an ITO may be sworn before a commissioner of oaths. She opined that the wording of s. 487(1) does not require the oath be taken before a JP, the issuing one or any other one. It authorizes "a justice" to issue a search warrant on the basis of "information on oath in Form 1." Nor was the fact the commissioner taking the oath also worked for the police of concern. The accused was convicted of possessing child pornography.

Ontario Court of Appeal

The accused appealed, again arguing that swearing of the ITO before a commissioner of oaths violated s. 487, resulted in an unlawful search and therefore breached s. 8. The Court of Appeal, however, rejected this submission. There was nothing in the language of s. 487(1) nor the Form 1 to support the accused's position:

> There is nothing in the wording of s. 487(1) of the Code requiring that the information on oath must be sworn by a justice. Rather s. 487(1) provides that a justice must issue the warrant.
>
> The role of a justice commissioning an oath comes into play only by virtue of the wording of Form 1. Section 32 of the Interpretation Act, R.S.C. 1985, c. I-21, provides that "[w]here a form is prescribed, deviations from that form, not affecting the substance or calculated to mislead, do not invalidate the form used." Section 849 of the Criminal Code permits forms in the Criminal Code to be "varied to suit the case". That is what has happened in this case. Form 1 has been amended in the Kitchener area (as it has been amended in other regions in Ontario and elsewhere in Canada) to permit commissioners of oaths to commission ITOs. This is entirely appropriate and does not alter the essential point of s. 487(1), namely, that a justice must consider and issue the search warrant based on sworn evidence. [paras. 8-9]

The accused's appeal was dismissed.

Editor's note: Additional case facts taken from *R. v. D. G.*, [2012] O.J. No. 2512 (ONCJ).

CORROBORATION MAY ASSIST WITH CREDIBILITY ASSESSMENT

In 2010 the accused was charged with sex offences committed between 1973 and 1978 when he was between the ages of 12 and 17-years-old. He was required to respond to these allegations some 35 to 40 years after they occurred. At trial in a New Brunswick Provincial Court only the police investigator and the complainant (a brother of the accused) testified for the Crown. The accused also took the stand along with three other witnesses; his wife, an uncle, and another brother. He categorically denied all the

allegations but was nonetheless convicted in 2012 of indecent assault and gross indecency. The accused then appealed his conviction (*R. v. D.M.S.*, 2014 NBCA 3).

The New Brunswick Court of Appeal was quite critical of the police for not corroborating the complainant's statement. In its view, corroboration would have been useful in establishing a chronology of the events or assessing credibility, as noted by the following examples:

- The complainant said he reported the abuse to his grandmother who in turn "tried to have Social Services come in and take the kids away from my parents." The police did not make any effort to determine whether Social Services had a record of the grandmother's report.
- The complainant had said he was unsure of where he was living when he reported the abuse to his grandmother but did say he was in the hospital for the removal of his appendix. The police did not check with any area hospital's to confirm whether he had been a patient.
- The complainant testified on one occasion that the accused cut him across the ankle when he threatened to tell his parents about the abuse. This injury required the complainant to go to the hospital. The police did not check with any hospitals for a related record.
- The complainant said his sister took him from the home but he was returned after his parents put up a "big stink." The police did not interview the sister nor was she called as a witness.
- The complainant named four other people he said were with him when he was 10-years-old and forced to have sex with a girl. The police did not interview these other people.

When questioned about these shortcomings the investigator said she had no reason to disbelieve the complainant and that the other family members did not want to speak to police. As for his observations regarding the police investigation, Justice Bell wrote:

> In many historic sexual assault cases, the police and prosecutorial authorities are faced with a paucity of potential evidence. Often, the only potential sources of information are the complainant and the alleged perpetrator. Such cases are often precariously prosecuted as a "credibility contest" between the alleged victim and the accused. That did not have to be the case in this matter. The determination of the issue of credibility, particularly with respect to the [accused] and his brother, the complainant, could have been greatly facilitated by minimal investigative efforts. [para. 5]

And further:

> ... I am surprised police would not fully investigate a matter because they heard indirectly that someone did not want to talk to them. One would expect the police to make reasonable efforts to speak directly with potential witnesses to determine whether they might exonerate the suspect or support the complainant's version. It is painfully evident the police and prosecution proceeded in a "tunnel vision" fashion without any serious effort to investigate independent sources which could have confirmed or refuted the complainant's version or aided in objectively assessing his credibility.
>
> I would add that New Brunswick is a jurisdiction where prosecutorial authorities review files and approve charges that are to be laid by police. The Attorney General's office could, at any time, have requested the police conduct further enquiries of hospitals, social service departments or other potential witnesses, prior to approving charges. [paras. 7-8]

There were many problems with this case and a new trial was ordered after the Court of Appeal found the trial judge misapprehended the evidence and made fundamental flaws in his reasoning.

"It is painfully evident the police and prosecution proceeded in a "tunnel vision" fashion without any serious effort to investigate independent sources ..."

B&E PRESUMPTION LOGICAL: APPLIES UNLESS EVIDENCE TO THE CONTRARY

R. v. Holland, 2013 NBCA 69

The occupants of a home awoke to find the accused in their house. When they confronted him, he wanted the police called. When the police arrived and arrested him, he said he was with the FBI and he was there to save the occupants. He also talked about people from Afghanistan coming.

New Brunswick Provincial Court

The accused testified that he had been drinking heavily that night. He thought he might be a hero and thwart a crime when he followed another individual who had stated he would break into a home. At some point, this other person turned on the accused in a threatening way and then, armed with a piece of wood in which nails were embedded, chased him. This caused the accused to seek refuge by breaking into a home. He argued that the evidence about his level of intoxication rebutted the presumption found in s. 348(2) of the *Criminal Code* and negated the specific intent required that he had broken into the house with the intent to commit an indictable offence therein. One of three testifying officers opined that the accused was intoxicated while two other officers, as well as an occupant of the home, noted no obvious signs of intoxication.

> "The presumption set out in s. 348(2) reflects the legal and logical relationship between the proven fact of [the accused] having broken and entered the victim's home and the inference that, as he had no right to be there, he must have done so with the intent to commit an offence."

The judge did not believe the accused and concluded that he had entered the house with the intent to commit an indictable offence. Then, when the homeowner caught him, he spun a tale to try to extricate himself from the situation. He was convicted of break and enter with intent to commit an indictable offence under s. 348(1)(a) of the *Criminal Code*.

New Brunswick Court of Appeal

The accused argued, in part, that the trial judge erred in failing to consider his evidence to the contrary which was sufficient to rebut the presumption. Justice Richards, speaking for the Court of Appeal, described the presumption this way:

> The presumption set out in s. 348(2) reflects the legal and logical relationship between the proven fact of [the accused] having broken and entered the victim's home and the inference that, as he had no right to be there, he must have done so with the intent to commit an offence. In the usual course of things, people have no business breaking and entering into a stranger's home, and it is logical to presume that, where one has done so, it is for an improper purpose. Of course, in some cases, there may be an innocent explanation. Thus, the legal effect of the presumption is that it is applied unless there is evidence to the contrary.
>
> In a criminal case, the onus of proof is on the prosecution to prove all elements of an offence beyond a reasonable doubt. Where, as in s. 348(2), a provision creates a presumption that applies "in the absence of evidence to the contrary", it is wrong to say that there is an onus on the accused to rebut the presumption on a balance of probabilities. The presumption applies unless there is any evidence, not expressly disbelieved, that would negate it. All the accused has to do is point to evidence to the contrary that could reasonably be true. Unless that evidence is affirmatively rejected, it will negate the effect of the presumption and then require the prosecution to prove the mens rea element of the office beyond a reasonable doubt. [paras. 11-12]:

In this case, the accused offered two aspects of evidence to the contrary; (1) he broke into the house to escape the pursuit of a person who meant him harm and (2) he was intoxicated.

As for breaking into the home as a means of escape, the trial judge rejected this because the accused did not cry for help whether outside the home or upon entry. He only mentioned it when he was caught by the homeowner. The trial judge said he made up this story to get himself out of the situation.

As for being intoxicated, the accused was required to point to evidence that showed he was in a state of advanced intoxication to the degree of not being able to form the specific intent required for conviction; that he lacked the foresight of the consequences of his act. It is not enough to simply say he had been drinking. "To simply say there is evidence I was drinking and therefore I could not have formed the intent to commit an indictable offence in the house into which I broke and entered is insufficient," said Justice Richards. "The state of an accused's intoxication must be examined in light of all the circumstances. If these suggest an advanced state of intoxication sufficient to raise a reasonable doubt that the accused lacked the foresight of the consequences of his or her act, then intoxication may constitute evidence to the contrary."

In this case, the trial judge expressly rejected the suggestion of advanced intoxication and therefore it could not have constituted evidence to the contrary.

The accused's appeal was dismissed.

Complete case available at www.canlii.org

EVEN IF CHARTER BREACHED EVIDENCE WAS ADMISSIBLE

R. v. Galbiati, 2014 BCCA 5

The police searched the accused's property under the authority of a valid warrant. The search warrant was directed solely for evidence of a marihuana grow-operation in the "residence and garage", notes and records relating to growing marihuana, and documentation relating to "occupancy". The police found a pair of concealed rooms that had previously housed a grow operation and about 19 lbs. of marihuana packaged for sale. Police also seized 28 firearms and ammunition that was unsafely stored throughout the house and readily visible. A backhoe and excavator on the property were also seized after police queried their VIN numbers and discovered they were stolen. Police perused copies of the accused's income tax returns found in the house and formed the opinion that the "obvious high quality" of his home and assets indicated an income well in excess of that reported in the tax returns. A "proceeds of crime investigation" commenced and various other vehicles and property belonging to the accused were seized on the basis that these items were evidence "in plain view" relating to this proceeds of crime investigation. No new search warrant was obtained to seize these items.

British Columbia Provincial Court

The accused was only charged with possessing marihuana for the purpose of trafficking and unsafely storing firearms. He was never charged with any offence related to the seized vehicles nor with being in possession of proceeds of crime. He argued that all of the evidence seized, including the marihuana, guns and ammunition, should be excluded under s. 24(2) of the *Charter*. He contended that the police had gone far beyond the terms of the search warrant in seizing the two stolen vehicles, in reading his income tax returns and in seizing the other vehicles on the basis of a proceeds of crime investigation. In his submission, the search warrant had not been properly or reasonably executed and <u>all</u> of the evidence was in effect tainted.

The judge concluded that there were four distinct investigations: (1) the marihuana grow operation (for which the warrant was granted), (2) proceeds of crime, (3) firearms and (4) stolen equipment. She concluded that the marihuana was obtained by virtue of a lawful search warrant and the guns and ammunition were lawfully seized under the plain view doctrine. However, she found the police should have obtained another search warrant to seize the stolen vehicles and also when they became suspicious and made seizures in pursuit of the proceeds of crime investigation. The proceeds of crime property therefore had been improperly seized and breached s. 8 of the *Charter*. She would have excluded this evidence had a proceeds of crime charge been laid. However, she admitted the

evidence on the marihuana grow operation and firearms storage charges. There were no breaches related to this evidence and excluding it would have brought the administration of justice into disrepute. The accused was convicted of possession for the purpose of trafficking and unsafely storing firearms.

British Columbia Court of Appeal

The accused argued that his rights under s. 8 of the *Charter* were breached and that all of the evidence ought to have been excluded under s. 24(2). But the Court of Appeal disagreed. It was doubtful that the evidence of the marihuana and guns was obtained in a manner that infringed s. 8 even though the trial judge found breaches regarding the stolen equipment and proceeds of crime seizures. And, even assuming the marihuana items, firearms and ammunition were found and seized as part of one overall transaction which breached s. 8, the admission of this evidence would not bring the administration of justice into disrepute. The seized property was in plain view and police acted in good faith. "There was no suggestion [police] conduct was part of an overall pattern of 'short-cuts' or failures to respect the constitutional rights of persons encountered by the police in the course of their exercise of their duties," said Justice Newbury. "Society has an interest in having the charges adjudicated, and even if the firearms charges were 'regulatory' and at the less serious end of the spectrum as counsel suggests, the consequences of [the accused's] failing to store the guns and ammunition properly could be serious indeed." Deference was owed to the findings of the trial judge and the accused's appeal was dismissed.

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

Note-able Quote

"[P]olice practice is one thing. What the law is on the mater is quite another. Unless authorised by judicial decision or by statute, police practice is no more than that. It is not the law." - Lord Hope of Craighead, R. v. Commissioner of Police of the Metropolis, [2002] 2 All ER 865 at para. 18.

IMPORTING REQUIRES MORE THAN KNOWLEDGE & RECEIPT OF CONTRABAND

R. v Atuh, 2013 ABCA 350

Two packages from Pakistan that were addressed to third persons at the accused's address were intercepted by police when the goods arrived in Canada. The packages contained books with heroin in their spines. The police rigged the books with an alarm. A police officer dressed as a Canada Post carrier then delivered the goods to the address on the packages. The accused told the police officer that he was expecting packages, that the addressees lived at the address and that he could accept the packages for them. About one and one half hours after delivery the alarm went off when the accused opened a book from one of the packages. The police entered the home and arrested the accused for both possession for the purpose of trafficking and importation.

Alberta Court of Queen's Bench

The judge concluded that the accused knew that there were drugs in the package. As a result, he was convicted of possessing heroin for the purpose of trafficking and importing. The basis for the importing conviction was the accused telling the police he was expecting packages, that the addressees lived at the residence and that he could accept delivery on their behalf.

Alberta Court of Appeal

The accused appealed only his importation conviction. He argued that importing could not be proven simply by establishing that a person knowingly accepted imported drugs in a controlled delivery. Furthermore, he suggested that merely expecting and accepting packages knowing they contained drugs did not make him a party to the offence of importing. The Crown, on the other hand, submitted that importation was a continuing offence that did not end until the product reached its final destination.

The Court of Appeal, even assuming that importation was a continuing offence, found a conviction in this case was not warranted. "To prove that a recipient is guilty of importing, something more than receipt and knowledge of receiving a controlled drug is required to prove that the recipient was either a principal in, or party to, importing," said the Appeal Court. "Here the trial judge did not turn his mind to whether [the accused] knew where the drugs were coming from." The trial judge was not only to consider the accused's knowledge that the books contained drugs but also the origin of the drugs. The Crown was required to prove that the accused knew that the drugs he knowingly expected and accepted were from out of the country.

The accused's appeal was allowed, his conviction for importation was vacated and a new trial on that charge was ordered.

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

NO s. 10(b) CHARTER BREACH: ARRESTEE SATISFIED WITH DUTY COUNSEL

R. v. McLeod, 2013 SKCA 28

A police officer arrested the accused for impaired driving, made a demand for breath samples, advised him of his right to retain and instruct counsel of choice without delay, and informed him that Legal Aid duty counsel was available free of charge. The accused confirmed he understood. At the police station, the arresting officer asked whether the accused wished to contact a lawyer. He responded that he wanted to talk to a lawyer but he did not have one. The officer told him that he could call a lawyer, or family or friends to help find a lawyer, and that legal aid duty counsel was available at no cost. This conversation took place at the police station in an interview room in which there was no telephone, no phone book and no list of lawyers. The accused indicated that he wanted to contact Legal Aid. The officer arranged a call to Legal Aid and the accused spoke with duty counsel for about seven minutes. He was escorted to the interview room, asked if he was satisfied with his call and replied that he was. He was then taken to the Intoxilyzer technician and again confirmed he was satisfied with his Legal Aid consultation. He then took the Intoxilyzer tests and failed.

Saskatchewan Provincial Court

The judge found the accused's right to counsel under s. 10(b) of the *Charter* had been breached because the police never mentioned that a phone book was available and never presented one to him. Because of this, the accused's implementational component of his right to counsel could not be carried out. In the judge's view, the accused's only option was to call Legal Aid; thus there was no real choice. The certificate of analyses was excluded and the accused was acquitted of driving over 80mg%.

Saskatchewan Court of Queen's Bench

The Crown's appeal was successful. An appeal judge concluded that there was no s. 10(b) breach. Because the accused expressed satisfaction about his consultation with counsel, the police were entitled to assume that his right to counsel had been satisfied and they could proceed with taking the breath samples. And, even if there had been some error in the police facilitating the right to counsel, that error had been superseded by the accused's expression of satisfaction. His acquittal was set aside and a new trial was ordered.

Saskatchewan Court of Appeal

A further appeal by the accused was dismissed. The Saskatchewan Court of Appeal concluded that the accused's s. 10(b) rights had not been breached as found by the Court of Queen's Bench.

Complete case available at www.canlii.org

Editor's note: The accused then sought leave to appeal to the Supreme Court of Canada. The application, however, was dismissed. *R. v. McLeod*, [2013] S.C.C.A. No. 224.

CO-OFFENDING ASSAULTS AGAINST POLICE OFFICERS

According to a Statistics Canada report recently released entitled "Co-offending in Canada, 2011" there were 8,145 incidents in Canada of assaulting a police officer. Of those, 7,374 involved a lone offender, 616 were committed by pairs, and 155 were a group crime, involving three or more accused.

In Canada, co-offending - crimes involving two or more accused - accounted for 11% of cleared incidents. Most co-offences were pair crimes (76%) while the remaining 24% involved three or more people. Co-offending was more common among female accused (27%) than male accused (21%). For co-offending groups, however, most were made exclusively of males (54%).

Co-offending was also more common among youth (12-17 years old) at 44% while adults co-offended only 19%.

Co-offending was more common in the following offences:

- Drug trafficking, production, importation/ exportation = 34%
- Robbery = 32%
- Arson = 30%
- Counterfeiting = 24%

Co-offending was less common in the following offences:

- Impaired driving - 1%
- Sexual violations against children - 2%
- Administration of justice - 3%
- Level 1 sexual assaults - 3%

Co-offences were more likely to involve a firearm or other weapon, or result in injury to the victim compared to lone offences.

Source: Statistics Canada, 2013, "Co-offending in Canada, 2011", Catalogue no. 85-002-X,released on November 19, 2013.

MANNER OF DETENTION WAS 'OVER-KILL' IN THE CIRCUMSTANCES

R. v. Christie, 2013 NBCA 64

Shortly after midnight a patrol officer in a marked police cruiser stopped the accused after he saw him driving with an expired registration sticker on his vehicle. The officer requested his driver's license, registration and proof of insurance. The accused was unable to produce a driver's license and had no current proof of insurance or registration. The officer saw an open bottle of wine on the floor behind the driver's seat as well as a large buck hunting knife in the driver's door pocket. The officer, after calling for back-up but before it arrived, asked the accused to step out of the vehicle, handcuffed him behind his back and placed him in the rear seat of his police cruiser. He wanted to search the vehicle for more liquor and other weapons. He searched a duffle bag on the front passenger seat and located various quantities of cocaine including a 28 gram rock, as well as marihuana, baggies and weigh scales. He also found two cellular telephones in the center console and an additional quantity of marihuana under the driver's seat. The officer returned to his police car, identified the accused and arrested him for the drug offences. He was subsequently transported to the police station where he was searched again and a small additional amount of cocaine was located on his person. He was charged with drug offences.

New Brunswick Provincial Court

The accused accepted that his original detention was lawful when his vehicle was pulled over to investigate the motor vehicle infraction - an expired licence plate. But the nature of his detention changed when he was asked to step out of the vehicle, handcuffed with his hands behind his back and confined in the rear seat of the police vehicle. The judge, however, concluded that this action - the handcuffed detention - was reasonably necessary in the circumstances to address the risk when the officer saw the knife in the pocket of the driver's door. As for the search of the vehicle and the duffle bag, the judge conducted a step-by-step analysis of how the matter evolved from a *Motor Vehicle Act* (*MVA*) stop into a search. In this case, he found the officer conducted the search for his own safety as well as to locate other evidence. The search was valid and there were no *Charter* violations. The accused was convicted of simple possession of marihuana and possessing cocaine for the purpose of trafficking. He was sentenced to 17 months in prison.

New Brunswick Court of Appeal

The accused appealed his convictions arguing that his detention became unlawful and the warrantless searches were unreasonable. Thus, he contended his ss. 8 (unreasonable search and seizure) and 9 (arbitrary detention) *Charter* rights were breached and the evidence was inadmissible under s. 24(2).

The Detention

Once again the accused did not challenge the lawfulness of his original detention when he was pulled over and investigated for the *MVA* offence. However, the drastic change in the nature of his detention was unjustified. Justice Deschênes, delivering the Court of Appeal's judgment, disagreed with the trial judge that the manner of detention - securing the accused in the police cruiser in handcuffs - was reasonably necessary in the totality of the circumstances. The trial judge failed to determine "whether there were other reasonable means available to the officer to alleviate his safety concerns about the presence of the knife, short of what he did."

In this case, there were several relevant circumstances that the trial judge failed to mention:

- The accused readily identified himself in response to a request from the officer and produced an expired vehicle registration card bearing his name.
- He was being investigated for summary offences under New Brunswick's *MVA* and *Liquor Control Act* (*LCA*).
- The hunting knife was properly in its case and stored in a space designated for storage in the driver's door.

- There was nothing in the accused's conduct which would raise any safety concerns for the officer, nor did the officer have any reason to suspect that the accused might be a danger to anyone.
- The accused was not asked to hand over the knife or the car keys before he was instructed to step out of the vehicle to be handcuffed and placed in the police cruiser.
- The officer had made contact with another unit on patrol very early on after the accused's vehicle was pulled over and he knew help would arrive within a few minutes. Although the circumstances recited by the trial judge could lead one to conclude that the call for a second unit took place after the accused had been secured in the police cruiser, the evidence is that the call was made before the accused was placed in the police vehicle.
- As soon as the officer realized the accused was unable to produce any relevant documents pursuant to the *MVA*, there was no question in his mind that the accused's vehicle was going to be impounded.
- The quick pat-down search of the accused as he stepped out of his vehicle did not raise any safety concerns.

Justice Deschênes stated:

> Under such circumstances, obvious questions come to mind. Why, for example, was it important to rush into this detention when, to the officer's knowledge, a second unit was a few minutes away? A short wait with the [accused] being detained in his own vehicle under the officer's watchful eye until arrival of a second unit would not have impinged on the [accused's] right to be released from detention as soon as reasonably possible. Nor would a wait of a few minutes necessarily put the safety of the officer in jeopardy. What prevented the officer from asking the [accused] to hand over the keys to the vehicle? After all, the [accused] could not produce the required documents and would certainly not be allowed to drive away. Would it be unreasonably unsafe to ask the [accused] to carefully hand over the sheathed hunting knife? Finally, is it unrealistic to think that the arrival of other officers on the scene would have eliminated the necessity of the detention in the police vehicle and would not have jeopardized the investigation being carried on for infractions under the relevant provincial statutes?
>
> In my respectful view, the obvious answers to these questions reveal that the officer could have addressed his safety concerns in a way that would have fallen well short of the drastic detention imposed upon the [accused]. [paras. 19-20]

Detaining the accused in handcuffs in the rear of the police vehicle was not reasonably necessary. It was unlawful and therefore arbitrary, breaching s. 9 of the *Charter*.

The Search

Since the accused had a privacy interest in his vehicle and the duffle bag, the warrantless search would only be reasonable if it was authorized by law, if the law itself was reasonable and if the search was carried out in a reasonable manner. The accused argued that the trial judge equated the common law search authority under investigative detention (limited to searches for personal safety only) to the search authority pursuant to an arrest (which includes the additional power to search for evidence). The Crown submitted that the statutory search and seizure provisions found in New Brunswick's *Provincial Offences Procedure Act* (*POPA*) permitted the searches.

Common Law - Investigative Detention

When the police lawfully detain a person for investigation they may engage in a protective pat-down search of the detainee if they have reasonable grounds to believe that their safety or that of others is at risk. This search power, which is narrowly focussed and limited to safety concerns, is to be distinguished from the broader power to search incident to a lawful arrest. A search incidental to arrest has three main purposes:

1. to ensure the safety of the police and the public;
2. the protection of evidence from destruction; and

3. the discovery of evidence that can be used against the accused.

Searches incident to a lawful detention, on the other hand, are limited to legitimate safety concerns and do not permit searches for evidence connected to the reasons for the detention. In this case, the officer did not have the power to search the vehicle or the duffle bag at common law incidental to the detention for evidence related to infractions under the *LCA*.

As for the officer's other professed reason to search the duffle bag, for weapons in order to alleviate his safety concerns, the Court of Appeal found this difficult to understand. "After all, the officer had no information relating to the [accused] that would cause him to have safety concerns," said Justice Deschênes. "The knife was properly confined in a legitimate location and a second police vehicle was a few minutes away. Of more significance is the fact that when the officer decided to open the duffle bag to look for evidence of open liquor or other weapons, the [accused] was sitting, handcuffed, in the police cruiser and his vehicle was going to be impounded. Under such circumstances, it offends common sense to say that the officer had a legitimate concern for his or the public's safety."

The common law power to search incident to an investigative detention did not allow the officer to search the duffle bag, seize its contents nor search under the driver's seat.

Statute Law

The Court of Appeal also found the search of the duffle bag could not be justified pursuant to a statutory power. A search under s. 135 of *POPA* requires that the searching officer have reasonable and probable grounds to believe that there was, in or upon the vehicle or container, an item of evidence and that it was impracticable in the circumstances to obtain a search warrant. These two requirements (reasonable belief and impracticability) must be proven to trigger the right to search for further evidence of regulatory offences under a provincial statute. Although the Crown argued that the officer had the requisite grounds to believe evidence of other open liquor bottles would be found in the duffle bag on the basis of an open bottle of wine behind the driver's seat, the officer's own testimony did not support this position. The evidence did not establish that the officer believed, on reasonable and probable grounds, that evidence of an offence under the *LCA* would be found in the vehicle or a container. Instead, the officer said he had a right to search the vehicle without a warrant because the search could "possibly" lead him to other open bottles of liquor or other weapons. In addition, the Crown did not establish that it would have been impracticable to apply for a warrant. Since the Crown did not satisfy the onus of establishing the requirements of s. 135, the search and seizure of the cocaine and drug trafficking accessories in the duffle bag, including the marijuana found in the vehicle, were unlawful and breached s. 8. The arrest that followed was also unlawful, as was the seizure of evidence resulting from the search incident to such arrest.

s. 24(2) Charter

In determining whether the evidence should be excluded, the Court of Appeal found the the *Charter*-infringing conduct was serious. "The officer knew or ought to have known that he had options other than the type of detention he decided to impose," said Justice Deschênes. "The detention of [the accused] in the back of the police vehicle in handcuffs was uncalled for under the circumstances and was a serious infringement of [his] s. 9 Charter right not to be detained arbitrarily." He continued:

BY THE BOOK:

New Brunswick's Provincial Offences Procedure Act

s. 135 (1) A peace officer may search, without warrant, any vehicle or container if the peace officer believes, on reasonable and probable grounds, that there is in or upon the vehicle or container an item of evidence and that it is impracticable in the circumstances to obtain a search warrant.

... ...

> But what is perhaps more serious is the unlawful search of the vehicle, more particularly the duffle bag under the purported authority of the Liquor Control Act, or the pretense of a safety concern, a concern that simply defies common sense. Again, the officer knew or ought to have known of the requirements of reasonable and probable grounds needed to open the duffle bag and that some thought had to be given to obtaining a search warrant. In my view, the officer acted with disregard for the [accused's] rights not to be subjected to an unreasonable search and seizure under s. 8 of the Charter. The seriousness is aggravated when one considers the officer's testimony that he believed he could open the duffle bag based upon only the "possibility" of finding "open liquor". This is evidence of an abusive practice – one that must be soundly denounced. To admit the evidence would be to encourage situations where police officers could insist, when it is not reasonably necessary, on using handcuffs to confine a person in the rear seat of police vehicles and to search persons or vehicles without the grounds required by law. This could have a chilling effect on the public's confidence in the rule of law. [para. 56]

Despite the accused's reduced privacy interest in the search of his vehicle, the impact of the breach on the accused's *Charter*-protected interests was significant, which also favoured exclusion:

> The detention in the police vehicle in handcuffs was arbitrary and impacted upon the [accused's] liberty interests to a considerable extent. The search of his vehicle, and particularly the duffle bag, without the required reasonable grounds impacts upon the [accused's] privacy interest. The search of the duffle bag expanded way beyond the scope of one allowed to alleviate safety concerns.

Finally, although the evidence was both relevant and reliable, and the truth seeking function of the criminal trial process favoured admission of the evidence, the evidence was nonetheless excluded:

> The main reason relates to the seriousness of the conduct of the officer in clear violation of the [accused's] ss. 8 and 9 rights. He employed a type of detention that was clearly "over-kill" in the circumstances when he had many other options at his disposal. He also conducted a search of the duffle bag when there were neither reasonable grounds to allow it in the context of an infraction under the Liquor Control Act, nor any genuine safety concerns. The search also appeared to be part of a standard practice followed by the officer, a practice based upon the possibility of finding evidence of an infraction without consideration of the requirements of reasonable grounds or the practicality of trying to obtain a warrant. In my view, the Court must dissociate itself from this conduct. [para. 59]

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

Complete case available at www.canlii.org

SNIFFER-DOG DEPLOYMENT LAWFUL: REASONABLE SUSPICION STANDARD MET

R. v. Navales, 2014 ABCA 70

The accused arrived in Calgary on an overnight bus from Vancouver and was observed by a plain-clothes police officer disembark and enter the bus depot. The officer was patrolling the bus depot as part of an "Operation Jetway" program, which targets drug trafficking and regularly monitored this particular bus route because Vancouver was known as a major hub for the supply of drugs. The accused walked towards the exit, then changed direction to the washroom area where police dogs were training. The accused noticed the police dogs, stopped, and changed direction towards the exit again. He then turned around again and headed back the way he had come until a police

"[T]he officer knew or ought to have known of the requirements of reasonable and probable grounds needed to open the duffle bag and that some thought had to be given to obtaining a search warrant."

dog crossed his path. He then stopped, turned and, once more, headed back to the exit. The officer followed the accused outside the bus depot and spoke to him, hoping he would agree to a luggage search. The accused showed the officer his bus ticket, which was purchased 35 to 45 minutes before the bus departed. The ticket had been purchased with cash in a name different than the accused's identification, which he provided to the officer from his wallet. The officer also noted that the accused had a large quantity of $100 bills in his wallet. When asked how long he was staying in Calgary, the accused gave two different responses within a minute or two. His behaviour became increasing nervous and when asked, "Did you pack your bags?", after a 3 to 4 second delay, the accused replied, "For the most part." A police dog was summoned to sniff the accused's luggage. When the dog indicated a drug scent, the accused was arrested and his bag was manually searched. Ten one kilogram bricks of cocaine were found inside.

Alberta Court of Queen's Bench

The accused argued that he was subjected to an unreasonable search under s. 8 of the *Charter* because the dog sniff was not based on a reasonable suspicion. The judge, however, disagreed. The judge noted that the reasonable suspicion standard required more than a sincerely held subjective belief on the part of the police officer. It must be supported by factual elements that can be adduced into evidence and permit an independent judicial assessment. "Trial judges need to look at the totality of the circumstances and review all the relevant factors collectively," she said. In determining that the search met the reasonable suspicion standard for a dog sniff, the judge identified the following relevant factors, none of which individually would support a reasonable suspicion, but when taken together supported "an objective suspicion by a reasonable person that [the accused] was in possession of contraband":

1. The bus was from Vancouver.
2. The accused said he was from Vancouver.
3. The accused's changes of direction in the bus depot and his attention to the police dogs.
4. The accused's bus ticket was purchased last minute and he paid cash.
5. The accused used what appeared to be a false name when he purchased his ticket.
6. The accused's wallet contained $100 bills, a denomination of bill the officer testified is used in the drug business.
7. The accused gave two different versions of how long he planned to stay in Calgary within one or two minutes.
8. The accused's increased nervousness.
9. The officer's question, "Did you pack your bags yourself?" to which the appellant replied after a 3 to 4 second delay, "for the most part."

The officer also testified that he had 26 years of experience with the drug unit, including 8 years with the Jetway program, that the Jetway team found the Vancouver route very productive for drug seizures, and that he had been told by drug couriers that they would purchase bus tickets at the last minute. There was no s. 8 breach, the evidence was admitted and the accused was convicted of trafficking in cocaine.

Alberta Court of Appeal

The accused appealed his conviction, again asserting his s. 8 right to be free from unreasonable search and seizure was violated. The Court of Appeal noted that a dog sniff of a traveller's luggage in a public terminal is a search within the meaning of s 8. However, the police have a common law power to engage in a sniffer-dog search as a tool to investigate drug offences if they have a "reasonable suspicion" that the person is involved in drug related offences. "The reasonable suspicion standard addresses the possibility of uncovering criminality, not the probability of doing so," said Justice Paperny for the majority. "The assessment of the constellation of factors must be done in a flexible and common sense manner, through the

"Reasonable suspicion must be assessed against the totality of the circumstances; the inquiry must consider the constellation of objectively discernible facts said to give the investigating officer reasonable cause to suspect that the individual is involved in criminal activity. The suspicion must be sufficiently particularized, and not amount merely to a generalized suspicion that would include too many presumably innocent persons within its purview. For this reason, factors that apply broadly to innocent people and those that may "go both ways", cannot, on their own, support a reasonable suspicion. However, exculpatory, neutral or equivocal information cannot be disregarded when assessing the constellation of factors. The totality of the circumstances, including favourable and unfavourable factors, must be weighed in the course of arriving at any conclusion regarding reasonable suspicion.

eyes of a reasonable person armed with the knowledge, training and experience of the investigating officer." She further stated:

> Reasonable suspicion must be assessed against the totality of the circumstances; the inquiry must consider the constellation of objectively discernible facts said to give the investigating officer reasonable cause to suspect that the individual is involved in criminal activity. The suspicion must be sufficiently particularized, and not amount merely to a generalized suspicion that would include too many presumably innocent persons within its purview. For this reason, factors that apply broadly to innocent people and those that may "go both ways", cannot, on their own, support a reasonable suspicion. However, exculpatory, neutral or equivocal information cannot be disregarded when assessing the constellation of factors. The totality of the circumstances, including favourable and unfavourable factors, must be weighed in the course of arriving at any conclusion regarding reasonable suspicion. [references omitted, para. 19]

In this case, the trial judge properly examined the totality of the circumstances, rather than assessing the factors individually. Some of the circumstances were general, such as the fact that the accused was traveling from Vancouver and was himself from Vancouver, while others were particular to the accused, such as his ticket purchase under a false name, two different versions of his plans when questioned, his possession of several $100 bills, his increasing nervousness, his actions to avoid the police dogs and his delayed response to the question as to whether he had packed his own bags. "The trial judge rightly noted that no one circumstance on its own would support a finding of reasonable suspicion, but she judged that, taken together, the evidence was capable of supporting a logical inference that the [accused] was in possession of contraband," said Justice Paperny. The trial judge was also entitled to take the officer's experience into account in assessing those factors that might otherwise be considered as too general to support a reasonable suspicion.

There was no reason to interfere with the trial judge's analysis. The majority dismissed the accused's appeal.

Same Result, Own Reasons

Justice Berger also would dismiss the appeal, but gave his own reasons. In his view, recent Supreme Court of Canada decisions have "dramatically [lowered] the threshold for searches by police officers on the basis of 'reasonable suspicion'." This standard engages the mere "possibility" of crime, which he felt had been "transformed into nothing more than a generalized suspicion." Since the standard was now so markedly diminished, he opined that the outcome of the appeal was inevitable.

Complete case available at www.albertacourts.ab.ca

FRIDAY, 28 MARCH 2014

WALKING THE NARROW ROAD OF LEADERSHIP:

Leadership Principles for Law Enforcement Personnel and Managers

The law enforcement profession is continuing to face significant challenges in its operational and organizational roles. Unfortunately, one of the more pressing issues facing law enforcement agencies may be the failure of its supervisors and managers to consistently practice recognized leadership principles that they learn in management training programs. Most supervisors and managers seem to take the "path of least resistance" when dealing with problem employees or in communicating with employees. This "wide road of mediocrity" is believed to be the primary path of most managers and these leadership failures have become a significant form of stress and frustration for the law enforcement culture.

This program examines why these problems occur, and the practical methods that managers and supervisors can use to become effective leaders and walk the narrow road of leadership excellence – both at work and at home.

JACK E. ENTER

Jack Enter has been associated with the field of criminal justice since 1972 when he began his career as a law enforcement officer. Since that time, he has worked as a street police officer, detective, vice/narcotics investigator, and as the administrator of a law enforcement agency in the suburbs of Atlanta. Jack obtained his Ph.D. in 1984 and has served as a professor and administrator in the university setting and served as Director of Information and Education for the Governor's Criminal Justice Coordinating Council. He was also one of the research associates assigned to the planning of the security component of the 1996 Summer Olympic Games in Atlanta.

He has lectured throughout the United States and abroad. He recently published his first book: *Challenging the Law Enforcement Organization: Proactive Leadership Strategies.*

Jack lives in Auburn, Georgia, with his wife Barbara. They have three adult children and five grandchildren.

"Leaders tend to generate commitment in most people they supervise. They lead by example, both professionally and personally. Though they fail on occasion, overall they consistently discipline themselves to demonstrate recognized leadership behaviors in their dealings with others."

Jack Enter

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