



A newsletter devoted to operational police officers in Canada.



IN MEMORIAM

On June 4, 2014 RCMP Constable Douglas Larche, Constable David Ross, and Constable Fabrice Gevaudan were shot and killed by a heavily armed subject in Moncton, New Brunswick. Two other RCMP constables were wounded. The subject was apprehended 30 hour later following a massive manhunt in which a large part of Moncton was shutdown.



Constable Douglas Larche was 40-years-old and had served with the RCMP for 12 years.

Constable David Ross was 32-years-old and had served with the RCMP for seven years.

Constable Fabrice Gevaudan was 45-years-old and had served with the RCMP for six years.



Cst. Douglas Larche



Cst. Fabrice Gevaudan



Cst. David Ross



On May 7, 2014 50-year old Thunder Bay Police Service **Constable Joseph Prevet** suffered a fatal heart attack while participating in a joint training exercise with the Ontario Provincial Police. He and his K9 partner, Timber, were navigating a course when he suddenly collapsed. He was transported to a local hospital where he passed away. Constable Prevet had served in law enforcement for 16 years and is survived by his wife and family.



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

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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 with the recruitment and handling of informants and agents. It includes preparation of judicial authorizations utilizing informant / agent information, policy and how to effectively report on information derived from these assets.

September 16-19, 2014

JIBC Police Academy Advanced Training

www.jibc.ca/course/POLADV715

BCACP/CACP

2015 Police Leadership Conference

April 12-14, 2015

"Leading with Vision and Values"

This is Canada's largest police leadership conference providing an opportunity for delegates to hear leadership topics discussed by world-renowned speakers. [Click here](#)

BCLEDN Conference

November 5, 2014

"Radicalization of Terrorists"

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Graduate Certificates

Intelligence Analysis

or

Tactical Criminal Analysis

www.jibc.ca

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JUSTICE INSTITUTE
of BRITISH COLUMBIA
LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

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

The active reader: strategies for academic reading and writing.

Eric Henderson.

Don Mills, ON: OUP Canada, 2011, c2012.

PE 1408 H385 2012

Aggression [videorecording].

VEA

Burnaby, BC: Distribution Access [distributor], c2013.

1 videodisc (22 min.) : sd., col. ; 4 3/4 in. (DVD)

Are all people capable of murder? What drives people to violence? Can TV affect our actions and even influence us to acts of violence? This interview-led documentary style program examines aggressive media, aggressive behaviour and the banality of evil with the support of original film footage of research and actual crimes. This program features research psychologists providing explanations and reasoning behind aggression.

BF 575 A3 A34 2013 D1841

Doing qualitative research.

David Silverman.

London, UK; Thousand Oaks, CA; New Delhi; Singapore: SAGE Publications Ltd, c2013.

H 62 S472 2013

E-tivities: the key to active online learning.

Gilly Salmon.

New York, NY: Routledge, Taylor & Francis Group, c2013.

LB 1044.87 S25 2013

Exploring digital libraries: foundations, practice, prospects.

Karen Calhoun.

London, UK: Facet Publishing, c2014.

ZA 4080 C35 2014

Getting control of yourself: anger management tools & techniques.

with Christian Conte, Ph.D.

Mill Valley CA: Psychotherapy.net, c2012.

1 videodisc (75 minutes); 4 3/4 in. (DVD) + 1 instructor's manual (52 pages ; 18 cm)

Instructor's manual by Katie Read, MFT.

RC 569.5 A53 G47 2012 D1838

HBR guide to persuasive presentations.

Nancy Duarte.

Boston, MA: Harvard Business Review Press, c2012.

HF 5718.22 D817 2012

The little book of stress relief.

David Posen.

Buffalo, NY: Firefly Books, c2012.

RA 785 P67 2012

Managing business ethics: straight talk about how to do it right.

Linda Klebe Treviño, Katherine A. Nelson.

New York, NY: John Wiley, c2011.

HF 5387 T734 2011

Mediating employment disputes.

Barry Kuretzky, Jennifer MacKenzie.

Toronto, ON: Canada Law Book, c2013.

KE 3206 K87 2013

Successful writing at work.

Philip C. Kolin.

Boston, MA: Cengage Learning, c2013.

PE 1408 K694 2013

Teaching in blended learning environments: creating and sustaining communities of inquiry.

Norman D. Vaughan, Martha Cleveland-Innes, and D. Randy Garrison.

Edmonton, AB: AU Press, c2013.

LB 2395.7 V39 2013

www.i0-8.ca



EVIDENCE AS A WHOLE SUPPORTS KNOWLEDGE & CONTROL

The Ontario Court of Appeal upheld a trial judge's ruling that an accused committed theft, produced marihuana and possessed it for the purpose of trafficking. Thanh Bao Nguyen had argued that the evidence in the trial did not support the inference that he had the required knowledge and control of the marihuana grow operation. This evidence included the presence of his car on two occasions at the premises where the grow-op was located, his possession and use of the garage door opener, a sighting of him coming from the area of the front door of the premises, his exit from the garage about five hours after the police had commenced observation of the premises, and the seizure from his own home of documents related to the operation of a grow-op.

If the facts were taken individually, knowledge and control may not have been established. However, the trial judge was required to consider the evidence as a whole. The grow-op would have been obvious to anyone entering the home and, in the Court of Appeal's view, the whole of the evidence fully supported the inference that Nguyen had been inside the home and had the required knowledge and control. - *R. v. Nguyen*, 2014 ONCA 7

DISTURBANCE REQUIRES MORE THAN YELLING AT POLICE

R. v. Kukemueller, 2014 ONCA 295



The fire department received a call to attend the accused's rural address for a car fire. The car, which belonged to the accused's girlfriend Wiles, had been crashed into a tree. The fire department requested police assistance. At the scene there was a crowd of young people who appeared to have been drinking. As firefighters extinguished the fire, police learned the vehicle fire may have been caused by people playing "demolition derby." A police officer spoke to the accused and Wiles. They both smelled of alcohol. When Wiles told police that she had been driving the car when it hit the tree, she was arrested for dangerous driving but struggled with the officer. The accused and some of his friends became upset and the officer used her emergency button to request backup.

The police officer and a firefighter took Wiles to the police car at the road and the crowd of young people started yelling. The accused was upset and yelling and swearing. More officer's arrived and, not long afterwards, so did the accused's father driving an off-road vehicle. He was arrested for impaired driving. The accused reacted with a loud, profane and angry tirade against the police. About 22 people, including family members, friends, firefighters and police officers, were present. Even the accused's grandmother came out of her house and tried to calm him down. The accused was arrested and charged with causing a disturbance and later with assault. He allegedly scooped water from the toilet, threw it around and got some of it on a civilian cell monitor at the police station.

Ontario Court of Justice



The judge concluded that the accused had caused a disturbance. She found the accused's "behaviour had an effect on the other family and friends who were present and contributed to raising the tension at the scene amongst those people as well as the police".

In her view, the accused's behaviour "made things worse". A conviction of causing a disturbance in or near a public place contrary to s. 175(1) (a) of the *Criminal Code* was entered. As for the assault charge, the judge was not satisfied that the accused had deliberately splashed water on the cell attendant. He was acquitted of assault.

Ontario Superior Court of Justice



The accused's appeal was unsuccessful. Since the accused's conduct "contributed to raising the tension at the scene," an appeal judge found the trial judge did not err in holding that the offence of causing a disturbance had been made out.

Ontario Court of Appeal



A further appeal by the accused was successful. The Ontario Court of Appeal concluded that the trial judge had erred in law in determining that a disturbance occurred. Although it was not condoning yelling obscenities at the police, conduct described as obnoxious or deplorable, the Court of Appeal found it was not criminal.

Under s. 175(1)(a) it is an offence for someone who, "not being in a dwelling-house, causes a disturbance in or near a public place, (i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language..." There are two elements to this offence:

- the commission of one of the enumerated acts.
- the commission of the acts caused a disturbance in or near a public place.

In this case there was no doubt the accused committed one of the enumerated acts. He yelled and swore at the police. As for whether those acts "cause[d] a disturbance in or near a public place," the Court of Appeal found they did not.

The meaning of "disturbance" in s. 175(1)(a) is not so expansive as to include the mere disturbing of the peace or tranquility on a person's mind. Mere mental or emotional annoyance or disruption is

“Contributing to raising the tension at the scene of an interaction between the police and the public does not amount to the kind of disturbance that is required for this offence to be made out.”

insufficient. Rather, the meaning of “disturbance” is more restrictive and the enumerated conduct must cause, in the words of *R. v. Lohnes*, [1992] 1 S.C.R. 167, “an overtly manifested disturbance which constitutes an interference with the ordinary and customary use by the public of the place in question”. The aim of the offence is “not the protection of individuals from emotional upset, but the protection of the public from disorder calculated to interfere with the public’s normal activities” and interference “with the ordinary use of a place”. Emotional upset does not amount to interference with the ordinary and customary use of the premises by the public.

Here, the accused’s conduct did not satisfy the second element of the offence – causing a disturbance in or near a public place. “There was no evidence and no finding that the [accused’s] conduct interfered with the public’s normal activities or with the ordinary and customary use by the public of the place in question,” said Justice Sharpe on behalf of the Court of Appeal. “Contributing to raising the tension at the scene of an interaction between the police and the public does not amount to the kind of disturbance that is required for this offence to be made out.” As for the accused’s grandmother coming out of her house and trying to calm him down, she was “simply concerned about his well-being. She thought that he would listen to her. She testified that she was ‘upset’ but ... emotional upset does not amount to a disturbance.”

The accused’s appeal was allowed and his conviction for causing a disturbance was set aside.

Complete case available at www.ontariocourts.on.ca

www.10-8.ca

CAUSING A DISTURBANCE: A COMMENTARY

Section 175 of the *Criminal Code* creates the offence of causing a disturbance. It reads (in part):

s. 175 Criminal Code

(1) Every one who

(a) not being in a dwelling-house, causes a disturbance in or near a public place,
(i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,

... ..

is guilty of an offence punishable on summary conviction.

Evidence of peace officer

(2) In the absence of other evidence, or by way of corroboration of other evidence, a summary conviction court may infer from the evidence of a peace officer relating to the conduct of a person or persons, whether ascertained or not, that a disturbance described in paragraph (1)(a) ... was caused or occurred.

What is a Disturbance?

In *R. v. Lohnes*, [1992] 1 SCR 167 the Supreme Court of Canada considered this section. First, it found the word “disturbance” was capable of many meanings. But just what is a disturbance such that criminal liability would attach? The Court found it was more than mere emotional disturbance, annoyance or anxiety. Simply applying a mental disturbance test was not sufficient. In the Court’s view:

“There must be an externally manifested disturbance of the public peace, in the sense of interference with the ordinary and customary use of the premises by the public.”

It must be something more than people being upset, offended or their feelings hurt.

The *actus reus* for causing a disturbance has two components:

1. The accused must have engaged in one of the enumerated acts, which includes "screaming, shouting, swearing, or using insulting or obscene language" and
2. The accused's actions must have caused "an externally manifested disturbance of the public peace, in the sense of interference with the ordinary and customary use of the premises by the public." The *Lohne's* Court went on to add:

As the cases illustrate, the interference with the ordinary and customary conduct in or near the public place may consist in something as small as being distracted from one's work. But it must be present and it must be externally manifested.

The Supreme Court, in looking at the French version of s. 175(1), noted the test would be satisfied if actions by an accused resulted in an "externally manifested disturbance involving violent noise or confusion disrupting the tranquillity of those using the area in question."

In addition, there are the elements of "not being in a dwelling-house" and "in or near a public place."

So then, **can a police officer be disturbed when responding to a call?** A couple of recent decisions that post-date *Lohnes* seem to say no.

In *R. v. Swinkels*, 2010 ONCA 742, two police officers were patrolling downtown just as the bars were closing. They heard someone yell obscenities from within a large crowd of about 15-20 people outside a bar. The officers pulled over to investigate, and as they exited their police car Bradley Swinkels came quickly towards one of them yelling further obscenities. Swinkels arms were straight out and his middle fingers were up. An officer believed that Swinkels was about to assault or grab him, so the officer pulled him to the ground and arrested him for causing a disturbance. Swinkels was convicted at trial of causing a disturbance but a majority of the Ontario Court of Appeal overturned the conviction.

Justice LaForme stated, **"Generally speaking, the trial jurisprudence has held that shouting obscenities at police officers is not a disturbance in and of itself."** The Court went on to add that **"a 'public disturbance' requires more than a crowd observing – or even shouting anti-police sentiments at – police officers in the course of arrest."** In this case, the evidence was that the people that had gathered were "a normal bar type crowd," the streets were packed and there was "ongoing yelling" in the area. It was not Swinkels who had initially caused the crowd to gather and while a group of onlookers did gather around the police, it happened only after the police engaged him to make an arrest.

In *R. v. Walker*, 2007 ONCA 104, the accused was a police officer convicted of assault causing bodily harm. He was patrolling when he saw a man he believed may have been in a gang and fit the description of someone wanted for arrest. He quickly realized the man was not the person wanted but continued to question him anyways. The man loudly insulted the officer, accusing him of being racist. The officer felt the man was causing a disturbance because people on the street were watching. He arrested the man, but the man resisted. The officer knocked the man to the ground, breaking his cheek bone. Walker unsuccessfully appealed to the Ontario Superior Court of Justice which was affirmed on appeal by the Ontario Court of Appeal. Walker tried to argue that the man, through his actions of berating him, caused a disturbance and could be arrested for it. The man resisted the officer's efforts to place him under arrest and, as a result, the officer was entitled to use reasonable force to effect the arrest. Here is what the Ontario Court of Appeal had to say:

Even if there was a "disturbance," in common parlance, there was no "disturbance" within the meaning of the Criminal Code in this case. The trial judge found that the [officer] had no right to continue investigating or questioning the complainant. While the complainant's loud and rude protestations may have been "disturbing" to some, they did not constitute reasonable grounds for the [officer] whose improper actions instigated the exchange to believe there was a criminal disturbance.

Walker tried appealing to the Supreme Court of Canada but it did not want to hear the case.

Here are some other note-able quotes:

“[S]imply swearing at a police officer, without more, is not a crime.” - *R. v. Murphy*, 2013 CanLII 40807

“[T]he law is clear that yelling and swearing in a public place is not in itself a criminal offence. Equally, the existence of emotional disturbance, such as [the constable’s] belief that the defendant’s language was vulgar, aggressive and inappropriate, is insufficient to establish a disturbance within section 175(1)(a).” - *R. v. Osbourne*, 2008 ONCJ 742

s. 175(2) Criminal Code

But what of s. 175(2)? What this appears to say is that a police officer can give evidence of a disturbance sufficient for a conviction without the necessity of Crown to call individual members of the public as witnesses to establish that they were disturbed. Rather, a judge can infer the fact of a disturbance from a police officer’s testimony.

Of course, this requires more than the officer simply stating that they were upset/offended/disturbed. Instead, the officer should look at what is happening around them. Are other people being disturbed? What are they doing? Are they gathering in a crowd? Are they stopping what they normally would be expected to do? What activity is normally associated with the place? Is what is happening now different than what is expected? In the words of Lohnes, “Is there an externally manifested disturbance of the public peace, in the sense of interference with the ordinary and customary use of the premises by the public?”

Although not required by subsection (2) a civilian witness or two for court might be most beneficial.

REASONABLE GROUNDS NEED ONLY BE RATIONALLY SUPPORTED

R. v. Churko, 2014 SKCA 41



Shortly before 1:00 am, the accused was observed driving into the parking lot of a bar. A police officer patrolling in the parking lot observed that his driving and the way he stopped his vehicle were abnormal or out of the ordinary. The accused entered the parking lot at a higher rate of speed than would normally be expected and then came to an abrupt stop. When the accused got out of his vehicle he appeared to hold onto the door to steady his balance. The officer approached and detected a smell of alcohol coming from the accused’s breath and saw that his eyes were bloodshot. The officer arrested the accused and subsequently made a breath demand. Samples of 150 mg% and 130 mg% were obtained and charges of impaired driving and over 80mg% were laid.

Saskatchewan Provincial Court



The police officer testified that he arrested the accused because he had reasonable and probable grounds to believe he was impaired. The trial judge accepted the officer’s observations but determined that they established only reasonable suspicion or, at most, a subjective belief in reasonable and probable grounds. The observations did not sufficiently reach the level of objective grounds necessary for arrest. The judge concluded that the accused’s s. 9 *Charter* right had been violated and the Certificate of Analysis was excluded under s. 24(2). As for the impaired driving charge, the judge had a reasonable doubt that the accused’s ability to operate a motor vehicle was impaired. The accused was found not guilty of all charges.

Saskatchewan Court of Queen’s Bench



The appeal judge found the observations of the police officer and the evidence as a whole established both a subjective and objective belief there were reasonable and probable grounds for the breath demand:

... I am of the opinion that [the officer] subjectively held reasonable grounds to arrest [the accused] at the point in time when he exited his truck and I am of the view that his grounds were justifiable on an objective basis. At that moment, [the officer] was not required to establish that an indictable offence had been committed on a balance of probabilities, and I am also satisfied that he had more than just a "reasonable suspicion" or hunch. In this regard, I am taking into consideration that all evidence available to the officer has to be viewed cumulatively and not in piecemeal fashion. Lastly, the standard must be applied contextually, having regard to the events leading up to the arrest, the dynamics at play, and the experience and training of the arresting officer. [2013 SKQB 235 at para. 27]

The accused's over 80 mg% acquittal was set aside and a conviction was entered.

Saskatchewan Court of Appeal



The accused then challenged his conviction, arguing the appeal judge erred in determining that the officer had the requisite reasonable

grounds. Justice Ottenbriet, on behalf of the Court, stated:

... The reasonableness of the police officer's belief must be considered by the trial court from the vantage point of whether the observations and circumstances articulated by the officer are rationally capable of supporting the inference of impairment which is drawn by the officer; however, the Crown does not have to prove the inferences drawn were true or even accurate. In other words, the factors articulated by the

"The reasonableness of the police officer's belief must be considered by the trial court from the vantage point of whether the observations and circumstances articulated by the officer are rationally capable of supporting the inference of impairment which is drawn by the officer."

arresting officer need not prove the accused was actually impaired. This is so because that is the standard of proof reserved for a trial on the merits, a proof beyond a reasonable doubt.

In this case, the observations and circumstances as a whole articulated by the police officer and accepted by both the trial judge and the summary conviction appeal court judge are rationally capable of establishing an objective belief of impairment and therefore reasonable and probable grounds. The trial judge erred in the application of the burden on the Crown to establish reasonable and probable grounds and appeared to require that the facts articulated by the police officer 'would reasonably lead to a *conclusion* that this man was driving while impaired by alcohol [emphasis added]" ... [paras. 5-6]

The appeal court judge correctly concluded that the trial judge erred in determining the officer lacked reasonable and probable grounds. The accused's appeal was dismissed.

Complete case available at www.canlii.org

LEGALLY SPEAKING:

SENTENCING: DIAL-A-DOPING



"It is well known that dial-a-dope operations enable a pervasive and rapid dissemination of illicit narcotics that wreak destruction to

both the individuals who use them and to our community. The proliferation of these operations has significantly increased accessibility to these drugs, and their harmful effects. As a result, the courts have routinely recognized that the primary objectives in imposing sentences for trafficking in this manner must be deterrence and denunciation.." – British Columbia Court of Appeal Justice Neilson in *R. v. Gill*, 2013 BCCA 320 at para. 22, upholding a six-month custodial sentence for selling 0.8 grams of cocaine in a dial-a-dope scenario.

CROWN NOT REQUIRED TO DETAIL EVERY MINUTE OF DELAY

R. v. Singh, 2014 ONCA 293



While patrolling various licenced establishments, a police officer stopped the accused driving at 1:52 am. The officer formed a suspicion the accused was operating a vehicle with alcohol in his body and made an ASD demand at 1:58 am. A suitable sample was provided at 2:00 am and a FAIL registered. The officer then arrested the accused at 2:01 am for operating a motor vehicle while over 80 mg%. She was then read her right to counsel, cautioned and given a breathalyzer demand at 2:05 am. The accused was transported to the police station, arriving at 2:22 am, where she was presented to the breath technician at 3:11 am. The first breath sample of 170 mg% was obtained at 3:22 am and a second sample of 160 mg % was taken at 3:50 am.

Chronology

2:01 AM: accused arrested
2:05 AM: breathalyzer demand given
2:22 AM: arresting officer and accused arrived at the police station
3:11 AM: accused delivered to the breath technician
3:22 AM: first breath sample taken = 170 mg%
3:50 AM: second breath sample taken = 160 mg%

Ontario Court of Justice



At trial the accused argued that the second breath sample was not taken "as soon as practicable" after the first breath test as required by s. 258 (1)(c)(ii) of the *Criminal Code*. In his view, the Crown had failed to specifically explain, by calling evidence, the 28-minute delay between the first and second breath samples. The judge, however, rejected this submission. In the judge's opinion, the Crown need

not provide an explanation for every minute that the accused was in police custody. He concluded that all of the times were reasonable and that the police had acted "as soon as practicable." The accused was convicted of over 80 mg%.

Ontario Superior Court of Justice



The accused successfully appealed his conviction. The appeal judge noted that an interval of 17 to 20 minutes between samples is commonly seen, in light of the statutory requirement that there be an interval of at least 15 minutes between the taking of the two samples. In this case, however, there was an unexplained delay of 8-11 minutes. With this unexplained gap between the two tests, the Crown had failed to prove the samples were not taken "as soon as practicable." The accused's conviction was quashed and an acquittal was entered.

Ontario Court of Appeal



The Crown appealed the acquittal submitting that the trial judge did not err in finding the samples were taken "as soon as practicable." The Court of Appeal agreed. In its view, just because there is an unexplained gap between two samples does not necessarily lead to the conclusion that the "as soon as practicable" requirement was not met. The Crown is not required to provide a detailed account of every minute an accused is in custody, including between tests:

The requirement that the samples be taken "as soon as practicable" does not mean "as soon as possible". It means nothing more than that the tests should be administered within a reasonably prompt time in the overall circumstances. A trial judge should look at the whole chain of events, keeping in mind that the Criminal Code permits an outside limit of two hours from the time of the offence to the taking of the first test. The "as soon as practicable" requirement must be applied with reason.

"The requirement that the samples be taken 'as soon as practicable' does not mean 'as soon as possible'. It means nothing more than that the tests should be administered within a reasonably prompt time in the overall circumstances."

It is worth repeating that the Crown is not required to call evidence to provide a detailed explanation of what occurred during every minute that the accused is in custody. These provisions of the Criminal Code were enacted to expedite the trial process by facilitating the introduction of reliable evidence to prove an accused's blood-alcohol level. Interpreting these provisions to require an exact accounting of every moment in the chronology from the time of the offence to the second test runs counter to their purpose. ... "The touchstone for determining whether the tests were taken as soon as practicable is whether the police acted reasonably." [references omitted, paras. 14-15]

Here, the trial judge found the samples were taken as soon as practicable. There was no evidence the delay between the two samples was related to the reliability of the test results nor did the trial judge misinterpret or misapply s. 258 (1) (c) (ii) to the facts of this case. The Crown's appeal was allowed and the accused's conviction was restored.

Complete case available at www.ontariocourts.on.ca

NO LINK BETWEEN CRIMES & RESIDENCE: ITO INSUFFICIENT TO SUPPORT WARRANT

R. v. Liu & Le, 2014 BCCA 166



Acting on the information of five confidential informants, the police investigated Liu and Le for drug trafficking. These informers provided broadly consistent information that an individual known as "Greek Peter" was selling drugs. Four different informers indicated that Greek Peter was trafficking drugs on behalf of Le while one also said that Liu and Le were involved in providing cocaine to Greek Peter for the purposes of trafficking. The affiant also received an anonymous phone call from a tipster stating that a Vietnamese man named Michael and an Asian woman named Coco were selling cocaine at the kilogram level. The anonymous caller also indicated that the couple lived in an apartment building. Based on information from two of these informers and police interviews with representatives of certain apartment buildings, the police confirmed that Greek Peter lived in a

building known as Regiment Square. It was believed that he dealt drugs near his residence. Greek Peter's suppliers were said to be a man known as "Viet Mike" (Le) and a woman named "Coco" (Liu).

During a four-week period of surveillance, including the use of vehicle trafficking devices, the police observed Liu and Le using a magnetic fob to gain entry into the parking garage of Regiment Square and from there using a key to enter Greek Peter's apartment. There was evidence that one or both of them visited Regiment Square nine times, staying only a short while each time. The police decided to arrest both Liu and Le as they left Regiment Square. Le was in possession of \$780 in cash and Liu had \$2,157, but neither of them was in possession of drugs. The police then obtained search warrants for Greek Peter's residence, as well as Liu and Le's apartment where police seized significant quantities of drugs, including 740 grms. of cocaine, 140 grms. of heroin and \$45,000 cash along with other evidence consistent with drug trafficking.

British Columbia Provincial Court



The accused argued that the information deposited in the ITO was insufficient to support the search warrant for their home. They argued that without a valid warrant, the search breached s. 8 of the *Charter* and the evidence should have been excluded under s. 24(2). The judge found the warrant was lawfully issued. She held that a common sense inference could be drawn that drugs were stored at the accused's apartment. This inference was not based on the fact that this was merely their home, but that it was where they generally returned after their short visits to Greek Peter's residence. In the judge's view, the travel patterns provided an evidentiary basis upon which the issuing justice could reasonably have concluded that Liu and Le were supplying Greek Peter with cocaine stored at their residence. In exchange, they received cash that they took back to their apartment. The search and seizure did not violate the *Charter* and the evidence was admissible. Liu and Le were convicted possessing controlled substances (cocaine and heroin) for the purpose of trafficking.

British Columbia Court of Appeal



Liu and Le submitted that there was no objective basis for believing there was a link between their apparent trafficking activities and their home. They noted that there were nine instances detailed in the ITO where one or both of them likely attended at Greek Peter's Regiment Square apartment, but an absence of information about where they were before or after they visited it. In their view, the police were merely engaged in a fishing expedition when their was searched. So, even assuming the police had credible grounds to believe they were trafficking drugs, the facts set out in the ITO did not support a credibly based probability that cocaine would be found in their home.

The Crown, on the other hand, conceded that the ITO would be insufficient if it rested solely on the basis that there would be drugs in Liu and Le's home because they were drug dealers. However, the Crown suggested that a reasonable inference could be drawn from the ITO that the accused used their apartment to store drugs. The threshold, the Crown opined, was that the apartment was a probable storage place.

Justice Garson, delivering the Court of Appeal's opinion, first summarized the jurisprudence regarding the legal standard for reviewing the validity of a search warrant. She said this:

- The trial judge's role in reviewing the validity of a search warrant is to consider whether the material filed in support of the warrant, as amplified on review, could support the issuance of the warrant.
- The trial judge should examine the information in its totality, not on a piece meal basis, in a "practical, non-technical, and common sense basis".
- The question is not whether the reviewing judge would have granted the order, but whether there was an objective basis on which the issuing justice could have done so.

- The appropriate standard is one of "reasonable probability" rather than "proof beyond a reasonable doubt" or "prima facie case". The phrase "reasonable belief" also approximates the requisite standard.
- Reasonable grounds may be said to exist at "the point at which credibly-based probability replaces suspicion".

The Court of Appeal found there was insufficient grounds to justify the search warrant for the accuseds' apartment. Although there was overwhelming evidence that Greek Peter was trafficking drugs and information that could provide reasonable grounds for the police to conclude the accuseds were trafficking in drugs with him, there was not enough to provide a reasonable belief that evidence of drug trafficking would be found at their apartment. Despite the tracking devices and frequent surveillance, the police did not observe the accused depart from their apartment before attending Regiment Square. Justice Garson stated:

In my view, the ITO filed in support of the warrant, as amplified and excised on review, did not disclose a basis on which the issuing justice could conclude that there was a reasonable probability drugs were being stored at the [accuseds'] residence. The totality of the circumstances, including the frequency of the [accused's] attendance at Regiment Square, does not lead to a credibly based probability that the drugs were coming from [the accuseds' residence]. There is a gap in the information as to the [accused's] point of origin prior to their alleged delivery of drugs to Regiment Square. This gap is curious given that police placed tracking devices on the [accuseds'] vehicles. In my view, there is nothing more (on the information presented in the ITO) than supposition that the drugs were originating from [the accuseds' residence]. [para. 45]

The trial judge erred in concluding that the ITO, as amplified and excised on review, disclosed reasonable grounds to issue a search warrant for the accuseds' apartment. Section 8 had been breached and a new trial was ordered so the proper application of s. 24(2) could be applied.

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

CUMULATIVE CIRCUMSTANCES JUSTIFY STRIP SEARCH

R. v. Mammadov, 2014 ONCA 328



Shortly after midnight an eyewitness saw the accused crash into a traffic sign, leave his car, walk across the roadway, throw items into a nearby wooded area and then return to his car. The witness called police and, when an officer arrived, the accused left his car and tried to run away. But he was caught. He was intoxicated, arrested and transported to the police station where he provided two breath samples. After the investigation was complete, the accused was strip searched and lodged in a cell until police considered him sober enough to be released.

Ontario Court of Justice



At trial the judge found the strip search unrelated to gathering evidence nor for investigative purposes. The arresting officer said he was worried the accused was carrying something that he might use to harm himself. The sergeant in charge, however, said that the accused was strip searched as a matter of routine – he was being lodged in a cell. The Crown conceded this was a s. 8 *Charter* breach. The accused then admitted he was impaired at the time of the offence but wanted a stay of proceedings under s. 24(1).

The judge refused to grant a stay and convicted the accused of impaired driving. In her view, the strip search had no impact on trial fairness nor on the accused's ability to make full answer and defence. The strip search had nothing to do with the collection of evidence against the accused nor was any evidence obtained as a result of the s. 8 breach. As for whether irreparable prejudice would be caused to the integrity of the justice system if the prosecution were to continue, the trial judge considered the gravity of the breach and the manner in which the search was conducted. She found the search was carried out in a private room where the accused was given the opportunity to remove his clothing himself and the procedure followed by the

officers ensured that he was never completely naked. The arresting officer was sensitive to the intrusive nature of a strip search and took whatever steps he could to minimize the inherent traumatic effects that flowed from it. As for the gravity of the breach, the judge found the police did not lack reasonable and probable grounds to conduct the strip search. The arresting officer's concern for the accused's safety, the judge found, could reasonably arise from (1) the accused disposing of unknown items at the scene of the collision; (2) his attempt to flee; (3) his severe impairment; and (4) vomiting twice while in custody.

Ontario Superior Court of Justice



The appeal court dismissed the accused's appeal from his conviction for impaired driving. The appeal judge found no error in the approach taken by the trial judge.

Ontario Court of Appeal



The accused sought leave to further appeal. He submitted the trial judge erred in not entering a stay under s. 24(1) for the conceded violation of his s. 8 *Charter* breach. In his view, the trial judge did not properly apply the objective component of the test for justifying a strip search as explained by the Supreme Court of Canada in *R. v. Golden*, [2001] 3 S.C.R. 679. He contended that the judge did not look for the objective confirmation of the arresting officer's subjective safety concern. Instead, the accused argued that the circumstances outlined by the trial judge only gave rise to a generalized concern for safety and did not amount to objective evidence of the likelihood that he had secreted anything with which he could harm himself.

The Court of Appeal, however, disagreed that "the circumstances described by the trial judge [could] be placed in such watertight compartments." Here, the Court of Appeal found "the cumulative circumstances set out by the trial judge gave rise to a concern for the [accused's] safety and amounted to reasonable and probable grounds to strip search

him.” Thus, the objective standard required by *Golden* had been met.

The trial judge did not err in exercising her discretion to refuse to grant a stay and the accused’s application for leave to appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

TOTALITY OF CIRCUMSTANCES CONSIDERED IN ARREST ANALYSIS

R. v Canlas, 2014 ABCA 160



A police officer assigned to a roving traffic unit pulled over a Suburban driving near Vermillion, Alberta. The accused was the driver and he had one passenger with him. When the door to the Suburban was first opened, the officer smelled a faint odour of raw marijuana, (although no marijuana would later be found). The officer also made the following additional observations:

- A large can of air freshener in the passenger side door compartment, which he knew was often used to conceal drug odours.
- Fast food wrappers littering the vehicle, consistent with drug couriers being unwilling to leave their vehicle to eat while travelling.
- When the accused was asked why he was speeding, he said he was to get to a basketball tournament in Saskatoon which was to start two hours later, at 5 pm that day; however, neither the accused nor his passenger were able to provide the location of where they were to play, the schedule or plans for the tournament, or the full name of their coach.
- A parka lay across the backseat concealing what was beneath it. When the officer returned to the Suburban after running a document search, he noted a basketball had been placed on top of the parka which he interpreted as an effort to support the occupants’ earlier claims that they were headed to a basketball tournament. He found this action extremely odd.

- The accused and his passenger appeared very nervous when first spoken to, continually rubbing their hands over their limbs. This nervousness increased rather than decreased as the interaction continued, which in the officer’s experience was inconsistent with what usually happens. A stopped driver is initially nervous but then calms as he talks to the police.
- The accused and his passenger initially became vague when asked for further details about the basketball tournament. When later questioned separately they provided inconsistent information as to the details of the tournament and as to their own occupations.

The accused was arrested for possessing a controlled substance and the Suburban was searched. In the vehicle police located four ounces of crack cocaine under the parka, 190 ecstasy pills, numerous cellphones, a camera and over \$5,000 in currency. A loaded handgun was also found under the vehicle’s seat.

Alberta Court of Queen’s Bench



The arresting officer testified that he had dealt with a variety of narcotics throughout his career and his experience made him very familiar with the smell of marijuana in any amount, at any stage of processing. The judge determined that under all of the circumstances the officer had the requisite subjective as well as reasonable and probable grounds to arrest the accused and search the vehicle. There was no *Charter* breach and the evidence was admitted. The accused was convicted of possessing a controlled substance for the purpose of trafficking and possessing a loaded firearm.

Alberta Court of Appeal



The accused suggested the grounds for arrest and search were inadequate. But Justice Bielby, delivering the Court of Appeal’s judgment, found the police actions lawful under s. 495(1)(a) of the *Criminal Code*, which provides that a peace officer may arrest without warrant a person

who, on reasonable and probable grounds, they believe has committed an indictable offence.

For an arrest to be lawful under s. 495(1)(a) there are two components that must be satisfied; (1) subjective and (2) objective. As for the subjective component of the standard, the officer testified he believed he had grounds to arrest. This subjective belief went unchallenged.

As for the objective test, a court is required to determine "whether the entire constellation of facts suggests the reasonable and probable existence of criminal behaviour." In this case, the trial judge was not limited to the quality of the marijuana odour. She was entitled to consider the totality of the circumstances in determining whether there were reasonable grounds to believe an offence had been committed. Justice Bielby stated:

In regard to the objective component, she expressly observed that while one piece of evidence, such as the can of air freshener maybe dismissed as a neutral factor, context and circumstances are key in assessing the entire collection of pieces of evidence. That collection included [the accused's] nervousness, the inconsistent stories relating to the basketball tournament, the faint smell of marijuana, the air fresher, the parka and the basketball. This totality of evidence objectively supported her conclusion that reasonable grounds for arrest had been established objectively as well as subjectively. [para. 12]

The arresting officer's experience also played a role in the objective analysis.

The Court of Appeal also dismissed that suggestion that the statements he made about the basketball tournament should not have been considered by the trial judge in the reasonable grounds analysis. They were made before his arrest, but after the traffic stop and he had not yet been cautioned or given information about his right to counsel. He argued that he was detained at the time and the only questions the officer could ask were those relating to driving offences. He was never told he was free to leave, nor was he advised that he was not under any obligation to answer questions other than those

relating to driving offences. Although this issue was not argued at trial nor raised in the accused's constitutional notice of appeal, Justice Bilby found the questions posed by the officer before the accused's arrest were relevant to his investigation of traffic offences as well as his concern that criminal activity had or was occurring. "He first asked [the accused] why he was speeding, a question which could well fall within the proper ambit of questioning for the apparent traffic violations," said Justice Bielby. "[The accused's] answers revealing deficiencies in his knowledge of basketball tournament details, flowed naturally and logically from the question about speeding." She continued:

This situation is parallel to that considered by the Supreme Court of Canada in *R. v. Nolet*, 2010 SCC 24, ... in 2010 where an officer discovered contraband while searching the cab of a truck as authorized by provincial legislation in the context of investigating a regulatory offence. The court concluded that the evidence of contraband discovered there was properly admitted at trial because the officer in conducting the search did so with a dual purpose - to find evidence of a regulatory offence as well as evidence of a criminal offence. [para. 18]

The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

AT POINT OF DETENTION OFFICER HAD REASONABLE SUSPICION: NO s. 9 BREACH

R. v. Papilion, 2014 SKCA 45



At about 2:05 am a patrol officer noticed a Ford Explorer travelling towards him. It was not being driven erratically, it was not speeding, and had no mechanical issues. However, the town was having problems with vandalism and break and enters into vehicles in the area where the vehicle was headed. As the officer drove down the road he came across a parked Ford Explorer with the lights off. As he drove by, he noticed that the driver's seat was reclined and saw a head "bob" up and down. The officer backed up and pulled behind the

Explorer. He got out of his marked patrol car and approached the driver's side of the Explorer. The driver's side window was rolled down and the officer saw a male in the driver's seat, a female in the passenger seat, and a strong odour of alcohol coming from the vehicle.

The driver provided his driver's licence upon request and said that he had a few beers when asked about drinking. When he got the driver to exit the Explorer, the officer noted the accused had slightly red, bloodshot eyes, slightly slurred speech, and the odour of alcohol on his breath. An approved screening device demand was given and the accused failed the test. The officer concluded that the accused's ability to operate a motor vehicle was impaired by alcohol, the breath demand was made, the right to counsel and police warnings given and a reading of 110 mg% was obtained at 2:45 am. The Intoxilyzer registered an ambient failure as the officer readied it for the second test. He waited a short time and prepared the instrument again. The second test, taken at 3:13 am, also resulted in a reading of 110 mg%. The accused was charged with impaired driving and driving over 80 mg%.

Saskatchewan Provincial Court



The judge found that the accused was arbitrarily detained under s. 9 of the *Charter* when the officer "attended" on the Explorer. In the judge's view, the officer was not "checking for sobriety, licences, ownership, or mechanical fitness of the accused's vehicle" and therefore he was not acting pursuant to statutory authority conferred under s. 209.1 of Saskatchewan's *Traffic Safety Act*. Nor was there any evidence that the officer had reasonable grounds to believe the accused was involved in criminal activity. Although the accused's actions may have been "odd," this was insufficient to establish reasonable grounds. Instead, the judge held the officer was engaged in "preventative policing" which was an impermissible authority upon which to detain or investigate the accused. As a result of the s. 9 breach, all of the evidence was excluded under s. 24(2), including the fail reading on the approved screening device, the Intoxilyzer results, and the

indicia of impairment noted by the officer. The accused was acquitted on both charges.

Saskatchewan Court of Queen's Bench



The Crown successfully appealed the acquittal. The appeal judge found that the trial judge made a legal error in concluding that the accused was detained when the officer stopped his vehicle behind the Explorer. Instead, the detention occurred when the officer asked the accused to produce his driver's licence. However, in the appeal judge's opinion the officer "had the unfettered right to do that in the exercise of his responsibilities pursuant to s. 209.1." When the officer smelled alcohol on his approach to the vehicle he then had reasonable grounds to detain the accused for investigative purposes related to the *Criminal Code*. The evidence was admissible and a new trial was ordered.

Saskatchewan Court of Appeal



The Saskatchewan Court of Appeal disagreed with the appeal judge's view that the officer had the "unfettered right" to detain the accused under s. 209.1. Section 209.1 does not create a general power of detention for investigative purposes. Rather, the officer must be pursuing a traffic safety purpose in order to randomly stop a motorist pursuant to this provision, such as checking for sobriety, licences, ownership, insurance and the mechanical fitness of cars. Justice Herhauf, delivering the Court of Appeal's judgment, stated:

There was no evidence to support the view that [the officer] was acting pursuant to a traffic safety purpose prior to his questioning the [accused]. The only evidence with regard to [the officer's] purpose at the relevant time was his concern that the [accused] was acting strangely by turning his car shortly after he spotted a police vehicle, by stopping his vehicle shortly thereafter, and by ducking his head down when [the officer] looked at him. [The officer] also had concerns related to the time of night and the area that the car was in. That area had been experiencing higher than average crime rates. These observations and suspicions do not relate

to sobriety, licences, ownership, insurance or the mechanical fitness of the vehicle, nor do they provide a basis upon which such a motive could be attributed. For this reason, it is my view that s. 209.1 of The Traffic Safety Act is not applicable to this case. [para. 22]

Detention

The meaning of detention under s. 9 includes situations sometimes referred to as psychological detention - a reasonable person would conclude by reason of the police conduct that they have no choice but to comply with a direction or demand. In this case, the accused was not detained when the officer parked his vehicle behind the Explorer.

[The officer] did not pull over the [accused's] vehicle, nor did he engage his police lights. In this case [the officer] pulled in behind a parked car - he did not block the vehicle's exit path. There is no evidence to suggest that a spotlight was placed on the [accused] or that [the officer] otherwise indicated that the [accused] was specifically under suspicion. [para. 32]

However, a detention materialized when the officer started asking the accused questions relating to producing his licence and whether he had been drinking. "A reasonable person at that point would not have felt that they were free to leave," said Justice Herauf. But by this time, the officer had smelled the odour of alcohol emanating from the vehicle which, along with his other observations, provided the reasonable suspicion necessary for making an investigative detention, which was not arbitrary:

In this case, [the officer] detected an odour of alcohol emanating from the vehicle as he approached the [accused's] window. On smelling alcohol, and having observed the unusual behaviour involving [the accused] popping his head up to peek out of his truck, [the officer] had reasonable grounds to suspect [the accused] was committing or had committed the Criminal Code offences of being in care or control of a vehicle while impaired or with blood alcohol content above .08. As a result, ... he was lawfully entitled to briefly detain [the accused] for investigative purposes. When his questioning and other observations revealed [the

accused's] condition, [the officer] had proper grounds to make the roadside screening demand and then, given the fail reading, the breathalyzer demand. All of this means that [the accused's] detention was not arbitrary.

Since there was no s. 9 breach, a s. 24(2) analysis was unnecessary. The accused's appeal was dismissed and the order for a new trial was upheld.

Complete case available at www.canlii.org

BY THE BOOK:

Saskatchewan's Traffic Safety Act



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

(a) is readily identifiable as a peace officer;

and

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

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

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

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

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

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

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



BC Law Enforcement Memorial
Sunday, September 28, 2014 at 1:00 pm
Rotary Stadium, Abbotsford, British Columbia
Muster at 11:30 am, Thunderbird Memorial Square, Veterans Way

NEW SUPREME COURT JUDGE ANNOUNCED

On June 12, 2014 the Honourable Mr. Justice Clément Gascon was sworn-in as a judge of the Supreme Court of Canada in a private ceremony. He had formerly served as a judge of the Quebec Court of Appeal. The Supreme Court consists of nine judges with at least three of them appointed from the Quebec Court of Appeal, the Superior Court of Quebec, or from among Quebec advocates.



NOTHING MORE THAN 'WARN' REQUIRED FOR IMMEDIATE ROADSIDE PROHIBITION

**Wilson v. British Columbia (Superintendent of Motor Vehicles),
2014 BCCA 202**



Wilson was stopped in a police road check. He had "an odour of liquor on his breath" and "admitted to four beers hours earlier." As a result of an ASD demand, he blew a WARN reading (at least 50 mg%). Under s. 215.41 of British Columbia's *Motor Vehicle Act*, the officer served Wilson with Notice of an immediate roadside prohibition (IRP) for a period of three days.

Superintendent's Review



Wilson applied to British Columbia's Superintendent of Motor Vehicles for a review of the prohibition. He argued the officer did not have reasonable grounds to issue the IRP because there was no indication that his ability to drive was affected by alcohol. In his view, the WARN reading by itself was insufficient to uphold the prohibition. An adjudicator for the Superintendent, however, disagreed. In the adjudicator's view, the WARN reading constituted the reasonable grounds for the officer's belief that Wilson's ability to drive was affected by alcohol.

British Columbia Supreme Court



Wilson sought judicial review of the adjudicator's decision. He submitted that the legislation outlined in s. 215.41 of British Columbia's *Motor Vehicle Act* requires more than a WARN result from an ASD before a driving prohibition can be issued. In his view, the WARN reading needed to be corroborated by other evidence capable of supporting the officer's reasonable belief that a driver's ability to drive was affected by alcohol.

The judge found that the language used in IRP legislation did require more than a WARN reading before a driving prohibition could be issued. In the

BY THE BOOK:

BC's *Motor Vehicle Act* s. 215.41(3.1)



If, at any time or place on a highway or industrial road,

(a) a peace officer makes a demand to a driver under the Criminal Code to provide a

sample of breath for analysis by means of an approved screening device and the approved screening device registers a warn or a fail, and

(b) the peace officer has reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol,

the peace officer, or another peace officer, must,

(c) if the driver holds a valid licence or permit issued under this Act, or a document issued in another jurisdiction that allows the driver to operate a motor vehicle, take possession of the driver's licence, permit or document if the driver has it in his or her possession, and

(d) ... serve on the driver a notice of driving prohibition.

judge's opinion, an officer must have reasonable grounds to believe that a driver's ability to drive is affected by alcohol *in addition* to the driver's breath sample having registered a WARN or FAIL. In other words, an IRP could not be issued strictly on the basis of a WARN reading alone. "A plain reading of the legislation requires more than just a WARN reading," said the judge. "There is no presumption that a driver's ability to drive is affected by alcohol solely on the basis of a WARN reading." If the legislature intended the WARN reading to be sufficient, the judge found it would have expressly said so in the statute. Since there was no evidence that Wilson's ability to drive was affected by alcohol, the notice of prohibition was quashed.

British Columbia Court of Appeal



The Superintendent of Motor Vehicles then appealed the judicial review decision quashing the prohibition. A critical question on appeal was whether it was reasonable for the adjudicator to find a 'WARN' result sufficient to provide reasonable grounds to trigger the driving prohibition.

The Court of Appeal found the adjudicators interpretation was reasonable, on the basis of the plain language of the text, the context of the section in the statutory scheme, and the purpose and objectives of s. 215.41(3.1).

Text

The officer's belief that the driver's ability to drive was affected by alcohol follows "as a result of the analysis." Thus, "the result of the analysis is the foundation or basis of the peace officer's belief," said Justice Harris. "The section does not expressly require that the peace officer's belief be based on any grounds other than the result of the analysis. While the demand to provide a breath sample is made under the *Criminal Code*, the only stated required statutory foundation for the belief formed by the peace officer is the result of the analysis." He continued:

On the wording of the section, it seems to me that a WARN result can be a sufficient basis underlying a peace officer's reasonable belief that a driver's ability to drive is affected by alcohol. It may be that circumstances might arise when a peace officer does not have reasonable grounds to conclude that, even though the result of an analysis is a WARN, a driver's ability to drive has been affected by alcohol. But nothing in the wording of the section requires that a peace officer's belief be based on anything other than the result of the analysis. [paras. 25]

"[I]t seems to me that a WARN result can be a sufficient basis underlying a peace officer's reasonable belief that a driver's ability to drive is affected by alcohol."

Context

This provision "is part of an integrated scheme that is intended to facilitate the removal from the road of drivers whose ability to drive is affected by alcohol. The lynchpin of the system is the use of ASDs often in circumstances, such as road blocks, where a peace officer has little, if any, opportunity to assess a driver's driving. The focus of the section is on the results of the analysis, including a second analysis on a different ASD, if requested. The analysis results are the trigger for the issuance of a notice." There is nothing in the statutory language that requires additional evidence beyond the result of the analysis, whether it be a FAIL or WARN reading. Furthermore, there is nothing in the Superintendent's review procedures that allows for the setting aside of a Notice of Prohibition if the officer's reasonable belief is based only on the analysis result. The analysis result is the foundation for the peace officer's reasonable belief.

Purpose

The purpose and objective of ARP is to allow for the summary removal of drinking drivers, which is better served by relying on analysis results rather than an individualized inquiry by the peace officer to justify a reasonable belief. "The administrative regime is based on scientific evidence that drivers with blood alcohol levels of .05% and higher are significantly more likely to be involved in an accidents," said Justice Harris. "The statute recognizes that not every drinking driver is 'impaired', but the purpose of the statutory scheme includes removing drivers from the road who may pose a risk of causing injury by employing a common standard, regardless of a particular individual's tolerance for alcohol." He continued:

In summary, the purpose behind the ARP regime is to reduce the number of deaths and injuries resulting from alcohol-related crashes by getting drinking drivers off the roads. To achieve this goal, the Province has established an administrative regime, which is triggered when a driver's breath sample registers a WARN or a FAIL on an ASD. The adjudicator's interpretation of the section is reasonable because it furthers that purpose.

The prohibition follows “the happening of an event”; not the happening of an event and something more supporting a reasonable belief. ... [para. 36-37]

The adjudicator’s interpretation of s. 215.41(3.1) was reasonable. Nothing more than a WARN was required for the officer to conclude that a driver’s ability to drive was affected by alcohol.

The Superintendent’s appeal was allowed and the prohibition was reinstated.

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

CIRCUMSTANCES ESTABLISH CONSTRUCTIVE POSSESSION



The Ontario Court of Appeal has concluded that a trial judge did not err in finding An Bai Zheng in constructive possession and control of the house and its contents, which included 343 marihuana plants in the basement. The police had responded to a 911 call about gunshots heard at a house. When police searched the three bedroom home to see if anyone was injured they found the large marihuana grow operation. Only one bedroom was being used as a bedroom. The second bedroom was covered in black garbage bags, had large lights, dirt and wires in it. The third bedroom had 200 stacked and empty flower pots, and soil on the floor. Zheng’s passport, citizenship and a signed power of attorney were found on a coffee table. Zheng’s conviction for possessing marihuana for the purpose of trafficking was upheld. “[Zheng] was the sole occupant of a house in which a very large marihuana grow operation was discovered - spread through the entire house,” said Justice Blair. “Another judge may have come to a different conclusion, but it was open to the trial judge here, on the record before her, to find that the [accused] was in control and possession of the premises and had knowledge of the operation and, therefore, was in constructive possession of the marijuana plants.” - R. v. Zheng, 2014 ONCA 345

WITNESS REPORT OF IMPAIRED DRIVING DID NOT ALTER s. 10(b) DELAY

R. v. Ackerman, 2014 NLCA 26



A citizen was concerned another driver may be impaired after seeing a vehicle swerving and being driven “all over the road”. He called the police and reported its licence plate number, a general description and said it had turned into an industrial park. A police officer was immediately dispatched and was told that the vehicle was registered to the accused. The officer located the vehicle in a parking lot. The accused came out of a building to speak with the officer as a result of a message the officer had sent via another worker. When questioned, he identified his vehicle and told the officer that he had parked it there. The officer noted an odour of alcohol on the accused’s breath and that his speech was slurred. The officer then made a demand under 254(2) of the *Criminal Code* for the accused to provide a breath sample into an approved screening device. He complied and registered a FAIL. He was then arrested, advised him of his right to counsel under section 10(b) of the *Charter*, and brought to the detachment for breathalyzer testing.

Newfoundland Provincial Court



The judge rejected the accused’s evidence that he had left his vehicle in the parking lot overnight and that his fiancé had driven him to work. In the judge’s opinion, the only rational inference from the evidence was that the accused drove the vehicle to work in the morning, which resulted in the citizen calling police. The judge also ruled that the accused’s s. 10(b) right to counsel had not been breached when the officer did not immediately advise the accused of his right to counsel but waited until he was arrested. He was convicted of operating a motor vehicle while over 80 mg%.

Newfoundland Supreme Court



The accused argued, among other things, that the trial judge erred in not finding a s. 10(b) breach. The appeal judge ruled that there was a reasonable limit, prescribed by law under s. 1 which did not require the police to immediately advise the accused of his right to counsel upon contact. Since the trial judge had properly determined that the right to counsel was provided at the appropriate time, the accused's appeal was dismissed.

Newfoundland Court of Appeal



The Court of Appeal recognized that these facts were slightly different from other typical impaired cases because the accused was not pulled over while driving. In typical impaired driving cases, where a police officer stops a vehicle under provincial legislation, the s. 10(b) requirements can be satisfied at the time of arrest, as opposed to the time of the initial pull over. In this case, however, the accused was not pulled over while driving. The vehicle had been parked and it was someone other than the police officer who saw the vehicle being driven.

Justice Welsh, for the unanimous Court of Appeal, concluded that the accused was detained for the purposes of s. 10(b) when the officer began to ask him questions related to driving his vehicle. When the detention started he was not provided his right to counsel and therefore his s. 10(b) right was infringed. This infringement, however, was prescribed by law and justified under s. 1 of the *Charter*:

1. The police were acting under the statutory scheme of the *Criminal Code* provisions which authorize them to investigate suspected impaired drivers. "Section 254 provides authority for a police officer to conduct specified sobriety tests and to make a demand for breath samples for purposes of an approved

screening device and a Breathalyzer," said Justice Welsh.

2. The delay (limit) in advising the accused of his s. 10(b) right to counsel was "implied from the operating requirements" of s. 254 and was for the purpose of roadside screening. The ASD result was used solely for the police officer in forming his grounds for making the breathalyzer demand. The accused was given the opportunity to exercise his s. 10(b) right upon arrest (after the screening process) but before being requested to provide incriminating evidence through breath samples.

As for the officer not observing the accused driving, it didn't matter in determining whether s. 10(b) had been breached. Justice Welsh stated:

... The fact that the erratic driving, together with information to identify the vehicle, was provided by a concerned citizen has no effect on the analysis. It is clearly within the authority of the police to investigate potential offences reported by members of the public.

In this case, the police officer was undoubtedly acting within the lawful execution of her duties and responsibilities when she pursued an investigation into a suspected impaired driver based on the information supplied just minutes earlier by a concerned citizen. Significant detail was provided including the basis for the observer's concerns, the licence plate number and a description of the vehicle, and information that the vehicle had turned into a commercial parking lot. The officer arrived at the scene within about ten minutes and immediately located the parked vehicle. By that time she had already obtained the name of the registered owner of the vehicle and, without delay, took steps to locate him. The officer asked [the accused] if he had parked the car in the lot, to which he responded yes. He did not qualify his response by saying he had not driven the vehicle since the previous day having left it overnight in the parking lot. He gave no indication that he had not just been driving the vehicle, or that someone else had been driving it, with or without his permission. The officer noticed the odour of alcohol on [the accused's] breath and that his

"[T]he police officer was entitled to proceed on the basis of the information she had at the time of her investigation."

speech was slurred. While [the accused] testified at trial that he had not been driving the vehicle at the relevant time, the police officer was entitled to proceed on the basis of the information she had at the time of her investigation.

The officer formed the opinion, based on the collected information, that she had sufficient grounds for making a demand, pursuant to section 254(2) of the Criminal Code, requiring [the accused] to provide breath samples on an approved screening device. He registered a "fail". At that point the officer arrested [the accused], charged him with the impaired driving offence and advised him of his section 10(b) right to counsel. [paras. 29-31]

Although the accused's right to counsel under section 10(b) was infringed when he was initially detained, the infringement was justified under section 1 "given the nature of the offence, the circumstances surrounding the police officer's investigation, and the officer's action in advising [the accused] of his right to counsel upon his arrest at the conclusion of the investigation phase." The accused's appeal was dismissed and his conviction was upheld.

Complete case available at www.canlii.org

ACCUSED MUST PROVE RIGHTS BREACHED UNDER s. 10(b) CHARTER

R. v. Edmonton, 2014 ABCA 186



The accused was arrested for impaired driving and given advice about his right to counsel. He spent from 11:13 pm to 11:20 pm in a phone room where he attempted to reach a toll free number but was told he should call back in 10 minutes. At 11:20 pm the officer told the accused, "It's up to you, you can keep trying, there are lots of numbers". The accused tried a second number and by 11:26 pm had redialed the number on the wall. He held the phone to his ear and, at 11:30 pm, hung up, but dialed again at 11:31 pm. The officer saw the accused with the phone to his ear and apparently speaking. At 11:41 pm the accused came to the phone room door and told the

officer that he was done. This statement to the officer was consistent with the officer having earlier told the accused to tell him when he was finished. There was no further conversation about counsel and the accused provided two breath samples over 80 mg% at 11:48 pm and 12:08 am.

Alberta Provincial Court



The judge found the accused's s. 10(b) Charter rights had been breached. In his view, the implementational aspect of the right to counsel had not been met. The accused had been told to call back in 10 minutes and the police failed to provide him with a reasonable opportunity to exercise his right to counsel. The judge held the officer was required under the circumstances to question the accused and re-advise him of his right to counsel. The evidence of the breathalyzer readings was excluded and the accused was acquitted of over 80 mg%.

Alberta Court of Queen's Bench



The appeal court upheld the acquittal, finding the trial judge did not err in holding that the officer should not have assumed that the accused had made all the calls he wanted to when he said was done on the phone. Therefore, he had not exercised his right to consult with counsel. The appeal judge speculated that the accused may have spoken to a law student or some other inadequate advisor on the phone.

Alberta Court of Appeal



A further Crown appeal was successful. Justice Watson, speaking for the Court of Appeal, concluded that the accused had failed in his burden of proving that his rights under s. 10(b) had been breached. In this case, the police were entitled to act on what the accused told them. He said he was done. The officer assisting the accused was not required to make enquiries or be satisfied that the accused had actually had a sufficient conversation with a lawyer. The Crown's appeal was allowed and a new trial was ordered.

Complete case available at www.albertacourts.ab.ca

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CANADA



Radicalization of Terrorists

Nov. 5th, 2014 from 9am to 4pm @ The Justice Institute of BC

Registration from 8am to 8:45am • Pre-register at www.bclcdn.org

\$175 (before or on Sept 30) and \$225 (after September 30)

Attendance Restricted to Law Enforcement Personnel Only

Keynote Speakers



Dr. Martin Bouchard

Associate Professor of Criminology & Director of the International Cyber Crime Research Centre (SFU) and Associate Director of Research of TSAS. Bouchard will present on the role of social networks connected to illegal markets, organized crime & more specifically, terrorism.



Dr. Lorne L. Dawson

Chair of the Department of Sociology and Legal Studies at the University of Waterloo and Professor in the Department of Sociology and Legal Studies and Department of Religious Studies. Dawson will discuss the process of radicalization in homegrown terrorists groups.



Mubin Shaikh

Coming from a background of having been a Muslim extremist in earlier years to becoming an undercover operative in several high profile classified cases. Shaikh will provide an extremely unique perspective on radicalization and recruitment as it relates to society today.



Insp. Steve Corcoran

Operations Officer for the E Division National Security Enforcement Team (INSET) and active member of the National Security Program for over 11 years. Corcoran brings a local and front-line perspective on homegrown terrorism and radicalization.

The BC LEDN is a sub-committee of the British Columbia Association of Chiefs of Police with representation from the following participating agencies.



'FASD' DID NOT PREVENT ACCUSED FROM FORESEEING CONSEQUENCES OF STABBING



After Dakota Manitowabi was convicted of second degree murder for stabbing a man, he was sentenced as an adult, given life imprisonment and ordered to serve his time in a federal penitentiary. He then appealed to Ontario's top court, arguing that he suffered from Fetal Alcohol Spectrum Disorder (FASD) at the time of the murder which impaired his ability to foresee the consequences of his actions; stabbing the victim in the abdomen would be fatal.

"FASD is a permanent neuro-developmental disorder. It is an umbrella term describing a range of effects that can occur in an individual whose mother drank alcohol during pregnancy. Those effects can include physical, mental, behavioural and learning disabilities. Fetal Alcohol Syndrome ("FAS") describes the most severe manifestations of the disorder. ... FASD impacts on executive functioning. Executive functioning engages the more abstract forms of thinking, including the ability to maintain an appropriate problem-solving set for the attainment of goals. Executive functioning refers to specific cognitive skills, including planning and mental representation. An individual with an executive functioning deficit may display poor organizational skills and planning, a lack of concrete thinking and inhibition, difficulty grasping cause and effect, and an inability to delay gratification. FASD in a particular individual may affect some but not other forms of executive functioning." [paras. 40-41]

The Ontario Court of Appeal rejected his submission. Although the expert evidence established that Manitowabi suffered from FASD and it was relevant to the state of mind inquiry, the evidence failed to establish that his FASD had an effect on understanding the probable consequences of stabbing the victim. *"Evidence that FASD can, in some people, on some occasions, affect some forms of executive functioning, including appreciation of cause and effect relationships, could not materially advance the defence claim that the Crown had failed to prove that [Manitowabi] foresaw [the victim's] death as a likely result of the stabbing,"* said Justice Doherty. - R. v. Manitowabi, 2014 ONCA 301

INFERRED JOINT POSSESSION JUSTIFIES ARREST & SEARCH

R. v. De Guzman, 2014 ABCA 201



After a police officer passed a car in a marked police vehicle, the car suddenly braked and slowed from 115 kmh to 97 kmh. The officer thought this was "atypical" in a 110 kmh zone. Because of the slow speed, other vehicles had to manoeuvre around it. The officer then pulled the accused over to check for fitness and sobriety. The accused initially lowered his car window halfway down. The officer asked him to lower it fully and requested licence, registration and insurance information. The passenger began answering questions the officer posed to the accused. The passenger was exhibiting signs of extreme nervousness, bouncing his leg and moving his hand to his waist as if checking for a weapon.

The officer commented to the passenger about his nervousness and, at the same time, became suspicious and concerned for his safety. He asked the passenger for identification. When the passenger pulled his hand out of his right pocket, the officer saw a "dime bag" - a small bag marked with a marijuana leaf. The officer considered the bag was consistent with those used to hold illicit substances. When the officer asked the passenger to show him the contents of his pockets, he tried to hide the bag, dropping it on the floor near the accused. Both men were arrested for possession of a controlled substance. The accused was patted down and a package containing methamphetamine was found on him. A bag of methamphetamine was also located in the vehicle along with other drug paraphernalia, including a scale.

Alberta Provincial Court



The judge found the accused and his passenger had been detained, but the detention was not arbitrary and the search was reasonable. He ruled that the detention was a result of a traffic stop for a driving-related purpose and was intended to be brief. He also found that the request for the passenger's

identification was permitted under Alberta's *Traffic Safety Act*. Further, the judge ruled that when the passenger produced a bag containing drugs, the officer had reasonable and probable grounds to arrest the passenger. The officer also drew a reasonable inference that the driver was in joint possession - he had knowledge, possession and control of things within his vehicle; and therefore his arrest was lawful. The searches of the accused and his vehicle were incidental to arrest and reasonable. There were no ss. 8 or 9 *Charter* breaches and a conviction for possessing methamphetamine for the purpose of trafficking was entered.

Alberta Court of Appeal



The accused appealed his conviction arguing, among other grounds, that the trial judge erred in finding his rights under ss. 8 and 9 of the *Charter* were not violated. In his view, the evidence should have been excluded under s. 24(2).

Detention

The accused submitted that his s. 9 *Charter* rights were violated when the vehicle was arbitrarily stopped, his passenger detained during the demand for identification, and the detention continued beyond a traffic stop.

The Crown conceded that both occupants were detained. However, the Court of Appeal found the detention was not arbitrary. The accused, as driver, was lawfully detained for the purpose of the *Traffic Safety Act* which flowed from his driving pattern. Further, the passenger's detention, if arbitrary, did not result in breach of the accused's s. 9 rights.

"In our view, whether the passenger's rights (in this case the co-accused) had been violated is somewhat beside the point," said the Court of Appeal. "Charter rights are personal." Whether a detention is lawful must be based on the circumstances regarding the accused, not the rights or circumstances of his passenger. The Court of Appeal stated:

In this case, it was the passenger's behaviour that raised a reasonable suspicion in the mind of the

police officer. The passenger was providing answers on behalf of the [accused], he was extremely nervous, he kept reaching for something in his pocket, and his overall behaviour caused the constable concern for his own safety. The constable asked that the passenger identify himself so that he could run his name through CPIC to gather further information regarding this possible threat.

It was only in the process of producing his identification that the passenger either coincidentally or accidentally displayed the bag. [paras. 21-22]

Under the totality of the circumstances, the Court of Appeal concluded the accused was not unlawfully detained.

Search

The accused argued that his s. 8 *Charter* rights were also breached when the officer demanded his passenger produce identification and show the contents of his pockets. He further contended that the search of his person and vehicle were also unreasonable.

Again, any breach of the passenger's s. 8 rights did not necessarily amount to a breach of the accused's rights. Further, the discovery of the passenger's "dime bag" supported reasonable grounds for the arrest and search of the accused:

Once the "dime bag" was produced, the constable was lawfully entitled to arrest the passenger for possession: section 495(1)(b) of the Criminal Code.

The constable testified and the trial judge accepted that once the drugs were produced, the constable drew a reasonable inference that possession of the drugs was joint. Specifically, the trial judge noted the driving pattern of the [accused], the half-open window, and that the passenger's method of trying to get rid of the drugs implicated the [accused]. He found on these facts that the constable had reasonable and probable grounds to arrest the [accused] based on his joint possession of an illicit substance. This conclusion was available on the evidence

and we see no basis in law to interfere. The search of the [accused] and his vehicle were conducted incidental to a lawful arrest. [paras. 24-25]

The evidence was properly admitted and the accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

WARRANTLESS FULL DOWNLOAD OF SMARTPHONE UNREASONABLE

R. v. Mann, 2014 BCCA 231



During a kidnapping investigation, the accused was arrested and a BlackBerry seized from him. He was released without charge but re-arrested 20 days later once he was charged with the kidnapping. On this arrest, a second BlackBerry device was seized from him. The BlackBerry seized from the first arrest was submitted for analysis to the RCMP's Technological Crime Unit in Ottawa but could not be analyzed because it was password protected. It was resubmitted two years later and the user data extracted included 72 text messages the Crown used as evidence. The BlackBerry seized from the second arrest was also submitted for analysis about a week after that arrest and was analyzed some three weeks later resulting in the recovery of 269 text messages. No search warrant was sought or obtained with respect to the searches of the BlackBerry devices.

British Columbia Supreme Court



The accused submitted, among other arguments, that the warrantless searches of the contents of the BlackBerry devices were not authorized under the common law power of a search incident to arrest. In his view, searches as an incident to arrest do not extend to the "highly intrusive" search of a mobile communication devices that can store private information, such as the BlackBerrys in this case.

The judge found the warrantless searches were lawful as an incident to the arrests. He relied on

case law that held such a search did not fall outside the scope of the common law power. The searches were reasonable, authorized by the common law power to search incident to arrest, and no warrants were required to search the BlackBerrys' contents. There were no s. 8 *Charter* breaches and therefore s. 24(2) was not triggered. The accused was convicted of several charges related to the kidnapping.

British Columbia Court of Appeal



Although he conceded that a cursory search of a smartphone incident to arrest for a valid purpose related to arrest did not breach s. 8, the accused argued that the case law has evolved such that a detailed search of a smartphone type device now required a warrant. The Crown, on the other hand, submitted that the BlackBerry searches were reasonable as authorized by the common law as searches incident to arrest.

Search Incident to Arrest

Justice Levine, writing the Court of Appeal's decision, first examined the power of search under the common law as an incident to arrest. She noted the following points:

- s. 8 of the *Charter* protects an individual's privacy from unjustified state intrusion.
- The onus is on the Crown to show that the state's interest in law enforcement outweighs the individual's privacy interest. This generally requires prior authorization (eg. warrant).
- Warrantless searches are presumed to be unreasonable.
- Where a search is carried out without a warrant, the Crown has the burden of showing, on a balance of probabilities, that the search was reasonable. A warrantless search will be reasonable if it is authorized by law, if the law itself is reasonable, and the manner in which the search was carried out is reasonable.
- The warrantless power of search incident to arrest is a well-established exception to the requirement for prior judicial authorization for a valid search.

- There are two justifications for the power to search incident to arrest.
 1. To ensure the arrested person will come before the court. A search for weapons or other dangerous articles precludes the possibility of their use against police, the public or the accused themselves.
 2. The process of arrest must ensure that evidence found on the accused and the immediate surroundings is preserved.
- There are limits on the power to search incident to arrest in cases where the privacy interest of an individual is heightened (eg. the seizure of samples of bodily substances, strip searches).

Smartphones

Since this case, the Supreme Court of Canada has recognized the highly invasive nature of cell phone searches and computers based on the quantity and quality of information the devices can contain. Justice Levine concluded that “the law as it stands today no longer permits police to conduct warrantless searches of the entire contents of an individual’s cell phone.” The warrantless searches of the BlackBerrys breached the accused’s s. 8 *Charter* rights:

It seems to me that downloading the entire contents of a cell phone or smartphone, like the BlackBerrys in this case, seized on the arrest of the accused, after some delay, without a search warrant, can no longer be considered valid under s.8 of the Charter as a reasonable warrantless search. The highly invasive nature of these searches exceeds the permissible scope for a warrantless search authorized under the common law as a search incident to arrest.

The interest of the state in law enforcement does not justify such a warrantless search. In this case, the searches were carried out more than two years after the [accused’s] arrests. The delay itself demonstrates that none of the purposes that justify a warrantless search incident to arrest were relevant. Obtaining a warrant could not have interfered with preserving the evidence or with officer safety. In fact, there is no

explanation for not obtaining a warrant except that the nature of the object searched had previously been likened to other objects – logbooks, diaries, notebooks – that had not been considered to give rise to a serious invasion of the accused’s right to privacy.

It now seems obvious that the individual’s privacy interest in the contents of a device such as a BlackBerry outweighs the state’s interest in law enforcement, and a warrantless search of those contents is unreasonable according to the test set out in *Collins*. [paras. 118-120]

Admissibility - s. 24(2)

Despite the s. 8 breach, the evidence was not excluded under s. 24(2) as its admission would not bring the administration of justice into disrepute. The breach was not serious; the police acted on the law as it stood at the time. Although the accused’s privacy interest in the information contained in the BlackBerrys was considered high, the actual information retrieved did not include such highly private material such as photos, videos, or even music. The information obtained consisted of messages and contacts and were discoverable had the police obtained a search warrant. Finally, the evidence obtained from the BlackBerrys was highly reliable and relevant, and existed independently of any *Charter* breach. Its exclusion would negatively impact the truth-seeking function of the criminal trial process. The seriousness of the offence of kidnapping also favoured admission.

The accused’s appeal was dismissed.

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

Editor’s note: The British Columbia Civil Liberties Association appeared as an Intervenor in this case. It not only supported the accused’s submission on the warrant requirement for the smartphone but went farther to suggest that the common law did not authorize a cursory search of a smartphone incident to arrest. The British Columbia Court of Appeal, however, felt it unnecessary to address this argument.

Some Cases Referred to by BCCA in R. v. Mann

R. v. Polius, [2009] O.J. No. 3074: Police seized a cell phone on arrest for counselling murder, searched it to find its number, and used that information to obtain a production order under s. 487.012 of the Criminal Code to acquire his cell phone records. The judge found the arresting officer did not have a reasonable basis to believe that the cell phone may contain evidence of the alleged offence. In addition, the judge opined that a search warrant was required to search it beyond a cursory examination.

R. v. Manley, 2011 ONCA 128: Police seized a cell phone on arrest for two robberies. The police opened the cell phone to search for evidence of ownership and found a photograph of the accused holding a sawed off shotgun, taken the day after one of the robberies. The photograph was copied and printed. The police subsequently obtained a warrant to search the contents of the phone. The warrantless cursory search of the cell phone to determine ownership was lawful as the police had information that the accused had stolen cell phones in the past and because ownership of the cell phone was relevant to the offences for which he had been arrested.

R. v. Fearon, 2013 ONCA 106: Police seized a cell phone on arrest for armed robbery. The arresting officer examined the contents of the cell phone (which was not password protected) and found incriminating photographs and a text message. The cell phone was searched further during the night and the next morning as the investigation continued, but no more evidence was found. Months later, the police obtained a search warrant to search the phone again. The cursory search of the cell phone immediately following the arrest was a lawful search incident to

arrest as was the examination of the cell phone's contents at the police station because they too were connected to the search at the scene of the arrest. This decision is under appeal to the Supreme Court of Canada.

R. v. Hiscoe, 2013 NSCA 48: The police read the text messages on a cell phone on arrest for possession of cocaine, and re-read the messages later that day. One month later, police had all the contents of the phone downloaded onto a DVD by the Technological Crime Unit. The police were authorized to conduct a cursory review of the text messages upon arrest and later that day, but the full content download or "data dump" was beyond the scope of a search incident to arrest. The month delay between the seizure of the phone and the full data retrieval also reduced any connection with the arrest. The evidence obtained through the data dump, except for the text messages twice retrieved on the day of arrest, was excluded under s. 24(2) of the Charter.

R. v. Vye, 2014 BCSC 93: Police searched an "iPhone 4" three times without a warrant, removing it from the accused's pocket, doing a cursory search of the device the same day, and conducting a software-aided forensic examination nearly one year later. The accused did not contest the validity of the first two searches, but the judge found the software-aided forensic search breached the accused's s. 8 Charter rights because the search was beyond the power of search incident to arrest.

R. v. Morelli 2010 SCC 8; R. v. Vu, 2013 SCC 60: These two Supreme Court of Canada cases did not deal with a search incident to arrest but underscored the heightened privacy interests individuals have in the contents of computers and cell phones.

NO INFORMER PRIVILEGE OVER EMAIL: NO EXPRESS or IMPLIED PROTECTION OFFERED

R. v. Cook, 2014 ONCA 170



The accused, a police officer, was convicted of attempting to possess cocaine for the purpose of trafficking, breach of trust by an official, possession of stolen property and simple possession of marijuana. He intercepted a controlled delivery of fake cocaine packaged in the shape of bricks, each weighing one kilogram. He had 15 bricks in the trunk of his police cruiser and

took them home. Tracking devices installed in the bricks led police to locate them inside his garage. Police also found 443 grams of marijuana and stolen property. His defence was that he did not know the bricks were cocaine and that he took them home on the orders of his supervising officers.

After he was sentenced and launched a conviction appeal, the police received an anonymous email alleging misconduct by the accused's supervising officers that dated back decades. The Internal Affairs Bureau investigated the email, identified its author and disclosed the results of the investigation in redacted form to the accused's counsel. On request

for the email author's identity, the Crown refused to disclose it by asserting informer privilege.

Ontario Court of Appeal



The accused sought disclosure of the email author's identity, submitting it was not privileged and could assist with a fresh evidence application on appeal. The Crown, to the contrary, suggested the author's identity was protected by privilege and therefore the accused needed to engage the "innocence at stake" exception.

Justice Benotto, speaking on behalf of the Ontario Court of Appeal, concluded that the identity of the email author was not protected by either confidential informer or public interest privilege. Here, "there was no conduct on the part of the police, express or implied, that could have led the author to believe that his or her identity would be protected," said Justice Benotto. "The police merely received an unsolicited anonymous email." Nor was it similar to a "crime stoppers" communication which is founded on a promise of anonymity.

Further, public interest privilege did not apply either:

Public interest privilege involves a claim by a government or an official that certain information should be kept secret. Typical situations involve the need to keep police investigative techniques confidential or the protection and safety of individuals. The Crown has the burden of establishing the need to keep the identity of the author secret. The Crown attempted to satisfy this burden by alleging that the author's mental health issues, fear of police and fear of retribution engage public interest privilege. However, there is no objective evidence underlying the author's fears. On the record before us, the Crown's burden has not been met. [para. 19]

The Crown's claim for privilege over the redacted information was rejected. The accused's application was allowed and the Crown was directed to provide unredacted copies of the documents it had already produced, subject to privacy issues identified in camera.

Complete case available at www.ontariocourts.on.ca

POSITION AS POLICE OFFICER AGGRAVATING FACTOR IN SENTENCING



The Ontario Court of Appeal has upheld the conviction and five year sentence of a police officer convicted of arson and administering a noxious substance. The accused, Cecile Fournel, was a detective with the Ontario Provincial Police. The Ontario Superior Court of Justice found Fournel had spiked her daughter-in-law's drink with a non-prescription sleep aid, put her to bed and then set her house on fire. The daughter-in-law was able to escape the fire unharmed.

In sentencing Fournel to two years for administering a noxious substance and three years consecutive for the arson, the judge found her status as a police officer was a serious aggravating factor. Fournel appealed her sentence arguing it was unduly harsh and excessive. However, the Ontario Court of Appeal upheld the five year sentence as fit. "[The accused's] position as a police officer, and the violation of the community expectation she would obey the law" was properly considered as an aggravating factor. *R. v. Fournel*, 2014 ONCA 305

CHARTER BREACHES MUST BE CONNECTED TO DISCOVERY OF EVIDENCE

R. v. Andel, 2014 BCCA 179



Police received a report that a cedar log outhouse had been stolen and received a tip that a white Dodge pickup truck had been seen in the area around the time of the theft. A few weeks later a police officer received photos of the stolen outhouse in a new location on a large rural property. Police, without a warrant, attended at the 30+ acre apple orchard to investigate. The property had numerous outbuildings and barns

situated on it as well as two rental homes, a trailer and a recreational vehicle. The accused rented the recreational vehicle and lived in it.

Upon entering onto the property's driveway, the officer noticed a white 2007 GMC Sierra pickup truck driven by the accused pulling a black flat-deck trailer. When he saw the police, the accused stopped the truck, exited it and fled on foot. An officer ran toward the truck, shouted for the accused to stop and gave chase. When the accused was caught he said the officers were on private property and initially refused to answer any questions including those about his identity. He was arrested for "investigation of" possession of stolen property even though the outhouse had not yet been located. He was handcuffed and placed in the rear of a police vehicle. The police learned the plates on the white pickup truck and flat-deck trailer were inactive. They also learned that the accused had outstanding warrants for robbery and theft. The police found the outhouse and also searched the area surrounding the accused's recreational vehicle, finding more stolen property. They also learned the truck and flat-deck trailer were also stolen and he was rearrested for possessing them. During this time the accused had been sitting in the police vehicle for over 2.5 hours. He was taken to the police station where he eventually spoke to a lawyer. He was charged with 22 counts of possessing stolen property, including several vehicles, licence plates, and domestic appliances.

British Columbia Provincial Court



At trial the Crown elected to proceed only on the counts relating to the stolen pickup truck and flat deck trailer. The accused then alleged that his arrest and detention were arbitrary under s. 9 of the *Charter* and that his right to consult counsel without delay under s. 10(b) had been breached. The judge concluded that it was unnecessary to determine whether the accused's ss. 9 and 10 rights had been violated. The evidence that the accused was driving the stolen pickup truck and trailer when first encountered by the officer was unconnected causally, temporally, or contextually to the alleged ss. 9 and 10 infringements. Since the discovery of

the stolen truck and trailer did not result from the accused's arrest or detention, no exclusion under s. 24(2) was possible. He was convicted on two counts of possession of stolen property over \$5,000 related to the pickup truck and trailer.

British Columbia Court of Appeal



The accused contended that the trial judge erred in finding that the breaches of his *Charter* rights were not connected to the obtaining of the evidence. Justice Groberman, delivering the unanimous Appeal Court decision, disagreed. Even assuming the accused's arrest was unlawful and that his s. 10(b) right had been breached, for s. 24(2) to be engaged there must be a sufficient connection between the *Charter* violations and the discovery of the evidence. This connection need not be strictly causal but a lesser connection may suffice provided it is more than remote or tenuous:

In the case before us [the accused] was seen operating the truck and towing the trailer before any breaches of ss. 9 or 10(b) occurred. He abandoned the pickup truck and the trailer in suspicious circumstances, and there was no impediment to the police investigating the abandoned vehicles. [The accused's] identity, too, was ascertainable, because the plate on the stolen vehicle had been previously registered to him. In the circumstances, it cannot be said that there was any connection between [the accused's] arrest (or the alleged denial of his right to counsel) and the police obtaining evidence that the truck and trailer were stolen. [para. 33.]

Here, the trial judge did not rely on speculation in finding that there was no connection between any *Charter* breaches and the discovery of the evidence. "[The accused's] arrest did not have any bearing on the police investigation, either in a formal causal sense, or in the sense of influencing police conduct in a way that happened to lead them to the impugned evidence," said Justice Groberman. "In my view, the judge made no error in concluding that there was an absence of any causal, temporal or contextual connection between the alleged breaches and the impugned evidence."

The accused also argued on appeal that his rights under s.8 of the *Charter* were breached when the police (1) turned onto the orchard's driveway and first observed him in the pickup truck and (2) attended and searched the area around his recreational vehicle. As for the driveway, the Court of Appeal found the accused did not have a reasonable expectation of privacy respecting it. The driveway was generally available for use by the public and was in full view of the highway. The accused did not rent the driveway, nor was there evidence suggesting he had possession or control of it or the right to exclude others from using it. The police did not violate the accused's rights simply by entering onto the property. Further, while it was likely the warrantless search of the area around the accused's recreational vehicle breached his s. 8 rights, this did not taint the police investigation regarding the charges related to the truck and trailer. The accused failed to raise the s. 8 issue at trial and no critical findings of fact about whether there was a sufficient connection to the evidence were made by the trial judge. It was therefore inappropriate for the Appeal Court to address this argument.

The accused's appeal was dismissed.

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

ASSAULT ARREST LAWFUL: ACCUSED OBLIGATED TO IDENTIFY SELF

R. v. Met, 2014 ABCA 157



A uniformed patrol officer was dispatched to a disturbance on a bus. The suspect, who had fled from the scene, was described as a white male, 5'10", 200 pounds, 40 years old, wearing brown shoes and a black jacket. As the officer drove around the area looking for people fitting the description, he saw the accused standing at a bus stop. He was the only individual who loosely matched the description. He was a lot bigger than the individual described, but the same age, wearing a black jacket and close to where the disturbance occurred.

CIRCUMSTANCES LEAD TO INFERENCE OF FIREARM POSSESSION



The British Columbia Court of Appeal has upheld the conviction of Saekwan Lee for the possession of two loaded pistols found in a plastic bag partially concealed under the backseat of a vehicle in which he was the front seat passenger. The evidence, including five fingerprints on the bag belonging to Lee, its location within his arms reach, the clumsy attempt to hide the guns, and the absence of an innocent explanation, led the trial judge to conclude that the accused exercised control of and had knowledge of the guns. Justice Goepel, in a short oral decision, found the trial judge did not misapprehend the evidence nor render an unreasonable judgment. *"The evidence is that the weapons at issue were found in a bag in a car where the [accused] was the passenger,"* said Justice Goepel. *"The bag had a number of the [accused's] fingerprints on it [and he] did not testify."* R. v. Lee, 2014 BCCA 164

Wanting to talk to the accused to determine whether he was involved in the disturbance, the officer parked his vehicle. As he got out, the accused jaywalked across the street with his hands in his pockets. Growing more suspicious, the officer called out to the accused, identified himself as a police officer, and told him to stop because he needed to talk to him. The accused ignored the officer and continued to walk away. Another uniformed officer arrived, stepped in front of the accused and said, "Sir, please, you need to stop" but he walked right past. Then, when an officer grabbed the accused's arm to stop him, he clenched a fist, threw a "haymaker" punch, and struck the officer's right shoulder area. The accused was arrested for assaulting a peace officer and refused to identify himself, telling the officer to "Go fuck yourself." He later identified himself to a detective at the police station.

Alberta Provincial Court



The judge found the officer was not in the lawful execution of his duty when he placed his hand on the accused's arm to stop him. He was not under arrest or investigative detention at the time and was therefore not legally obliged to cooperate with the officer. The punch, however, was not a reasonable response in self-defence under the circumstances. It was excessive. Although acquitted of assaulting a peace officer in the execution of his duty, the accused was convicted of common assault. As for the arrest, there were grounds that the accused assaulted the officer and therefore the accused was then legally obligated to identify himself. Since he willfully refused to do so he was also convicted of obstructing a peace officer in the execution of his duty.

Alberta Court of Appeal



The accused submitted, among other grounds, that the trial judge erred in finding that the officer was acting in the execution of his duties after the punch. In his view, the officer lacked reasonable and probable grounds to arrest him for committing the offence of assaulting a peace officer. Since the arrest was unlawful, the officer was not acting in the execution of his duties, even after the punch.

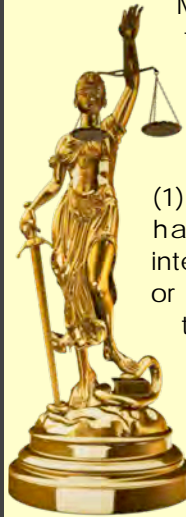
The Court of Appeal disagreed. The officer was entitled to arrest the accused following the punch:

Since the [accused's] self-defence argument was properly rejected by the trial judge, the fact remains that he assaulted [the officer] who was then lawfully entitled to arrest the [accused]: s 495(1)(b) of the Code. The fact that the [accused] was found not guilty of assaulting a police officer but rather convicted of the lesser and included offence of common assault in no way derogates from the lawfulness of the arrest. Having effected a lawful arrest, [the officer] was entitled to detain the [accused] and to demand that he identify himself, which of course the [accused] failed to do. [reference omitted, para. 21]

The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

UTTERING THREATS DOES NOT REQUIRE ACTUAL FRIGHT



Manitoba's highest court has ruled that the offence of uttering threats does not require that the recipient of the threats actually feel frightened. The Crown must only prove that, objectively, the words (1) threatened death or serious bodily harm and (2) that the accused intended the words be taken seriously or the recipient feel intimidated by them. "The mens rea for uttering threats requires that the accused intends that the recipient of his words feels intimidated by his words or that he intended that the words be taken seriously," said Justice Beard for the Manitoba Court of Appeal. "It is not necessary that the recipient, himself or herself, actually feels intimidated or actually takes the words seriously. The recipient's reaction to the accused's words is relevant only to the extent that it assists in understanding the accused's intention in speaking the words at issue." - R. v. Roussin, 2014 MBCA 30

ADMISSION OF DRINKING PROVIDES GROUNDS FOR ASD

R. v. Flight, 2014 ABCA 185



While driving home from a golf course on a paved rural road, the accused accelerated his vehicle, fishtailed out of control, crossed the centre line, and collided head on with another vehicle. It was a warm, sunny day, visibility was good, and the road was bare and dry. The accused's Onstar service reported the collision at 7:32 pm and police were dispatched to the scene at 7:35 pm. The primary investigator arrived at the scene at 7:52 pm. The officer spoke with the accused, but did not notice anything unusual about his motor skills or speech, nor did he detect any odour of alcohol. The officer believed that the accused was in shock and told him to go see EMS personnel at the scene.

At 8:25 pm, the officer was advised that the driver of the other car died at the scene; its passenger had been airlifted to hospital. The officer noticed the accused standing a short distance away with his family and asked him to come to his police car so more information about the crash could be obtained. While walking, the officer asked the accused if he had anything to drink that day. The accused replied, "Yeah, just a couple of drinks at the golf course." The officer formed the belief that alcohol may have played a role in the crash and made an approved screening device (ASD) demand. The ASD registered a FAIL result and the accused was arrested for impaired driving causing death. He was advised of his s. 10(b) *Charter* right to counsel, read the standard police caution and a breath demand was made. At the police detachment he was placed in a private phone room where he remained for 37 minutes and made several outgoing calls. He informed the officer that the lawyer he spoke with told him to call another lawyer for a second opinion, so he was left alone in the phone room for a further two minutes. When asked if he was able to reach a lawyer, the accused replied, "Didn't get much advice but m-hm." The accused provided two breath samples of 100 mg% and 90 mg% respectively. The following day he gave warned statements to police.

Alberta Court of Queen's Bench



The judge was satisfied that the officer had the necessary subjective belief that the accused had alcohol in his body for an ASD demand under s. 254(2) of the *Criminal Code*, but she found the belief was not objectively reasonable. In the judge's opinion, the accused's admission of alcohol consumption provided little detail about the quantity or timing of consumption. This admission, without more, was not sufficient to lead a reasonable person to conclude that the accused had alcohol in his body. As a result, the ASD demand was not properly made. Since the Crown conceded that the officer did not have the necessary reasonable and probable grounds to make the breathalyzer demand without the ASD FAIL result, the judge found that the accused's s. 8 *Charter* rights had been breached. However, the judge admitted the breathalyzer results under s. 24(2).

Furthermore, the judge ruled that the police did not breach the accused's s. 10(b) right to counsel. The accused had been informed of his s. 10(b) rights and was provided a reasonable opportunity to retain and instruct legal counsel in private when he arrived at the detachment. The officer was entitled to interpret the accused's response, "Didn't get much advice but m-hm" as meaning he had received legal advice. The judge concluded that the accused's blood alcohol concentration impaired his ability to operate his vehicle at the time of the collision and his impulsive decision to accelerate the vehicle caused it. He was convicted of impaired driving causing death and impaired driving causing bodily harm.

Alberta Court of Appeal



The accused challenged his convictions, arguing (in part) that the breathalyzer results were obtained in violation of his *Charter* rights and that the police denied him adequate access to counsel.

Breathalyzer Test Results

The accused challenged the trial judge's s. 24(2) *Charter* analysis concerning the admissibility of the breathalyzer results. The Crown, on the other hand, suggested that the officer had the necessary reasonable suspicion to make the ASD demand which provided the necessary reasonable and probable grounds to make the breathalyzer demand. Thus, in the Crown's view, the trial judge erred in finding any *Charter* breaches at all.

A lawful demand under s. 254(3) requires reasonable and probable grounds to make it. In this case, the only evidence of reasonable and probable grounds for the breathalyzer demand was the FAIL result on the roadside ASD. Thus, the officer needed the requisite legal authority to make the ASD demand.

Justice Veldhuis, delivering the unanimous Appeal Court's opinion, first examined s. 254 of the *Criminal Code*, finding it set out a two stage scheme to address the dangers of impaired driving:

1. “[Section 254(2)] authorizes a peace officer to demand a roadside ASD sample if the peace officer has a reasonable suspicion that the driver has alcohol in his body. An ASD will show a pass, a warning, or a fail result. This serves an important investigatory, screening function and permits a peace officer to determine whether further, more conclusive, testing is warranted. In normal circumstances, a ‘fail’ result from an ASD is sufficient to provide a peace officer with the requisite reasonable and probable grounds to proceed to the second stage.”
2. “[Section 254(3)] authorizes a peace officer who has reasonable and probable grounds to believe that a driver has committed an impaired driving offence to demand samples for a breathalyzer test. A breathalyzer is a more precise instrument. It permits peace officers to determine the alcohol concentration in a person’s blood, and determine whether the driver’s alcohol level exceeds the limit prescribed by law. Because a breathalyzer test is more intrusive, the grounds required to make such a demand are higher.”

In this case, the appropriateness of the breathalyzer demand depended entirely on whether the officer properly made the ASD demand. The reasonable suspicion standard for the ASD demand - which strikes a balance between an individual’s privacy interest and the public interest in enabling law enforcement to investigate crime - has both subjective and objective elements. Reasonable grounds is a lower standard than reasonable and probable grounds and engages the reasonable possibility, rather than probability, of crime.

The officer subjectively suspected that the accused had alcohol in his body at the time of driving. But was the accused’s admission that he had “a couple of drinks at the golf course,” with no clarification about the quantity or timing of consumption, sufficient by itself to objectively ground a reasonable suspicion that he had alcohol in his body?

BY THE BOOK:

Criminal Code: s. 254



s. 254(2) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours,

operated a motor vehicle or vessel, operated or assisted in the operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, the peace officer may, by demand, require the person ...

[...]

(a) to provide forthwith a sample of breath that, in the peace officer’s opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

s. 254 (3) If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as a result of the consumption of alcohol, the peace officer may, by demand made as soon as practicable, require the person

(a) to provide, as soon as practicable, (i) samples of breath that, in a qualified technician’s opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person’s blood, or

[...]

(b) if necessary, to accompany the peace officer for that purpose.

“In most cases, the admission of consumption alone, without further information about the amount and/or timing of consumption, will be sufficient to ground an objectively reasonable suspicion.”

The Court of Appeal reviewed two divergent lines of authority about whether an admission of alcohol alone was sufficient to objectively ground a reasonable suspicion under s. 254(2). One line of authority found that any admission of drinking would suffice while the second line held that a driver's admission that they had something to drink “a while ago” was not enough, absent other indicia. Justice Veldhuis went on to conclude the following:

In most cases, the admission of consumption alone, without further information about the amount and/or timing of consumption, will be sufficient to ground an objectively reasonable suspicion. Police officers should not be required to inquire into alcohol consumption history with a driver at the roadside. [para. 50]

And further:

In my view, the wording of section 254(2) suggests that the admission of alcohol alone will, generally, ground an objectively justifiable, reasonable suspicion. That section provides that a peace officer can make a roadside ASD demand where he “has reasonable grounds to suspect that a person has alcohol or a drug in their body and that person has, within the preceding three hours, operated a motor vehicle”. ... [T]he test for reasonable suspicion in section 254(2) is based on consumption alone, not its amount or effects.

This conclusion is also grounded in practicalities. To require peace officers to

conduct a roadside calculation of likely current impairment based on common elimination rates is unrealistic and does not reflect the practical realities of a roadside stop, nor the two-stage scheme that Parliament has established in section 254. Parliament created a framework for ready-use in the field. Turning it into a standard difficult to apply would thwart Parliament's will. [reference omitted, paras. 52-53]

In addition, “where a driver is asked whether he has had anything to drink and he responds with something akin to ‘a couple of drinks’ without a temporal limitation, it is reasonable to assume that the driver is referring to the present time,” said Justice Verdhuis. This applies even where the police have arrived at the scene of a serious motor vehicle accident. “It should be no surprise to anyone that in such a situation, an investigating officer would inquire about alcohol consumption. If the inquiry had not been made, there may be a suggestion that the police did not conduct a thorough investigation. The [accused] responded in an unqualified manner that he had ‘a couple of drinks.’ In these circumstances, it is reasonable to infer that he was referring to alcoholic drinks and that his consumption was relatively recent.”

However, each case must be assessed on its own facts. Where a driver qualifies an admission of consumption temporally, such as stating they had something to drink “a while ago,” the admission alone may not be sufficient to ground a reasonable suspicion.

... I do not go so far as to suggest that an admission of alcohol consumption alone will always be enough to meet the reasonable suspicion threshold. Again, each case must be decided on its own facts and the constellation of relevant factors must be examined in their totality. The police are entitled (and, indeed, required) to react to circumstances as they develop. All of the circumstances known to the

“[W]here a driver is asked whether he has had anything to drink and he responds with something akin to ‘a couple of drinks’ without a temporal limitation, it is reasonable to assume that the driver is referring to the present time.”

officer at the relevant time must be considered together, not in isolation.

In summary, I conclude that in most cases, admission of consumption alone will be sufficient to ground an objectively reasonable suspicion. Reasonable suspicion is a low standard. Police officers are not required to inquire into an alcohol consumption history with a driver at the roadside. However, each case must be assessed on its own facts. Police officers must respond to information as it unfolds. [paras. 60-61]

In this case, the officer had the requisite reasonable suspicion, based on the totality of the circumstances, to make the roadside ASD demand. “[He] arrived at the scene of a serious car crash on a June evening. The roads were dry and unobstructed. The weather was sunny, and visibility was good. The cars appeared to have been involved in a head-on collision. The [accused] was the driver of one of the cars. The driver of the other car died in the crash and the passenger was badly injured. When [the officer] asked whether the [accused] had anything to drink, he responded, ‘Yeah, just a couple of drinks at the golf course.’” The “fail” result on the ASD then gave the officer reasonable and probable grounds to believe that the accused had committed an impaired driving offence. The breathalyzer demand was therefore properly made and the test results were admissible as evidence without the need for a s. 24 (2) analysis. There was no s. 8 *Charter* breach nor was the accused arbitrarily detained under s. 9 since the officer had the necessary reasonable grounds.

Right to Counsel

The accused’s argument that the police breached his s. 10(b) right to retain and instruct counsel was rejected. He had contended that his response,

FACTS, VIEWED CUMULATIVELY, PROVIDED GROUNDS FOR ARREST



The Ontario Court of Appeal has rejected a conviction challenge by upholding a trial judge’s ruling that the police lawfully arrested Haytham Meiz at the door to his apartment. While the police stood at the door they smelled marihuana smoke coming from the room when they questioned him and saw drug paraphernalia (a weigh scale, white powder on the weigh scale, and a pill beside the weigh scale) on the shelf in the room. As well, Meiz acted suspiciously during questioning. “*This constellation of facts, viewed reasonably and cumulatively by someone with the experience of the police officer in question, provided ample grounds for [the accused’s] arrest,*” said the Court of Appeal. Since the arrest was lawful there was no s. 9 *Charter* breach. *R. v. Meiz*, 2014 ONCA 209

“Didn’t get much advice but m-hm” was ambiguous enough that the officer should have asked clarifying questions to get an unequivocal response before continuing the investigation. The trial judge stated the correct legal principles involved and applied them properly. She found the accused had received legal advice and that the officer was entitled to interpret his response as a positive one. The officer was not required to further inquire into the quality of legal advice the accused had received.

The accused’s appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

“In summary, I conclude that in most cases, admission of consumption alone will be sufficient to ground an objectively reasonable suspicion. Reasonable suspicion is a low standard. Police officers are not required to inquire into an alcohol consumption history with a driver at the roadside. However, each case must be assessed on its own facts. Police officers must respond to information as it unfolds.”



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