JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

For more on the 2014 British Columbia Law Enforcement Memorial see pages 32-34.

"They are our heroes. We shall not forget them."

Inscription on Canadian Police and Peace Officer Memorial—Parliament Buildings Ottawa, Ontario.

Highlights In This Issue

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Upcoming Events

Human Source Management

This course will equip participants with the basic skills required and the best practices to follow associated 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"

see page 4

Graduate Certificates

Intelligence Analysis

or

Tactical Criminal Analysis

www.jibc.ca

see page 40

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 5 languages of appreciation in the workplace: empowering organizations by encouraging people.

Gary D. Chapman, Paul E. White.

Chicago, IL: Northfield Pub., c2012.

HF 5549.5 M63 C438 2012

Be more than a bystander [videorecording]**: break the silence on violence against women.**

Vancouver, BC: Ending Violence Association of BC, c2014.

1 videodisc (20 min.) : sd., col. ; 4 3/4 in. (DVD).

Produced by the Ending Violence Association of BC and the BC Lions Football Club. Looks at violence against women through the lens of an initiative between the Ending Violence Association of BC and the BC Lions Football Club. It examines what gender violence is, why people should get involved and what being "more than a bystander" means.

HV 6250.4 W65 B4 2014 D1974

Becoming a strategic leader: your role in your organization's enduring success.

Richard L. Hughes, Katherine Colarelli Beatty, David L. Dinwoodie.

San Francisco, CA: Jossey-Bass, c2014.

HD 57.7 H84 2014

Brain boosting secrets [videorecording]**: 16 things you must know about your brain.**

Terry Small.

Surrey, BC: Terry Small, c2011.

1 videodisc (96 min.) : sd., col.; 4 3/4 in. (DVD).

Terry Small shares his plan to boost your brain power, improve your thinking, and optimize your brain and body health for the rest of your life. He covers the following: how to eat right and think right; how to get rid of negative thoughts; the #1 food for your brain; how to improve your reading skills; how to sharpen your memory; how to outwit Alzheimer's; the 3 things every brain must have; and more.

QP 376 S63 2011 D1991

Brain power: improve your mind as you age.

Michael J. Gelb and Kelly Howell; foreword by Tony Buzan.

Novato, CA: New World Library, c2012.

BF 724.55 C63 G45 2012

Leaders eat last: why some teams pull together and others don't.

Simon Sinek.

New York, NY: Portfolio/Penguin, c2014.

HD 57.7 S548 2014

Leading change.

John P. Kotter.

Boston, MA: Harvard Business Review Press, c2012.

HD 58.8 K65 2012

Leading with questions: how leaders find the right solutions by knowing what to ask.

Michael J. Marquardt.

San Francisco, CA : Jossey-Bass, c2014.

HD 57.7 M392 2014

Power over stress: 35 quick prescriptions for mastering the stress in your life.

Kenford Nedd.

Toronto, ON: QP Press, 2003.

RA 785 N42 2003

The practical coach 2 [videorecording]**.**

Seattle, WA: Media Partners Corp., c2014.

1 videodisc (ca. 25 min.) : sd., col. ; 4 3/4 in. (DVD) + 1 CD-ROM.

DVD also contains the leader's guide (PDF format; requires a computer that has a DVD drive and Adobe Acrobat Reader software), previews, and contact information; CD-ROM also contains the leader's guide. Takes managers step-by-step through the three most critical times for performance intervention. Covers the following: coaching on personal habits and hygiene; avoiding employee's defensive sidetracks; and positive ways to reward and encourage peak performance

HF 5549 P73 2014 D1971

Think Globally Police Locally

BCLEDN
BC Law Enforcement Diversity Network

> presents

MADE IN 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.bcledn.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.

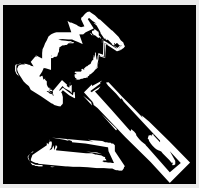
Insp. Steve Corcoran

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.

LEGALLY SPEAKING:

Drug Business



"In the drug business, loyalty and integrity are important. At every step along the way. Wholesalers. Brokers. Retailers. Street dealers. Everyone has their role. And everyone gets their due, their full due. No one gets short-changed. And no one gets cut out. Sometimes, however, loyalty and integrity get left behind. Forgotten. Ignored. Payments are short. Deliveries are light. Brokers are cut out. Retailers deal directly with wholesalers. Disloyalty has its price. And sometimes that price is very steep. As here. One death, a murder." – Ontario Court of Appeal Justice Watt in *R. v. Saleh*, 2013 ONCA 742 at paras. 1-3.

LACK OF RGB DOES NOT RENDER PRESUMPTION OF IDENTITY INAPPLICABLE

R. v. Anderson, 2013 QCCA 2160

Police officers observed a vehicle late at night being driven by someone not wearing a seat belt. They decided to stop the vehicle, which was moving quickly as if the driver was trying to flee. After losing sight of the vehicle, the police officers spotted it parked diagonally across a parking spot. When an officer spoke to the accused about not wearing his seat belt, he was somewhat aggressive. The officer noted a strong odour of alcohol on his breath. The accused did not answer routine questions, appeared to be "stoned," fumbled as he took out his papers, his movements were slow and his were eyes glassy. He was arrested and given a breathalyzer demand. He subsequently provided two breath samples of 141mg% and 142mg%.

Court of Quebec

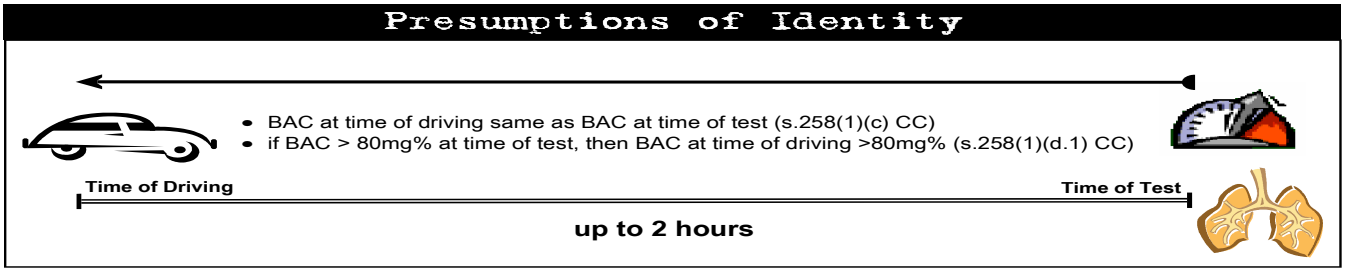
The judge found the stop lawful under Quebec's *Highway Safety Code* because of the viewed seat belt violation. However, the judge ruled that the police violated the accused's rights by arresting him. Although the officer had the requisite subjective belief and enough grounds for an ASD demand, there were insufficient grounds that the accused was impaired and therefore not enough grounds for a breathalyzer test. Nevertheless, the judge admitted the breathalyzer evidence under s. 24(2). The judge rejected the accused's argument that the presumption of identity under s. 258(1)(c) of the *Criminal Code* did not apply without evidence there were reasonable grounds to believe that an offence had been committed. The judge found the absence of reasonable grounds was relevant to the s. 24(2) inquiry but, once an accused complied with the demand and the breath samples were ruled admissible, the accused was in the same position under s. 258(1)(c) as someone whose rights have not been violated. The certificate of analysis was admissible, the presumption of identity applied and a conviction of over 80mg% followed.

Quebec Superior Court

The accused appealed arguing that the trial judge failed to properly weigh the s. 24(2) factors. These arguments were rejected. Recognizing that the relevant s. 24(2) factors were analyzed, the appeal judge accorded considerable deference to the trial judge's decision and concluded it was reasonable. He also opined that the presumption of identity still applied even in the absence of reasonable grounds for the breath demand.

Quebec Court of Appeal

The accused again appealed his conviction arguing, among other grounds, that the presumption of identity in s. 258(1)(c) did not apply if, at the time of the arrest, the officer did not have reasonable grounds to believe that he was committing or had committed an offence under s. 253 (impaired driving/over 80mg%).



s. 258(1)(c) Criminal Code

Section 258(1)(c) establishes a presumption of identity and relieves the Crown from having to prove that the accused's blood alcohol content (BAC) at the time of the offence was the same as at the time of testing. Using the presumption of identity, the accused's BAC at the time of the breathalyzer test is presumed to be the same as their BAC at the time of the alleged offence provided the breath samples were taken in compliance with the provisions of s. 254(3). Absent this presumption, the Crown is required to prove that the results represent the BAC at the time of the offence, likely through expert evidence.

Following the Supreme Court of Canada decision *R. v. Rilling*, [1976] 2 S.C.R. 183 (even though decided prior to the *Charter)*, the Quebec Court of Appeal stated:

> [T]he lack of reasonable and probable grounds to believe that an individual's ability to drive is impaired by alcohol does not mean that the incriminating certificate of analysis is inadmissible if the driver complies with the breathalyzer demand. In other words, it is not necessary to prove reasonable and probable grounds for the presumptions in the Code to apply. [para. 42]

If breath samples are obtained without reasonable grounds for the demand, the evidence may be excluded under s. 24(2) of the *Charter*. However, if the samples are ruled admissible under s. 24(2), the presumption of identity continues to apply:

> In my opinion, the trial judge was correct in saying that when a motion to exclude evidence is dismissed, [translation] "the accused is in the same situation as an accused who has not invoked the Charter, and Rilling applies. The certificate of analysis is admissible in evidence, and the presumptions apply".
>
> The logical outcome of admitting the breathalyzer evidence is the application of the presumption of identity.
>
> To find otherwise would indirectly undermine the still-applicable principles in Rilling and considerably reduce the effect of the judgment rendered under subsection 24(2) of the Charter. [paras. 49-51]

In this case, the accused's motion to exclude the Certificate of Analysis under s. 24(2) was dismissed. Since he complied with the breathalyzer demand and the evidence was ruled admissible, the absence of reasonable grounds did not render the presumption of identity inapplicable.

The accused's appeal was dismissed.

Complete case available at www.canlii.org

SECURITY GUARD PRIVATE ACTOR: CHARTER DID NOT APPLY TO SEARCH

R. v. Jacobs, 2014 ABCA 172

The accused and her companion approached a security checkpoint at the entrance to a summer exhibition. A security guard asked if he could search the accused's purse. The accused consented by placing her purse on the table in front of him. Inside, the security guard observed a closed cigarette package. When he asked about its contents, the accused's voice quivered, her hands shook and she pulled the cigarette package away. The security guard took it back and opened the package. In it he found a white powder which appeared to him to be "some form of illicit drug."

The security guard called over a police officer to show her what he had discovered. The officer pulled the drugs out of the cigarette package, immediately arrested the accused, searched her purse and found three bundles of cash. Laboratory analysis later confirmed the contents as being 13 individually wrapped packages of soft cocaine weighing 2.4 grams, and 14 individually wrapped packages of hard or crack cocaine weighing 2.3 grams.

Alberta Provincial Court

The Crown argued that the security guard was not acting as an agent of the state when he searched the accused's purse and therefore the search was not subject to *Charter* scrutiny. The accused, to the contrary, submitted that the security guard, as an experienced former police officer, was acting as an agent of the state, essentially working as an extension of the authority conferred upon the police officer, who had been assigned to work with the security guards and was present throughout.

The judge ruled that the security guard was acting in a private capacity and therefore his actions were not subject to s. 8 *Charter* scrutiny. The judge, relying on expert drug evidence, then convicted the accused of possessing cocaine for the purpose of trafficking and two counts of failing to comply with release conditions.

Alberta Court of Appeal

The accused appealed her convictions arguing, among other things, that the trial judge erred in finding that the *Charter* did not apply to the search that led to the discovery of the cocaine. In her view, the security guard was acting as an agent of the police, being implicitly authorized or requested by police to search entrants. The security guard was a former police officer who relied on his police training, the police had been hired as extra security at the event and were present at the site, and an officer was positioned close to the security guard at the checkpoint.

State Actor?

The Alberta Court of Appeal agreed with the trial judge that the security guard was acting in a private capacity and not as a state agent. Here, the police officer had not been involved in the search until the drugs were discovered. Although the officer's presence at the time of the search raised the possibility that police influenced how the security guard conducted the search, mere possibility of influence was insufficient to prove actual influence:

> [T]there is no evidence before us to suggest that the police exercised influence over whether or how to conduct [the security guard's] search. There was evidence before the trial judge that it was Northlands' policy to search some entrants to Capital EX for weapons or drugs that would pose a risk to the safety or health of other patrons. While police officers were contracted to assist in implementing that policy, Northlands required no authority or instruction from the police to search entrants to Northlands' premises. [The security guard] testified that he decided to search the [accused] and her companion because they were carrying what he considered to be "very large" purses ... . On the evidence before us, the unavoidable conclusion is that the [accused's] purse would have been searched in the manner it was searched, irrespective of police presence. We are not swayed from this conclusion by [the security guard's] reliance on his past police training and experience in conducting the search. Indeed, it would have made sense for Northlands to retain someone with that professional background to promote security checkpoint searches that are both effective and efficient. [para. 33]

This ground of appeal was dismissed. A new trial was ordered, however, on the basis that the trial judge erred in admitting the opinion evidence of trafficking.

Complete case available at www.albertacourts.ab.ca

JUDGE NEED NOT ENTERTAIN IMPLAUSIBLE CONJECTURE

R. v. Polley, 2014 NSCA 71

A van seen driven erratically left the highway, rolled over several times and ended up in a ditch. Witnesses described seeing two male occupants, one driving the van and the other seated in the right front passenger seat. One man (the accused's brother-in-law) was observed get out of the front passenger seat while the accused (the van owner and a prohibited driver) was found lying on the ground about 60 feet from the vehicle, apparently knocked out but still alive. Both men emitted a strong smell of alcohol. The accused was charged with over 80mg%, impaired driving, driving while disqualified and dangerous driving.

Nova Scotia Provincial Court

At trial the accused did not testify nor call any evidence. His brother-in-law said he could not recall who was driving the van at the time of the crash. Witnesses identified the brother-in-law as the man they saw seated in and getting out of the right front passenger seat, using the passenger side door. Police photographs taken later showed what was described as a seatbelt rash on the brother-in-law's right shoulder and several cuts to his right arm and hand. The judge convicted the accused of impaired driving, dangerous driving, and driving while disqualified. He was sentenced to five years in prison.

Nova Scotia Court of Appeal

The accused argued, in part, that the judge was wrong to conclude that his brother-in-law was the passenger and deduce that he was the driver. He suggested that his brother-in-law could have been driving but ended up in the passenger seat due to the forces of physics The accused claimed that when the van rolled over he could have been ejected from the passenger seat and thrown through the windshield.

Justice Saunders, speaking for the Court of Appeal, rejected this alternative theory as "implausible conjecture":

> Respectfully, such an hypothesis cannot be seriously advanced. There is nothing in this record to offer even the remotest support for the [accused's] fanciful suggestions. To embark upon such idle speculation would constitute legal error. A reasonable doubt based upon an inference unsupported by facts is a misapplication of the law. [para. 18]

She continued:

> [T]he Crown was able to establish a strong circumstantial case based upon the following facts. The van and the scene of the crash were littered with cans and bottles which had once (or still) contained alcohol. Both men had a strong smell of alcohol on their breath suggesting that each had been drinking before or at the time of the crash. The [accused] was found lying shirtless and unconscious in the woods some 60 feet away from where the van came to rest. His brother-in-law ... was seen seated in the right front passenger seat and getting out of the van using that passenger side door. He was wearing a bloodied white t-shirt and had many lacerations to his right arm and hand, which he could not explain. Photographs taken by the police showed blood on the inside of the right front passenger door and armrest. Such evidence, when taken together, would certainly be enough to lead [the trial judge] to the perfectly rational and logical conclusion that the [accused] was driving the van when it left the highway and that he was drunk at the time.
>
> It was not the trial judge's responsibility to reconstruct how this mishap occurred or explain the occupants' kinesics during the crash with scientific certainty. His obligation was to decide whether the Crown had proved all essential elements of the offences charged, beyond a reasonable doubt. He did exactly that. He stated and applied the law correctly. He did not misconstrue or ignore material evidence. He made strong findings of fact. He drew reasonable inferences from those facts. He carefully reviewed the important evidence and provided clear and cogent reasons to explain the basis for his conclusions. [paras. 23-24]

The judge made sound factual findings and inferences, properly applied the law to the evidence and his analysis and conclusions were fully supported. The accused's appeal against conviction was dismissed.

Complete case available at www.canlii.org

DUAL PURPOSE STOP LAWFUL: DRIVING OFFENCE WITNESSED

R. v. Hugh, 2014 BCSC 1426

Marihuana Enforcement Team officers carried out an investigation and obtained search warrants for a leased commercial property as well as a residence. Part of the grounds for the search warrant involved a uniform officer executing a traffic stop at the request of investigators doing covert surveillance. The uniformed officer was told over the radio that the occupant of a vehicle had been driving poorly and was making lane changes without signalling. He did not know the specific lane changes or the location of them. The uniformed officer was able catch up to a black BMW, confirmed with investigators that it was the correct vehicle and that it had made lane changes without signalling. He activated his emergency lights and the BMW pulled over. After being told that he was being stopped for making lane changes without signalling, the accused (driver) told the officer that he had answered a call on his cell phone while driving. He was issued a ticket for driving with an electronic device. The request for the traffic stop was not disclosed in the ITO. As a result of the investigation and search warrants, the accused was charged with production of marihuana and two counts of possessing marihuana for the purposes of trafficking.

British Columbia Supreme Court

The search warrant affiant and member of the covert surveillance team testified the plan was to complete a dual-purpose traffic stop to identify the accused if "a moving motor vehicle violation was observed". He testified he saw the accused make a left turn and a lane change without signalling, at which point the uniformed officer conducted the stop.

The accused argued that the dual-purpose traffic stop required "a legitimate concern for public safety authorized by traffic legislation," but there was no danger to the public. In his view, the traffic stop was unlawful and the information derived from it should have been excised from the ITO. The Crown, on the other hand, submitted that as long as the traffic offence was legitimately witnessed, the dominant purpose for the stop (such as identifying the driver) was irrelevant.

Justice Schultes agreed with the Crown. The investigator saw a lane change in violation of British Columbia's *Motor Vehicle Act* (*MVA*) and relayed this to the uniformed officer. Changing lanes without signalling under s. 151(c) *MVA* does not require that the public be endangered. This was not the same as a stop being a mere ruse or saying the offence did not occur. The fact a ticket was issued for a different offence also did not render the stop unlawful. The officer, after speaking to the accused, exercised "independent judgment by looking into the causes of the violation of which he had been informed, and not acting as a mere tool of the drug investigators."

There was no *Charter* breach with regard to the stop. The judge did, however, note the police were less than candid in leaving the impression that the vehicle was stopped for a purpose entirely unrelated to the investigation. The search warrant was upheld and the evidence was admissible even though there were other problems with it.

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

BY THE BOOK:

British Columbia's *Motor Vehicle Act*

Signals on Turning

s. 151 (c) A driver who is driving a vehicle on a laned roadway

...

(c) must not drive it from one lane to another without first signalling his or her intention to do so by hand and arm or approved mechanical device ... .

s. 489(2) CC DOES NOT REQUIRE UNRELATED PURPOSE

R. v. R.M.J.T., 2014 MBCA 36

During an investigation into sexual offence allegations, the police approached the accused's wife (and complainant's mother) and requested her consent for the seizure of the accused's computer. The wife agreed and officers attended the family home, were shown the computer and seized it. Police subsequently obtained a warrant to search the computer (and other items seized) and found fragments of sexually explicit emails in nature on the computer. The accused was subsequently charged with sexual assault, sexual interference, voyeurism (surreptitious recording), making child pornography, possessing child pornography, extortion and inviting sexual touching.

Manitoba Court of Queen's Bench

The judge found the seizures of the computer by police did not infringe the accused's s. 8 *Charter* rights. As for the computer, he noted that the mother did not have the authority to consent to the computer's seizure. However, the mother lawfully consented to the police entry to her home and the warrantless seizure of the computer was then justified under s. 489(2) of the *Criminal Code*. The judge also ruled that, even if there was a s. 8 breach, the evidence was admissible under s. 24(2). The accused was convicted of several sex-related offences.

Manitoba Court of Appeal

The accused appealed his convictions arguing, among other things, that the computer seizure was not authorized under s. 489(2) and therefore breached of s. 8.

He contended the application of s. 489(2) to the seizure of the computer was unconstitutional for three reasons:

1. The police entered his house specifically to seize his computer. He suggested that the seizing officer must be engaged in a lawful activity for a purpose unrelated to the seizure.

2. The police entered his home unlawfully. The mother could not consent to police entering and searching for the computer prior to seizing it.

3. The reasonable grounds requirements of s. 489(2) were not satisfied. There was no evidence that the police officers subjectively believed that the computer had been used in the commission of an offence or would afford evidence in respect of the commission of an offence, nor did police say they were relying on s. 489(2).

The Crown submitted that the trial judge appropriately applied the legislation and noted the police obtained a warrant before searching the computer's contents (where the expectation of privacy was notably high).

BY THE BOOK:

Seizure without warrant: ***Criminal Code***

s. 489(2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds

(a) has been obtained by the commission of an offence against this or any other Act of Parliament;

(b) has been used in the commission of an offence against this or any other Act of Parliament; or

(c) will afford evidence in respect of an offence against this or any other Act of Parliament.

(Un)related Purpose?

In rejecting the accused's first argument, Justice Cameron, speaking for the Court of Appeal, reviewed the case law and made the following observations about s. 489(2):

- Its purpose is the preservation of evidence.
- It is a self-contained provision that does not require the seizing officer to meet all of the requirements of the plain view doctrine.
- Unlike the plain view doctrine, it is not necessary for the evidence seized to have been discovered in the course of a search in an unrelated investigation.
- The place of seizure alone (whether a private home or public place) does not render the provision unconstitutional. The issue is whether the police were lawfully present, not simply the place where the seizure took place.

(Un)lawful Entry?

The accused maintained that the mother was not able in law to consent to the police entering the family home to seize his computer. The issue though, as the Court of Appeal noted, was not whether the mother could consent to the police searching the contents of the computer (where the accused had a very high expectation of privacy in the information it contained), but whether she could consent to the police entry into the family residence where the computer was located. Justice Cameron found the police entry authorized. The mother was the accused's wife and lived in the home. She had the authority to provide consent to enter the area where the computer was located (a shared area of the home) and, as found by the trial judge, provided informed consent.

Reasonable Grounds?

For an officer to have reasonable grounds, "there must be a subjectively held belief by the police as well as a readily ascertainable objective belief." In this case, neither officer testified as to their subjective belief nor that they were relying on s. 489 (2) to justify the seizure. But the Court of Appeal found this did not matter. First, a trial judge can infer subjective belief as to the existence of reasonable grounds where the police officer does not specifically testify to such a belief as long as such an inference was supported by the evidence. Here, there was sufficient evidence on which the trial judge could infer that the officers subjectively believed there were reasonable grounds that the computer was used in the commission of an offence and/or that it would afford evidence of an offence. Second, s. 489(2) can apply even when a police officer testifies that a seizure was founded on a different basis (such as consent). "Jurisprudence has demonstrated that a seizure made under mistaken authority is not necessarily fatal where authority otherwise exists," said Justice Cameron. "The officers met the requisite conditions to seize the computer pursuant to s. 489(2) of the Code. The fact that they did not state that they were relying on that section is not fatal. Also not fatal is the fact that they were relying on different authority, that being the consent of the mother, to seize." The seizure of the computer was lawful under s. 489(2) and the accused's appeal was dismissed.

Complete case available at www.canlii.org

DOCUMENTS IN POSSESSION USED AS CIRCUMSTANTIAL EVIDENCE: NOT INADMISSIBLE HEARSAY

R. v. Black, 2014 BCCA 192

The police executed a warrant to search for electricity theft and discovered a marihuana grow operation in an outbuilding on a rural property. The outbuilding was dedicated solely to the grow operation and the accused was seen to manipulate the lock as she exited it on the morning the warrant was executed. An unsigned and undated one-page handwritten note was found in a grow room in the outbuilding addressed to someone named "Chrissy," containing what appeared to be a "to-do" list of tasks related to the grow operation. The note directed "Chrissy" to move upstairs plants and set something, as well as report that "Gary never did finish the fan, I will do this morn." The accused was charged with drug offences.

British Columbia Provincial Court

The judge concluded that "Chrissy" was the accused and inferred from the list of tasks that she was involved in the production of marihuana at the grow operation. Based on the circumstantial evidence she was convicted of producing marihuana and possessing it for the purpose of trafficking.

British Columbia Court of Appeal

The accused claimed, among other things, that the note was inadmissible hearsay and the trial judge erred in relying on its contents as evidence that she was involved in the grow operation. The Crown, on the other hand, suggested the note was not being tendered for the truth of its contents. Instead, it was a document found in the accused's possession and was admissible as circumstantial evidence of her association with the outbuilding and her involvement with the grow operation.

Documents in Possession Rule

The long-standing and well-established "documents in possession rule provides that the contents of a document found in possession of the accused may be used as circumstantial evidence of the accused's involvement in the transactions to which the documents relate." The Court of Appeal found the content of the note relating to the grow operation was circumstantial evidence of the accused's involvement in the transactions to which they related. The accused was found by the trial judge to be "Chrissy". Justine Levin went on to state:

> The inference of the [accused's] involvement in the grow operation does not derive from whether it is true that the upstairs short plants should be moved downstairs or that she "knew how to set" something and should "just keep on hitting the set button". It is derived from the location of the Note in the outbuilding, containing a list of tasks to do in relation to the grow operation which occupied the whole of the outbuilding, to which the [accused] was one of a few people who had access and to whom the Note was addressed. [para. 39]

The note was admissible under the documents in possession rule as circumstantial evidence and was not relied upon by the trial judge as the truth of its contents (inadmissible hearsay inferences). The accused's appeal was dismissed.

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

ALL CIRCUMSTANCES TO BE CONSIDERED IN REASONABLE GROUNDS DETERMINATION

R. v. Brown, 2014 ONCA 525

Police received information from a reliable confidential source that a known drug trafficker would be receiving a quantity of drugs from his supplier, whose street name was "Dee". This transaction was expected to take place after midnight on a specified date. The police had previously videotaped Dee when he was sitting on a bench with the known drug trafficker. At 1:18 am police saw a silver Nissan Sentra drive past and park a block away from the drug trafficker's residence. An officer drove towards the vehicle at 30-35 km/h with his high beams on in an attempt to identify the occupants. He believed that Dee was seated in the driver's seat of the Nissan and the drug trafficker was beside him in the passenger seat. Police approached the vehicle with guns drawn and arrested the accused. He was found in possession of 28.9 grams of powder cocaine and 13 grams of crack cocaine.

Ontario Superior Court of Justice

The officer said his identification of the accused was based mostly on the fact that he was a black male with his hair in a ponytail on the top of his head - the same way Dee's hair was styled in the video recorded earlier. He also relied on "the face in general", saying his initial focus was on the driver and he was only able to glance quickly at the passenger. Although the person on the passenger side of the vehicle resembled the known drug trafficker, it turned out not to be him.

The accused adduced evidence from two witnesses (an articling student and a forensic engineer

"[I]n determining whether the grounds for arrest were objectively reasonable, the trial judge was entitled to consider... all the surrounding circumstances."

specializing in accident reconstruction) who conducted drive-by simulations replicating the circumstances of the night in question. Both testified that when they drove past the Nissan Sentra with their high beams on they could not identify any of the occupants' facial features. In the accused's view, if the officer was unable to make out the accused's facial features, he could not have identified him and could not have had reasonable grounds to support his belief that the accused was in the vehicle, selling or intending to sell drugs. Since the arresting officer could not have had reasonable grounds for the arrest, the accused opined that the drug evidence should be excluded under s. 24(2) of the *Charter*.

The judge concluded that the constellation of circumstances relied upon by the arresting officer objectively amounted to reasonable and probable grounds, even considering the testimony of the defence witnesses. In addition, the judge found that even if the arrest was unlawful, the admission of the evidence would not bring the administration of justice into disrepute. The accused was convicted of possession for the purpose of trafficking and sentenced to 13 months in jail.

Ontario Court of Appeal

The accused appealed his conviction arguing that the trial judge erred in finding there were objectively reasonable grounds for his arrest. He also claimed that the evidence obtained from the search of his person and vehicle ought to have been excluded under s. 24(2). The Court of Appeal, however, rejected the accused's submissions, stating:

> First, in determining whether the grounds for arrest were objectively reasonable, the trial judge was entitled to consider, as he did, all the surrounding circumstances. Those circumstances included:
>
> i. the information received from a reliable informant that a drug dealer would be receiving drugs from his supplier (the [accused], who was known to the arresting officer) in the early morning hours of the day in question;
> ii. the observation of a vehicle parked on a street near the dealer's home at 1:18 a.m. on the day in question;
> iii. the officer's observations of the [accused] in the company of the drug dealer on two previous occasions, the last of which was two and one-half months earlier, and his review prior to the arrest of a video taken of the [accused] on that occasion; and
> iv. the [accused's] distinctive hairstyle, which consisted of a ponytail flipped up at the back and worn at the top of his head.
>
> These circumstances provided important context to the officer's identification of the [accused] as he drove past the parked car with the highbeams of his truck on. [reference omitted, para. 4]

As for reconciling the officer's evidence with the testimony of the defence witnesses that it was impossible to make out the facial features of the occupants of the vehicle as they drove past in their simulations, the Court of Appeal upheld the trial judge's understanding of the evidence:

> A careful reading of the officer's evidence indicates that the most important factor in his identification of the [accused] was his distinctively placed ponytail, a feature with which the officer was familiar, based on his earlier observations. The [accused's] hair had been cut and the ponytail removed when the defence witnesses performed their simulations. As well, the officer did not say he observed any specific features, but said he recognized the face "in general".
>
> In our view, the trial judge's acceptance of the officer's evidence was not inconsistent with his acceptance of the evidence of the defence witnesses who said they were unable to observe facial features. [paras. 5-6]

Since both the subjective and objective requirements of reasonable grounds were satisfied, the accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: Additional case facts taken from *R. v. Brown*, [2012] O.J. No. 3605 (OntCA)

SPECULATION ABOUT OFFICER'S MOTIVES IMPROPER

R. v. Brodeur, 2014 NBCA 44

A member of a roving traffic unit with a police service dog was patrolling the Trans-Canada Highway. While sitting in an unmarked vehicle in a 110 km/h posted zone, he captured three radar readings: 120 km/h, 125 km/h and 130 km/h. He believed a black vehicle driven by the accused and passing other vehicles was travelling at the 130 km/h speed. The officer pursued the accused vehicle for about 1.5 km before turning on his flashing police lights and pulling him over. The officer approached the passenger side, smelled perfume and saw an open bottle of Axe perfume in plain view in the vehicle's console. As the smell of perfume dissipated the officer could then smell raw marihuana and arrested the accused. He searched the vehicle incident to arrest and discovered 14 pounds of marihuana in ziplock bags, which were not vacuumed sealed. The police service dog was never deployed during the stop. The accused was charged with possessing marihuana for the purpose of trafficking.

New Brunswick Court of Queen's Bench

The officer, a 23 year police veteran with previous experience in a drug section, testified that, based upon his experience and training, perfume is used to camouflage marihuana odour and the perfume smell was an indication to him that the vehicle might be carrying contraband drugs. He had taken "Pipeline" training, which teaches police officers about signs and indicators of other offences that might be taking place while performing a routine traffic stop. The accused said he was not speeding and believed the officer stopped the wrong vehicle. The judge accepted much of the accused's evidence and rejected the officer's. Although he found the officer stopped the right vehicle travelling at 130 km/h, the judge found the officer was deliberately misleading the court. As well, the judge used the officer's training, experience and resources as a basis for determining his motives and truthfulness. The judge found the officer's mission was to stop and catch drug traffickers. The judge found the accused was arbitrarily detained under s. 9 of the *Charter*, excluded the evidence under s. 24(2) and entered a not guilty verdict.

New Brunswick Court of Appeal

The Crown appealed by arguing that the trial judge erroneously grounded some of his critical factual conclusions on speculation and conjecture, including findings on the officer's motives and truthfulness based on his training, equipment, resources and duties. Justice Bell, delivering the Court of Appeal's decision, agreed. Even though the officer was assigned to a traffic unit patrolling the only major arterial highway and was trained in the use of his radar unit, his Pipeline training and the presence of a police dog caused the trial judge to speculate about the officer's purpose for the stop:

> In my view, speculating about [the officer's] motives for stopping [the accused's] vehicle based upon equipment, resources available and direction of traffic is tantamount to questioning the motives or credibility of a police officer accused of excessive force because he happens to carry a baton or a revolver and is trained in its use. The approach adopted by the trial judge appears to advance the notion that Charter violations will be easier to prove when the arresting officer testifying is highly trained and has significant resources available to him or her, the presumption being that the police officer would use that knowledge and equipment for an improper purpose. The converse, of course, is that where police officers are poorly trained and have limited resources available, the court will be less inclined to be skeptical of their motives

> and less inclined to find a Charter breach. I need make no comment on the legitimacy of such an approach.

A proper inference contains two essential elements: (1) it must be rational and (2) it must be based on the evidence. Here, the trial judge's conclusion about the officer's motives and truthfulness, among other findings, was neither rational nor based on the evidence. As a result of these legal errors, the Crown's appeal was allowed, the accused's acquittal was set aside and a new trial was ordered.

Complete case available at www.canlii.org

REASONABLE SUSPICION: EACH CIRCUMSTANCE NOT TO BE CONSIDERED SEPARATELY

R. v. Yates, 2014 SKCA 52

At about 1:20 am an officer heard a motor vehicle create a very loud noise while passing by the police station. He searched for and found the suspect vehicle, then followed it. The vehicle intermittently travelled at speeds of 70 to 80 km/h in a 50 km/h zone and also made a very abrupt move from the left lane in which it was traveling into the right lane and then abruptly move back into the left lane for no apparent reason. The officer pulled the vehicle over to investigate the traffic concerns. When the officer attended at the driver side window, he told the accused why he had been stopped and asked him to produce his driver's licence. At this time, the officer detected the odour of alcohol from the vehicle through its open window. He saw that the accused's eyes were "somewhat bloodshot" and glossy. Based on these observations, the officer suspected the accused had alcohol in his body and, at 1:27 am, asked him to step out of his vehicle and gave an ASD demand. The accused complied and a "fail" reading registered. The accused was arrested for impaired driving, advised of his right to counsel, a breath demand was made, and he was transported to the police station. After he spoke to a lawyer two breath samples in excess of 80 mg% were obtained and the accused was charged accordingly.

Saskatchewan Provincial Court

The judge accepted the officer's observations as evidence but concluded that the reasonable suspicion standard for demanding an ASD sample had not been met. In her view, the officer did not consider the source of the alcohol odour prior to making the ASD demand. Therefore, the officer did not have reasonable grounds to suspect that the accused had alcohol or a drug in his body at the time of the demand. Thus the requirements of s. 254(2) *Criminal Code* had not been met. The judge found violations of ss. 8 and s. 9 of the *Charter* and the results of the ASD test and Intoxilyzer readings were excluded. The accused was acquitted.

Saskatchewan Court of Queen's Bench

A Crown appeal was unsuccessful. The appeal judge found the Crown bore the burden of adducing evidence to support the objective reasonableness of the officer's suspicion. Here, there were insufficient facts to infer that the accused was the source of the odour as opposed to his vehicle. "Only if the accused was alone in the vehicle could such an inference be drawn," said the appeal judge. Since the Crown failed to lead evidence on the number of persons in the vehicle, the smell of alcohol could not form part of the objective component of the police officer's reasonable suspicion to make the demand. As a result, the findings of ss. 8 and 9 *Charter* breaches were sustained and the accused's acquittal upheld.

Saskatchewan Court of Appeal

The Crown appealed again arguing, in part, that the police officer did not breach the accused's ss. 8 and 9 rights. In the Crown's opinion, the appeal court judge misinterpreted the standard of "reasonable grounds to suspect" and misapplied the standard to the relevant facts.

Justice Klebuc first reviewed the evidentiary burdens in this case. An accused carries the burden of proving a breach of their *Charter* rights. A

warrantless search or seizure is presumed to be unreasonable. Thus, an accused can establish a s. 8 *Charter* violation by demonstrating that a warrantless search or seizure took place. Then, the onus shifts to the Crown to show that the search or seizure was reasonable. An ASD demand under s. 254(2)(b) is a warrantless search and will only be reasonable if it is authorized by law, if the law itself is reasonable, and if the manner in which the search was carried out is reasonable.

Reasonable Grounds to Suspect

The Crown suggested that the lower court applied the higher evidentiary burden of "reasonable grounds to believe" to an ASD demand, rather than the lower standard of "reasonable grounds to suspect" that the driver had alcohol in his or her body. The accused, on the other hand, contended that the smell of alcohol flowing out of the window of his vehicle, his "somewhat bloodshot" and glossy eyes, his violation of the speed limit, and his erratic driving did not, collectively, amount to a "reasonable suspicion" that he had alcohol in his body.

Justice Klebuc found the authority of a police officer to demand a driver provide a breath sample for analysis into an ASD under s. 254(2)(b) on the basis of "reasonable grounds to suspect" was less onerous than the standard of "reasonable grounds to believe" required under s. 254(3) to demand a breath sample for the purpose of determining whether the driver's ability to operate a motor vehicle was impaired by alcohol. He found a valid demand under s. 254(2)(b) required:

- "the police officer must subjectively (or honestly) suspect the detained driver has alcohol in his or her body; and
- the police officer's subjective suspicion must be based on a constellation of objectively verifiable circumstances, which collectively indicate that the suspicion that the detained driver has alcohol in his or her body is reasonable."

He continued:

> Consequently, the constellation of circumstances need not be sufficient to prove the detained person actually has alcohol in his or her body. Nor should each circumstance in the constellation be separated, analysed and evaluated apart from the constellation. Rather, the adequacy of a police officer's suspicion is to be assessed under the de novo analysis called for in R. v. MacKenzie using this test: would a reasonable person, standing in the shoes of the investigating police officer and aware of all of the objectively verifiable evidence, reasonably suspect the driver had alcohol in his or her

"It is an error in law to dissect the constellation of circumstances and individually test each circumstance or the absence of other circumstances."

BY THE BOOK:

Breath Demands: ***Criminal Code***

254(2) If a peace officer has **reasonable grounds to suspect** that a person has alcohol or a drug in their body … the peace officer may, by demand, require the person to … (b) 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.

… … …

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 offense 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 … .

[emphasis added]

> body? The reviewing court is not to consider whether the investigating officer's suspicion was accurate or whether other inferences could be drawn from the constellation of circumstances, or to consider whether the investigating officer could have taken further steps to confirm or dispel a prima facie reasonably held suspicion that alcohol was present in the driver's body. It is an error in law to dissect the constellation of circumstances and individually test each circumstance or the absence of other circumstances. [para. 34]

Justice Klebuc concluded that the lower courts erroneously required the Crown to prove the higher standard of reasonable belief as opposed to the lower standard of reasonable suspicion. It was not necessary for the Crown to establish that the accused probably had alcohol in his body. The proper standard of reasonable suspicion only required that the Crown prove a reasonable suspicion that a driver possibly had alcohol in his or her body. Thus, the Crown did not have to eliminate other possible sources for the alcohol odour coming from the accused's vehicle. Furthermore, the full constellation of circumstances leading the officer to form his suspicion that the accused had alcohol in his body must be considered:

> In my respectful view, the requirement that an investigating officer must have direct proof of a driver having alcohol in his or her body in order to found a reasonable suspicion that the driver has alcohol in his or her body is inconsistent with the prescribed standard and the requirements of s. 254(2)(b). ...[T]he applicable evidentiary standard only requires the investigating officer to have a reasonable suspicion that a driver has alcohol in his or her body, based on a constellation of objective events. The constellation of necessity may include factors capable of an innocent or innocuous explanation. ... "[F]actors that give rise to a reasonable suspicion may also support completely innocent explanations. This is acceptable, as the reasonable suspicion standard addresses the possibility of uncovering criminality, and not a probability of doing so." [reference omitted, para. 38]

And further:

> There is no onus on the Crown to adduce evidence to support or disprove the alternative scenarios of the defence as to the possible source of the odour of beverage alcohol. The Crown need only prove that the inferences drawn by the investigating officer are rational and reliable on the basis of the evidence it has adduced and that, on the whole of it, the facts known to the investigating officer and inferences of fact drawn by the investigating officer reasonably support a suspicion that the accused had alcohol in his or her body.
>
> By holding the Crown to dispel speculation that other persons were in the vehicle or to definitively show that the [accused] was the source (or was the probable source) of the odour of beverage alcohol, the trial court and the appeal court mistakenly elevated the evidentiary and persuasive burden imposed on the Crown and held the Crown to establish the validity of the s. 254(2)(b) demand on a standard greater than "reasonable suspicion." [paras. 45-46]

Applying the law to the facts in this case, the Court of Appeal found that "a reasonable person standing in the shoes of the officer and aware of the entire aforementioned objective factors, would reasonably suspect that the [accused] had alcohol in his body." The accused was the driver, he drove at speeds significantly greater than the posted speed limit, drove in an erratic manner, made excessive noise while passing the police station at approximately 1:00 am, an odour of alcohol beverage emanated from the driver's door window, his eyes were "somewhat bloodshot" and glossy, and he stopped his vehicle in a safe manner. "The possibility of another person or source for the odour did not undermine the rational inference that the odour might have been coming from the accused. "Given the officer had smelled the odour of beverage alcohol flowing out of the vehicle's open window, the officer could rationally infer that the [accused] was the source of the odour," said Justice Klebuc. "Moreover, nothing in the evidence before the trial court eliminated the [accused] as a possible source of the odour."

The s. 254(2)(b) demand and resulting ASD test did not amount to an unreasonable search or seizure nor was there an arbitrary detention. The accused's acquittal was set aside and a new trial was ordered.

A Different View

Justice Jackson, in dissent, concluded there were no errors made by the trial judge in finding ss. 8 and 9 breaches. "Having regard for the officer's agreement that the smell of alcohol was not coming from the breath or body of the accused, the totality of the circumstances could only amount to a 'mere suspicion' that [the accused] had alcohol in his body at the time the demand was made," she said. Since a new trial had been ordered by the majority, she found it unnecessary to address the trial judge's decision to exclude the evidence under s. 24(2).

Complete case available at www.canlii.org

911 ENTRY: CURSORY SEARCH JUSTIFIED IN CIRCUMSTANCES

R. v. Depace, 2014 ONCA 519

A grandmother called 911 after receiving a call from her 11 year old grandson that his parents were fighting. The police attended and, after they knocked and identified themselves, saw the kitchen light turned off and heard a dog barking. But no one answered the door. The police checked their records on the home's occupant. They had the accused's name and photograph as well as information that he was associated with the Hell's Angels. After 25 minutes the police forcibly entered the home. They saw the accused, who appeared to be drunk, as well as a woman and boy on the main floor of the house, which was relatively small and open. An officer decided to check both upstairs and downstairs for officer safety and to make sure there was no one else present who may have needed help. In the basement police saw evidence of drug dealing, including cocaine, scales, cash and debt lists. The police then obtained a search warrant and found a large quantity of cocaine and cash. The accused was charged with drug offences.

> "[I]n the context of a 911 emergency call, the police do not need to take the word of the occupant that everything is alright. They are entitled to satisfy themselves. The extent of what they may need to do will depend on the particular circumstances."

Ontario Superior Court

The officer testified that he did not know exactly who was who regarding the 911 call or whether there wasn't another person there who had been involved in the reported fighting. The judge rejected the accused's challenge to the warrantless search. He found no s. 8 *Charter* breach and, even if there was a violation, would have nonetheless admitted the cocaine and money under s. 24(2). Convictions followed.

Ontario Court of Appeal

The accused again challenged the warrantless search of his home. Although he agreed that the police could forcibly enter his home in response to the 911 call, he argued they were not entitled to go to the basement where they saw the drug evidence in plain view. In his view, the exigent circumstances permitting entry ended once the police found the mother and child safe and unharmed, and all three occupants of the home were accounted for. He further submitted that the police could have assured themselves there was no one else present by asking the occupants. The police had heard no noise or anything else to suggest that there might be someone else present.

The Court of Appeal rejected the accused's submissions. "The fact that the occupants denied entry to the police for 25 minutes made the 911 situation much more acute and suspicious," said the Court. It continued:

> As the Supreme Court said in R. v. Godoy ..., in the context of a 911 emergency call, the police do not need to take the word of the occupant that everything is alright. They are entitled to satisfy themselves. The extent of what they may need to do will depend on the particular circumstances. In this case, the grandmother did not know who might be in the house as she was called by her grandson. [In] Godoy, the court stated the applicable principle as follows: "While there is no question that one's privacy at home is a value to be preserved and promoted, privacy cannot trump the safety of all members of the house-hold."
>
> In this case, the search was undertaken for two legitimate purposes: to ensure no one else was there either injured or frightened on the one hand, or threatening on the other. The search itself was cursory and non-invasive. [paras. 8-9]

Since there was no s. 8 breach, s. 24(2) was not triggered and the evidence was admissible.

Complete case available at www.ontariocourts.on.ca

OFFICER SAFETY RENDERED DETENTION & SEARCH LAWFUL

R. v. B.S., 2014 BCCA 257

At about 2:30 am two police officers were on patrol in a marked police car when they came across a group of five young people (appearing under the age of 19) walking down the road in a residential area. One of the officers believed they may have been intoxicated based on their "buoyancy" and "body language", which exhibited some swaying as they walked. He decided to stop and check to see if they were okay and to ensure there was no threat of property damage, which, in his experience, commonly occurred when young people were intoxicated. The officer pulled his car ahead of the group, got out and started talking to them. The officer could smell liquor coming from someone in the group. One of the youths tried to walk away but was called back. He was exhibiting symptoms of intoxication but denied drinking. As the officer began to speak individually to the youths, asking for identification and about outstanding warrants, the accused (who had not yet been approached or spoken to directly) became fidgety. A second officer sitting in the police car radioed that she could see the accused doing something behind his back.

The officer speaking to the youths had safety concerns because he was dealing with a group of five young people. He told the accused he was going to search him. The accused was handcuffed and searched, in a cursory fashion, for weapons. The officer found a baton in the small of the accused's back and a bag of cocaine. He was arrested for possessing a weapon dangerous to the public peace and possessing a controlled substance. Back at the police detachment further drugs were found in his possession.

British Columbia Provincial Court

The accused testified that he believed he was not free to leave once the officer stopped the group. Although he was not told directly that he could not leave, he assumed he could not leave when the other youth was called back. Another youth, however, testified that she believed the group was free to leave. The officer said he stopped the group under the *Liquor Control and Licensing Act* and as a preventive measure to talk to them and make sure they were not so intoxicated that they were a danger to themselves or to others' property. He said he had no intention of detaining the young people, believed they were free to refuse to speak to him or to produce their identification and were free to walk away.

The accused argued his rights under ss. 8 and 9 of the *Charter* had been breached. He submitted that he had been arbitrarily detained when the officer first approached the group. The subsequent search and seizure of the drugs and baton were therefore unlawful. Further, he contended that his rights under s. 10(b) of the *Charter* and s. 25(2) of the *Youth Criminal Justice Act* (*YCJA*) were violated because he was not advised of his right to counsel immediately upon his detention. In his view, the evidence should have been excluded under s. 24(2).

Although describing this case as a close call, the judge concluded that the accused was not detained when first stopped but was detained when the officer began to question him. By that time though, the officer had legitimate concerns for officer safety which justified the search. Thus, the accused had not been arbitrarily detained nor subject to an unreasonable search. The safety concern also entitled the officer to search the accused before advising him of his rights under s. 10. Since there were no *Charter* breaches, the evidence was admitted. Even if there was a breach, the judge would have admitted the evidence under s. 24(2). The accused was convicted of three counts of possessing a controlled substance for the purpose of trafficking (cocaine, ecstasy, and LSD) and carrying a concealed weapon.

British Columbia Court of Appeal

The accused appealed his convictions arguing that the trial judge erred in finding no *Charter* breaches nor a violation of the *YCJA*. In his view, he was arbitrarily detained as soon as the officer approached and stopped the group, even before he was spoken to. He claimed he reasonably believed that the direction for the other youth to come back applied to him as well. The Crown, on the other hand, argued that the trial judge did not err in finding the accused was not detained until his furtive gestures attracted attention and raised concerns for officer safety, leading to the search and the discovery of the baton and drugs.

Detention

Just because a person is delayed or kept waiting by police does not necessarily mean they are psychologically detained. "Whether there has been a detention is determined by an objective test: having regard to the entire interaction, would the actions of the police cause a reasonable person in the position of the suspect to conclude that he or she is not free to go, and must comply with the directions of the police," said Justice Neilson for the Court of Appeal. The factors considered in deciding whether an interaction with police amounts to a psychological detention include the circumstances of the encounter, the nature of the police conduct and the particular characteristics or circumstances of the individual.

The Court of Appeal agreed this was a close call but found the trial judge did not err in finding the accused was not detained until questioned by police:

- **Circumstances of the encounter.** The appearance and behaviour of the group justified reasonable police inquiries. The officer believed the group wandering down the street at 2:30 am was under the legal drinking age and, based on his experience, exhibited a degree of exuberance and some mobility characteristics that he associated with intoxication and potential property damage. This impression was confirmed when he smelled alcohol on approaching the group, and observed signs of impairment in one of the youth.

BY THE BOOK:

Right to Counsel: ***Youth Criminal Justice Act***

Arresting officer to advise young person of right to counsel

s. 25(2) Every young person who is arrested or detained shall, on being arrested or detained, be advised without delay by the arresting officer or the officer in charge, as the case may be, of the right to retain and instruct counsel, and be given an opportunity to obtain counsel.

"Whether there has been a detention is determined by an objective test: having regard to the entire interaction, would the actions of the police cause a reasonable person in the position of the suspect to conclude that he or she is not free to go, and must comply with the directions of the police."

- **Nature of the police conduct.** The officer had no intention of detaining the group, believed they were free to refuse to speak to him or produce their identification and were free to walk away. His tone was conversational, and he had no physical contact with any of the young people before his dealings with the accused. He said he expected that once he finished talking with each of them, he would be on his way. Asking the young people for identification and about outstanding warrants provided some support for a conclusion the officer's inquiries were directed at investigation rather than prevention but there was no evidence of the responses he received. Nor was there evidence that the police followed up with computer checks, or other action to further these inquiries. Instead, all but the accused were permitted to leave.

  Although the officer called back one of the group members as he walked away, another youth testified she believed they were free to leave. After greeting the young people generally, the officer dealt with each of them individually and sequentially. He had not yet approached the accused or communicated with him directly before he attracted police attention through his own actions - becoming "fidgety" with his hands behind his back. It was open to the trial judge to find that the accused was not the subject of "focussed suspicion" amounting to a detention but rather someone who was "delayed" or "kept waiting" while the officer dealt with the others in the group.

- **Characteristics of the accused.** The accused's age and relative sophistication did not undermine the trial judge's finding.

The trial judge made no error in finding that the accused was not detained until the officer approached him directly and told him he was going to search him. "At that point there were legitimate concerns for officer safety," said Justice Neilson. "The youths were unfamiliar to [the officer], he did not know what the [accused] was doing behind his back, and he was concerned the [accused] might have a weapon. The justifiable concern for officer safety rendered the [accused's] detention and search lawful, and precluded a finding that his rights under s. 8 and s. 9 of the Charter had been violated."

Right to Counsel

As for the alleged s. 10 breach, the "safety concern also justified a postponement of the officers' obligation to advise the [accused] of his rights under s. 10 of the Charter." Similarly, s. 25(2) *YCJA* was not violated.

The Court of Appeal also agreed with the trial judge that, had the accused's rights been infringed, the admission of the evidence would not have brought the administration of justice into disrepute.

The accused's appeal was dismissed.

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

TOTALITY OF CIRCUMSTANCES INFORMS REASONABLE GROUNDS ANALYSIS

R. v. Slippery, 2014 SKCA 23

The accused had a few alcoholic drinks after work. When driving home he noticed his vehicle was swerving so he pulled it over into a ditch on the side of the road. Police were called by other drivers and, shortly after 1:00 am, they arrived. The accused appeared to be asleep inside the car. The officer had difficultly arousing him and getting documentation from him. He smelled strongly of liquor, had glossy eyes, slurred his speech, was slow in answering questions, and stumbled backward, leaning against his car. Breath samples were demanded and the accused was charged with care and control over the legal limit.

Saskatchewan Provincial Court

The judge found the police officer had reasonable grounds to believe the accused had care and control of a motor vehicle while over the legal limit. He stated the test for determining whether reasonable and probable grounds existed was "whether, on the whole of the evidence adduced, a reasonable

"The emphasis on considering the totality of the circumstances exists to avoid concentrating on individual pieces of evidence which are offered to establish the existence of reasonable and probable grounds. One indicium of impairment may not amount to reasonable and probable grounds on its own. One must consider all of the circumstances to assess whether the officer had reasonable and probable grounds to make the demand."

person, standing in the shoes of the officer, would have believed that the individual's ability to operate a ... motor vehicle was impaired." The certificate of analysis was admitted and the accused was convicted of over 80 mg%.

Saskatchewan Court of Appeal

The accused appealed his conviction arguing, among other things, that the trial judge erred by considering irrelevant facts in assessing whether reasonable grounds existed and in concluding that such grounds were objectively justified. He submitted that the trial judge referred to facts that were not known to the officer when he made the breath demand, such his own testimony that he parked his car because he had been drinking earlier and might have been impaired when he was driving, and his falling to sleep between the two breath samples. Justice Whitmore, delivering the unanimous judgment, found the judge applied the correct legal test:

> In assessing whether there are reasonable and probable grounds, the Court must look at the facts known to the officer which were available to the officer at the time he or she formed the requisite belief. The events which came to light subsequently to the formation of the officer's belief are not relevant in determining whether the police officer had reasonable and probable grounds for his belief at the time he formed the belief. Although the totality of the evidence must be considered, this does not include post-demand conduct. The totality of the evidence is that which is available to the police officer at the time he held the belief.
>
> The emphasis on considering the totality of the circumstances exists to avoid concentrating on individual pieces of evidence which are offered to establish the existence of reasonable and probable grounds. One indicium of impairment may not amount to reasonable and probable grounds on its own. One must consider all of the circumstances to assess whether the officer had reasonable and probable grounds to make the demand. [references omitted, paras. 21-22]

In Justice Whitmore's view, the trial judge did not consider facts not know to the officer as factors in assessing whether the officer had reasonable grounds to make the demand.

As for the objective grounds, the Court of Appeal concluded the officer had "ample and compelling reasons to believe the [accused] was impaired." "In assessing whether the officer's belief was reasonable a court must measure the facts as the police officer honestly understood them to be," said Justice Whitmore. "The lawfulness of an arrest must be judged on the circumstances that were apparent to the officer at the time, even if those circumstances turn out to be inaccurate."

The accused's appeal was dismissed.

Complete case available at www.canlii.org

MARIHUANA ODOUR SUFFICIENT TO JUSTIFY ARREST

R. v. MacCannell, 2014 BCCA 254

A police officer stopped the accused after observing his truck speeding along a highway. The officer approached the driver's side and spoke to the accused through an open window. He obtained a driver's licence and other documents and began to walk back to his police car. As he walked past the rear door, he smelled an overwhelming odour of vegetative marihuana coming from the accused's truck. The officer immediately returned to the driver's door,

told the accused he could smell an "overpowering smell of marihuana" coming from inside the truck and arrested him. The vehicle was then searched and a cardboard box containing 50 starter marihuana plants was found behind the driver's seat. The officer also found a Mason jar and baggie both containing marihuana on the passenger side and four pounds of dried marihuana in the truck's canopy area. At the police station a further 34 pounds of marihuana, cannabis resin and $4,000 in cash was located.

British Columbia Provincial Court

Although the officer testified he could not estimate the quantity of marihuana from smell alone, he said that the overwhelming odour of vegetative marihuana was the only basis for his conclusion that he had reasonable grounds for the arrest. The officer found the smell so overpowering that he formed the opinion "there was marihuana actually present in the pickup, not the remnants of smells from marihuana being there at some time previously." The judge noted the officer's extensive experience involving marihuana investigations and ability to distinguish between the distinctive smells of "burnt", "growing or vegetative" and "dried" marihuana.

The judge concluded that the smell of vegetative marihuana, without any other factors, was sufficient for the officer to form the necessary reasonable grounds to arrest the accused for possession of marihuana under s. 495(1)(b) of the *Criminal Code*. The judge also held that the existence of other possible explanations for the smell of marihuana did not mean that the officer could not have reasonable grounds to arrest based on the odour alone. The accused was convicted of possessing marihuana for the purpose of trafficking.

Officer's Experience

The officer testified he had come into contact with individuals possessing marihuana approximately 1,000 times, had been involved in hundreds of vehicle stops involving the presence of marihuana and had been involved in 12–15 investigations of marihuana production or grow-op offences.

British Columbia Court of Appeal

The accused appealed his conviction suggesting that his arrest was unlawful and the search of his vehicle incidental to that arrest was unreasonable. First, he suggested that under s. 495 (1)(a) a peace officer may only arrest for an indictable offence. Since the officer could not determine the quantity of marihuana, he could not have reasonable grounds to believe the accused possessed more than 30 grams of it (making it indictable); possession of 30 grams or less is a summary only offence. Second, if the arrest was made under s. 495(1)(b), odour alone was insufficient to constitute reasonable grounds. Third, the officer failed to consider other possible explanations of the presence of marihuana such as a medical access authorization.

> "An officer may only arrest an individual for an offence under [s. 495(1)(b)] where the officer personally witnesses facts or events that can support an objectively reasonable belief that the suspect is presently committing an offence."

Arrest & Reasonable Grounds

Justice Garson, speaking for the Court of Appeal, rejected the accused's arguments. He found the arrest was lawful under s. 495(1)(b) which "permits an officer to arrest an individual who is committing a criminal offence either summary conviction or indictable."

"An officer may only arrest an individual for an offence under ss. [495(1)] (b) where the officer personally witnesses facts or events that can support an objectively reasonable belief that the suspect is presently committing an offence," said Justice Garson. He continued:

> [A]n arrest for possession of marihuana in the circumstances of ... this case is based on ss. (b) not ss. (a). As the Crown argues in this case, ss. (b) provides for the arrest of an individual whom the arresting officer "finds committing any offence", whether summary or indictable. The

BY THE BOOK:

Warrantless Arrest: ***Criminal Code***

s. 495 (1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

(b) a person whom he finds committing a criminal offence; or

(c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

> significance of the arrest being under ss. (b) is that proof of the offence of possession does not depend on the amount of marihuana being greater than 30 grams. [The accused's] argument that the officer could not have known or have had reasonable grounds to believe he was in possession of more than 30 grams is irrelevant. [para. 33]

The Court of Appeal found that the odour of marihuana alone, in this case, was sufficient to ground a credible belief that an offence was being committed. The officer had a subjective belief that the accused was in possession of marihuana. This belief was also objectively reasonable. "Standing in the shoes of the officer, with his extensive experience, objectively he could easily have held a credibly based belief that [the accused] was in possession of vegetative marihuana," said Justice Garson.

Alternate Explanations

The Court of Appeal also rejected the accused's submission that the officer was required to consider and rule out other potential innocent explanations for possession of the marihuana such as an authorization to possess for medical needs or that the odour could have been left over from earlier use of the vehicle to transport marihuana:

> [The reasonable grounds] standard does not require an officer to satisfy him or herself that there is evidence of proof beyond a reasonable doubt or even a prima facie case. All that the officer must have is an objectively reasonable basis for believing the suspect is presently in possession of marihuana, without necessarily ruling out potentially innocent inferences, defences or lawful excuses. [para. 45]

The arrest was lawful and the search incidental to arrest did not breach s. 8 of the *Charter*. The accused's appeal was dismissed.

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

PENILE SWAB UNREASONABLE AS AN INCIDENT TO ARREST

R. v. Saeed, 2014 ABCA 238

The accused was arrested at 6:05 am for sexual assault after police received a complaint from a 15 year old girl. He was taken to the police station, but released sometime between 7:00 am and 7:30 am only to be re-arrested again at 8:35 am. He was placed in a "dry cell", handcuffed to a steel pipe and seated on the floor with his hands behind his back. Police took photographs of him as well as a penile swab. He wiped his own penis with the swab and then turned it over to the police. A subsequent DNA analysis of the swab showed DNA matching the complainant.

Alberta Court of Queen's Bench

The accused wanted the DNA report resulting from the penile swab excluded as evidence. The judge ruled that police conduct fell within definition of a strip search (*R. v. Golden*, 2001 SCC 83). She found the police took appropriate steps to ensure that the procedure was carried out in a reasonable fashion. Nevertheless, the judge concluded there were no exigent circumstances justifying the search. None of the police officers testified about a concern that the

DNA evidence could be lost or degraded. The judge ruled the Crown had not established that obtaining the swab was lawful as a search incident to arrest. The Crown therefore did not overcome the presumptive warrant requirement and the warrantless search breached the accused's s. 8 *Charter* rights. But she found the evidence admissible under s. 24(2) of anyway. The accused was convicted of sexual assault causing bodily harm and sexual interference.

Alberta Court of Appeal

The accused submitted, in part, that the trial judge erred in admitting the results of the penile swab as evidence. The Crown, on the other hand, argued that there was no s. 8 *Charter* violation in taking the penile swab as a search and seizure incident to arrest.

A majority of the Court of Appeal found the penile swab in this case was not a proper exercise of the police power to search as an incident to the accused's re-arrest:

> Generally, it is our view that in the absence of a recognized exception to the presumptive requirement for prior judicial authorization to permit a search of this intimate sort to occur, the absence of that prior authorization means that there was a breach of the right of the [accused] to be free of unreasonable search and seizure. Those exceptions include situations where an accused consents to the search and seizure, where it is truly incidental to arrest in the sense it flows from a valid concern for officer safety or evidence preservation, or in situations of exigency. This last category deserves particular comment because its qualities and limitations dictate that it will rarely arise. [para. 50]

The majority found the character of the penile swab more intrusive than a strip search and more akin to obtaining bodily samples from a suspect (as in *R. v. Stillman*, [1997] 1 SCR 607). Justices Watson and Bielby stated:

> We conclude, however, that the Supreme Court's decision in R v Stillman... governs the disposition of this appeal; it cannot be distinguished on the basis that some of the seized material there was obtained from within the body, namely the dental impressions, whereas here the seized material was obtained from the surface of the body, from on the penis. The relevant question is not whether the seizure occurs from the surface of or from within any part of the body, but whether the nature of the area from which material is taken is such that the search and resulting seizure may infringe upon the person's bodily dignity in such a way as to constitute the ultimate affront to human dignity. A typical person would judge an affront to their dignity of a greater nature through the taking of a penile swab than a dental impression, notwithstanding the internal nature of the latter search and seizure.
>
> In Canadian society, people generally identify themselves with their bodies. Non-consensual interferences with the body are experienced as a violation of human dignity. That is particularly so where the genital area is the subject of the search, although this principle is not limited to genital searches. [paras. 55-56]

And further:

> In sum, unless a statute otherwise provides, a warrant is required for any intimate search and seizure for bodily samples from the person, absent consent, absent evidence which establishes that the time required to apply for a warrant could result in the bodily samples sought significantly deteriorating or disappearing before a search and seizure under warrant could be undertaken or absent evidence of extreme exigency. Such a search cannot be justified, without warrant, simply on the basis of being incidental to arrest, without more. [para. 62]

Thus, the warrantless search and seizure (penile swab) was unreasonable under s. 8. However, the majority would not exclude the evidence under s. 24(2), the accused's appeal was dismissed and his convictions were upheld.

"Non-consensual interferences with the body are experienced as a violation of human dignity. That is particularly so where the genital area is the subject of the search ..."

"[U]nless a statute otherwise provides, a warrant is required for any intimate search and seizure for bodily samples from the person, absent consent, absent evidence which establishes that the time required to apply for a warrant could result in the bodily samples sought significantly deteriorating or disappearing before a search and seizure under warrant could be undertaken or absent evidence of extreme exigency."

A Second Opinion

Justice MacDonald disagreed with the majority. He concluded that there was no s. 8 breach because, even in the absence of exigency, the search and seizure was proper as an incident to arrest. First, the arrest was lawful. Second, the search was related to the reasons for the arrest. The arrest was for sexual assault and the search was to determine whether the complainant's DNA was on the accused. Finally, the search was executed reasonably. The police wanted to preserve the evidence and did so in a respectful manner. The accused himself took the sample and handed it back to the officer.

Furthermore, the officer had reasonable and probable grounds to justify the strip search as required by *Golden*. The search was conducted at the police station and therefore exigent circumstances were not required. *Golden* only requires exigent circumstances if the strip search is conducted in the field. "In my opinion, there was no need for the police to have obtained a warrant in order to conduct the penile swab as they had ample authority to do so pursuant to the common-law power of search incident to arrest, given the facts of this case i.e., a sexual assault that had occurred mere hours before and the need to preserve important evidence," said Justice MacDonald.

Justice MacDonald also found the Supreme Court of Canada decision in *Stillman* distinguishable. In that case, the police took samples of the accused's own bodily substances which would not deteriorate over time. In this case, the accused was being swabbed for the DNA of another person (the complainant) which would deteriorate over time:

> It would be an affront to one's sense of justice for the police in this case to be required to stand idly by while highly relevant but time sensitive DNA evidence disappeared forever. Again it must be emphasized that this is potential DNA evidence of the complainant located on the [accused's] body surface and not the [accused's] own DNA. The latter situation is governed by R v Stillman. In my view, a telewarrant was not required as a precondition for the police to have conducted the penile swab in question. [para. 36]

Justice MacDonald found the trial judge erred in finding a s. 8 breach and the evidence was admissible. He too dismissed the accused's appeal.

Complete case available at www.albertacourts.ab.ca

INFORMANTS MAY CROSS-CORROBORATE EACH OTHER

R. v. Evans, 2014 MBCA 44

Based on information from five informants, four of which were first-timers, the police obtained a search warrant under s. 487(1)(b) of the *Criminal Code*. When police executed the warrant at the accused's premises their seizure included 19 STEN submachine guns, magazines and ammunition. As a result the accused was charged with possessing stolen property, unlawful possession of various weapons and making a false firearms possession acquisition licence.

Manitoba Court of Queen's Bench

The accused brought a pre-trial motion alleging, in part, that the ITO lacked sufficient grounds to meet s. 487 requirements. Although she found this to be a "very close case", the reviewing judge dismissed the accused's motion. After excising erroneous information, the judge found there was sufficient reliable information remaining such that

the issuing justice could have granted the search warrant. She was satisfied that the information of two of the five informants in the ITO was sufficiently detailed and corroborated to provide the requisite reasonable grounds. Although first time informants, they both saw the accused in possession of a STEN submachine gun. The accused was ultimately convicted by a judge and jury of manufacturing STEN submachine guns and four other firearm related offences.

Manitoba Court of Appeal

The accused challenged his convictions arguing, among other grounds, that his s. 8 *Charter* rights were breached by the search of his property. In his view, the reviewing judge erred in concluding that there was sufficient reliable information, after excision, to uphold the warrant.

Justice Mainella, delivering the Court of Appeal's opinion, disagreed. "In our view, when the information of informants Y and K is considered in the totality of the circumstances, the statutory pre-conditions to issue a search warrant for the [accused's] property could have been satisfied," he said. He further added:

> There was ample evidence in the ITO that the property of the [accused's] son-in-law was being used for trafficking in STEN submachine guns. The inference that could be drawn from Y and K's information is that the [accused's] property (which was nearby to his son-in-law) was being used to store the guns and that the [accused] knew that, as he was seen by both informants with STEN submachine guns and K had seen such guns on the [accused's] property.[para. 13]

Furthermore, the judge did not err in "considering the effect of informants, Y and K's, information cross-corroborating each other in assessing whether, in the totality of the circumstances, reasonable grounds to search the [accused's] property existed."

The accused's appeal was dismissed.

Complete case available at www.canli.org

TERMS OF CONTRACT NEGATED PRIVACY INTEREST IN PACKAGE

R. v. Godbout, 2014 BCCA 319

A young man went to a DHL office (courier company) in Alberta and dropped off a child's toy box for delivery to the accused in British Columbia. The man signed and was given a copy of the waybill. On the waybill there was a reference that the full terms of the shipping contract could be accessed on the DHL website. The shipping contract included a term that DHL or any government authority could search the box without notice. It read:

> "Without notice, DHL may, at its sole discretion, open and inspect any shipment and its contents at any time. Customs authorities, or other governmental authorities, may also open and inspect any shipment and its contents at any time."

The man paid the shipping fee and left. The DHL worker recognized the man from a previous transaction. Due to his manner and presentation she was uncomfortable with the transaction and decided to open the box. In the box she saw a child's toy and two "bricks" wrapped in tape. Police were contacted the police and an officer attended the DHL office, met with staff and was directed to the open box. He took the box to the Calgary airport where he requested Canada Border Services agents to x-ray the box. He was advised there was an object inside likely made up of plant material consistent with marihuana. The officer then took the package to his office and opened the bricks. Inside each brick were smaller baggies containing cocaine totaling 535 grams.

Alberta police sent the box to a Vancouver police drug section to arrange a controlled delivery of the package. The bricks were repackaged with inert substances and a small amount of narcotics. Police obtained a tracking warrant authorizing the installation of a tracking device in the DHL package and a general warrant authorizing the entry into the residence of the location where the DHL package was located once the alarm had been activated. An officer, dressed as DHL staff, delivered the box to an

apartment in British Columbia. The accused answered, confirmed his identity and signed for the package which was left with him. About 75 minutes later, the package alarm went off, police entered the apartment and the accused was arrested. A search warrant for the apartment was then obtained. In the apartment, police recovered the DHL package as well as over 600 ecstasy pills in a safe, a digital scale with white powder residue, score sheets, a stun gun, and plastic bags, one of which contained traces of cocaine and MDMA. They also retrieved text messages from the accused's cell phone that he had attempted to delete after he was detained. The messages appeared to refer to the delivery of the box and arrangements to sell the cocaine.

British Columbia Provincial Court

The accused contended that the interception of the DHL box violated his s. 8 *Charter* right and the evidence obtained from the time the package was seized in Alberta should have been excluded under s. 24(2). The judge, however, dismissed this argument. He found that the terms of the shipping contract specifically authorized the initial inspection of the package and government agents to do the same. The judge ruled that the accused could not have a greater expectation of privacy in the contents of the box than the man who sent it. "I cannot conclude that the consignee in these circumstances has greater privacy interests than the consignor, whose expectation of privacy, given the contractual term, was extremely low, perhaps nonexistent given the terms of the contract," said the judge. "Given these circumstances, I cannot conclude that [the accused's] s. 8 rights were violated when the package was opened and turned over to the police in Calgary as he has little or no expectation of privacy in that package." Furthermore, even if there was a s. 8 breach, the judge would have admitted the evidence under s. 24(2). The accused was convicted of possessing controlled substances (cocaine and MDMA) for the purpose of trafficking.

British Columbia Court of Appeal

The accused again claimed that the opening, and search and seizure of the package violated s. 8 and the evidence should have been excluded. In his opinion, the trial judge erred when he found the police had not conducted an unlawful search and seizure when they took possession of the box from the DHL staff. The Crown took the position that the accused had no objectively reasonable expectation of privacy in the contents of a package sent to him by a third party who, by contract, had authorized the carrier and police to inspect the package. Since the police did not intrude on any recognizable privacy interest of the accused, there was no search or seizure within the meaning of s. 8.

Justice Goepel first outlined the principles underlying s. 8 of the *Charter*:

> Section 8 of the Charter protects the right to be secure against unreasonable search and seizure. To establish an infringement of s. 8, the person raising the claim must establish that he or she had a reasonable expectation of privacy in the thing searched or seized. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances.
>
> The evaluation of any claim under s. 8 of the Charter involves two distinct inquiries. The first is whether the impugned state conduct intruded upon an applicant's reasonable expectation of privacy so as to constitute a search within the meaning of s. 8. The second is whether the state intrusion upon the applicant's privacy was unreasonable. The second inquiry, namely whether the search was reasonable or justifiable, arises only if the first is answered in the affirmative. [references omitted, paras. 18-19]

To be afforded protection under s. 8, any claimed expectation of privacy must be objectively reasonable.

"To establish an infringement of s. 8, the person raising the claim must establish that he or she had a reasonable expectation of privacy in the thing searched or seized. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances."

In this case, the shipping contract authorized the inspection of the package by the courier company as well as government authorities. The Court of Appeal found the specific terms of the shipping contract "negated any objectively reasonable expectation of privacy that either [the sender] or the [accused] could assert." Justice Goepel continued:

> The recipient could not have a greater expectation of privacy than the sender. The fact that the [accused] may not have known of the terms of shipment does not make his subjective expectation objectively reasonable.
>
> In the circumstances of this case there is no support for the [accused's] assertion of a reasonable expectation of privacy in the package and its contents during the period between the delivery of the box to DHL and the controlled delivery to the [accused]. The police did not breach his constitutionally protected privacy rights by taking custody, from the shipping company, of an opened package that contained 535 grams of cocaine shipped by a third party under a contract that expressly authorized both the carrier and the governmental authorities to open the package, because the [accused] had in the circumstances no such rights. [paras. 27-28]

Since the accused's asserted privacy interest was not objectively reasonable, he had no reasonable expectation of privacy and therefore there was no search or seizure within the meaning of the *Charter*. Because there was no s. 8 breach, there was no need for a s. 24(2) analysis. The accused's appeal was dismissed.

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

INCIDENTAL PAT-DOWN REASONABLE, BUT SEARCH OF FLASH DRIVE NOT

R. v. Tuduce, 2014 ONCA 547

The police stopped the accused for speeding at 10:22 am, arrested him for driving with a suspended licence and patted him down for safety reasons. He was wearing a large, puffy winter coat and the officer placed his hands in the front pocket of the coat and pulled out a small leather wallet, a USB key (flash drive), and a bundle of credit cards held together with an elastic band. The officer noticed that the cards were not in the accused's name, and that one of the cards was in a small manila envelope. He was placed in the rear of the police car and was allowed to call his mother to pick up his vehicle. The officer returned to the SUV to turn off the ignition and roll up the window. While doing so, he saw two *Provincial Offences Act* notices on the back seat and a dismantled cell phone, a SIM card, and a large number of credit card-sized manila envelopes in the front area. At that point, the officer formed the belief that the cards found in the accused's pocket were stolen, and he had sufficient grounds to make an arrest for possession of stolen credit cards.

The officer returned to the police car, arrested the accused for credit card offences, handcuffed him, and took his cell phone and bundle of cards. When he returned to the SUV to seize the items he noticed earlier, he saw a green fabric box on the floor behind the driver's seat. He could see a portion of an Ontario driver's licence sticking out of the box, removed it and found it was in someone else's name. He also saw a saran-wrapped package, unwrapped it and found a number of small electronic parts that could be used to take information from the magnetic strip of credit and debit cards. He also noticed several shopping bags containing computer cables and a credit card imprinter. The officer halted his search for safety reasons; cars were passing at a high rate of speed near where he was standing. The accused was taken to the police station, searched and six more SIM cards and a small electronics board were located. His USB key was placed in his personal effects. At 3:40 pm fraud squad detectives searched the vehicle, now stored at a towing company, and seized the shopping bags and their contents. They also decided to search the USB key that evening without a warrant, relying on the power to search as an incident to arrest and believing it could contain credit card data. The USB key was turned over to a police expert and a week later a forensic analysis of the USB key was conducted. The USB key contained photographs of a card reader and a circuit board used in skimming devices. Text files containing

credit or debit card numbers followed by four digit Personal Identification Numbers and links to websites that offered pinhole cameras and material used in skimming devices, as well as instructions on how to make a magnetic strip card reader, were also found. The accused was charged with several credit card related offences.

Ontario Superior Court of Justice

The accused argued that the various searches breached his rights under s. 8 of the *Charter* and sought exclusion of all the evidence under s.24(2). The judge found there were four searches and all but one of them unreasonable:

1. **Pat-down search at roadside.** This warrantless search was incidental to arrest for "an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused". Small items that could have been used as a weapon, such as a razor blade, could have been located in the wallet or the stack of credit cards. The judge held it was also reasonable for the officer to examine the contents of the wallet and read the names on the credit cards while he conducted his search. It was unrealistic to require a police officer to refrain from examining items that he locates during the course of a pat-down search for weapons.

2. **Roadside search of SUV.** The judge found that the officer did not have reasonable and probable grounds to arrest the accused for possession of stolen credit cards based on his observation of the disassembled cell phone, the SIM card and the manila envelopes, which were located in the front seat of the SUV. Since the credit card arrest was unlawful, the search of the SUV at the roadside and the seizure of the cell phone, the SIM card and the manila envelopes from the front seat area was unreasonable.

3. **Search of SUV after it was towed.** Since the arrest was unlawful, this search of the SUV incidental to arrest was also unlawful.

4. **Search of USB key.** The judge also found this search unlawful because the police power to search as an incident to arrest does not authorize the warrantless search of electronic devices, absent exigent circumstances.

Despite these *Charter* breaches, the judge nonetheless admitted the evidence under s. 24(2), convicted the accused of seven credit card related offences and sentenced him to two years less a day in prison followed by two years' probation.

Ontario Court of Appeal

The accused argued, in part, that the trial judge erred in not finding the pat-down search, and examination of his wallet and credit cards breached his s. 8 rights and in failing not to exclude all of the evidence under s. 24(2).

Arrest & Pat-Down Search

Justice Gillese, authoring the Court of Appeal decision, found both the arrest and pat-down lawful. First, Section 217(2) of Ontario's *Highway Traffic Act* provides a broad discretion for an officer to arrest a person driving with a suspended driver's licence on the standard of reasonable and probable grounds. In this case, the officer had the requisite justification for the arrest and properly exercised the power. Justice Gillese stated:

> This is not a case where there was a complete absence of justification to arrest or where the arrest was made for an unlawful or improper purpose. The [accused] was the sole occupant of the SUV. He was speeding and driving with a suspended licence. Based on his record check, [the officer] knew that the [accused's] licence had been suspended for a sufficient length of time that the [accused] would have received notice of the suspension by mail. Had [the officer] issued a summons and left the [accused]

"A search incident to arrest may be carried out to ensure the safety of the police and the public, to protect evidence from destruction, or to discover evidence that can be used at trial."

> alone on the highway, it is entirely possible that the [accused] would have gotten back into his SUV and continued driving on the highway. [The officer] had the power to arrest, in the circumstances. He detained the [accused] by placing him in the back of his cruiser but did not handcuff the [accused], allowing him to contact a licenced driver to pick up the vehicles. The power to arrest was not improperly exercised. The arrest was lawful. [para. 47]

Second, the pat-down search was also lawful. "A search incident to arrest may be carried out to ensure the safety of the police and the public, to protect evidence from destruction, or to discover evidence that can be used at trial," said the Court of Appeal. "[The officer] believed, and in the circumstances had a reasonable basis for believing, that a protective pat-down search would serve the purpose of ensuring officer safety; he was therefore entitled to engage in such a search." The officer testified he conducted the search for safety reasons relating to both himself and the accused. He was working alone on a busy highway and knew that he would be placing the accused in the back of his police cruiser without handcuffs.

"[The officer] believed, and in the circumstances had a reasonable basis for believing, that a protective pat-down search would serve the purpose of ensuring officer safety; he was therefore entitled to engage

Furthermore, the trial judge did not err in concluding the pat-down search did not go too far when the officer checked the accused's wallet and package of cards:

> [The officer] testified that he carried out the search incident to arrest for safety reasons. Although he did not testify directly that the same reasoning applied to his search of the wallet and cards, the trial judge appears to have accepted [the officer's] testimony as extending to the search of the wallet and stack of credit cards. The trial judge stated that it is possible for a small item, such as a razor blade, to be located in a wallet or among a stack of credit cards. Accordingly, the trial judge said, it was "unrealistic" to expect the officer to have refrained from examining those items located in the [accused's] coat pockets in the course of a pat-down search for weapons.
>
> The trial judge made these findings in the context of a pat-down search that had been conducted in a reasonable manner. [The officer] patted down the [accused's] waistband and the pockets of his jeans. The [accused] was wearing a large, puffy winter coat. [The officer] reached into the front pockets of the coat and removed a wallet, USB key and package of cards bound together by an elastic band. He did not remove other items from the pockets and he did not ask the [accused] to remove any clothing for closer inspection.
>
> As for [the officer's] observation of the names on the cards, I do not see how [the officer] could have checked the package of cards for possible weapons without looking at the cards and, in doing so, noticing the names recorded on them. [paras. 52-54]

Since the pat-down search was valid, s. 24(2) did not apply to the evidence obtained from this search .

Exclusion of Evidence

The Court of Appeal also rejected the accused's claim that the trial judge made an error in not excluding the evidence obtained from the SUV and USB key searches. Using the three part s. 24(2) analysis regarding (i) the seriousness of the *Charter*-infringing conduct, (ii) the impact of the breach on the *Charter*-protected interests of the accused, and (iii) society's interest in adjudication of the case on its merits, Justice Gillese found the evidence admissible. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

2014 BRITISH COLUMBIA LAW ENFORCEMENT MEMORIAL

Friday, September 26 to Sunday, September 28, 2014

On Sunday, September 28, 2014 law enforcement officers from across British Columbia and northwest Washington State will meet at Abbotsford's Rotary Stadium at Exhibition Park to honour our fallen comrades who made the ultimate sacrifice while serving the citizens of the province of British Columbia.

On September 24, 1998, the Government of Canada officially proclaimed the last Sunday of September of every year as Police and Peace Officers' National Memorial Day. The Solicitor General of Canada stated that "a formal, national Memorial Day gives Canadians an opportunity each year to formally express appreciation for thededication of Police and Peace Officers, who make the ultimate, tragic sacrifice to keep communities safe." Law Enforcement Officers from all over Canada gather in Ottawa and march to the Police and Peace Officers' Memorial Pavilion on Parliament Hill, where all fallen Officers are remembered and their sacrifices honoured.

The British Columbia Law Enforcement Memorial coincides with the National Police & Peace Officers' Memorial held in Ottawa and alternates annually between the site of "The Bastion" on the grounds of the BC Legislature in Victoria and the Lower Mainland. The Bastion, a Provincial Monument dedicated to those officers who lost their lives in active service to the citizens of BC, was unveiled in September 2004 by Premier Gordon Campbell, Solicitor General Rich Coleman and Mr. and Mrs. Ng, representing a "Fallen Hero Family" at the annual Memorial event.

On behalf of the British Columbia Association of Chiefs of Police (CACP), the British Columbia Police Association and the organizing committee representing all BC Law Enforcement agencies we would like to invite all peace officers and citizens to join us on this last Sunday in September in honouring our fallen comrades and supporting their surviving family members.

Host Agencies & Organizing Committee

The Abbotsford Police Department and Langley RCMP Detachment are honoured to host this year's Memorial event together with committee members representing: BC Sheriff Service; Canada Border Service Agency; City of Abbotsford – Parks, Recreation & Culture; Commercial Vehicle Safety & Enforcement; Conservation Service of BC; Correctional Service of BC; Correctional Service of Canada; CP Police Service; Delta Police Department; E Division RCMP; Police & Peace Officers' Memorial Ribbon Society; and Vancouver Police Department.

2014 MEMORIAL WEEKEND OVERVIEW

Friday, September 26, 2014

- *1st Annual Memorial Golf Tournament*
  - Ledgeview Golf & Country Club in Abbotsford
  - Texas Scramble, best-ball format / Inter-agency competition

Saturday, September 27, 2014

- ✦ *Memorial Bike Ride*
- ✦ *Master Workout Class*
  - formats Zumba, Bootcamp, Yoga
- ✦ *BC Law Enforcement Memorial Mess Dinner*
  - To be held at Abbotsford Centre
  - Event open to law enforcement officers only

Sunday, September 28, 2014

- ✦ *BC Law Enforcement Memorial*
  - Rotary Stadium, Exhibition Park, Abbotsford
- ✦ *Memorial Reception*
  - Ag-Rec Building, Exhibition Park, Abbotsford

PARKING

Participants may park at:

- Exhibition Park – lower lot north of Rotary Stadium (32470 Haida Drive)
- Abbotsford City Hall parking lots (Trethewey Street at Veterans Way)
- Mouat Secondary High School (32355 Mouat Drive)

TRANSPORTATION

All Law Enforcement agencies will be responsible for providing their own transportation to Abbotsford.

PARADE ORDERS

The parade will form up on Thunderbird Memorial Square on Veterans Way in Abbotsford (behind City Hall) at 1130 hrs. Colour Party and Rifle Escorts will be leading; with Pipe Bands leading each company. The senior officers shall also be positioned in front of their respective units. Sergeant Major's Briefing - will be held on the Sunday morning at Abbotsford Police Headquarters (2838 Justice Way) at 1100 hrs. The Parade will STEP OFF at 1215 hrs. The Memorial Service will be conducted followed by a march past of the Review Party and surviving family members of the fallen.

ORDER OF DRESS

Members shall wear the order of dress as established by their respective agencies. Headdress will remain ON for the entire service.

MOTORCYCLES

Motorcycles will line up in the parking lot west of The Reach Gallery at 32388 Veterans Way, Abbotsford.

LAW ENFORCEMENT SERVICE DOGS

Service Dogs and their handlers will march behind the company of their home agency.

RECEPTION

Following the parade a reception will be held at the Air Cadet Building, Exhibition Park until 1600 hrs. Finger foods, coffee and water will be provided. At 1600 hrs the doors of The Rancho (35110 Delair Road, Abbotsford) will be opened.

2014 British Columbia
Police & Peace Officers' Memorial

2838 Justice Way, Abbotsford, BC V2T 3P5 Phone: 604-859-5225 Fax: 604-859-4812
Contact Email: memorial@abbypd.ca

Host Agencies:

Abbotsford Police Department

Langley RCMP Detachment

BRITISH COLUMBIA
LAW ENFORCEMENT MEMORIAL
COLLECTOR COIN

The front of the coin depicts a Federal and Municipal officer standing post at the British Columbia Law Enforcement Memorial Bastion located on the grounds of the Provincial Legislature in Victoria; with the flag of British Columbia in the background.

The back of the coin depicts officers from Federal, Provincial and Municipal agencies firing a rifle salute with the Memorial Ribbon in the background. The phrase around the border is etched into the Bastion.

Coins are $10 each

Net proceeds will be donated to:
British Columbia Law Enforcement Memorial Foundation
&
Police & Peace Officers' Memorial Ribbon Society

Be the one

on the front line
enforcing the law
keeping communities safe

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