JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

CAPE 2015

Canadian Association of Police Educators

Effective & Defensible Training Through Collaboration

Conference: May 20-22, 2015

Pre-conference Workshop: May 19, 2015

The Canadian Association of Police Educators (CAPE) promotes excellence in law enforcement training and education through the guidance of innovative research, program development, knowledge transfer, network facilitation, and collaborative training initiatives. In the changing landscape of police training many agencies are stretching their resources to do more with less. The goal of the 2015 CAPE conference is to promote discussion on hot topics in police training, highlighting collaboration as a mechanism to achieve effective and defensible training within the current economic climate.

Sessions at the conference are designed to be short, fast-paced presentations followed by facilitated group discussions, panel discussions, or question and answer sessions with panelists to promote interaction and critical thinking. Innovations in police training in BC will be showcased throughout the conference and scheduled updates from various organizations and committees will promote collaboration.

More info on p. 4

Highlights In This Issue

National Library of Canada Cataloguing in Publication Data

Main entry under title:

In service: 10-8. -- Vol. 1, no. 1 (June 2001)

Monthly

Title from caption.

"A newsletter devoted to operational police officers across British Columbia."

ISSN 1705-5717 = In service, 10-8

1. Police - British Columbia - Periodicals. 2. Police - Legal status, laws, etc. - Canada - Cases - Periodicals. I. Justice Institute of British Columbia. Police Academy. II. Title: In service, 10-8. III. Title: In service, ten-eight.

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JUSTICE INSTITUTE of BRITISH COLUMBIA | LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

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

Becoming a critical thinker.
Vincent Ryan Ruggerio.
Australia: Wadsworth, (2014).
BF 455 R829 2015

Build your own rainbow: a workbook for career and life management.
Barrie Hopson and Mike Scally.
Oxford, UK: Lifeskills International, (2014).
BF 637 S8 H667 2014

Collaborative learning techniques: a handbook for college faculty.
Elizabeth F. Barkley, Claire Howell Major, K. Patricia Cross.
San Francisco, CA: Jossey-Bass, (2014)
LB 1032 B318 2014

Decision making and problem solving strategies.
John Adair.
Philadelphia, PA: Kogan Page Ltd, (2013).
HD 30.23 A43 2013

Develop your leadership skills.
John Adair.
London, UK: Kogan Page Limited, (2013).
HD 57.7 A2746 2013

A guide to the project management body of knowledge (PMBOK guide).
Newtown Square, PA: Project Management Institute, Inc., (2013).
HD 69 P75 G845 2013

Improve your writing.
Ron Fry.
Boston, MA: Cengage Learning, (2012).
LB 1047.3 F796 2012

Influencer: the new science of leading change.
Joseph Grenny [and others].
New York,NY: McGraw-Hill Education, (2013).
BF 774 I54 2013

Interface design for learning: design strategies for learning experiences.
Dorian Peters.
Berkeley, CA: New Riders, (2014).
LB 1028.5 P47 2014

Interpersonal communication: relating to others.
Steven A. Beebe, Susan J. Beebe, Mark V. Redmond, Terri M. Geerinck, Lisa Salem-Wiseman.
Toronto,ON: Pearson, (2015).
BF 637 C45 I68 2015

Leadership 2030: the six megatrends you need to understand to lead your company into the future.
Georg Vielmetter and Yvonne Sell.
New York, NY: AMACOM, American Management Association, (2014).
HD 30.27 V54 2014

Learning to lead: a workbook on becoming a leader.
Warren Bennis and Joan Goldsmith.
New York , NY: Basic Books, c2010.
HD 57.7 B463 2010

The lens of leadership: being the leader others want to follow.
Cory Bouck.
New York, NY: Aviva Publishing, (2013).
HD 57.7 B683 2013

The theory and practice of change management.
John Hayes.
Houndmills, Basingstoke, Hampshire; New York, NY: Palgrave Macmillan, (2014).
HD 58.8 H39 2014

Canadian Association of Police Educators

Effective & Defensible Training Through Collaboration

Conference: May 20-22, 2015
Pre-conference Workshop: May 19, 2015

Presentation topics at the 2015 CAPE Conference include:

- Hot topics in police training:
  - ✓ Mental readiness
  - ✓ Two-tiered policing
  - ✓ The Economics of policing
- Training for Vancouver's Downtown East Side
- The JIBC continuum of training
- Assessing in the real world:
  - ✓ Outcomes based assessment
  - ✓ Reality-based training and assessment
  - ✓ Blended learning: e-learning for outcomes based assessment
- Developing provincial standards:
  - ✓ BC's Certified Use of Force Instructor Course (CUFIC)
  - ✓ BC's Firearms working group
  - ✓ Police Services Division – working towards provincial standards in BC
- Assessment Centre
- National Training Inventory
- Collaboration in Police Training
- BC's Crisis Intervention and De-Escalation training

A limited-capacity pre-CAPE workshop on curriculum mapping will be offered where participants will work directly with the BC Police Academy Curriculum Developer to map their curriculum to the Police Sector Council National Framework of Competencies.

There will be opportunities to network and exchange ideas in an informal setting.

cape-educators.ca

NEW JUSTICE APPOINTED TO SUPREME COURT

On November 27, 2014 the Right Honourable Beverley McLachlin, Chief Justice of Canada, welcomed the appointment by Prime Minister Stephen Harper of Ms. Suzanne Côté to the Supreme Court of Canada. "Ms. Côté is appointed directly from the Bar of Quebec, after a distinguished career as an advocate", said Chief Justice McLachlin. "She brings extensive expertise in commercial and civil law, as well as a wealth of experience in public law. I look forward to her contributions to the Court."

Justice Côté was sworn-in as a judge of the Supreme Court of Canada before the Chief Justice and the other judges of the Court in a private ceremony on December 2, 2014. Justice Côté joins eight other judges comprising the Supreme Court of Canada.

Judges of the Supreme Court of Canada

- **Madam Chief Justice Beverley McLachlin**
  ➡ appointed 1989
- **Madam Justice Rosalie Silberman Abella**
  ➡ appointed 2004
- **Mr. Justice Marshall Rothstein**
  ➡ appointed 2006
- **Mr. Justice Thomas Albert Cromwell**
  ➡ appointed 2008
- **Mr. Justice Michael J. Moldaver**
  ➡ appointed 2011
- **Madam Justice Andromache Karakatsanis**
  ➡ appointed 2011
- **Mr. Justice Richard Wagner**
  ➡ appointed 2012
- **Mr. Justice Clément Gascon**
  ➡ appointed 2014
- **Madam Justice Suzanne Côté**
  ➡ appointed 2014

MANNER OF STRIP SEARCH MATTERS: s. 8 CHARTER BREACHED

R. v. Muller, 2014 ONCA 780

Police received information from two confidential informants. Both were drug users and criminals, and their reliability was unconfirmed. They said that a man named "Biggie" was selling crack cocaine out of an apartment belonging to another man ("Peter"). "Peter" received drugs in exchange for using the apartment. The information was current as one of the informants had bought drugs from "Biggie" earlier in the day. Biggie was described as being a big black man, six feet tall, with a large build, short brown hair in braids, and weighing about 240 pounds. One informant told police that Biggie had bought a handgun for protection, but he had not seen it. Police were able to identify the lessee of the apartment, and he matched the informants' description of "Peter". On the basis of this information, the police obtained a s. 11 *Controlled Drugs and Substances Act* (*CDSA*) search warrant, which was executed by the Emergency Services Unit.

As the search warrant was being executed, police officers were conducting surveillance outside the building to ensure people did not escape or throw drugs off the balcony. They noticed the accused walk out of the building through a pedestrian exit (side door) located not far from the apartment being searched. He fit Biggie's general description: a six foot tall black man with a large build. The officers, wearing clothing that clearly identified them as police, approached the accused on foot. As they did, he discarded a digital scale and continued to walk away. The scale had a residue on it resembling crack cocaine. The officers caught up to the accused and asked him for identification. He identified himself orally and produced no identity documents. He was arrested for possessing crack cocaine for the purpose of trafficking, advised of his right to counsel, and frisk searched. Three cellphones and some money were found in his possession, but no drugs, debt lists or other common indicia of drug trafficking. Thinking the accused was Biggie and that he was trying to hide something from them, he was taken to the police station to be strip searched.

At the police station, the accused was strip searched by two male police officers in a strip search room. He was asked to remove his clothing, piece by piece, and hand them over. When naked, he was asked to turn around and "bend over and spread his butt cheeks." As he bent over, a plastic bag inside another bag was visibly concealed between his buttocks. An officer removed the bag and found crack cocaine, cocaine and a dozen oxycodone tablets inside it. The search was conducted in a room with the door open, and was recorded on video and electronically viewable by others in the station. The officers did not obtain supervisory approval for the strip search. Four other people arrested inside the apartment were also subsequently strip searched at the police station, but nothing was found on them.

Ontario Superior Court of Justice

The judge found both the arrest and the incidental searches (frisk and strip search) lawful. He concluded that the information provided by the informants, standing alone, was insufficient to justify the arrest. But the cumulative effect of the information along with the observations of the surveillance officers provided the police with requisite reasonable grounds to make the arrest. The accused was the physically similar to Biggie's description, the timing an location of the accused's departure from the building and his attempt to discard a digital scale and move away from the police added to the informant information.

As for the strip search, the judge found it too was lawful. The police had the necessary grounds to justify it. First, the accused had discarded a digital scale, signalling he was trying to conceal material from the police. Second, although the frisk revealed no drugs, police found money and three cell phones, further enhancing the officers' grounds to believe the accused was involved in the sale of drugs. Finally, the accused was evasive during his arrest, refusing to produce identification or provide an address. "In these circumstances, the officer believed that the accused was trying to hide

something from him," said the judge. "The evasive manner of the accused, together with his earlier attempt to dispose of evidence, offered some basis for believing that he might have taken steps to conceal evidence of the offence." The judge was also satisfied the strip search, although not a model one, was not conducted in an unreasonable manner. There was no evidence the open door or electronic video actually caused a privacy breach. There were grounds justifying the search procedure and the lack of supervisory approval did not change this. Finally, the bag was concealed between the accused's buttocks and was not in his anus. There was no *Charter* breach, the evidence was admissible and the accused was convicted.

Ontario Court of Appeal

The accused appealed his convictions arguing that both his warrantless arrest and the searches that followed were unlawful,. Further, he suggested that the had not been conducted in a reasonable manner.

Arrest (& Frisk)

The accused argued his arrest was unlawful because the police did not have reasonable grounds upon which to arrest him. He contended that the police did not reasonably believe that he had possession of drugs. Accordingly the incidental searches that followed were unreasonable. The Crown, on the other hand, argued that the reasonable grounds standard had been met; it was not equivalent to "proof beyond a reasonable doubt" or even "a prima facie case". In the Crown's opinion, the cumulative effect of all the information known to the police prior to the accused's arrest supported an objectively reasonable belief that he was in possession of crack cocaine for the purpose of trafficking and, therefore, the arrest and search incident to the arrest were lawful.

Under s. 495(1)(a) of the *Criminal Code* a peace officer is permitted to make a warrantless arrest if they believe, on reasonable grounds, that a person has committed or is about to commit an indictable offence. In describing this power, Justice Watt, writing the Court of Appeal's judgment, stated:

> [T]he arresting officer must subjectively have reasonable grounds on which to base the arrest. However, that on its own is not enough to make the arrest lawful. In addition, those grounds must be justifiable from an objective point of view. A reasonable person placed in the position of the officer must be able to conclude there were indeed reasonable grounds for the arrest. [references omitted, para. 36]

Justice Watt noted that the information provided by the confidential informants, by itself, was insufficient to meet the reasonable grounds threshold. Although "the information was somewhat specific", it can from one untested source and one whose reliability was unverified. However, the police had more than just the information. The accused matched "Biggie's" general description, walked out of the building as a *CDSA* warrant was being executed, and discarded a digital scale covered with a residue resembling crack cocaine when officers approached. "In combination, the information provided by the informants, coupled with the observations made of the [accused's] behaviour, met the standard imposed by s. 495(1)(a) of the Criminal Code," said Justice Watt. "The proper issue was not whether the police had reasonable grounds to believe the pedestrian was Biggie, but rather, whether they had reasonable grounds to believe the pedestrian had been or was in possession of drugs for the purpose of trafficking."

"[T]he arresting officer must subjectively have reasonable grounds on which to base the arrest. However, that on its own is not enough to make the arrest lawful. In addition, those grounds must be justifiable from an objective point of view. A reasonable person placed in the position of the officer must be able to conclude there were indeed reasonable grounds for the arrest."

Following a lawful arrest, the police may conduct a search incidental to that arrest. "A search incident to arrest derives its authority from the lawful arrest and requires no independent justification, either at common law or under the Canadian Charter of Rights and Freedoms," said Justice Watt. "Breaking this down, for a search to be justified as an incident to arrest, the arrest itself must have been lawful and the search must have been incident to the arrest, meaning the search must have related to the reasons for the arrest itself." As for this case, the Court of Appeal stated:

> The lawful arrest of the [accused] permitted the police to conduct a frisk search of him incidental to the arrest. In this case, the frisk search was incidental because it related to the reasons for the arrest. The arrest was for the possession of drugs for the purpose of trafficking. The purpose of the frisk search was to discover evidence of the offence: drugs or drug paraphernalia on the [accused's] person. [references omitted, para. 43]

Strip Search

As for the strip search, the accused contended that there were no reasonable grounds upon which it could be based such that the presumption of unreasonableness was rebutted. He suggested that the trial judge combined neutral factors (possession of cellphones), misapprehensions of evidence (the accused's refusal to identify himself), and a negative factor (failure to find drugs on the frisk search) as positive evidence sufficient to justify a strip search for drugs. The Crown, on the other hand, submitted that the strip search was reasonable in the circumstances. The accused had been lawfully arrested and frisked, and the purpose of the strip search was to discover evidence of contraband or other drug paraphernalia. The money and cellphones found, as well as the accused's refusal to produce identification or provide an address, solidified the grounds required to justify the strip search.

"Strip searches conducted as a matter of routine policy, even if executed in a reasonable manner, are not reasonable within s. 8 of the Charter. Compelling reasons, rooted in the circumstances of the arrest, are required to render a strip search reasonable, even where the execution is flawless."

Justice Watt outlined several principles governing a strip search:

- "The more intrusive the search, the greater the degree of justification and constitutional protection appropriate;
- "Strip searches involve a significant and direct interference with personal privacy and can be humiliating, embarrassing and degrading for those subjected to them.
- "Where a strip search is justified as an incident to arrest, the arrest itself must be lawful. The search must also be incident to the arrest. In other words, the search must be related to the purpose of the arrest.
- "The reasonableness of the search for evidence, including the reasonableness of the strip search, is governed by the need to preserve evidence and prevent its disposal by the arrested person. Where arresting officers suspect the arrested person may have secreted evidence on areas of his or her body that can only be exposed by a strip search, the risk of disposal must be reasonably assessed in all the circumstance.
- "The mere possibility that an individual may be concealing drugs on his or her person is not sufficient to justify a strip search of that person.
- "Strip searches conducted as a matter of routine policy, even if executed in a reasonable manner, are not reasonable within s. 8 of the *Charter*. Compelling reasons, rooted in the circumstances of the arrest, are required to render a strip search reasonable, even where the execution is flawless.
- "The fact that police have reasonable grounds to arrest a person without warrant under s. 495

(1)(a) does not, on its own, clothe them with automatic authority to carry out a strip search. This is so even where the strip search qualifies as incidental to a lawful arrest. Something further relating to the purpose of the strip search is required. That something further is that the police must have reasonable and probable grounds for concluding a strip search is necessary in the specific circumstances of the arrest

For a strip search to be constitutionally valid, it must be:

- **Conducted as an incident to a lawful arrest;**
- **Conducted for the purpose of discovering weapons or evidence on the body of the arrested person related to the reason for the arrest;**
- **Based on reasonable and probable grounds for concluding a strip search is necessary in the circumstances of the arrest; and**
- **Conducted in a reasonable manner.**

In this case, the arrest was lawful. The arrest was for drug trafficking and the police were searching for evidence related to his arrest - possessing crack cocaine for the purpose of trafficking. Justice Watt also found the trial judge did not err in determining that the police had the grounds necessary to conduct the strip search for the purpose of discovering evidence relating to drug trafficking. In other words, the police had reasonable and probable grounds to believe a strip search was necessary in the circumstances of the arrest.

Although, the circumstances surrounding the accused's identification were not relevant, the other circumstances were properly taken into account. The fact that no drugs were found on the frisk search and the arresting officer's experience with drug dealers concealing crack cocaine "in their underwear or in their butt cheeks" were legitimate factors to consider. Further, the possession of three cellphones and a small quantity of cash, along with the arresting officer's experience that the presence of multiple cellphones, was consistent with drug trafficking, was also properly considered. Finally, police evidence about the frequency of finding drugs during the strip search of a suspected cocaine trafficker as 7.5% was also relevant, although not determinative.

In *R. v. Golden* the Supreme Court of Canada provided a framework for the police to follow in conducting a *Charter* compliant strip search by offering guidelines, in the form of questions:

- Can the strip search be conducted at the police station and, if not, why not?

- Will the strip search be conducted in a manner that ensures the health and safety of all involved?
- Will the strip search be authorized by a police officer acting in a supervisory capacity?
- Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?
- Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?
- What is the minimum of force necessary to conduct the strip search?
- Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
- Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?
- Will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact?
- If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?
- Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?

Manner of Search

The accused argued that the manner in which the strip search was conducted was not reasonable. He was required to face an open door, his genitalia were exposed directly to anybody who may pass by and could be seen indirectly by video to anyone with access to it. He was also not asked whether he consented to the video recording of the search. The Crown, on the contrary, submitted that the search was conducted reasonably because it was generally compliant with the guidelines established by the Supreme Court of Canada in *R. v. Golden*, [2001] 3 S.C.R. 679.

Despite the search being carried out by two officers of the same gender in an appropriate room, the Court of Appeal found the manner of the search to be unreasonable based on the following factors:

- No supervisory authorization was sought to conduct the strip search.
- The door to the strip search room was left open while the search was conducted, contrary to usual practice. The accused, standing naked, faced the open door into a hallway accessible by others of either gender.
- The search was videotaped and could be viewed electronically by others at various places in the police station.
- The evidence was unclear whether the accused had been informed he was being videotaped.
- He was not given the choice to remove the plastic bag from between his buttocks himself. Instead, a police officer removed it.
- No adequate record of the strip search was created other than the videotape.

Although the warrantless arrest was lawful and the criteria for a strip search met, the manner in which the strip search was conducted was unreasonable. The accused's appeal was allowed, his convictions were set aside, and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

FIREARM NEED NOT ALSO MEET DEFINITION OF WEAPON

R. v. Dunn, 2014 SCC 69

A private investigator saw the accused pull a pistol out of his jacket pocket, point it at a man and then leave in his car. Police were called and attended the accused's trailer where they found a black handgun resting on a chair in a shed beside the trailer. The handgun was a Crosman Pro77 airgun that fired .177 calibre spherical BBs propelled by means of compressed air from a canister. It was fully functional and loaded with a partly used CO2 cartridge. It had a warning on the side:

Warning, not a toy, misuse can cause fatal injury. Before using read owner's manual available from Crosman Corp.

There was no ammunition in the magazine. The accused was charged with several offences including handling a firearm in a careless manner, carrying a weapon for a purpose dangerous to the public peace, and carrying a concealed weapon.

Ontario Court of Justice

A firearms examiner testified that the airgun had an average velocity of 261.41 feet per second (ft/s). He said this type of airgun could be purchased without producing any documentation, as long as the muzzle velocity did not exceed 500 ft/s. The expert also cited a scientific study which set a standard for a barrelled object causing death or bodily injury. This study found that any shot exceeding 214 ft/s was capable of causing serious injury to a pig's eye. A pig's eye is similar in size and composition to that of a human. As well, the study determined that a projectile travelling at 246 ft/s would penetrate a pig's eye 50% of the time (known as the V50 standard).

The judge, noting the airgun was not a "real powder fired bullet shooting gun," ruled that the Crown was required to prove it was also a weapon as defined in s. 2 of the *Criminal Code*.

> "weapon" means any thing used, designed to be used or intended for use
> (a) in causing death or injury to any person, or
> (b) for the purpose of threatening or intimidating any person
> and, without restricting the generality of the foregoing, includes a firearm.

Since the Crown failed to prove that the airgun was used or intended for use in causing death or injury or to threaten or intimidate, the judge ruled that it was not a "weapon" and therefore not a "firearm." The accused was acquitted.

Ontario Court of Appeal

The Crown argued that a barrelled device that satisfied the *Criminal Code* definition of "firearm" need not also meet the definition of "weapon." This interpretative issue arises because each definition refers to the other and there were differing views in the case law about whether or not a "firearm" is always a weapon irrespective of whether it meets the definition of "weapon" (by its use or the intent of its possessor). Justice Rosenberg, writing the unanimous decision, framed the question this way:

> [B]ecause "firearm" is defined as "a barrelled weapon", the question arises whether the prosecution must prove not only that the object discharges a shot, bullet or other projectile that is capable of causing serious bodily injury or death, but also that it meets subsections (a) or (b) in the definition of "weapon"; namely, that the object was used, designed to be used or intended for use in causing death or injury to any person or for the purpose of threatening or intimidating any person. Or, is the word "weapon" used in the definition of "firearm" only in a descriptive sense, such that it is not a formal element of the definition requiring proof? The definition of "weapon", in turn, refers to "firearm". The concluding phrase in that definition, "without restricting the generality of the foregoing, includes a firearm", appears to exclude the used, designed or intended for use requirements and deems a firearm to be a weapon." [para. 16]

500 ft/s = 152.4 m/s

Since there were differing case law decisions on this matter, a five (5) judge panel heard the case.

Is a Firearm Always a Weapon?

Justice Rosenberg ruled that the term "weapon" in the definition of "firearm," was simply a descriptor and not a formal element. Thus, barreled objects meeting the definition of "firearm" need not also meet the definition in paragraphs (a) or (b) of "weapon":

> In my view, ... an object, whether it is a conventional powder-fired gun or a spring or gas fired gun, will fall within the definition of 'firearm' in s. 2 provided there is proof that any shot, bullet or other projectile can be discharged from the object and that it is capable of causing serious bodily injury or death to a person. [para. 34]

Thus, the focus becomes the objects nature as a barreled device and its capability (to cause serious bodily injury or death), not the intent of its possessor nor the use made of it. The Court of Appeal noted that certain weapons are deemed not to be firearms if the shot, bullet or other projectile does not exceed a muzzle velocity of 152.4 m/s (500 ft/s). However, this velocity threshold deeming weapons as non-

"[A]n object, whether it is a conventional powder-fired gun or a spring or gas fired gun, will fall within the definition of 'firearm' in s. 2 provided there is proof that any shot, bullet or other projectile can be discharged from the object and that it is capable of causing serious bodily injury or death to a person."

firearms is only in relation to specific offences concerning the strict licensing regime of the *Firearms Act* and *Criminal Code* (eg. unauthorized possession, trafficking, importing/ exporting, failing to report or false reporting of lost, found, or destroyed firearms). Other offences such as carrying a concealed weapon (s. 90), careless handling (s. 86), and possession for a dangerous purpose (s. 88) are not subject to the 152.4 m/s threshold.

Justice Rosenberg also examined the legislative scheme and found there were three different categories (or groups) of barrelled objects:

> Group One: Barrelled objects shooting a projectile with a velocity of less than 214 ft./s. (or 246 ft./s., using the V50 standard) are not firearms because they are not capable of serious injury or death; these objects will only be considered weapons, and thus fall within a prohibition such as the concealed weapon prohibition in s. 90, if they meet paras. (a) or (b) in the definition of "weapon".
>
> Group Two: Barrelled objects shooting a projectile with a velocity of more than 214 ft./s. (or 246 ft./s., using the V50 standard) are firearms, because they are capable of causing serious injury or death, whether or not they also meet paras. (a) or (b) in the definition of "weapon"; these weapons will fall within a prohibition such as that found in s. 90. Nevertheless, they will not be subject to the stricter licensing regime in the Criminal Code and the Firearms Act if they fall within one of the exemptions in s. 84(3), for example, if the velocity of the projectile does not exceed 500 f/ s.
>
> Group Three: Barrelled objects shooting a projectile with a velocity of more than 500 f./s. These objects fall within the definition of firearm for all purposes of the Criminal Code and the Firearms Act and must be licensed accordingly. Some airguns and most powder-fired bullet shooting guns will fall with in this regime. At a minimum, ... Group Three objects do not need to meet the para. (a) or (b) definition of weapon to be deemed to be weapons. [paras. 44-46]

The legislative history, its object (public safety) and the grammatical and ordinary sense of the words used also supported the Court's view of its interpretation.

The Crown's appeal was allowed, the accused's acquittals for careless handling of a firearm, carrying a weapon for a purpose dangerous to the public peace, and carrying a concealed weapon were set aside and a new trial was ordered.

Supreme Court of Canada

The accused further appealed to the Supreme Court of Canada submitting that the airgun, although falling within the definition of a "firearm", must also meet the definition of "weapon" in s. 2 of the *Criminal Code*. In a short oral judgment, the seven member panel of the Supreme Court hearing the case agreed with Justice Rosenberg's reasons and dismissed the accused's arguments.

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

Criminal Code sections where a barrelled weapon with a muzzle velocity of 152.4 m/s or less is not considered a "firearm" *(see s. 84 (3)(d))*

91	Unauthorized possession of firearm	101	Transfer firearm without authority
92	Possess firearm knowing possession unauthorized	103	Importing/exporting firearm knowing it is unauthorized
93	Possess firearm at unauthorized place	104	Unauthorized importing/exporting
94	Unauthorized possession of firearm in motor vehicle	105	Losing or finding without reporting or delivering
95	Possess prohibited/restricted firearm with ammunition	106	Destroying without reporting
99	Weapons trafficking	107	False statements concerning loss, theft or destruction
100	Possess firearm for the purpose of trafficking	117.03	Seizure on failure to produce authorization

VIOLENT KICK TO COP CAR CAUSED STATE OF FEAR

R. v. Horton, 2014 ONCA 616

During the G20 summit in Toronto, the accused approached a marked police car that was stopped on a downtown street in broad daylight. The car had its drivers window closed but its rear window on the driver's side had already been smashed out and its windshield was also broken. A police officer was seated in the driver's seat. He was in uniform, wearing a bright yellow jacket with reflective markings, had the word "Police" on the front and back, and police patches on each sleeve. The accused proceeded to kick the upper portion of the driver's door and window twice, but the window did not break.

Ontario Court of Justice

The accused testified he did not know anyone was inside the police cruiser. He said he kicked the door because he was disgruntled at the abusive treatment by police of some G20 demonstrators. The judge, however, found the accused had a clear and unobstructed view of the police car and the driver's door window when he kicked it. The accused was found guilty of intimidating a justice system participant and assaulting a police officer. The judge found that kicking the window of the cruiser was an attempt by the accused to apply force to the officer either directly, or by causing the glass to shatter and strike the officer. Further, in the circumstances, with the windshield already damaged and the rear driver's side window broken out, the officer could reasonably believe the accused had the present ability to carry out his purpose. He was sentenced to 10 months in jail, prohibited from weapons, ordered to provide a DNA sample, and placed on probation.

Ontario Court of Appeal

The accused contended that the trial judge failed to properly consider evidence relevant to his knowledge about whether the marked police cruiser was occupied by a police officer, despite it occurring during broad daylight. Furthermore, he submitted that the trial judge was mistaken in concluding the essential elements of assaulting a peace officer and intimidating a justice system participant had been proven.

Knowledge

The Court of Appeal held that the trial judge was aware that the accused denied he knew the car was occupied. However, on the evidence, the trial judge was entitled to find the accused had a clear and unobstructed view. "The video itself, even on a casual viewing, reduces to sheer fantasy any suggestion that the [accused] could not or did not see a person in the driver's seat wearing a bright yellow jacket with police markings on it," said the Appeal Court.

Essential Elements

The trial judge also did not err in concluding that the essential elements for assaulting a peace officer had been proven. It was open to her to find an assault

BY THE BOOK:

Intimidation of a Justice System Participant: ***Criminal Code***

s. 423.1 (1) No person shall, without lawful authority, engage in conduct referred to in subsection (2) with the intent to provoke a state of fear in ... (b) a justice system participant in order to impede him or her in the performance of his or her duties ... .

Prohibited conduct

(2) The conduct referred to in subsection (1) consists of

(a) using violence against a justice system participant ... or destroying or causing damage to the property of any of those persons; ...

Punishment

(3) Every person who contravenes this section is guilty of an indictable offence and is liable to imprisonment for a term of not more than fourteen years.

under s. 265 (1)(b) of the *Criminal Code* had occurred. The kicking was an attempt to apply force to the officer who reasonably believed the accused had the ability at that time to carry out his purpose.

As for the conviction of intimidating a justice system participant under s. 423.1 of the *Criminal Code*, it too was proper. The Court of Appeal was satisfied that the accused's conduct met the elements of the offence, stating:

> The police officer who occupied the driver's seat of the marked police vehicle was a peace officer engaged in the exercise of his duties, monitoring the activities of an unruly crowd of protesters engaged in damaging property in the downtown area of Canada's largest city. On any reasonable assessment, the evidence could support an inference that the violent kicks aimed at the driver's door and window of the cruiser were intended to cause and did cause more than a momentary state of fear in the officer to impede him in the performance of his duties. For only the second time in his lengthy police career, the officer made a 10-33 call. And that was enough to establish the [accused's] guilt under s. 423.1 (1) of the Criminal Code.

Assault

The Court of Appeal also refused to stay the accused's conviction for assaulting a peace officer because it did not violate the rule against multiple convictions for the same delict. Although there was a sufficient factual nexus between the assault and intimidating a justice system participant since they were grounded on the same conduct, there was no legal nexus between them. "The offence of s. 423.1 contains additional fault elements, the ulterior intent to provoke a state of fear in the justice system participant, that is absent from the offence of assaulting a peace officer in the execution of his duties," said the Court of Appeal. Thus, the rule against multiple convictions was not applicable.

The accused's appeal against his convictions was dismissed.

Complete case available at www.ontariocourts.on.ca

LAWFUL ARREST NEUTERS CIVIL CLAIM

Maxwell v. Wal-Mart, 2014 ABCA 383

The plaintiff purchased a number of items from Wal-Mart with his wife, including a television. He pocketed the receipt but refused to produce it when a Wal-Mart greeter asked to see it. He continued out of the store and into the parking lot. The store manager was called and confronted the plaintiff. He again refused to show any proof of purchase. Loss prevention officers (LPOs) arrived and the plaintiff's wife called 911. A scuffle ensued and the plaintiff kicked one LPO in the groin and twisted the arm of another. His own head also struck and dented an adjacent truck. A police officer enroute to the call understood that Wal-Mart LPOs were trying to arrest someone over a TV following a dispute about a receipt and this person was fighting back.

When he arrived, the officer placed the plaintiff under arrest for theft and assault based on the information obtained from the police radio and computer, and bystanders pointing the plaintiff out as the suspect. After frisking the plaintiff, the officer found a receipt for the television. He then realized the television was not stolen, but placed the handcuffed plaintiff in the police car, subsequently providing him with *Charter* warnings and cautioning him for assault, mischief, and two counts of assault with intent to resist arrest. At his criminal trial, the plaintiff was ultimately acquitted of all charges, the judge finding that the store employees had no power of arrest where no actual theft occurred and that the force the plaintiff used to resist was reasonable in all the circumstances. The plaintiff then sued a number of defendants, including the arresting officer.

Alberta Court of Queen's Bench

The arresting officer, among others, sought summary dismissal of the claims against him which included negligent investigation, wrongful arrest, unlawful search, continued arrest, false imprisonment, and malicious prosecution. He contended that he met the standard of care for arrest in compliance with s.

495 of the *Criminal Code*. He said he subjectively had reasonable and probable grounds on which to base the arrest, and those grounds were justifiable from an objective point of view. The judge dismissed the claims against the police, finding none of them would have any chance of success, even when viewing the evidence most favourably to the plaintiff.

Negligent Investigation

The duty of care owed to suspects during an investigation is measured by the standard of a reasonable officer in similar circumstances. "The standard required of [the arresting officer] was not perfection, as judged in hindsight; it allows for errors in judgment," said the judge. "The circumstances in this case included urgency in preventing further assault. [The arresting officer] was entitled to rely on the information he had received. He was not required to complete the investigation prior to the arrest. He was not required to exhaust all possible avenues of inquiry, to interview all potential witnesses, including the person to be charged, or to rule out the Plaintiff's possible defences." Further, while the plaintiff may not have had a legal obligation to provide the receipt voluntarily, had he done so he may have resolved any confusion about the theft.

Wrongful Arrest

The arrest was lawful under s. 495 of the *Criminal Code*. The officer had reasonable grounds (both subjectively and objectively) to believe that the plaintiff had committed an indictable offence. Both theft and assault are indictable offences, giving rise to s. 495 arrest powers. There was no need to establish a *prima facie* case for conviction at the arrest stage, nor was the arresting officer required to obtain a version of events from the person to be charged, nor to rule out possible defences to the charge. "An officer cannot ignore information which exonerates," said the judge. "However, a police officer is expected to do what s/he can in the circumstances, and need not solve the case before arresting someone reasonably believed to have committed an offence." It was reasonable for the police officer to conclude that the plaintiff was probably struggling with Wal-Mart staff after attempting to steal a television. The fact the plaintiff was acquitted at trial did not, by itself, support a cause of action against the arresting police officer. The officer continued his investigation following the arrest, which did not render it unlawful.

Unlawful Search

The search was incidental to the arrest and was justifiable for safety and evidence gathering purposes. The frisk search revealed the receipt for the television and, as a result, no further steps were taken in relation to a theft charge.

Continued Arrest

The continued detention was lawful because reasonable grounds continued to exist. The officer had information from witnesses that the plaintiff had shoved a store manager when the manager asked to see a receipt for the television, twisted an LPO's arms, and kicked another in the groin while damaging a vehicle during the altercation. The officer had reasonable grounds to continue the arrest for assault, mischief and assault with intent to resist arrest. "[The arresting officer] was not required to determine whether the Plaintiff's possession of the concealed receipt would ultimately exonerate him from criminal liability for engaging in a violent struggle."

False Imprisonment

The police did not take an unreasonable amount of time to process the complainant, a maximum of 2.5 hours for the arrest, transport, and release after the necessary paperwork was complete. There was no evidence this process did not occur in a reasonably timely fashion, or that the plaintiff was purposefully held longer than was necessary or subjected to abusive treatment or conditions.

Malicious Prosecution

Although the court proceedings against the plaintiff were terminated in his favour, there was no evidence of an absence of reasonable and probable cause, or an improper motive by the arresting officer (malice). The primary purpose for the arrest and prosecution was nothing other than enforcement of the law.

"Where an accused person is ultimately acquitted, an arresting police officer is not liable for arresting that person where he or she subjectively has reasonable and probable grounds upon which to make an arrest, grounds which must additionally be justifiable from an objective point of view."

Alberta Court of Appeal

The plaintiff appealed the summary dismissal of his claims against police. He argued that, because he was eventually acquitted on the criminal charges brought against him, his arrest was improper and he should never have been arrested in the first place. Thus, the police should be liable to pay him monetary damages. But the Court of Appeal found otherwise:

> Where an accused person is ultimately acquitted, an arresting police officer is not liable for arresting that person where he or she subjectively has reasonable and probable grounds upon which to make an arrest, grounds which must additionally be justifiable from an objective point of view. [reference omitted, para. 20]

Nor is negligence presumed where a police officer arrests a person. Here, the arresting officer deposed that he believed he had reasonable and probable grounds to arrest the plaintiff. The Queen's Bench judge agreed, concluding the officer had both a subjective belief and reasonably objective grounds for the arrest. There was no evidence the police acted other than as reasonable officers would act, in the circumstances at and before the arrest. "In particular, the fact that the 911 call was initiated by [the plaintiff's wife] rather than by a Wal-Mart employee did not compel [the arresting officer] to take any further steps prior to arrest, such as obtaining [the plaintiff's] version of events, if other evidence formed reasonable and probable grounds," said the Court of Appeal. "While the [Queen's Bench] judge was obliged to attach the most favourable interpretation of evidence before him in making his decision, that interpretation does not compel the conclusion that the arrest was improper and actionable because [the arresting officer] arrested [the plaintiff] after the Wal-Mart employees already had him under arrest, nor arrested him in the face of knowledge that a store employee initiated physical contact when trying to grab the straps of the television as he took it out of the store."

The plaintiff had failed to establish that the Queen's Bench judge committed palpable and overriding error in dismissing the claims against the police. The plaintiff's appeal was dismissed.

Complete case available at www.albertacourts.com

CORROBORATING SOURCES ENHANCE RELIABILITY

R. v. K., 2014 MBCA 97

The accused's girlfriend called police after discovering child pornography on his family's computer. The accused had been housesitting at his parents' place and his girlfriend had found the materials while using the computer under his user name. She showed her friend the images to confirm they were child pornography. The police obtained statements from the two women and subsequently applied for and executed a search warrant for the computer at the accused's parents' home. Thousands of images of prepubescent females were found in three separate folders downloaded to the computer, including 140 images the accused admitted were child pornography.

Manitoba Court of Queen's Bench

Although the images as described by the girlfriend may not have resulted in a conviction, the judge found that the descriptions of what was observed by the girlfriend and her friend were sufficient to constitute reasonable grounds to believe that evidence of the offence of possession of child pornography would be found on the computer. The judge also noted that

the information in the ITO was reliable because it was first-hand, detailed, corroborated as between the girlfriend and her friend on a number of important and relevant issues, and was provided by witnesses rather than unnamed informants. The accused's application to quash the search warrant was dismissed, the evidence was admissible, and the accused was convicted of possessing child pornography.

Manitoba Court of Appeal

The accused appealed his child pornography conviction by arguing the police breached his s. 8 *Charter* rights and the evidence found on the computer seized from his parents' house should have been excluded under s. 24(2). In his view, the ITO was insufficient because there was no evidentiary basis for the issuing justice to conclude that the images viewed by the women amounted to child pornography as defined in s. 163.1(1) of the *Criminal Code*.

The Court of Appeal found the trial judge properly applied the standard of review for a search warrant. He did not substitute his opinion for that of the authorizing judge, but rather determined whether, on the basis of the evidence, the judge who authorized the warrant could have done so. Justice Cameron, writing the Court of Appeal's judgment, stated:

> While the images described by the girlfriend ultimately may or may not have led to a conviction for possession of child pornography under the Code, in my view, they constituted a sufficient basis for the issuing justice to have concluded that there were reasonable and probable grounds to believe that the accused was in possession of child pornography and that evidence with respect to that offence would be found on the computer. [para. 10]

In this case, the ITO contained sufficient reliable evidence to support the issuance of the search warrant. The fact the information provided by the accused's girlfriend was corroborated by her friend added to its reliability. "Cross-corroboration of sources is a factor enhancing reliability and, therefore, enhancing reasonable grounds for belief," said Justice Cameron. However, he found that the trial judge erred in holding that because the girlfriend and her friend were witnesses and not unnamed informants, the information they provided was more credible and therefore more reliable. Information from a named source is not necessarily more reliable than an unnamed source. Despite this error, the information relied upon for the issuance of the search warrant was sufficiently reliable.

The search and seizure of the computer was not conducted in breach of s. 8, the evidence was admissible, and the accused's appeal was dismissed.

Complete case available at www.canlii.org

POLICE CONDUCT ASSESSED BY WHAT THEY DID, NOT COULD HAVE DONE

R. v. Stevenson, 2014 ONCA 842

Following the shooting death of a woman walking from her home to her van at 7:20 pm, police suspected her estranged husband may have been involved. A detective from the Brockville Police did not have grounds to arrest the accused but wanted to locate him and the couple's two children. An erroneous message was conveyed through police dispatch to the jurisdiction where the accused lived that he had shot his wife in the head. At about 9:20 pm OPP officers arrived at the accused's sister's home and saw his car parked in the driveway. At about 9:30 pm police saw him leave his sister's house with two children and walk towards his car. They immediately approached him, ordered him to the ground at gunpoint, and handcuffed and searched him. At 9:42 pm he was placed under arrest for homicide and advised of his right to counsel. His hands were wrapped in plastic bags in anticipation of testing them for gunshot residue (GSR). A lead Brockville detective arrived at the arrest scene at 10:08 pm and spoke with the accused's mother and sister. They said the accused had left at 4:20 pm to go shopping in Brockville and returned at 8:20 pm. At 10:24 pm the accused was transported back to Brockville, the lead detective

believing he had reasonable grounds to "continue" the arrest. At 12:04 am the accused was advised he was under arrest for first degree murder, informed of his right to silence and advised of his right to counsel. At 12:35 am his hands were daubed for GSR, his clothing was taken and other items from his vehicle were submitted for testing. As a result, GSR particles were both of his hands, the right sleeve of his jacket, and the front and back of his pants.

MORE ON GUNSHOT RESIDUE (GSR)

The evidence at trial was that a GSR particle is not visible to the naked eye and contains fused elements of lead, antimony and barium. GSR particles are easily transferred by contact or air movement. The presence of GSR particles on any surface, including a person's hands, does not assist in identifying how the particles came to be deposited on that surface. GSR particles could be on a person's hands and clothing from (1) recently discharging a firearm, (2) being in close proximity when a firearm was discharged, or (3) picking them up from another surface.

Ontario Superior Court of Justice

The judge found the arrest, based on the misinformation provided by the dispatcher, was unlawful but was not arbitrary because the OPP officers were acting in good faith in relying on that information. He held that the bagging of the accused's hands was not a search or seizure and therefore did not engage s. 8 of the Charter. The police conduct that led to the obtaining of samples - the GSR swabbing and clothing samples - occurred after the police had reasonable grounds to arrest the accused, rendering those events lawful as an incident to arrest. This evidence was admissible and, on the basis of other circumstantial evidence such as the nature of the shooting, motive, and opportunity, the accused was convicted of first degree murder.

Ontario Court of Appeal

The accused argued, among other grounds, that his rights under ss. 8 and 9 of the *Charter* were infringed at the time of his arrest and that the results of the GSR testing should have been excluded under s. 24(2).

Arbitrary Detention

The accused again submitted that his arrest, based on the misinformation provided by the police dispatcher, was unlawful and therefore resulted in his arbitrary detention contrary to s. 9 of the *Charter*. The Crown, on the other hand, suggested that, even if the arrest was unlawful, the accused's detention was not arbitrary because police at least had grounds to detain him for investigative purposes at the time of his arrest and, within an hour of this detention, had sufficient grounds to make the arrest.

Justice Doherty, speaking for the Court of Appeal, first examined the police power to make an arrest under s. 495(1) of the *Criminal Code*. "An arrest without warrant is lawful if the police have reasonable grounds to believe that the person arrested has committed an indictable offence," he said. "The police must believe that reasonable grounds exist (the subjective requirement) and that belief must be based on information that would lead a reasonable person in the position of the police to conclude that reasonable grounds existed for the arrest (the objective requirement)."

BY THE BOOK:

Criminal Code: *s. 495(1)*

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;

[...]

In this case, the OPP officers were justified in arresting the accused based on the information provided by the Brockville police dispatcher. But since the OPP officers did not make their own independent assessment of the information, the arrest would only be lawful if the Brockville police had the requisite reasonable grounds for the arrest. "In circumstances where one officer, or one police force, acts on the direction of another, the question of whether reasonable grounds for an arrest exist is answered by reference to the information available to the officer or police force giving the direction." At the time of the accused's initial arrest, the Brockville police did not have reasonable grounds to do so. They only considered him a suspect. His arrest was unlawful, not being authorized by s. 495(1) or by any other law. And the detention pursuant to the unlawful arrest could not be saved through the application of the police power to detain for investigative purposes or to ensure the safety of the children. "Whatever lawful police power, apart from the arrest power, the police may have had to detain the [accused], they did not purport to exercise any such power," said Justice Doherty. He added:

> The police arrested the [accused]. The police conduct at and after the gunpoint encounter with the [accused], is only consistent with a full arrest. The arbitrariness of the [accused's] detention must be determined having regard to the police power actually exercised and not by reference to some other police power which may have been, but was not, exercised. [references omitted, para. 56]

Since the arrest was unlawful, the accused's detention was arbitrary. Hence, the police "could not rely on that detention to justify any further restraint on or restriction of the [accused]." The bagging of his hands in preparation of preserving evidence was as "an additional restricting feature of the arbitrary detention that further compromised the [accused's] liberty and security interests protected by the right against arbitrary detention." The Court of Appeal did note, however, that the accused was lawfully arrested by the time the samples were taken and the clothing seized. The police did have grounds to arrest at 10:24 pm, after the lead investigator had spoken to the accused's mother and sister, which intervened between the bagging and the actual taking of the samples for analysis.

Unreasonable Search or Seizure

The accused contended that the steps taken by police incidental to his unlawful arrest, including the bagging of the his hands to preserve any potential evidence in anticipation of GSR testing, breached s. 8 of the *Charter*.

Had the accused's arrest been lawful, the Court of Appeal would have found that the search of his pockets and bagging of his hands for GSR testing was justifiable as incidental to arrest. However, the arrest by the OPP was unlawful. The search could also not be saved as one incidental to investigative detention. "The arrest cannot be converted to an investigative detention for the purposes of determining the constitutionality of the police conduct," said Justice Doherty.

As for whether the bagging of the accused's hands actually amounted to a search or seizure in these circumstances, Justice Doherty stated:

> It is somewhat artificial to describe the bagging of the [accused's] hands as a search or seizure. The bagging is more accurately characterized as a step taken in preparation of an anticipated search or seizure. In the usual case, when the anticipated search or seizure follows upon the preparatory steps without any intervening compliance with the Charter, the entirety of the search-related conduct can be considered part of the s. 8 violation. In this case, however, a lawful arrest intervened between the step preparatory to the search, the bagging of the [accused's] hands,

> "The arbitrariness of the [accused's] detention must be determined having regard to the police power actually exercised and not by reference to some other police power which may have been, but was not, exercised."

and the actual search, the taking of the samples and seizure of the clothing. In this unusual circumstance, it therefore becomes necessary to draw a distinction between steps in preparation of a search and the search. [para. 61]

But, as noted above, the accused was afforded *Charter* protection under s. 9 without "stretching the normal meaning of the words search or seizure to include the bagging of the [accused's] hands." Justice Doherty also noted that the bagging could also arguably be seen as a distinct violation of s. 7 of the *Charter*.

Admissibility of the Evidence

The accused contended that the GSR evidence should have been excluded from evidence under s. 24(2) while the Crown opined that the results of the GSR testing should be admitted. The Court of Appeal agreed with the Crown using the three pronged s. 24 (2) analysis. The evidence was admitted and the accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

WATCHING DETAINEE DID NOT BREACH s. 10(b)

R. v. Coaster, 2014 MBCA 108

The police identified the accused, a member of the Native Syndicate gang, as one of several suspects involved in the beating death of another inmate. He was serving a sentence at the time and had been recently charged with second degree murder in an unrelated shooting death. The police arranged to interview him at the institution where he was being held as a maximum security inmate. He was taken to an interview room by a correctional officer where police advised him he would be charged with either manslaughter or second degree murder, depending on the Crown Attorney's review of the evidence. He was told of his rights, including the right to consult with counsel "in private." He indicated he wanted to speak to his lawyer.

He was taken to an office with a phone, but told the door to the room would remain open so the correctional officer would be able to keep him in sight but remain out of earshot. He was also told he should keep his voice down so that there was no chance of being overheard. The door to the telephone room was left open about eight inches and the correctional officer was 10 feet away across the hallway. The police officers remained in the interview room with the door closed and could not hear the accused. Before the interrogation began, the accused told the investigator that he had spoken to his lawyer. During a 45-minute interview the accused admitted to striking the victim a couple of times in the jaw while he lay unconscious on the floor bleeding from the mouth. He was subsequently charged with second degree murder.

Manitoba Court of Queen's Bench

The accused testified that he believed the correctional officer would try to overhear him. He also said that he could hear voices of prison staff through the open door to the telephone room so he saw no point in keeping his voice down. He also testified that he was unable to reach his lawyer. He then decided to make an unauthorized call to his ex-girlfriend, which was unsuccessful, and then lied to the investigator that he had spoken to his lawyer.

The judge concluded that s. 10(b) of the *Charter* had not been infringed. Although the door to the telephone room was not completely closed and a correctional officer was within eyesight of him, there was no evidence anyone overheard his conversation. Furthermore, his behaviour in calling his ex-girlfriend, along with the set-up for the phone consultation, suggested his conversation was not overheard. He was convicted of manslaughter.

Manitoba Court of Appeal

The accused appealed his conviction arguing, in part, that he was not given reasonable privacy in the exercise of his right to counsel. He submitted that his s. 10(b) *Charter* right was breached because he was not alone while exercising his right to retain and instruct counsel prior to giving his statement but rather was under the watch of a correctional officer.

Justice Mainella, speaking for the Court of Appeal, explained the right to consult counsel in private this way:

> The right to privacy, so far as circumstances permit, is inherent in the right to retain and instruct counsel without delay guaranteed by s. 10(b) of the Charter.

The level of privacy afforded to a detainee consulting with counsel will be unreasonable where an actual invasion of privacy has been established such that the police did overhear a detainee's conversation. The Court of Appeal also looked at different approaches in assessing the reasonableness of privacy short of an actual invasion. Justice Mainella preferred a broader and more flexible approach such that the analysis would focus on reasonableness from the detainee's perspective, rather than the auditory abilities of the police. Thus, a s. 10(b) infringement can result where there is a reasonable belief on the part of a detainee that they cannot speak to counsel in private, unless the Crown can demonstrate that the detainee did, in fact, speak to counsel in private. This reasonable belief will involve subjective and objective considerations. Of course, where the detainee unreasonably believes that their conversation may be overheard by the police there will be no s. 10(b) breach.

"The right to privacy, so far as circumstances permit, is inherent in the right to retain and instruct counsel without delay guaranteed by s. 10(b) of the Charter."

In this case, the accused was afforded reasonable privacy under s. 10(b). First, there was no actual invasion of privacy. Neither the police nor the correctional officer could hear the accused's telephone conversations. Second, the accused's act in phoning his ex-girlfriend - an unauthorized call - demonstrated he did not have a reasonable belief that his conversation could be overheard. The trial judge stated and applied the correct legal principles, and appropriately considered the totality of the circumstances. The accused's appeal was dismissed.

Complete case available at www.canii.org

POLICE OWE NO DUTY TO INVESTIGATE

Holmes v. White, 2014 ONSC 5809

The applicant, an employe of Canadian National (CN) Railways, was twice charged with criminal offences by the CN Police Service for allegedly defrauding CN. It was alleged that he took money that did not belong to him. Both times these charges were withdrawn by Crown, the second time only after a preliminary inquiry. CN sued the applicant claiming damages for fraud and the applicant sued CN, its Police Service, and several of its officers for alleged misconduct in respect of laying the unsuccessful criminal charges. He asserted that CN Police Service officers misused their criminal law authority to enhance CN's position in its civil lawsuit by prosecuting him and his wife. He asked three police forces - London, Peel Region and the RCMP - to conduct a criminal investigation into the conduct of the CN Police Service. Each of those police forces exercised their discretion and declined to open investigations.

The applicant sought mandamus - an order from a court compelling a public official to perform an act required by law which it has neglected or refused to do. Here, the applicant sought a court order compelling the police forces to fulfill their duties by undertaking a criminal investigation into his complaints and laying charges against the CN Police Service and its officers if warranted.

Ontario Superior Court of Justice - Divisional Court

The judge quashed the application completely because, among other grounds, he found mandamus was unavailable to compel the police to investigate criminal offences. In his view, the police do not owe a public or private law duty to investigate a complaint. Rather, the police have a discretion whether or not to proceed with an investigation.

Ontario Superior Court of Justice - Divisional Court

The applicant brought a motion for judicial review. He wanted the lower court's quashing of his application for mandamus set aside and the three police forces compelled to undertake criminal investigations. He submitted that case law supported the proposition that every alleged victim of a crime has a right to have a court compel the police to either investigate their allegations or require the police to establish in court that they objectively and subjectively had reasonable grounds to decline to investigate.

But Justice Matlow, speaking for the three member Divisional Court, disagreed. In his view, none of the cases cited by the applicant suggested that a court could order mandamus to compel a police force to investigate a particular criminal offence at the behest of an alleged victim of crime. The multi-pronged test for mandamus includes the requirement that there was a legal duty to act owed to the applicant. Mandamus is also unavailable to compel (1) the exercise of an unfettered discretion or (2) a fettered discretion in a particular way. In this case, the Divisional Court noted the applicant failed to satisfy the requirements for mandamus. First, as the lower court noted, "the police do not owe either a public law or private law duty to any individual to investigate crime." Plus, the applicant was asking the court to dictate the outcome of the police forces' discretionary decisions. All three police forces exercised their discretion and decided not to investigate the allegations made by the applicant. The applicant was now asking that the police be compelled to investigate his allegations against the CN Police Service, something a court could not do:

> The Court cannot issue mandamus to require a particular result. If the discretion of the police is unfettered, then it is not amenable to mandamus at all. But even if the police have only a fettered or limited discretion, the Court may be entitled to require a recalcitrant office holder to make a decision, but the Court cannot dictate the outcome of the discretionary decision. The applicant asks the Court to do that which the Supreme Court of Canada has said it cannot do. [para. 19]

The applicant's motion to set aside the order quashing his application for mandamus was dismissed.

Complete case available at www.ontariocourts.on.ca

OFFICERS MAY USE EXPERIENCE IN MAKING DECISIONS

Canada v. Tam, 2014 FCA 220

A 72 year-old female traveller coming from China entered Canada at an International Airport in Ottawa. She presented a Declaration Card to a Canada Border Services Agency (CBSA) primary inspector in which she stated she was not bringing into Canada any meat or meat products. The primary inspector asked the traveller whether she had "any food items, plants or vegetation, candies or anything edible" because "it has been [his] experience working in the air mode stream that it is more than common that individuals of Chinese origin returning from China to bring agricultural products with them." The traveller specifically responded that she did not have any food or agricultural products in her bags. When doing so, the inspector noticed that the manner in which she responded to the food question was more sharp, and quick than her other responses. She also appeared nervous. Because of her demeanor and her answers, the primary officer referred her for a secondary examination where pork products purchased in China were discovered. She was issued a Notice of Violation with an $800 penalty for importing an animal by-product contrary to s. 40 of the *Health of Animals Regulation*.

BY THE BOOK:

Health of Animals Regulations

s. 40 No person shall import into Canada an animal by-product, manure or a thing containing an animal by-product or manure except in accordance with this Part.

Canada Agricultural Review Tribunal

The traveller filed a request for review before the Canada Agricultural Review Tribunal. The Tribunal found the primary inspector's referral for the secondary inspection was made on the basis of race, an irrelevant consideration. In its view, there was direct evidence, through the primary inspector's own report, of racial profiling. "The concept of racial profiling and the prohibitions against same, as developed in criminal law, are equally applicable to proceedings involving a determination to issue a Notice of Violation in relation to an administrative monetary penalty," said the Tribunal. "To maintain such proceedings when racial profiling has, as here, been admitted to by the Agency, would bring the system of justice into disrepute." Although the Tribunal imputed no bad faith in relation to the primary inspector's conduct, it nonetheless concluded that the referral to secondary inspection was initially based on "discriminatory criteria" and this improper purpose contributed to the issuance of the Notice of Violation. The Tribunal found the Notice of Violation a nullity and the traveller was not liable to pay the monetary penalty.

Federal Court of Appeal

The Attorney General of Canada then sought judicial review of the Tribunal's decision. Justice Nadon, delivering the Court of Appeal's opinion, found the Tribunal's decision could not stand, citing the following reasons:

- The traveller did, in fact, bring pork products into Canada which she failed to declare upon entry.

"Officers on the front line ... cannot be expected to leave their experience, acquired usually after many years of observing people from different countries entering Canada, at home or at a place far removed from their place of work."

- The Tribunal failed to consider the whole of the evidence surrounding the primary inspector's decision to refer the traveller for a secondary examination. Not only did the officer refer to his experience in making his decision, but he made his decision based on the traveller's demeanour and the manner in which she answered questions; her response to questions regarding the importation of food products was more sharp, and quick then the other questions and she appeared nervous.
- There was no evidence of racial profiling. "The officer simply asserted in his statement that in his experience it was not uncommon for Chinese persons to bring agricultural products with them upon returning from China," said Justice Nadon. "The officer's hunch, based on his experience and his observance of the [traveller's] demeanour, was confirmed by the secondary examination."
- "Officers on the front line, such as the first officer herein, cannot be expected to leave their experience, acquired usually after many years of observing people from different countries entering Canada, at home or at a place far removed from their place of work."

Justice Nadon concluded, "To find, as the Tribunal did in this case, that the first officer had exercised racial profiling and that to not declare the Notice of Violation a nullity would tend to bring the system of justice into disrepute is, in our respectful opinion, a view which is unsupportable in the circumstances of this case and is therefore totally devoid of merit." The application for judicial review was allowed, the decision of the Tribunal was set aside, and the matter remitted for reconsideration of whether the traveller committed the violation and the amount of the penalty to be imposed.

Complete case available at www.canli.org

CELL PHONE SEARCH INCIDENT TO ARREST LAWFUL, BUT LIMITED

R. v. Fearon, 2014 SCC 77

Following a robbery by two men, one armed with a handgun, police reasonably believed that there was a handgun on the streets and the large quantity of jewellery taken was readily-disposable. The police wanted to locate the gun before it could be used again and the jewellery before it could be disposed of or hidden. Later that evening, the accused and another man were arrested, but the jewellery nor the handgun had been found. The accused was patted down and a cell phone was found in his pants pocket. Police looked through the phone by manipulating the key pad to access text messages and photographs. Photos of males and a gun were found along with an unsent text message that read: "We did it were the jewelry at nigga burrrrrrrrrrr." Police also checked some of the numbers called on the phone to see if they led to possible associates. The police eventually obtained a warrant to search a getaway vehicle they seized and secured shortly after the robbery. The search revealed a loaded Smith and Wesson silver semi-automatic handgun. The police also obtained a warrant some months later to search and download the contents of the cell phone, but no new evidence was discovered. The accused was charged with robbery and other offences.

Ontario Court of Justice

The accused argued that the search of his cell phone breached s. 8 of the *Charter* and that the evidence ought to have been excluded under s. 24(2). The judge disagreed and found that the search of the cell phone was incident to arrest. He held the search was directed at public safety (locating the hand gun), avoiding the loss of evidence (the stolen jewellery), and obtaining evidence of the crime (information linking the accused to the robbery and locating potential accomplices). In the judge's view, the officer reasonably believed that the cell phone might contain evidence of the robbery. "I find that there was a reasonable prospect of securing evidence of the offence for which the accused was being arrested in searching the contents of the cell phone," said the judge. "In particular, it was reasonable for [the officer] to believe that the arrestee ... may have

Cell phones in this context include "smart phones" - the functional equivalent of a computer. The majority noted that the privacy afforded individuals in a cell phone did not necessarily depend on whether the phone was password protected. Justice Cromwell stated:

> *I would not give this factor very much weight in assessing either an individual's subjective expectation of privacy or whether that expectation is reasonable. An individual's decision not to password protect his or her cell phone does not indicate any sort of abandonment of the significant privacy interests one generally will have in the contents of the phone. ...Cell phones — locked or unlocked — engage significant privacy interests.*

had communication through the cell phone before, during or after the robbery with other perpetrators or with third parties." Plus, police said it was important to follow up all leads immediately because they still had jewellery, a firearm and an unidentified suspect outstanding. There was no s. 8 violation and the photos and text message were admissible. The judge found that the gun recovered from the car was used in the robbery and was the one depicted in the photo found on the accused's cell phone. He was convicted of robbery with a firearm and related offences.

Ontario Court of Appeal

The accused's appeal was unanimously dismissed. The Court of Appeal upheld the trial judge's conclusion that the search was incident to arrest and there was no s. 8 *Charter* breach. The initial search by the arresting officer was within the ambit of the power to search incident to arrest. The police reasonably believed that they might find relevant evidence. The Court of Appeal found it unnecessary and declined to create an exception to the power of search incident to arrest with respect to cell phones given the fact the cell phone was not password-protected or otherwise "locked." However, the Court of Appeal suggested that it would not have been appropriate to search a locked phone without a warrant. The accused's appeal was dismissed.

"The common law framework requires that a search incident to arrest must be founded on a lawful arrest, be truly incidental to that arrest and be conducted reasonably."

Supreme Court of Canada

The accused again appealed, submitting that the draft text message and photos found by the police on his cell phone were inadmissible because the search was unreasonable under s. 8. In his view, the police did not have the common law power to search his cell phone incident to his arrest.

Majority

A four member majority of the Supreme Court found that cell phones could be searched as an incident to arrest, subject to certain limitations. In doing so, the majority noted that a weighing of competing interests was required; the public purposes served by effective law enforcement versus respect for the liberty and fundamental dignity of individuals (everyone's right to be free of unreasonable searches and seizures).

The general framework of the common law power to search incident to arrest permits searches without a warrant even where there are no grounds to obtain a warrant and exigent circumstances do not exist. Justice Cromwell, speaking for the majority, described the general requirements this way:

> The common law framework requires that a search incident to arrest must be founded on a lawful arrest, be truly incidental to that arrest and be conducted reasonably. [para. 27]

The majority, however, went on to modify the general common law power in a way that would recognize the potentially significant informational privacy in a cell phone and the invasion that would result from a search of it by placing meaningful limits on the purpose, manner and extent of a cell phone search. Thus, a search of a cell phone or

"The law enforcement objectives served by searches incident to arrest will generally be most compelling in the course of the investigation of crimes that involve, for example, violence or threats of violence, or that in some other way put public safety at risk, such as the robbery in this case, or serious property offences that involve readily disposable property, or drug trafficking."

similar device will not be permissible on every arrest. Rather, the following factors will be required for a reasonable search of a cell phone:

- ✓ **The arrest must be lawful**;
- ✓ **The search must be truly incidental to the arrest**. The police must have a reason based on a valid law enforcement purpose to conduct the search, and that reason is objectively reasonable. Valid law enforcement purposes are:
  - ***Protecting the police, the accused, or the public***;
  - ***Preserving evidence***; or
  - ***Discovering evidence***, including locating additional suspects, in situations in which the investigation will be stymied or significantly hampered absent the ability to promptly search the cell phone incident to arrest. However, "if ... all suspects are in custody and any firearms and stolen property have been recovered, it is hard to see how police could show that the prompt search of a suspect's cell phone could be considered truly incidental to the arrest as it serves no immediate investigative purpose. This will mean, in practice, that cell phone searches are not routinely permitted simply for the purpose of discovering additional evidence. The search power must be used with great circumspection. It also means, in practice, that the police will have to be prepared to explain why it was not practical (and I emphasize that this does not mean impossible), in all the circumstances of the investigation, to postpone the search until they could obtain a warrant;"
- ✓ **The nature and the extent of the search must be tailored to the purpose of the search**. As the majority stated, "generally, even when a cell phone search is permitted because it is truly incidental to the arrest, only recently sent or drafted emails, texts, photos and the call log may be examined as in most cases only those sorts of items will have the necessary link to the purposes for which prompt examination of the device is permitted. But these are not rules, and other searches may in some circumstances be justified. The test is whether the nature and extent of the search are tailored to the purpose for which the search may lawfully be conducted;" and
- ✓ **The police must take detailed notes of what they have examined on the device and how it was searched**. "[O]fficers must make detailed notes of what they have examined on the cell phone," said Justice Cromwell. "In my view, given that we are dealing here with an extraordinary search power that requires neither a warrant nor reasonable and probable grounds, the obligation to keep a careful record of what is searched and how it was searched should be imposed as a matter of constitutional imperative. The record should generally include the applications searched, the extent of the search, the time of the search, its purpose and its duration. After-the-fact judicial review is especially important where, as in the case of searches incident to arrest, there is no prior authorization. Having a clear picture of what was done is important to such review being effective. In addition, the record keeping requirement is likely to have the incidental effect of helping police officers focus on the question of whether their conduct in relation to the phone falls squarely within the parameters of a lawful search incident to arrest."

In modifying the general framework, the majority notably rejected the following approaches:

(1) A categorical prohibition against searching a cell phone without a warrant;
(2) Imposing a requirement that officers have reasonable grounds to believe that evidence of the offence will be found on the cell phone; or
(3) A prohibition of cell phone searches in all but exigent circumstances.

In this case, the majority found the accused's arrest for robbery was lawful. The searches of the cell phone leading to the text message and the photos were also truly incidental to the arrest. They were conducted for valid law enforcement objectives and were appropriately linked to the offence for which the accused had been lawfully arrested. However, the searches were nonetheless held to be unreasonable and therefore a s. 8 breach because there was no "detailed evidence about precisely what was searched, how and why."

Admissibility

Despite the *Charter* breach, the evidence was admitted under s. 24(2). The police acted in good faith, which favoured admission. The dominant view at the time of the arrest was that cell phone searches incident to arrest were permissible. "Of course, the police cannot choose the least onerous path whenever there is a gray area in the law," said Justice Cromwell. "In general, faced with real uncertainty, the police should err on the side of caution by choosing a course of action that is more respectful of the accused's potential privacy rights. But here, if the police faced a gray area, it was a very light shade of gray, and they had good reason to believe, as they did, that what they were doing was perfectly legal." As for the impact on the accused's *Charter* protected interests, the accused's informational privacy interests were not gravely impacted. This factor weakly favoured exclusion. Finally, the evidence was cogent and reliable. Society's interest in the adjudication of the case on its merits favoured admission. Overall, the admission of the evidence would not bring the administration of justice into disrepute.

Crimes Types

The majority hinted that some crimes will more likely justify a limited search of cell phones:

> Beyond the facts of this case, there are other types of situations in which cell phone searches conducted incidental to a lawful arrest will serve important law enforcement objectives, including public safety. Cell phones are used to facilitate criminal activity. For example, cell phones "are the 'bread and butter' of the drug trade and the means by which drugs are marketed on the street". Prompt access by law enforcement to the contents of a cell phone may serve the purpose of identifying accomplices or locating and preserving evidence that might otherwise be lost or destroyed. Cell phones may also be used to evade or resist law enforcement. An individual may be a "scout" for drug smugglers, using a cell phone to warn criminals that police are in the vicinity or to call for "back up" to help resist law enforcement officers. In such situations, a review of recent calls or text messages may help to locate the other perpetrators before they can either escape or dispose of the drugs and reveal the need to warn officers of possible impending danger. [references omitted, para. 48]

And further:

> The law enforcement objectives served by searches incident to arrest will generally be most compelling in the course of the investigation of crimes that involve, for example, violence or threats of violence, or that in some other way put public safety at risk, such as the robbery in this case, or serious property offences that involve readily disposable property, or drug trafficking. Generally speaking, these types of crimes are most likely to justify some limited search of a cell phone incident to arrest, given the law enforcement objectives. Conversely, a

> search of a cell phone incident to arrest will generally not be justified in relation to minor offences. [para. 79]

The accused's appeal was dismissed.

Another View

A three member minority concluded that police officers are not entitled to search a mobile phone found in the possession or vicinity of an accused person upon arrest unless there were exigent circumstances to do so:

> The intensely personal and uniquely pervasive sphere of privacy in our personal computers requires protection that is clear, practical and effective. An overly complicated template, such as the one proposed by the majority, does not ensure sufficient protection. Only judicial pre-authorization can provide the effective and impartial balancing of the state's law enforcement objectives with the privacy interests in our personal computers. Thus, I conclude that the police must obtain a warrant before they can search an arrested person's phone or other personal digital communications device. Our common law already provides flexibility where there are exigent circumstances — when the safety of the officer or the public is at stake, or when a search is necessary to prevent the destruction of evidence. [para. 105]

Thus, the minority would permit a warrantless search of a cell phone incident to arrest in cases of exigent circumstances. This requires either a reasonable basis to suspect a search may prevent an imminent threat to safety or reasonable grounds to believe that the imminent loss or destruction of evidence may be prevented by a warrantless search.

In this case, the police were required to obtain a warrant before searching the phone because they did not have exigent circumstances, although they were entitled to seize the phone pending an application for a warrant. The evidence, being unconstitutionally obtained, would have been excluded by the minority and the accused's appeal allowed.

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

INFORMATION COMPELLING, CREDIBLE & CORROBORATED: RGB SATISFIED

R. v. Williams, 2014 ONCA 908

Just after 4:00 pm the police received a tip from a known confidential informant that a black male in his early twenties was dealing cocaine from his car – a black four-door Mazda. The informant said the car was parked outside a residence and provided the address. The police attended the address and watched it. At about 4:50 pm they saw a young black male (the accused) driving a black four-door Mazda arrive. He went into the residence, stayed for about a minute and returned to his car. He was arrested and searched, along with his car, as an incident to arrest. As a result of the search, the police charged him with possessing cocaine, oxycodone and heroin for the purpose of trafficking (PPT) and possession of the proceeds of crime exceeding $5,000.

Ontario Court of Justice

The judge found that the police had reasonable and probable grounds to arrest the accused. He accepted police testimony that, at the time of the arrest, they subjectively believed they had grounds to arrest. As for the objective reasonableness of that belief, the informant was credible, the information provided was compelling, and the information was corroborated. Although the search of the car was warrantless and presumptively unreasonable, it was properly conducted as an incident to lawful arrest. The drugs and money found in the search of the car were admissible and the accused was convicted of all charges except for PPT heroin, which was reduced to simple possession.

Ontario Court of Appeal

The accused contended that the trial judge erred in finding that the police had reasonable and probable grounds to arrest him. He argued that the police lacked the necessary subjective belief because they testified they did not believe they had

"The objective reasonableness of the arrest must be viewed through the lens of the arresting officers. They were experienced drug enforcement officers."

sufficient grounds to obtain a warrant to search the residence on the basis of the information the informant provided. He suggested that the police used the arrest and search incident to arrest to circumvent the higher requirement for a search warrant.

The Court of Appeal disagreed. First, the test for a search warrant was inapplicable. Further, the test for a search warrant is different than the test for reasonable grounds to arrest. Moreover, the police evidence about whether there were grounds to obtain a search warrant for the residence related only to the information they obtained from the informant, not whether they had the requisite grounds at the time of arrest. At the time of arrest, the informant's information had been corroborated and further observations were made of the accused going in and out of the residence.

The accused also submitted that the officers' subjective belief was not objectively reasonable. He contended that (1) the informant information provided was not compelling (it lacked meaningful detail), (2) the informant's credibility was suspect (it had not been proven that his criminal record did not include dishonesty offences), and (3) the information was not sufficiently corroborated. This ground of appeal was also rejected. The Court of Appeal stated:

> The objective reasonableness of the arrest must be viewed through the lens of the arresting officers. They were experienced drug enforcement officers. The information the informant provided contained details relating to a description of the suspect and his car and a specific address where he would be at a specific time. Significantly, the address was one known to the police to be associated with the drug trade. These details elevated the information to more than mere rumour or gossip. Furthermore, the information came from an informant with considerable credibility given the reliability of information he had previously provided the police on many occasions. While the informant's entire criminal record was not put into evidence, he or she nonetheless could only be described as a "gold standard informant".
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> Finally, the information the informant provided was corroborated by the arrival of a young black man driving a four-door black Mazda at the address the informant gave the police. Of additional corroborative significance was the [accused's] brief trip inside the residence – conduct the experienced police officers identified as indicative of a drug transaction in a residence they knew was used for such a purpose. [paras. 14-15]

In this case, the trial judge considered all the relevant factors when assessing reliability in their totality - compelling information from a credible informant that was corroborated. The judge did not err in concluding that, at the time of arrest, the police officers had reasonable and probable grounds. The judge also properly recognized that a weakness in one area of the reliability assessment may be compensated by strengths in the other two.

The accused's appeal against conviction was dismissed.

Complete case available at www.ontariocourts.on.ca

REASONABLE GROUNDS ASSESSED AT TIME OF ARREST

R. v. Day, 2014 SCC 74

A police investigator received a tip from a reliable informant that the accused and his roommate possessed quantities of marihuana, cocaine, and steroids for sale. That same day the investigator corroborated some of the tip's details, including the accused and his roommate's address, the vehicles they drove, and the roommate's involvement in selling drugs. The investigator also learned that a year earlier the accused had been found in possession of marihuana and a set of digital scales, though he had not been

charged at that time. The accused's residence was placed under surveillance and he was seen leaving it and driving off in a black Honda Civic at 3:25 pm, a vehicle the investigator was informed he would be driving. After stopping at a convenience store, a man came out of the store and got into the accused's car. The officers were unable to see what happened in the car or when exactly the man got out of it, but they saw the car drive away and followed it. The accused parked it and then entered a downtown bar.

Meanwhile, the investigator appeared before a judge, obtained a search warrant at 4:00 pm and let the surveillance officers know. About half an hour later, the surveillance officers observed the accused exit the bar with two women and walk to the Honda Civic that was parked nearby. When he got into the driver's seat and started the car he was confronted by police and arrested for trafficking. The women were advised that they could leave and did so. A search of the accused's person yielded two cell phones and some cash. He was cautioned, informed of his *Charter* rights and placed in a police car. When the police searched his car they found a small quantity of marihuana, a bud buster and a used marihuana pipe. Two zip lock bags, each containing a half pound of marihuana, were found in the trunk. The accused was charged with possessing marihuana for the purpose of trafficking.

Newfoundland Provincial Court

During testimony the investigator said he waited for the warrant to issue before arresting the accused because he wanted to minimize the risk that the arrest could prompt contact with someone at the residence and result in the destruction of evidence. On cross-examination the investigator did not want to speculate as to what he would have done had the search warrant not been issued.The judge found that the accused's arrest was unlawful and that his *Charter* rights to be free from arbitrary detention (s. 9) and unreasonable search and seizure (s. 8) had been breached. In the judge's view, the police did not have the requisite subjective belief for arresting the accused because the officer could not say whether he would have ordered the arrest if the search warrant had not been issued. As well, the judge found that a reasonable person placed in the position of the police would not be able to conclude that there were reasonable grounds for the arrest. She excluded the marihuana, cell phones and drug paraphernalia from evidence under s. 24(2) of the *Charter*. As a result, the accused was acquitted.

Newfoundland Court of Appeal

The Crown appealed the accused's acquittal on the basis that the trial judge erred in ruling that the arrest was unlawful and that ss. 8 and 9 of the *Charter* were breached. In the Crown's opinion, the investigating officer ordering the arrest had the necessary subjective belief that the accused was committing or was about to commit a drug trafficking offence and that this belief was justifiable from an objective point of view. Furthermore, the Crown contended that even if the accused's Charter rights were breached the judge erred in excluding the marihuana, cell phones and drug paraphernalia as evidence.

Arrest

Justice Hoegg, authoring a majority judgment, first noted that "the reasonable grounds for arresting a person without a warrant encompass both 1) a subjective belief on the part of the police that the person has committed or is about to commit an indictable offence, and 2) that the subjective belief must be 'justifiable from an objective point of view'."

"[T]he reasonable grounds for arresting a person without a warrant encompass both 1) a subjective belief on the part of the police that the person has committed or is about to commit an indictable offence, and 2) that the subjective belief must be 'justifiable from an objective point of view'.

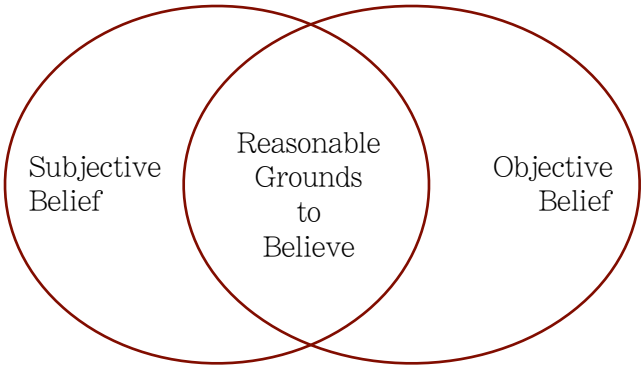
Subjective Belief

The majority concluded that the officer had the requisite subjective belief. At no time did the officer say his grounds for arrest depended on the warrant being issued nor was there any evidence that his belief hinged on such a case. Justice Hoegg stated:

> [I]t is worth observing that a decision to arrest can involve more than simply having the requisite grounds. The fact that the officer may not have arrested [the accused] had the warrant not been issued does not mean that the officer's subjective belief was vitiated, or that his grounds were not objectively justifiable. The police may have a subjective belief that is objectively justifiable to arrest a person whom they choose not to arrest, and the fact that the arrest is not carried out does not mean that the police do not have the grounds. [para. 25]

The investigator's subjective belief for the arrest was what he personally believed at the time it was made. What his belief might have been in a different set of circumstances was irrelevant. Here, the judge focussed on the investigator's answers to hypothetical questions respecting the warrant not being issued. Since there was no evidence linking the investigator's belief in grounds for arrest to the warrant's issuance, the evidence respecting the hypotheticals was not relevant. It was an error in law for the trial judge to not apply the proper legal standard. She was required to consider only the relevant evidence respecting the investigator's subjective belief. Had she done so, the trial judge would have determined that the investigator had the requisite subjective belief. The trial judge also made a palpable and overriding error by inferring that the investigator lacked a subjective belief from his hesitation to answer a hypothetical question if the warrant had not been issued.

"The police may have a subjective belief that is objectively justifiable to arrest a person whom they choose not to arrest, and the fact that the arrest is not carried out does not mean that the police do not have the grounds."



Objective Grounds

Justice Hoegg found the trial judge also erred in concluding the objective test for reasonable grounds had not been satisfied. The informant was very reliable, provided information from first hand knowledge and some of the details were verified like the accused's address and type of vehicle he drove. In addition, there was independent verification that the accused had been involved with drugs on a prior occasion. Had the trial judge properly considered the correct legal principles, she would have concluded, in the totality of the circumstances, that the grounds for arresting the accused were objectively justifiable. "The tip itself provided detail beyond a bald conclusionary statement that [the accused] was trafficking in drugs, some of the details were corroborated, the reliability of Source B was very high and his or her source was first hand, and additional investigation and surveillance served to support the belief in grounds," said Justice Hoegg.

Since both the subjective and objective prongs of the reasonable grounds test had been met, the accused's arrest was lawful and he was, therefore, not arbitrarily detained under s. 9 of the *Charter*.

The Search

Under the common law doctrine of search incident to arrest, the police may search without a warrant provided (1) the arrest was lawful, (2) the search was conducted incident to the arrest for a valid purpose, and (3) the manner in which the search was carried out was reasonable. Valid purposes for conducting searches incident to arrest include protecting the police, and protecting and discovering evidence related to the arrest.

In this case, the police searched the accused and his car for the purpose of discovering evidence, a valid reason for searching incident to arrest. Furthermore, the public manner of the search did not taint its reasonableness. Justice Hoegg stated:

> In my view, the time and place of the search were called for in the circumstances. There was nothing abusive about the search of [the accused] and nothing done to him or in the searching of his car that could lead to the conclusion that the search was carried out in an unreasonable manner. While respect for the privacy and dignity of accused persons is always called for, the police cannot be expected to conduct their work at times and places which are optimal from the point of view of persons involved in investigations. Accordingly, I conclude that the search was carried out in a reasonable manner. [para. 68]

The searches of the accused and his car were lawfully conducted incident to his arrest, and there was no s. 8 *Charter* breach. The marihuana, cell phones, and drug paraphernalia were admissible as evidence.

The Crown's appeal was allowed and a new trial was ordered.

A Different View

Justice Rowe, in dissent, concluded that the arresting officer did not believe he had reasonable grounds independent of the search warrant being granted. Instead, he believed he had grounds, in part, because the search warrant had been granted. Since the arresting officer couldn't say whether he would have had grounds to make the arrest in the absence of the search warrant being issued, then the subjective prong of the test had not been made out. The inference the trial judge drew that the arresting officer did not subjectively have reasonable grounds for the arrest was logical. As for the objective test, Justice Rowe found it too had not been satisfied.

Since the arrest was arbitrary and unlawful, a search incidental to such an arrest would also be unlawful. "The arrest of [the accused] was a clear abuse of authority, one that warrants censure by the courts," said Justice Rowe. In his view, the evidence was properly excluded and he would have dismissed the Crown's appeal.

Supreme Court of Canada

The accused then appealed, again arguing the arresting officer did not subjectively or objectively have reasonable and probable grounds to arrest him. Thus, he contended the arrest without a warrant under s. 495(1) of the *Criminal Code* was not lawful nor was the incidental search of his vehicle that followed.

A five judge panel of the Supreme Court heard the appeal. But they had very little to say other than dismissing the appeal for the reasons of Justice Hoegg. Thus, the Newfoundland Court of Appeal's decision was upheld and the order of a new trial affirmed.

Editor's note: Case facts and Newfoundland Court of Appeal decision taken from *R. v. Day*, 2014 NLCA 14.

PENILE SWAB & FINGERNAIL CLIPPINGS PROPER AS INCIDENT TO ARREST

R. v. Harasemow, 2014 BCSC 2287

The accused encountered a drunk women in his apartment building. She had left a friend's apartment and was wandering about the hallways. She willingly went to the accused's apartment where she claimed she was held prisoner in his bedroom for over an hour, during which time he had vaginal intercourse without a condom, attempted anal intercourse and had her perform oral sex. Eventually she managed to get to the balcony of his apartment and yelled for help, attracting the attention of a man who called police. The accused was arrested at his apartment and taken to the police station where he was booked into a cell. As an incident to his arrest, his clothing was seized, his

hands and penis were swabbed, and his finger nails were clipped. As a result of the police investigation, the accused was charged with sexual assault causing bodily harm and unlawful confinement.

British Columbia Supreme Court

At a trial voir dire the accused submitted that his *Charter* rights under s. 8, and perhaps s. 7, had been breached and that the bodily samples obtained were inadmissible under s. 24(2).

Since no warrant was obtained, the onus was on the Crown to prove, on a balance of probabilities, that the searches were reasonable by showing they were (1) authorized by law; (2) the law itself was reasonable; and (3) the manner in which the searches were carried out were reasonable. In describing the power of the police to search as an incident to arrest, Justice McKinnon stated:

> A search is authorized by law if it is conducted as an incident to a lawful arrest. Three conditions must be satisfied in order for a search to be valid under the common law power of search incident to arrest: (1) the arrest must be lawful; (2) the search must have been conducted as an incident to the lawful arrest; (3) the manner in which the search is carried out must be reasonable. [para. 17]

Penile Swab

Justice McKinnon found the taking of the penile swab in the circumstances of this case was lawful as incidental to arrest. He analyzed the penile swab under the framework for a strip search, which requires (1) a lawful arrest, (2) a search related to the purpose of arrest, such as to preserve evidence or prevent its disposal, (3) reasonable and probable grounds that a strip search was necessary in the circumstances, and (4) the strip search must be conducted in a reasonable manner:

> I have concluded that reasonable and probable grounds to justify a strip search were present in the case at bar. [A sergeant] testified that he was informed the accused had forced sexual intercourse on the victim without a condom. He testified that the nature of the alleged crime suggested that the complainant's DNA was likely on the suspect's penis or underneath his fingernails, given the proximity of time and the fact that the accused appeared not to have showered or otherwise made any attempt to remove evidence.
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> [A constable] also testified that time was of the essence, and she needed to obtain the evidence without delay to ensure that it would not be lost. The presence of the bodily fluids was transitory and fleeting, as it could be quickly dissipated through urination, sweating or washing.
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> I accept that the search was also necessary in the sense that the alternative procedure would have resulted in a greater violation of the accused's personal dignity. The penile swab involved a period of 15 to 20 seconds which violated the accused's privacy. [Another constable] testified that the alternative option would have required officers to keep [the accused] in handcuffs and under constant supervision until a general search warrant could be obtained, which could take up to 12 hours. He would also require assistance eating or using the bathroom, which would clearly violate his privacy in a far great capacity. [paras. 24-26]

The strip search, therefore, did not breach s. 8 of the *Charter*.

The bodily substances obtained by the penile swab was also properly authorized incident to the arrest:

> In Stillman, the Court held that a search warrant is required when taking bodily samples from a suspect. In that case, police took hair samples, buccal swabs and dental impressions from the accused. The Court determined that a higher standard of justification is required when the search and seizure incident to arrest infringes upon a person's bodily integrity, which may constitute the ultimate affront to human dignity. The common law power must be limited, as DNA is personal and its permanence eliminates the need for haste.
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> … … …
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> However, in Stillman, what the police sought from the individual in question were samples of his own bodily substances. These samples were

> taken for the sole purpose of comparing Mr. Stillman's DNA with other DNA evidence found at the crime scene.
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> ... ...
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> At bar, the DNA in question was not personal to the accused. Rather, ... the police sought the bodily samples of the complainant that were present on the surface of the accused's skin. Although the area swabbed in the case at bar was more intimate than an elbow or ear lobe, the evidence seized did not result in an affront to the accused's human dignity, as his right to privacy related to the information within his DNA was intact.
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> Further, the case at bar is not similar to Stillman where there was "simply no possibility of the evidence sought being destroyed if it was not seized immediately" given that the accused's DNA would not change overtime . In contrast at bar, the evidence that the police sought to preserve was at imminent risk of destruction. [An expert] confirmed that DNA on skin and under fingernails degrades quickly, and would not last longer than 24 hours.
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> Thus, Stillman differs factually from the case at bar. The DNA sought in Stillman was that of the accused, which was in no danger of being lost/destroyed, whereas, at bar ..., the DNA sought was that of the alleged victim, which was in imminent danger of being lost/destroyed. [references omitted, paras. 29-35]

The seizure of bodily substances obtained from the penile swab were admissible.

Fingernail Clippings

The fingernail clippings were also obtained lawfully incidental to arrest. Justice McKinnon stated:

> Clipping the accused's fingernails was arguably more intrusive than taking the penile swab, since it resulted in the actual seizure of bodily substances from the accused. However, the purpose remained the same: to retrieve the complainant's DNA.
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> [A sergeant] testified that he had reasonable grounds to believe that the accused's fingernails would carry the complainant's DNA because sexual assault often involves manhandling the victim, and sexual intercourse produces bodily secretions that can be deposited underneath fingernails. The seizure at bar did not violate the same informational privacy interest of the accused, as it had in Stillman, as the fingernails themselves were never analyzed to obtain the accused's DNA.
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> Unlike Stillman, the evidence from the fingernails was also fragile. [The constable] testified that although genetic material can be obtained by either clipping or scraping, clipping is preferred in sexual assault cases, as in her experience, scraping often results in a very small sample that can fall off the scraper. She believed that it was urgent to retrieve the evidence from under the nail, as it can be lost through every day contact or tampered with. Although she was unsure how long the material would stay under the nail, in her opinion it is hours, rather than days.
>
> In the result, although clipping an individual's fingernails may be more intrusive than swabbing one's skin, this seizure in the circumstances is distinguishable from Stillman and was a lawful search incident to arrest. [paras. 38-40]

The Court also found there did "not appear to be any warrant available that could authorize police to obtain a suspect's fingernail clippings in the present circumstances":

> Although a general warrant would authorize fingernail scrapings, it would likely not authorize full fingernail clippings, as s. 487.01(2) prohibits general warrants from authorizing "interference with the bodily integrity of any person".
>
> A DNA warrant would also be inappropriate in the case at bar. Sections 487.04 to 487.09 of the Code authorize search warrants for the purpose of seizing bodily substances for forensic DNA testing. In particular, s. 487.05 authorizes the seizure of a suspect's bodily substances in order to compare his or her DNA with the DNA associated with the crime. At bar, the fingernail clippings themselves were not analyzed, and were only seized to more easily obtain the complainant's DNA.
>
> Section 487.06(1) also limits the seizure of bodily samples to plucking hairs, taking buccal swabs and taking blood by pricking the surface of the skin.

The Crown cited s. 489(2) of the Code as confirming the common law duty of police to secure and preserve evidence without a warrant. ...

While it might be argued that this broad power of warrantless search and seizure might authorize fingernail clippings, the lack of clear statutory authority militates against that finding, particularly given the Court's view in Stillman as to the seriousness with which it regards the taking of bodily samples. In the result, it would appear that the taking of clippings is only authorized as a search incident to arrest. [paras. 43-47]

The Court also found the seizure of the accused's fingernail clippings did not engage s. 7 of the *Charter*. The physical interference and inconvenience of cutting the accused's fingernails had been adequately addressed under s. 8 and s. 7 added nothing to the analysis.

The evidence obtained from the penile swab and fingernail clippings were admissible at trial.

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