JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

IN MEMORIAM

On January 21, 2015, 42-year-old RCMP Constable David Wynn succumbed to a gunshot wound sustained five days earlier while investigating a stolen vehicle in St. Albert, Alberta.

Constable Wynn and an auxiliary constable had responded to the Apex Casino at about 3:00 am. The two officers had just reviewed video of the theft and were leaving the casino when they encountered the suspect.

As they placed the man under arrest, he suddenly spun away from them, drew a concealed handgun, and opened fire, striking Constable Wynn in the head and the auxiliary constable in the torso. The man fled the scene and committed suicide in a nearby house. Constable Wynn was transported to a local hospital in grave condition and died five days later.

Constable Wynn had served with the RCMP for six years. He is survived by his wife and three children.

On February 1, 2105, 40-year-old BC Commercial Vehicle Safety and Enforcement (CSVE) Officer Toni Kristinsson was killed in a vehicle crash north of Valemount, BC.

His department vehicle collided with a commercial vehicle, causing him fatal injuries. The driver of the other vehicle suffered minor injuries.

Officer Kristinsson had served with CVSE for three years. He is survived by his wife, son, and sister.

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

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

inscription on Canada's Police and Peace Officers' Memorial, Ottawa

Highlights In This Issue

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JUSTICE INSTITUTE of BRITISH COLUMBIA | LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

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

The 15 invaluable laws of growth: live them and reach your potential.
John C. Maxwell.
New York,NY: Center Street, (2012).
BF 637 S4 M386 2012

Do the next right thing: surviving life's crises.
Frank O'Dea with John Lawrence Reynolds.
Toronto, ON: Viking, (2013).
BF 637 S4 O34 2013

Everybody writes: your go-to guide to creating ridiculously good content.
Ann Handley.
Hoboken, NJ: Wiley, (2014).
HF 5415.1265 H358 2014

Keeping the record straight: introductory accounting for not-for-profit organizations.
Toronto, ON: Certified General Accountants Association of Ontario, (2012).
HF 5686 N56 K447 2012

Lean for dummies.
Natalie Sayer and Bruce Williams.
Hoboken, NJ: Wiley, (2012).
HD 58.9 S29 2012

Now you see it: how the brain science of attention will transform the way we live, work, and learn.
Cathy N. Davidson.
New York, NY: Viking, (2011).
BF 321 D38 2011

The presentation lab: learn the formula behind powerful presentations.
Simon Morton.
Hoboken, NJ: Wiley, (2014).
HF 5718.22 M384 2014

Recruitment and selection in Canada.
Victor M. Catano, Willi H. Wiesner, Rick D. Hackett.
Toronto, ON: Nelson Education, (2013).
HF 5549.5 R44 R427 2013

Symptoms and signs of substance misuse.
Margaret Stark, Jason Payne-James, Michael Scott-Ham.
Boca Raton, FL: Taylor & Francis, (2014).
RC 564 S74 2015

Think smarter: critical thinking to improve problem-solving and decision-making skills.
Mike Kallet.
Hoboken, NJ: Wiley, (2014).
HD 30.29 K35 2014

Turning learning into action: a proven methodology for effective transfer of learning.
Emma Weber.
London; Philadelphia: KoganPage, (2014).
HD 58.82 W43 2014

Wait: the art and science of delay.
Frank Partnoy.
New York, NY: PublicAffairs, (2012).
BF 637 P76 P37 2012

What your boss really wants from you: 15 insights to improve your relationship.
Steve Arneson.
San Francisco, CA: Berrett-Koehler Publishers, (2014)
HF 5548.83 A76 2014

Why motivating people doesn't work ... and what does: the new science of leading, energizing, and engaging.
Susan Fowler.
San Francisco, CA: Berrett-Koehler Publishers, (2014)
HF 5549.5 M63 F69 2014

CAPE 2015

Canadian Association of Police Educators

JUSTICE INSTITUTE of BRITISH COLUMBIA

715 McBride Boulevard
New Westminster, BC

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.

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

cape-educators.ca

MR. BIG: PROBATIVE VALUE v. PREJUDICIAL EFFECT?

R. v. Mack, 2014 SCC 58

About a month after the accused's roommate disappeared, the police received a call from a friend claiming that the accused had confessed to killing his roommate and burning the body. The police launched a Mr. Big operation and obtained a wiretap authorization to intercept the accused's phone calls. The undercover Mr. Big operation lasted four months, involved 30 scenarios, and saw the accused paid about $5,000 for his work with the organization, plus expenses. The Mr. Big operation started with Ben, an undercover officer, meeting the accused at a nightclub. A week later he was asked to help repossess a vehicle for which he was paid $200. Later, the accused was introduced to "Mr. Big" but declined to speak about his missing roommate. He was told that it was his choice to talk, but refusing to speak meant he would remain on the organization's "third line". The only way to advance to the "first line" was by talking about his missing roommate. The accused again refused, explaining that "loose lips sink ships".

Eventually, the accused told Ben he was willing to do what it took to work with the organization. When asked why he killed his roommate, he said his roommate was "a liar, a thief, and a piece of shit drug dealer." He told Ben that he shot his roommate five times with a .223 rifle— four times in the chest and once in the back. He said there was "nothing left" of the body and he took Ben to a fire pit on his father's property where he said he had burned it. A few days later the accused was flown to meet with Mr. Big. He described his roommate to Mr. Big as a "crack head" and said he stole from his son's piggy bank. He again said he killed his roommate by

shooting him five times with a .223 rifle — four times in the chest and once in the back. He added that there had been a "big fire" at his dad's place, and that there was "nothing left" of the body. A week later he was arrested and charged with first degree murder. The police searched his father's property and found the victim's remains in the fire pit that the accused had shown Ben. Shell casings were also discovered in the fire pit. These had been fired from a rifle found in the accused's apartment.

Alberta Court of Queen's Bench

The Crown conceded that the wiretap authorization it had obtained to intercept the accused's phone calls did not meet the requirements of the *Criminal Code* and therefore breached s. 8 of the *Charter*. The Crown, however, did not adduce any of the intercepted calls as evidence. The accused denied killing his roommate and blamed another man for the murder. This other man also claimed that the accused had confessed to him about the killing. The accused argued that the statements he made to the two Crown witnesses were misinterpreted or untrue. He said that his confessions made during the Mr. Big operation should be excluded because the illegal wiretap was used to design the undercover

"[A] Mr. Big confession will be excluded where its prejudicial effect outweighs its probative value, or where it is the product of an abuse of process. In this context, the confession's probative value is a function of its reliability. Its prejudicial effect stems from the harmful character evidence that necessarily accompanies its admission."

operation. Since the wiretap was so intertwined with the Mr. Big operation, he suggested that that the illegality of the authorization required excluding his statements made to the undercover officers under s. 24(2) of the *Charter*.

The judge disagreed. He found the incriminating statements the accused made to the undercover officers had not been "obtained in a manner" that violated any of his *Charter* rights. A jury went on to convict the accused of first degree murder.

Alberta Court of Appeal

The accused contended that the trial judge erred, among other things, in concluding that s. 24(2) was not engaged. This argument, however, was rejected. The Court of Appeal found the trial judge's decision under s. 24(2) was entitled to deference and there was no basis for interfering with it. The accused's appeal from his murder conviction was dismissed.

Supreme Court of Canada

The accused again attacked, in part, the trial judge's s. 24(2) ruling. He wanted his conviction overturned and a new trial ordered.

Mr. Big Confessions

7:0

A seven member panel of the Supreme Court noted that the accused did not have the benefit of *R. v. Hart*, 2014 SCC 52, a decision in which a two-pronged framework for assessing the admissibility of Mr. Big confessions was developed:

> Under the Hart framework, a Mr. Big confession will be excluded where its prejudicial effect outweighs its probative value, or where it is the product of an abuse of process. In this context, the confession's probative value is a function of its reliability. Its prejudicial effect stems from the harmful character evidence that necessarily accompanies its admission. [para. 31]

Justice Moldaver, writing the Supreme Court's opinion, concluded that the confessions in this case would have been admissible under the *Hart* framework because any prejudicial effect arising from the Mr. Big confessions was easily outweighed by their probative value.

As well, the confessions were not the product of an abuse of process. The undercover officers did not engage in any improper conduct. The accused had not been presented with any overwhelming inducements:

> He had prospects for legitimate work that would have paid even more than the undercover officers were offering. Nor did the officers threaten the [accused] with violence if he would not confess. The most that can be said is that the officers created an air of intimidation by referring to violent acts committed by members of the organization. But the [accused] was not coerced into confessing. This much is evidenced by the [accused's] initial refusal to speak with Ben and [Mr. Big] about [his roommate's] disappearance. Indeed, the undercover officers explicitly made clear to the [accused] that he did not have to speak with them about [his roommate], and that he could remain in his current role within the organization. None of the undercover officers' conduct approaches abuse. [para. 36]

s. 24(2) Charter

The Supreme Court upheld the trial judge's ruling in concluding that any connection between the confessions and a *Charter* breach was insufficient to engage s. 24(2). The confessions had not been obtained in a manner that violated the accused's *Charter* rights. In describing the necessary connection, Justice Moldaver stated:

> Whether evidence was "obtained in a manner" that infringed an accused's rights under the Charter depends on the nature of the connection between the Charter violation and the evidence that was ultimately obtained. The courts have adopted a purposive approach to this inquiry. Establishing a strict causal relationship between the breach and the subsequent discovery of evidence is unnecessary. Evidence will be

> tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct. The required connection between the breach and the subsequent statement may be temporal, contextual, causal, or a combination of the three. A "remote" or "tenuous" connection between the breach and the impugned evidence will not suffice. [reference omited, para. 38]

Whether or not there is a sufficient connection between an alleged *Charter* breach and the evidence to trigger s. 24(2) is a question of fact entitled to considerable deference and will only be interfered with on appeal where the trial judge has failed to consider the proper factors or has made an unreasonable finding. Here, the trial judge found the tenuous causal connection between the s. 8 breach and the confessions undermined the significance of the temporal relationship. The Supreme Court declined to interfere with this fact driven exercise. The accused's appeal was dismissed.

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

Mr. Big Confession

R. v. Mack, 2014 SCC 58: Prejudicial Effect v. Probative Value Grid

Prejudicial Effect	• the bad character evidence that accompanied the confessions was limited. • none of the scenarios involved violence. • the operation did not reveal prejudicial facts about the accused's past history. • the accused's involvement with the organization was primarily limited to assisting with repossessing vehicles and delivering packages.	
Probative Value	• probative value high. • inducements provided by the undercover officers were modest. • he was paid approximately $5,000 over a four-month period, at a time when well-paying, legitimate work was readily available to him. • he was not threatened by the officers. • he was told, in his first meeting with "Mr. Big", that he could decline to say anything and remain on the organization's "third line" — an option he initially accepted. • there was an abundance of evidence that was potentially confirmatory. • his purported confessions to the other two men described the same motive for the killing as his confessions to the undercover officers. • They all made reference to burning the victim's body. • immediately after confessing to Ben, the accused led him to the firepit in which the victim's remains lay undiscovered • shell casings fired from a gun found in the accused's apartment were found in the same firepit.	

SUPREME COURT CARVES NEW RULES FOR MR. BIG CONFESSIONS

R. v. Hart, 2014 SCC 52

The accused's three-year-old twin daughters drowned in a lake adjacent to a park. He was the last person to see them alive. He said he took them to play on some swings when they ran onto a dock. When one daughter fell into the water, he panicked because he could not swim. He ran back to his car and drove home to get his wife. But he forgot about his other daughter, leaving her on the dock. Upon returning to the park, both daughters were found dead, floating in the lake several hundred meters apart. The accused told police he did not call for help using either of two cell phones in his car because one did not have any minutes on it and the other did not belong to him. He also said he never thought of stopping at a nearby restaurant or hospital for help instead of driving all the way home to get his wife. He denied drowning his daughters.

Convinced the accused had killed his daughters and lied about it, the police questioned him again for about eight hours some five weeks later. He again denied killing the girls. Two weeks later though, he contacted police and volunteered that he had been untruthful. This time he said he had a seizure at the park after he removed his daughters from the car. When the seizure passed, he could see one of his daughters "in the water." His only thought was to drive home to his wife. He said he had lied earlier because he did not want to lose his driver's licence as a result of his epileptic seizures. With insufficient evidence to charge him, the investigation went cold.

Two years later, the police targeted the accused in a Mr. Big operation. They conducted several weeks of "lifestyle" surveillance, revealing he was on government assistance and socially isolated. He rarely left home and, if he did, he was with his wife. Undercover officers developed a relationship with the accused, eventually employing him as a driver in a trucking company. Undercover officers told him they were part of a criminal organization, headed by a "boss". The accused participated in simulated criminal activity with the officers, delivering trucks that purportedly contained smuggled alcohol and packages with stolen credit cards. He spent several nights in hotels paid for by the undercover officers, enjoyed frequent dinners, and was paid about $4,470 over two months of work. He became fully immersed in his new fictitious life, telling one officer he loved him and that they were like brothers. One night the accused confessed that he planned the murder of his daughters and carried them out. The operation continued over the next two months with the importance of trust, honesty and loyalty within the organization constantly being preached. It was stated that those who were not trustworthy were met with violence. On one occasion, an undercover officer slapped another across the face in front of the accused. As the operation built towards its climatic meeting with Mr. Big, the accused was told of a forthcoming "big deal" that would net him between $20,000 and $25,000 if he participated. Later on, he was shown $175,000 in cash, said to be a down payment toward the impending deal.

The accused was told that he would only be allowed to participate if Mr. Big gave his approval. They said the organization performed a background check and found a problem. He was urged to be honest during the meeting with Mr. Big. Mr. Big told the accused that there might be some "heat" coming from the deaths of his daughters and asked why he killed them. He replied that he had suffered a seizure, but was told by Mr. Big not to "lie." After some further prodding by Mr. Big, the accused confessed to killing his daughters because he feared Child Welfare was going to take them away and place them with his brother. When asked how he did it, he said that they "fell" over the wharf at the park. When pressed for more details, he explained that he "struck" his daughters with his shoulder and that they fell into the water. Two days later the accused took an undercover officer to the park and re-enacted how the drowning occurred. He was later arrested and charged with two counts of first degree murder. When allowed to make a phone call, his first call for help went to one of the undercover officers.

In total, the accused participated in 63 scenarios with undercover officers, travelled to Halifax, Montreal, Ottawa, Toronto and Vancouver, stayed in hotels, frequently dined in some of the finest restaurants, and was paid $15,720 for his work. The full cost of the Mr. Big operation was $413,268.

Newfoundland Supreme Court

The accused testified on a *voir dire* that he worked for the fictitious criminal organization because he was making good money and was afraid of the undercover officers. He denied making his first confession and said that he had lied about the other confessions because he was afraid of Mr. Big. The accused argued his confessions ought to have been excluded as evidence under s. 24(2) of the *Charter*. He suggested that the intimidating and threatening conduct of the officers was oppressive and breached his rights under s. 7 (life, liberty and security of the person). He also contended that this same conduct rendered his confessions inadmissible under the principled approach to the rule against hearsay because the threatening police conduct made his confessions unreliable.

The judge admitted the confessions as evidence. He found that the accused had bonded with the undercover officers, continually sought more work from them, and was given a number of chances to leave the operation but made no effort to do so. He rejected the accused's evidence that he felt threatened and intimidated by the undercover operatives. He was convicted on two counts of first degree murder.

Newfoundland Court of Appeal

The accused again argued that the confessions he made during the Mr. Big operation were inadmissible under s. 24(2) of the *Charter* because they were obtained in breach of his right to silence under s. 7. A two member majority found the accused was under "state control" at the time of the confessions and therefore his right to silence, which can extend beyond situations where an individual has been detained, was breached. The accused's statement to Mr. Big and the subsequent re-enactment of the events on the wharf resulting from the Mr. Big interview should have been excluded from evidence at the trial. However, the first confession was admissible and a new trial was ordered. Justice Barry, in dissent, was of the view that the accused's right to silence was not triggered prior to detention. Further, even if a "state control" test was applicable, there was no s. 7 breach. The trial judge found that the accused had numerous chances to leave the operation but made no effort to do so. Justice Barry would have also ordered a new trial but for a different reason.

Supreme Court of Canada

The Crown appealed the ordering of a new trial, arguing, in part, that the trial judge did not err in admitting the accused's confessions made during the Mr. Big operation.

Mr. Big Confessions

Justice Moldaver, speaking for a five member majority, first described the Mr. Big technique as follows:

> The technique tends to follow a similar script in each case. Undercover officers conduct surveillance on a suspect in order to gather information about his or her habits and circumstances. Next, they approach the suspect and attempt to cultivate a relationship. The suspect and the undercover officers socialize and begin to work together, and the suspect is introduced to the idea that the officers work for a criminal organization that is run by their boss — "Mr. Big". The suspect works for the criminal organization and is assigned simple and apparently illegal tasks — serving as a lookout, delivering packages, or counting large sums of money are common examples. As occurred in this case, this stage of the operation can last for several months.
>
> As the operation wears on, the suspect is offered increasing responsibility and financial rewards. By flying the suspect across the country, putting him up in hotels, and taking him to expensive restaurants, undercover officers show

> the suspect that working with the group provides a life of luxury and close friendships. All the while, the suspect is constantly reminded that his or her ultimate acceptance into the group depends on Mr. Big's approval.
>
> Throughout the operation, the suspect is also told that the organization demands honesty, trust and loyalty from its members. An aura of violence is cultivated to reinforce these values. Officers teach the suspect that those who betray the trust of the organization are met with violence. They do this by telling the suspect that the organization kills "rats," or by exposing him to simulated acts of violence perpetrated by members of the organization against other undercover officers as punishment for imagined betrayals. ...
>
> Once the stage is set, the operation culminates in a meeting, akin to a job interview, between the suspect and Mr. Big. Invariably during these meetings, Mr. Big expresses concern about the suspect's criminal past and the particular crime under investigation by the police. As the meeting unfolds, it becomes clear that confessing to the crime provides a ticket into the criminal organization and safety from the police. Suspects may be told that Mr. Big has conclusive evidence of their guilt and that denying the offence will be seen as proof of a lack of trustworthiness. In another variation, suspects are told that Mr. Big has learned from contacts within the police that a prosecution for the offence is imminent based on new evidence. The organization offers to protect the target through a variety of means — by offering to eliminate a witness or by having someone else confess to the crime — if the suspect confesses to Mr. Big. Throughout the interrogation, any denials of guilt are dismissed as lies, and Mr. Big presses for a confession. [references omitted, paras. 57-60]

Dangers of Mr. Big

The majority noted that there are three inherent dangers (or risks) associated with Mr. Big operations:

- **unreliable confessions**,
- **prejudicial facts** about the accused's character, and
- the potential for **police misconduct**.

Justice Moldaver put the **reliability** concern this way:

> The purpose of these operations is to induce confessions, and they are carefully calibrated to achieve that end. Over a period of weeks or months, suspects are made to believe that the fictitious criminal organization for which they work can provide them with financial security, social acceptance, and friendship. Suspects also come to learn that violence is a necessary part of the organization's business model, and that a past history of violence is a boast-worthy accomplishment. And during the final meeting with Mr. Big — which involves a skillful interrogation conducted by an experienced police officer — suspects learn that confessing to the crime under investigation provides a consequence-free ticket into the organization and all of the rewards it provides.
>
> It seems a matter of common sense that the potential for a false confession increases in proportion to the nature and extent of the inducements held out to the accused. [para. 68-69]

As for the ***prejudicial effect***, the evidence may show a jury that the accused wanted to join a criminal organization and that he participated in "simulated" crimes that he believed were real. The prejudice regarding bad character evidence was explained as follows:

> Bad character evidence causes two kinds of prejudice. It causes "moral prejudice" by marring the character of the accused in the eyes of the jury, thereby creating a risk that the jury will reason from the accused's general disposition to the conclusion that he is guilty of the crime charged, or that he is deserving of punishment in any event. And it causes "reasoning prejudice" by distracting the jury's focus away from the offence charged, toward the accused's extraneous acts of misconduct (ibid.).
>
> When a Mr. Big confession is admitted, the character evidence that accompanies it places the accused in a difficult situation. In these cases, the accused is often obliged, as a tactical necessity, to testify in order to explain why he falsely confessed to Mr Big. The character evidence that has already been admitted is damaging in this context because it shrouds the accused with an aura of distrust before he or she

> steps into the witness box. This distrust is compounded when the accused asks the jury to disregard his confession because he was lying when he gave it. And all of this furnishes the Crown with ample fodder for a forceful attack on the accused's credibility in cross-examination. [references omitted, paras. 74-75]

The majority also noted that Mr. Big operations can become abusive, creating the risk of **police misconduct**. The police may resort to unacceptable tactics in their pursuit of a confession. "In conducting these operations, undercover officers often cultivate an aura of violence in order to stress the importance of trust and loyalty within the organization," said Justice Moldaver. "This can involve — as it did in this case — threats or acts of violence perpetrated in the presence of the accused. In these circumstances, it is easy to see a risk that the police will go too far, resorting to tactics which may impact on the reliability of a confession, or in some instances amount to an abuse of process."

To address these three concerns, the majority developed a framework for determining the admissibility of Mr. Big Confessions while attempting to strike an appropriate balance between the dangers posed by a Mr. Big operation and law enforcements' ability to investigate serious crime. The two prong approach recognized a new common law rule for admissibility, which included reliance on the doctrine of abuse of process to address police misconduct. "The purposes of this two-pronged approach are to protect an accused's right to a fair trial under the Charter, and to preserve the integrity of the justice system," said Justice Moldover. "Those are the ends that must ultimately be achieved. This approach strives to reach them by ensuring that only those confessions that are more probative than prejudicial, and which do not result from abuse, are admitted into evidence."

"Where the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him, any confession made by the accused to the state during the operation should be treated as presumptively inadmissible."

New Common Law Rule

Under the new rule for assessing admissibility, Mr. Big confessions are presumptively inadmissible. However, this presumption can be rebutted if the Crown can establish, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect.

Presumptive Inadmissibility. "Where the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him, any confession made by the accused to the state during the operation should be treated as presumptively inadmissible." The majority saw many benefits with the Crown having to demonstrate the confession should be admitted:

- The police design and implement Mr. Big operations thereby creating the dangers of a potentially unreliable confession and its prejudicial character.
- Having the burden of establishing admissibility, the state "will be strongly encouraged to tread carefully in how it conducts these operations."
- The onus will encourage better record keeping of the operation such as recording key interactions.

Probative Value v. Prejudicial Effect. If the Crown can establish, on a balance of probabilities, that the probative value of the confession (tending to prove an issue) outweighs its prejudicial effect, then the presumption of inadmissibility may be overcome. The probative value of a confession will turn on an assessment of its reliability while its prejudicial effect flows from the bad character evidence that must be admitted in order to put the operation and the confession in context. If the Crown cannot demonstrate that an accused's confession is admissible, the rest of the evidence surrounding the Mr. Big operation becomes irrelevant and thus inadmissible.

In determining whether the probative value of evidence outweighs its prejudicial effect, a "cost benefit analysis" is required. Is the value of the evidence worth its costs? The goal at this stage is for a judge to decide whether the evidence should be heard by the jury, and not whether it should be accepted or acted upon. The probative value of a Mr. Big confessions lies in its reliability. "A confession provides powerful evidence of guilt, but only if it is true," said Justice Moldaver. "A confession of questionable reliability carries less probative force, and in deciding whether the probative value of a Mr. Big confession outweighs the prejudicial effect of the character evidence that accompanies it, trial judges must examine its reliability." The prejudicial effect is measured through the spectre of moral and reasoning prejudice. **Moral prejudice** arises because the jury learns that the accused wanted to join a criminal organization and committed a host of "simulated crimes" believed to be real. **Reasoning prejudice** creates the risk that the jury will be distracted away from the actual charges before the court.

Factors relevant to assessing the **reliability** of a Mr. Big confession include the **circumstances** under which it was elicited and **confirmatory evidence**.

Circumstances

A judge must first look at all the circumstances leading to and surrounding the making of the confession. This will include, but is not limited to:

- The length of the operation;
- The number of interactions between the police and the accused;
- The nature of the relationship between the undercover officers and the accused;
- The nature and extent of the inducements offered;
- The presence of any threats;
- The conduct of the interrogation itself;
- The personality of the accused, including their age, sophistication, and mental health. According to research, people with mental illnesses or disabilities, and youth, present a much greater risk of falsely confessing and will raise greater reliability concerns.

Confirmatory Evidence

Next, the court should look to the confession itself for confirmatory evidence, or markers of reliability. This includes:

- The level of detail contained in the confession;
- Whether the confession leads to the discovery of additional evidence;
- Whether the confession identifies any elements of the crime that had not been made public (e.g., the murder weapon); or
- Whether the confession accurately describes mundane details of the crime the accused would not likely have known had they not committed it (eg. the presence or absence of particular objects at the crime scene).

This test looks directly at the evidence. The greater the concerns raised by the circumstances in which the confession was made, the more important it will be to find markers of reliability in the confession itself or the surrounding evidence. The risk of prejudice may be mitigated by excluding certain pieces of particularly prejudicial evidence that are unessential to the narrative. As well, trial judges can give limiting instructions to the jury which may reduce the prejudicial effect of the evidence.

Abuse of Process

The doctrine of abuse of process serves as a check on police conduct. This inquiry focusses on police behaviour in eliciting the evidence. A Mr. Big operation that is abusive may, by itself, render a confession inadmissible or allow for a stay of proceedings. Thus, weighing the probative value and prejudicial effect of the conviction may be unnecessary. The onus will be on the accused to establish an abuse of process.

There is no precise formula for determining when a Mr. Big operation will become abusive, but a confession becomes problematic when the will of an accused is overcome and a confession is coerced. Examples of coercive police tactics include physical violence or threats of violence, or when an accused's vulnerabilities are preyed upon such as mental health problems, substance addictions, or

youthfulness. Other misconduct offending the community's sense of fair play and decency may amount to an abuse of process and warrant the exclusion of the statement.

Residual Discretion for Exclusion

The majority noted that it was no foreclosing the possibility that a Mr. Big confession could be excluded even where the new common law rule would allow for the admission of it. Judges retain a discretion to exclude evidence where its admission would compromise trial fairness.

Exclusion In This Case

In this case, the majority excluded all three confessions (including the re-enactment) because their probative value was outweighed by their prejudicial effect. Their was serious doubt about their reliability and no confirmatory evidence:

> Each of them came about in the face of overwhelming inducements. This calls into question their reliability — and there is no confirmatory evidence capable of restoring our faith in them. As such, they carry little if any probative value. On the other hand, the bad character evidence accompanying the confessions carries with it an obvious and serious potential for prejudice. In these circumstances, the prejudicial effect of the [accused's] confessions outweighs their probative value. [para. 13]

Having found the confessions inadmissible, there was no need to determine whether there was an abuse of process. The Crown's appeal was dismissed.

A Similar View

Justice Cromwell agreed with the majority on its legal framework for assessing the admissibility of a Mr. Big confession, but would not rule on the admissibility of the confessions in this case. Instead, he would leave that question for a judge to decide at the accused's new trial.

Same Result, Different Reasons

Justice Karakatsanis also agreed that the confessions ought to have been excluded. In her view, Mr. Big operations create circumstances that compromise a suspect's autonomy, undermine a confession's reliability, and raise concerns about abusive state conduct. She found the confessions breached the principle against self-incrimination protected under s. 7 of the *Charter*, which required an examination of four factors: (1) coercion; (2) an adversarial relationship between the accused and the state; (3) the prospect that an unreliable confession would be given; and (4) a concern that admitting the statement would increase the likelihood of abusive conduct by the state. She would then have excluded the confessions under s. 24(2).

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

SIDEBAR

More on what the SCC said about Mr. Big

"***When conventional investigations fail to solve serious crimes, police forces in Canada have sometimes used the 'Mr. Big' technique. A Mr. Big operation begins with undercover officers luring their suspect into a fictitious criminal organization of their own making. Over the next several weeks or months, the suspect is befriended by the undercover officers. He is shown that working with the organization provides a pathway to financial rewards and close friendships. There is only one catch. The crime boss — known colloquially as 'Mr. Big' — must approve the suspect's membership in the criminal organization.***

The operation culminates with an interview-like meeting between the suspect and Mr. Big. During the interview, Mr. Big brings up the crime the police are investigating and questions the suspect about it. Denials of guilt are dismissed, and Mr. Big presses the suspect for a confession. As Mr. Big's questioning continues, it becomes clear to the suspect that by confessing to the crime, the big prize — acceptance into the organization — awaits. If the suspect does confess, the fiction soon unravels and the suspect is arrested and charged." [para. 1-2]

INSTRUCTION TO JURY ON FALSE CONFESSIONS MAY BE NECESSARY

R. v. Pearce, 2014 MBCA 70

The victim of a homicide was found face down on a sofa in his home. An autopsy established that he had been brutally beaten to death, likely with a golf club. He had suffered at least 57 blows and was also stabbed, likely with the broken shaft of a golf club. In the kitchen sink police located a #4 iron and a #2 iron. Near the deceased's body police found the heads of a #3 iron and a driver. The broken shafts of the golf clubs (one of which was bloodied) were found elsewhere in the residence. There was no obvious suspect(s) or motive but the accused contacted police some five months after the homicide. He was interviewed by detectives. He said he was a friend of the victim and casual sex partner, and he agreed to take a polygraph. The polygraph examiner told detective's he believed the accused had nothing to do with the victim's death. Five days later the accused contacted police and insisted he speak with them. He told detectives that after the polygraph examination he became upset because it had been mentioned the deceased had AIDS. This, he claimed, caused him to remember an argument with the deceased that he thought he should share with the police. During the interview he said he had fought with the accused. He drew a map of where the argument ended (near a sofa) and said, "I might've hit him here … I did something really bad."

The accused was immediately arrested for murder because he had identified the exact location where the deceased's body was found, information that was unknown to any member of the public except for the killer. The accused was left alone for two hours while detectives discussed what to do and to arrange for a video-recording of an interrogation. The detectives then began an interrogation that lasted for just over two and one-half hours. The accused repeated that he and the deceased had sex followed by an argument when the deceased revealed he had AIDS. He told police he felt horrible, was angry, and "temporarily lost it." He repeatedly said he did not remember what happened during the argument except for being very angry. Eventually he said he was so angry he swung a golf iron at the deceased and hit him on the head with it. He was charged with manslaughter.

Manitoba Court of Queen's Bench

The accused testified he did not kill the deceased and said his confession was false. He told the jury he confessed for three reasons: (1) he was emotionally unstable; (2) he was confused because he was under the influence of Tylenol 3; and (3) the two police officers manipulated him into admitting to something he did not do. Although the judge charged the jury about the reliability of the accused's confession, he did not caution the jury about the phenomenon of false confessions. The jury returned a verdict of manslaughter and a seven-year sentence was imposed.

Manitoba Court of Appeal

The accused appealed his conviction arguing that the trial judge did not adequately instruct the jury. In his view, the judge failed to explain the phenomenon of false confessions. He posited that false confessions do occur despite being counterintuitive. The Crown, on the other hand, contended that both counsel addressed the jury on the question of whether the accused falsely confessed which was sufficient. It was the Crown's position that the jury would have understood that, although false confessions sometimes occur, the issue for them to decide was whether the accused's confession might be false.

Justice Mainella, delivering the Court of Appeal's opinion, described the evidentiary strength of a confession this way:

> A confession is a statement by an accused, whether by words or assertive conduct, to a person in authority, which the prosecutor seeks to introduce as part of their case. The statement can be either inculpatory, exculpatory, or both. The statement can address all or some of

"A confession is like no other evidence. Our system of justice accepts that an accused can be convicted solely on the basis of their own confession without any confirmatory evidence of its truth. A confession is seen as such a powerful piece of evidence because of the logic that an innocent person is unlikely to incriminate themselves."

> the material facts of the offence(s) the accused is being tried on; it need not be a full admission of guilt.
>
> Historically an accused's out-of-court statement to a person in authority is called a confession while a similar statement to someone who is not a person in authority is called an admission. That distinction is driven by the application of the confessions rule, where an accused's statement to a person in authority is presumptively inadmissible unless demonstrated to be voluntary. The different terminology has nothing to do with the potential probative value of the statement. An admission may be more incriminating in a given context than a confession. For the purposes of my reasons I use these two terms inter-changeably by reference to the expression confession.
>
> A confession is like no other evidence. Our system of justice accepts that an accused can be convicted solely on the basis of their own confession without any confirmatory evidence of its truth. A confession is seen as such a powerful piece of evidence because of the logic that an innocent person is unlikely to incriminate themselves. [references omitted, paras. 48-50]

Justice Mainella, however, also acknowledged that the phenomenon of false confessions is real. Even confessions that may be found to be admissible under the confessions rule may nonetheless be false. Examples of false confessions that may survive the voluntariness test under the confessions rule include:

- A confession made, without external pressure, for an ulterior purpose (notoriety, to relieve guilt, illness or a disorder, or to protect another person);
- A confession made to escape the pressure of police interrogation;
- A confession resulting from persuasion of guilt by a skillful interrogator; and
- A confession resulting from inhuman or degrading treatment by a person not in authority.

Jury Instructions

An accused is entitled to a fair trial which includes a properly instructed jury. With regards to an admissible confession, a trial judge must "properly instruct the jury that it is for them to decide, based on all of the evidence, whether the confession was actually made and whether it was true (i.e., the weight, if any, to be given to it)." "Cautions are given not because a jury is considered to be unintelligent, but because they are uninformed about the problem with the particular type of evidence," said Justice Mainella. "The education of a jury provided by a judge's caution serves two essential purposes: to alert the jury to the potential danger of the evidence in question, and also to provide assistance to the jury with the necessary tools to evaluate the evidence in their fact-finding function." There is not, however, an obligation to instruct a jury about false confessions unless there is an air of reality to such a claim. In this case, the accused recanted his confession at trial. This recantation provided an air of reality to his claim that he gave a false confession. Justice Mainella then described the process as follows:

> When a claim of a false confession does have an air of reality, in addition to outlining the theory of the defence to the jury, the trial judge is required to relate the essential evidence to the claim of false confession so that the jurors may appreciate the value and effect of that evidence in arriving at a just conclusion. [reference omitted, para. 118]

And further:

> Whether an accused's narrative in their confession is consistent with or conflicts with

> the independently verifiable circumstances of the crime is important for a trial judge to review with the jury. The trial judge should also direct the jury to any evidence from the trial as to the accused's knowledge of the crime and the source(s) of that knowledge. Relevant is whether the accused's knowledge of the crime, as set out in his or her confession, is information only the real perpetrator would know, or alternatively, is information the accused may have learned from the police, the media or some other source before the confession, thereby decreasing the potential probative value of the confession. [references omitted, para. 120]

In this case, the trial judge properly instructed the jury in all the above aspects. As for a caution concerning the phenomenon of false confessions, the decision to provide one and its content is within the discretion of the trial judge, depending on the facts of the case. While prudent, a caution may not be necessary as a matter of law "where the explanation for the potential false confession is not complicated and readily understandable by the jury."

But here, the trial judge failed to caution the jury about the phenomenon of false confessions, which Justice Mainella found was necessary given the circumstances. The jury needed to understand that a person may confess to something they did not do even though such a claim seemingly defies common sense. In omitting this caution, the judge committed a legal error which deprived the accused of a fair trial. The accused's appeal was allowed, his conviction was quashed, and a new trial was ordered.

Complete case available at www.canlii.org

JEOPARDY DID NOT CHANGE: NO RIGHT TO RE-CONSULT COUNSEL

U.S. v. 'Isa, 2014 ABCA 256

The applicant, a naturalized Canadian citizen, was arrested in Canada after a lengthy investigation by U.S. and Canadian law enforcement authorities. The U.S. had sought his extradition on charges of conspiracy to commit murder, providing material support to terrorist conduct, and aiding and abetting the murder of U.S. nationals abroad. It was alleged that he was a member of a terrorist facilitation network that was responsible for suicide bombings. On the day of his arrest the accused spoke to a lawyer for 45 minutes. The Canadian officer specifically told the lawyer that American authorities may want to talk to the accused later. He was then interviewed by a Canadian police officer, followed by a U.S. Department of Justice investigator. The U.S. interview was used in the committal hearing to support extradition.

Alberta Court of Queen's Bench

The applicant argued, among other things, that his rights under s. 10(b) of the *Charter* had been breached during his post-arrest interviews and the statement he made to the U.S. investigator should not have been used at the committal hearing. The extradition judge, however, rejected the s. 10(b) submission. He found the applicant had spoken to experienced counsel, controlled the length of the call, and was informed of the jeopardy confronting him both in Canada and the U.S. The judge ordered the applicant's committal into custody to await extradition, which was followed later by the Minister of Justice ordering his surrender to the U.S.

Alberta Court of Appeal

The applicant appealed the extradition judge's decision in finding that his rights under s. 10 (b) were not violated. He suggested, in part, that his interview by the U.S.

investigator triggered a right to a second consultation with counsel. In his view, the U.S. interview constituted a "change in circumstance" such that a further consultation with counsel was triggered.

The Court of Appeal disagreed. The questioning by the U.S. investigator was neither "a non-routine procedure" nor was there a substantial change in jeopardy.

In *R. v. Sinclair*, 2010 SCC 35 the Supreme Court of Canada found that some detainees will be entitled to an additional opportunity to speak to a lawyer if there are new non-routine police procedures. The *Sinclair* court put it this way:

> The initial advice of legal counsel will be geared to the expectation that the police will seek to question the detainee. Non-routine procedures, like participation in a line-up or submitting to a polygraph, will not generally fall within the expectation of the advising lawyer at the time of the initial consultation. It follows that to fulfill the purpose of s. 10(b) of providing the detainee with the information necessary to making a meaningful choice about whether to cooperate in these new procedures, further advice from counsel is necessary.

In this case, the questioning by U.S. authorities would have fallen within the advising lawyer's expectations because the Canadian police officer, while speaking to the lawyer, specifically said that the applicant might be interviewed by U.S. authorities.

As for a change in jeopardy, there was no fundamental and discrete change in the purpose of the investigation nor was there an investigation for another or significantly more serious offence not contemplated at the time of the earlier consultation. Both the applicant and his lawyer understood from the beginning about the possibility of an interview with U.S. authorities to answer U.S. charges. The circumstances did not change such that the initial advice received by the applicant may have been inadequate. The communication to counsel that an interview with U.S. authorities was possible provided relevant information necessary for choosing whether to cooperate with the police or not. The applicant was not constitutionally entitled to a second consultation.

The appeal from the decision of the extradition judge to commit the applicant was dismissed.

Complete case available at www.canlii.org

SAFETY SEARCH EXERCISED IN REASONABLE MANNER

R. v. Peterkin, 2015 ONCA 8

Two police officers were dispatched to investigate a 911 call connected to a townhouse unit at about 2:30 am. No one spoke during the call and the line was busy on call back. When police arrived, the front and back doors of the townhouse were found to be locked, the unit was in darkness, no one answered the door, no sounds from within could be heard, and there were no signs typical of an actual or attempted forced entry. As they waited nearby for the arrival of a security guard to let them into the premises so they could continue their investigation, the accused arrived on foot. They saw him walk into the fenced back yard of the townhouse unit through an open gate. He was talking on a cell phone. When approached by the officers, the accused denied any connection to the townhouse and explained that he was just waiting for a ride. He appeared nervous and avoided eye contact.

Unsatisfied with the accused's explanation, the officers advised him he was being detained under Ontario's *Trespass to Property Act*. He was asked whether he wanted to speak to a lawyer, but there was no mention of the toll-free number for duty counsel or the availability of immediate free legal advice. The accused produced a driver's licence to confirm his identity, but declined to speak to a lawyer. While his driver's license information was checked through the police computer, he began to act suspiciously. He was seen tapping his right hip with his right wrist, and "blading" himself to the officers so that his right side was furthest away from them. When his driver's licence was returned, the accused received it awkwardly by holding his right elbow tightly to his right hip.

Suspecting he was carrying a weapon, the police decided, in the interests of their own safety, to conduct a "pat-down" search of the accused for weapons before releasing him. When the officers told him they were going to pat him down, he backed away, refused to permit the search, and tried to flee. Officers struggled with him but he was quickly taken to the ground and subdued. The police officers discovered, almost immediately, that he had a handgun. An officer had felt the butt of a gun on the right side of the accused's waist and removed it. The struggle stopped and the accused was arrested for unlawfully possessing a firearm. The firearm was loaded with a bullet in the chamber. When searching incident to his arrest, police recovered 40 bullets, cocaine, marijuana, two cellphones, and $275 in cash.

Ontario Superior Court of Justice

The judge found the officers had a sufficient legal basis to detain the accused in the backyard for investigation and to conduct a safety search (pat-down) incidental to this detention. "While completing their investigation, the accused conducted himself in a way that caused the police to reasonably suspect that he was armed with a weapon," said the judge. "The proposed 'pat down' search of the accused for weapons was fully justified as incidental to the investigative detention of the accused given that the reason for the search was officer safety, and the officers reasonably believed that their safety was at risk. Of course, when the accused refused to permit this incidental 'pat down' search for weapons and instead tried to flee, the police were entitled to use reasonable and proportional force to prevent the accused's escape, and to conduct the necessary weapons search to protect themselves and the general public in the vicinity." There was no s. 8 *Charter* breach.

The judge did, however, find two other *Charter* violations under s. 10. First, s. 10(a) was breached when the police failed to advise the accused of both reasons for his detention; they did not tell him he was also being detained in connection with the 911 call. Second, s. 10(b) was breached when they failed to tell him about the availability of duty counsel and provide him with the toll-free number. Nevertheless, the evidence was admitted under s. 24(2) and the accused was convicted of unlawfully possessing a loaded restricted firearm and possessing cocaine for the purpose of trafficking.

Ontario Court of Appeal

The accused argued that the warrantless safety search which followed his investigative detention was unlawful. He submitted that a warrantless search is presumptively unreasonable and the Crown failed to rebut this presumption by establishing, on a balance of probabilities, that the police had reasonable and probable grounds to believe, at the time the search was conducted, their own safety or that of the public was at risk. In his view, a reasonable suspicion for the presence of a weapon reflects only a standard of possibility which is not sufficient to discharge this obligation. Rather, the evidence must give rise to a reasonable belief, which reflects a standard of probability.

The Crown, on the other hand, contended that a lawful safety search incidental to an investigative detention requires only a reasonable suspicion or, in other words, a demonstration of reasonable grounds to believe that police or public safety is at risk. This standard relates to reasonable possibility of harm, not a reasonable probability. In the Crown's opinion, it doesn't make sense that the power to conduct a limited safety search incidental to a lawful investigative detention should require a higher standard than for the detention itself. Furthermore, even if a higher reasonable belief standard applied, the Crown's position was that the evidence in this case satisfied that standard.

Police Safety Searches

Under the common law, police officers have a limited power to detain a person for investigative purposes. The police must have both a reasonable suspicion that there is a clear nexus between the prospective detainee and a recent or ongoing criminal offence. As well, the detention must be

"[S]afety searches incidental to investigative detentions are justified where the officer believes on reasonable grounds that his or her own safety, or the safety of others, is at risk. The search must be grounded in objectively discernible facts to prevent fishing expeditions on the basis of irrelevant or discriminatory factors."

executed in a reasonable manner. "The investigative detention should be brief and does not impose an obligation on the detained individual to answer questions posed by the police," said Justice Watt, speaking for the unanimous Court of Appeal.

As for searches incidental to investigative detention, they too are permissible under the common law. However, such searches do not exist as a matter of course and are not to be equated with the power to conduct a search incident to lawful arrest. Instead, "safety searches incidental to investigative detentions are justified where the officer believes on reasonable grounds that his or her own safety, or the safety of others, is at risk," said Justice Watt. "The search must be grounded in objectively discernible facts to prevent fishing expeditions on the basis of irrelevant or discriminatory factors." He added:

> First, the officer's decision to search must be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition. Second, the safety search must be exercised in a reasonable manner. [references omitted, para. 45]

In this case, the Court of Appeal upheld the safety search:

> When [the accused] entered the backyard of unit 132 at 296 Grandravine Drive, the officers were investigating a static line 911 call from the unit. In doing so, they were discharging their common law duty to preserve the peace, prevent crime, and protect life and property. [The accused's] entry into the fenced rear yard also entitled the officers to detain him to investigate a potential breach of the Trespass to Property Act, an arrestable offence under s. 9(1) of that Act.
>
> As the interaction with [the accused] continued, the officers noticed several movements they considered to signal possession of a gun. Taps to the waistband of the [accused's] pants. "Blading" to obstruct their view of the [accused's] right side. Awkward receipt of the driver's licence when the officers returned it to the [accused]. An indication by the officers of a pat-down search for the officers' safety. Resistance. An attempt to flee. Apprehension and only then a search. This accumulation of factors fully supported a reasonable belief on the part of the officers that their safety was at stake and justified the search. [paras. 61-62]

Reasonable Suspicion v. Reasonable Grounds

In a recent decision of the Supreme Court of Canada (*R. v. MacDonald*, 2014 SCC 3), a majority concluded that safety searches require the officer believe on reasonable grounds that their safety is at stake (or reasonable grounds to believe a person is armed or dangerous or a reasonable belief in an imminent threat to safety). The minority in that decision took this to mean that a new, higher standard was created to replace the lower reasonable grounds to suspect standard articluated in *R. v. Mann*, 2004 SCC . Justice Watt observed that *MacDonald* did not involve a safety search incident to an investigative detention, but was a free-standing search power. In the end, Justice Watt found it unnecessary to determine whether the standard for

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determining the lawfulness of a safety search has been re-calibrated because, in this case, the test for a reasonable belief that the officer's safety was at stake was satisfied.

The safety search was lawful, the evidence admissible under s. 24(2), the accused's appeal dismissed, and his convictions upheld.

Complete case available at www.ontariocourts.on.ca

PREVENTATIVE ARREST IN DOMESTIC INCIDENT JUSTIFIED

R. v. Alexson, 2015 MBCA 5

When police responded to a 911 hang-up call at about 4:00 am they saw and heard, through the living room window, the accused screaming at a woman (his wife) and a child that he was "pissed off." The wife and child appeared to be terrified as they were clinging to each other. When officers banged on the window and door, the wife ran to let them in and implored the officers to "take him away." The officers entered the home and noted the accused smelled strongly of alcohol and was likely intoxicated. He became verbally abusive to both the officers and his wife. When the officers asked the wife to take the child to another room, the accused got up as if to go after her and the child. He was told to calm down. While he put on some clothes, the accused continued to yell profanities at the officers, despite repeated attempts to calm him down. He clenched his fists and took up a fighting stance. Police concluded they would need to intervene for the wife and child's safety as well as their own. They told the accused he would be taken into custody because he was intoxicated. He was pushed to the ground, handcuffed and removed from the home. The officers wanted to get him out of the house and bring him to a detoxification centre where he could sober up and then be released. When they tried to place him in the police car, he braced himself against the back door and kicked one of the officers in the jaw with his steel-toed boot. He said, "I gotcha." He was arrested for assaulting a peace officer in the execution of their duty.

Manitoba Provincial Court

Although the judge recognized this to be a difficult situation that escalated very quickly, he believed the officers should have done more to resolve the matter without taking the accused into custody, which "clearly just inflamed the situation." In the judge's view, there was insufficient evidence to believe the accused was about to commit an assault or a breach of the peace in the home. Thus, the police officers were not acting in the execution of their duty when they forcibly took him out of the house. The accused was acquitted of assaulting an officer "engaged in the execution of his duty."

Manitoba Court of Queen's Bench

The appeal judge agreed with the trial judge that the officers were not lawfully acting in the execution of their duty when they forcibly removed the accused from the home. The police lacked reasonable grounds to believe an offence or a breach of the peace was likely to occur. The forcible removal from the residence amounted to police assault and the accused was justified in using reasonable force to defend himself.

Manitoba Court of Appeal

The Crown appealed the accused's acquittal arguing that the officers were lawfully acting in the exercise of their duty when they removed the accused from the home and had the necessary reasonable grounds to believe an offence or breach of the peace was likely if they did not intervene.

Chief Justice Chartier first observed the difficulty police face in investigating domestic violence:

"Unfortunately, domestic violence incidents like this one are often before the courts. What are officers to do when they believe a belligerent and intoxicated person poses a danger to others in the home? Do they arrest that person and risk being assaulted with impunity and sued in civil court for unlawful arrest; or, do they leave and risk being blamed if another member of the household is hurt because they did not remove that person?"

Unfortunately, domestic violence incidents like this one are often before the courts. What are officers to do when they believe a belligerent and intoxicated person poses a danger to others in the home? Do they arrest that person and risk being assaulted with impunity and sued in civil court for unlawful arrest; or, do they leave and risk being blamed if another member of the household is hurt because they did not remove that person?

Police Authority to Enter the Home

Although an individual's home deserves special protection from police intrusion, the common law can in some cases provide authority for the police to enter. In this case, the police had the general duty to preserve the peace, prevent rime and protect life and property. The officers were investigating a 911 hang-up call. "There can be no question that the officers in this case had the authority to enter the home to investigate the reason for the 911 call, irrespective of whether the person that let them in had the authority to do so," said Chief Justice Chartier. "In fact, they could have used reasonable force to enter to ascertain the health and safety of the 911 caller, had it been required. Their investigation, as brief as it was, led them to believe, based on their judgment and experience, that an assault on the wife or child was about to occur."

Was the accused's forced removal justified?

Considering the totality of the circumstances, the Court of Appeal concluded that the officers were acting in the lawful execution of their duties when they removed the accused from the home without a warrant:

> [I]n this case, the duty being performed was preserving the peace and preventing crime by addressing the safety concerns of the wife and child. The officer testified that he was taking the [accused] to a detoxification centre to prevent him from assaulting them and to sober up. He was not going to charge him with an offence. A cumulative assessment of the relevant factors satisfies me that the arrest and detention were reasonably necessary for the carrying out of the duty to preserve the peace and prevent crime. It was a preventative and restrained measure taken to protect other members of the household. The nature and extent of the interference with the [accused's] liberty was limited to the time it took for him to sober up. It was also a reasonable interference that served an important public purpose. [para. 22]

Reasonable grounds offence likely?

Section 495(1)(a) of the *Criminal Code* permits a police officer to arrest when they believe, on reasonable grounds, that a person "is about to commit an indictable offence." Reasonable grounds carries both a subjective and objective component: was the officer's subjective belief objectively reasonable in the circumstances?

"Under s. 495(1)(a) of the Code, officers do not have to wait until a person overtly threatens or becomes very violent before intervening," said Chief Justice Chartier. "The threshold is much lower." There is no need to demonstrate a prima facie case nor does it require an imminent and substantial risk. Instead, all that is required is "the officer's belief that an assault was about to occur be more likely than not." Furthermore, "the evidence that can form the basis for the officer's reasonable grounds can be hearsay evidence."

Here, the officer's subjective belief was not in dispute. He believed that it was necessary to remove

"Under s. 495(1) (a) of the Code, officers do not have to wait until a person overtly threatens or becomes very violent before intervening. The threshold is much lower."

the accused from the home to protect the safety of the wife and child from assault. Moreover, his subjective belief was objectively supported by the facts. The Court of Appeal concluded that the officer had reasonable grounds to arrest for an assault about to be committed:

> Someone had called 911 and it can reasonably be inferred that it was the wife; the [accused] was seen screaming at them; he was yelling at them that he was "pissed off"; he was intoxicated and undeterred by the police presence; he attempted to go after the wife and child when the officers sent them to the other room; and he clenched his fists and took a fighting stance against the officers. [para. 28]

Since the arrest was lawful under s. 495(1)(a), it was unnecessary to decide whether the accused could have been arrested for a breach of the peace under s. 31 of the *Criminal Code* or at common law for an anticipated breach of the peace. As for the charge of assaulting a police officer in the execution of his duty, the accused had deliberately kicked the officer when he was attempting to place him in the police car. The accused's acquittal was overturned and a conviction was entered. The matter was remitted to the trial judge for sentencing.

Complete case available at www.canlii.org

BY THE BOOK:

Arrest: s. 495(1)(a) Criminal Code

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, ...

DYNAMICS OF SITUATION CONSIDERED IN ASSESSING GROUNDS FOR ARREST

R. v. Bakajika, 2015 ONCA 2

At 9:55 pm a police officer saw a four door sedan parked two stalls away from a large SUV in a bank parking lot. The bank was closed at the time. The unoccupied sedan had its lights on and windows down. The officer saw the accused standing outside the SUV, leaning into its door, shifting his weight back and forth. He had something in each hand. In one hand was a dark coloured object and in the other was a white square, like a brick. As the officer approached undetected to investigate, he believed a drug transaction had taken place, although he did not actually see anything exchange hands. As the accused turned, the officer saw a black cone cylinder in one hand and a white sunglass case in the other. He asked the accused to show his hands and said, "What's in your hands?" But the accused walked over to the sedan, holding the black object at his side as if to conceal it, his arm implanted in the side of his body. The officer again asked to see what was in his hands, but the accused continued to walk away and replied "nothing." He opened the passenger door of the sedan and discarded both objects into the passenger seat.

The officer now believed he had reasonable grounds to arrest the accused for possessing a controlled substance. These grounds consisted of the following nine factors:

1. The time of night. All the stores in the plaza were closed including the bank.
2. These were the only two vehicles in the plaza.
3. He had done a previous drug arrest in this same parking lot.
4. He had information from a confidential informant regarding drug transactions in the area.
5. He had taken a one day course in Pavis training and proactive initiatives regarding drugs and weapons.

6. He had seen the two vehicles, one unoccupied with its lights on and the other two parking spots over.
7. He had seen the accused leaning in and out of the SUV and the other male in the driver's seat of the SUV leaning towards the accused.
8. He had approached the vehicles, apparently undetected. The accused had turned and looked at the officer with the two objects in his hands and then attempted to conceal the black cylinder object by holding it in an unusual manner by his side.
9. The accused had refused to answer or cooperate with the officer's demand to show him what was in his hands and discarded both objects into the car.

The accused was arrested, advised of his *Charter* rights, and cautioned. Police searched the cylinder object and found 93 grams of cocaine. In the car they also found some marihuana, a receipt with the accused's name on it, digital scales, and three cellular telephones. In his pocket, police located $520 in $20 bills and an additional $500 in cash in his wallet. The accused was re-arrested for possessing both cocaine and marihuana for the purpose of trafficking.

Ontario Court of Justice

At trial it was agreed that the officer had the necessary subjective belief for an arrest. However, the accused attacked the objective grounds for this belief. In cross-examining the officer, the accused was able to get the following pieces of evidence, among others, on the record:

- What was seen in the plaza parking lot could not be characterized as a hand to hand drug transaction like the officer had seen before. He did not see the black cylinder or white object pass back and forth between the two men.
- His previous arrest at that plaza involved a person in a motor vehicle smoking a joint.
- The information he had from the confidential informant had nothing to do with the two men and was simply about drug trafficking taking place in this area. The information was received seven months earlier and the officer did not know if it was current.
- The ATM machine at the bank was open on a 24 hour basis and people often go to an ATM because the bank is closed.
- He did not know how long the vehicles had been in the parking lot before he saw them nor did he know what the accused had been doing prior to seeing him leaning into the SUV.
- He agreed that it was certainly possible that the accused had been to the plaza to use the ATM
- He did not smell anything nor witness an actual drug transaction prior to the arrest.

Under s. 495(1)(a) of the *Criminal Code*, a police officer must have reasonable grounds to believe that a person has committed or is about to commit an indictable offence before making an arrest. The reasonable grounds required for a lawful arrest have both a subjective and an objective component. "Therefore, an arresting officer must not only subjectively believe that he has reasonable and probable grounds on which to base the arrest, but those grounds must be justifiable from an objective point of view," said the judge. "The test is whether a reasonable person standing in the shoes of the arresting police officer would conclude that the arrest was justified." He also noted:

> First, reasonable grounds has been described as credibly based probability - reasonable probablity. Reasonable and probable grounds does not amount to proof beyond a reasonable doubt, nor is it the equivalent of a prima facie case. The Crown need not establish more than that the officer had reasonable and probable grounds. Second, a trained officer is entitled to draw inferences and make deductions drawing on experience. Third, judicial scrutiny of reasonable grounds for an arrest must recognize the context within which the police officer's obligation operates. For example, the law does not expect the same kind of inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant. Therefore, in determining whether the reasonableness standard is met, the nature of the power exercised and the context within which it is exercised must be considered. The dynamics at play in an arrest

> situation must be noted by the court because in many cases, including this one, the officer's decision to arrest must be made quickly in a volatile and rapidly changing situation. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete. [para. 33]

Although this was a close case, the judge concluded that the arrest was justified:

> The court must consider the entirety of the constellation of factors taken in to consideration by the officer, as well as the dynamics of the situation in that the decision to arrest had to be made relatively quickly. [The officer] had observed some justifiably suspicious behaviour prior to attending at the plaza parking lot. The [accused] had reacted to his inquiry in such a way that even considering that the [accused] was not required to respond to the officer, his response by word and deed, particularly considering the fast-paced dynamic of the situation was sufficient to elevate the officer's suspicions to meet the test for objectively discernible factors justifying an arrest for the offence of possession of controlled substance and, thus, justifying the subsequent search incidental to that arrest.
>
> This is by no means a clear cut case. The constellation of objectively discernible facts amounting to reasonable and probable grounds available to the officer was not overwhelming but the case law is clear that reasonable and probable grounds is a credibly based reasonable probability and is not to be equated to a prima facie case or proof beyond a reasonable doubt. Applying that test results in the appropriate objective standard being met in this case. [paras. 47-48]

The accused was convicted of possessing marihuana and cocaine for the purpose of trafficking.

Ontario Court of Appeal

The accused appealed his convictions arguing that the trial judge erred by finding that the arresting officer had reasonable and probable grounds to arrest him and that the search incidental to arrest was not unreasonable. As a consequence, he asserted that the evidence seized should have been excluded under s. 24(2) of the Charter.

In a short endorsement, the Court of Appeal disagreed. First, the officer subjectively believed that he had reasonable and probable grounds to arrest. Second, the trial judge made no error in concluding that the grounds were objectively reasonable. "The trial judge summarized ... the observations (nine in all) that led the officer to believe that he had reasonable and probable grounds," said the Court of Appeal. "He noted in particular, the need to consider 'the entirety of the constellation of factors taken into consideration by the officer as well as the dynamics of the situation in that the decision to arrest had to be made relatively quickly'." This was the proper analysis and the trial judge's conclusions were sound. Since there were no *Charter* breaches, there was no need to consider s. 24(2). The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: Case facts taken from R. v. Bakajaki, (2013) Court File No.: Halton 12-9415 (Ont.C.J.)

PLAIN VIEW DOCTRINE NOT APPLICABLE TO STATUTORY SEIZURE PROVISIONS

R. v. Mah & Desbiens, 2014 SKCA 135

The police obtained and executed a search warrant for a residence pursuant to the *Controlled Drugs and Substances Act* (*CDSA*). The warrant authorized the police to search for cocaine and marihuana. In the home, police found, 989 grams of resin in the kitchen, half was on the seat of a chair pushed under the kitchen table and half was on the floor under the kitchen table in a plastic bag. Other things found in the home included marihuana, digital scales, score sheets, and $7,585 in cash. The two accused were arrested inside the home and charged with numerous offences including possession of cannabis resin for the purpose of trafficking.

Saskatchewan Provincial Court

Neither accused challenged the validity of the search warrant, but they argued that the resin seized by the police was not admissible because it was not mentioned in the search warrant. The judge found that s. 489(1) of the *Criminal Code* entitled the police to seize, in addition to the things mentioned in the search warrant, any thing that had been obtained by, or used in the commission of an offence or would afford evidence in respect of an offence. In his view, "such a large amount of resin hidden under the kitchen table and on the floor would cause an officer to believe on reasonable grounds of an offence committed." The resin was admitted as evidence and convictions of possessing it for the purpose of trafficking, among other charges, followed.

Saskatchewan Court of Appeal

The admissibility of the evidence was again challenged. It was argued that the resin was not referred to in the search warrant nor was it in plain view. Justice Whitemore, writing the Court of Appeal's opinion, found the trial judge erred in referring to s. 489 of the *Criminal Code* because the warrant was issued under the *CDSA*. However, since s.11(6) of the *CDSA* uses substantively the same wording as s. 489, the same considerations would apply and the trial judge's error was therefore harmless.

Plain View

The accused submitted that s. 11(6) of the *CDSA* permits the seizure of items not described in the search warrant only if they are in plain view of the officer conducting a lawful search.

But Justice Whitemore disagreed. "In this case, the search was conducted under the statutory authority of the CDSA and thus, in my opinion, the 'plain view doctrine' does not apply," he said. "When conducting a search pursuant to a valid search warrant and authorized by s. 11(6) of the CDSA, a peace officer is permitted pursuant to s. 11(8) to seize, in addition to the items listed in the warrant, 'any thing' he believes on reasonable grounds relates to the commission of an offence. There is no requirement that the additional items be in 'plain view' and the Crown is not required to establish the components of a 'plain view' seizure." He continued:

> In this case, there is no dispute the search of the residence was authorized by the warrant. The warrant entitled the officers to enter the residence and search for and seize marihuana and cocaine. Therefore, whether the resin was

BY THE BOOK:

Seizure of things: ss. 11(6) & (8) CDSA

Seizure of things not specified

11(6) A peace officer who executes a warrant issued under subsection (1) may seize, in addition to the things mentioned in the warrant,

(a) any controlled substance or precursor in respect of which the peace officer believes on reasonable grounds that this Act has been contravened;

(b) any thing that the peace officer believes on reasonable grounds to contain or conceal a controlled substance or precursor referred to in paragraph (a);

(c) any thing that the peace officer believes on reasonable grounds is offence-related property; or

(d) any thing that the peace officer believes on reasonable grounds will afford evidence in respect of an offence under this Act.

...

Seizure of additional things

11(8) A peace officer who executes a warrant issued under subsection (1) or exercises powers under subsection (5) or (7) may seize, in addition to the things mentioned in the warrant and in subsection (6), any thing that the peace officer believes on reasonable grounds has been obtained by or used in the commission of an offence or that will afford evidence in respect of an offence.

"The warrant entitled the officers to enter the residence and search for and seize marihuana and cocaine. Therefore, whether the resin was 'hidden' or not is irrelevant."

> "hidden" or not is irrelevant. In any event, it is an exaggeration to say the resin was hidden, as a portion of it was on a chair in the kitchen and the chair was pushed under the kitchen table. The remainder was on the floor under the table. It was not "hidden." The police were authorized to look under the table and on the chair for marihuana and cocaine. That the resin was not enumerated in the warrant is immaterial. They found it where they were empowered to search. [para. 27]

The appeal against conviction for possessing the resin for the purpose of trafficking was dismissed.

Complete case available at www.canlii.org

GROUNDS FOR ARREST TO BE VIEWED CUMULATIVELY, NOT IN PIECEMEAL FASHION

R. v. Wasilewski, 2014 SKCA 138

Police were involved in a drug trafficking investigation. Undercover officers bought marihuana from a known drug dealer named Chartier. He was seen being driven by a male to the home of Belyk (also known to be a drug dealer) in a black Volvo SUV registered to the accused. Chartier got out of the vehicle, went into Belyk's house, made a transaction and carried back to the vehicle what was believed to be bags of marihuana. Police continued to actively surveil Chartier. About two months later, Chartier was to supply marihuana to undercover officers but he told them he first had to "reload". Knowing Chartier would be going to Belyk's house to get more marihuana, the police set up surveillance. They saw the same black Volvo SUV seen earlier pull up to the house, but this time it was driven by a female. Chartier got out of the vehicle and entered the house. He came out carrying a Wal-Mart shopping bag, which the police believed contained marihuana. He got into the Volvo SUV and it was subsequently pulled over. The arresting officer opened the door and told the accused (driver) she was under arrest for possessing marihuana for the purpose of trafficking. At the same time, a second police officer approached the passenger side of the vehicle to arrest Chartier. A strong odour of marihuana was noted and the Wal-Mart bag was observed at Chartier's feet. Chartier was holding a cell phone in each hand and was arrested. The Volvo SUV was taken back to the police station and searched. The shopping bag was found to contain marihuana.

Saskatchewan Provincial Court

The judge found the police lacked reasonable and probable grounds to arrest the accused and excluded all evidence obtained from the searches of her vehicle and cell phone incident to arrest, as well as a transcript of her interview with the police following her arrest. Although there was ample basis to arrest Chartier, the judge noted there had been no targeting of the accused and she had not been on police "radar" during this particular drug investigation. Further, at the time of arrest, the officer did not have reasonable and probable grounds to believe the accused had been involved in any way with Chartier or with the drug scene. In the judge's view, the arresting officer needed something which would impute the accused with knowledge as to the contents of the Wal-Mart bag in order to have reasonable and probable grounds for her arrest. The accused was acquitted of possessing marihuana for the purpose of trafficking.

Saskatchewan Court of Appeal

The Crown appealed the accused's acquittal submitting that the trial judge erred in finding the arrest unlawful and excluding all of the evidence. In the Crown's opinion, the trial judge failed to apply the "totality of the circumstances" test in assessing the existence of reasonable grounds to arrest. He relied solely on the absence of evidence for the accused's knowledge of Chartier's criminality

"[A]n arresting officer is not required to establish the commission of an indictable offence on a balance of probabilities or a prima facie case for conviction before making the arrest; but an arresting officer must act on something more than a 'reasonable suspicion' or a hunch."

while ignoring all of the other circumstantial factors such as the previous association of her vehicle with Chartier and Belyk, the odour of marihuana, and the fact it would be unlikely for a drug trafficker to take an "innocent" party to a drug deal. The Crown also contended that the police were not required to have information about the identity of the accused before her arrest nor did the arrest require proof that she knew there was marihuana in the bag.

The accused, on the other hand, contended that the trial judge was correct in finding that the police lacked reasonable grounds at the time of her arrest. All the police had was her presence at the time of a suspected offence involving Belyk and Chartier. Her arrest occurred immediately after the vehicle was stopped and before any effort was made to identify her and determine her involvement. There was no evidence seized from the vehicle at the time of the arrest and no warrant had been sought to search her vehicle as she was unknown to the police.

Justice Lane, delivering the Appeal Court's decision, found the trial judge erred by focusing only on the immediate circumstances of the arrest, while failing to consider all of the relevant information the arresting officer had available based on the investigation as a whole. Citing an earlier decision of the Court of Appeal (*R. v Shinkewski*, 2012 SKCA 63), Justice Lane set out a list of factors to be considered in determining the lawfulness of a warrantless arrest:

- "an arresting officer must subjectively hold reasonable grounds to arrest and those grounds must be justifiable from an objective point of view - in other words, a reasonable person placed in the position of the arresting officer must be able to conclude there were indeed reasonable grounds for the arrest;
- "an arresting officer is not required to establish the commission of an indictable offence on a balance of probabilities or a prima facie case for conviction before making the arrest; but an arresting officer must act on something more than a "reasonable suspicion" or a hunch;
- "an arresting officer must consider all incriminating and exonerating information which the circumstances reasonably permit, but may disregard information which the officer has reason to believe may be unreliable;
- "a reviewing court must view the evidence available to an arresting officer cumulatively, not in a piecemeal fashion; and
- "'the standard must be interpreted contextually, having regard to the circumstances in their entirety, including the timing involved, the events leading up to the arrest both immediate and over time, and the dynamics at play in the arrest' and, context includes the experience and training of the arresting officer. [references omitted, cited at para. 14]

The Crown's appeal was allowed, the accused's acquittal was set aside, and a new trial was ordered.

Complete case available at www.canlii.org

"[A]n arresting officer must subjectively hold reasonable grounds to arrest and those grounds must be justifiable from an objective point of view - in other words, a reasonable person placed in the position of the arresting officer must be able to conclude there were indeed reasonable grounds for the arrest."

GROUNDS FOR BREATH DEMAND MUST BE ASSESSED IN 'TOTALITY'

R. v. Schofield, 2015 NSCA 5

A police officer with 38 years' experience including some 600 impaired driving investigations saw a vehicle being driven at dusk with dim headlights and no taillights. When the officer turned on his emergency lights, the vehicle turned into a driveway and in doing so cut across the edge of the shoulder of the road and the driveway. The driver got out and leaned against the tail of the vehicle while smoking a cigarette. The officer saw a can of beer on the ground, still foaming. He believed it was thrown out the window of the vehicle. The officer recognized the driver as the accused. He had arrested him for a previous impaired charge and later met him sober at the courthouse. He also knew he was a prohibited driver. The officer could smell a strong odour of alcohol coming from the accused's breath and saw that his eyes were glassy.

The officer concluded that he had reasonable and probable grounds for reading the breathalyzer demand. He escorted the accused to the police vehicle, read the demand for breath samples, and arrested him for impaired driving. He was advised of his right to counsel but declined to exercise it. At the police station he provided two breathalyzer samples with readings of 220mg% and 200mg%. He was charged with prohibited driving, operating a motor vehicle while impaired, and over 80mg%.

Nova Scotia Provincial Court

The judge found the officer subjectively believed that he had reasonable grounds to make the breath demand. But the judge concluded the officer did not have reasonable grounds to make the breath demand from an objective point of view. First, the judge discounted the foaming can of beer because there was no indication that the officer actually saw him throw it out of the car and it would have had little to do anyways in assessing whether or not there were grounds to make the breath demand. Second, the judge discounted the accused's driving over the shoulder of the driveway because there was no evidence presented that he had any experience driving into it. Third, there was no evidence of the accused's motor skills having been impaired. As a result, the judge was left with two indicia of impairment: the strong smell of alcohol coming from the accused and his glassy eyes. There were no results of sobriety testing or roadside screening.

"The officer in this case would have had to have conducted further observation of the accused prior to making the breath demand," said the judge. "The officer could have asked the accused to perform sobriety tests or could have utilized an approved screening device or perhaps spent more time speaking to the accused." As a result, the judge held that the officer did not objectively have reasonable grounds to demand a breath sample under s. 254(3) of the *Criminal Code*. The breathalyzer procedure was an unreasonable search and seizure under s. 8 of the *Charter* and the breath sample results were excluded under s. 24(2). The accused was acquitted of the impaired driving related charges but convicted of driving while prohibited under s. 259(4)(a).

BY THE BOOK:

Breath Demand: s. 254(3) Criminal Code

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

(a) to provide, as soon as practicable,

(i) samples of breath that, in a qualified technician's opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood ....

Nova Scotia Court of Appeal

The Crown argued that the judge erred by ruling that the officer did not have the requisite reasonable grounds to demand a breath test under s. 254(3), and in holding that the taking of the breath tests violated his rights under s. 8 of the *Charter*.

After reviewing the case law on reasonable grounds, Justice Fichaud, speaking for the unanimous Court of Appeal, found that reasonableness must be assessed from the officer's perspective and described the following principles:

> The question is - did the "totality of the circumstances" known to the officer at the time of the breath demand rationally support the officer's belief? The officer may infer or deduce, draw on experience, and ascribe weights to factors. Parliament expects the officer to do this on the roadside according to a statutory timeline, while informed by the available circumstances, but without either the benefit of trial processes to test the accuracy of his or her belief or "the luxury of judicial reflection". The officer must identify the supporting circumstances at the voir dire. But the officer was not expected to apply the rules of evidence at the roadside. So the support may be based on hearsay. The supporting connection must be reasonable at the time, but need not be proven correct at the later voir dire that considers s. 254(3).
>
> The judge should not segregate the officer's criteria for piecemeal analysis, then banish each factor might have a stand-alone explanation. From the officer's roadside perspective, the factors may have had corroborative weights that together formed a sounder platform for an inference of impairment. The reductive approach denies that corroborative potential. ...
>
> There is no minimum period of investigation, mandatory line of questioning or legally essential technique, such as a roadside screening. The judge should not focus on missing evidence. Rather, the judge should consider whether the adduced evidence of circumstances known to the officer reasonably supported the officer's view. [references omitted, paras. 33-35]

In this case, the trial judge erred in finding the officer did not have reasonable grounds to demand a breath sample. He misapplied the principles in determining whether reasonable grounds existed by:

- Erroneously segregating the officer's criteria, assessing them in isolation, then eliminating them sequentially before considering reasonableness.
- Rejecting the officer's reasonable inferences such as the accused's driving over the shoulder of the driveway and the foaming can of beer. Driving over the shoulder was reasonably inferential of slight impairment despite no evidence of the accused's experience with that driveway. As for the foaming can of beer, the officer was entitled to draw the reasonable inference that the beer can was "foaming" because it had recently hit the ground when the accused discarded it. When the accused turned into the driveway, the officer saw "motion in the vehicle" and the can was "still foaming" on the ground a few feet from the accused. Nobody else was in the vicinity.
- Not considering the officer's awareness of the accused's history of impaired driving. The judge ignored the officer's earlier arrest of the accused after a similar incident and observing him at the courthouse sober. The officer had a rare opportunity to compare the accused's varying demeanours – one inebriated and one sober – before assessing his state for this investigation. The officer's familiarity with the accused was part of the "totality of the circumstances".
- Treating missing evidence, such as further observation, a sobriety test or use of an approved screening device, as a legal prerequisite.

"[T]he officer was not expected to apply the rules of evidence at the roadside. So the support may be based on hearsay. The supporting connection must be reasonable at the time, but need not be proven correct at the later voir dire that considers s. 254(3)."

In holding that the officer had an objective basis to demand a breath sample under s. 254(3) under the totality of the circumstances, Justice Fichaud stated:

> In summary, on April 3, 2010, thirteen months earlier, [the officer] had a similar encounter with [the accused], that led to a conviction for driving with excessive blood alcohol and a driving Prohibition Order. On May 13, 2011, [the officer] was aware of the earlier incident and that the Prohibition Order was still in effect. The officer had met [the accused] twice before, once when [the accused] was inebriated and once sober. From 600 impaired driving investigations over 38 years, the officer was well positioned to recognize the signs of impairment. On May 13, 2011, [the accused] drove over the driveway's shoulder, there was a foaming beer can next to him, he smelled strongly of alcohol and his eyes were glassy. The officer's belief was reasonable. From the facts as found, the judge erred in law by reaching a different conclusion.

Since the breath sampling did not violate s. 8 of the *Charter*, the evidence was admissible, the Crown's appeal was allowed, and a new trial was ordered on the impaired driving charges.

Complete case available at www.canlii.org

BLOOD DEMAND FOLLOWING 'DRE' DOES NOT REQUIRE A FURTHER s.10(b) ADVISEMENT

R. v. Fogarty, 2015 NSCA 6

The accused, a methadone patient, collided with an oncoming Mustang with two occupants. Earlier, there had been complaints of erratic driving by his vehicle. Officers arrived on scene at 3:30 pm and noted the accused had glassy eyes, but didn't smell of alcohol. He said he was a recovering drug addict and had taken methadone at 8:00 am that day. The accused was transported by ambulance to the hospital. He was told that one of the Mustang's passengers had died. While in the ambulance, the accompanying officer formed the opinion that the accused's ability to operate a motor vehicle had been impaired by a drug, concluding he had reasonable grounds to demand that the accused submit to a drug recognition evaluation (DRE) under s. 254(3.1) of the *Criminal Code*. The demand was read and the accused said he understood. When they arrived at the hospital, the accused was taken to an emergency room, assessed by medical staff, and cleared. The accused was then arrested for impaired driving and advised of his right to a lawyer. He said he wanted to speak to a lawyer and was given a cell phone to consult legal aid in private. A DRE assessment was conducted. His coordination was poor and unsteady, his speech was fast, slightly slurred, and he was stuttering often. His face was flushed, his nose was runny, and his eyelids were droopy. Vision, divided attention, balance, hand-eye and psycho-physical coordination tests were also conducted. As well his blood pressure, pulse, body temperature, pupil dilation, and muscle tone were checked.

Based on the DRE, the evaluator opined that the accused's ability to operate a motor vehicle was impaired by a drug. A blood sample was then demanded under s. 254(3.4). The accused did not request nor was he given further access to counsel after the DRE was completed but before his blood was drawn. Subsequent toxicological analysis indicated that his blood contained central nervous system depressants - Valium (Diazepam) and several active metabolites of Valium and Mirtazapine. Also found in his blood was methadone that, when combined with central nervous system depressants, can exacerbate impairment. The other occupant of the Mustang also died and the accused was subsequently charged with two counts of impaired driving causing death and two counts of dangerous driving causing death.

Nova Scotia Supreme Court

The accused argued the evidence of his blood samples and their analysis should be excluded under s. 24(2) of the *Charter* because the police failed to provide him with an additional opportunity to consult counsel after the demand for a blood sample but before the blood was drawn. The judge, however, disagreed. The accused was aware of the extent of his jeopardy when he consulted legal counsel. He understood the demand for a drug evaluation test and was aware the

police wanted to test him to determine whether there were drugs in his body in relation to his arrest for impaired driving by drug. He spoke with legal counsel for about 15 minutes following the demand for a drug evaluation test and it was reasonable to infer that competent counsel would have advised him of the procedure set out in s. 254 (ie. a demand would be made that he provide bodily samples in the event he failed the drug evaluation test). There was no evidence that he did not receive competent legal advice or that he did not understand the legal advice given. There was no change in the accused's circumstances between the exercising of his right to counsel and the demand for a blood sample which would, objectively viewed, require a further consultation with counsel. There was no s. 10(b) *Charter* breach, the evidence was admissible, and the accused was convicted on all counts. He was sentenced to prison.

Nova Scotia Court of Appeal

The accused appealed the trial judge's ruling, again arguing his blood sample and the subsequent toxicological analysis should have been excluded under s. 24(2) because the police breached his s. 10(b) right when they failed to provide him with an opportunity to re-consult counsel after the demand for his blood.

Under *R. v. Sinclair*, 2010 SCC 35, it was recognized that s. 10(b) normally affords the detainee a single consultation with counsel unless circumstances change such that a further opportunity to consult a lawyer will be required. Such situations requiring an additional consultation with counsel include:

- ***New non-routine procedures*** involving the detainee, such as participation in a line-up or submitting to a polygraph, which will not generally fall within the expectation of the advising lawyer at the time of the initial consultation.
- ***A change in jeopardy*** such as when the investigation takes a new and more serious turn as events unfold.
- There is ***reason to question the detainee's understanding*** of their s. 10(b) such as when events indicate that a detainee who has waived their right to counsel may not have understood their right.

In this case, the accused asserted that the request for blood was a change of circumstance requiring a further opportunity to consult counsel. In his view, ss. 254(3.1) and (3.4) establishes a unique two-step process and legal advice should accompany each step. Since, at the time of the DRE demand, the police did not tell him of the potential for blood sampling later on, then both steps - the DRE and the blood sampling - required a s. 10(b) advisement.

The accused's argument was rejected by the Court of Appeal. Justice Fichaud stated:

> ... In my view, a blood demand under s. 254(3.4) would occupy the expectation of the advising lawyer during the DRE consultation under s. 254 (3.1). The point of the DRE is to determine whether to demand a fluids sample. That is clear from s. 254(3.4): "If, on completion of the evaluation, the evaluating officer has reasonable grounds to believe, based on the evaluation, that the person's ability to operate a motor vehicle … is impaired by a drug … the evaluating officer may … demand" a sample of saliva, urine or blood.
>
> The DRE and blood demand are not disjunctive investigative techniques. Rather, the DRE culminates in the fluids demand. That linear progression is apparent from the plain words of ss. 254 (3.1) and (3.4), with which competent counsel would be familiar. During the DRE consultation with the client, competent counsel would expect that a failed DRE likely would trigger a demand for blood, urine or saliva, and would advise the client respecting that eventuality. [paras. 47-49]

"In my view, a blood demand under s. 254(3.4) would occupy the expectation of the advising lawyer during the DRE consultation under s. 254(3.1). The point of the DRE is to determine whether to demand a fluids sample."

Without evidence of the content of the accused's legal advice that preceded the DRE or that his counsel acted incompetently, the judge made no error in finding that the police did not have to provide an additional opportunity for the accused to consult counsel. His appeal was dismissed and his convictions were upheld.

Complete case available at www.canlii.org

BY THE BOOK:

DRE: ss. 254(3.1) & (3.4) Criminal Code

Evaluation

(3.1) If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the previous three hours has committed, an offence under paragraph 253 (1)(a) as a result of the consumption of a drug or of a combination of alcohol and a drug, the peace officer may, by demand made as soon as practicable, require the person to submit, as soon as practicable, to an evaluation conducted by an evaluating officer to determine whether the person's ability to operate a motor vehicle ... is impaired by a drug or by a combination of alcohol and a drug, and to accompany the peace officer for that purpose.

...

Samples of bodily substances

(3.4) If, on completion of the evaluation, the evaluating officer has reasonable grounds to believe, based on the evaluation, that the person's ability to operate a motor vehicle ... is impaired by a drug or by a combination of alcohol and a drug, the evaluating officer may, by demand made as soon as practicable, require the person to provide, as soon as practicable,

(a) a sample of either oral fluid or urine that, in the evaluating officer's opinion, will enable a proper analysis to be made to determine whether the person has a drug in their body; or

(b) samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, will enable a proper analysis to be made to determine whether the person has a drug in their body.

'ITO' GROUNDS NOT TO BE FRAGMENTED BUT RATHER CONSIDERED IN TOTALITY

R. v. Liberatore, 2014 NSCA 109

A police officer swore an Information to Obtain (ITO) a s. 487 *Criminal Code* search warrant to search a residence owned by the accused and his mother. The ITO said there were reasonable grounds to believe that a .45 semi-automatic handgun; a 9 mm semi-automatic handgun; a .38 revolver; and .45, 9 mm and .38 calibre ammunition would be found on the premises. The ITO cited information from other police officers, Sources A, B and C, and from the investigation. Included in the ITO was the following information:

- The accused had a criminal record dating from 2000 to 2011 for weapons and drug related offences;
- Source A, who had been a source for less than a month, provided information based on personal knowledge obtained from conversations and observations of the persons involved that the accused was selling marijuana and cocaine from a shed located on his property; that he had three handguns, a .45 calibre pistol, a 9mm. pistol and a .38 calibre revolver which were kept in a locked toolbox in his shed; that he had two white trucks, a Chevrolet Silverado and a GMC Sierra Dinali, which he parked next to a shed on his property, and that his residence was under renovation. Source A had a criminal record, associated freely with persons involved in criminal activity and was financially motivated to provide information.
- The officer followed up on the information and saw two white trucks matching the descriptions given by Source A parked next to a shed located across the land from a residence, which appeared to be under renovation. Investigation confirmed that the properties on which the shed and residence were located were owned by the accused and his mother. The officer also corroborated that one of the two trucks he saw was registered to the accused but could not confirm the registered owner of the second truck because he could not see its licence plate number.

- Source B said the accused was selling drugs from a shed on his property; that he had three guns in his shed; a .45 calibre, a .38 calibre and another unknown handgun; that these guns had been at the accused's place the previous week and that the accused had these guns since before Christmas. Source B provided this information based on their direct observation of and conversations with persons who were the subject of the information. Source B had provided information on prior occasions, had proven to be reliable, and their information had resulted in the seizure of contraband. Source B was financially motivated.
- Source C's information, provided four years earlier, was about the accused becoming a big drug dealer and keeping a 9 mm. pistol in the passenger side door of his girlfriend's vehicle. Source C's information had previously led to the search and seizure of crime related property or drugs and the laying of criminal charges.
- The accused's residence had also been the scene of three home invasions in a four year period and little of value had been taken during these incidents. In two of these incidents the perpetrators were armed with handguns and other weapons were used during the third incident. During the first incident, when only the accused's mother was present, she refused to allow the responding officers to enter one of the rooms in the residence. Items in the residence consistent with a marijuana grow operation and drug trafficking were observed. During the second home invasion the accused did not immediately call the police but called some friends and his mother. The accused's girlfriend called the police and, when they arrived, the accused said nothing was taken during the incident.
- In many cases where persons produce or sell drugs they often keep firearms or other weapons for protection.

The warrant was issued and executed the following day. The search uncovered several replica firearms, but not the weapons specified in the ITO. The police found a knife that opened by centrifugal force, sandwich bags containing cocaine (33.3 grams, 12.2 grams, and 5 grams), a dime bag with 25 ecstasy pills, a bag with 83.4 grams of marihuana, marihuana packaged for resale (1.1, 2.0 and 3.5 gram bags), many large bags with marihuana residue, a mason jar with 701 meth pills and 5 ecstasy pills, and a bottle of valium. The search also disclosed weigh scales, empty plastic bags and three spoons with white residue. The accused was charged with weapons and drug offences.

Nova Scotia Supreme Court

The accused sought the exclusion of evidence, contending that the ITO lacked reasonable and probable grounds to establish a factual nexus between the weapons offences for which the search warrant was sought and the premises to be searched. The judge disagreed and determined that the issuing justice had reasonable and probable grounds to establish the factual nexus. Finding the warrant properly issued., the judge stated:

> The ITO established a factual nexus between the items to be searched for and the location to be searched. It was not based on mere conclusory statements but rather on the personal observations and conversations of two Sources with the [accused]. These Sources both indicated that the [accused] was dealing drugs from a shed located on his property; that the [accused] had three firearms; the Sources described the calibre of weapons they had seen or been told of by the [accused] in the previous one to four weeks. Some of the information provided by Source A was corroborated by the affiant ... such as the location of the shed; that it was across the road from the [accused's] residence which was under renovation; the make, model and colour of the [accused's] vehicles and where they were parked.
>
> The ITO also contained facts regarding the [accused's] criminal record for drug and weapons offences; the three home invasions over a four year period, two of which were by armed gunmen; and the affiant's statement, based on experience and training that drug dealers often keep firearms or other weapons for protection.
>
> In conclusion, the justice had before him reasonable and probable grounds establishing a factual nexus between the offences for which the warrant was sought and the places to be searched. The search warrant was properly

"The reliability of the information is assessed by recourse to 'the totality of the circumstances', including its degree of detail, the informer's source of knowledge and indicia such as the informer's past reliability and confirmation from other sources. Even an anonymous tip attracts the inquiries - how compelling was the information, how credible was the source, and was the information corroborated by other evidence? The body of evidence isn't anatomized for a segregated analysis of each fragment. Viewed as a whole, its bits may be cross-confirmatory."

issued and the evidence obtained as a result of the search is admissible.

The accused then pled guilty to two weapons offences and five counts of possessing controlled substances for the purpose of trafficking. He was sentenced to three years in prison.

Nova Scotia Court of Appeal

The accused appealed the reviewing judge's ruling that the ITO contained sufficient reliable information that the issuing justice could find that there were reasonable and probable grounds to believe that there was a handgun and ammunition on the property. The Crown indicated that it would not rely on Source C's information in seeking to uphold the validity of the search warrant because it was so dated that it would have been of no value.

In challenging the judge's reasoning, the accused sought to deconstruct the ITO. He submitted that the ITO's only evidence of the presence of weapons on the premises was the affiant's hearsay derived from Sources A and B. Everything else, such as his criminal history, was propensity evidence, reputational, and distracting. He sought to dispose of Source A's information as being unreliable because it was stale (being a month old), they had a criminal record, was motivated by financial gain, and was unproven - their information had not yet led to an arrest. As for Source B, the accused contended his information about the guns was a "bald" assertion, with no detail regarding date, time, place and frequency of observations . Further, the language used in the ITO that Source B's information was "based upon direct observations of, and conversations with persons who are the subject of the information" was "mere boilerplate, intended to whitewash over perceived deficiencies in the ITO". With these attacks on the information in the ITO, the ITO as dismantled crumbled and there remained no reliable basis for the warrant.

Justice Fichaud, for the unanimous Court of Appeal, rejected these arguments. The test for determining whether a warrant was properly issued is not whether the reviewing court would itself have issue the warrant. Instead, the test is whether there was sufficient credible and reliable evidence to permit the authorizing justice to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place. As for the ITO in this case, Justice Fichaud held:

> The reliability of the information is assessed by recourse to "the totality of the circumstances", including its degree of detail, the informer's source of knowledge and indicia such as the informer's past reliability and confirmation from other sources. Even an anonymous tip attracts the inquiries - how compelling was the information, how credible was the source, and was the information corroborated by other evidence? The body of evidence isn't anatomized for a segregated analysis of each fragment. Viewed as a whole, its bits may be cross-confirmatory.
>
> Source A was a tipster. But the tip's detail demonstrated specific knowledge of the weapons and their recent location, [the accused's] premises, shed and vehicles, and his drug trafficking activities. The detail was sourced in the informant's personal observation. Source

A was untested, and his past reliability unknown. But his information was corroborated externally in several respects – [the accused's] ownership of the premises, its layout, shed and description of the house renovations, and the make of vehicles observed by the police on the premises.

Source A's information was significantly corroborated by Source B.

Source B was a tested informant of four years, whose information had proved to be accurate and actionable, leading to arrests. His information was current, and from personal observation. He gave specific details of the guns, [the accused's] premises and drug trafficking operations.

The evidence of [the accused's] criminal history of convictions showed that possession of a firearm was not an isolated event. Drug and weapons offences going back ten years tended to corroborate the inference that weapons pertained to [the accused's] activities in the drug trade.

The ITO set out the history of three home invasions and a robbery at [the accused's] premises, and the reluctance of [the accused] and his mother to allow the police entry or to cooperate with the police investigation of those offences. As [the reviewing judge] noted, these facts also occupied the broad field of circumstances from which a corroborative inference of illicit activity may spring. [references omitted, paras. 27-32]

The Court of Appeal agreed that the issuing justice, having recourse to the totality of the circumstances, could conclude that there were reasonable and probable grounds to establish a factual nexus between the offences for which the warrant was sought and the accused's premises. The warrant was properly issued and the accused's appeal was dismissed.

Complete case available at www.canlii.org

ARRESTEE's BEHAVIOUR PREVENTED s. 10 ADVISEMENT: NO BREACH AT THAT TIME

R. v. Boliver, 2014 NSCA 99

The accused exited a mall in which a lounge was located and began confronting the police who were outside. He was loud, aggressive and quickly became out of control in this confrontation. He attracted a significant amount of attention, was causing a disturbance, and acting in a manner consistent with an inebriated state. When he was advised he was under arrest, a violent struggle ensued in which officers attempted to handcuff him. They got one handcuff on but fell to the ground. The accused, a very large man, thrashed about with the handcuffs flailing from his one cuffed wrist.The crowd that had gathered became more vocal and police tried a number of holds, hand strikes, and pressure point applications, to no avail. Police issued a warning that if the accused did not stop resisting and put his hands behind his back he would be tasered. He did not comply and was tasered. A second deployment of the taser was necessary to bring the accused under control. He was handcuffed and brought to the police car where he continued to be violent, screaming, cursing and banging on the window. He kicked the rear door with so much force he damaged it, leaving it bowed outward. He was eventually transported from police cells to the hospital where he could be assessed. His emotional state was such that it was not possible for the police to explain the reason for his detention, the nature of the charges, or his right to counsel until after his return to the police station from the hospital.

Nova Scotia Provincial Court

The accused asserted, among other *Charter* allegations, that his ss. 10(a) and (b) rights had been breached. He argued that at no time during his arrest, or his transportation to the holding cell or to the hospital, was he informed of the reason for it. Further he contended that he was never informed of his right to contact legal counsel, given an opportunity to contact legal counsel, or provided with the legal aid number for duty counsel.

The judge found that the accused was informed of the fact that he was being placed under arrest, but that the officer did not get the opportunity to say anything more than "you're under arrest." The reason for the arrest had been public intoxication and a breach of the peace that had unfolded as a result of the accused's actions. Once the officers placed their hands on either side of the accused to get him to the police car, he began to violently resist, which resulted in his tasering and handcuffing. When placed in the police car, his actions remained out of control. He was banging against the interior of the vehicle and also kicking the rear door. Even upon being taken to the police station, the accused did not moderate his actions to the point where it was possible to have meaningful interaction with him. However, at some point during the night the necessary information could have been provided to him. Thus, the accused's s. 10(a) and 10(b) rights were violated by the police. However, no remedy for these breaches, including the stay of proceedings sought by the accused, was imposed. He was convicted of resisting arrest, damage to property and public intoxication. He was sentenced to a fine and twelve months' probation.

Nova Scotia Supreme Court

The appeal judge was satisfied that the trial judge did not err in deciding that no s. 10 violation occurred at the time of arrest. "Virtually all of the actions which constituted elements of offences for which he was charged were committed long before the police would have had a reasonable opportunity to explain the charges to him and his right to counsel," said the appeal judge. He also agreed that the ss. 10(a) and (b) violations had no effect on the charges against the accused and therefore there was no evidence obtained as a result of these violations, so there was nothing to exclude. As well, he agreed the breaches did not warrant a remedy. The accused's appeal was dismissed.

"The information obligation described in s. 10(b) of the Charter is subject to the need to secure officer or public safety."

"Section 29(2) of the Code also requires that everyone who arrests a person must give notice "when it is feasible to do so" of the reason for the arrest."

Nova Scotia Court of Appeal

The accused appealed again, arguing, in part, that the violation of this s. 10(a) and 10(b) rights rendered his arrest unlawful. In upholding the lower judgments, Justice Bryson stated the following:

> Section 10(a) of the Charter entitles everyone arrested or detained "to be informed promptly of the reasons therefor". Section 10(b) entitles everyone who is arrested or detained "to retain and instruct counsel without delay and to be informed of that right". The information obligation described in s. 10(b) of the Charter is subject to the need to secure officer or public safety.
>
> Section 29(2) of the Code also requires that everyone who arrests a person must give notice "when it is feasible to do so" of the reason for the arrest. [references omitted, paras. 11-12]

However, the Court of Appeal observed that the trial judge found the officers were fully occupied with responding to the accused's violent behaviour which precluded them from informing him of the reasons for his arrest at that time. It was the accused's own behaviour that produced the situation which made it practically impossible to do so. Thus, there was no s. 10(a) violation at that time. And the subsequent violation of his s. 10 later on had no effect on the charges against him. No evidence was obtained as a result of the violation of his rights, so there was no evidence to exclude as a result. In all the circumstances, the trial judge's conclusion that the breaches did not warrant a remedy were owed deference. The accused's appeal was again dismissed.

Complete case available at www.canlii.org

NEW K9 RULES FOR BC

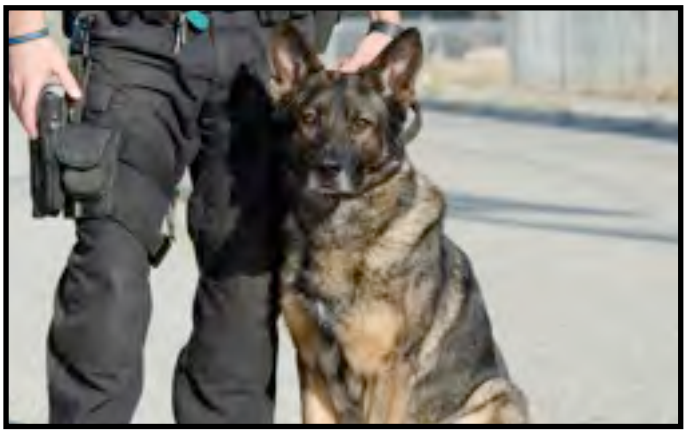
On September 1, 2015, new British Columbia Provincial Policing Standards (BCPPS) concerning the use of police dogs will take effect. "The goal of the Provincial Standards for police service dogs is to have effective and accountable police service dog units, which minimize bites and injuries, without hindering the appropriate use of police service dogs to further public safety," it states in the BCPPS 1.4. The standards outline eight principles:

- Police dogs are important policing tools and can be used for a variety of tasks.
- Police dogs are also intermediate weapons; police dogs bite.
- A police dog bite can cause injury.
- The use of a dog, as with all other force options, must be proportional to the level of risk posed to the officer, the suspect and the community as a whole.
- Police dog bites must be minimized as much as reasonably possible and must be proportional to the risk posed to the handler and to others.
- Police dogs must be well trained. They require high levels of initial training, and continuous maintenance of their performance.
- Police dogs must always be under control of their handler, and the handler is always responsible for the behaviour of their dog.
- There must be accountability for the use of police dogs.

Permitted Uses of Police Dogs

Authorized uses of police dogs include:

- Tracking or searching for persons who may have committed, or be about to commit, an offence;
- Apprehending persons by police dog bite or display;
- Tracking or searching for missing or lost persons;
- Searching for drugs;
- Searching for explosives/firearms;
- Searching for evidence;
- Crowd control;
- Community relations and other demonstration events.



Threshold and Circumstances of Use

The Standards also outline the threshold and circumstances of using a police dog where a bite may occur. Section 1.4.2 states that a chief constable, chief officer, or commissioner must:(1)

"Prohibit police dog handlers from permitting a police dog to bite a person, and prohibit dog handlers from permitting a police dog to continue to be deployed if it would reasonably be expected that the police dog would bite a person, unless:

(a) The person is causing bodily harm to an officer, a third party or the police dog;

(b) The police dog handler is satisfied, on reasonable grounds, that the person's behaviour will imminently cause bodily harm to an officer, a third party, or the police dog; or

(c) The person is fleeing or hiding and there are reasonable grounds for their immediate apprehension by a police dog bite."

Reasonable grounds is defined in the Standard as having ***"both a subjective and an objective component, and means that the officer must personally believe that the decision or action is necessary, and in addition, the decision or action must be able to stand the test of whether an objective third person, who is acting reasonably—and is informed of the officer's training, experience and the factual circumstances known at the time—would also reach the same conclusion."***

Other things the Standards address include training, certification, warnings, removing the dog from a bite, searching, reporting and data.

The complete Provincial Policing Standards are available here.

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