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 June 8, 2015, 35-year-old Edmonton Police Service Constable Daniel Woodall was shot and killed as he and several other officers attempted to serve an arrest warrant at a home.

As the officers attempted to enter the home, the man opened fire from inside. Constable Woodall was struck several times and was fatally wounded. A second officer was shot in the back but the bullet was stopped by his vest. The home became engulfed in flames following the shooting and the subject was later found deceased.

Constable Woodall had served with the Edmonton Police Service for eight years. He is survived by his wife and two children.

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

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

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

BC Law Enforcement Memorial

Sunday, September 27, 2015 at 1:00 pm
BC Legislature, Victoria, British Columbia
Muster at 12:00 pm, 800 block Wharf Street

see p. 37

Highlights In This Issue

National Library of Canada Cataloguing in Publication Data

Main entry under title:

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

Monthly

Title from caption.

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

ISSN 1705-5717 = In service, 10-8

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

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 recent acquisitions which may be of interest to police.

As we speak: how to make your point and have it stick.
Peter Meyers and Shann Nix.
New York, NY: Atria Books, 2011.
HM 1166 M49 2011

Creating effective teams: a guide for members and leaders.
Susan A. Wheelan, G.D.Q. Associates, Inc.
Thousand Oaks, CA: SAGE Publications, Inc., 2016.
HD 66 W485 2015

Dangerous personalities: an FBI profiler shows how to identify and protect yourself from harmful people.
Joe Navarro, MA, FBI Special Agent (Ret.); with Toni Sciarra Poynter.
Emmaus, PA: Rodale, 2014.
HV 7431 N38 2014

Diversity profile of British Columbia.
Law Foundation of British Columbia.
Vancouver, BC: 2014.
HB 3530 B7 L38 2014

Don't make me think, revisited: a common sense approach to Web usability.
Steve Krug.
Berkeley, CA: New Riders, 2014.
TK 5105.888 K78 2014

Everything you ever needed to know about training: a one-stop shop for everyone interested in training, learning and development.
Kaye Thorne, David Mackey.
London, UK; Philadelphia, PA: Kogan Page, 2007.
HF 5549.5 T7 T4625 2007

Evidence-based training methods: a guide for training professionals.
Ruth Colvin Clark.
Alexandria, VA: ATD Press, 2015.
HF 5549.5 T7 C58 2015

Information dashboard design: displaying data for at-a-glance monitoring.
Stephen Few.
Burlingame, CA: Analytics Press, 2013.
HD 30.213 F49 2013

Painless presentations: the proven, stress-free way to successful public speaking.
Lenny Laskowski.
Hoboken, NJ: Wiley, 2012.
PN 4129.15 L38 2012

Stop teaching our kids to kill: a call to action against TV, movie, and video game violence.
Lt. Col. Dave Grossman and Gloria DeGaetano.
New York, NY: Harmony Books, 2014.
HQ 784 M3 G76 2014

The art of thinking clearly.
Rolf Dobelli; translated by Nicky Griffin.
New York, NY: Harper, 2013.
BF 442 D632 2013

Writing for success.
Tara Horkoff.
S.l.: 2014.
PE 1112 H67 2014

Younger brain, sharper mind: a 6-step plan for preserving and improving memory and attention at any age.
Eric R. Braverman.
Emmaus, PA: Rodale: Distributed to the trade by Macmillan, 2011.
QP 376 B739 2011

QUESTIONING NOT ALWAYS A SEARCH

R. v. Sebben, 2015 ONCA 270

Following a report of an erratic driver, a police officer stopped the accused and administered a roadside breath test. He passed. During computer checks, the officer received information that the accused had a possible connection to drugs. The officer then asked the accused (seated in the driver's seat) for consent to search his vehicle. The accused replied that he didn't think he needed to give consent but began to roll his rear window down. He said the officer could look in the back because all he had were tools and Christmas presents. When the officer said the search wouldn't be for Christmas presents, but for things like drugs or marihuana, the accused immediately reached in the centre console area, indicated he had marihuana, showed a clear Ziploc bag of it and gave it to the officer. He was arrested for possession of marihuana and a search of the vehicle as an incident of that arrest followed. More marihuana was found and the accused was charged with drug offences.

Ontario Court of Justice

The officer acknowledged that he did not have reasonable grounds to conduct a search when he decided to ask for the accused's consent. Nor was the officer acting on the belief that the accused had consented to a search. The officer said he did not get a chance to obtain a valid consent or review the standard consent form used by police. Rather, the accused immediately said he had marihuana and produced a bag of it. The accused argued that he was arbitrarily detained, denied his right to counsel when he was asked to consent to the search, and subjected to an unreasonable search that led to both the production of the bag of marihuana and the subsequent discovery of more marihuana in his vehicle.

The judge found that the accused was detained at the roadside, both before and after the breath test was administered, but these detentions were not arbitrary. Nor was there a s. 8 *Charter* breach. The officer's request (to search) was not a search for constitutional purposes. Rather, the accused chose to voluntarily turn over the baggie of marihuana to the police officer in the hope of curtailing a more thorough search of his vehicle. However, the judge did find a s. 10(b) *Charter* violation since the accused had not been advised of his right to counsel when his detention continued following the breath test. Nevertheless, the evidence was admitted under s. 24(2). The accused was convicted of possessing marihuana and possessing marihuana for the purpose of trafficking.

Ontario Court of Appeal

The accused appealed his drug convictions arguing that the trial judge erred in not finding a s. 8 *Charter* violation which, when combined with the s. 10(b) breach, ought to have resulted in the exclusion of the evidence. He submitted that the officer's request for consent marked the start of a search and anything produced subsequent to that request constituted a seizure under s. 8. Thus, the officer's request for permission to search followed immediately by the production of the marihuana and the subsequent search of the vehicle was a single, ongoing, warrantless and non-consensual search.

Justice Doherty, however, speaking for the unanimous Court of Appeal, concluded that not all questioning of a detained person by police can be regarded as the start or part of a search under s. 8:

> Not every request by an officer that a person consent to a search is automatically a search. Sometimes questions, including a request to conduct a consent search, will be part of a subsequent search. In other fact situations,

"Not every request by an officer that a person consent to a search is automatically a search. Sometimes questions, including a request to conduct a consent search, will be part of a subsequent search. In other fact situations, the questions will not form any part of a search."

the questions will not form any part of a search. A fact-specific inquiry is necessary.

Any request by a police officer that a detained person consent to a search must be closely scrutinized. The power imbalance in that situation is obvious. That does not, however, mean that any request to search should be deemed to be the commencement of a search. That approach ignores the fact-sensitive nature of the inquiry.

In this case, there was no evidence that:

- the [accused] felt compelled to cooperate with the police officer;
- the [accused] believed that a search of his vehicle was inevitable regardless of whether he consented;
- the [accused] was subject to any demand or direction by the police officer;
- the police officer said anything to the [accused] that invited or induced the [accused] to produce the narcotics; and
- the officer intended to search of the vehicle regardless of whether the [accused] consented.

On the facts as found by the trial judge, the police officer had commenced the process by which he hoped to obtain the [accused's] informed consent to a search of the vehicle. Before he could complete that process, the [accused] voluntarily and unilaterally produced a bag of marihuana in the hope of avoiding more serious problems. The [accused's] production of the marihuana effectively ended the officer's need to make any further inquiries requesting the [accused's] consent to a search. The officer was entitled to search the vehicle as an incident of the [accused's] arrest for possession of the bag of marihuana. On the officer's evidence, there was no search, but rather a production of the marihuana in the bag by the [accused] followed by a search incident to an arrest. [references omitted, paras. 12-15]

There was no s. 8 *Charter* breach nor any reason to interfere with the trial judge's s. 24(2) analysis. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

FOCUSSED SUSPICION ALONE DOES NOT CREATE DETENTION

R. v. Seagull, 2015 BCCA 164

The police received statements from two complainants that the accused had engaged in sexual activities with them when they were boys. The police decided to interview the accused, the only suspect in the crimes. Rather than arresting him though, the investigating officer chose to arrange for an interview to gather evidence that would support charges. She left two messages for him but he did not immediately respond. The officer persisted and eventually spoke to the accused by telephone. She told him "vaguely and briefly" about the complaints and he agreed to come to the police station to provide a statement. The interview took place at 5 pm in an unlocked interview room. It lasted an hour and fifty minutes and was audio and video taped. The investigator did not advise the accused of his s. 10(b) *Charter* right to retain and instruct counsel and began the interview as follows:

[Y]ou're here on your own free will. You're not under arrest or anything. You can certainly leave at anytime that you feel like you'd like okay. Ah, no problems?

The officer then briefly explained that allegations of inappropriate sexual conduct had been made and told the accused that anything he said could be used against him as evidence. The officer asked some general questions about the accused's relationship with the boys, and then shifted to more specific questions about whether he had engaged in sexual activity with them. The officer repeatedly advised the accused she needed to know his side of the story. Eventually, the officer intensified her questions about whether the accused had initiated sexual acts with the boys. He was charged with sex offences.

British Columbia Supreme Court

The accused argued his statement should be excluded as evidence because it had been obtained in violation of his rights under s. 10(b) of the *Charter*. The judge, however, found the accused had willingly agreed to

the police interview. This, in his view, "conveyed an element of choice" by the accused that the interview was optional, not mandatory. The accused had understood and accepted the officer's introductory advice that he was there of his own free will, was not under arrest and could leave at any time. Holding the interview at the police station which limited the accused's mobility was inconsequential to determining whether a reasonable person would conclude he was not free to end the interview and depart. The judge concluded that the accused's statements during the interview and the surrounding circumstances demonstrated that he was not detained when he gave his statement and his s. 10(b) rights had not been violated. While the accused never made inculpatory statements, the trial judge relied on his demeanour during the interview to find his testimony at trial not credible. The judge did not accept any of the accused's evidence and convicted him of sexual exploitation and sexual assault.

British Columbia Court of Appeal

The accused appealed his sexual exploitation convictions arguing, in part, that the trial judge failed to recognize that he was detained while he gave his statement and should have been advised of his right to counsel under s. 10(b). In his view, a reasonable person in his circumstances, knowing he was the only suspect in an investigation focused on sexual misconduct with adolescents, would believe he was detained once he sat down for the interview with police. He contended that the officer's decision not to arrest and charge him before the interview, despite having the grounds to do so, was deliberate, tactical, and directed at depriving him of his right to counsel and the ability to make an informed choice as to whether to speak to police. Further, he suggested that the purpose of the interview was not to determine if a crime had taken place by exploring the complainants' ages at the time of the sexual acts, the question of consent, or other issues related to the elements of the alleged crimes, but to obtain a confession. By failing to immediately inform him of his right to counsel, the police breached his *Charter* rights had been breached and his statement was inadmissible as evidence.

"Detention identifies the point at which the authorities are obliged to immediately inform a suspect of the right to counsel under s. 10(b) of the Charter."

The Crown, on the other hand, argued that the accused was not detained. Although he was the subject of highly-focussed suspicion when he was interviewed, the Crown said this alone was not determinative of detention.

Detention

Justice Neilson, writing the Appeal Court's judgment, described the legal principles governing when a detention occurs as follows:

> Detention identifies the point at which the authorities are obliged to immediately inform a suspect of the right to counsel under s. 10(b) of the Charter. This recognizes the vulnerability of individuals who are taken under effective state control, and ensures that they have the opportunity to seek legal advice, and understand that they have a choice as to whether to cooperate with and speak to the authorities. Detention may be physical or psychological. Psychological detention occurs when a reasonable person in the subject's position would conclude by reason of the state's conduct that he or she has no choice but to comply with authorities. It may be difficult to determine when a person is psychologically detained. In addressing this issue, the court should consider the entire interaction as it developed. [reference omitted, para. 35]

"Psychological detention occurs when a reasonable person in the subject's position would conclude by reason of the state's conduct that he or she has no choice but to comply with authorities. It may be difficult to determine when a person is psychologically detained."

"There is no question that the [accused] was the subject of precisely focussed suspicion, but this alone does not turn an encounter into a detention. ... Nor is the fact that [the officer] had reasonable grounds to arrest the [accused] prior to the interview definitive in establishing detention."

Factors to consider in determining whether an individual has been psychologically detained include:

(a) The **circumstances** giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.

(b) The nature of the police **conduct**, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

(c) The particular **characteristics** or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

In this case, the trial judge did not err in finding the accused was not detained during the police interview. Although the officer had grounds to arrest the accused but deliberately chose to interview him without advising him of his right to counsel, a reasonable person, viewing the interaction as a whole, would not have concluded the accused was deprived of his choice to cooperate with the police:

> There is no question that the [accused] was the subject of precisely focussed suspicion, but this alone does not turn an encounter into a detention. What matters is the manner in which the police interacted with the suspect.
>
> Nor is the fact that [the officer] had reasonable grounds to arrest the [accused] prior to the interview definitive in establishing detention. … [E]ach case must be determined on its own facts in the context of all of the circumstances.
>
> While one of [the officer's] objectives was undoubtedly to obtain inculpatory admissions, this was not the sole purpose of the interview. She testified that in her experience cases of sexual assault often have two sides to the story and so she wished to discover the [accused's] version of events. Consent was a real issue, given the boys' ascending ages over the four years of the alleged sexual activity and, contrary to the [accused's] submission, [the officer] attempted to explore this with the [accused], as well as whether the sexual acts had occurred at all. I am accordingly satisfied there is evidentiary support for the trial judge's conclusion that legitimate areas of inquiry remained and the interview had a valid investigatory purpose.
>
> Most significantly, it is apparent that the [accused] was well-aware of the purpose of the interview, his potential jeopardy, and his rights in responding to the situation. He knew [the officer] was investigating allegations of sexual impropriety with the complainants. She told him he could be charged "right now", and that a charge of sexual exploitation was a possible outcome. The [accused] knew he could leave, that he had the right to remain silent, and that he was entitled to advice from a lawyer. He voluntarily came to the interview without legal assistance, however, and spoke to [the officer] for almost two hours, during which he carefully retained control of what he was prepared to say, before the interview was terminated at his request.
>
> The notion of choice is central in determining whether a person has been detained by the authorities. Because the [accused] did not testify on the voir dire there is no evidence of whether he subjectively believed that he had a choice as to cooperating with [the officer]. The objective evidence of their encounter clearly supports the trial judge's findings. The [accused] has failed to persuade me that the judge made any reviewable error in concluding that he failed to establish that a reasonable person in his position

> would have concluded that he had been deprived of the liberty of choice during the interview with [the officer]. [references omitted, paras. 55-59]

The accused's appeal was dismissed and his convictions upheld.

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

BESTIALITY MORE THAN SEX ACT WITH ANIMAL

R. v. D.L.W., 2015 BCCA 169

The accused brought the family dog into a bedroom, applied peanut butter to his teenage step daughter's vagina, and then videotaped the dog licking her. He was charged with bestiality along with other offences alleged to have been committed over years of repeated sexual molestation. These other charges included sexual assault, sexual interference, invitation to sexual touching, sexual exploitation, and making and possessing child pornography.

British Columbia Supreme Court

The judge found that the term "bestiality" included acts of sexual touching with animals and penetration was not an element of the offence. "In my view, 'bestiality' means touching between a person and an animal for a person's sexual purpose," said the judge. "This is reflected in the numerous guilty pleas entered on charges under s. 160 where the bestiality consists of an animal licking a person's genitals. It is also consistent with the entire scheme of the [Criminal] Code." Since the accused had encouraged the complainant to commit bestiality and had used peanut butter, he had aided and abetted her in committing the offence and was therefore a party to the offence of bestiality under s. 21(1) of the *Criminal Code*. The accused was convicted of bestiality, along with the other 13 sexual offences, and he was sentenced to 16 years in prison.

British Columbia Court of Appeal

The accused appealed only the bestiality conviction arguing that penetration was a required element of the offence. He argued that the trial judge statutorily misinterpreted the bestiality provision by failing to find that the Crown was required to prove penetration. The Crown, on the other hand, submitted that a proper interpretation of the meaning of bestiality would include sexual activity of any kind between a person and an animal.

Meaning of Bestiality

A two member majority of the Court of Appeal ruled that penetration remained an element of the offence of bestiality as it had been in the common law. It concluded that previous amendments to legislation in 1954 (introducing the term "bestiality" to the buggery provision of the *Criminal Code*) and 1985 (creating a separate offence for bestiality) had not changed the elements of this offence to include a broader range of sexual conduct with animals:

> Bestiality has a long understood meaning in Canadian criminal law. At the time the offence was created, Parliament saw fit to adopt language that included an element of penetration as part of offence. If Parliament had intended in the 1954 Amendment or the 1985 Amendment to sever bestiality from its historical foundation, one would have expected it to so directly, using clear and specific language. ... [para. 38]

Finding the conduct in the case to be "most disturbing", the majority commented that Parliament could criminalize sexual acts with animals beyond penetration by easily modifying the definition of bestiality or the essential elements of it. Since penetration remained an element of bestiality and there was no act of penetration in this case, the appeal was allowed and an acquittal was entered on the bestiality charge.

BY THE BOOK:

Bestiality: ***s. 160 Criminal Code***

Every person who commits bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

Parties to Offence: ***s. 21(1) Criminal Code***

Every one is a party to an offence who

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

A Different View

Chief Justice Bauman had a different opinion. In his view, the change to the *Criminal Code* in 1954 amended the offence of bestiality such that it did not require penetration. "Nothing in jurisprudence requires this Court to conclude that anal penetration, or indeed any kind of penetration, is a required element of the offences created by s. 160 of the Code," he said. "Applying traditional principles of statutory interpretation allows us to conclude ... that s. 160(1) creates a general intent offence which encompasses sexual activity of any kind between a person and an animal." Chief Justice Bauman would have dismissed the accused's appeal and upheld the bestiality conviction.

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

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ASD DELAY MUST BE RELATED TO DRIVER IN PARTICULAR, NOT MOTORISTS GENERALLY

R. v. Lomenda, 2015 SKCA 40

The accused was stopped at 8:17 pm by police to check his driver's licence, vehicle registration and sobriety. At 8:20 pm he admitted to consuming one beer about 15 minutes earlier, but then, on further questioning, said it could possibly have been sooner. The officer decided to wait 15 minutes before administering an ASD test. Then, during further discussion at 8:32 pm the accused said he had four drinks over a two hour period with the last drink being 45 minutes before the stop. At 8:36 pm the officer presented the ASD to the accused and a fail reading was reported. The breath demand was read, the accused detained for "over .08" and he was informed of his right to counsel. He was transported to the police station, spoke to legal aid and provided two breath samples resulting in readings of 150mg% and 140mg%. He was charged with impaired driving and driving over 80mg%.

Saskatchewan Provincial Court

The officer testified he waited 15 minutes before administering the ASD test because he was worried about obtaining a false positive result (fail reading) due to the presence of mouth alcohol. He also repeatedly said it was his standard procedure to wait 15 minutes for an ASD sample to ensure that a motorist did not burp or regurgitate alcohol. The judge accepted the officer's evidence and found his subjective belief that it was necessary to wait 15 minutes was reasonable. The accused had admitted that it was possible his last drink was less than 15 minutes before the stop and he wasn't keeping track of when he had his last drink. As well, the accused changed his versions on how much he had consumed and on how long it had been since his last drink. The judge concluded that the ASD sample was taken "forthwith" and complied with s. 254(2) of the *Criminal Code*. The accused was convicted of driving while his blood alcohol content exceeded 80mg%.

Saskatchewan Court of Queen's Bench

The accused appealed his conviction arguing the ASD breath sample was not taken "forthwith" as required by s. 254(2) and, as a result, should have been excluded as evidence. In his view, the officer decided to wait 15 minutes because it was his standard practice to observe a motorist for that period. Thus, he suggested the evidence did not support the trial judge's conclusion that it was necessary to wait 15 minutes before administering the ASD test.

The appeal judge examined the meaning of "forthwith" in s. 254(2) and how long a police officer may wait before taking a roadside breath sample. "It is ... clear that a police officer is entitled to wait 15 minutes if the delay is reasonable or justified," said the appeal judge. "In particular, the officer can delay if there is evidence which leads him to conclude that the motorist consumed alcohol within that period." However, it is not acceptable to wait 15 minutes in every case for the purpose of observing the motorist to ensure that he does not burp or regurgitate.

Here, the officer waited 15 minutes because he thought it necessary to observe the accused for that period to ensure that he did not burp or regurgitate alcohol. Waiting 15 minutes to observe every motorist because they generally cannot be trusted to accurately report when they had a drink was not reasonable or justified in the circumstances:

> [I]t is my view that the ASD was not administered forthwith. [The officer] had no reason to and did not believe that [the accused] had burped or regurgitated alcohol. Indeed, he did not give evidence that he suspected that mouth alcohol might be present. Rather, he delayed because he concluded that the only way to know was to wait 15 minutes, and observe [the accused] throughout, and because any motorist might have had a recent drink, and lie about it. [para. 36, 2014 SKQB 77]

Since the officer failed to administer the ASD test forthwith, the accused's rights under ss. 8, 9 and 10 (b) of the *Charter* were infringed. The accused's appeal was allowed, the ASD result and the breath sample readings were excluded as evidence, his conviction was overturned, and an acquittal was entered.

Saskatchewan Court of Appeal

The Crown then challenged the appeal judge's ruling. It argued that he erred in finding the police officer had failed to administer the ASD test "forthwith" and thereby breached the accused's *Charter* rights. But the Court of Appeal agreed with the Queen's Bench judge that the ASD test had not been administered "forthwith" in the circumstances of this case. As well, the three member panel upheld the conclusion that the evidence ought to have been excluded. The Crown's appeal was dismissed and the order directing an acquittal was confirmed.

Complete case available at www.canlii.org

Editor's Note: Additional case facts taken from *R. v. Lomenda*, 2014 SKQB 77.

'AS SOON AS PRACTICABLE' IS NOT AS SOON AS POSSIBLE

R. v. Burwell, 2015 SKCA 37

Shortly before midnight a police officer stopped the accused for a traffic infraction. At 11:56 pm he made an ASD demand and the accused blew a "fail". At 12:04 am the officer made a demand for a breath sample. The nearest detachment (Delisle) with an Intoxilyzer was 30 kms away but was not accessible because it was locked, there was no staff on call, and the officer did not have a key for it. At 12:09 am he then transported the accused to another detachment (Saskatoon) some 40 kms away where an approved instrument was available. When he arrived at the Saskatoon detachment at 12:43 am, the officer discovered its approved instrument had not been serviced and was not immediately operational for testing breath samples. Being a qualified technician, he completed the appropriate maintenance steps

Presumption of Accuracy

A certificate of a qualified technician stating the analysis of the samples made by means of an approved instrument in proper working order operated by the technician is evidence of the facts in the certificate.

required to make the instrument operational, which took between 10 to 20 minutes, and then obtained a samples of the accuseds breath of 130mg% at 1:06 am and 120mg% at 1:27 am. The time between the demand for breath samples and the taking of the first sample was about 62 minutes. The accused was charged with over 80mg%.

Saskatchewan Provincial Court

The judge concluded that the breath samples were not taken as soon as practicable. There were unreasonable delays and the Crown was therefore not entitled to rely on the presumption of accuracy under s. 258(1)(c) of the *Criminal Code*. Although the officer tried to take the samples "as soon as practicable," the delay was caused because nobody was available at the nearest detachment. This required the officer to travel a farther distance to another detachment. When there, the Intoxilyzer needed maintenance before it could be used because there was nobody responsible for ensuring it was in proper working order. This caused further delay. "The cumulative effect of these delays is that the accused's breath samples were not taken as soon as practicable," said the judge. "As a result, the presumption in section 258(1)(c) is lost and the Certificate of Analyses is not evidence of the accused's blood alcohol content as at the time of the offence." Without this evidence, the concentration of alcohol in the accused's blood could not be established and he was acquitted.

Saskatchewan Court of Queen's Bench

A Crown appeal was successful. The appeal judge found the trial judge applied a standard of "as soon as possible" rather than "as soon as practicable". The circumstances existing after the demand was made needed to be considered. "It is not realistic to suggest that every rural detachment should have someone available 24 hours a day, seven days a week on the off chance the breathalyzer machine in the detachment could be made use of at any time," said the appeal judge. "It is not realistic that qualified breath technicians, who have no knowledge in advance of whether they will be required at all on a particular shift, remain at the detachment in the off chance they are required. It is not realistic to expect perfection in the control of the expiration dates on the Intoxilyzer solution." The breath samples were taken "as soon as practicable", the presumption in s. 258(1)(c) was operative and the Certificate of Analyses was proof that the concentration of alcohol in the accused's blood at the time of the offence was over 80mg%. The accused's acquittal was set aside, a conviction was entered and the matter was remitted to the trial judge for sentencing.

Saskatchewan Court of Appeal

The accused appealed his conviction arguing, among other things, that the appeal judge erred in finding that the accused's breath samples were taken "as soon as practicable." All three Court of Appeal judges agreed that the "as soon as practicable" provision created a legal standard, which required a correct result. As long as the first breath sample is taken as soon as practicable and no later than two hours after the offence has been alleged to have been committed (as required by s. 258(1)), the Crown can rely on the breath technician's certificate to prove the concentration of alcohol in the accused's blood at the time of driving. As a result, there was no need to call an expert to prove that fact. However, they all gave different reasons concerning whether the standard was satisfied on the facts of this case.

As Soon As Practicable?

Justice Klebuc concluded that the appeal judge correctly interpreted and applied the "as soon as practicable standard" to the evidence. There is no requirement that breath samples be taken "as soon as possible", they only need be taken

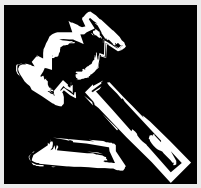
within a reasonably prompt time. The slightly longer time it took for the officer to drive to the other detachment and service its Intoxilyzer was not a delay to be taken into account when assessing whether the breath samples were taken within a reasonably prompt time. As well, the trial judge erred in determining the "as soon as practicable" standard had not been met because breath samples possibly could have been taken earlier had the police managed its human and physical resources differently. Nor was the closer detachment in Deslisle, a rural one, required to be staffed and available at all hours of every day in the absence of any evidence concerning its designated hours of operation, the financial resources available to maintain it, whether any police staff resided at or near it, or of any legal requirement that the police make that detachment available at all times. It was also an error for the trial judge to find it an unacceptable practice for a qualified technician not to be available at the other detachment in Saskatoon at all hours of every day for the purpose of conducting breath tests and maintaining its approved instrument in an immediate operational state. Justice Lebuc granted the accused's appeal on other grounds, set aside his conviction and ordered a new trial.

Justice Ottenbreit also found that the accused's breath samples were taken "as soon as practicable." In his view, the trial judge improperly focused on systemic and operational police issues without an appropriate evidentiary basis, and assumed that the systemic delay was *prima facie* unreasonable and that the Crown needed to explain it. "In the context of this case, the fact no one was working or available at the Delisle detachment is not prima facie unreasonable so as to place on the Crown an onus to explain why this was so and require the Crown to give a 'good' reason for the unavailability," said Justice Ottenbreit. He further stated:

> In the circumstances of this case, the summary conviction appeal court judge correctly stated that the delays were minimal notwithstanding the unavailability of the Delisle detachment and the expiration of the Intoxilyzer solution. Given

LEGALLY SPEAKING:

As Soon As Practicable



"Subsection 258(1) of the Criminal Code provides a simplified method for the Crown to establish the offence of drinking and driving over .08 by using certificate evidence. It is an evidentiary shortcut and is essentially an exception to the hearsay rule. If the Crown cannot meet the requirements of the section, it can always call an expert to correlate the readings back to the time of driving.

If all of the requirements are met, however, s. 258(1) allows the Crown to rely on the breath technician's certificate to prove what the accused's blood alcohol content would have been at the time of driving in lieu of calling an expert to prove that fact." – Justice Jackson at paras. 67-68.

"The purpose of s. 258(1)(c) of the Criminal Code is to provide the Crown an evidentiary shortcut to proving impairment. It is a fair statement that the 'as soon as practicable' criterion was enacted to ensure that the presumption created by the section operates fairly and that the breath testing leads to accurate results. As such it protects against the manipulation or skewing of the results by delaying testing to allow for the absorption of alcohol into the accused's blood. The outer limit of this criterion is two hours after the offence was alleged to have been committed as regards the first sample.

The interpretation of 'as soon as practicable' is informed by the criteria of what is reasonable based on the circumstances of the case taken as a whole. " Justice Ottenbreit at paras. 118-119.

R. v. Burwell, 2015 SKCA 37

> that the first sample was obtained one hour and approximately 11 minutes after the traffic stop was made, any prejudice by the short delay of driving to Saskatoon rather than Delisle and replacing the solution is inconsequential.
>
> In such a case, where the actions of the officer are not in themselves unreasonable and the first sample is taken without pushing the two-hour limit, it was not necessary for the Crown to explain why the Delisle detachment was unavailable or why there was no one tasked at that time to keep the solution current. To require the Crown to address this issue in the context of this case wrongly elevates the onus on the Crown to what may be described as the "as soon as possible" standard. [paras. 139-140]

Justice Ottenbreit would too grant the accused's appeal so he could advance his other arguments, set aside his conviction and order a new trial.

Justice Jackson found the appeal judge did not give proper effect to the trial judge's findings of fact and, in any event, incorrectly determined that the first breath sample was taken as soon as practicable. She noted that the delay was 71 minutes, from the time of the observed infraction to the taking of the first breath sample. In her view, the trial judge correctly determined that the first breath sample was not taken as soon as practicable after the offence was alleged to have been committed:

> In this case, the trial judge found unreasonable delay arising from these facts: (i) the Delisle detachment was not open or accessible; and (ii) during the drive to Saskatoon, which was longer than the drive to Delisle, the equipment in Saskatoon was not verified to be useable and was not, in fact, operational. We do not need to assess each of these observations independently to determine whether the trial judge's individual attributions of delay are correct. Rather, we must assess the trial judge's conclusion that "the cumulative effect" of the delay means that the breath samples were not taken as soon as practicable.
>
> The trial judge's conclusion, regarding the cumulative effect of the delay, must be assessed in light of the length of the delay (71 minutes) and the explanation or the lack of explanation for it. Here, the evidence of explanation came from [the officer], who was admirably frank. It was he who had the following expectations: (i) the Delisle detachment would be accessible; and (ii) the Saskatoon detachment would have someone on duty and the Intoxylizer solution would be up to date. In light of this evidence, it is difficult to see how the trial judge could be found to have erred in law when he looked for an explanation and found it wanting. Based on his findings of fact, his conclusion that the breath samples were not taken as soon as practicable is correct. [paras. 109-110]

Justice Jackson would have allowed the accused's appeal, set aside the conviction and restored the acquittal.

Complete case available at www.canlii.org

ENOUGH GROUNDS WITHOUT ISP SUBSCRIBER: WARRANT VALID

R. v. Thomas, 2015 ABCA 45

A 27-year-old man went online presenting himself as a 19-year-old male. He met a 14-year-old girl and then later her 13-year-old friend. He was able to persuade the girls to remove their clothing and touch themselves while he did the same. At one point he met the 13-year-old and had sexual intercourse with her. The police interviewed the two girls who were able to provide considerable information regarding the offender's identity. The 14-year-old permitted a police officer to assume her internet identity and continue communicating with the offender. During conversations, the offender activated his web cam allowing the officer to identify him as the person who lived at the accused's address. During one of the chats, the officer obtained an IP address for the offender's username using free online software. With that IP address and another free public website, the officer determined that the internet service provider (ISP) was Telus Communications. A law enforcement request of Telus for information relating to customer

usage was requested and the accused's name and address was provided.

Using the identifying information provided by the girls and the ISP request, a search warrant for the accused's home and vehicle was obtained. It was executed and the accused's computer and other items were seized. During the search the accused returned home, was arrested and given a copy of the warrant, which listed the 12 charges. He was "chartered and cautioned", taken to the police station and given an opportunity to consult counsel. Then, before questioning, he was given another copy of the search warrant and the charges were read to him. The complainant's name in count 10 had been crossed out because it mistakenly referred to one of the victims rather than the undercover officer standing in for her. He was told that someone else would explain to him later why the name had been crossed out. The accused was then given another opportunity to contact counsel, which he declined. He was told that if he changed his mind to let the officer know and he would be allowed to speak to counsel again but never did. An interview followed and the accused made a number of admissions regarding his conduct and communications with the victims, and his understanding of their ages. He was charged with 12 offences.

Alberta Court of Queen's Bench

The accused argued that his rights under ss.8 and s.10 of the *Charter* had been violated by the police and that all of the evidence obtained from his computer and his confession should have been excluded. He submitted that the ISP information - his name and address - provided by Telus breached s. 8. Using it to support the search warrant rendered the items seized from its execution inadmissible. As for s. 10, he contended that his right to counsel was undermined and that his jeopardy had changed such that he was entitled to another opportunity to consult counsel.

The judge disagreed and admitted the evidence. First, although the judge found the accused had a subjective expectation of privacy in his subscriber name and address, this was not objectively reasonable. Second, the accused's right to counsel was not undermined nor was there a change in jeopardy. He was facing a charge of communicating with someone who was, or whom he believed was, under the age of 16 years whether it be one of the victims or an undercover officer posing as her. The accused was convicted child internet luring x 6, invitation to sexual touching x 2, sexual touching and sexual assault (intercourse) of a child.

Alberta Court of Appeal

The accused again argued both his s.8 and s.10 *Charter* rights had been violated and the evidence should have been excluded under s. 24(2).

Unreasonable Search and Seizure?

In *R. v. Spencer*, 2014 SCC 14 the Supreme Court of Canada established that "a subscriber's identifying information with his or/her ISP is subject to a reasonable expectation of privacy and in the absence of exigent circumstances, is not to be disclosed to police without judicial authorization." However, in this case it was unnecessary to address this issue.

"First, the other identifying information obtained from the two victims, also referenced in the ITO, was more than enough evidence of identification to support the search warrant that was issued," said the Court of Appeal. "In other words, the search warrant would have issued even without the information (the [accused's] name and address) provided by the ISP." Second, the Supreme Court of Canada admitted the evidence in *Spencer* anyway. "Had the impugned information been necessary to obtain the warrant in this case, a proper analysis of s.24(2) would have come to the same result, particularly since neither the police nor the trial judge had the benefit of the *Spencer* decision and to that point the law did not require judicial authorization to access that information."

Right to Counsel?

The accused maintained that the failure of the police to explain why the victim's name in count 10 had

been erased constituted a violation of his s.10 *Charter* right and his confession ought to have been excluded as a result. He argued that crossing out the victim's name in count 10 caused him confusion and the refusal or inability of police to clarify the situation prevented him from receiving effective legal advice. But the Court of Appeal disagreed that this situation was such that the accused should have been given a further right to consult with counsel:

> In this case, it appears that the [accused] understood the accusations relating to his computer luring of the two named complainants. Count 10 was worded exactly the same, but with the complainant's name crossed out. That left the relevant portion:
>
> > ... by means of a computer system communicate with a person who was, or who the accused believed was, under the age of 16 years, for the purpose of facilitating the commission of an offence under s.173(2), contrary to s.172.1(1)(b) of the Criminal Code.
>
> We agree with the trial judge that this change in jeopardy (if change it was) was not of a kind that would cause a reasonable person to seek further legal advice in order to permit him to make an informed decision as to whether to cooperate with the police. Indeed, the jeopardy the [accused] faced under count 10 was arguably less than the others for which he had already received legal advice, as the person he was communicating with in that count was in fact a 40 year old policeman, rather than a 13 or 14 year old child.
>
> In any event, even if the [accused's] legal jeopardy had changed, the police provided him with the opportunity to contact counsel at that point and at any time he wished thereafter. We conclude that the [accused] throughout possessed sufficient information to make an informed and appropriate decision as to whether or not he needed to speak to counsel again, and he made his choice. [paras. 25-27]

The accused's appeal was dismissed.

Complete case available at www.canlii.org

JACKET ABANDONED WHEN SUSPECT FLED POLICE

R. v. Aden, 2015 SKCA 59

An integrated drug unit received information from confidential sources that a group of black males were selling cocaine from a home, hotels and vehicles in Saskatoon. As a result, police set up surveillance on the residence and saw people coming and going, which was believed to be consistent with the information about cocaine trafficking from the premises. The investigation culminated with a briefing and three surveillance teams active in the field over a four hour period. One of the surveillance teams consisted of two officers under the direction of a sergeant. When the officers arrived at the hotel they were assigned to watch, they saw a a black male walking from the south end of it. The officers followed the male from the hotel. He walked into a Co-op Home Centre and stayed only briefly, which was believed to be consistent with drug trafficking. The officers decided to arrest the man and called out, "Stop, police". The man stopped and the officers grabbed him, but he slipped out of his leather jacket and ran into traffic on a nearby street. He was subsequently apprehended and arrested, and his jacket was searched. In the jacket, police found a plastic card key for a hotel room which was later searched with a warrant. In the room, police located almost eight ounces of cocaine and trafficking paraphernalia. After further evidence was gathered and other arrests made, four men, including the accused, were jointly charged with possessing cocaine for the purpose of trafficking and possessing proceeds of crime.

Saskatchewan Provincial Court

The accused Aden challenged the constitutionality of his arrest and the subsequent search of his jacket. He argued that the arresting officers did not have reasonable and probable grounds to arrest him. Thus, the search of his jacket, which revealed the card key for the hotel room, was made pursuant to an arrest without reasonable and probable grounds. The search, he suggested, was therefore not valid as

an incident to arrest. The judge, however, concluded that the accused's arrest was valid and his s. 9 *Charter* rights had not been violated. The police officers had the requisite subjective belief that he was involved in drug trafficking and sufficient objective criteria to support that belief. "I arrive at this conclusion after assessing the objectively discernible facts – whether inculpatory, exculpatory or neutral," said the judge. "In doing so I also take into account the individual and collective experience of the officers involved in drug investigations and covert surveillance activities. While it is the duty of the Court to rigorously assess the objective facts, it is not the function of the Court in hindsight to individually dissect single events or inferences."

As for the search of the discarded jacket, the judge found the accused had abandoned it in an attempt to escape the custody of the police. Searching it was not invasive and the police merely checked its pockets. Further, the search was conducted to ensure officer and public safety, to prevent the destruction or disappearance of evidence and to find evidence of criminal activity. The search was reasonable and lawful as an incident to arrest. Section 8 of the *Charter* had not been violated. The evidence was admissible, and the accused was convicted on all counts and sentenced to 585 days in jail.

Saskatchewan Court of Appeal

The accused argued, in part, that the trial judge erred by failing to find that the police breached his rights under ss. 8 and 9 of the *Charter* and that the trial judge ought to have excluded the evidence of the hotel room card key found on him under to s. 24(2).

Arbitrary Detention

The accused submitted that the trial judge did not explicitly indicate what the arresting officer subjectively believed at the moment of arrest. But the Court of Appeal concluded that it was clear that the arresting officer believed she was arresting the accused for drug trafficking and the fact the trial judge made no findings in this regard did not undermine his ultimate conclusion that the arresting officer had reasonable and probable grounds for the accused's arrest.

> As of the time of trial, [the officer] had been a police officer for 13 years, including five years with the Saskatoon Integrated Drug Unit. In the spring of 2012, she was taking part in a major investigation that pertained to drug trafficking; she had just been briefed by the leaders of the particular investigation; she was monitoring the radio and she had just been advised that the vehicle in which [the accused] had been a passenger had been stopped by the police and the occupant arrested for drug trafficking.
>
> [The officer] was cross-examined by counsel for each of the four accused and re-examined by counsel for the Crown. She was asked, in varying ways, as to the basis for her arrest. She testified the reason she arrested him was "for drug trafficking". She said she "was participating in a drug investigation involving two specific vehicles". Later, she stated she would have had no reason to arrest [the accused] without the information that "trafficking was actually going on". [paras. 63-64]

Unreasonable Search

The accused contended that he did not abandon his jacket and therefore maintained a privacy interest in it. In his view, he was merely escaping from an "unlawful arrest." Justice Jackson speaking for the Court of Appeal disagreed:

> I see no basis to interfere with the trial judge's finding of fact that [the accused] had abandoned his jacket. ... [the accused] slipped out of the jacket expressly as a means of trying to escape the police during the course of a lawful arrest. In doing so, he left the jacket literally in their hands. Clearly, he intended to abandon his proprietary interest in the jacket. If [the accused] had been able to escape, he would not have come back to retrieve his jacket or come looking for it at some later time. By leaving it in the hands of the police, he acted in a manner inconsistent with the reasonable assertion of a continuing privacy interest. He may have had a subjective expectation of privacy in the contents of the jacket pockets, but his expectation was not objectively reasonable. [reference omited, para. 72]

"[T]he power to search incident to arrest is contextual, but extends at least to searching a lawfully-arrested person and to seizing anything in his or her possession or immediate surroundings to guarantee the safety of the police and the accused, prevent the accused's escape or provide evidence against him."

And, even if the jacket were not abandoned, the search of it was incidental to his arrest. Citing *R. v. Fearon*, 2014 SCC 77, Justice Jackson outlined the following principles applicable to searching as an incident to arrest:

i. the fact the police need to be able to promptly pursue an investigation upon making a lawful arrest is an important consideration underlying the power to search incident to arrest;
ii. the power to search incident to arrest is contextual, but extends at least to searching a lawfully-arrested person and to seizing anything in his or her possession or immediate surroundings to guarantee the safety of the police and the accused, prevent the accused's escape or provide evidence against him; and
iii. there is "simply a requirement that there be some reasonable basis for doing what the police did". [para. 73]

In this case, the searching officer said he searched the jacket to ensure no weapons were in it that could accompany the accused to the police station and to discover evidence related to trafficking. In finding the jacket search reasonable, the Court of Appeal said:

> The police were in a fast-moving investigation. Arrests were being made in three locations almost simultaneously. While in the process of arresting [the accused], he slipped free and ran into a busy thoroughfare. Officer safety was clearly engaged by his actions, and it was reasonably probable that evidence would be found that would assist the police in concluding their multi-faceted investigation. [para. 75]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

PELLET GUN WITHOUT MAGAZINE & CO2 CARTRIDGE NOT A FIREARM

R. v. Crawford, 2015 ABCA 175

Needing transportation, three men found a vehicle idling but occupied. They drove it a short distance but it stalled and could not be restarted. A few blocks away they found another car idling but occupied. One of them approached the driver, drew an unloaded pellet gun, pointed it and ordered the driver out of the vehicle. The driver complied, and the three men entered the vehicle and left. The police were contacted immediately and located the vehicle through its OnStar GPS system. As the police approached, the accused ran but was quickly apprehended. A pellet gun was found in the vehicle. It was later examined by a firearms expert who reported that it was unloaded and missing both an ammunition magazine and a CO2 canister, which was required to fire it. However, once pellets, a CO2 canister and a magazine was added, the gun could discharge a pellet of sufficient velocity to cause serious bodily harm as measured by the "pig's eye test". The accused was charged with motor vehicle theft and robbery while using a firearm.

Alberta Provincial Court

The judge concluded that the CO2 pistol was a "firearm" for the purpose of s.344 (1)(a.1) of the *Criminal Code*. "Had it been loaded (i.e. with the CO2 cartridge with some CO2 in it and pellets), it was capable of being fired and causing bodily injury," said the judge. "Thus, I find it is a 'firearm' within the meaning of s.2 of the Criminal Code ... ." The accused was convicted of theft of an automobile and being a party to a robbery committed with a firearm. He was sentenced to the mandatory minimum sentence of four years' imprisonment.

Alberta Court of Appeal

The accused argued, in part, that the trial judge erred in finding that the pellet gun was a firearm for the purposes of s. 344(1)(a.1). Although a new trial was directed on other grounds, a majority of the Appeal Court nonetheless addressed the pellet gun issue to assist the judge at a new trial.

Was the Pellet Gun a "Firearm"?

Justice Martin, speaking for the majority, found that the pellet gun did not meet the definition of firearm. He noted that the objective of the legislation was to protect a victim from serious bodily harm or death, not fright or alarm.

> [H]ere the weapon was missing more than ammunition and a magazine to be operable. It also lacked a CO2 canister with sufficient gas to propel a pellet at a velocity to meet the "pig's eye test". The Crown, relying on R v Watkins and Graber, argues that both the magazine and the CO2 canister fall within the meaning of ammunition and, therefore, like ammunition, they are not required to satisfy the definition. ... I respectfully disagree.
>
> In this case, the absence of a magazine to hold the pellets, which the expert said was essential to load the gun, and a functioning CO2 canister rendered the weapon inoperable as a firearm, and without those items it could not be made operable during the commission of the offence or flight therefrom. I note that at the time of their arrest (a half hour after the offence, at 5:30 in the morning), the [accused] and Anderson had already fled the scene and still did not have the missing pieces. Even if I am wrong in finding the missing magazine significant, the missing CO2 canister would lead me to the same conclusion: this pellet pistol did not qualify as a firearm.
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> Therefore, in my opinion, as the weapon was not capable of being loaded and fired during the commission of the offence or flight therefrom, the trial judge erred in finding that it was nonetheless a firearm as defined in s. 2 of the Criminal Code. My conclusion is consistent with the decision of the Ontario Court of Appeal in R v Smith, 2008 ONCA 151 ... , where the weapon, a rifle, used in three robberies was missing a breach bolt without which it could not be fired. There being no evidence that a breach bolt was available "on the scene", the court overturned the trial judge's finding that the weapon was a firearm. [paras. 35-37]

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

Another View

Justice Wakeling agreed that a new trial should be ordered on other grounds and therefore found it unnecessary to address the pellet gun operability issue.

Complete case available at www.canlii.org

BY THE BOOK:

Criminal Code

Firearm

s. 2 "firearm" means a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm;

...

Robbery

s. 344. (1)(a.1) Every person who commits robbery is guilty of an indictable offence and liable ... (a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years.

OFFICER'S EXPERIENCE MATTERS

R. v. Herritt, 2015 NBCA 33

A New Brunswick police officer working traffic enforcement conducted a routine stop on a vehicle with a Newfoundland and Labrador licence plate. Section 15(1)(d) of New Brunswick's *Motor Vehicle Act* allows police to stop a vehicle to check for licences and registration, among other things. The officer detected an overwhelming odour of raw tobacco emanating from the vehicle when he approached its front passenger side window. The officer told the accused he was being stopped to check his documents and asked to see his licence, registration and insurance. When the accused opened the glove compartment to retrieve these things, the officer noted two packages of cigarettes with a Québec stamp on them. The accused, who was nervous, confirmed that he was travelling from New Brunswick back home that day.

The officer believed he had reasonable and probable grounds to arrest the accused for possession of illegal tobacco, but decided not to at that time. He first wanted to check the police computer system to confirm the accused's identity, determine if he had any prior offences, cautions or warrants, and to arrange for backup. While in the process of doing this, the accused exited his vehicle and moved toward the passenger side while exhibiting further nervousness. He was walking around and stretching, then lit a cigarette. The accused then retrieved his jacket by getting back into the vehicle on the drivers side when he could have easily done so through the open passenger window. The officer decided to make the arrest because the accused's actions made him nervous. He was placed in the rear of the police car before backup arrived and was allowed to call counsel on a cell phone. Only about four minutes elapsed form the time of the initial stop to the arrest.

The officer then searched the accused's vehicle to locate evidence related to the suspected offence. He found three cartons of cigarettes in the back seat, as well as four cardboard boxes containing sealed packages in the trunk of the vehicle. The sealed packages contained marihuana. The accused was re-arrested for possessing marihuana for the purpose of trafficking and permitted another call to counsel. No illegal tobacco was found in the vehicle. When a backup officer arrived, he took the accused to the police station and the vehicle was towed to a secure garage bay. Another officer at the garage also noted a strong odour of raw tobacco coming from the vehicle. Police then seized 59½ pounds of marihuana in vacuum-sealed bags and one kilogram of hashish from the vehicle. The accused was charged with trafficking marihuana and resin and possessing it for the purpose of trafficking,.

New Brunswick Court

The accused argued that the officer initially detained him without reasonable suspicion, thus breaching s. 9 of the *Charter,* and also lacked reasonable grounds to arrest him for possessing illegal tobacco, making the arrest unlawful and the vehicle search unreasonable under s. 8. The judge found the initial roadside stop to conduct the random document check lawful. However, he found the arresting officer did not had reasonable and probable grounds to believe that the accused was committing a criminal offence (possessing a large quantity of illegal tobacco). In the judge's view, the officer's subjective belief that the accused was in possession of contraband tobacco, based on the overwhelming smell of raw tobacco, was not objectively reasonable. No contraband tobacco was found in the vehicle and the odour was equally consistent with tobacco being present in the vehicle on a prior occasion (but not at the time of the stop). "In my view, [the arresting officer], in failing to consider and assess other possible exculpatory alternatives for the cause of the strong smell of raw tobacco, improperly adopted and applied a reasonable suspicion standard in determining that he had reasonable and probable grounds for arresting [the accused]." The accused was arbitrarily detained and the warrantless search conducted incidental to his arrest was unlawful and breached s. 8 of the *Charter*. The judge excluded the drugs under s. 24(2) and acquitted the accused.

New Brunswick Court of Appeal

The Crown appealed the accused's acquittal submitting that the trial judge erred in concluding that, objectively, the arresting officer lacked reasonable grounds to make the arrest. The Crown opined that the fact no substantial quantity of illegal tobacco was later found in the vehicle did not undermine the arresting officer's smell of a strong odour of raw tobacco. As well, the Crown contended that the arresting officer did not have an obligation under law to consider exculpatory (innocent) reasons why the accused's vehicle might smell strongly of raw tobacco when none was present. In the Crown's view, the arresting officer had reasonable grounds to believe that there was a large amount of contraband tobacco in the vehicle entitling him to arrest the accused.

Reasonable Grounds For Arrest

Justice Quigg, speaking for the Court of Appeal described the requirement for a lawful arrest this way:

> The reasonable ground standard (consisting of an officer's objectively reasonable subjective grounds to make an arrest) is what is required in order to make an arrest constitutional, and is established using less than the criminal standard of proof. [reference omitted, para. 16]

The Court of Appeal found the trial judge made mistakes in assessing the officer's belief. First, the trial judge discounted the officer's belief by requiring some explanation for the lack of illegal tobacco turned up by the search. "The fact that no large amount of tobacco was ever found in the vehicle cannot ex post facto undermine the belief that tobacco was there," said Justice Quigg. "Although the constable was not correct in this assumption, the reasonableness of the belief is unaffected by this result. This is simply the obverse side of the proposition that the results of a positive search cannot retroactively verify the belief." This was so even though another officer testified that the odour of raw tobacco could be explained by an earlier presence in the vehicle:

> The constable's belief cannot be disparaged because he was unable to explain why he smelled an overwhelming odour of raw tobacco and yet found only a small amount. It is true that [another officer] ventured an explanation that the odour of raw tobacco possibly lingered after the tobacco was removed; however, that was a different officer's opinion, and the constable had to rely upon his own experience and knowledge to substantiate his belief. The possibility that the strong odour of raw tobacco confronting [the arresting officer] may have been attributable to the past presence of tobacco simply does not outweigh the constable's experience.
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> [The arresting officer] had been a member of the RCMP for almost 23 years. In 2002, he was assigned to a pilot project on a highway patrol

BY THE BOOK:

s. 495 Criminal Code

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

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

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

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

"The reasonable ground standard (consisting of an officer's objectively reasonable subjective grounds to make an arrest) is what is required in order to make an arrest constitutional, and is established using less than the criminal standard of proof."

> unit that eventually became the Roving Traffic Unit, for which he has been on full-time duty since 2004. In addition to his general and other more specific police training, the constable took a two-day pipeline course in 1995. He described this course as being designed to train officers to look beyond traffic tickets and detect, by recognizing certain indicators of criminal conduct, criminals travelling with illegal contraband along known corridors or pipelines such as main highways, which would include Route 2 in New Brunswick. [The arresting officer] took this course a second time prior to the Roving Traffic Unit being established on a full-time basis. Since then, he has attended conferences respecting travelling criminals every two years. He was trained as an instructor of the pipeline course in 2009 and now teaches this course to other officers. [The arresting officer] is also a trained dog handler and has had a drug detection dog as an aid in performing his duties for the past eight years. On a typical day, he can perform 40 to 50 licence plate checks and actually stop 15 to 30 vehicles. He estimated that, in an average year, he is involved in 25 to 30 seizures of contraband such as illegal drugs, tobacco or firearms. At the commencement of the trial on the motion, the constable testified that he had seized illegal tobacco on approximately 30 to 35 occasions and assisted on an additional 10 to 12 occasions in his career. He testified that in all such instances, when he smelled a strong or overwhelming odour of raw tobacco similar to what was emanating from [the accused's vehicle] vehicle, the discovery of a large quantity of illegal tobacco resulted. [paras. 22-23]

In this case, there were a number of factors that convinced the officer that the accused was transporting illegal tobacco including his nervousness, the overwhelming odour of raw tobacco, the out-of-province licence plates, and cigarette packages bearing Quebec stamps. This, when viewed through the officer's experience and training, rendered the probability of a large quantity of tobacco in the accused's vehicle very high.

The trial judge also erred by inferring that the officer ought to have known there were other possible causes for the overwhelming odour of raw tobacco. The trial judge speculated that the officer had additional knowledge that he was withholding from the court. The trial judge should have only considered the actual training and knowledge revealed by the evidence, and assessed whether the grounds for arrest were objectively reasonable looking through that lens.

The Court of Appeal concluded that the trial judge erred in finding that, objectively, the arresting officer lacked reasonable grounds to arrest the accused for possessing contraband tobacco. The Crown's Appeal was allowed, the accused's acquittal set aside and a new trial ordered.

Complete case available at www.canlii.org

CAVITY EXAMINATION NOT A CHARTER SEARCH: DOCTOR NOT A STATE AGENT

R. v. Johal, 2015 BCCA 246

The accused sold a small amount of crack cocaine to an undercover police officer for $100 after the officer dialed a number suspected to be associated with a dial-a-dope operation. He was immediately apprehended, arrested for trafficking and informed of his *Charter* rights. The police searched the car he had been driving but found no drugs. He was transported to the police station where he was strip searched by two different police officers. The strip search was conducted in a private room with no windows. An officer observed what appeared to be white powder around the accused's anus and blood in his underpants. The officer suspected that the accused had hidden a bag of drugs in his rectum even though he could not see anything in it. Nevertheless, the officer feared the bag may have burst, posing a risk to the accused's safety. A second officer continued the strip search. He too observed white power around the accused's anus and what seemed to be blood on his underpants. This officer was also concerned that a bag of drugs may have burst in the accused's rectum despite his denials that he had not hidden any drugs. Both officers then took the accused to the hospital. They explained to a doctor their suspicion that drugs may be hidden in the

accused's rectum and expressed concern for his health and safety. The doctor told the accused that he had to submit to an internal search. The officers left the room and the doctor digitally searched the accused's rectum while he was still handcuffed. Nothing was found. Then, about 30 minutes later, the accused was x-rayed. The x-ray showed there were no drugs hidden in his body. The accused was taken back to the police station where he was photographed, fingerprinted and released on a promise to appear. He was subsequently charged with cocaine trafficking.

British Columbia Provincial Court

The accused sought a stay of proceedings based, in part, on the ground that the strip and internal searches were unreasonable under s. 8 of *Charter*. The judge disagreed and found there were no *Charter* breaches. The arresting officer "had valid concerns" that the accused may have hidden drugs in his rectum and was concerned for his safety. Although two officer's were involved with the strip search, the judge considered this a single search which did not breach s. 8. As for the internal search at the hospital, the judge found the doctor was not a state agent whose conduct needed to be scrutinized under the *Charter*. In the judge's view, the doctor performed the internal search solely for medical purposes. The accused was convicted of cocaine trafficking.

British Columbia Court of Appeal

The accused argued, among other grounds, that the trial judge erred in assessing both the strip searches and the internal search. In the accused's view, the trial judge did not consider that there were two strip searches and erroneously found the officer's suspicions were sufficient to justify those searches. As for the internal search at the hospital, the accused contended that the officers' suspicions were insufficient to justify it and the doctor was a state agent. He had acted at the request of the police rather than solely for medical purposes.

The Crown, on the other hand, submitted that the officer had reasonable grounds to believe the accused might have been concealing drugs and properly considered the actions of both officers to constitute one search. The doctor, the Crown argued, was not acting as a state agent and the medical treatment provided was not a search for *Charter* purposes.

The Strip Search

A strip search may be conducted incidental to a lawful arrest provided it is undertaken for the purpose of discovering evidence related to the reason for the arrest, justified by reasonable and probable grounds and carried out in a reasonable manner. In this case, the accused was lawfully arrested and the police were searching for drugs, which was related to trafficking. The Court of Appeal concluded the trial judge did not err in finding there were reasonable and probable grounds for the strip search. "[The accused] was operating a dial-a-dope operation and he sold crack cocaine to an undercover officer, yet there were no other drugs found in his vehicle," said Chief Justice Bauman speaking for the unanimous Court of Appeal. "In the experience of the arresting officers, traffickers sometimes conceal drugs in their underpants or rectum." The strip search was also carried out in a reasonable manner:

> In my opinion, the judge did not err in finding that the first search was conducted reasonably. It was conducted in a private room at the police station by a male officer, who acted quickly and ensured [the accused] was not completely undressed at any one time. [The officer] did not touch [the accused]. ...
>
> The second look by [another officer] is best analysed for the purposes of s. 8 as a continuation of the same "search". [This officer] was involved only because [the arresting officer] wanted a second opinion about the white powder and blood he had observed. The evidence was that the two officers had the same motivation and their conduct was identical in all material respects. ... [paras. 31-32]

s. 8 Charter
Everyone has the right to be secure against unreasonable search or seizure.

STRIP SEARCHES: THE BARE ESSENTIALS

In *R. v. Golden*, 2001 SCC 83 the Supreme Court of Canada provided a list of 11 questions that are useful indicators in determining the reasonableness of a strip search. These questions outline a framework for the police in deciding how best to conduct a Charter compliant strip search incident to arrest.

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

The Internal Search

The Court of Appeal upheld the trial judge's ruling that the doctor was not a state agent whose conduct had to be assessed for *Charter* compliance. "A doctor who acts at the request of police is a state agent unless his or her action is performed 'solely for medical purposes'," said Chief Justice Bauman. In this case, "the officers anticipated that the doctor would conduct an internal search and were prepared to seize any evidence the doctor discovered, but the officers did not direct the doctor to conduct the search. Rather, it was the doctor himself who deemed an internal search to be necessary for [the accused's] health and safety."

The fact the police anticipated a doctor would deem an internal search necessary for medical purposes did not mean they directed it. The police believed that a bag of drugs may have burst in the accused's body which would have placed him in imminent danger. "It is clearly uncontroversial and beyond reasonable dispute that is dangerous to have a burst package of drugs in one's body," said Chief Justice Bauman. "I am prepared to take judicial notice of the grave health and safety risk of having significant

"A doctor who acts at the request of police is a state agent unless his or her action is performed 'solely for medical purposes'."

quantities of heroin, cocaine or other similar drugs rapidly absorbed into one's blood stream."

The Court of Appeal found it was "appropriate to conclude, even absent medical evidence, that the internal search was necessary for [the accused's] health and safety. The doctor was not investigating or attempting to collect evidence on behalf of the officers; the search was conducted solely for medical purposes." And, even if the accused felt he had no choice but to submit to the internal search and did not give his consent to perform it (including the x-ray), this would be a medical ethics and possibly civil case rather than a *Charter* compliance issue affecting the constitutional analysis. The doctor acted solely for medical reasons and was not a state agent.

A NOTE ABOUT NOTES

Neither officer made any notes about the reasons for wanting to strip search the accused. The Court of Appeal found this deficiency "troubling" but not sufficiently serious to render the strip search unreasonable under s. 8 of the *Charter*. This should, however, serve as a reminder for officers to prepare accurate, detailed and comprehensive notes, particularly about the manner in which a search is conducted. The manner of a search is an essential element to a s. 8 analysis.

The accused's appeal was dismissed and his conviction upheld.

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

"It is clearly uncontroversial and beyond reasonable dispute that is dangerous to have a burst package of drugs in one's body."

EXIGENT CIRCUMSTANCES JUSTIFIED SAFETY SEARCH DESPITE UNLAWFUL DETENTION

R. v. Fountain, 2015 ONCA 354

The accused and another young black male were walking past a police car when he was singled out and called over for questioning. The police officer was part of the Toronto Anti-Violence Intervention Strategy (TAVIS), a community policing program within the Toronto Police Service. TAVIS officers engage in pro-active policing, sometimes randomly approaching people and talking to them. Information revealed during these encounters may be of a general or investigative interest and may be documented by means of a Field Investigative Report ("208 card") with identification and association information. This information is used to build and maintain a database of individuals and their associates, primarily in high-crime or so-called "priority" areas.

The officer, after identifying the accused and confirming there were no outstanding warrants of arrest for him, began to fill out a 208 card. A third man, unknown to either the accused or the officer, walked up behind the officer and his partner, and began interrogating the police about harassing the men. The accused abruptly turned sideways, bladed his body, placed his left arm on his left hip, and took two paces backwards. The officer commanded the accused to show his hands, but he failed to do so. The officer reached out, patted the accused's side, felt a hard object and yelled "gun". The accused bolted and a gun fell out of his jacket as he jumped a fence. He was quickly apprehended. The entire encounter from the officer's initial approach to the pat-down lasted only about three minutes. The accused was charged with a variety of offences related to possessing an illegal handgun.

Ontario Court of Justice

The judge recognized that each street-level encounter must be assessed on its own merits even though pro-active policing programs have generally passed

"A person blades his body when he turns sideways to his counterpart. A person may blade his body to protect a firearm held on one side."

Charter scrutiny. He noted that the police practice known as carding treads "a very fine line depending on the particular circumstance of any given situation." The judge found that the accused had been arbitrarily detained (psychologically) when the uniformed officer ordered him, a young, black man, to come over and talk. The officer asked if he had any open warrants and planned to arrest the accused if he did. He told the accused to keep his hands down and did not tell him that he was free to leave. In the judge's view, a reasonable person in these circumstances would have felt compelled to obey the officer and that he could not walk away.

However, the judge found the pat-down search reasonable because it flowed from exigent circumstances, even though it took place during an unlawful detention. "In all the circumstances it was absolutely necessary for the officer to conduct this safety pat-down to protect himself," said the judge. "The conduct of the officer was entirely reasonable, lawful, and understandable, and justified on officer-safety grounds."

The judge concluded that the discovery of the gun did not flow from the unlawful detention, but from a lawful pat-down search. Therefore, s. 24(2) of the *Charter* was not triggered. However, even if the gun's discovery resulted from the arbitrary detention, such that the gun was "obtained in a manner" that violated the *Charter*, the trial judge found the gun was admissible as evidence under s. 24(2). The accused was convicted of possessing the firearm and sentenced to four years in prison.

Ontario Court of Appeal

The accused argued, in part, that the trial judge erred in applying the exigent circumstances doctrine to justify the pat-down search. In his view, exigent circumstances could not justify the search because the police were not in the lawful execution of their duties at the time. He asserted that he had been arbitrarily detained from the moment the officer began speaking to him until the search. As well, he contended that the police created the exigent circumstances and could not rely on them to justify the search. Since the search was unlawful, the gun should have been excluded as evidence after a fresh s. 24(2) analysis was conducted.

Detention

Justice LaForme, writing the Court of Appeal's decision, concluded that the accused was unlawfully detained from the moment police called out to him and began a conversation. The stop was a "focused, investigative engagement" to determine if the accused was wanted and the officer admitted he had no basis to detain the accused when he began speaking to him. He had no suspicion that the accused was involved in any particular criminal activity. Since the detention was unlawful it breached s. 9 of the *Charter*.

Pat-Down Search

Although a warrantless search is presumptively unreasonable, a warrantless safety search, even one conducted outside of an investigative detention, may be reasonable in appropriate circumstances. "A safety search is generally 'a reactionary measure', often 'driven by exigent circumstances'," said Justice LaForme. "For a safety search to be lawful, an officer must 'have reasonable grounds to believe that there

"Warrantless searches are presumptively unreasonable. But a warrantless safety search may be reasonable in appropriate circumstances. A safety search is generally 'a reactionary measure', often 'driven by exigent circumstances'. For a safety search to be lawful, an officer must'"have reasonable grounds to believe that there is an imminent threat" to police or public safety'. A safety search must also be carried out reasonably."

is an imminent threat' to police or public safety." Plus, a safety search must be conducted reasonably. And, "even if a safety search takes place in the context of an unlawful detention, exigent circumstances can still justify the search."

The Court of Appeal rejected the accused's argument that the police could not justify the warrantless search on the basis that the exigent circumstances were created by their own unlawful conduct. There was no evidence that the third party intervened because of an unlawful detention. "A third party bystander could not easily tell, in all the circumstances of this case, whether [the officer] had detained the [accused] or, if he had detained the [accused], whether the detention was lawful," said Justice LaForme. "The third party would likely still have intervened even if [the officer] had not detained the [accused] or if he had lawfully detained the [accused]."

The Court of Appeal found the doctrine of exigent circumstances justified the search. The police did not create their own exigent circumstances. Not only did a third party interject in the encounter, the accused became nervous, "bladed" his body, placed his left arm on his left hip, and took two paces backwards. "A person blades his body when he turns sideways to his counterpart," noted Justice LaForme. "A person may blade his body to protect a firearm held on one side." In this case, the circumstances provided the officer with reasonable grounds to believe the accused presented an imminent threat to his safety and conduct the pat-down search.

s. 24(2) - Admissibility

The Court of Appeal disagreed with the trial judge that the unlawful detention and the gun's discovery were not sufficiently connected to warrant a s. 24(2) analysis. Rather, the lawful search was sufficiently linked to the unlawful detention to trigger a s. 24(2). However, the gun was nonetheless admissible.

The accused's appeal was dismissed.

Complete case available at ww.ontariocourts.on.ca

INCIDENTAL SEARCH MAY PROCEED ARREST PROVIDED GROUNDS PRE-EXIST SEARCH

R. v. Richards, 2015 ONCA 348

A known, reliable confidential informer told an OPP officer about a man selling cocaine in Leamington, Ontario. He provided the trafficker's nickname, city where he lived, approximate age, kind of car he drove, and described him as a short Jamaican male. Two days later the officer was able to obtain the accused's name from a Windsor officer who recognized the nickname, and also the accused's description, date of birth and photograph. Six days later, the informer was shown the accused's photograph and confirmed he was the trafficker. The informer also told the officer that the man was going to travel to Toronto to pick up crack cocaine and would return on a Greyhound bus to Windsor at about 5:00 am the following morning. He would have a quantity of crack cocaine with him and would take a Leamington Yellow Taxi Ca, which would be waiting for him at the Windsor bus station, to Leamington.

The OPP officer checked the Greyhound bus schedule and learned that a Greyhound bus was scheduled to leave Toronto and arrive at the Windsor bus depot at about 5:00 am the next morning. Police set up surveillance on the bus depot. They immediately noticed a Leamington Yellow taxi, with engine running and lights on, parked in the lot next to the bus depot. Shortly before 5:24 am, a Greyhound bus arrived at the Windsor bus depot. A man carrying a knapsack and a white plastic bag exited the bus, walked towards the taxi and entered its passenger side. Although the man had a hoodie pulled up over his head, the OPP officer believed he was the accused because he was short, there were few people on the bus, and he walked directly to the waiting taxi and entered it. When the taxi pulled out of the parking lot the police followed it. The OPP officer believed that he had reasonable and probable grounds to arrest the accused for cocaine possession.

At 5:30 am, the OPP officer contacted a Leamington police sergeant, advised him of the situation and asked that the taxi be stopped and the accused arrested. The accused was also on a recognizance not to possess any cell phones, electronic devices or drugs. The sergeant directed his members to stop the taxi. It was pulled over and three people were inside – the driver, a female in the front passenger seat and the accused. He was sleeping in the back seat, using a backpack as a pillow for his head. The driver said he picked up his passengers in Windsor. The female passenger was recognized as someone heavily involved in the Leamington drug scene. When the officer opened the taxi's rear door to speak with the accused, he immediately noticed a fairly large bulge in the accused's left pocket, which he believed could be a weapon. He patted the outside of the jacket pocket, felt something hard and asked the accused "what do you have in your pocket here?" The accused reached into his pocket, pulled out three cellphones and was arrested for breach of recognizance. He was patted-down but no drugs were found. The police seized the backpack from the rear seat of the taxi. The female passenger claimed ownership of it and was then arrested for possessing a controlled substance. Police searched the taxi but found no drugs. At the police station, the female passenger claimed that the backpack did not belong to her and that she did not know who owned it. Police then searched it for drugs. They found 28.5 grams of crack cocaine hidden inside a pair of rolled-up tube socks, a number of documents in the accused's name and items of men's clothing. The accused was then re-arrested for possessing a controlled substance for the purpose of trafficking.

Ontario Superior Court of Justice

The officer who conducted the initial traffic stop said he "wanted a little more" before he arrested the accused for possessing a controlled substance, despite the information received from the OPP. He testified that when he spoke with the accused after pulling over the taxi he intended to gather his own grounds for arrest. When he saw the bulge in the accused's jacket he was concerned about his safety.

The accused argued that the officer did not have the necessary subjective grounds to arrest him during the traffic stop and therefore his ss. 7, 8, and 9 *Charter* rights had been infringed. The judge disagreed and found there had been no *Charter* breaches. When the officer saw the bulge in the accused's jacket he had reasonable grounds to believe his safety was at risk. The evidence was admitted and the accused was convicted of possessing cocaine for the purpose of trafficking as well as two breaches of his recognizance for possessing cell phones and drugs. He was sentenced to 18 months in prison.

Ontario Court of Appeal

The accused again argued that the officer did not have the subjective grounds to arrest him during the traffic stop. As such, the trial judge erred in failing to find that his ss. 8 and 9 *Charter* rights were breached when the taxi was stopped and he was searched. As well, he submitted that the judge erred in failing to find that his s. 8 rights were breached when his backpack was searched at the police station. As a result, he contended that the evidence ought to have been excluded under s. 24 (2).

The Traffic Stop

The Court of Appeal found that, even if the officer did not subjectively believe he had reasonable grounds to arrest the accused for possessing a controlled substance, he had a lawful basis to conduct an investigative detention. This requires:

> On an objective view of the totality of the circumstances, the officer must have a reasonable suspicion that the particular individual is implicated in the criminal activity under investigation and that the detention is necessary. [reference omitted, para. 32]

Here, the officer reasonably suspected that the accused was involved in cocaine trafficking. The officer was entitled to rely on the information and direction of his sergeant to conduct an investigative detention. The sergeant had reasonable grounds to

"A police officer has the power to conduct a safety search incident to an investigative detention when the officer believes, on reasonable grounds, that his or her safety, or the safety of others, is at risk and that, as a result, it is necessary to conduct a search. The search must also be carried out in a reasonable manner."

believe that the accused had controlled substances with him. That information was received from the OPP and clearly implicated the accused in the criminal activity under investigation - possessing cocaine for the purpose of trafficking.

The Pat-down Search

As for the pat-down search, it was a lawful safety search incident to detention and did not violate s. 8 of the *Charter*:

> A police officer has the power to conduct a safety search incident to an investigative detention when the officer believes, on reasonable grounds, that his or her safety, or the safety of others, is at risk and that, as a result, it is necessary to conduct a search. The search must also be carried out in a reasonable manner. [references omitted, para. 34]

In this case, the officer had reasonable grounds to believe that his safety was at risk when he patted down the accused's jacket:

> When [the officer] opened the taxi door to speak with the [accused], he saw a fairly large bulge in the [accused's] jacket pocket. He was close to the [accused] on a dark and deserted rural highway at about 6:00 a.m. He had been told by his instructing supervisor that there were reasonable and probable grounds to arrest the [accused] for possession of crack cocaine, and as a police officer, he knew it is common for drug traffickers to carry weapons. It was entirely reasonable for [the officer] to be concerned that the bulge in the [accused's] pocket might be caused by a weapon. [para. 36]

The pat-down search was also conducted in a reasonable manner. "[The officer] briefly patted down the outside of the [accused's] jacket in the area of the bulging pocket," said Justice Gillese. "He did not dig into the [accused's] pocket nor did he ask the [accused] to empty his pockets. The pat-down was brief, restrained and limited to the one specific area of concern." This was not a "pretext" search as suggested by the accused.

The Backpack Search

Even though the police searched the backpack before the accused was arrested for possessing a controlled substance, it was still properly conducted as an incident to arrest:

> A search conducted prior to arrest will nonetheless be incidental to that arrest if: (1) prior to the search, the police had reasonable and probable grounds for the arrest; and (2) the arrest occurs quickly after the search. [references omitted, para. 41]

First, there were reasonable and probable grounds to arrest the accused for drug possession prior to searching the backpack. When the sergeant directed the backpack be searched, he had reasonable and probable grounds to arrest the accused for possession of a controlled substance, which did not arise from the discovery of the drugs in the backpack. Rather, the sergeant's grounds came from the compelling and credible information provided by the OPP. Thus, he had reasonable grounds to arrest for possession before the search. These grounds were based on the "totality of the circumstances" and included factors such as "the reliability of the tipster as a source of information for

"A search conducted prior to arrest will nonetheless be incidental to that arrest if: (1) prior to the search, the police had reasonable and probable grounds for the arrest; and (2) the arrest occurs quickly after the search."

the police, the source of the tipster's information, and the extent to which the police are able to confirm the information before the arrest":

> [The OPP officer's] information began with the receipt of detailed, compelling information from a reliable CI. The CI told [the OPP officer] that the [accused] would arrive on a Greyhound bus from Toronto, in the Windsor bus station at about 5:00 a.m. on February 25, 2010, with a quantity of crack cocaine and that a Leamington Yellow taxi would be waiting for the [accused] to take him to Leamington, where he lived.
>
> [The OPP officer] testified that the CI had never provided false information. The CI had frequently given him information about drugs and firearms over the two-year period leading up to the events in question. On two occasions, firearms were seized and arrests made as a result of information from the CI. The CI did have a criminal record and provided the information for financial compensation. [The OPP officer] testified that the CI had first-hand knowledge of the information provided.
>
> Furthermore, as on many prior occasions, [The OPP officer] was able to verify material aspects of the information provided by the CI. [paras. 44-46]

As well, the accused was at the police station when the backpack was searched and was arrested on the drug charges shortly after the drugs were discovered in the backpack.

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

R. v. Richards, 2015 ONCA 348 Grounds Grid

Confidential Informer (CI) Information	Corroboration
The CI provided the nickname and a description of a man who was selling cocaine in Leamington. The CI described the man as a short Jamaican.	The officer contacted the Windsor Police, who recognized the nickname provided by the CI. The Windsor Police identified the trafficker as the accused. A photograph of the accused was obtained and other information, including his date of birth. The officer showed the photograph to the CI who confirmed that the accused was the man who had been selling cocaine in Leamington.
The CI said the accused was going to travel to Toronto to pick up crack cocaine and would return to Windsor by Greyhound bus the following day around 5 am.	The officer reviewed the Greyhound bus schedule and confirmed that a Greyhound bus was scheduled to leave Toronto and arrive in Windsor about 5:00 a.m. The officer went to the Windsor bus depot and saw a Greyhound bus from Toronto arrive at 5:24 am.
The CI said that a Yellow Taxi Cab Company taxi from Leamington would be waiting for the accused's arrival at the Windsor bus depot.	When the officer arrived at the Windsor bus depot, he immediately noticed a Leamington Yellow Taxi Cab Company taxi parked in the parking lot next to the bus depot. The taxi's engine was running and its lights were on.
The CI said that after the accused's bus arrived at the Windsor bus depot, he would take the Leamington Yellow Taxi Cab Company taxi that had been waiting for him from Windsor to Leamington.	At about 5:24 am, the officer saw a person he believed to be the accused leave the bus at the Windsor bus depot, walk towards the Leamington Yellow Taxi Cab and enter it. The police followed the taxi as it drove to Leamington. Although the officer could not see the man's face as he walked towards the taxi because he had a hoodie pulled up over his head, the officer believed that this person was the accused because he exited the bus and walked towards the waiting Yellow taxi, he was a short man and there were not many people on the bus.

POLICE DID NOT CREATE EXIGENCIES BY NOT ARRESTING

R. v. Paterson, 2015 BCCA 205

Police and ambulance were dispatched to an incomplete 911 call from a cell phone. The police were informed that the 911 caller was female, crying and apparently injured. The owner of the cellphone (the mother) had given it to her daughter to use. The mother called her daughter's place of employment but was told she had not shown up for work. The mother then drove to her daughter's boyfriend's home where she saw her daughter's car parked. The mother called the cell phone but received no answer. The mother then told police that she thought her daughter was with her boyfriend, the accused, who lived in a nearby apartment. The mother said that the two had a volatile relationship and had a "previous history", which an officer understood was a previous assault. The mother also said the accused had a shotgun.

The police went to the apartment building and learned that the daughter had been transported by ambulance to the hospital with unknown injuries. Officers concluded that the dropped 911 call came from the accused's apartment and wanted to determine if anyone else was in the apartment or needed assistance. They knocked several times and announced "police", yet no one answered. The door was locked and light could be seen under it, but nothing was heard. As an officer put a pass key obtained from the manager in the door, the accused opened it. As soon as the door opened, the officer smelled a fairly strong odour of raw and smoked marihuana. A second officer could only smell smoked marihuana. When questioned about the 911 call, the accused first said he did not know anything about it, and then said they should ask his girlfriend. He told police he found her on the floor when he got out of the shower, and helped her up and out of the apartment. The accused seemed "physically okay" and was not in need of any assistance. The police noted his cell phone rang non-stop while he was questioned.

What the police found included:

- a loaded Smith & Wesson 38 special revolver.
- a Ruger P85 9-millimetre semi-automatic pistol containing a 15-cartridge ammunition magazine.
- a Ruger P90 45-calibre semi-automatic pistol containing an ammunition magazine with seven cartridges in it.
- an IMI Desert Eagle 44-calibre Remington Magnum semi-automatic pistol with an ammunition magazine with eight cartridges in it.
- cocaine worth $31,200 at the wholesale level.
- methamphetamine worth $5,850 at the wholesale level.
- ecstasy worth $17,466 at the wholesale level.
- a bulletproof vest.
- a bag of marihuana.
- $30,000 in cash in a box underneath the couch.

When questioned about the marihuana smell, the accused denied the odour was coming from his apartment but then admitted smoking some. He said he still had some "roaches" (unconsumed marihuana) lying around. The police decided to seize the marihuana and "be on their way" without charging the accused with drug offences. The accused agreed to hand over the "roaches" but attempted to close the door. An officer used his foot to prevent the door from closing fearing that the accused would destroy evidence and for officer safety (they had been told he had a shotgun). The accused then told the officer that he could enter the apartment. When police entered, the accused picked up a baggie on the kitchen counter to hand over. The officer saw a bullet-proof vest in the living room area, a handgun on an end table and a bag of pills on a speaker stand. He arrested and searched the

accused, finding a Blackberry cell phone and $4,655 in cash. The premises was "cleared" for officer safety purposes. The police were looking for any other persons. In a closet police found two large bags of orange and blue pills (ecstasy), and a bag of crack cocaine. The apartment was secured, the accused transported to the police station and a search warrant under the *Controlled Drugs and Substances Act* (*CDSA*) was obtained. When police attended the hospital, the injured woman said she slipped, hit the back of her head and called 911. When the search warrant was executed, three more handguns were found in a bedroom drawer as well as another bag of drugs in the kitchen. A Form 5.2 was filed by police several months after the seizure. The accused was charged with several offences

British Columbia Supreme Court

The accused argued his rights under s. 8 of the *Charter* had been violated and sought the exclusion of the evidence. In his view, the police entry into the apartment building and then his apartment were unreasonable. The judge, however, disagreed. He concluded that the police were entitled to enter the apartment building, based on their common law duty to protect life and public safety, and were entitled to enter the apartment unit based on exigent circumstances. Entering the apartment building, listening at the accused's door, looking under it for light, testing the doorknob to see if it was locked and inserting a key into the lock and turning it was all reasonable. Although the police knew the woman was not in the apartment, the judge accepted the officer's testimony that it was common in 911 calls for there to be more than one victim.

As for the search, the police had the grounds to obtain a search warrant under s. 11(1) of the *CDSA* but by reason of exigent circumstances it was impracticable to do so. The smell of marihuana and the accused's admission he had some provided the grounds. The exigent circumstances resulted from the belief the accused would likely have destroyed the evidence while a warrant was obtained since the police were not going to arrest him. As well, the police had a right to "clear" the apartment on officer safety grounds. The judge upheld the search warrant but found the delay in filing the incorrectly completed 5.2 report constituted a breach of s. 8. He nevertheless admitted the evidence under s. 24 (2). The accused was convicted of nine offences: possessing illicit drugs x 2, possessing illicit drugs for the purpose of trafficking x 3 and unlawful possessing a firearm x 4.

British Columbia Court of Appeal

The accused appealed his convictions arguing, in part, that the trial judge erred in finding that the entry and search of his apartment was justified based on exigent circumstances.

BY THE BOOK:

s. 11 ***Controlled Drugs and Substances Act***

s. 11 (1) A justice who, on ex parte application, is satisfied by information on oath that there are reasonable grounds to believe that

(a) a controlled substance or precursor in respect of which this Act has been contravened,

(b) any thing in which a controlled substance or precursor referred to in paragraph (a) is contained or concealed,

(c) offence-related property, or

(d) any thing that will afford evidence in respect of an offence under this Act or an offence, in whole or in part in relation to a contravention of this Act, under section 354 or 462.31 of the Criminal Code

is in a place may, at any time, issue a warrant authorizing a peace officer, at any time, to search the place for any such controlled substance, precursor, property or thing and to seize it.

...

(7) A peace officer may exercise any of the powers described in subsection (1), (5) or (6) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain one.

Apartment Entry

The accused submitted that the police created the "exigent circumstances" and the impracticability of obtaining a search warrant by the way they handled the situation. But Justice Bennett, speaking for the unanimous Court of Appeal, disagreed. In her view, the police had the necessary grounds to arrest the accused, to obtain a search warrant and in believing that exigent circumstances existed:

> The police smelled marihuana and [the accused] admitted having marihuana in the premises. [The accused] was in the premises, and the police had no intention of arresting him. I note, parenthetically, that the trial judge was alive to the possibility that the police were creating a situation so they could enter the apartment without a warrant, and found that they had not done so. He accepted their evidence that they only wanted to seize the "roaches", and then would be on their way in a "no case" seizure. Had they left [the accused] to obtain a warrant, he could have easily destroyed the roaches.
>
> The next question is whether the trial judge was correct in concluding that it was "impracticable" to obtain a warrant. In R. v. Erickson, 2003 BCCA 693…, this Court concluded that "impracticable" means "something less than impossible and imports a large measure of practicality, what may be termed common sense".
>
> In this case, the police would have had to arrest [the accused], a much greater interference with his liberty rights, and obtain a warrant to seize the roaches. The police weighed these options, and concluded that it was not practical (in my words) to take those steps for what they believed would be a "no case" seizure. In these circumstances, the trial judge concluded that it was impracticable to obtain a warrant, and there is no basis to interfere with this finding. [paras. 72-74]

The accused's appeal was dismissed.

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

BURDEN OF PROVING ARBITRARY DETENTION LIES WITH ACCUSED

R. v. Hardy, 2015 MBCA 51

The accused was arrested for failing to provide a roadside breath sample after he made a number of attempts to blow into an ASD. Police had stopped him when he was seen driving a vehicle in the dark without its headlights on and did not stop at a stop sign. He had glossy eyes, admitted to drinking two beers and there were unopened cans of beer in his vehicle. He was transported to the police station where a demand that he provide a breathalyzer sample was made. After refusing to provide a breathalyzer sample he was detained in custody overnight at a correctional facility under s. 497(1.1) of the *Criminal Code*. He was released the following morning after having been detained for about 12 hours. He was charged with refusing to provide a breath sample by means of an approved screening device (ASD).

Manitoba Provincial Court

The accused argued that the decision to detain him overnight was not based on his level of intoxication but rather as punishment for the fact that he refused to provide a breathalyzer sample at the police station. He submitted that the police failed to comply with s. 497 and therefore his detention was arbitrary under s. 9 of the *Charter*. He wanted a judicial stay of proceedings under s. 24(1) of the *Charter* or, at least, the exclusion of his refusal to provide a breath sample under s. 24(2). The judge, however, convicted the accused. She found that the accused failed to establish a s. 9 *Charter* breach:

> There is no evidence in this case of any systemic abuse with regard to the application of Section 497. Rather, the evidence supports a finding that an individual assessment is made in each case with respect to the issue of release. That decision is not left solely in the hands of the investigating officer, but rather is subject to review by the supervising sergeant prior to implementation.

> There is ample evidence from credible police officers, some of which is corroborated by [the accused's] own evidence, that [he] was in an emotional and agitated state. That he was belligerent and uncooperative with police. There was evidence of consumption of alcohol and police formed a subjective belief the accused was intoxicated. Section 497(1.1) is not exhaustive and police clearly are to consider the totality of the circumstances related to an accused in assessing whether a public safety justification exists for detaining the accused. Here, as I have said, they were dealing with a highly emotional, uncooperative person they believed to be intoxicated and acting in a manner inconsistent with his own best interests. I can come to no conclusion other than that the police decision to lodge the accused in custody, pursuant to Section 497 of [t]he Code, was justifiable.
>
> The length of detention was essentially overnight, and I find that it was not an excessive period of time in all the circumstances. There is nothing in the evidence I have accepted as credible, to support a finding that the police exercise of discretion here was capricious or unjustifiable. Ultimately, the accused bears the burden of establishing a Section 9 [C]harter breach on a balance of probabilities, and he has failed to do so here. His own evidence was very unreliable … .

Manitoba Court of Queen's Bench

The accused appealed the trial judge's dismissal of his *Charter* application. The appeal judge, however, agreed with the trial judge and adopted her reasoning in determining that the accused was properly detained for reasons of public interest pursuant to s. 497(1.1)(a).

Manitoba Court of Appeal

The accused again appealed the *Charter* ruling arguing that a s. 9 breach resulted from his warrantless arrest and detention under s. 497 and the onus was on the Crown to show his detention was not arbitrary. Further, he suggested the judge erred in finding his continued detention justified. In his view, the decision to detain him was not properly assessed, was for an improper purpose and he should have been given the opportunity to contact a sober third party to whom he could be released. Finally, he asserted that once detained, he should have been monitored to determine whether the initial conditions for detention continued to exist.

s. 9 Charter
Everyone has the right not to be arbitrarily detained or imprisoned.

Arbitrary Detention

An unlawful detention is arbitrary and therefore amounts to a s. 9 violation. Said another way, a lawful detention is not arbitrary unless the law authorizing it is arbitrary. In *R. v. Grant*, 2009 SCC 32, the Supreme Court of Canada found this approach mirrored the s. 8 jurisprudence in that a search must be authorized by law, the law must be reasonable and the search must be carried out in a reasonable manner.

But the accused took this one step further and analogized that once it was shown that the accused was arrested and detained without warrant, the subsequent detention must be presumed arbitrary and the onus shifted to the Crown to establish that the detention was justified in the public interest. This is similar to the case law that once an accused has demonstrated that a search or seizure was warrantless it is presumed to be unreasonable and the onus shifts to the Crown to show it was reasonable. The Crown, on the other hand, contended that the accused bears the legal burden to establish, on a balance of probabilities, that there were no reasonable grounds for the detention.

The Court of Appeal confirmed that the legal burden of proving an arbitrary detention, as in this case, lies with an accused. However, the Crown may be required to explain, by adducing evidence, the reasons for detention:

BY THE BOOK:

s. 497 Criminal Code

s. 497 (1) Subject to subsection (1.1), if a peace officer arrests a person without warrant for an offence described in paragraph 496(a), (b) or (c), the peace officer shall, as soon as practicable,

(a) release the person from custody with the intention of compelling their appearance by way of summons; or

(b) issue an appearance notice to the person and then release them.

Exception

497. (1.1) A peace officer shall not release a person under subsection (1) if the peace officer believes, on reasonable grounds,

(a) that it is necessary in the public interest that the person be detained in custody or that the matter of their release from custody be dealt with under another provision of this Part, having regard to all the circumstances including the need to

(i) establish the identity of the person,

(ii) secure or preserve evidence of or relating to the offence,

(iii) prevent the continuation or repetition of the offence or the commission of another offence, or

(iv) ensure the safety and security of any victim of or witness to the offence; or

(b) that if the person is released from custody, the person will fail to attend court in order to be dealt with according to law.

The accused has not convinced me that the circumstances of this case create a presumption of arbitrariness, thereby shifting the legal burden to the Crown such as in s. 8 Charter warrantless searches or Charter waiver cases. Unlike those exceptions, in this case the alleged breach is post-arrest, it does not involve circumstances where a breach may bear directly on the guilt or innocence of an accused, and it does not involve evidence statutorily required for proof of an offence.

However, in certain circumstances where an accused raises a s. 9 argument which the Crown seeks to justify on the basis of s. 497(1.1), an evidential burden may arise requiring the Crown to explain the reasons for the detention.

...

Thus, where an accused presents a prima facie case of arbitrary detention, an evidential burden arises for the Crown to present evidence justifying the detention. The evidential burden arises because, it is the police officers who have the exclusive knowledge of the reasons for the detention.

In the context of s. 497(1.1), the Crown's evidential burden is to adduce evidence as to the peace officer's belief, on reasonable grounds, that detention is necessary on any of the grounds enunciated in the section. After considering all of the facts and circumstances, including the objective reasonableness of the police officer's subjective belief and any alternative or improper motive on the part of the police, the court then decides whether a breach has been proven. This is in contrast to placing a legal burden on the Crown which would dictate that, in the absence of any evidence having been called by the accused except for the fact that he was arrested without warrant, the Crown would bear the legal burden of proving compliance with s. 9 in every case where an accused has been detained.

In this case, the accused having shown that he was arrested without warrant and detained in a correctional facility for 12 hours, the evidential burden shifted to the police/Crown to justify his detention pursuant to s. 497(1.1). [paras. 39-44]

Was the Detention Justified?

Under s. 497(1.1) there are a number of factors to be considered in the decision to detain, including the public interest, establishing identity, securing and preserving evidence, prevention of continuation of the offence or of the commission of another offence, ensuring the safety and security of a victim, as well as administrative concerns such as ensuring court attendance. "The decision to detain is highly contextual," said Justice Cameron. "There are numerous factors that courts have considered in deciding whether to detain an arrestee."

"[T]here is no bright line legal obligation to consider release to a sober third party in every instance."

In this case, the judge did not err in her determination that the detention was lawful under s. 497(1.1). She found "the accused was in an 'emotional and agitated state,' 'belligerent and uncooperative with police,' that there was 'evidence of consumption of alcohol and police formed a subjective belief the accused was intoxicated', and the accused was 'acting in a manner inconsistent with his own best interests'." Furthermore, she rejected the accused's evidence that the police threatened him with jail overnight if he did not comply with the breathalyzer demand. Ultimately, "the circumstances under which detention may be justified are varied, contextual and require individual assessment in each case."

Obligation to Release to a Sober Party

As for there being a positive legal obligation on the police to consider release to a sober third party, Justice Cameroon found there was no such duty. "In my view, there is no bright line legal obligation to consider release to a sober third party in every instance, as argued by the accused," she said. "Each case must be determined on its own facts. ... [T]he police obligation is to 'undertake a reasonable assessment of the sobriety of the accused and his or her suitability for release'." She also disagreed "that there is a positive legal obligation on the police to allow an accused an opportunity to phone and look for someone to pick him or her up." Again, such an analysis will be contextual and fact driven.

Continued Detention

The accused argued that, even if his detention was initially justified, there was an ongoing obligation on the police to continually assess the situation to determine whether the conditions for detention continued to exist or whether there was a change of circumstances requiring he be released "as soon as practicable." The Crown, on the other hand, submitted that once the decision to detain had been made, the detained person must be brought before a justice within twenty-four hours under s. 503.

Justice Camerson noted that there was no requirement for an ongoing and continuous reassessment process. "To start, there is nothing in s. 497 that requires that an accused be monitored during the 24 hours that he or she is detained prior to taking him or her before a justice." She continued:

> Furthermore, if a person is deemed acceptable for release prior to the expiry of 24 hours, this does not now mean that s. 497(1) comes into play mandating release "as soon as practicable." On the other hand, it does not mean that once it is determined that an accused person should be detained pursuant to s. 497(1.1), the detention must necessarily last until the accused is brought before a magistrate pursuant to s. 503. As previously mentioned, the police must make an individual assessment based on all of the circumstances in each case. [para. 63]

Release will depend on all the circumstances and the accused may call evidence that the length of his holding or continued detention was arbitrary. However, simply showing that an accused was held overnight may not be enough. Evidence such as the nature and frequency of contact an accused had with police may be required in the analysis.

The trial judge did not err in holding that the police decision to detain the accused overnight was unreasonable.

The accused's appeal was dismissed.

Complete case available at www.canlii.org

"[I]f a person is deemed acceptable for release prior to the expiry of 24 hours, this does not now mean that s. 497(1) comes into play mandating release 'as soon as practicable.' On the other hand, it does not mean that once it is determined that an accused person should be detained pursuant to s. 497(1.1), the detention must necessarily last until the accused is brought before a magistrate pursuant to s. 503."

BRITISH COLUMBIA: CANADA'S MOST EXPLOSIVE PROVINCE

According to data released by the Canadian Bomb Data Centre in 2015, Canada had a total of 137 explosive incidents in 2014. British Columbia ranked first among incidents, bombings, attempted bombings, improvised explosive device recoveries, hoax devices and explosives thefts. There were no deaths or injuries reported as a result of these incidents.

The following definitions will help explain the incidents reported in the table below.

Incidents – The number of times Explosives Disposal Units were called to scenes involving the possible use of explosives.

Bombings – Explosions of devices created for non-authorized or criminal use.

Attempted Bombings – An explosion where one or more IEDs failed to function because of an unintentional defect in design or assembly.

Hoax Devices – A device constructed from inert or non-explosive components intended to resemble actual bombs.

Improvised Explosive Device (IED) – A bomb created for non-authorized use.

Recovered IEDs – Number of IEDs, that were recovered by Explosives Disposal Units. At one incident, one or more IEDs can be recovered.

Explosive Thefts – Incidents that involved reporting stolen explosives materials.

Explosive Recoveries – Recovery of commercial and military explosives.

Source:
http://www.rcmp-grc.gc.ca/tops-opst/cbdc-ccdb/crim-use-usage-explo-eng.htm

Region	Incidents	Bombings	Attempted Bombings	Hoax Devices	Recovered IEDs	Explosive Thefts	Explosive Recoveries	Accidental Explosion
British Columbia	49	6	4	4	17	3	12	-
Alberta	8	-	1	2	2	-	3	-
Saskatchewan	12	-	-	1	-	-	8	-
Manitoba	6	-	-	2	-	-	-	1
Ontario	16	1	1	3	3	-	5	-
Quebec	5	-	-	1	1	-	3	-
New Brunswick	8	-	-	1	1	-	2	-
Nova Scotia	18	-	-	1	1	-	16	-
Prince Edward Island	2	-	-	-	-	-	2	-
Newfoundland	11	-	-	-	1	-	10	-
North West Territories	-	-	-	-	-	-	-	-
Yukon	2	-	-	-	-	-	2	-
Nunavut	-	-	-	-	-	-	-	-
Canada	137	7	6	15	26	3	63	1

2015 British Columbia Law Enforcement Memorial

Sunday, September 27, 2015 at 1:00 pm
Ceremony at the BC Legislature in Victoria, BC

Law Enforcement participants to form up in the 800 block of Wharf Street at 12:00 pm.

For further information call 250-592-2424 or email
Kent Thom Kthom@oakbaypolice.org or Stacey Trudgian Stacey.Trudgian@gov.bc.ca
or visit our website at http://www.bclem.ca

Host Agencies:
Oak Bay Police Department & BC Corrections

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BC's NEW LEFT LANE LAW

As of June 12, 2015, drivers in British Columbia must stay out of the leftmost lane of a multi-lane highway unless they have a good reason to travel in it. Under BC's *Motor Vehicle Act* a new section was added which requires drivers on multi-lane highways where the speed is more than 80 km/h per hour to stay to the right unless they are overtaking and passing another vehicle, moving left to allow traffic to merge, preparing for a left hand turn, or moving left to pass an official vehicle displaying a flashing light (such as a police car, ambulance, or tow truck). If the actual speed of traffic is below 50 km/h, such as periods of congestion, drivers can use the left-most lane to keep traffic flowing.

"During the Rural Highway Safety and Speed Review last year, I heard that one of the top driver frustrations across the province was being prevented from passing because someone won't leave the left lane," said Minister of Transportation and Infrastructure Todd Stone. ***"We have strengthened the law to give police better tools to crack-down on left-lane hogs."***

"Drivers who block the left lane increase the risk caused by aggressive drivers who will pass on the right or tailgate," said Chief Neil Dubord, chair of the BC Association of Chiefs of Police Traffic Safety Committee. ***"This change provides clarity to police officers who will enforce the requirement for vehicles to travel in the right lane."***

Penalty

The ticketed amount for violating s. 151.1(3) - improper use of leftmost lane - is $167, with three driver penalty points. This includes a $145 fine plus a $22 victim surcharge levy. If the ticket is paid within 30 days the fine is reduced by $25.

BY THE BOOK:

s. 151.1 BC's *Motor Vehicle Act*

When drivers must not use leftmost lane

s. 151.1 (1) In this section, "leftmost lane", in relation to a laned roadway to which this section applies, means the lane that is furthest to the left of the marked lanes available for traffic proceeding in the same direction, other than

(a) a bus lane,

(b) a high occupancy vehicle lane, or

(c) a designated use lane.

(2) This section applies to a laned roadway if

(a) there are 2 or more marked lanes available for traffic proceeding in the same direction, other than a bus lane, a high occupancy vehicle lane or a designated use lane,

(b) the speed limit is at least 80 km/h, and

(c) the actual speed of traffic is at least 50 km/h.

(3) A driver of a vehicle in the leftmost lane must exit the lane on the approach of another vehicle in that lane, if it is safe to do so, except when

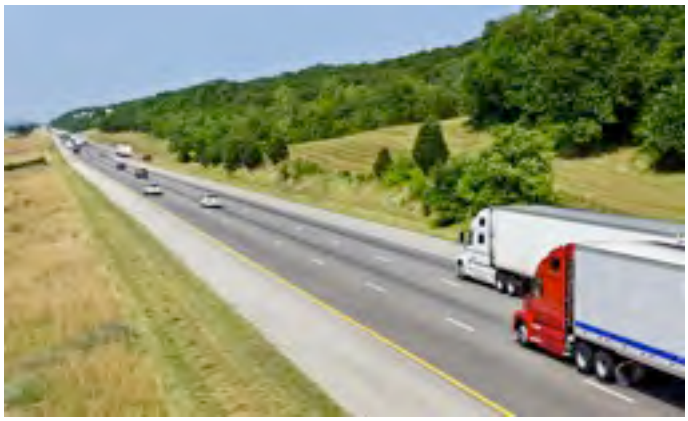
(a) overtaking and passing a third vehicle,

(b) allowing traffic to merge,

(c) preparing for a left hand turn at an intersection or into an exit, a private road or a driveway, or

(d) passing an official vehicle stopped on the side of or on the roadway.

Note: "official vehicle" is defined in s. 47.01 of the Motor Vehicle Act Regulations.



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