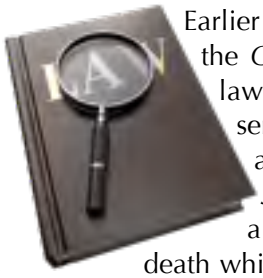
JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.



Earlier this year, Bill C-35 amended the *Criminal Code* to better protect law enforcement, military and service animals. This Act, cited as the *Justice for Animals in Service Act*, honoured Quanto, a police dog that was stabbed to death while helping apprehend a fleeing suspect.

This law creates s. 445.01, which makes it a hybrid offence to wilfully and without lawful excuse kill, maim, wound, poison or injure:

- a law enforcement animal while it is aiding a law enforcement officer in carrying out that officer's duties;
- a military animal while it is aiding a member of the Canadian Forces in carrying out that member's duties; or
- a service animal while it is assisting a person with a disability.

NEW

s. 445.01 (1) Every one commits an offence who, wilfully and without lawful excuse, kills, maims, wounds, poisons or injures a law enforcement animal while it is aiding a law enforcement officer in carrying out that officer's duties, a military animal while it is aiding a member of the Canadian Forces in carrying out that member's duties or a service animal.

The new law also defines "law enforcement animal", "law enforcement officer", "military animal" and "service animal".

"law enforcement animal" means a dog or horse that is trained to aid a law enforcement officer in carrying out that officer's duties.

"law enforcement officer" means a police officer, a police constable or any person referred to in para. (b), (c.1), (d), (d.1), (e) or (g) of the definition "peace officer" in s. 2 of the *Criminal Code*.

This includes:

- Correctional Service of Canada officers
- Police officers
- Canada Border Services officers
- Immigration officers
- Fisheries officers
- Canadian Forces officers.

"military animal" means an animal that is trained to aid a member of the Canadian Forces in carrying out that member's duties.

"service animal" means an animal that is required by a person with a disability for assistance and is certified, in writing, as having been trained by a professional service animal institution to assist a person with a disability.

Punishment

If a person is convicted of an offence under this provision by indictment, the maximum term of imprisonment is five (5) years. A minimum mandatory sentence of six (6) months attaches if an accused kills a law enforcement animal in the commission of an offence. If a charge proceeds summarily, the maximum punishment is a fine of $10,000 and/or 18 months in prison.

Any sentence imposed for a conviction under this new offence must also be served consecutively with any other punishment imposed for an offence arising out of the same event or series of events. (s. 445.01 (3)).

As well, s. 718.03 of the *Criminal Code* has been added which requires a court to give primary consideration to the objectives of denunciation and deterrence upon sentencing for an offence under s. 445.01(1).

Continued on page 5

Highlights In This Issue

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Upcoming Courses

Advanced Police Training

Advanced training provides opportunities for skill development and career enhancement for police officers. Training is offered in the areas of investigation, patrol operations and leadership for in-service municipal and RCMP police officers.

JIBC Police Academy

See Course List here.

November 17, 2015
9 am - 3 pm
JIBC Theatre
715 McBride Blvd.
New Westminster, BC

see page 4

Graduate Certificates

Intelligence Analysis

or

Tactical Criminal Analysis

www.jibc.ca

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.

The 5 choices: the path to extraordinary productivity.

Kory Kogon, Adam Merrill, Leena Rinne.

New York, NY: Simon & Schuster, 2015.

HD 69 T54 K64 2015

Breakthroughs in decision science and risk analysis.

edited by Louis Anthony Cox, Jr.

Hoboken, NJ: John Wiley & Sons, Inc., 2015.

HD 61 B74 2015

Experiential learning: a handbook for education, training and coaching.

Colin Beard, John P. Wilson.

London, UK: Kogan Page Limited, 2013.

LB 1060 B43 2013

Gender, sex and the law in Canada.

edited by Johanne Elizabeth O'Hanlon.

Toronto, ON: Carswell, 2015.

KE 4399 G46 2015

Hungry!: fuelling your best game.

Ryan Walter.

Langley, BC: Heads-up Communications Corp., 2014.

BF 503 W34 2014

Learn or die: using science to build a leading-edge learning organization.

Edward D. Hess.

New York, NY: Columbia University School Publishing, 2014.

HD 58.82 H365 2014

The learning challenge: dealing with technology, innovation and change in learning and development.

Nigel Paine.

Philadelphia, PA: Kogan Page, 2014.

HD 58.82 P35 2014

The power of thanks: how social recognition empowers employees and creates a best place to work.

Eric Mosley and Derek Irvine.

New York, NY: McGraw-Hill, 2014.

HF 5549.5 M63 M675 2014

Research strategies: finding your way through the information fog.

William Badke.

Bloomington, IN: iUniverse, LLC, 2014.

Z 710 B23 2014

The resiliency revolution: your stress solution for life, 60 seconds at a time.

Jenny C. Evans.

Minneapolis, MN: Wise Ink Creative Pub., 2015.

BF 575 S75 E93 2015

Tell me a story [videorecording]**: a powerful way to inspire action.**

created by John A. Jenson and CRM Learning.

Carlsbad, CA: CRM Learning, c2013.

1 videodisc (18 min.) : sd., col. ; 4 3/4 in. + 1 CD-ROM.

1 leader's guide, 5 participant workbooks.

Stories can capture peoples' hearts and minds; using them makes communication both memorable and meaningful. In this program, John Jenson illustrates how leaders can use storytelling to impact such things as: creating a shared vision of the future, kick-starting new projects, highlighting lessons learned, and reinforcing the organization's brand.

HD 30.3 T455 2013 D2047

Using emotional intelligence at work: 17 tried and tested activities for understanding the practical application of emotional intelligence.

Mike Bagshaw.

Port Perry, ON: Owen-Stewart Performance Resources Inc., 2008.

BF 576.3 B34 2008

JUSTICE INSTITUTE of BRITISH COLUMBIA | POLICE ACADEMY | LEGAL ISSUES IN POLICING

Proactive Policing: Powers, Pitfalls & Practice

Police departments and individual officers are subject to intense scrutiny. The very nature of police work lends itself to complaints, lawsuits, media attention and courtroom critique of police investigations. Law enforcement officers must understand the ever-changing legal landscape under which they carry out their duties on a daily basis. A failure to appreciate and correctly apply the law can lead to serious consequences, including criminal sanctions against individual officers and the exclusion of evidence. Criminals can walk free, victims may be discouraged and officers become frustrated by the process. This seminar will provide officers with a solid foundation in the principles of police powers.

Topics include:

- Significant Supreme Court of Canada judgments.
- Types of police/citizen encounters.
- Continuum of suspicion.
- Using source information.
- Vehicle stops.
- Investigative detention.
- Pat downs & frisks.
- Arrest & search.
- Right to counsel.
- K-9 sniffs.
- Trash pulls.
- Safety searches.
- Entrapment.
- and much more.

Date:
November 17, 2015
9:00 am – 3:00 pm

Location:
JIBC Theatre
715 McBride Boulevard
New Westminster, BC

How to Register:
Email: Karen Albrecht
kalbrecht@jibc.ca
or contact your Training Section

Registration Fee:
$89 (plus GST)

Restricted to law enforcement officers.

For more information:
Email: Sgt. Kelly Joiner
kjoiner@jibc.ca

Instructor: Mike Novakowski (M.O.M., M.A., L.L.M.) is a serving police officer presently holding the rank of Staff Sergeant. He has a Master of Arts degree in Leadership and Training and a Master of Laws degree from Osgoode Hall Law School specializing in Criminal Law and Procedure. He is a former legal studies instructor at the JIBC Police Academy, has taught several advanced police training courses and is currently a sessional instructor at UFV in the School of Criminology and Criminal Justice. Mike is the author and editor of "In Service: 10-8", a peer read newsletter devoted to operational police officers in Canada, and the case law editor for Blue Line magazine with its national readership of 55,000. Mike's law degree, experience as a police officer and passion for teaching gives him a unique perspective to present an exciting seminar that is a must see for all police officers.

Consecutive Sentences

Bill C-35 also changed the way sentences are to be imposed for assaults committed against law enforcement officers under ss. 279(1), 270.01 and 270.02. The *Criminal Code* now requires such sentences to be consecutive to any sentences imposed out of the same event or series of events:

NEW **s. 270.03 A sentence imposed on a person for an offence under subsection 270(1) or 270.01(1) or section 270.02 committed against a law enforcement officer, as defined in subsection 445.01(4), shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events.**

Existing s. 718.02 provides that, when a sentence is imposed for serious offences against a peace officer (or intimidation of a justice system participant), the court shall give primary consideration to the objectives of denunciation and deterrence.

s. 718.02 When a court imposes a sentence for an offence under subsection 270(1), section 270.01 or 270.02 or paragraph 423.1(1)(b), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

Did you know?

According to Statistics Canada, there were 9,450 assaults against peace officers reported in 2014. This was 376 fewer reported assaults than 2013.

As for assaults overall, the numbers were as follows:

- Assault - Level 1
  - 153,352
- Assault - Level 2 (weapon or bodliy harm)
  - 44,788
- Assault - Level 3 (aggravated)
  - 3,232

source: Statistics Canada, Police Reported Crime Statistics in Canada, 2014, 85-002-X (released July 22, 2015)

BY THE BOOK:

Assaults Against Peace Officers: ***Criminal Code***

Assaulting a peace officer

s. 270. (1) Every one commits an offence who

(a) assaults a public officer or peace officer engaged in the execution of his duty or a person acting in aid of such an officer;

(b) assaults a person with intent to resist or prevent the lawful arrest or detention of himself or another person; or

(c) assaults a person

(i) who is engaged in the lawful execution of a process against lands or goods or in making a lawful distress or seizure, or

(ii) with intent to rescue anything taken under lawful process, distress or seizure.

Punishment

(2) Every one who commits an offence under subsection (1) is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

5 yrs. max

Assaulting peace officer with weapon or causing bodily harm

s. 270.01 (1) Everyone commits an offence who, in committing an assault referred to in section 270,

(a) carries, uses or threatens to use a weapon or an imitation of one; or

(b) causes bodily harm to the complainant.

10 yrs. max

Punishment

(2) Everyone who commits an offence under subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term of not more than 18 months.

Aggravated assault of peace officer

s. 270.02 Everyone who, in committing an assault referred to in section 270, wounds, maims, disfigures or endangers the life of the complainant is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

14 yrs. max

IMPAIRED DRIVER'S NECESSITY EXCUSE REJECTED

R. v. Gardner, 2015 NLCA 44

The police arrested the accused after responding to a complaint from a woman alleging he had assaulted her and left her house after drinking. The accused was found driving slowly on a road. He exhibited signs of impairment and provided two breath samples over the legal limit (210 mg% and 200 mg%). In a cautioned statement he admitted that he was impaired, but told police he drove out of fear. He said he did not knock on someone's door for help instead of driving his car because he wanted to go to the home of someone he knew. As well, he stated he did not approach the police, who were nearby, because he had "gotten himself out of the situation" by then but still wanted to protect his car from damage. He was charged with impaired driving and over 80mg%.

Newfoundland & Labrador Provincial Court

The accused again admitted he was impaired but argued he drove out of necessity. He feared for his life and the safety of his vehicle after being ejected from the complainant's home by another man. He claimed the man dragged him from the house on his back and left him lying outside.

The judge ruled that the excuse of necessity had not been made out. Even if his life was in imminent peril, there were other legal alternatives available to the accused. He could have sought shelter in nearby houses. The judge also found the accused had inflicted more harm in driving while intoxicated than the harm he claimed he was seeking to avoid. The accused was convicted, fined $1,500 and a 14-month driving prohibition was imposed.

Newfoundland & Labrador Supreme Court

An appeal judge agreed with the trial judge that the defence of necessity was inapplicable in the circumstances as described by the accused. His appeal was dismissed.

BY THE BOOK:

Operation While Impaired: ***Criminal Code***

s. 253(1) Every one commits an offence who operates a motor vehicle ... or has the care or control of a motor vehicle, ... whether it is in motion or not,

(a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or

(b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

Newfoundland & Labrador Court of Appeal

The accused then sought further leave to appeal asking that his convictions be set aside. Justice Barry, writing the Court of Appeal judgment, refused to grant an appeal. In his view, there was no reasonable possibility that an appeal would succeed because the law was well settled.

Necessity Excuse (Defence)

For the excuse of necessity to succeed, three elements must be satisfied:

1. the accused must be in **imminent peril**.
2. the accused must have **no reasonable legal alternative** to disobeying the law.
3. there must be **proportionality** between the harm inflicted and the harm avoided.

Justice Barry then went on to discuss each of these requirements and how they related to the accused's situation.

Imminent Peril: The accused was not in imminent peril once the man he claimed he feared had returned to the home:

> If [the accused] believed his life was still at risk, as he stated, that belief was an unreasonable one. ...

> [The accused], by his own admission, believed he had gotten himself out of the situation of danger before driving. As for [the accused's] argument that he needed to move his car to protect it from possible damage, assuming, but not deciding, that avoiding imminent property damage may in certain circumstances meet the test of necessity, in the present case damage to his car was not "on the verge of transpiring and virtually certain to occur" but merely a speculative risk which did not provide a valid excuse for driving. [paras. 14-15]

No reasonable legal alternative: This element was not met. The accused could have contacted the nearby police or walked to nearby houses.

Proportionality: "[B]y driving while impaired, [the accused] exposed the public to a much greater risk of harm than he himself was experiencing or sought to avoid," said Justice Barry. "This is not permissible. The harm inflicted must not be out of proportion to the peril to be avoided."

As for applying these requirements to this case, the Appeal Court stated:

> The factors of imminent peril and no reasonable legal alternative are evaluated in accordance with a modified objective standard. It is not enough for [the accused] to establish he believed he was in imminent peril with no reasonable legal way out. That belief must be one that is reasonable in the circumstances. In [the accused's] case it was not reasonable. [reference omited, para. 17]

The lower courts did not err in finding the Crown had proven there was no imminent peril and reasonable legal alternatives existed. Leave to appeal was refused.

Complete case available at www.canlii.org

Note-able Quote

"Want to walk fast, walk alone.
Want to walk far, walk together"-

African Proverb

GROUNDS VIEWED THROUGH OFFICER'S LENS

R. v. Wu, 2015 ONCA 667

After arresting three men, including Calvin Jiang, in the parking lot of a plaza, the police found a half kilogram of freshly-prepared methamphetamine in a blue Acura. The men were charged with possession of a controlled substance for the purpose of trafficking and their cell phones were seized. Some 18 days later a detective was told about a tip from a confidential informer. The informer had provided information about a man, "believed to be Wu", who was involved in the production and trafficking of methamphetamine. Although the police took steps to confirm the accuracy of this information, there were problems with the reliability of the informer including the fact that s/he was untested and had a criminal record. The informer also provided a telephone number for Wu. This number was registered to a Tommy Wu. Police records, information from the Ministry of Transportation and information from an intelligence officer at the Canada Border Services Agency supported both the telephone number provided by the confidential informer and the address to which the number was connected.This telephone number was also found in Jiang's cellphone which was seized during the earlier arrest.

The police then conducted surveillance in July, August, and early September. Many observations were made on several dates over these months. As a consequence of the information received and the surveillance observations, the detective concluded that there was reason to believe that the accused was in possession of controlled substances and other evidence related to the production of it. He ordered the accused's arrest.

The police arrested the accused and searched the car he was driving incident to the arrest. Police found evidence of methamphetamine possession and production, including 105 grams of MDMA (ecstasy), a white plastic bag containing jars, plastic juice containers, and a plastic tube-like cup with straws attached to the tops, keys with a security fob,

a satchel containing about $2,000 in cash and identification. The detective then prepared an Information to Obtain (ITO) search warrants regarding two condominium units connected to the accused. The ITO contained information relating to the entire investigation including the detective's own observations, observations reported by other officers, information from the confidential informer and the evidence obtained from the search incident to the accused's arrest. The warrants were issued and the police searched the two units finding extensive evidence of methamphetamine production, including a tray of drying brown powder, a jug of methyl hydrate, drying MDMA, and bags of drugs or cutting agents. The accused was charged with production of methamphetamine, possession of methamphetamine for the purpose of trafficking, production of ecstasy, possession of ecstasy for the purpose of trafficking, and possession of proceeds of crime.

Ontario Superior Court of Justice

Although the judge believed the officer had the subjective belief that he had grounds to arrest the accused, she concluded those grounds were not objectively reasonable. Since the evidence did not support a search for safety concerns or exigent circumstances, the arrest and the search incident to arrest breached ss. 8 and 9 of the *Charter*. All reference to the evidence found in the course of the accused's arrest was excised from the ITO. In considering the balance of the information in the ITO, the judge found it could no longer support the warrants. The evidence found in both condominium searches was excluded under s. 24(2) of the *Charter*. Once the drug evidence was excluded, the Crown advised that no further evidence would be called and the charges were dismissed by the judge.

Ontario Court of Appeal

The Crown appealed the acquittals arguing the trial judge erred in her assessment of whether the detective had reasonable grounds to arrest the accused. In the Crown's view, the evidence obtained in the search incident to the accused's arrest should not have been excised from the ITO. The accused, on the other hand, submitted that the trial judge correctly decided that the police breached ss. 8 and 9 of the *Charter* when they arrested and searched him incident to his arrest.

Reasonable Grounds for Arrest

Justice Epstein, writing the Court of Appeal's decision, described the test for reasonable grounds as follows:

> To establish reasonable and probable grounds for arrest, a police officer must subjectively believe that a person has committed or is about to commit an indictable offence, and the police officer must be able to justify that belief on an objective basis, meaning that a reasonable person placed in the position of the police must be able to conclude that there were reasonable and probable grounds. The police need not demonstrate anything more than reasonable and probable grounds. Specifically, the police need not establish a prima facie case for conviction. [reference omitted, para. 49]

Importantly, this analysis involves examining the belief that grounds for arrest existed through the lens of a reasonable person placed in the position of the police officer. This includes a consideration of the officer's training and experience. In concluding that the trial judge erred in her analysis of whether there was reasonable grounds to arrest the accused, Justice Epstein stated:

"To establish reasonable and probable grounds for arrest, a police officer must subjectively believe that a person has committed or is about to commit an indictable offence, and the police officer must be able to justify that belief on an objective basis, meaning that a reasonable person placed in the position of the police must be able to conclude that there were reasonable and probable grounds."

> The primary problem with the trial judge's analysis lies in her failure to ... assess the probative value of the evidence "through the lens of a reasonable person 'standing in the shoes of the police officer'".
>
> Here, the lens through which the trial judge was legally obligated to evaluate the probative value of the evidence available to the police was particularly powerful.
>
> As the trial judge noted, the evidence called on the voir dire established that [the detective] was a police officer with impressive training and considerable experience in investigating drug-related criminal activity. [The detective's] evidence was to the effect that his conclusion that grounds existed to arrest [the accused] was based on his view of all of the available evidence as interpreted by him against the background of his training and experience.
>
> [The detective] made it clear that his conclusion that there were grounds to arrest [the accused] was not the result of a snap judgment. Rather, it was a conclusion reached based on evidence gathered over the course of an investigation that started with a tip and evidence linking [the accused] to Jiang and that appeared increasingly fruitful as observations were made during two months of surveillance.
>
> As previously noted, the trial judge acknowledged [the detective's] training and experience in her ruling. However, there is no indication that she did what she was required to do – assess whether a case for reasonable grounds had been made out by examining the totality of the available information through the lens of a reasonable person standing in [the detective's] shoes. In failing to do so, I conclude that the trial judge's assessment of the objective reasonableness of [the detective's] belief that reasonable grounds existed to arrest [the accused] was tainted by legal error. [paras. 53-58]

In this case, the Court of Appeal concluded that the detective did have reasonable grounds. The informer information (although weak) and the information supporting a connection between the accused and Jiang (including that relating to the telephone number, and the surveillance evidence), when interpreted by the detective through his experience and training, provided objective support for his subjective belief that reasonable and probable grounds existed for the arrest.

The trial judge erred in excising from the ITO the evidence obtained from the search incidental to the accused's arrest. The Crown's appeal was allowed, the acquittals were set aside and a new trial was ordered.

Complete case avaialable at www.ontariocourts.on.ca

POLICE DID NOT CREATE EXIGENCIES: 'SWEEP SEARCH' JUSTIFIED

R. v. Hunter, 2015 BCCA 428

A police officer, with five years' experience, prepared an Information to Obtain a search warrant (ITO). He included information from a number of sources. This included information from other police officers and from three confidential informers.

- Informer 1 provided specific information that the accused sold cocaine and received his drugs from an individual named Johnny. In the officer's view, based on his experience and knowledge of the drug trade in the area, the person referred to by the first informant as "Johnny" was Windsor Nguyen, a member of the Red Scorpions.
- Informer 2 said that Windsor Nguyen had a safe house at 155 Strickland Street, Nanaimo, and that the accused sold drugs for Windsor Nguyen, lived at the address on Strickland Street and used taxis to run drugs. This information, however, was undated.
- Informer 3 provided specific information that the accused was actively selling ounces of cocaine and heroin, that he trafficked cocaine and heroin for Windsor Nguyen and that Windsor Nguyen used the street name "Johnny".

All three informers were identified as reliable and as individuals who had provided information that had resulted in other arrests and seizures.

The police then conducted surveillance over four days and made the following observations:

- By way of taxi, the accused briefly visited the residence of a known drug trafficker;
- The accused met a known member of the Red Scorpions;
- A brief visit by the accused and the Red Scorpions member to the residence of another known drug trafficker;
- A brief visit to the accused's home by a person, later identified as Philip Pham, who was seen to enter and leave the Strickland Street house with a small black duffel bag. When he departed with the bag, he took a taxi directly to the Departure Bay ferry terminal where he was arrested at about 6:30 p.m. A search of the duffel bag disclosed that he was carrying in excess of $50,000 cash in wrapped and labelled bundles.

Pending the application for a search warrant, the police went to the accused's address on Strickland Street. Surveillance indicated that two people were in the residence but it was not known whether the accused was one of them. The police conducted a warrantless sweep search to determine if the home was in fact occupied and to secure it. When the search warrant was obtained and executed, the police found 400 grams of cocaine, 1.7 kgs. of crack, 700 grams of heroin and 800 grams of methamphetamine in a safe in a bedroom closet. The accused was charged with three counts of possessing a controlled substance for the purpose of trafficking.

British Columbia Supreme Court

The judge found the accused's arrest lawful. The police relied upon the confidential source information, the surveillance observations and the discovery of the cash in the duffel bag following the arrest of Pham at the Departure Bay ferry terminal. The officer had reasonable grounds to arrest the accused, which was objectively justifiable in the circumstances. He reasonably believed that a drug delivery or drug reload had occurred when Pham was at the Strickland Street residence. As for the warrantless search, the judge found there were grounds to obtain a search warrant under s. 11(1) of the *Controlled Drugs and Substances Act (CDSA)*. There were significant specific details in the informer tips relating to the nature of the drugs, the quantity, the type of the drugs, and how the drugs were distributed or delivered. This information was cross-corroborated by comparison of tip-to-tip information and with the information available to police, including the surveillance observations that corroborated both innocent details and certain aspects of the criminality alleged by the informer.

As for exigent circumstances, the judge found that exigent circumstances existed so as to justify a warrantless entry under s. 11(7) under the *CDSA* to secure the residence pending receipt of the warrant. He stated:

> [The officer] considered the fact that the arrest of Mr. Pham on a Friday night at a busy ferry terminal, where someone who might have been meeting up with Mr. Pham or expecting Mr. Pham to arrive could have easily contacted the persons inside the residence. Surveillance had indicated to [the officer] that two people were inside the residence and two people had left the residence at that point. Because it was dark, it was not clear to the police whether the individuals inside the residence included [the accused].
>
> ... ...
>
> [The officer] was of the view, based on all of the circumstances known to him at that point, that a large quantity of drugs was in the residence. He believed that evidence could be easily destroyed by way of flushing those drugs down the toilet, incinerating them, or throwing them away in some other manner. [*R. v. Hunter*, 2014 BCSC 1492 at paras. 18-20]

The judge also found that the police had not created the exigency by arresting Pham in front of witnesses at the ferry terminal. The warrant that was subsequently obtained was also found to have been properly issued. The accused was convicted of possessing cocaine, heroin and methamphetamine for the purpose of trafficking.

British Columbia Court of Appeal

The accused argued that the trial judge made several errors, including his findings that there were exigent circumstances and that the police had not created them.

Exigent Circumstances?

The accused argued that it was pure speculation by the police that there was a risk evidence would be destroyed. The police did not know who was in the house, whether the occupants had been made aware of Pham's arrest, nor could they identify anyone who was aware of the arrest. Justice Willcock, speaking for the Court of Appeal, disagreed:

> That argument fails to take account of the substantial evidence leading [the officer] to conclude the drug operation involved numerous individuals (including the [accused], Windsor Nguyen and other Red Scorpions, of whom Mr. Pham was only one), and the evidence that the Strickland Street residence was being used by that organization as a "stash house". In these circumstances, in my view, it was not necessary for the police to identify a specific individual who might have observed or soon become aware of Mr. Pham's arrest, or to determine who remained in the house, in order to have a well-grounded belief that evidence might be destroyed if they did not act quickly to secure it. [para. 21]

Police Exigency?

The accused argued the police could have delayed the arrest of Pham in order to obtain the search warrant before news of his arrest would have reached his associates. But it was the discovery of the cash in possession of Pham and its role in the decision to arrest the accused and search his residence that was key to obtaining the warrant. Justice Willcock stated:

> [T]here seems to me to be no basis for the argument that the police ought to have obtained a warrant to search the Strickland Street residence before arresting Mr. Pham. Further, that argument flies in the face of the [accused's] fundamental argument that his arrest and the search of his residence can only be justified by reliance upon the evidence obtained as a result of the arrest and search of Mr. Pham. [para. 28]

The Court of Appeal also rejected the accused's submission that Pham's arrest should have been effected in private so it would not have come to the attention of his associates:

> Here, ... the police "were faced with an active, unfolding crime". The arrest of Mr. Pham cannot be said to have been effected at a time and place of the police's choosing. There is no suggestion that Mr. Pham's visit to the Strickland Street residence and his immediate departure from Vancouver Island was either anticipated or engineered by the police. His apparent plan to board the ferry was found by the trial judge to have forced the hand of the police. The conclusion that the police did not create the exigency is reliant upon findings of fact with which we ought not to interfere, including the finding that [the officer] subjectively believed evidence would be destroyed and that there were objective grounds for that belief. [reference omitted, para. 30]

The accused's appeal was dismissed.

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

BACKUP OFFICER RESUSCITATES QUESTIONABLE EVIDENCE OF COLLEAGUE

R. v. Rompre, 2015 ONCA 707

After observing a vehicle cross a stop line and proceed through an intersection on a red light, a police officer pulled it over. The driver (accused) began to get out but was ordered back in the car. As the officer approached the driver's door he smelled a strong aroma of fresh marijuana from about 12 feet away. He believed the smell was coming from the car and observed the driver leaning over the console when he was about 10 feet away. When he reached the driver's door he noted that the driver was very nervous. The driver produced his driver's licence as requested. The officer leaned in the window and found the marihuana smell overwhelming. The driver removed his keys from the ignition and again tried to get out of the car. The officer called for backup and the accused was arrested for possessing the drug. He was placed in a police car and a small bag of a green leafy substance was found in the vehicle's console. The officer smelled marijuana coming from the back seat and, after pulling down the back seat latch to gain access to the trunk, was overwhelmed

with the marijuana odour. A garbage bag filled with over three kilograms of marijuana was found in the trunk along with a bag and a shoe box containing a combined $71,150 in cash. A sergeant arrived to witness the findings go into property bags. The accused was arrested for possessing a controlled substance for the purpose of trafficking and he was taken to the police station. He was subsequently charged with possessing marihuana for the purpose of trafficking and two counts of possessing proceeds of crime.

Ontario Superior Court of Justice

The arresting officer denied that he had pulled the accused over and stopped him without reason just to see what he might be able to find. His credibility was questioned in cross-examination because he had been previously found guilty of discreditable conduct three years earlier where he admitted lying. He had called in to report that another police officer was sick and wouldn't be able to attend court that day. The judge found that the officer was not forthright in his testimony about the misconduct incident and expressed "serious doubt" about his testimony concerning the traffic stop. The backup officer, however, also testified that he immediately "could smell" marijuana when he arrived on scene. He said the odour was "fresh", reminded him of a grow op, and was a very heavy smell when he got out of his vehicle. The backup officer also said that, in his experience, he had also seen drivers run red lights at that location.

The accused argued that the Crown had failed to establish that the officer had reasonable grounds to stop his car. In his view, the officer was an "unmitigated liar" and his evidence should not be accepted. Since the stop was unlawful, the search of the car breached s. 8 of the *Charter* and the evidence ought to be excluded. The Crown, on the other hand, argued that the onus was on the accused to establish a *Charter* breach on a balance of probabilities. The judge framed the issue this way:

> If I were to accept on a balance of probabilities that [the arresting officer] had reasonable and probable grounds to conduct the traffic stop, then I would have to find the search of his motor vehicle was legal. If I were to find that I was not, on a balance of probabilities, able to accept that [the arresting officer] had reasonable and probable grounds, then, I would have to find the search was illegal, and then consider whether the items seized must be excluded.
>
> I am satisfied that while it is for the defendant to establish a Charter breach, it is for the Crown to establish on a balance of probabilities that [the arresting officer] had reasonable and probable grounds to stop the defendant ..., before he conducted his search of the defendant's car. This case is troubling because I must weigh the evidence of a police officer who is not only a proven liar, but lied at the preliminary inquiry, and was unresponsive in evidence before me. I remind myself that [the arresting officer] is a professionally trained witness who according to him has given evidence on countless occasions, but whose evidence had all of the hallmarks of either a liar, or someone who did not understand their obligations in the witness box.
>
> While the professional misconduct findings in 2009 are of concern, it was his evidence before me that I found troubling. He obfuscated, avoided the question, answered the question he wished had been asked, and generally was unresponsive. While the cross-examination was robust, it was respectful. I could see no reason for his virtual refusal to be forthcoming about the 2009 incident. Needless to say his refusal to be forthcoming concerning the 2009 incident, and not being truthful about his preliminary inquiry evidence which was very clear, raises serious questions concerning his evidence about the events leading up to the defendant's traffic stop. To put it bluntly, how would I know when he is being candid and truthful, and when he is not? Ordinarily, in weighing the evidence of a witness, one can simply weigh the consistencies and inconsistencies internal to the evidence and balance it against other evidence. Here we have the unfortunate situation of a police witness who has created suspicion about the reliability of his own evidence through his own obfuscations and untruths. [paras. 17-19, 2014 ONSC 5600]

The judge then concluded that the backup officer, who was straight forward and believable, corroborated most of the arresting officer's evidence which added weight to it. This corroboration

satisfied the judge, on a balance of probabilities, that the traffic stop was conducted after reasonable and probable grounds had been established. The search of the vehicle was therefore lawful. The accused was convicted of possessing marihuana for the purpose of trafficking and two counts of possessing proceeds of crime. He was sentenced to nine months in jail, 12 months probation and given a 10 year weapons prohibition.

Ontario Court of Appeal

The accused submitted, in part, that the trial judge erred in concluding that the arresting officer;s testimony was confirmed by the backup officer. The Court of Appeal, however, disagreed:

> It was open to the trial judge to accept or reject the evidence of the arresting officer, with or without confirmatory evidence. The arrest arose out of a routine traffic stop and the evidence of the second officer on the scene confirmed much of the testimony of the arresting officer. The second officer was not present when the [accused] was said to have ran the red light, but his testimony as to experience at the intersection where the stop occurred confirmed visibility issues and he confirmed other aspects of the arresting officer's account as well. [para. 5]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: Additional facts taken from *R. v. Rompre*, 2014 ONSC 5600

SUPREME COURT UPHOLDS AUTOMATIC DRIVING PROHIBITION REGIME

Goodwin v. British Columbia (Superintendent of Motor Vehicles), 2015 SCC 46

Four separate drivers received 90 day driving prohibitions, had their vehicles impounded for 30 days and paid monetary penalties and fees under British Columbia's Automatic Roadside Prohibition (ARP) law found in its *Motor Vehicle Act*. Three of the drivers provided a breath sample into an ASD and registered a "fail" while the fourth driver failed to provide an adequate breath sample.

Superintendent's Review

All four drivers applied to the Superintendent of Motor Vehicles for a review of their driving prohibitions. In each case, however, the Superintendent's adjudicator dismissed the applications and confirmed the prohibitions.

British Columbia Supreme Court (in Chambers)

The drivers then challenged the ARP scheme arguing that it was *ultra vires* the province. In their view, the ARP regime was beyond the competence of the province to legislate, in effect, criminal law, a power reserved for the federal government. They also submitted that the ARP scheme violated ss. 8 (search and seizure), 10(b) (right to counsel) and 11(d) (presumption of evidence) of the *Charter*.

The judge, in chambers, found the ARP scheme was *intra vires* (within the legislative competence of) the province. He also found there was no s. 11(d) breach because the ARP scheme did not create an "offence" within the meaning of the *Charter* and s. 10(b) was saved by s. 1. However, he ruled that the ARP scheme breached s. 8 of the *Charter* when the screening device registered a "fail" reading, but not when a person refused.

British Columbia Court of Appeal

The drivers appealed the Supreme Court judge's ruling arguing that he erred in law by holding that the ARP regime was valid provincial legislation, and by failing to classify it as an "offence" or in finding that it did not impose "true penal consequences". The Superintendent cross appealed, contending that the prohibitions, costs and penalties for an ASD reading in the "fail" range did not violate s. 8 of the *Charter* and, in any event, was saved by s. 1. All appeals were dismissed and the chambers judge's decision was upheld.

Supreme Court of Canada

The drivers launched a further appeal again suggesting that the ARP scheme was exclusively within the federal government's criminal law power and was therefore *ultra vires* the provincial government. As well, the appeal addressed whether ss. 8 and 11(d) of the *Charter* were violated. Did the ARP regime create an "offence" for the purpose of s. 11(d) and was the seizure of a breath sample reasonable under s. 8?

Provincial or Federal Jurisdiction?

The *Constitution Act, 1867*, divides powers between the federal and provincial governments. The federal government exercises exclusive jurisdiction over the criminal law and procedure, while each province exercises exclusive jurisdiction over property and civil rights in the province. In determining whether a law is a valid exercise of federal or provincial jurisdiction, the analysis considers (1) what the "matter" - pith and substance - of the legislation is and (2) whether the "matter" falls within a head of provincial power.

The Supreme Court rejected the notion that the ARP scheme was nothing more than crime control - a criminal law response to drunk driving without engaging the *Charter* and its procedural protections - dressed up as licensing. Justice Karakatsanis, speaking on behalf of five other justices, wrote:

> I agree with the chambers judge that the Province's purpose in enacting the ARP scheme was not to oust the criminal law, but rather to prevent death and serious injury on public roads by removing drunk drivers and deterring impaired driving. The ARP scheme is part of the MVA, which establishes a regulatory regime setting the terms and conditions of driver licensing in British Columbia. It continues British Columbia's ongoing efforts to stem the tide of drunk-driving related incidents in the province. ... [B]oth the legislative history and the statutory scheme support finding that the ARP scheme was enacted to enhance highway safety. [para. 25]

And further:

> At the end of the day, the purposes and effects of a law must be considered together, rather than in isolation, to determine its pith and substance. No doubt the ARP scheme has incidental impacts on criminal law. No doubt it targets, in part, specific criminal activity and imposes serious consequences, without the protections attendant on criminal investigations and prosecutions. However, the consequences relate to the regulation of driving privileges. In my view, the chambers judge was correct in characterizing the pith and substance of the ARP scheme as "the licensing of drivers, the enhancement of highway traffic safety, and the deterrence of persons from driving on highways when their ability is impaired by alcohol". [para. 29]

Having identified the "matter" - pith and substance - of the legislation as the licensing of drivers, the enhancement of traffic safety and the deterrence of persons from driving while impaired by alcohol, the majority went on to find that this was within the legislative competence of the provincial government. "Provinces thus have an important role in ensuring highway safety, which includes regulating who is able to drive and removing dangerous drivers from the roads," said Justice Karakatsanis. "Provincial drunk-driving programs and the criminal law will often be interrelated." In agreeing with the chambers judge and finding the matter fell within British Columbia's provincial power over property and civil rights, she noted, "While the ARP scheme represents a more aggressive approach by the Province than the ADP scheme, it nonetheless retains its character."

"The devastating consequences of impaired driving reverberate throughout Canadian society. Impaired driving renders roads unsafe, destroys lives, and imposes costs throughout the health care system." (para. 1)

Does ARP Create a s. 11(d) "Offence"?

Under s. 11(d) of the *Charter*, "Any person charged with an offence has the right...to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." The majority found that the ARP scheme did not create an "offence" within the meaning of s. 11(d). It was not a criminal proceeding. It was not public in nature nor aimed to redress the wrong done to society by applying the principles of retribution and denunciation in an open courtroom. Rather, the ARP regime was administrative. It regulated conduct within a limited private sphere of activity:

> The ARP scheme imposes a driving prohibition coupled with a monetary penalty. It is not concerned with addressing the harm done to society in a public forum; instead, its focus is on the regulation of drivers and licensing, and the maintenance of highway safety. Although it has a relationship with the criminal law, in the sense that it relies on Criminal Code seizure powers and is administered by police, the scheme is more accurately characterized as a proceeding of an administrative nature. As the chambers judge noted, the proceedings arising under the ARP scheme do not take the form of prosecutions. No criminal records result. The proceedings are initiated by the drivers themselves. ...
>
> Administrative regimes do not attract s. 11 protections. "This Court has often cautioned against the direct application of criminal justice standards in the administrative law area".
>
> Nor are the consequences truly penal. While a 90-day suspension is a meaningful consequence for a licensing violation, and the approximately $4,000 in possible costs and penalties are significant, they are not sufficient to engage the fair-trial rights embodied by s. 11 — rights that, after all, are some of the most fundamental in our legal system. I note that financial penalties considerably more severe than those at issue here have been found to not constitute true penal consequences.
>
> Whether such penalties amount to penal consequences must of course be assessed relative to the conduct in question and the regulatory objective. The driving prohibition relates directly to the regulatory terms and conditions under which a person may be licensed to drive. Vehicle impoundment is directly related to the removal of drivers from the road, and drivers may apply to the Superintendent for review, including on compassionate and economic hardship grounds. The remaining costs are tied to the various remedial programs, including installation of an ignition interlock device, and are incidental to the scheme's objective of getting drivers and vehicles off the road. Such costs can hardly be considered to be penal, particularly when viewed in light of the public interest in removing a drunk driver from a roadway once detected.] references omitted, paras. 43-46]

Since the ARP scheme did not create an "offence" under s. 11 of the *Charter*, the protections of s. 11 were not engaged.

ARP Scheme and s. 8 of the Charter?

A roadside breath demand constitutes a warrantless seizure under s. 8 of the *Charter* and therefore it is presumptively unreasonable. However, a warrantless seizure will nonetheless be reasonable if it was authorized by law, the law itself was reasonable and the manner in which it was carried out was reasonable.

Authorized by Law

The ARP scheme (s. 215.41(3)(a) MVA) authorizes the seizure of a roadside breath sample by relying on s. 254(2) of the *Criminal Code*.

Is the Law Reasonable?

In deciding whether a seizure of breath is reasonable under the ARP scheme, the Supreme Court of Canada reviewed its purpose and nature, the mechanism of seizure and availability of judicial oversight (see grid).

After examining these four elements against the ARP testing regime, Justice Karakatsanis concluded that the ARP scheme (as it was in 2010) breached s. 8 of the *Charter*:

> The ARP scheme as enacted in 2010 depends entirely on the results from a test conducted using an ASD, a device known to produce false positives where mouth alcohol is present. Despite this defect regarding ASD reliability, the scheme provides no meaningful opportunity to challenge a licence suspension issued under this scheme on the basis that the result is unreliable. In the particular circumstances of these appeals, in which a "fail" result automatically triggers serious consequences for a driver without the possibility of review, the scheme fails to provide adequate safeguards. Thus, despite the pressing objective and minimal intrusiveness of the seizure, the ARP scheme fails to strike a reasonable balance between the interests of the state against those of individual motorists, and infringes drivers' s. 8 rights. [para. 77]

The majority then went on to hold that this scheme was not saved by s. 1 of the *Charter*.

A Different View

Chief Justice McLachlin, in dissent, agreed with the majority except for the issue about whether the ARP scheme breached s. 8 of the *Charter*. Using an approach that examined (1) the state objective, (2) the restraint of the incursion on the private interest to what was reasonably necessary to achieve the object, and (3) the availability of judicial supervision, she found no *Charter* violation.

The appeals were dismissed

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

Editor's Note: This case dealt exclusively with BC's ARP regime in 2010. Since that time, amendments to the law in 2012 changed the scope of review for ARPs. The Superintendent now, on review, may determine the weight to be given to evidence, and must be satisfied that the driver was advised of the right to request a second analysis, that the second analysis was performed with a different ASD, that the prohibition was issued on the basis of the lower of the two results, and that the result of the ASD analysis was reliable. These amendments were not before the Supreme Court in this case.

"Administrative regimes do not attract s. 11 [Charter] protections."

ARP Breath Sample Seizure Reasonableness Grid

Purpose of ARP	Nature of ARP	Mechanism of Seizure	Judicial Oversight
• removing impaired drivers off the road • preventing death and serious injuries on public highways • ASD analysis identifies drivers over 50mg% • suspend driving privileges **in 2010 ARP legislation**	• ASD results determinative of consequences • ASD test sole basis for penalties and suspensions • although regulatory, has certain criminal-like features (eg. use of s. 254(2) Criminal Code) • consequences are immediate and serious and do not require the use of a more reliable breathalyzer	• ASD is minimally intrusive • more than demand for documents, but less than a blood sample or DNA swab • concerns with reliability of ASD (eg. mouth alcohol) • second sample only on request but no obligation to advise of this right • second test governed regardless of whether it was higher or lower than initial test	• no meaningful way to challenge the basis for the ASD test nor its accuracy • only two issues could be considered in a challenge to the Superintendent: (1) whether the applicant was a "driver" (2) whether the ASD registered a "fail, "warn" or the applicant refused

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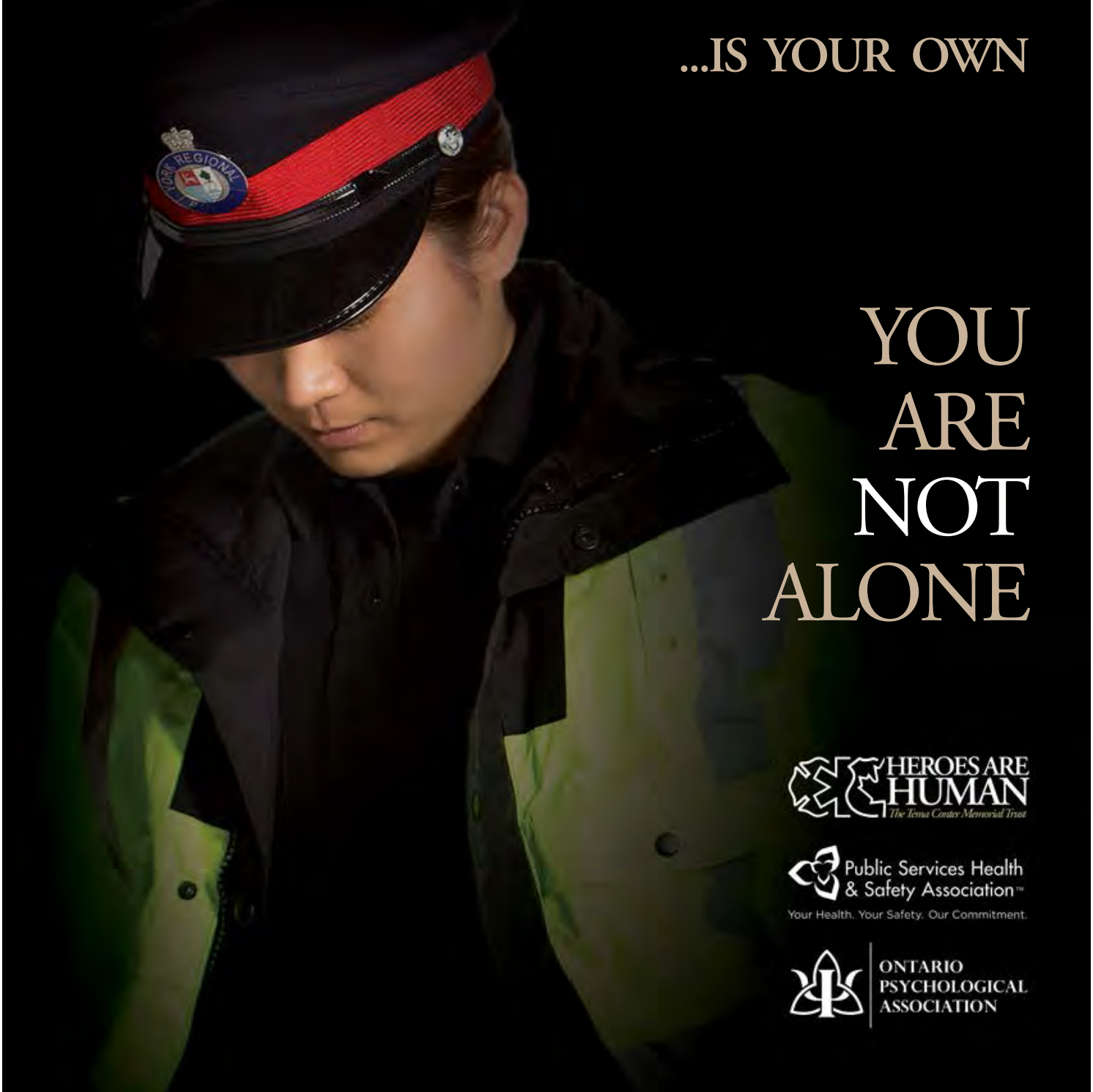

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FACTS - FIGURES - FOOTNOTES

Probation

... was the most common type of sentence imposed in adult criminal court cases, either by itself or in combination with other sentences. In 2013/2014 probation was imposed in 43% of all guilty cases.

Custody was imposed in 36% of cases while a fine was levied in 30%. The breakdown for when probation was imposed by the nature of the crime included:

- violent offences = 72%
- property offences = 58%
- administration of justice offences = 31%
- other Criminal Code offences = 49%

Source: Statistics Canada, 2015, "Adult criminal court statistics in Canada, 2013/2014", Catalogue no. 85-002-X,released on September 28, 2015.

Impaired Driving

... was the most common type of offence completed in adult criminal court. In 2013/2014 there were 38,635 impaired driving offences. This was followed by theft (36,364), fail to comply with order (35,516), common assault (33,630), and breach of probation (31,334).

Of the above offences, breach of probation had the highest conviction rate with 80% of adult cases resulting in a guilty finding. Only 17% of probation cases were stayed or withdrawn, 2% resulted in an acquittal and 1% were classified as other outcomes, such as not criminally responsible or unfit to stand trial. Impaired driving was close second with a 78% conviction rate followed by fail to comply with order (68%), theft (61%) and common assault (47%).

The most common offence stayed or withdrawn was prostitution at 73%. This was followed by attempted murder (65%), fail to appear and drug possession (both at 53%) and possession of stolen property (50%.

Source: Statistics Canada, 2015, "Adult criminal court statistics in Canada, 2013/2014", Catalogue no. 85-002-X,released on September 28, 2015.

4%

The percentage of adults acquitted of criminal offences in Canada. Of the 360,640 adult criminal cases in 2013/2014, 13,979 resulted in an acquittal. This is a small number compared to the 228,328 guilty verdicts (63%) and the 114,525 stayed or withdrawn cases (32%). The remaining 3,808 offences, or 1%, resulted in other findings such as not criminally responsible, unfit to stand trial or special pleas.

Source: Statistics Canada, 2015, "Adult criminal court statistics in Canada, 2013/2014", Catalogue no. 85-002-X,released on September 28, 2015.

Custody

... was the most frequently imposed sentence in administration of justice offences. In 2013/2014, 53% of cases involving administration of justice offences where there was a finding of guilt resulted in a custodial sentence. In cases where there was not an administration of justice offence, custody was imposed only 22% of the time.

Source: Statistics Canada, 2015, "Trends in offences against the administration of justice", Catalogue no. 85-002-X,released on October 15, 2015.

Failure to Comply

Failure to comply with an order was the most common administration of justice charge in court, representing 50% of the charges. Breach of probation was second at 33%. The top five are:

Charge	Number (2013/14)
Fail to comply with order	164,612
Breach of probation	109,822
Other offences (eg. bribery, breach of trust, personating a peace officer)	23,837
Fail to appear	19,753
Unlawfully at large	10,500

Source: Statistics Canada, 2015, "Trends in offences against the administration of justice", Catalogue no. 85-002-X,released on October 15, 2015.

NOTHING MORE THAN 'WARN' REQUIRED FOR AUTOMATIC ROADSIDE PROHIBITION

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

Wilson was stopped in a police road check. He had an odour of alcohol on his breath and admitted consuming four beers hours earlier. As a result of an ASD demand, he blew a WARN reading (at least 50 mg%) into two different ASDs. Under s. 215.41 of British Columbia's *Motor Vehicle Act*, the officer served Wilson with a Notice of an Automatic Roadside Prohibition (ARP), also known as an immediate roadside prohibition (IRP), for a period of three days.

Superintendent's Review

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

British Columbia Supreme Court

Wilson sought judicial review of the adjudicator's decision. He submitted that the legislation outlined in s. 215.41 required more than a WARN result from an ASD before a driving prohibition could be issued. In his view, other confirmatory evidence was needed to support the officer's reasonable belief that a driver's ability to drive was affected by alcohol.

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

BY THE BOOK:

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

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

(a) a peace officer makes a demand to a driver under the Criminal Code to provide a sample of breath for analysis by means of an approved screening device and the approved screening device registers a warn or a fail, and

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

the peace officer, or another peace officer, must,

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

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

British Columbia Court of Appeal

The Superintendent of Motor Vehicles then appealed the judicial review decision quashing the prohibition. The Court of Appeal found it was reasonable for the adjudicator to find a WARN result sufficient to provide reasonable grounds to trigger the driving prohibition.The adjudicator's interpretation was reasonable, on the basis of the plain language of the text, the context of the section in the statutory scheme, and the purpose and objectives of s. 215.41 (3.1).

Supreme Court of Canada

A further appeal to the Supreme Court of Canada was unanimously dismissed. All seven justices hearing the case found the adjudicator's interpretation to be reasonable when considering the text, context and legislative objectives of the ARP scheme.

Text

Justice Moldaver, speaking for the Supreme Court, found the plain meaning of s. 215.41(3.1) supported the interpretation that the officer's belief was linked to the results of the ASD analysis. "The provision states that the peace officer must have reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol," he said. "The wording could not be clearer. The ASD analysis is the yardstick against which to measure the reasonableness of the officer's belief."

There was no need for the officer to have confirmatory evidence showing the driver's ability to drive was affected by alcohol. However, if a driver blows a "warn" or "fail," and the officer has reason to doubt the accuracy of the result (eg. reason to doubt the ASD device functioned properly or reason to doubt that the samples were taken properly), the officer must not issue a prohibition. On the other hand, if the officer has an honest belief in the accuracy of the ASD result then they will have reasonable grounds to believe, "as a result of the analysis", that the driver's ability to drive is affected by alcohol on a "warn" or "fail" reading.

Context

The context of the provision is also consistent with the grounds on which the Superintendent may review a prohibition. Nowhere on review may the Superintendent revoke a prohibition if the officer does not point to other confirmatory evidence beyond an AD "warn" or "fail." Nor does the ARP regime's reliance on the *Criminal Code* demand for a roadside breath sample incorporate the same protections provided under the *Criminal Code* regime:

> The MVA and the Code are two independent statutes, with two distinct purposes. They were enacted by two different levels of government, neither of which is subordinate to the other. Under the MVA, the demand for a breath sample triggers a regulatory regime that is wholly independent of the Criminal Code. The fact that the MVA relies on a Criminal Code demand for a breath sample does not render it subsidiary legislation.
>
> In addition, it has long been recognized that regulatory legislation, such as the MVA, differs from criminal legislation in the way it balances individual liberties against the protection of the public. Under regulatory legislation, the public good often takes on greater weight. ...

"Impaired driving is a matter of grave public concern in Canada. Over the years, various Criminal Code offences have been enacted to deal with this problem. The provinces have also enacted regulatory legislation in an attempt to curb the number of impaired drivers on the road. Despite these measures, the problem of drunk driving persists, resulting as it often does in lives lost and lives shattered."

> ... Roadside driving prohibitions are a tool to promote public safety. As such, the legislation necessarily places greater weight on this goal. Unlike the criminal law regime, persons who register a "Warn" or "Fail" under the regulatory regime do not end up with a criminal record, nor are they exposed to the more onerous sanctions under the criminal law, including the risk of incarceration. In short, regulatory legislation does not share the same purpose as the criminal law, and it would be a mistake to interpret it as though it did. [references omitted, paras. 32-34]

Legislative Objective

The adjudicator's interpretation was also consistent with the legislative objectives of the ARP regime to improve highway safety and deter impaired driving:

> Allowing the police to rely on ASD test results is critical to the fulfilment of these objectives. ASD testing provides an immediate, efficient tool for assessing whether an individual's ability to drive is affected by alcohol. As the Court of Appeal noted..., scientific evidence shows that at 50 mg % — the level needed to register a "Warn" — driving skills are significantly impaired and the likelihood of being involved in a collision is markedly elevated. Evidence also shows that it is extremely difficult to identify drivers who have been drinking by observation alone. These are the concerns that the ARP scheme is designed to address. It establishes a common standard for removing drivers from the road who pose an elevated risk to others. It also serves to deter drunk driving. [references omitted, para. 40]

As a result, a peace officer may rely solely on an ASD result to form the requisite grounds to believe a driver's ability to drive is affected by alcohol. Wilson's appeal was dismissed.

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

How the Supreme Court described BC's ARP regime

"[The ARP regime] is dependent upon, and is only triggered by, a roadside demand for a breath sample made under s. 254 of the Criminal Code. Under the ARP scheme, when a driver registers a "Warn" or "Fail" on the ASD, the peace officer must issue a Notice, provided he or she has reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol. A driving prohibition must also be issued to individuals who fail or refuse to comply with a demand for a breath sample without reasonable excuse.

Drivers who blow a "Warn" — when the ASD registers a blood alcohol concentration of 50 milligrams of alcohol in 100 millilitres of blood ("50 mg%") or higher — receive a Notice prohibiting them from driving for 3, 7, or 30 days, depending on their driving history. There is a corresponding fine of $200, $300, or $400, respectively. Drivers who blow a "Fail" — when the ASD registers a blood alcohol concentration of 80 milligrams of alcohol in 100 millilitres of blood ("80 mg%") or higher — and drivers who refuse or fail to provide a breath sample receive a Notice prohibiting them from driving for 90 days and a $500 fine. Drivers who receive either a 30- or 90-day driving prohibition are subject to a mandatory 30-day vehicle impoundment. At the peace officer's discretion, drivers who are served with a 3- or 7-day driving prohibition may also have their vehicle impounded for the duration of their driving prohibition. Drivers may also be subjected to a variety of other consequences, including enrollment in a remedial program and the imposition of an ignition interlock device. Drivers are required to bear the costs of these programs, and must pay a fee to have their licence reinstated and their vehicle released if it has been impounded.

An individual who has been issued a Notice may apply to the Superintendent of Motor Vehicles for review. However, the review is limited and the Superintendent may only revoke a Notice under certain grounds prescribed in s. 215.5 of the MVA. For an individual who has blown a "Warn" or "Fail", the factors the Superintendent is to consider are:

- *Whether the person was a "driver" within the statutory meaning;*
- *Whether the person was advised of his or her right to a second ASD analysis and provided with a second analysis (if requested);*
- *Whether the second analysis, if requested, was performed with a different ASD machine;*
- *Whether the Notice was served on the basis of the lower of the two analysis results;*
- *Whether the ASD registered a "Warn" as a result of the driver's blood alcohol concentration being at least 50 mg% or the ASD registered a "Fail" as a result of the driver's blood alcohol concentration being at least 80 mg%;*
- *Whether the result of the analysis was reliable; and*
- *In the case of a 7-day prohibition, whether it was the driver's second prohibition, and in the case of a 30-day prohibition, whether it was the driver's third or subsequent prohibition."* - paras. 8-10, references omitted.

FIELD STRIP SEARCH JUSTIFIED: EXIGENT CIRCUMSTANCES EXISTED

R. v. Parchment, 2015 BCCA 417

The police executed a search warrant under the *Controlled Drugs and Substances Act* at the accused's home using a battering ram to knock in the front door. In the process, the accused was seen standing in the kitchen. He picked something up from the counter and threw it to the floor near the refrigerator while the officer forced him to the floor. On the floor under the refrigerator police found rock cocaine. The accused was arrested and asked if he had anything on his person that the police "needed to worry about." He responded "I don't think so." The officer then conducted a pat-down search, finding an unsheathed hunting knife with a four-inch blade wedged between two pairs of pants and fastened to the accused. An exacto knife was also located in the front pocket of his exterior pair of pants. When asked if he had anything else that might cause concern to the police, the accused, after a few seconds, said "No." Eight other people found in the residence were moved to the living room, which was separated from the kitchen by a dividing wall.

The accused began to fidget or squirm while he was lying on the kitchen floor. After consulting with a supervisor, an officer conducted a further search. The accused was stood up, his exterior pair of pants was removed and, on a pat-down search, a hard object was detected in the accused's groin area. Believing it could be a knife, the officer looked down the loose-fitting inner pants. The accused had no underwear on and the officer could see a baggie containing what appeared to be drugs attached to the accused's penis by an elastic band. The officer then pulled the inner pants down to the accused's knees, removed the baggie and he was taken to the police station. The baggie contained 18.9 grams of cocaine and 22.4 grams of heroin. Scales, wrappers, and other indicia of drug trafficking were also found in the home along with sheets indicating payments in amounts and quantities indicative of drug trafficking.

British Columbia Supreme Court

The judge, treating the search in this case as a strip search, found the police had reasonable grounds to conduct it in the field and that it was done reasonably. The judge accepted the police officer's concern that the hard object he felt may have been a weapon and that the subsequent investigation was reasonable. The search was carried out in a private area and the other people present could not view the accused. The removal of the object was quick; the police simply distended the elastic band and removed the package. Any discomfort was "trifling" and the police were wearing gloves. As well, they made notes about the strip search and his race (being black) did not render the search an unreasonable one. The evidence was admitted and the accused was convicted of possessing cocaine and heroin for the purpose of trafficking.

British Columbia Court of Appeal

The accused argued that the trial judge erred, among other things, by admitting the evidence found during the search of his person. He argued that the judge improperly found that exigent circumstances existed to justify both the field strip search and the ensuing physical search (the seizure of the drugs). In his view, his s. 8 *Charter* rights had been breached and the evidence was inadmissible under s. 24(2).

Exigent Circumstances

In assessing whether the strip search in the field was justified by exigent circumstances, the Court of Appeal noted the progression of the searches in this case:

> Whether a field strip search was justified depends on the circumstances of the search. It is well established that the police have a right to "frisk" or "pat-down" a person arrested to determine if the person has weapons on his person. Having found weapons in that search and given the hesitation in answering whether he had anything else, the second pat-down search also was clearly within the allowable parameters.[para. 32]

In *R. v. Golden*, 2001 SCC 83, the Supreme Court of Canada observed that a strip search will be justified "if the frisk search reveals a possible weapon secreted on the detainee's person or if the particular circumstances of the case raise the risk that a weapon is concealed on the detainee's person." In this case, Justice Saunders, speaking for the Court of Appeal, found the Crown had satisfied this concern:

> The discovery of a hard object, combined with the knives found earlier on the pat-down searches, led to the police looking down [the accused's] inner pants. There, not hidden by underpants, the officer saw the object attached to [the accused's] person. Accepting that this part of the events was a strip search because, as it turned out, [the accused] was not wearing underpants, I consider it was open to the judge to accept the police officer's concern that the hard object that was felt may have been a weapon and to find in consequence that the subsequent investigation was reasonable. That finding brings the case within the statement from Golden that a strip search will be justified if the circumstances of the case raise the risk that a weapon is concealed. [para. 34]

Seizure of the Object

The accused objected to a number of aspects of the search, including privacy, health and safety, the "field" nature of it, the discomfort he experienced, lack of police notes and that his race was a factor. But the Court of Appeal rejected each of these challenges and upheld the findings of the trial judge.

Privacy: Even though the search took place in a space in the kitchen, it was a private area and the other people present could not see the accused.

"Field" Nature of the Search: The police need not have transported the accused to the police station with the elastic band and baggie still on him to have it removed by a medically trained person. "It defies credulity to consider the police should have left this elastic band and object on [the accused], given that it could be removed in a private area and that [the accused] had been fidgeting with it on," said Justice Saunders. The search was swift; the elastic band was stretched and the package removed. Any discomfort was, at most, minor and transitory. And the search would not have be any less intrusive or humiliating if conducted at the police station.

Health and Safety: The police officers were wearing gloves and may even have put latex gloves on.

Notes: The police said they made notes at the scene and, while not marked as an exhibit, their existence was known and they were available for cross-examination. Even so, the contemporaneous notes standard described in *R. v. Fearon*, 2014 SCC 77 for establishing the legitimacy of a cell phone search incidental to arrest was not comparable to a search addressing officer safety concerns. The search then only deviated from that safety concern when the police discovered, instead of a weapon, what they thought was a drug packet.

Race: The accused's race (being black) did not render the search unreasonable. "The circumstances of the warranted entry into [the accused's] residence and subsequent progressive searches appear to me to be well within the parameters of proper investigative techniques in respect to any member of the community, and there is no suggestion on the record that racial considerations were applied to [the accused's] detriment so as to otherwise give him cause for complaint as to the events," said the Court of Appeal.

The trial judge made no errors in concluding that the police actions were reasonable and that there was no s. 8 *Charter* breach in the search incidental to the accused's arrest. As such, there was no need to consider s. 24(2).

The accused's appeal was dismissed.

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

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