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 February 13, 2016 26-year-old Service de Police de Lac Simon Québec Constable Thierry Leroux was shot and killed as he and another officer responded to a domestic disturbance call at approximately 10:30 pm.

A male subject inside the home opened fire on the two officers as they approached the house. Constable Leroux was struck by the shot. He was transported to a hospital where he succumbed to the wound.

The subject who fired the shot committed suicide inside the home.

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

IN-SERVICE: 10-8 ENTERS 16th YEAR

Policing a democracy is no easy task. The rule of law is a bedrock principle and the police must respect the limits of the authority they are granted. There are many sophisticated nuances in applying and enforcing the law and ultimately decision making requires sound judgment, often in an atmosphere of violence with little time for reflection. When those split second decisions are made, there is no benefit of hindsight and often no opportunity for a second opinion, academic reflection, or peer review.

The police make decisions every day that require careful and prudent deliberation. These decisions impact people's lives, in some cases forever. Errors can be costly. When the cops screw up, cases, careers, and even lives can be at stake. There is an old saying that, "Doctors bury their mistakes while lawyers send theirs to prison. Police officers do a little of both." As professionals, the police owe it to themselves, their families, their organizations, and their communities to pursue a path of continuous learning that keeps pace with today's demands. In Service: 10-8 continues to be a proud leader in bringing legal information to the attention of those serving on the front line.

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.

Bulletproof spirit: the first responder's essential resource for protecting and healing mind and heart.

Captain Dan Willis, La Mesa Police Department.

Novato, CA: New World Library, 2014.

RA 785 W533 2014

Change management: a guide to effective implementation.

Los Angeles, CA: Sage, 2016.

HD 58.8 M33 2016

The eighty-year rule: what would you regret not doing in your lifetime?

Claire Yeung.

Bloomington, IN: Iuniverse Inc., 2015.

BF 637 S4 Y48 2015

The influential project manager: winning over team members and stakeholders.

Alfonso Bucero.

Boca Raton, FL: CRC Press, 2015.

HD 69 P75 B776 2015

The like switch: an ex-FBI agent's guide to influencing, attracting, and winning people over.

Jack Schafer, Ph.D., with Marvin Karlins, Ph.D.

New York, NY: Simon & Schuster, 2015.

BF 575 F66 S33 2015

Managing the unexpected: sustained performance in a complex world.

Karl E. Weick, Kathleen M. Sutcliffe.

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

HD 49 W45 2015

Mindful management: the neuroscience of trust and effective workplace leadership.

Dalton A. Kehoe.

Richmond Hill, ON: Communicate for Life, Ltd., 2015.

HD 57.7 K44 2015

The new one minute manager.

Ken Blanchard, PhD, Spencer Johnson, MD.

New York, NY: William Morrow, an imprint of Harper Collins Publishers, 2015.

HD 31.2 B53 2015

Not everyone gets a trophy: how to manage the millenials.

Bruce Tulgan.

Hoboken, NJ: Jossey-Bass, 2016.

HF 5549.5 M63 T854 2016

Resilience: how to cope when everything around you keeps changing.

Liggy Webb.

Chichester: Capstone, 2013.

BF 698.35 R47 W43 2013

Resilience: why things bounce back.

Andrew Zolli & Ann Marie Healy.

New York, NY: Free Press, 2012.

TA 169 Z65 2012

The resilience dividend: being strong in a world where things go wrong.

Judith Rodin.

New York, NY: PublicAffairs, 2014.

BF 698.35 R47 R63 2014

The Sage handbook of action research.

edited by Hilary Bradbury.

Los Angeles, CA: Sage Reference, 2015.

HM 571 H36 2015

The right decision: evidence-based decision making for government professionals.

Paul S. Maxim, Len Garis, Darryl Plecas, and Mona Davies.

Abbotsford, BC: School of Criminology and Criminal Justice, University of the Fraser Valley, 2015.

JF 1525 D4 M39 2015

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

Public Safety: Gangs, Guns & Grams

Protecting the public is one of law enforcement's most important duties. Gangs, guns and the violence that accompanies the illicit drug trade threaten public safety. The challenge for the police, however, is to investigate and enforce the law by negotiating the area where personal freedoms and the public interest intersect. "In determining the boundaries of police powers," the Supreme Court has noted, "caution is required to ensure the proper balance between preventing excessive intrusions on an individual's liberty and privacy, and enabling the police to do what is reasonably necessary to perform their duties in protecting the public."[1] This seminar will provide officers with practical information they can use to better understand their powers in this area.

Topics include:

- Significant Supreme Court of Canada judgments
- Ancillary powers doctrine
- Continuum of conclusion
- Using source information
- Vehicle stops
- Investigative detention
- Pat downs & frisks
- Arrest & search
- Plain view
- Safety searches
- Possession
- and more.

"[T]he toxic combination of drugs and guns poses a pernicious and persisting threat to public safety and the welfare of the community." –

R. v. Wong, 2012 ONCA 767

Date:
March 30, 2016
9:00 am – 3:00 pm

Location:
JIBC Theatre
715 McBride Boulevard
New Westminster, BC

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

Registration Fee:
$89 (plus GST) by Mar 9, 2016
$99 (plus GST) by Mar 29, 2016

Restricted to law enforcement officers.

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

[1] *R. v. Clayton*, 2007 SCC 32

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, the case law editor for Blue Line magazine with its national readership of 55,000 and co-author of "Canadian Police Powers and Duties". 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.

USING FLASHLIGHT TO SCAN INSIDE VEHICLE WAS NOT A CHARTER SEARCH

R. v. Diamond, 2015 NLCA 60

A police officer stopped a pick-up truck on a remote road at 12:55 am for travelling 80 km/h in a 50 km/h zone. He radioed in the licence number and was advised to be cautious because the registered owner had been arrested for drugs before, and had a scanner and a knife. As the officer approached the vehicle, he saw a police scanner above the driver-side window visor and noted the truck body was higher than usual. It had large tires and a suspension lift. When asked for his driver's license and registration, the accused checked his window visor but could not find it. The officer then requested that the glove box be checked. When the accused leaned towards the glove box, the officer saw some money the accused had been sitting on.

With at least part of his head and hand through the open window, the officer shone his flashlight on "an unsheathed hunting type knife" next to the driver's side door. The knife was within the accused's reach when seated. The accused was arrested for possessing a weapon dangerous to the public peace and he was placed in handcuffs. He was patted-down at the roadside and a small bag of cocaine fell from his clothing. He was advised of his right to counsel, which he declined, and was given the standard police caution. A subsequent strip-search at the police station led to the discovery of an additional 28 small bags of cocaine totaling 12 grams.

Newfoundland Provincial Court

The accused argued that his rights under ss. 8 and 9 of the *Charter* were breached. In his view, the act of the officer leaning his head in the truck and shining his flashlight constituted a warrantless search without sufficient grounds to do so. He submitted the officer's conduct was "quite egregious" and a "ruse".

The judge, however, found the initial stop was not a ruse to justify a drug or weapon search. The accused was driving 30 km/h over the speed limit. Dispatch told him to exercise caution. As an officer working alone, in the dark, and told to be cautious, he needed to take a reasonably thorough view of the vehicle. "Police work is a dangerous job, particularly when one is unaccompanied in the dead of night," said the judge. "Vehicles are capable of transporting weapons, armaments and contraband." Although the accused had an expectation of privacy while operating his vehicle, it was a reduced one, and the officer's inspection of the truck's cab did not amount to a search. The judge stated:

> Where speed is a factor, the officer must be attentive to the possibility of impairment by alcohol or drugs. Where one is alerted to the possibility of the presence of a knife, one might also be expected to rotate one's flashlight around to check the environment. This was not an open convertible or sports car which the officer could survey from above. In order to view the vehicle in a proper manner to address the concern of impairment or personal safety around the possible presence of a weapon, the skills of a gymnast were not needed. Nonetheless, the height of the vehicle required the head of the officer and the flashlight to minimally enter the open window area and the knife was seen immediately.

The knife was in plain view and seeing it was inadvertent. "The officer did not expect to find a knife," said the judge. "All the officer did was a routine scan of the vehicle with his flashlight as he had to do in that place and that circumstance and

"There is a significant amount of jurisprudence affirming that a police officer may use a flashlight at night to observe activities or objects inside vehicles."

the physical dimensions of the vehicle required a minimal insertion of head, hand and flashlight far enough through the open window to allow a view of this large knife, unsheathed and available for ready use in the lower door compartment on the driver's side of the truck." The judge found the officer had the necessary reasonable grounds to justify an arrest under s. 495(1) of the *Criminal Code* for possessing a weapon for a purpose dangerous to the public peace. The searches incidental to the arrest that uncovered the cocaine were therefore reasonable. The accused was convicted of unlawfully possessing a weapon dangerous to the public peace and unlawful possession of cocaine for the purpose of trafficking.

Newfoundland Court of Appeal

The accused appealed his convictions by contending that the trial judge erred in finding that the officer's inspection of the cab was not a search. He argued that the officer did more than a simple visual inspection. Rather he performed a search when he physically placed part of his head and hand while holding a flashlight inside the truck's interior. He also submitted that the discovery of the knife alone was insufficient to justify the arrest. Therefore, the pat-down and strip searches that revealed the cocaine were unreasonable. In his opinion, all of the evidence should have been excluded under s. 24(2) of the *Charter*.

Search

Justice Harington, speaking for the majority, noted that "there is a significant amount of jurisprudence affirming that a police officer may use a flashlight at night to observe activities or objects inside vehicles." He then concluded that the officer's visual inspection of the cab's interior in this case did not amount to a search:

> The judge found that the officer minimally inserted his head and a hand holding a flashlight inside the vehicle only briefly, to assess his immediate surroundings for his own safety. This minimal intrusion was necessary due to the height of the truck. I agree with his finding that this did not constitute a search. [para. 18]

His visual inspection of the truck was lawful. As well, the plain view doctrine applied. The officer was in a lawful position from which to view the unsheathed knife.

Arrest

The majority of the Court of Appeal also agreed that the accused's arrest was lawful. The officer had not only the required subjective belief (as conceded by the accused) but it was also objectively reasonable in the circumstances. The totality of the circumstances not only included the presence of the knife but also the following:

(i) The knife was located on the driver's side, where it would be most easily accessible;

(ii) It was unsheathed. If the knife was related to illegal drug activity, it would be advantageous to have it unsheathed for quicker access;

(iii) Involvement in the drug trade can be a motive to carry a weapon for a purpose dangerous to the public;

(iv) The officer knew the [accused] had previously been arrested for possession of drugs;

(v) The [accused] was carrying a machete type knife when he was last arrested for possession of drugs;

(vi) The [accused's] vehicle was carrying a police scanner. That is a known drug-trafficking accessory; and

(vii) The [accused] was carrying a police scanner the last time he was arrested for possession of drugs. [para. 25]

BY THE BOOK:

Arrest: ***Criminal Code***

s. 495(1)(a) 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 ...

The majority, however, did offer this caution:

> In reaching this conclusion, I am not suggesting that, in every instance when an unsheathed knife is located in a door pocket beside the driver of a vehicle, this would be the basis for arresting the driver for possession of a weapon dangerous to the public peace. It is the confluence of circumstances that supports the arrest for that offence in this case. The officer had been warned to proceed with caution since the owner of the vehicle had previously been charged with drug offences and, at the time, he had had a knife. The officer was alone on a rural road at 12:55 a.m. The officer saw that the [accused] had been sitting on an amount of money which was visible when he leaned over to open the glove box. In the circumstances, he reasonably suspected the involvement of drugs which alerted him to the possibility that the knife was intended for a use dangerous to the public peace, including to himself. [para. 21]

Since the arrest was lawful, the seizure of the cocaine was justifiable incidental to the accused's arrest. The accused's appeal was dismissed.

A Different View

Justice White, in a dissenting judgment, concluded that the police officer, in placing his head and hand into the accused's vehicle and scanning it with a flashlight, did conduct a search. "The fact determinative of this issue is not that the officer relied on the assistance of a flashlight to illuminate the otherwise dark interior of the vehicle," he said, "but that, without permission, the officer physically placed himself inside the interior of the vehicle, a space where the [accused] had a reasonable expectation of privacy." Justice White continued:

> A police officer is either outside the vehicle conducting a visual inspection, whether aided by a flashlight or not, or inside the vehicle to such extent that he can see items it would be impossible to see from outside and the public's access to which the owner of the vehicle has sought to restrict. The degree of intrusion in the case at bar is no different in principle to the officer opening the door and sitting on the car seat. There is either an intrusion into the vehicle or there is not. Here there was, resulting in a warrantless search. [para. 34]

This warrantless search, however, was justified on the basis of officer safety. "While the stated concerns for officer safety were rather vague and perhaps a different conclusion was available, considering all of the circumstances and the law ..., I cannot say that the trial judge made a palpable and overriding error in finding that officer safety was a concern," said Justice White. "There was no 'unreasonable' search and, therefore, no violation of the [accused's] section 8 rights for this reason alone."

Justice White, unlike the majority, found the arrest to be unlawful because the officer did not objectively have reasonable grounds:

> My colleague references a number of loosely connected facts each of which is perhaps individually suspicious and somewhat indicative of the [accused] being on occasion involved in unsavoury activities. However, the question on this appeal is whether, taken together, all of these facts could have reasonably and probably indicated to the officer that the [accused] had committed, was about to commit or was committing the offence of possessing a weapon for purposes dangerous to the public peace or for committing an offence contrary to section 88 (1) of the Criminal Code. In my view they do not. Simply put, the officer's mere general knowledge that the [accused] had been previously arrested for drug offences and during that arrest was in possession of a knife, does not

> give the officer reasonable and probable grounds to arrest the [accused] for possessing a weapon for a purpose dangerous to the public peace on any subsequent occasion when the officer sees the [accused] with a knife. Otherwise a person in the position of the [accused] would always thereafter be at risk of arrest if he ever carried a knife again, even though possessing such a knife is not per se unlawful. This is especially so when there is no evidence the knife was used to commit any offence or used for dangerous purposes on either occasion.
>
> A knife is not a prohibited or restricted weapon such as a gun. Unlike a gun, a knife is inherently a tool, not a weapon. The fact of possessing a knife is not, without more, a criminal offence. While knives may be considered weapons within the meaning of section 2 of the Criminal Code with possession in some circumstances regulated by section 88(1), there is not a scintilla of evidence in this case that the [accused] had previously used the knife dangerously, that he was attempting to use the knife dangerously, that he was committing any offence with the knife or that he had any purpose dangerous to the public peace. Even though it was nighttime, the [accused] was driving alone in his vehicle, without exposing any other persons to the knife and he cooperated fully with the officer. I cannot conclude that a reasonable person would say that the officer had anything close to reasonable and probable grounds for arresting the [accused] for possession of this knife. [paras. 46-47]

Since the arrest was unlawful, it breached s. 9 of the *Charter*. The knife, seized as evidence of an offence incidental to the unlawful arrest, was sufficiently connected to the s. 9 breach such that s. 24(2) was engaged. Justice White would have excluded all of the evidence under s. 24(2) and entered acquittals on the charges.

Complete case available at www.canlii.org

Note-able Quote

"You can only go as high on the leadership ladder as your character will allow you." - John C. Maxwell

OFFICER'S REQUEST TO COME TO POLICE CAR FOR ID PURPOSE REASONABLE

R. v. Shipley, 2015 ONCA 914

A uniformed police officer working nightshift in a high drug trafficking area saw a car at 9:48 pm stopped diagonal to the marked parking stalls in a bank parking lot. The car's interior lights were on and the driver was alone in the vehicle looking down as if doing something on his lap. When the driver looked up and saw the officer, he appeared startled "like a deer caught in the headlights." The officer did a u-turn to go back and speak to the driver. He wanted to determine if the accused was licensed and to investigate why he was in the empty bank parking lot at night, parked strangely, with the interior lights on and why he would be startled upon seeing the police. At the same time, the car left the parking lot turning in the opposite direction. The officer did another u-turn and followed the vehicle, entered the license number into his computer and learned it was a rental.

The officer pulled the car over and approached the driver, asking to see a driver's license and the vehicle's documentation. The accused identified himself as Stephen Casey and told the officer he was licensed but did not have it with him. He was not able to produce any photo identification. When the officer ran the name provided on CPIC it came back as an alias to Stephen Shipley. Shipley was on bail for outstanding drug related offences. The computer entry also produced a 4 x 4 photograph of Shipley. To confirm identity, the officer asked the accused to accompany him to his cruiser. When the accused complied and stepped out of his car, the officer noticed a number of plastic bags containing a white substance on the driver's door and a further plastic bag with a white rock in it on the passenger seat. The accused was arrested for possessing cocaine and he was patted down. Police found $450 in various pockets, $25 and a dime bag of cocaine in his wallet, and a black cell phone. When the car was searched, police recovered the plastic bags of cocaine from the front of the vehicle. A baby seat in

the rear had bags of cocaine partially hidden in the cloth portion of the seat. Police also found another cell phone, a digital scale with white residue on it, marijuana seeds and latex gloves. The drugs weighed 35 grams. The accused was transported to the police station where he was strip searched in a private area but no drugs were found on his person or in his clothes. He was charged with possessing cocaine for the purpose of trafficking and possessing proceeds of crime not exceeding $5,000.

Ontario Superior Court

The officer admitted in cross examination that a rental car is often used in drug trafficking and that drug involvement by the driver was one of a number of possibilities going through his mind when he decided to stop the vehicle and investigate further. The accused argued that the officer did not have grounds to stop him, order him out of the car and then search the vehicle. In his view, the stop was clearly a ruse based on a hunch that drugs were involved. Since the vehicle stop was unlawful, so too were the searches of his car and person, and the strip search that followed. He submitted that any evidence found should be excluded under s.24(2) of the *Charter*.

The Crown, on the other hand, submitted that the officer had reasonable grounds to stop the car under s.216(1) of Ontario's *Highway Traffic Act (HTA),* ask the accused to step out to confirm his identity and determine whether he was licensed to drive. The cocaine was clearly visible when the accused opened the car door and the officer had every right to then arrest him and search the vehicle incidental to the arrest. As well, the officer needed to do a pat down search for safety reasons and strip search him later before he was placed in the general prison population.

The judge found the officer had a dual purpose in deciding to stop the accused. First, he wanted to make sure the accused was properly licensed and, second, he wanted to know why he was stopped in the bank parking lot. He ruled that the stop was not a ruse and the inquiries made by the officer, including the request that the accused step out of his car, did not extend beyond the scope of s. 216(1) *HTA*:

> The officer, under these circumstances, was well justified in stopping the [accused] under the H.T.A. to ensure he was properly licensed. There was nothing improper for the other reason for his stop which was to investigate why the [accused] was stopped at an empty bank parking lot at night, with interior lights on, in a high drug area, and looking startled upon seeing the police.
>
> I further conclude that the officer was justified in requesting that the [accused] step to his cruiser to determine his I.D. The [accused] did not have a license with him, contrary to the H.T.A. He was unable to produce any photo I.D. He was driving a rented car. He had previously looked startled upon seeing the police. He gave a name which came up with an alias when searched on the officer's computer. The officer had a picture on his computer screen and an individual a number of feet away in his car at night with lighting obviously not at its best. Under those circumstances I think it entirely reasonable for the officer to ask the [accused] to attend at his car to be able to do a proper photo comparison with the [accused] next to his photo on the computer screen.
>
> Once the [accused] opened the door to his vehicle the drugs were clearly visible to the officer, both on the driver's door and the passenger seat. The officer then had reasonable grounds to arrest the [accused] and search the vehicle. [2014 ONSC 4795, paras. 23-25]

As for the strip search, it was properly conducted and was reasonable in the circumstances. It was not simply being done as a matter of routine. The accused had been arrested for drug trafficking and the purpose of the search was to discover illegal drugs secreted on his person. It was conducted in private at the police station by officers of the same gender with the accused removing his own clothes. Further, as bail was to be opposed, the accused would be placed in the general prisoner population. The police did not want hidden drugs smuggled into the jail. There were no *Charter* breaches and therefore no reason for a s. 24(2) analysis. The accused was convicted of both charges.

Ontario Court of Appeal

The accused argued that his ss. 8 and 9 *Charter* rights had been breached. In his view, the trial judge erred in finding that the arresting officer had reasonable and probable grounds to detain him and search inside his vehicle. He submitted that the drugs found around the driver's seat should have been excluded under s. 24 (2). The Court of Appeal, in a short endorsement, rejected this argument:

> We agree with the trial judge that the officer, in order to determine the [accused's] identity, was justified in requesting that [he] step out of his car and come to the police cruiser. The [accused] did not have a licence with him as required by the HTA, and he was unable to produce any photo identification. The officer had a picture of the person whose name was the alias the [accused] had given him showing on his computer screen in the police car. As a result, it was entirely reasonable for him to ask the [accused] to come over to the police car to compare the [accused] with the image on the computer screen to properly identify him for HTA purposes.
>
> When the [accused] stepped out of his vehicle, the dime bags and rock of cocaine around the driver's seat were in plain view. [paras. 4-5]

Relying on *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 (Ont. C.A.), the Court of Appeal found the officer's purpose in learning what the accused was doing in the bank parking lot at the late hour was well within the ongoing police duty to investigate criminal activity and did not taint the lawfulness of the s. 216(1) *HTA* stop. There were no ss. 8 or 9 *Charter* breaches. The evidence was admissible and the accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: Additional facts taken from *R. v. Shipley*, 2014 ONSC 4795.

POLICE DID NOT CREATE EXIGENCIES: WARRANTLESS ENTRY LAWFUL

R. v. Phoummasak, 2016 ONCA 46

An undercover officer purchased 4.5 grams of cocaine from a drug dealer. Ten days later a second purchase was arranged but this time the dealer said he had to get the cocaine from his supplier. He was observed enter apartment 428N at 1169 Queen Street. He then rejoined the officer in a vehicle a few moments later and completed the sale. The dealer left the vehicle and returned to unit 428N. From this, police believed that the dealer's supplier lived at, or was connected to, unit 428N. The lead investigator believed he had grounds after the second transaction to obtain a search warrant for unit 428N but he did not apply for one. Instead, he wanted "to confirm a 100% that this was the [supplier's] address". Police planned for a third transaction with the dealer and would arrest him and anyone else there were reasonable grounds to believe was involved in the transaction.

Police set up surveillance in the area of the apartment building on Queen Street. The plan was to apply for a warrant to search the apartment if the dealer went to unit 428N in connection with the third transaction. An officer began working on the necessary paperwork for the warrant. As the third transaction began, the undercover officer drove the dealer to 1169 Queen Street. The dealer went inside the building and returned to the vehicle about 10 minutes later. He and the undercover officer drove a short distance away at which point the dealer produced 15.3 grams of cocaine. The officer gave the dealer $800 and took the drugs. The dealer left the vehicle but, before he could be arrested as planned, he returned to 1169 Queen Street. He was then apprehended in front of the apartment building. His cell phone began to ring repeatedly immediately after he was arrested. The call display indicated that the calls were all coming from someone named "Vic", believed to be the supplier who police thought was in unit 428N. Worried that the supplier would become suspicious when the dealer did not answer his cell phone and would take steps to

destroy any evidence relating to the drug transactions in the apartment, the police decided to enter the apartment immediately to "freeze" it until a search warrant could be obtained.

The police entered the apartment building using a fob seized from the dealer, went to the door of unit 428N and knocked. No one answered but the police heard noises coming from inside. Using a key seized from the dealer, the police entered the apartment and saw the accused coming back into the apartment from the balcony. A police officer outside the building had seen the accused throw three baggies containing drugs off the balcony. Police secured unit 428N, arrested the accused, and applied for and obtained a search warrant for the apartment. When the warrant was executed, police found various drugs and more than $5,000 in cash.

Ontario Superior Court of Justice

The accused argued that the search was unlawful and therefore breached s. 8 of the *Charter*. He contended that the exigent circumstances exception to the warrant requirement under s. 11(7) of the *Controlled Drugs and Substances Act* (*CDSA*) did not apply because the police created the exigent circumstances by their own operational decisions made in the course of the ongoing investigation. The judge rejected this submission. He found the police could not have obtained a search warrant after the second transaction and acted lawfully in entering and securing the accused's premises. Convictions on drug charges followed.

Ontario Court of Appeal

The accused again argued that the police created the exigent circumstances upon which they relied to justify the warrantless entry into his apartment. The Court of Appeal, however, disagreed.

Exigent Circumstances

Justice Doherty, speaking for the Court of Appeal, described exigent circumstances and their application to s. 11(7) of the *CDSA* this way:

"Generally speaking, the police cannot enter a residence to search for evidence without prior judicial authorizations. There are a few exceptions to that rule. Section 11(7) of the CDSA recognizes the common law exigent circumstances exception to the warrant requirement."

> Generally speaking, the police cannot enter a residence to search for evidence without prior judicial authorizations. There are a few exceptions to that rule. Section 11(7) of the CDSA recognizes the common law exigent circumstances exception to the warrant requirement. It provides:
>
> > 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.
>
> Section 11(7) of the CDSA, unlike other statutory provisions providing for exigent circumstances searches (e.g. Criminal Code s. 529.3), does not define exigent circumstances. In my view, the phrase has the same meaning in s. 11(7) of the CDSA as it does in the Criminal Code provisions and at common law. Exigent circumstances under s. 11(7) exist if (1) the police have grounds to obtain a search warrant under s. 11 of the CDSA (the probable cause requirement) and (2) the police believe, based on reasonable grounds, that there is imminent danger that evidence located in the premises will be destroyed or lost if the police do not enter and secure the premises without delay (the urgency requirement). [references omitted, paras. 11-12]

In this case, the accused agreed that both conditions for a warrantless search under s. 11(7) existed. However, he argued that the police manufactured the exigencies and therefore could not rely upon them to justify the search. In his view, the police had the necessary grounds to get a search warrant after the second drug transaction. Instead, they chose to

proceed with a third transaction knowing that their plan would place them outside the apartment door. They knew its occupant would then be suspicious once the dealer had not returned to the apartment and would take steps to destroy any evidence in the apartment.

Although "the police cannot orchestrate exigent circumstances by creating the requisite urgency through a preplanned course of conduct," Justice Doherty concluded that was not what happened in this case. Even though the police had grounds to obtain a search warrant for the accused's apartment prior to the third drug purchase, they did not anticipate that the investigative steps they took would create the urgency to justify an entry into the apartment without a warrant. "The existence of reasonable grounds to obtain a warrant does not preclude the existence of exigent circumstances," said Justice Doherty. "To the contrary, probable cause is a prerequisite to the existence of exigent circumstances." He continued:

> [E]vidence that the police had grounds to obtain a search warrant, but did not obtain a warrant and instead proceeded with other investigative measures, can in some situations afford evidence that the police set out to create exigent circumstances to justify entry into a premise without a warrant. If that inference is drawn, the circumstances are not exigent and cannot justify a warrantless search or entry.
>
> The inference that the police set out to avoid the warrant requirement does not flow automatically from the fact that the police could have obtained a search warrant for the premises before the exigent circumstances arose. The specific circumstances of each case must be examined.

"The existence of reasonable grounds to obtain a warrant does not preclude the existence of exigent circumstances. To the contrary, probable cause is a prerequisite to the existence of exigent circumstances."

"[T]he police cannot orchestrate exigent circumstances by creating the requisite urgency through a preplanned course of conduct."

> In this case, the officer in charge explained his reasons for not applying for a warrant before the third drug transaction. That explanation was not unreasonable. [The dealer] had made two sales to the undercover officer, one unconnected to unit 428N and the other connected to unit 428N. The officer in charge reasonably believed that it was prudent to seek further confirmation of the connection of the apartment to the drug transactions before seeking a warrant. The reasonableness of the officer's approach is evident from the trial judge's opinion that the police did not have reasonable grounds to obtain a search warrant before the third transaction. Although I disagree with her assessment, this difference of judicial opinion suggests that the officer's decision to seek further confirmation of the connection between unit 428N and the drug transactions before applying for a warrant was a reasonable one. [paras. 15-17]

In this case, neither the arrest in front of the apartment building nor the unanswered telephone calls to the dealer were anticipated by the police. The police did not create "an artificial situation of urgency." The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

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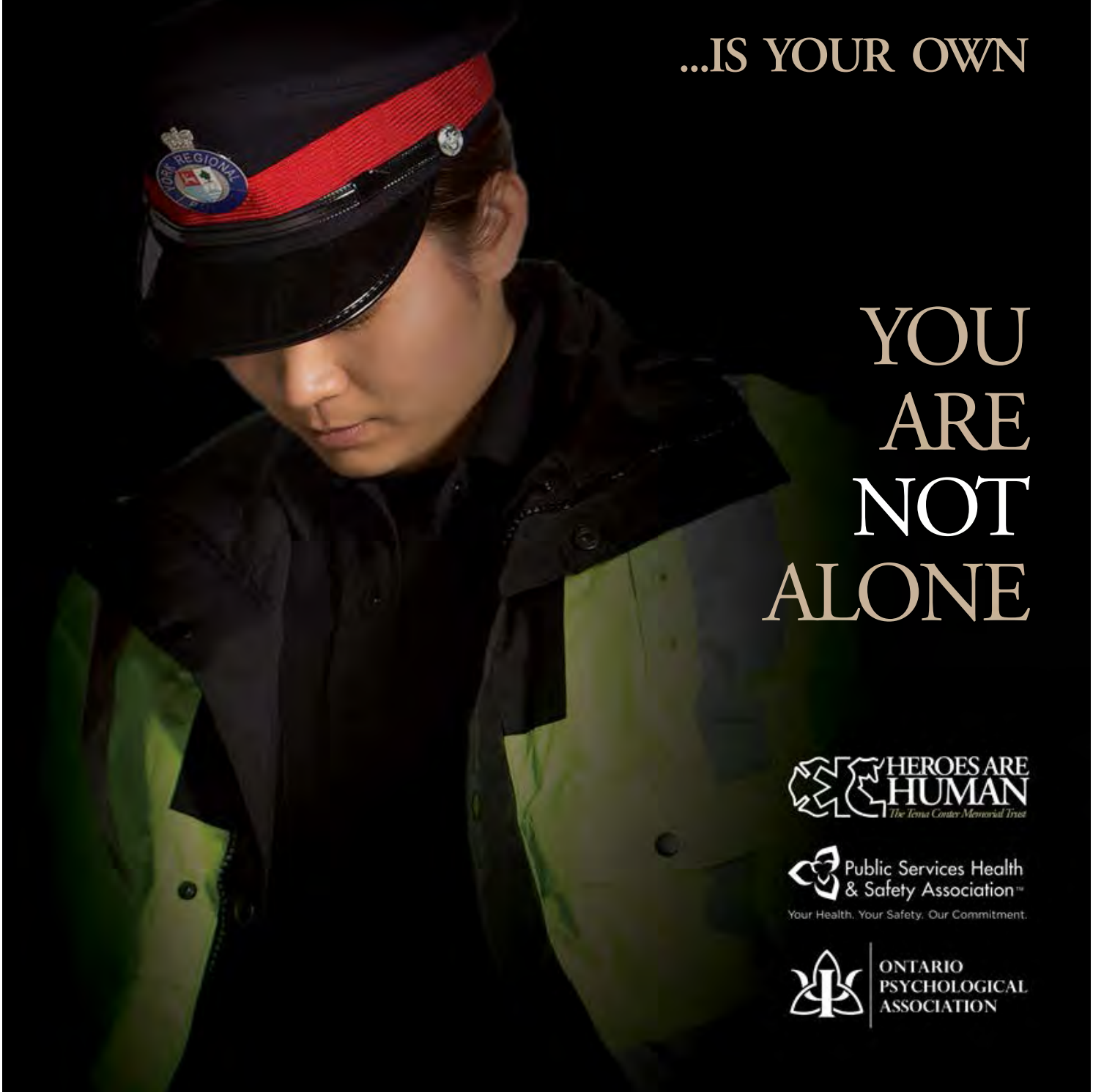

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JUSTICE INSTITUTE of BRITISH COLUMBIA | POLICE ACADEMY | LEGAL ISSUES IN POLICING

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.

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- Right to counsel.
- K-9 sniffs.
- Trash pulls.
- Entrapment.
- and much more.

Date:
March 1, 2016
9:00 am – 3:00 pm

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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, the case law editor for Blue Line magazine with its national readership of 55,000 and co-author of "Canadian Police Powers and Duties". 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.

NO PRIVACY INTEREST IN SDM: VEHICLE LAWFULLY SEIZED

R. v. Fedan, 2016 BCCA 26

The accused lost control of his pick-up truck on a curve and struck a large tree. Both of his passengers were killed. The area was lit by streetlights, the weather was overcast and the road was flat, dry and in good repair. Police attended the accident scene and seized his vehicle and stored it at a towing compound. Two days later the police obtained a warrant to search the vehicle for evidence such as blood, DNA, personal effects and documents to identify the driver. However, the search warrant did not specify the seizure and search of the sensing diagnostic module (SDM) and its data. The SDM is an electronic device capturing the speed, throttle, and braking of the vehicle in the five seconds before an airbag event (eg. collision) or near-deployment event (eg. sudden deceleration).

A police officer attended the towing compound and removed the SDM which was embedded underneath the floor of the driver's seat. He had not been involved in the preparation of, obtaining or execution of the search warrant. Data from the SDM was imaged with specialized equipment and revealed that in the five seconds before the accident the accused's truck was travelling 106 km/h (over twice the speed limit). It had accelerated in the four seconds before the brakes were engaged, and the brakes were not applied until one second before the tree was hit. This data, along with other evidence, resulted in several charges being laid including two counts of dangerous driving causing death.

British Columbia Supreme Court

The judge found the removal of the SDM and the retrieval of its data did not breach s. 8 of the *Charter*. There was no evidence that the accused was aware the SDM was embedded in his vehicle. Therefore, he did not have a subjective expectation of privacy in the data. Without a subjective expectation of privacy, s. 8 was not triggered. There was then no reason to consider whether there was an objective reasonable

expectation of privacy. Further, even if there was a s. 8 breach, the judge would have admitted the evidence anyway under s. 24(2). The evidence proved the accused drove dangerously and he was convicted on two counts of dangerous driving causing death.

BC Court of Appeal

The accused argued the trial judge erred in not presuming a subjective expectation of privacy in the SDM that was objectively reasonable. In his view, he had a presumed expectation of privacy in his vehicle which extended to the SDM, a component of it akin to an "onboard computer" or "black box". He submitted that had not abandoned this privacy interest in the accident, the data contained within it (precise speed, acceleration, and braking) was not visible to the public eye and its seizure was intrusive since it was not easy to remove.

The Crown, on the other hand, argued the trial judge made no error in finding the accused did not have a subjective expectation of privacy in his vehicle. It was destroyed in the accident and was lawfully seized under s. 489(2) of the *Criminal Code*. As well, the data captured by the SDM only related to the use of the vehicle (speed, throttle and braking), was limited to a five-second window before the crash, and did not record any intimate details of the accused's biographical core, lifestyle or personal choices. Furthermore, even if there was a subjective expectation of privacy in the SDM and its data, the

Crown contended the expectation was not objectively reasonable. Any expectation of privacy in the vehicle had all but vanished when the vehicle was destroyed in the accident and was lawfully seized by the police in a criminal investigation. In addition, the SDM data would have been visible to any witness who had been present to observe the event. The data was highly relevant and reliable, did not expose any intimate details of the accused's biographical core, lifestyle or personal choices, and its removal was not intrusive because the vehicle had already been destroyed.

Reasonable Expectation of Privacy

Section 8 of the *Charter* is only engaged if an accused can establish a reasonable expectation of privacy in the subject matter of the search and/or seizure. This requires a subjective expectation of privacy that is objectively reasonable. A subjective expectation of privacy requires a finding that an individual had or was presumed to have had an expectation of privacy in the content of the subject matter of the search. As well, such privacy must be objectively reasonable on the totality of the circumstances considering a number of factors. Section 8 protects privacy interests that are ***personal*** (bodily integrity), ***territorial*** (such as a home or vehicle) and/or ***informational*** (personal information that may reveal intimate details about a person).

In this case, the Court of Appeal found the vehicle had been lawfully seized without a warrant under s. 489(2) of the *Criminal Code* and stored in the towing compound. "In some circumstances, an item can be seized without a warrant," said Justice Smith. "Section 489(2) authorizes the seizure of any thing without a warrant where an officer in the execution of his or her duties reasonably believes that a thing: (i) has been obtained by the commission of an offence; (ii) has been used in the commission of an offence; or (iii) will afford evidence in respect of an offence. There must be an evidentiary basis to justify the use of the extended power to seize under s. 489 (2)(a), (b) or (c)." This lawful seizure of the vehicle included the right to examine it and extinguished any privacy interest the accused may have had in the SDM and its data.

Although the accused could have been presumed to have a subjective expectation of privacy in his vehicle, which extended to the SDM, this privacy interest was not objectively reasonable. "I am unable to see how [the accused] could have any residual territorial privacy interest in the SDM after the vehicle was lawfully seized or any informational privacy interest in the SDM data as, standing alone, the data provided no personal identifiers that could link [the accused] to the captured data," said Justice Smith. "He therefore had no reasonable expectation of privacy in the SDM or its data after the vehicle was lawfully seized." She continued:

> [I]n this case, the data recovered by the SDM provided no personal information about [the accused]. The captured information pertained only to the use of the vehicle in a five-second window of time before a deployment or near-deployment event. It did not capture any information that revealed intimate details of [the accused's] biographical core, and in particular about who was driving the car. Further evidence had to be obtained to connect the driving of his vehicle to [the accused] himself. In my view, [the accused's] informational privacy interests were not engaged by the downloading of the SDM data.
>
> Nor do I accept [the accused's] analogy between the SDM and a personal computer or a "black box" and therefore do not find the reasoning in Vu to be applicable. As noted, the data recorded by the device did not extend to personal identifiers of the driver of the vehicle. Most significantly it contained no intimate details of the driver's biographical core, lifestyle or personal choices, or information that could be said to directly compromise his "dignity, integrity and autonomy". [reference omitted, paras. 81-82]

And further:

> Again, after undertaking a normative assessment of the reasonableness of [the accused's] privacy claim I find it difficult to see how an operator of a vehicle might be found to have reasonably intended the last five seconds of information pertaining to his or her driving before a collision to be private. Driving on a public road is a highly regulated activity that is open to public

> view, as evidenced by Mr. Schneider witnessing [the accused's] erratic driving 20 minutes before the accident. Had another member of the public witnessed the collision, that person would have seen the information captured by the SDM, albeit with less accuracy.
>
> ...
>
> In sum, in the context of this case and the totality of the circumstances, I find [the accused] did not have a reasonable expectation of privacy in the SDM and its data. His territorial privacy interest in the device was extinguished by the lawful seizure of the vehicle and he had no informational privacy interest in the SDM data as it contained no personal information linking him to the operation of the vehicle at the material time. [paras. 84-86]

There was no error in the trial judge's finding that the accused's s. 8 *Charter* right was not violated. And, even if there was a *Charter* breach, the trial judge did not err in admitting the evidence under s. 24(2). The SDM and its data was properly admitted as evidence and the accused's appeal was dismissed.

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

APPEAL COURT SPLIT ON WHETHER DETENTION OCCURRED

R. v. Folker, 2016 NLCA 1

On July 19, 2010 the accused reported to police that his common-law wife and mother of their infant son was missing. He said that she had left their home the previous evening and had not returned. On July 23 he was contacted by police for an interview, agreed to the request and drove himself to police headquarters the following morning. When he arrived, he was escorted to an interview room, asked to turn off his cell phone and told the interview would be video recorded. The interview lasted one hour and thirty-five minutes. It focussed on the events of July 18, personal circumstances, and information about the missing person's habits, friends and use of their computer. The accused said that he had telephoned his wife's friends and family the day following her disappearance to find her but had not tried to call his wife on her cell phone since she had been missing. The accused voluntarily agreed to consent to a search of the home computer. A consent form was reviewed with him. It included advice that he had the rights to contact a lawyer before signing it and to refuse consent. It also contained an explanation that anything obtained in the search could be retained as evidence and that the search could result in charges being laid against him. The accused did not wish to contact a lawyer and said he understood the potential repercussions of the search. During the interview, the police advised the accused that they would want to verify the truth of what he told them. In this regard, the prospects of cell and home phone records searches, other searches and a future polygraph test were discussed. He stated he would agree to the searches and the polygraph. At the end of the interview, he said he wanted to cooperate with the police and that he "wanted her found." At this time, surveillance of the accused was arranged.

On July 27 the accused again went to police headquarters where he, and other members of the missing woman's family, met with police for an update on the progress of the investigation. After the meeting, police met with the accused alone for 10 minutes to again discuss whether he would consent to searches of his cell phone records, their house phone and their vehicle. He agreed and was advised by police that they would prepare the consent forms for those searches and meet him again the next day so he could sign them. The possibility of a polygraph examination was again discussed. The police wanted a polygraph done to know if the accused was responsible for his wife's disappearance. He again stated that he would submit to a polygraph test and also allowed police to view his body to see if there were any marks on it. This meeting was audio-taped.

On July 28 the police met with the accused in an unmarked police car outside his place of employment for 12 minutes. They reviewed consent forms for searches of his cell phone, home phone and computer. Each consent form was explained and indicated that the accused had the right to consult with legal counsel about whether to consent, that he

was giving his consent freely and voluntarily, and that he knew and understood that any evidence or information resulting from the searches could be used against him in court proceedings. All consent forms were agreed to by the accused. As a result of the statements the accused made during these interviews and other evidence, he was arrested and charged with murder.

Newfoundland Supreme Court

The judge ruled that the uncautioned and un-Chartered statements made by the accused to police on July 24, 27 and 28 were admissible because he had not been detained when he gave them. The police were in the early stages of a missing person investigation reported by the accused. There was no evidence of a crime being committed and the police did not have reasonable grounds to arrest anyone, including the accused. He was asked to come to the police station for follow-up, came in his own vehicle and left after the interview on his own. As for the surveillance, it was set up to determine whether what the accused said was accurate. As well, the judge ruled that the statements had been given voluntarily. No threats, promises or inducements were made nor were there any dirty police tricks. The accused was convicted of second degree murder.

Newfoundland Court of Appeal

The accused argued that the trial judge erred in admitting the three statements he made, among other things, because he was detained and ought to have been given his *Charter* rights before providing those statements. He claimed he felt compelled to cooperate with the police by answering questions during the interviews. He asserted he was viewed as a suspect because the statements were videotaped and/or audio recorded and he was placed under surveillance. Thus, in his view, the statements should have been excluded under s. 24(2). As well, he submitted that the statements were obtained through police trickery and were therefore involuntary and inadmissible under the common law.

Detention

Justice Hoegg reviewed the Supreme Court of Canada jurisprudence on what constitutes a detention under the *Charter*. He made the following observations:

- A detention can be "physical or psychological"
- A "psychological detention as arising in two ways: 1) 'a subject is legally required to comply with a police demand' and 2) 'a reasonable person in the subject's position feels obligated to comply with a police restrictive or coercive demand even though there is no legal requirement to do so'."
- "Not all encounters with police should be interpreted as psychological detention, and specifically stated that information gathering in a non-adversarial context lacks the essential character of a section 9 detention."
- "An individual's Charter rights are not engaged by cooperating with police questioning when police do not have specific grounds to connect that individual to the commission of a crime, even when it turns out that the individual being questioned is implicated in the crime"
- "An investigative encounter has the potential to turn into a detention which would engage the requirement to give a detainee his or her Charter rights. Suspicion of a particular individual could trigger the requirement for Charter rights, but 'focussed suspicion, in and of itself, does not turn [an] encounter into a detention. What matters is how the police, based on that suspicion, interacted with the subject'. In this regard, if the words and actions of the police are such that a reasonable person would conclude that he or she is not free to leave or decline to answer questions then the subject can be said to be detained."

Recorded Statements?

The fact the accused's statements were recorded during the interviews did not necessarily render him a suspect and his interaction with the police a detention:

"Video and audio recording of police interviews has become increasingly common in recent years, as the Judge noted. Such electronic records provide an accurate account of what actually transpires during a police interview, thereby providing reliable information for police use in their investigation as well as reliable evidence for possible later use. Electronic recordings of police interviews also protect other important interests. They serve as a strong deterrent to the use of improper police tactics and also help to protect police from spurious claims."

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>
> In this case, [the accused] was advised that the interview on July 24 was being videotaped and that the meetings of July 27 and 28 were being recorded. The statements he made in each of the July interviews were therefore made by him in the full knowledge that they were being recorded. Moreover, [the accused] was advised several times throughout the interviews that the police wanted to make sure that what he was telling them was true. In these circumstances, I cannot see how the video and/or audio recording of his statements supports his detention argument. [reference omitted, paras. 21-22]

Compelled to Cooperate?

The majority also rejected the accused's contention that he was detained because he felt compelled to cooperate with the police. "While [the accused's] subjective feelings in this regard are relevant, they do not determine that he was detained," said Justice Hoegg. "The test set out in Grant is an objective one, requiring that a reasonable person in the shoes of [the accused] would conclude that because of the police conduct he or she had no choice but to comply with the police questioning. Accordingly, the circumstances of the interviews, the nature of the police conduct and [the accused's] personal circumstances must be considered." In concluding that the accused was not detained during any of the interviews, the majority stated:

> [The accused's] July statements are recordings of early police investigatory work in which [the accused's] words can be fairly characterized to have been made in furtherance of his position that he did not know what happened to Ms. Shirran and that he wanted to help the police to find her. The police questioning of [the accused], in these first of many interactions with him, was of a general nature, naturally touching on his relationship with Ms. Shirran, possible reasons for her disappearance, and the efforts he made to contact her. In my view, the July 2010 interview was a far cry from "focussed interrogation amounting to detention". There is nothing in the evidence of the way the police interacted with him during the three July interviews that would cause a reasonable person in his shoes to believe that he or she had no choice but to answer the police questions. All in all, the circumstances giving rise to [the accused's] interviews with police in July, the nature of the police conduct and [the accused's] personal circumstances do not support his contention that he was detained so as to engage his Charter rights. I conclude that the Judge did not err in determining that [the accused] was not detained when he gave those statements. [para. 29]

Voluntariness?

In determining whether a statement is voluntary, a court must examine the confessions rule and consider four factors:

1. threats and promises,
2. oppression,
3. operating mind and
4. police trickery. This involves a distinct inquiry known as the "shock the community test."

In this case, the judge found there were no threats or promises, physical contact or restraint by the police, harsh language or raised voices on anyone's part, or police accusations or other police behaviour which could be interpreted as oppressive. The accused was not vulnerable nor was there any evidence that he did not have an operating mind. As for police trickery, the police were honest and frank with the accused and told him several times they wanted to check out his story. Although the police did not tell him he would be or was under surveillance, this did not cause him to answer police questions. The accused's statements were voluntary and properly admitted.

A Second Opinion

Justice White, in dissent, disagreed with the majority that the accused had not been detained. In his view, the trial judge failed to properly apply the test for what constitutes a detention for the purposes of the *Charter*. Rather than applying a claimant-centered modified-objective test, he found the trial judge almost entirely focused on the perceptions and knowledge of the police. Instead of asking whether the police had reasonable and probable grounds to believe the accused had committed an offence, the trial judge should have determined whether the police had "zeroed in on the individual as someone whose movements must be controlled" and whether the accused could have had a reasonable perception that he was detained. "The key is to determine 'the line between general questioning and focussed interrogation amounting to detention'," said Justice White. "While focussed suspicion is not on its own enough to establish detention, focussed suspicion combined with jeopardy for the accused, combined with something more than a general inquiry from police, may be sufficient to give rise to the claimant's reasonable perception that he or she is detained due to an implicit direction not to leave."

In this case, Justice White found the facts of the case led to the conclusion that the accused had been the subject of an investigative detention in the circumstances:

- The police were investigating what was a suspicious disappearance and a possible crime.
- The police had a suspicion that the accused might be involved and had reasonable grounds for this suspicion.
- The interviews were not general or preliminary; the police had clearly formed a theory and began to pursue it with the accused as a suspect.
- The police were engaging in a focussed interrogation, with specific questions such that the police were clearly trying to get an incriminating statement or an admission of greater involvement from the accused.
- The police had decided to transfer the case to the major crimes unit and place the accused under surveillance. The several interviews during which the police obtained consents for multiple searches of the accused's property also indicated that the police continued to have a keen interest in his actions.
- The interviews were recorded and the accused was asked to turn off his cellphone. The interviews were not a brief delay on the street and he was not directly told he could leave. He was told to ask police before leaving the room, for example to go to the bathroom, implying a direction to stay put.
- The accused testified that he felt compelled to go to the police interview.

Although the accused was detained, it was not unlawful. The police had reasonable and probable grounds to suspect that he was involved in an offence. However, the police failed to advise the accused of his s. 10 *Charter* rights upon detention. They should have told him of the reasons for his detention and about his right to counsel. Justice White would nevertheless admit the evidence under s. 24(2).

The accused's appeal was dismissed.

Complete case available at www.canlii.org

NO POSITIVE DUTY ON POLICE TO ENSURE DETAINEE SPOKE TO COUNSEL

R. v Beauregard, 2016 ABCA 37

The accused was arrested on a warrant for robbery. Four masked and armed men had robbed a truck stop about 3 ½ months earlier. The accused was read a standard *Charter* warning. When asked if he wanted a lawyer he replied "Yeah". He was transported to the police station where he was placed in a telephone room with a list of about 20 local lawyers, the number for Legal Aid, and a phonebook. After about 5 minutes he was off the phone. The arresting officer entered the room and asked if he was done. The accused said "yes". The following day, a police officer took the accused from his cell to an interview room. He was given a caution about not saying anything but nevertheless confirmed his involvement in the armed robbery during the interview. This helped prove his identity as one of the robbers.

Alberta Court of Queen's Bench

The judge found that, during his time in the telephone room, the accused had not talked to any lawyer but had called his mother. The arresting officer never explicitly asked the accused if he had talked to a lawyer, nor had the accused advised he had not spoken to one. Although the police complied with the informational duties imposed under s. 10(b) of the *Charter*, the judge concluded that the police had breached the implementational duty. "If a police officer faces a detainee who diligently but unsuccessfully seeks legal advice, he must obtain a clear, unequivocal waiver and provide what is known as a Prosper warning, or afford the detainee more time to contact a lawyer," said the judge. "In my view the implementational duty is only satisfied if a reasonable period of time to contact a lawyer has been provided and before moving to elicit evidence the officer confirms the detainee has been able to speak to a lawyer. A detainee who has been unable to reach a lawyer after five minutes, and who is asked by a police officer, 'Are you done', may well feel pressure to wrap it up and may not have the fortitude to ask for more time or may not realize they are entitled to a reasonable opportunity to reach counsel, and more time if their initial attempts are unsuccessful." As a remedy for this *Charter* breach, the judge excluded the accused's statement under s. 24(2). There was insufficient evidence to prove identity and the accused was acquitted.

Alberta Court of Appeal

The Crown appealed the accused's acquittal arguing that the trial judge erred in finding a s. 10(b) *Charter* violation. The Court of Appeal described the duties imposed on the police under s. 10(b) as follows:

> Section 10(b) of the Charter confirms the right of any arrested person to retain and instruct counsel without delay, and to be informed of that right. As it expressly states, the section confers "informational rights" on the detained person; the police have a corresponding obligation to inform the detained person of the right to contact counsel and the availability of duty counsel. …
>
> There are also "implementational duties" on the police. "These duties require the police to facilitate a reasonable opportunity for the detainee to contact counsel, and to refrain from questioning the detainee until that reasonable opportunity is provided. However, these obligations are contingent upon a detainee's reasonable diligence in attempting to contact counsel. It is significant that these implementational duties only extend to providing a "reasonable opportunity" to consult counsel. There is no obligation on the police to guarantee or ensure that the detained person did in fact contact counsel. This is implicit in the finding that there is no constitutional obligation on the government to provide free duty counsel. [references omitted, paras. 13-14]

In this case, the Court of Appeal found the police sufficiently discharged their implementational duties. They placed the accused in a telephone room with the usual telephone numbers. The onus then shifted to the accused to make it clear that he had

"[Section 10(b) of the Charter] confers 'informational rights' on the detained person; the police have a corresponding obligation to inform the detained person of the right to contact counsel and the availability of duty counsel. … There are also "implementational duties" on the police. 'These duties require the police to facilitate a reasonable opportunity for the detainee to contact counsel, and to refrain from questioning the detainee until that reasonable opportunity is provided. However, these obligations are contingent upon a detainee's reasonable diligence in attempting to contact counsel'."

not succeeded in contacting counsel and wanted to have a further opportunity. Here, however, there was nothing said by the accused that he had not been able to contact counsel. There was no positive obligation on the police to ask the accused if he had in fact contacted counsel:

> When the [accused] indicated he wished to talk to a lawyer, he was taken to the detachment and placed in a telephone room. The only reasonable inference is that the purpose of him being put in that room was to contact counsel. When [the arresting officer] asked him if he was "done", the only thing that question could have referred to was the "contacting of counsel". When the [accused] replied "Yup", that answer could not reasonably be interpreted as being "No, I never contacted counsel". The police are entitled to act on what the detained person tells them, analysed objectively. [reference omitted, para. 16]

Nor was this a situation where the accused waived his rights after asserting them such that a subsequent Prosper warning was required. "The [accused] specifically said that he did want to contact counsel, he was given that opportunity, and when asked if he was finished he replied affirmatively," said the Court of Appeal. "There was no objective basis on which the police could be expected to take his actions and responses as a waiver of the right to contact counsel, and Prosper was not triggered." Since there was no obligation on the police to positively ask if a detained person has been successful in contacting counsel, the accused had failed to discharge his burden in proving a s. 10(b) breach. His statement obtained the next day was admissible as evidence. Furthermore, even if there was an implementational breach of s. 10(b), the statement was nonetheless admissible under s. 24(2). Any breach was minor and done in good faith, the impact on the accused was minimal, and there was a strong public interest in prosecuting this violent crime.

"The police are entitled to act on what the detained person tells them, analysed objectively."

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

Complete case available at www.canlii.org

REASONABLE SUSPICION SATISFIED: NO ENTRAPMENT IN CRAIG'S LIST LURING

R. v. Argent, 2016 ONCA 129

Two advertisements in the "casual encounters" section of Craigslist were posted by the accused seeking someone interested in smoking marijuana "and more". The ads included photos of the accused's genitals and he was also shown holding a marijuana bud. The ad specified that he was looking for a woman between the ages of 18 and 30 with whom he proposed to smoke marihuana and have sex. A male police detective in a Child Pornography Unit pretended to be a 14-year-old-girl named "Carlee" and communicated electronically with the accused. The detective's training suggested that people who seek children will mention the age of 18 because 18 is the minimum age which Craigslist will publish in the personal erotic ads.

The detective's first message in response to the accused's ad was:

> *Hey..cool pix! im not sure which is bigger… the bud in your hand or your bud! lol!… smoked for first time at my gr8 grad a few weeks ago..yeah! lemme know when you r smokin again some time…luv to try again*

"Carlee" then exchanged emails and messages with the accused which indicated she was a 14-year-old virgin in grade 8 and inexperienced with drugs and sex. The accused pursued the correspondence with talk of oral sex and condoms for vaginal sex.

Ontario Superior Court of Justice

The accused was convicted at trial of luring a child under 16-years-old to engage in sexual activity but argued that the charge ought to have been stayed because he was entrapped. He submitted that the police provided an opportunity for him to commit a crime under the guise of "Carlee" without either having a reasonable suspicion he was already engaged in criminal activity or while making a bona fide inquiry. The Crown, on the other hand, contended that the police did not provide him with an opportunity to commit an offence and, even if they did, they had a reasonable suspicion to do so and/or were acting pursuant to a bona fide enquiry.

> "The police had reasonable grounds to suspect criminal activity when they viewed the ad as posted and as the conversation with the [accused] unfolded."

The judge concluded that the police did provide the accused with the opportunity to commit the offence but the officer had reasonable grounds to suspect that he was already engaged in criminal activity when the opportunity was provided. As well, the judge ruled that the police acted pursuant to a bona fide inquiry and did not induce the crime. The accused's entrapment application was dismissed.

Ontario Court of Appeal

The accused argued that the officer did not have reasonable grounds from the outset to suspect that there was criminal activity going on. In his view, his ad specified a woman of at least 18 years of age and this, on its own, did not provide a sufficient basis for suspicion. He also submitted that the officer sexualized the communication by referring to the "bud" in the first email and it was this response that manufactured the criminal activity and induced the crime.

The Court of Appeal rejected these submissions:

> The police had reasonable grounds to suspect criminal activity when they viewed the ad as posted and as the conversation with the [accused] unfolded.
>
> The ad included a photo of the [accused's] penis and requested a smoking partner "and more". The police's consideration of the use of the age 18 as a flag for potential child abusers was reasonable. This was the lowest age that could be posted.
>
> We do not agree that the officer manufactured the criminal activity by sexualizing the first communication. The photos had already done that. The communications from the officer made it clear from the outset that Carlee was 14, had just graduated from grade 8, was inexperienced sexually, and was under the watch of her mother. The questions posed by the officer were open-ended. It was the [accused] who pursued the discussion of sexual activity. These facts support the officer's suspicion that criminal activity was underway. [paras. 12-14]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

CAUSE FOR ARREST TO BE ARGUED AT TRIAL, NOT FIRST TIME ON APPEAL

R. v. Myette, 2016 SKCA 11

An officer received information from a confidential source that the accused and a man named Sheldon Durocher were in a taxi cab in Meadow Lake and they were in possession of crack cocaine. The source also said where the taxi was located. Seven minutes later the officer located the taxi near a bar in Meadow Lake. The officer confirmed that the accused and Sheldon Durocher were passengers in it. The officer followed the taxi for a short time, saw it travel to a grocery store and stop, and then pulled it over after it drove away.

The accused was in the front passenger seat. He was removed from the taxi and told he was under arrest for possessing crack cocaine for the purpose of trafficking. He was searched and seven individually packaged pieces of crack cocaine were found in his jacket pocket. He also had some cash in his pants pocket and a cell phone. Another officer dealt with the other passenger.

Saskatchewan Provincial Court

The accused alleged that his arrest amounted to an arbitrary detention under s. 9 of the *Charter* and the search of his person incidental to that arrest was a s. 8 breach. The judge found the accused had been unlawfully arrested because the officer did not have reasonable grounds to arrest him for trafficking. The informer's tip was insufficient to objectively support a belief that the accused and his companion were intending to sell crack cocaine. The judge stated:

> Instead of continuing to watch the taxi, [the arresting officer] almost immediately arrested [the accused] for possession of cocaine for the purpose of trafficking. Consequently, he arrested [the accused] only on what the confidential informant told him. That very limited information did not implicate [the accused] or his companion in drug trafficking. The constable's surveillance did not reveal anything that could reasonably be construed as involving either of the men in drug trafficking.
>
> Objectively, this information did not support the officer's belief that [the accused] or his companion probably were intending to sell crack cocaine. For this reason I find that the officer did not have reasonable grounds to arrest [the accused] and that the arrest contravened [the accused's] right to be free from arbitrary detention and imprisonment. [*R. v. Myette*, 2015 SKPC 100, paras. 19-20]

The subsequent search as an incident to an unlawful arrest therefore breached s. 8 of the *Charter*. The evidence was excluded under s. 24(2) and the accused was acquitted of possession and possession for the purpose of trafficking.

Saskatchewan Court of Appeal

The Crown appealed the trial judge's rulings arguing that he failed to consider that the accused was arrestable for simple possession and this should have been considered in the s. 24(2) analysis. As well, the Crown suggested the trial judge erred in excluding the evidence.

Simple Possession Arrest

At trial, the evidence proceeded on the basis that the accused had been arrested for possessing cocaine for the purpose of trafficking rather than simple possession. The Crown never suggested that the accused was arrestable for simple possession nor was the trial judge asked to consider whether the circumstances would have permitted such an arrest. Nor did the arresting officer provide any reason as to why the arrest was made for the more serious offence. Since this argument was not made at trial it was improper for the Court of Appeal Court to order a new trial on this basis.

As for the trial judge's s. 24(2) analysis, it was upheld. The Crown's appeal was dismissed.

Complete case available at www.canlii.org

Editor's note: Additional facts taken from *R. v. Myette*, 2015 SKPC 100.

EXCEEDING 24-HOUR DELAY IN PRESENTING BEFORE JUSTICE NOT NECESSARILY ARBITRARY

R. v. Vassell, 2015 ABCA 409

The accused was arrested along with other individuals after a lengthy drug investigation. Cocaine had been found on top of his driver's licence in a drawer of a filing cabinet in a bedroom of a house after a search warrant was executed. He was arrested for possessing cocaine at 17:41 hrs and advised of his right to counsel. He was again advised of his right to counsel at 21:44 hrs but was not able to speak to a lawyer until 02:45 hrs the following day, about nine hours after his arrest. At 20:56 hrs he appeared for a bail hearing, more than 24 hours after his arrest. He was charged with possessing cocaine for the purpose of trafficking and possessing proceeds of crime over $5000. Then at 22:07 he was interviewed by police. This interview was audio/video recorded. In the interview, the accused acknowledged that the residence where the cocaine was found was his home and that the drawer in which the cocaine was found was in his room, but he denied knowledge of the cocaine.

Alberta Court of Queen's Bench

The accused contended that his bail appearance more than 24 hours after his arrest breached s. 503 of the *Criminal Code* and therefore his detention became arbitrary under s. 9 of the *Charter*. He submitted that this arbitrary detention was connected to the interview such that it should have been excluded under s. 24(2). In addition, he suggested that he should have been re-advised of his right to counsel when he was informed at his bail hearing that he was being charged with possessing proceeds of crime. This, in his opinion, amounted to a "change in jeopardy" requiring an additional s. 10 (b) advisement.

The judge found that the police did not breach s. 503 of the *Criminal Code*. They started the process of an appearance before a justice by faxing the bail package within the 24-hour period. Even though the accused did not appear personally within the 24-hour period, in the judge's view, the police brought him before the justice of the peace both within a reasonable time and as soon as possible under the circumstances. There was evidence that the justice of the peace had 14 other people ahead of the accused in this matter. Therefore, a justice was not immediately available and s. 503(1)(b) applied. As for the s. 10 (b) re-advisement argument, the judge held there was nothing in the new charge of possessing proceeds of crime that amounted to a change in jeopardy requiring a second interview with a lawyer. The accused was convicted of possessing cocaine for the purpose of trafficking.

Alberta Court of Appeal

The accused appealed his conviction arguing, among other things, that the audio/video statement he made to police should not have been admitted as evidence. He suggested that that he was arbitrarily detained under s. 9 of the *Charter* because he did not appear before a justice within 24 hours of his arrest. As well, he asserted that his s. 10(b) right to counsel was infringed because police did not re-advise him of his right to counsel when his jeopardy changed with the addition of the proceeds of crime charge.

Arbitrary Detention

A majority of the Court of Appeal found the trial judge did not err in concluding that the accused was not arbitrary detained. "The police could not be said to have been acting in a manner which 'bears no relation to, or is inconsistent with', the terms of s. 503 of the Criminal Code," said the majority. It continued:

> [T]he degree of departure from s 503 could not be said to reach the level of arbitrariness. This case does not require an elaborate discussion of what it means when the framers of s 9 used "arbitrarily detained or imprisoned" and "la détention ou l'emprisonnement arbitraires" as compared to the words "illegally" and "illegales" which, of course, Parliament understood. Suffice it to say that the meaning of "arbitrary" as a

> feature of a principle of fundamental justice should be consistent in its Charter applications. Finally, there is no nexus between that defect, if any, and what the [accused] said to the police. Even if strict cause and effect is not required to be proven, there is no air of reality to the suggestion that somehow what the [accused] said to the interviewing officer had anything to do with the slight delay in his bail appearance. For a Charter submission, there must be evidence establishing that the breach was linked to the evidence for which the exclusion is sought. [para. 30]

Right to Counsel

The majority also rejected the accused's argument that he should have been re-advised of his right to counsel. "Nor are we persuaded that the [accused's] s 10(b) rights were re-engaged when he was advised that he also faced a charge of being in possession of the proceeds of crime," said the majority. "This is not the type of change of jeopardy that warrants a further right to speak to counsel."

The majority dismissed the accused's appeal.

Another Perspective

Justice O'Ferrall, unlike the majority, found the police did breach s. 9 of the *Charter* by not taking the accused for a personal appearance before a justice until 27.5 hours after his arrest. "The Code requires that the attendance before a justice must be in person, although this can also occur by video link," he said. But here, the police failed to do that. Further, since a justice was available by video link 24-hours a day, it was possible for the police to bring the accused before a justice within the 24-hour limit in s. 503(1)(a) and therefore s. 503(1)(b) did not apply. "[Section 503(1)(b)] was not designed to allow institutional backlog to interfere with a detainee's right to be brought before a justice within a reasonable time of his arrest," said Justice O'Ferrall. "The police in this case could have avoided the problems they faced at the last minute by bringing the [accused] and his co-accused before the justice much earlier and seeking an adjournment to allow the police further time to prepare the bail packages. In that circumstance, the court would still learn that the [accused] was in custody, even though the bail hearing had been adjourned for a short time." As for this rendering the detention arbitrary under s. 9, Justice O'Ferrall stated:

> Section 503(1)(a) imposes a positive legal obligation on police upon which the continued detention of an accused depends to remain lawful. A failure to comply with the section, therefore, means the detention is not "authorized by law" and "violates section 9." Although my colleagues suggest a somewhat different test for arbitrariness…, a failure to comply with the section also amounts to arbitrariness under that test because it means the police have been acting in a manner that "bears no relation to, or is inconsistent with" the terms of section 503. Under both tests, therefore, the failure of the police to bring the [accused] before a justice in accordance with subsection 503(1)(a) amounted to a breach of section 9 of the Charter. [para. 75]

As for a s. 10(b) breach, again Justice O'Ferrall dissented from the majority. In his view, the

BY THE BOOK:

Taking Before Justice: ***Criminal Code***

s. 503(1) A peace officer who arrests a person with or without a warrant ... shall cause the person to be detained in custody and, in accordance with the following provisions, to be taken before a justice to be dealt with according to law:

(a) where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period, and

(b) where a justice is not available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice as soon as possible ...

accused's s. 10(b) rights were violated when he was not given the opportunity to consult with a lawyer at the time of the bail hearing because there were two changes in his jeopardy:

1. **The addition of the new charge for possessing the proceeds of crime.** "The charge here was a separate charge, independent of the original charge of possession for the purpose of trafficking, for which there is a maximum penalty of 10 years in jail. If the accused was found guilty of both offences, therefore, the second charge would have the potential of significantly increasing his sentence. More importantly, however, with respect for the need to get further legal advice, the second charge was based upon different facts. This would affect what the [accused] might be inclined to say in any conversations with the police. In my view, therefore, there was a fundamental and discrete change in jeopardy once the police decided to charge the [accused] with the second offence that gave right to a new opportunity to speak to counsel."

2. **At the time of the bail hearing his continuing detention was unlawful and arbitrary.** "An additional change in legal jeopardy occurred once 24 hours had passed without bringing the [accused] before a justice. At this point, the [accused's] detention became unlawful and arbitrary, giving rise to a further right to speak with counsel."

With regards to the accused's statement, Justice O'Ferrall would have excluded it under s. 24(2) and ordered a new trial if his decision to grant a stay of proceedings on other grounds was wrong.

Complete case available at www.canli.org

Note-able Quote

"Two things define you: Your patience when you have nothing and your attitude when you have everything." - Unknown

NIGHTCLUB STAFF NOT ACTING AS POLICE AGENTS WHEN DETAINING ASSAULT SUSPECT

R. v. Nguyen, 2016 BCCA 32

After the accused was involved in an altercation at a nightclub with another man, he was held by nightclub staff on the street until police arrived. The attending police officer saw the accused in the middle of the street struggling to get away from two employees of the nightclub. When the officer ran up to the men and asked what was going on he was told the accused had likely hit someone on the head with a bottle inside the club. The officer yelled "police" in the accused's ear "police" and told him to stop fighting. When he did not do so, the officer handcuffed the accused for officer safety before investigating what had occurred. The officer was alone, there were many intoxicated people on the street and the accused was fighting with bar staff. He did not stop fighting after police arrived, and he appeared to be strong, very angry and breathing heavily.

After handcuffing the accused, the officer walked him to a safer location on the sidewalk. A woman approached and said, "My boyfriend was just protecting me because a white guy had touched my ass." The accused then said, "Listen man some guy grabs your girl's ass you'd knock him out too wouldn't you?" The officer had not asked the accused any questions or engaged in discussion before the statement was made. Within two minutes of handcuffing the accused, the officer formed reasonable grounds to believe he had assaulted someone and arrested him at 3:01 a.m. for assault with a weapon and assault causing bodily harm . He gave the accused the ss. 10 (a) and (b) *Charter* warnings. The accused stated he understood and requested an opportunity to speak to a lawyer he named.

The officer did not allow the accused to call counsel on a cell phone from the scene. The scene was not safe and privacy could not be provided. There were many people standing nearby on the street and the accused could not be placed alone in the police

cruiser, which had no shield separator preventing access to the steering system, the computer and the radio. Any call made from the scene would have to be brief and would likely be interrupted to permit the officer to manage the scene. As the officer began to write notes, the accused made another unelicited statement: "Listen, some fucking fag grabbed my girl's ass, so I knocked the motherfucker out. Yeah, I did, big fucking white guy, out cold. He threw a punch. I laid him out. Yeah." The accused was handed over to another officer at 3:10 am and re-read the *Charter* warnings. He was then transported to the police station in a police wagon and was allowed to speak with his lawyer at 5:40 am.

British Columbia Supreme Court

The accused sought the exclusion of his statements under s. 24(2) of the *Charter* on the basis that this evidence was obtained in breach of his s. 10(a) and (b) rights. He argued, among other things, that the bar staff acted as agents of the police by exercising a common law power of arrest and they should have advised him of his rights under the *Charter* immediately upon restraining him. He also contended that he should have been advised of the reason for his detention by police and of his *Charter* rights immediately upon being detained. Finally, he argued that his s. 10(b) right was also breached by the delay in permitting him access to counsel, which he submitted should have been provided immediately.

The judge found the nightclub staff had only detained the accused for an investigation. He had not been arrested. "Detaining the [accused] and turning him over to police did not make [the employees] police delegates," said the judge. "Given the finding that they were not exercising a common-law power of arrest, nor acting as state agents, they owed no Charter obligations to the [accused]." As for the police action, the accused had been lawfully detained for investigation and there were exigent circumstances preventing the *Charter* warnings from being given for a short period of time. Finally, the delay from the time the accused was arrested until he was given an opportunity to retain and instruct counsel was reasonable such that there was no s. 10 (b) breach. "There was no reasonably available opportunity for the accused to make his phone call until he got to the station," said the judge. "No self-incriminating evidence was elicited accidentally or intentionally between the time the accused expressed his desire to consult with a lawyer and the time his access to a lawyer was facilitated." The statements made to the nightclub staff and the police officer were admissible and the accused was convicted by a jury for aggravated assault.

British Columbia Court of Appeal

The accused challenged his convictions arguing the judge made several errors in finding his statements to nightclub staff and the police officer were admissible. He again submitted, in part, that the nightclub employees were agents of the police such that they were required to inform him of his *Charter* rights. In his view, he was arrested when the employees did not let him walk away and held him at the scene until the police arrived. Therefore, he said he was entitled to his s. 10 rights. He also said his detention for safety reasons by police required that he be given a *Charter* warning. As well, he contended that his s. 10(b) *Charter* rights were breached when he was not provided with counsel on request.

s. 10(b) Charter

Everyone has the right on arrest or detention ...
(b) to retain and instruct counsel without delay and to be informed of that right.

Nightclub Staff as Police Agents?

Justice Willcock, speaking for the Court of Appeal, upheld the trial judge's ruling that the police were not acting as police agents and therefore were not obligated to protect the accused's *Charter* rights. Security staff involved in an investigative detention, prior to an arrest, do not have *Charter* obligations. Here, the nightclub staff had not arrested the accused and therefore were not required to inform him of his *Charter* rights.

Police Conduct at Scene

Justice Willcock also held the trial judge did not err in finding that a *Charter* warning was not required when the accused was first detained by police because it was impracticable to do so in the circumstances. The judge found that exigent circumstances, some of which were of the accused's own making, prevented the warning from being given for a short period of time. This was a factual finding that the Appeal Court was not going to interfere with.

Delay in Accessing Counsel

The Court of Appeal also rejected the accused's argument that his *Charter* rights were breached by a long delay in allowing him to retain and instruct counsel:

> The trial judge properly noted that the words "without delay" under s. 10(b) mean at "the first reasonably available opportunity" or "as soon as practicable". She correctly recognized the police duty … to provide a detained person telephone access as soon as practicable, to reduce the possibility of accidental self-incrimination and to avoid eliciting evidence from the individual before access to counsel has been facilitated. Considering the difficulty providing privacy to the [accused] in the circumstances, … she held "overheard consultations are not an adequate alternative to the right to counsel". Her conclusion there had been no Charter breach occasioned by delay was based upon findings of fact … . [references omitted, para. 61]

The statements made to the officer were not elicited by him. They were made in an effort by the accused to have the victim investigated for grabbing his girlfriend's "ass" and to explain why he had knocked out the victim. Moreover, even if there were s. 10 breaches, the statements would not have been excluded under s. 24(2). The accused's appeal was dismissed.

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

ACCUSED NOT DETAINED IN HOSPITAL: s. 10(b) WARNING NOT REQUIRED

R. v. Kiene, 2015 ABCA 326

After the accused was involved in a motor vehicle accident and seriously injured, he was taken to the hospital by EMS. A police officer went to the hospital twice to obtain a legislatively mandated collision statement from the accused as required by section 71 of Alberta's *Traffic Safety Act*. During the first attendance the accused was groggy and could not focus. The officer left at the accused's request. A few days later the officer returned to the hospital in uniform and the accused completed the one page collision statement. The officer then asked the accused questions about the collision and recorded the questions and answers on the same collision statement form. When asked if he had had anything to drink that night, the accused stated: "I remember having 2 beer." At the end of their conversation the accused agreed to complete and sign a form consenting to the release of his hospital records.

When the officer reviewed the medical records a few weeks later, he discovered that the attending EMS members had smelled alcohol on the accused. He also learned that the accused had admitted to consuming alcohol and a blood sample taken at the hospital just over one hour after the accident revealed a blood alcohol reading of 216 mg%. A Production Order for the hospital records was subsequently obtained. He was charged with impaired driving and over 80 mg% five months later.

Alberta Court of Queen's Bench

The officer testified that he believed the accused was the victim in the accident and he had no suspicion and no grounds to charge him with anything. He did not inquire about the accused's medication or mental state during their conversation, and was not aware that the accused had undergone surgery two days earlier and received psychiatric counseling the day of the interview. The accused appeared to be alert

"Section 10(b) Charter mandates that a person 'has the right on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right; and ...'. The right does not crystalize until arrest or detention."

and attentive and the officer did not perceive a power imbalance between the two, nor did he conclude that the accused felt compelled to answer any questions. The officer did, however, inform the accused during the second visit that it was early in the investigation and if there were additional charges, those might be laid later.

The accused described the interaction as a "normal conversation" with the officer's demeanor being pleasant and friendly. He testified that he felt compelled to give a statement. He said signing the form consenting to the release of the records "was part of the investigation and was mandatory" even though he acknowledged that he wanted to provide a statement to aid in the investigation of the other driver in order to prevent the other driver from getting "off the hook". He testified that he felt detained because the officer did not inform him of his rights and because the officer could stay as long as he wanted while the accused was confined to a hospital bed.

The judge accepted a Crown concession that the accused's s. 8 *Charter* right had been breached because his consent was invalid since he was not aware of the potential consequences of providing the consent. However, the judge concluded that the accused had not been detained at the hospital such that he was entitled to a s. 10(b) warning. The judge found that the accused did not feel compelled to provide the information, nor did the requirement to provide an accident collision statement under the legislation impose any serious criminal liability sufficient to trigger a detention. Rather, the accused gave his statement because he felt it was his "moral duty" and because he wanted to assist the investigation. The hospital records were admitted under s. 24(2) and a Crown blood alcohol expert opined that the accused's blood alcohol level was between 184 mg% and 219 mg% at the time of the accident. He was convicted of impaired driving and over 80 mg%.

Alberta Court of Appeal

The accused appealed his convictions arguing, in part, that the trial judge erred by finding that his right to counsel had not been breached. In his view, he was psychologically detained while being interviewed at the hospital which he was unable to leave. He submitted he felt compelled to give a statement because the officer was in uniform, clearly signaled that the information sought was part of the larger investigation and that other charges could be brought. Further, his admission of having "two beer" was an admission against his interests which would change the nature of the investigation.

A majority of the Court of Appeal upheld the trial judge's ruling. With respect to detention and s. 10(b) it stated:

> Section 10(b) Charter mandates that a person "has the right on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right; and ...". The right does not crystalize until arrest or detention. In addition to its more obvious meanings, detention can include circumstances, objectively determined, "when police conduct would cause a reasonable person to conclude that he or she no longer had the freedom to choose whether or not to cooperate with the police". [reference omitted, para. 24]

And further:

> Psychological detention can occur where an individual has a legal obligation to comply with a request, or a reasonable person would conclude by reason of the State conduct that he or she had no choice but to comply. When there is no physical restraint or legal obligation, in order to determine whether a reasonable person in the individual's circumstances would conclude a deprivation of liberty, the court may

> "Psychological detention can occur where an individual has a legal obligation to comply with a request, or a reasonable person would conclude by reason of the State conduct that he or she had no choice but to comply."

> consider a number of factors including whether the police were making general inquiries regarding a particular occurrence as opposed to singling out an individual for a focussed investigation. Among other factors are the nature of the police conduct and the place where the interaction occurred. [references omitted, para. 28]

Although another court may have reached a different conclusion on the facts, the majority found that the trial judge made no palpable and overriding error in reaching his conclusion and rejected the psychological detention argument for the following reasons:

- The only legally mandated information was the first page of the collision statement. The officer told the accused he was required to complete the collision statement.
- There was no legal obligation to provide the consent to release medical information. The officer did not tell the accused that he had to sign the consent form. He merely asked him to sign it.
- The accused had no questions about the form.
- The accused testified that he wanted to assist the police and felt a moral duty to assist in the investigation of the other driver.
- The accused was not singled out for a focussed investigation. The officer was unaware that the medical information would reveal the blood alcohol content and at the time of obtaining the consent, the police had no suspicion regarding the accused's impairment. The medical consent was obtained in the context of a general investigation into the other driver.
- The officer's demeanor was friendly and non-adversarial, and the accused knew that he could ask the officer to leave as he had done so several days earlier.

The trial judge's s. 24(2) analysis was upheld and the accused's appeal was dismissed.

A Second Opinion

Justice O'Ferrall would have excluded the evidence under s. 24(2). In his view, the trial judge underestimated the seriousness of the *Charter*-infringing police conduct and the administration of justice would have been brought into disrepute by the admission of the evidence. He would have quashed the convictions and entered acquittals.

Complete case available at www.canlii.org

PSYCHOLOGICAL DETENTION WITHOUT s. 10(b) WARNING BREACHED CHARTER

R. v. Wong, 2015 ONCA 657

The police attended the accused's apartment in response to her reporting her car stolen. A uniformed officer arrived, knocked on the door and entered. He noticed a faint smell of marijuana smoke and asked whether there was a place they could talk. He was led to an island in the kitchen where he saw some "Zigzag" cigarette papers and a digital scale on the counter. He knew these might be drug-related but thought it odd that the accused would invite him into her home when there was obvious evidence of marijuana use. As the discussion progressed, the officer asked for some documents and followed to help her look in a den for them. On the top of the desk, in plain view, the officer saw two tin boxes with drug markings, rolling papers and metal screen filters that he knew were commonly used to smoke marijuana. The officer decided to "call" the accused on the drug paraphernalia and said to her:

> *I need to talk to you about something. I'm starting to see a lot of stuff around your apartment pertaining to marijuana and drug use. So, what's going on here?*

He told her she was not required to speak to him and let her know she could be arrested for possession. When he told her this, she became fearful. The accused said the items belonged to her boyfriend and that she was not involved. He asked several questions about the items and eventually asked "What else is here that's not yours, that's your boyfriend's." In response, the accused pointed to a drawer under the desk and opened it. Three bags of marijuana, some identity cards and passports were observed. The officer reached into the drawer, seized the bags, and put them on the kitchen counter. The accused was again cautioned about speaking and more questions were asked resulting in the accused revealing a duffle bag on the floor beside a bed. The duffle bag contained 15 packages of MDMA totaling 11 kilograms. Two detectives arrived, arrested the accused, cautioned her and informed of her right to counsel. A search warrant was subsequently executed and police seized additional drugs, drug paraphernalia, a semi-automatic firearm, ammunition and various pieces of identification.

Ontario Superior Court

The judge concluded that the accused had not been detained at any point before she revealed the contents of the drawer and identified the duffle bag. Although she was responding to the officer's words and actions, it was her initiative to open the drawer. There was no compulsion of her by the officer's words or conduct. Since there was no detention, s. 10(b) was not triggered. The judge also ruled there was no search at that point because the accused voluntarily showed the officer the property of another and disclaimed any privacy interest in it. And, even if there was a *Charter* breach, the judge would have admitted the evidence under s. 24(2). Finally, the judge found the accused's statements to be voluntary.

"A reasonable person in the [accused's] position, on being told that she could be arrested, would conclude that she was not free to go."

Ontario Court of Appeal

The accused submitted that she had been psychologically detained when the officer alleged drug use. The Crown, on the other hand, asserted there was no psychological detention because: (i) the officer made no "demand or direction" to her or otherwise restricted her liberty; (ii) he was not focusing suspicion on her but on her boyfriend; (iii) he cautioned her twice that she was not obliged to say anything; and (iv) she had the power to conclude the encounter at any time by asking the officer to leave her home. In the Crown's view, the officer believed he was speaking with a witness, not a suspect.

Detention

Chief Justice Strathy, speaking for the Court of Appeal, concluded that the accused had been detained before being asked questions that led to the discovery of the drugs and other contraband. This detention occurred before the accused pointed out the drawer containing the three bags of marijuana and before she identified the duffle bag in the bedroom. In his opinion, a reasonable person in the accused's situation would conclude that she no longer had the freedom to choose whether or not to cooperate with the police and had to comply with the requests. He found the trial judge did not apply the proper objective test as required by *R. v. Grant*, 2009 SCC 32. Chief Justice Strathy then conducted his own detention analysis:

> *The circumstances giving rise to the encounter*: The encounter began as a consensual one, initiated by the [accused]. It soon shifted, however, into a drug-related investigation centred on her apartment. This would cause a reasonable person to believe that the officer was no longer addressing her as the victim of a car theft, but rather as a potential suspect in his drug investigation.
>
> *The nature of the police conduct*: The officer's conduct became increasingly authoritative. He demanded an explanation for the presence of the drug paraphernalia: "So what's going on here?" He challenged her explanation: if the

> scale was for baking, where were her supplies? He told her that she was in possession of the drug paraphernalia and that he could arrest her. As in Grant, the officer took control of the [accused] and sought to obtain information from her.
>
> *The characteristics and circumstances of the [accused]*: The [accused] was an apparently naïve young woman. She was alone, in her small apartment, with a uniformed police officer who was undertaking a drug investigation. She told the officer she was frightened, as she undoubtedly was. As in Grant, the encounter, as it developed, was inherently intimidating.
>
> In my view, the [accused] was detained when, in furtherance of his drug investigation, the officer told her that he could arrest her based on the possession of drug paraphernalia and asked her for an explanation. A reasonable person in the [accused's] position, on being told that she could be arrested, would conclude that she was not free to go. [paras. 45-49]

Since the accused was detained and was not advised of her right to counsel, her s. 10(b) *Charter* right was breached:

> The officer did not inform the [accused] of her right to counsel when he began to question her for his drug investigation, or at any time before her arrest. He did inform her of her right to silence, a right closely related to the right to counsel. At the same time, however, he made it clear to the [accused] that he was looking for her cooperation. He suggested that the best way out of her predicament was to provide an explanation for the drug-related paraphernalia and, later, to direct him to her boyfriend's contraband.
>
> The officer encouraged the [accused] to incriminate herself by demonstrating knowledge of the presence and location of the contraband, without advising her of her right to speak to a lawyer. This goes to the very heart of the principle underlying s. 10(b). The [accused] had a right to remain silent unless and until she made an informed decision to waive that right and to provide the requested information to the police. By failing to comply with s. 10(b), the officer prevented her from making that informed decision. [references omitted, paras. 51-52]

The evidence was excluded under s. 24(2). The Court of Appeal found the *Charter*-infringing conduct to be serious. Although the breaches were not deliberate, the officer failed to appreciate the significance of the encounter, the accused's *Charter* rights and the accompanying police obligations. The accused's appeal was allowed, the convictions set aside and acquittals entered.

Complete case available at www.ontariocourts.on.ca

WILL AN INITIAL s. 9 BREACH RENDER ALL SUBSEQUENT DETENTIONS UNLAWFUL?

R. v. Rowson, 2015 ABCA 354

The accused proceeded into an intersection from a secondary road and struck the passenger side of a vehicle travelling on a major highway. Three passengers in the other vehicle were seriously injured. Police arrived on scene at 9:07 pm. The accused said he had stopped at the stop sign but thought he had time to make it. He claimed he had not been drinking and did not need any medical attention. At 9:18 pm a police officer placed him in the back seat of her police car and closed the door. She wanted to make sure the accused was safe. The scene was chaotic and there was an air ambulance arriving. At 9:23 a second officer at scene saw the accused speaking on his cell phone. He told the accused to hang up the phone and advised him that he was under investigative detention "in relation to the accident," but did not tell him about his right to counsel.

At 9:20 pm, a third officer spoke with the accused in the back of the police vehicle and noticed the smell of fresh chewing gum. He told the accused to spit out his gum and blow air in his direction. The accused made a "fake blow," puffing up his cheeks but not exhaling any air. At 9:37 pm the officer returned to the police vehicle and saw the accused using his cell phone again, claiming he was texting a friend. At this point, the accused was arrested for

dangerous driving and "possibly impaired driving" and his cellphone was seized. The officer included "possibly impaired driving" because he wanted the accused to know that he was still investigating him for it. The accused was advised of his right to counsel, searched and placed in the back of another police vehicle. The accused said he wanted to contact counsel, but the officer told him that he could not contact a lawyer at that time due to privacy concerns.

At 9:50 pm a fourth officer opened the police car door, asked a few questions but could not smell any alcohol. At 10:13 pm the accused was transported to the police station where he was re-cautioned and asked if he understood. When he said "Yes, sir", the officer smelled alcohol on the accused's breath. After the accused spoke to legal aid, a roadside screening demand was made and the accused failed. The breath demand followed as did an unsuccessful attempt to contact a lawyer. The accused provided breath samples resulting in readings of 110 mg% and 100 mg%. He was subsequently charged with impaired driving and dangerous driving causing bodily harm and over 80 mg%.

Alberta Court of Queen's Bench

The accused argued several *Charter* breaches including an arbitrary detention by the first officer at the scene of the collision, an unlawful investigative detention by the second officer without the requisite grounds, and an unlawful arrest by the third officer without sufficient cause to do so. The judge did find several *Charter* breaches, including an arbitrary detention under s. 9 when the first officer placed him in the back seat of the locked police car and failed to advise him of anything other than to stay put. However, he held the investigative detention by the second officer lawful. "The evidence on the whole supports the fact that [the second officer] had reasonable grounds to suspect that [the accused] was connected to a particular crime and that such detention was necessary when he placed him under investigative detention and prevented him from using his cell phone," said the judge. As for the arrest, it too was lawful. "The evidence on a whole supports the fact that [the third officer] had reasonable and probable grounds to arrest [the accused] for dangerous driving," said the judge. The breath results were admitted under s. 24(2) and the accused was convicted of impaired and dangerous driving causing bodily harm.

Alberta Court of Appeal

The accused argued, among other things, that the trial judge made and error in not finding a continuous arbitrary detention that began with the initial unlawful detention and carried through the investigative detention and arrest, rendering them all unlawful. In his view, the initial arbitrary detention could not be remedied. Once the judge found the accused had been arbitrary detained when placed in the back of the police car, the later investigative detention by the second officer and the arrest by the third officer were not lawful.

Continuous Detention

Justice O'Ferrall concluded that the judge did not err in failing to find to one continuous arbitrary detention following the initial arbitrary detention:

> I fail to understand how an initial arbitrary detention can render subsequent lawful detentions arbitrary. In our view, the arbitrary part of the [accused's] detention (i.e., the part not authorized by law; or authorized by law, but not Charter-compliant) came to an end the instant the police had a reasonable suspicion that the [accused] may have committed the offence of dangerous driving. And the police had that suspicion very early in the investigation. So the arbitrary detention, in our view, was of short duration.
>
> The trial judge found that the [accused] was arbitrarily detained when he was placed in the back of the police car by [the first officer]. The Crown does not contest that finding. But I reject the argument that when the second constable … placed the [accused] under investigative detention a mere 10 minutes after he had been placed in the police vehicle by [the first officer], he had no grounds to do so. At that point in time there were grounds to suspect that the [accused] may have been guilty of at least a stop sign

> violation or failing to proceed in safety which would have required the preparation of a summons. The [accused's] own pre-detention admission that he thought he could make it across even two lanes of this divided highway disclosed grounds for a reasonable belief that a more serious offence had occurred, namely dangerous driving.
>
> The [accused] also argues that [he] was never relieved from the initial arbitrary detention and that therefore the arbitrary detention continued notwithstanding that reasonable grounds for detaining [him] may have subsequently emerged. I reject that argument. What were the police to do? Tell the [accused] in one breath that he was free to go, thereby relieving him of the arbitrary detention, and in the next breath advise him that he was being detained while the police investigated their reasonable suspicion that [he] had committed a driving offence which may have caused serious injuries to two women in a car which appeared to have the right of way? The [accused] was not free to go. Irrespective of the possibility of offences having been committed, the [accused] was required to remain at the scene. [paras. 22-24]

As for the legality of the accused's arrest, Justice O'Ferrall found it too was lawful:

> Within 20 minutes of [the second officer] informing the [accused] that he was under investigative detention, [the third officer] placed the [accused] under arrest. [The arresting officer] seized the [accused's] cellphone, placed him in the back seat of his police vehicle, told him he was being arrested for dangerous driving and possibly impaired driving and advised him of his right to counsel.
>
> The [accused] argues that the trial judge erred in finding that the police had grounds to arrest the [him]. The Crown, in its factum, listed eight pieces of information which [the arresting officer] attested formed the basis for his belief that the [accused] may have committed the indictable offence of dangerous driving. In short, the circumstances of the accident and the road conditions were such that it was both subjectively and objectively reasonable to believe that the [accused] might have committed the offence of dangerous driving. … [paras. 25-26]

The trial judge did not err in admitting the breathalyzer tests under s. 24(2) and the accused's appeal was dismissed.

A Second Opinion

Justice Martin, writing his own decision, also dismissed the appeal on the s. 24(2) basis, but also commented on the lawfulness of the arrest:

> I wish to add that I do not agree with the [accused] that there were no grounds to detain or arrest him at the scene of the accident. The [accused] was the driver of a half-ton truck that attempted to cross a major, much travelled, four-lane highway from a secondary road. That evening the roads were dry and clear, visibility was unimpeded and all oncoming traffic was travelling with headlights on. The posted speed limit on the major highway was 90 km/hour, and it appears traffic was travelling at approximately that speed. The [accused] advised that he stopped before attempting to cross the highway as required by the stop sign facing him. He told the first responding police officers that he proceeded because, "I thought I had time to make it."

A Third View

Justice Veldhuis took a different view than her colleagues on the legality of the accused's arrest. There were no grounds to arrest him for dangerous driving. The grounds accepted by the trial judge were mostly neutral and could not ground an arrest for dangerous driving. "The fact that the accident was serious did not give the officer any information about whether the driving that caused it was criminal, nor did the location of the driver of the truck, the time of day, the speed limit at that portion of the roadway or the fact that 22X is a busy roadway," she said. Since the accused's arrest was unlawful, it was arbitrary and was never cured. This significantly impacted the trial judge's s. 24(2) analysis. Justice Veldhuis would have allowed the appeal, excluded the breath tests, set aside the convictions and acquitted the accused.

Complete case available at www.canlii.org

ON-DUTY DEATHS DROP

On-duty peace officer deaths in Canada decreased by two last year over 2014. In 2015 three peace officers lost their lives on the job as reported by the Officer Down Memorial Page.

Guns, once again, posed the greatest risk to officers last year. Since 2006, 13 officers have lost their lives to gunfire. However, circumstances involving vehicles, including automobile accidents (15), vehicular assault (5) and being struck by a vehicle (2), posed the most risk to officers over the last decade. These deaths account for nearly half (49%) of all on-duty deaths, which is much higher than the next leading cause of gunfire (29%) in the same 10 year period. On average, nine officers have lost their lives every two years during the last decade, while 2010 had the most deaths at seven.

Source: http://canada.odmp.org [accessed February 13, 2016]

2015 ROLL OF HONOUR

Constable David Mathew Wynn
Royal Canadian Mounted Police, AB
End of Watch: January 21, 2015
Cause of Death: Heart Attack

Officer Toni Kristinsson
Commercial Vehicle Safety & Enforcement (BC)
End of Watch: February 1, 2015
Cause of Death: Automobile Accident

Constable Daniel Woodall
Edmonton Police Service, AB
End of Watch: June 8, 2015
Cause of Death: Gunfire

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

2015 Average Tour: 5 years 8 months
2015 Average Age: 39
2015 Deaths by Gender: female - 0
male - 3
2015 Deaths by Province:
- **Alberta - 2**
- **British Columbia - 1**

2015 Deaths by Cause:
- **gunfire - 1**
- **heart attack - 1**
- **automobile accident - 1**

Last 10 years by Gender:
- **female - 6**
- **male - 39**

Canadian Peace Officer On-Duty Deaths (by cause & year)

Cause	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	Total
Assault				1							**1**
Auto accident	1	1	2	3		3	3	1		1	**15**
Drowned			1			1					**2**
Duty related illness										1	**1**
Gunfire	2	3	1			1			3	3	**13**
Heart attack		1						1			**2**
Natural disaster						2					**2**
Stabbed							1				**1**
Struck by vehicle				1	1						**2**
Training accident			1								**1**
Vehicular assault			1		2				1	1	**5**
Total	**3**	**5**	**6**	**5**	**3**	**7**	**4**	**2**	**4**	**6**	**45**
Female	0	1	1	1	0	1	1	0	0	1	6
Male	3	4	5	4	3	6	3	2	4	5	39

PEACE OFFICER ASSAULTS

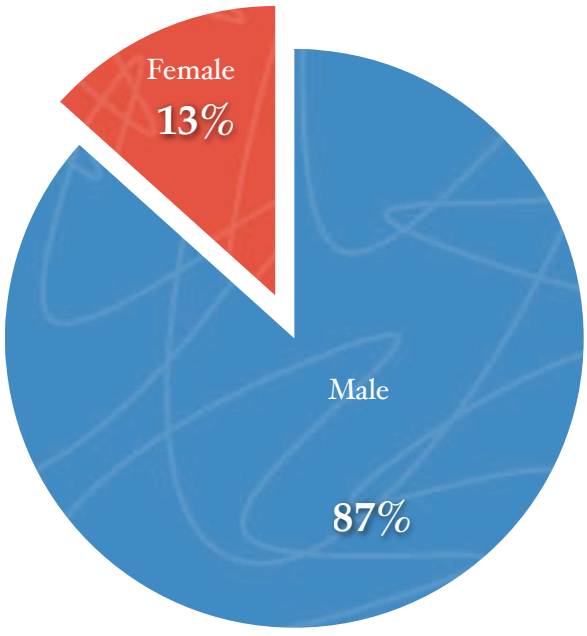
According to a Statistics Canada report, "*Police-reported crime statistics in Canada, 2014*," assaulting a peace officer dropped (-5%) from 2013 to 2014. In 2014 there were 9,450 assault peace officer offences compared to 9,826 the previous year. From 2004 to 2014, the assault against peace officer rate has dropped (-7%).

For other assaults in 2014, there were:

- 153,352 reports of common assault (level 1).
  - ➡ down 5% from 2013.
- 44,788 assaults with a weapon or bodily harm (level 2).
  - ➡ down 4% from 2013.
- 3,242 offences of aggravated assault (level 3).
  - ➡ down -1% from 2013.

Source: Statistics Canada, 2015, "Police-reported crime statistics in Canada, 2014", Catalogue no. 85-002-X,released on July 22, 2015.

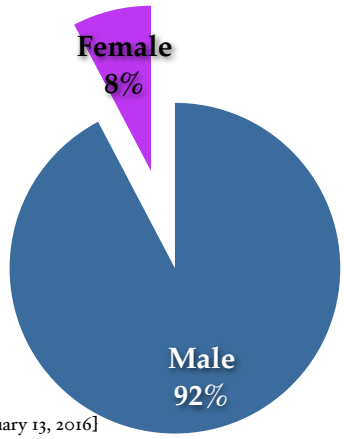
On-Duty Deaths 2006-2015 by Gender



U.S. ON-DUTY DEATHS RISE

During 2015 the U.S. lost 130 peace officers, down three from 2014. The top cause of death was gunfire (39) followed by automobile accidents (28), heart attack (18), vehicular assault (8), 911 related illness (6), and bombs (6).

Texas lost the most officers in 2015 at 13 - followed by Georgia (10), Louisiana, New York and the U.S. Government at nine each, California (5), Kentucky (5), Mississippi (5), Pennsylvania (5), Alabama (4), Colorado (4), New Jersey (4), Puerto Rico (4) and Tennessee (4). The average age of deceased officers was 40 years while the average tour of duty was 12 years and six months. Men accounted for 92% of U.S. officer deaths while women made up 8%.



Source: http://www.odmp.org/year.php [accessed February 13, 2016]

U.S. Peace Officer On-Duty Deaths		
Cause	**2015**	**2014**
911 related illness	6	7
Accidental	2	-
Aircraft accident	1	-
Assault	3	2
Automobile accident	28	27
Bomb	6	-
Drowned	-	2
Duty related illness	2	3
Fall	1	-
Fire	-	1
Gunfire	39	47
Gunfire (accidental)	2	2
Heart attack	18	18
Motorcycle accident	4	4
Struck by vehicle	5	5
Vehicle pursuit	5	5
Vehicular assault	8	10
Total	**130**	**133**

Inscription at the National Law Enforcement Officers Memorial, Washington, D.C.

"It Is Not How These Officers Died That Made Them Heroes. It Is How They Lived."

U.S. On-Duty Deaths by Year (2005-2014)											
Year	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	Total
Deaths	130	133	120	134	180	177	140	161	204	161	1540
Avg. age	40	41	43	42	41	42	40	40	40	38	
Avg. tour	12 yrs. 6 mos.	12 yrs. 10 mos.	14 yrs. 5 mos.	12 yrs. 8 mos.	13 yrs. 7 mos.	12 yrs. 2 mos.	11 yrs. 11 mos.	11 yrs. 12 mos.	11 yrs. 5 mos.	11 yrs. 5 mos.	
Female	10	4	7	12	12	10	3	16	9	9	92
Male	120	129	113	122	168	167	137	145	195	152	1448

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