JUSTICE INSTITUTE of BRITISH COLUMBIA

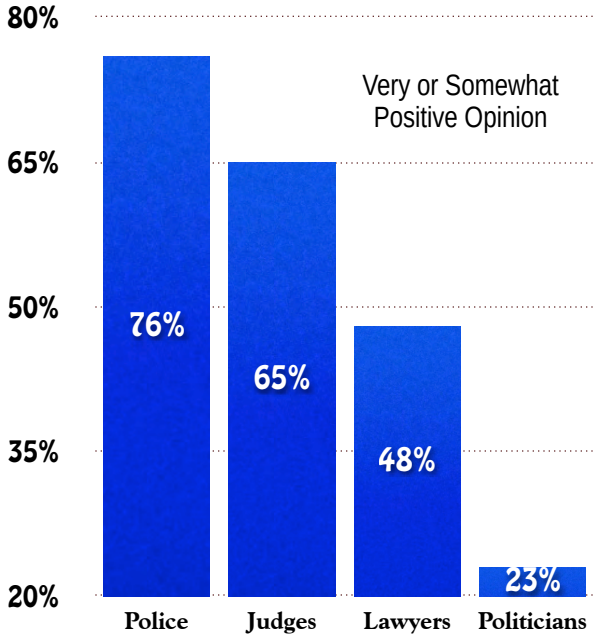
IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

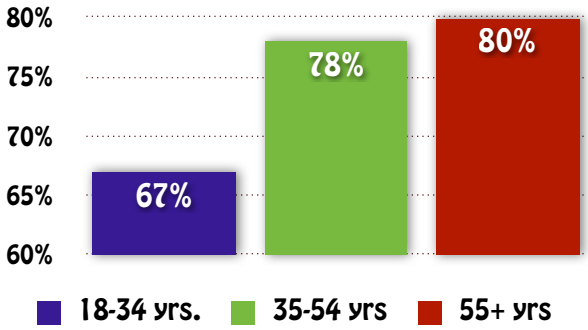
COPS TOP RESPECTED JUSTICE PROFESSIONS

Police officers are more respected by Canadians than judges, lawyers or lawmakers. In a recently released Canada wide Insights West poll, police officers earned the most respect among Canadians of all other justice professions. The survey, which asked Canadians about 27 occupations, saw police officers attain a 76% positive opinion of their professions followed by judges (65%), lawyers (48%) and politicians (law makers) at 23%.



Fast Facts

- More men (77%) held a higher view of police than women (75%).
- The older the person, the higher their admiration for the police.



- Except for Atlantic Canada, the further west one lived, the higher their opinion of the police.

Province/Region	Very or Somewhat positive opinion
BC	85%
Alberta	83%
Manitoba/Saskatchewan	80%
Ontario	72%
Quebec	70%
Atlantic	77%

- The higher one's household income, the more they respected the police.

Household income	Very or Somewhat positive opinion
less than $50,000	71%
$50,000 > $100,000	80%
more than $100,000	84%

Continued on page 9

Highlights In This Issue

NEW JIBC Graduate Certificate in Public Safety Leadership

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2016 BC LAW ENFORCEMENT MEMORIAL

This year's Memorial Service will be hosted by the Vancouver Police Department and Delta Police Department.

Date & Time:

Sunday, September 25, 2016 at 1:00 PM

Location:

Brockton Oval in Stanley Park, Vancouver, BC

see pages 31-32

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.

Designing adaptive and personalized learning environments.
Kinshuk.
New York, NY: Routledge, 2016.
LB 1031 K415 2016

Effective succession planning: ensuring leadership continuity and building talent from within.
William J. Rothwell.
New York, NY: Amacom, 2016.
HD 57.7 R689 2016

First Nations in Canada.
James S. Frideres.
Toronto, ON: Oxford University Press, 2016.
E 78 C2 F723 2016

The happiness equation: want nothing + do anything = have everything.
Neil Pasricha.
New York, NY: G.P. Putnam's Sons, 2016.
BJ 1481 P38 2016

How to teach adults: plan your class, teach your students, change the world.
Dan Spalding.
San Francisco, CA: Jossey-Bass, a Wiley Brand, 2014.
LC 5225 T4 S67 2014

Journey to healing: Aboriginal people with addiction and mental health issues: what health, social service and justice workers need to know.
edited by Peter Menzies and Lynn F. Lavallée; foreword by Elder Vern Harper.
Toronto, ON: CAMH, 2014.
RC 451.5 I5 J69 2014

Millennials who manage: how to overcome workplace perceptions and become a great leader.
Chip Espinoza & Joel Schwarzbart.
Indianapolis, IN: Pearson Education, 2016.
HF 5549.12 E77 2015

The organized mind: thinking straight in the age of information overload.
Daniel J. Levitin.
Toronto, ON: Allen Lane, 2014.
BF 444 L49 2014

Originals: how non-conformists change the world.
Adam Grant; foreword by Sheryl Sandberg.
London: WH Allen, 2016.
HD 53 G742 2016

Riding the waves of culture: understanding diversity in global business.
Fons Trompenaars & Charles Hampden-Turner.
New York, NY: McGraw-Hill, 2012.
HF 5549.5 M5 T76 2012

Talking to crazy: how to deal with the irrational and impossible people in your life.
Mark Goulston.
New York, NY: AMA, 2015.
BF 637 I48 G68 2015

Therapeutic nations: healing in an age of indigenous human rights.
Dian Million.
Tucson, AZ: University of Arizona Press, 2014.
E 92 M57 2014

They say / I say: the moves that matter in academic writing.
Gerald Graff, Cathy Birkenstein & Jim Burke.
New York, NY: W.W. Norton & Company, 2014.
PE 1431 G73 2014

What great trainers do: the ultimate guide to delivering engaging and effective learning.
Robert Bolton & Dorothy Grover Bolton.
New York, NY: AMA, 2016.
HF 5549.5 T7 B5785 2016

DETAILED INFO + CORROBORATION MADE UP FOR INFORMER CREDIBILITY

R. v. Dhillon, 2016 ONCA 308

The police received information from three confidential informers that the accused was trafficking heroin and crystal methamphetamine. They investigated this information which included searching various databases and conducting surveillance. Several months later, the investigator and other police officers set up outside the accused's residence. The investigator saw three encounters that he believed were drug transactions. In all three, the accused left his home and entered the front passenger seat of a vehicle that had pulled up in front of his house or into his driveway.

The first car, a Nissan SUV, arrived at 1:02 pm. It was stopped by police shortly after leaving the accused's residence. The driver fled the car on foot but was arrested. He was carrying approximately $3,000 in cash. A black Ford truck arrived at about 1:06 pm and the accused approach it with something cupped in his hand. The accused entered the passenger seat of this truck and then left two minutes later empty handed.

Later, at about 1:40 pm a silver Ford entered the accused's driveway. After the accused got into the passenger seat of the Ford, police intervened and arrested him. They found 9.3 grams of heroin near his feet in the car. The police then entered the home believing exigent circumstances required them to secure the residence to preserve evidence and ensure officer safety. There were five adult women and one young child inside. A search warrant was issued and executed later that day. Police found 46.8 grams of heroin and about 300 grams of methamphetamine in a bedroom.

Ontario Superior Court of Justice

The judge found the investigator had the necessary subjective grounds for arrest but those grounds were not objectively reasonable. In the judge's view, the tipster information was not credible nor compelling, and

there was little material corroboration of the trafficking allegations. Since the arrest was not lawful, the accused's right not to be arbitrarily detained under s. 9 of the *Charter* was breached and the evidence found in the silver Ford and the accused's home was excluded under s. 24(2). The accused was acquitted on three counts of possessing heroin and methamphetamine for the purpose of trafficking.

Ontario Court of Appeal

The Crown appealed the acquittals arguing the trial judge erred in his *Charter* ruling. In the Crown's opinion, the investigator had the necessary grounds to make the arrest. The Court of Appeal agreed. Even without the information related to the Nissan driver's arrest, the police still had reasonable grounds to arrest the accused.

The Arrest

Section 495(1)(a) of the *Criminal Code* allows a peace officer to make an arrest without a warrant when they believe, on reasonable grounds, that the person has committed or is about to commit an indictable offence. The arresting officer must subjectively have reasonable and probable grounds on which to base the arrest and those grounds must be objectively justifiable to a reasonable person placed in the position of the officer.

In this case, the trial judge failed to consider the totality of the circumstances by considering the confidential informer information and the police observations in isolation. He also improperly discounted the informers' information due to their weak credibility. Justice Tulloch, speaking for the Court of Appeal, stated:

"In circumstances where confidential informant information is at issue, … [o]ne must weigh whether the informant was credible, whether the information predicting the commission of a criminal offence was compelling, and whether the information was corroborated by police investigation. The totality of the circumstances must meet the standard of reasonableness."

> In circumstances where confidential informant information is at issue, … [o]ne must weigh whether the informant was credible, whether the information predicting the commission of a criminal offence was compelling, and whether the information was corroborated by police investigation. The totality of the circumstances must meet the standard of reasonableness. [para. 30]

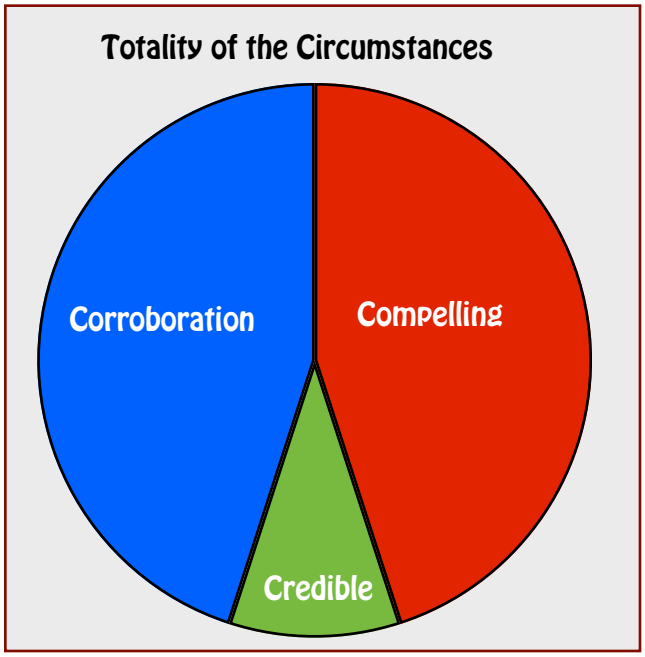
Here, the credibility of the three informers was weak. They were all untested. However, the information was compelling and corroborated. "The information was fairly detailed and specific," said Justice Tulloch. "It described various personal characteristics of the [accused], the types of drugs being trafficked, where the transactions occurred, and how they were carried out. All the informants identified the [accused's] Alfonso Crescent residence as the hub. Two of the confidential informants identified the precise address."

As for corroboration, "the consistency of the information from the three informants should be given some weight. There was significant overlap in their description of the respondent's nickname and name, approximate age, ethnicity, residence, vehicle, types of drugs in which he trafficked, location at which the transactions occurred, and … certain similarities in the manner in which the transactions would occur. These consistencies increase the significance and reliability of the informant information and distinguish this case from circumstances in which there is only one anonymous or untried informant."

Furthermore, the police confirmed the accuracy of specific information during their investigation which included: the accused's name; the colour, make, and age of his vehicle; and his ethnicity, address, approximate age and that he had been arrested but not convicted in relation to the possession of stolen property. Police confirmation of these details tended to substantiate the reliability of the informers' information. The police observations also provided some corroboration that the alleged criminal activity was indeed occurring. There were three brief meetings within one hour, all of which occurred outside the accused's residence in various cars. This behaviour, in light of the investigator's knowledge and experience, also helped inform the inferences that could be drawn when assessing the objective reasonableness of the grounds for arrest. This sequence of events also conformed with the pattern predicted by the informer information so as to remove the possibility of innocent coincidences.

Since the police had subjectively and objectively justifiable reasonable grounds to arrest the accused, his s. 9 *Charter* rights were not breached. The Crown's appeal was allowed and the acquittals were set aside.

Complete case available at www.ontariocourts.on.ca



PENILE SWAB JUSTIFIED AS AN INCIDENT TO ARREST

R. v. Laporte, 2016 MBCA 36

In December 2007 the accused approached a 38-year-old woman who was waiting for a taxi. He said he had a knife and told her to follow him into a building. He hit and punched her, fracturing her nose and other facial bones, and forced the woman to have sex with him. The accused was arrested shorty after this crime and he was taken to the police station. The police took penile swabs without his consent and without any physical objection. He had been allowed to call his lawyer prior to the swabs being taken. He was subsequently released from custody later in November 2008.

About two weeks after his release, the accused was involved in three more separate sexual assaults all committed during the same day. The first involved an eight-year-old boy. This attack was interrupted by a neighbour and the accused fled the scene. The second incident occurred in an elevator two hours later when the accused attacked a woman who was with her two-year-old child. He grabbed the woman, dragged her towards a stairwell and threatened her with a knife. Another tenant intervened and the woman and child got away. The third assault happened two hours later when the accused attacked another woman. This assault was interrupted when the building caretaker heard a woman scream. The caretaker threw the accused to the ground and held him until police arrived.

The police took the accused to the police station where they again obtained warrantless penile swabs from him without his consent. This time, however, he struggled vehemently and was not allowed to speak to his lawyer. He was subsequently charged with nine crimes involving the four victims which included charges of sexual assault causing bodily harm, unlawful confinement and assault with a weapon. A charge of assaulting a police officer was also laid as a result of an officer being kicked by the accused during the arrest.

Manitoba Court of Queen's Bench

The accused brought a motion under s. 24(2) of the *Charter* for the exclusion of the DNA evidence obtained from the penile swabs. He argued that the taking of the penile swabs by police, in search of the victims' DNA, breached his rights under s. 8 of the *Charter* to be secure against unreasonable search and seizure since they were warrantless and nonconsensual. As a result, he asserted that the admission of this evidence would bring the administration of justice into disrepute. The Crown took the position that the DNA samples were lawfully taken as an incident to arrest and a warrant was not required.

The judge found that the taking of the penile swabs without warrant did not fall within the common law power of search incident to arrest and that the Crown had not demonstrated emergency or exigent circumstances for their taking. Nor did police consider the availability of a telewarrant under s 487.1(1) of the *Criminal Code*. Therefore, obtaining the swabs breached the accused's s. 8 rights both times. The judge, however, allowed the evidence of the 2007 DNA swabs under s. 24(2) but excluded the 2008 DNA swabs. During the 2008 swab, the police denied the accused his right to counsel and the manner of police conduct was unreasonable considering the number of officers present, the use of the spit sock and the amount of force used.

Nevertheless, the accused was convicted of sexual assault causing bodily harm x 3, unlawful confinement x 2, assault with a weapon, forcible

seizure and assaulting a police officer. The accused was designated a dangerous offender and sentenced to a period of indeterminate incarceration.

Manitoba Court of Appeal

The accused appealed his convictions submitting, among other things, that the trial judge erred in not excluding the 2007 DNA evidence. The Crown, on the other hand, argued there was no s. 8 *Charter* breach and, if there was one, the trial judge properly admitted the evidence under s. 24(2) in any event.

Penile Swabs

The Manitoba Court of Appeal found that a penile swab can be taken as a lawful search incident to arrest. Noting that "the jurisprudence concerning the taking of penile swabs is developing", Justices Hamilton and Pfuetzner used other Supreme Court of Canada decisions as an analytical framework to address the question of whether the taking of the 2007 penile swabs breached the accused's s. 8 rights.

"Searches incident to arrest are an established exception to the general rule that warrantless searches are prima facie unreasonable," they said. "They have an important law enforcement function that includes the collection and preservation of evidence." The Court of Appeal continued:

> The taking of penile swabs in a sexual assault investigation can capture important evidence arising from bodily samples from a complainant found on the accused person. This is to be distinguished from collecting bodily samples containing personal information relating to an accused person, which requires a warrant. …

"Searches incident to arrest are an established exception to the general rule that warrantless searches are prima facie unreasonable. They have an important law enforcement function that includes the collection and preservation of evidence."

> Given that distinction, we conclude that the taking of penile swabs falls within the existing general framework of the common law power of a search incident to arrest. [para. 44]

The general framework of searching as an incident to arrest was then modified so that the following three elements are required for a penile swab to be a lawful search incident to arrest:

1) The police have reasonable and probable grounds justifying the arrest;

2) The police have reasonable and probable grounds justifying the penile swab search incident to arrest. In other words, the police have reasonable and probable grounds to believe that the penile swab will provide relevant evidence related to the arrest; and

3) The police have conducted the penile swab in a manner that complies with s. 8 of the *Charter*. ... [para. 61]

This modified framework, in the Court's view, provides the appropriate balance between the law enforcement interest in pursing legitimate police investigations of sexual assaults with an accused person's significant right to privacy.

Continued p. 9

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	The following questions, adopted from R. v. Golden by the Manitoba Court of Appeal, provide a framework for the police (and the courts) in addressing Charter compliance.	
	Strip Search Framework **R. v. Golden, 2001 SCC 83**	**Penile Swab Framework** **R. v. Laporte, 2016 MBCA 36**
1	Can the strip search be conducted at the police station and, if not, why not?	Was the penile swab conducted at the police station and if not, why not?
2	Will the strip search be conducted in a manner that ensures the health and safety of all involved?	Was the penile swab conducted in a manner that ensured the health and safety of all involved?
3	Will the strip search be authorized by a police officer acting in a supervisory capacity?	Was the penile swab authorized by a police officer acting in a supervisory capacity?
4	Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?	Were the police officers carrying out the penile swab of the same gender as the person being searched, and if not, why not?
5	Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?	Was the number of police officers involved no more than necessary in the circumstances?
6	What is the minimum of force necessary to conduct the strip search?	Was the minimum force that was necessary used to conduct the search?
7	Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?	Was the penile swab carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
8	Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?	Was the penile swab conducted as quickly as possible and in a way that ensures that clothing removal or exposure is restricted to that necessary to complete the swab?
9	Will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact?	Was the procedure recorded in a respectful manner? For example, was the camera turned away during the swab procedure or directed at the accused person's back to avoid genital exposure?
10	If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?	Was the accused person given the opportunity to swab himself and if not, why not?
11	Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?	Was a proper record kept of the reasons for and the manner in which the penile swab was conducted?

> "Strip searches generally should be conducted at a police station unless there are exigent circumstances. … Given that, and the nature of a penile swab search, we expect that it will be the rare circumstance that a penile swab will not take place in a police station."

Like strip searches, penile swabs should be taken at the police station:

> Strip searches generally should be conducted at a police station unless there are exigent circumstances. … Given that, and the nature of a penile swab search, we expect that it will be the rare circumstance that a penile swab will not take place in a police station. [paras. 64]

Applying the Penile Swab Framework

In this case, the 2007 swab complied with the Court of Appeal's framework and thus s. 8 of the *Charter*. The police had subjective and objective reasonable and probable grounds to arrest the accused and, in the circumstances of the case, they had subjective and objective reasonable grounds to believe that evidence from the victim could be found on his penis. The police provided the accused with two opportunities to speak to a lawyer and the swabs were taken in an interview room at the police station within 12 hours of the attack. The search was videotaped, but the swabs were taken off camera. The high degree of justification required for the penile swab search existed in the circumstances and the evidence was admissible. The accused's appeal was dismissed.

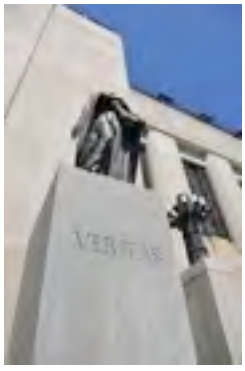
Complete case available at www.manitobacourts.mb.ca

Editor's note: On December 1, 2015 the Supreme Court of Canada heard the appeal of a penile swab case out of Alberta (*R. v. Saeed*, 2014 ABCA 238). In that case, the police took a penile swab without a warrant as well. The *Saeed* judgement was on reserve when the Manitoba Court of Appeal released *Laporte*. However, on June 23, 2016 the Supreme Court released *Saeed*. See page 12.

Profession	Very or Somewhat Positive Opinion
Nurses	92%
Farmers	91%
Veterinarians	87%
Scientists	86%
Doctors	85%
Teachers	85%
Architects	83%
Engineers	82%
Accountants	79%
Dentists	78%
Police Officers	76%
Actors/Artists	73%
Athletes	72%
Auto Mechanics	70%
Military Officers	69%
Judges	65%
Psychiatrists	64%
Journalists	58%
Building Contractors	57%
Priest/Ministers	56%
Bankers	53%
Realtors/Real Estate Agents	49%
Business Executives	48%
Lawyers	48%
Pollsters	34%
Car Salespeople	30%
Politicians	23%

Source: Insights West, "Nurses and Farmers Seen as Canada's Most Respected Professions". June 1, 2016.

SUPREME COURT TAKES LONGER TO DECIDE CASES



In its report "Supreme Court of Canada - Statistics 2005 to 2015" the workload of Canada's highest Court was outlined. In 2015 the Supreme Court heard 63 appeals, down from 80 in 2014. The most appeals heard annually in the last 10 years was in 2008 when 82 were brought before the Court. The lowest number of appeals heard in a single year during the last decade was 53 in 2007.

Case Life Span

The time it takes for the Court to render a judgment from the date it hears a case was 5.8 months, up 1.7 months from 2014. Overall it took 17.2 months, on average, for the court to render an opinion from the time an application for leave to hear a case was filed in 2015. This is up from the previous year when it took 15.5 months. The shortest time within the last 10 years for the Court to announce its decision after hearing arguments was 4.1 months (2014) while the longest time was 7.7 months (2010).

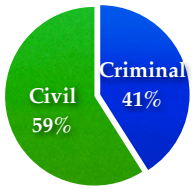
Applications for Leave

In 2015 there were 483 applications for leave to appeal the decision of a lower court, meaning a party sought permission for a hearing from a three judge panel. Ontario was the source of most applications for leave at 121 cases. This was followed by Quebec (108), the Federal Court of Appeal (79), British Columbia (64), Alberta (48), Saskatchewan (16), Nova Scotia (14), Manitoba (12), New Brunswick (8), Newfoundland and Labrador (7), the Northwest Territories (5) and Prince Edward Island (1). No applications for leave came from Nunavut or the Yukon. Of the 483 leave applications, 39 or 8% were granted while 40 were pending. Of all applications for leave, 27% were criminal and 73% were civil.

Appeals Heard

Of the 63 appeals heard in 2015, Quebec had the most of any province at 14. This was followed by the Federal Court of Appeal with 13, Ontario (12), British Columbia (10), Alberta (8), Manitoba (2), New Brunswick, the Yukon, Saskatchewan and Newfoundland and Labrador each with one. No appeals originated from Nova Scotia, the Northwest Territories, Prince Edward Island, or Nunavut.

Of the appeals heard in 2015, 59% were civil while the remaining 41% were criminal. Eighteen percent (18%) of the criminal cases dealt with *Charter* issues.

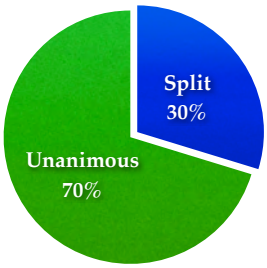


Fifteen (15) of the appeals heard in 2015 were as of right. This source of appeal includes cases where there was a dissent on a point of law in a provincial court of appeal.

The remaining 48 cases had leave to appeal granted.

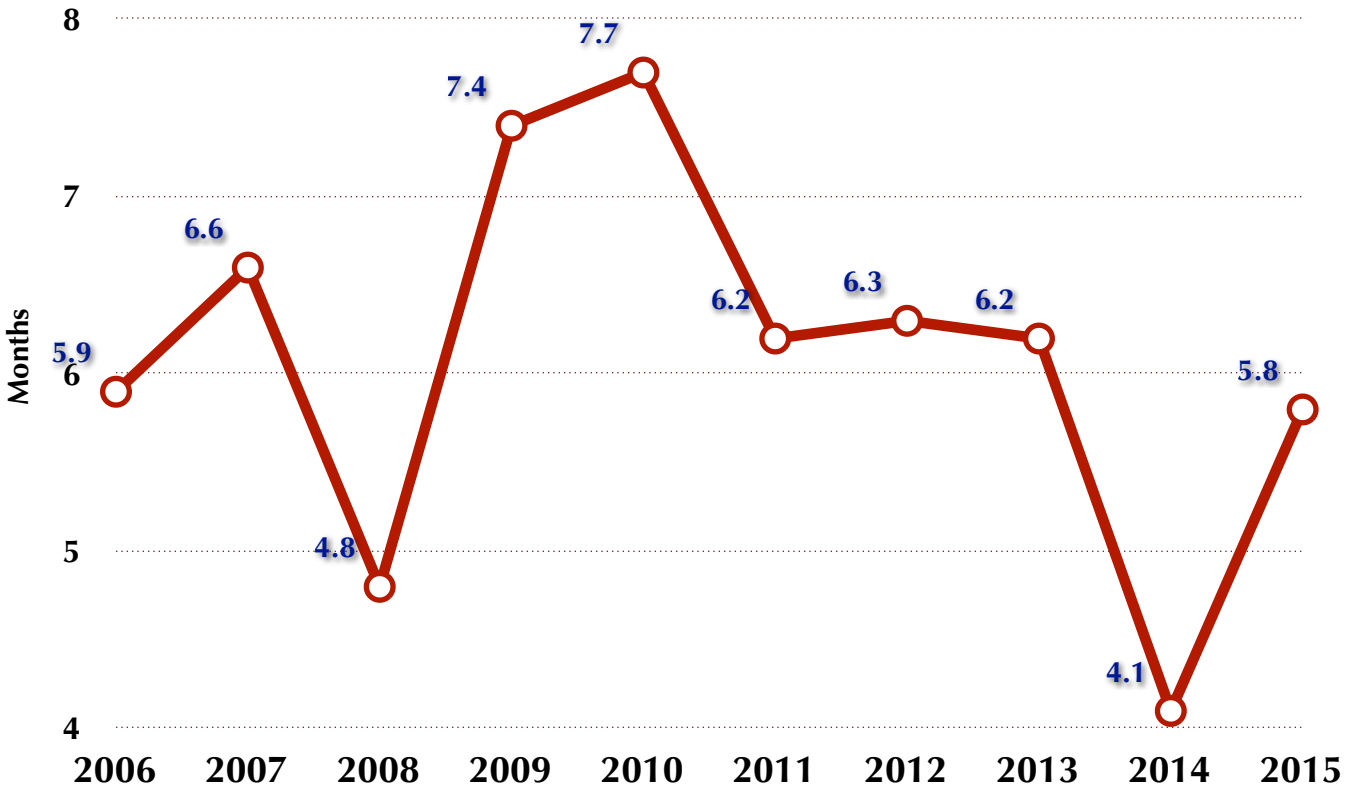
Appeal Judgments

There were 74 appeal judgments released in 2015, down from 77 the previous year. Sixteen (16) decisions were delivered from the bench last year while the remaining 58 were delivered after being reserved. Thirty-five (35) appeals were allowed while 39 were dismissed. In terms of unanimity, the Supreme Court agreed on 70% of its cases. This is up slightly from 68% the previous year. For the remaining 30% of its judgments released in 2015 the Court was split.



Source: www.scc-csc.gc.ca

Average Time Lapses (in months) between SCC hearing and judgment



SUPREME COURT UPOLDS PENILE SWABS AS AN INCIDENT TO ARREST

R. v. Saeed, 2016 SCC 24

The police attended a group home at about 5:00 am in response to a complaint that a 15-year-old female had been sexually assaulted. The complainant was taken to the hospital where she was examined. She had bruises, cuts and scrapes all over her body, and tenderness to her vagina. The accused was arrested at 6:05 am for sexual assault after the police attended his apartment. He was taken to the police station, but mistakenly released sometime between 7:00 am and 7:30 am only to be re-arrested at 8:35 am. He was taken back to the police station, arriving at 8:50 am, and he was allowed to speak to a lawyer, ending his call at 9:20 am. At some point, the police became aware that the sexual assault involved penile penetration.

As a consequence, the accused was placed in a "dry cell", handcuffed to a steel pipe and seated on the floor with his hands behind his back to prevent him from licking his hands or washing away evidence. The detective felt there were reasonable grounds to believe that the complainant's DNA would be found on the accused's penis. At 10:40 am a phone call with an interpreter was arranged. The police repeated the reason for the accused's arrest and again advised him of his rights under s.10(b). He indicated he had already spoken to a lawyer and knew he did not have to provide a statement. Police explained the process for obtaining a swab and told the accused that he could take the swab himself, or have a male officer take it.

At 10:45 am, the accused pulled his pants down and used a swab with a cotton tip to swab along the length of his penis and around its head. There were only two officers in the cell at the time and the small window in the door was blocked by the bodies of police officers so no one could look in. The swab cam into contact only with the outside skin of teh accused's penis and the procedure took no more than two minutes. A subsequent DNA analysis of the swab showed DNA matching the complainant.

Alberta Court of Queen's Bench

A forensic specialist called by the Crown provided an expert opinion that the complainant's vaginal DNA would be expected to be found on the accused's penis for a period of time after a sexual assault involving penile penetration, if no condom was used. He indicated that urination by the accused, humidity, warmth, sweat and the natural bacteria present on the accused's skin could all cause this type of DNA evidence to degrade. An accused could also wash off or wipe away the DNA. However, the expert could not definitively state a time frame within which a swab must be taken, due to the many factors that affect how long a complainant's DNA will remain on an accused's penis — including whether the accused chose to destroy the evidence. But, due to the likelihood that an accused will urinate, wash or wipe away the evidence, the expert said that a swab should be taken as soon as possible.

The accused argued the DNA report from the penile swab should have been excluded as evidence under s. 24(2) of the *Charter* because his s. 8 rights had been breached. The judge agreed, ruling that the taking of the penile swab violated s. 8 because there were no exigent circumstances (the imminent loss of evidence) justifying the search. The judge found the Crown had not established that obtaining the swab was lawful as a search incident to arrest and therefore did not overcome the presumptive warrant requirement. Nevertheless, the judge found the evidence admissible under s. 24(2). The accused was convicted of sexual assault causing bodily harm and sexual interference.

Alberta Court of Appeal

A majority of the Court of Appeal found the penile swab in this case was not a proper exercise of the police power to search as an incident to arrest and therefore breached s. 8. The majority found the character of the penile swab more intrusive than a strip search and more akin to obtaining bodily samples from a suspect (as in *R. v. Stillman*, [1997] 1 SCR 607). Justices Watson and Bielby stated:

> In sum, unless a statute otherwise provides, a warrant is required for any intimate search and seizure for bodily samples from the person, absent consent, absent evidence which establishes that the time required to apply for a warrant could result in the bodily samples sought significantly deteriorating or disappearing before a search and seizure under warrant could be undertaken or absent evidence of extreme exigency. Such a search cannot be justified, without warrant, simply on the basis of being incidental to arrest, without more. [para. 62, *R. v. Saeed*, 2014 ABCA 238]

Thus, the warrantless search and seizure (penile swab) was unreasonable under s. 8. However, the majority would not exclude the evidence under s. 24(2).

Justice MacDonald, on the other hand, concluded that there was no s. 8 breach because, even in the absence of exigency, the search and seizure was proper as an incident to arrest. First, the arrest was lawful. Second, the search was related to the reasons for the arrest. The arrest was for sexual assault and the search was to determine whether the complainant's DNA was on the accused. Finally, the search was executed reasonably. The police wanted to preserve the evidence and did so in a respectful manner. The accused himself took the sample and handed it back to the officer. Furthermore, the officer had reasonable and probable grounds to justify the search. It was conducted at the police station and therefore exigent circumstances were not required. Justice MacDonald also found the Supreme Court of Canada decision in *Stillman* distinguishable. In that case, the police took samples of the accused's own bodily substances which would not deteriorate over time. In this case, the accused was being swabbed for the DNA of another person (the complainant) which would deteriorate over time. Justice MacDonald found the trial judge erred in finding a s. 8 breach and the evidence was admissible.

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

Supreme Court of Canada

The accused appealed his convictions again suggesting that his rights under s. 8 were infringed because the police performed the penile swab without his consent or a warrant and therefore the DNA results ought to have been excluded as evidence under s. 24(2). The main issue on appeal was whether the police were entitled to rely on the common law power of search incident to arrest to take the penile swab. A majority of the Supreme Court (7:2) found the penile swab was lawful as an incident to arrest.

Search Incident to Arrest

Under the common law, the police may search a person as an incident to arrest. "The common law power of search incident to arrest is an ancient and venerable power," said Justice Moldaver speaking for the seven member majority. "For centuries, it has proved to be an invaluable tool in the hands of the police. Perhaps more than any other search power, it is used by the police on a daily basis to detect, prevent, and solve crimes. ... By the same token, it is an extraordinary power. Searches incident to arrest

"The common law power of search incident to arrest is an ancient and venerable power. For centuries, it has proved to be an invaluable tool in the hands of the police. Perhaps more than any other search power, it is used by the police on a daily basis to detect, prevent, and solve crimes."

are performed without prior judicial authorization, and they inevitably intrude on an individual's privacy interests."

However, Courts are tasked with striking a proper balance between the accused's privacy interests and valid law enforcement objectives. Thus, the more significant the accused's privacy interests will be, the general framework for searches incident to arrest may require modification in order to be *Charter*-compliant.

A General Framework

A reasonable search under the *Charter* must meet the following three requirements:

- ***The search must be authorized by law***;
- ***The law must be reasonable***; and
- ***The search must be conducted reasonably***.

One law that can authorize a warrantless search is the common law power of search incident to arrest. For a search to be reasonable under the common law, the following general framework applies:

1. ***The person must be lawfully arrested***;
2. ***The search must be truly incidental to arrest***. This means that the search must be for a valid law enforcement purpose related to the reason for arrest; and
3. ***The search must be conducted reasonably***.

In some cases, however, the privacy interest of the individual is so high that the general framework must be modified and tailored to ensure that this heightened privacy interest receives adequate protection. An example where this framework has been modified is in the case of a strip search.

Penile Swabs

Before outlining a *Charter*-compliant framework for the taking of penile swabs, the majority noted that the case of *R. v. Stillman* did not apply. First, the purpose of the penile swab was not to take samples of the accused's own body (his DNA), but rather was done to obtain the complainant's DNA. Second, the penile swab was quick and painless, was not penetrative and no objects or substances were placed inside the accused. Unlike *Stillman*, the swabbing did not involve the forcible taking of parts of a person. Finally, evidence of the complainant's DNA degrades over time and can be destroyed, intentionally or accidentally. As a safeguard to the collection of the accused's DNA, the majority made it clear that any of the accused's DNA collected during this process could not be used for any purpose:

> [I]f an accused's DNA is obtained through a penile swab and the swab was taken without a warrant authorizing such seizure, or the accused's consent, the accused's DNA cannot be used for any purpose. [para. 48; see also para. 67]

The majority then outlined the framework for taking penile swabs incident to arrest:

1. **The arrest itself must be lawful**;
2. **The swab must be truly incident to the arrest**, in the sense that the swab must be related to the reasons for the arrest and it must be performed for a valid purpose. The valid purpose will generally be to preserve or discover evidence.
3. **The police must also have reasonable grounds to believe that a penile swab will afford evidence of the offence for which the accused was arrested**.
4. **The penile swab must be conducted in a reasonable manner.** The Court outlined a number of factors the police must consider in performing a penile swab:
   (1) ***The penile swab should, as a general rule, be conducted at the police station.*** As with strip searches, penile swabs should generally be performed at the police station. This requirement is even stricter for penile swabs than strip searches. Safety concerns may justify a strip search for weapons in the field. Safety concerns are highly unlikely to justify a penile swab in the field. However, the Court did not rule out the possibility that a penile swab may reasonably be performed in another suitable location, such as a hospital, if there is some valid reason for doing so.

(2) ***The swab should be conducted in a manner that ensures the health and safety of all involved***;

(3) ***The swab should be authorized by a police officer acting in a supervisory capacity***;

(4) ***The accused should be informed shortly before the swab of the nature of the procedure for taking the swab, the purpose of taking the swab, and the authority of the police to require the swab***. As a general rule, the police must explain to the accused the procedure for taking a swab before it is taken, to ensure the accused understands the nature of the procedure and the steps it involves. Reviewing the procedure with the accused in advance can only help to keep the procedure quick and efficient;

(5) ***The accused should be given the option of removing his clothing and taking the swab himself, and if he does not choose this option, the swab should be taken or directed by a trained officer or medical professional, with the minimum of force necessary***. Giving the accused the option of taking the swab himself enables the accused to minimize the intrusiveness of the swab. The police may use force in taking a penile swab incident to arrest, but only if the force used is necessary and proportional in the specific circumstances. In other words, as with strip searches, if the accused resists the swab, the police may only use the minimum amount of force necessary to obtain it. However, the fact that an accused resists does not entitle the police "to engage in behaviour that disregards or compromises his or her physical and psychological integrity and safety";

(6) ***The police officer(s) carrying out the penile swab should be of the same gender as the individual being swabbed, unless the circumstances compel otherwise***;

(7) ***There should be no more police officers involved in the swab than are reasonably necessary in the circumstances***;

(8) ***The swab should be carried out in a private area such that no one other than the individuals engaged in the swab can observe it***;

(9) ***The swab should be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time***; and

(10) ***A proper record should be kept of the reasons for and the manner in which the swabbing was conducted.*** A detailed record of how the swab was conducted is important for after-the-fact review of these searches to be effective and it is likely to focus police officers' attention on whether their conduct is reasonable.

The Court cautioned that these factors will not be determinative in every case and "should not be taken as deciding the question of whether a penetrative swab performed in accordance with the common law police power of search incident to arrest would be reasonable and therefore *Charter* compliant. They are restricted to genital swabs conducted on the outer surface of the skin." Whether a particular penile swab incident to arrest accords with s. 8 will depend on the individual facts of a particular case.

Reasonable Grounds

The reasonable grounds to believe that a penile swab will afford evidence of the offence for which the accused was arrested must not be confused with the reasonable grounds required for the arrest:

> They are independent. Whether reasonable grounds have been established will vary with the facts of each case. Relevant factors include the timing of the arrest in relation to the alleged offence, the nature of the allegations, and whether there is evidence that the substance being sought has already been destroyed.
>
> For example, the police will generally lack reasonable grounds if the alleged sexual offence did not involve contact between the suspect's penis and the complainant. Similarly, if the suspect is arrested several days after the alleged offence, the police will probably lack reasonable grounds because it is likely that the evidence will have degraded or been wiped or washed away in the interim.

> To be clear, meeting the reasonable grounds standard is more than a mere pro forma exercise. The potential for destruction or degradation of the complainant's DNA will always be a concern in this context. The greater the time frame between the alleged offence and the swab, the more difficult it will be for the police to establish reasonable grounds for believing that the swab will afford evidence of the offence for which the accused was arrested. [paras. 75-77]

Outcome

The majority found the penile swab in this case did not breach s. 8. The arrest was lawful and the police were searching for evidence related to the arrest - the complainant's DNA. The police also had reasonable grounds to believe the complainant's DNA had transferred to the accused. The swab was taken several hours after the sexual assault and there was no reason to believe the accused had taken steps to destroy the evidence. Finally, the swab was taken in a reasonable manner. The accused was informed in advance of the procedure for taking the swab and the purpose of the swab. The swab was conducted quickly, smoothly, and in private. The accused took the swab himself, there was no physical contact with the officers and those involved took detailed notes regarding the reasons for and the process of taking the swab.

A Second View

Two justices concluded that the warrantless taking of the penile swabs breached s. 8 of the *Charter* because they were not authorized by the the common law power of search incident to arrest. Justice Karakatsanis, however, would have admitted the evidence under s. 24(2) while Justice Abella would have excluded it.

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

Complete case available at www.scc-csc.ca

Editor's note: Additional facts taken from *R. v. Saeed*, 2014 ABCA 238.

INVESTIGATIVE DETENTION TURNED ARBITRARY WHEN DETAINEE SHOULD HAVE BEEN RELEASED

R. v. McGuffie, 2016 ONCA 365

At about 2:00 am the police received a call from security at a downtown bar reporting that a group of five men in the bar were seen passing a handgun around. Several police officers responded to the call. They found security staff ushering patrons out from the bar. A doorman identified two individuals as part of the group that had been passing the handgun around. On of them, the accused, walked away quickly from the bar. An officer followed, caught up to him a short distance from the bar and asked him why he was "running away from his friends?" The accused gave conflicting responses. The officer then detained him. He suspected the accused had the handgun as seen in the bar earlier. But the accused denied having a handgun.

The accused was handcuffed and patted down for firearms but nothing was found. The officer then placed the accused in the back of a police car and returned to the bar to assist in the search for the handgun. Thirty minutes later, the officer returned to the police car, removed the accused and began a more thorough safety search. During this search, the officer felt a hard rectangular object in the accused's shirt pocket. Concerned that it might be the handgun, he removed the object. It turned out to be 118.5 grams of powdered cocaine. The officer continued to search the accused and found some money and marihuana in his pant pocket.

The accused was arrested for trafficking in cocaine, advised of his right to counsel (now 40 minutes after he was first detained). The accused said he wanted to speak to a lawyer. He was transported to the police station and strip searched. The officer was concerned the accused might still be carrying a handgun, as well as more drugs, even though a handgun had already been found by other officers. Initially, the accused vigorously resisted the strip search but his resistance was overcome by several officers, including the arresting officer, standing on his ankles. During the search, the police found 7.5 grams of crack cocaine sewn into the waist of the accused's underwear. The accused became more cooperative and produced 22.7 grams of crack cocaine that he had secreted in his buttocks. He was then taken into another room to complete the strip search. The door to the room was open and three police officers were in the room. After the strip search was completed, the police gave the accused an opportunity to speak to his lawyer, some 90 minutes after he was first detained. An hour had passed since the accused had indicated he wanted to speak to a lawyer. After speaking with his lawyer, the accused told the police his real name and that there were warrants outstanding for his arrest.

R. v. McGuffie Timeline

Time	Action
2:00 am	Call received from bar security staff that a group of men had been seen passing around a handgun.
2:07 am	Detaining officer arrives on scene. Other police officers already present.
	Accused detained and handcuffed.
2:19 am	Accused placed in rear of police car.
2:50 am	Officer returns to accused - 31 minutes after leaving him there.
	Accused again searched and drugs found.
2:55 am	Accused arrested.
3:09 am	Handgun found on asphalt outside building.
3:25 am	Arrived at police station with accused.
3:54 am	Strip search completed & accused allowed to contact counsel.

Times taken from 2016 ONCA 35 & 2013 ONSC 2097.

Ontario Supreme Court

The officer said he decided to detain the accused for possessing the handgun seen earlier in the bar but never suggested to have grounds for an arrest. The judge found the initial street detention of the accused for a

"An individual's right to be left alone by the police and the police duty to investigate crime and protect the public will inevitably come into conflict. That conflict often plays out in street level encounters ... . Section 9 provides the constitutional imperative against which the competing interests of the individual and the state, as represented by the police, must be balanced and resolved."

firearm-related investigation was a constitutionally appropriate investigative detention. He also held that the pat down search was a reasonable safety-related search that did not breach s. 8 of the *Charter*. However, the judge found the police repeatedly violated the accused's rights from the time he was placed in the police car until he was finally permitted to speak to his lawyer some 90 minutes later. In the judge's view, detaining the accused in the back of the police car while the officer went back into the bar to assist in the search of the handgun ignored the police obligation to minimize the length of the detention, thus breaching s. 9 of the *Charter*. The judge compared the officers action to others on scene who had briefly detained other individuals suspected of having some connection to the firearm but released them when the detention provided no grounds for an arrest.

The officer's failure to advise the accused of his right to counsel when he first detained him in the police car breached s. 10(b), which was further breached when the accused was not given an opportunity to speak to his lawyer for an hour after he indicated that he wanted to do so. The manner of the search at the police station also breached the accused's s. 8 rights. The officer inflicted intentional and gratuitous pain by standing on the accused's ankles for about a minute. The police also failed to adequately respect privacy rights when they conducted the strip search with the door open and in the presence of officers who were unnecessary for the proper conduct of the strip search.

The judge, however, admitted the evidence under s. 24(2) of the *Charter*. The accused was convicted on two counts of possessing cocaine for the purpose of trafficking, three counts of breaching a recognizance and breaching a probation order.

Ontario Court of Appeal

The accused challenged the admissibility of the evidence, including the drugs, against him. However, before addressing the accused's argument that the trial judge erred in admitting the evidence under s. 24(2), the Court of Appeal chose to clearly identify the *Charter* breaches in this case.

s. 9 - Initial Detention

Justice Doherty, speaking for the Court of Appeal, first described the competing interests between the police and the accused:

> An individual's right to be left alone by the police and the police duty to investigate crime and protect the public will inevitably come into conflict. That conflict often plays out in street level encounters like the one involving [the officer] and the [accused]. Section 9 provides the constitutional imperative against which the competing interests of the individual and the state, as represented by the police, must be balanced and resolved. [para. 32]

In this case, the accused was detained from the moment the officer stopped him on the street, which was made all the more obvious when he was handcuffed. This initial detention, however, was "a lawful exercise of the police power to detain persons in the course of a criminal investigation." The officer had the necessary reasonable grounds to suspect that the accused was involved in the illegal possession of a handgun. The officer had information from the doorman, had seen the accused quickly leaving the area of the bar and the location of the handgun was unknown. "[The officer's] investigation raised legitimate and immediate public safety concerns," said Justice

"An individual may be detained for investigative purposes if the police are acting in the exercise of their duty and the detention is justified as reasonably necessary in the totality of the circumstances."

Doherty. "While [the officer] did not have grounds to arrest the [accused], he did have a duty to investigate the gun-related incident and the [accused's] potential connection to it." He continued:

> An individual may be detained for investigative purposes if the police are acting in the exercise of their duty and the detention is justified as reasonably necessary in the totality of the circumstances. [references omitted, para. 35]

s. 9 - Continued Detention

Although the initial detention was lawful, the continued detention became arbitrary. The officer was required to release the accused unless he had grounds to arrest him. Here, the officer imprisoned the accused when he confined him in the rear of the police car while he pursued the investigation elsewhere, in the bar. An investigative detention is different than an arrest and is designed to be brief:

> The significant interference with individual liberty occasioned by an arrest is justified because the police have reasonable and probable grounds to believe that the arrested person has committed an offence. Investigative detention does not require the same strong connection between the detained individual and the offence being investigated. The detention contemplated by an investigative detention cannot interfere with individual liberty to the extent contemplated by a full arrest.
>
> The duration and nature of a detention justified as an investigative detention must be tailored to the investigative purpose of the detention and the circumstances in which the detention occurs. A brief detention on the street to question an individual implicated in a criminal investigation involving ongoing events may be justifiable under the Mann criteria, but under those same criteria imprisonment in a police cruiser while handcuffed for some indefinite period while an officer carries out other aspects of a criminal investigation could not be justified. The police cannot use investigative detention as an excuse for holding suspects while the police search for evidence that might justify the arrest of the suspect. Nor does investigative detention mean that the police can detain suspects indefinitely while they carry out their investigation. [paras. 37-38]

"The rights created by s. 10(b) attach immediately upon detention, subject to legitimate concerns for officer or public safety."

s. 10(b) - Right to Counsel

The right to counsel under s. 10(b) was described by the Court of Appeal as follows:

> Section 10(b) creates the right to retain and instruct counsel without delay, and the right to be informed of that right without delay. If a detained person, having been advised of his right to counsel, chooses to exercise that right, the police must provide the detained person with a reasonable opportunity to exercise that right and must refrain from eliciting incriminatory evidence from the detained person until he has had a reasonable opportunity to consult with counsel.
>
> The rights created by s. 10(b) attach immediately upon detention, subject to legitimate concerns for officer or public safety. [references omitted, para. 41-42]

In this case, the accused should have been advised of his a right to speak to a lawyer no later than immediately after he was handcuffed and patted down while standing on the street. He should have been asked if he wanted to speak with counsel and, if he did, the police should have afforded him that opportunity without delay:

> The purpose animating s. 10(b) applied with full force in this case. The [accused] was under the control of the police. He was effectively imprisoned from the moment he was handcuffed and placed in the cruiser. [The officer] took advantage of that control to subject the [accused] to an unconstitutional detention and two intrusive unconstitutional searches, both of which yielded incriminatory evidence. The [accused] was in serious legal jeopardy. He needed legal advice. More importantly, he was constitutionally entitled to it. The conduct of the police, and specifically [the arresting officer], ensured that he would not receive that advice until after the police were done with the appellant and had the evidence they needed to convict him. The [accused's] rights under s. 10(b) were breached. [para. 44]

s. 8 - Unreasonable Search

The Court of Appeal found the initial pat down search to be reasonable and justified as an incident to investigative detention:

> [I]n the circumstances of this case, there is no doubt that [the officer] had sufficient grounds to believe there was an imminent threat to his safety should he confront and detain the [accused] on the street for investigative purposes. That reasonable belief of an imminent threat could, in my view, be based on the reasonable suspicion that the [accused] had the handgun. A cursory pat down search of the [accused] was justified to eliminate that concern. [para. 52]

However, the more thorough search at the scene and the strip search at the police station were both unreasonable. The alleged "safety" search at the scene was conducted when the accused was unlawfully detained. "I would draw an analogy between searches that are said to be lawful as an incident of an arrest and safety searches which are said to be lawful as an incident of a lawful investigative detention," said Justice Doherty. "If the arrest is unlawful, the search incidental to the arrest is unlawful and contrary to s. 8. Similarly, if an investigative detention is unlawful, a safety search said to be justified on the basis of that detention must be unlawful and contrary to s. 8." Since the accused's detention in the back of the police car was unlawful, the warrantless search of his person could not be justified.

The strip search at the police station was also performed in an unreasonable manner. The trial judge found the officer gratuitously assaulted the accused during efforts to subdue him by standing on his ankles. Further, the police failed to take reasonable steps to minimize the inherently humiliating and degrading impact of the strip search.

s. 24(2) - Exclusion of Evidence

Unlike the trial judge, the Court of Appeal excluded the evidence. The police misconduct was very serious. The officer totally and blatantly disregarded the accused's ss. 8, 9 and 10(b) *Charter* rights. As well, the breaches seriously impacted of the accused's *Charter*-protected interests. None of the breaches were technical or minor:

> The [accused's] arbitrary detention effectively negated his personal liberty. Not only was he in imprisoned, but he was imprisoned in a manner that left him vulnerable to further police misconduct. The police took advantage of the [accused's] arbitrary detention to unlawfully search the [accused]. That conduct led directly to the discovery of incriminating evidence. The

"I would draw an analogy between searches that are said to be lawful as an incident of an arrest and safety searches which are said to be lawful as an incident of a lawful investigative detention. If the arrest is unlawful, the search incidental to the arrest is unlawful and contrary to s. 8. Similarly, if an investigative detention is unlawful, a safety search said to be justified on the basis of that detention must be unlawful and contrary to s. 8."

> strong causal connection between the denial of the [accused's] liberty, the unconstitutional search of his person, and the subsequent obtaining of the incriminating evidence speaks to the profound impact of the breaches on the [accused's] Charter-protected interests.
>
> The [accused's] interests protected by s. 10(b) of the Charter were completely compromised by the police conduct. Detained persons are constitutionally entitled to know of their right to that advice, and to a reasonable opportunity to access that advice. Access to legal advice while detained is fundamental to individual liberty and personal autonomy in a society governed under the rule of law.
>
> The [accused] was not made aware of his right to speak to counsel until after [the officer] had searched him and found drugs. Even then, the [accused] was not given an opportunity to exercise his right to counsel, despite expressing his desire to do so. Instead, he was subjected to a second unconstitutional search which discovered yet further evidence. Had the [accused] been afforded an opportunity to speak to counsel before the strip search, it may well be that the strip search would have been unnecessary.
>
> The significant negative impact of the unconstitutional strip search on the [accused's] privacy rights is obvious. The police misconduct was highly intrusive and struck at the core of even the most restrictive notion of personal privacy. [paras. 79-82]

Since the drugs were excluded, the accused was acquitted on the possessing cocaine for trafficking charges. The other convictions were also overturned. Had the *Charter* been respected, the accused would have been released after his initial detention and never identified. Thus, none of the other charges would have been laid.

Complete case available at www.ontariocourts.on.ca

Editor's note: Additional facts taken from *R. v. McGuffie*, 2013 ONSC 2097.

'CLEAR & CONVINCING' IS THE STANDARD FOR ONTARIO POLICE DISCIPLINARY MATTERS

Jacobs v. Ottawa (Police Service), 2016 ONCA 345

A police officer was charged with one count of Unnecessary Exercise of Authority under Ontario's *Code of Conduct* for allegedly using unnecessary force in the course of an arrest. In reaching her decision, the hearing officer applied the civil standard of proof on a ***"balance of probabilities"*** by relying on the judgment of the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53 rather than the higher standard of ***"clear and convincing evidence"*** found in s. 84(1) of Ontario's *Police Services Act* (*PSA*) as argued by the officer. The officer was found guilty after a four day disciplinary hearing and the "penalty of forfeiture of 12 days' time" was imposed.

Ontario Civilian Police Commission (OCPC)

The officer's appeal of his conviction to the OCPC was dismissed. The OCPC found the standard of proof in police discipline matters was on a balance of probabilities.

Ontario Divisional Court

The officer sought judicial review but his application was dismissed. The Ontario Superior Court of Justice Divisional Court found that the existence of an intermediate standard of proof was rejected in *McDougall*.

Ontario Court of Appeal

The officer appealed the Divisional Court's ruling asserting that s. 84(1) of the *PSA* mandates a standard of proof that lies somewhere between a balance of probabilities and proof beyond a reasonable doubt. It was the officer's view that the hearing officer, the OCPC and the Divisional Court erred in finding that

the standard of proof is a balance of probabilities. The Chief of Police, complainant and the OCPC, on the other hand, suggested that the the standard of proof for finding police misconduct was a balance of probabilities. They contended that "clear and convincing evidence" describes the quality of evidence generally required to meet the balance of probabilities standard in professional discipline matters and that this quality of evidence applies equally to police officers prosecuted under the *PSA*.

Police Services Act (PSA)

Section 84(1) of the PSA states:

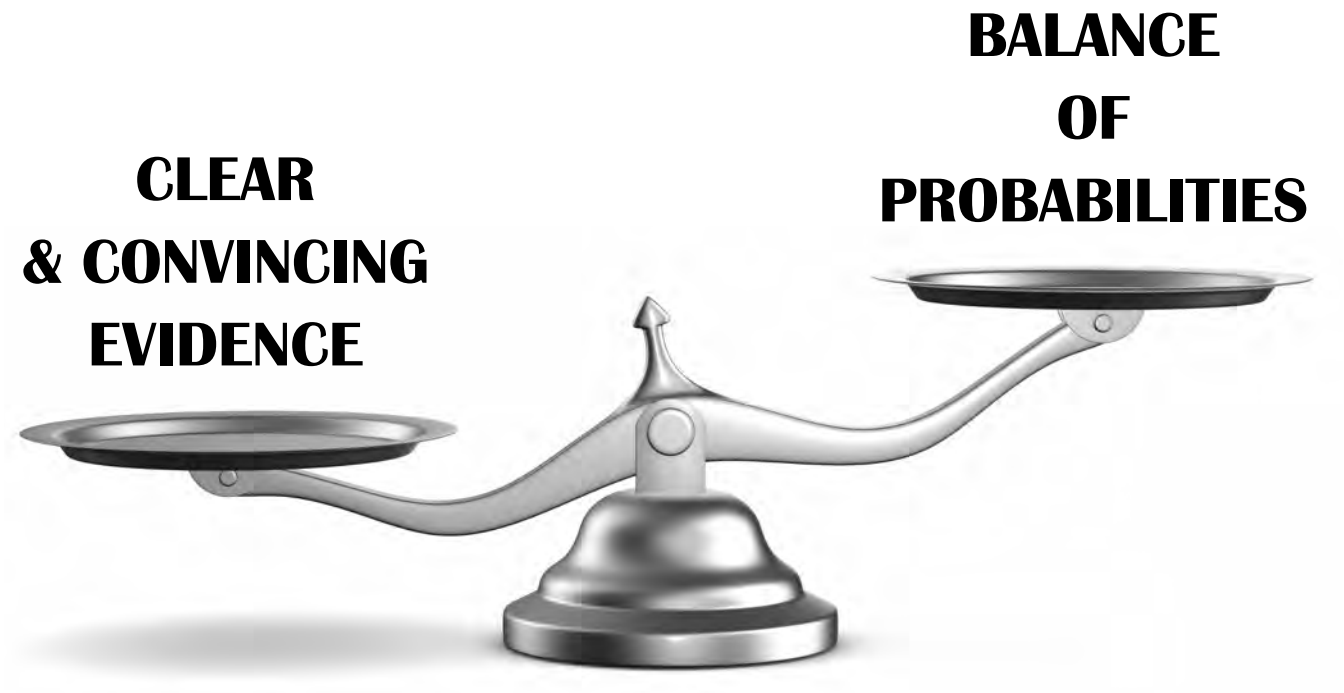
> If at the conclusion of a hearing under subsection 66 (3), 68 (5) or 76 (9) held by the chief of police, misconduct as defined in section 80 or unsatisfactory work performance is proved on clear and convincing evidence, the chief of police shall take any action described in section 85. [emphasis added]

The Court of Appeal concluded that the Divisional Court erred in relying on *McDougall*, which considered the civil standard of proof at common law in a civil claim alleging sexual assault. "McDougall did not purport to establish a universal standard applicable to statutory standards of proof," said Justice Hourigan. "It is well-settled that it is within the authority of a legislature to create a standard of proof specific to a particular statute."

The Court of Appeal found it was bound by the case of *Penner v. Niagara*, 2013 SCC 19 that "the standard of proof in PSA hearings is a higher standard of clear and convincing evidence and not a balance of probabilities." The officer's appeal was allowed, the order of the Divisional Court dismissing the application for judicial review was set aside, and the matter was remitted to the OCPC for further consideration in light of these reasons .

Complete case available at www.ontariocourts.on.ca

"[T]he standard of proof in PSA hearings is a higher standard of clear and convincing evidence and not a balance of probabilities."



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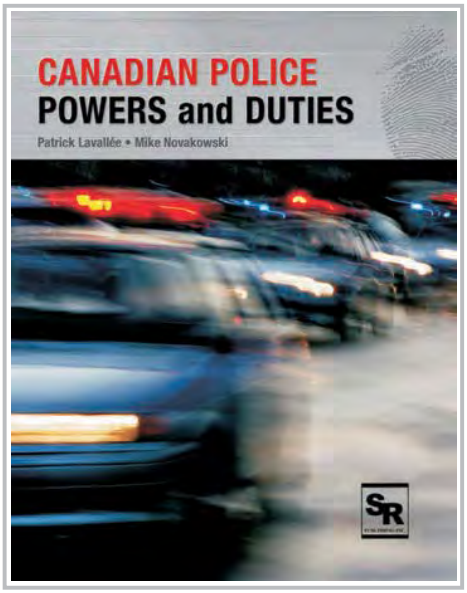

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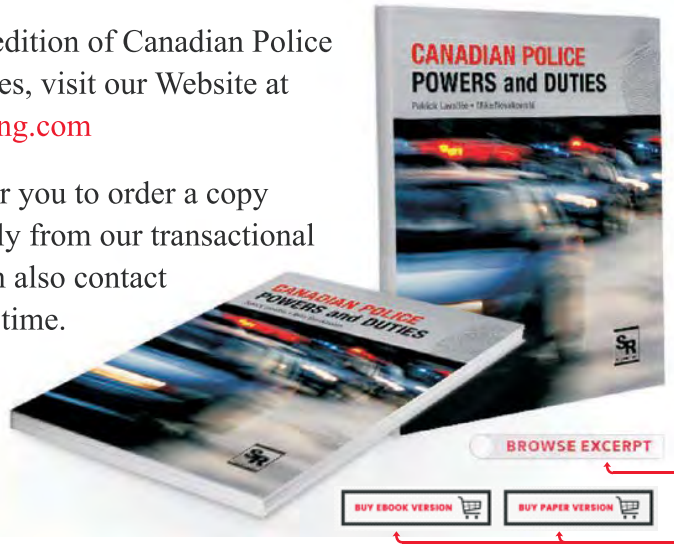

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DISHONEST POLICE TESTIMONY RELEVANT TO SERIOUSNESS OF CHARTER BREACH

R. v. Pino, 2016 ONCA 389

The police received a tip about a suspected marijuana "grow-op" at a house. They reviewed hydro records of electricity usage in the neighbourhood and noticed a house across the street from the target residence also had a pattern of high electricity usage. Other signs - unusual heat patterns from the house, an unusual number of vents on the roof and an odour of marijuana around the house - suggested this second house was being used as a grow-op. The police obtained warrants to search both homes, the original target residence and the one across the street.

Before executing the warrants, the police surveilled the area. Just after noon, the accused was seen coming out of the second residence carrying a box, which she put in the trunk of her car. When she drove away at 12:48 am, the police followed. She drove to a Value Village and met a man. The accused slid over to the passenger seat and the man took over driving. At this point, the detective ordered the accused's arrest. The car was stopped about 1:00 pm and both occupants were arrested.

The police searched the car and found a box in the trunk. The box was opened and 50 marihuana clone plants were discovered. At 3:34 pm a search warrant was executed at the second residence and police found a large marihuana grow operation. The accused was charged with possessing marihuana (the 50 plants) for the purpose of trafficking.

Ontario Court of Justice

At trial, the accused, along with the male driver, described the arrest as follows:

• an unmarked police car cut their vehicle off;

- the detective was dressed in black, his face covered with a balaclava and he was armed with a handgun
- The detective got out of the car, pointed his gun at the them and shouted aggressively.
- The accused was arrested, handcuffed and made to sit on the curb.

The detective, on the other hand, denied he drew his gun and claimed the arrest was "like a regular traffic stop." A second officer on scene for the arrest said he did not remember whether the detective pulled his gun. The judge rejected the detective's evidence and did not accept the other officer's explanation that he did not remember.

The judge found the police breached the accused's *Charter* rights. The police carried out the arrest by a dangerous and unnecessary masked take-down at gunpoint. This was unreasonable even though the police had reasonable grounds to arrest the accused and conduct a search incidental to arrest. Since the police did not have justification for the way they arrested the vehicle's occupants, the manner of arrest and subsequent search were unreasonable and breached s. 8 of the *Charter*.

Further, the judge concluded that the police breached the accused's s. 10(b) rights. First, her s. 10 (b) informational right were infringed. The detective misinformed the accused about her right to counsel. He failed to advise her of her right to counsel without delay and "probably" failed to advise her of her right to free, immediate legal advice. The detective was not carrying his duty book, which contained a pre-written "rights to counsel" card and relied only on his memory. However, he had difficulty describing what he told the accused on cross-examination.

Second, the police breached the accused's s. 10 (b) implementational rights. They unnecessarily delayed access to counsel by holding her incommunicado in a jail cell for almost 5 1/2 hours after her arrest. Although a reasonable period in suspending her access to counsel was justified to prevent the impending search warrant execution from being compromised, once this reasonable period had passed the accused was left in her cell and not afforded an opportunity to consult with a lawyer until some time later.

Despite these breaches, the judge admitted the evidence under s. 24(2). In his view, the s. 10(b) violations occurred after the marihuana was seized. Therefore, he could not consider these breaches in his s. 24(2) analysis no matter how serious they were because they did not meet the "obtained in a manner" requirement. As for the s. 8 breach, the judge found this to be "far from the extreme end of seriousness". He speculated that the officer drew his gun for safety reasons and only lied because he had not filed a use of force report. As for the impact of this breach on the accused, it was of "moderate" significance on her *Charter*-protected interests. Finally, excluding the marihuana, which was real and reliable evidence, would "gut the prosecution". The accused was convicted of possessing marihuana for the purpose of trafficking.

Ontario Court of Appeal

The accused appealed her conviction arguing the trial judge erred by not considering the two s. 10(b) breaches in the 24(2) analysis. As well, she contended that the judge understated the seriousness of the s. 8 breach and failed to properly consider the police testimonial lies in not excluding the evidence.

Obtained in a Manner

Justice Laskin, delivering the Court of Appeal decision, found the two s. 10(b) breaches and the s. 8 breach met the "obtained in a manner" requirement under s. 24(2). The connection between the evidence and a *Charter* breach may be **causal**, **temporal**, **contextual** or any **combination** of the three. In this case, the marihuana seized from the trunk of the car and all three *Charter* breaches were part of the same transaction:

> The connection between the evidence and the breaches is both temporal and contextual, and is neither too tenuous nor too remote. The connection is temporal because the three breaches are relatively close in time and are part of a continuum straddling [the accused's] arrest. The connection is also "contextual". I take "contextual" – a word often used by lawyers and judges – to mean pertaining to the surroundings or situation in which something happens. In this case, the something that happened is [the accused's] arrest. And the two s. 10(b) breaches and the s. 8 breach surrounded her arrest or arose out of it. Indeed, the trial judge found that the s. 10(b) breaches form "part of the context" in which the s. 8 breach occurred. [para. 74]

Police Lies

Justice Laskin found the trial judge erred in understating the police officer's dishonest testimony by speculating and attributing rather innocuous motives for lying:

> The trial judge suggested that [the detective] drew his gun for reasons of "officer safety". He speculated that the officer may have lied about doing so not because he knew all along his conduct was unlawful, but because he had not filed a use of force report.
>
> I do not think the trial judge was justified in proffering these explanations for [the detective's] testimony, explanations that had the effect of understating the seriousness of his dishonesty. No evidence was led at trial to show that the arrest of [the accused] posed any risk to either officer's safety. And no evidence was led to explain why [the detective] pulled his gun or why he lied about doing so. Indeed, neither officer could give any evidence about the gun because one denied and the other claimed not to remember whether [the detective] had brandished his weapon during the arrest.
>
> It seems to me that if the two police officers were going to justify their conduct, they were obliged to put forward evidence explaining why [the detective] drew his gun and why he acted aggressively in carrying out the arrest of [the

s. 24(2) Charter

Where ... a court concludes that evidence was *obtained in a manner* that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

> accused]. These explanations could only come from the officers. Although [the accused] had the ultimate burden under s. 24(2) to show the marijuana should be excluded, on this issue of the police's conduct, the Crown had the burden to put forward a plausible explanation. It did not and could not do so.
>
> As ... counsel for [the accused] pointed out, by suggesting fairly innocent explanations for the police officers' testimony, the trial judge allowed them to benefit from their own dishonesty. They were able to shield their true motives for the way they carried out the arrest of [the accused] by lying about their own misconduct. For the purpose of assessing the seriousness of the Charter breaches and the overall assessment of whether the marijuana should have been excluded from the evidence at trial, the officers' dishonest testimony should not be understated by explanations unsupported in the evidence. [reference omitted, paras. 94-97]

s. 24(2) Charter

Given that the trial judge erred in the s. 24(2) determination, the Court of Appeal excluded the evidence after conducting its own analysis. First, the three breaches were near the extreme end of seriousness. This favoured exclusion as the "admission of the evidence in the light of the seriousness of the breaches, and especially the officers' dishonest testimony, may send the message that the justice system condones this kind of conduct." Second, the s. 10(b) breaches increased the impact on the accused's *Charter*-protected interests. "These breaches were neither technical nor fleeting," said Justice Laskin. "Being forced to sit alone in a jail cell for over five hours after her arrest without access to counsel undermined the very interests s. 10(b) seeks to protect: correct information about the right to counsel and the immediate ability to consult with a lawyer. [The accused] was vulnerable and she needed counsel, not just for legal advice, but as a lifeline to the outside world." This also favoured exclusion of the evidence. Society's interest in an adjudication on the merits, however, favoured admission. The marihuana was both real and reliable evidence and its exclusion would end the prosecution. On balance, the Court of Appeal concluded that the admission of the marijuana would bring the administration of justice into disrepute; "the court's need to disassociate itself from the police's conduct is greater than society's interest in prosecuting [the accused] for possessing 50 marijuana plants."

The accused's appeal was allowed, her conviction set aside and an acquittal was entered.

Complete case available at www.ontariocourts.on.ca

BESTIALITY MORE THAN SEX ACT WITH ANIMAL

R. v. D.L.W., 2016 SCC 22

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

British Columbia Supreme Court

The judge found that the term "bestiality" included acts of sexual touching with animals and penetration was not an element of the offence. Since the accused had encouraged the complainant to commit bestiality and had used peanut butter, he was a party to the offence under s. 21(1) of the *Criminal Code*. The accused was convicted of bestiality, along with the other 13 sexual offences, and he was sentenced to 16 years in prison.

British Columbia Court of Appeal

The accused appealed only the bestiality conviction arguing that penetration was a required element of the offence. He argued that the trial judge statutorily misinterpreted

the bestiality provision by failing to find that the Crown was required to prove penetration. The Crown, on the other hand, submitted that a proper interpretation of the meaning of bestiality would include sexual activity of any kind between a person and an animal.

A two member majority of the Court of Appeal ruled that penetration remained an element of the offence of bestiality as it had been in the common law. The majority concluded that previous amendments to legislation had not changed the elements of this offence to include a broader range of sexual conduct with animals. Since penetration remained an element of bestiality and there was no act of penetration in this case, the appeal was allowed and an acquittal was entered on the bestiality charge.

A dissenting judge was of the view that a change to the *Criminal Code* amended the offence of bestiality such that it did not require penetration and he would have allowed the appeal. "

Supreme Court of Canada

The Crown appealed the accused's acquittal on the bestiality charge arguing that any sexual activity between a human and an animal would suffice while the accused continued to contend that bestiality required penetration as an element.

Bestiality

The Supreme Court examined the history of the offence for bestiality and noted the following:

- Parliament has never defined the elements of bestiality;
- It is a very old crime and has also been referred to as a type of sodomy or buggery;
- Until at least 1955 the term bestiality was understood to mean buggery with animals;
- Legislative changes in 1955 and 1988 did not expand the offence of bestiality to all human-animal sexual activity. Penetration was still required;
- Sexual penetration has always been one of its essential elements;
- Parliament, not judges, need to change the elements of the offence.

The six member majority judgment held that "the offence of bestiality under s. 160(1) of the *Criminal Code* required sexual intercourse between a human and an animal." Penetration was required. The Crown's appeal was dismissed and the accused's acquittal was upheld.

A Different View

In her dissenting opinion, Justice Abella concluded that the 1988 amendment to the *Criminal Code* rendered penetration irrelevant. After examining the language, history and evolving social landscape of the bestiality provision, she stated:

> I do not see the absence of a requirement of penetration as broadening the scope of bestiality. I see it more as a reflection of Parliament's common sense assumption that since penetration is physically impossible with most animals and for half the population, requiring it as an element of the offence eliminates from censure most sexually exploitative conduct with animals. Acts with animals that have a sexual purpose are inherently exploitative whether or not penetration occurs, and the prevention of sexual exploitation is what the 1988 Amendments were all about. [para. 149]

Justice Abella would have allowed the Crown's appeal, set aside the acquittal and restored his conviction.

Complete case available at www.scc-csc.ca

Positive Opinions of CJS Professions - BC	
Police Officers	80%
Judges	66%
Lawyers	49%
Politicians	21%

GROUNDS FOR ARREST DETERMINED BY TOTALITY OF CIRCUMSTANCES

R. v. Pham, 2016 ONCA 258

A police officer reported that an SUV was being driven unsafely. Another officer followed this vehicle for several kilometers and pulled it over. While the officer waited for the two occupants to produce the information he requested, particularly from the accused driver, he made several observations. Both occupants seemed nervous and the accused kept looking back towards two large black suitcases in the rear of the vehicle. He observed several cellphones on the console and air fresheners hanging from the rear-view mirror. A strong smell of raw marijuana was detected from the vehicle.

As the officer walked by the vehicle to return to his cruiser, he noticed a cardboard box in the cargo area of the vehicle. It had Ziploc bags protruding from it that contained material of the shape and size of marijuana. These observations were made through heavily tinted windows. After the officer conducted a CPIC check, he returned to the vehicle and arrested the accused and her passenger for possessing marihuana for the purpose of trafficking. However, he delayed advising the accused of her right to counsel for some three to four minutes. In the vehicle, police found 48 pounds of packaged marihuana.

Ontario Court of Justice

The accused was convicted of possessing marihuana for the purpose of trafficking and sentenced to six months in jail. The judge found both the traffic stop and the accused's arrest to be lawful. However, he concluded that the police breached s. 10(b) of the *Charter* because the arresting officer did not inform the accused of her s.10(b) rights immediately upon arrest. Despite this *Charter* breach, however, the evidence was admitted under s. 24(2).

Ontario Court of Appeal

The accused appealed her conviction arguing, in part, that the police lacked reasonable grounds to detain her and therefore had no lawful authority to search her vehicle incident to arrest. She also contended that the evidence ought to have been excluded under s. 24(2).

But the Court of Appeal disagreed with all these submissions. First, the stop was legal:

> We are satisfied, as the [accused] acknowledges, that the initial traffic stop was fully justified under s. 216(1) of the Highway Traffic Act. The same may be said of the request for documents identifying the occupants and the authority of the driver to operate the vehicle with appropriate insurance coverage. Any additional purpose the officer had was neither improper nor did it entail an infringement on the liberty or security of the occupants beyond what is contemplated by the purpose animating s.216(1) of the Highway Traffic Act. [para. 7]

As for the marihuana possession arrest, the investigating officer had the requisite reasonable and probable grounds:

> "The cumulative effect of these observations amounted to reasonable and probable grounds to arrest the [accused]. It followed that the search of the vehicle incident to the lawful arrest and carried out in a reasonable manner was constitutionally valid."

> When the officer reached the vehicle, he detected a strong odour of raw marijuana. New air fresheners hung from the rear-view mirror. Several cellphones were in the vehicle. Both occupants were nervous. The [accused] repeatedly looked back at the large bags in the rear seat or cargo area. The officer noticed a large box with bags containing a substance that resembled marijuana in size and shape protruding from it. The cumulative effect of these observations amounted to reasonable and probable grounds to arrest the [accused]. It followed that the search of the vehicle incident to the lawful arrest and carried out in a reasonable manner was constitutionally valid. [para. 9]

As for the s. 10(b) Charter breach, it did not warrant the exclusion of evidence. Although the police failed to advise the accused of her right to counsel immediately upon arrest, the informational component of the right was delayed only three to four minutes. The investigating officer did call the toll-free number for duty counsel and requested a response from a Vietnamese-speaking lawyer. There was no reason to interfere with the trial judge's decision to admit the marihuana found in the vehicle.

The accused's appeal from her conviction was dismissed.

Complete case available at www.ontariocourts.on.ca

NO THREATS OR PROMISES: STATEMENT VOLUNTARY

R. v. Toope, 2016 NSCA 32

A Street Crime Enforcement Unit executed a search warrant at the accused's home, where he lived with his parents. He was arrested at about 11:00 am outside his home. A cellphone, $1,000 cash and a marijuana joint were found on him. He was taken to the police station and provided an opportunity to consult with counsel while police searched his home. In his bedroom, police found 97 orange hydromorphone pills and other evidence. Seven marihuana plants were found outside behind the garage. They were growing in plastic cups.

At 2:28 p.m., the police began questioning the accused at the police station for just over an hour. The interview was videotaped, during which the accused admitted ownership of the marijuana plants and the pills, but said the pills were for his personal use.

Nova Scotia Provincial Court

The accused argued his confession was not voluntary because he was induced and coerced by the police. He said he was anxious, felt pressured and was intimidated by police when they asserted that his parents might be charged with producing marijuana if he did not accept responsibility for the plants found in the back of his parents' property. He also said he believed his release from custody was connected to whether he cooperated.

The judge found that the process followed by teh police was not oppressive and that there were no threats or promises made. "The video of that interview process showed anything but an oppressive exercise," said the judge. "The demeanour of [the interviewer] was professional and respectful. There were no threats or promises." The judge concluded that the accused had an operating mind, and, considering the entire context of the interview, his confessions were voluntary. The accused was convicted of possessing hydromorphone for the purpose trafficking, production of marihuana and breach of a probation order.

Nova Scotia Court of Appeal

The accused submitted that the trial judge erred in finding his confessions to the police were voluntary. He again contended that he was coerced and induced by the police into confessing that he owned the plants and the pills.

"The video of that interview process showed anything but an oppressive exercise"

Confessions

A statement made to the police must be voluntarily given. In deciding whether a statement was voluntary, a court must consider the context of the interview in its entirety, including the following relevant factors (*R. v. Oickle*, 2000 SCC 38):

- **Threats or promises** - *quid pro quo* offer;
- **Oppression** such as depriving a detainee of food, clothing, water, sleep, medical attention, or access to counsel, or whether the interviewee was confronted with fabricated evidence or was questioned aggressively for a prolonged period of time;
- **Operating mind** - whether the accused knew what he was saying and that it might be used to his detriment; or
- **Police trickery** - whether the methods employed by the police were so appalling as to shock the community.

Justice Hamilton, speaking for the Court of Appeal, found the trial judge properly applied the law to the facts in concluding that the accused's statement was voluntarily given.

> I am satisfied the judge applied the correct legal test in determining that the [accused's] confessions were voluntary. In reaching his conclusion, he considered the context of the interview in its entirety, as Oickle directs. He specifically referred to the factors Oickle directs be considered, and that were relevant to the case before him. He made no palpable and overriding error in finding the plants were not found until after the [accused] was taken to the police station and consequently that the appellant could not have been coerced by the police telling him his parents would be charged if he did not admit to owning the plants.
>
> A review of the video of the interview confirms that he made no palpable and overriding error in finding that the police did not induce the [accused] to confess. He correctly found that during the interview the police did not suggest he would be released if he admitted ownership of the pills. [paras. 29-30]

The accused's conviction appeal was dismissed.

Complete case available at www.canlii.org

Here's what the trial judge found:

- The officer was aware of the accused's anxiety and offered a number of times to get water for him if he wanted any.
- The officer avoided drawing any connection between the success of the interview and possible release from custody, despite repeated efforts by the accused to do so.
- The officer was aware that the accused was concerned that a finding of guilt in this matter could hurt his efforts to educate himself and gain employment in addictions counselling. But the officer was careful not to draw any connection to the success of the interview with favourable treatment by the police authorities.
- There was nothing in the exchanges between the accused and the officer that would have or could have caused him to believe that he had no choice but to say whatever the officer wanted him to say.
- Nothing in the procedure followed, the words spoken or the actions taken by the police interfered with the accused's operating mind and the decisions he made to speak or remain silent.
- The officer did nothing to improperly induce the accused to make any admissions against his own interests.

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