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 September 21, 2016 51-year-old Sûreté du Québec Constable Jacques Ostigny suffered a fatal heart attack while attempting to locate two hikers who had reported encountering a bear in a wooded area in Saguenay Fjord National Park.

The area was unpassable by vehicle, requiring Constable Ostigney to hike into the woods in an attempt to locate the hikers. During the search he became ill and collapsed.

He was flown to a local hospital where he passed away.

Constable Ostigny had served with the agency for 24 years.

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

'GOOD SAMARITAN DRUG OVERDOSE ACT' PROPOSED

On February 22, 2016 Bill C-224, the *"Good Samaritan Drug Overdose Act"*, was introduced into Parliament and received first reading. This act proposes to amend the *Controlled Drugs and Substances Act* (*CDSA*) by exempting people in possession of drugs from criminal charges if they seek emergency medical or law enforcement assistance for themselves or another person following an overdose on a controlled substance. On June 3, 2016 the Bill received second reading and was referred to Committee, which reported the Bill without amendment in the House of Commons.

This Act would add a definition for "overdose" and amend s. 4 of the *CDSA*, which addresses what is more commonly known as simple possession of a controlled substance, by adding the following provisions:

Definition of overdose

s. 4.1(1) For the purposes of this section, overdose means a physiological event induced by the introduction of a controlled substance into the body of a person that results in a life-threatening situation and that a reasonable person would believe requires emergency medical or law enforcement assistance.

Exemption from possession of substance charges

s. 4.1(2) No one who seeks emergency medical or law enforcement assistance because they, or another person, are suffering from an overdose is to be charged under subsection 4(1) if the evidence in support of that offence was obtained or discovered as a result of that person having sought assistance and having remained at the scene.

Precision

s. 4.1(3) The exemption under subsection (2) applies to any person who is at the scene upon the arrival of the emergency medical or law enforcement assistance.

Highlights In This Issue

NEW JIBC Graduate Certificate in Public Safety Leadership

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Upcoming Courses

Advanced Police Training

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

JIBC Police Academy

See Course List here.

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BCLEDN BC Law Enforcement Diversity Network

CHALLENGES OF MODERN DAY LAW ENFORCEMENT

November 2, 2016

Justice Institute of BC
715 McBride Blvd.
New Westminster, BC

See pages 16-17

Graduate Certificates

Intelligence Analysis
or
Tactical Criminal Analysis
www.jibc.ca

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.

Coaching basics.
Lisa Haneberg.
Alexandria, VA : ATD Press, 2016.
HF 5549.5 C53 H263 2016

The cost of emotions in the workplace: bottom line value of emotional continuity management.
Vali Hawkins Mitchell; Kristen Noakes-Fry, editor.
Brookfield, CT: Rothstein Associates, 2013.
HF 5548.8 H39 2013

Doing the right things right: how the effective executive spends time.
Laura Stack.
Oakland, CA: Berrett-Koehler Publishers, [2016]
HD 38.2 S73 2016

The ethical warrior: values, morals & ethics for life, work and service .
Jack E. Hoban.
Spring Lake, NJ: RGI Media and Publications, 2012.
HV 7419 H63 2012

Evaluation basics.
Donald V. McCain.
Alexandria, VA: ATD Press, 2016.
HF 5549.5 T7 M334 2016

Facilitation basics.
Donald V. McCain.
Alexandria, VA: ATD Press, 2015.
HF 5549.5 T7 M333 2015

Integral conflict: the new science of conflict.
Richard J. McGuigan & Nancy Popp; foreword by Ken Wilber and Vern Neufeld Redekop.
Albany, NY: State University of New York Press, 2015.
HM 1126 M396 2015

A knock on the door: the essential history of residential schools from the Truth and Reconciliation Commission of Canada.
foreword by Phil Fontaine.
Winnipeg, MB: University of Manitoba Press: National Centre for Truth and Reconciliation, University of Manitoba, 2016.
E 96.5 K56 2016

The literature review: six steps to success.
Lawrence A. Machi & Brenda T. McEvoy.
Thousand Oaks, CA: Corwin, 2016.
LB 1047.3 M33 2016

Models of proposal planning & writing.
Jeremy T. Miner & Kelly C. Ball-Stahl.
Santa Barbara, CA: Greenwood, an imprint of ABC-CLIO, LLC, 2016.
HG 177.5 U6 M558 2016

Performance basics.
Joe Willmore.
Alexandria, VA: ATD Press, 2016.
HF 5549.5 T7 W55 2016

Training design basics.
Saul Carliner
Alexandria, VA: ATD Press, 2015.
HF 5549.5 T7 C275 2015

The trusted executive: nine leadership habits that inspire results, relationships and reputation.
John Blakey.
London; Philadelphia: Kogan Page, 2016.
HD 57.7 B554 2016

Your right to privacy: minimize your digital footprint.
Jim Bronskill & David McKie.
North Vancouver, BC: Self-Counsel Press, 2016.
JC 596 B76 2016

GENERAL WARRANT DID NOT PRECLUDE POLICE SEARCH AS AN INCIDENT TO ARREST

R. v. Ly, 2016 ABCA 229

Canada Border Services Agency (CBSA) in Montreal identified a package to be delivered to a Calgary address by Canada Post that appeared to have originated in Peru. The package was addressed to "Sammy Davies". CBSA agents suspected that the package contained controlled drugs. They opened the package and found 961 grams of cocaine wrapped in packets. These packets were inserted in tea bag packages and then inserted in bags of coffee. The package was transported from Montreal to Calgary for a controlled delivery to the Calgary address. Under the authority of a s. 487.01 *Criminal Code* general warrant the police substituted a benign substance in place of the cocaine and installed a triggering alarm within the package.

A second general warrant authorized the police to deliver the package within a two day time period and then directed that **"once the package was delivered, investigators would wait until the alarm is tripped signalling the package has been opened or 12 hours has elapsed from the time of delivery."** The warrant also stated that the **"police may overtly enter any vehicle that contains the package."** The warrant, however, made no reference to cell phones.

A police officer, posing as a Canada Post employee, delivered the parcel to the address. A man accepted the parcel. Later, the accused arrived at the residence and was observed by the police as he placed the package into his vehicle and covered it with a blanket. He was then arrested and the package recovered. He was searched and had a Blackberry in his pocket. On the Blackberry phone the police found text messages from another co-accused, referring to "Sammy David", and a draft message with the tracking number of the parcel. In his vehicle, police found a Huawei cell phone, three Western Union money orders payable in US dollars to someone in Peru and a lease agreement for the vehicle. The cell phones were sent to the Technological Crime Unit for a more thorough search. The alarm in the package was never triggered and the package was seized from the vehicle less than 12 hours after delivery. The accused was jointly charged with two others with possessing cocaine for the purpose of trafficking and unlawful importation.

Alberta Court of Queen's Bench

The accused argued that he was subject to an unlawful arrest and unreasonable search and seizure and that all of the items seized at the time of arrest from him and the vehicle he had been driving should be excluded from evidence on the basis that the arrest was unlawful and the seizures breached s. 8 of the *Charter*. In his view, the pre-conditions of the general warrant were not met prior to his arrest and search, and the searches of his cell phones were not properly conducted as an incident to arrest.

The judge found the searches of the accused and his vehicle (other than the seizure of the controlled delivery package) were searches incidental to arrest. The controlled delivery package was seized in accordance with the terms of the general warrant. There was no s. 8 *Charter* breaches arising from these searches and seizures. The judge also held that the cursory search of the Blackberry cell phone did not fall outside the ambit of the common law doctrine of search incidental to arrest, and the resulting data was admitted into evidence. The more thorough searches of the cell phones by the Technological Crime Unit, however, should have been conducted under a warrant and did amount to a s. 8 breach. Nevertheless, the evidence was admitted under s. 24(2). The accused was convicted on both charges and he was sentenced to six years in prison.

Alberta Court of Appeal

The accused again argued that the pre-conditions of the general warrant were not met prior to his arrest and the seizures, and the searches of his cell phones were not proper as an incident to his arrest. He contended that the police were required to follow the warrant in a linear progression and wait for the disjunctive

"The general warrant does not address the powers of arrest. ... As we see it, entry into the vehicle to seize the parcel was lawful under both the general warrant and as a search incident to arrest. ... [I]n our opinion, the police had authority to enter the vehicle as a search incident to arrest."

pre-conditions before exercising the authorities outlined in the anticipatory warrant. Since there was no triggering alarm signalling that the package was opened nor had 12 hours have elapsed since the delivery of the package, the accused maintained the search by police was unlawful.

Warrant Pre-conditions

The Court of Appeal agreed with the trial judge that the provision that the "police may overtly enter any vehicle that contains the package" was not constrained by a waiting period and there was no temporal condition relative to the authority to enter a vehicle that contained the package.

Search incident to arrest

For a search to be proper as an incident to arrest, "the arrest itself must be lawful, the search must be truly incidental to the arrest and the objective of the search must be for a valid administration of justice purpose. Cellphone searches … may also be appropriate as a search incident to arrest subject to two additional conditions: the search must be tailored to its purpose and the police are required to take detailed notes of what they examined and how they examined it."

As for whether the issuance of the general warrant with its specified conditions precluded reliance upon the common law power to search incident to arrest, the Court of Appeal found it did not.

> The general warrant does not address the powers of arrest. The factual matrix establishes a strong basis upon which the trial judge properly concluded that the police had both a subjective and objective basis to believe that the [accused] was committing an indictable offence. As we see it, entry into the vehicle to seize the parcel was lawful under both the general warrant and as a search incident to arrest. The triggering events, on a plain reading of the terms of the general warrant, do not operate as conditions precedent to the seizure of the parcel from the vehicle (section 4.g. of the general warrant). In addition, in our opinion, the police had authority to enter the vehicle as a search incident to arrest. The factual underpinnings articulated by the trial judge, in our opinion, satisfy the common law conditions precedent. [para. 17]

As to the cell phone search, the trial judge did not have the benefit of the Supreme Court of Canada decision in *R. v. Fearon*, 2014 SCC 77. And, even if the *Fearon* criteria for cell phone searches incident to arrest were not met, the trial judge made no error in her s. 24(2) analysis in admitting the evidence:

> [W]e see no basis upon which to set aside the trial judge's conclusion that the police reasonably believed they had the lawful authority to conduct the cellphone search, including the forensic data searches. Assuming without deciding that the infringement of the Charter protected interests was, nonetheless serious, and thereby favoured exclusion of the evidence, the trial judge properly concluded on the unique facts of this case that the package and its contents of contraband constituted real evidence and that the evidence was indispensible to prove certain elements of the indictable crimes. Deference in the absence of factual misapprehension or error in principle precludes appellate intervention. [para. 18]

The accused's appeal was dismissed.

Complete case available at www.canlii.org

"Cellphone searches … may also be appropriate as a search incident to arrest subject to two additional conditions: the search must be tailored to its purpose and the police are required to take detailed notes of what they examined

COURT MUST CONSIDER TOTALITY OF EVIDENCE IN ASSESSING RELIABILITY OF TIP

R. v. Merelles, 2016 ONCA 647

Police received information from a confidential informer that the accused was dealing in large amounts of heroin. The informer provided information about the accused, including his personal attributes, the location of properties frequented by him, a description of his truck and licence plate, and the kind of heroin in his possession. During three days of surveillance, police noted four apparent hand-to-hand drug transactions between the accused and unknown individuals, one of which occurred at his Delaware Ave. residence. The accused also appeared to engage in counter-surveillance driving techniques.

The police obtained search warrants for three properties, including his residence on Delaware Ave. and the garage of his girlfriend's mother's home on Columbine Ave. They seized 189.19 grams of cocaine from the Columbine property; 983.51 grams of heroin, 29.36 grams of cocaine, $19,850 in Canadian currency and $150 in US currency from the accused's Delaware residence; and 6.41 grams of heroin, including 20 decks of 0.15 grams each, and 1.88 grams of cocaine, on the accused's person.

Ontario Superior Court of Justice

The judge found the accused lacked standing to challenge the search warrants for his girlfriend's mother's property because he did not have a reasonable expectation of privacy in it. There was no evidence he had an ownership, leasehold or possessory interest. He only had a key to the garage and stored machinery and tools there with consent. As for the the accused's residence, the judge accepted that the accused had a reasonable expectation of privacy in it since it was his home. The warrant, however, was valid. The information from the confidential informer and police surveillance provided reasonable grounds to believe that drugs and related property would be located

there. The confidential informer's information was highly detailed and compelling. As well, the apparent hand-to-hand transactions were consistent with the confidential informer's information that the accused was trading in illicit drugs. He was convicted of possessing heroin for the purpose of trafficking, possessing cocaine for the purpose of trafficking and possessing proceeds of crime. He was sentenced to 10 years' imprisonment, less time served.

Ontario Court of Appeal

The accused argued that the trial judge erred in concluding that he did not have standing to challenge the search of the his girlfriend's mother's property and in finding that the search warrant for his residence was valid.

Privacy Interest

Section 8 of the *Charter* protects a reasonable expectation of privacy, to be established by the claimant, based on the totality of the circumstances. Factors to consider in assessing whether a claimant has a reasonable expectation of privacy include:

- presence at the time of the search;
- possession or control of the property or place searched;
- ownership of the property or place searched;
- historical use of the property or item;
- the ability to regulate access, including the right to admit or exclude others from the place;

- the existence of a subjective expectation of privacy; and
- the objective reasonableness of the expectation.

Here, the accused did not testify. His girlfriend lived at the residence with her mother; he only had a key to the garage, not the rest of the house, and was permitted to store tools and machinery there. In upholding the trial judge's conclusion that the accused did not have standing to challenge the search warrant for his girlfriend's mother's property, Justice Pepall stated:

> In my view, the trial judge did not err in concluding that the [accused] had no standing with respect to the Columbine property. While the [accused] had a key, there was no evidence that the [accused] regulated access to the garage. Nor was there any evidence of historical use of the property – only that he used it in September 2010. The [accused] was not present at the time of the search and he did not possess, control or own the garage. Although one could infer that he could admit people to the garage, there was no evidence to suggest that he could exclude entry. There was no evidence about others in possession of a key. There was also no evidence of any subjective expectation of privacy or evidence supporting an inference of a subjective expectation of privacy. [The accused] was "no more than a privileged guest".
>
> I also reject the [accused's] argument that a garage in these circumstances is akin to a rental locker. There was no evidence that the [accused] rented the garage space or that he had exclusive access to it. From the evidence before the trial judge, the [accused] was simply permitted to use the garage to store tools. The totality of the circumstances did not give rise to a reasonable expectation of privacy. [para. 21-22]

Search Warrant

When a court reviews the sufficiency of a search warrant, which is presumed valid, the test is "whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued." Here, the Court of Appeal found there was ample evidence for the trial judge to conclude that there were reasonable and probable grounds for its issuance with respect to the accuse's residence. In regards to informer information, the Justice Pepall stated:

> Evidence of a tip from an informant by itself is insufficient. When assessing the reliability of a tip from a confidential informant, the court is to consider the totality of the circumstances. The court must look to a variety of factors including: (1) the degree of detail of the tip (including the time, place, participants involved, and nature of the alleged activity); (2) the informant's source of knowledge (whether it is first-hand or obtained from others); and (3) indicia of the informant's reliability such as past performance or confirmation from other investigative sources. [para. 26]

In this case, although the confidential informer had only provided information on one previous occasion that resulted in charges as opposed to a conviction, the information provided by the informer was detailed and first-hand. And there was no information given in the past to the police that turned out to be unreliable. In addition, "the police investigation and surveillance established a strong link between the [accused] and the Delaware residence and included the observation of an apparent hand-to-hand transaction in the residence's well-lit garage," said Justice Pepall. "The [accused]

"Evidence of a tip from an informant by itself is insufficient. When assessing the reliability of a tip from a confidential informant, the court is to consider the totality of the circumstances. The court must look to a variety of factors including: (1) the degree of detail of the tip (including the time, place, participants involved, and nature of the alleged activity); (2) the informant's source of knowledge (whether it is first-hand or obtained from others); and (3) indicia of the informant's reliability such as past performance or confirmation from other investigative sources."

then was observed to have left the premises and to have participated in another apparent hand-to-hand transaction. The police surveillance observations amplified, and were consistent with, the rest of the information provided by the informant."

Since the search was lawful, there was no need to consider s. 24(2) of the *Charter*. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

POLICE HAD DUTY TO ENTER PREMISE TO CHECK SAFETY

R. v. Lowes, 2016 ONCA 519

A person called 911 reporting that she heard her neighbours arguing. She heard a man threaten to kill a woman. The woman was crying and pleading, "Please don't kill me." Loud banging and crashing was also heard. Police arrived at the apartment within minutes. Police confirmed with the neighbor the location of the apparent assault and knocked on the door but there was no answer. Eventually, a woman came to the window on the third floor. A police officer explained why the police were on scene. The woman said she was in bed, told the officer to leave, refused to open the door and insisted there was no one else in the apartment. It was obvious to the police, however, that the woman was speaking to someone who was standing behind her.

The police, concerned that the woman and/or others were in immediate danger, decided to seek their supervisor's permission to break down the door and enter the residence. However, before they had a chance to force entry, the woman appeared at the door. She had no visible injuries, stepped outside and spoke to the police. She did not want the police inside her residence and there were no sounds coming from within. Concerned for the woman's safety and that of any other unknown person who might be in the residence with the person who had been heard uttering the death threats, the police forced their way inside the residence. Once inside, police observed marijuana and other drugs and found the accused hiding under a cover under the bed. Continuing to search for anyone else who might be in the residence, the police found more contraband. The accused was removed from the residence, the apartment was "sealed" and a warrant was sought, granted and executed. The drugs were seized and the accused was charged with drug offences.

Ontario Court of Justice

The police testified they were concerned about the woman's safety or that of other people based on the contents of the reported 911 call, the obvious lies told by the woman about the presence of anyone else in the house, and the woman's demeanour when she spoke to them from the window and at the door. The judge recognized that the police could enter a residence without a warrant if they had reasonable grounds to believe that entry was necessary to protect the lives and safety of others. However, he held that the police could not enter the residence without taking additional investigative steps. They could have questioned the woman further about the circumstances of what went on in the apartment, questioned the neighbour who made the 911 call or applied for a telewarrant. The judge found the police entry unlawful and the resultant search and seizure of the contraband a s. 8 *Charter* breach. The evidence was excluded under s. 24(2) and the accused was acquitted.

Ontario Court of Appeal

A Crown appeal was successful. In the Court of Appeal's view, the police lawfully entered the apartment:

> [N]one of [the additional investigative steps identified by the trial judge] were necessary or, indeed, even relevant to whether the police were under a duty to enter the premises when they did to ensure that there was no one in the premises whose life or safety was in immediate danger and to ensure that [the woman's] life or safety was not in immediate danger should she choose to re-enter the residence.

"[N]one of [the additional investigative steps identified by the trial judge] were necessary or, indeed, even relevant to whether the police were under a duty to enter the premises when they did to ensure that there was no one in the premises whose life or safety was in immediate danger and to ensure that [the woman's] life or safety was not in immediate danger should she choose to re-enter the residence."

> The circumstances in which the police found themselves strongly suggested that [the woman] was the victim of ongoing domestic abuse when they arrived at the residence. She clearly lied to the police when they first spoke to her. In these circumstances, the police would have been derelict in their duty had they accepted what [the woman] said without going into the residence.
>
> Any further discussion with the neighbour would not in any way have detracted from the emergency situation faced by the police. Nothing the neighbour could possibly have said would have eliminated the immediate risk to the lives and safety of others, including [the woman]. Finally, the delay inherent in obtaining a telewarrant, assuming the police could get one, created obvious and significant risks that in these circumstances the police could not, in good conscience, take. [paras. 11-13]

The accused's acquittals were quashed and a new trial was ordered with the Appeal Court noting that the issue of whether the scope of any search conducted by the police after they entered the premises went beyond the boundaries of s. 8 may be analyzed at the new trial.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

"The person who never made a mistake never tried anything new." - Albert Einstein

'AS SOON AS PRACTICABLE' MEANS WITHIN A REASONABLY PROMPT TIME, NOT AS SOON AS POSSIBLE

R. v. Prestupa, 2016 SKCA 118

A police officer saw the accused remain at a stop sign for several minutes, although there was no other traffic in the area. He then turned onto a highway and accelerated to 160 km/h. The officer pulled the accused over at 12:10 am. The officer smelled alcohol on the accused's breath and noticed that his eyes were glossy and bloodshot. An approved screening device demand was made and a roadside breath test was administered. The accused failed. He was arrested for impaired driving and was given his rights and warnings.

The officer planned to tow the accused's vehicle, but agreed to allow his parents come and pick it up. While waiting for the parents to attend, the officer called his home detachment to ensure that the on-call breath technician would be ready to take breath samples when they arrived. The parents arrived about 20 to 25 minutes later and took the truck. The officer left the scene at about 12:57 am and drove the 80 kms to the detachment, arriving at 1:30 am. After the right to counsel was addressed, the first breath sample was taken at 1:45 am (190 mg%) and a second sample some 20 minutes later (180 mg%).

Saskatchewan Provincial Court

The officer testified that he took the accused to his home detachment because it was his home base and he knew that a qualified breath technician was on call. He said he was aware that there was another detachment only about 40 to 50 kms away from the scene, but he did not know whether that detachment would have been able to facilitate breath testing. He was also aware there were other detachments in the area but did not know how far away they were from the scene. The accused testified there was one detachment some 55 km away and another 75 km away. However, there was no evidence those detachments were equipped with an operational

"The legal meaning of the phrase 'as soon as practicable' is well established ... It simply means the breath samples must be taken within a reasonably prompt time in the circumstances. In other words, the Crown does not need to prove that breath samples were taken as soon as possible to satisfy the "as soon as practicable" requirement. The upshot of this is that, depending on the circumstances, breath tests can be taken as soon as practicable, even if they could have been taken sooner. The legal test is flexible and grounded in common sense."

breath testing instrument on the night of the stop nor any evidence they were staffed with a police officer or qualified breath technician.

The judge concluded that the Crown failed to discharge its burden in proving beyond a reasonable doubt that the breath samples were taken as soon as practicable. Thus, the Crown could not rely on the evidentiary presumption of identity found in s. 258(1)(c) of the *Criminal Code,* which deems the results of the breath tests to be proof of the accused's blood alcohol level at the time of the offence, absent evidence to the contrary. Since one detachment was 35 kilometers closer than the officer's home detachment and another 25 kilometers closer, breath samples could have been taken sooner at those locations. "I find that the Crown has not demonstrated that the police officer acted reasonably in the circumstances of this case because the police officer did not inquire if there was a machine or breath technician available at a closer detachment where there was nothing preventing him from doing so," said the judge. "He had ample time to make such inquiries while they waited for the accused's parents to come pick up his vehicle and the time of the first breath test was pushing toward the two hour limit." Since the Crown could not rely on the presumption, there was no evidence of the accused's blood alcohol concentration at the time of driving and he was acquitted of driving over 80mg %.

Saskatchewan Court of Queen's Bench

A Crown appeal of the accused's acquittal was successful. The appeal judge ruled that the trial judge had erred with respect to the interpretation and application of the "as soon as practicable" requirement set out in s. 258(1)(c) because he equated the test for "as soon as practicable" with "as soon as possible". "The phrase 'as soon as practicable' means nothing more than that the breath samples be taken within a reasonably prompt time under the circumstances," said the appeal judge. "I find that under the circumstances of this case the constable did not offend the applicable provision of the Criminal Code when he decided to go to his home detachment where he knew a breathalyzer technician was waiting to conduct the tests. Quite frankly this was just simply common sense." The certificate of analysis was admissible, the accused's acquittal was set aside and a conviction for over 80mg% was entered. The matter was remitted to the trial judge for sentencing.

Saskatchewan Court of Appeal

The accused appealed his conviction arguing that his acquittal should not have been set aside. He submitted, among other things, that the trial judge substituted his own view of the facts as to whether the breath samples had been taken as soon as practicable, something he was not entitled to do. The Court of Appeal, however, disagreed. There was no dispute about the facts. Instead, this was a question of law—did the trial judge apply a more onerous "as soon as possible" standard?

Justice Ottenbreit, speaking for the Court of Appeal, concluded that the trial judge did make an error of law and that the appeal judge correctly found the actions of the police officer complied with s. 258(1)(c):

> The legal meaning of the phrase "as soon as practicable" is well established ... . Therefore, I need not explain it in detail. It simply means the breath samples must be taken within a reasonably prompt time in the circumstances. In other words, the Crown does not need to prove that breath samples were taken as soon as possible to satisfy the "as soon as practicable" requirement. The upshot of this is that, depending on the circumstances, breath tests can be taken as soon as practicable, even if they could have been taken sooner. The legal test is flexible and grounded in common sense. [references omitted, para. 16]

In this case, the trial judge improperly focussed on whether the breath samples could have been taken sooner even though there was no evidence that a breath instrument was accessible or calibrated at the closer detachments:

> The trial judge's view of this evidence and what was reasonable was coloured by her focus on whether the breath samples could have been taken sooner. This is clear from her statement "All things being equal the breath samples could have been taken sooner in Lanigan or Watrous." Although she had no evidence before her that a breath machine was accessible or calibrated at closer detachments, the mere existence of those closer detachments was crucial to her approach and findings. In the absence of such evidence, it is a fair inference that time became the paramount factor in her analysis. This resulted in an "as soon as possible" approach to viewing the reasonableness of the constable's actions.
>
> The trial judge erred by requiring the constable to inquire outside of his detachment area whether a breath machine was accessible and calibrated on the basis that there was a possibility that the tests might have been taken sooner. She assumed that all things were "equal" apart from distances. This is in contrast to the constable's reliance on a machine at his own detachment and a technician he knew was available. Even assuming that the constable had been able to locate another machine and technician closer to Viscount than Saskatoon, it would have saved only a small amount of time assuming he could have travelled as fast to that location. Evidence of the possibility of breath machines or technicians closer than the one chosen by an officer or the failure of an officer to inquire about that possibility, without more, is not determinative that the breath tests were not done as soon as practicable. The test, "as soon as practicable," is not honed to such a fine point. The test is grounded in common sense. [paras. 18-19]

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

Complete case available at www.canlii.org

CHILD PROTECTION INTERVENTION DID NOT SAVE CRIMINAL INVESTIGATION

R. v. Noftall, 2016 NLCA 48

A social worker with Newfoundland's Department of Child, Youth and Family Services received a call reporting that a one-year-old child may be in need of protective intervention. The caller reported that "there was information in the community" that the accused and his partner, the child's mother, had a grow-op in their home and were selling drugs. The social worker knew the caller but did not know either the accused or his partner, the child's mother. The social worker contacted the police and requested that a police officer accompany her and another social worker for the investigation.

When the officer along with the social workers arrived at and entered the home, a strong odour of growing marihuana was detected. The social worker told the child's mother that she believed she smelled marihuana. The child's mother denied that there was marihuana in the house, but suggested the smell might come from the accused's clothes since he occasionally smoked marihuana. The social worker told the child's mother that she was investigating a report that there was a grow-op in the house from which drugs were sold. When the social worker asked if they could look around the house, the accused asked if they had a warrant. The social worker, as did the police officer, said they did not

have a warrant nor did they need one when investigating a child protection referral.

The accused showed the second social worker and the police officer to the bedroom. In the closet were six tubs with marihuana plants growing. There was a heat lamp, temperature gauges, fans and a stainless steel hood-refractor. A rifle with a loaded magazine was found nearby. The police officer arrested the accused for producing marihuana and possessing the unsecured firearm. He was removed from the house and a search warrant was obtained. Marihuana, related paraphernalia, the rifle and loaded magazine were seized. The child's mother removed the child from the house and the accused was subsequently charged with unlawfully producing marihuana.

Newfoundland Supreme Court

The judge accepted the officer's testimony that he went with the social workers not because of the drug allegations, but to ensure the safety of the social workers as they investigated the referral that there was a child in the house who might be at risk of harm. In the judge's view, the police officer lawfully entered the accused's house with the social workers as they completed their investigation. Then, once the growing marihuana had been found, the officer withdrew from the property to obtain a search warrant before going any further with his criminal investigation of the marihuana grow-operation. The judge found no s. 8 *Charter* breaches and, even if there was one, the evidence was admissible under s. 24(2). The accused was convicted of producing marihuana.

"When he smelled the marihuana, the officer had two separate mandates, that is, securing the safety of the social workers, and investigating a possible offence. He could not use the former to clothe the latter with authority that would otherwise result in a breach of [the accused's] rights under section 8 of the Charter."

Newfoundland Court of Appeal

The accused argued that his rights under s. 8 of the *Charter* had been breached. The Court of Appeal agreed. In its view, the police officer required a search warrant to locate the marihuana plants. Justice Welsh, speaking for the Court of Appeal, stated:

> The information in the report to the Department together with the smell of growing marihuana provided sufficient grounds for the police officer to suspect the commission of an offence under the Controlled Drugs and Substances Act. However, he was in [the accused's] residence, which engages a high expectation of privacy under section 8 of the Charter. The marihuana plants and firearm were not in plain view from where the officer stood.
>
> When he smelled the marihuana, the officer had two separate mandates, that is, securing the safety of the social workers, and investigating a possible offence. He could not use the former to clothe the latter with authority that would otherwise result in a breach of [the accused's] rights under section 8 of the Charter. In order to avoid this conundrum, the officer could have taken the following approach. When he smelled the marihuana which he identified as "growing", he could, as he did, have given this information to [the accused], the child's mother and the social workers. At that point, he could have proceeded in a manner that would have been consistent with both his mandates by asking all present to remain in the kitchen while he took action to obtain a search warrant. A warrant, which may be requested by telephone, would have provided authorization for a search under the Controlled Drugs and Substances Act consistent with [the accused's] rights under section 8 of the Charter.
>
> I would note in passing that [the accused's] conduct could not be construed as informed consent to the search for purposes of grounding a charge under the Controlled Drugs and Substances Act. He conducted a social worker and the officer to the location of the marihuana plants in reliance on the social worker's

representation that a search warrant was not required.

I would note further that a request by the officer that [the accused] remain in the kitchen with him would constitute an investigative detention, engaging the relevant law. It is unnecessary to consider the issue in this case since that was not the approach taken by the officer.

In the circumstances, the police officer's failure to obtain a warrant prior to a search for the location of the marihuana plants resulted in a breach of [the accused's] rights under section 8 of the Charter for purposes of investigating an offence and laying a charge under the Controlled Drugs and Substances Act. The trial judge erred in concluding that the officer's involvement in the social worker's investigation under the Act allowed him to search [the accused's] residence and to lay a charge when he was led to the location of the plants which, together with the firearm, were then in plain view. [paras. 33-37]

s. 24(2) Admissibility

The Court of Appeal agreed with the trial judge that the evidence was nonetheless admissible. The conduct of the police fell at the lower end of the continuum of seriousness, the impact on the accused's Charter protected interests was not significant and the evidence was important to proving a serious offence in which society had a significant interest in having adjudicated on its merits.

The evidence of the grow-op was admissible, the accused's appeal was dismissed and his conviction was upheld.

Complete case available at www.canlii.org

"I would note further that a request by the officer that [the accused] remain in the kitchen with him would constitute an investigative detention, engaging the relevant law."

ARREST LAWFUL: OFFICER MET REQUISITE SUBJECTIVE & OBJECTIVE STANDARDS

R. v. Rowson, 2016 SCC 40

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 cell phone 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 many *Charter* breaches including that there was an unlawful arrest by the third officer without sufficient cause to do so. The judge did find some *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, the arrest was ruled 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, relying on the following eight factors:

1. The officer had been called to what was described as an injury collision and had been advised that the injuries were serious;
2. The roads were dry and it was a clear night;
3. The officer was advised that a black truck had gone through a stop sign and collided with a white car also in the ditch;
4. The location of the driver of the black truck was identified to the officer and he later identified that person as the accused;
5. It was 21:00 at night;
6. Highway 22X is a very busy roadway;
7. The speed limit was quite high in that area; and
8. A normal person would expect traffic to be on that highway at that time of night.

Despite the other *Charter* violations, 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 an error in not finding the arrest arbitrary. In his view, once the trial judge found he 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 one continuous arbitrary detention through to the arrest following the initial s. 9 breach. As for the legality of the accused's arrest, he found it 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]

Justice O'Ferrall upheld the admission of 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 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. She found 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.

Supreme Court of Canada

The accused appealed his conviction to the Supreme Court of Canada again arguing that the arresting officer did not have the requisite reasonable grounds for the arrest. In his view, the officer did not have the necessary subjective belief for a lawful arrest nor were his grounds objectively justified.

In a very short oral judgment, a three member majority of the Supreme Court of Canada dismissed the accused's appeal, substantially for the reasons of Justice O'Ferrall of the Alberta Court of Appeal.

A View of Two

Justices Abella and Côté would have allowed "the appeal primarily on the basis that the cumulative effect of the multiple breaches warranted the exclusion of the breathalyzer evidence."

Complete case available at www.scc-csc.ca

Editor's note: Facts taken from *R. v. Rowson*, 2015 ABCA 354.

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CHALLENGES
OF MODERN DAY LAW ENFORCEMENT

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Nov. 2nd, 2016 from
8am to 4pm

The Justice Institute of BC
715 McBride Boulevard,
New Westminister

Registration from
7:30am to 8am

Attendance Restricted to Law Enforcement Personnel Only

0730 – 0800
Registration

0800 – 0815
Opening Remarks
MC

0815 – 0915
Public Perceptions of Police
Mark Towhey

0915 – 1015
Legal Issues around
Freeman on the Land
Kyle Friesen

1015 – 1045 - Coffee

1045 – 1145
Syrian Refugee Settlement
Nader Khalil & Sam Jaroudi

1145 – 1230 - Lunch

1230 – 1400
Policing in the Modern World
Angela Workman-Stark, PhD

1400 – 1415 - Coffee

1415 – 1545
Transgender Awareness
Velvet Steele & Dr. Aaron Devor

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The BC LEDN is a sub-committee of the British Columbia Association of Chiefs of Police with representation from the following participating agencies.

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Angela Workman-Stark
Angela Workman-Stark is an Associate Professor of Organizational Behavior at Athabasca University in Alberta, Canada and a retired Chief Superintendent of the Royal Canadian Mounted Police (RCMP). In her current role, Angela teaches, undertakes research and consults in the areas of leadership and creating inclusive workplaces. She has delivered numerous conference presentations, keynotes, and workshops related to cultural change and the role of gender in the workplace.

Mark Towhey
Born in Kamloops, B.C., Mr. Towhey is currently a father of two boys. Mr Towhey worked as an international management consultant in Afghanistan and Pakistan before signing on to work on Rob Ford's mayoral campaign in early 2010. In 2012 he become Rob Ford's Chief of Staff. Mark has written a book about the experience titled: Mayor Rob Ford: Uncontrollable: How I Tried to Help the World's Most Notorious Mayor.

R. Kyle Friesen
Kyle Friesen is the legal advisor to the RCMP Deputy Commissioner for British Columbia ("E" Division) and all RCMP personnel. Since 1998, he has provided "live" legal advice on all operational and administrative policing matters. He was Legal Counsel to the Vancouver 2010 Integrated Security Unit for the 2010 Winter Olympics. Mr. Friesen has appeared in all levels of Courts in British Columbia and the Yukon Court of Appeal, as well as national and provincial administrative tribunals.

Nader Kahill & Sam Jaroudi
Cst. Nader Kahlil has been a member of the RCMP since 2008 and is currently posted to RCMP Calgary INSET. Sam Jaroudi is a Civilian Member of the RCMP with over 16 years of experience in community outreach. Nader and Sam were two of four RCMP members who deployed to Jordan to engage with Syrian Refugees prior to their arrival in Canada.

Velvet Steele
Is an activist crusading for the human rights trans folk and those of sex workers. Most notably on gender presentation, expression and issues of safety, security, sexuality and sexual health.

Dr. Aaron H. Devor
Dr. Aaron H Devor, PhD, FSSSS, FSTLHE, holds the world's only Research Chair in Transgender Studies and has been studying and teaching about transgender topics for more than thirty years. He is the author of numerous well-cited scholarly articles, and the widely-acclaimed books. He is a national-award-winning teacher, an elected member of the elite International Academy of Sex Research, an elected Fellow of the Society for the Scientific Study of Sexuality, and the Society for Teaching and Learning in Higher Education.

The BC LEDN is a sub-committee of the British Columbia Association of Chiefs of Police with representation from the following participating agencies.

CLOSING ARGUMENTS ARE NOT EVIDENCE: LAWFUL EXCUSE NOT MADE OUT

R. v. Dilk, 2016 MBCA 98

The complainant, who was in a common-law relationship with the accused, obtained a prevention order under Manitoba's *Domestic Violence and Stalking Act* prohibiting the accused from entering the complainant's residence and from having any contact or communication with her except to discuss major decisions affecting their sons or to make arrangements for access. The terms of the prevention order stated:

- *[The accused] is enjoined and restrained from entering upon any premises where [the complainant] may be living separate and apart from [the accused].*
- *[The accused] shall not have contact or communication with [the complainant] except to discuss major decisions affecting [the children] or to make arrangements regarding [the accused] exercising access to [the children].*

About eight years later, the accused entered the complainant's residence to give their son some money. When the complainant found him in her home, they argued and she asked him to leave. After the accused left, the complainant contacted the police to report a breach of the prevention order and the accused was charged with two counts of breaching a court order under s. 127 of the *Criminal Code*.

Manitoba Provincial Court

The complainant testified that the accused had entered her home before and she had told him many times that this "had to come to a stop", but he would not listen to her. When the judge asked the self-represented accused during closing arguments whether he had a lawful excuse for breaching the prevention order the accused described a history of acquiescence by the complainant in not seeking to have the order enforced. The accused said he had been going to the complainant's residence for six to eight years and that she had been allowing him to breach the court order. The trial judge found that "the previous eight year practice that may have developed" was a lawful excuse to the charges and found him not guilty. In his view, the complainant and the accused "had loosely interpreted" the order and made "tolerances" for what were technical breaches. The accused was acquitted.

Manitoba Court of Queen's Bench

The Crown unsuccessfully challanged the accused's acquittals. The appeal judge relied on the accused's submissions during his closing argument as evidence in the trial. Although the accused had breached the prevention order when he entered the residence of the complainant and had contact or communication with her, the appeal judge upheld the trial judge's finding that there was a "period of acquiescence", which amounted to a lawful excuse within the meaning of s. 127. The Crown's appeal was dismissed.

Manitoba Court of Appeal

The Crown appealed again arguing that the appeal judge misapprehended the evidence and erred in finding the accused had a lawful excuse for breaching the prevention order.

Misapprehension of the Evidence

The Court of Appeal concluded that the accused's responses when questioned by the trial judge about the complainant not seeking to have the order enforced on prior occasions which formed the basis of the lawful excuse for breaching the prevention order was not evidence at the trial. "The information provided to the court by the accused was not under oath, the Crown was not given an opportunity to cross-examine the accused on the information, and the information was not put to the complainant, who had testified to the contrary at the trial," said Justice Lemaistre for the Court. "Further, the [appeal] judge

BY THE BOOK:

Disobeying Court Order: ***Criminal Code***

s. 127 (1) Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of

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

(b) an offence punishable on summary conviction.

relied on the information in upholding the trial judge's finding of a lawful excuse. In doing so, he misapprehended the evidence."

Lawful Excuse

The appeal judge also erred in finding there was a lawful excuse for breaching the prevention order:

> Section 127 of the Code makes it an offence to disobey a court order without a lawful excuse. Once the Crown has proven the elements of an offence beyond a reasonable doubt, as was done in this case, the burden shifts to the accused to establish a lawful excuse on a balance of probabilities. A lawful excuse operates to negate the mens rea of an offence which, in the case of a charge of breaching a court order, means that the accused did not intend the actions that led to the breach. For the purposes of proof of an offence under section 127, "it matters not whether it is a civil or criminal order that is being disobeyed".
>
> Whether the accused had a lawful excuse for breaching the prevention order was therefore a fundamental question at the summary conviction appeal. Since there was no properly tendered evidence of a lawful excuse before the trial judge, the [appeal] judge's conclusion that there was a lawful excuse was a material misapprehension of the evidence and cannot be allowed to stand. [references omitted, paras. 12-13]

The Court of Appeal also commented on whether the order could be varied by the practice of inaction on behalf of the complaint respecting other breaches:

> The [appeal] judge found that it is a "solid practical approach" to allow the parties to a prevention order to vary the order by their conduct and to "resort back to relying upon the order" with notice. It is contrary to the purpose of the Act, and what is known about domestic violence, to suggest that an order can be varied in this manner. Pursuant to section 14(1) of the Act, a prevention order may only be made if the court finds that the person to be protected by the order has been stalked or subjected to domestic violence by the responding party. Once the order has been made, served on the responding party, and filed in court, the order remains in effect until a judge is satisfied on application "that it is fit and just" (at section 19(1)) to vary or revoke the order. [refrences omitted, para. 14]

The Crown's appeal was allowed, the accused was convicted on two counts of breaching a court order and an absolute discharge was imposed.

Complete case available at www.canlii.org

Editor's note: Additional facts taken from *R. v. Dilk*, 2015 MBCA 111.

REFUSAL ADMISSIBLE DESPITE SUSPENSION OF s.10(b) CHARTER RIGHT

R. v. Caswell, 2015 ABCA 97

A police officer stopped the accused's truck after seeing it travelling a few kilometers over the speed limit and learning it was registered to a woman. The officer advised the accused that he had pulled him over to check for sobriety and documentation. Although the accused said he had been drinking, the officer noted that he covered his mouth when he spoke, looked tired, was slurring his

speech slightly and a had moderate smell of alcohol on his breath. The officer told the accused he suspected that he may be impaired. The officer radioed for another unit, which he knew was close by, to bring an approved screening device (ASD). He also asked the accused to accompany him to his police vehicle.

The officer told the accused to leave his cell phone in his truck, which he was holding when he got out of it. The ASD arrived within two minutes and the officer requested an ASD sample. The accused replied that he would not blow into the ASD until he had spoken with his lawyer, and stated that he should be allowed to use his cell phone to call one. The officer explained the difference between an ASD and a breathalyzer and that the accused would have an opportunity to contact a lawyer before being asked for a breathalyzer sample at the police station. The accused continued to refuse to give an ASD sample and the officer continued to insist he could not have an opportunity to phone a lawyer until he complied with the ASD demand. After several minutes of "just going in circles", the officer arrested the accused for refusing to give a breath sample. The accused was not taken to the police station but instead released from the scene on a promise to appear. His truck was towed and impounded pursuant to the provincial administrative scheme. He was charged with refusing to provide a breath sample.

Alberta Provincial Court

The officer testified he did not allow the accused to use his cell phone to call a lawyer because he had been taught that detained persons are not allowed to contact a lawyer when faced with an ASD demand. He also said that it was his practice to tell drivers to leave their cell phone in their vehicle as it was easier to keep track of a detained person's property if it remained in the person's own vehicle.

The judge found the officer had no duty to allow the accused to contact a lawyer before providing a roadside sample. While s 10(b) of the *Charter* guarantees the right to retain and instruct counsel without delay upon detention or arrest, the law was settled that s 10(b) rights are suspended while a detained motorist is asked to participate in roadside sobriety screening tests regardless of whether the right could be reasonably accommodated with the presence of a cell phone. This violation of s. 10(b) was justified as a reasonable limit under to s 1.

The judge also found that allowing the opportunity to consult a lawyer prior to the test may lead to a breach of the s. 254(2) *Criminal Code* requirement that the test be done "forthwith." As well, it may not be possible for police officers to provide sufficient privacy at a roadside stop to allow for reasonable consultation with counsel. Finally, even if there was a s. 10(b) breach by denying the accused's request to call his lawyer on his cell phone, the evidence of his refusal to comply with the ASD demand was nonetheless admissible under s. 24(2) of the *Charter*. The officer was acting in good faith, he correctly understood the law and the refusal was real evidence essential to the Crown's case. The accused was convicted of failing, without lawful excuse, to comply with the demand.

Alberta Court of Queen's Bench

The accused appealed the trial judge's ruling that his constitutional right to counsel had not been breached. The appeal judge found the right to counsel could be suspended for a roadside breath sample provided the test could be done forthwith. Cellular technology, she found, did not override the continued overall purpose and justification for suspending the right to counsel during roadside sobriety investigations. The societal objective of facilitating the detection and deterrence of impaired driving along with practical operational realities continued to be relevant. In this case, a proper ASD demand was made forthwith and there was no reasonable excuse for failing to comply with it. The accused's appeal was dismissed.

Alberta Court of Appeal

The accused again appealed arguing, in part, that the appeal judge erred in relying on evidence of the refusal that was obtained while his rights were suspended. In his view, the evidence of the fact of his refusal to

comply should be inadmissible on a basis analogous to the position that a "fail" result on completion of ASD testing should not be used as evidence for proof of impairment. But the Court of Appeal disagreed:

> The [accused] calls the difference between a refusal and a failure on the test an "artificial distinction". This argument is an apples and oranges situation. The use of a 'fail' result would be use of conscripted evidence about one set of facts to support an inference about the state or condition of the motorist. By comparison, the fact of refusal is the actus reus of the offence of refusal. The only conscription there emanates directly from the Code itself as a matter of law, absent … a Charter restriction on the law itself. There is no analogy and, therefore, no "artificial distinction". [para. 8]

Nor did the Court of Appeal accept the accused's additional argument that the "fact" of refusal should be treated in some manner as conditional or perhaps revocable by the individual until after the individual has consulted with counsel. "Parliament speaks of lawful excuses, not conditional deferments to run the clock perhaps in hope of a remittance of some blood alcohol concentration," said Justice Watson. "Parliament enacted a demand, not an invitation to treat." Although the accused told the officer he would not comply with the demand until after he spoken to counsel, the officer correctly told him he had to decide on his own. "If the [accused] made an error of judgment, it was an error of law on his part, not misconduct by the state," said Justice Watson. The officer immediately release the accused on a promise to appear at the roadside. There was no need for the officer to convey him to the police station and allow him to speak to a lawyer and then make his decision to offer samples.

The accused's appeal was dismissed.

Complete case available at www.canlii.org

"Parliament speaks of lawful excuses, not conditional deferments to run the clock perhaps in hope of a remittance of some blood alcohol concentration."

INNER COMPULSION TO CONFESS NOT ATTRIBUTABLE TO POLICE CONDUCT

R. v. Fernandes, 2016 ONCA 772

The accused walked into a police station and told the front counter administrative assistant that he wanted to turn himself in for burning down his mother's house. He was not under investigation, detention or arrest for any offence. A police officer was summoned and interviewed the accused. The accused said he was homeless and wanted to go to jail. The officer advised the accused that anything he said could be used as evidence and recommended that he exercise his right to consult counsel. During the interview, the officer told the accused three times that he was free to leave at any time, four times that anything he said could be used as evidence against him and 10 times that arson was a serious offence. On three occasions the officer mentioned that arson could result in a sentence of 14 years in prison. The officer also repeatedly asked the accused if he wanted to speak with a lawyer and that one could be provided free of charge. He refused the offer of counsel nine times but did call duty counsel the tenth time it was offered. Then, after speaking to counsel, the accused provided a detailed confession about the arson in which he implicated himself. The accused was charged with arson.

Ontario Superior Court

During a *voir dire* on the voluntariness of the statement, the Crown called the police officers and staff who had contact with the accused at the police station when he made his statement as well as the officers who initially investigated the fire. Although the judge found the interviewing officer's conduct was "unimpeachable" and "blameless" and the accused had an operating mind when the statement was made, she ruled that a combination of "oppressive conditions and inducement have operated together to produce an involuntary confession." In her view, the officer had induced the accused to confess

"Where the state induces a suspect to confess, regardless of whether the inducement comes in the form of a threat or a promise, the confession will be inadmissible when the inducement, whether standing alone or in combination with other factors, is strong enough to raise a reasonable doubt about whether the will of the subject has been overborne."

through presenting the *quid pro quo* of jail in return for a confession. The accused had been "oppressed" by his own "mind" and "imagination" because he was homeless and in desperate need of shelter. The judge stated:

> This is one of those cases where oppressive conditions and inducement have operated together to produce an involuntary confession. Although it is usually the case that the focus is on police conduct when examining threats, promises or oppressive circumstances, this case illustrates how, even with unimpeachable police conduct, a confession may be found to be involuntary when all of the circumstances are examined . . . an accused may be labouring under circumstances of oppression sufficient to create a reasonable doubt that have nothing to do with the police.

The statement was ruled inadmissible and, without the statement, the Crown could no longer proceed to trial. An acquittal was entered.

Ontario Court of Appeal

The Crown appealed the trial judge's ruling on the voluntariness of the accused's statement. In the Crown's view, the judge misapplied the law concerning inducements and oppression and conflated voluntariness with reliability.

Confessions Rule

Under the common law confessions rule, the Crown bears the onus of establishing, beyond a reasonable doubt, that a statement made to a person in authority was voluntary. In determining whether a statement was voluntary, a court must consider inducements (threats or promises), oppression, the operating mind requirement and police trickery. In this case, the judge found there was no police trickery and concluded the accused had an operating mind. Thus, the two factors requiring analysis were inducement and oppression.

Inducement

Justice Hourigan, speaking for the Court of Appeal, described the inducement factor this way:

> Where the state induces a suspect to confess, regardless of whether the inducement comes in the form of a threat or a promise, the confession will be inadmissible when the inducement, whether standing alone or in combination with other factors, is strong enough to raise a reasonable doubt about whether the will of the subject has been overborne.
>
> The most important consideration in determining whether the accused's statement has been induced by such a threat or promise is whether there was a quid pro quo offer by the interrogators. A quid pro quo offer is an inducement for the suspect to confess that raises the possibility that the suspect is confessing, not

"The most important consideration in determining whether the accused's statement has been induced by such a threat or promise is whether there was a quid pro quo offer by the interrogators. A quid pro quo offer is an inducement for the suspect to confess that raises the possibility that the suspect is confessing, not because of any internal desire to confess, but merely in order to gain the benefit offered by the interrogator."

"A statement of an accused will be rendered involuntary and inadmissible where the conduct of a police officer or the circumstances of the detention are so oppressive as to raise a doubt whether the accused was able to make an independent choice to speak to the police or remain silent."

> because of any internal desire to confess, but merely in order to gain the benefit offered by the interrogator. [references omitted, paras. 26-27]

Here, however the trial judge erred in concluding the officer's advisement that the accused could be imprisoned as a consequence of his confession, given his desire to find shelter, operated as an inducement:

- There was no nexus between the threat or promise and the confession. "There can be no inducement where the thing said or done by the person in authority does not result in the confession. There was no nexus in this case as the [accused] came to the police detachment with the express purpose of confessing to the arson. He made his intentions known to the administrative assistant before speaking to the officer."

- "The act of supplying accurate factual information to an accused does not constitute an inducement." The officer had a duty to provide information about the accused's potential jeopardy and, if he did not do so, the statement could potentially be found to be involuntary on that basis. "Police officers should not be placed in an untenable position where both providing and failing to provide suspects with information about their potential jeopardy could each render statements inadmissible."

- "The officer was not actively seeking to elicit a confession. To the contrary, he repeatedly advised the [accused] to seek counsel, told him he was free to leave at any time, and made clear the seriousness of the situation."

Oppression

The Court of Appeal described the oppressive state conduct in relation to voluntariness as:

> A statement of an accused will be rendered involuntary and inadmissible where the conduct of a police officer or the circumstances of the detention are so oppressive as to raise a doubt whether the accused was able to make an independent choice to speak to the police or remain silent.
>
> Examples of oppressive conditions include situations where the detainee is deprived of food, clothing, sleep, or medical attention. Excessively aggressive, intimidating questioning by the police for a prolonged period of time may also constitute oppression.
>
> Under the confessions rule, the oppressive conditions must be caused or created by the state. The concern underlying this part of the rule is that state agents may abuse their authority over an accused to effectively negate the accused's ability to make an independent decision to speak to the authorities. [references omitted, paras. 33-34, 36]

In this case, oppression was not a factor. The trial judge found that the accused had an operating mind and that there was no police misconduct. The accused himself was responsible for making his own decision to speak to police and not exercise his right

"Under the confessions rule, the oppressive conditions must be caused or created by the state. The concern underlying this part of the rule is that state agents may abuse their authority over an accused to effectively negate the accused's ability to make an independent decision to speak to the authorities."

to silence. Any inner compulsion to confess created by the accused's own mind and imagination was not attributable to police conduct such that the confession would be rendered involuntary.

Voluntariness v. Reliability

Justice Hourigan agreed with the Crown that the trial judge conflated the confession's voluntariness with its reliability. On the *voir dire*, the issue was the voluntariness of the accused's statement and thus its admissibility. Its reliability (truth or falsity) was an issue for trial, where all of the evidence could be considered.

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

Complete case available at www.ontariocourts.on.ca

MANNER OF DETENTION RENDERED IT ARBITRARY

R. v. Squires, 2016 NLCA 54

Police received an anonymous phone tip in the early hours of the morning that a male in a "black jeep" near the Froude Avenue Community Centre in St. John's Newfoundland had a firearm, possibly a shotgun or rifle. The first officer on scene saw a lone black sport utility vehicle with a male occupant in the parking lot. He activated his vehicle's emergency lights, exited the vehicle, drew his firearm and told the male, whom he recognized as the accused from a previous occasion, to put his hands out the window. The accused fully cooperated. When a second officer arrived a few minutes later, she also drew her gun and the accused was told to exit his vehicle and lie face down on the ground. He was handcuffed, placed in a police car, read his rights and caution, and was told the police were investigating a weapons complaint. The accused admitted there was a shotgun in his vehicle.

The first officer, unaware of the accused's statement that there was a gun in the vehicle, used a flashlight and looked through the tinted glass of the accused's vehicle to determine if there was anyone else and to ensure officer safety. Not seeing any other occupant, he looked again and saw the partially covered barrel of a shotgun on the back seat. He opened the door, seized the gun and shotgun shells, and told the second officer to arrest the accused for unsafe handling of a firearm. The accused was re-advised of his rights and cautioned, and then arrested for careless use of a firearm and breach of a weapons prohibition. The accused was charged with several firearms offences.

Newfoundland Provincial Court

The first officer testified that he did not have grounds to arrest the accused prior to observing the firearm but said he nonetheless searched the vehicle incident to the arrest. The second officer claimed reasonable grounds for the arrest based on the original complaint that had been phoned in, the accused's admission that there was a shotgun in the vehicle and the fact that the first officer had seen the firearm in the vehicle. It was clear, however, that the formal arrest made by the second officer had not occurred before the gun and shells were actually observed and seized.

The judge concluded that the accused's rights under ss. 8 and 9 of the *Charter* had been breached. First, he found the reasonable suspicion standard justifying an investigative detention was not met. "[The first officer] had not formed a subjective belief in the truthfulness of the tip he had received," said the judge. "There was no objective evidence in support of that tip beyond the presence of a black vehicle at the community centre. By removing the accused and handcuffing and searching him, from the vehicle, he arbitrarily detained the accused and violated his section 9 rights." The search of the vehicle was also unreasonable. "By performing a visual search of the vehicle by examining by flashlight through the tinted windows, he violated the section 8 rights as he was basing his search as an incident of arrest and there had been no lawful arrest," he said. The judge excluded the evidence of the shotgun and shells and the accused was acquitted.

Newfoundland Court of Appeal

The Crown appealed the accused's acquittals arguing the trial judge erred in finding an arbitrary detention and in ruling that the search of the vehicle was unreasonable. A five member Court of Appeal was empaneled to hear the Crown's challenge of the trial judge's rulings.

Investigative Detention

Chief Justice Green, authoring the three member majority judgment, found there was sufficient grounds to justify an investigative detention:

> Here, the officers acted on a tip that a man was in a black utility vehicle at the community centre with a shotgun or rifle. That was sufficient to justify investigating. In the absence of anything indicating worthlessness or substantial unreliability of the information received, the police are entitled to rely on such information for the purpose of investigating further. It is the duty of a police officer to investigate potential crimes and to ask questions of citizens in relation to that investigation. It is not necessary that the police must have a subjective belief in the accuracy of the information at the time of commencing an investigation or that, at these early stages, there need be any objective corroboration of the information suggesting the need for investigation.
>
> That said, the right and duty to investigate does not automatically imply a right to detain or use force short of arrest. The degree of detention that is justifiable in pursuance of the investigation will depend, on a view of the totality of circumstances, on what is reasonably necessary to facilitate that investigation. At that point, the officer must have reasonable grounds to suspect that in all the circumstances the targeted person "is connected to a particular crime and that such detention is necessary".
>
> Upon arrival at the scene, the first officer observed a man in a vehicle that roughly fit the description given in the tip. No one else fitting the description was present. Given the possible presence of a firearm, it was perfectly reasonable for the officer to suspect that [the accused] was connected with the alleged crime and to seek to detain him to investigate further. The safety of the public and the investigating officers was potentially engaged. [references omitted, paras. 18-20]

Although the detention was justified, the majority found the manner in which it was effected rendered it arbitrary:

> However, in the absence of any indication of attempted flight, uncooperativeness or threatening behavior, that could have been accomplished by requiring the [accused] to exit the vehicle and to place his hands in plain sight on the top of the vehicle, preparatory to a pat down search. It did not in the circumstances require ordering him to the ground at gunpoint, handcuffing him and placing him in the police cruiser before continuing to look for any weapons. What began as a lawful detention became unlawful when excessive force and unnecessary detention methods were employed. The detention became arbitrary and was therefore a breach of section 9 of the Charter. [para. 36]

"What began as a lawful detention became unlawful when excessive force and unnecessary detention methods were employed. The detention became arbitrary and was therefore a breach of section 9 of the Charter. "

"[T]he right and duty to investigate does not automatically imply a right to detain or use force short of arrest. The degree of detention that is justifiable in pursuance of the investigation will depend, on a view of the totality of circumstances, on what is reasonably necessary to facilitate that investigation."

Unreasonable Search?

The search of the vehicle could not be justified as a search incident to investigative detention because at the time of the search the detention became unlawful. However, it was a lawful search incident to arrest because at the time of the search, the police had reasonable grounds to arrest the accused before the search was conducted. These grounds included the presence of the shotgun which the officer saw when he looked through the tinted window using his flashlight. Unlike the trial judge, the majority found looking through the window with the aid of a flashlight did not constitute a search for *Charter* purposes:

> To constitute a search within section 8, the actions of the police must have intruded on a reasonable expectation of privacy. While it is true that whether a reasonable expectation of privacy exists is said to depend upon "the totality of the circumstances" and the fact that the subject matter being observed or seized is in public view is but one factor among many to be considered in the privacy expectation analysis, the situation is different if all that is occurring is visual observation, without more, from outside the territorial zone of privacy that is involved and when what is engaged is not an issue involving personal or informational, as opposed to territorial, privacy. …
>
> This surely makes sense when what is involved is simple observation in circumstances where only territorial privacy is engaged. We rightly expect more of our police forces when conducting an investigation than for them to wander aimlessly about their business in the hopes they will stumble upon something relevant. We expect them to be purposeful, focused and methodical in what they do. One of their chief tools in carrying out an investigation is their powers of observation. If they can exercise their powers of observation productively without physically invading any private space in which the owner or occupier has a reasonable expectation of territorial privacy and without invading informational and personal privacy, the person who has not taken the trouble to conceal the item observed can hardly complain. To restrict the police from looking or, if they have already looked, to effectively pretend that what they saw did not exist, would unreasonably, unnecessarily and arbitrarily hamper them in effectively doing their duty. It must be remembered that a police officer needs no legal authority to approach or speak to a person sitting in a vehicle in a public space like a parking lot. In making such an approach the officer does not have to avert his or her eyes from looking in the vehicle and observing items in plain sight.
>
> Nor does the fact that the officer was aided in his observation by the use of a flashlight through tinted glass make any difference. …
>
> Accordingly, observing portions of the shotgun sufficient to identify it as a shotgun, in plain

Charges the accused faced:

- careless handling or storage of a firearm (section 86(1) of the Criminal Code);
- unauthorized possession of a prohibited or restricted weapon (section 92(2) of the Code);
- unauthorized possession of a prohibited or restricted firearm with readily accessible ammunition (section 95(1) of the Code);
- possession of a firearm while prohibited (section 117.01 of the Code);
- unauthorized possession of a prohibited or restricted weapon (section 91(2) of the Code);
- unlawful possession of a firearm in a motor vehicle (section 94(1) of the Code); and
- possession of a firearm with an altered, defaced or removed serial number (section 108(1)(b) of the Code).

"It must be remembered that a police officer needs no legal authority to approach or speak to a person sitting in a vehicle in a public space like a parking lot. In making such an approach the officer does not have to avert his or her eyes from looking in the vehicle and observing items in plain sight. Nor does the fact that the officer was aided in his observation by the use of a flashlight through tinted glass make any difference."

"The plain view doctrine allows for a seizure without warrant where the item being seized is in plain sight of the person effecting the seizure and the item is potentially related to the matter being investigated. An object to which the plain view doctrine applies can be seized without breach of section 8 rights."

> view on the backseat of the vehicle, did not amount to a search. The trial judge erred in concluding otherwise. [references omitted, paras. 52-55]

Thus, the search of the vehicle only commenced when the officer opened the door, not when he looked in the window and saw the gun. But opening the door and searching the vehicle was justified as a search incident to arrest. "Upon observing the shotgun through the window, that information, coupled with the information which initiated the attendance of the officers at the scene, and the admission by [the accused] that he had a gun in his possession, constituted reasonable and probable grounds for arrest," said Chief Justice Green. "The subjective and objective components of the test were satisfied. Inasmuch as the observation of the gun on the backseat of the vehicle did not… amount to a search in itself, this is not a case of attempting to use the results of the search to constitute the grounds for arrest. Furthermore, once the items were seized, the arrest followed immediately thereafter. The seizure was therefore incident to the arrest. It can therefore be justified on that basis."

Plain View

The majority also concluded that the seizure of the gun was also authorized by the plain view doctrine:

> The plain view doctrine allows for a seizure without warrant where the item being seized is in plain sight of the person effecting the seizure and the item is potentially related to the matter being investigated. An object to which the plain view doctrine applies can be seized without breach of section 8 rights.
>
> In this jurisdiction, the application of the doctrine has been expressed to be dependent on the existence of three requirements: (i) the officer must be lawfully in a position from which the evidence was plainly in view; (ii) discovery of the evidence must be inadvertent; and (iii) it must be apparent to the officer at the time that the observed item may be evidence of a crime or otherwise subject to seizure. [references omitted, paras. 65-66]

Chief Justice Green concluded that the firearm was discovered inadvertently, however, even if it wasn't, he opined that inadvertent discovery was not an absolute requirement for the operation of the plain view doctrine:

> In this case, given the absence of unanimity on the issue across the country, the absence of any definitive statement or analysis on the issue by the Supreme Court of Canada, the possible misunderstanding of the United States jurisprudence which formed the basis of earlier Canadian decisions, the fact that the rationale for the plain view doctrine (based on the absence of any interference with a reasonable expectation of privacy) does not support an inadvertence requirement, and the fact that the rule in this case does not involve upsetting settled police expectations and it is not a rule upon which an accused would rely, I am satisfied that the requirements for the establishment of the plain view doctrine should not include inadvertent discovery. So long as the police are lawfully in a place from where the

"[T]he requirements for the establishment of the plain view doctrine should not include inadvertent discovery. So long as the police are lawfully in a place from where the viewing can take place without invading the suspect's zone of territorial privacy and the item is in plain view, it may be seized without a warrant."

> viewing can take place without invading the suspect's zone of territorial privacy and the item is in plain view, it may be seized without a warrant. While the fact that discovery is inadvertent may reinforce the genuineness of police assertions supporting plain view, it need not be a stand-alone requirement. [para. 78]

s. 24(2) Admissibility

Even though the seizure of the gun did not breach s. 8 of the *Charter*, the s. 9 breach resulting from the use of excessive force during the detention required a s. 24(2) analysis. The majority, however, would have admitted the evidence. The Crown's appeal was allowed and a new trial was ordered.

A Concurring Opinion

Justice Rowe, authoring his own opinion, agreed with the majority that "a police officer standing in a public place and looking through the window of a vehicle is not conducting a 'search' within the meaning of section 8 of the Charter." He also agreed that "where a police officer has grounds to make an arrest and where as part of a single transaction the officer first conducts a search and seizure and then carries out the arrest, the search and seizure can properly be viewed as incidental to the arrest." However, he did not rely on the plain view doctrine in his analysis and would not extend its scope as the majority did. Justice Rowe concurred with the majority in allowing the Crown's appeal, admitting the evidence under s. 24(2) and ordering a new trial.

"Where a police officer has grounds to make an arrest and where as part of a single transaction the officer first conducts a search and seizure and then carries out the arrest, the search and seizure can properly be viewed as incidental to the arrest."

A Different View

Justice Welsh concluded that police not only used excessive force against the accused but also conducted a *de facto* arrest when he was ordered to lie face down on the ground, handcuffed and placed in the rear of the police car. This was performed in the absence of the required subjective belief to ground the arrest. The *de facto* arrest was thus unlawful and amounted to an arbitrary detention:

> While the nature of the information relayed to the officers involving the presence of a gun dictated the exercise of heightened care, there was no indication from the anonymous call to the communications centre that [the accused] was using a gun or acting in a threatening manner. [The accused] immediately complied with the first officer's commands. He put his hands out the window in full view and got out of the car as directed by the officer. It would be expected that an officer in this situation would have directed [the accused] to place his hands on top of the car for the purpose of ensuring that his hands remained visible and to allow the officer to conduct a pat-down search to determine whether he was carrying a weapon. This would also provide the officer with an opportunity to tell the individual the reason for his detention. ... In the circumstances of this case, to require [the accused] to lie face down on the ground, and to handcuff him would amount to excessive force and an arbitrary detention as well as a de facto arrest in breach of section 9 of the Charter. [para. 128]

The search of the vehicle incident to this unlawful arrest was therefore unreasonable. Justice Welsh would have upheld the trial judge's decision in excluding the evidence and dismiss the Crown appeal.

Complete case available at www.canlii.org

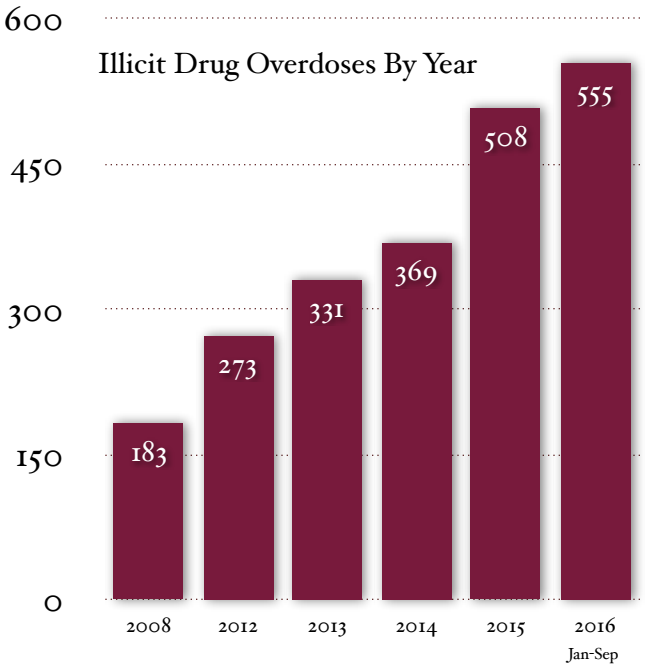
Note-able Quote

"One of the most important keys to success is having the discipline to do what you know you should do, even when you don't feel like doing it." - Unknown

ILLICIT DRUG OVERDOSES IN BC

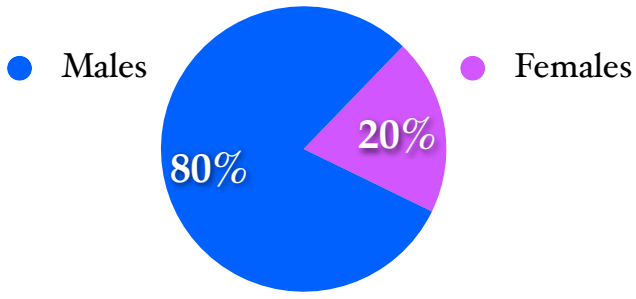
The British Columbia Coroners Service recently released statistics for overdose deaths occurring in its province from January 1 to September 30, 2016.

555 The number of apparent drug overdose deaths from January-September 2016.



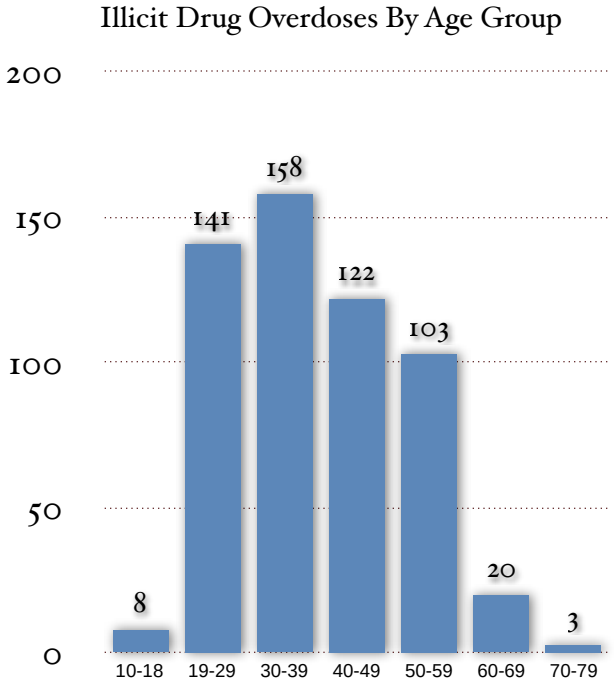
444 The number of deaths involving males, which accounted for 80% of all deaths.

111 The number of deaths involving females.



195 The Fraser Health Authority had the most illicit drug overdose deaths.

30-39 The age group accounting for the largest percentage of illicit drug overdose deaths.



Cities with 20 or more illicit drug deaths	
Vancouver	110
Surrey	71
Victoria	44
Kelowna	31
Abbotsford	26
Kamloops	25
Maple Ridge	22
Langley	20
Nanaimo	20

60% The proportion of illicit drug overdose deaths from January to August 2016 for which fentanyl was detected.

Source: Illicit Drug Overdose Deaths in BC - January 1, 2007 - September 30, 2016. Ministry of Justice, Office of the Chief Coroner. October 19, 2016

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by Patrick Lavallée and Mike Novakowski

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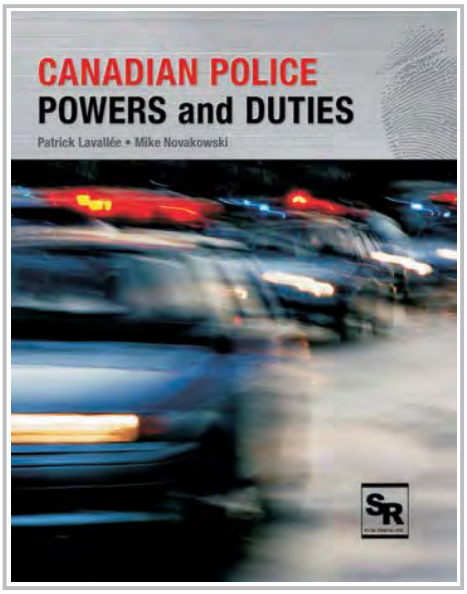

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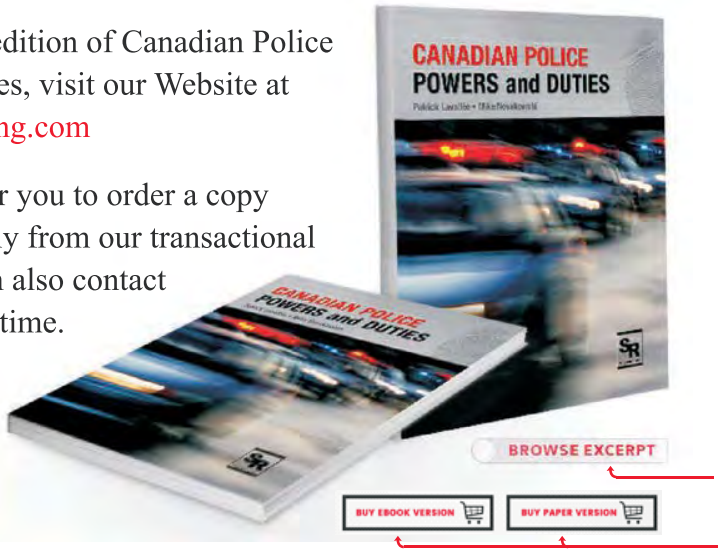

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