JUSTICE INSTITUTE of BRITISH COLUMBIA

# IN SERVICE: 10-8

A PEER READ PUBLICATION

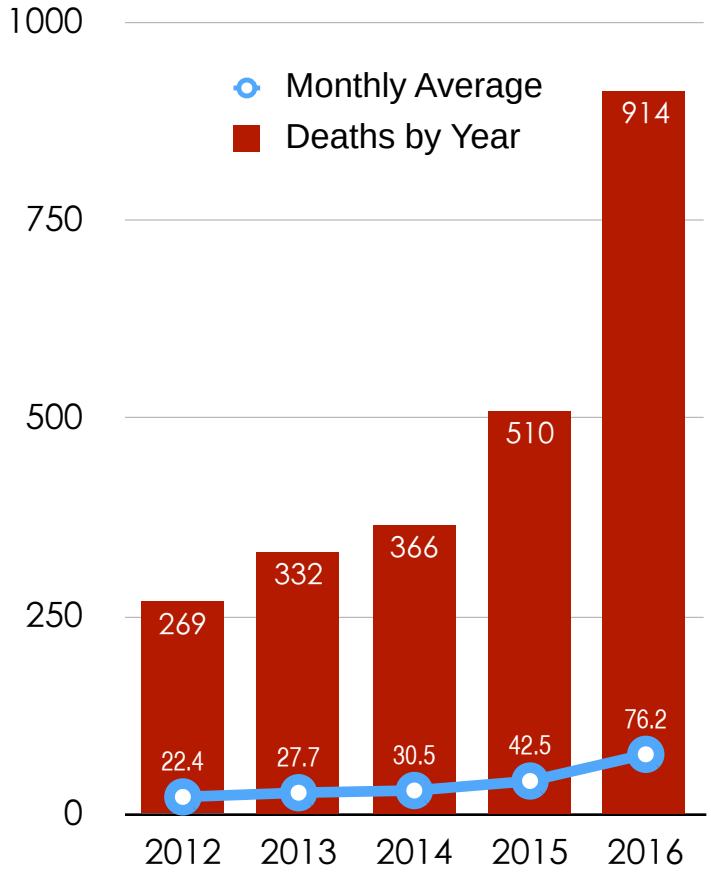
A newsletter devoted to operational police officers in Canada.

## BC's 2016 ILLICIT DRUG OVERDOSE STATS RELEASED

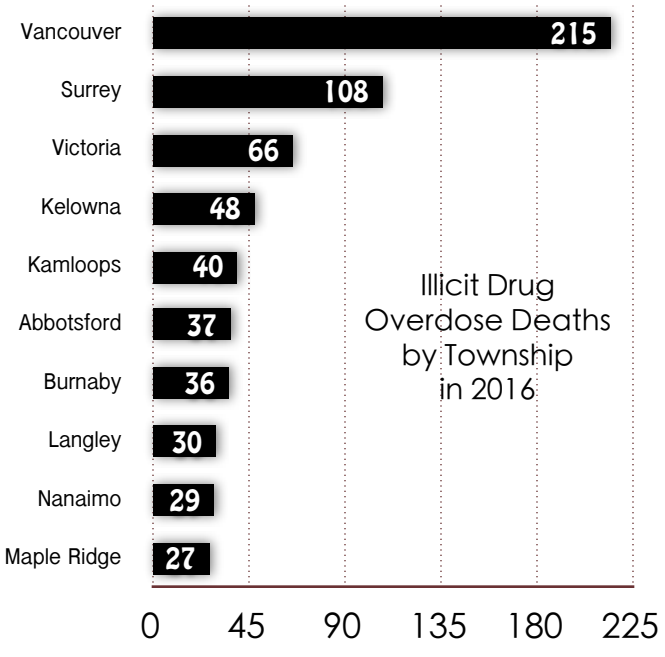
The Office of BC's Chief Coroner has announced the 2016 statistics for illicit drug overdose deaths in the province. Last year there were 914 overdose deaths, almost an 80% increase over the same period in 2015. Moreover, the report attributes Fentanyl laced drugs as accounting for the increase in deaths. In December 2016 alone, there were 142 deaths. This was the highest recorded number of deaths occurring in a single month in BC and was more than double the monthly average number of illicit drug overdose deaths since 2015.

People aged 30-39 were the hardest hit in 2016 with 252 illicit drug overdose deaths followed by 40-49 year-olds at 216 deaths and 19-29 year-olds at 201 deaths. Vancouver had the most deaths at 215 followed by Surrey (108), Victoria (66), Kelowna (48) and Kamloops (40).

The data also indicates that most illicit drug overdoses occur inside (90%) while 9% occurred outside, including vehicles, streets, sidewalks, parking lots, parks, wooded areas and campgrounds. For the remaining eight deaths, the place of death was unknown.




This year - 2017 - is off to a rough start as well. In January there were 116 overdose deaths. This is a 36.5% increase over the number of deaths in January 2016. That's more than three people dying every day.



## 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.**


Leadership Through Crisis

**Westin Bayshore, Vancouver, BC**

**See page 21**

### Note-able Quote

*"Our greatest glory is not in never falling, but in getting up every time we do."* - Confucious

## Graduate Certificates

Intelligence Analysis

or

Tactical Criminal Analysis

www.jibc.ca

see pages 39-40

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.

**7 steps to a comprehensive literature review: a multimodal & cultural approach.**

Anthony J. Onwuegbuzie & Rebecca Frels.

London, UK: SAGE Publications, 2016.

LB 1047.3 O59 2016

**Aboriginal law.**

Thomas Isaac.

Toronto, ON: Carswell, 2016.

KE 7709 I823 2016

**Communicating risk.**

edited by Jonathan Crichton, Christopher N. Candlin, & Arthur S. Firkins.

Houndmills Basingstoke, Hampshire; New York, NY: Palgrave Macmillan, 2016.

T 10.68 C636 2016

**The craft of research.**

Wayne C. Booth, Gregory G. Colomb, Joseph M. Williams, Joseph Bizup & William T. FitzGerald.

Chicago, IL: The University of Chicago Press, 2016.

Q 180.55 M4 B66 2016

**Cure back pain: 80 personalized easy exercises for spinal training to improve posture, eliminate tension & reduce stress.**

Jean-François Harvey, BSc, DO.

Toronto, ON: Robert Rose, 2016.

RD 771 B217 H38 2016

**Deep work.**

Cal Newport.

London, UK: Piatkus, 2016.

BF 323 D5 N49 2016

**Determinants of indigenous peoples' health in Canada: beyond the social.**

Edited by Margo Greenwood, Sarah de Leeuw, Nicole Marie Lindsay & Charlotte Reading.

Toronto, ON: Canadian Scholars' Press, 2015.

RA 450.4 I53 D48 2015

**Facilitating learning with the adult brain in mind: a conceptual and practical guide.**

Kathleen Taylor & Catherine Marienau.

San Francisco, CA: Jossey-Bass, 2016.

LC 5225 L42 T4 2016

**The greats on leadership: classic wisdom for modern managers.**

Jocelyn Davis.

London, UK; Nicholas Brealey Publishing, 2016.

HD 57.7 D385 2016

**Invisible influence: the hidden forces that shape behaviour.**

Jonah Berger.

London, UK: Simon & Schuster UK Ltd, 2016.

HM 1176 B47 2016

**Michael Allen's guide to e-learning: building interactive, fun, and effective learning programs for any company.**

Michael W. Allen.

Hoboken, NJ: John Wiley & Sons, Inc., 2016.

HF 5549.5 T7 A468 2016

**Study smarter, not harder.**

Kevin Paul, MA.

North Vancouver, BC: Self-Counsel Press, 2014.

LB 1049 P37 2014

**Weapons of math destruction: how big data increases inequality and threatens democracy.**

Cathy O'Neil.

London, UK: Allen Lane, 2016.

QA 76.9 B45 O64 2016

**What color is your parachute?: a practical manual for job-hunters and career-changers.**

Richard N. Bolles.

Berkeley, CA: Ten Speed Press, 2017.

HF 5383 B56 2017

# IMPRACTICABILITY TO APPEAR IN PERSON NOT THE SAME AS URGENCY IN GETTING WARRANT

**R. v. Clark, 2017 SCC 3**

A police officer completed an ITO and a telewarrant application at 2:00 am to investigate theft of electricity at a residence. The officer was seeking a warrant to search "by day." In the application, the officer stated he was using the telewarrant procedure as it was impracticable for him to appear personally before a justice because he was working a nightshift and the courthouse was presently closed. After leaving a message through British Columbia's Justice Centre phone line, the officer received a call from a Judicial Justice of the Peace (JJP) at 2:10 am asking him why the application could not be made in person during the day at the courthouse. He provided several points and the JJP suggested those reasons be set out in the ITO. The officer changed his ITO and faxed the revised application to the JJP at 2:35 am.

At 3:07 am the officer received a signed telewarrant authorizing him (and other officers) to enter the residence between 2:00 pm and 6:00 pm to search for evidence of electricity theft. When the police executed the warrant, they not only found an electrical by-pass but also a large marihuana grow-operation. The police seized 707 marihuana plants, grow-operation equipment, evidence of a bypass, $500 cash and two gold rings believed to be offence-related property. The accused was found inside the home at the time the warrant was executed. He was charged with producing marihuana, possessing marihuana for the purpose of trafficking, and theft of electricity.

## British Columbia Supreme Court

The accused suggested that the warrant was invalid, in part, because the JJP had acted inappropriately by providing advice to the officer in the preparation of the ITO. The judge agreed, finding the JJP was


not acting judicially when he guided the officer in the telewarrant application and that he was predisposed to grant the application he had not yet seen. The judge excised the paragraph from the ITO that addressed the impracticability of an in-person application. Without this, the impracticability requirement of the telewarrant provision had not been satisfied. The warrant was quashed and the search of the residence amounted to a warrantless one. The accused's s. 8 *Charter* rights had been breached and the evidence of the drugs and other items was excluded under s. 24(2). The accused was acquitted of all charges.

## British Columbia Court of Appeal

The Crown suggested, in part, that the trial judge erred in when he found that the JJP gave improper assistance to the officer submitting the telewarrant.

## Judicial Independence & Impartiality

Justice Frankel, speaking for the unanimous Court of Appeal, found the trial judge's inference that the JJP was predisposed to grant the warrant even before he saw it was neither reasonable nor logical. In some cases, "it is permissible for a judicial justice to provide some advice and/or direction to an officer applying for a warrant," said Justice Frankel. "The inquiry [the JJP] made of [the officer] —in effect, 'why can't this wait until normal office hours'—is something any judicial justice or judge likely would ask at that time of day. ... He did no more than advise [the officer] fully set out his reasons for using the telewarrant procedure."

> "The impracticability-requirement is concerned with whether it is practicable to make an in-person application at the time the application is brought; it does not require that an immediate need for a warrant be demonstrated."

### Impracticability

The accused suggested that the impracticability requirement of appearing in person was not satisfied even if the paragraph explaining why the officer did not appear before a JJP was considered. In his opinion, there was no urgency for obtaining a warrant in the early morning hours and there was no explanation from the officer why he could not wait until the courthouse opened later that day. But Justice Frankel rejected this submission. The ITO need only support a basis why an in-person application was not practicable. It was not necessary to also show that urgency was a factor such that there was an immediate need for a warrant:

> The telewarrant procedure was designed to make it possible for law enforcement officers to apply for a search warrant 24 hours a day, seven days a week. Whether the application is made in-person or by fax the reasonable-grounds standard must be met before a warrant can be issued. The impracticability-requirement is concerned with whether it is practicable to make an in-person application at the time the application is brought; it does not require that an immediate need for a warrant be demonstrated. [para. 66]

In this case, the paragraph addressing impracticability could have satisfied a JJP that the ITO disclosed "reasonable grounds for dispensing with an information presented personally and in writing" as would the statement printed on the form that said the local courthouse was presently closed. The Court of Appeal concluded the telewarrant was properly issued. The Crown's appeal was allowed, the accused's acquittals set aside and a new trial ordered.

### Supreme Court of Canada

The accused argued, among other things, that the JJP lost his independence and impartiality when he provided guidance to the investigating officer, and that it wasn't impracticable for the officer to appear in person. However, a unanimous Supreme Court sitting all nine justices, in a very short judgment, dismissed the accused's appeal substantially for the reasons provided by the Court of Appeal. The decision reversing the trial judge and ordering a new trial was upheld.

Complete case available at www.scc-csc.ca

**Editor's note:** Additional facts taken from *R. v. Clark*, 2015 BCCA 488.

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## FAILURE TO PROTECT INFORMER's IDENTITY RESULTS IN LARGE DAMAGE AWARD

**Nissen v. Durham Regional Police Services Board, 2017 ONCA 10**

The plaintiff, Ms. Stack, lived with her husband (Mr. Nissen) and their two children. She learned from a neighbour that the teenage son of a different neighbour had broke into a home, stole guns, and (with his brother) took the guns to school and threatened students. Ms. Stack said she decided to tell the police but she did not want her name associated with any investigation. She claimed she subsequently spoke to a police officer over the phone and insisted she not be identified and that she was afraid of the teenage neighbour and his brother. She asserted the officer promised her that her identity would not be disclosed and, if she came to the police station to discuss the matter, her identity would be kept secret and that she would remain totally anonymous.

At the police station, unbeknownst to Ms. Stack, her police interview was recorded on videotape. Within a few days of her interview the boys were arrested and her identity and her videotaped interview were included in the Crown's disclosure package. This disclosure provoked an angry reaction from the boys' parents. Their father drove his truck at Ms. Stack causing her to leap from the sidewalk and further threatening and harassing conduct occurred against Ms. Stack and her family. This on-going harassment became unbearable and Ms. Stack and her family ultimately decided to sell their home and move to another community. Ms. Stack and Mr. Nissen sued the police and several named officers for breaching informer privilege.

## Ontario Superior Court of Justice

The judge concluded that the police officer had promised Ms. Stack anonymity and confidentiality despite police denials that such confidentiality was promised or that she enjoyed the status of a confidential informer. "On a balance of probabilities, I hold that [the officer] promised Ms. Stack that her identity would be preserved, and not disclosed, if she came to the police station and provided information about suspected criminal activity," said the judge. "He did not qualify that promise in any way. Thus, both expressly and by implication Ms. Stack became entitled to informer privilege, that is, she was entitled to have her anonymity preserved with respect to her involvement in conveying information to the police." The judge found the police owed a common law duty not to disclose the identity of an informer and they had not taken reasonable care in this case.

The judge then went on to award Ms. Stack $345,000 in general damages for emotional and psychological injury. She had complained of feeling hopeless and depressed following these events, and she had been diagnosed with post-traumatic stress disorder. Her family, friends and a psychiatrist had testified about the significant change in her behaviour and enjoyment in her life. The judge also awarded $65,000 in Ontario *Family Law Act* damages for loss of guidance, care and companionship to Mr. Nissen. A sum of $25,000 was also awarded to each child.

## Ontario Court of Appeal

The police (defendants) appealed arguing, in part, that the trial judge erred in finding that Ms. Stack was promised confidentiality and in finding that she had established the necessary elements for such a claim.

## Promise of Confidentiality

The police argued that the officer would not have asked Ms. Stack to come to the police station for an interview if she was being treated as a confidential informer. This submission, however, was rejected. The trial judge's finding that the officer promised Ms. Stack confidentiality and anonymity was based on a thorough review of the evidence and was supported, among other evidence, by the conversation between the officer and Ms. Stack at the conclusion of the videotaped statement. Even though the officer never used the term "confidential informer", when Ms. Stack asked the officer not to let anyone know about their conversation he said, **"[T]his is between you and I. Of course, I have to keep records of this for ourselves...That stuff does not get disclosed. It is not made available to the public. You don't have to worry about that."**

## Elements of Claim

The police argued that not only did the plaintiff need to prove a promise of confidentiality in exchange for information, but that they also needed to establish that the information provided was difficult or impossible to obtain, and the informer was likely to suffer harm or danger if their identity were disclosed. However, Justice Sharpe, speaking

"It is, of course, for the police to decide whether or not to make a promise of confidentiality. ... If the police tell the witness that they will not reveal his or her identity or involvement in order to get information, they should keep their promise, or face the ordinary consequences of violating the assurance they have given. If the police decide that the witness does not deserve or warrant the requested assurance of confidentiality and anonymity, they should clearly say so and refuse to give the witness the requested assurance."

for the Court of Appeal, determined that the elements required for a claim of damages against the police for breaching a promise they made of confidentiality to a citizen reporting criminal wrongdoing was the same as the civil law action for breach of confidence. He refused to add the additional elements as suggested by the police in establishing a civil claim for damages. In this case, the officer made a promise of confidentiality and anonymity to Ms. Stack in exchange for the information she provided, the promise was breached and Ms. Stack suffered damages as a result. Justice Sharpe wrote:

> While other considerations may come into play in a criminal case where the prosecution is resisting disclosure of the identity of a confidential informer to an accused, this is a civil case between the police and an individual who was promised confidentiality. That promise gave rise to a common law and equitable right entitling Ms. Stack to have her identity kept confidential. Her right was not contingent upon other ways the Police may have had to get the information she provided, or on what the Police thought about the danger she faced. [para. 33]

In terms of police offering a promise of confidentiality, the Court of Appeal stated:

> It is, of course, for the police to decide whether or not to make a promise of confidentiality. In making that decision, they will no doubt make an assessment of the value of the information the witness may have to offer, whether they can get the information through other means, and the danger the witness may face if his or her identity is revealed. If the police tell the witness that they will not reveal his or her identity or involvement in order to get information, they should keep their promise, or face the ordinary consequences of violating the assurance they have given. If the police decide that the witness does not deserve or warrant the requested assurance of confidentiality and anonymity, they should clearly say so and refuse to give the witness the requested assurance. That would allow the witness to decide whether to nonetheless give the information and accept the risk of disclosure. Simply put, a citizen in Ms. Stack's situation should be able to rely upon what the police tell her. [para. 35]

The defendants' appeal was dismissed and the awarding of damages upheld.

Complete case available at www.ontariocourts.on.ca

## BULLET POINTS

### Breaching Informer Privilege

A claim for damages for breaching informer privilege requires:

- A promise of confidentiality;
- Breach of the promise; and
- Damages.

# NO DETENTION, NO RIGHT TO COUNSEL

**R. v. O'Leary, 2017 ONCA 71**

A man lost control of his vehicle, swerved into the oncoming lane and struck a van. The man was killed and the van's driver was seriously injured. A police press release indicated they were looking for the driver of a light coloured vehicle seen in the vicinity and travelling in the same direction as the deceased. The accused heard a radio broadcast of the press release and went to the police station to speak with officers. A detective interviewed the accused from 8:20 am to 9:25 am, some 65 minutes including breaks.

Prior to the interview, the detective read the accused his right to counsel and other warnings. The accused said that he did not have a lawyer. The detective immediately told him about the number for legal aid and repeated the offer of a lawyer. The accused said nothing more to indicate he wanted to contact counsel. An interview then occurred in a small room. The officer exaggerated the speeds of the other vehicles and referred to a non-existent video. The accused admitted he was racing the deceased's vehicle along a stretch of road a short distance from the accident scene. Following the interview, the accused was allowed to leave. He was not arrested or charged at the time. The Crown's theory was that the accused was racing when the deceased lost control of his motor vehicle and collided with the oncoming van. The accused was charged with dangerous driving causing death and dangerous driving causing bodily harm.

## Ontario Superior Court of Justice

The accused submitted, in part, that his right to silence under s. 7 and his right to counsel under s. 10(b) of the *Charter* had been breached and that his statement was not voluntary. In his opinion, he was detained shortly after the interview began. And even though his s. 10(b) right was read to him, along with the cautions, there was never any clear and unequivocal waiver of it. He wanted his statement ruled inadmissible on several grounds, including s. 24(2) of the *Charter* and the common law confessions rule.

**What The Police Press Release Said**

""Grey County OPP continues to investigate the fatal motor vehicle collision which occurred at approximately 10:15 p.m. last night...Police have obtained video depicting a light coloured vehicle travelling with the deceased's vehicle just prior to and after the collision. Police would like to speak with the person operating this vehicle or anyone who may have any information regarding the driver and or the vehicle in question".

The Crown, on the other hand, argued that the accused's statement was admissible. In its view, the accused was not detained. The Crown argued that the concept of detention does not include every instance where the police have grounds to arrest someone but choose to hold off and question the individual or elicit evidence in some other manner. Moreover, the Crown suggested that the statement was voluntary.

## Detention

In looking at whether or not a psychological detention occurs, the judge stated:

> There is no exhaustive list of ingredients for the recipe of psychological detention. A judge may consider, first, the circumstances which precipitated the encounter between the police officer and the suspect. For example, were the police making general inquiries or were they singling out this accused for focussed investigation of a specific event? Second, a judge may consider the nature of the police conduct. For example, where did the interview occur? For how long? How did the suspect get there? Was anyone else present? Third, a judge may consider the particular characteristics of the accused – his age, size, minority status and level of sophistication, as examples.

# DETENTION FACTOR GRID

| Factors Favouring a Finding of Detention | Factors Favouring a Finding of No Detention | Neutral Factors |
|---|---|---|
| The detective, shorty into the interview, had reasonable grounds to arrest the accused for dangerous driving. | The detective testified he never intended or actually did detain the accused. | Nature of the questions. Although started with general inquiries and moved to more focussed questions, the detective was professional. The questioning was not aggressive. |
| | The detective never touched or restrained the accused, nor did he physically direct his movements. | |
| The accused testified he felt he could not leave the interview room. | The nature and tone of the interview was fairly calm and non-confrontational. The detective did not stand over the accused in the interview room, did not shout at him, did not get visibly angry with him nor berate him. | The officer gave the accused the right to counsel almost immediately followed by the detective telling him that he was not in custody and could get up and walk out. The detective clarified that the accused "may" be charged with certain offences. |
| The place of the interview was a small room with the door closed. | | |
| | The detective told the accused he was not in custody and could leave at any time. | The accused's personal characteristics. He was a young adult, average sophistication, not much smaller than the detective and was not a minority. |
| | The detective told the accused he could get up and walk out if he wanted. | |
| | The accused arrived at the police station on his own, unannounced. He drove himself and was not asked or expected to attend. He did not ask for the interview to be done over the telephone or take place somewhere else. He met the detective in the lobby and then followed the officer in to the interview room. | Instances of the detective telling the accused to "sit for a second" were made in a friendly tone and in the context of the detective doing something in the absence of the accused, such as photocopying outside of the interview room. It was a figure of speech and not a command. |
| | The accused was texting on his cellphone while the detective was out of the room. The accused felt comfortable enough to take out his phone, in plain view, and text, multiple times and at length. | Length of the interview. It was not very brief nor was it long. |
| | The detective never seized anything from the accused. | |
| | The accused walked out of the interview and drove away on his own. | |

Factors taken from R v. O'Leary, 2015 ONSC 1346

In this case, the judge found the accused had not met the burden of proving on a balance of probabilities that he had been detained when interviewed. The accused was not physically detained and he had no legal obligation to comply with a police demand or to answer the detective's questions. Nor would any reasonable person in his shoes have felt psychologically detained at any point before, during or after the interview. (see detention factor grid).

Since the accused was not detained, his right to counsel was not breached. And, even if he was entitled to the right to counsel, he waived that right.

### Right to Silence

The judge found the accused's right to silence under s. 7 of the *Charter* had not been breached whether he was detained or not:

> He never expressed or implied, during the interview, that he did not want to speak. That is because he wanted to talk. He wanted to answer the questions. He wanted to tell his side of the story. He wanted to correct the officer's misapprehensions. He did not want to remain silent, which is why he never asserted that right.

### Voluntariness

The Crown has the burden of proving beyond a reasonable doubt that a person's statement to the police was voluntary. If a statement is not voluntary, it is not admissible as evidence at trial. "The rationale for the confessions rule is that involuntary confessions are more likely to be unreliable," said the judge. "The rule protects the rights of the accused while not unduly limiting society's need to investigate and solve crime." Factors a judge will consider in determining voluntariness include evidence of threats, promises and/or inducements, oppression, the operating mind requirement and police trickery. However, "not every threat, promise or inducement will render a confession involuntary."

## ALLEGED INDUCEMENT

DETECTIVE: But you wanted to be found, just because your conscience, and I appreciate that, and I knew that was gonna happen. I bet on it last night that somebody, whoever it was, is gonna realize the mistake that was made that cost a person his life, and come in here. And we have another guy heading for London for surgery. The guy in the van, okay? He's, it's not life threatening, but he's got to have surgery on his foot and his hand, okay? And I don't know if you know who that guy is?

ACCUSED: He works at Springmount.

DETECTIVE: Yeah. So, and it's probably some place where you stop and get gas once in a while…

ACCUSED: Every morning, yeah.

DETECTIVE: …yeah. Yeah. So we have, it's like a family kind of thing we've got goin' on here. This isn't people from Toronto that were involved in this.

ACCUSED: Yeah.

DETECTIVE: These are all Owen Sound people.

ACCUSED: Mhm.

DETECTIVE: And we've got to make it right, okay? And like I say, that's why I appreciate you coming in.

In this case, the judge found the accused's statement to be voluntary. He had an operating mind and there were no threats or promises made, nor any oppression. As for the detectives references to "conscience" and "family", these were not improper inducements. "These are the types of alleged moral or spiritual inducements that will rarely give rise to a finding of involuntariness," said the judge. "[The detective] had no control over [the accused's] conscience or his sense of family. There was no quid pro quo." As for police trickery, there was none:

> It is one thing for a police officer to exaggerate the strength of the evidence against the accused; it is another thing for the officer to

> "In the absence of a detention, neither s. 10(b) of the Charter, nor the right to silence as guaranteed in s. 7 of the Charter, are engaged."

fabricate out of left-field evidence which simply does not exist.

Here, the most that the Defence can point to are items like [the detective] exaggerating the speeds of the two motor vehicles and referring to a video that, as it turns out, does not exist. These are not the types of police trickery that render an otherwise conversational statement legally inadmissible as involuntary.

The Crown had proven, beyond a reasonable doubt, that the accused's statement was voluntary.

The accused was convicted of dangerous driving while racing causing bodily harm, and one count of dangerous driving while racing causing death.

### Ontario Court of Appeal

The accused appealed his convictions suggesting, among other things, that his statement was inadmissible. The Court of Appeal, however, rejected this submission. First, the trial judge properly applied the law in finding that the accused was not detained when he gave his statement to the police. "In the absence of a detention, neither s. 10(b) of the *Charter*, nor the right to silence as guaranteed in s. 7 of the *Charter*, are engaged," said the Court of Appeal. As for the voluntariness inquiry, the trial judge correctly concluded that the officer did not induce the statement by inviting the accused, as a member of the local community, to do the responsible thing and tell the police what he knew. There was no improper inducement by the police and no oppression. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

**Editor's note:** Additional facts taken from *R. v. O'Leary*, 2015 ONSC 1346.

## CRIMINAL STANDARD OF PROOF TO BE APPLIED TO EVIDENCE AS A WHOLE

**R. v. McKay, 2017 SKCA 4**

Two men entered a convenience store and one of them demanded cigarettes from the clerk, saying "Do you want a knife on your throat?" as he put his hand in his pocket. This man was wearing a light-coloured mask with black detail and a dark jacket with fur trim, a baseball cap, a dark sweatshirt with a Starter logo, a blue shirt with a neon green or yellow stripe, and a pair of dark sweatpants, also emblazoned with a Starter logo on the left leg. The incident was captured on the store's video surveillance system.

About 43 minutes after the robbery two individuals, including the accused, were detained by the police about two blocks from the convenience store. When detained, the accused was wearing a dark sweatshirt and sweatpants, both with a Starter logo, a blue shirt with a neon green or yellow stripe, and a light-coloured baseball cap. The other person was wearing a dark jacket with fur trim, jeans, a Chicago Bulls baseball cap, and a white bandana with black markings. Police took photographs of the two suspects during their detention, but released them because the convenience store surveillance video had not yet been reviewed. Three days later the accused, wearing a white baseball cap and a dark sweatshirt with a Starter logo, and the other person were arrested. The accused was charged with robbery.

### Saskatchewan Provincial Court

The judge compared the similarity in clothing worn by the masked man and the other person as shown in the surveillance video with the clothing worn by the two people stopped by police, as evidenced by the photographs taken at that time of their detention. After considering the clothing piece-by-piece the judge decided that, although similar, he could not conclude the clothing was

"It is well established that it is an error in law to subject individual pieces of evidence to the standard of proof beyond a reasonable doubt. It is also settled that trial judges are obligated to consider the cumulative effect of all relevant evidence as a whole."

one in the same. Although he had "very serious suspicions" that the accused and the masked man at the robbery were the same person, he was not satisfied beyond a reasonable doubt. The accused was acquitted of the robbery charge.

### Saskatchewan Court of Appeal

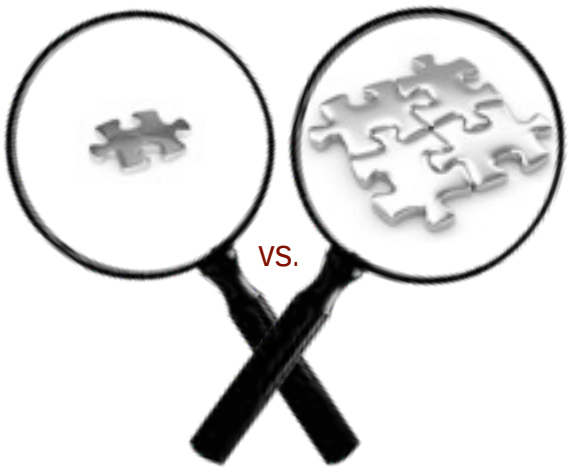
The Crown appealed the accused's acquittal arguing the trial judge erred by applying the criminal standard of proof to individual pieces of evidence and by failing to consider the evidence as a whole.

### Proof Beyond A Reasonable Doubt

"It is well established that it is an error in law to subject individual pieces of evidence to the standard of proof beyond a reasonable doubt," noted Justice Whitmore, speaking for the Court of Appeal. "It is also settled that trial judges are obligated to consider the cumulative effect of all relevant evidence as a whole."

In this case, the trial judge erred by applying the criminal standard of proof to individual pieces of evidence. Rather than applying the criminal standard of proof at the verdict stage, he applied it to the fact-finding stage when he referred to each piece of clothing worn by the masked man in the convenience store surveillance video and compared it to the clothing as seen in the photographs taken by police a short time after the robbery. Justice Whitmore stated:

> The trial judge considered the clothing piece-by-piece and seemingly discarded the evidence once he decided he could not conclusively determine that the pieces of clothing were the same. In doing so, he applied the criminal standard of proof to individual pieces of evidence. He thereby committed an error … [para. 17]




Furthermore, the trial judge failed to weigh all of the evidence as a whole in determining the accused's guilt or innocence:

> The trial judge considered the pieces of evidence separately and determined that nothing definitive could be concluded from each piece. He then failed to consider the evidence together, even though each piece of evidence remained capable of supporting the other items of evidence and strengthening the inference that the [accused] was the masked perpetrator. In taking this approach, the trial judge did not consider the evidence as a whole and thereby potentially discounted evidence with respect to the [accused's] clothing that should have been considered in conjunction with the rest of the evidence in his analysis. [paras. 23]

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

Complete case available at www.canlii.org

### Note-able Quote

*"What lies behind you and what lies before you pales in comparison to what lies within you."* - Ralph Waldo Emerson

# THIRD-PARTY CHARTER BREACHES CONSIDERED IN s. 24(2) ANALYSIS

**R. v. Mauro, 2017 BCCA 45**

The accused was the driver of a car involved in a collision with another vehicle. His car was significantly damaged and a passenger in the other vehicle was injured. Following the collision, the accused telephoned his mother and asked her to drive to the accident scene. Before her arrival, he took a plastic bag from the passenger seat of his vehicle and held it until his mother arrival. He made no enquiries into whether the occupants of the other vehicle were injured. When his mother arrived, she was driving a car registered in the accused's name and he put the plastic bag and its contents into it. A witness thought this behaviour was odd and took a photograph of the accused. When the police arrived on the scene they were advised of what had been seen and their suspicions were aroused. The accused's mother was questioned about the bag and, upon being pressed to do so, she handed it to one of the investigating officers. When the bag was opened, it was found to contain about 1.3 kgs. of cocaine. Both the accused and his mother were arrested.

## British Columbia Provincial Court

The accused challenged the lawfulness of the search and seizure under s. 8 of the *Charter*. The judge found the arresting officer made a warrantless search of the accused's property by asking his mother to produce the bag for inspection, and inn opening it. The arresting officer had bypassed the owner of the bag in order to obtain and examine it, knowing the accused had an interest in it, without a warrant and without cause to conduct a search. The accused's *Charter* rights had been breached by this warrantless search as there were no grounds to conduct a search incidental to a lawful detention or incidental to a lawful arrest at the scene of the accident.

Despite this finding, the judge nevertheless admitted the evidence under s. 24(2) of the *Charter*. In doing so, he only considered the conduct of the police in relation to the accused and not in their dealings with his mother. In the judge's view, it would be improper for the accused to invoke alleged breaches of his mother's *Charter* rights for any purpose including the purpose of seeking to have the cocaine excluded. The accused was convicted of possessing cocaine for the purpose of trafficking.

## British Columbia Court of Appeal

The accused argued, among other grounds, that the trial judge failed to weigh the conduct of the arresting officer in relation to the accused's mother when considering the seriousness of the *Charter* breach. The Crown acknowledged that the accused's mother was unlawfully detained and her ss. 10(a) and 10(b) rights were breached when the arresting officer failed to inform her of the reasons for her detention or about her right to counsel. As well, the Crown acknowledged that the trial judge erred in failing to weigh the breach of the accused's mother's rights in relation to both the assessment of the seriousness of his *Charter* breach and whether the admission of the evidence could bring the administration of justice into disrepute.

Despite this error made by the trial judge, the Court of Appeal nevertheless concluded that the evidence should not have been excluded even when considering the significance of his mother's (a third party) *Charter* breaches. Although the seriousness of the Charter-infringing state conduct was more significant when taking into account the breach of the mother's rights, the findings in relation to the accused's mother's detention did not tip the analysis in favour of exclusion:

- Although she was "psychologically detained", she chose to engage with the officer in conversation on the subject of his inquiries;
- The arresting officer reasonably believed she gave him an untruthful answer to a question

posed in the course of the criminal investigation;

- When pressed her for a truthful answer she handed the bag to him;
- She had ostensible authority to deal with the officer in connection with the bag – an authority confirmed by her advice that the vehicle into which the bag had been placed was "her car" and by handing the bag over;
- In the circumstances, the officer made a reasonable mistake of fact as to who had authority to give him the bag;
- The officer did not intentionally seek to "end run" the accused by dealing with his mother;
- There was no coercion or excessive use of psychological force.

"It should be borne in mind that [the officer] was dealing with [the mother] as a witness to the offence and not as a suspect," said the Court of Appeal. "In short, he did not believe he was detaining her. That, rather than bad faith, caused him to fail to inform her of the reasons for her detention and her right to counsel." The cocaine was admissible and the accused's appeal was dismissed.

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

## TRAFFIC STOP VALID DESPITE DUAL PURPOSE

**R. v. Nguyen, 2017 BCSC 105**

A patrol officer was asked by a drug investigator to stop a specific vehicle and identify its driver. The patrol officer found the vehicle within 30 seconds of the request and followed it. The officer saw the vehicle twice overlap the adjacent lane from the curb lane without signalling. The officer then stopped the vehicle, approached the driver's side window and only advised the accused that he had pulled him over for overlapping into the adjacent lane. He was not told that the officer had been requested by a drug investigator to pull him over to obtain his identity.

On request, the accused provided his driver's license. He was polite, cooperative, appeared sober and said he would be more careful in the future. No ticket was issued. Within two hours of the traffic stop, the officer sent an email to the drug investigator detailing the stop. This information was then used in an Information to Obtain (ITO) a search warrant. The accused was subsequently charged with conspiring to export and conspiracy to produce methamphetamine, and with three firearms/prohibited device offences.

### British Columbia Supreme Court

The officer testified that he knew he needed grounds to stop the vehicle. He said he initiated a stop of the vehicle for a dual purpose:

1. To check the sobriety of the driver. The officer considered he had grounds to stop the vehicle under ss. 151(a) and (c) of BC's *Motor Vehicle Act* (*MVA*), which makes it an offence for the driver of a vehicle to change lanes unsafely and without signalling; and
2. To obtain the identity of the driver pursuant to the request from the drug investigator.

The accused argued that the police breached his *Charter* rights under ss. 9 and 10. In his view, the traffic stop for an *MVA* offence was a ruse and the real reason for the stop was to identity of the driver at the request of the drug investigator. In support of his position, the accused noted the following:

- the request made by the drug investigator to stop the vehicle;
- the tenuous connection between the driving observed and the *MVA* offences cited;
- the fact that no ticket was issued;
- the close relationship between the time of the traffic stop and the subsequent e-mail sent to the drug investigator.

The accused wanted any information or evidence obtained by the officer from the accused during the traffic stop excluded under s. 24(2).

## What the email said (in part)

As the vehicle continued to drive it overlapped into the #2 lane twice, contrary to the Motor Vehicle Act and a traffic stop was conducted to access the sobriety of the driver.

The driver and lone occupant was advised of the reason for the stop, he was polite, apologized and advised it was probably because he was driving a large truck.

The driver when asked produced BCDL which identified him as Quang Dong NGUYEN, DOB 1973-09-18, of Vancouver. Constable KHALIF was satisfied with his identification.

NGUYEN advised the truck belonged to his uncle and that he was in Surrey visiting friends. A shaker cup with brown liquid was noted in the center console along with a coffee cup and NGUYEN advised it contained protein and that he was working out. NGUYEN also stated he was on the way to Church's Chicken prior to the traffic stop.

...

Identification and insurance was returned to NGUYEN he was advised to be more careful when driving, as to not get side swiped.

NGUYEN when asked stated he understood and did not have any questions for police.

- Of note the second time police came back to the vehicle to return BCDL and Insurance NGUYEN had Asian music blaring showing that he was not too concerned with the traffic stop, he also did not appear nervous or paranoid during police interaction with him.

NGUYEN was then allowed to proceed.

## What the ITO said (in part)

As the grey Tundra continued to drive it overlapped into the middle lane twice, contrary to the Motor Vehicle Act and a traffic stop was conducted to assess the sobriety of the driver. The driver and lone occupant was advised of the reason for the stop, he was polite, apologized and advised it was probably because he was driving a large truck. The driver when asked produced a drivers license which identified him as Quang Dong NGUYEN, born September 18, 1973, of Vancouver. Cst. KHALIF was satisfied with his identification. NGUYEN advised the truck belonged to his uncle and that he was in Surrey visiting friends. Identification and insurance was returned to NGUYEN he was advised to be more careful when driving, as to not get side swiped.

The Crown, on the other hand, submitted that the traffic stop was valid because it was based on observed *MVA* offences. As well, while the patrol officer may have had a primary motivation to stop the vehicle to identify its driver, he would not have done so absent observing a driving offence.

### Dual Purpose Stop

In this case, Justice Greyell ruled that the officer acted appropriately when he stopped the accused for driving offences under the *MVA* and thereby obtained his identity:

> In the present case [the officer] testified he knew he needed a reason to initiate a motor vehicle stop other than a request from drug section investigators to stop the vehicle and ascertain the identity of the driver. That is, he was aware he needed to observe some driving or MVA infraction before stopping the vehicle. He testified he observed the driver cross the line demarking the adjacent lane several times. He testified he was also concerned with the sobriety of the driver. [para. 22]

And further:

> When [the officer] approached the driver he explained the reason he had been pulled over. The driver did not voice objection but rather, explained his driving behavior as resulting from his unfamiliarity with driving a large vehicle. While the officer did not issue a ticket, this fact in my view does not mean the traffic stop under the MVA was simply a ruse to detain [the accused] to obtain his identity. [para. 24]

Since the officer had a legitimate traffic related reason to stop the vehicle, the fact he wanted to use the information of the accused's identity for intelligence purposes did not render the stop unlawful. There were no breaches of the accused's ss. 9, 10(a) or 10(b) rights.

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

# BY THE BOOK:

**Driving on Laned Roadway:** ***Motor Vehicle Act***


s. 151 A driver who is driving a vehicle on a laned roadway

(a) must not drive it from one lane to another when a broken line only exists between the lanes, unless the driver has ascertained that movement can be made with safety and will in no way affect the travel of another vehicle,

...

(c) must not drive it from one lane to another without first signalling his or her intention to do so by hand and arm or approved mechanical device ...

# SAFETY QUESTIONS ON INVESTIGATIVE DETENTION PERMISSIBLE

**R. v. Patrick, 2017 BCCA 57**

At 4:20 am the accused was stopped driving an SUV on a dimly lit residential street. The officer recognized the vehicle's licence plate number and was aware that someone was attempting to register it in the name of a person whose identity had been stolen. There were three other large men in the vehicle. The front passenger appeared passed out and was difficult to arouse. A rear seat passenger had two black eyes and a gash on his forehead. After identifying the three passengers, the officer conducted background checks and determined they were known to be involved in the drug trade and violent. The accused had a dated criminal record which the officer did not consider significant. Three other uniformed officers arrived as backup. After being provided a phone by one of the occupants, the officer spoke to a person pretending to be the owner of the vehicle. The officer then returned to the vehicle and told the accused she believed the vehicle had been obtained fraudulently and that everyone in it was being detained for investigative purposes.

The SUV occupants were asked to step out of the vehicle, one at a time. The passengers were cooperative and were patted down. When the accused was asked to get out, he turned to his right with his back to the officer and appeared to be fumbling with something. The officer directed the accused to show his hands but he did not comply. When a second request went ignored police entered the vehicle and yelled at the accused to show his hands. He complied and exited the vehicle. As he did so, the officer noticed an oddly shaped, unnatural bulge in the area of his right shoulder under his jacket. The officer directed the accused to keep his hands where she could see them and asked him, **"Do you have something on you?"**. He said he did, patted his right shoulder and, when asked what he had, said it was a shotgun.

A loaded, sawed-off shotgun was immediately retrieved from under the accused's jacket. He was arrested for carrying a concealed weapon, handcuffed, searched and advised of his right to counsel. He said he wanted to speak to a lawyer but was not provided access to one even though cellphones were available at the scene. The accused was then transported to the police station while the passengers were released at the scene. The accused was given an opportunity to speak with a lawyer, some 40 minutes after the vehicle stop, following his booking procedure and a more thorough search in which a 9 mm bullet was found. The accused was charged with three offences related to the discovery of the sawed-off shotgun.

## British Columbia Supreme Court

At trial, the accused conceded that the investigating officer had the requisite reasonable grounds to detain him at the roadside for investigative purposes and to conduct a protective pat-down search for safety by the time he was asked to step out of the vehicle. The accused, however, contended that the manner of the search - asking him a question instead of patting him down - exceeded the scope of a safety search. As for the implementation of his right to counsel, the accused submitted that he was entitled to speak to a lawyer at the roadside even though privacy could not be assured.

The Crown, on the other hand, argued that the two questions asked by the officer were a legitimate extension of the search power incident to investigative detention because these inquiries were motivated by a safety concern. In the Crown's view, the police are allowed to ask a detainee questions like "Is there something I need to be worried about?" or "Do you have anything on you?" before conducting a protective pat-down search.

The judge found, among other things, that the questions the officer asked the accused at the roadside and the response those questions elicited breached his s. 8 rights. The trial judge excluded all

> "[T]he power to search incident to a lawful investigative detention is not necessarily restricted to a physical pat-down of the person detained."

of the evidence seized at the roadside under s. 24(2) including the shotgun. The accused was acquitted of all charges.

## British Columbia Court of Appeal

The Crown argued that the trial judge erred in law in concluding that the accused's s. 8 *Charter* rights were violated during the roadside stop. In the Crown's opinion, a police officer has the power to ask a detainee if they are in possession of anything that may cause injury before embarking upon or in the course of conducting a permissible pat-down search incident to a lawful investigative detention. And even though the officer's question was framed in general terms, it was intended by the officer and understood by the accused to be a question about whether he was in possession of weapons. The inquiry was confined to the officer's safety-based concerns and was not an attempt on her part to use the search power as a subterfuge for evidence gathering. The Crown sought a new trial on charges related to the discovery of the sawed-off shotgun at the roadside.

The accused, on the other hand, submitted that the police were not entitled in any circumstances to ask questions preliminary to or in the course of a permissible pat-down search. In his view, a search incident to an investigative detention is restricted to physical pat-downs of detained persons. He argued that any questions asked in this context necessarily exceeds the scope of the common law power police officers have to conduct protective searches incident to an investigative detention and result in a violation of s. 8. Furthermore, the accused suggested that the questions asked were impermissibly broad and ran afoul of the strictures governing police powers to conduct investigative detention searches.

## Search Incident to Investigative Detention

Justice Fitch, authoring the decision for the Court of Appeal, in assessing the scope of the power of police to search as an incident to an investigative detention, noted the following:

- The general duty of officers to protect life may, in certain situations, give rise to the power to conduct a pat-down search incident to an investigative detention.
- To lawfully exercise this authority, the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk.
- The decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified upon mere intuition or on the basis of vague or non-existent concerns for safety.
- The search must be conducted in a reasonable manner.
- The power to search incident to an investigative detention is circumscribed by its underlying rationale – the protection of police officers and others from harm that could have been avoided through a minimally intrusive search.
- The power to search incident to an investigative detention is not a license to search for evidence and must be distinguished from the power to search incidental to a lawful arrest.
- The power to conduct a protective search incidental to a lawful investigative detention recognizes the unpredictable, dynamic and sometimes dangerous context in which the police are obliged to discharge their public duties.
- The risks are heightened when the police approach an occupied vehicle in which weapons may be concealed.
- The risks are magnified even further when a roadside stop occurs in darkness and the vehicle is occupied by a group of men, some of whom are known to have connections to the drug trade and a propensity for violence.

"Detainees may also be in possession of concealed sharp objects like knives or uncapped hypodermic needles that could seriously injure an officer conducting a pat-down search if no prior inquiry is made of the detainee about whether they are in possession of any such items."

## Asking Safety Related Questions

The Court of Appeal found the power to conduct a search incident to an investigative detention is not limited to a physical pat-down of a detainee. After reviewing several cases, Justice Fitch stated:

> I take from these authorities the following points. First, the power to search incident to a lawful investigative detention is not necessarily restricted to a physical pat-down of the person detained. Second, whether the search was justified and conducted in a reasonable manner must be assessed in light of the rationale underlying the common law power itself – the prevention of avoidable harm through a brief and minimally intrusive search. Third, the public duties of police officers oblige them to interact with members of the public in potentially dangerous situations; they must be allowed reasonable latitude in determining how to conduct the search in the context of the particular case. ... As this case illustrates, detainees may be in possession of concealed, loaded firearms. Detainees may also be in possession of concealed sharp objects like knives or uncapped hypodermic needles that could seriously injure an officer conducting a pat-down search if no prior inquiry is made of the detainee about whether they are in possession of any such items. [para. 94]

And further:

> As in the case of a search incident to arrest, an officer about to search a person pursuant to an investigative detention could reasonably conclude that it is necessary to make inquiries of that person before proceeding with a pat-down search. To hold otherwise is to accept the proposition that the only recourse the police have in conducting a search pursuant to an investigative detention is to make physical contact with the detainee. The circumstances of this case illustrate the dangers associated with adopting a bright line rule restricting Mann-style searches to physical pat-downs of a detainee.
>
> [The officer] did not know that a loaded firearm was being concealed by the [accused] when she asked her questions. Had [the officer] been constitutionally obliged to make only physical contact with the [accused] without any prior inquiry about what was being concealed, it is conceivable that the search could have caused the loaded, sawed-off shotgun to discharge, imperiling the lives of everyone present. I cannot accept that police officers and other members of the public at the scene of a detention are, in every case and regardless of the circumstances, constitutionally obliged to court this risk.
>
> Requiring as a matter of constitutional principle that police officers be confined to a physical pat-down search of the detainee risks bringing about the very harm the common law power is designed to guard against.
>
> ...
>
> In my view, questioning a detainee about to be frisk searched as to whether they are in possession of anything that might cause the searching officer injury is minimally intrusive search. In some respects, it is less intrusive than a physical pat-down search. I would hold that narrowly tailored questions of this kind motivated solely by safety concerns are permissible. ... [A]sking a detainee whether they are in possession of anything that might cause injury to an officer about to execute a pat-down search constitutes a justifiable exercise of the powers associated with the duty of police officers to preserve the peace, prevent crime and protect life. That the search takes the form of minimally intrusive questioning as opposed to physical contact does not, standing alone, make the manner of the search unreasonable.

"[Q]uestioning a detainee about to be frisk searched as to whether they are in possession of anything that might cause the searching officer injury is minimally intrusive search. In some respects, it is less intrusive than a physical pat-down search. I would hold that narrowly tailored questions of this kind motivated solely by safety concerns are permissible."

> Nothing compels a detainee to answer such a question. It stands to reason, however, that the police will be afforded additional latitude in determining the manner in which the search needs to be conducted if the detainee declines to respond. [references omitted, paras. 98-103]

Whether or not a response to a safety question is admissible as evidence at the trial proper, since s. 10(b) had not been provided, was left for another day.

The Court of Appeal declined to consider if the open-ended question asked in this case by the officer was a justifiable exercise of her common law powers, preferring to leave the resolution of this issue to a new trial. Since the trial judge erred in law in considering whether the accused's s. 8 rights were violated in the course of the roadside stop, a new trial was ordered on the charges.

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

**Editor's note:** There were other issues involved in this case but not discussed in this summary.

### Note-able Quote

*"Every thought-seed sown or allowed to fall into the mind and to take root there, produces its own, blossoming sooner or later into act, and bearing its own fruitage of opportunity and circumstance. Good thoughts bear good fruit, bad thoughts bad fruit."* - James Allen

## CHANGE IN JEOPARDY REQUIRED SECOND CHANCE TO CONSULT COUNSEL

**R. v. Moore, 2016 ONCA 964**

The accused was involved in a road rage incident involving the driver of a van. Following a verbal altercation, the van driver followed the accused's car and cut him off. When the van driver got out of his vehicle and approached the accused, the accused initially reversed and then drove forward striking the van driver. The accused was arrested for dangerous driving and spoke to duty counsel. However, a police officer conducting a formal interview later told the accused that, in addition to the charge of dangerous driving causing bodily harm, he was also going to be charged with assault with a weapon. The accused responded several times "That can't be right" and stated, "It wasn't an assault." The accused asked to contact his own lawyers and the interviewer attempted to contact the individuals named. In the meantime, while waiting for a call back from the accused's counsel, the arresting officer told the interviewer that the accused had agreed to, and did, speak to duty counsel after his arrest. Upon receiving this information, the interviewer concluded that the accused had an opportunity to consult with counsel and continued with an interview. The accused provided a statement and he was charged with serious driving offences.

### Ontario Superior Court of Justice

While the judge acknowledged that the accused would have been entitled to a second opportunity to speak to counsel had there been a change in the jeopardy he was facing, he found that the charge of assault with a weapon did not constitute a change in jeopardy. Both charges arose from the same circumstances, the accused was fully aware of those circumstances, both offences carried the same maximum penalty and dangerous driving was a straight indictable offence while assault with a weapon was hybrid in nature. As well, even if there

was a s. 10(b) *Charter* breach, the judge would have admitted the accused's statement under s. 24(2) anyways. The interviewer acted in good faith, the accused had repeatedly stated that he wanted to tell his story to the police and the outcome would not have been different had the accused been given a further opportunity to speak to his own lawyer. The accused was convicted of dangerous driving causing bodily harm and assault with a weapon (motor vehicle).

## Ontario Court of Appeal

The accused argued, in part, that the trial judge erred in failing to find that the police breached his *Charter* right under s. 10(b) and by not excluding the evidence of his formal police interview under s. 24(2).

## Right to Counsel

The Court of Appeal agreed that the trial judge did err in determining whether the accused's jeopardy had changed by focusing on the fact that the charges arose from the same circumstances, that the offences carried the same maximum penalty and that the new charge was a hybrid offence:

> Considered in the circumstances of this case, the assault with a weapon charge significantly increased the [accused's] alleged moral blameworthiness in relation to the charge in that it required proof that he acted intentionally to harm the van driver, rather than simply that his driving constituted a marked departure from the norm. This, in turn, markedly increased the potential penalty that the [accused] faced. [para. 10]

As for whether the accused, who had received advice from duty counsel not to make a statement, would have continued with the interview in any event was speculative. "The new charge of assault with a weapon was significantly different and carried more serious potential consequences than the original charge of dangerous driving causing bodily harm," said the Court of Appeal. "Moreover, it is apparent from the accused's reaction to being informed of the new charge that he believed there was something amiss." Thus, the police breached the accused's s. 10(b) *Charter* rights by failing to afford him a second opportunity to speak to counsel.


As for whether the statement was admissible under s. 24(2), the Court of Appeal added this:

> In our view, the admission of the evidence would have a negative impact on society's confidence in the justice system. We say this with specific regard to the three Grant factors. First, in terms of the seriousness of the Charter-infringing state conduct, depriving the [accused] of access to counsel in the face of his increased jeopardy was serious. Second, this deprivation had a serious impact on the protected interests of the [accused], namely the [accused's] right to make a meaningful and informed choice of whether to speak to the police. Third, with respect to society's interest in adjudicating the case on its merits, declining to admit the evidence does not undermine the ability of the prosecution to proceed. .... [T]here is no absolute rule of exclusion for Charter-infringing statements. However, as a matter of practice, courts have tended to exclude such statements on the ground that admission on balance would bring the administration of justice into disrepute. For the reasons that we have explained we consider that to be the case here. [para. 14]

The accused's appeal was allowed, his convictions are set aside and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

# POLICE LEADERSHIP CONFERENCE ★
## APRIL 9 - 11, 2017

British Columbia Association of Chiefs of Police / Canadian Association of Chiefs of Police

## LEADERSHIP THROUGH CRISIS
### The Westin Bayshore | Vancouver, BC

## CONFERENCE AND THEME

The British Columbia Association of Chiefs of Police in partnership with the Canadian Association of Chiefs of Police are hosting the Police Leadership Conference in Vancouver, British Columbia. This is Canada's largest police leadership conference. This Police Leadership Conference will provide an opportunity for delegates to hear leadership topics discussed by world-renowned speakers.

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**Call:** 1-800-WESTIN-1 or 604-682-3377
**Email:** bayshore.reservations@westin.com
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$450 + GST ($472.50) Prior to January 1, 2017

$475 + GST ($498.75) January 1, 2017 – Conference start

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## PARKING METER NOT A PLACE FOR PURPOSE OF POSSESSING BREAK-IN INSTRUMENTS

**R. v. Reid, 2017 BCCA 53**

The accused was seen trying to pull coins from a parking meter. He was using a tool – a wire trimmer and a straw with a magnet in it. About a week later he was seen using a flattened piece of metal again trying to get money from two parking meters. When arrested, he had in his possession a flat metal rod and a white straw about three inches in length.

### British Columbia Provincial Court

For the first offence, the accused pled guilty to s. 351(1) of the *Criminal Code* – possessing a break-in instrument – which has a maximum sentence of 10 years. For the second offences he pled guilty to s. 352 – possessing instruments for breaking into coin operated devices – which has a maximum sentence of two years.

A few years later, immigration authorities issued a removal order against the accused. Although he moved to Canada with his family when he was five years old and became a permanent resident, he never obtained his Canadian citizenship. Under s. 36(1)(a) of the *Immigration and Refugee Protection Act* (*IRPA*), permanent residents are inadmissible on grounds of "serious criminality". A conviction under s. 351 of the *Criminal Code* with its 10 year maximum sentence amounts to "serious criminality" and attracts the operation of s. 36(1) of *IRPA* while s. 352 with its maximum sentence of two years does not. He was subsequently detained and advised he would be removed from Canada.

### British Columbia Court of Appeal

The accused appealed from his conviction under s. 351(1) of the *Criminal Code* because of the application of s. 36(1) of *IRPA* to his status in Canada. The accused argued that the differences in the legal elements of the *Criminal Code* provisions he pled guilty to were never addressed and he was never told of the adverse immigration consequences flowing from a conviction under s. 351(1). In his view, he was convicted under the wrong section of the *Criminal Code*.

## BY THE BOOK:

**Serious Criminality:** ***IRPA***


s. 36 (1) A permanent resident ... is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

...

### Meaning of "Place"

Under s. 351(1) of the *Criminal Code*, the possession of the instrument must be suitable for the purpose of breaking into any place, motor vehicle, vault or safe. "Place" is defined as meaning: a dwelling-house; a building or structure or any part thereof, other than a dwelling-house; a railway vehicle, a vessel, an aircraft or a trailer; or a pen or an enclosure in which fur-bearing animals are kept in captivity for breeding or commercial purposes.

The Crown conceded that the accused could not in law have been properly convicted under s. 351(1) on the facts and that a "parking meter" was not a "place, motor vehicle, vault or safe", but instead was a "coin-operated" device within the meaning of s. 352.

Justice Kirkpatrick, speaking for the Court of Appeal, agreed that a parking meter was not a "place". "Having regard to the definition, it is in my opinion self-evident that 'place' does not include a

parking meter," she said. "I agree with counsel that 'structure' has historically been interpreted to mean something built up from component parts, permanent, and 'of substantial size'."

As a result, the Court of Appeal allowed the accused's appeal and directed a verdict of acquittal.

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

## NO NEED TO RESPOND UNLESS MISUNDERSTANDING OF s. 10(b) RIGHTS COMMUNICATED

**R. v. Dunford, 2017 SKCA 1**

The accused was arrested by police after he drove into and killed a flag person working in a construction zone. After the collision occurred, the accused called 911 for assistance. When the police attended the scene, the accused was distraught but was able to produce his driver's licence and answer questions without difficulty. No signs of alcohol or other impairment were observed. He was provided with information about his right to counsel and he said that he understood. When asked if he wished to call a lawyer, the accused said no. He was also given the police caution and said that he understood this warning.

The accused was transported to the police station where he was interviewed. At the beginning of the interview, the arresting officer confirmed the accused's right to counsel had been provided to him and asked if he wanted to speak with a lawyer. The officer then asked him if he wanted to talk to Legal Aid. The accused indicated that he did not mind going without a lawyer and said he just wanted to "get it done". During the interview the accused was calm and collected, nothing seemed out of the ordinary and he did not ask for clarification about anything. He did provide a statement that he wasn't paying attention while driving. At the end of the interview, the accused raised the issue about what would happen to him. In response, the officer identified what in his view were potential penalties that the accused might face. The accused then expressed an interest in Legal Aid. A phone was provided, he spoke to duty counsel and refused to give any further statement. He was charged with criminal negligence causing death and dangerous driving causing death.

| Conversation Between Accused & Officer Before Interview Started | |
|---|---|
| Officer: | … You've been arrested and you've been read your rights uhm, did you want to contact a lawyer? |
| Accused: | I don't know one, I need legal aid so … |
| Officer: | You don't know if you need legal aid? |
| Accused: | Well, I don't know of a lawyer and I can't afford one so I think I need legal aid. |
| Officer: | Did you want to talk to legal aid, it's completely up to you. |
| Accused: | That's fine as I don't mind going without. |
| Officer: | Going without? |
| Accused: | Yeah, yeah. Just get it done. |
| Officer: | Okay. |
| Accused: | I know I was in the wrong. |
| Officer: | Kay. Well if you change your mind you can let me know. Uhm and I read you what was called a police caution. So basically anything you tell me can be used as evidence. Okay, do you remember me telling you that? |
| Accused: | Yes sir. |

### Saskatchewan Court of Queens Bench

The accused applied to have his statement excluded as evidence because he argued his s. 10(b) *Charter* rights had been breached. He submitted that the officer ought to have recognized he was distraught and that he did not understand his right to counsel. He also contended that he was not a Canadian citizen and was unfamiliar with the Canadian legal system. As well, he alleged that the

"The police do not have an obligation to respond to a detainee's misunderstanding of his rights or how to implement them if that misunderstanding is not communicated to the police or if there are no other indicators suggestive of a lack of comprehension. These indicators viewed objectively must signal confusion or misunderstanding."

combination of his initial discussion with the officer about not qualifying for Legal Aid, his subsequent talk with a Legal Aid lawyer and his silence with respect to any statement thereafter indicated he wanted to speak with a lawyer from the outset.

The judge found the accused's statement was voluntary and that he understood the right to counsel. In the judge's view, there was nothing in the circumstances that would alert the officer that further information and explanation of those rights was required. The judge also found that any lack of understanding by the accused of his rights was never conveyed by him to the officer. The accused's s. 10(b) rights had not been breached. He was convicted of dangerous driving causing death, sentenced to two years less a day and given a three year driving prohibition.

**Saskatchewan Court of Appeal**

The accused contended, among other things, that the trial judge erred in concluding that his s. 10(b) *Charter* rights had not been infringed. He argued that the officer who read him his rights and dealt with him during the interview ought to have recognized that he did not understand his right to counsel and warnings.

"[T]he fact that [the accused] was willing to speak to a lawyer after he became aware of possible penalties does not compel a conclusion that he did not understand he could have the assistance of a lawyer either at the scene of the accident or at the beginning of the interview."

Justice Ottenbreit, speaking for the Court of Appeal, found the trial judge made no such error:

> The police do not have an obligation to respond to a detainee's misunderstanding of his rights or how to implement them if that misunderstanding is not communicated to the police or if there are no other indicators suggestive of a lack of comprehension. These indicators viewed objectively must signal confusion or misunderstanding. [references omitted, para. 27]

In this case, there was nothing in the circumstances that should have alerted the officer that the accused did not understand his right to counsel. At both the scene of the accident and at the police station, the accused indicated he did not want a lawyer. He understood the information provided and declined access to counsel. "Moreover, the fact that [the accused] was willing to speak to a lawyer after he became aware of possible penalties does not compel a conclusion that he did not understand he could have the assistance of a lawyer either at the scene of the accident or at the beginning of the interview," said Justice Ottenbreit. "It is entirely understandable that he decided to seek legal advice only after learning of possible sanctions." There was no indication that the accused was uncertain about his right to counsel or anything that would require the officer to provide a further explanation to the accused about his rights. No *Charter* breach under s. 10(b) had been proven. The accused's appeal was dismissed.

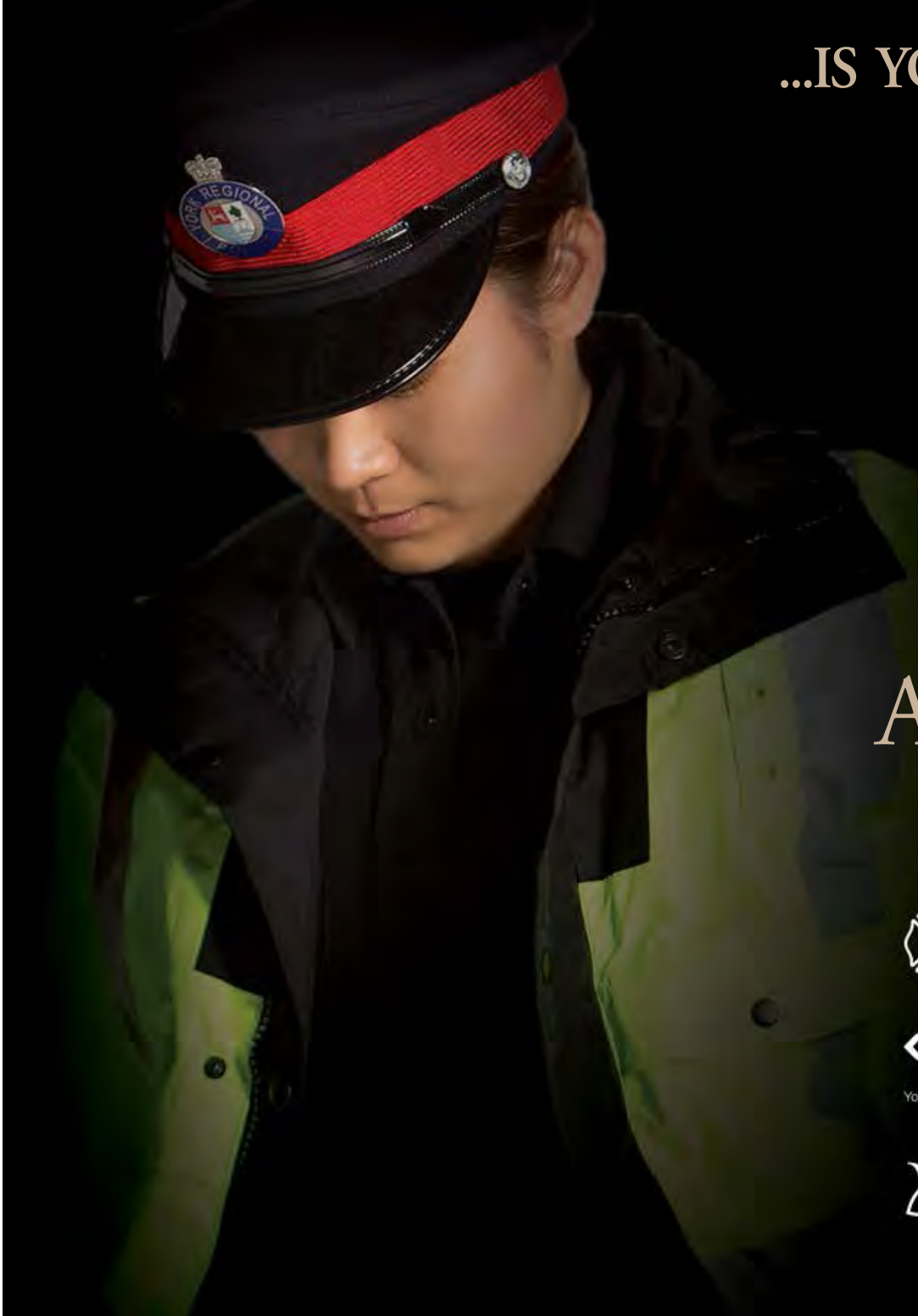
Complete case available at www.canlii.org

**Note-able Quote**

*"Whether you think you can or you think you can't, you're right."* - Henry Ford

SOMETIMES THE LIFE IN NEED OF SAVING

...IS YOUR OWN

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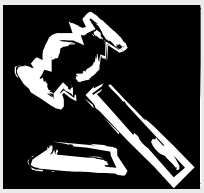
# LEGALLY SPEAKING:

## Assessing Informer Information



"When ... the information to support the warrant comes almost entirely from a CI, the totality of the circumstances inquiry focuses on three questions. Does the material before the reviewing judge demonstrate that the CI's information was compelling? Does the material demonstrate that the CI was credible? And does the material demonstrate that the CI's information was corroborated by a reliable independent source?

The first question addresses the quality of the CI's information. For example, did he purport to have first-hand knowledge of events or was he reporting what he had been told by others? The second question examines the CI's credibility. For example, does he have a long record which includes crimes of dishonesty, or does he have a motive to falsely implicate the target of the search? The third question looks to the existence and quality of information independent of the CI that offers some assurance that the CI provided accurate information. The answers to each of the questions are considered as a whole in determining whether the warrant was properly issued in the totality of the circumstances. For example, particularly strong corroboration may overcome apparent weaknesses in the CI's credibility: ." - Ontario Court of Appeal in *R. v. Shivrattan*, 2017 ONCA 23 at para. 27-28, references omitted.

### Note-able Quote

*"Don't mistake activity with achievement."* - John Wooden

# FLEEING ACCIDENT SCENE TO AVOID BEING FOUND IN STOLEN AUTO MEETS MENS REA TEST FOR HIT & RUN

**R. v. Seipp, 2017 BCCA 54**

After someone stole a car and other items during a break-in, the resident decided to drive around the neighbourhood in search of the stolen car. The victim saw the accused driving the car, caught up to it and tried to overtake it in a roundabout. The two vehicles collided and the accused fled the scene without providing either his name or address. The accused was charged with several offences related to the break-in, and hit and run for failing to stop and provide his name and address at the scene of an accident as required by s. 252 of the *Criminal Code*.

## British Columbia Provincial Court

During final submissions at the accused's trial, his lawyer acknowledged the accused's guilt on the hit and run charge and he was convicted. He was also convicted of possessing a stolen vehicle, fraud and using a stolen debit card.

## British Columbia Court of Appeal

The accused appealed his hit and run conviction on the basis that his lawyer was ineffective because an essential element of the hit and run charge under s. 252(1)(b) of the *Criminal Code* required proof of **"intent to escape criminal or civil liability."** In his view, his lawyer misapprehended the essential elements of the offence which deprived him of an opportunity to have the offence tried on its merits. Had his lawyer understood the elements and went to trial, there was a reasonable probability he would have been acquitted. The Crown, to the contrary, submitted that the accused was guilty of the offence and therefore he suffered no prejudice.

# BY THE BOOK:

**Failure to Stop at Scene of Accident:** *CCC*


s. 252 (1) Every person commits an offence who has the care, charge or control of a vehicle, vessel or aircraft that is involved in an accident with

(a) another person,

(b) a vehicle, vessel or aircraft, or

(c) in the case of a vehicle, cattle in the charge of another person,

and with intent to escape civil or criminal liability fails to stop the vehicle, vessel or, if possible, the aircraft, give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance.

...

(2) In proceedings under subsection (1), evidence that an accused failed to stop his vehicle, vessel or, where possible, his aircraft, as the case may be, offer assistance where any person has been injured or appears to require assistance and give his name and address is, in the absence of evidence to the contrary, proof of an intent to escape civil or criminal liability.

## s. 252(1)(b) of the *Criminal Code*


The accused argued that the proper interpretation of "escape civil or criminal liability" under s. 252(1) is that the intent must relate to avoiding liability in connection with the **cause** of an accident rather than any liability arising from the general operation of a motor vehicle. In this case, the accused testified that he fled the scene because he did not want to be found with a stolen vehicle. Since the trial judge concluded that his driving was not the cause of the accident, he did not leave to escape civil or criminal liability in relation it.

The Crown submitted that the intention to escape civil or criminal liability must be related to or substantially connected to the accident. In the Crown's view, the accused fled the scene to evade liability for driving a stolen car at the time of the accident. Although his manner of driving did not cause the accident, such that he could be held liable for the passenger's injuries, his use of the stolen car was a factual cause of the accident. This, in the Crown's opinion, was a sufficient link between the liability he sought to avoid and the collision to establish the necessary *mens rea*.

In analyzing s. 252, Justice Bennett summarized the law as follows:

> Section 252(2) requires a driver who is involved in an accident to: (i) stop, (ii) give their name and address, and (iii) offer assistance if a person appears injured or in need of assistance. A driver is required to complete all three steps. Proof of failure to perform any one of these three acts will trigger a rebuttable presumption with respect to the driver's intent. The evidence need only raise a reasonable doubt that the driver did not have the requisite intent.
>
> Therefore, failure to perform any of the three requirements is sufficient to form the actus reus of the offence and trigger the presumption of intent to escape criminal or civil liability. The mens rea may be proved by the presumption of intent in the absence of evidence to the contrary.
>
> There are two approaches in the jurisprudence for what is meant by "intent to escape civil or criminal liability" and what amounts to "evidence to the contrary". One approach limits the intent required to the intent to avoid the legal consequences of the accident itself; the other includes the course of conduct leading up to the accident. Neither approach includes the evasion of criminal conduct at large as meeting the intent requirement. [references omitted, paras. 30-32]

"It seems to me that ... being involved in an accident and fleeing to evade liability for driving a stolen motor vehicle, like driving while one's licence is suspended, or driving while impaired, is conduct and intent that is intended to be included in this legislation."

In deciding the meaning of the phrase **"with intent to escape civil or criminal liability"**, the Court of Appeal found it included the course of conduct leading up to the accident:

> The object of the Code offence is to provide a penal incentive for a driver who is involved in an accident, regardless of whether they are at fault, to remain at the scene, provide their name and address, and offer assistance if another person appears to be injured or in need of assistance. The liability a driver seeks to evade is not narrowly construed as solely arising from the consequences of the accident itself, but must also encompass offences connected to the driving, such as impaired driving, driving while suspended, criminal negligence, and dangerous driving.

Flight to avoid criminal liability for driving a vehicle knowing it was stolen also fits into the continuum of liability connected to the accident:

> The legislation was clearly intended to provide penal consequences for those who avoid an investigation for impaired driving by fleeing the scene. It also intended to provide penal consequences to persons who remain at the scene but do not offer to assist injured persons, and to provide penal consequences for those who attempt to hide their identities by failing to leave a name and address. A driver who commits these acts to escape civil or criminal liability arising from their driving has the requisite mens rea. The liability contemplated in the section cannot be solely in relation to the cause of the accident, as the driver may not be at fault, but the driver is still required to comply with the legislation. I would adopt the test ... that "civil or criminal liability should be broadly interpreted to include any liability, civil or criminal, which might properly arise from the operation of the motor vehicle by the defendant at the time the accident takes

place" (emphasis added). [reference omitted, para. 46]

Here, the accused was charged with the *actus reus* of failing to give his name and address. "[He] did not want to be identified as the driver of the car, as he was knowingly in possession of a stolen automobile, and was driving it at the time he was involved in the accident," said Justice Bennett. "His flight from the scene was to avoid criminal liability in connection with a vehicle he was driving at the time of the accident." She continued:

> It seems to me that ... being involved in an accident and fleeing to evade liability for driving a stolen motor vehicle, like driving while one's licence is suspended, or driving while impaired, is conduct and intent that is intended to be included in this legislation. Being the driver of a stolen car when involved in an accident, and fleeing to avoid detection as the driver, is, in my view, sufficiently related to the event to be captured by the intent of the legislation. Fleeing to avoid arrest as the driver of a stolen vehicle after an accident is therefore not evidence to the contrary, but falls within the criminal liability contemplated by the section. [para. 49]

So, even if the accused's explanation that he fled the scene to avoid being found in a stolen vehicle was accepted, the presumption of intent would not have been rebutted. Therefore, his lawyer did not err in admitting the elements of the s. 252 *Criminal Code* offence. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.onc.ca

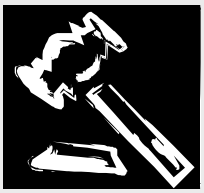
## INTENDED RECIPIENT OF ELECTRONIC MESSAGE DOES NOT INTERCEPT IT

**R. v. Mills, 2017 NLCA 12**

A police officer created a Hotmail account for a fictitious 14-year-old girl named "Leann", together with a Facebook page and profile containing background information. This included information that she was a high school student along with a photo from the internet. About three weeks later, the officer received a Facebook message from the accused (a 32-year-old man). Over a period of approximately three months, there was an exchange of emails. The officer used a public and commonly used screen shot program called "Snagit" to capture all the information on his computer screen during each communication with

## LEGALLY SPEAKING:

### Night Time Warrant Execution



"Unlike warrants issued under the Criminal Code, there is no statutory presumption that warrants issued under s. 11 of the CDSA are to be executed before 9:00 p.m. unless night time execution is justified under s. 488 of the Criminal Code. That does not mean that the time at which a warrant is executed may not factor into the reasonableness of the manner in which the warrant is executed. It means only that when considering the reasonableness of the manner in which a warrant issued under s. 11 of the CDSA was executed, the Criminal Code distinction between warrants executed before and after 9:00 p.m. has no application." - Ontario Court of Appeal in *R. v. Shivrattan*, 2017 ONCA 23 at para. 61.

the accused. A meeting at a park was arranged and, when the accused showed up, he was arrested and subsequently charged with communicating via a computer system for the purposes of committing sexual offences.

## Newfoundland Provincial Court

The police were able to identify the documents produced by the "Snagit" screen captures and testified that they were accurate. The judge, however, went on to conclude that the accused's s. 8 *Charter* right to be secure against unreasonable search or seizure was breached because the police failed to meet the requirements under Part VI of the *Criminal Code* to obtain authorizations to intercept the electronic communications. In the judge's view, the police were required to obtain an authorization under s. 184.2 of the *Criminal Code*. The judge, however, nevertheless admitted the evidence under s. 24(2).

The accused was convicted of communicating by means of a computer with a person believed to be under the age of sixteen years for a sexual purpose. He was sentenced to 14 months imprisonment, which was reduced by two months to compensate for the *Charter* violation. He was also sentenced to one year probation and ordered to provide a sample of his DNA.

## Newfoundland Court of Appeal

The Crown appealed the accused's sentence, submitting that the trial judge erred in finding that Part VI of the *Criminal Code* applied in this case and therefore he improperly found a *Charter* breach upon which he reduced the sentence. In the Crown's submission, Part VI deals with the "Invasion of Privacy", which did not apply in this case.

## Part VI Application

Justice Welsh, delivering the Court of Appeal's opinion, noted that ss. 184 and 184.2 only apply where there is an "intercept". In this case, she concluded there was no intercept:

> The definition of "Intercept" in section 183 clarifies the various ways in which an interception may be made. It does not provide a dictionary-style definition of the word. Section 183 states:
>
> > "Intercept" includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof;
>
> That language does not alter the ordinary meaning of an interception which requires the involvement of a third party. Where there is direct communication between two people, the intended recipient cannot be characterized as having "intercepted" a communication meant for that person.
>
> Further, the fact, unknown to the sender, that the recipient is a police officer cannot change the nature of the communication or transform a receipt by the intended recipient into an interception. Viewed from another perspective, if "Leann" had, in fact, been a fourteen year old girl, it could not be said that her receipt of the communications from [the accused] constituted an interception.
>
> Electronic communications in the modern world involve a degree of anonymity and easily permit either the sender or recipient of a message to give misleading or false information. In this case, the recipient purported to be a fourteen year old girl while the sender purported to be a twenty-three year old male. Neither was true. [paras. 12-15]

"Where there is direct communication between two people, the intended recipient cannot be characterized as having "intercepted" a communication meant for that person."

Since there was no intercept, Part VI of the *Criminal Code* did not apply and no authorization under s. 184.2 was required.

### Use of "Snagit"

The use of the Snagit computer software did not alter the conclusion that the officer did not intercept the accused's communications. The Snagit program did not affect the manner in which the his communications came into the officer's possession and the program was simply a means to retain a record of the communications. "Making a copy of a received message, either on paper or electronically, could not, on that basis, be characterized as an interception," said Justice Welsh. "Making a record of a received electronic communication using a software program for that purpose does not constitute an interception of the communication."

### Other s. 8 *Charter* Breaches?

In this case, the Court of Appeal also found there was no alternative basis for finding a s. 8 *Charter* breach because the accused did not have a reasonable expectation of privacy in the messages he sent to "Leann":

> ... [The accused] was using electronic social media to communicate and share information with a person he did not know and whose identity he could not confirm. On an objective analysis, as the sender of such communications, [the accused] must have known that he lost control over any expectation of confidentiality that he appears to have hoped would be exercised by the recipient of the messages. He took a risk when he voluntarily communicated with someone he did not know, a person he was not in a position to trust. Any subjective expectation of privacy [the accused] may have had was not objectively reasonable. In the absence of a reasonable expectation of privacy, section 8 of the Charter was not engaged.
>
> I hasten to add that the nature of communications between [the accused] and "Leann", which took place using social media such as Facebook, must be distinguished from communications in which there would, in fact, be a reasonable expectation of privacy. For example, privacy could be expected if the recipient of a communication is the sender's bank. Such a communication is sent for a particular purpose, using a means of communication that is represented to be secure, that clearly engages objectively reasonable privacy interests. [paras. 23-24]

"Making a copy of a received message, either on paper or electronically, could not, on that basis, be characterized as an interception. ... Making a record of a received electronic communication using a software program for that purpose does not constitute an interception of the communication."

Without a reasonable expectation of privacy, there could be no s. 8 *Charter* infringement.

The Crown's appeal was allowed, the two month sentence reduction was set aside and the sentence of 14 months imprisonment was affirmed. However, the additional two months imprisonment was stayed as requested by Crown.

Complete case available at www.canlii.org

## POLICE ENTITLED TO ACCEPT DISPATCH INFO EVEN WITHOT INDEPENDENT CONFIRMATION

**R. v. Carelse-Brown, 2016 ONCA 943**

Shortly before 7:00 pm, two police officers responded to a 911 dispatch call. The callers reported "a person with a gun" following an encounter they had with two occupants of a vehicle – whom they saw with handguns – at a Tim Hortons coffee shop. Dispatch indicated that the suspects – both light-skinned black males, under 24 years of age, wearing dark baseball caps – had a firearm and were in a silver four-door Dodge sedan bearing licence plate BMMH719. The location that the vehicle was travelling was provided and a


subsequent licence plate query determined it was registered to a four-door silver Dodge AXT (believed to be a Dodge Avenger) belonging to a rental company, but it was not flagged as a crime vehicle. The officers travelled to the area where the vehicle was reported to be in an attempt to intercept it. As they drove, updated locations for the Dodge were given because the 911 callers were following it. At one point, the 911 callers reported that the suspect vehicle was pulling into an underground parking area. Shortly after that, the callers indicated that they could see police officers and said they would wait at the intersection for the them.

The officers then saw a silver Dodge sedan driving with a matching licence plate. The police followed the Dodge, estimating its speed to be about 60 kmh in a 40 kmh zone, and then pulled it over. The officers initiated a "high risk takedown" – an arrest at gunpoint – and ordered the driver (a young black male with a medium to light complexion) to exit with his hands up and he was taken into custody. The accused (a black male, with a light to medium complexion, in his twenties) was the front seat passenger and was ordered out with his hands up. He was told to lie face down on the ground with his hands to his sides. He was handcuffed and told he was under arrest for possessing a firearm. He was searched and police found two baggies of marijuana weighing 0.83 grams in his coin pocket. They also found more than one thousand dollars in cash, folded into bundles, in this front right pocket, and more cash and a cellphone in his left front pocket. The accused was then arrested for possessing marijuana and read his rights to counsel. A police dog searched the area but did not find any firearms. The accused was taken to the police station where he was strip searched for safety reasons since he was to be held with other prisoners pending a show cause hearing. During this search, the police discovered 25.3 grams of cocaine in his underwear.

## Ontario Superior Court of Justice

The arresting officer – a 22 year veteran – testified that speaking to the 911 callers before intercepting the suspect vehicle was not an option because the two occupants of the car were reportedly in possession of firearms. As well, he said that he had responded to well over 100 gun calls and had been shot at twice. He said he formed the intention to arrest the occupants of the Dodge before he made observations about them. He further testified that he did not detain the accused to further his investigation but, rather, placed him under arrest knowing that allowed him to search the accused's pockets. He also stated that he understood the difference between investigative detention and arrest and that an arrest would be subject to greater judicial scrutiny. As for his search, the officer said he was looking for "anything in relation to firearms", including ammunition, a magazine or a handgun. In his view, a pat-down search would have been insufficient because the 911 callers had mentioned that the Dodge sedan had been seen to pull into an underground parking garage and that the callers had lost sight of the vehicle, so the occupants of the Dodge could have discarded firearms while in the parking garage.

The accused argued that while the police had grounds for an investigative detention, they went too far when they arrested him and searched his pockets. He asserted that the police were only entitled to conduct a pat-down search for safety purposes and were not entitled to conduct the more intrusive search which led to finding the marijuana and the money, which then led to the arrest on drug charges and to the strip search and discovery of cocaine in the accused's underwear. In the accused's opinion, he was arbitrarily detained and unreasonably searched, thus the evidence should be excluded under s. 24(2) for breaches of ss. 8 and 9 of the *Charter*.

The judge rejected the accused's assertion, instead finding the police had sufficient objective reasonable and probable grounds for the arrest. The judge ruled that s. 495(1)(a) of the *Criminal*

*Code* provided the police with the power of arrest. Not only did the arresting officer personally believe he had reasonable and probable grounds to make the arrest (as conceded by the accused) but his grounds were also objectively established. The judge noted that a police officer is entitled to take into account information that they receive from a police dispatcher, even if they cannot independently confirm it. And even though the officers could have conducted further investigation, it did not mean that they were required to do more before arresting the accused in a situation that required them to act. Since there were no *Charter* breaches, there was no basis upon which to exclude the evidence and, even if there was a breach, the judge would have admitted the evidence under s. 24(2). The accused was convicted of possessing cocaine for the purpose of trafficking and was sentenced to 21 months' imprisonment and three years' probation.

## Ontario Court of Appeal

The accused argued that the trial judge erred in concluding that the arresting officer objectively had reasonable and probable grounds to make the arrest. Without the required reasonable grounds, the police would be limited to a pat-down search incident to an investigative detention and the evidence should be excluded under s. 24(2).

Justice Gillese, speaking for the Court of Appeal, refused to interfere with the trial judge's determination that the police objectively had reasonable and probable grounds to arrest the accused for unlawful possession of a firearm. "For an arrest under s. 495(1)(a) of the Criminal Code to be lawful: (1) the arresting officer must personally believe that he or she has reasonable and probable grounds to make the arrest; and (2) it must be objectively established that those reasonable and probable grounds existed," said Justice Gillese. In this case, the following was sufficient to objectively provide reasonable and probable grounds such that a reasonable person, standing in the arresting officer's shoes, would have believed that reasonable and probable grounds existed to make the arrest:

- The 911 callers had recently encountered the occupants of the suspect vehicle at a nearby Tim Hortons coffee shop and dispatch reported that both of the occupants of the suspect vehicle had handguns;
- The 911 callers had identified themselves by giving their first names to the police dispatcher;
- The 911 callers gave specific and detailed information about the vehicle and its occupants, and behaved in an open and helpful way, actively assisting the police in locating the suspect vehicle, by following it and reporting on its movements;
- The 911 callers offered to stop and meet the police at a specified intersection;
- When police first encountered the suspect vehicle, it was being driven at a high rate of speed – 60 km/h on a residential street with a speed limit of 40 km/h;
- The colour, make and type of the suspect vehicle; the vehicle's licence plate; the vehicle's location as it moved about; and the number and description of its occupants had been confirmed.
- Everything that the officers saw was consistent with the information that the 911 callers had given and there was no reason to discount that information. Based on this information, the officers had every reason to believe that the occupants of the suspect vehicle were in possession of handguns and no reason to doubt the bona fides of the callers.

"[F]or an arrest under s. 495(1)(a) of the Criminal Code to be lawful: (1) the arresting officer must personally believe that he or she has reasonable and probable grounds to make the arrest; and (2) it must be objectively established that those reasonable and probable grounds existed."

The Court of Appeal opined that not only were the police justified in acting on the information they had, they would have been derelict in their duty had they not acted on it. Nor were the police limited to an investigative detention because they had not taken steps to confirm the 911 callers' information:

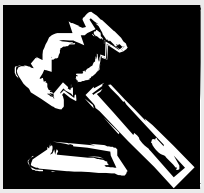
> This was a dynamic, dangerous and rapidly changing situation involving a serious threat to public and officer safety. Only about ten minutes elapsed from the time that the 911 call was first made, in which the callers alerted the police to their encounter with two men bearing handguns, to the time of the [accused's] arrest – an arrest that took place next to the car in which he had been a passenger and which had been speeding through a residential area in Toronto. ... [The arresting officer] made his decision to arrest after taking into account all of the available information. To this I would add that the court has not been pointed to any information which [the arresting officer] is said to have disregarded and I see none on my review of the record. [para. 48]

The police are not required to interview a complainant in every case of a 911 call nor are they obligated to undertake additional investigative steps to test a 911 report of ongoing crime before they are entitled to take action in reliance on that call. In this case, "both occupants of a speeding car had been very recently seen with handguns and there was every reason to believe, at the time the car was stopped, that both men in the car had handguns." The question to ask here is not whether the arresting officer did not simply conduct an investigative detention, but instead whether the arrest was lawful. The arresting officer's decision to make the "arrest was a good-faith choice, objectively supported by the facts available to him at the time of arrest." The police had reasonable and probable grounds to stop a speeding car and arrest its two occupants based on the 911 gun call and were not limited to an investigative detention. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

# LEGALLY SPEAKING:

## Fentanyl



"The classic meaning of "perdition" is a state of eternal punishment and damnation into which a sinful and unpenitent person passes, after death. The modern usage is more secular in nature, and suggests perdition is a place of utter disaster, ruin, or destruction. Where the illicit use of fentanyl is concerned, perdition is precisely the correct term for the ultimate destination of purveyors and users of this substance." - Saskatchewan Court of Queen's Bench in *R. v. Fyfe*, 2017 SKQB 23 at paras. 1-2.

## CANADA's TOP OFFENCES IN ADULT CRIMINAL COURT

In a recently released report, Statistics Canada identified the top offences that were concluded in adult criminal court. In 2014/2015 there were **328, 028** cases completed for a total of **992,635** charges under the *Criminal Code* and other federal statutes. The five types of offences outlines below accounted for nearly half (48%) of all completed cases.

**CASES COMPLETED & OUTCOME**

| Type | Number | Guilty | Stay/ Withdrawn | Acquitted |
|---|---|---|---|---|
| Theft | 34,001 | 61% | 37% | 1% |
| Impaired driving | 33,121 | 79% | 17% | 4% |
| Fail to comply with court order | 31,544 | 68% | 29% | 2% |
| Common assault | 29,867 | 47% | 46% | 6% |
| Breach of probation | 29,626 | 80% | 18% | 2% |

Source: Statistics Canada, 2016, "Adult criminal court statistics in Canada, 2014/2015", Catalogue no. 85-002-X, released on February 21, 2017.

## ON-DUTY DEATHS UNCHANGED

The number of on-duty peace officer deaths in Canada for 2016 remained the same as the previous year. In 2016 three peace officers lost their lives on the job as reported by the Officer Down Memorial Page.

Since 2007, 15 officers have lost their lives to automobile accidents. Circumstances involving vehicles, including automobile accidents (15), vehicular assault (4) and being struck by a vehicle (2), posed the greatest risk to officers over the last decade. These deaths account for half (50%) of all on-duty deaths, which is much higher than the next leading cause of gunfire (26%) in the same 10 year period. On average, four officer have lost their lives every year during the last decade, while 2010 had the most deaths at seven during that same period.

Source: http://canada.odmp.org [accessed February 25, 2017]

## 2016 ROLL OF HONOUR

Constable Thierry Leroux
Service de Police de Lac Simon, QC
End of Watch: February 13, 2016
Cause of Death: Gunfire

Constable Sarah Beckett
Royal Canadian Mounted Police, BC
End of Watch: April 5, 2016
Cause of Death: Automobile Accident

Constable Jacques Ostigny
Sûreté du Québec, QC
End of Watch: September 21, 2016
Cause of Death: Heart Attack

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

**2016 Average Tour: 17 years 6 months**
**2016 Average Age: 36**
**2016 Deaths by Gender: female - 1**
**male - 2**
**2016 Deaths by Province:**
- **British Columbia - 1**
- **Quebec - 2**

**2016 Deaths by Cause:**
- **gunfire - 1**
- **heart attack - 1**
- **automobile accident - 1**

**Last 10 years by Gender:**
- **female - 6**
- **male - 36**

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

| Cause | 2016 | 2015 | 2014 | 2013 | 2012 | 2011 | 2010 | 2009 | 2008 | 2007 | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Assault | | | | | 1 | | | | | | 1 |
| Auto accident | 1 | 1 | 1 | 2 | 3 | | 3 | 3 | 1 | | 15 |
| Drowned | | | | 1 | | | 1 | | | | 2 |
| Gunfire | 1 | 2 | 3 | 1 | | | 1 | | | 3 | 11 |
| Heart attack | 1 | | 1 | | | | | | 1 | | 3 |
| Natural disaster | | | | | | | 2 | | | | 2 |
| Stabbed | | | | | | | | 1 | | | 1 |
| Struck by vehicle | | | | | 1 | 1 | | | | | 2 |
| Training accident | | | | 1 | | | | | | | 1 |
| Vehicular assault | | | | 1 | | 2 | | | | 1 | 4 |
| **Total** | **3** | **3** | **5** | **6** | **5** | **3** | **7** | **4** | **2** | **4** | **42** |
| Female | 1 | 0 | 1 | 1 | 1 | 0 | 1 | 1 | 0 | 0 | 6 |
| Male | 2 | 3 | 4 | 5 | 4 | 3 | 6 | 3 | 2 | 4 | 36 |

## PEACE OFFICER ASSAULTS

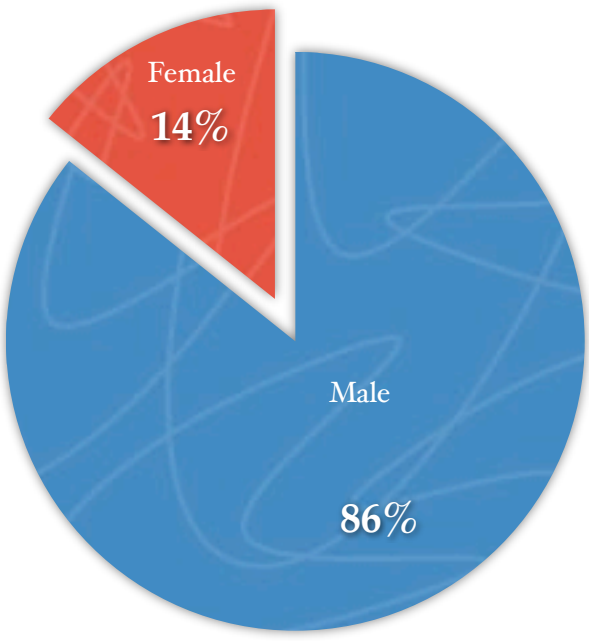
According to a Statistics Canada report, *"Police-reported crime statistics in Canada, 2015,"* the number of assaulting a police officer offences increased by 278 (+3%) from 2014 to 2015. In 2015 there were 9,835 assault police officer offences compared to 9,557 the previous year. However, from 2005 to 2015, the assault against police officer rate dropped by 7%.

For other assaults in 2015, there were:

- 156,688 reports of common assault (level 1).
  - ➡ rate increase of 1% from 2014.
- 47,119 assaults with a weapon or bodily harm (level 2).
  - ➡ rate increase of 4% from 2014.
- 3,286 offences of aggravated assault (level 3).
  - ➡ effectively a 0% rate change from 2014.

Source: Statistics Canada, 2016, "Police-reported crime statistics in Canada, 2015", Catalogue no. 85-002-X,released on July 20, 2016.

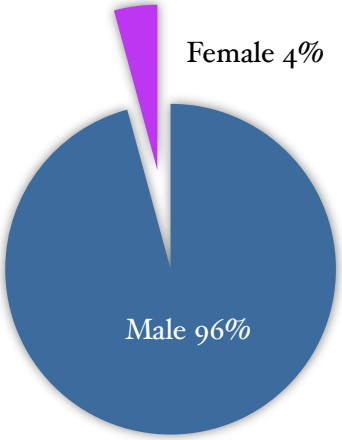
**On-Duty Deaths 2006-2015 by Gender**



# U.S. ON-DUTY DEATHS RISE

During 2016 the U.S. lost 142 peace officers, up 12 deaths from 2015. The top cause of death was gunfire (63) followed by automobile accidents (23), vehicular assault (12), being struck by vehicle (9), heart attack (8) and motorcycle accident (7).

Texas lost the most officers in 2016 at 19 - followed by California (11), Louisiana (9), Georgia (8), Michigan (6), Tennessee (6), the U.S. Government (6), Florida (5), Iowa (5), Ohio (5), Colorado (4), Illinois (4), New York (4), Pennsylvania (4), and Puerto Rico (4). The average age of deceased officers was 41 years while the average tour of duty was 13 years and two months. Men accounted for 96% of U.S. officer deaths while women made up 4%.




Source: http://www.odmp.org/year.php [accessed February 25, 2017]

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

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

| U.S. Peace Officer On-Duty Deaths | | |
|---|---|---|
| **Cause** | **2016** | **2015** |
| 911 related illness | 3 | 8 |
| Accidental | - | 2 |
| Aircraft accident | 1 | 1 |
| Animal Related | 1 | - |
| Assault | 3 | 3 |
| Automobile accident | 23 | 27 |
| Bomb | - | 6 |
| Drowned | 2 | 1 |
| Duty related illness | 1 | 2 |
| Fall | 1 | 1 |
| Gunfire | 63 | 39 |
| Gunfire (accidental) | 2 | 2 |
| Heart attack | 8 | 17 |
| Motorcycle accident | 7 | 3 |
| Stabbed | 1 | - |
| Struck by Train | 1 | - |
| Struck by vehicle | 9 | 4 |
| Vehicle pursuit | 4 | 5 |
| Vehicular assault | 12 | 8 |
| Weather/Natural Disaster | - | 1 |
| **Total** | **142** | **130** |

| U.S. On-Duty Deaths by Year (2007-2016) | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **Year** | 2016 | 2015 | 2014 | 2013 | 2012 | 2011 | 2010 | 2009 | 2008 | 2007 | Total |
| **Deaths** | 142 | 130 | 146 | 125 | 139 | 181 | 177 | 140 | 162 | 204 | 1546 |
| **Avg. age** | 41 | 41 | 41 | 43 | 42 | 42 | 42 | 40 | 40 | 40 | |
| **Avg. tour** | 13 yrs. 2 mos. | 12 yrs. 4 mos. | 13 yrs. 8 mos. | 14 yrs. 9 mos. | 12 yrs. 9 mos. | 13 yrs. 8 mos. | 12 yrs. 1 mos. | 11 yrs. 11 mos. | 12 yrs. 1 mos. | 11 yrs. 5 mos. | |
| **Female** | 6 | 11 | 5 | 8 | 12 | 12 | 10 | 3 | 16 | 9 | 92 |
| **Male** | 136 | 119 | 141 | 117 | 127 | 169 | 167 | 137 | 146 | 195 | 1454 |


## DID YOU KNOW ...

... that BC's **Crown Counsel Policy Manual** directs the prosecutor to notify, in writing, the senior officer in charge of a police department when a judge makes an adverse finding concerning a police officer's reliability or credibility in court?

Policy Code POL 1.1 of the manual states:

***"Where a member of the judiciary makes an adverse finding on the court record about the reliability of the evidence given by, or the credibility of, a peace officer short of an allegation of perjury, Crown Counsel should provide written notification of such finding to the senior officer in charge, or equivalent, of the officer's agency. The notification should include the following:***

1. ***The police agency file and court file number;***
2. ***The date of the officer's testimony;***
3. ***The date and nature of the adverse finding;***
4. ***The judge or justice who made the finding; and***
5. ***A covering memo briefly outlining the matter sufficient to facilitate ordering transcripts or other reasonable steps by the officer in charge.***

***Crown Counsel's role in this process is to notify the senior officer in charge of the judicial finding, rather than to offer an opinion regarding the judicial finding."***

For the purpose of this policy, the term "peace officer" includes police officers and any law enforcement personnel who have the powers of a peace officer, such as Corrections Officers, Conservation Officers, Sheriffs, Youth Probation Officers, Canadian Border Services Agency Officers, Canadian Armed Forces Police, Fisheries Officers and By-Law Enforcement Officers.

The **Public Prosecution Service of Canada** has a similar provision in its Deskbook – *3.14 Testimony of Police Officers and Police Civilian Agents* – which states:

***"Where a court makes a finding or where it can be reasonably inferred from judicial comments that misleading or inaccurate evidence has been intentionally given by a police witness, Crown counsel must bring it to the attention of their supervisor or manager in writing so that the matter will be referred to the police for possible investigation. If Crown counsel otherwise has a compelling basis for believing that inaccurate testimony has been intentionally given by a police witness, they must bring it to the attention of their supervisor or manager, and they must notify defence and the court. For example, where a police officer had testified at trial that the voluntary statement evidence he was giving the court were the exact words of the defendant. In fact, the police officer later indicated that he had reconstructed his notes. In this situation, Crown counsel must inform the team leader, Deputy Chief Federal Prosecutor or Chief Federal Prosecutor and defence counsel and put the witness back on the stand to explain himself."***

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