JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

"The power to arrest is only available when the officer subjectively believed he had reasonable and probable grounds to do so. In addition, those grounds must be justified from an objective point of view, as assessed from the standpoint of the reasonable person."

***R. v. Ngai*, 2017 ABCA 199**

REASONABLE GROUNDS

The term "reasonable grounds" is, in many cases, fundamental to police decision-making and is the catalyst that often animates police powers and thereby deprives an individual of their constitutional freedoms (eg. detention, arrest, search and seizure, breath demands and use of force). Similarly, the lack of reasonable grounds may also drive the low visibility, non-court litigated decisions of the police not to search, arrest, or detain.

In the context of an arrest, the arrest itself may be the trigger that sets in motion the process for the production of incriminating fruits that may have a significant impact on the determination of an arrestee's legal guilt. For example, a successful arrest may lead to a lawful search incidental to that arrest and the results of the search may reveal the evidence necessary to sustain a conviction. As this example illustrates, a valid arrest can be pivotal to a successful prosecution. This leaves a police officer's arrest and the reasonable grounds upon which it was based as fertile soil for a defence lawyer to plough. It is not uncommon in courtrooms across Canada for a defence lawyer to attack an officer's grounds for an arrest in the hopes a judge will find it unlawful, the resulting search incidental to it unreasonable, and open the door for the exclusion of evidence and ultimately an acquittal.

Interestingly, there is no statutory definition for reasonable grounds found in the *Criminal Code* or other similar statutes. There are, however, many judicial decisions where courts have tried to explain the meaning of this term, whether it relates to belief or suspicion. Police officers, lawyers, and judges alike must therefore look to case law, and in many respects common sense, to understand its meaning. This issue of "In Service: 10-8" is full of appellate level cases which discuss this important concept. Enjoy the read!

Highlights In This Issue

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Note-able Quote

"Only I can change my life. No one can do it for me."

Carol Burnett

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.

Ask more: the power of questions to open doors, uncover solutions, and spark change.

Frank Sesno.

New York, NY: AMACOM (2017).

BF 637 C45 S474 2017

Crunch time: how to be your best when it matters most.

Rick Peterson & Judd Hoekstra.

Oakland, CA: Berrett-Koehler Publishers (2017).

BF 637 S8 P468 2017

Cultural intelligence: surviving and thriving in the global village.

David C. Thomas and Kerr Inkson.

Oakland, CA: Berrett-Koehler Publishers (2017).

HM 1211 T486 2017

Eat that frog!: 21 great ways to stop procrastinating and get more done in less time.

Brian Tracy.

Oakland, CA:Berrett-Koehler Publishers, (2017).

BF 637 P76 T73 2017

Getting things done: the art of stress-free productivity.

David Allen.

New York, NY: Penguin Books, (2017).

BF 637 T5 A45 2015

How to run seminars and workshops: presentation skills for consultants, trainers, teachers, and salespeople.

Robert Jolles.

Hoboken, NJ: John Wiley & Sons, Inc., (2017).

AS 6 J65 2017

How you learn is how you live: using nine ways of learning to transform your life.

Kay Peterson, Experience Based Learning Systems, David A. Kolb, Institute for Experiential Learning.

Oakland, CA: Berrett-Koehler Publishers, (2017).

BF 318.5 P47 2017

Interpersonal communication: relating to others.

Steven A. Beebe, Susan J. Beebe, Mark V. Redmond & Lisa Salem-Wiseman.

Don Mills, ON: Pearson Canada Inc., (2017).

BF 637 C45 I68 2017

Marijuana and mental health.

Edited by Michael T. Compton, M.D., M.P.H.

Arlington, VA: American Psychiatric Association Publishing, (2016).

C 568 C2 M376 2016

Rapid media development for trainers: creating videos, podcasts, and presentations on a budget.

Jonathan Halls.

Alexandria, VA: ATD Press, (2017).

HF 5549.5 T7 H355 2017

Research methods in crime and justice.

Brian L. Withrow.

New York, NY: Routledge, Taylor & Francis Group, (2017).

HV 6024.5 W58 2016

Stop guessing: the 9 behaviors of great problem solvers.

Nat Greene.

Oakland, CA: Berrett-Koehler Publishers, (2017).

BF 449 G74 2017

Your perfect right: assertiveness and equality in your life and relationships

Robert E. Alberti, PhD ; Michael L. Emmons, PhD.

Oakland, CA: Impact Publishers, (2017).

BF 575 A85 A43 2017

You've got 8 seconds: communication secrets for a distracted world.

Paul Hellman.

New York, NY: AMACOM, (2017).

HD 30.3 H437 2017

CO-HABITANT CAN CONSENT TO POLICE ENTRY

R. v. Reeves, 2017 ONCA 365

The accused lived in a home for 10 years with his common-law spouse and his two teenage daughters. He was a co-owner and contributed to the mortgage payments. He was charged with domestic assault and had a no contact order with his spouse, which required him to stay away from the home unless he had his spouse's written consent. He was subsequently arrested and held in custody. The next day, his spouse called his parole officer to revoke consent for him to visit the home. At the same time, she told the parole officer that the accused had child pornography on the family computer. A police officer went to the home and obtained a signed consent from his spouse for the warrantless seizure of the computer. The accused and his spouse were "joint owners" of the computer and protected it with a password that was available to each of them. The police subsequently obtained a warrant to search the computer. They found 140 images and 22 videos of child pornography. The accused was charged with possessing and accessing child pornography.

Ontario Court of Justice

The accused successfully had the child pornography excluded as evidence under s. 24(2) of the *Charter*. Among other *Charter* issues, the judge found the police violated the accused's s. 8 right by seizing the computer from his home that he shared with his spouse. Although the judge found the spouse freely consented to both the search of the home and seizure of the computer, he held she could not, as a third party, consent to the search or otherwise waive the constitutional protection of s. 8 on behalf of the accused. In the judge's view, the officer knew or should have known that he did not have the accused's consent to enter the residence and remove the computer. The evidence obtained from the computer, including the results of the forensic examination, its files and its hard drive, was excluded. The accused was acquitted.

Ontario Court of Appeal

The Crown appealed the trial judge's ruling arguing, among other things, that he erred in finding that the accused's spouse could not consent to the seizure of the computer and erred in excluding the evidence.

Consent

The Crown submitted that where two or more people have an equal and overlapping privacy interest in a residence, any of the co-habitants could validly consent and the police do not need to obtain the consent from each co-habitant. The accused, on the other hand, suggested that one resident could not consent to a search or seizure on behalf of all residents.

Justice LaForme, speaking for the Court of Appeal, first outlined a number of considerations in addressing the issue of spousal or co-habitant consent searches:

- A valid consent is a waiver that immunizes a search or seizure from challenge under s. 8.
- Consent must be fully informed and voluntary.
- Consent must come from the right person. "The person who consents must be the person whose rights are engaged," said Justice LaForme. "Someone else cannot waive your s. 8 rights for you."

- The weight of trial court jurisprudence suggests a contextual test – a co-resident can usually consent to a search of the common areas, but not the private areas of another resident, such as his or her bedroom or dresser.

The Court of Appeal found the question was not whether one resident could waive the constitutional rights of another. Instead, the question was what impact, if any, the fact of joint residency had on one's expectation of privacy, assessed in the totality of circumstances. Justice LaForme stated:

> At a high level of generality, the fact of co-residency is clearly relevant to reasonable expectation of privacy. Descriptively, a co-resident knows from the outset that the other co-resident has the right to invite others into shared spaces. Further, normatively, it would not be reasonable for one resident to expect that the other co-resident could never invite an agent of the state into the residence. In fact, one could reasonably expect that the other might have a legitimate interest in consenting to entry by law enforcement into common spaces from time to time. Of course, by the same token, one would not reasonably expect police entry without the consent of another co-resident. And certainly the facts and circumstances of the case – including the nature of living arrangements – will shape the reasonable expectations of co-residents.
>
> In other words, in the co-residency context, consent by a co-resident other than the accused is not relevant as a form of waiver. Rather, it is relevant as part of determining whether the police have intruded upon a reasonable expectation of privacy held by the accused.
>
> Therefore, in my view, the inquiry is two-staged: (a) would the accused reasonably expect that his or her co-resident would have the power to consent to police entry into a common space, and (b) if so, did the co-resident actually consent? Of course, the specific facts and circumstances will drive the answer to both of those questions.
>
> Before moving on, two final notes about consent. First, an accused does not reasonably expect the police to be able to enter without the valid, voluntary and informed consent of a co-resident. Nor does an accused reasonably expect police to go beyond the scope of consent provided by the co-resident in entering the space. Where the police do so without justification, the accused's reasonable expectation of privacy will be violated.
>
> Second, in my view, the analysis I have described also applies with respect to consent to seizure of jointly owned property within a shared residence, though different circumstances may call for a different analytical approach, and discrete issues of seizure may raise different questions of reasonable expectation. [paras. 48-52]

"The person who consents must be the person whose rights are engaged. Someone else cannot waive your s. 8 rights for you."

In this case, the warrantless search of the jointly-owned home and the seizure of the jointly-owned computer was lawful. The accused's expectation of privacy in the shared spaces of the family home and in the family computer was greatly diminished. He could not access the home except with his spouse's permission and she had revoked her consent in a phone call to the parole officer. Furthermore, he had been arrested the day before and was still in custody. As for the accused's expectation of privacy in the computer, seizing it did not interfere with any heightened expectation of privacy in its informational content. "In light of the history and legal status between them, it would

"Descriptively, a co-resident knows from the outset that the other co-resident has the right to invite others into shared spaces. Further, normatively, it would not be reasonable for one resident to expect that the other co-resident could never invite an agent of the state into the residence."

"[T]he inquiry is two-staged: (a) would the accused reasonably expect that his or her co-resident would have the power to consent to police entry into a common space, and (b) if so, did the co-resident actually consent?

have been within [the accused's] reasonable expectations that [his spouse] might have a legitimate interest in consenting to police access to the shared space and property," said Justice LaForme. "It was not reasonable for [the accused] to expect [his spouse] would not be able to consent to police entry into the common areas of the home or to the taking of the shared computer."

The trial judge erred in finding the accused's spouse could not consent to the search of the shared areas of the home and the seizure of the computer by police. The spouse's consent was valid. It was both voluntary and informed. The officer told the spouse that he was responding to the call she had made when she reported seeing child pornography on the family computer. The officer then satisfied himself an offence had been committed and the spouse signed a consent form granting permission to enter the residence and search it and its contents, which were owned and/or controlled by the spouse, and seize anything or arrest any person that was believed to be relevant to this investigation. The officer did not search any area of the home nor did he seize any additional property. Once he obtained the computer, he locked it up and did not search it until a warrant was obtained.

s. 24(2) *Charter*

Since the trial judge focused heavily on the issue of third party consent in his s. 24(2) analysis, a fresh consideration on the admissibility of the evidence was necessary. Although there were other s. 8 breaches in this case, society had an extremely strong interest in the evidence being placed before a court. If the evidence was admitted, the administration of justice would not be brought into disrepute.

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

Complete case available at www.ontariocourts.on.ca

Editor's note: This decision only dealt with the warrantless search of the jointly-owned home and the seizure of a jointly-owned computer. It did not address a search of the computer and the seizure of its stored information and data belonging to the accused.

MORE ON THIRD-PARTY CONSENT TO ENTER

It would seem that the trial judge in *Reeves* misapplied the Supreme Court of Canada's ruling in *R. v. Cole*, 2012 SCC 53. In *Cole*, the Supreme Court of Canada found that the school board could not validly consent to a search or otherwise waive the constitutional protection of its employee in the context of an employer-provided computer. In *Reeves*, the Ontario Court of Appeal agreed that the accused's spouse, as a co-habitant, was not entitled to waive his s. 8 *Charter* protections. However, it was the accused and his spouse's co-habitation that impacted the accused's reasonable expectation of privacy in the shared home which would determine whether the accused's spouse could consent to the police entry into the home without breaching the accused's s. 8 right. The trial judge did not look at the impact of this co-residency relationship on the accused's reasonable expectation of privacy. This reasoning led the Ontario Court of Appeal to develop the following two stage enquiry:

1. **Would the accused reasonably expect that his spouse, as a co-resident, would have the power to consent to police entry into a common space; and**

2. **If the answer to the first question is yes, did the accused's spouse actually consent?**

The *Reeves* reasoning is consistent with the Manitoba Court of Appeal's approach in ***R. v. R.M.J.T.*, 2014 MBCA 36**. In *R.M.J.T.*, the police approached the accused's wife and requested her consent for the seizure of the accused's computer during an investigation into sexual offences. The wife agreed, officers were shown the computer in the family home and seized it. Police subsequently obtained a warrant to search the computer and found fragments of sexually explicit emails. The accused was charged with several offences including sexual assault, making child pornography, possessing child pornography, and inviting sexual touching.

A Manitoba Court of Queen's Bench judge found the seizure of the computer by police did not infringe the accused's s. 8 *Charter* rights. The accused's wife lawfully consented to the police entry into the home and the warrantless seizure of the accused's computer was then justified under s. 489(2) of the *Criminal Code*. The accused was convicted of several sex-related offences.

The accused then argued, before the Manitoba Court of Appeal, that his wife could not consent to the police entering the family home to seize his computer. The Court of Appeal noted this case was not about whether the accused's wife could consent to the police searching the contents of his computer (where he had a very high expectation of privacy in the information it contained), but whether she could consent to the police entering the family residence where the computer was located. The Court of Appeal found the police entry was authorized. The accused's wife lived in the home, she had the authority to provide consent to enter the area where the computer was located (a shared area of the home) and, as found by the trial judge, she provided informed consent.

In ***Tymkin v. Ewatski et al.*, 2014 MBCA 4**, the plaintiff sued the police for malicious prosecution, false imprisonment and battery. The police had entered a dwelling house in the middle of the night to arrest the plaintiff for a domestic assault against his former wife. When they knocked on the door, an occupant opened it and allowed the police to enter. It turned out, however, that the occupant answering the door was merely an overnight guest. The Manitoba Court of Queen's Bench nevertheless found the arrest to be lawful.

The plaintiff challenged the trial judge's conclusion before the Manitoba Court of Appeal that the warrantless arrest within the dwelling house was lawful. Justice Monnin, in dissent but on this point agreed with by the majority, found consent was an exception to the need for a Feeney warrant for an arrest in a dwelling house. Such consent to enter need not be given by the arrestee, but could be given by someone within the home. Justice Monnin stated:

> Where police seek to rely upon a consent to enter the premises to effect an arrest, they must rely upon a valid one. The requirements for a valid consent include that:
>
> a) it must be given by someone who has a privacy interest in the premises ...; and
>
> b) the consent must be an informed one.

However, in this case, the person answering the door could not waive the privacy interests of the occupants in allowing entry for the purposes of an arrest because he was simply an overnight guest and not a person with a reasonable expectation of privacy. "In order to gain entry and to effect an arrest without a warrant, [the police] had to obtain the informed consent of an individual with a sufficient privacy interest to allow them to do so," said Justice Monnin.

In ***R. v. Squires*, 2005 NLCA 51** leave to appeal dismissed **[2005] S.C.C.A. No. 561**, a pre-*Cole* case, the police arrived at the accused's apartment, that he shared with his common law wife. Although not under arrest, the police took the accused to the police detachment to be interviewed about a murder. He had been with the victim the same day she had been found dead. Another officer stayed at the apartment and questioned the accused's wife. When she told him that the accused had worn a striped shirt, the officer asked to see it. She showed him into their bedroom where he examined the shirt and noticed a stain that looked like blood. The officer sealed the apartment, applied for a search warrant and the blood-stained shirt was seized. A forensic analysis indicated that the shirt had three

stains of the victim's blood. The accused was subsequently charged with first degree murder.

A Supreme Court of Newfoundland and Labrador judge found the accused's wife's consent allowing the officer to conduct the warrantless search of the apartment to inspect the shirt was not informed consent and, in any event, his wife did not have the right in the circumstances to waive the accused's s. 8 *Charter* rights. The judge then excised the material based upon this search from the warrant's ITO. However, the evidence was admitted under s. 24(2) and the accused was convicted of first degree murder.

An appeal by the accused to the Newfoundland and Labrador Court of Appeal was unsuccessful. Although the trial judge's decision respecting the validity of the common law wife's consent was left unchallenged, the Court of Appeal offered the following comment in its determination of the trial judge's s. 24(2) analysis:

> The trial judge held that [the accused's wife] did not have the right to waive [the accused's] s. 8 Charter rights, i.e. that she could not authorize a search of the bedroom. ... I respectfully disagree. A spouse, or co-habitant of a personal residence, can authorize the police to search areas of a personal residence which are shared in common with that person's spouse or co-habitant. ... [references omitted, para. 34]

In ***R. v. Blinch (1994), 90 C.C.C. (3d) 346 (B.C.C.A.)***, the accused's wife left the family home without telling him and went to be with her parents' who lived out of province. Upon leaving, she gave a house key to a neighbour. She did not ask the neighbor to do anything in relation to the house but asked her to send things from the house which she might have forgotten.

About a week later, the accused told the neighbor he was going to see his wife, but not to tell his wife he was leaving. He asked the neighbour to feed the dog, which did not involve going inside the home, and told her that he had left an envelope on the table. The neighbour notified the accused's wife. At the request of the accused's wife, the neighbour went inside the home to check if any guns were missing. The neighbour found a gun missing and a will on the table. The neighbour called the accused's wife and told her what she had found. The accused's wife promptly called the police.

Police attended the accused's home and spoke to the neighbour. The neighbour unlocked the house and the police went inside for about 10 minutes. While inside, police saw various guns and a will on the kitchen table. Police left the home, obtained a search warrant and later seized the will, several firearms and ammunition.

A British Columbia Supreme Court judge found the neighbour had "authority" to enter the residence from both the accused and his wife. He also found that the police determined they had the neighbour's authority to enter the residence. The judge concluded that the police entered with "lawful permission". There was no s. 8 *Charter* breach and the accused was convicted of possessing a weapon dangerous to the public.

The accused appealed this ruling to the British Columbia Court of Appeal. He argued that the neighbour could not waive his rights under the *Charter* to be secure from unreasonable search and seizure. The Court of Appeal agreed. It held that the neighbour could not give effective consent for the police to search the accused's home, even in circumstances where the neighbour had earlier entered the home at the request of the accused's wife. Of note, the accused's wife had not given the neighbour any instructions about allowing, or not allowing, police officers into the house.

A Final Thought

The *Reeves* case, and others, is an important commentary on the law of co-occupant consent searches. It is important to understand that one person cannot waive the s. 8 *Charter* rights of another. However, the relationship of co-residency changes privacy expectations such that one person may be able to allow police entry without violating the rights of another. This is an important distinction. It will be interesting to see how courts use this analysis to new cases moving forward.

TRUNK & KNAPSACK SEARCH PROPER AS AN INCIDENT TO IMPAIRED ARREST

R. v. Pearson, 2017 ONCA 389

On January 14, 2008, a man was killed after being shot in the back with a shotgun. The following day, January 15, the police stopped the accused driving his car. The officer was concerned about impaired driving given the manner in which the car was operated. When he approached the driver's side of the car, the officer noticed the accused's eyes were unusually red. His pupils were dilated and the officer smelled burnt marijuana. The accused was slow in retrieving his papers and failed field sobriety tests. The officer arrested the accused for impaired driving and searched the vehicle, finding two shotgun shells in a knapsack in the trunk. These were seized.

On January 27 another man was killed. He too had been killed with a shotgun. On February 19, the accused was again stopped by police. The vehicle he was driving had tinted windows. There was also a passenger in the vehicle. The officer saw a red shotgun shell in plain view on the back seat. The accused and his passenger were arrested for careless storage of ammunition. A search of the vehicle revealed three more shotgun shells in the trunk. The accused was cautioned and he asked to speak to his lawyer. Before he could exercise his right to speak to counsel, however, the officer approached the accused, holding the shotgun shells in his hand and asked: "Where did these come from?" The accused said that he had found them and intended to use them to make firecrackers. Then, while in the back of the police car on the way to the police station, the accused asked the officer if his friend had been arrested. When told that the friend had also been charged with careless storage of ammunition, the accused blurted out that the ammunition was his, thereby taking ownership of it.

On March 20, a detective spoke to the accused's lawyer advising him that the accused's name had come up in an investigation and that the police wanted to speak to him. On March 24, a detective met with the accused and drove him to the police station for a recorded interview. He was told he did not need to speak with police and that he was neither detained nor charged. He said he had spoken to a lawyer before coming in, told police he did not kill either victim and was prepared to submit to a polygraph test. Then, on April 15, after some discussion between the police and the accused, he was given the polygraph test that he requested. A detective explained the process and confirmed that the accused did not have to speak with police and could leave whenever he wanted. He was also told that the results of the polygraph could not be used in court but his comments made during it could be used. He was also advised that, if it was determined he killed the victim, he would be charged with murder. The accused understood and also signed a consent form. During the interview and polygraph, the accused admitted to being present at both killings but said he was not the shooter. The interview ended with the accused asking to speak to a lawyer, receiving legal advice and refusing to speak further with police. He was subsequently charged with both murders.

Ontario Superior Court of Justice

The judge found the January 15 traffic stop and impaired driving arrest were lawful. The purpose of the trunk and knapsack search was to locate evidence helpful to the impaired driving offence. As a result,

the search of the car was lawful as an incident to the accused's impaired driving arrest. As for the February 19 roadside statements, the judge excluded the accused's response to the officer's question because his right to counsel had been violated. However, the judge found the second statement claiming ownership of the shotgun shells was made spontaneously without prompting by the officer, who was driving the police car at the time. Forensically, the shotgun shells seized from the accused were similar to those used in both killings. This evidence could be used at the murder trials.

As for the April 15 polygraph and interview, the judge found the accused made his statements voluntary. He was not deprived of an operating mind and his right to silence was not overborne by police. The judge also rejected the accused's argument that his statement was made involuntarily because police suspected him of the murder, had reasonable grounds to believe he had committed it and failed to caution him again. In the judge's view, the absence of a caution was not decisive, but may be a factor in assessing whether or not a statement was voluntarily made. Had the accused become a suspect, with the police intending to charge him with murder, his "jeopardy would have changed dramatically and he would be entitled to be advised of that change along with a caution and advice of Charter rights to speak with a lawyer." But that is not what happened. The accused was convicted of the two separate murders by two different juries at two separate trials.

Ontario Court of Appeal

The accused appealed his convictions arguing, in part, that the search of his car on January 15 was not incidental to his arrest for impaired driving and therefore the shotgun shells found in it should have been excluded as evidence. Second, he asserted that the statements he made to police during the second vehicle stop on February 19 while he was sitting in the back seat of a police car should have been excluded because the police breached his right to counsel under s. 10(b). Finally, he suggested that

What the trial judge said about the vehicle search on January 15:

- *"In light of the fact that the charge was impaired driving by a drug, i.e. marihuana, it was reasonable for the officer to think drugs might be found in the vehicle."* [para. 28]
- *"When a person is arrested, police may conduct a search as part of the arresting process. The defence takes the position that searching the whole vehicle in the circumstances of this case would not be a search incident to the arrest of [the accused]. On the contrary, I think that a search of the vehicle for drugs was reasonable when the person arrested for impaired driving has been arrested for impairment by a drug."* [para. 30]
- *"With [the accused], the vehicle search was not a fishing expedition. Rather, it was purposeful. That purpose was to locate evidence that would be helpful to the impaired driving offence. The impaired driving accusation was that the impairment was the result of using a drug."* [para. 34]
- *"Since the search of the vehicle is lawful and incident to arrest, the seized shotgun shells are lawfully seized."* [para. 35]

R. v. Pearson, 2011 ONSC 1913

What the trial judge said about the vehicle search on February 19:

- *"[The officer] had justification to stop a car driven with windows darkened too much for the provisions of the Highway Traffic Act. ... [T]he officer saw a shotgun shell on the back seat. The Criminal Code provides for safe storage of ammunition. In detaining and expecting to charge the driver and occupants with a charge of improper storage of ammunition, searching the vehicle incident to arrest is reasonable. Therefore, searching the car is valid. The detention was reasonable when the officer saw the tinted windows. Further detention when ammunition is in plain view is reasonable. There would be reasonable and probable grounds to anticipate more ammunition and/or guns would be in the car including in the trunk."* [para. 20]

R. v. Pearson, 2011 ONSC 1912

"The arrest of the [accused] for impaired driving was lawful. The search was undertaken to look for marijuana and by a police officer who was not involved at all in the homicide investigations. Discovery of marijuana in the trunk of the [accused's] car and in his knapsack would have some probative value on the issue of whether his ability to drive was impaired by marijuana. There was a reasonable basis for the officer's actions and a reasonable prospect of finding evidence of the offence for which the [accused] had been arrested."

his statements to police on April 15 should not have been admitted because they were not voluntarily made.

Search Incident to Arrest

The accused contended that the search conducted incidental to his arrest went too far. In his view, searching the trunk, and the knapsack found in it, for evidence related to the impaired driving offence was unreasonable. In his view the search should have been confined to the area close to the driver's seat. But the Court of Appeal disagreed:

> The arrest of the [accused] for impaired driving was lawful. The search was undertaken to look for marijuana and by a police officer who was not involved at all in the homicide investigations. Discovery of marijuana in the trunk of the [accused's] car and in his knapsack would have some probative value on the issue of whether his ability to drive was impaired by marijuana. There was a reasonable basis for the officer's actions and a reasonable prospect of finding evidence of the offence for which the [accused] had been arrested. [references omitted, para. 26]

The Roadside Statement

The accused suggested that the statement in the back of the police car was tainted by the violation of his *Charter* rights when the officer posed a question before he could consult counsel. Justice Pardu, however, found the accused's spontaneous utterance was not "obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter" within the meaning of s. 24(2). "Given [the trial judge's factual findings that the [accused's] statement that the shotgun shells were his own was made spontaneously, out of concern for his friend, and that the statement was not prompted by any investigative step on the part of police, I am satisfied that the connection between the Charter breach and the statement made from the back seat of the police car was tenuous and remote," she said.

Polygraph and Interview

The Court of Appeal deferred to the trial judge's conclusion that the accused was not a suspect on March 24 and had not become one until he was detained at the end of the April 15 interview. Up until then, the police did not have grounds to arrest him even though they had reason to believe he might be linked in some fashion to the killings. Further, whether or not the accused was a suspect, the absence of a caution is not determinative of voluntariness. It is only a factor to consider. "The voluntariness inquiry is a contextual one that considers all the relevant circumstances and eschews rigid and strict rules," said Justice Pardu. She continued:

> In the present case, it was abundantly clear that, in his interactions with the police as of March 24, 2008, the [accused] freely chose to speak to police. At the April 15, 2008 polygraph, he explicitly said to the interviewers, "No one's going to intimidate me. You can't intimidate me." There is no suggestion that his will was overborne by the police.
>
> At the start of the April 15 interview, police told the [accused] he was free to leave, that he could stop the polygraph process at any time, that he did not have to speak to police and that what he said could be admissible in court. He signed a consent form confirming that he did not have to say anything and that anything he said could be used in court. He had the benefit of legal advice before both the March 24 and April 15 interviews. [paras. 20-21]

There was no basis to interfere with the conclusion that accused's April 15 statements were voluntarily made beyond a reasonable doubt.

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

CONDITIONAL DISCHARGE FOR DOMESTIC ASSAULT OVERRULED

R. v. E.G., 2017 MBCA 57

The accused had been involved in an off and on relationship with the victim for about three years but they had been only living with each other for two months. The accused discovered that the victim had stole money from him to buy drugs. He became furious with her. A struggle ensued. The accused choked the victim and placed his knees on her chest while they were on the floor. Then, he placed a leather belt around her neck to prevent her from fleeing. He kept the belt around her neck for several hours and they went and tried to recover his money from the victim's drug dealer. The victim suffered physical and psychological injuries including bruising to her head and body, abrasions to her throat, anxiety and depression. The accused was charged with a number of offences.

Manitoba Court of Queen's Bench

The accused pled guilty to assault with a weapon and was found guilty after trial of an additional charge of assault. He was acquitted of other charges. He was sentenced to a conditional discharge with two years of supervised probation, concurrent on both counts. The judge found a conditional discharge was in the best interest of the accused and not contrary to the public interest.

Manitoba Court of Appeal

The Crown appealed the conditional discharge arguing the sentencing judge erred by not properly assessing the relevant sentencing principles and that he imposed an unfit sentence. Justice Lemaistre, speaking for the Court of Appeal, agreed. She found the sentencing judge did not give sufficient weight to general deterrence:

> The circumstances of the offences are serious. The theft by the complainant of the accused's money does not amount to provocation and does not excuse his violent reaction. The initial assault was spontaneous, but the act of putting the belt around the complainant's neck was deliberate, prolonged and demeaning. One of the hallmarks of domestic violence is an attempt to control the behaviour of an intimate partner through the use of violence. It is trite to say that cases involving domestic violence require a strong message of deterrence and denunciation. In our view, the principle of general deterrence is not satisfied in this case by a discharge. [para. 8]

The Appeal Court also found there were no exceptional circumstances warranting a discharge.

On re-sentencing, Justice Lemaistre noted the circumstances did not warrant re-incarceration. The accused pled guilty, lacked a record, had family support, ongoing employment and was a low risk to reoffend. He had spent two days in custody after his arrest, had been released on stringent judicial interim release for three years and eight months and the offences occurred four years earlier.

The Crown's appeal was allowed, and a two-year suspended sentence with supervised probation was substituted.

Complete case available at www.canlii.org

"One of the hallmarks of domestic violence is an attempt to control the behaviour of an intimate partner through the use of violence. It is trite to say that cases involving domestic violence require a strong message of deterrence and denunciation."

WARRANT HAS IMPLIED EXECUTION DATE

R. v. Saint, 2017 ONCA 491

Acting on confidential informer tips that the accused was trafficking drugs, the police obtained a warrant under s. 11 of the *Controlled Drugs and Substances Act* to search his residence. The warrant identified the target of the investigation, the address to be searched, and the objects of the search. It authorized for **"any peace officer, at any time, to enter the said place …"** to conduct the search. However, it did not specify a date for its execution. The warrant was nevertheless served about seven hours after it was issued and the police seized methamphetamine, morphine, and hydromorphone. The accused was charged with drug offences.

Ontario Court of Justice

The accused argued that the search breached s. 8 of the *Charter* because the warrant was invalid. He contended that the warrant was temporally unlimited. In his view, it authorized a search to be conducted on any date in the future at the sole discretion of the police, regardless of whether it took place days or even years later. He submitted that the search was therefore warrantless, breached s. 8 and the evidence ought to have been excluded under s. 24(2).

The judge concluded that the warrant was not "non-expiring". Rather, he found it had an implied execution date. The judge upheld the warrant as valid and found it was executed in a reasonable manner. There were no s. 8 breaches and the evidence was admissible.

Ontario Court of Appeal

The accused argued that a specified date for the search is just as critical to a warrant's function and validity as is the location where the search is to take place and what items are to be searched for. An undated warrant, he submitted, is "nn-expiry" and leaves the date of execution open to the discretion of the executing officers and conceivably to a date where there are no longer grounds for a search.

Justice Miller, delivering the Appeal Court's ruling, first described the reasons for a search warrant:

> The function of a search warrant is to authorize police officers to enter a specified place they would otherwise have no authority to enter, in order to search for and seize specified property. Because forced entry into a private place, particularly a person's residence, is such an extraordinary exercise of executive power, it is subject to stringent juridical control: it must be judicially authorized ex ante and is subject to judicial scrutiny ex post.
>
> With respect to prior judicial authorization, the law is clear that a warrant must contain an adequate description of the place to be searched and the property to be searched for. There are multiple reasons for this demand for

BY THE BOOK:

Controlled Drugs and Substances Act

Information for search warrant

11 (1) A justice who, on ex parte application, is satisfied by information on oath that there are reasonable grounds to believe that

(a) a controlled substance or precursor in respect of which this Act has been contravened,

(b) any thing in which a controlled substance or precursor referred to in paragraph (a) is contained or concealed,

(c) offence-related property, or

(d) any thing that will afford evidence in respect of an offence under this Act or an offence, in whole or in part in relation to a contravention of this Act, under section 354 or 462.31 of the Criminal Code

is in a place may, at any time, issue a warrant authorizing a peace officer, at any time, to search the place for any such controlled substance, precursor, property or thing and to seize it.

"The function of a search warrant is to authorize police officers to enter a specified place they would otherwise have no authority to enter, in order to search for and seize specified property. Because forced entry into a private place, particularly a person's residence, is such an extraordinary exercise of executive power, it is subject to stringent juridical control: it must be judicially authorized ex ante and is subject to judicial scrutiny ex post."

> specificity. First, meaningful judicial pre-authorization requires specific details. It is crucial for effective judicial control of the search that the reviewing justice understand the parameters of the proposed search, and that the search conducted be the search that was in fact authorized. Second, by providing a precise description of the place to be searched, the warrant directs the actions of the executing officers, guiding them to the specific place to be searched and defining the boundaries of the search. An insufficiently specific warrant will fail to provide the requisite guidance to the executing officers, leaving them to fill in the blanks with their own knowledge, or to pursue attractive leads at their own discretion. Third, specification of place in the warrant allows a person served with the warrant to readily apprehend that executing officers have legal authority to enter and conduct the search, reducing the risk of conflict and violent resistance to the search. [references omitted, paras. 6-7]

As for whether the warrant was "expressly non-expiring" (as the accused had characterized it) and could be executed at any date in the future at the discretion of the police, the Court of Appeal rejected this notion. The language in the *CDSA* warrant authoring entry "at any time" did not mean the warrant could be executed at all times on any date in the future. Rather, it merely obviated the need for special justification for nighttime execution as is the case for *Criminal Code* warrants as required by s. 488:

> As the Crown argues, s. 11 of the CDSA is crucial context that informs the meaning of the phrase "at any time" in the warrant. Section 11 provides that "a justice who … is satisfied … that there are reasonable grounds to believe that …(a) a controlled substance … is in a place may, at any time, issue a warrant authorizing a peace officer, at any time, to search the place …" ... . Unlike warrants issued under sections 487 and 487.1 of the Criminal Code, which must be executed by day (as that term is defined in the Code), unless the preconditions for execution at night in s. 488 are met, a warrant issued under s. 11 of the CDSA does not require any additional grounds to justify night-time execution, and no time of execution need be specified. [reference omitted, para. 16]

"Unlike warrants issued under sections 487 and 487.1 of the Criminal Code, which must be executed by day (as that term is defined in the Code), unless the preconditions for execution at night in s. 488 are met, a warrant issued under s. 11 of the CDSA does not require any additional grounds to justify night-time execution, and no time of execution need be specified"

Nor was the warrant invalid for not specifying a date of execution. It had an implied execution date for entry. Since no other date appeared on the warrant, it was implicit that the warrant was sought to be executed on the day it was issued. The failure to expressly set out a date on the warrant was a technical fault and did not necessarily invalidate it. The warrant was facially valid, there was no s. 8 *Charter* breach and therefore no reason to consider the exclusion of the evidence under s. 24(2).

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

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11th National Symposium on Tech Crime and Electronic Evidence

February 9, 2018

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CHARACTER CANADA
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INVOLVING DECEASED's MOTHER AT INTERROGATION NOT OPPRESSIVE

R. v. Calnen, 2017 NSCA 49

A 35-year-old woman was reported missing to the police. She had lived with the accused for two years before she went missing. He denied having involvement in her disappearance. Several weeks after she disappeared, he was arrested for her murder. He was taken to the police station where he was interviewed by a detective from 2:50 pm to 6:00 pm. He was given about an hour break during this time where he exercised his right to counsel. He had met with and spoke to his lawyer for about 45 minutes. He was then transferred to another police station and interviewed again over a period of 18 hours, from 7:40 pm until 1:50 pm the following day, less a six hour break from 2:00 am to 8:00 am when he was taken to his cell.

During his interview, the police played on the accused's emotions. They made references to his children, played audio recordings from his son and the deceased's mother, and read a letter from one of his daughters. The police also constantly told the accused to "do the right thing." At 11:40 am, the victim's mother was brought into the interview room. She embraced him, held his hand, touched his arm and face, made references to their friendship and said she forgave him. She pleaded and begged with the accused to reveal where her daughter was buried so she could have closure.

At 12:15 pm, the accused confessed to knowing the location of the victim's ashes. The victim's mother left the interview room and police continued to question the accused. Although he insisted he did not kill her, he admitted he moved and burned her body. Later, the accused carried out a 20 minute re-enactment at his home explaining how the victim died. He was then taken back to his cell. The deceased's body was never found but the accused was charged with second degree murder nevertheless and indecently interfering with human remains.

Nova Scotia Supreme Court

The Crown submitted that all of the accused's statements were voluntary. There were no threats, inducements or promises made, and he had an operating mind. The accused, on the other hand, argued that the police created an atmosphere of oppression such that the statements he made were involuntary and therefore inadmissible.

The judge did find that the deceased's mother was a person in authority. She was acting as an agent of the state. She had been instructed by the police and had been assisted by them. Plus, the police were also present so there was no doubt the accused's statements were made to a person in authority.

The judge held that the deceased's mother did not offer any inducements. Her visit was not a benefit or a reward. He also found the accused had an operating mind. There was no evidence the accused suffered from a mental illness or that he was on mind-altering medication. Nor was police trickery used. There was no evidence the police lied to him in any way. Finally, there was no oppressive atmosphere during the interrogation.

Although the police strategy was clearly designed to play on the accused's emotions, he was treated with respect. Appealing to the accused's conscience in the manner the police did was a prudent thing to do. "Bringing [the deceased's mother] into the interview room was obviously a late attempt to elicit a confession," said the judge. "It worked and [the accused] subsequently told the police more details and walked them through a re-enactment. When I consider all of the facts, the law, and apply a contextual analysis, I come to the overwhelming conclusion that the Crown has proven beyond a reasonable doubt that the statements were voluntary." The accused was convicted of second degree murder and sentenced to life imprisonment without parole for 15 years. He had also pled guilty to two counts of indecently interfering with human remains and was sentenced to five (5) years in prison on those charges.

Nova Scotia Court of Appeal

The accused appealed his conviction on a number of grounds including an assertion that the trial judge erred in applying the law about voluntariness to his statement and the re-enactment he made with police. In his view, bringing the victim's mother into the interrogation room during questioning in order to persuade him to tell her where her daughter's body was constituted an atmosphere of oppression, thereby casting doubt on the voluntariness of his statements.

Chief Justice MacDonald, in his minority opinion but agreed upon by the majority on this point, dismissed the voluntariness argument. He found the judge well understood the law and did not misapprehend the facts.

The majority, however, set aside the second degree murder conviction on other grounds and ordered that any retrial, absent additional evidence, should be on a manslaughter charge only.

Complete case available at www.courts.ns.ca

Editor's note: Additional facts taken from *R. v. Calnen*, 205 NSSC 291.

Note-able Quote

"Our achievements today are but the sum total of our thoughts of yesterday" - Blaise Pascal

INFORMER TIP & REASONABLE GROUNDS: LOOKING AT THE WHOLE PICTURE

R. v. Richards, 2017 ONCA 24

The police received information from a confidential informer. The tip described a person named "Adrian". He was dealing powered and crack cocaine from his car and would deliver it to a specific location within a few hours. The informer also provided a vehicle description and licence number. The police established surveillance at the address provided and, within a few minutes, the accused drove up to the residence. The car matched the description provided by the informer, including its license plate number, as did the accused's physical description. Plus, the accused arrived at the residence within the time frame provided by the informer. The accused drove away after nine minutes and the police followed him, noting he picked up a passenger and conducted a "heat check."

The accused was stopped and arrested by police for possessing cocaine for the purpose of trafficking. They search his car and found 18.8 grams of cocaine and 18.8 grams of crack cocaine in his vehicle. He was charged with drug offences.

Ontario Superior Court of Justice

The judge found the police had the requisite reasonable grounds for the arrest. He considered the totality of the circumstances and was satisfied that the officer's belief was subjectively and objectively reasonable. There were no *Charter* breaches, and the accused was convicted of possessing cocaine and crack cocaine for the purpose of trafficking.

> "[T]he driver's behaviour was consistent with drug dealing. He was at the residence for a short time, then took an indirect route and picked up a passenger in front of a closed business."

BULLET POINTS

Reasonable Grounds

In R. v. Debot, [1989] 2 S.C.R. 1140, the Supreme Court of Canada stated there were at least three factors to weigh in determining whether the police had reasonable and probable grounds on the basis of an informer's tip:

- Was the information compelling?
- Was the informer credible?
- Was the information corroborated?

Each of these factors does not form a separate test. Weaknesses in one area may be compensated by strengths in the other areas.

Ontario Court of Appeal

The accused argued, in part, that the police had insufficient grounds to effect his warrantless arrest and conduct the search that resulted in the discovery of the drugs. He submitted that a higher degree of corroboration was required because of the absence of information on the confidential informers source of knowledge.

But the Court of Appeal disagreed. The totality of the circumstances supported the trial judge's findings and conclusion that reasonable grounds existed, and there was no need for any additional corroboration:

> First, was the information predicting the commission of the offence compelling? The [accused] does not take direct issue with this element of the test. The information predicting the commission of the offence was compelling.

> The [accused] was in possession of a large amount of cocaine and crack cocaine. The confidential informant provided specifics on the anticipated commission of an offence including detailed information about the amount of drugs, based on the informant's interaction with the [accused].
>
> Second, was the confidential informant credible? The informant was very well known to the police and had a significant positive track record. He had provided reliable and consistently accurate information. He had never provided information that resulted in no drugs being seized or no warrant being issued. He had provided information to the police on ten prior occasions.
>
> Third, was the information corroborated? The police corroborated the information provided by the confidential informant in that:
>
> - the description of the driver matched that given by the confidential informant. He was black, in his mid-20s, and approximately 6 feet tall with short black hair;
> - the car was a Toyota Camry;
> - its license number was BNEK 485;
> - he drove to the precise residential address provided by the confidential informant; and
> - he went there within the window of time described by the confidential informant.
>
> Lastly, the driver's behaviour was consistent with drug dealing. He was at the residence for a short time, then took an indirect route and picked up a passenger in front of a closed business. [paras. 7-10]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

"First, was the information predicting the commission of the offence compelling? ... Second, was the confidential informant credible? ... Third, was the information corroborated?"

MISUSE OF CPIC A SERIOUS BREACH OF PUBLIC TRSUT

R. v. Heron, 2017 ONCA 441

The accused was a police officer and organizer of a cheese smuggling racket. He asked his friend, another police officer, to bring some cheese into Canada from a New York pizzeria. His friend never declared the cheese at the border, nor did he or the accused ever pay the required duty. The cheese was sold to local Canadian restaurants for profit, at discount prices made possible by the evasion of the 246% duty. About $133,000 of cheese and other food was smuggled and $325,000 in duty was evaded.

One day the friend, while on a return run in the United States, told the accused he thought he was being followed and it appeared that the scheme may have been discovered. He also told the accused that the police were making enquiries about them at the supplier. On his first shift back at work, the accused ran a CPIC check on his friend's licence plate. The CPIC check would not only provide information about the subject of the search but also about who else has conducted a similar search within the previous 120 hours. As a result of this CPIC check the accused was charged with *Criminal Code* breach of trust. He was also charged with conspiracy and other *Customs Act* offences related to the smuggling operation.

Ontario Superior Court of Justice

The judge found that the only reasonable inference to be drawn from the circumstances relating to the accused's CPIC check was that he made it in order to evade detection and try to determine to what extent his police colleagues were on to him. No other plausible alternative inferences were suggested by the accused. "I have no doubt that he made this query in hopes of evading detection," said the judge. "The conspiracy was over. [The accused's friend] had stopped running cheese but it

"The [accused] is a police officer. He is entitled to access the CPIC system, but only for matters relating to his duties as a police officer."

was to [the accused's] benefit to know what was going on with his colleagues, otherwise why would he have taken the risk? He knew that these queries are tracked and a query of [his friend] is not so easily explained as a query of himself or his wife."

The accused was convicted of breach of trust by a public official, conspiracy to smuggle cheese into Canada from the United States without paying the required duties and unlawful possession of imported goods under the *Customs Act*. He was sentenced to three months' imprisonment for the smuggling offences and one month's imprisonment, consecutive, on the breach of trust offence.

Ontario Court of Appeal

The accused sought to have his *Criminal Code* conviction for breach of trust set aside. In his view, the trial judge erred in concluding on the totality of the circumstantial evidence that he conducted the CPIC check to try and find out whether the police were on to him. But the Court of Appeal disagreed. "The [accused] is a police officer. He is entitled to access the CPIC system, but only for matters relating to his duties as a police officer," said Justice Blair. "If someone else ... had conducted a similar enquiry recently it would suggest that the police were investigating [the accused and his friend] and provide insight into what was going on at the time." The Court of Appeal agreed that "the overwhelming, irresistible and only reasonable inference on the record was that the [accused] conducted the CPIC query in order to gain insight into the status of the police investigation regarding the cheese smuggling operations."

"The public is entitled to expect honesty and not corruption in the members of its police forces."

Sentence Appeal

The accused also appealed his sentence, but this too was dismissed. "The [accused] is also a police officer holding a public office," said Justice Blair, in part. "The public is entitled to expect honesty and not corruption in the members of its police forces. ... I also agree that the [accused's] resort to CPIC with a view to protecting his criminal interests, as best he could, constituted a serious breach of public trust in the circumstances."

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

TAX TROUBLES

The Canada Revenue Agency also went after the accused for not reporting income from his "business" of importing cheese and other products and reselling them to restaurants in Canada. In 2013, a Notice of Reassessment was issued against him for his unreported income of $23,916 and $84,216 in the 2010 and 2011 taxation years respectfully. Penalties were also levied (see *Heron v. Her Majesty the Queen*, 2017 TCC 71).

BY THE BOOK:

***Criminal Code:* Breach of trust by public officer**

s. 122 Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.

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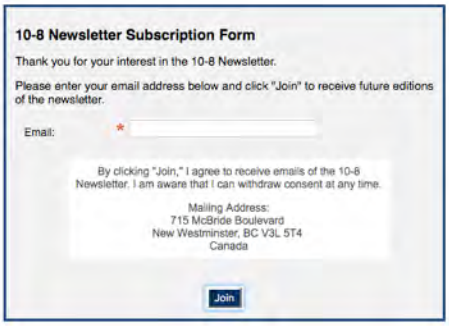

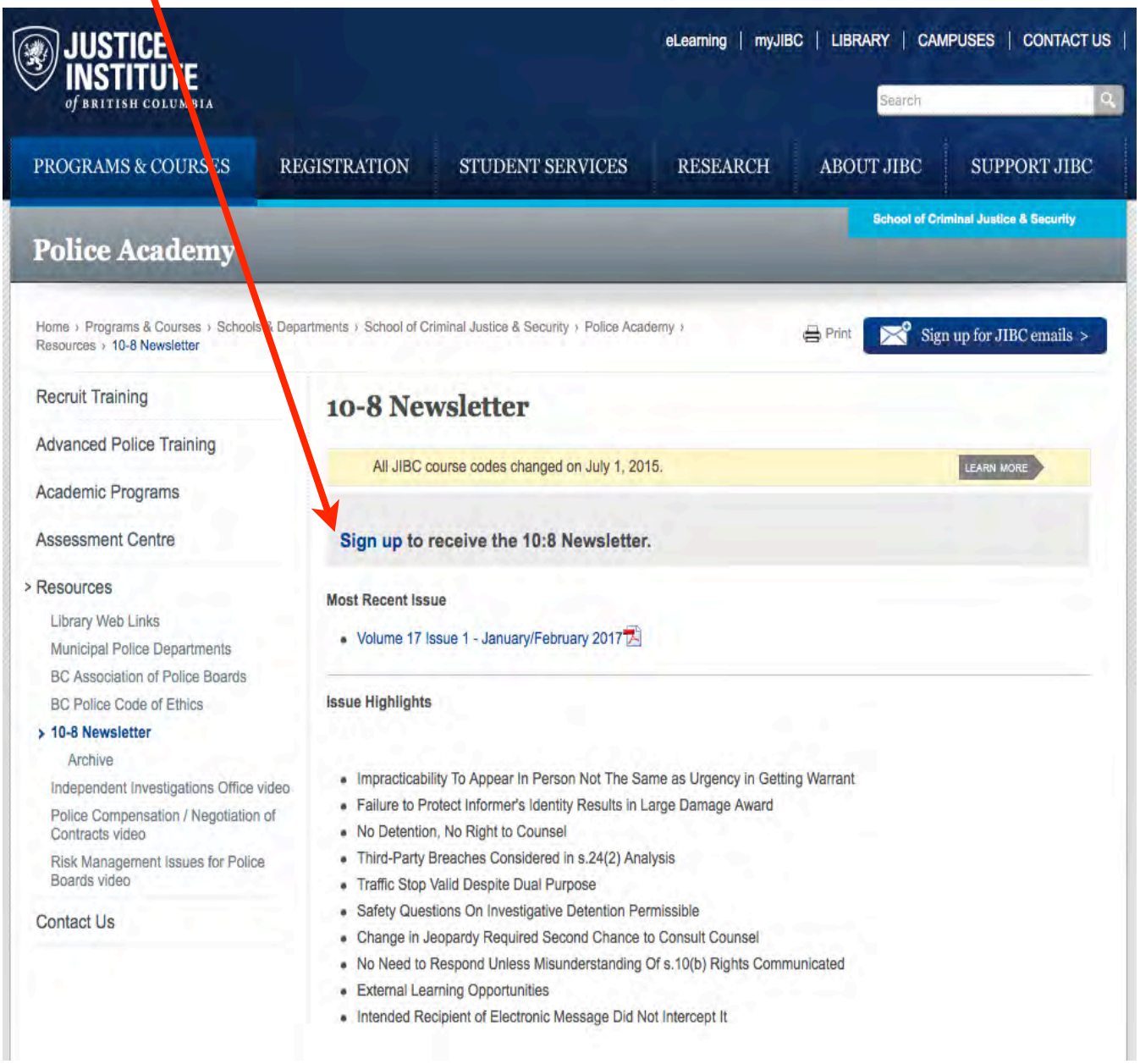

Canadian Police and Peace Officers' 40th Annual Memorial Service

September 24, 2017
Parliament Hill
Ottawa, Ontario

Le 24 septembre 2017
Colline du Parlement
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Le 40e service commémoratif annuel des policiers et agents de la paix canadiens

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2017 British Columbia Law Enforcement Memorial

Sunday, September 24, 2017 at 1:00 pm
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BC LAW ENFORCEMENT MEMORIAL

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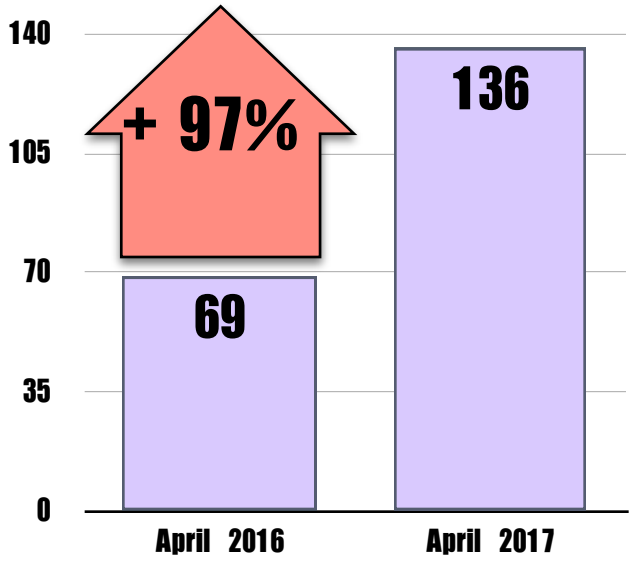
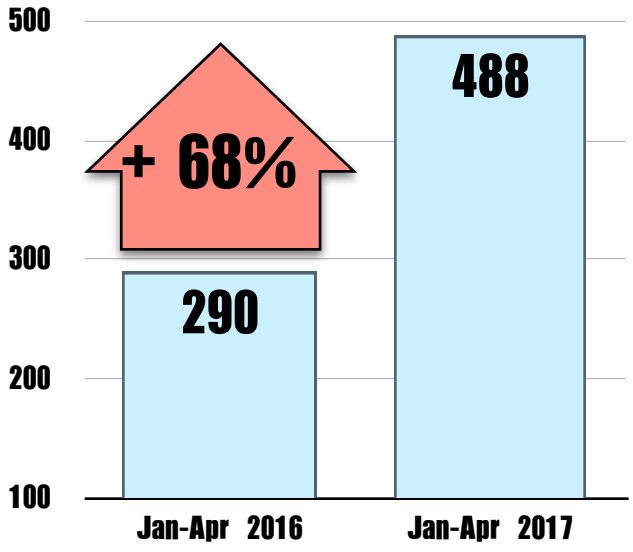
ILLICT DRUG OVERDOSE DEATHS ON THE RISE 3.0

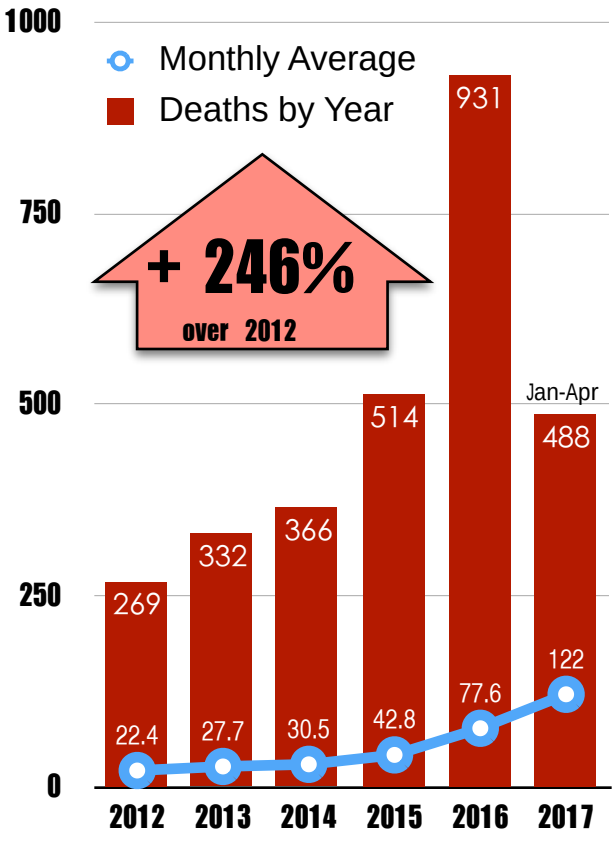
The Office of BC's Chief Coroner has released statistics for illicit drug overdose deaths in the province from **January 1, 2017 to April 30, 2017**. In April there were 136 suspected drug overdose deaths. This represents a 97% increase over the number of deaths occurring in April 2016. This amounts to about nine (9) people dying every two days of the month (or 4.5 people per day).

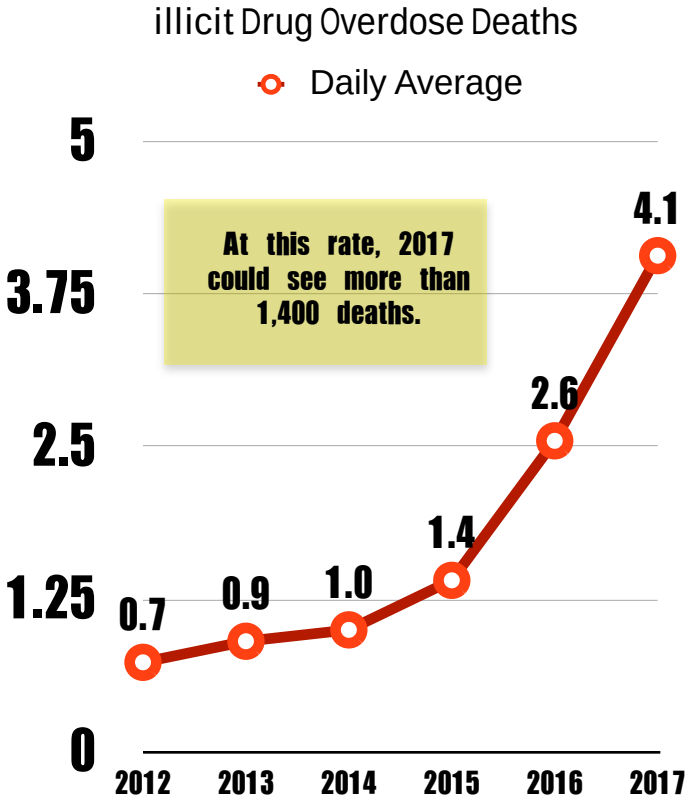


From January 1 to April 30, 2017 there were a total of **488** illicit drug overdose deaths. This is a **68%** increase over the same period last year.



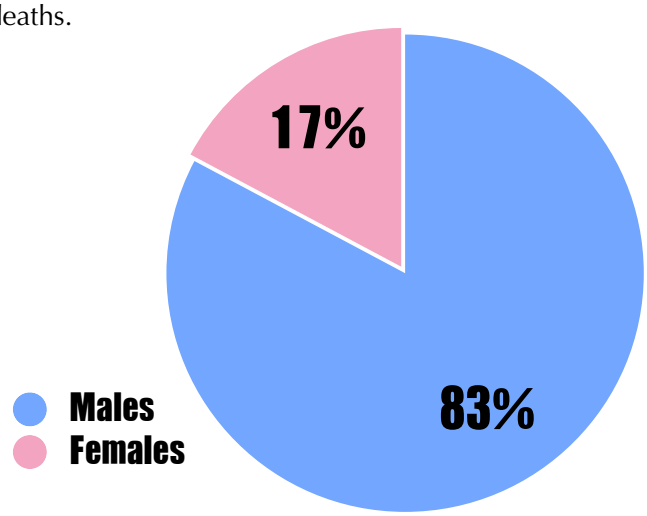
Last year, there were **931** overdose deaths, more than an **81%** increase over the same period in 2015 and a **246%** over 2012. Moreover, the report attributes fentanyl laced drugs as accounting for the increase in deaths. In December 2016 alone, there were **142** deaths. This was the highest recorded number of deaths occurring in a single month in BC and was more than double the monthly average of illicit drug overdose deaths since 2015.

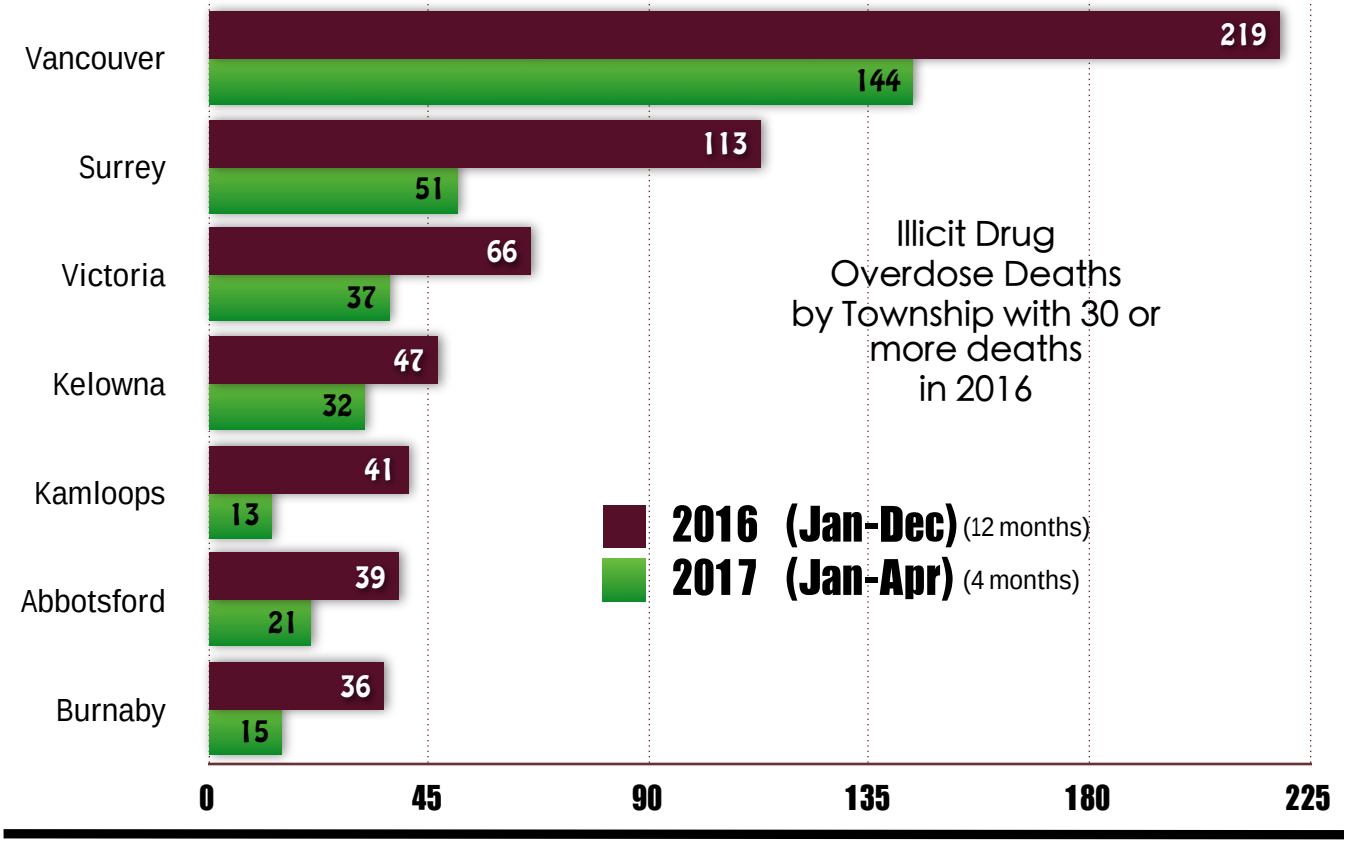




People aged 30-39 have been the hardest hit so far in 2017 with **144** illicit drug overdose deaths followed by 40-49 year-olds at **105** deaths and 50-59 year-olds at **100** deaths. Vancouver had the most deaths at 144 followed by Surrey (**51**), Victoria (**37**), Kelowna (**32**) and Abbotsford (**21**).

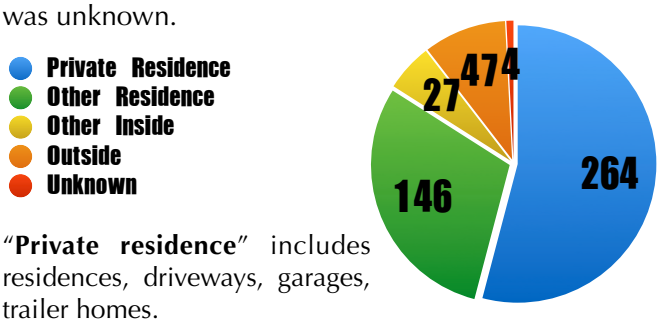
Males continue to die at almost a **5:1** ratio compared to females. From January to April 2017, **404** males have died while there were **84** female deaths.





Deaths by location: Jan-Apr 2017

The data indicates that most illicit drug overdose deaths (**89.5%**) occurred inside while **9.6%** occurred outside. For four (4) deaths, the location was unknown.



"**Private residence**" includes residences, driveways, garages, trailer homes.

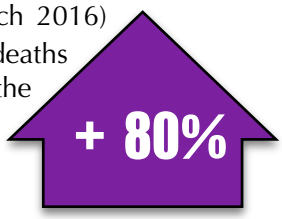
"**Other residence**" includes hotels, motels, rooming houses, shelters, etc.

"**Other inside**" includes facilities, occupational sites, public buildings and businesses.

"**Outside**" includes vehicles, streets, sidewalks, parks, wooded areas, campgrounds and parking lots.

DEATHS SINCE PUBLIC HEALTH EMERGENCY

In April 2016, BC's provincial health officer declared a public health emergency in response to the rise in drug overdoses and deaths. The number of overdose deaths in the 13 months preceding the declaration (March 2015-March 2016) totaled **667**. The number of deaths in the 13 months following the declaration (April 2016-April 2017) totaled **1,202**. This is an increase of **80%**.



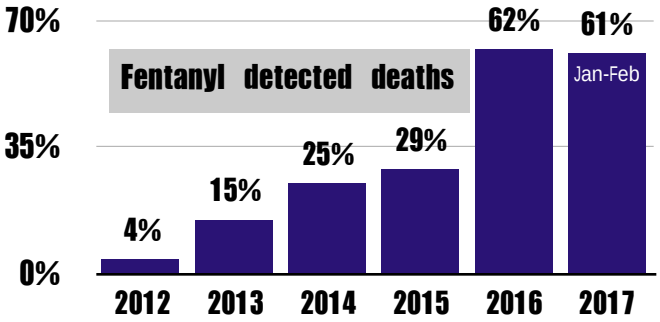
TYPES OF DRUGS

The top four detected drugs relevant to illicit drug overdose deaths from 2015 and 2016 were cocaine, which was detected in **48.4%** of deaths, fentanyl (**44.8%**), heroin (**36.2%**) and methamphetamine/amphetamine (**29.3%**).

From January to February 2017, fentanyl was detected in **61%** (139) of illicit drug overdose deaths. This is a **90%** increase in which fentanyl was detected in deaths occurring during the same period in 2016 where fentanyl was detected in 79 deaths.

Many police departments are trying to message to various segments of the population in different ways. Above is one such messaging example provided by the Abbotsford Police Department as is the example on p. 23 (Source Abbotsford Police).

According to Vancouver Coastal Health, drugs users at Insite - a supervised injection site - checked their drugs more than 1,000 times from July 2016 to March 2017. Overall, **79%** of the drugs checked were positive for fentanyl, including **83%** of heroin samples, **82%** of crystal meth and **40%** of cocaine.



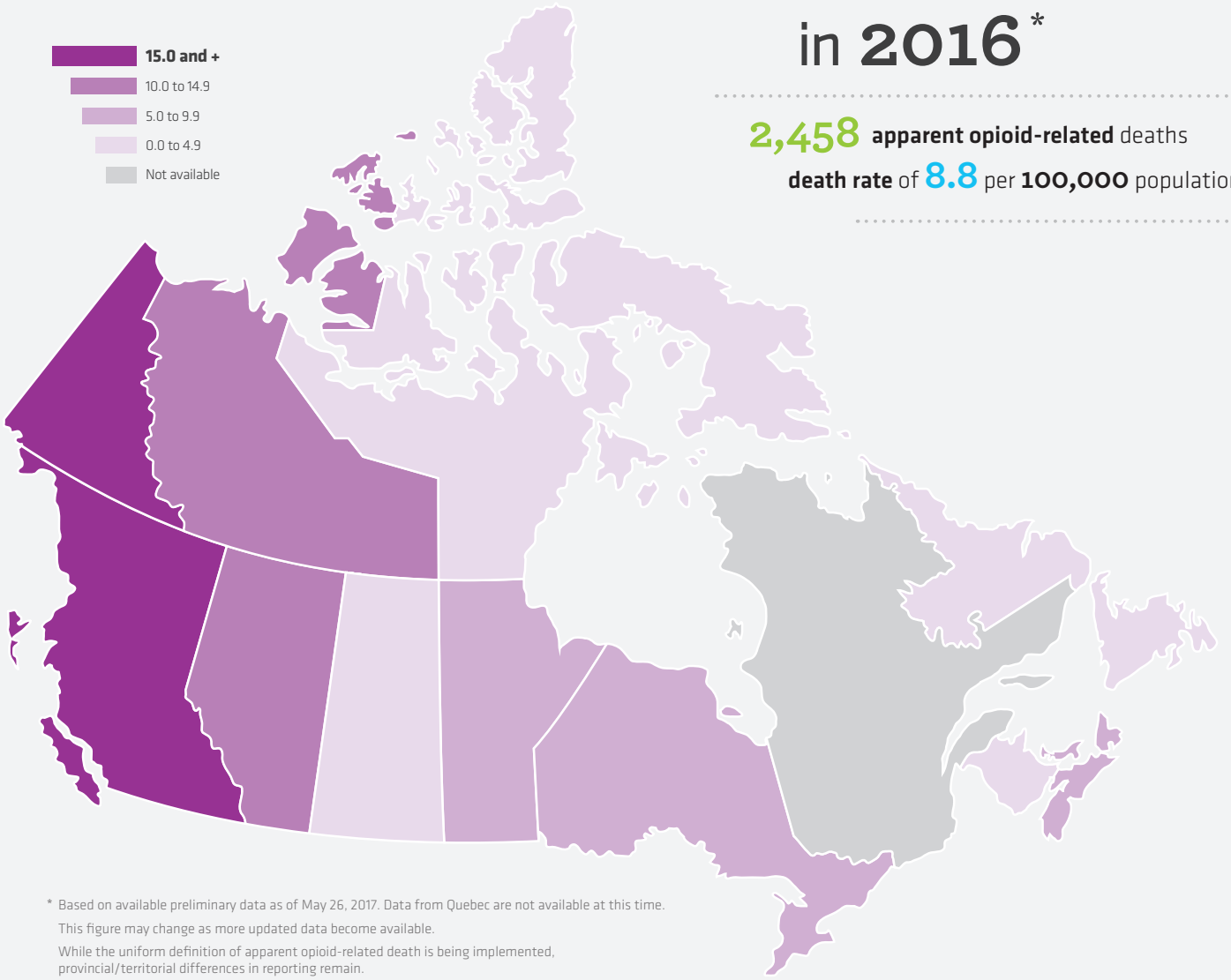
Sources:

-Illicit Drug Overdose Deaths in BC - January 1, 2017 to April 30, 2017.

-Fentanyl Detected Illicit Drug Overdose Deaths - January 1, 2012 to February 28, 2017.

Ministry of Justice, Office of the Chief Coroner. April 19, 2017.

APPARENT **OPIOID**-RELATED **DEATHS** in **CANADA**



in 2016 *

2,458 **apparent opioid-related** deaths

death rate of **8.8** per **100,000** population

* Based on available preliminary data as of May 26, 2017. Data from Quebec are not available at this time.
This figure may change as more updated data become available.
While the uniform definition of apparent opioid-related death is being implemented, provincial/territorial differences in reporting remain.

OPIOID-RELATED DEATHS CAN BE PREVENTED

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CROWN BEARS BURDEN OF PROVING WARRANTLESS SEARCH REASONABLE

R. v. Dunstan, 2017 ONCA 432

Police were engaged in a drug trafficking investigation known as "Project Gladiator", led by a Staff Sergeant. They had obtained wiretap authorizations and a general warrant to enter places associated with the principal target of the investigation and other known persons and to search for items related to the investigation such as drugs and other evidence. The general warrant allowed police to disguise these covert entries - or sneak and peeks - as break-ins if they located a large cache of drugs. But they were unable to locate the stash house. The accused was not a major target of the project but he had been seen by police associating with the target. The police located the accused's vehicle parked at a residence. However, his residence was not named in the general warrant.

Early one morning the police received an anonymous call on their non-emergency line from a blocked number reporting a break-in at the accused's residence. The caller said he had seen eight men run out from the house and it looked suspicious. The caller could not be identified nor could the call be traced. Responding officers found the front door broken open. They entered the house to ensure the safety of anyone inside. No one was there but the police discovered various open bags of drugs in plain view. They secured the premises, obtained a search warrant and subsequently found 43 lbs of marijuana, 4.7 kgs of cocaine, 4 kgs of psilocybin, 6.77 g of MDMA and over $100,000 in cash. The officers seized the drugs, the cash and some drug-related paraphernalia. The accused was charged.

Ontario Superior Court of Justice

In a pre-trial *Charter* motion, the accused sought to have the evidence of the drugs and cash excluded on the basis that the police had staged the break-in and placed the anonymous call in order to gain access to his house illegally. This he argued, breached his s. 8 *Charter* right to be secure against unreasonable search or seizure. He alleged that the Staff Sergeant was the anonymous caller and instigator of the break-in. The Staff Sergeant vigorously denied this. As a consequence, the accused wanted an expert to compare the the Staff Sergeant's voice to the voice on the recorded call using spectrographic voice identification analysis. To do this, the accused

The Anonymous Call to Police

Operator:	*York Regional Police Communications, Jaime*
Caller:	*Uh, I just saw eight guys run out of a house at 76 Red Ash and look suspicious.*
Operator:	*76 Red Ash?*
Caller:	*Yup.*
Operator:	*What city is that in?*
Caller:	*It's in Markham.*
Operator:	*And this just happened?*
Caller:	*It just happened, like 15 minutes ago.*
Operator:	*So where are they now?*
Caller:	*I'm not following them. I don't know. They didn't look too friendly.*
Operator:	*So eight males 15 minutes ago ran out of …*
Caller:	*[Hangs up.]*
Operator:	*Hello?*

requested an order from the judge permitting the use a high-quality microphone to record the testimony of the Staff Sergeant for the expert analysis rather than relying on the lower-quality court recording.

Although he permitted the Staff Sergeant to read the text of the anonymous call into the record four times, the judge rejected the request to use a high-quality microphone. He concluded he did not have the power to make such an order. First, he said he could not compel a witness to provide a voice sample. Second, he ruled he did not have the inherent power to make the order. Finally, he rejected the accused's argument that the right to make full answer and defence permitted the recording. As a result, the expert was unable to provide a professional opinion about the comparison because only a low-quality recording was used.

Next, the judge determined that the accused bore the burden of establishing, on the balance of probabilities, that the original break-in was committed by police. Although suspicious, the judge was not satisfied the Staff Sergeant was responsible for the break-in and made the anonymous call. The judge went on to conclude that there were no *Charter* breaches related to any of the three entries: (1) the initial break and enter, (2) the entry by the police in response to the anonymous telephone call and (3) the subsequent search by the police and seizure of the drugs under the search warrant. The evidence was admissible and the accused was convicted of multiple counts of possessing drugs for the purpose of trafficking and one count of possessing proceeds of crime. He was sentenced to eight years' in prison, less credit of 18 months for pre-sentence custody and strict bail conditions. A forfeiture order, DNA order and a weapons prohibition were also imposed.

Ontario Court of Appeal

The accused argued the trial judge erred in determining there was no the authority to allow the defence to record the Staff Sergeant's voice using a high-quality microphone so it could be properly analyzed on a spectrograph. He also suggested that the judge erred in holding that he bore the burden of proving the illegality of the warrantless entry into his home.

Ordering the Recording

Justice Blair, writing the unanimous judgment for the Court of Appeal, concluded that the applications judge did have the power to order the recording. The Staff Sergeant was not being compelled solely for the purpose of having his voice recorded. He was properly before the court giving substantive evidence on the *voir dire* and his voice was being recorded anyways. Using a high-quality microphone was merely substituting one technology for another in relation to how the Staff Sergeant's voice would be recorded. This would not further intrude into his privacy or security rights. Further, the judge did have the discretionary authority to order the use of a high-quality microphone, either under Ontario's *Courts Justice Act* or his inherent jurisdiction as a Superior Court judge, to ensure the fairness of a trial and the accused's right to make full answer and defence. Justice Blair said, among other things:

> The rights of an accused should not turn on the particular level of technology utilized by the court, in my view. If it is permissible for an

"The rights of an accused should not turn on the particular level of technology utilized by the court, in my view. If it is permissible for an expert to listen to the court recording of a witness's testimony for purposes of subjecting it to a voice identification comparison with another voice on another recording ... it should not become impermissible to do so simply because of a difference in the quality of the recording device used to record that testimony."

> expert to listen to the court recording of a witness's testimony for purposes of subjecting it to a voice identification comparison with another voice on another recording – as the Crown acknowledges – it should not become impermissible to do so simply because of a difference in the quality of the recording device used to record that testimony. To the extent the giving of testimony in these circumstances may amount to the provision of a bodily sample for the purposes of forensic testing – as the Crown puts it – the sample is being provided in any event. [para. 63]

Burden of Proof

The Court of Appeal found the applications judge erroneously required that the accused needed to establish that the warrantless search was not justified. "Even though there is a general burden on an accused to persuade the court that his or her Charter rights have been infringed, once it is established that a search was a warrantless search – as the entry of the York Regional Police was, admittedly, here – the jurisprudence provides that the onus shifts to the Crown to justify the entry," said Justice Blair. He continued:

> The initial entry involving the break-in and the York Regional Police entry are inextricably intertwined in the circumstances. The warrantless entry could not be justified (whatever the reasonable belief of the YRP officers and the circumstances confronting them on their arrival) if it had been triggered by an unlawful ruse carried out by state actors in the first place. The Crown does not dispute this. To hold otherwise – as the [accused] points out – would be to permit the police to Charter-proof their conduct from constitutional scrutiny by the simple expedient of having one officer trick another into making a warrantless entry, on the theory that the blamelessness of the "dupe" officer would insulate the conduct from attack. For this reason, in my opinion, the two entries – the allegedly fake break-in and subsequent anonymous phone call, and the responding entry by the York Regional Police – are part of a single integrated chain of events that should not be considered, in silo fashion, as two independent and separate events.
>
> Considering the two entries as a whole, the overall burden of persuasion rests with the Crown to justify the entry and the police conduct associated with it. That said, there is an evidentiary burden to be met by the [accused] in the circumstances. The evidentiary burden required the [accused] to lead evidence demonstrating a credible "air of reality" to the allegation that a state agent, [the Staff Sergeant], made the anonymous call and that he or his team was responsible for the initial break-in. ... [The accused] succeeded in doing just that. The onus must then shift back to the Crown to counter the credible evidence led by the accused and to meet its ultimate persuasive burden of satisfying the court, on a balance of probabilities, that the police entry was justified.
>
> But the Crown led no such counter-evidence, although it was within the Crown's own particular knowledge and power to do so, if such evidence existed. It was content to stand by [the Staff Sergeant's] strong denial that he was the anonymous caller or that he or his team had staged the break-in.
>
> Indeed, in the face of the preliminary foundation laid by the [accused], the Crown remained passive. Although requested by the [accused] to do so, it did not provide [the Staff Sergeant's] cell phone records, which the pre-trial application judge observed "would have been very helpful evidence". The [accused] argued that, since [the Staff Sergeant] acknowledged he did not have a personal cell phone and only used his Durham Regional Police cell phone, his phone records would have shown whether he did or did not make the anonymous call to the non-emergency line on the morning in question. Although

"Even though there is a general burden on an accused to persuade the court that his or her Charter rights have been infringed, once it is established that a search was a warrantless search .. the jurisprudence provides that the onus shifts to the Crown to justify the entry."

> requested by the [accused] to do so, the Crown also did not provide information respecting [the Staff Sergeant's] whereabouts which, the [accused] argued, may have shown whether he was or was not near 76 Red Ash Drive on the morning in question. [paras. 86-89]

Had the applications judge properly applied the Crown onus, "he may or may not have decided that the evidence fell short of satisfying him on a balance of probabilities that the Crown had justified the warrantless entry".

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

Complete case available at www.ontariocourts.on.ca

Editor's note: Additional facts taken from *R. v. Dunstan*, 2016 ONSC 971.

POLICE NEED NOT CORROBORATE ALL OF INFORMER's INFORMATION

R. v. Reid, 2017 ONCA 430

A confidential informer told the police that they had purchased cocaine from the accused, who he knew as "Rocky", and his roommate, a man named Cal Morris. The informer also said the accused possessed a gun. The police conducted surveillance at the address provided by the informer and observed the accused at the address. Based on the informer's information and the surveillance evidence, at 8:32 pm the police applied for a telewarrant under s. 487.1 of the *Criminal Code* to search the accused's residence for a handgun, identification and cocaine in relation to an offence under s. 91(1) of the *Criminal Code*. The affiant justified the application for a telewarrant by stating that it was after 4:00 pm, the court house was closed and a justice of the peace was not available in the jurisdiction. The warrant allowed for its execution over a three day period.

The next day the accused was observed engaging in several hand-to-hand transactions suggestive of drug trafficking. He was arrested and found in possession of drugs. The search warrant was then executed and police discovered cocaine, cash and drug trafficking paraphernalia in the accused's apartment but no gun was found. In total, the police seized 123.34 grams of powder cocaine and 151.98 grams of crack cocaine.

Ontario Superior Court of Justice

The accused brought an application under s. 8 of the *Charter* arguing, in part, that there were insufficient grounds upon which to justify the search warrant, including the conditions for using the telewarrant procedure. Since the warrant was invalid, the police breached his right to be secure against unreasonable search or seizure and the evidence collected ought to have been excluded.

The judge concluded that the conditions for a telewarrant had been satisfied. He also held that the informer's information had been sufficiently corroborated. The warrant was valid and the evidence was admissible. The accused was convicted of possessing cocaine for the purpose of trafficking and possessing proceeds of crime. He was sentenced to five years' imprisonment, less nine months' credit as he was subject to restrictive bail conditions.

Ontario Court of Appeal

The accused alleged the trial judge made several mistakes. He submitted, among other things, that the judge erred in finding reasonable and probable grounds with respect to the firearm offence. He also again suggested the conditions for obtaining a telewarrant were not met and the informer information was not sufficiently corroborated.

Firearms Offence

The accused contended that the ITO did not provide reasonable and probable grounds to believe an offence had been committed under

"The [accused's] illegal possession of the handgun could be inferred reasonably, if not inevitably, from the circumstances set out in the ITO. The [accused] had a criminal record, which included offences that attracted a mandatory weapons prohibition under s. 109 of the Criminal Code. Further, it was reasonable to assume that the possession of a gun by the [accused] in the context of his activities as a drug dealer would be illegal."

s. 91(1) of the *Criminal Code* because it did not provide any evidence that his possession of the handgun was illegal. There was no information in the ITO about whether the police took any investigative steps to determine whether he had a valid firearm licence or certificate, or whether he was prohibited from possessing a firearm. Rather, the ITO affiant merely deposed that he believed the accused was in possession of a handgun based on the informer's information that he had seen the gun in the accused's possession.

Justice van Rensburg, writing the Court of Appeal's decision, disagreed. He found the trial judge did not err in concluding that the ITO disclosed reasonable and probable grounds to believe the accused was unlawfully in possession of a firearm. "The [accused's] illegal possession of the handgun could be inferred reasonably, if not inevitably, from the circumstances set out in the ITO," he said. "The [accused] had a criminal record, which included offences that attracted a mandatory weapons prohibition under s. 109 of the Criminal Code. Further, it was reasonable to assume that the possession of a gun by the [accused] in the context of his activities as a drug dealer would be illegal."

The Telewarrant

The accused asserted that the conditions for a telewarrant had not been met. Since the affiant requested three days to execute the search warrant, the accused suggested that it was not impracticable for the affiant to appear personally before a justice.

The Court of Appeal ruled that the trial judge did not err in finding the conditions for a telewarant had been met. "Section 487.1 of the Code provides for the issuance of a telewarrant, and requires the applicant's 'belief that an indictable offence has been committed and that it would be impracticable to appear personally before a justice to make application for a warrant'," said Justice van Rensburg. He cited *R. v. Clark*, 2015 BCCA 488, a decision affirmed by the Supreme Court of Canada, where the British Columbia Court of Appeal stated that "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." Justice van Rensburg continued:

> Similarly, in this case, the affiant explained that the court house was closed when the application was made. Further, the trial judge reasonably concluded that waiting 12 hours to obtain a search warrant could have impacted the ability to execute the warrant. As in Clark, the onus is on the [accused] to demonstrate that it was practicable for the affiant to have made an in-person application notwithstanding the fact that the court house was closed. The trial judge did not err in her conclusion that the "impracticability" requirement for a telewarrant had been met. [para. 23]

Corroboration

The accused maintained that the police did not sufficiently corroborate the information provided by the informer because they did not corroborate the information provided about his roommate Morris and failed to explain how they identified the accused during their surveillance. This argument too was rejected.

The trial judge was required to consider whether the information from the confidential informer was compelling, credible and corroborated. "The trial judge noted that where the police receive

"[T]he law does not require the police to corroborate every detail of a CI's tip. Rather, the totality of the circumstances must meet the standard of reasonableness and weaknesses in one area may, to some extent, be compensated by strengths in the other two."

compelling information from a known CI with a track record of reliability, 'something less in the way of verification might suffice'," noted the Court of Appeal. "The law does not require the police to corroborate every detail of a CI's tip. Rather, the totality of the circumstances must meet the standard of reasonableness and weaknesses in one area may, to some extent, be compensated by strengths in the other two." In this case, Justice van Rensburg stated:

> [T]here were reasonable grounds to justify the issuance of the search warrant sought based on the information in the ITO, taken as a whole. The CI provided detailed and firsthand information about the [accused]. In particular, he or she described the handgun, when they last saw it and how many times they had seen it. The CI also provided very specific information regarding how often and how much cocaine he or she personally purchased from "Rocky" who lived at the [accused's] address. As the trial judge correctly noted, the information provided by the CI was not commonplace or easily ascertainable. Furthermore, it was reasonably open to the issuing justice to find that the CI was credible, after considering the CI's track record of reliability and his or her motive for providing the information to the police. In these circumstances, the past reliability of the CI and the specific nature of the CI's information made up for the fact that not every aspect of the tip was corroborated. [para. 29]

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

Complete case available at www.ontariocourts.on.ca

ARRESTEE NOT ALWAYS LIMITED TO 'ONE PHONE CALL'

R. v. Stevens, 2016 QCCA 1707

The accused was arrested at his residence on charges of rape and indecent assault for offences occurring some 30 years earlier. He was taken to a police station to be interrogated. After the accused was read his constitutional rights at 9:13 am, he was led to another room so that he could exercise his right to counsel. He managed to reach a civil lawyer by telephone, but the lawyer was unable to help him. The civil lawyer provided the name of a criminal defence lawyer and the accused wrote the criminal lawyer's name on a piece of paper. When he returned to the interrogation room at 9:28 am, he brought the paper with him.

The officer saw the lawyer's name on the piece of paper and recognized it as the name of a local criminal lawyer he had previously encountered. When the officer saw the name, he inferred that the accused had written it down during his conversation with the civil lawyer. In addition, the accused told the officer that his civil lawyer had recommended the other lawyer and that is why he jotted down the telephone number. The accused also told the police officer that he thought he could not contact the criminal lawyer right away because the officer had earlier told him he had no right to another phone call. During the interrogation, which lasted about five hours, the criminal lawyer left messages for the accused at the police station, but these were not delivered to him until the end of the interrogation. At the end of the day, the accused was able to speak with his criminal lawyer.

"Section 10(b) gives the detainee the right to the assistance of counsel, not, like in the movies, a constitutional right limited to ... 'one phone call'."

"[I]t is understood that, beyond the duty to inform detainees of their rights, s. 10(b) imposes at least two duties on police officers. First, if a detainee indicates that he or she wishes to exercise this right, the police officer must, barring emergency, provide the detainee with a reasonable opportunity to do so. Second, the police officer must refrain from eliciting evidence until the detainee has had that reasonable opportunity."

Court of Quebec

Although the accused never admitted to the offences, the Crown nonetheless sought to introduce the video recorded interrogation as evidence. The accused requested a *voir dire* and challenged its admissibility. He argued, among other things, that his right to counsel under s. 10 (b) of the *Charter* had been breached during the interrogation and that the statement should be excluded under s. 24(2).

Although the officer told the accused that his right to counsel had been exercised in calling the civil lawyer (even when he saw the criminal defence lawyer's name on the piece of paper), the judge found that the accused's right to counsel had not been breached. The judge held that the officer had given the accused another opportunity to contact the criminal defence lawyer but the accused declined. The officer was required to do nothing more. "The accused was informed of his right to counsel of his choice," said the judge. "The accused had a reasonable opportunity to exercise this right and... even reached a [lawyer]". The interrogation recording was admissible as evidence and the accused was convicted of rape and indecent assault.

Quebec Court of Appeal

The accused raised several grounds of appeal including the argument that the trial judge erred in law by finding that there was no violation of his right to counsel under s. 10(b). In his view, the officer did not provide him with a reasonable opportunity to exercise his right to counsel. The Crown, on the other hand, submitted that the trial judge did not err. In the Crown's view, s. 10(b) of the *Charter* does not require that the police officer review the quality of the counsel received by the detainee once attorney-client communication is established.

Right to Counsel

Justice Kasirer, on behalf of the Court of Appeal, concluded the accused's right to counsel had been breached. Unlike what the trial judge found, the Court of Appeal concluded that the officer did not inform the accused that the criminal defence lawyer was trying to contact him during the interrogation, even though he knew the accused wanted to speak with this lawyer. Nowhere in the video did the officer tell the accused he could contact the criminal lawyer and the judge was mistaken in finding so.

As for what the s. 10(b) right to counsel entails, the Court of Appeal stated:

> ... [I]t is understood that, beyond the duty to inform detainees of their rights, s. 10(b) imposes at least two duties on police officers. First, if a detainee indicates that he or she wishes to exercise this right, the police officer must, barring emergency, provide the detainee with a reasonable opportunity to do so. Second, the police officer must refrain from eliciting evidence until the detainee has had that reasonable opportunity.
>
> The duty imposed on officers to give detainees the reasonable opportunity to exercise their right to counsel, which is distinct from the duty to inform, flows from the very wording of s. 10(b) of the Charter, as doctrinal authors remind us. We may go even further and say that a joint reading of the French and English versions provides a dual perspective on the "application" aspect of the right to counsel. The expression "to retain and instruct counsel without delay" in the English text emphasizes the act of communication undertaken by the

"When police officers have clear indications that attorney-client communication has not been sufficiently established, they may not refuse to fulfill their duty under the pretext that the accused is entitled to only 'one phone call'."

> detainee with the lawyer; with the words "d'avoir recours sans délai à l'assistance de l'avocat", the French text, for its part, focuses on the opposite perspective, the actual provision of legal advice by a lawyer to a detainee, who is here seen as the recipient of the advice.
>
> The versions are not inconsistent; together, they contribute to the expression of a common meaning encompassing the full scope of the Charter-enshrined right. The right to counsel includes the right to inform the counsel retained of the situation in which the detainee finds himself or herself ("the right to retain and instruct counsel"), and its corollary, the right to obtain advice from the attorney retained ("le droit...à l'assistance de l'avocat"). Implicit in the term "assistance" is the notion of instructing counsel in an attorney-client relationship, which is explicit in the term "instruct" in the English version. Similarly, "to instruct counsel" also implies receiving "assistance" from a lawyer, which is explicit in the French text. The two versions combine to express the bilateral relationship of attorney-client communication at the heart of this Charter-enshrined right.
>
> Moreover, the recognition of this two-way relationship is necessary to fulfill the objective of s. 10(b). As the Supreme Court noted in R. v. Willier,[12] "s. 10(b)'s text remains the starting point in its interpretation, an understanding of its animating purposes is essential to a full understanding of its content". The purposive interpretation proposed by the Supreme Court takes into account the objective of the right to counsel, which seeks to mitigate the power imbalance between the detainee and the State when the former is being interrogated by police officers.This interpretation –focused on the right to counsel as a bulwark against the abusive deprivation of freedom and a buttress for the right to silence – is consistent with the relationship of bilateral communication protected by the two versions of s. 10(b). [references omitted, 61-64]

The police breached the accused's right to counsel in this case by failing to give him a reasonable opportunity to exercise his right to counsel without delay. Although he did speak to a lawyer, the officer should have inferred that the accused had not been able to benefit from the assistance of the lawyer when the officer observed the accused had written the name of a criminal lawyer on a piece of paper. Rather than redressing the situation, the officer misled the accused by allowing him to believe that his constitutional right had been exhausted with the "one phone call" to which he was entitled and by keeping quiet about the messages from the lawyer with whom the accused wanted to speak. The officer knowingly prevented the accused from exercising his constitutional right.

"When police officers have clear indications that attorney-client communication has not been sufficiently established, they may not refuse to fulfill their duty under the pretext that the accused is entitled to only 'one phone call'," said Justice Kasirer. "Giving the [accused] 'one phone call' was clearly not sufficient to fulfill the police officer's duty in relation to "implementing" the right enshrined at s. 10(b)". He continued:

> ...[I]t is true that "normally, s. 10(b) affords the detainee a single consultation with a lawyer." However, if the circumstances demonstrate that, despite the call, the right to counsel has not been exercised because the detainee was

"[I]t is true that 'normally, s. 10(b) affords the detainee a single consultation with a lawyer.' However, if the circumstances demonstrate that, despite the call, the right to counsel has not been exercised because the detainee was not able to 'instruct counsel' and did not receive the 'assistance' of a lawyer, the ... 'one phone call' does not suffice."

> not able to "instruct counsel" and did not receive the "assistance" of a lawyer, the ... "one phone call" does not suffice. What constitutes a "reasonable opportunity" to exercise the right to counsel necessarily varies according to the facts of each case. Section 10(b) gives the detainee the right to the assistance of counsel, not, like in the movies, a constitutional right limited to ... "one phone call". [references omitted, para. 75]

Here, the officer had clear indication that the legal counsel obtained by the accused during his phone call with the civil lawyer was not adequate. The officer knowingly ignored this so that he could continue the interrogation without interruption. "The officer understood, when he saw [the criminal defence lawyer's] name on the piece of paper, or at the latest when he received the telephone message for the [accused], that the [accused] had not had a reasonable opportunity to exercise his right to counsel," said Justice Kasirer. "He continued questioning him, violating his duty with respect to the implementation of the right provided at s. 10(b) of the Charter."

Exclusion of Evidence

In excluding the video recorded interrogation as evidence, the Court of Appeal found the police misconduct to be serious:

> [N]ot only did the police officer act without regard for the [accused's] right to counsel, he also took deliberate action to undermine the exercise of that right by purposefully concealing [the criminal lawyer's] messages and allowing the [accused] to believe that he had to wait until the end of the interrogation before being able to obtain his assistance. The police officer was seeking to limit the [accused's] right to silence to further his investigation, without regard for his constitutional rights: this blameworthy conduct on the part of a police officer is an abuse of authority which falls near the most serious end of the scale referred to by the Supreme Court in Grant [para. 93]

A new trial was ordered.

Complete case available at www.canlii.org

WHEN IS A 'GUN' A FIREARM?

That is a question the Ontario Court of Appeal had to answer in *R. v. Gordon*, 2017 ONCA 436. The accused was charged with conspiracy, armed robbery, two counts of forcible confinement and using a firearm while committing an indictable offence. One of the victims of a robbery said one of the robbers pointed a handgun and threatened to shoot. The gun was not fired during the robbery and was never recovered.

Despite the accused arguing that the evidence was equally consistent with the gun being an imitation firearm, the trial judge concluded that the gun was real, capable of firing bullets and fell within the definition of a firearm under s. 2 of the *Criminal Code*. The accused then tried to argue before Ontario's top court that this finding was unreasonable. But the Court of Appeal disagreed:

> There was ample evidence from which the trial judge could infer that the gun used in the robbery was a real gun capable of firing bullets. Certainly, the victims thought it was real and the robbers acted as if it was real. A trier of fact is entitled, although clearly not obligated, to take a robber at his word when, in the course of the robbery and to subdue the victims, the robber points what appears to be a gun at the victim and threatens to shoot them. It is a fair inference that the threat is not an idle one and that the robber has the means at hand to make good on the threat. [para. 31]

The accused's appeal was dismissed.

INFORMATION PROVIDED BY CREDIBLE SOURCE & CONFIRMED: RGB UPHELD

R. v. Gow-Leach, 2017 QCCA 764

A confidential informer known to the police claimed that the accused, aged 20 to 25 years, was a drug courier for a person named Brett Tylor. Police believed on reasonable grounds that Tylor was a drug supplier and used a grey Honda Accord with licence plate number: 501 ZBX. The confidential informer provided the area in which the accused lived and said he stored his drugs there. Another source – an anonymous citizen who did not wish to be named – confirmed that the accused sold drugs and owned a grey Honda Accord. The anonymous citizen also provided the exact apartment address of the accused.

Police surveillance and data files confirmed the following:

- The accused was 22 years old;
- He owned a grey Honda Accord registered to 501 ZBX;
- He paid the electricity bill at the address provided by the anonymous source;
- Brett Tylor went three times in five surveillance days to the accused's apartment building; and
- The accused's vehicle was seen at least once in the apartment building's rear parking lot.

The police obtained a search warrant and executed it at the accused's apartment. They found 2.8 grams of cocaine and 309 grams of marihuana. He was charged with drug related offences.

Court of Quebec

The accused argued that the police breached his s. 8 *Charter* right and the evidence ought to have been excluded under s. 24(2). However, the trial judge concluded that the Information to Obtain (ITO), even after excising any erroneous information, nonetheless afforded reasonable and probable grounds to believe that the accused had committed an offence under the *Controlled Drugs and Substances Act* (*CDSA*) and that evidence of that crime would be found at his apartment. The evidence was admitted and the accused was found guilty of two drug related offences.

Quebec Court of Appeal

The accused maintained, in part, that the trial judge wrongly concluded that the ITO for the search warrant could have afforded reasonable and probable grounds to believe that he had committed an offence under the *CDSA* and that evidence of that crime would be found at his apartment.

In reviewing a search warrant, the court does not determine whether it would itself have issued the warrant, but whether there was sufficient credible and reliable evidence for the authorizing judge to do so. Further, an accused bears the burden of demonstrating that an ITO is insufficient.

In this case, the Court of Appeal agreed with the trial judge that sufficient reliable information remained to issue the warrant. "The information was reliable," said Appeal Court. "[The confidential informer] had already supplied the police with reliable information in the past. The anonymous citizen was also reliable since part of the information he provided were corroborated by [the confidential informer] and the police investigation carried out prior to the issuance of the search warrant."

The search of the accused's apartment was not unreasonable and his appeal was dismissed.

Complete case available at www.canlii.org

Note-able Quote

"Happiness is not the end of life; character is." - Henry Ward Beecher

REASONABLE GROUNDS FOR BELIEF LESS THAN BALANCE OF PROBABILITIES

R. v. Henareh, 2017 BCCA 7

An unknown tipster told a police sergeant that a man named "Aghasi", who was associated with a particular address, and a man named "Henareh" were involved in importing opium into Canada. This information was relayed to the Canada Border Service Agency (CBSA). A week later, the sergeant received more information from the same tipster that "Aghasi" and "Henareh" were importing opium from Iran, that Aghasi had been responsible for importing large amounts of opium into Canada, and that there was a large amount of opium in Aghasi's residence. The sergeant attended the address provided by the tipster and spoke with a man named Aghasi Salamant Ravandi. He confirmed that Ravandi was from Iran and, while his father was an opium addict, he had never before seen opium. He invited the sergeant to do a cursory search of the apartment but no opium was discovered.

About a month later, the sergeant received information from the CBSA that a shipment had arrived from Iran addressed to Ravandi at his residence. The shipment consisted of four large packages said to contain teapots and rugs. The packages were referred for secondary inspection and found to contain about 18 kgs. of opium. On the same day, Ravandi attended the CBSA Air Cargo Centre to collect the shipment. He was told that it would take a number of days for the shipment to clear and that he would be contacted to re-attend for pick up. Two days later, Ravandi unexpectedly returned to the CBSA Air Cargo Centre to collect the shipment. He was invited by a CBSA officer to wait in a small café adjacent to the CBSA Air Cargo Centre for his packages to be readied. Surveillance officers saw a second man, the accused, seated in the café at the same time. Both Ravandi and the accused were typing on their handheld devices but did not speak or appear to acknowledge one another. Ravandi exited the café followed shortly thereafter by the accused. The accused was seen getting into a Honda Civic and drove away from the CBSA Air Cargo Centre

Ravandi returned to the CBSA Air Cargo Centre with a U-Haul van to collect the shipment. The four packages were loaded into the van and he drove away, followed by police. Ravandi eventually pulled over and parked his vehicle. He appeared to have his head down, sending text messages on his phone but he did not exit the van. Minutes later, he did a U-turn and drove back down the street. He parked in front of a building associated with the Honda's licence plate. The accused was then observed standing near the Honda across the street from where the van was parked. The police watched the two men load one of the packages from the van into the Honda. Both men then got into the Honda and the accused drove it away. The accused parked a block or two away from Ravandi's residence. Ravandi got out and began walking towards his building while the accused stayed in the car. When the accused drove around to the back alley of Ravandi's building, the sergeant stopped the Honda and arrested the accused for importing a controlled substance. Another officer was directed to search the Honda and found 13.787 kgs. of opium in three coolers located underneath a blanket in the trunk of the Honda.

British Columbia Supreme Court

The judge held that the Sergeant subjectively believed that he had reasonable and probable grounds to arrest the accused. As well, the judge considered the totality of the circumstances and concluded that it was objectively reasonable for the sergeant to have believed that he had reasonable grounds to arrest the accused for importing opium. The arrest was lawful, the drug-related evidence was admitted and the accused was convicted of possessing opium for the purpose of trafficking and sentenced to three years in prison.

British Columbia Court of Appeal

The accused argued that the sergeant did not have the necessary reasonable grounds to arrest him without a warrant under s. 495 of the *Criminal Code*. In his view, the sergeant's subjective belief was not objectively reasonable. Thus, he was arbitrarily detained and the search of his vehicle was unreasonable under s. 8 of the *Charter*. The Crown, on the other hand, contended that there was abundant evidence to support the officer's subjective belief as being objectively reasonable.

Reasonable Grounds for Arrest

In this case, the Court of Appeal found there was no question whether the sergeant subjectively believed he had reasonable grounds to arrest the accused for importing opium. As for the objective element of the test, Justice Fitch stated:

> The reasonable grounds standard requires something more than mere suspicion, but something less than the standard applicable in civil matters of proof on the balance of probabilities. The appropriate standard is one of reasonable probability. Reasonable or credibly-based probability contemplates a practical, non-technical and common sense evaluation of the probability of the existence of facts and asserted inferences.
>
> Determining whether reasonable and probable grounds exist requires an assessment of the "totality of the circumstances".
>
> [...]
>
> Trial judges are obliged to assess the objective reasonableness of an arresting officer's belief that he or she had reasonable grounds to arrest from the perspective of a reasonable person standing in the arresting officer's shoes. The analysis takes account of the arresting officer's knowledge and experience with respect to the matter under investigation. [references omitted, paras. 39-42]

"Determining whether reasonable and probable grounds exist requires an assessment of the 'totality of the circumstances'."

Here, the sergeant weighed the totality of the information he had before deciding to arrest the accused for importing opium. And the trial judge did not overemphasize the reliability of the tipster's information. Justice Fitch stated:

> Although nothing was known of the tipster's history of reliability, the information supplied by the informer was rich in detail and confirmed in material ways. In these circumstances, it was reasonable for [the sergeant] to regard the tip as a whole as reliable, including information that a second man was involved in importing opium from Iran. Indeed, this information could reasonably be regarded as having been confirmed by the [accused's] conduct the day Mr. Salamat Ravandi took delivery of shipment. [para. 48]

Furthermore, it was reasonable for the Sergeant to believe that the package transferred to the Honda contained opium. He was not required to consider other innocent explanations for the accused's behaviour. "The trial judge was not obliged to scrutinize the evidence by employing tests applicable to the determination of guilt or innocence," said Justice Fitch. He continued:

> She was not obliged to rule out every possible innocent inference for suspicious activity in determining whether [the sergeant's] grounds for arrest were objectively reasonable. Rather, she was obliged to consider the totality of the circumstances relied upon by [the sergeant] and decide whether a reasonable person standing in the arresting officer's shoes and imbued with that officer's knowledge and experience would have believed that reasonable grounds existed to make the arrest. [para. 52]

"The reasonable grounds standard requires something more than mere suspicion, but something less than the standard applicable in civil matters of proof on the balance of probabilities."

> "Trial judges are obliged to assess the objective reasonableness of an arresting officer's belief that he or she had reasonable grounds to arrest from the perspective of a reasonable person standing in the arresting officer's shoes. The analysis takes account of the arresting officer's knowledge and experience with respect to the matter under investigation."

The Court of Appeal agreed that the totality of the circumstances known to the sergeant at the time of the arrest made it objectively reasonable for him to believe that the man driving the Honda was the second person identified by the tipster as being involved with Ravandi in importing opium from Iran to Canada. Since the arrest of the accused was lawful, the search of the vehicle was justified as an incident to the arrest. The accused's *Charter* rights were not breached and his appeal was dismissed.

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

INTEL FILE INFORMATION INSIGNIFICANT: ARREST UNLAWFUL

R. v. Ngai, 2017 ABCA 199

A vehicle passed a police car that was stopped at the side of the road. The officer, in company an auxiliary constable, thought the vehicle passed by too close and too fast. The officer stopped the car driven by the accused to discuss safety matters about how to pass an emergency vehicle and to possibly give him a ticket for passing too closely and too quickly. The auxiliary went to talk to the accused while the officer worked on his computer. When the officer approached the vehicle he heard the accused telling the auxiliary that he had been visiting his girlfriend in Calgary where she was writing university exams. The accused presented a rental agreement for the car and the officer saw three cell phones in it. The officer also recognized a distinctive pattern on the accused's wallet. He had arrested another person with a similar wallet a year earlier for drug possession. That person also drove a similar car (make, model and colour) and had similar cell phones. The accused was also extremely nervous. He was breathing heavily and was shaking when he presented his documents. The officer saw there was no luggage visible and the accused was wearing no shoes.

The officer went back to his police car. He had taken a pipeline training course in detecting drug traffickers and felt drug traffickers liked to use rental cars so there would be no registration information from the licence plate that could assist the police in checking on the driver. As well, it was difficult to put a tracking device on a rental car. The officer felt the fast food in the car indicated a driver who did not want to stop long to eat, since that would leave the car, and presumably its illegal cargo, unattended. Not wearing shoes showed a person who wanted to be comfortable on a long trip. The officer also had a girlfriend at university and thought that exams were over. The computer check on the accused said that he was somehow involved in the Saskatoon drug trade.

The officer went back to the accused's car to ask questions and confirm some information. The accused now said that he was the one writing exams and said that he had a rental car because his brother's car, which he usually drove, had been in an accident. The officer conducted more computer checks and no report of an accident involving the brother's car was found. The officer arrested the accused for possessing a controlled substance. This occurred about 30 minutes after the stop. The accused was also advised of his right to counsel and asked if he could call a lawyer before the car was searched. The officer said that he could call a lawyer but that the car was still going to be searched. The officer opened the trunk of the rental car and saw a large box. When he said that he bet that there was weed in the box, the accused nodded and said, "Yeah". The officer opened the box and found five pounds of marijuana. The accused was again arrested and told that he could

call a lawyer at the police station. He was then taken to the police station where he spoke to a lawyer, almost 3 1/2 hours after the stop. The accused was charged with possessing marihuana for the purpose of trafficking.

Alberta Provincial Court

The accused argued that he was improperly detained at the roadside from the time of the stop until he was arrested. During this time he was not told of the reason for his detention nor of his right to counsel. He also suggested that that his right to contact counsel was further violated when he was not afforded a chance to call counsel at the scene of the stop, despite his request to do so. As well, he submitted that there were insufficient grounds to search the vehicle. The Crown, on the other hand, contended that the accused was properly stopped for a traffic infraction and that his detention was properly related to the stop and then to the suspicion that he was carrying drugs. The Crown maintained that the officer had reasonable and probable grounds to arrest the accused and that the search was properly incidental to arrest. Finally, the Crown argued that there was no realistic opportunity for the accused to call counsel at the roadside and that any delay in calling a lawyer had no practical effect on the obtaining of evidence.

Before the judge considered each of the factors (either individually or in their totality) the officer used to support his grounds for believing that the accused was transporting drugs, he determined that some of the observations were made in violation of the accused's *Charter* rights. The judge found the accused was properly stopped for a perceived infraction of provincial traffic rules but that the reason for detention changed to a far more serious criminal investigation when the officer went back to the accused the second time. By then the officer knew that the accused's licence was valid and that the car was rented. He had enough information to issue a traffic ticket or to discuss the accused's driving with him. But he was suspicious that there was contraband in the vehicle and he wanted to confirm some information before arresting the accused.

The accused should have been told about the change in the investigation. "Answering questions about a speeding ticket is obviously very different than answering questions that might lead to a very serious criminal charge," said the judge. "A detainee should know of this charge so he can make an informed decision about his course of conduct." The accused's right to know of the reason for his detention was violated when the officer went back to the car the second time, intending to ask questions that could lead to serious criminal charges. The judge excluded the facts learned on the second visit to the car from the evidence, those being the reason for being in Calgary and the reason for being in a rented car.

As for the officer's grounds, the judge dismissed the perceived similarities (wallet, car and phones) between the accused and someone else the officer had arrested one year earlier for drug offences as lacking significance. As for the story about the girlfriend in Calgary, the rental vehicle and the eating of food in the car, these factors were not enough to justify the arrest although they may have had value to the officer. The judge, however, found the computer check was significant and the reported nervousness of the accused was highly relevant. "The last two factors are extremely important and, when taken together with the other factors were sufficient, in my view, to give the officer reasonable and probable grounds to believe that the accused was carrying drugs and to arrest him for that offence," said the judge. Since the arrest was lawful, the search incidental to the arrest was reasonable. There was no s. 8 *Charter* breach.

Although there was a s. 10(b) breach following his arrest because the police did not let him call counsel at the roadside, the judge found "the accused has no right to expect the police to delay their search until he spoke to counsel." The right of the police to search was not dependent on the accused's consent. Therefore, the judge concluded there was "no logical connection between the accused's thwarted right to call counsel from roadside and the police right to search the vehicle." The evidence was admitted and the accused was convicted of possessing marihuana for the purpose of trafficking.

Alberta Court of Appeal

The accused argued that the trial judge erred in finding that the officer had the required reasonable and probable grounds to arrest him. Without a valid arrest, he suggested that the search that followed was unreasonable under s. 8 of the *Charter* and the evidence ought to have been excluded.

As for the officer's belief in this case, the Court of Appeal concluded that trial judge erred in determining it was objectively reasonable. There were concerns with the two factors that the trial judge relied quite heavily: (1) the computer check and (2) the accused's nervousness.

Computer Check

The officer's evidence that the computer check revealed the accused was listed on an intel file regarding drug activity was weak. The officer did not look into this intel further and provided no detail. Justice Martin stated:

> [The officer] said he eventually accessed the system and learned that the accused's name was "listed in regards to drug activity in Saskatoon and that's all I'm going to say on that". He said that he did not do anything further because the listing of [the accused's] name on an intel file was all he needed to know. [The officer] could not speak to the particulars of how [the accused] was involved or the basis for anybody's belief in placing such information onto the system where it was accessed by [the officer]. [The officer's] general assertion was unsupported by any screenshot or document outlining what specific information he relied upon. Disclosure was requested, but not provided, and any cross-examination was necessarily limited by the absence of any documentary records as well as [the officer] stating that he did not know what was in that file. [The officer] simply stated that it referred to the accused. Relying on internal information systems may supply the type of hearsay statement that could go to [the officer's] subjective belief, but more is needed when assessing the objective reasonableness of that belief.
>
> There is no basis on which to test the reliability of the information in that system or even [the officer's] recollection of it without further evidence. The notion that people may be arrested because their names are mentioned on an undisclosed information system would be a startling development indeed. This is especially so since [the officer] also did not seem to have taken into account the countervailing facts that [the accused] had no criminal record and no traffic violations. [paras. 7-8]

Nervousness

As for nervousness, the Court of Appeal determined it should not have been given the weight ascribed to it by the trial judge:

> [The officer] also stated that innocent people who are stopped may be nervous at first but then relax, whereas this accused maintained his nervousness or it increased. He pointed to [the accused's] hands shaking and that he breathed fast and deeply and stuttered. [The officer] also said that [the accused] denied that he was driving too fast or too close and was defensive about being stopped at all. The stop took much longer than normal, indeed half an hour, and the accused was asked many different questions. In such circumstances, nervousness might be expected and it does not appear to amount to sufficiently probative evidence to ground an objective and reasonable and probable grounds for arrest on drug charges. [para. 9]

Admissibility

Without sufficient grounds for the arrest, it was unlawful and the incidental search of the vehicle was unreasonable. Since the Crown conceded that an unlawful arrest would result in the exclusion of drugs, the accused's appeal was allowed, his conviction was quashed, and an acquittal was entered.

Complete case available at www.canlii.org

Editor's note: Additional facts taken from *R. v. Ngia*, 2014 ABPC 80.

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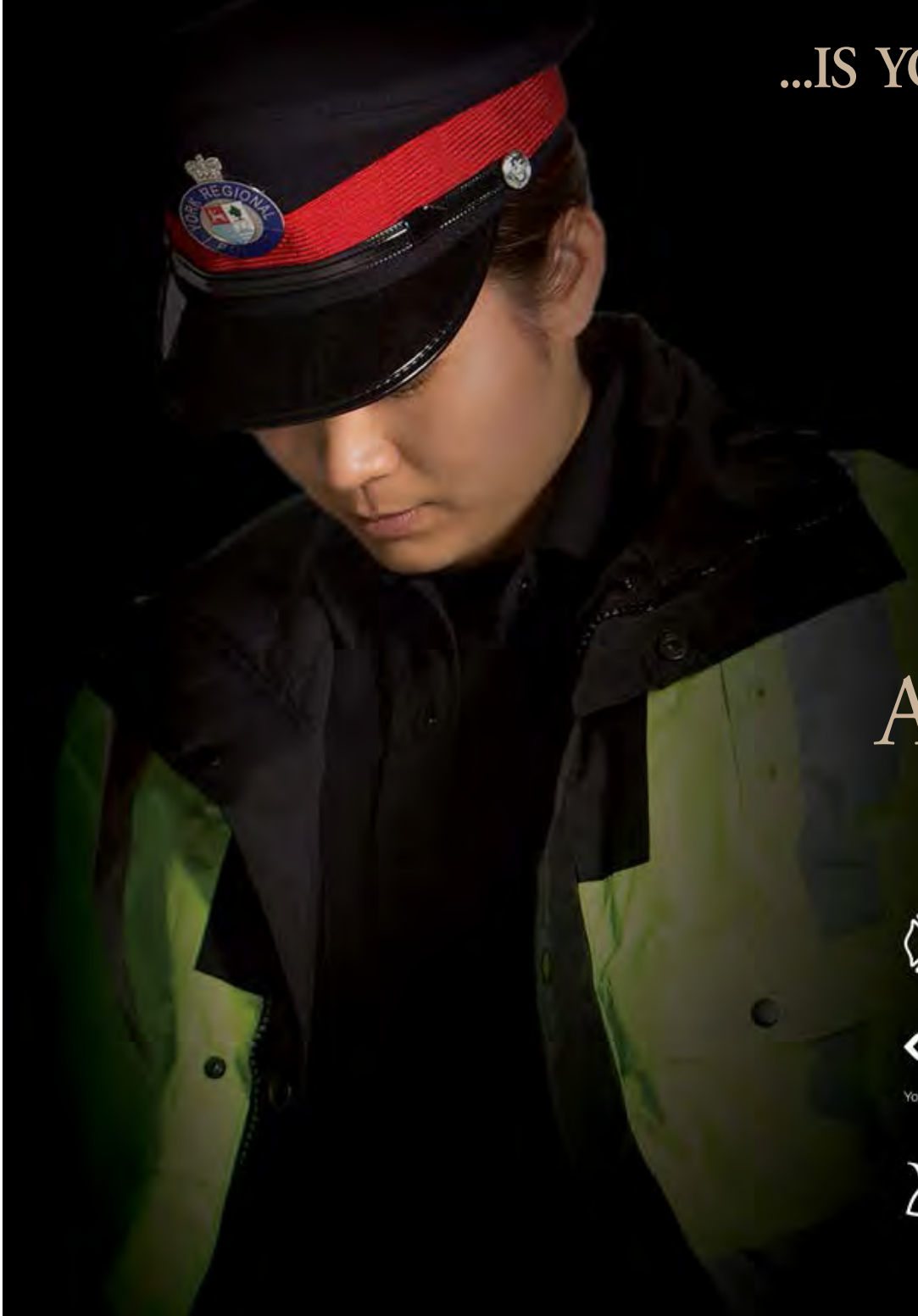

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