JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

IN MEMORIAM

On December 13, 2019, 49-year-old Royal Canadian Mounted Police Constable Allan Poapst was killed while on duty. He was travelling westbound on the Perimeter Highway in Winnipeg, Manitoba when a pickup truck travelling eastbound crossed the median and collided with Constable Poapst's RCMP vehicle. Constable Poapst was pronounced deceased at the scene. The driver and passenger in the pickup truck were transported to hospital with injuries.

Constable Poapst was the proud father of three teenaged girls and five days away from serving 13 years with the RCMP. He was an avid fan of the Winnipeg Blue Bombers and the Winnipeg Jets.

"Allan is gone, but he will never be forgotten by the many officers who worked by his side and by the people of Manitoba who he so proudly served."

Assistant Commissioner
Jane MacLatchy,
Commanding Officer, Manitoba RCMP

~ Constable Allan Poapst ~

Highlights In This Issue

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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.

The art of statistics: learning from data.

David Spiegelhalter.

London, UK: Pelican, an imprint of Penguin Books, 2019.

HA 29 S654 2019

Bounce back: how to fail fast and be resilient at work.

Susan Kahn.

New York, NY: Kogan Page, 2020.

HF 5381 K324 2019

Business writing today: a practical guide.

Natalie Canavor.

Thousand Oaks, CA: SAGE, 2019.

HF 5718.3 C365 2019

Conceptual blockbusting: a guide to better ideas.

James L. Adams.

New York, NY: Basic Books, 2019.

BF 449 A25 2019

Fentanyl, Inc.: how rogue chemists are creating the deadliest wave of the opioid epidemic.

Ben Westhoff.

New York, NY: Atlantic Monthly Press, 2019.

RC 568 O45 W47 2019

Guide to effective committees for directors of not-for-profit organizations.

Sandi L. Humphrey, CAE.

Toronto, ON: Canadian Society of Association Executives, 2017.

HD 62.6 H86 2017

The introverted leader: building on your quiet strength.

Jennifer B. Kahnweile.

Oakland, CA: Berrett-Koehler Publishers, Inc., 2018.

BF 637 L4 K27 2018

The leader you want to be: five essential principles for bringing out your best self-every day.

Amy Jen Su.

Boston, MA: Harvard Business Review Press, 2019.

HD 57.7 S8 2019

Nancy Clark's sports nutrition guidebook.

Nancy Clark, MS, RD, CSSD, Sports Nutrition Services, LLC, Newton, MA.

Champaign, IL: Human Kinetics, 2020.

TX 361 A8 C54 2020

Outsmart your smartphone: conscious tech habits for finding happiness, balance & connection IRL.

Tchiki Davis PhD.

Oakland, CA: New Harbinger Publications, 2019.

BF 575 H27 D38 2019

Power and resistance: critical thinking about Canadian social issues.

Wayne Antony, Jessica Antony & Les Samuelson, editors.

Winnipeg, MB: Fernwood, 2017.

HN 103.5 P67 2017

Public inquiries in Canada: law and practice.

Ronda Bessner & Susan Lightstone.

Toronto, Ontario : Thomson Reuters, 2017.

KE 4765 B47 2017

Research strategies: finding your way through the information fog.

William Badke.

Bloomington, IN : iUniverse, Inc., 2017.

Z 710 B23 2017

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

Richard N. Bolles.

Berkeley, CA: Ten Speed Press, 2020.

HF 5383 B56 2020

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For more resources on better understanding mental health in the context of the experiences and pressures of first responders, as well as the broader population, visit the following link.

www.BCFirstRespondersMentalHealth.com

NO PRIVACY INTEREST IN TEXT MESSAGES ON SEX ASSAULT COMPLAINANT's PHONE

R. v. Phagura, 2019 BCSC 1638

The complainant reported to police that she had been sexually assaulted by the accused earlier in the day. The complainant was the daughter of a close family friend and the accused was allowing her to reside in his home while she was attending university in Canada. The police interviewed the complainant and obtained a statement from her. During the interview, a police officer took three photographs capturing screenshots of a WhatsApp text message exchange between the accused and the complainant. One exchange occurred before the alleged sexual assault and the other two followed it.

British Columbia Supreme Court

The Crown sought to introduce the photographs of the text messages as evidence for the purposes of an admission by an opposing party and to corroborate the complainant's statement. The accused, however, argued that his s. 8 *Charter* rights had been breached when police obtained the photographs of the text message exchange. In his view, they ought to be excluded under s. 24(2).

Reasonable Expectation of Privacy?

In order to engage s. 8 of the *Charter*, the accused had to establish a reasonable expectation of privacy in the subject matter of the search - the electronic conversation. The conversation consisted of text messaging through WhatsApp between the accused and the complainant. These messages were located on the complainant's phone. In determining whether the sender of a text message sent to and located on a recipient's phone has a reasonable expectation of privacy, the totality of the circumstances must be considered.

Here, Justice Crabtree found the accused had a direct interest in the subject matter of the search and subjectively expected it to remain private. The accused was one of two participants in the electronic conversation and authored the text messages the Crown sought to introduce. He also asked the complainant to delete the messages and not tell anyone about them.

However, after reviewing case law, including the Supreme Court of Canada judgement in *R. v. Marakah*, 2017 SCC 59, the judge did not find that the accused's subjective expectation was objectively reasonable. He examined three factors used in *Marakah* to assist in determining whether an accused's expectation of privacy was objectively reasonable: (1) the place of the search; (2) the nature of the subject matter of the search (its capacity to reveal personal information); and (3) the ability to regulate, control, and historical use.

The electronic conversation took place on the WhatsApp program. The messages sent were encrypted, which reduced the ability for anyone, other than the two participants of the chat to observe the messages. It was noted that even the operators of the WhatsApp program or application do not have access to the messages that flow through it. As well, unlike a case involving the exchange of texts related to illegal activity between two willing participants freely engaged in a criminal enterprise or activity, this case involved a

THE TEXTS

Before alleged sexual assault

11:44 pm - 1st Text Message: not reported in case. Accused requested the complainant delete the message prior to the alleged sexual assault taking place.

Following alleged sexual assault

The accused told complainant "Don't tell anyone. Your honour will be ruined" and "I will pay for your college fees."

12:13 am - 2nd Text Message: "Please don't tell anything to anyone."

12:15 am - 3rd Text Message: "Am so sorry."

Arguments

DEFENCE	DEFENCE
• The nature of the alleged conversations between the complainant and the defendant ought to attract a high degree of privacy, as such conversations are capable of revealing a great deal of personal information. • It is reasonable to assume that messages between a married man and a young woman are, by definition, very private in nature. • A person does not lose control of information due to the fact another person possesses or can access the information.	• In the present circumstances, there was nothing private or biographical in nature that was revealed in the exchanges between an alleged perpetrator of a crime and the victim. • The purpose or intent of the unsolicited exchange was an effort to secure the silence of the victim. • The police did not seize the complainant's phone. She willingly turned it over in the course of the investigation. • The complainant consented to the police photographing the images of the text message exchange displayed on her cell-phone.

text exchange between the perpetrator (an adult) of the alleged offence and the complainant (who was residing at the accused's home while attending university).

In holding that a sender's reasonable expectation of privacy of a text message is not absolute, Justice Crabtree stated:

> While the social norm is that a text message between a sender and a recipient will remain private, there are exceptions, as have been noted. In other words, the sender does not or cannot have absolute confidence that a text message will remain private. There is much that depends on the circumstances. [para. 54]

In this case, the judge concluded that the accused failed to establish a reasonable expectation of privacy in the text messages sent to the complainant:

> In these circumstances, what is the reasonable expectation of [the accused]? The relationship between the two was one of a close family friend providing a place to live for [the complainant], the daughter of a friend, while she was studying in Canada. In light of the allegation before the court, it is also one of perpetrator of the alleged offence and the victim.
>
> The content of [the accused's] text messages, both before and following the alleged events, supports the [accused's] subjective expectation of privacy. However, it is only one factor to consider when determining whether the expectation of privacy was objectively reasonable. While it is open to infer that [the accused] wished the messages to remain private, there is no evidentiary basis to support that both [the accused] and [the complainant] had similar interests in keeping the messages private. On this basis, there is no ability to evaluate whether [the accused's] asserted expectation of privacy was in fact reasonable.
>
> ...
>
> Here, there is no information to assess whether [the accused's] wish to have the message remain private was similar to [the complainant's]. This is an important factor in determining whether [the accused's] belief was objectively reasonable. [paras. 51-53]

The accused failed to establish an objectively reasonable expectation of privacy and therefore had no standing to challenge the admissibility of the photographs under s. 24(2) of the *Charter*.

Consent?

In the event he was wrong about whether or not the accused had an objectively reasonable expectation of privacy, Justice Crabtree also examined whether the police had obtained the photographs of the text messages by consent. He noted there was no warrant obtained and therefore the onus shifted to the Crown to establish, on a balance of probabilities, that the search was authorized by law, the law was reasonable, and the search was carried out in a reasonable manner.

Here, the complainant identified and volunteered the information contained on her cell phone. ***"[The complainant] could have disclosed the details of the text messages between [the accused] and herself, without the intervention of the police officer taking the photographs,"*** said the judge. ***"In this particular case, the only information that [the complainant] provided access to was that which [the accused] shared with her. [The complainant's] consent does not operate to permit the police to obtain the electronic information stored on [the accused's] device, only what was sent to her. It only operates to provide information to which both [the complainant] and [the accused] have an overlapping interest. In this context, it is not reasonable for [the accused] to think or expect that [the complainant] would not be able to consent to provide such information to the police. In my view, the consent provided by [the complainant] was valid and sufficient for the police to obtain copies of the text message exchange between the two parties."***

Admissibility - s. 24(2) *Charter*

Even if the accused's s. 8 rights had been breached, the evidence was nevertheless admissible under s. 24(2). First, any search occurred prior to the release of *Marakah*. The police officer was acting in good faith and reviewed and photographed the text message conversations only once permission was received from the victim to do so. Second, the impact of any breach on the accused's *Charter* protected interests was reduced. The complainant provided the information contained in the text messages to the police and it could have been provided as an admission against interest by an opposing party, even if the photographs were not introduced as evidence. As well, the accused was not compelled to conscript himself nor where the rights of a third party trampled in order to obtain the evidence. Finally, the text messages offered probative evidence in the prosecution of a serious criminal offence. The messages outlined an admission of an opposing party and corroborated a witness account of what transpired on the evening in question. Society has a significant interest in the adjudication of this type of offence on its merits. The exclusion of the evidence would have resulted in greater harm to society's confidence in the administration of justice than would its admission.

The accused's application for the exclusion of evidence was dismissed.

Complete case available at www.canlii.org

Editor's Comments: It must be noted that the Ontario Court of Appeal decision *R. v. Reeves*, 2017 ONCA 365 relied upon by the trial judge in this case has since been overturned by the Supreme Court of Canada (2018 SCC 56) at least in relation to "third-party" consent with respect to a shared computer.

What's an Admission by an Opposing Party?

"Under the rules of evidence, statements made by an accused are admissions by an opposing party and, as such, fall into an exception to the hearsay rule. They are admissible for the truth of their contents. When statements are made by an accused to ordinary persons, such as friends or family members, they are presumptively admissible without the necessity of a voir dire. It is only where the accused makes a statement to a 'person in authority', that the Crown bears the onus of proving the voluntariness of the statement as a prerequisite to its admission. This, of course, is the confessions rule." - *R. v. S.G.T.*, 2010 SCC 20 at para. 20.

"Statements, including statements made in email messages, made by an accused are admissions by an opposing party and, as such, fall into an exception to the hearsay rule. They are admissible for the truth of their contents." - *R. v. Douglas*, 2017 NLPC 0816 at para. 13.

"Inculpatory statements made by an accused person fall under an exception to the hearsay rule as admissions by an opposing party. They are prima facie admissible for the truth of their contents at the trial of the accused if the statements were made to ordinary civilians. However, statements made to persons in authority, such as police officers, are governed by the common law (voluntariness) rule and require the Crown to satisfy the Court that the statements were made voluntarily." - *R. v. Swampy*, 2015 ABQB 107 at para. 43.

SEARCHING UNDER HOOD OF CAR PROPER AS AN INCIDENT TO DRUG ARREST

R. v. Stonefish, 2019 ONCA 914

The accused was stopped while driving on a highway. The officer could not read the vehicle's licence plate number because the plate light was not functional, an offence under Ontario's *Highway Traffic Act*. When the accused opened the window, the officer could smell the odour of burnt marijuana. The accused could not produce his driver's licence or any other identification but he correctly identified himself. He said he was driving from Winnipeg to Seine River First Nation, where he intended to pick up his sister and bring her back to Winnipeg. He advised the officer he was driving overnight to avoid getting caught driving without a licence.

The accused appeared nervous and the officer suspected he was under the influence of marijuana because his eyes were red. When the officer asked about the smell of marijuana, the accused said that he had smoked some and pointed to a silver metal marijuana grinder in the cup holder of the car. The grinder contained a green leafy substance. The officer arrested the accused for possessing a controlled substance. Upon search, the officer found $1,195 in cash in the accused's pocket. She also seized a cell phone from the driver's seat, which was receiving text messages and at least one call during that time.

The officer questioned the accused about the ownership of the vehicle. The accused said that the car belonged to his friend's girlfriend, but then gave the officer an incorrect name for the car's owner.

Another officer then opened the hood of the car and found a package containing 172 grams of cocaine in a ziploc bag. The package was clearly visible when the hood was opened. The street value of the cocaine was between $11,000 and $18,000.

Ontario Court of Justice

The accused argued that his s. 10(b) right to counsel had been breached when the officer questioned him about the odour of marijuana in his vehicle, and that his s. 8 right to be secure against unreasonable search or seizure was violated by the search of the car. The judge, however, dismissed the accused's *Charter* application. With respect to the officer's question, the judge stated:

> [T]he officer was entitled to follow-up her suspicions concerning the driver's sobriety by asking a question that is the functional equivalent in the circumstances of the unobjectionable, "have you had anything to drink tonight." In this case, "why does your car smell like burnt marijuana?" [The accused's] answer to that question provided ample grounds for the officer to proceed with an arrest.

As for the search of the vehicle, the accused argued that looking under the hood was not rationally connected to his arrest for being in possession of a small amount of marijuana and was therefore

"Reasonable grounds to suspect means reasonable suspicion. Reasonable suspicion is not the same thing as reasonable grounds to believe. Both concepts must be grounded in objective facts and stand up to independent scrutiny. However reasonable suspicion is a lower standard as it engages reasonable possibility rather than probability."

outside the scope of a lawful search incident to arrest.

The judge, however, found the the common law power to search incident to arrest extended to the accused's motor vehicle including under its hood. The judge found that ***"it was objectively reasonable to search the vehicle for evidence of more controlled substances."*** The relatively small and unconcealed amount of marijuana initially located in the vehicle did not render the search unreasonable. The judge concluded that ***"popping the hood of the car to check the engine compartment and finding a suspicious package in plain view is not a search carried out in an unreasonable fashion,"***

The judge found the accused was in possession of the drugs under the hood - he had the necessary knowledge and control - and convictions for possessing cocaine for the purposes of trafficking and failure to comply with a recognizance followed. The accused was sentenced to 41 months imprisonment.

Ontario Court of Appeal

The accused again argued that his *Charter* rights were breached. In her view, when the arresting officer detected the smell of marijuana, the situation changed from a routine traffic stop under the *Highway Traffic Act* into an active criminal investigation. He submitted that the officer should then have immediately advised him of his *Charter* rights and refrained from asking questions of him. Thus, the question asked: "Why does your vehicle smell like burnt marijuana?" was impermissible. When the officer knew that the accused was not licensed, the arresting officer also knew that he would not be driving the car again that night, so that any questions concerning his sobriety were no longer relevant.

The Ontario Court of Appeal rejected the accused's submissions:

> In our view the [accused] takes too granulated an approach to the situation. It was evolving and it was not unreasonable for the officer, upon smelling the burnt marijuana, to arrest the [accused] for possession of a controlled substance. Her question was quite natural in the circumstances and did not constitute a Charter violation. Indeed, she need not have asked the question since the answer was obvious. [para. 14]

As for the search of the car, it was reasonable. As an incident to arrest, the police can search to secure evidence related to the offence for which the person was arrested. This can include the search of an automobile provided there is a reasonable prospect of securing such evidence. ***"Once she arrested the [accused], the officer was free to search him and the vehicle incident to the arrest,"*** said the Court of Appeal. ***"The fact that there was a small amount of marijuana in the cup***

"Once she arrested the [accused], the officer was free to search him and the vehicle incident to the arrest. The fact that there was a small amount of marijuana in the cup holder led quite naturally to a search for more marijuana elsewhere in the car. That search turned up the cocaine stored in open view that was revealed when the hood was opened."

holder led quite naturally to a search for more marijuana elsewhere in the car. That search turned up the cocaine stored in open view that was revealed when the hood was opened. This is not a case in which the officers were using the Highway Traffic Act as a pretext for searching the car, as in some of the cases. In this case, the search was not particularly intrusive, nor did it cross any Charter lines."

The accused's appeal was dismissed.

Editor's Note: The law on possessing marihuana has changed since the date the facts of this case arose.

Complete case available at www.ontariocourts.on.ca

DRUGS FOUND DURING FIRST AID TREATMENT ADMITTED UNDER s. 24(2) CHARTER

R. v. Pountney, 2019 BCCA 423

The police were called to attend to a restaurant parking lot where an individual was in medical distress. An officer found a man lying face up in the parking lot in front of the restaurant, with his feet on the sidewalk. The man's breathing was shallow and his complexion was slightly blue. He was unresponsive to speech and to mild pain stimuli. The officer requested paramedics attend the scene. In the meantime, the officer commenced first aid, trying to determine whether the man had suffered an injury. The officer patted and squeezed the man's body, starting at the head and proceeding downwards, looking for signs of bleeding, wounds, broken bones, or injured joints.

When he reached the man's left leg, the officer noticed a bulge on his left ankle. The officer examined it, thinking that the ankle might be twisted or broken. On squeezing the bulge, the officer felt something "crunchy" and heard a "wrinkling" sound. He did not know what he had detected, and thought that the man might have "caught something" on his ankle. He pulled up the leg of the man's sweatpants and observed that something appeared to have been stuffed down the man's sock. He rolled the sock down, and pulled out a clear plastic bag that contained three smaller bags and a wad of money. The officer suspected that the smaller bags contained drugs and that the money was proceeds of trafficking.

The officer continued to examine the man for injuries. When paramedics arrived, they gave the man an injection of naloxone and he regained consciousness. The man was not arrested and the officer spoke to the man in an effort to identify the drugs. The officer also encouraged the man to attend at a hospital. The officer treated the matter as a "no case seizure". He confiscated the drugs and money but did not complete a Report to a Justice (Form 5.2). No notes were made of the incident. Later, his supervising officers strongly encouraged him to proceed with charges and the officer did so. The bag contained $360 in cash, and the smaller bags contained cocaine (29.4 grams of white powder), a mixture of heroin and fentanyl (15.3 grams of small reddish-brown pebbles), and a mixture of fentanyl and caffeine (15.1 grams of white powder). The accused was charged with three counts of possessing a controlled substance for the purpose of drug trafficking.

British Columbia Provincial Court

The accused argued that the seizure of the bag and the failure of the police to complete a Form 5.2 made the seizure unlawful. In his view, his right to be free free from unreasonable search and seizure under s. 8 of the *Charter* had been breached and the evidence was inadmissible under s. 24(2). The Crown contended that the failure to complete the Form 5.2 was not a violation of the law, but conceded that the seizure of the bag violated the accused's rights. The Crown submitted that the evidence was nevertheless admissible under s. 24(2) despite the *Charter* breach.

The judge found the evidence admissible. First, the breach was not the product of bad faith or a deliberate disregard for the accused's *Charter* rights. The circumstances were fairly unique. The officer was in the process of administering first aid to a man laying in the parking lot, and came upon the

"In summary, the judge erred in requiring specific corroboration of all elements of the tip. Such corroboration was unnecessary. Rather, what was required was that the police had sufficient information to harbour a reasonable suspicion that they were calling a phone number attached to a drug trafficking operation."

evidence in the course of treatment. The officer was not acting in bad faith. With respect to the Form 5.2, the only items seized were illegal drugs and some cash. Second, the breach was not an invasive one, and the evidence seized was real evidence, not conscriptive. The failure to file a Form 5.2 Report did not affect the accused's ability to conduct his defence. Finally, it was in society's interest to have this case adjudicated on its merits. Without the evidence, there was no case for the prosecution.

The accused was convicted on three counts of possessing a controlled substance for the purpose of trafficking, one count in respect of each cocaine, heroin, and fentanyl.

British Columbia Court of Appeal

Although the Crown conceded at trial that the seizure of the drugs and the money violated the accused's *Charter* rights, on appeal it took the position that the discovery of the bag and its removal from the accused's sock formed part of a *bona fide* first aid assessment undertaken by the officer and, therefore, was lawful. But Justice Groberman, speaking for a unanimous Court of Appeal, noted it was not open to the Crown to now argue that the seizure was lawful. ***"A fair reading of the evidence and of the trial judge's ruling indicates that once the officer pulled up [the accused's] pant leg and saw that there was something stuffed down his sock, there was no medical reason to pull the sock down or to examine the item that was hidden in it,"*** said Justice Groberman. ***"The judge's finding that there was a violation of [the accused's] rights under s. 8 of the Charter was, therefore, a correct one, and it was appropriate that she conduct an analysis under s. 24(2)."***

Admissibility of Evidence

In assessing whether the trial judge erred in admitting the evidence, the Court of Appeal reviewed the three lines of inquiry under s. 24(2):

- The **"seriousness of the state conduct that led to the breach"**. This involves an evaluation of the culpability of the state actor in engaging in the conduct leading to the violation. The court must consider the extent to which it is necessary to dissociate itself from that conduct. Where the state actor has deliberately violated *Charter* rights or has acted with reckless disregard of them, the demand for exclusion of evidence will be very strong. On the other hand, where the state actor has acted in good faith, or where the conduct has been necessitated by extenuating circumstances, the breach is more excusable, and the demand for exclusion of evidence is attenuated. Courts have recognized that, in examining the seriousness of state conduct, there will be a spectrum, with "good faith" and "bad faith" forming the endpoints.

- The **"seriousness of the impact of the Charter breach on the Charter-protected interests of the accused"**. Some *Charter* breaches will result in very limited or purely technical interference with protected rights, while others will be "profoundly intrusive".

- The **"truth seeking function of the criminal trial process"** and the public interest in having matters adjudicated on their merits.

Application To This Case

The Court of Appeal declined to interfere with the trial judge's conclusions on any of the three lines of the s. 24(2) inquiry and her decision to admit the evidence was entitled to deference:

- **Police Conduct:** The officer was involved in administering first aid at the time he came across the drugs. He did not take deliberate steps to violate the accused's rights, nor did he take advantage of the accused's situation with a view to conducting a criminal investigation. There was no indication of bad faith. As well, the officer's removal of the bag from the accused's sock during the first aid examination represented a completely natural and understandable reaction to detecting a bulge. However, it could not be said to have fully met the requirements of a *"good faith" Charter* breach because the officer did not turn his mind to the question of whether the removal of the bag constituted a seizure, or whether it complied with *Charter* requirements. The trial judge's evaluation that the officer's actions were closer to the good faith end of the spectrum than to the bad faith end was reasonable in the circumstances.

- **Impact on the Accused:** This was not a case where the police aggressively searched an individual in the face of his protests, and forcibly reached into his pockets. The search in this case took place in the context of a first aid examination, in which the accused's privacy was already justifiably compromised. The seizure of the bag had an exceedingly limited incremental impact on the accused's privacy.

- **Societal Interest:** It is clear that the charges here were serious, and that the impugned evidence was crucial to a full exposure of the facts.

As for the officer's failure to complete a Form 5.2 in respect of the drug seizure, the trial judge adequately considered that the failure to do so had no appreciable effect on either the seriousness of the state conduct or on the accused's *Charter*-protected rights.

The accused's appeal was dismissed.

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

ARREST BASED ON REASONABLE GROUNDS: SEARCH REASONABLE

R. v. Chang, 2019 ONCA 924

As a result of an undercover police investigation aimed at combatting juvenile prostitution by means of a sting operation, an undercover agent posed as an underage 15-year-old girl. A target of the investigation began communicating with the "girl". In communications between the two, the "girl" told the target to attend at a particular McDonald's restaurant and purchase a "Happy Meal" when he arrived. The accused attended the restaurant but bought a drink when he arrived, not a Happy Meal. He then left before the "girl" arrived. The accused was arrested by police and he was searched incident to arrest. The accused was charged with sex related offences.

Ontario Court of Justice

The accused argued that his rights under ss. 8 and 9 of the *Charter* had been breached. In his view, although the officer had the necessary subjective belief to arrest, it was not objectively reasonable. He contended that the evidence discovered on a search incident to his arrest was therefore inadmissible under s. 24(2). The judge rejected the accused's assertion and concluded that the arresting officers' subjective belief in grounds for arrest was objectively reasonable. The accused was convicted of two charges arising from his attempts to purchase sexual services from a young person.

Ontario Court of Appeal

The accused argued, in part, that the police did not have the requisite grounds to arrest him. He opined that the trial judge failed to consider exculpatory factors that pointed away from the accused as the person communicating with the undercover agent posing as the "girl". The fact the accused did not purchase

a "Happy Meal" as directed and he left before the "girl" arrived were exculpatory factors the accused raised. But the Court of Appeal disagreed. It found the trial judge applied the correct legal test and principles:

> While the undercover agent originally told the target to purchase a Happy Meal, the target responded that he had purchased a drink, not a Happy Meal. The information that was communicated to the arresting officers on the scene at the McDonald's was that the target had purchased a drink. The [accused] in fact had purchased a drink while he was inside the McDonald's. Thus, the fact he bought a drink rather than a Happy Meal is not exculpatory evidence.
>
> The fact that the [accused] walked out of the McDonald's before the "girl" arrived does not undermine the probative value of the evidence before the trial judge. The [accused] attended at the McDonald's, as directed by the "girl" he was there to have sex with, either inside the washroom (which the "girl" said she did not want) or in his car; he arrived at the specific McDonald's where the "meet" had been set, at the time the police expected the target to arrive; he was driving a car, as anticipated; he was observed on his cellphone as he approached the McDonald's (the target had been corresponding through text messages with the undercover agent); and he exited the McDonald's after buying a drink there, just as the target indicated he had done, by way of a text communication to the undercover agent. [paras. 6-7]

The accused's appeal against his conviction was dismissed.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

"It is during our darkest moments that we must focus to see the light."
~Aristotle~

GROUNDS FOR ARREST BASED ON INFORMER INFO TO BE ASSESSED IN TOTALITY

R. v. Dawad, 2019 SKCA 125

A police sergeant assigned to CFSEU was responsible for investigating criminal organizations and drug trafficking. He received information from a source handler that a confidential informer said a black male named "Karbino" was at a certain woman's residence in Prince Albert, "reloading them" with methamphetamine and cocaine. The informer also said that Karbino had access to a firearm and that "they" were driving in a newer white Dodge Ram. The sergeant was told the informer had proven reliable in the past and had never been charged with lying to police. A database search revealed a residential address for the woman identified by the informer. A drive-by of the residence showed a newer white Dodge Ram pickup truck, bearing an Alberta licence parked in the driveway. Police placed the residence under surveillance. There was no movement observed for about 45 minutes. Then, three black males and an Indigenous female were seen to leave the residence, enter the Dodge Ram, and drive away with police surveilling it.

The truck went through a Tim Horton's drive-through and then proceeded out of Prince Albert travelling west in the direction of Shellbrook, Saskatchewan. Surveillance officers now had a photograph of Karbino and had been informed that a man named Dawad was the registered owner of the truck. As the vehicle was surveilled, the police sergeant was kept up-to-date. The Dodge stopped at a gas station in Shellbrook and a black male, believed to be Karbino, exited it from the driver's side and went into the gas station. After the driver returned to the truck, it left, travelled northbound on a highway and stopped at an Esso station. The accused exited the truck from the driver's side, opened its tailgate, removed a jerry can, and filled it with fuel. He then placed the jerry can back in the truck box, returned to the driver's seat, and continued driving on the highway. The sergeant

then received information from another handler that a different informer said three or four black males, one named "Karbino", were on their way to Pinehouse or Beauval for the purpose of supplying cocaine to the community. The sergeant was also told this informer had proven reliable in the past and had never been charged with lying to police. There was only one secondary highway by which anyone could reach Beauval and Pinehouse by road, and the highway the truck was travelling on was the only highway by which drivers could access this secondary highway.

With this information, the sergeant believed he had the necessary grounds to stop the truck and arrest its occupants for possessing cocaine for the purpose of trafficking. He contacted the Beauval detachment and asked that a high risk vehicle stop be initiated. After the occupant's were arrested, a post-arrest search of the accused's truck located about 52 grams of crack cocaine in rock form, separated into three separate chunks. One chunk was found in a plastic bag inside a knotted sock which was stuffed in a discarded Tim Horton's bag on the floor in front of the back passenger seat where Karbino had been seated. The other two chunks were found in separate plastic bags hidden inside a discarded rubber boot in the pickup box under a tonneau cover. The accused, along with Karbino, was charged with possessing cocaine for the purpose of trafficking.

Saskatchewan Provincial Court

The accused contended that he was unlawfully arrested (s. 9 *Charter* breach) which led to an improper warrantless search (s. 8 *Charter* breach). In his view the evidence was inadmissible under s. 24(2).

The judge found that the sergeant directed the arrest of the truck's occupants and therefore it was his grounds that required assessment for objective reasonableness. The decision to arrest was grounded in information provided by two confidential informers. As for the credibility of the informers, the judge concluded that because the sergeant made the decision to arrest, he did *"not need to delve into the actual credibility or reliability of [the informers]."* Rather, what mattered was whether it was reasonable for the sergeant to rely on the informers as being credible, based on the information he knew about them at the time. In doing so, the judge considered that neither informer was anonymous and both had been found by their handlers to have been proven reliable in the past. Thus, the sergeant had no reason to question the informers' credibility. The judge also found the information provided was compelling (detailed) and much of the information provided by the informers had been corroborated. The judge held that the accused's arrest was lawfully made under s. 495(1)(a) of the *Criminal Code*. The sergeant's subjective belief that he had reasonable grounds to order the immediate arrest of the occupants of the truck was objectively reasonable. Since the arrest was lawful, there were no *Charter* breaches. Both men were convicted of possessing cocaine for the purpose of trafficking.

Saskatchewan Court of Appeal

Among other things, the accused argued that the trial judge erred in concluding that the police had reasonable grounds to arrest him. In his view, the trial judge was incorrect when he said that he did "not need to delve into the actual credibility or reliability" of either informer.

Justice Leurer, delivering the Appeal Court's decision, described the police power of arrest as follows:

> In order to justify a warrantless arrest pursuant to s. 495(1)(a) of the Criminal Code, the arresting officer must have the subjective belief that the individual arrested had committed or was about to commit an indictable offence, and that belief must be objectively reasonable. In respect to the second element of the test, it must be objectively established that "a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest". [reference omitted, para. 44]

In this case, Justice Leurer found the trial judge erred in not delving into the actual credibility and reliability of the two informers. Thus, the Court of

LEGALLY SPEAKING:

Debot Criteria

"First, was the information predicting the commission of a criminal offence compelling? Second, where the information was based on a 'tip' originating from a source outside the police, was that source credible? Finally, was the information corroborated by the police investigation prior to making the decision to conduct the search?" - R. v. Debot, [1989] 2 SCR 1140.

Appeal undertook a fresh consideration in determining whether there was an objectively reasonable basis for the arrests in the totality of the circumstances.

Was the information compelling?

"The degree to which a confidential tip is compelling is a function of its detail," said Justice Leurer. Here, the first informer provided a general description and the first name of the person who was travelling in a white Dodge Ram. The informer also said this person was 'reloading' people with illicit drugs at a particular woman's residence in Prince Albert. This informer also provided the specific type of drugs that "Karbino" was trafficking, and said "Karbino" had access to a firearm.

The second informer also provided compelling detail. This informer identified the same suspect and that at least three black males were travelling to Beauval and Pinehouse to provide cocaine to the community."

Was the informer credible?

Although the trial judge erred in holding he did not need to delve into the actual credibility or reliability of the informers, the first informer was both credible and reliable. His handler testified that he had known the informer for *"[a]pproximately one year at that time"* and *"had provided information to [the handler] more than 20 times"*, which had led to an unstated number of seizures of drugs and stolen property convictions and "several vehicle stops". As well, the informer's information *"had been used in more than five judicial authorizations at the time"* which led to charges against numerous people and one conviction had been obtained. The handler described the informer as having been "proven reliable" and, although having a criminal record, there were no offences involving dishonesty. As for the second informer, there was no evidence that would allow their credibility to be independently assessed.

Was the information corroborated?

The first informer's information was corroborated. The police saw a black man named Karbino travelling in a white Dodge Ram which had been parked at the residence in Prince Albert where the informer said that Karbino had been reloading people with illicit drugs. The second informer's information was also confirmed during police surveillance. Three black males were in the truck, one of whom was named Karbino. The Dodge truck, as predicted by the informer, was travelling northwest on the only highway from which a motor vehicle operator could access the road to Beauval or Pinehouse.

"In order to justify a warrantless arrest pursuant to s. 495(1)(a) of the Criminal Code, the arresting officer must have the subjective belief that the individual arrested had committed or was about to commit an indictable offence, and that belief must be objectively reasonable. In respect to the second element of the test, it must be objectively established that 'a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest'."

Putting it all together

Credibility, compelling information, and corroboration are not separate tests, but are to be objectively viewed on the totality of the circumstances. ***"The objective reasonableness of the belief of the arresting officer must be assessed only against the facts as they presented themselves at the time, not the facts as they might have been,"*** said Justice Leurer. ***"Here, the reasonable basis to arrest [the accused] rests on the combination of (a) the existence of two confidential informants, the credibility and reliability of one of which was grounded in evidence before the Court, (b) the compelling detail provided by them, (c) the corroboration of information provided by the informants, which included the presence of [the accused] and others on a highway leading to a finite number of destinations, including the two small communities where [the second informer] indicated the drugs were to be sold, and d) the fact the vehicle was registered to [the accused]."***

The accused's *Charter* rights were not violated and there was no need to consider whether the evidence of the cocaine should have been excluded under s. 24(2).

The accused's appeal was dismissed.

Complete case available at www.canlii.org

PURSE SEARCH INCIDENTAL TO ARREST UNREASONABLE: EVIDENCE EXCLUDED

R. v. Smith, 2019 SKCA 126

The accused was wanted on an arrest warrant for possessing stolen property and obstruction. She was also under surveillance at that time as a person of interest because she was the girlfriend of the prime suspect in a homicide investigation. In furtherance of the homicide investigation, the police had obtained a General Warrant authorizing them to "covertly remove" any mobile device found on the accused and to forensically examine it.

What the General Warrant said:

If, upon arrest of: [the accused and five other named individuals]
They are found in the possession of a cellular telephone(s), a peace officer may:

- Covertly remove the cellular telephone(s) from their personal property and using established procedures and/or software written with the capability of extracting information and data, forensically examine the cellular telephone(s).
- All information located will examined [sic], copied, photographed and/or seized accordingly, before the cellular telephone(s) are returned.

A police officer located the accused along with two male companions. He asked them to stop so he could speak with them. But they fled. The accused and one male were caught. The male was identified as her brother and released but he waited around anyway. The accused was uncooperative in her arrest and police believed she was impaired by some drug. The second male, believed to be her boyfriend, had hopped a fence and escaped arrest.

The police handcuffed the accused and took her purse from her. Her brother asked the arresting officers if he could take the purse. The accused also told the officers she wanted to deliver the purse to her common law partner. The police refused these requests. An officer searched the purse at the site of the arrest. In it, he located a black camera case. When it was opened, four baggies of methamphetamine, weighing 2.7 ounces, were found.

Saskatchewan Provincial Court

The officer who opened the accused's purse said he searched it for two reasons. First, to locate potential weapons that could harm the officer or anyone else. And second, to locate the accused's cell phone pursuant to the General Warrant.

The judge found the officer's search of the purse unreasonable under s. 8 of the *Charter*. In his view, the search had not been lawfully conducted incident to arrest. The accused had been separated from her purse at the time the police searched it and there was no reasonable basis to be concerned about officer or public safety. Furthermore, a search could not be justified on the basis of a vague concern for safety. And, if the officer had a concern about police personnel who would later conduct an inventory search at the station, the easy answer was to leave the purse with her brother at the scene of the arrest. Finally, the police were not likely to find any evidence relating to the offences set out in the warrant — possession of stolen property and obstruction — in the purse. As for a search under the the General Warrant, the judge found the General Warrant only authorized a search of the accused's cell phone if the police came into lawful possession of it. The General Warrant did not authorize the police to search the purse for the cell phone.

The then excluded the methamphetamine as evidence under s. 24(2). The police misconduct was serious and the s. 8 breach had a significant impact on the accused's *Charter* rights, considering the high expectation of privacy she had in her purse. The accused was acquitted of possessing methamphetamine for the purpose of trafficking.

Saskatchewan Court of Appeal

The Crown argued that the trial judge, among other things, erred in finding that the police did not have lawful authority to search the accused's purse incident to her arrest and in holding that the General Warrant did not authorize a search of the purse for a cell phone. Furthermore, the Crown submitted that the judge was incorrect to exclude the methamphetamine found in the purse from evidence under s. 24(2).

Search Incident to Arrest

The Court of Appeal examined prior precedent regarding search incident to arrest and noted the following core principles:

- The power of search incident to arrest is an exception to the general principle that a warrantless search is prima facie unreasonable and to the requirement of reasonable grounds to search.
- The power of search incident to arrest is an exceptional policing tool and its exercise must be limited to searches "truly incidental" to the arrest in question.
- Reviewing courts must consider the motives of the police for the timing and place of the arrest and the relationship in time and place between the arrest and the search. That is, the search must be limited to areas and things both spatially and causally connected to the arrest in question.
- A search is not incidental to an arrest when the police are acting for purposes unrelated to the arrest.

The general framework for a valid search incident to arrest requires:

- The individual searched has been lawfully arrested;
- The search is truly incidental to the arrest in the sense that it is for a valid law enforcement purpose related to the reasons for the arrest such as ensuring the safety of the police and public, the protection of evidence from destruction at the hands of the arrestee or others, and the discovery of evidence which can be used at the arrestee's trial; and
- The search is conducted reasonably.

"[T]he power of search incident to arrest is an exception to the general principle that a warrantless search is prima facie unreasonable (and therefore in violation of s. 8 of the Charter) and to the requirement of reasonable grounds to search."

"[T]he common law police power to search incident to an arrest does not permit the police to do anything more than conduct a frisk or pat-down search of a detainee's person for weapons where the officer holds a reasonable concern that the detainee might have a weapon on or about his or her person. However, where the circumstances of the case or the initial body search itself reasonably give rise to a weapons-related safety concern that warrants a further, more-intrusive search, such a search may be lawfully conducted incident to the arrest."

In this case, Justice Caldwell, speaking for the Appeal Court, found the question before it was whether the search of the accused's purse was truly incidental to her arrest in that it was conducted for a valid law enforcement purpose related to the purpose of the arrest.

Here, the Crown conceded that the search of the purse was not conducted for the purpose of obtaining or preserving evidence related to the reasons for her arrest (ie. the arrest warrant for possessing stolen stolen property and obstruction). Rather, the Crown suggested that the search was conducted for police and public safety. In the Crown's view, the trial judge erred by concluding the police only had "vague concerns" about officer safety. The Crown suggested the totality of the evidence contributed to the searching officer's belief that it was reasonable to search the accused's purse for a weapon. This evidence included the accused's efforts to elude police, her abusive and aggressive behaviour towards the arresting officer, her demand that she be allowed to give her purse to her common law partner, and her appearance of being under the influence of a drug. The Court of Appeal added that the totality of the circumstances also included the accused being handcuffed and separated from her purse.

The police power of search incident to arrest has been expanded to include a search for items of evidence not in the immediate possession of the arrestee so police officers can discover and preserve evidence related to the reasons for arrest. However, Justice Caldwell was not convinced ***"the expanded power reaches far enough to cover searches for the purpose of officer or public safety."*** ***"That justification does not, on its face, extend to a search for items not in the possession of a detainee for the purpose of police or public protection,"*** said Justice Caldwell. ***"[The existing common law doctrine of exigent circumstances] already accounts for an arrest scenario where the public or other officers might be put at risk ... Under the doctrine of exigent circumstances, a police officer may already lawfully conduct a search of a detainee's purse incident to an arrest where the officer holds a reasonable suspicion that such a search is necessary to prevent imminent bodily harm or death."***

The Crown tried to offer support for its argument that a broad power to search for weapons incident to any arrest is justifiable by raising the following points:

- Safety concerns may continue even after an arrest and after the detainee has been handcuffed;
- When a detainee is taken into custody, the concern for officer safety extends to officers and detention personnel at the police station;
- Many things have the potential to be used as a weapon, including small or sharp objects, and the existence of a potential weapon is, on its own, a safety risk; and
- A detainee will regain possession of his or her belongings, which may include a potential weapon, when released from detention.

Justice Caldwell, however, noted these ***"factors speak to matters of officer safety that are far removed from the direct arrest-related safety***

concerns." He rejected the broad proposition offered by Crown that ***"the searching officer need only have a reasonable concern that the person arrested might have something that could potentially be used as a weapon."*** He added:

> [T]he common law police power to search incident to an arrest does not permit the police to do anything more than conduct a frisk or pat-down search of a detainee's *person* for weapons where the officer holds a reasonable concern that the detainee might have a weapon on or about his or her person. However, where the circumstances of the case or the initial body search itself reasonably give rise to a weapons-related safety concern that warrants a further, more-intrusive search, such a search may be lawfully conducted incident to the arrest.
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> Of course, where an individual is arrested *for a weapons-related offence*, the police officer may —depending on the circumstances—have an objectively valid reason for conducting a more intrusive or expansive search for weapons because there might be "some reasonable prospect of securing evidence" related to that offence. Regardless, ... when the objective of a search incident to arrest is officer or public safety, that concern must be tied directly to the risk that the detainee might be armed and might thereby pose a threat to safety. [reference omitted, para. 33]

The Court of Appeal concluded there was no Supreme Court of Canada jurisprudence supporting the Crown's proposition that the police may, for general safety reasons, always conduct an intrusive search for weapons incident to an arrest. Even though a weapons search incident to an arrest addresses the valid objective of officer and public safety, it must also, in all circumstances, be conducted for a valid objective that is truly incidental to the arrest in question. In this case, there was no suggestion that the police believed the accused had a weapon in her purse. ***"Moreover, it is hard to conclude the police reasonably believed the possibility [the accused's] purse contained a weapon (or an object that might be used as a weapon) posed a safety risk to officers or to the public, given that they had detained her, handcuffed her and separated her from her purse,"*** said Justice Caldwell. He continued:

> In the case at hand, once [the accused] had been arrested, she no longer had access to her purse or, therefore, to any potential weapon it contained. By separating [the accused] from her purse, the police had reasonably and effectively averted any threat to safety the purse —or [her] access to it—presented in the context of the arrest, thereby eliminating the legal basis to search it under the common law power of search incident to arrest and under the common law safety search power (latterly, because there could be no imminent threat). There are markedly different safety risks associated with a detainee who might have a weapon hidden on or about his or her person versus a purse placed outside a detainee's control or access that might contain a potentially harmful object. [para. 37]

And further:

> [I]t is important to remember that the common law police power to search incident to an arrest only permits the police to conduct searches that are truly incidental to the arrest in question. Here, [the accused] had not been arrested on weapons-related offences and, once she had been isolated from her purse, any concern for safety could no longer be premised on whether there might be a potential weapon in her purse that she might use against the police or the public, or to aid in an escape. At that point, on the Crown's argument, the safety concern became whether there might be something in the purse that could—independent of any action on [the accused's] part and independent of her arrest—injure an officer or a detention staff member while they were going through her purse for inventory purposes at the police station.
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> Looking at the Crown's argument in that way, the principle it puts forward would permit the police to search a purse, backpack or other bag every time they arrest someone because there is always a possibility that something inside items like those could harm other officers or detention staff. That is, the Crown's proposition is that such a search is necessarily incidental to

"The common law power of search incident to arrest has not been expanded to allow a blanket search of the personal property of a detainee on the basis it will inevitably be searched for inventory purposes."

> all arrests where the detainee has a purse, backpack or other container that might conceal a weapon or an object that could cause harm to an officer or detention staff conducting an inventory search. [reference omitted, paras. 51-52]

But, as the Appeal Court noted, an inventory search is not a valid objective for a search incident to arrest. ***"The common law power of search incident to arrest has not been expanded to allow a blanket search of the personal property of a detainee on the basis it will inevitably be searched for inventory purposes,"*** said Justice Caldwell:

> Aside from that, what the Crown's argument also overlooks is the objective reasonableness of the search. In the scenario proffered by the Crown, the arresting officer would conduct a search of a purse at the arrest scene so as to mitigate the risk to other officers and detention staff, who will later conduct an inventory search of the purse at the police station. In its factum, the Crown argued these other officers and detention staff may be unaware that there could be a weapon or harmful object in the purse. I find that premise extremely difficult to accept because it implies police services will negligently fail to instruct their detention staff to be wary of, and to train and equip their detention staff to deal with, a known and pervasive safety risk inherent to their job function. Furthermore, if the safety concern is related to sharp objects, which could cause injury to the searcher, then it seems counterintuitive to me to think that a police officer at the scene of the arrest would somehow be better positioned than detention personnel at the police station to safely search through a purse. Intuitively, I would have thought that, by searching at the scene of arrest in the heat of the moment, the arresting officer might actually cause the potential safety risk to materialise.
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> As the Crown asserted, a detainee may pose a continuing safety threat to officers or the public even though they are handcuffed. This is particularly so when the police have reason to believe the detainee has a weapon secreted on or about his or her body. However, items that belong to a detainee but which are no longer in the detainee's possession or within the detainee's grasp are unlikely to pose a continuing threat to the safety of officers or the public and, where they do not, the police lack a reasonable basis to conduct an intrusive search for weapons incident to the detainee's arrest. In contextual terms, the factual circumstances of [the accused's] arrest did not give rise to a weapons-related safety concern that continued after she had been frisked, handcuffed and separated from her purse. [paras. 44-45]

Application to the Facts

In this case, Justice Caldwell concluded that the common law power to search incident to arrest on the basis of officer and public safety did not justify the search of the accused's purse. The search was neither spatially nor causally connected to her arrest. ***"Once the police had handcuffed [the accused] and separated her from her purse, the search of that purse for items that might affect officer or public safety was not truly incidental to her arrest"*** said the Appeal Court. ***"The officer's subjective belief that the purpose of officer and public safety would be served by the search was not objectively reasonable in the circumstances."*** Moreover, given the existence of the General Warrant, the police refusal to allow the accused to give her purse to her brother and the officer's secondary purpose to search for and retrieve the cell phone, the search was not related to safety concerns respecting jail staff. It was noted, however, that other circumstances may well justify a search of an arrestee's belongings at the scene of and incidental to an arrest. ***"It is certainly conceivable that a search of a purse for safety reasons might be found to be lawful in different circumstances, but it was not reasonable in the***

circumstances at hand," said Justice Caldwell. Furthermore, he recognized that, depending on the circumstances, the search of a purse may be justified as a safety search — if there are reasonable grounds to believe a detainee's purse contains something dangerous to a police officer or the public — or on the basis of exigent circumstances (s. 487.11 of the *Criminal Code*). ***"Of course, these ancillary powers require a higher level of knowledge or suspicion on the part of the police than that required under a search incident to arrest; but then, the power to search incident to arrest is an extraordinary exception to the general principle that a search without warrant is unlawful,"*** said Justice Caldwell. ***"To put it another way, where a search is reasonably necessary to eliminate an imminent threat to the safety of the public or the police, or where an officer has a reasonable suspicion a search is necessary to prevent imminent bodily harm or death, the police already have the power to lawfully conduct the search."***

The General Warrant

Under s. 487.01(1) of the *Criminal Code*, a judge may issue a warrant authorizing a peace officer to use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property. The trial judge ruled that the General Warrant did not authorize a search for the cell phone. The Crown, however, argued the General Warrant implicitly, if not expressly, authorized the police to covertly seek out and remove any mobile device the accused may have had in her possession at the time of her arrest. In the Crown's view, the General Warrant authorized two searches: (1) a covert search of the personal property of the individuals named in the General Warrant and (2), if a cell phone was found therein, the covert removal of that device to facilitate a forensic search of the data on it.

The Appeal Court, however, rejected the Crown's submissions and concluded that the General Warrant neither expressly authorized the search of the accused's person or her personal property (it did not say that) nor did it implicitly do so. ***"On its wording, the General Warrant required that the police find [the accused] "in the possession of a cellular telephone(s),"*** said Justice Caldwell. ***"In my reading of it, this wording supports the trial judge's interpretation of the limits of the authority conferred under the General Warrant."***

s. 24(2) of the *Charter*

The trial judge's decision to exclude the evidence was upheld. Although society had a strong interest in having this case tried on its merits, the severity of the *Charter* breach and the impact of the breach on the accused's *Charter* protected interests both favoured the exclusion of the methamphetamine.

The Crown's appeal was dismissed.

Complete case available at www.canlii.org

OFFICER LIABLE FOR WRONGFUL ARREST DESPITE TRAINING TO THE CONTRARY

Kosoian v. Société de transport de Montréal, 2019 SCC 59

The plaintiff, a 38-year-old woman, was leaning forward and rummaging through her bag as she descended an escalator at a Laval subway station. She was not holding the escalator's handrail despite a pictogram indicating that the handrail should be held. A police officer (acting as a transit inspector) saw her, approached her, and said, ***"Careful, you might fall. It's dangerous. You should hold the handrail."*** The plaintiff refused to hold the handrail and a heated exchange occurred. The officer ordered the plaintiff several times to hold the handrail but she refused to comply. When she reached the bottom of the escalator, she refused to accompany the officer to a room so he could ticket her, and she tried to walk away. She was physically escorted to a holding room where she refused to provide identification.

Image attached as an Appendix to the judgment.

She was handcuffed, forced to sit in a chair and her bag was searched. She was subsequently identified, and given a statement of offence for disobeying a pictogram and hindering police in their duties.

The plaintiff was acquitted of the offences in a Quebec Municipal Court because the judge concluded he was not satisfied beyond a reasonable doubt that there was an obligation to obey the pictogram.

Court of Quebec

The plaintiff brought a civil action against the police officer who arrested her, the city who employed him (Laval), and the authority responsible for the subway system (Société de transport de Montréal). She argued that her arrest was unlawful and unreasonable, and it constituted a fault under Quebec civil law. In her view, holding the handrail was not an obligation under a by-law, but simply a warning, and a reasonable police officer in the same circumstances would not have acted as the arresting officer did. She claimed to suffer significant psychological stress and humiliation and sought $69,000 in compensatory and punitive damages.

The plaintiff's arguments were rejected and her civil action was dismissed. In the judge's view, the rules were clear and their implementation was beyond reproach. Further, the officer's actions were exemplary and irreproachable. The plaintiff was not unlawfully detained and the officer's conduct was entirely justified. The plaintiff was the author of her own misfortune by refusing to comply with the officer's order and not holding the escalator's handrail.

Quebec Court of Appeal

Two members of the Court of Appeal ruled that the officer did not commit a civil fault by ticketing and arresting the plaintiff when she refused to identify herself. Failing to hold the handrail was a by-law offence, which was presumed valid. The officer had been trained that holding the handrail was an obligation under a by-law and he acted as a reasonable police officer would have done under the same circumstances.

A dissenting judge, however, found there was no obligation imposed under a by-law that required a person to comply with the pictogram and hold the handrail. First, the pictogram had not been approved by the city, a requirement for making a by-law offence. Second, the pictogram only communicated a warning to hold the handrail, not a directive to do so. The dissenting judge would have awarded the plaintiff $20,000, but reduced it to $15,000 after finding she was 25% at fault for aggravating the situation by failing to cooperate with police. The $15,000 was to be paid by the subway authority because it drafted the by-law, trained police officers and prosecuted the plaintiff.

Supreme Court of Canada

In a unanimous 9:0 judgment delivered by Justice Côté, the by-law was found not to create an offence for failing to hold the handrail. The pictogram was only a warning to hold the handrail and communicated advice to be careful. It did not impose an obligation to do so and therefore it could not be disobeyed. The officer unreasonably believed in the existence of an

"As professionals responsible for law enforcement, police officers must be able to exercise judgment with respect to the applicable law. They cannot rely blindly on the training and instructions given to them, nor can they mechanically follow internal policies, directives and procedures or usual police practices."

offence that did not exist in law. Since there was no legal basis for the actions taken by the officer, his conduct was unlawful. ***"In short, a reasonable police officer in the same circumstances would necessarily have doubted the existence in law of the offence and, as a result, would not have required [the plaintiff] to identify herself so that she could be given a statement of offence,"*** said Côté. ***"Such an officer would certainly not have arrested her if she refused, but would instead have allowed her to continue on her way. I therefore conclude that [the officer] departed from the conduct expected of a reasonable police officer by grabbing [the plaintiff] in order to prevent her from leaving and by taking her to the holding room. By acting in that manner, he made an arrest which was unlawful … and which, having regard to the context, constituted a civil fault."***

Police Legal Knowledge

In its judgment, the Supreme Court considered the obligation of police officers to know and understand the law. In doing so, Justice Côté made the following comments (references omitted):

- "In a free and democratic society, police officers may interfere with the exercise of individual freedoms only to the extent provided for by law. Every person can therefore legitimately expect that police officers who deal with him or her will comply with the law in force, which necessarily requires them to know the statutes, regulations and by-laws they are called upon to enforce. Police officers are thus obliged to have an adequate knowledge and understanding of the statutes, regulations and by-laws they have to enforce. Police forces and municipal bodies have a correlative obligation to provide police officers with proper training, including with respect to the law in force." [para. 6]

- "Police officers are obliged to have an adequate knowledge and understanding of criminal and penal law, of the offences they are called upon to prevent and repress and of the rights and freedoms protected by the Charters. They also have an obligation to know the scope of their powers and the manner in which these powers are to be exercised. A police officer whose application of the law departs from that of a reasonable police officer in the same circumstances commits a civil fault. In this respect, an officer who arrests someone on the basis of a non-existent offence may be civilly liable." [para. 55]

- "[W]hile police officers are not held to an obligation of result with regard to knowledge of the law, the applicable standard is a high one. Citizens rightly expect them to have an adequate knowledge and understanding of the statutes, regulations and by-laws they are called upon to enforce and of the limits of their authority." [para. 58]

- "Police officers cannot claim to carry out their mission — to maintain peace, order and public security and to prevent and repress crime and offences under the law and by-laws — without

"[I]t is well established that police officers cannot avoid personal civil liability simply by arguing that they were merely carrying out an order that they knew or ought to have known was unlawful. … The same is true of the training and instructions given to police officers and of internal police force policies, directives and procedures."

"[P]olice officers are not lawyers and are not held to the same standards as lawyers. For example, they are not themselves expected to carry out thorough research or to engage in extensive reflection concerning the subtleties of conflicting case law. Moreover, where a question of law is controversial, a police officer's conduct should not be found to constitute fault insofar as it is based on an interpretation that is reasonable and consistent with the training and instructions given to the officer."

having an adequate knowledge and understanding of the fundamental principles of criminal and penal law, of the rights and freedoms protected by the Charters and of the offences they are called upon to repress, and without knowing the limits of their authority. [para. 58]

- "The training and instructions given to police officers, as well as internal police force policies, directives and procedures, must be considered in assessing an officer's conduct, although they are not conclusive in themselves. A reasonable police officer must know that they do not have the force of law." [para. 59]

- "As professionals responsible for law enforcement, police officers must be able to exercise judgment with respect to the applicable law. They cannot rely blindly on the training and instructions given to them, nor can they mechanically follow internal policies, directives and procedures or usual police practices." [para. 60]

- "[I]t is well established that police officers cannot avoid personal civil liability simply by arguing that they were merely carrying out an order that they knew or ought to have known was unlawful. … The same is true of the training and instructions given to police officers and of internal police force policies, directives and procedures." [para. 61]

- "[P]olice officers are not lawyers and are not held to the same standards as lawyers. For example, they are not themselves expected to carry out thorough research or to engage in extensive reflection concerning the subtleties of conflicting case law. Moreover, where a question of law is controversial, a police officer's conduct should not be found to constitute fault insofar as it is based on an interpretation that is reasonable and consistent with the training and instructions given to the officer." [para. 62]

- "[T]he expectations that exist for police officers remain high. Where there is uncertainty about the law in force, it is incumbent on them to make the inquiries that are reasonable in the circumstances, for example by suspending their activities in order to consult with a prosecutor or by rereading the relevant provisions and the available documentation. In principle, an error will be judged less severely if it is made during an emergency response, or in a situation where public safety is at stake, rather than in the context of a carefully planned operation or the routine application of a by-law. In other words, unless the circumstances require immediate intervention, it is not appropriate to act first and make inquiries later. I note that — even in an emergency — the fact that conduct seems dangerous to a police officer does not permit the officer to presume the existence of an offence." [para. 63]

"[P]olice officers are not lawyers and are not held to the same standards as lawyers. For example, they are not themselves expected to carry out thorough research or to engage in extensive reflection concerning the subtleties of conflicting case law.

- "[P]olice officers sometimes commit a civil fault if they act unlawfully, even where their conduct is otherwise consistent with the training and instructions they have received, with existing policies, directives and procedures and with the usual practices. It is all a matter of context: the question is whether a reasonable police officer would have acted in the same manner." [para. 64]

- "[A] police officer's conduct must be assessed in light of the law in force at the time of the events. An officer can hardly be faulted for applying a provision that was presumed to be valid, applicable and operative at the relevant time." (para. 65)

Liability

As for apportioning liability, Justice Côté found the subway authority, the City of Laval, and the police officer all liable. The subway authority was at fault as the officer's mandator by designating the officer as a transit inspector, and for implementing the bylaw and teaching police officers that the pictogram imposed an obligation to hold the handrail. The City of Laval was liable as the police officer's employer. Since the plaintiff had no legal obligation to hold the handrail and was entitled to refuse to obey an unlawful order, no apportionment of liability was imposed on her.

The plaintiff's appeal was allowed, the Quebec Court of Appeal's judgment was set aside, and the award of $20,000 in damages set by the dissenting judge in the Quebec Court of Appeal was assessed, 50% apportioned to the subway authority and 50% to the police (the officer involved).

Complete case available at www.canlii.org

"[A] police officer's conduct must be assessed in light of the law in force at the time of the events. An officer can hardly be faulted for applying a provision that was presumed to be valid, applicable and operative at the relevant time."

'STEP SIX' WARRANT PROCEDURE UPHELD: EVIDENCE ADMISSIBLE

R. v. Dhesi, 2019 ONCA 569

The Ontario Court of Appeal has once again used "Step Six" of the *Garofoli* procedure, this time in upholding the validity of a search warrant executed at the accused's home. ***"According to step six, the Crown is entitled to rely on the unredacted version of the ITO to justify the issuance of the warrant, even though the accused does not have access to the unredacted version, so long as the court can provide the accused with a judicial summary of the redacted portions that is sufficient to make the accused aware of the nature of the redacted content of the ITO so as to allow the accused to challenge the validity of the warrant,"*** said the Court of Appeal. It dismissed a conviction appeal on charges of possessing cocaine for the purpose of trafficking and possessing proceeds of crime ($20,710).

The warrant had been heavily redacted to protect the identity of two confidential informers and the Crown conceded that the issuance of the warrant could not be justified on the basis of the redacted ITO. The accused was provided a copy of the redacted ITO along with a judicial summary of the redacted portions which, in the trial judge's view, allowed the accused to meaningfully challenge the warrant. Thus, the accused's right to make full answer and defence under s. 7 of the *Charter* had not been compromised. The trial judge then reviewed the contents of the unredacted ITO and found there was a sufficient basis upon which to grant the warrant. Thus, there was no s. 8 breach and the evidence was admissible.

On appeal, the accused argued that his *Charter* rights were breached under s. 7 and 8 and he wanted either the evidence excluded and an acquittal entered, or a stay of proceedings on the charges. But the Court of appeal upheld the trial judge's ruling, finding he identified and applied the correct legal principles:

In applying the legal principles, the trial judge referred to the contents of the summary at length. He noted several parts of the summary, which allowed the accused to make informed submissions about the CIs' credibility (e.g. the CI's involvement in the drug subculture, and the involvement in prior cases with the police), and the cogency of the CI's information (e.g. some, but not all, of the information was based on first-hand knowledge and observation). The summary also referred to information which had come from other sources and was said to corroborate aspects of the CI's information (e.g. the [accused's] address, and the model of his automobile).

In our view, it was open to the trial judge to reach the conclusion that the judicial summary, combined with the other information available to the [accused], put him in a position where he could meaningfully challenge the basis upon which the warrant issued even though he had not seen the unredacted ITO. Step six in Garofoli contemplates that an accused will have sufficient information as to the nature of the information in the ITO to permit meaningful submissions even though the specifics of the content of the ITO are not available. Step six does not envision a summary that will actually inform an accused as to the contents of the redacted portions of the ITO. That kind of summary would seriously compromise the CI's privilege.

Obviously, an accused operating with a summary rather than a copy of the full ITO is at a disadvantage in attempting to show that the warrant should not have issued. The step six procedure, however, seeks to balance inherently conflicting interests. That balancing inevitably puts some limits on the accused that are not present in the normal course of litigation. Those limits do not amount to a per se violation of s. 7. The violation arises only if an adequate summary cannot be provided.

LEGALLY SPEAKING:

Garofoli "Step Six" Procedure

In *R. v. Garofoli*, [1990] 2 S.C.R. 1421, the Supreme Court of Canada outlined a six step procedure that can be used in determining the validity of a sealed judicial authorization/warrant requiring redactions. The procedure permits the Crown to apply to have the reviewing judge consider as much of the excised material as is necessary to support the search warrant, which the reviewing judge may do upon providing the accused with a judicial summary of the excised material. "Step Six" is invoked when the redacted ITO is insufficient to support reasonable grounds and the issuance of the authorization/warrant is in question:

STEP 1: If the Crown objects to disclosure of any of the sealed material, an application should be made by the Crown suggesting the nature of the matters to be edited and the basis therefor. Only Crown counsel will have the affidavit/ITO at this point.

STEP 2: The trial judge should then edit the affidavit/ITO as proposed by Crown counsel and furnish a copy as edited to counsel for the accused. Submissions should then be entertained from counsel for the accused. If the trial judge is of the view that counsel for the accused will not be able to appreciate the nature of the deletions from the submissions of Crown counsel and the edited affidavit/ITO, a form of judicial summary as to the general nature of the deletions should be provided.

STEP 3: After hearing counsel for the accused and reply from the Crown, the trial judge should make a final determination as to editing, bearing in mind that editing is to be kept to a minimum and applying the factors listed above.

STEP 4: After the determination has been made in Step 3, the edited affidavit/ITO should be provided to the accused.

STEP 5: If the Crown can support the authorization on the basis of the material as redacted, the authorization/warrant is confirmed.

STEP 6: If, however, the redacting renders the authorization insupportable, then the Crown may apply to have the trial judge consider so much of the excised material as is necessary to support the authorization. The trial judge should accede to such a request only if satisfied that the accused is sufficiently aware of the nature of the excised material to challenge it in argument or by evidence. In this regard, a judicial summary of the excised material should be provided if it will fulfill that function. It goes without saying that if the Crown is dissatisfied with the extent of disclosure and is of the view that the public interest will be prejudiced, it can withdraw tender of the evidence resulting from the authorization/warrant.

"A court reviewing the validity of a warrant starts with the presumption that the warrant – a judicial order – was lawfully issued. The review of the issuing of the warrant is limited to a determination of whether there was a basis upon which the warrant could properly issue."

> The trial judge was satisfied that the information the [accused] had allowed him to make informed submissions, which would direct the trial judge to matters that were relevant to the CIs' credibility and the cogency of the information provided to the police. We see no basis upon which to interfere with the trial judge's ruling. [para. 9-12]

As for the validity of the warrant, it was upheld. ***"A court reviewing the validity of a warrant starts with the presumption that the warrant – a judicial order – was lawfully issued,"*** said the Appeal Court. ***"The review of the issuing of the warrant is limited to a determination of whether there was a basis upon which the warrant could properly issue."*** It was open to the trial judge to uphold the warrant:

> The ultimate validity of the warrant depended on the contents of the unredacted ITO. The trial judge could not, of course, refer to the redacted portions of the ITO in explaining why he was satisfied that the warrant would issue. His reasons consequently may seem somewhat cursory. The trial judge did, however, consider whether the ITO provided information that was germane to the credibility of the CIs, the cogency of the information they provided, and whether the information they provided was corroborated. He ultimately described the CIs' information as "sufficiently current", "very detailed" and confirmed "significant portions" by information from other sources. [para. 14]

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ONTARIO's TOP COURT PROVIDES GUIDANCE FOR WARRANT REVIEW

R. v. Booth, 2019 ONCA 970

The Ontario Court of Appeal has provided a useful summary of the relevant law as it relates to full and frank disclosure, amplification and material non-disclosure in a search warrant application. The Appeal Court found two search warrants — one for a residence and one for a digital video recorder — should not have been issued for lack of reasonable grounds:

> Obviously, it is imperative that issuing judges or justices have an accurate understanding of the material, known facts available to the affiant officer. If the ITO contains erroneous, incomplete, or dishonest information relating to known information, an issuing judge or justice could be misled, and provide an authorization that should not have been provided. To ensure accuracy, anyone seeking an ex parte authorization, such as a search warrant, is required to make full and frank disclosure of material facts. This is because an ex parte warrant application is not adversarial. As a corollary of the privilege of being the only party permitted to present evidence in an ex parte application, a search warrant affiant bears the burden of presenting the facts accurately and fairly, from the perspectives of both sides.
>
> Therefore, a search warrant ITO should never try to trick its readers, or offer misleadingly incomplete recitations of known facts, and the affiant officer must not "pick and choose" among the relevant facts in order to achieve a desired outcome. Nor should the affiant officer invite inferences that would not be drawn or a conclusion that would not be reached if the omitted facts were disclosed.

"[A] search warrant ITO should never try to trick its readers, or offer misleadingly incomplete recitations of known facts, and the affiant officer must not "pick and choose" among the relevant facts in order to achieve a desired outcome."

What, then, is the frame of material information that should be included to make full and frank disclosure? To answer that question, consider what is required to issue a "reasonable and probable grounds" search warrant. For such a search warrant to issue, the grounds for the warrant must be adjudged not only to be probable, but reasonable to rely upon. The ITO affidavit has to disclose ... a "credibly-based probability [that] replaces suspicion". As a result, the frame of material information required to achieve full and frank disclosure includes all material information that: (a) could undercut the probability that the alleged offence has been committed; (b) could undercut the probability that there is evidence to be found at the place of the search; and (c) that challenges the reliability and credibility of the information the affiant officer relies upon to establish grounds for the warrant.

Where full and frank disclosure has not been made, a reviewing court will correct the warrant ITO to achieve full and frank disclosure, and then determine based on that corrected ITO whether the warrant could properly have issued if full and frank disclosure had been made. "What is involved is an analysis [of the corrected ITO] to determine whether there remains sufficient reliable information upon which the search authority could be grounded".

Sometimes erroneous information in an ITO will be corrected by simply removing it. Information that should not have been included in the warrant will always be "excised" in this way.

Erroneous information that would have been appropriate for inclusion in the ITO if presented accurately will sometimes be corrected by "amplification" so that it can be considered during the sufficiency review. Amplification entails adding information that should have been disclosed in order to give an accurate picture or replacing mistakenly inaccurate information with accurate information. When

material information that would hinder a finding of reasonable and probable grounds has been improperly omitted, the ITO must be amplified to include it. However, amplification relating to information that could advance the warrant application is permissible only if the error in not making full and frank disclosure is: (1) a "minor, technical error"; and (2) made in "good faith".

Whether the omission satisfies the first of these two amplification prerequisites – the "minor technical error" requirement – depends on the significance and nature of the error.

Errors that have been corrected by amplification include: mistakenly attributing observations to the wrong observer; mistaken dates and typographical errors; and erroneous but unimportant errors in the description of the source of information.

In contrast, amplification was not available for errors that are too significant to qualify as "minor, technical" errors, including: the failure to identify properly the target unit in a plaza; the failure to include information supporting the expertise of a police officer; and the failure to provide evidence supporting the provenance and reliability of a document of disputed authenticity.

"'[A]mplification' is to be used to correct 'minor, technical' errors caused by a good faith failure to make full and frank disclosure. It is not an opportunity during the search warrant review for the Crown to retroactively add information that it could have included in support of the warrant but failed to do so. To permit this would turn the authorization process into a sham."

Where the erroneous information cannot be corrected because the error is not a "minor, technical" one, it is obvious that it must be excised in its entirety. This is because the uncorrected, erroneous information simply cannot be permitted to remain in the ITO, thereby providing an inaccurate boost to the case for reasonable and probable grounds.

The same is true where an officer has not acted in good faith when failing to make full and frank disclosure – the second amplification prerequisite. Given that amplification is confined to "good faith" error correction, it follows that by acting in bad faith, an affiant officer squanders the opportunity to have intentionally misleading information considered in its corrected form by the reviewing judge. The misleading information cannot remain.

In some cases, bad faith on the part of an affiant officer can have an even more profound effect. Where an affiant officer's failure to make full and frank disclosure is egregious enough to "[subvert] the pre-authorization process through deliberate non-disclosure, bad faith, deliberate deception, fraudulent misrepresentation or the like", a court has the "residual discretion" to set aside the search warrant, even if there would have been reasonable and probable grounds, had there been full and frank presentation of the information.

To emphasize, "amplification" is to be used to correct "minor, technical" errors caused by a good faith failure to make full and frank disclosure. It is not an opportunity during the search warrant review for the Crown to retroactively add information that it could have included in support of the warrant but failed to do so. To permit this would turn the authorization process into a sham. [references omitted, paras. 54-66]

In this case, the Appeal Court concluded both warrants were issued without reasonable grounds and therefore the searches were s. 8 Charter breaches. The evidence was excluded, the accused's convictions of nine offences including robbery, wounding with a firearm, aggravated assault and possessing a loaded firearm were set aside and acquittals entered.

Complete case available at www.ontariocourts.on.ca

JUDGE MAY TAKE CHARTER BREACHES INTO ACCOUNT IN CRAFTING SENTENCE

R. v. Kennett, 2019 NBCA 52

The accused, along with another man, was arrested on the deck of his residence. The police had reasonable grounds to believe stolen property was present at the address but did not have a warrant. The officers peered through the windows of the house and took photographs of its inside from the outside. Then they entered the accused's residence and looked into every room. They also searched the cell phone seized from the accused. Later, police obtained a warrant to search the residence and seized drugs with an approximate street value of $10,130. The accused was charged with five drug offences.

New Brunswick Provincial Court

The judge concluded that the warrantless search of the accused's residence — including peering into the residence and taking photographs — and the search of his cell phone breached s. 8 of the *Charter*. The judge expunged from the ITO the information gathered through these warrantless searches. However, the judge held the search warrant, which resulted in the seizure of the drugs, could have been issued even if the information gathered through the illegal searches was expunged from the ITO. Although she determined the breaches were egregious and impacted the *Charter* protected rights of the accused, the judge admitted the drugs under s. 24(2). The accused was convicted of one count of possessing a controlled substance and four counts of possession for the purpose of trafficking (PPT). He was sentenced to 30 months in jail for PPT cocaine (less time served) and concurrent time for the remaining charges: PPT methamphetamine (24 months), PPT cannabis (10 months), PPT methylphenidate (six months) and possessing amphetamine (6 months).

New Brunswick Court of Appeal

The accused appealed his sentence, among other things, by arguing that his sentence ought to have ben reduced by six months to remedy the *Charter* breaches. In his view, the trial judge erred by failing to consider the misconduct of the state agents during the sentencing proceedings. This, he submitted, resulted in the imposition of an unfit sentence. The Crown, on the other hand, contended that the *Charter* breaches had ben remedied when the information obtained from the searches had been expunged from the ITO. In the Crown's opinion, nothing more was required and the sentence imposed was reasonable and fit. If however, a sentence reduction for the police misconduct was to be considered then the Crown suggested a reduction of no more than three months was appropriate.

In reviewing *R. v. Nasogaluak*, 2010 SCC 6, the Appeal Court noted that a sentence reduction can be an appropriate response to a *Charter* breach and may be addressed as part of the sentencing process under the *Criminal Code* as a mitigating circumstance. ***"I am of the view that in the circumstances of this case, the sentencing judge should have considered the incidents of state misconduct during the sentencing proceedings,"*** said Justice Lavigne, speaking for the Court of Appeal. And the court disassociating itself from the police misconduct by expunging the unlawfully obtained information from the ITO did not bar any further remedy at the time of passing sentence pursuant to sentencing provisions of *Criminal Code*. ***"The expunging of the ITO did not eliminate the need for proper application of the sentencing principles set out in the Code,"*** said Justice Lavigne. ***"While I agree with the Crown's argument that a sentencing judge is not obliged to reduce the sentence every time a Charter breach is found, it is a factor that should be considered. The discretion comes in when deciding whether or not this factor will impact the sentence which would have otherwise been imposed."***

"While I agree with the Crown's argument that a sentencing judge is not obliged to reduce the sentence every time a Charter breach is found, it is a factor that should be considered. The discretion comes in when deciding whether or not this factor will impact the sentence which would have otherwise been imposed."

The sentencing judge erred by failing to consider the state misconduct as a relevant factor in sentencing the accused. This resulted in the imposition of an unfit sentence.

A Fit Sentence?

In this case, the Court of Appeal reduced the accused's sentence. In doing so, Justice Lavigne emphasized the following:

- A sentencing judge may take into account *Charter* breaches while crafting a fit and proportionate sentence.
- Remedies granted to redress *Charter* wrongs are intended to meaningfully vindicate a claimant's rights and freedoms.
- The expunging of the ITO, which had no impact on the trial, was insufficient to remedy the impropriety of the state actions.
- The more egregious the breach, the more attention is to be paid to it in determining a fit sentence.

In agreeing with the trial judge's determination that ***"the breaches were egregious and impacted the Charter protected rights of the accused,"*** Justice Lavigne stated:

> This case reflects a casual, cavalier approach to the investigation. Without a warrant and without any objective indicators pointing to the possibility of persons inside [the accused's] residence, officers entered the residence and carried out a search of every room, for the stated purpose of confirming the residence was unoccupied. One of those officers was an RCMP corporal with significant experience in law enforcement. In his testimony, he said he would do it again and attempted to make a case for "exigent circumstances" to justify the warrantless entry and warrantless search of the cell phone; however, the judge found no exigent circumstances justifying the warrantless searches. It is no excuse to say the approach he took here is one he or other officers would have taken, or that it is an accepted practice. If that were so, it would simply be indicative of a wider spread systemic problem.
>
> The fact the lead investigator testified he would repeat his unconstitutional behaviour points towards a disregard of an accused's Charter rights. The police conduct represented a serious departure from well-established constitutional norms; the officers were not operating in unknown legal territory. Both a residence and a cell phone carry high expectations of privacy.
>
> Section 8 of the Charter guarantees a broad and general right to be secure from unreasonable searches and seizures which extends at least so far as to protect the right of privacy from from unjustified state intrusion. Warrantless searches are prima facie unreasonable under s. 8. I can only conclude the warrantless entry and search of [the accused's] home and his cell phone was carried out with indifference for the law and [the accused's] constitutional rights. It may be time to remind us all once again of the importance of a person's home for s. 8 purposes and the age-old principle of the inviolability of the dwelling-house. [reference omitted]

The accused's sentence appeal was allowed, his sentence for PPT cocaine was reduced from 30 months to 25 months (less time served) and his concurrent sentence for PPT methamphetamine was reduced from 24 months to 19 months.

Complete case available at www.canlii.org

"It may be time to remind us all once again of the importance of a person's home for s. 8 purposes and the age-old principle of the inviolability of the dwelling-house."

"In a free and democratic society, police officers may interfere with the exercise of individual freedoms only to the extent provided for by law. Every person can therefore legitimately expect that police officers who deal with him or her will comply with the law in force, which necessarily requires them to know the statutes, regulations and by-laws they are called upon to enforce. Police officers are thus obliged to have an adequate knowledge and understanding of the statutes, regulations and by-laws they have to enforce. Police forces and municipal bodies have a correlative obligation to provide police officers with proper training, including with respect to the law in force."

Supreme Court of Canada

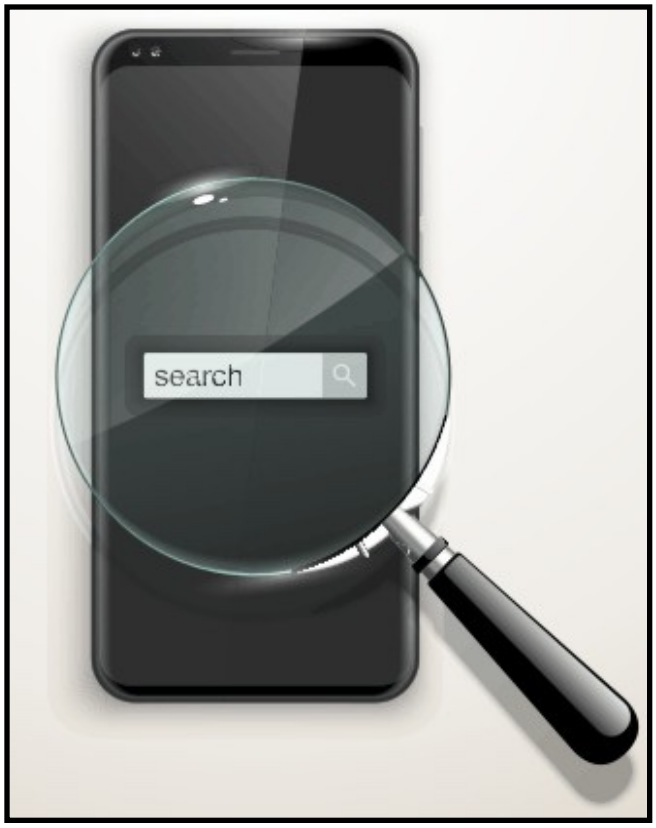
Kosoian v. Société de transport de Montréal, 2019 SCC 59

IMMIGRATION LEGISLATION AUTHORIZED WARRANTLESS SEARCH OF CELL PHONE

R. v. L.E., 2019 ONCA 961

The Ontario Court of Appeal has ruled that Canada's *Immigration and Refugee Protection Act* (*IRPA*) authorized the warrantless search of an accused's cell phone on which child pornography was found. The accused, a foreign national, had her cell phone seized by an officer from the Canada Border Services Agency (CBSA). The accused had been subject to a removal order from Canada, as her claim for refugee status had failed, and she had been arrested and detained at the time the cell phone was searched.

The accused's cell phone, an LG Nexus, was not password protected. The CBSA officer conducting the search said she was relying on s. 16(3) of *IRPA* as her authority for the search. Officials were looking for evidence that the accused had valid passports and had been in communication with her husband. She had claimed she did not know her husband's whereabouts, had not spoken to him for a year and had no means of contacting him. This information would assist CBSA in proving the accused was a flight risk and would justify her detention pending removal. In the cell phone's contacts list two separate contact names and numbers for the accused's husband under "My love" and "My husband's number" were found. Text message conversations with one of the numbers had been deleted. Thinking that other information relevant for s. 16(3) *IRPA* purposes may have been deleted, the officer turned the LG Nexus phone over to a digital forensic examiner at the CBSA. The CBSA digital forensic examiner was able to locate deleted information and, while searching for pictures of the accused's husband, the examiner found some photographs which he considered child pornography. He stopped his search and called the police. Police obtained a search warrant, seized the LG Nexus phone and forensically imaged the contents of the LG Nexus phone. The



BY THE BOOK:

Immigration & Refugee Protection Acy

Evidence relating to identity

s. 16(3) An officer may require or obtain from a permanent resident or a foreign national who is arrested, detained, subject to an examination or subject to a removal order, any evidence — photographic, fingerprint or otherwise — that may be used to establish their identity or compliance with this Act.

... ...

Seizure

s. 140 (1) An officer may seize and hold any means of transportation, document or other thing if the officer believes on reasonable grounds that it was fraudulently or improperly obtained or used or that the seizure is necessary to prevent its fraudulent or improper use or to carry out the purposes of this Act.

"To be authorized by law, the search must be authorized by a specific statute or common law rule; the search must meet the procedural and substantive requirements of the law; and the search must not exceed any subject-matter or location limits imposed by the law."

police identified 129 images believed to constitute child pornography leading to the charges of making, distributing and possessing child pornography. Convictions for making and distributing child pornography were entered in the Ontario Court of Justice and the accused was sentenced to 36 months imprisonment (less credit for pre-sentence custody) followed by probation for three years.

On appeal, the accused's argument, among others, that neither s. 16(3) nor s. 140 of *IRPA* afforded a lawful basis for the cell phone search was rejected. But Justice Watt, delivering the Court of Appeal's decision, found the CBSA search was authorized by law. He noted:

> Conduct by state actors which amounts to a search or seizure is subject to the requirement of reasonableness in s. 8 of the Charter. To be reasonable:
>
> i. a search or seizure must be authorized by law;
> ii. the authorizing law must be reasonable; and
> iii. the search must be carried out in a reasonable manner.
>
> ...
>
> To be authorized by law, the search must be authorized by a specific statute or common law rule; the search must meet the procedural and substantive requirements of the law; and the search must not exceed any subject-matter or location limits imposed by the law. [references omitted, paras. 62-64]

In Justice Watt's view, the CBSA officer's search of the accused's cell phone was authorized by ss. 140 and 16(3) of *IRPA*:

> Section 16(3) of the IRPA gives CBSA officers a statutory search power:
>
> An officer may require or obtain from a permanent resident or a foreign national who is arrested, detained, subject to an examination or subject to a removal order, any evidence — photographic, fingerprint or otherwise — that may be used to establish their identity or compliance with this Act.
>
> Section 16(3) imposes procedural and substantive limits on the CBSA officer's search power. Under this provision, a CBSA officer can conduct a search if:
>
> i. the subject of the search is a permanent resident or foreign national;
> ii. the subject of the search is arrested, detained, or subject to an examination or removal order; and
> iii. the search is to establish the subject's identity or determine compliance with the IRPA.
>
> But s.16(3) does not limit the subject matter of the search. It allows the CBSA officer to obtain "any evidence" so long as that evidence is obtained to establish the subject's identity or determine compliance with the IRPA.
>
> In my view, s. 16(3) authorized the CBSA officer's search of the [accused's] cell phone. The [accused] was a foreign national; she had been arrested and detained and was subject to a removal order. The CBSA officers sought evidence that the [accused] was attempting to contravene her removal order. They sought evidence from the LG Nexus cell phone in the [accused's] possession on arrest, to determine the [accused's] compliance (or lack thereof) with the IRPA, having information that could support a reasonably grounded belief the [accused] was obstructing her removal from Canada.

> The [accused] told CBSA officers that her husband's phone number was on the LG Nexus cell phone. It was open to the officers to infer that her cell phone was likely to reveal details of the contact between the [accused] and her husband relevant to the true state of affairs surrounding their entry into Canada and attempts to circumvent their removal. [paras. 67-71]

Since s. 16(3) of *IRPA* authorized the search of the accused's cell phone, it was authorized by law.

Complete case available at www.ontariocourts.on.ca

EXIGENT CIRCUMSTANCES JUSTIFIED WARRANTLESS ENTRY

R. v. Shomonov, 2019 ONCA 1008

The accused shot himself in the hand at an industrial unit he leased. The bullet went through the wall of an adjacent unit that was occupied by a boxing club. People in the boxing club heard a loud sound and noticed a hole in the wall. Blood was also seen outside the front door of the accused's unit and its door was locked. The police were called to the scene, arrived shortly thereafter and secured the premises.

The police called the accused's cell phone. He said he was taken to the hospital by his girlfriend and was being treated for an injury caused by a "nail gun". The police went to the hospital to investigate. They discovered that the accused told nursing staff that he had been a robbery victim and did not want the police involved. His girlfriend was contacted and said that she had not seen him all day. Police also spoke to a doctor who said the accused suffered a gunshot wound. Police interviewed the accused, questioning him about what happened. However, their questioning became confrontational and they accused him of lying to them about the cause of his injury. The accused then admitted that he recently bought two firearms and that they were still inside his unit.

In the meantime, the police were attempting to determine if anyone was in the accused's unit. They knocked on the door, but nobody answered. They saw fresh footprints in the snow, which they had not previously noticed, that led to a locked rear door. Concerned that someone might be in the unit and injured, the officer in charge ordered that the police conduct a warrantless search. The police broke down the door and searched the unit. Nobody was inside. However, the police found two firearms. A search warrant was obtained and the subsequent search also resulted in the discovery of a quantity of marijuana and cash.

Ontario Superior Court of Justice

The judge found the accused was not detained when police first arrived at the hospital. There was nothing remarkable about the early police questioning; they were simply attempting to determine what happened. However, the judge found the accused was detained and his s. 10(b) *Charter* rights triggered when the police became confrontational with him and accused him of lying. His statements about the firearms in his unit were therefore obtained in breach of s. 10(b) and were excluded under s. 24(2) for the purpose of proving the accused's guilt. However, the judge held that the information derived from this part of the interview could inform the reasonableness of the officers' grounds to conduct a warrantless search.

As for the search of the accused's industrial unit, the initial, warrantless search was justified on the basis of exigent circumstances. ***"I have no hesitation in concluding that the officers had an honest and reasonable concern that there could be an injured victim inside the unit,"*** said the judge. ***"They were not prepared to take a chance by waiting for several hours until a search warrant could be obtained. In my opinion, in entering unit B without a warrant, they made the right decision. The fact that the search revealed that there was no injured victim inside the unit does not mean that the decision was the wrong one. There was a reasonable belief that a person's safety could be at risk."*** Moreover, even if the warrantless search

infringed s. 8, the evidence was admissible under s. 24(2). As for the search conducted with the warrant, it was valid even without the paragraphs in the ITO that detailed the accused's admissions at the hospital or the information derived from the warrantless search. The accused was convicted on two counts of possessing a prohibited firearm, careless use of a firearm and possessing marijuana. He was sentenced to 19 months' imprisonment.

Ontario Court of Appeal

The accused argued that the two searches of his industrial unit were unlawful. The Court of Appeal, however, disagreed.

The Warrantless Search

The trial judge accepted the evidence of the police officers involved in the warrantless search that they had a genuine concern that an injured person might still be inside the unit. ***"The circumstances known to the police at the time amply justified the warrantless entry into the [accused's] commercial unit,"*** said the Court of Appeal. ***"In other words, the trial judge did not err in finding that the entry was 'compelled by urgency, calling for immediate police action to preserve evidence, officer safety or public safety' and that 'taking the time to obtain a warrant would pose serious risk to those imperatives'."***

The Search Warrant

The accused submitted that the search warrant was invalid because the police improperly relied upon the accused's admissions made following the breach to his rights under s. 10(b) of the *Charter*, and the fruits of the warrantless search.

The Court of Appeal also dismissed this argument. The trial judge made no error in his analysis of the validity of the search warrant. Although he excised the paragraphs in the ITO referring to the accused's admissions,he found the balance of the ITO provided an abundant basis for the conclusion that reasonable grounds existed to permit the issuance of the search warrant. Furthermore, the trial judge held that if the fruits of the warrantless search were also excised the warrant would still be invalid. These findings made by the trial judge that there was still a more-than-adequate basis for the issuance of the search warrant were reasonable.

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

HIGH-RISK TAKEDOWN DURING INVESTIGATIVE DETENTION JUSTIFIED

R. v. Garland, 2019 ABCA 479

A woman attended her parents' home to get her five year old son. She had left him with her parents (the Likneses) to enjoy a sleepover. The next morning the woman returned to her parents home to pick up her son. She arrived to find a bloody scene, the aftermath of a vicious attack. But nobody was home. She called 9-1-1.

When police attended they found a large amount of blood throughout the house, mixed with broken teeth. Police initiated a major investigation to find the Likneses and their grandson. A forensic pathologist believed that the amount of blood present was indicative of one or more of the victims having been seriously injured, but perhaps still alive. Police reviewed home and business security video. They saw a truck closely resembling the unique old truck the accused drove on the Likneses street both at 3:10 am and again at 7:45 am. This information, and information that the accused had a long-standing grudge against Mr. Liknes and a router had been disabled - something the accused would understand how to do given his expertise - took the police to the accused's family farm.

The officer in charge instructed his officers that if they saw the accused leave the property alone, they were to follow him. But if there was more than one person in the truck, they were to intercept it and

detain the occupants. The accused was soon observed driving his truck away from the property at 6:15 pm. An officer mistakenly thought he saw a second person in the vehicle. The vehicle was stopped. At gunpoint, the accused was placed in investigative detention at 6:20 pm by an Emergency Response Team. He was Chartered and cautioned. He was searched for weapons, handcuffed and taken to a police station. At 7:57 pm, while still being held in investigative detention, the accused's footwear was seized (DNA from blood of one of the victims was subsequently found on the shoes). At 10:49 pm, he was formally arrested and charged with kidnapping. At 12:11 am the following morning, he was also charged with three counts of murder.

Following the accused's initial detention,police entered without a search warrant in the hope that the missing people may still be alive but in need of medical assistance. The officer in charge of the investigation instructed officers to enter the property and search only buildings and receptacles that were large enough to conceal a body. During the search of the property, the police found a large amount of highly incriminating evidence and subsequently obtained a warrant to search it.

Alberta Court of Queen's Bench

The accused argued that there was no clear nexus between the accused and the violent incident at the Liknes' residence. He also maintained that the high-risk takedown was excessive for the purposes of a detention. In his view, the method of detention was more akin to an arrest than a detention.

The judge found the investigative detention effected by police was based on a reasonable suspicion that the accused was connected to the disappearance or kidnapping of the three people. Moreover, the manner by which the accused was detained by police was not unreasonable in the circumstances. The extreme violence used to kidnap three people during a home invasion justified the precautions taken by the police. They were ready to ram his vehicle and use snipers if necessary. The judge also found the length of detention (more than four hours) was justified in the circumstances. Thus, there was no s. 9 *Charter* breach. However, the judge ruled the seizure of the accused's footwear while under investigative detention but prior to arrest was unreasonable under s. 8 of the *Charter*. But the judge admitted the footwear as evidence under s. 24(2). The accused was convicted of three counts of first-degree murder by a jury and he was sentenced to imprisonment for life without eligibility for parole until he had served 75 years.

Alberta Court of Appeal

The accused asserted, among other things, that his detention was arbitrary because the standard of reasonable suspicion had not been met. Further, he submitted that the manner of the detention was unreasonable.

Investigative Detention

The Court of Appeal described the power of investigative detention as follows:

> The law regarding investigative detention is not in dispute; the police may detain a person for investigative purposes if there are reasonable grounds to suspect that person is connected to a crime and that the detention is reasonably necessary. That reasonable suspicion must be based on objectively discernible facts. [reference omitted, para. 28]

Reasonable Suspicion

Here, the standard of reasonable suspicion had been met:

> The [accused] had an abiding grudge against Mr. Liknes. He also had an old truck matching the description of the truck seen passing by the Liknes residence, (40-50 kms from the [accused's] home), at 3:10 on the morning the Liknes residence was broken into and the family assaulted and kidnapped. The crime was facilitated by the router being disabled, suggesting the assailant had a considerable understanding of computers; the [accused] is a

person with such expertise. That, in the circumstances of this case, provided the legal justification required to place him under investigative detention. [para. 32]

Manner of Detention

As for the manner in which the detention was carried out, it was reasonable and the trial judge's decision was entitled to deference. The precautions taken by the police, ready to ram the accused's vehicle and use snipers if necessary, along with wearing body armour and having guns drawn, were not inappropriate in the circumstances. There was no evidence that the accused was even aware of the snipers or the plan to ram his vehicle if necessary. The accused's observations were limited to noting that the officers who detained him had their guns drawn, were wearing body armour and helmets and driving a fortified police vehicle. ***"In the circumstances of this case, we see nothing offensive about the manner of the arrest that actually occurred, or the contingency plan that was not implemented, of which the [accused] was apparently unaware,"*** said the Court of Appeal.

Length of Detention

"As to the length of the investigative detention before the appellant was formally charged, (more than four hours) the reasonableness of that detention is to be determined by the circumstances of each case, and we find no fault in the trial judge's conclusion that in all of the circumstances of this case that time was not unreasonable'" said the Appeal Court. **"We note as well that the investigative detention ended with the formal arrest of the [accused]."**

The accused's appeal was dismissed.

Complete case available at www.canlii.org

Editor's Note: This case addresses several more issues related to police actions taken during this investigation. Additional details taken from *R. v. Garland*, 2017 ABQB 189.

PPSC RELEASES ANNUAL REPORT

The Public Prosecution Service of Canada (PPSC) has released its 2018-2019 Annual Report. The report outlines a number of statistics related to the activities of the service, including the following.

Dispositions by Charge

Acquittal After Trial	**1,577**
Conviction After Trial	**1,947**
Guilty Plea	**23,208**
Judicial Stay of Proceedings	**109**
Withdrawn/Crown Stay of Proceeding	**43,571**
Other (eg. discharge at preliminary hearing/mistrial)	**108**

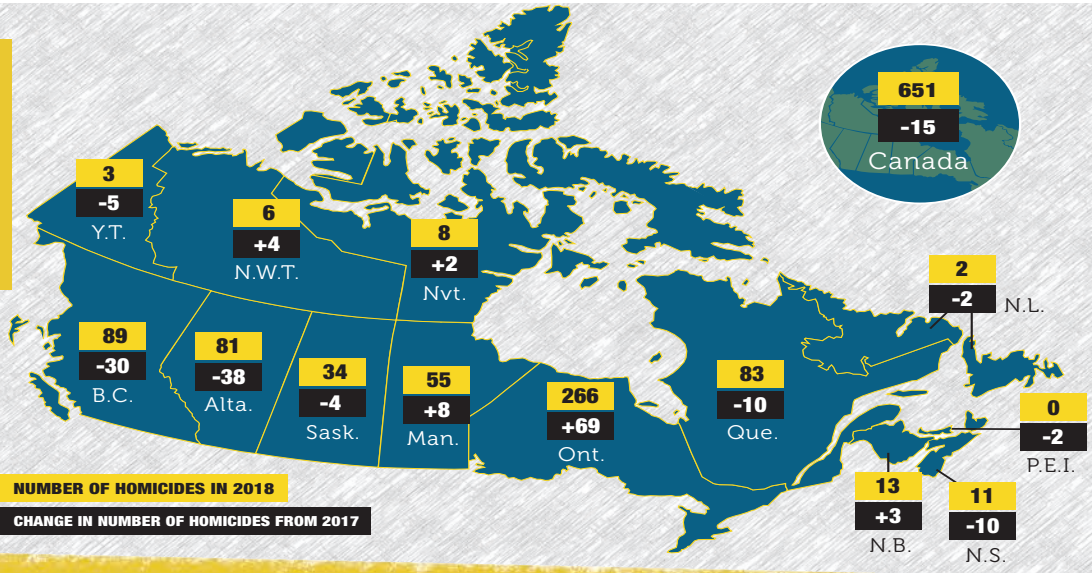
Top 10 Federal Statutes

Statute	# Charged persons	# Charges
CDSA	**127,651**	**98,279**
Criminal Code	**114,238**	**96,526**
Fisheries Act	**5,936**	**4,281**
Employment Insurance Act	**2,065**	**2,052**
IRPA	**1,940**	**1,466**
Income Tax Act	**1,573**	**1,263**
Excise Tax Act	**1,193**	**862**
Customs Act	**1,111**	**936**
Cannabis Act	**977**	**722**
YCJA	**778**	**771**

Nationwide, there were **651** homicides at a rate of **1.76** per 100,000 population.

487 male victims

164 female victims



HOMICIDE IN CANADA, 2018

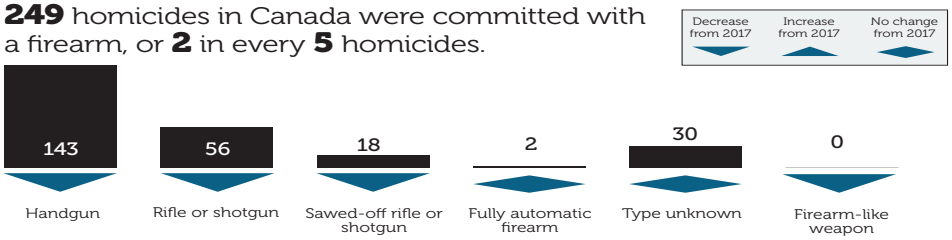
1 in every **10** homicides in Canada was gang-related.

The number of **gang-related** homicides **decreased** after **3** consecutive years of increases.

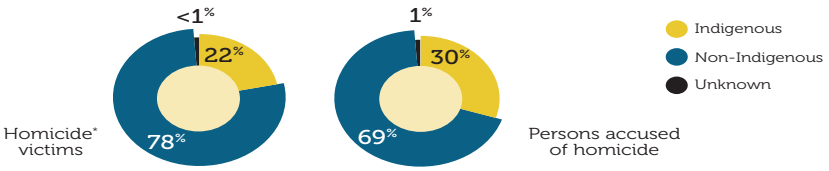
The rate of **gang-related** homicides in 2018 was still the **2nd highest rate** since 2005.

Homicides committed with a firearm were **down** for the first time in **5 years**.

249 homicides in Canada were committed with a firearm, or **2** in every **5** homicides.



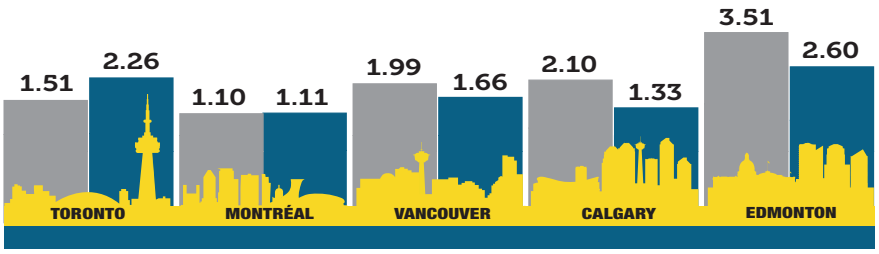
Indigenous people[1] represented about **5%** of Canada's total population in 2018, yet accounted for **22%** of homicide **victims** and **30%** of **accused** persons.



*Total exceeds 100% due to rounding.

Of solved homicides, approximately **4** out of **5** victims knew their accused.

Homicide victims by accused-victim relationship



Homicide rate for every 100,000 people living in the **5 largest** census metropolitan areas (CMAs)

2017 2018

1. The term Indigenous is being used in place of Aboriginal for this product. Aboriginal identity is reported by police for the Homicide Survey. Aboriginal identity includes victims and accused persons identified as First Nations persons (either status or non-status), Métis, Inuit, or an Aboriginal identity where the Aboriginal group is not known to police.

2. Includes boyfriend, girlfriend, same-sex relationship, extra-marital lover, ex-boyfriend/girlfriend and other intimate relationships. Intimate relationship homicide counts include victims of all ages.

3. Includes close friend, neighbour, authority or reverse authority figure, business relation and casual acquaintance.

Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Homicide Survey.

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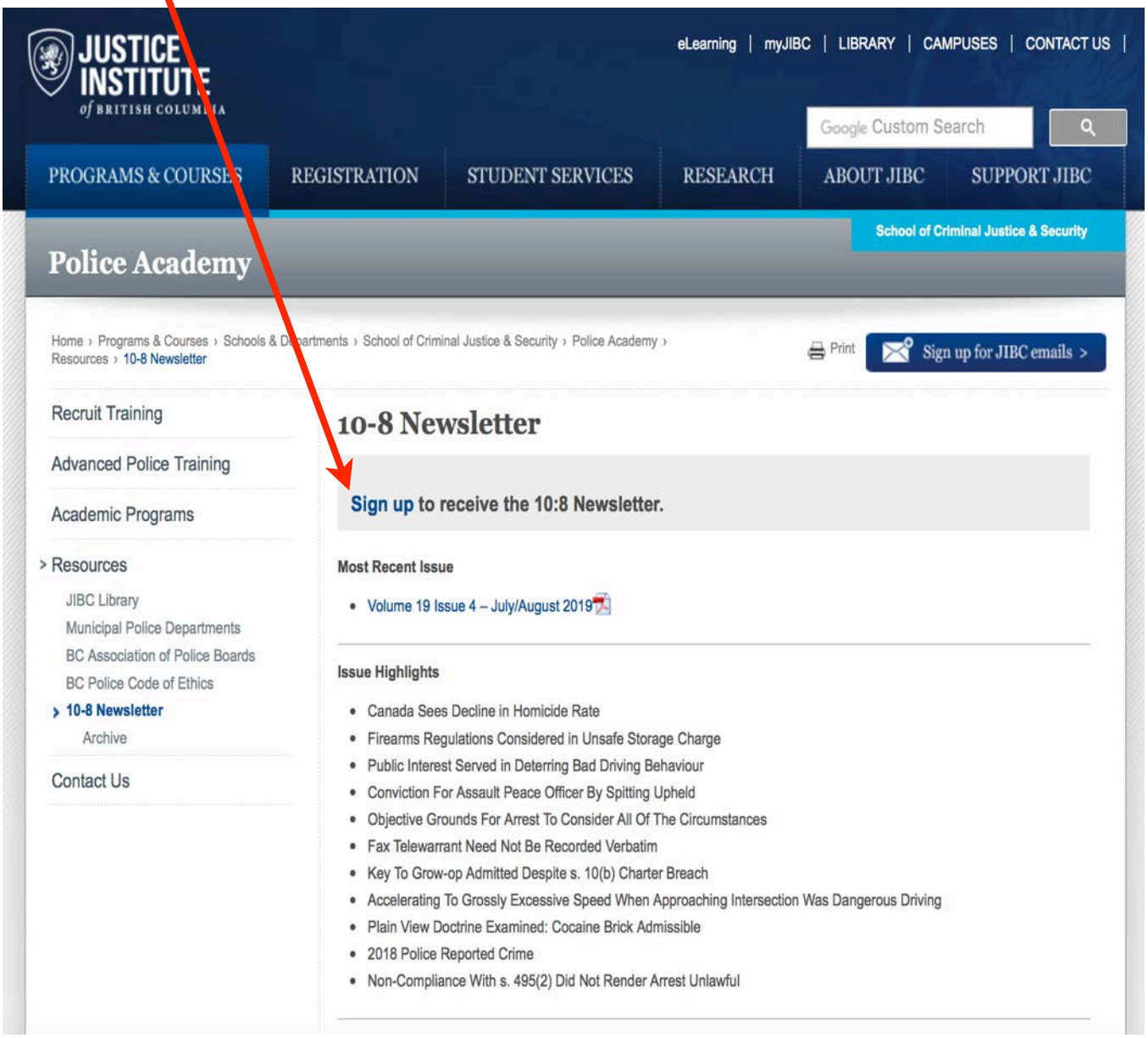

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February 24, 2020
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January 8, 2020
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January 13, 2020
Introduction to Investigative Skills & Processes (INVE-1003)

January 14, 2020
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January 31, 2020
Personal Safety (INVE-1300)

February 3, 2020
Introduction to Criminal Law (INVE-1001)

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POLICE-REPORTED CANNABIS OFFENCES IN CANADA, 2018: BEFORE AND AFTER LEGALIZATION

NEW CANNABIS LEGISLATION IN CANADA

C-45

√ Provided a legal framework for the legalization and regulation of the production, distribution, sale, possession, importation and exportation of cannabis in Canada.

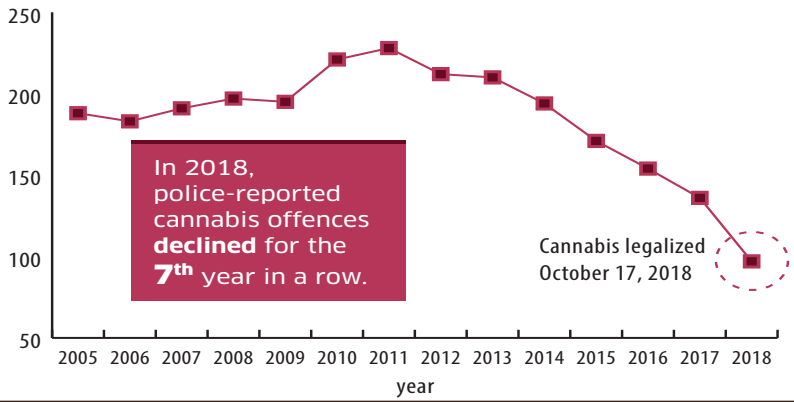
C-46

√ Introduced new provisions related to police ability to screen drivers for drug impairment.

For more cannabis data:
- **Cannabis Stats Hub**
- **National Cannabis Survey**

In the **2 ½ months** following legalization in 2018, police reported **1,454 cannabis offences** under the new *Cannabis Act*.

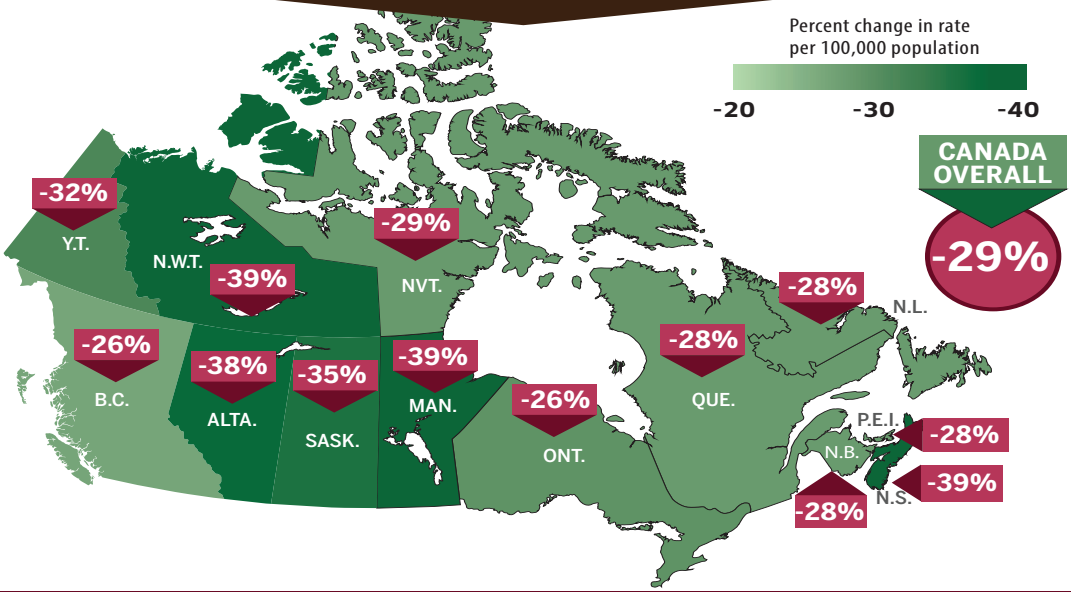
RATE OF CANNABIS OFFENCES PER 100,000 POPULATION



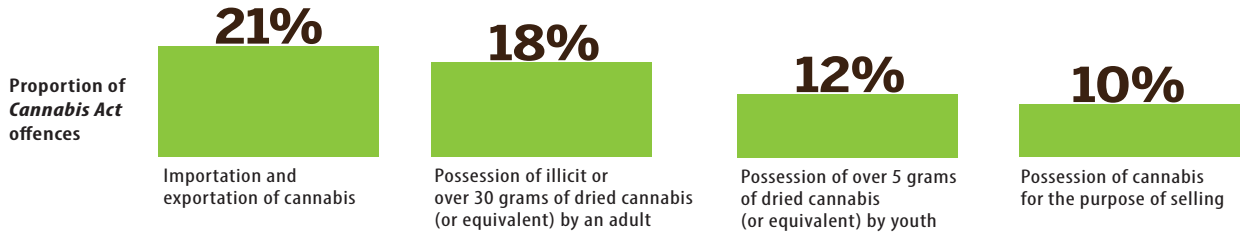
But, incidents of **importation and exportation increased** prior to legalization in 2018.

+22%

CHANGE IN RATE OF ALL POLICE-REPORTED CANNABIS OFFENCES BY PROVINCE OR TERRITORY, 2017 TO 2018



MOST COMMON *CANNABIS ACT* OFFENCES



For more information, see the full *Juristat* article: "Police-reported crime statistics in Canada, 2018."
Source: Statistics Canada, Canadian Centre for Justice Statistics, Uniform Crime Reporting Survey.
"Police-reported crime statistics in Canada, 2018," *Juristat*, Statistics Canada.

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