JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

IN MEMORIAM

On April 19, 2020, 48-year-old Royal Canadian Mounted Police Constable Heidi Stevenson was killed while on duty. She was responding to an active shooter incident in Nova Scotia where 22 innocent people were killed at the hands of a gunman. Three other people were also injured, including another RCMP officer.

During the rampage, Constable Stevenson's vehicle collided head on with the gunman's vehicle. She engaged the gunman, but he took her life. The gunman also took Constable Stevenson's gun and magazines and set her vehicle on fire. The gunman fled the scene and was later shot and killed by police at a gas station.

Constable Stevenson was a 23-year veteran of the RCMP. She is survived by her husband and two children.

Source: www.rcmp-grc.gc.ca/en/news

~ Constable Heidi Stevenson ~

"Heidi answered the call of duty and lost her life while protecting those she served."

Assistant Commissioner Lee Bergerman,
Commanding Officer, Nova Scotia RCMP

Highlights In This Issue

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"What you think about is what expands."

~Dr. Wayne Dyer~

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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.

Atomic habits: an easy & proven way to build good habits & break bad ones: tiny changes, remarkable results.

James Clear.

New York, NY: Avery, an imprint of Penguin Random House, 2018.

BF 335 C525 2018

Cognitive-behavioral therapy for PTSD: a case formulation approach.

Claudia Zayfert, Carolyn Black Becker.

New York, NY: The Guilford Press, 2020.

RC 552 P67 Z39 2020

Communicate in a crisis: understand, engage and influence consumer behaviour to maximize brand trust.

Kate Hartley.

London, UK: Kogan Page, 2019.

HD 49.3 H37 2019

Contagious you: unlock your power to influence, lead, and create the impact you want.

Anese Cavanaugh.

New York, NY: McGrawHill, 2020.

HD 57.7 C388 2020

Cybercrime: awareness, prevention, and response.

Kathy Macdonald.

Toronto, ON: Emond Montgomery Publications, 2019.

HV 6773 M33 2019

The cybersecurity playbook: how every leader and employee can contribute to a culture of security.

Allison Cerra.

Hoboken, NJ: John Wiley & Sons, Inc., 2019.

QA 76.9 A25 C4327 2019

Dis/consent: perspectives on sexual consent and sexual violence.

edited by KelleyAnne Malinen.

Halifax, NS: Fernwood Publishing, 2019.

HV 6593 C3 D57 2019

Domestic and family violence: a critical introduction to knowledge and practice.

Silke Meyer and Andrew Frost.

London, UK; New York, NY: Routledge, 2019.

HV 6626 M49 2019

How charts lie: getting smarter about visual information.

Alberto Cairo.

New York, NY: W. W. Norton & Company, Inc., 2019.

QA 76.9 I52 C338 2019

How people learn: designing education and training that works to improve performance.

Nick Shackleton-Jones.

London, UK: Kogan Page, 2019.

HF 5549.5 T7 S53 2019

Powerful teaching: unleash the science of learning.

Pooja K. Agarwal and Patrice M. Bain.

San Francisco, CA: Jossey-Bass, 2019.

LB 1062 A36 2019

Tools and weapons: the promise and the peril of the digital age.

Brad Smith and Carol Ann Browne.

New York, NY: Penguin Press, 2019.

HM 851 S594 2019

Understanding how we learn: a visual guide.

Yana Weinstein & Megan Sumeracki ; with Oliver Caviglioli.

Abingdon, Oxon; New York, NY: Routledge, 2019.

LB 1060 W44 2019

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IT'S TIME TO SPEAK UP ABOUT MENTAL HEALTH.

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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

A PERSON IS EITHER DETAINED or NOT DETAINED

R. v. Ratt, 2020 SKCA 19

Two police officers saw a group of people fighting at a street corner. The officers went to investigate the fight and, as they arrived on scene, saw a man running away. One of the officers yelled at the fleeing man to "stop" and told him he was "under arrest". The officer pursued the man and found him hiding behind a propane tank.

The officer recognized the man as the accused, a probationer who was not permitted to be within 25 kilometres of the location where he was found. The accused was arrested for breaching his probation order and, while being escorted to the police vehicle, allegedly threatened both officers. He was placed in the police vehicle, and advised of his right to silence and his right to counsel. He was subsequently charged with breaching his probation, resisting a peace officer in the lawful execution of his duty "by fleeing arrest" and two counts of uttering threats to cause bodily harm.

Saskatchewan Provincial Court

The judge concluded that the accused's ss. 9 and 10(a) *Charter* rights had been breached. The judge found the accused had been unlawfully detained or arrested when police yelled at him to **"stop"** and that he was **"under arrest"**. In her view, the officers did not have the necessary reasonable grounds to arrest under s. 495(1) of the *Criminal Code*. They were acting on a *"mere suspicion"* since they did not see the accused committing an indictable offence. Nor did they have reasonable grounds to believe he had committed such an offence. Since there was no authority to arrest the accused, his detention was arbitrary. The accused was also not promptly advised of the reason for his arrest at this time. Thus, his s. 10(a) *Charter* right had been violated.

All of the evidence pertaining to the events that occurred thereafter — the officer's identification of the accused, the probation breach, his resisting arrest and his uttering threats — was excluded under s. 24(2). The accused was acquitted.

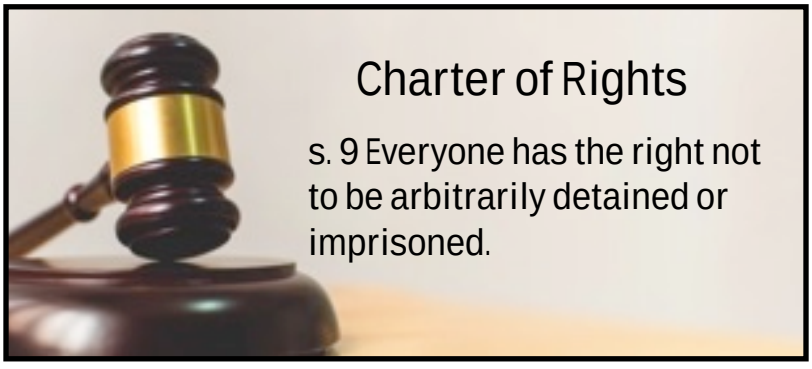
Saskatchewan Court of Appeal

The Crown challenged the accused's acquittal arguing, among other things, that the trial judge erred in holding he was actually "detained" under the *Charter* when the officer yelled at him to "stop" and that he was "under arrest". Since he had not been actually detained at this moment, the Crown contended that ss. 9 and 10 were not triggered.

The accused, on the other hand, submitted that the trial judge properly found he was detained when the officers yelled at him, even though the detention was only momentary and fleeting.

Was the Accused Detained?

Justice Ryan-Froslie, delivering the opinion for the unanimous Court of Appeal, first reviewed the ***"subtle, though distinct, difference between effecting an arrest and a detention"***:



An arrest can only occur if (i) there is an actual seizure or touching of a person's body with a view to detention; or (ii) in the absence of a seizure or touching, the person submits to the process of arrest. Merely stating "you're under arrest" is not sufficient to effect an arrest unless the person submits to the process and goes with the arresting officer.

On the other hand, where a peace officer makes a demand or gives a

"Unless an individual is physically 'seized', a detention requires submission or acquiescence to a police direction or demand, coupled with circumstances in which a reasonable person would understand that there was no choice but to comply. The submission or acquiescence can be extremely brief and immediately followed by flight."

> direction to a person, that person is detained "where he or she 'submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist'." [references omitted, paras. 21-22]

And further:

> Unless an individual is physically "seized", a detention requires submission or acquiescence to a police direction or demand, coupled with circumstances in which a reasonable person would understand that there was no choice but to comply. The submission or acquiescence can be extremely brief and immediately followed by flight. [para. 36]

In this case, Justice Ryan-Froslie concluded there was no arrest. The officers never "seized" or touched the accused, nor did he submit to arrest, before he was found behind the propane tank.

As for a detention, there was none. First, there was no physical restraint. Second, although the officer's command to "stop" because he was "under arrest" was a police demand, the accused ***"did not submit or acquiesce — even briefly — to the peace officer's commands."*** Here, the accused was already running away when the officers got out of their police vehicle and issued commands at him. Since he did not submit or acquiesce to these demands, there was no detention. Without a detention, there was no need to proceed to the second stage of the analysis — determining arbitrariness.

"Before there can be an arbitrary detention within the meaning of s. 9 of the Charter, there must first be a detention," said Justice Ryan-Froslie. ***"An attempted detention is not a detention for the purposes of s. 9."*** Since a violation of both s. 9 and s. 10(a) depended upon a proper finding of detention, which the trial judge erred in deciding, the Crown's appeal was allowed, the accused's acquittal on the charges was set aside and a new trial was ordered.

Whether or not there were other *Charter* breaches related to the accused's actual arrest behind the propane tank remained an open question to be answered at the new trial.

Complete case available at www.canlii.org

"Before there can be an arbitrary detention within the meaning of s. 9 of the Charter, there must first be a detention. An attempted detention is not a detention for the purposes of s. 9."

CIRCUMSTANCES JUSTIFIED ORDERING PASSENGER BACK IN VEHICLE: DETENTION NOT ARBITRARY

R. v. Slippery, 2020 SKCA 23

At 11:50 p.m. a police officer on patrol pulled a vehicle over in a routine stop under Saskatchewan's *Traffic Safety Act*. While calling in the stop, the officer noticed the vehicle's front seat passenger door open and then quickly close. This action raised a safety concern for the officer and he called for backup. As backup arrived, the passenger (accused) got out of the vehicle and stood by the passenger side with the door open. The officer shouted at him to get back into the car, which he did. There were also two other passengers in the back seat.

The officer approached the driver's side of the car and asked the driver for his licence and registration. The accused — a passenger — was also asked for his name and birthdate. He provided a name that was later determined to be false after a CPIC query did not produce any results. The driver was arrested after police learned he was bound by an undertaking and could only operate a motor vehicle if the registered owner was in it. The officer took the driver to the police vehicle, and returned to the accused, who was now standing outside the car with a backup officer. As he walked around the car, the officer saw a firearm — which he had not noticed before — inside the car on the floor just in front of the passenger seat.

The officer arrested the accused for possessing the firearm, handcuffed him and laid him on the sidewalk. He was then turned over to another officer. The accused later spoke to a lawyer at the police station. The firearm was a loaded, sawed-off rifle with a round in the chamber and four or five rounds in its magazine. Police also found drugs under the seat and a radio belonging to the City of Regina in the back seat. The accused was charged with various criminal offences.

Saskatchewan Provincial Court

The arresting officer testified that, in his experience, the passenger's action of opening the door raised an officer safety issue. Doors open when people are fleeing from a vehicle or fleeing from a criminal offence. The officer said that most people do not get out of a vehicle on their own. He testified he did not intend to allow any of the occupants in the vehicle to get out based on his safety concerns. He said that he would do the same whenever he made a traffic stop until he felt it was safe to approach the vehicle and assess the situation. A backup officer confirmed that all occupants of a vehicle would be kept inside it for officer safety reasons because the police would have no information about the people in the car.

The accused sought the exclusion of the firearm, the drugs and the radio as evidence under s. 24(2) of the *Charter*. In his view, his rights under ss. 8, 9 and 10(b) of the *Charter* had been violated.

The judge concluded that the accused had been detained when the officer ordered him to get back in the car. ***"When one considers the definition of 'detention' ... , it seems clear that when the accused was instructed to get back into the vehicle, he was detained,"*** said the judge. ***"It is hard to imagine that any reasonable person would feel they had the right to walk away when shouted at by a police officer to get into a vehicle."*** However, the judge found this detention was not arbitrary. It was a lawful exercise of police powers in the circumstances for **"officer safety"** purposes:

> In the present case two experienced police officers testified that it is unusual for a passenger to attempt to exit a vehicle stopped for a routine traffic stop. Defence counsel submits this is just a hunch on the part of the officers that the persons in the vehicle may be involved in some criminal activity. In my view, the officers' evidence established that the behaviour, based on their experience, gave rise to a reasonable concern that officer safety may be at risk. This is more than a hunch; it is an objective assessment of the situation based on past experience.

> [The arresting officer] was lawfully in the execution of his duty in stopping the vehicle and he was entitled to ensure there was no danger to him from any of the occupants in the vehicle. A routine traffic stop can be fraught with danger for police officers. They have no way of knowing who is in the vehicle, how many persons are in the vehicle or if there are any weapons in the vehicle. Despite the fact that there was no evidence presented about the training police receive regarding traffic stops, I am prepared to accept the evidence of the two officers that at least at the commencement of a traffic stop it is necessary for police safety to keep the occupants of the vehicle in the vehicle while the issue of their safety and public safety is investigated. ... [see *R. v. Slippery*, 2019 SKPC 5, paras. 28-29]

Next, the judge proceeded on the assumption that the officer was not entitled to demand the accused identify himself and therefore assumed the demand for his name and date of birth was an unreasonable search. However, the judge concluded the accused had no standing to argue the search of the vehicle, which resulted in the seizure of the firearm, drugs and radio, was unreasonable. In the judge's view, the accused failed to establish he had a reasonable expectation of privacy in the vehicle. The vehicle belonged to the driver's wife's grandmother and the driver was simply giving the accused and the two other passengers a ride, having only met them that day. Further, once the accused was out of the vehicle, the officer clearly saw the firearm on the floor of the vehicle in front of the passenger seat rendering it in plain view and subject to a warrantless seizure. A further search of the vehicle was lawful.

As for s. 10(a) of the *Charter*, the judge found the accused should have been told of the reason for his detention when the officer told him to get back into the vehicle. The officer could have told the accused that he was being detained in the vehicle for officer safety reasons and that it would be brief while he checked the driver's licence and vehicle registration. As for s. 10(b), there was no breach since it would have been impractical for the officer to give the accused his right to counsel at that point. Once the firearm was observed, the accused was immediately arrested and was provided his s. 10(b) caution.

The judge found the firearm, drugs and radio were not obtained in a manner that breached the accused's rights under s. 8 (the request to provide his name and date of birth) or s. 10(a) (not being informed promptly of the reason for detention). The accused's request for exclusion was denied and this evidence was admissible. Had she been asked to do so, the judge would have excluded the evidence of the accused providing the false name and date of birth to police under a s. 24(2) since it was obtained in breach of the *Charter*. However, the accused was never charged with providing the police with a false name. The accused was convicted of possessing a loaded firearm, possessing a firearm for a dangerous purpose, transporting a firearm in a careless manner and four counts of breaching an undertaking. He was sentenced to five years in prison, less pre-sentence credit.

Saskatchewan Court of Appeal

The accused argued, among other things, that the trial judge had misinterpreted the law when she stated, ***"at least at the commencement of a traffic stop it is necessary for police safety to keep the occupants of the vehicle in the vehicle while the issue of their safety and public safety is investigated"*** (see para. 29 above) The Crown accepted that the trial judge overstated the law, but submitted the error had no impact on her decision to admit the firearm as evidence in the circumstances of this case. Furthermore, the Crown asserted that the trial judge erred in finding a s. 8 breach when the officer asked the accused to identify himself.

The Court of Appeal dismissed the accused's challenge to his convictions. Despite the trial judge's overstatement about the necessity of the police routinely keeping all occupants in a vehicle while they investigated police safety, the Court of Appeal concluded that the trial judge did not err in

determining there was no s. 9 breach in this case. The trial judge found the two experienced police officers conducted an objective assessment of the accused's behaviour, which gave rise to a reasonable concern that officer safety may be at risk (see para. 28 above). The officers were not acting on a hunch.

Moreover, the accused was detained only briefly before the firearm was discovered in plain view. Even if there was a s. 9 breach, the Court of Appeal was of the view there was no basis to interfere with the trial judge's s. 24(2) ruling.

Furthermore, the trial judge did not decide whether a demand for identification constituted a s. 8 breach. Instead, she merely assumed a breach and then considered whether the breaches warranted the exclusion of the firearm. The accused's appeal was dismissed.

Complete case available at www.canlii.org

Editor's note: Additional details taken from *R. v. Slippery*, 2019 SKPC 005.

HANDCUFFING ON INVESTIGATIVE DETENTION JUSTIFIED: NO s. 9 BREACH

R. v. Upright, 2020 ABCA 122

Just after midnight, police officers surveilled a Ford Explorer, including the use of a police helicopter. The Explorer was at a residential address associated with a man wanted on 46 outstanding warrants. The police had information that the man had access to firearms and had recently escaped police custody while carrying a handgun. They considered him a high risk to police and public safety, highly motivated to avoid arrest and possibly armed with a handgun.

While being surveilled, the Explorer was seen to make three separate stops in three different parking lots. At the first two stops a person was seen to enter and exit the Explorer using the rear passenger doors. At the third stop, the Explorer and a second vehicle stopped at a MacDonald's restaurant with their driver's side doors next to each other. The drivers of the two vehicles were seen to interact. An officer saw the driver of the Explorer through its open driver's side window and identified him as the wanted man.

Police attempted a high risk traffic stop, but the Explorer did not stop and accelerated away at high speed. Police did not pursue but surveillance continued by helicopter. When the Explorer's route became predictable, officers were able to stop the vehicle after deploying a spike belt. Two persons — the driver and a passenger — ran from the vehicle. Though they ran in somewhat different directions, police believed they reunited in a convenience store at one end of a strip mall near where the Explorer had stopped. When the man and the accused exited the convenience store together and walked toward a pizza restaurant at the other end of the strip mall, an officer approached them. The officers asked them to go into the pizza restaurant and stay there while police continued their initial investigation. The two entered the restaurant and sat on a bench in the restaurant's foyer. A police dog was deployed and followed a track from the driver's side of the stopped Explorer to the pizza restaurant.

While in the restaurant, an officer identified the man and arrested him. The accused was detained for investigative purposes — possession of a weapon — and she was handcuffed. Her purse, which was already open and either on her lap or within her reach, was searched. Police saw two plastic baggies at the top of the purse believed to contain crystal methamphetamine. The accused was arrested for possessing methamphetamine for the purpose of trafficking, advised or her rights and patted down. She was transported to the police station where she was strip searched, but nothing more was found. A more detailed search of her purse at the police station revealed further evidence including more drugs, cellphones, identification, score sheets and cash. The accused was charged with several offences including four counts of possessing a controlled substance for the purposes of trafficking — methamphetamine, diazepam, cocaine and heroin — and possessing proceeds of crime.

Alberta Court of Queen's Bench

The officer testified he detained the accused because he believed both persons fleeing the Explorer had not left the area. He also believed the accused had been its second occupant and there was potential that the male was in possession of a firearm. ***"I detained her and told her she was being detained for possession of a weapon. . . . So it stood to reason for me that if one person had a firearm that this other person, I guess, regardless of whether she was even in the vehicle, she's with him now, could have said firearm or any other weapon with her or in her purse,"*** said the officer. ***"So that was the reason for my detention, to further investigate that."***

As for handcuffing her, the officer said he did so ***"primarily for safety reasons. This was, like I said, a high risk event. Had she — had anyone else in that vehicle — had the vehicle stopped, they all would have been handcuffed for safety. For our safety and for the public's safety."*** The officer explained the practice of placing detainees in handcuffs where weapons were potentially involved or where there was risk of flight. He then said he searched the accused's purse for safety purposes. He was aware the male was potentially in possession of a firearm and, since the accused was with him, the firearm could have transferred hands.

Finally, the strip search was conducted because of the nature of the charges and the accused's history of drug trafficking. She was also with a person involved with firearms and it was "likely very probable" the accused would be held in close quarters to other people who had been arrested.

The accused argued that handcuffing her was a breach of her right to be free from arbitrary detention and the that search of her purse was unreasonable. She also argued that the later strip search at the police station infringed her s. 8 *Charter* right to be secure against unreasonable search. She sought the exclusion of the evidence under s. 24(2) or a stay of proceedings under s. 24(1). But the judge disagreed and found no *Charter* infringements.

First, the judge concluded that the accused had not been arbitrarily detained in breach of s. 9. He found the officer had a reasonable suspicion to detain her. Moreover, placing her in handcuffs was also reasonable. ***"The ... reasonable belief that [the accused] could be armed and therefore that she possibly posed a significant safety concern to both the police and the public, and the concern, given the reasonable belief that she had fled from the Explorer when it was stopped and was therefore a flight risk, justified restraining her with handcuffs while further investigative measures were taken,"*** said the judge. ***"In my view, in the circumstances, the intrusion on [the accused's] liberty was no more than reasonably necessary to address reasonably perceived risks."***

Second, there was no s. 8 breach in relation to the warrantless search of the accused's purse. The same reasons for detaining her provided the reasons for searching her purse — it might contain a firearm. ***"Given the reasonable belief that [the accused] might be in possession of a firearm and that if she was, the most likely location of the firearm was in the purse, it was reasonable for [the officer] to search the purse to ensure officer and public safety,"*** said the judge. ***"In the circumstances, a warrantless pat down search of [the accused's] person was clearly reasonable. It was reasonable to eliminate the possibility that she had a firearm hidden in her clothing. It was, in my view, equally reasonable and justified to perform a warrantless search of her purse to eliminate the possibility that it contained a firearm."***

Third, in the judge's view, the strip search was conducted to ensure the safety of the accused being detained in custody, and other detainees and police officers in the lockup, more than it was to discover and preserve evidence. ***"The concern that she might have a weapon or drugs hidden on her body arose from the circumstances surrounding her arrest and gave rise to the conclusion that she should be strip searched before being placed in the police lockup or remand custody,"*** said the judge in holding there was sufficient justification in

the circumstances for conducting the strip search. The strip search was also conducted in a reasonable manner.

Since there was no breach of the accused's *Charter* rights resulting from her brief detention in handcuffs prior to her arrest, nor any *Charter* violations as a result of either the search of her purse or the strip search of her person at the police station, the evidence was admitted. The accused was convicted of simple possession of cocaine, possessing heroin, methamphetamine and Diazepam for the purpose of trafficking, and possessing proceeds of crime ($450 cash). She was sentenced to five years in prison less 11 months pre-trial custody for a remaining sentence of four years and one month.

Alberta Court of Appeal

Although she conceded her detention was justified, the accused argued handcuffing her breached s. 9 of the *Charter* — the right to be free from arbitrary detention.

She also contended the search of her purse and later strip search at the police station violated her s. 8 *Charter* right to be secure against unreasonable search. She wanted the evidence, including the drugs and trafficking paraphernalia found in her purse, ruled inadmissible as evidence.

Handcuffing on Detention

The accused challenged the use of handcuffs suggesting the police had an obligation to use the least restrictive method of detention. The Court of Appeal, however, found the trial judge did not err in concluding the accused had demonstrated she was a flight risk and therefore the use of handcuffs was justified.

Purse Search on Detention

As for the search of her purse, the Court of Appeal noted that the trial judge found there was reason to believe the accused may have been armed and therefore posed a potential safety threat to both the police and the public. ***"One of the arresting officers testified that the [accused's] purse was either on her lap or within her reach,"*** said the Appeal Court. ***"The trial judge found that the police had reason to believe that the [accused] was armed and if she was, the most likely place for a gun would be in her purse. The trial judge found that the risk of the presence of a firearm and the belief that safety was at stake provided the police with a sufficient basis to conduct a 'safety search' of the purse ... . On those findings by the trial judge, no Charter breach is disclosed."*** This was not a case where the police did not subjectively believe safety was at stake when the search was performed nor one that was not objectively justified. Rather, the accused ***"was sitting right next to the purse suspected of containing a gun."*** The search of the purse did not infringe s. 8.

Strip Search at the Police Station

Here, the the trial judge found the accused was strip searched for the safety of the accused and other persons in custody. ***"There was a reasonable concern that the [accused] might have drugs or weapons on her body or in her clothing,"*** said the Court of Appeal. ***"The trial judge found that there were reasonable grounds to conduct the strip search, which was done substantially in accordance with the guidelines in R. v. Golden, 2001 SCC 83, [2001] 3 SCR 679. These findings were all justified on the record."*** The strip search did not breach s. 8.

The accused's appeal was dismissed.

Editor's note: Additional details obtained from *R. v. Upright*, 2018 ABQB 490, *R. v. Upright*, 2018 ABQB 944 and *R. v. Upright*, 2019 ABQB 14.

WITHOUT REASONABLE SUSPICION INVESTIGATIVE DETENTION ARBITRARY

R. v. Sanscartier, 2019 QCCA 1079

While conducting a drug trafficking investigation, which included surveillance, the police suspected the accused of supplying narcotics for sale in New Brunswick. A New Brunswick judge subsequently authorized a search warrant for the accused's Quebec residence after he had been seen in the company of two people who were arrested in New Brunswick in possession of a kilogram of cocaine. The police were to conduct the search of the accused's home once a Quebec justice endorsed the New Brunswick search warrant.

While on his way to meet other officers for the search, an officer heard on the radio that the accused had just left his residence in his vehicle after placing an unidentified object in the trunk. A few moments later, the officer found the accused's vehicle and pulled it over on a busy street during rush hour. The accused appeared nervous. The officer advised the accused he was under detention and told him the police had a search warrant for his home. He was directed to keep his hands on the steering wheel, then ordered out of his vehicle and to place his hands on its roof. The accused was handcuffed and taken to a patrol car. He was cooperative and not aggressive.

Before being asked to sit in the back seat of the patrol car, the officer patted-down the accused. A loaded illegal handgun was discovered in the waistband of his trousers. The accused was then arrested and informed him of his rights. He was searched and a small quantity of heroin and cocaine was found in his possession. A vehicle search yielded no further evidence. The accused was charged with various offences related to his possession of a prohibited firearm, heroin and cocaine. He was also charged with breach of probation.

Court of Quebec

The judge found the accused was arrested, not merely detained, when he was stopped. He held that the officer's action in controlling the accused exceeded an investigative detention because the officer (1) asked the accused to keep his hands on the steering wheel, (2) told him to get out of his vehicle, (3) handcuffed him, (4) told him that the police had a warrant to search his residence and that anything he said could be held against him, (5) led him to the patrol car, and (6) decided to search him before putting him in the vehicle. In the judge's view, the police did not have the necessary reasonable grounds to believe the accused was involved in the commission of an offence at the time of his arrest. The officer also acknowledged he did not subjectively believe he had grounds for the arrest. The arrest was arbitrary and breached s. 9 of the *Charter*.

As for the subsequent pat-down search, it was unreasonable under s. 8 of the *Charter*. The Crown failed to prove the warrantless pat-down search was justified on the basis of the officer having reasonable grounds to believe there was a threat to his safety or that of others. The officer acknowledged he was not at all concerned for his safety or that of the public, and he did not feel threatened. The accused was in handcuffs, cooperative, not aggressive and other officer were nearby. The judge excluded the evidence under s. 24(2) and the accused was acquitted.

Quebec Court of Appeal

The Crown appealed the accused's acquittals arguing the trial judge erred in finding (1) the accused was under arrest rather than simply being detained for investigative purposes and (2) the accompanying pat-down search was unreasonable. In the Crown's view, the trial judge imposed too high a burden on the officer to justify the accused's detention. As a result, the Crown contended that the evidence ought not to have been excluded under s. 24(2).

"The police officer's subjective belief alone is not enough. The reasonable suspicion standard requires that the suspicion be based on objectively discernible facts. The analysis must be performed from the standpoint of a reasonable person 'standing in the shoes of the police officer'. Reasonable suspicion must be assessed against the totality of the circumstances."

Investigative Detention

The Court of Appeal described the police power to detain for investigative purposes as follows:

> Investigative detention carried out in accordance with the common law power does not infringe the right protected by s. 9 of the Charter. To justify investigative detention, a police officer must have reasonable grounds to suspect that the totality of the circumstances present a clear nexus between the detained individual and a recent or on-going criminal offence. In the absence of such reasonable suspicion, the detention becomes implicitly arbitrary and thereby infringes s. 9 of the Charter.
>
> The police officer's subjective belief alone is not enough. The reasonable suspicion standard requires that the suspicion be based on objectively discernible facts. The analysis must be performed from the standpoint of a reasonable person "standing in the shoes of the police officer". Reasonable suspicion must be assessed against the totality of the circumstances.
>
> In addition, investigative detention must be conducted in a reasonable manner, taking into account the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference.
>
> In every case, investigative detention must be brief in duration and must not become a de facto arrest.
>
> [...]
>
> Investigative detention must not only be justified, it must, above all, be reasonably necessary. [footnotes omitted, paras. 16-21]

Here, the Court of Appeal agreed that the accused's detention was arbitrary. Although it could be inferred that the officer had reasonable grounds to suspect that the accused was involved in drug trafficking in general, there were no reasonable grounds to suspect he was committing or about to commit an offence at the time of the stop. Nor did the police officer properly exercise his power of investigative detention:

> [The officer] intervened with the intention of detaining the [accused] to prevent him from hindering the imminent search of his home and in the hopes of obtaining a warrant to search the trunk of his vehicle where he had allegedly place an unidentified object when he left his home.
>
> These two grounds do not justify detaining the [accused]. He had just left his home and was unaware of the impending search. There was nothing to indicate that he was about to return to his home or, even if that had been the case, that he would hinder the search.
>
> Furthermore, the mere fact that the [accused] had placed an unidentified object in the trunk of his car did not raise a suspicion that an offence was on-going or make investigative detention necessary. The [accused's] residence was under surveillance when he left his home. No one found it necessary to intercept him at that time, just as no one had detained him during previous surveillance operations. The police cannot use investigative detention as an excuse while they search for evidence. [footnotes omitted, paras. 22-24]

De Facto Arrest

Furthermore, it was open to the trial judge to conclude that the accused's detention amounted to a *de facto* arrest within the first few minutes of the

stop. This *de facto* arrest, however, was not based on reasonable grounds to believe that the accused was involved in drug trafficking at the time of the stop. The officer acknowledged he did not subjectively believe he had such grounds and the facts did not establish that he could have objectively believed there were such grounds.

Thus, whether the stop was merely an investigative detention or an arrest, neither action was justified and therefore the accused's s. 9 *Charter* right was breached.

The Pat-Down Search

The Court of Appeal determined that the trial judge did not err in concluding the pat-down search was unlawful and therefore breached s. 8. Since neither an investigative detention or a *de facto* arrest was unlawful, a search of the accused incidental thereto was unreasonable. In this case, the Crown had not proven that the officer was justified in conducting a pat-down search. He did not have reasonable grounds to believe there was a threat to his safety or that of others. The officer searched the accused solely for the purpose of confining him in the police vehicle. And further:

> It is true that the police systematically search detainees before putting them in the police car. In such cases, however, the search follows a lawful arrest. This case, however, presents a completely different state of affairs. Even if it were accepted that drug traffickers are often armed, in the circumstances, an experienced officer knew or should have known that he had no grounds to detain the [accused] and therefore to search him. [para. 36]

s. 24(2) *Charter*

The trial judge did not err in excluding the evidence resulting from the arbitrary detention and unreasonable search. First, the *Charter* breach was serious. The officer exceeded his authority in detaining the accused. There was no urgency to act and nothing to lead the officer to believe that the object placed in the truck was illegal or likely to disappear. In addition, the officer did not advise the accused of the true reasons for his detention nor tell him of his rights. Nor was the officer acting in good faith. Second, while the impact of the breaches (a relatively non-intrusive detention and pat-down search) were not egregious, they were significant. And there was no urgency or danger that the accused would destroy the evidence sought by the search warrant. Finally, despite the reliability of the evidence and its importance to the Crown's prosecution, society's interest in the adjudication of the case on its merits did not outweigh the seriousness of the breaches nor their significant impact on the accused.

The Crown's appeal was dismissed and the accused's acquittals upheld.

Complete case available at www.canlii.org

GROUNDS FOR ARREST CONSIDERED DIFFERENTLY THAN GROUNDS FOR SEARCH WARRANT

R. v. Buchanan, 2020 ONCA 245

The police received information from a confidential informer that a man was trafficking heroin and fentanyl out of a specific residential address. Police also had received several citizen complaints about vehicle and pedestrian traffic at the residence. As a result, police set up surveillance on the home over two days. They saw activity consistent with what they believed to be drug trafficking at the home. This included numerous individuals, some of who were known drug users and one a known heroin dealer, attending at the residence on foot, by bicycle, and by car. Most of the individuals stayed in the residence fort less than 10 minutes and sometimes three minutes or less. And, in a few instances, individuals entering the residence were seen placing something in their pockets or had something in their hands. Based on the confidential tip and their surveillance of the home, the police unsuccessfully applied for a search warrant. The justice provided the police with the following reason for denying the search warrant:

> ***Grounds as presented and when considered in totality, falls short of rpg to believe that items to be searched for will be at the location. No evidence to show that heroin and fentanyl would be in residence.***

After learning that the search warrant had been denied, the police decided to arrest ***"the next suspected buyers."*** The accused's vehicle was next to arrive at the address. The accused and his passenger went into the home, stayed about 15 minutes and then left. This observation led police to believe that there were grounds to arrest the accused and his passenger for being in possession of a controlled substance. Two uniform officers were instructed to pull over the vehicle and make the arrests. Upon searching the vehicle incident to arrest, the police found a stolen, loaded, restricted firearm in a case that had been secreted behind a modified glove box; four cell phones; a significant amount of cash; and 23.56 grams of cocaine and 29.84 grams of heroin packaged in small baggies. The drugs were secreted in an air vent. Other evidence related to the ownership, insurance and financing of the vehicle was found.

Ontario Court of Justice

The team leader testified that he understood the warrant to have been denied because there were insufficient grounds to believe that heroin and fentanyl, as opposed to other controlled substances, were in the residence. That is why he said he instructed his team to ***"arrest the next suspected buyers … [p]ersons that come and show behaviour similar to what we've observed over the last couple of days."*** It was his hope that the police would then obtain grounds to advance a second search warrant application for the home. He testified:

> ***… I believe we have reasonable grounds to make the arrest and then search incident to arrest. Yes, I would hope to locate the drugs that in my mind, they're purchasing from the residence, and they're under arrest for possession of a controlled substance, and then we have the evidence to support that which then I can add to my warrant hopefully meet the threshold to get the warrant for [the address].***

The judge concluded that the accused's ss. 8 and 9 *Charter* rights had been violated. The accused's arrest was unlawful as the police lacked sufficient reasonable grounds to do so. Although the police subjectively believed the accused had purchased drugs in the residence, their belief was not objectively reasonable in the circumstances. Thus, the arrest was arbitrary under s. 9. Since the arrest was unlawful, the search flowing from the unlawful arrest was unreasonable under s. 8.

As for the admissibility of the evidence under s. 24(2), the judge admitted the gun and drugs. First, the *Charter* breaches were serious, but not egregious, abusive or flagrant. The police were merely negligent and the court need not distance itself from the police conduct. Although the police did not have sufficient grounds to arrest the accused, they had enough to justify an investigative detention. However, the police failed to consider that option. Even so, a search incidental to an investigative detention would not have permitted a search of the vehicle where the drugs and gun were located. Second, the impact of the breach on the accused's Charter-protected interests was significant and favoured exclusion. Finally, the charges were serious and the value of the evidence was significant. The evidence was reliable and critical to the Crown's case. This favoured inclusion. Upon balancing all three factors of the s. 24(2) analysis, the judge was not satisfied that the admission of the evidence would bring the administration of justice into disrepute. The accused was convicted of various drug trafficking and firearms offences and he was sentenced to four-and-a-half-years in prison.

Ontario Court of Appeal

The accused argued the trial judge made three mistakes in her s. 24(2) assessment about the seriousness of the *Charter*-infringing police conduct. First, he submitted the police did not have the grounds to conduct an

"Reasonable grounds to suspect is a lower standard than reasonable grounds to believe. The first engages a reasonable possibility, while the latter engages a reasonable probability. When determining whether those thresholds have been reached, a common sense and practical approach to considering all of the circumstances is called for."

investigative detention let alone even to stop his vehicle. Second, arresting him after the search warrant rejection showed a "cynical disregard" for the judicial process. He contended the police misinterpreted the warrant denial as an invitation to arrest the next suspected buyer. Third, police negligence was a factor that pulled towards exclusion, not inclusion as the trial judge found. In his view, any of these errors required a new s. 24(2) analysis and the exclusion of the evidence.

Recognizing that strong deference is owed to a trial judge's s. 24(2) analysis — absent an error in principle, a palpable and overriding factual error or an unreasonable determination — Justice Fairburn, delivering the opinion of the Court of Appeal, concluded there was no basis to overturn the trial judge's decision.

Investigative Detention

In agreeing with the trial judge that the police had sufficient grounds to detain the accused for investigation, the Appeal Court first described this power as follows:

> The police may detain an individual for investigation where, in all of the circumstances, there exist reasonable grounds to suspect that the individual is connected to a particular crime and the individual's detention is necessary. Reasonable grounds to suspect is a lower standard than reasonable grounds to believe. The first engages a reasonable possibility, while the latter engages a reasonable probability. When determining whether those thresholds have been reached, a common sense and practical approach to considering all of the circumstances is called for. [references omitted, para. 23]

In this case, the trial judge found the grounds the police did have rose to the level of a reasonable suspicion that the accused was in possession of a controlled substance, which was sufficient to justify an investigative detention. Justice Fairburn agreed, holding ***"there were ample grounds upon which to detain the [accused] for investigation."*** The police were dealing with information coming from a confidential informer that had been amply confirmed. The police had much more than the simple attendance of a person at a suspected drug house. All of the circumstances known to the police at the time they intercepted the accused, filtered through ***"their practical, everyday experience to the interpretation of what they were seeing"***, must be taken into account:

> ... There was a confidential tip about drug trafficking at the exact residence where civilians had made complaints about activity that suggested short visits to buy drugs. Police surveillance confirmed that activity, revealing numerous people, some of whom were known to the police from the local drug community, attending at the residence for very short periods of time. The police even observed what they believed to be a hand-to-hand drug transaction through the window of a vehicle out front of the residence, just prior to the [accused's] attendance at the home. He was only in the home for fifteen minutes. Again, the police testified that this was consistent with a drug transaction.
>
> There was an ample factual foundation upon which the trial judge could conclude that the police had sufficient grounds to detain the [accused] for investigation. Indeed, so plentiful were the grounds that this may well have been a case where the s. 9 issue could have resolved differently. [paras. 34-35]

"[T]here is nothing inherently wrong with the police using a lawful arrest to advance an investigation, even where that arrest is to assist with furnishing the grounds upon which a search warrant application may rest."

The Search Warrant Refusal

The Court of Appeal found the police did not improperly ignore the denial of the search warrant application. Far from seeing the denial of the search warrant as an "invitation" to arrest the next person who came to the residence, the denial ***"caused the police to pursue alternative means to advance their investigation."*** Justice Fairburn noted ***"there is nothing inherently wrong with the police using a lawful arrest to advance an investigation, even where that arrest is to assist with furnishing the grounds upon which a search warrant application may rest."*** And the police did not simply set out to arrest the next person to arrive at the home. ***"Rather, they set out to arrest the next person who they believed to have done a drug transaction in the home,"*** said Justice Fairburn. ***"In other words, they set out to arrest the next person they had reasonable grounds to arrest. Given the short time that the [accused] attended at the residence, the police believed that he fit the same pattern as the people who they had been previously seen coming and going from the residence."*** Moreover, the refusal of a search warrant does not mean the police do not have the grounds for an arrest:

> The denial of a search warrant does not act as a legal declaration that the police are prohibited from using the grounds contained within the Information to Obtain the warrant to furnish grounds for other purposes. It is important to distinguish between the role of a justice in determining whether to issue a search warrant and the role of the police in determining whether they have sufficient grounds to arrest. These are two fundamentally different acts.
>
> When considering whether to issue a search warrant, a Justice of the Peace has a specific and discrete job to do: consider whether there are sufficient reasonable grounds to support the statutory prerequisites to issuance. Justices are not required to give reasons for granting or dismissing search warrant applications. Accordingly, it will not always be possible to know why a search warrant has been denied. There may be any number of reasons for the dismissal of an application, including insufficient grounds about the alleged offence, about the location to be searched, whether the items to be seized are in the location to be searched and so on.
>
> On the other hand, the grounds for arrest involve an assessment of all of the circumstances known to the police at the time of the arrest. In this case, those circumstances involved information that was included in the Information to Obtain the search warrant, but also included what the police observed while the warrant was being considered: what appeared to be a hand-to-hand drug transaction outside of the home. Determining whether the police had sufficient grounds to justify an arrest is a matter that falls within the exclusive domain of the trial judge.
>
> While I accept that it would be wise for the police to pause and consider the strength of their grounds in the face of a search warrant denial, particularly where their grounds to arrest overlap with the grounds for the search warrant, there is nothing inherently wrong with the police pursuing other investigative options based upon their own view of the facts. In other

"[T]here is nothing inherently wrong with the police pursuing other investigative options based upon their own view of the facts. In other words, the police are not required to alter what they believe (or suspect) to be true, simply because a search warrant has been denied."

"Negligent police conduct itself may fall on a spectrum. Clear violations of well-established rules governing state conduct may exist at one end of a negligence spectrum, while less clear violations of less clear rules may be at the other."

> words, the police are not required to alter what they believe (or suspect) to be true, simply because a search warrant has been denied. [reference omitted, para. 41-44]

In this case, the justice denying the search warrant said it was because she was not satisfied that the specific drugs – heroin and fentanyl – would be found in the place to be searched. ***"The police were not, as the [accused] suggests, flouting the Justice of the Peace's decision,"*** said Justice Fairburn. ***"Indeed, to the contrary, they showed respect for that decision and worked toward obtaining further grounds to fill what the Justice of the Peace perceived as the gap in the warrant application: evidence respecting the actual drugs of heroin and fentanyl."***

Negligent Police Conduct

The trial found that the police were mistaken in their belief that they had reasonable grounds to arrest. While the trial judge rejected the notion that the *Charter* breaches were inadvertent or minor, she held they were closer to negligent conduct than to blatant, wilful or reckless conduct. In doing so, the trial judge was aware that not every *Charter* breach is equal and she exercised her discretion — which was owed deference -— in where she placed the police conduct on the "spectrum" of seriousness.

Moreover, not all negligent police conduct pushes evidence towards exclusion. ***"While negligence cannot be equated with good faith, neither can it necessarily be equated with bad faith,"*** said Justice Fairburn. ***"Negligent police conduct itself may fall on a spectrum. Clear violations of well-established rules governing state conduct may exist at one end of a negligence spectrum, while less clear violations of less clear rules may be at the other."*** In this case, she noted that the following:

> ... [T]he law surrounding the grounds for arrest has been clear for some time. But it is a test that is applied using the best judgment of police officers, engaged in real time, on the ground policing. There is a difference between a police officer miscalculating whether she had sufficient grounds to arrest, when on the trial judge's view she only had sufficient grounds to detain for investigation, and other more serious forms of police miscalculation. As found by the trial judge, there was nothing cavalier or flagrant about the police conduct. Nor was there any pattern of Charter breaches. In my view, if the police were short on reasonable grounds to arrest, it was by a short distance only. The fact is that the trial judge did not find that the level of negligence, a simple, unintentional miscalculation as to the strength of the grounds to arrest, rose to the level that would aggravate the seriousness of the state-infringing conduct. She is owed deference on that point. [para. 54]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

"[T]he law surrounding the grounds for arrest has been clear for some time. But it is a test that is applied using the best judgment of police officers, engaged in real time, on the ground policing. There is a difference between a police officer miscalculating whether she had sufficient grounds to arrest ... and other more serious forms of police miscalculation."

SURVEILLANCE OBSERVATIONS IN CONDOMINIUM HALLWAY AMOUNTED TO A SEARCH

R. v. Pipping, 2020 BCCA 104

While investigating a suspected dial-a-dope operation involving a number of people, undercover police officers used an identified telephone number associated with the operation to make a number of drug purchases. In the course of their undercover operation, police eventually came to meet the accused Summers (believed to be the manager of the dial-a-dope line) and the accused Pipping (believed to be the "boss"). These two accused became key targets and the police set out to discover where they might be keeping their drugs and cash.

Police followed the two men. Undercover officers saw them enter a condominium complex. It was a four-level building containing 96 units with key access to outside entrances. There was open access once inside and no video surveillance. The police wanted to identify which unit the accused might be using, but the property management company refused to provide tenant information without a production order. The police subsequently obtained a general warrant under s. 487.01 of the *Criminal Code*. The general warrant ordered the management company to provide a key to police and permit them access to the common areas of the condominium complex, including the foyer, entrance way, stairwells, hallways, elevators, access / egress points as well as the underground parking.

The police entered the building and positioned themselves on all four floors. One of the officers was able to surreptitiously observe the accused Pipping enter unit 407 with a key. The police then used this observation as the basis to seek and obtain a search warrant for unit 407. The police executed the search warrant and discovered drugs, cash, and firearms. The accused Pipping was charged with several drug and firearm-related charges.

EVIDENCE

found in search of unit 407 included:

- Furanyl fentanyl, fentanyl, fentanyl/heroin, heroin, cocaine, W18 and methamphetamine having a total estimated street value of $1,366,160.
- Cutting agents and other chemicals such as acetone, acetic acid and dimethyl sulfoxide.
- A number of firearms, including a 9 mm Beretta handgun, firearm silencer, and ammunition. Some of the firearms were loaded.
- Kitchen blenders, bottles of flavoring and food coloring, a discoloured kitchen stove, and a large press that could be used to make kilogram sized bricks.

British Columbia Provincial Court

The judge found the accused Pipping had a reasonable expectation of privacy in the common areas of the condominium complex and therefore had standing to challenge the validity of the general warrant. In the judge's view, the facts established a low but nevertheless reasonable expectation of privacy in the hallway leading to the unit where the accused was seen to enter with a key. This expectation was subjectively held and objectively based. The judge then held that the actions of the police — undercover surveillance performed in the common hallway outside a suite accessed by the accused in a condominium complex having a locked main door — amounted to a covert search. Thus, the notice provision under s. 487.01(5.1) was required. However, the judge ruled that the absence of a notice provision did not affect the validity of the general warrant and, even if it did, its absence could be addressed under s. 24(2) of the *Charter*.

The accused was convicted of possessing fentanyl, cocaine, methamphetamine, and heroin for the purpose of trafficking, producing fentanyl, and possessing a loaded restricted firearm and a prohibited device, a silencer. The accused was also convicted of trafficking in cocaine and in heroin/

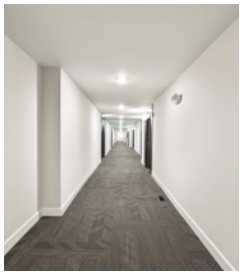
fentanyl based on drug purchases by undercover officers. His sentenced included 15 year's in prison less time served and paying the owner of the condominium unit $35,000 as partial compensation for remediation costs.

British Columbia Court of Appeal

The accused Pipping argued that the general warrant under which the police entered the condominium complex in order to determine which unit he was associated with was not lawfully issued because it failed to contain the requisite statutory notice provision. He sought a stay of proceedings on all counts or, in the alternative, he wanted an acquittal on the charges related to the evidence obtained in the search of the condominium unit or a new trial to be ordered on those counts.

The Crown, on the other hand, submitted that the accused did not have a reasonable expectation of privacy in the common hallway of the condominium building and therefore it was unnecessary for the police to have obtained a general warrant at all to enter the building. In its opinion, the accused's connection to the condominium complex was tenuous as he was neither the owner nor registered tenant, and the hallway was a public space once entry to the building was gained. And, even if a warrant was necessary, the Crown contended that the notice provision under s. 487.01(5.1) of the *Criminal Code* was not necessary. Further, in the event of a *Charter* breach, the Crown asserted the evidence was admissible under s. 24(2) of the *Charter*.

Common Areas and REP



"Whether a general warrant was required and whether the search of the common areas was covert are both issues related to the question of whether [the accused] had a reasonable expectation of privacy in the common area," said Justice Garson, authoring the Court of Appeal's decision. ***"If he did have a reasonable expectation of privacy in the common area, then the police required a warrant to search that area."*** In this case, the Court of Appeal agreed with the trial judge that the accused did have a reasonable expectation of privacy in the hallway of the condominium outside unit 407.

Whether or not a person can establish a reasonable expectation of privacy requires a contextual approach. Here, this assessment will focus on such factors as:

- The manner public access to the common areas of a building is controlled (ie. "the ability to regulate access, including the right to admit or exclude others from the place";
- The exclusivity of occupation;
- The size of the building;
- Whether property management or a condominium board has consented to the police presence;
- The breadth of the observations being made by the police;
- The ownership of the property; and
- The frequency with which a particular area is used.

Although the breadth of the police observations were narrow in this case, the building was secure and the property manager refused to grant police access to the building without a warrant. There was no video surveillance in the hallways and unit 407 was at the end of a hallway. ***"In my view, the judge was correct to find that the occupants of the building reasonably expected that entry to the building would be limited to invitees and otherwise members of the public would be excluded,"*** said Justice Garson. The trial judge's decision that the accused had a reasonable expectation of privacy in the hallway outside unit 407 was upheld.

Was the search covert?

Under s. 487.01(5.1), a general warrant authorizing a covert search requires notice of the search be given after the fact:

> A warrant issued under subsection (1) that authorizes a peace officer to enter and search a place covertly shall require … that notice of the entry and search be given within any time after the execution of the warrant that the judge considers reasonable in the circumstances.

Since he had a reasonable privacy interest in the hallway outside the apartment, the accused suggested that the police surveillance in the hallway was a covert search. On the other hand, the Crown argued that the search was not covert because there was no surreptitious entry and the observations were made from a common area. Thus, there was no requirement that the general warrant contain a notice provision.

The Court of Appeal upheld the trial judge's finding that the undercover surveillance was a covert search. ***"Given that the search in this case was conducted by undercover officers seeking to avoid detection, in my view the trial judge committed no palpable and overriding error by finding that the police surveillance here constituted a covert search,"*** said Justice Garson. She continued:

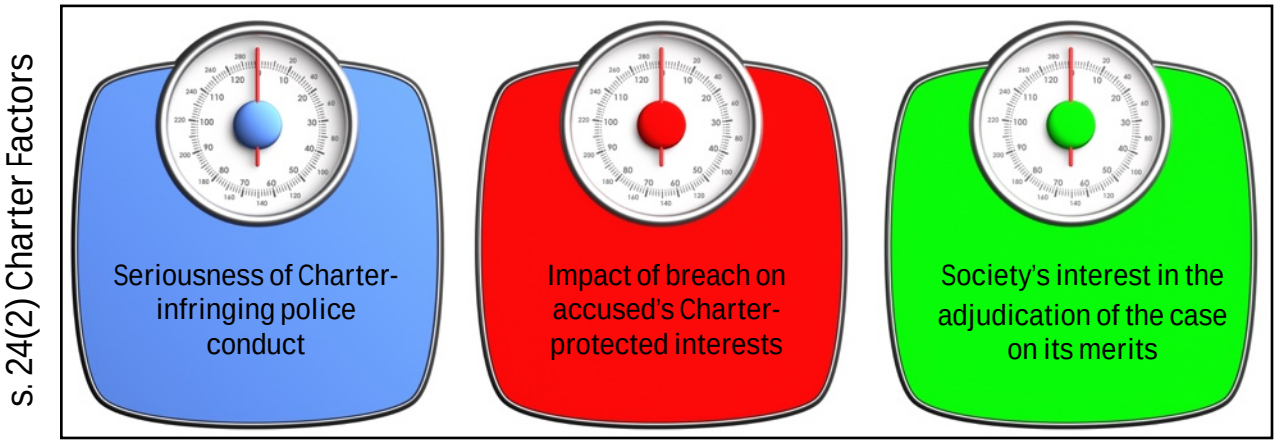
> While the Crown is correct to note that the warrant was directed to the property manager, who is the agent of the owners of the condominium units, and that the warrant itself makes no mention of a covert search, in my view this misses the point. The inquiry must focus not on the words of the warrant but on what the police sought to do. The police sought to covertly observe [the accused] in the hallway. This conclusion is supported by the language used in the Information to Obtain the general warrant, which reads in material part:
>
> 175) This General Warrant involves allowing the police to have access to the common areas of the [Burnaby Property] to make observations of what suite(s) [the accused] are accessing and using for their drug trafficking operation.
>
> 176) Given the nature of this investigation, covertly being able to confirm which suite(s) [the accused] are accessing without arousing their suspicions will assist police in identifying which suite(s) to target for a CDSA search warrant.
>
> [Emphasis added.]

No Notice, Invalid Warrant?

Contrary to the trial judge's ruling that the general warrant was not invalid despite the absence of notice of the warrant, the Court of Appeal came to a different conclusion. ***"It is reasonable to interpret s. 487.01(5.1) as imposing a mandatory notice requirement after the fact because the anticipated search is covert or unknown to the individual whose privacy rights are being intruded upon,"*** said Justice Garson. ***"The failure to abide by a statutorily-mandated requirement to provide notice fails to give effect to s. 8 protections and infringes the Charter. In my view, the trial judge erred in finding that the lack of notice provision did not affect the validity of the general warrant. I conclude that the lack of a provision requiring the police to give notice of their covert entry rendered the general warrant invalid."***

s. 24(2) Charter

Since the accused had a privacy interest in the common areas of the condominium building and the general warrant was invalid, the covert search conducted by the police in the hallway breached his s. 8 *Charter* rights. The observations made during this covert search were used to obtain a warrant to search the condominium unit. Without these observations, the warrant to search the condominium unit could not have issued, a point the Crown conceded. Thus, the Court of Appeal excised the surveillance observation related to unit 407 from the Information to Obtain the search



warrant and proceeded on the basis that the search of unit 407 was warrantless and a s. 8 breach.

However, the Court of Appeal nevertheless admitted the evidence under s. 24(2). First, the *Charter* breach was not serious. The breach was technical and ***"the police did not commit any real misconduct."*** The trial judge found the police operated in good faith throughout the investigation. There was no intent to deceive or mislead, and there was no pattern of abuse. This factor did not favour exclusion. Second, the impact of the breach on the *Charter* rights of the accused was serious, but attenuated by the fact he had not established any legal right of access to the premises. The owner of the unit believed it was being rented to someone else. Nevertheless, this factor favoured exclusion. Finally, society had a strong interest in the adjudication of this case. The evidence obtained from unit 407 was reliable and crucial to seven of the accused's 10 convictions for serious drug offences, including producing fentanyl. In balancing the three s. 24(2) factors, the Court of Appeal concluded that the exclusion of the evidence, not its admission, would bring the administration of justice into disrepute even ***"though the unconstitutional search of a residence strikes at the heart of the privacy interests protected by s. 8."***

Editor's note: The accused Pipping had a co-accused on this matter (Summers). Additional details taken from *R. v. Pipping and Summers*, 2018 BCPC 223,

ARREST SHY OF REASONABLE GROUNDS WAS AN ARBITRARY DETENTION, BUT EVIDENCE ADMISSIBLE

R. v. Chapman, 2020 SKCA 11

The accused was travelling alone eastbound on Highway #1 in Saskatchewan driving a vehicle he rented in British Columbia two days earlier. He passed marked police cars with their lights activated that were stopped behind another motorist. It appeared the accused did not reduce his speed to below 60 kilometres per hour as required by Saskatchewan's *Traffic Safety Act* (*TSA*) when passing emergency vehicles. As a result, officers caught up to the accused and pulled him over.

One officer went to the accused's driver's side door while the other went to the passenger side. They saw that the vehicle was a rental based on its licence plate. There was a radar detector attached to the vehicle's windshield and an empty energy drink container on the passenger's side floor. One of the officers spoke with the accused, but did not advise him of the reason for the stop. The officer immediately noticed that the accused appeared to be very nervous. He had a "nervous twitch" in his upper lip and his hands were visibly shaking when he provided his driver's licence, vehicle registration and rental agreement.

When asked where he was going, the accused said he was on his way to Moose Jaw to visit a friend. Upon examining the rental agreement, the officer saw that the vehicle had been rented in Richmond, British Columbia and was required to return it to Calgary, Alberta three days later. The officer was suspicious of the accused's story given the stated purpose for the trip and the distance to be travelled in a relatively short period of time. The officer returned to his police vehicle and queried the accused on his in-car computer. A CPIC query disclosed that the accused had been convicted of weapons offences and, as a result, was subject to a ten-year firearm prohibition order. A PIP query suggested the accused was involved in illegal gang and drug activity in the lower mainland of British Columbia. Unfortunately, the officer's computer froze and 15 to 20 minutes were spent trying to reboot it, all the while the accused remained seated in his vehicle.

Another officer, who had a drug sniffing dog with him, arrived on scene. He was advised of the computer trouble and asked to let the accused know they would be another minute. When this officer attended to the accused's vehicle and spoke with him, he saw the accused was sweating profusely and that his lip was quivering. He also noticed the radar detector. The officers discussed their observations and information from the computer queries. This discussion was some 30 minutes after the initial stop. The officers decided they had reasonable grounds to arrest the accused, believing he was in possession of illegal drugs. They felt there was no need to deploy the drug sniffing dog given they already had more than reasonable suspicion.

The accused was then advised he had initially been stopped for speeding and immediately was arrested for possessing a controlled substance. His vehicle was searched and police discovered a body panel in the cargo area of the vehicle that appeared to have been moved or manipulated. When the body panel was removed, police found three individual one-kilogram bricks of cocaine. The accused was then re-arrested for possession for the purpose of trafficking and subsequently charged.

Police explanation provided for significance of factors

- **Nervousness**. Accused had a higher than expected level of nervousness than what an innocent motorist would be expected to have.
- **Presence of a five hour energy drink.** Travelling criminals use such drinks to sustain long driving periods because they are at greater risk of being stopped when in transit on the highway with their contraband and they want to get to their destination as quick as possible. The use of these drinks helps them stay awake to keep driving.
- **Radar detector.** These devices alert travelling criminals of the presence of police and this helps them modify their driving accordingly to avoid detection.
- **Radar detector in a rental.** Rental cars do not come equipped with radar detectors so it would have had to be placed in the car for the specific trip.
- **Rental car.** Travelling criminals know these vehicles are newer and more reliable and less likely to break down which would be a problem. In addition, having a rental avoids forfeiture of the criminal's own vehicle. Being in a rental car provides a level of anonymity. The rental cannot be associated to the criminal unlike if the criminal is using his own vehicle which may be known to the police.
- **The rental agreement.** Showed accused had rented the car on September 17 in Richmond, British Columbia and was due back in Calgary, Alberta on September 20 at noon and they had stopped him on September 19. This connected to the accused's statement that he was going to see a friend in Moose Jaw and yet had to have the rental back to Calgary the next day at noon. This would leave the accused little time to visit in Moose Jaw. Police felt this story defied logic and was nonsensical.
- **Canned story.** Travelling criminals often have rehearsed or canned stories and this appeared to be the case here.
- **Place of rental/departure.** The car was rented in British Columbia, a known source of illicit drugs. The accused was travelling east which was a known route for drugs from British Columbia to the east. This also helped in deciding that the contraband would be drugs and other contraband like guns.
- **The CPIC conviction.** The accused had a conviction for a weapon offence and was on a 10 year prohibition.
- **PIP data.** The police intelligence indicated gang and drug involvement for the accused.
- **Overall query.** Police believed the accused had involvement with guns, gangs and drugs.

Saskatchewan Court of Queen's Bench

The accused opined that several of his *Charter* rights had been violated. First, he submitted that the initial stop was unlawful (s. 9 *Charter*). Second, the police failed to inform him of the reason for the stop (s. 10(a) *Charter*). Third, the police lacked reasonable grounds to arrest him (s. 9 *Charter*). He asserted that the police at best had only a reasonable suspicion and should have used other police techniques such as an interview and/or deploying the sniffer dog before arresting him. Finally, since his arrest was unlawful, the search of his vehicle incidental to the arrest was unreasonable (s. 8 *Charter*). In his view, any evidence gathered post-stop was unlawfully obtained and inadmissible under s. 24(2).

The judge found the initial traffic stop was lawful. The police honestly believed the accused was travelling greater than 60 km/h and treated the matter as nothing more than a traffic stop until the officers conferred about the totality of their observations and turned their minds to the possibility that the accused was in possession of illegal drugs. As for being promptly informed of the reason for his detention, the judge determined that the accused's s. 10(a) right had been violated because he had not initially been told of the reason for the stop. The judge, however, found this was simply a mistake by one officer which was not known to the others. Further, the judge concluded that were no other ss. 10(a) or 10(b) breaches up until the point the officers had decided they had grounds for an arrest. No additional information needed to be provided about the reason for the stop and it was not required that the accused be informed of his right to counsel during the traffic stop matter.

As for the arrest, the judge found it was lawful. The police had the necessary reasonable grounds to believe the accused possessed a controlled substance based on the following factors: extreme nervousness; a rental vehicle; the rental agreement; the destination; the nonsensical story of travel; the canned story; the energy drink; the radar detector; and the police queries. Since the arrest was lawful, the search of the vehicle was incidental to the arrest.

Despite the s. 10(a) breach, the judge admitted the evidence under s. 24(2). First, the s. 10(a) breach was relatively minor. The officer made a "regettable mistake" in failing to advise the accused he was being stopped for speeding. This was not a systemic problem, nor borne from wilful blindness, bad faith or a blatant disregard for *Charter* rights. Second, the impact of the breach on the accused was minor.

BY THE BOOK:

Saskatchewan's *Traffic Safety Act*

Speed limits when passing emergency vehicles

s. 204(1) No person shall drive a vehicle on a highway at a speed greater than 60 kilometres per hour when passing an emergency vehicle that is stopped on the highway with its emergency lights in operation.

(2) Subsection (1) does not apply if: (a) the vehicle is being driven on a divided highway; and (b) the vehicle is travelling on the opposite roadway from the emergency vehicle.

This was an otherwise routine traffic stop and much of the time the accused was kept waiting was taken up by "appropriate and proper police work." Finally, society had an interest in this case being adjudicated on its merits. The evidence was non-bodily physical evidence and highly reliable. The accused was convicted of possessing a controlled substance for the purpose of trafficking and sentenced to three years' in prison.

Saskatchewan Court of Appeal

The accused challenged his conviction contending that the trial judge erred in failing to find his rights under ss. 8 and 9 of the *Charter* had been breached. He further submitted that the trial judge erred by admitting the evidence under s. 24(2) when his s. 10(a) right had been violated. He also sought a stay of proceedings under s. 24(1) as a result of the *Charter* breaches.

Arbitrary Detention

Justice Kalmakoff, authoring the Court of Appeal's judgement, agreed that the initial detention for speeding was lawful based upon the trial judge's factual findings. The stop was authorized by the *TSA* and its purpose did not change until the officers decided to arrest the accused for possessing a controlled substance.

Once the accused was arrested, his detention would become arbitrary and breach s. 9 if the arrest was unlawful. Since the warrantless search of the accused's vehicle was incidental to his arrest, the Crown bore the burden of proving both the lawfulness of the arrest and the reasonableness of the vehicle search. Justice Kalmakoff described the *Criminal Code* power of arrest:

"A warrantless arrest made without the requisite 'reasonable grounds to believe' is unlawful and violates s. 9 of the Charter."

> Section 495(1)(a) of the Criminal Code gives a police officer the power to arrest, without a warrant, a person "who has committed an indictable [sic] offence or who, on reasonable grounds, [the officer] believes has committed or is about to commit an indictable offence". A warrantless arrest made without the requisite "reasonable grounds to believe" is unlawful and violates s. 9 of the Charter. In this case, the question of whether the trial judge was correct to conclude that [the accused] was not arbitrarily detained turns on the lawfulness of his arrest or, more precisely, whether, at the time of the arrest, [the arresting officer] had reasonable grounds to believe that [the accused] had committed the indictable offence of possessing a controlled substance.
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> [...]
>
> When the lawfulness of a warrantless arrest under s. 495(1)(a) is challenged, the determination of whether the arresting officer had the requisite "reasonable grounds to believe" involves an assessment of whether that officer subjectively believed the individual arrested had committed or was about to commit an indictable offence, and whether the observations and circumstances articulated by the arresting officer(s) are objectively capable of supporting that belief. The question is whether an objective observer, standing in the shoes of the police officer with an awareness of the same circumstances, would conclude it was reasonable to believe the individual had committed or was about to commit an indictable offence. [reference omitted, paras. 53, 55]

"When the lawfulness of a warrantless arrest under s. 495(1)(a) is challenged, the determination of whether the arresting officer had the requisite 'reasonable grounds to believe' involves an assessment of whether that officer subjectively believed the individual arrested had committed or was about to commit an indictable offence, and whether the observations and circumstances articulated by the arresting officer(s) are objectively capable of supporting that belief."

"The reasonable grounds to believe standard is not overly onerous."

Justice Kalmakoff reviewed appellate jurisprudence and noted several principles guiding the determination of whether reasonable grounds for arrest exist. These include:

- An arresting officer must subjectively hold reasonable grounds to arrest and those grounds must be justifiable from an objective point of view – in other words, a reasonable person placed in the position of the arresting officer must be able to conclude there were indeed reasonable grounds for the arrest.
- The reasonable grounds to believe standard is not overly onerous. An arresting officer is not required to establish the commission of an indictable offence on a balance of probabilities or a prima facie case for conviction before making the arrest; but an arresting officer must act on something more than a "reasonable suspicion" or a hunch.
- An arresting officer must consider all incriminating and exonerating information which the circumstances reasonably permit, but may disregard information which the officer has reason to believe may be unreliable.
- A reviewing court must view the evidence available to an arresting officer cumulatively, not in a piecemeal fashion. Whether there were reasonable grounds to believe that an offence had been committed must be determined solely on the facts known to the arresting officer and available at the time the requisite belief was formed.
- Where officers are acting as a team, it is not necessary that the arresting officer personally knows each and every fact necessary to establish reasonable grounds; the collective knowledge of the entire group is relevant. The "knowledge", of course, must consist of objective facts supported by evidence.
- The reasonable grounds standard must be interpreted contextually, having regard to the circumstances in their entirety, including the timing involved, the events leading up to the arrest both immediate and over time, and the dynamics at play in the arrest and, context includes the experience and training of the arresting officer.
- A belief does not need to be correct in order to be reasonable; reasonable grounds can be based on an officer's belief that certain facts exist, even if that belief turns out to be mistaken.
- The inference drawn by the officer need not be the only inference that may be drawn from the available information, or even the most compelling one, as long as it is a reasonable inference to have drawn. The presence of other plausible, innocent explanations for police-observed behaviour does not automatically negate reasonable grounds to believe.
- There is no checklist or mathematical formula with a certain number of indicia that must be met before reasonable grounds to believe will be established. There is no single identifiable factor that marks the point at which reasonable suspicion crosses the threshold to become reasonable belief.
- Distinguishing between reasonable suspicion and reasonable grounds to believe is a qualitative, not quantitative, exercise. While the gap between them is not necessarily wide, the two standards must remain distinguishable.

"A belief does not need to be correct in order to be reasonable; reasonable grounds can be based on an officer's belief that certain facts exist, even if that belief turns out to be mistaken. Furthermore, the inference drawn by the officer need not be the only inference that may be drawn from the available information, or even the most compelling one, as long as it is a reasonable inference to have drawn. The presence of other plausible, innocent explanations for police-observed behaviour does not automatically negate reasonable grounds to believe."

"There is no checklist or mathematical formula with a certain number of indicia that must be met before reasonable grounds to believe will be established. There is no single identifiable factor that marks the point at which reasonable suspicion crosses the threshold to become reasonable belief."

- While the knowledge, training and experience of the police officer(s) involved is a relevant consideration in the determination of whether the reasonable grounds to believe standard has been met, deference is not always owed to a police officer's view of the circumstances. Police testimony should not be seen as a "trump card" simply because officers have specialized training and relevant experience, nor should a police officer's assessment of whether seemingly innocuous observations are indicative of criminal activity, based on that training and experience, be accepted uncritically.
- It is important to remember that reasonable grounds to believe is not intended to be a standard that hampers effective police work, or one that requires police officers to have an airtight case before taking action. The other side of that coin, however, is that given the intrusive nature of many police powers that can be exercised on the basis of reasonable grounds to believe, courts must be careful not to permit the standard to be watered down or interpreted in a way that effectively negates the difference between reasonable belief and reasonable suspicion.

In this case, the Court of Appeal disagreed with the trial judge that the police had the requisite reasonable grounds to arrest the accused. Although the officers subjectively believed they had the necessary grounds, their belief was not objectively justified. ***"In my view, notwithstanding [one of the officer's] considerable experience and his assertion regarding how that experience informed his subjective belief, the constellation of factors observed by the officers in this case fell short of satisfying the objective criteria necessary to ground a reasonable belief that [the accused] was transporting illegal drugs at the time [the arresting officer] arrested him,"*** said Justice Kalmakoff. ***"I reach this conclusion, even taking into account the officers' collective training and experience."*** He explained as follows:

> Most of the factors upon which the officers relied in this case were, individually, completely innocuous. In that regard, I am referring to [the accused's] nervousness following the original stop, his route of travel, his destination, the fact that he was driving a rented vehicle, the use of a radar detector, and the presence of an empty energy drink container. In saying this, I am mindful of the need to consider the totality of the evidence, rather than examining individual factors in isolation. However, even when the more inculpatory factors are added to the mix – namely, [the accused's] somewhat implausible story about the route of and purpose for his journey and the information gained from the police database queries (an old, unrelated conviction, and suspected involvement in gang and drug activity) – and are weighed together in light of the officers' combined experience and training, the evidence as a whole does not reveal a strong connection between [the accused] and the criminal activity alleged. To an objective observer, in my view – even one with the level of training and experience of the officers in this case – this combination of factors suggests only a possibility, not a probability, that [the accused] was transporting illegal drugs. [para. 81]

And further:

> In this case, I accept that the officers were acting on more than just a hunch, given the observations they had made, the information available to them, and their collective training and experience, when they arrested [the accused]. But "more than just a hunch" is not synonymous with "reasonable grounds to believe". When viewed as a whole, the information upon which the officers relied in this case simply did not have the objective quality required to rise from reasonable

suspicion to the more onerous standard of reasonable grounds to believe. That is, an objective observer, even with the collective training and experience of the officers in this case, would not be able to conclude that there was a probability, rather than just a possibility, that [the accused] was transporting illegal drugs. [para. 86]

... [M]any of the factors upon which the officers relied to support their belief were individually, and perhaps even collectively, innocuous. In addition to that, the CPIC and PIP database information, which appeared to be something upon which the officers placed heavy reliance in their consideration, did not reveal anything specific in nature. There is no question that information gained from police database queries is relevant and properly considered in determining whether police have reasonable grounds to suspect, or believe, that someone is involved in criminal activity, as it can show a propensity on the part of the person in question. However, when determining whether that information, when weighed together with other information, supports a reasonable belief, rather than just reasonable suspicion, it is important to consider the degree to which it connects the suspect to the crime in question. Recency, similarity, proximity, specificity and quality of source are all important considerations.

In this case, at least on the basis of the evidence before the trial judge, the police database queries did not provide much that was compelling. A nine-year-old conviction for weapons offences had little connection to the nature of the offence for which Mr. Chapman was arrested and the evidence in the record about his "gang and drug" activity was non-specific in terms of time or scope. In my view, even when considered with all the other available information, and in light of the officers' collective experience, it was not enough to provide an objective basis to believe that [the accused] was committing the offence for which he was arrested. [references omitted, paras. 90-91]

The accused was arbitrarily detained and his s. 9 *Charter* right was breached.

Unreasonable Search?

Since there were not reasonable grounds for the accused's arrest, the warrantless search of his vehicle conducted incidental to the arrest was unreasonable and breached s. 8 of the *Charter*.

s. 24 of the Charter

The accused's application for a stay of proceedings under s. 24(1) was rejected. "***A stay of proceedings, while available as a remedy for Charter violations stemming from improper police conduct, is a drastic remedy reserved for the clearest of cases,"*** said Justice Kalmakoff. ***"If the misconduct does not, itself, impact on the fairness of the trial, in order to justify a stay of proceedings, it must be so egregious that the mere fact of going forward in light of it would be offensive. In this case, even though [the accused's] Charter rights were breached, the conduct of the police officers does not come close to meeting that standard."***

Describing this case as a ***"close call"***, the Court of Appeal declined to exclude the evidence even though there were breaches under ss. 8 and 9 of the *Charter* to consider in addition to the s. 10(a) breach identified by the trial judge. Although the impact of the breaches on the accused's *Charter* interests was significant, the *Charter*-offending police conduct fell at the lower end of the scale of seriousness. The police did not act capriciously, nor were their actions groundless.

"In a dynamic and fluid situation, the conduct of the officers fell just short of reaching a legal standard that is not always easy to recognize," said the Appeal Court. Furthermore, the evidence obtained in connection with the breaches was highly reliable and essential for the prosecution of a serious offence in which there was a significant public interest in an adjudication on the merits. The discovery of the cocaine in the accused's vehicle was admissible, his appeal was dismissed and his conviction was upheld.

Complete case available at www.canlii.org

COURT USED PRIOR REPORTED CASES INVOLVING OFFICERS IN ASSESSING REASONABLE GROUNDS

In *R. v. Chapman*, 2020 SKCA 11 the accused drew the trial judge's attention to other previously decided cases involving the same officers. One of the officers was even questioned during cross-examination about an earlier case in which he testified. The accused was using these prior cases to demonstrate the officers only had a reasonable suspicion when faced with similar information like they had in the *Chapman* case but took other investigative steps before making an arrest, something they did not do this time.

The Court of Appeal found the earlier cases were not decisive in determining whether the officer had a reasonable belief in this case, but a court could cautiously consider an officer's prior experiences and actions when deciding whether the reasonable grounds threshold was met in the case currently under review:

> To be clear, I do not reach [the conclusion that the objective criteria necessary to ground a reasonable belief fell short] simply because the evidence in this case was very similar to information upon which these officers based a suspicion in the past. ... [T]he assessment of whether the reasonable grounds to believe standard has been met in individual cases is heavily fact-driven. While the applicable legal standard must remain consistent in its interpretation, there will inevitably be quantitative and qualitative differences in the evidence that must be borne in mind when comparing cases side-by-side.
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> This means the manner in which an individual officer treated a previous case involving a similar constellation of observations is not necessarily determinative of whether reasonable grounds to believe existed in a subsequent case. While police officers are not invariably required, when deciding whether they have reasonable grounds to believe an offence has been committed, to recall past cases in which they acted on the basis of having a reasonable suspicion and ask themselves "Do I have more now than I had then?", the court is entitled to consider the way past experiences and actions informed the choices the officer made in the case under review when deciding whether the requisite legal standard has been met.
>
> By that same token, however, information that objectively grounded only a reasonable suspicion in a prior case does not rise to the level of objectively supporting a reasonable belief in a subsequent case just because the officer in possession of the information feels that he or she now knows more than he or she used to. Trial judges must be careful not to permit officer experience to override all other considerations.
>
> All of this is not to be taken as meaning that police officers are required to proceed with a regimented step-by-step approach, carefully identifying when they have suspicion and then pausing to consider what additional steps need to be taken to cross the threshold to belief before making an arrest. Investigations, especially those that occur in the context of traffic stops, are dynamic events. They can unfold quickly and unpredictably; it is not an exact science. Sometimes the information available to the officer will be blatant and overwhelming. Other times, it will be subtle and nuanced. Every case is different. At some point, a police officer will always have to make a judgment call, which will fall to be examined against the reasonable grounds to believe standard.

This was not first the decision to consider an officer's involvement in a prior case. In *R. v. Harflett*, 2016 ONCA 248, the accused pointed to two other reported cases where the investigating officer was found to have exceeded his search powers. In both of these cases, evidence was excluded under s. 24(2). The accused sought to use these prior cases to demonstrate bad faith (i.e. a pattern of the officer abusing his search authority). The Ontario Court of Appeal referenced these cases in finding the officer's conduct fell at the serious end of the misconduct spectrum, which favoured the exclusion of evidence.

PSYCHOLOGICAL DETENTION AROSE WHEN POLICE BOXED IN VEHICLE SO IT COULD NOT BE DRIVEN AWAY

R. v. Thompson, 2020 ONCA 264

Police responded to an anonymous tip that drug dealing was taking place behind a shopping plaza. The tip was vague and alleged that women were going to and from a vehicle. At 12:23 a.m., two uniformed police officers drove their marked cruisers to the back of the plaza. The only car in the area was a Cadillac parked in a stall facing the curb. The Cadillac was running and it was occupied. Its windows were tinted. One officer parked her police cruiser directly behind the Cadillac — about 11 feet away — effecting blocking it from moving. A second officer parked his car directly behind the other police cruiser. One officer approached the Cadillac's passenger's side and tapped on its window. When the female passenger rolled down the window, the officer smelled burnt marijuana. She shone her flashlight into the car and within a minute saw a smoked marihuana roach in the centre console. Meanwhile, the other officer approached the driver's side — its window was already down — and smelled burnt marihuana. When he shone his flashlight at the driver, the accused's head "popped up".

Both occupants were asked for identification. The accused was also asked for the vehicle ownership documents. The accused — a black male — produced his Ontario driver's licence while the passenger verbally identified herself. Both were arrested for possessing a controlled substance — the marihuana roach. The accused was told to exit his car and he was patted down, a process taking about five minutes. He was placed in a police car and the Cadillac was searched. Some loose cash and a scale were discovered in the centre console and a backpack was found in the back seat. The backpack was searched and 29 grams of cocaine, 5 grams of marijuana, 8 grams of hash oil, 12 grams of hash, and about $18,000 in cash were located. The accused was then arrested for possession for the purpose of trafficking, cautioned and advised of his right to counsel. He was subsequently charged with possessing cocaine for the purpose of trafficking

Ontario Superior Court of Justice

Both officers conceded that when they blocked the Cadillac with their cruisers they had no basis to believe that anyone in the car had committed a criminal offence. The judge also accepted that the "generic" anonymous tip the police received "did not provide the police with any right to detain" the accused. Nevertheless, the judge ruled that the accused had not been detained under s. 9 of the *Charter* at this point. The judge found the accused was not aware of the police presence, much less the position of the police cruisers, until the officer was very close to the driver-side window and had shone his flashlight at him. Furthermore, the Cadillac's occupants were sitting in the car with no immediate plan to move. The encounter involved general neighbourhood policing. The police had not effectively taken control of the accused. Nor was the encounter inherently intimidating. It was brief, lasting less than a minute from when the accused noticed the flashlight to when he was arrested. And the accused was not a young person. Finally, the judge noted it was safer for the police to park directly behind the Cadillac to signal that the police were there rather than someone who might pose a threat.

As for the use of the flashlight resulting in the observation of the marihuana roach, the judge concluded this did not amount to a s. 8 *Charter* breach. The police were entitled to use a flashlight for their safety and the safety of the vehicle's occupants. And, since the accused's arrest was lawful, the search of the Cadillac and backpack were lawful as an incident to arrest.

The judge did find a s. 10(b) *Charter* violation. In his view, the accused should have been advised of his right to counsel and cautioned when he was placed in the police car. However, the judge

declined to exclude the evidence under s. 24(2) of the *Charter*. First, he found the evidence was not "obtained in a manner" that breached the *Charter*, since the evidence would have been obtained even if the accused had been advised of his right to counsel immediately upon arrest. Thus, s. 24(2) of the *Charter* was not triggered. But, even if s. 24(2) did apply, the evidence was nevertheless admissible. Although the s. 10(b) breach was "fairly serious", the impact of the violation on the accused's rights was minimal as he was not questioned before he was advised of his right to counsel. Moreover, the evidence was non-bodily physical evidence that was reliable and essential to the Crown's case. The accused was convicted of possessing cocaine for the purpose of trafficking.

Ontario Court of Appeal

The accused appealed his conviction arguing he was arbitrarily detained under s. 9 of the *Charter*. In his view, he was psychologically detained when the first police car was parked behind his Cadillac because the police removed his choice to drive away. He also contended that the trial judge applied a subjective approach — what was in the accused's mind only — rather than an objective approach to the police encounter. He suggested a reasonable person in his shoes would not believe they were free to leave after the police obstructed their car. Finally, he asserted the evidence ought to have been excluded under s. 24(2)

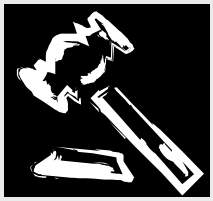
Arbitrary Detention?

In deciding whether the accused was arbitrarily detained, Justice Jamal, for the unanimous Court of Appeal, reviewed some of the general principles applicable in determining whether a person is **"detained"** under s. 9 of the *Charter*:

- *An inquiry under s. 9 involves two questions. First, was the claimant detained? Second, was any detention arbitrary?*
- *The Supreme Court of Canada has adopted a generous and purposive interpretation of s. 9, one that seeks to balance society's interest in*

LEGALLY SPEAKING:

Detention



1. Detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, inter alia, the following factors:

   (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.

   (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

   (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

Supreme Court of Canada, per the majority in *R. v. Grant*, 2009 SCC 32 at para. 44. underlining added.

"A psychological detention can arise either if: (1) an individual is legally required to comply with a police direction or demand (as with a demand for a roadside breath sample); or (2) absent actual legal compulsion, 'the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand'."

effective policing with robust protection for constitutional rights

- *The purpose of s. 9, broadly stated, is to protect individual liberty against unjustified state interference. This liberty includes an individual's right to make an informed choice about whether to interact with the police or to simply walk away. If the police have removed an individual's choice to leave, the individual is detained.*
- *A detention occurs where the individual has been taken "into the effective control of the state authorities". At this point, the individual's liberty has been "meaningfully constrained", and the individual has a "genuine need of the additional rights accorded by the Charter to people in that situation". These rights include the right to be informed of the reasons for the detention (s. 10(a)); the right to retain and instruct counsel without delay and to be informed of that right (s. 10(b)); and the right to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful (s. 10(c)).*
- *[N]ot every trivial or insignificant interference with individual liberty attracts Charter scrutiny under s. 9. Such a broad interpretation would "trivialize the applicable Charter rights and overshoot their purpose". The police may, as a result, interact with or even delay members of the public, without necessarily prompting a "detention" under ss. 9 or 10(b). Instead, a "detention" arises only where the police have suspended an individual's liberty interest through "a significant physical or psychological restraint".*
- *Physical restraint has been called "the paradigm form of detention", with arrest being the "paradigm form of physical restraint".*
- *[A] detention can also arise from psychological restraint. This is because police conduct "short of holding an individual behind bars or in handcuffs can be coercive enough to engage the rights protected by ss. 9 and 10 of the Charter".*
- *A psychological detention can arise either if: (1) an individual is legally required to comply with a police direction or demand (as with a demand for a roadside breath sample); or (2) absent actual legal compulsion, "the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand". This involves "an objective determination, made in light of the circumstances of an encounter as a whole".* [references omitted, paras. 28-36]

"An inquiry under s. 9 involves two questions. First, was the claimant detained? Second, was any detention arbitrary?"

Was there a Psychological Detention?

The Court of Appeal reviewed the Supreme Court of Canada's framework for determining whether a psychological detention occurred — absent physical restraint or a legal obligation to comply with a police direction or demand — and concluded that the accused was detained prior to his arrest. Justice Jamal found the trial judge erred in unduly focussing on what was in the accused's mind rather than on how the police behaved and how the police behaviour could be reasonably perceived.

The trial judge erroneously emphasized that the accused was not **subjectively aware** that the police had parked behind him until they shone a flashlight into his car. The trial judge also inferred that the

"[A] detention can also arise from psychological restraint. This is because police conduct 'short of holding an individual behind bars or in handcuffs can be coercive enough to engage the rights protected by ss. 9 and 10 of the Charter'."

accused had no subjective intention to drive away when the police arrived. ***"[The judge] conducted a largely subjective inquiry into the [accused's] state of mind during the encounter, rather than an objective inquiry about whether the police conduct would cause a reasonable person in the [accused's] circumstances to conclude that he was free to leave,"*** said Justice Jamal. ***"Whether the [accused] was detained, triggering the police's Charter obligations, should not turn on whether the [accused] saw the police in his rear-view mirror as they boxed him in (a subjective approach), but on whether a reasonable person in his circumstances would conclude that this police conduct effected a detention (an objective approach)."*** The correct question was not whether the accused intended to drive away. Rather, it was whether objectively the police had taken away his choice to do so.

An objective approach to detention is important for three reasons:

1. ***It allows the police to know when the detention occurs, based on their own conduct rather than the subjective perceptions of the accused;***

2. ***It maintains the rule of law, as all claims are subjected to the same standard, avoiding a different result if, for example, one accused saw the police in his rear-view mirror as they obstructed his car, but another did not; and***

3. ***It recognizes that some individuals are incapable of forming subjective perceptions, like the [accused] here, who did not appear to immediately perceive when the police obstructed his car.***

In applying the objective approach to detention — the circumstances giving rise to the encounter, the nature of the police conduct and the characteristics and circumstances of the accused — the Court of Appeal concluded that the accused was detained the moment the first police cruiser boxed in his car. At this point, the accused's choice to drive away was eliminated unless and until the police decided otherwise.

The circumstances giving rise to the encounter

The police were responding to a general, anonymous tip. When the police responded and found the car in the parking lot late at night with its engine running, this could be seen as "general neighbourhood policing". However, once the police obstructed the accused's car, things changed. ***"A reasonable person would know only that the police showed up late at night and for no apparent reason obstructed the [accused's] car,"*** said Justice Jamal. ***"Regardless of the officers' intentions as they blocked the [accused], a reasonable person would not perceive this action as 'assisting in meeting needs or maintaining basic order'."***

The nature of the police conduct

"The police conduct was authoritative from the outset," said Justice Jamal. ***"By obstructing the movement of the [accused's] car, the police would reasonably be perceived as sending the message that the [accused] was not free to leave until the police decided otherwise."*** Other circumstances of the encounter included:

- the police were uniformed and in marked police cars;
- they placed themselves on either side of the car to question the occupants;
- they looked into the car with flashlights and directed the passenger to roll down her window; and
- they directed the occupants to produce identification and vehicle ownership documents.

"Allowing a peace officer to serve a notice of 24-hour driving prohibition at the police detachment furthers the purpose of s. 215(3)(b), allows peace officers' duties under the MVA and the Criminal Code to dovetail, and avoids absurd consequences. In giving [the driver] a 24-hour driving prohibition at the police detachment, [the officer] implicitly decided that he had the authority to do so."

The character of the encounter moved from "general neighbourhood policing" to the police effectively taking control of the accused. The police obstructed the accused's car, approached it and sought information from its occupants. Although the encounter was brief, ***"a psychological detention can occur at the start of an interaction or within seconds." "In my view, most reasonable people would find it intimidating to have their car's movement obstructed by two police cruisers,"*** said Justice Jamal. Moreover, the Crown did not provide any authority to justify the legality of the detention, such as Ontario's *Highway Traffic Act* or the *Criminal Code*.

The Court of Appeal also rejected the Crown's submission that the accused was not detained because he could have walked away. ***"In my view, a reasonable person in the [accused's] position, whose car was deliberately obstructed by a police cruiser, would conclude that they were not free to leave, on foot or otherwise,"*** said Justice Jamal. ***"But even if the [accused] was free to leave on foot, as the Crown asserts, this confirms that his freedom of movement was significantly constrained. If the individual is a motorist or a driver, their freedom of movement includes the freedom to leave by driving away. Here, the [accused's] freedom to drive away was significantly constrained, which suggests that he was detained."***

The characteristics of the accused

Although there was no suggestion of racial profiling by police, the accused's status as a racialized Canadian — a black man — was relevant to the perception of a reasonable person in his shoes.

TIMELINE	
12:23 a.m.	Police arrive and park behind accused's car.
12:26 a.m.	Police arrest accused.
12:26 a.m. to 12:33 a.m.	Police conduct pat-down search of accused and place him in the back of the police car.
12:33 a.m. to 12:41 a.m.	Police search the accused's car incident to arrest.
12:44 a.m.	Police inform the accused of his right to counsel.

Was the Detention Arbitrary?

At trial and on appeal the Crown conceded that the police lacked reasonable grounds to detain the accused. A detention without at least reasonable suspicion is unlawful. And the Crown did not seek to justify the accused's detention on any other basis. Therefore, the accused's detention was arbitrary and breached s. 9 of the *Charter*.

s. 10(b) Right to Counsel

"When an individual is arrested or detained, s. 10(b) of the Charter guarantees the individual the right to retain and instruct counsel "without delay" and to be informed of that right," said Jutsice Jamal. ***"Subject to concerns for officer or public safety, or limitations prescribed by law and justified under s. 1 of the Charter, 'without delay' means 'immediately'."***

In this case, the trial judge held that the police did not inform the accused of his right to counsel immediately upon arrest. However, the only delay

attributed to the s. 10(b) breach by the trial judge was when the police searched the accused's car.

The Court of Appeal found this to be an error since the trial judge failed to find the accused was actually detained when the police parked behind his car. But it was unnecessary to decide whether the police were justified in postponing advising the accused of his right to counsel until they patted him down. The police should have at least advised the accused of his s. 10(b) rights when they placed him in the back of the police cruiser. They provided no reason for delaying the s. 10(b) advisement before they searched his car. Instead they waited another 11 minutes before doing so.

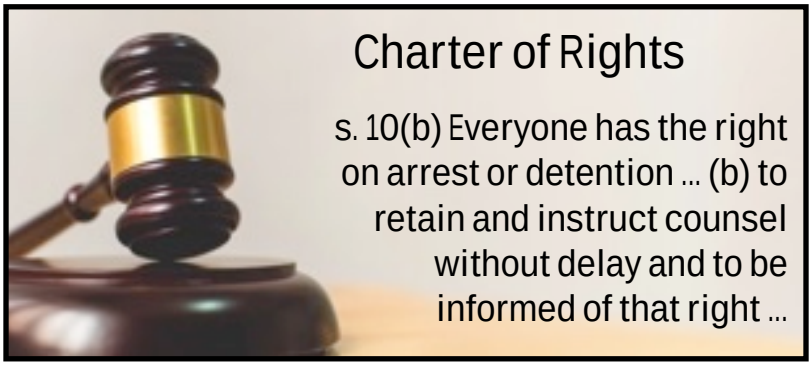
s. 24(2) Charter

Since the Court of Appeal found two *Charter* breaches — s. 9 and s. 10(b) — a new s. 24(2) *Charter* analysis was required. Here, the evidence was obtained in manner that breached both these rights. Although there was no causal connection between the the s. 10(b) violation and the discovery of the evidence, the Crown conceded there was a temporal connection sufficient to trigger s. 24(2). The breach and discovery were close in time and part of the same transaction. ***"A temporal connection between the breach of a Charter right and the discovery of evidence is enough to engage s. 24(2),"*** said Justice Jamal. ***"Here, there was such a connection between the breach of s. 10(b) and the discovery of the evidence."*** In addition, there was also a causal connection between the discovery of the evidence and the arbitrary detention. ***"The arbitrary detention had a direct causal connection to the discovery of the marijuana roach, and then to the arrest of the [accused], the search of his car, and the discovery of the evidence,"*** Justice Jamal said.

After balancing the s. 24(2) factors in the admissibility analysis — the seriousness of the Charter-infringing state conduct, the impact of the breach on the accused's Charter-protected interests and society's interest in the adjudication of the case on the merits — the Court of Appeal excluded the evidence. The seriousness of the police misconduct and the impact of the breaches on the accused pulled in favour of exclusion, which could not be outweighed by society's interest in an adjudication of the case on its merits. Since the evidence was excluded on the basis of the ss. 9 and 10(b) breaches, the Court of Appeal found no reason to address an alleged illegal search of the accused's car under s. 8.

An Institutional and Systemic Breach

One of the main factors favouring exclusion of the evidence in this case was the recognition that the s. 10(b) breach reflected an institutional or systemic problem. One officer testified her obligation to inform the accused of his right to counsel was "as soon as possible" which meant "if it's convenient for [her] to give rights to counsel and practical." The other officer testified that the accused had to be informed of his right to counsel "as soon as practicable". He said he was taught this at his initial training and as part of ongoing training. The Court of Appeal noted that "as soon as practicable" was a laxer standard from what s. 10(b) mandated. And, as the trial judge found, this belief that the right to counsel need only be given "as soon as practicable" highlighted a "chronic problem" with the police service in systematically delaying the right to counsel.



The trial judge even referred to an earlier court decision from 2017 where another judge had found the police service had failed to understand the immediacy requirement of the s. 10(b) right or they were unwilling to follow it. Moreover,

another court decision in 2014 found that the same police service, *"as an institution [,] failed to equip its officers with the knowledge required of a reasonably trained police officer"* with respect to s. 10(b) *Charter* rights being provided immediately upon an investigative detention. This systemic problem at the time was held to make the breach more serious.

The Court of Appeal noted that since 2017 there have been even more instances of this police service failing to respect their obligation to inform a detainee of their right to counsel immediately. This, it found, underscored an ongoing systemic problem. So, even though the two officers in this case did not appear to intentionally breach s. 10(b), were relatively inexperienced and appeared to be following their training, the institutional and systemic breach of clear and well-settled constitutional obligations under s. 10(b) served as an aggravating factor supporting exclusion of the evidence in this case.

The accused's appeal was allowed, the evidence was excluded under s. 24(2), his conviction was set aside and an acquittal was entered.

Complete case available at www.canlii.org

s. 24(2) ANALYSIS

s. 24(2) factors	s.9 breach	s. 10(b) breach
Seriousness of the Charter-infringing state conduct	• moderately serious. • negligence rather than wilful or deliberate misconduct. • police appeared to be unaware that their actions constituted or might constitute a detention.	• more serious • police waited without justification before advising accused of right to counsel • officers appeared confused about their obligations under s. 10(b). • the breach was rooted in an institutional and systemic police disregard for their constitutional obligations.
Impact of the breach on the accused's Charter-protected interests	• significant. • being obstructed by a police car without justification curtailed his expectation of liberty. • heightened by the lack of any reasonable basis for detention.	• minimal since police did not try to question the accused before advising him of his right to counsel and he made no inculpatory comments.
Society's interest in the adjudication of the case on its merits	• evidence was reliable and essential to the Crown's case.	• evidence was reliable and essential to the Crown's case.

Source: R. v. Thompson, 2020 ONCA 264

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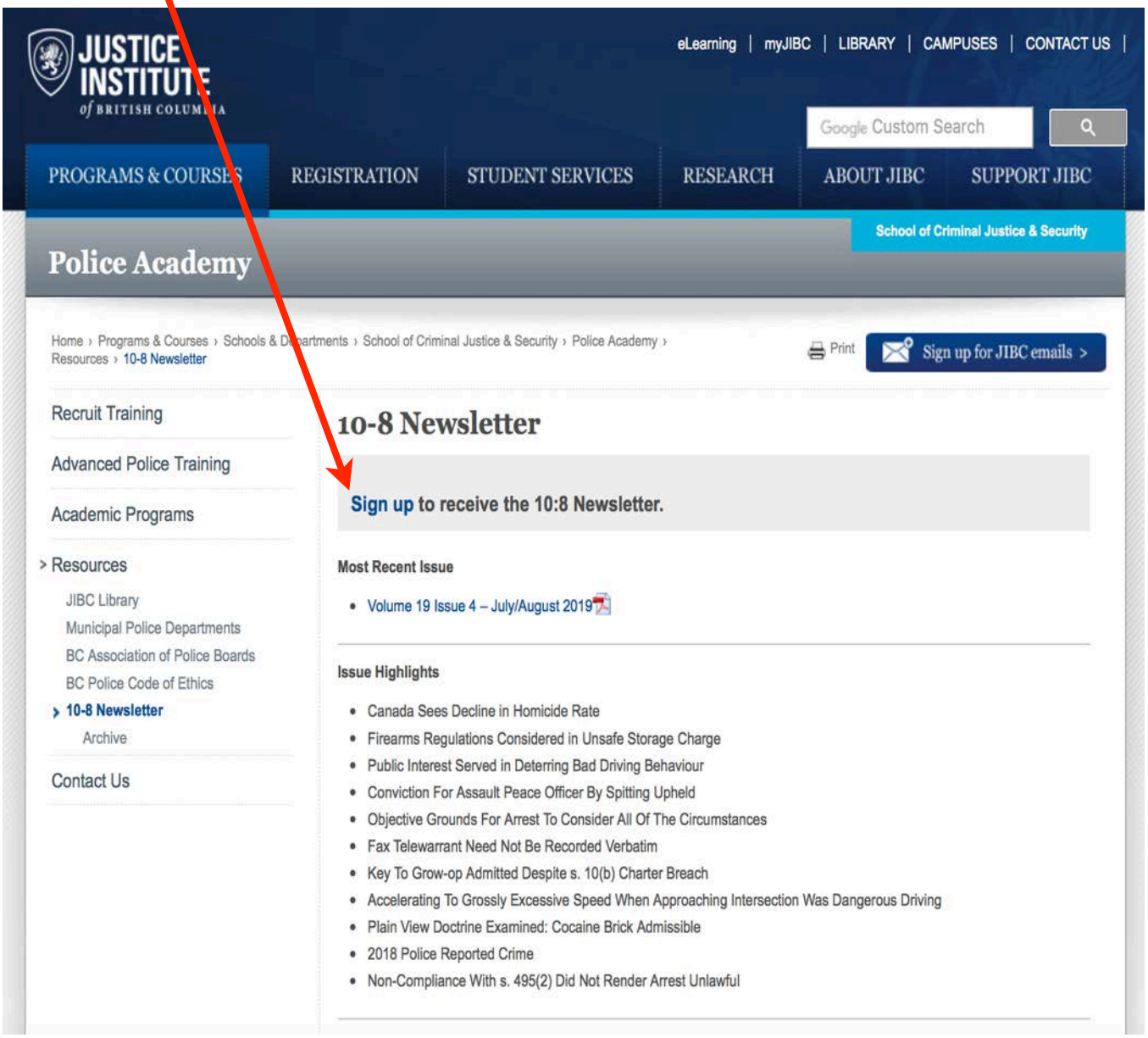

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