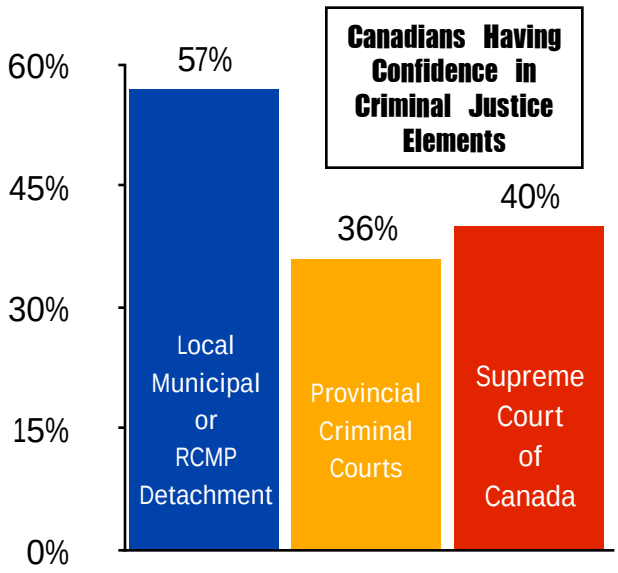
JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

COPS TOP COURTS IN CONFIDENCE OF THE PEOPLE

According to an Angus Reid poll released in January 2020, more Canadians have confidence in their local police than the courts. When asked, a majority (**57%**) of Canadians had confidence in their local municipal police or local RCMP detachment compared to those having confidence in their provincial criminal courts (**36%**) or even the Supreme Court of Canada (**40%**).



More people in BC had confidence in their local police (**63%**) than any other region, followed by Saskatchewan (**61%**). More Quebecers (**54%**) had confidence in the Supreme Court of Canada and their provincial criminal courts (**44%**). As for their provincial police forces, those from Ontario had more confidence (**59%**) than their neighbours in Quebec (**54%**). Overall, **54%** of Canadians expressed confidence in the RCMP.

For the complete poll click here.

"IN SERVICE: 10-8" TURNS TWENTY

The "In Service: 10-8" newsletter now spans two decades. Starting in 2001 and billing itself as a "peer read publication", it now enters its 20th year in 2020. Initially started as an "off-the-corner-of-the-desk" information source and distributed to Police Academy recruits and independent municipal police departments in British Columbia, it is now read by police officers and others from coast to coast to coast and beyond. The newsletter's readers span all 10 provinces and three territories. Hundreds of law enforcement officers subscribe to its email distribution list.

If you're a regular reader, you no doubt have seen the cases where the lack of knowledge by some officers has been heavily criticized by the courts and led to the exclusion of crucial evidence. There is no doubt that understanding all legal nuances is impossible. Just look at the Supreme Court of Canada itself. So often the justices of Canada's highest court can't agree on a particular issue. This is even after they have had months to reflect on evidence, evaluate legal arguments, and draft an opinion in the calmness of their chambers. Police, on the other hand, often in an environment of chaos and calamity, may only have a moment to make observations, orient themselves, make a decision and then act. (Some of you may recognize this as the OODA loop.) The point being, your decisions matter. And why you did what you did does too. Why not do all that you can to keep yourself up-to-date on the important cases that define and refine police powers and duties? The answer to me seems simple. We owe it to our profession! And the people we serve! The hope of this newsletter is to make this task a little bit easier!

Thank you for all you do in keeping Canada and your communities safe!

Mike Novakowski, Editor

We are interested in your feedback about the newsletter. Submit a comment here.

Highlights In This Issue

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Note-able Quote

"If you gotta do it anyway, why not be great at it?"

~Inky Johnson~

JUSTICE INSTITUTE of BRITISH COLUMBIA | LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

The Justice Institute of British Columbia Library is an excellent resource for learning. Here is a list of its recent acquisitions which may be of interest to police.

Being the boss: the 3 imperatives for becoming a great leader.

Linda A. Hill & Kent Lineback.

Boston, MA: Harvard Business Review Press, 2019.

HF 5549.12 H554 2019

Commissions of inquiry.

Hon. Stephen Goudge & Heather MacIvor.

Toronto, ON: LexisNexis Canada Inc., 2019.

KE 4765 C663 2019

Cooling the flames: communication, control, and de-escalation of mentally ill and aggressive patients: a comprehensive guidebook for firefighters and emergency medical services.

Ellis Amdur & John K. Murphy.

Shoreline, WA: Edgework Books, 2015.

RC 480.6 A43 2015

Critical perspectives on the management and organization of emergency services.

Paresh Wankhade, Leo McCann, & Pete Murphy, editors.

New York, NY: Routledge, 2019.

HV 551.3 C756 2019

The happiness project : or, why I spent a year trying to sing in the morning, clean my closets, fight right, read Aristotle, and generally have more fun.

Gretchen Rubin.

New York, NY: Harpercollins, 2018.

BF 575 H27 R83 2018

How to have impossible conversations: a very practical guide.

Peter Boghossian & James Lindsay.

New York, NY: Life Long, 2019.

BF 637 C45 B64 2019

Justice, crime, and ethics.

Michael C. Braswell, Belinda R. McCarthy & Bernard J. McCarthy, editors.

New York, NY: Routledge, 2020.

HV 7419 J87 2020

Looking at law: Canada's legal system.

Barry Wright, Vincent Kazmierski, Betina Appel Kuzmarov & Rebecca Jaremko Bromwich.

Toronto, ON: LexisNexis Canada Inc., 2019.

KE 444 F588 2019

Managing domestic violence: a practical handbook for family lawyers.

Desmond Ellis.

Toronto, ON: LexisNexis Canada, 2019.

KE 569 E44 2019

Questions are the answer: a breakthrough approach to your most vexing problems at work and in life.

Hal Gregersen.

New York, NY: HarperBusiness, an imprint of HarperCollins Publishers,

HD 53 G745 2018

Surrounded by idiots: the four types of human behavior and how to effectively communicate with each in business (and in life).

Thomas Erikson.

New York, NY: St. Martin's Essentials, 2019.

HM 1166 E742 2019

Violence assessment and intervention: the practitioner's handbook.

James S. Cawood & Michael H. Corcoran.

Abingdon, Oxon; New York, NY: Routledge, an imprint of the Taylor & Francis Group, 2020.

HM 1116 C39 2020

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IT'S TIME TO SPEAK UP ABOUT MENTAL HEALTH.

AMBULANCE PARAMEDICS OF BRITISH COLUMBIA | BC EMERGENCY HEALTH SERVICES | BC MUNICIPAL CHIEFS OF POLICE | BRITISH COLUMBIA POLICE ASSOCIATION | BRITISH COLUMBIA PROFESSIONAL FIRE FIGHTERS ASSOCIATION | CANADA BORDER SERVICES AGENCY | FIRE CHIEFS' ASSOCIATION OF BC | FIRST NATIONS EMERGENCY SERVICES SOCIETY OF BRITISH COLUMBIA | GREATER VANCOUVER FIRE CHIEFS ASSOCIATION | PROVINCE OF BC | ROYAL CANADIAN MOUNTED POLICE | TRANSIT POLICE | VOLUNTEER FIREFIGHTERS ASSOCIATION OF BC | WORKSAFEBC

BCFirstRespondersMentalHealth.com

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

SUFFICIENT INFORMATION REMAINED IN EXCISED ITO: WARRANT VALID

R. v. Tran, 2019 ONCA 1011

The police obtained *Controlled Drugs and Substances Act* warrants to search two marihuana growing houses in unoccupied residential premises as well as the accused's home. The ITO was common to all three search warrants. The ITO was based on a combination of information from a confidential informer, a city computer, various police data bases, the electricity provider, police surveillance and inferences drawn from an experienced drug investigator (the affiant). This included:

- Information provided over several months by a confidential informer about an alleged grow house at a specified address apparently monitored by a man fitting the general description of the accused and driving a motor vehicle of the same make and model as that registered to the accused's wife;
- The consumption of electricity from the electrical services provider at the premises where the two marijuana grow operations were located. This information included consumption data specific to each location and a comparison with consumption for similar-sized residences in the same neighbourhood. It was relied upon to support an inference that a by-pass was installed at each location to mask the electrical consumption necessary for a marijuana grow operation. The police obtained this information without a warrant or production order;
- The accused's dated prior convictions of two *Criminal Code* motor vehicle offences;
- Ten contacts of the accused with the investigating police service over a period of nine years, the most recent of which occurred six years before the offences being investigated and the oldest 15 years prior;
- Information about two incidents involving marijuana grow operations more than a decade earlier. In one, the accused was not charged and in the other he was acquitted of producing marijuana and possessing marijuana for the purposes of trafficking;
- Police surveillance of the premises shortly before the warrant was obtained and executed at two premises on the same street. Property records confirmed the accused owned these premises. Both apparently were unoccupied but had covered windows. Their roof vents were spinning even though vents on adjacent houses remained static. And an odour of vegetative marijuana was detected emanating from one of the premises;
- Police confirmed the accused's brief attendance at both properties through surveillance on the day before the warrant was obtained and executed. He was driving a vehicle registered to his wife identical in make and model to that described by the confidential informer;
- An experienced drug investigator gave an opinion describing the inferences she drew from the confidential informer's information and the confirmation of it by police surveillance, property records and vehicle registration.

What Police Found

Residence 1:
- A marihuana grow operation (333 plants)
- An electrical bypass

Residence 2:
- A marihuana grow operation (541 plants)
- An electrical bypass

Residence 3:
- Grow schedules
- Ziplock bags
- Correspondence
- Other documents

Ontario Superior Court of Justice

The accused challenged the validity of the search warrants and sought the exclusion of the evidence. The judge granted leave for the accused to cross-examine the affiant of the warrants. The accused wanted the information obtained by unconstitutional seizures and other information that was erroneous, false, misleading or strategically omitted stripped from

the ITO. The judge did excise the electrical records — obtained without prior authorization — and information related to the accused's history with police. The remaining information following excision, in the accused's view, was insufficient for the warrants to be issued and the evidence ought to be excluded. The accused also argued that, even if the warrant was valid, the judge should exercise his discretion and nevertheless set it aside because the affiant's conduct was subversive of the pre-authorization process.

The judge rejected the accused's assertions. First, even after excising the information obtained through unconstitutional police conduct — the electrical consumption records for the two grow houses — and other information the judge considered improper such as the accused's unrelated criminal record and contact with the police, and false or misleading information about two incidents occurring several years earlier, the warrants were not set aside. In the judge's opinion, there was enough sufficient reliable evidence remaining to issue the warrants despite the excision of this information.

Second, the judge refused to set aside the warrants on the basis that the affiant's conduct in connection with the ITO was so subversive of the pre-authorization process that the warrants should nonetheless be set aside even though they were grounded on an adequate evidentiary foundation. The accused was convicted on two counts of each for producing and possessing marihuana for the purpose of trafficking and theft of electricity. He was sentenced to 15 months imprisonment followed by one year of probation.

Ontario Court of Appeal

The accused again argued the warrants ought to have been quashed and the evidence excluded. He submitted the remaining information after excision was insufficient to justify the issuance of the warrants or, in the alternative, the judge ought to have exercised his residual discretion to set aside the warrant on the basis that the process was subverted.

Warrant Excision

The task of a trial judge when reviewing a search warrant it to excise information from the ITO that was obtained by constitutional infringement or was misleading or erroneous. Then, the judge is to determine whether what remained in the ITO, as amplified on review, affords sufficient reliable evidence on which the warrant could have issued.

In this case, the trial judge was satisfied that the remaining information in the ITO after excision, considered as a whole, was reliable enough evidence to issue the warrants. The Court of Appeal concluded the trial judge did not err nor materially misapprehend the evidence. The trial judge's conclusion was not plainly unreasonable nor did his reasons demonstrate any palpable and overriding error of fact.

Residual Discretion to Quash Warrant

The Court of Appeal also rejected the accused's suggestion that the trial judge erred in refusing to exercise his residual discretion to set aside the warrants on the basis that the affiant's conduct in the pre-authorization process amounted to a subversion of that process. But the Appeal Court offered this caution:

> [W]e consider it appropriate to add that the affiant's conduct in this case should not be repeated. The obligation of full, fair and frank disclosure is not a licence to include irrelevant information; invite propensity reasoning; contest factual determinations explicit or implicit in decisions of courts of competent jurisdiction; or offer opinions unsupported by essential factual underpinnings. [para. 18]

The accused's conviction appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's Note: Additional details obtained from *R. v. Tran*, 2018 ONSC 132.

Note-able Quote

"Life is lived in the front row."

~Marilyn Sherman~

ENTRY INTO PARKING GARAGE DID NOT BREACH PRIVACY BUT HALLWAY ENTRY DID

R. v. Yu et al., 2019 ONCA 942

While investigating criminal gang activity and high level drug trafficking, police obtained wiretap authorizations under the *Criminal Code* allowing them to intercept the communications of certain targets. Before the warrants were issued, the police had already accessed common areas of condominium buildings to make observations, including entering the parking garages, hallways and stairwells. These entries had generally been done with the consent of the condominium building management. The police had also installed hidden hallway cameras in some of the condominium buildings, again with the consent of condominium management.

A general warrant also obtained under the *Criminal Code* authorized the police to use a Mobile Device Identifier ("MDI") to identify the cellphones of the targets of the investigation. The general warrant also permitted the police to enter common areas of multi-unit buildings, enter the private units of some of the accused and their associates, and install hidden cameras in the hallways outside the condominium units of some of the investigation's targets. Police seized firearms, ammunition, bullet proof vests, GPS tracking devices, heroin, cocaine and almost $350,000 cash. The investigation led to the arrest of some 112 individuals on a variety of charges including murder, drug and firearms and human trafficking, possessing firearms, and possessing drugs for the purpose of trafficking.

Ontario Superior Court of Justice

Several of the targets — including each of the four accused — sought to exclude evidence obtained through the wiretaps and general warrants on the basis that their authorization and execution breached s. 8 of the *Charter*. As part of the challenge to the authorizations, the accused argued that the warrantless entries made by the police into the common areas of certain condominium buildings and the installation of police cameras in common areas without a warrant, but with the consent of the condominium management, breached s. 8 of the *Charter*.

The judge found, in part, the vast majority of the physical police surveillance occurred in relation to parking garages rather than hallways or common areas. He also concluded that the purpose of the garage entries was to determine whether the suspect's car was parked in the garage. This would assist police in deciding whether to set up surveillance outside the building. As for the entries into the elevators and hallways, these were done to confirm whether the suspect was a resident of the building, determine the unit number a suspect entered and determine which way the unit faced.

A judge dismissed the accused's application. He found the warrantless entries into the common areas did not violate s. 8 of the *Charter*. First, the accused did not have a reasonable expectation of privacy in the common areas of the condominiums and therefore the entries into those areas and limited physical surveillance did not amount to a "search" for *Charter* purposes. Second, the judge ruled there was no s. 8 violation by the warrantless installation of the hidden hallway cameras. The police had obtained valid consent from condominium management to install the cameras and a warrant was not required given the diminished expectation of privacy in common areas such as hallways. The accused were convicted and sentenced to prison.

Ontario Court of Appeal

The accused argued, among other things, that the application judge erred in failing to exclude evidence obtained through the wiretaps and general warrant. They suggested that the warrantless entries into condominium common areas and the warrantless installation of hidden cameras in their hallways breached s. 8 and the evidence ought to have been excluded under s. 24(2).

"Once it is determined that the accused has a reasonable expectation of privacy, a warrantless search that intrudes on that expectation will be presumptively unreasonable. The onus is on the Crown to show that the search was authorized by law. The authorizing law must be reasonable, and the search must have been conducted in a reasonable manner."

s. 8 of the *Charter*

Justice Tulloch, authoring the Court of Appeal's decision, first reviewed s. 8 of the *Charter*. He stated:

> For s. 8 of the Charter to be engaged, the accused person must possess a reasonable expectation of privacy. Once it is determined that the accused has a reasonable expectation of privacy, a warrantless search that intrudes on that expectation will be presumptively unreasonable. The onus is on the Crown to show that the search was authorized by law. The authorizing law must be reasonable, and the search must have been conducted in a reasonable manner. [references omitted, para. 63]

Common Areas of Multi-Unit Dwelling

Determining whether an individual has a reasonable expectation of privacy in the common areas of a multi-unit dwelling depends on the totality of the circumstances. Various factors to consider in this contextual analysis include:

1. The subject matter of the alleged search;
2. The claimant's interest in the subject matter;
3. Whether the claimant had a subjective expectation of privacy in the subject matter; and
4. Whether the subjective expectation of privacy was objectively reasonable.

Moreover, the following factors are relevant to the level of expectation of privacy in common areas of multi-unit buildings:

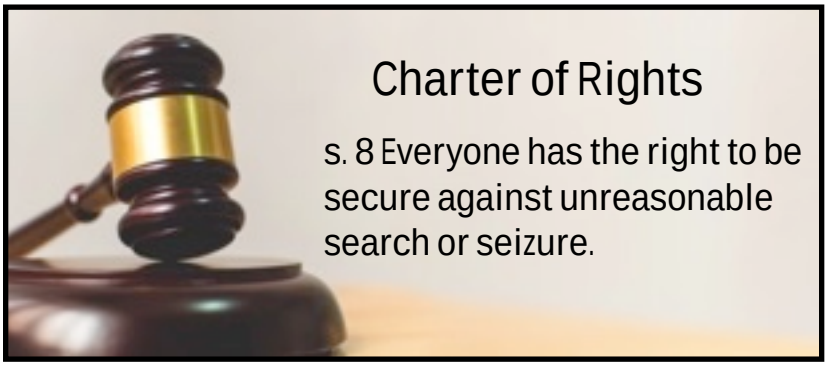
- The degree of possession or control exercised over the common area by the claimant;
- The size of the building: the larger the building, the lower the degree of reasonable expectation of privacy in common areas;
- Whether a security system or locked doors function to exclude the public and regulate access; and
- The ownership of the property.

In reviewing these factors Justice Tulloch stated:

> In my view, these factors lead to different conclusions depending on the type of common area accessed by the police, which in this case relates to the parking garage and the hallways. I conclude that the [accused] did not have a reasonable expectation of privacy in the parking garages, but they did have such an expectation of privacy in their hallways, albeit a diminished one. [para. 69]

In this case, the Court of Appeal found the subject-matter of the search, or ***"what the police were really after"***, was ***"information about the [accused's] residency and their comings and goings."*** The police wanted basic information such as the fact of residency in the building and the unit number of a suspect:

> This is information that would be available to the police and in public view if, for example, the police followed someone home to a detached house. A person's physical address is not personal information that attracts Charter protection. The police also wanted to determine the direction that the suspects' units faced, so they could conduct surveillance inside or outside the building without detection.



After these basic facts had been established, the police were interested in obtaining information about the [accused's] comings and goings – whether they were at home (when the police checked to see if their cars were parked in the garage), who they visited and who visited them, what they were carrying, and how long they stayed during these visits. Although any individual observation made from the physical surveillance might be characterized as "mundane", the surveillance observations together and over time produced more invasive information about what happened in and around the [accused's] homes. [references omitted, paras. 76-77]

Warrantless Garage Entries

In this case, the garage entries did not engage s. 8 of the *Charter*:

> [T]he parking garages in both Joe Shuster Way and Western Battery Road were large, and the [accused] had limited control over them. The Western Battery Road garage had a visitors' section that was accessible to the general public. As explained below, the police obtained consent before all prolonged surveillance in the Joe Shuster Way garage. While there is insufficient evidence of consent in relation to Western Battery Road, such consent was not necessary as the police generally entered the visitors' section to determine whether a target's car was parked in the garage or not, which they were entitled to do as any visitor could do. The [accuseds'] had no reasonable expectation of privacy regarding observations made from a space accessible to the general public. Even if the [accuseds] had a subjective expectation of privacy in the garage, that expectation was not objectively reasonable. [para. 80]

Warrantless Hallway Entries

As for the hallway entries, the accuseds had a reasonable expectation of privacy in the hallways of their respective buildings, although it was at the low end of the spectrum:

> Once inside an access-controlled condominium building, residents are entitled to expect a degree of privacy greater than what, for instance, they would expect when approaching the building from the outside. This results from the fact that anyone can view the building from the outside, but there is some level of control over who enters the building.
>
> The level of expectation of privacy inside a condominium building will vary. The level of expectation of privacy is dependent on the likelihood that someone might enter a certain area of the building, and whether a person might reasonably expect a certain area to be subject to camera surveillance.
>
> Some areas of condominium buildings are routinely accessed by all condominium residents, such as the parking garage or elevator lobby. The level of expectation of privacy in those areas is low, albeit remaining greater than would be expected outside of the building. The level of expectation of privacy increases the closer the area comes to a person's residence, such as the end of a particular hallway of a particular floor of the

"The level of expectation of privacy inside a condominium building will vary. The level of expectation of privacy is dependent on the likelihood that someone might enter a certain area of the building, and whether a person might reasonably expect a certain area to be subject to camera surveillance."

building. Even in those less-frequented areas the level of expectation of privacy is low, but not as low as in the more commonly used areas.

A resident or occupant's reasonable expectations surrounding camera surveillance in a condominium building depend on whether the cameras are visible, and whether the resident has been informed by the condominium management as to the location of any security cameras installed in the building. If there is no visible camera, and if the resident has been told that there are no security cameras, then residents are entitled to expect their movements are not subject to camera surveillance.

The only time that condominium residents should expect complete privacy is when they are inside their unit with the door closed. As soon as they open their door, or exit their unit, it is reasonable to expect that they may be observed, with that level of expectation increasing the closer they get to the main areas of the building or to any security cameras.

On balance, the factors listed above establish a low, but reasonable expectation of privacy in these common areas. The buildings had strict security features designed to exclude outsiders, and the condominium rules at Joe Shuster Way barred non-owners and non-occupants from accessing the common areas unless accompanied by an owner or occupant. It was thus reasonable for the [accused] to believe that the buildings' security systems would operate to exclude the police from entering the common areas of the building multiple times without permission. At the Joe Shuster Way building, security cameras are installed in the lobby, the ramp to the parking garage, at the elevator lobby, and in the elevators – but not in the hallways outside units. The [accused] had some limited reasonable expectation of privacy in those areas. [paras. 82-87]

The accused's reasonable expectation of privacy in these hallways was low. Both condominium buildings had over 300 units. The police observations in this case — the subject matter of the search — were limited. The police did not make or attempt to make any observations about things happening within the units or enter private areas such as storage lockers.

Consent

Justice Tulloch found third party consent to the police entries – in this case the property management or the condominium board – was an important aspect of the **"totality of the circumstances"**. Although third-party consent to police entry into a shared residential space is unsettled, in the context of the condominium operations the accused ***"would have reasonably expected that the board, and by extension, property management, could consent to police entry"***:

> The condominium corporation has a statutory duty to administer the common elements and to manage the property of the corporation on behalf of the owners: Condominium Act, 1998, S.O. 1998, c. 19, ss. 17(1), 17(2). The board is elected by the owners to manage these affairs in their best interests: ss. 27-28. This statutory duty can be understood as conferring a responsibility and authority on the board to act as the decision maker for the owners as a collective.

"Some areas of condominium buildings are routinely accessed by all condominium residents, such as the parking garage or elevator lobby. The level of expectation of privacy in those areas is low, albeit remaining greater than would be expected outside of the building. The level of expectation of privacy increases the closer the area comes to a person's residence, such as the end of a particular hallway of a particular floor of the building. Even in those less-frequented areas the level of expectation of privacy is low, but not as low as in the more commonly used areas."

> The condominium board and, by extension, property management, were entrusted with security of the building and the residents. The [accuseds] would have reasonably expected that the property manager could consent to police entry into the building and its hallways and, in fact, would be likely to consent to police entry if informed of the possibility of criminal activity within the building.
>
> I emphasize that the authority of the condominium board and property management to regulate access to the building is just that: an authority to regulate access. As I will discuss in the context of the warrantless camera installations, the authority to consent to police entry does not translate into an authority to consent to more intrusive police investigative measures, such as entry into a particular condominium unit.
>
> Accordingly, the [accused's] expectation of privacy with respect to the common areas is further reduced given the possibility that property management could consent to police entry. The [accused] had a reasonable expectation of privacy, albeit on the low end of the spectrum. [paras. 91-94]

Joe Shuster Way Condominium

Property management at Joe Shuster Way validly consented to the police entries and therefore the entries were authorized by law. The board had the authority to provide consent for police entry and the property manager had the authority to provide consent. The condominium board entrusted the property manager with management of the property, including its security. The police had obtained the property manager's consent to access the Joe Shuster Way property a day prior to the first entry into the garage, and more than a month prior to the first entry into the hallways or stairwells.

- The property manager was aware of his right to refuse to give consent and was aware that the police required access to both the garage and the building.
- The manager gave police a key fob and access code that could be used at both the garage entrance and the front lobby door.
- The manager clearly understood that both he and nearly all the residents of the building were innocent bystanders, and the police required their help.
- While the police had deliberately misstated the nature of the investigation to the manager in order not to compromise the investigation, his evidence was that the specific crime under investigation did not matter to him. In the circumstances of this case, the provision of inaccurate information about the offence under investigation did not affect the validity of the property manager's consent.

"The warrantless hallway entries at Joe Shuster Way conducted after the consent was provided did not violate s. 8 of the Charter," said Justice Tulloch. ***"The [accuseds] had a reasonable expectation of privacy in the hallways, which was attenuated by the ability of the board and property management to consent to police entry. Property management in fact consented. Accordingly, the resulting search was authorized by property management's consent. Section 8 of the Charter was not violated."***

Western Battery Road Condominium

There was insufficient evidence to conclude that the police had consent to enter Western Battery Road. There was no evidence from the property manager or board on the circumstances surrounding the giving of consent. Since the Crown failed to establish consent on a balance of probabilities they could not rely on it to authorize the warrantless hallway entries at Western Battery Road. Nor could the Crown justify the warrantless entries on any other statutory or common law authority. Thus, the search was not authorized by law and breached s. 8.

Surreptitious Hallway Video Recording

Two of the accused who resided in the condominium building where a hidden hallway camera had been installed had a reasonable expectation of privacy against such surreptitious video recording. Although they had a low but reasonable expectation of privacy in the hallways of

their building in relation to police entering and observing, they had a higher expectation of privacy against the state surreptitiously recording in the same hallways.

> As the application judge observed, condominium residents may, on occasion, be subjected to video surveillance from cameras installed by the property management in common areas of their buildings, and these inconveniences are to be expected. Indeed, there were such cameras in some locations of the common areas of Joe Shuster Way. It does not follow that residents would reasonably expect to be secretly recorded by the state. Both the fact that the camera was hidden and that it was installed and operated by police distinguish it from regular security cameras. The [accused] have different expectations of privacy in these different situations. [para. 124]

And further:

> ... While it might be arguable that condominium residents could not reasonably expect that building management would be unable to share with the police video recordings from cameras that management had installed for its own purposes, it does not follow that residents would reasonably expect building management to permit the police to install cameras for the police's own purposes.
>
> The installation of hidden cameras by the state is not something that condominium residents would reasonably expect the board to do in carrying out its management duties.
>
> Condominium residents expect the board to reasonably cooperate with the police as part of the board's duty to manage common areas in the residents' collective interest. This expectation does not give the board free reign to consent to all manner of police investigative steps in the common areas of the building, no matter how intrusive.
>
> Second, as the [accused] argue, the evidence before the application judge was that surveillance cameras installed by condominium management are generally visible. As the [accused] submit, while residents expect to be under surveillance by the visible cameras installed by management, they do not expect to be under surveillance by "hidden cameras," much less hidden cameras installed by the police.
>
> Furthermore, the nature of the information the police were seeking engaged heightened privacy interests. As the [accused] put it, the camera never blinks. Continuous surveillance over an extended period of time reveals more personal information about its subjects than do discrete and purpose-oriented individual entries. By the point the cameras were installed, the police had already determined where Mr. Mai resided, and were now pursuing information about who he associated with, and his living patterns in terms of when and how often he frequented the unit. As the application judge noted, this evidence had "considerable probative value" because it revealed the frequency of Mr. Mai's attendance at the unit, what he was carrying with him when he came and went, and which persons he associated with. [paras. 124-129]

Consent - Hidden Hallway Camera

Although the police purportedly obtained the consent to install the hidden hallway camera, the Court of Appeal concluded that the condominium board could not consent to such surreptitious video recording:

> In this case, the heightened privacy interests at stake lead me to conclude that surreptitious recordings cannot be authorized by the consent of the condominium board or property management. Permanent recording creates a risk of a different order of magnitude than visual observation by police officers who have the permission of the board or management to be in the common areas.
>
> As discussed with respect to the warrantless entries, the board and property management have valid authority to cooperate with the police, and to consent on behalf of the building residents to allow police entry. This authority is not unlimited. The respondent, in its factum, agrees that property management has authority to cooperate with the police only to a reasonable extent.

"It was not reasonable for the condominium board or its delegates to consent to surreptitious video surveillance on behalf of the residents. This is beyond the bounds of its authority. The board has a duty to manage common areas. This will sometimes involve allowing non-residents such as maintenance people, management, and perhaps even police, to enter common areas as needed. Surreptitious video surveillance by the police is different. There is a limit to the board's delegated authority. That limit was surpassed when the board purported to consent to the installation of hidden cameras on behalf of residents."

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Since there was no other statutory or common law power that authorized the police to install hidden cameras without a warrant, the warrantless installation of the camera at Joe Shuster Way violated s. 8 because it was not authorized by law.

Admissibility

After considering the three factor admissibility assessment under s. 24(2), the Court of Appeal admitted the evidence obtained from the warrantless installation of the hidden video camera. The Charter-infringing state conduct was not overly serious and favoured admission. The police sought and obtained consent from the condominium management and sought advice from the Ministry of the Attorney General. The cameras were also not installed out of convenience but to minimize the danger to police. The police also placed the cameras to minimize the impact on others in the building. As for the impact of the breach on Charter-protected interests of the accused, it was moderate, which favoured exclusion. Although the camera revealed some personal information, it was available for public observation. And the accused's expectation of privacy in the hallway was diminished. Finally, society's interest in the adjudication of the case on its merits favoured admission. The evidence was highly reliable and the offences serious. ***"Weighing all the factors, the repute of the justice system would be adversely affected if the evidence were to be excluded,"*** said Justice Tulloch. ***"Taken together, these factors militate in favour of admission."***

The accused's appeals against conviction were dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's Note: This case contained several issues beyond the warrantless police entries and installation of the hallway video cameras.

EVIDENCE INADMISSIBLE DUE TO 3-HOUR DELAY IN FACILITATING COUNSEL

R. v. Noel, 2019 ONCA 860

The police obtained a warrant — based on confidential information and surveillance — to search the accused's residence for cocaine, other controlled substances, and related evidence of drug trafficking. He lived with his partner and his brother, and all three were suspected of small-scale cocaine trafficking. When the warrant was executed police used a dynamic entry. The accused was arrested at gunpoint in a bedroom containing his belongings and identification. He was taken to the floor and

handcuffed. His partner and his brother were also arrested. The accused was not immediately advised of his his right to counsel. Instead, he was brought to a central location in the house where, within five minutes of police entry into the residence, he was read his right to counsel. He asked to speak to a lawyer, but no steps were taken to facilitate access to counsel.

Police found $5,670 CAD, $71 USD, 73 grams of cocaine, 55 grams of marijuana, and a digital scale in the bedroom. The accused was transported to the police station but no one facilitated his right to counsel. Calls to duty counsel were made by police and messages were left requesting duty counsel call back.

Ontario Superior Court of Justice

The judge ruled the accused's right to consult counsel without delay was violated because of an **implementational breach**. Although she characterized the police conduct as **"carelessness"**, the judge refused to exclude the evidence under s. 24(2). She found the seriousness of the breach was attenuated because the police complied with their obligation to hold off questioning the accused until after contact with counsel was facilitated. Further, the judge found there was no evidence the accused's s. 10(b) right to counsel was denied even though there was no evidence to establish whether duty counsel ever called back. Nor was there evidence that the delay adversely impacted the accused's ability to have a meaningful conversation with counsel. The accused was convicted of drug related offences.

Ontario Court of Appeal

The accused argued, among other things, that the trial judge erred in not excluding the evidence under s. 24(2). The Court of Appeal agreed, finding the trial judge erred in assessing the seriousness and impact of the s. 10(b) implementational breach related to police delay in facilitating the accused's right to counsel. As for the **seriousness of the breach**, it was not lessened because the police did not question the accused:

TIMELINE	
10:28 pm	Search warrant executed.
11:04 pm	Accused transported to police station.
11:10 pm	Accused arrives at police station.
12:48 am	Two calls placed to duty counsel & messages left asking for call back.
1:25 am	Accused had not yet received call from duty counsel. Call placed to duty counsel & message left asking for call back.

> First, had the police attempted to use [the accused] as a source of self-incriminating evidence before he had a reasonable opportunity to speak to counsel, that would have been yet another s. 10(b) breach. The seriousness of the breach the trial judge did find cannot be attenuated by the fact that the police did not commit an additional breach of [the accused's] rights.
>
> Second, there is no evidence that [the accused] ever succeeded in speaking to counsel. The evidence was that at 1:25 a.m., approximately three hours after his arrest, [an officer] left a message with duty counsel on [the accused's] behalf, but there was no evidence that anyone followed up to ensure contact occurred. It is true that the onus is on [the accused] to establish the s. 10(b) breach, and that he did not lead affirmative evidence that he never managed to speak to counsel. That does not change the fact, though, that there is no affirmative proof that he did. It was not appropriate for the trial judge to proceed on the assumption that [the accused] did ultimately speak to counsel. It was also not appropriate for the trial judge to conclude that the seriousness of the breach was mitigated by that assumed consultation. [paras. 19-20]

"The right to consult counsel without delay exists because those who are arrested or detained are apt to require immediate legal advice that they cannot access without help, because of their detention."

As for the **impact of the breach** on the accused, the Appeal Court concluded that the trial judge did not properly evaluate this aspect:

> [The Charter protected] interest is the right is to consult counsel without delay. The loss of this right is in no way neutralized because the right to consult counsel is delayed, as opposed to denied. Nor is the impact of delayed access to counsel neutralized where an accused fails to demonstrate that the delay caused them to be unable to have a late but meaningful conversation with counsel. It would be inconsistent with solicitor-client privilege to expect a detainee to lead evidence about the quality of their solicitor-client conversation. More importantly, this inquiry misses the mark.
>
> The right to consult counsel without delay exists because those who are arrested or detained are apt to require immediate legal advice that they cannot access without help, because of their detention.
>
> For example, an arrest and the search of one's home can raise urgent legal issues about the lawfulness of the arrest and the obligation to submit, as well as the validity of the search warrant and the scope of authority that the search warrant gives to the police. Such information could be useful in preventing an unjustified search, before it happens.
>
> Detention also raises questions of immediate importance relating to the detainee's rights during detention, including the right against self-incrimination.
>
> Beyond this, the right to counsel is also important in providing "reassurance" and advice, on such questions as how long the detention is apt to last, and what can or should be done to regain liberty. ... [References omitted, paras. 22-26]

"[The accused] was not required to offer direct evidence about why he required access to counsel without delay," said the Court of Appeal. ***"He asked to speak to counsel promptly but that right was denied. In assessing the impact of such breaches, it is not appropriate for courts to plumb the content and significance of the conversations a detainee would have had, if his right to consult counsel without delay had been respected, or to treat such breaches as 'quite neutral' in the absence of such evidence. The impact of the loss of the right to consult counsel without delay can be evaluated based on the interests it is meant to protect along with the length of the delay."***

s. 24(2) of the *Charter*

Since the trial judge erred in her analysis, the Court of Appeal did a fresh s. 24(2) determination and came to a different conclusion on admissibility.

Seriousness of the *Charter* Breach

Here, the s. 10(b) violation was serious. The accused was entirely under the control of the police. No one took charge of ensuring the accused had access to counsel as he requested. He was placed in a cell and left there. Three hours lapsed between the time of the accused's arrest and the first confirmed attempt by the police to secure counsel for him. And there was then no confirmation that the accused actually spoke to counsel. ***"From the beginning, the police appear to have had a somewhat cavalier attitude about a fundamental, important, and long-settled Charter right to consult counsel without delay,"*** said the Court of Appeal.

"[T]he right to counsel is also important in providing 'reassurance' and advice, on such questions as how long the detention is apt to last, and what can or should be done to regain liberty."

"The law around s. 10(b) is clear and long-settled. It is not difficult for the police to understand their obligations and carry them out."

Impact of *Charter* Breach

The impact of the breach on the accused's *Charter* protected interests was significant, not neutral. As the Court of Appeal emphasized, ***"[the accused] remained in custody without the benefit of counsel for at least three hours, unable to receive the direction, reassurance, and advice that counsel could provide,"***

Admissibility?

Despite its reliability and the necessity to proving the Crown's case, the evidence was excluded. The Court of Appeal was not prepared to be seen as condoning the ***"carelessness and disorganization"*** of the police in not facilitating the accused's right to counsel without delay. ***"This was a clear violation of a well-established rule,"*** it stated. ***"The law around s. 10(b) is clear and long-settled. It is not difficult for the police to understand their obligations and carry them out. Furthermore, it is troubling that the police in this case could not provide any reasonable explanation for the delay, nor could they even say whether [the accused] did, in fact, speak to counsel."***

The accused's appeal was allowed, the evidence was excluded, his conviction was set aside and verdicts of acquittal were entered.

Complete case available at www.ontariocourts.on.ca

INTERNATIONAL DAY FOR THE ELIMINATION OF RACIAL DISCRIMINATION

March 21, 2020

NO-KNOCK ENTRY JUSTIFIED: EVIDENCE ADMISSIBLE

R. v. Chang, 2019 ABCA 315

Following an investigation into a dial-a-dope operation, the police obtained a *Controlled Drugs and Substances Act* (*CDSA*) search warrant to be executed at the accused's apartment by way of a **"no-knock"** entry. The search of the accused's residence was to be followed by searches at two other homes. A 10 member tactical team attended the accused's apartment and forced the door open using a two-man ram. The first officer to enter had his pistol drawn and announced **"police"** and then **"search warrant"**. The officer then entered the bedroom occupied by the accused.

The accused was directed to show his hands and then to come towards the officer. As the accused crawled across the bed and stood up in front of the officer, his fists were clenched. The accused was directed to get on the ground. The officer administered an open-hand stun with his left hand to the right side of the accused's head and took him to the ground. He was then directed to bring his hands behind his back while the officer's knee was pressed to his back. The accused brought his right hand behind his back in a clenched fist. When directed to unclench his fist, he declined to do so and the officer administered an open-hand stun to his upper shoulder blades. The accused complied and unclenched his fist, following which the officer took control of the accused's right wrist.

The accused was then handcuffed, advised of his *Charter* rights, cautioned, and informed that he was being detained for a *CDSA* warrant. He was transported to a police station were he was subsequently arrested and allowed to contact a lawyer after all related searches had been completed. During the course of the search, the police located a total of 312.6 grams of cocaine and $110,950 in bundled cash at various locations in the master bedroom. He was charged with possessing cocaine for the purpose of trafficking and possessing proceeds of crime.

Alberta Court of Queen's Bench

Among other things, the accused argued that the police breached his ss. 7 and 8 *Charter* rights by using a no-knock entry and by using excessive force during his arrest. In upholding the manner of the entry, the judge concluded the police had reasonable grounds to be concerned about officer safety and the preservation of evidence:

- The police conducted two risk assessments relative to the manner of entry in accordance with established protocol;
- The police considered whether less drastic forms of entry would achieve their objectives regarding officer safety and preserving evidence;
- Following an investigation, the police reasonably believed that the accused's residence was being used to store and distribute illicit drugs;
- There were multiple warrants being executed on the same morning increasing the risk of someone alerting the accused and thereby jeopardizing officer safety and the preservation of evidence; and
- The presence of weapons was not uncommon in drug investigations and the individuals under investigation had ties to an organized crime group with a history of violence.

The judge also found the force used during the arrest was reasonable. He stated:

> I accept the evidence of [the officer] that the [accused] maintained his hands in a clenched fist notwithstanding the repeated directions to the contrary given during the course of the arrest. In my view, the minimal force used by [the officer] was objectively reasonable under the circumstances. [The officer] struck the [accused] once with an open hand in each of the three instances when the [accused] failed to comply with a direction to unclench his fists. On each occasion, the force was measured and modest and immediately resulted in compliance. He used an open-hand stun technique, once to the head and twice to the shoulder blades, to secure compliance. There is no evidence that the [accused] sustained any injury as a result of these stun techniques. Indeed, he offered no evidence as to the amount of force employed or the impact of such force. ...
>
> In my view, the amount of force employed was objectively reasonable in each instance given the circumstances confronting [the officer] at the time. As such, I find that the force employed to affect the arrest of the [accused] was in accordance with s. 25 of the Criminal Code. Having found that the amount of force employed to effect the arrest was reasonable, I am not satisfied that the [accused] has established a breach of either ss. 7 or 8 of the Charter on that basis. ... [*R. v. Chang*, 2017 ABQB 348 at para. 128]

The accused failed to establish a breach of either ss. 7 or 8 as a result of the forced entry into his residence nor did he establish a s. 7 breach on the basis that the police used excessive force in effecting his arrest. The evidence was admitted and the accused was convicted of possessing cocaine for the purpose of trafficking and sentenced to four years' in prison.

Alberta Court of Appeal

The accused contended, in part, that the trial judge erred in not finding his ss. 7 and 8 *Charter* rights had been breached by the manner of the police search and arrest. In his view, the police did not have reasonable grounds to execute a **"no-knock entry"** and in doing so, violated his s. 8 *Charter* right to be secure from unreasonable search and seizure. Moreover, he suggested that the force used against him was unnecessary, excessive and gratuitous.

"A search is only reasonable where it is authorized by law, where the authorizing law is itself reasonable, and where the search was conducted in a reasonable manner."

"[T]o substantiate 'exigent circumstances', the Crown must provide evidence showing that the police had 'reasonable grounds to be concerned about the possibility of harm to themselves or occupants, or about the destruction of evidence'."

Manner of Search

The Court of Appeal upheld the trial judge's finding that the **"no-knock entry"** was reasonable. ***"A search is only reasonable where it is authorized by law, where the authorizing law is itself reasonable, and where the search was conducted in a reasonable manner,"*** said Justices Schutz and Antonio for the unanimous Appeal Court.

Unless there are "exigent circumstances", the police must knock and announce before forcing entry into a dwelling house. When a "no-knock" or "hard entry" is conducted, the Crown bears the onus of demonstrating necessity. ***"Specifically, to substantiate 'exigent circumstances', the Crown must provide evidence showing that the police had 'reasonable grounds to be concerned about the possibility of harm to themselves or occupants, or about the destruction of evidence',"*** said the Court of Appeal. ***"The decision by the police must be judged by what was or should reasonably have been known at the time [and] the police must be afforded some latitude in the manner in which they choose to enter the premises."***

The factors the trial judge identified in concluding that the police had reasonable grounds to be concerned about officer safety and the preservation of evidence were entitled to deference. He made no errors of law or principle and his assessment and determination was reasonable.

Force Used During Arrest

The accused's contention that the trial judge erred in failing to find that the police had used excessive force in effectinghis arrest, thereby breaching ss. 7 and 8 of the *Charter,* was also rejected. The open-handed strike to the accused's head and two to his shoulders were not unnecessary.

"Section 25(1) of the Criminal Code ... provides that police officers may, in effecting an arrest, '[use] as much force as necessary'," said Justices Schutz and Antonio. ***"Similar language is found in s 12 of the CDSA which authorizes officers to use 'as much force as is necessary in the circumstances' when executing a CDSA search warrant."*** They continued:

> [I]n assessing whether or not a police officer has acted within the limits of the law, the Crown must demonstrate that the officer:
>
> (i) was required or authorized by law to perform an action in the administration or enforcement of the law;
>
> (ii) acted on reasonable grounds in performing that action; and
>
> (iii) did not use unnecessary force. [para. 94]

Here, the accused argued the force used was unnecessary. Noting the applicable standard is ***"whether the application of force was objectively reasonable in the circumstances"***, the Court of Appeal concluded the trial judge did not err in so finding:

> The trial judge accepted the evidence of [the officer] over the evidence of the [accused] where the evidence conflicted, and found that the [accused] had his hands clenched as he approached [the officer], thus prompting a single open-handed strike to the [accused's] head forcing him to the ground. The [accused] then brought his right hand behind his back, also clenched, and ignored [the officer's] instructions to unclench it, thus provoking a second strike to his shoulder blades. The same thing occurred with the [accused's] left hand, prompting the third and final strike. [The officer] perceived the clenched fists as "a threatening gesture" and the open-handed strikes were a "stun technique" employed to secure compliance. In short, [the officer's]

> application of force was in direct response to a perceived threat which could not be resolved through verbal commands due to the [accused's] non-compliance.
>
> While the perceived threat can arguably be characterized as modest, the trial judge found that the responding amount of force used was also "measured and modest". He also noted that the [accused] did not sustain any injuries as a result. In light of these facts, the trial judge concluded that the amount of force used was objectively reasonable in the circumstances.
>
> In our view, the trial judge committed no error, much less a palpable and overriding error. Even if it can be said that [the officer] used more force than was strictly necessary, police officers are not required to use the least amount of force necessary to achieve a desired result. They must be afforded a degree of latitude with respect to their judgment of the degree of force necessary in the exigency of the moment. As the Supreme Court cautioned in *R. v Nasogaluak* [2010 SCC 6], "[p]olice actions should not be judged against a standard of perfection". [some references omitted, paras. 96-98]

The no-knock entry was reasonable in the circumstances, as was the officer's use of force during the arrest. The accused's appeal was dismissed.

Complete case available at www.canlii.org

Editor's Note: Additional details taken from *R. v. Chang*, 2017 ABQB 348.

RESIDENTIAL ENTRY LAWFUL DUE TO SAFETY CONCERNS

R. v. Okemow, 2019 MBCA 37

After consuming alcohol and drugs, three men left the second floor of a rooming house where they became involved in a verbal confrontation with the accused and two other men. The accused and associates had been drinking in the main floor and yard of the rooming house. After the confrontation, the three men left and were walking to a beer vendor. As they were walking on the sidewalk, someone fired shots at them. One of the men was hit and died of a single gunshot wound to the base of his head. Another man sustained a gunshot wound to his leg while the third man was able to escape unharmed.

Shortly after the shooting police responded to a 911 call. They attended the scene and found a bullet casing across the street from where the deceased was located. Later that day the police received two calls relating to a male being sighted with a gun. Each of these calls reported the sightings to be within the direct vicinity of each other and in the area where the earlier shooting had occurred. When responding to the second gun sighting call, the police observed the accused outside of, and entering into, a residence. He was acting suspiciously. He appeared to be trying to hide something behind his back. He was shuffling sideways on the landing and entering the residence without turning his back to police.

The police attended the residence and were allowed entry. The accused and a number of other individuals were inside. As a result of further police investigation, the accused was detained and the residence was cleared. A live bullet was located on the stairs to the basement and a rifle with a casing inside it was found in the basement. Police also located a sawed-off, 12-gauge shotgun in the basement. Although documents relating to several other people were found in the residence, no documents related to the accused were found. Nor did the accused have a key on him when he was arrested. He was subsequently charged with second degree murder and attempted murder.

Manitoba Court of Queen's Bench

The accused argued, among other things, that the search of his residence breached his s.8 *Charter* right to be free from unreasonable search and seizure. The judge found the accused did not have standing to bring a s. 8 application. The landlord said that the residence had been leased to another individual and the names of other people allowed to live at

the residence were set out in the lease agreement, But the accused's name was not included on the list. Further, the landlord did not know the accused or of his presence at the residence, nor had he given the accused a key.

And, even if the accused did have standing, the judge found the police search lawful. Although the search was warrantless and therefore presumptively unreasonable, it was authorized under the common law. The police were dealing with ***"an unknown, unpredictable, and potentially dangerous situation"***, and it was reasonable for them to search the residence for other persons pursuant to their common law duty to keep the peace and preserve life. In addition, the search was carried out in a reasonable manner. Finally, even if the search was unreasonable, the admission of the evidence would not bring the administration of justice into disrepute. The accused was convicted by a jury of second degree murder and attempted murder in relation to the shooting.

Manitoba Court of Appeal

The accused argued, in part, that the police violated his rights under s. 8 when they conducted a warrantless search of the residence in which he was located. He submitted that the trial judge erred in concluding that he did not have standing to assert a s. 8 breach, that the search was lawful, and that the evidence should not have been excluded under s. 24(2).

Standing?

Before a court determines whether a search was unreasonable under s. 8 of the *Charter*, an accused must first establish standing to argue one's case. To do this, an accused must demonstrate that they had a reasonable expectation of privacy in the place searched or the item seized. In determining whether an accused has a reasonable expectation of privacy, a court will examine the totality of the circumstances. This includes an accused's subjective expectation of privacy along with the objective reasonableness of that expectation.

In this case, Justice Cameron, speaking for a unanimous Court of Appeal, ruled that while the accused had a subjective expectation of privacy in the residence he had not established that his expectation of privacy was objectively reasonable.

Although the accused was present at the time of the search and appeared to exercise some degree of control over the residence by allowing the police entry, he was not the owner of the residence, did not lease it, and was not listed on the lease as a person who was permitted to reside there. The landlord also testified that he did not know the accused nor had he ever met him. The landlord had not given the accused a key to the residence and did not receive any rent money from him. As well, the accused was not in possession of a key to the property upon his arrest and there was no evidence of the accused's historical use of the property nor any evidence as to where he lived.

The trial judge had rejected the accused's argument that he had the authority to admit or exclude others because he had opened the door when police arrived. The trial judge accepted the evidence of a police officer, who testified that the accused told him that he stayed at the residence but that he did not live there. Since the accused did not have a reasonable expectation of privacy in the residence he had no standing to make a s. 8 application.

Was the Search Lawful?

Even if the accused had standing under s. 8, Justice Cameron would have found the search of the residence lawful and reasonable. Here, the search of the residence for other people, including the owners or anyone who might be injured or in possession of a gun, was lawful pursuant to the common law duty and corresponding authority of the police to keep the peace and preserve life. The trial judge conducted a thorough review of the law and did not err in concluding that the police were acting in response to a real public safety concern. The police actions were justifiable and supported by the evidence. The police had reasonable grounds to search for people in the residence due to safety concerns.

Exclusion of Evidence

Since the search was reasonable, it was not necessary to conduct a s. 24(2) analysis.

The accused's appeal was dismissed.

Supreme Court of Canada

The accused sought leave to appeal the Manitoba Court of Appeal judgment but his application was dismissed (December 5, 2019).

Complete case available at www.canlii.org

EVIDENCE EXCLUDED DUE TO CHARTER BREACHES: ACCUSED ACQUITTED

R. v. Moyles, 2019 SKCA 72

The Canada Border Services Agency (CBSA) intercepted two boxes at the Vancouver International Airport, which were shipped from China and destined to "Bryan" at a residential address in Estevan, Saskatchewan. The packages were labelled as containing peppermint oil but when opened were found to contain six plastic bottles containing GBL, a precursor used to produce a date rape drug. GBL is not a controlled substance under the *Controlled Drugs and Substances Act* (*CDSA*) and therefore it is not an offence to possess or traffic in it. It is as a precursor, however, an offence to import or export it. The CBSA turned the boxes over to the police.

A telephone number on the packing slip had an Alberta area code and belonged to Bryan Moyles. A vehicle parked in the driveway with an Alberta licence plate displayed a "Team Industrial Services" logo. Bryan Moyles' Facebook page disclosed he worked at a business called "Team Industrial Services" and had friends in Estevan. The police decided to make a **"controlled delivery"**.

Police swore two Informations to Obtain (ITO). One ITO supported a general warrant under s. 487.01 of the *Criminal Code* authorizing the police to install and monitor the box alarms and to enter the house after a box alarm was triggered. A second ITO supported a warrant under s. 11 of the *CDSA* authoring entry, search and seizure. Both ITOs said the affiant had reasonable grounds to believe the accused had committed or would commit one or more of three offences relating to GBL: importing, possession for the purpose of trafficking, and conspiracy to commit these offences. Both warrants were issued for a seven-day period to afford police a reasonable time frame to allow for the delivery of the package.

"Gamma-Butyrolactone (GBL) is a precursor chemical for Gamma-Hydroxybutyrate (GHB), which is often used for drug-facilitated sexual assaults."

Source: Public Safety Canada, Canada-United States Border Drug Threat Assessment

Covert alarms were installed in each box and the six bottles of GBL were replaced with six bottles of water, one of which contained a small vial of GBL. An undercover operator posing as a Purolator courier delivered the boxes to the house. A person who identified himself as Bryan Moyles answered the door, showed identification, and signed for the delivery. After a minute or two, the police received notification from one of the box alarms that a package had been opened. They knocked and, receiving no answer, broke open the front door. The accused, who was coming down the stairs, was arrested. However, he was not provided access to duty counsel until more than two hours after his arrest. He subsequently provided a warned statement after speaking to a lawyer. He initially denying knowledge of the boxes but then admitted they belonged to him and that he had received a similar shipment before.

Saskatchewan Provincial Court

The accused asserted that both warrants were invalid and, among other things, his ss. 8 and 10(b) *Charter* rights had been violated. He wanted both the evidence seized from his residence and his warned statement excluded under s. 24(2). The judge found the

accused's s. 10(b) *Charter* right to counsel had been infringed because of an unreasonable delay (one hour and 45 minutes) in providing the accused access to counsel after safety concerns had been addressed. However, the judge admitted the accused's statement.

As for the search warrants, the judge held they were both valid. And, even if the warrants were invalid, the evidence was nevertheless admissible under s. 24(2). The accused was convicted of importing a precursor under the *CDSA* and two *Customs Act* offences, unlawfully importing goods and smuggling. He was given a six-month conditional sentence order.

Saskatchewan Court of Appeal

The accused argued that both warrants were invalid because the general warrant did not authorize the controlled delivery. Therefore, the search of the house was warrantless, breached s. 8 of the *Charter* and the evidence ought to have been excluded under s. 24(2). He wanted his convictions quashed and verdicts of acquittal entered. In the alternative, he sought an order directing a new trial.

The General Warrant

Although the ITO for the general made it clear that its central purpose was to obtain authorization to carry out the controlled delivery, the general warrant itself did not contain such or similar language. Rather, ***"[the general warrant] authorized the police to install and maintain box alarms,"*** said Justice Barrington-Foote. ***"It says entry into and a search of the 'the location' where 'the package' is delivered to is not authorized until there were reasonable grounds to believe [the accused] and/or unknown persons are or have been in possession of the package. It refers to the possibility the alarm may be activated. However, it does not refer to the delivery of the package by a peace officer at all."*** Nor did the Crown argue that the general warrant implicitly authorized the controlled delivery. Since the general warrant did not authorize the controlled delivery, it was invalid.

The CDSA Warrant

The Court of Appeal found the *CDSA* warrant was valid despite the general warrant not authorizing the controlled delivery:

> The CDSA ITO and warrant contain some of the same information as the general warrant ITO and general warrant but were by no means the same. Unlike the general warrant ITO, the CDSA ITO did not seek authority for the controlled delivery. Unlike the general warrant, the CDSA warrant did not say the police could not search the house until an alarm was triggered or there was evidence of actual possession of the package. It said there were reasonable grounds to believe evidence was at the house and authorized entry, and the search for and seizure of that evidence.
>
> However, the CDSA ITO fully disclosed the link between the general warrant and the CDSA warrant. It too described the proposed controlled delivery, step by step, but for the step that involved the removal and replacement of most of the GBL. In particular, it said the investigation would include the following steps:
>
> > … "The package" will be delivered to Bryan Moyles or the occupant of "the location" by a peace officer posing as a delivery person. The intrusion alarm within "the package" will alert peace officers when "the package" has been opened by the recipient. Peace officers will enter "the location" to arrest occupants within for "the offences" named in this information.
>
> [paras. 37-38]

Rather than the unauthorized controlled delivery rendering the *CDSA* warrant invalid, the references to the controlled delivery and to the general warrant could be excised from the *CDSA* ITO.

The trial judge had concluded there were reasonable grounds to believe an importation offence had occurred and that that Bryan Moyles was a party to that offence. As well, the trial judge found the *CDSA* warrant did not authorize an anticipatory search. There were sufficient reasonable grounds to believe there would be evidence related to unlawful importation in the house. However, the *CDSA* warrant was valid only

BY THE BOOK:

Controlled Drugs & Substances Act

Seizure of things not specified

s. 11 (6) A peace officer who executes a warrant issued under subsection (1) may seize, in addition to the things mentioned in the warrant,

(a)any controlled substance or precursor in respect of which the peace officer believes on reasonable grounds that this Act has been contravened;

(b) any thing that the peace officer believes on reasonable grounds to contain or conceal a controlled substance or precursor referred to in paragraph (a);

(c) any thing that the peace officer believes on reasonable grounds is offence-related property; or

(d) any thing that the peace officer believes on reasonable grounds will afford evidence in respect of an offence under this Act.

to the extent it authorized a search for notes, address books, contents of telecommunications devices, and records of telephone numbers. It did not authorize the search for the boxes or the GBL. In coming to his conclusion, the trial judge did not err in law, misapprehend the evidence or fail to consider relevant evidence. His findings were owed deference and there was no basis to interfere with his decision that the evidence disclosed reasonable grounds to believe the offence of importing GBL had occurred and that evidence of that offence would be obtained by searching the house. This was so even after reviewing the ITO as edited without reference to the controlled delivery or the general warrant.

Did the Search Breach s. 8?

The Crown bears the burden of demonstrating a warrantless search is authorized by a reasonable law and is carried out in a reasonable manner. The controlled delivery was a warrantless search that could not be justified under the common law "implied licence to knock" doctrine as the Crown suggested. Thus, the controlled delivery was an unreasonable search which breached the accused's s. 8 *Charter* right.

However, the search of the house was authorized by the *CDSA* warrant. Although ***"the only evidence found at the house that fell within the limited scope of the CDSA warrant specified by the trial judge was a note of an unidentified Chinese address found in [the accused's] room"***, the rest of the evidence found was properly seized under s. 11(6) of the *CDSA*. This provision allows the police to seize, while executing a s. 11(1) warrant, anything else they believe on reasonable grounds would afford evidence in respect of an offence under the *CDSA*. ***"I am aware of no authority that would support the conclusion that these provisions would not authorize the seizure of the boxes and GBL at the house,"*** said Justice Barrington-Foote. ***"The seizure of the other evidence found in the house was accordingly lawful."***

s. 24(2) *Charter*

The Court of Appeal found the trial judge erred in his s. 24(2) analysis and therefore a fresh admissibility determination was required. As for the **Charter-infringing police conduct** in relation to the s. 8 and s. 10(b) breaches, it was serious and strongly favoured exclusion of evidence. As was the impact on the accused's **Charter-protected interests**. Both the delay in implementing his s. 10(b) right to counsel and the impact of the s. 8 breach in relation to his home, where he enjoyed the highest expectation of privacy, seriously impacted the accused and strongly favoured excluding the evidence. Finally, these factors could not be outweighed by the reliability of the evidence and its necessity to the Crown's case. As a result, the Court of Appeal excluded the accused's warned statement; the fact he identified himself and signed the delivery slip, took delivery of the boxes, and that a box alarm was triggered shortly thereafter; and the boxes and other items in the house. As a result, there was insufficient evidence to support a conviction.

The accused's appeal was allowed, his conviction was set aside and an acquittal was entered.

Complete case available at www.canlii.org

UPCOMING EXTERNAL LEARNING OPPORTUNITIES

OSGOODE
OSGOODE HALL LAW SCHOOL
PROFESSIONAL DEVELOPMENT

13th Annual Intensive Course on Drafting and Reviewing Search Warrants

March 2, 2020 Optional Workshop: March 3, 2020
In Person or Webcast Click here.

17th National Symposium on Search and Seizure Law in Canada

March 27, 2020
Online Replay Click here.

13th National Symposium on Tech Crime and E-Evidence

April 3, 2020
In Person or Webcast Click here.

National Symposium on Sexual Assault Cases in the Criminal Court

April 25, 2020
In Person or Webcast Click here.

BC's MINISTRY OF PUBLIC SAFETY RELEASES POLICE DOG STATISTICS

In November 2019 the Policing and Security Branch of BC's Ministry of Public Safety and Solicitor General released data reported to the Director of Police Services on the use of police services dogs (PSD) for **2018**.

2,368 The total number of PSD **locations, apprehensions and arrests**. This included 1,739 by the RCMP and LMIPDS followed by the Vancouver Police (522), Victoria Police (53), Saanich Police (32) and West Vancouver Police (22).

-15% change over 2017

373 The total number of **subjects bitten** by a PSD. A bite is defined as ***"a police dog's use of mouth and teeth to grab or hold a person's body or clothes"***. The RCMP and LMIPDS accounted for 248 bites, followed by Vancouver (111), Victoria (11) and West Vancouver (3). There were five non-subject civilians and seven non-subject police officers bitten.

+14% change over 2017

5,055 The total number of **tracks or searches for suspects**. This included 3,707 by the RCMP and LMIPDS. Vancouver (1,118), Victoria (120), Saanich (71) and West Vancouver (39) followed.

-9.5% change over 2017

1,668 The total number of **apprehensions by bite or display**. There were 1,047 apprehensions made by the RCMP and LMIPDS, while Vancouver made 526, followed by Victoria (54), West Vancouver (22) and Saanich (19).

0% change over 2017

229 The total number of tracks or searches for missing persons.

Abbotsford, Delta, New Westminster, and Port Moody form part of the RCMP Lower Mainland Integrated Police Dog Service (LMIPDS).

348 The total number of **searches for drugs**. This included 332 by the RCMP and LMIPDS followed by Victoria (8) and Vancouver (8).

-4.1% change over 2017

267 The total number of **searches for explosives or firearms**. There were 190 by the RCMP and LMIPDS, while the Transit Police made 33 followed by Vancouver (28) and Victoria (16).

-41% change over 2017

1,529 The total number of **searches for evidence**. This included 1,466 by the RCMP and LMIPDS followed by Vancouver (32), Victoria (23), West Vancouver (5) and Saanich (3).

+23% change over 2017

The RCMP used a PSD twice for **crowd control** and a PSD was used for **community relations or other events** a total of 310 times by all agencies.

See the complete statistical report here.

BC's INTERMEDIATE WEAPON USE STATISTICS RELEASED

In November 2019 the Policing and Security Branch of BC's Ministry of Public Safety and Solicitor General also released the intermediate weapon use and firearm discharge data reported by BC police agencies for 2018.

59 The total number of **Extended Range Impact Weapon** (ERIW) discharges by police (number of subjects). This is up from 41 in 2017 and 39 in 2016.

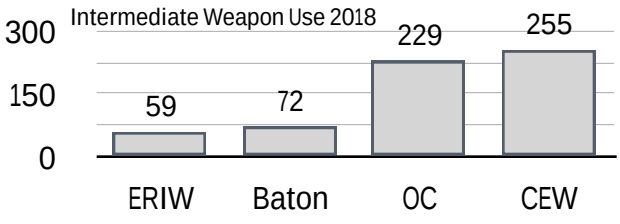
POLICE AGENCY - 2018	ERIW DISCHARGES (NUMBER OF SUBJECTS)
Vancouver	27
RCMP	11
Abbotsford	10
Victoria	5
New Westminster	3
Delta	2
Port Moody	1

72 The total number of **Baton Applications** by police (number of subjects).This is down from 89 in 2017 and 92 in 2016.

POLICE AGENCY - 2018	BATON APPLICATIONS (NUMBER OF SUBJECTS)
Vancouver	35
RCMP	11
Metro Vancouver Transit	7
West Vancouver	6
Abbotsford	5
Victoria	4
Delta	2
Port Moody	1
Stl'atl'imx Tribal	1

255 The total number of **Conducted Energy Weapon (CEW) Discharges** by police (number of subjects). This is up from 252 in 2017 and 222 in 2016.

POLICE AGENCY - 2018	CEW DISCHARGES (NUMBER OF SUBJECTS)
RCMP	181
Vancouver	47
Victoria	11
Saanich	3
Nelson	2
New Westminster	2
Metro Vancouver Transit	2
West Vancouver	2
Abbotsford	1
Delta	1
Oak Bay	1
Port Moody	1
Stl'atl'imx Tribal	1

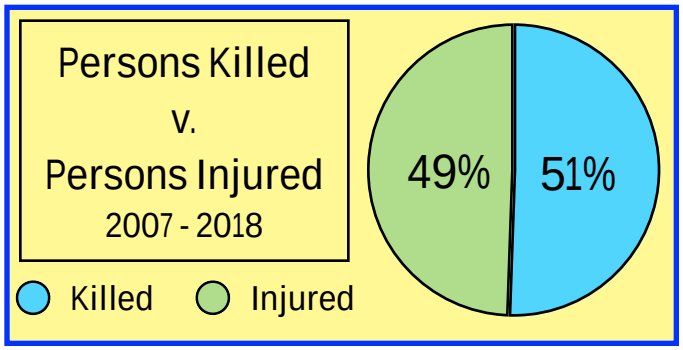


229 The total number of **Oleoresin Capsicum (OC) Spray Discharges** by police (number of subjects). This is up from 206 in 2017 and 224 in 2016.

POLICE AGENCY - 2018	OC DISCHARGES (NUMBER OF SUBJECTS)
RCMP	141
Vancouver	39
Victoria	22
Abbotsford	13
Metro Vancouver Transit	4
Saanich	3
West Vancouver	3
Port Moody	2
New Westminster	1
Oak Bay	1

POLICE FIREARM DISCHARGES

5 The total number of **Firearm Discharge** incidents by police in an operational setting in 2018. Three people were killed and one was injured. All of these incidents involved the RCMP. This is down from 14 in 2017 and nine (9) in 2016. This is the lowest number on record since 2007. On average, there were 12.5 firearm discharges incidents per year from 2007 to 2018. During this same time period, there were fewer than four (4) deaths per year ranging from a low of zero (0) in 2008 to a high of eight (8) in 2009.



Police Firearm Discharge Incidents By Agency

Police Agency	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	Total
Abbotsford	-	1	-	-	1	-	-	-	-	-	1	-	3
Metro Van. Transit	-	-	-	-	-	-	-	2	-	-	-	-	2
New Westminster	-	1	1	-	-	1	-	-	-	1	-	-	4
Port Moody	-	-	1	-	-	-	-	-	-	-	-	-	1
Vancouver	3	-	3	-	2	1	1	4	1	3	1	0	19
Victoria	1	-	1	-	-	-	-	1	-	-	-	-	3
West Vancouver	-	-	-	1	-	-	-	-	-	-	-	-	1
RCMP	12	11	20	8	6	8	9	10	11	5	12	5	117
Total	16	13	26	9	9	10	10	17	12	9	14	5	150
Persons-Killed	4	-	8	3	4	4	1	6	7	4	2	3	46
Persons-Injured	3	5	9	2	1	2	4	4	4	5	5	1	45

Central Saanich, Delta, Nelson, Oak Bay, Saanich and Stl'atl'imx Tribal police agencies recorded no police firearm discharge incidents during this period.

BC COURT OF APPEAL RULES MLACMA PROVISION UNCONSTITUTIONAL

R. v. Rajaratnam, 2019 BCCA 209

BC's top court has ruled that s. 36 of the *Mutual Legal Assistance in Criminal Matters Act* (*MLACMA*) is unconstitutional at least in so far as it related to criminal matters. The Crown sought the admission of travel history printouts for the accused and another man ***"to prove: (a) when the person whose name appears on the document entered or departed from Thailand; (b) the passport the person used; (c) the visa used (if any); (d) where the entry or departure occurred (e.g., airport or checkpoint); and (e) in the case of air travel, the flight on which the person arrived or departed."***

Section 36 would allow the Crown to tender a foreign document containing hearsay (such as the travel history printout) for the truth of its contents without the need to establish the evidence falls within a recognized exception to the hearsay rule or met the requirements of the principled approach to the hearsay rule. Hearsay evidence may be admitted under the principled approach if indicia of reliability and necessity are established at a *voir dire*. Under s. 36, necessity and reliability have no application. The Crown only need establish the document was obtained in response to a mutual legal assistance request.

After examining the traditional and principled approaches to the admissibility of hearsay, the Court of Appeal found the Crown could not rely on s. 36 for the admission of hearsay evidence at a criminal trial because it was not consonant with the principled approach. ***"[Section] 36 fundamentally alters the rules governing the admissibility of hearsay in a manner that is inconsistent with an accused's right to a fair trial,"*** said the Court of Appeal. It found the provision infringed ss. 7 and 11(d) of the *Charter* which the Crown did not seek to justify under s. 1. Section 36 was declared of no force or effect with respect to evidence tendered by the Crown in a criminal trial.

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

BY THE BOOK:

Mutual Legal Assistance in Criminal Matters Act

Foreign Records

s. 36 (1) In a proceeding with respect to which Parliament has jurisdiction, a record or a copy of the record and any affidavit, certificate or other statement pertaining to the record made by a person who has custody or knowledge of the record, sent to the Minister by a state or entity in accordance with a Canadian request, is not inadmissible in evidence by reason only that a statement contained in the record, copy, affidavit, certificate or other statement is hearsay or a statement of opinion.

Probative Value

(2) For the purpose of determining the probative value of a record or a copy of a record admitted in evidence under this Act, the trier of fact may examine the record or copy, receive evidence orally or by affidavit, or by a certificate or other statement pertaining to the record in which a person attests that the certificate or statement is made in conformity with the laws that apply to a state or entity, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the state or entity, including evidence as to the circumstances in which the data contained in the record or copy was written, stored or reproduced, and draw any reasonable inference from the form or content of the record or copy.

MORE ON HEARSAY

- Hearsay evidence is an out-of-court-statement (oral or documentary) tendered for the truth of its contents.
- Hearsay evidence is presumptively inadmissible unless it falls within an exception to the hearsay rule (common law or statute). Traditional exceptions to the hearsay rule remain presumptively in place.

- A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
- In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
- If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.
- The onus is on the party tendering hearsay evidence that does not fall within one of the traditional exceptions to establish the necessity and reliability criteria on a balance of probabilities.
- A trial judge has a residual discretion to exclude hearsay evidence even if necessity and reliability have been shown if its prejudicial effect outweighs its probative value.

See: *R. v. Rajaratnam*, 2019 BCCA 209

POLICE AREA-ENTRY SEARCH JUSTIFIED AT COMMON LAW

Langenfeld v. Toronto Police Services Board, 2019 ONCA 716

The Toronto Police Chief instituted a new protocol at police headquarters requiring any non-police personnel entering the building for any reason at the public entrance, with certain exceptions, to pass through security screening. The process consisted of special constables wanding persons entering the building with a metal detector and visually examining the contents of any purses or bags in their possession. The bags were examined for dangerous items such as knives or other weapons. There was also an ***"amnesty box"*** available for persons entering the building to place items they had with them that they were concerned may pose a problem in the search. If the person placed an item in the amnesty box before being searched, there would be no consequences but the person would not be allowed to retrieve the item.

A Toronto resident who regularly attended Toronto Police Services Board (TPSB) meetings refused to pass through security at the entrance. He was denied entry into the building and could not attend the TPSB meeting. He brought an application seeking a court injunction ordering the Police Chief to discontinue the screening process. He alleged that the Police Chief had no authority to institute the screening process. He further argued that the process infringed his right of freedom of expression under s. 2(b) of the *Charter* and violated the TPSB's statutory obligation to hold its meetings in public. In his view, the Police Chief had no lawful authority to subject persons who wished to attend the TPSB public meetings to warrantless searches for which there were no reasonable and probable grounds.

Ontario Superior Court of Justice

A judge held that the security measures applied to persons wishing to attend TPSB public meetings infringed s. 2(b) of the *Charter*. First, the applicant's attendance at the TPSB public meeting to listen and perhaps speak constituted expressive conduct. Second, this expressive conduct should not be excluded from the protection of s. 2(b). It was not violent, did not threaten violence and occurred in an area typically permitted public access. Finally, the security protocol limited the applicant's s. 2(b) rights by imposing a precondition on his attendance at the meetings that required him to give up aspects of his personal privacy by submitting to a warrantless search, unsupported by any grounds.

The judge further held that the security process was not prescribed by law and therefore any infringement of s. 2(b) could not be justified under s. 1 of the *Charter*. Although she accepted that the Police Chief could, at common law, impose preconditions to entry, the Police Chief's common law powers qua occupier did not extend to warrantless searches conducted without grounds on persons seeking entry to attend TPSB public meetings. Nor was there any statutory authority that

permitted the searches. The judge declared the practice of searching persons wishing to attend public TBSB meetings prior to entry to police headquarters in the absence of a warrant or reasonable and probable grounds a s. 2(b) infringement that could not be justified under s. 1 since the security protocols were not prescribed by law.

Ontario Court of Appeal

The Police Chief, supported by the TPSB, argued the screening process did not limit the applicant's s. 2(b) right. And, in any event, it was submitted that if the applicant's s. 2(b) right was limited, the limit was prescribed by law and justified under s. 1 of the *Charter*.

s. 2(b) *Charter*

Section 2(b) of the *Charter* states: ***"Everyone has the following fundamental freedoms: ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."***

Justice Doherty, authoring the Appeal Court's decision, found the application judge correctly concluded that the screening procedure was a *prima facie* infringement of the applicant's s. 2(b) rights. Although not every precondition to the exercise of freedom of expression will necessarily limit the exercise of that right, the security protocol in this case did limit the applicant's right. It was not a trivial or insubstantial precondition:

> [A] precondition to the exercise of one's right to freedom of expression can be described as trivial or insubstantial only if it has a truly minimal impact on the exercise of that right. For example, a requirement that persons wishing to attend a meeting of the TPSB enter through a designated entrance at Police Headquarters and assemble in a specified area at least 15 minutes before the scheduled commencement of the meeting would be the kind of logistical precondition that would not be viewed as a limit on s. 2(b).
>
> The precondition imposed on [the applicant's] exercise of his right to freedom of expression was not trivial or insubstantial. It required him to submit to a search of his person and personal belongings as a precondition to exercising his right to express himself by attending the meeting. While the security search was not as intrusive as many searches, it remained a very real interference with personal privacy and personal security. Simply because such searches have become common in today's world does not mean that their impact on personal privacy and security has become trivial or insignificant. [paras. 31-32]

The Court of Appeal also rejected arguments that the applicant was obliged to demonstrate that the security protocol imposed a substantial interference on his right to freedom of expression or that the preconditions needed to affect **"expressive content"** of the activity to limit the exercise of the freedom of expression. ***"A precondition that effectively dissuades individuals from engaging in expressive activity in which they would otherwise have engaged is surely as much a limit on freedom of expression as is one that limits the content, time, place or manner of expression,"*** said Justice Doherty. ***"[The applicant] could not express himself by attending the meeting of the TPSB without first yielding other personal rights and submitting to the security protocol and the personal intrusions that protocol involved."*** Nor did the availability of other means of participating in the TPSB meetings, such as making written submissions or watching the proceedings on YouTube, effectively eliminate the limitation imposed by the security protocol on the applicant's s. 2(b) right.

s. 1 Justification - Prescribed by Law

The Court of Appeal, however, concluded that the application judge erred in holding that the screening process was not prescribed by law and was not justified within the meaning of s. 1 of the *Charter*. In Justice Doherty's view, the searches were authorized by the Police Chief's **common law power**, as an occupier of police headquarters, and **the duties imposed on him** as an occupier by the *Occupiers' Liability Act*.

"[The Police Chief's] common law authority to control access to Police Headquarters to ensure the safety of persons in the building flows not from any police power, but from his status as an occupier. In imposing a precondition to entry for safety purposes, [the Police Chief] is performing the duty imposed on him as an occupier under s. 3(1) of the OLA. That same obligation and the same common law power applies to all occupiers who are subject to the OLA. [The Police Chief's] status as a government actor is irrelevant to the nature and scope of his common law powers as an occupier of Police Headquarters."

As the occupier of Police Headquarters, the Police Chief had the responsibility for, and control over, the conditions of the building and any activities in it. Under the *OLA* he was statutorily required ***"to take such care, as in all of the circumstances was reasonable, to ensure that persons entering or using the property were 'reasonably safe while on the premises'."*** At common law, he also had the powers to take the steps necessary to comply with the duty imposed on him by *OLA*. These powers extended ***"to excluding persons from the property, removing persons from the property, and imposing terms and conditions on persons while they are on the property"***:

> The common law authority of an occupier in respect of the property must extend to taking the steps necessary to comply with the statutory duty imposed on the occupier by s. 3(1) of the OLA. It cannot be that the occupier has a duty to take reasonable steps to protect persons on the property, but no power to take those steps. Those steps may include the imposition of preconditions to entry, such as a security screening, if the precondition is reasonable and connected to maintaining the safety of persons on the property. [reference omitted, para. 59]

And further:

> [The Police Chief's] common law authority to control access to Police Headquarters to ensure the safety of persons in the building flows not from any police power, but from his status as an occupier. In imposing a precondition to entry for safety purposes, [the Police Chief] is performing the duty imposed on him as an occupier under s. 3(1) of the OLA. That same obligation and the same common law power applies to all occupiers who are subject to the OLA. [The Police Chief's] status as a government actor is irrelevant to the nature and scope of his common law powers as an occupier of Police Headquarters. His status as a government actor, however, becomes constitutionally significant if, in the exercise of those common law powers, he limits the constitutional rights of persons seeking entry to Police Headquarters. [para. 61]

Here, the Police Chief's common law powers as an occupier extended to requiring persons to pass through security screening before entering the building and provided the basis for a finding that the state action was **"prescribed by law"**. The scope of this common law authority was not vague nor was the manner in which this authority was exercised vague. There was no uncertainty as to what the security protocol required. ***"[The Police Chief] exercised his authority in a transparent manner which gave anyone seeking access to Police Headquarters advance notice of the screening process and its application to all members of the public seeking to enter the building,"*** said Justice Doherty. ***"The imposition of the screening protocol was a reasonable measure taken in furtherance of [the Police Chief's] obligation to take such measures to protect the safety of persons in Police Headquarters."***

s. 1 Justification - Reasonable Limit

In addition to being prescribed by law, the security protocol was also a reasonable limit on the applicant's right to freedom of expression. First, the safety of persons attending the police building and the safety of persons working there was a **pressing and substantial goal**. Second, there was a **rational connection** between the screening protocol and the

safety of persons in the police building. Third, the screening protocol **minimally impaired** the s. 2(b) right:

> The screening process is tailored to its objective. It does not prevent, or even meaningfully delay, anyone from entering the building and exercising their right to freedom of expression by attending the meetings of the TPSB. It does not require individuals to identify themselves or provide any information to the authorities. The process is limited to a non-intrusive investigation for potentially dangerous objects. While the process negatively impacts on personal privacy, the impact is relatively minor. There is nothing in the manner in which the protocol is implemented that could be described as discriminatory, belittling, or aimed at discouraging persons from entering Police Headquarters for whatever purpose they may have. The security protocol is no more than persons could reasonably expect to encounter when entering a building like Police Headquarters in a city like Toronto in 2019.
>
> Nor, in my view, does the minimum impairment requirement dictate that the security protocol be tailored so as to not apply to persons seeking entry to the building for the purpose of attending the meeting of the TPSB. The safety risk to which the protocol responds is in no way connected to the purpose for entry. A security protocol at the entrance of a building which allows persons to declare themselves immune from the protocol by specifying a certain purpose for entering the building, surely, has little, if any, value as a safety measure.
>
> Also, from a practical perspective, a security protocol at the entrance that exempted persons from the protocol so they could attend the TPSB meeting would, in all likelihood, impose even more restrictions on the rights of those persons than does the security protocol. Presumably, persons who avoided the security protocol by declaring an intention to attend the meeting on the second floor would have to be detained for the purpose of being escorted to the meeting. They would also be required to remain in the meeting room throughout, and would once again be detained while being escorted out of the building after the meeting. Those individuals would also be required to declare to the authorities the reason for attending at Police Headquarters, something they are not required to do under the present protocol.
>
> In my view, a security protocol tailored to exempt individuals purporting to enter Police Headquarters to go to a meeting of the TPSB would not provide effective security for the building and would in all likelihood impose more significant limit on the rights of persons attending those meetings than does the existing security protocol.
>
> The ability to view the TPSB proceedings on YouTube and to make deputations in writing also mitigates the limit on freedom of expression imposed by the screening protocol to some extent. [paras. 81-85]

Finally, the security protocol did not have a **disproportionate effect** on the s. 2(b) right. ***"In my view, the protection of the safety of all persons entering Police Headquarters or working in Police Headquarters is an important objective,"*** said Justice Doherty. ***"The protection of persons wishing to attend the meetings of the TPSB, a form of freedom of expression, also promotes the value underlying freedom of expression. Balanced against that important objective is a relatively minor limit of [the applicant's] s. 2(b) right."***

The security protocol initiated by the Police Chief was a reasonable limit on the applicant's right to freedom of expression that was demonstrably justified in a free and democratic society.

The Police Chief's appeal was allowed, the application judge's order was set aside, and an order dismissing the application was substituted.

Complete case available at www.ontariocourts.on.ca

NATIONAL POLICE WEEK

May 10-16, 2020

BC PEDESTRIAN DEATHS: 2010-2019

On December 16, 2019 the BC Coroners Service has released its Pedestrian Deaths report that summarizes all accidental, traffic related deaths occurring between January 1, 2010 and November 30, 2019. A **"pedestrian"** is defined as ***"a person involved in a motor vehicle incident who, at the time of the incident, was on foot, sitting down, or lying down on a public highway or parking lot used by the public."*** This includes skateboarders, longboarders, and rollerbladers.

Highlights

- On average there were 56 pedestrian deaths annually between **2010-2019**.
- Pedestrian deaths occurred more frequently in the fall and winter months.
- **32%** of all pedestrian deaths occurred in Vancouver, Surrey and Abbotsford.
- **58%** of pedestrian deaths involved males.
- **59%** of pedestrian deaths involved persons aged 50 or over.

Pedestrian Deaths:Top 5 Towns

Township/City	# of Deaths	% of Total
Vancouver	81	14.4%
Surrey	70	12.4%
Abbotsford	31	5.5%
Richmond	30	5.3%
Burnaby	23	4.1%
Other	326	57.9%
Total	563	100.0%

Pedestrian Deaths By Year & Sex

Year	Deaths	Female	Male
2010	60	29	31
2011	57	20	37
2012	62	28	34
2013	52	24	28
2014	54	24	30
2015	65	23	42
2016	65	31	34
2017	43	19	24
2018	56	20	36
2019 (Jan-Nov)	49	18	31
Total	563	236	327

Pedestrian Deaths By Age Group

Age	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total
0-9	3	-	-	1	1	2	-	1	-	-	8
10-18	4	4	6	3	6	3	8	-	3	2	39
19-29	14	9	6	6	4	8	8	9	8	5	77
30-39	4	9	3	6	4	2	6	5	10	9	58
40-49	7	1	6	4	3	10	5	4	5	4	49
50-59	3	11	7	11	11	11	8	3	5	7	77
60-69	5	9	7	6	4	7	11	3	5	9	66
70-79	14	7	17	3	12	9	6	10	7	6	91
80-89	6	5	9	11	9	10	10	7	11	7	85
90+	-	2	1	1	-	3	3	1	2	-	13
Total	60	57	62	52	54	65	65	43	56	49	563

ASSAULTS AGAINST PEACE OFFICERS ON THE RISE

In September 2019 BC's Ministry of Public Safety and Solicitor General Policing and Security Branch released Crime Trends data for 2009-2018. Data indicates assaults against peace officers are up from 2017 to 2018.

Assaults Against Peace Officers			
Year	2017	2018	Change
Number	1,280	1,403	+9.6%
Clearance Rate	95.5%	96.9%	+1.4%
Cleared by Charge	933	1,087	+16.5%
Cleared Otherwise	290	273	-5.9%
Persons Charged	765	864	+12.9%

Theft Under $5,000 Most Common Offence

Theft under $5,000 was the most common offence reported to BC police in 2018. This was followed by mischief, disturbing the peace, and break and enter.

2018 Top Seven BC Offences			
Offence	Number	Cleared	Persons Charged
Theft under $5,000	120,967	13,474	6,439
Mischief	45,193	9,149	1,621
Disturbing Peace	41,848	12,716	747
Break & Enter	26,161	2,709	2,343
Assault Level 1	22,245	15,015	9,204
Fraud	20,160	2,375	1,573
Administration of Justice	19,504	17,733	13,639

Crime Rates : 100,000+ Residents								
Police Jurisdiction	Population	Crime Rate**	Total Criminal Offences	Total Violent Offences	Total Property Offences	Other CC Offences	Homicides	Vehicle Thefts
Victoria	110,859	105.4	11,683	2,653	7,541	1,489	1	217
Vancouver	674,776	81.8	55,173	8,338	42,183	4,652	15	1,212
Surrey	569,389	72.9	41,530	5,953	26,166	9,411	15	2,135
Langley Township	127,954	70.4	9,011	1,092	6,146	1,773	3	565
Abbotsford	152,043	67.0	10,188	1,673	7,709	806	6	636
Kelowna	136,233	66.9	14,684	1,524	10,017	3,143	1	579
Richmond	216,300	53.7	11,622	1,525	7,977	2,120	5	348
Burnaby	248,476	52.7	13,088	1,873	10,094	1,121	2	475
Coquitlam	148,665	47.9	7,122	1,005	4,499	1,618	1	249
Delta	110,391	40.7	4,494	527	3,115	852	1	146
Saanich	122,245	38.3	4,680	940	3,343	397	1	76

** per 100,000 residents.

Homicides Drop

Homicides dropped by **25%** from 2017 to 2018. In 2017 there were **119** homicides in BC while in 2018 there were **89**.

BC's Top 10 Highest Crime Rates: 2018

Policing Jurisdiction	Crime Rate	Population
Takla Landing Prov	385.4	205
Tsay Keh Dene Prov	324.2	586
Agassiz Prov	238.5	2,964
Quesnel Mun	233.8	10,428
Terrace Mun	226.5	12,248
Williams Lake Mun	216.9	11,359
Hope Mun	185.8	6,659
Fort St James Prov	179.9	4,457
Prince Rupert Mun	169.8	12,821
Langley City Mun	166.5	27,577

RELEVANCE v. MATERIALITY

In *R. v. Adan*, 2019 ONCA 709, the Ontario Court of Appeal examined the admissibility of after-the-fact conduct and how it is to be received in court. Evidence will be admitted if it is ***"relevant, material, not contrary to any applicable admissibility rule and its probative value exceeds it prejudicial effect."*** But just what do the terms relevant and material mean? This case helps explain those words.

Relevant

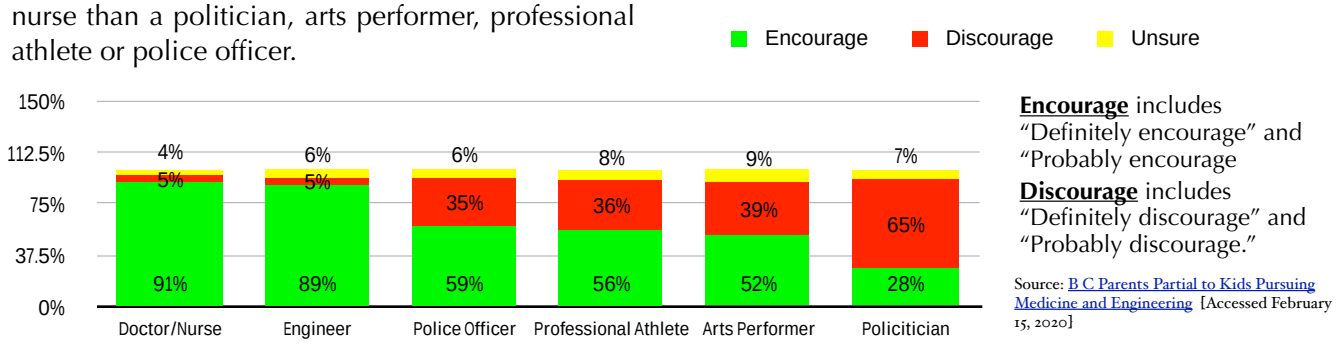
"Relevance has to do with the relationship between the item of evidence and the fact its proponent seeks to establish by its admission. Relevance is assessed in the context of the other evidence adduced, the case as whole, and the positions of counsel. Evidence is relevant if, as matter of everyday experience and common sense, it makes the fact for which it is tendered slightly more or less probable than it would be without the evidence. There are no per se or bright line rules." [reference omitted, para. 66]

Material

"Materiality is a legal concept. Evidence is material if it is offered to prove a fact in issue, as determined by the allegations in the indictment and the law governing the proceedings. Material issues at a trial are those dealing with the essential elements of the offences charged, the modes of participation relied upon, and the defences or justifications in play." [reference omitted, para. 68]

PARENTS MORE LIKELY TO ENCOURAGE CHILDREN TO BECOME DOCTORS THAN COPS

According to a poll conducted by Research Co. on career paths in British Columbia, more parents would encourage their children to be a doctor or nurse than a politician, arts performer, professional athlete or police officer.



Encourage includes "Definitely encourage" and "Probably encourage

Discourage includes "Definitely discourage" and "Probably discourage."

Source: B C Parents Partial to Kids Pursuing Medicine and Engineering [Accessed February 15, 2020]

CRIME STOPPERS RELEASES 2019 STATS

According to the Canadian Crime Stoppers Association, as of December 31, 2019 the program has resulted in the following:

- **198,570 arrests.**
- **271,915 cases cleared.**
- **$15,411,520 in rewards paid.**
- **$545,249,691 in property recovered.**
- **$3,606,954,967 in drugs seized.**

As at October 1, 2019, the Ontario Association of Crime Stoppers reported that its province accumulated the following statistics in relation to its programs:

- **125,485 arrests.**
- **133,687 cleared cases.**
- **$8,216,592 in rewards paid.**
- **$307,293,201 in property recovered.**
- **$1,928,888,072 in drugs seized.**

IIO DETERMINES WHAT 'COOPERATE FULLY' MEANS DURING INVESTIGATION

Independent Investigations Office of BC v. Vancouver (City) Police Department, 2020 BCCA 4

When several police officers responded to a robbery, one of them fatally shot a man. The Independent Investigations Office (IIO) investigated the matter. The IIO is a civilian-lead oversight agency responsible for conducting investigations into police actions resulting in death or serious bodily harm. The IIO directed several police **"witness officers"** to attend for compulsory interviews. These officers were witnesses to the incident and were not being investigated for their potential role in causing the death, unlike **"subject officers"**.

Prior to the interviews, lawyers for the witness officers asked the IIO for pre-interview disclosure. The officers wanted access to various contemporaneous records of the event such as computer assisted dispatch (CAD) entries that the officer made or was able to see during the incident; audio recordings or transcripts that the officer made or was able to hear during the incident; and video of the incident that showed events that the officer participated in or observed during the incident. The IIO refused to provide the requested disclosure, but was prepared to provide some limited materials on the day of the interview. As a result, the officers declined to be interviewed.

BY THE BOOK:

BC's *Police Act*

Officers to cooperate with independent investigations office

s. 38.101 An officer must cooperate fully with

(a) the chief civilian director in the chief civilian director's exercise of powers or performance of duties under this Act, and

(b) an IIO investigator in the IIO investigator's exercise of powers or performance of duties under this Act.

British Columbia Supreme Court

The IIO petitioned for a mandamus order compelling the witness officers to attend the IIO interviews without the pre-interview disclosure they requested. The IIO submitted that the duty to cooperate found in s. 38.101 of B.C.'s *Police Act* (*PA*) did not confer discretion on the witness officers to determine the

"The plain terms of the statute impose the duty to cooperate on police officers. The duty is owed to IIO investigators. It is a duty to cooperate fully with those investigators. It is expressed as a mandatory, not a qualified, duty. Nothing in the wording of the statute supports the inference that police officers can withhold their cooperation with the investigation, if they disagree with the terms on which it is being conducted."

terms of their cooperation. On the other hand, the witness officers contended that s. 38.101 did not empower the IIO to unilaterally impose interview terms related to disclosure that were not acceptable to witness officers.

The judge concluded that the IIO determines what **"cooperate fully"** means, not witness officers. First, a 2012 memorandum of understanding between the IIO and all BC police agencies was not legislative authority and therefore did not assist in interpreting the obligations on witness officers to "cooperate fully" with the IIO. Second, witness officers have an obligation to cooperate fully with an investigation and do not have discretion to determine the bounds of the interview process. At common law, police officers have the duty to assist in law enforcement and, as members of a self-governing profession, to cooperate with their governing bodies. The purpose of the legislative scheme was to ***"provide an independent and transparent investigative body for the purpose of maintaining public confidence in the police and the justice system along with the minimum procedural requirements expected at the investigation stage."***

The judge granted the order requiring the officers attend the interviews and respond in good faith to questions put to them by the IIO. In addition, the judge made the following declarations:

- The duty on witness officers to fully co-operate with the IIO includes the duty to attend interviews related to IIO investigations as and when the IIO directs;
- Attendance of witness officers' counsel and union representatives at IIO interviews is at the discretion of the IIO;
- The providing of pre-interview disclosure to witness officers is at the discretion of the IIO; and
- The witness officers failed or refused to comply with their statutory duty to co-operate fully with the IIO.

The witness officers complied with the judge's order and attended the interviews. Following the IIO investigation, no charges were filed against any officer.

British Columbia Court of Appeal

The witness officers sought to quash the Supreme Court judge's declarations. They argued that the legislature did not intend to give the IIO the unilateral power to determine the content of the duty to cooperate fully in an investigation. They suggested, among other things, that withholding the pre-interview disclosure they requested was illogical, unsupported by evidence and arbitrary. They wanted the sought materials to ensure that the information they would provide in the interview was the most accurate reflection of what happened as they witnessed it, untarnished by misperception or faulty recollection. The contemporaneous recording of each particular officer's participation in the event would best fulfil the investigation's truth-seeking function, avoid potential factual error and promote a scheme of investigation best able to ensure a transparent investigation capable of maintaining public confidence. In the officers' view, the duty to cooperate was not a duty to submit to arbitrary terms imposed by the IIO.

"[W]itness officers fail to comply with their duty to cooperate by demanding certain conditions — such as pre-interview disclosure, the presence of counsel, the presence of union representatives, assurances that there will be no derivative use of their accounts, and that the interview be scheduled to accommodate annual leave, weekly leave, particular shifts or on some other basis — as a pre-condition to their cooperation."

The Duty To "Cooperate Fully"

In interpreting the statutory duty to cooperate fully with an investigation under s. 38.101, Justice Harris, delivering the Court of Appeal's decision, found it was the IIO that decides what is required. He stated:

> The plain terms of the statute impose the duty to cooperate on police officers. The duty is owed to IIO investigators. It is a duty to cooperate fully with those investigators. It is expressed as a mandatory, not a qualified, duty. Nothing in the wording of the statute supports the inference that police officers can withhold their cooperation with the investigation, if they disagree with the terms on which it is being conducted. ...
>
> It is clear that the exercise of a statutory power must be exercised in a manner consistent with and to further the purposes of the statute. While the power to define the cooperation required of police officers in an investigation cannot be exercised for a purpose collateral to the statutory objective, I can see nothing in the record before us that could support the inference that the demands made by the IIO were arbitrary or capricious. Rather, the conflict between the parties reflects a disagreement about the best, most reasonable, or most efficient means of investigating this particular incident. Should demands be made, in other circumstances that are properly viewed as arbitrary because they are inconsistent with the objectives of the legislation, a remedy would lie.
>
> In my opinion, the broad and general definition of the duty to cooperate fully in s. 38.101, by contrast with the more prescriptive and specific articulation of the duty to cooperate elsewhere in the PA and other legislation, does not support an inference that the legislature intended that the scope and content of the duty to cooperate would be resolved by discussion among interested parties and perhaps included in a memorandum of understanding. To the contrary, the broad definition discloses a legislative intention to confer on the IIO a broad power to determine the terms on which an investigation will be conducted and to define what is required of police officers in discharging their duty to cooperate fully with an investigation as part of civilian oversight of investigations into police conduct. [paras. 16-18]

And further:

> This interpretation is consistent with the objects of the legislative scheme. The purpose of the scheme is to ensure civilian oversight of investigations into police conduct causing death or serious personal injury. The mechanism to achieve this is the IIO. The IIO is a product of, and a response to, public inquiries into alleged police misconduct ... It is common ground that an important objective of an independent and transparent investigative body is the maintenance of public confidence in the police and the justice system as a whole. [para. 20]

"The officers' public legal duty to cooperate fully with the IIO is part of a legislative scheme that is intended to provide an independent and transparent investigative body for the purpose of maintaining public confidence in the police and the justice system, and that only minimal procedural requirements can be expected at the investigation stage," said Justice Harris agreeing with the lower court. ***"I also agree that witness officers fail to comply with their duty to cooperate by demanding certain conditions — such as pre-***

interview disclosure, the presence of counsel, the presence of union representatives, assurances that there will be no derivative use of their accounts, and that the interview be scheduled to accommodate annual leave, weekly leave, particular shifts or on some other basis — as a pre-condition to their cooperation."

The officers' appeal was dismissed and the declarations were not quashed.

Editor's Note: The Court of Appeal recognized that the officers' request for disclosure was made in good faith and was intended to be consistent with their duty to fully cooperate with the investigation, not frustrate it.

It was the decision of the IIO's Chief Civilian Director to not forward charges to BC's Prosecution Service on this shooting event.

MORE ABOUT THE IIO

In its Annual Report 2018/19, the IIO describes itself as follows:

> The IIO has jurisdiction over all of B.C.'s policing agencies, including 11 municipal agencies, the Royal Canadian Mounted Police (rcmp), the South Coast BC Transportation Authority Police Service and the Stl'atl'imx Tribal Police Service. The organization's jurisdiction extends to officers appointed as special provincial constables, municipal constables, and includes on- and off-duty police officers. The IIO's authority comes from the British Columbia Police Act, which requires the police to notify the IIO of an incident that may fall within its jurisdiction.
>
> The IIO undertakes public interest investigations and conducts them to a criminal law standard. The investigations commence based on the fact that there has been serious harm or death. There does not need to be an allegation of wrongdoing. All investigations are carried out in as transparent a manner as is practical under the circumstances, while respecting the integrity of the investigation and the privacy interests of those involved. [p. 5]

According to the IIO's Annual Report, the IIO received **177** notifications of incidents that potentially involved serious harm or death arising from the action or inaction of police for the fiscal period from April 1, 2018 to March 31, 2019. Of those notifications, **50** were categorized as advice files while **127** were investigated. Of the **127** investigations, **66** files were closed and no public report was released, **32** files were closed with a public report released, three (**3**) files were referred to Crown Counsel and **26** files remained under investigation. Of the 101 closed investigations, **55** originated from an RCMP detachment, **43** from a municipal police department, two (**2**) from a Tribal Police Service and one (**1**) was reported by a conservation officer.

Of the **127** investigations, **99** notifications to the IIO occurred within 24 hours of the incident taking place. Of these notifications, **19%** were made within one hour of the incident while the average reporting time was five hours and 11 minutes. The remaining **28** notifications occurred after 24 hours.

AFFECTED PERSONS

Individuals who died or suffered serious injuries as a result of an interaction with BC police.

Ages	15-24	25-34	35-44	45-54	55-64	65-74	75-84	Total
Male	17	30	23	15	14	3	1	103
Female	5	10	2	3	3	1	0	24
Total	22	40	25	18	17	4	1	127

IIO STATS POLICE FORCE	Total	Death - Total	Death - Firearm	Death - In Custody	Death - Self-Inflicted	Death - MVI	Death - Other	Serious Harm - Total	Serious Harm - Firearm	Serious Harm - In Custody	Serious Harm - Self-Inflicted	Serious Harm - MVI	Serious Harm - CEW	Serious Harm - PSD	Serious Harm - Use of Force	Serious Harm - Other
Abbotsford	6	2	-	-	1	-	1	4	-	-	-	2	-	1	1	-
Delta	1	1	-	-	1	-	-	0	-	-	-	-	-	-	-	-
Nelson	1	0	-	-	-	-	-	1	-	1	-	-	-	-	-	-
New Westminster	2	1	-	-	1	-	-	1	-	-	-	-	-	-	-	1
Central Saanich	1	1	-	-	1	-	-	0	-	-	-	-	-	-	-	-
Saanich	3	0	-	-	-	-	-	3	-	-	-	2	-	-	1	-
Vancouver	32	2	-	1	1	-	-	30	-	3	1	6	-	4	11	5
Victoria	5	2	-	-	1	1	-	3	-	-	1	1	-	-	1	-
West Vancouver	2	1	-	-	1	-	-	1	-	-	-	1	-	-	-	-
Municipal Total	53	10	0	1	7	1	1	43	0	4	2	12	0	5	14	6
RCMP	71	26	5	4	7	3	7	45	2	7	3	5	1	4	15	8
Tribal Police	2	1	-	-	1	-	-	1	-	-	-	-	-	-	1	-
Other (Conservation)	1	0	-	-	-	-	-	1	-	-	-	1	-	-	-	-
Total	127	47	5	6	22	5	9	133	2	15	7	30	1	14	44	20

24-HOUR DRIVING PROHIBITION CAN BE SERVED OTHER THAN AT ROADSIDE

Evans v. New Westminster (Police Department), 2019 BCCA 317

A police officer was dispatched to a motor vehicle accident. The caller, who had been stopped at a red light, pointed to a vehicle stating its driver had rear-ended him. This driver was seated in his vehicle. When police spoke with him, an officer noted he had slurred speech, scattered thoughts and difficulty with balance. The driver said he had drug paraphernalia in his pocket. The paraphernalia was removed, including a used needle, metal tin, and a damp cotton ball.

The driver was detained for an impaired driving investigation and he was subjected to a Standardized Field Sobriety Test (SFST). On the basis of the test results and possession of drug paraphernalia, police concluded that the driver was impaired by drugs. A demand for a drug influence evaluation was made and the driver was transported to the police station for further testing by a Drug Recognition Expert (DRE). The driver contacted counsel before the additional test. He was subsequently served with a 24-hour notice of driving prohibition under to s. 215(3) of BC's *Motor Vehicle Act*.

British Columbia Supreme Court

On petition for judicial review of the officer's decision to impose the prohibition, the judge quashed it. She applied a strict interpretation of the statute and accepted the driver's position that the notice of 24-hour prohibition had to be issued roadside (on a highway or industrial road); it could not be issued at the police station. In her view, the officer had ***"no express or implied authority to issue the prohibition anywhere but the roadside"***, and therefore the notice was improperly issued. Since the purpose of s. 215(3) is ***"to provide a rapid response to someone who is driving while impaired"***, it was not reasonable for the officer to have interpreted the section expansively to allow for service at the police station.

BY THE BOOK:

BC's *Motor Vehicle Act*

24-Hour Driving Prohibition

s. 215 (3) A peace officer may, at any time or place on a highway or industrial road if the peace officer has reasonable grounds to believe that a driver's ability to drive a motor vehicle is affected by a drug, other than alcohol,

(a) request the driver to drive the motor vehicle, under the direction of the peace officer, to the nearest place off the travelled portion of the highway or industrial road,

(b) serve the driver with a notice of driving prohibition, and

(c) if the driver is in possession of a driver's licence, request the driver to surrender that licence. this Act.

British Columbia Court of Appeal

BC's Attorney General argued, among other things, that the officer's interpretation of s. 215(3)(b) was reasonable. The driver disagreed. The driver also submitted that, even if the officer's interpretation of s. 215(3)(b) was not unreasonable, the officer did not have reasonable grounds to believe that his ability to drive was affected by a drug other than alcohol.

s. 215(3)(b) of the MVA

After identifying and applying the correct standard of review (reasonableness), along with the modern approach to statutory interpretation, the Court of Appeal found the police officer's interpretation of s. 215(3)(b) over a strict reading of its text would

"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."

allow service of the 24-hour notice of prohibition at the police station. Such a flexible interpretation was within the range of reasonable possibilities considering the provision's purpose, its context and its consequences. ***"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,"*** said Justice Bennett. ***"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."*** She continued:

> I take [the officer's] interpretation to be that a notice can be served in the police station as long as there is a sufficiently strong connection to impaired driving on a highway or industrial road. ... I consider that interpretation to be within the range of defensible and acceptable outcomes. [para. 26]

And further:

> The purpose of s. 215(3)(b) is to ensure a driver does not drive any vehicle when there is a risk that their ability to operate a vehicle may still be affected by drugs. This includes driving a vehicle once the driver has left the roadside, as a driver can always return to the road upon release. A restrictive understanding of where the notice must be served would unduly fetter officers' ability to fulfil that purpose. It was reasonable for [the officer] to arrive at an interpretation that instead allowed him to manage the ongoing risk of [the driver] driving while impaired, a risk that did not end once he was removed from the road.
>
> [...]
>
> In serving [the driver] with a notice at the police station, [the officer] implicitly endorsed the integration of the MVA and Criminal Code impaired-driving regimes. The MVA and Criminal Code are an "interlocking scheme of federal and provincial legislation" aimed at controlling impaired driving. Whereas provincial legislation can lead to administrative consequences directed at minimizing the threat of an impaired driver, federal legislation can punish the impaired driver if their conduct rose to the level of criminality. [references omitted, paras. 32-34]

Justice Bennett also provided the following examples as absurd results if service of a 24-hour prohibition was only permitted roadside:

- An officer directs an impaired driver to drive their motor vehicle completely off of the highway because there is no safe place to stop on the highway.
- An impaired driver flees and pulls into a private driveway.
- An impaired driver is taken to a hospital before the officer can complete the necessary paperwork.
- Restricting service to the roadside would require the police to serve a notice on a person who is too impaired to understand its meaning.

Reasonable Grounds

The Court of Appeal also rejected the driver's contention that there were insufficient grounds to believe that his ability to drive was affected by a drug other than alcohol. Justice Bennett found the officer ***"had ample evidence of drug-induced intoxication and would have easily formed reasonable grounds that [the driver's] ability to drive was affected by a drug other than alcohol."*** She stated:

> Subsection 215(3) requires the officer to consider whether there is a credibly based probability that a driver's ability to drive is

"As a matter of common sense, when peace officers arrive on the scene of a collision and find an intoxicated individual with drug paraphernalia, including a still-moist cotton ball, in his pocket, they will be justified in concluding that they have reasonable grounds to believe that the individual is intoxicated by a drug other than alcohol."

> affected by a drug other than alcohol. Assessing reasonable grounds is a matter of considering the totality of the circumstances. The information must be examined as a whole on a "practical, non-technical, and common sense basis".
>
> [The officer] and his partner arrived on the scene on the basis of a complaint that [the driver] had rear-ended another driver while appearing intoxicated. Upon arrival, [the officer] observed signs of impairment and [the driver] freely admitted to possession of drug paraphernalia, including a still-moist cotton ball. [Another officer] then carried out a standard field sobriety test and concluded that [the driver] was impaired. It is difficult to conceive of stronger evidence of drug impairment that could be found during a simple roadside interaction.
>
> Although the officers' notes do not say that they specifically considered whether [the driver] was impaired by alcohol, they did not need to do so in this case. As a matter of common sense, when peace officers arrive on the scene of a collision and find an intoxicated individual with drug paraphernalia, including a still-moist cotton ball, in his pocket, they will be justified in concluding that they have reasonable grounds to believe that the individual is intoxicated by a drug other than alcohol. [references omitted, paras. 40-42]

The Attorney General's appeal was allowed and the 24-hour driving prohibition was reinstated.

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

EXTREMELY SERIOUS POLICE MISCONDUCT RESULTS IN EXCLUSION OF EVIDENCE

R. v. Mohammed, 2020 ONCA 9

Police stopped the accused's car in the parking lot of a closed Liquor Control Board of Ontario (LCBO) store because its licence plate light was out. An officer approached the car and noticed smoke that smelled like marihuana coming from it. The accused was arrested and given a **"soft caution"** - an informal caution that did not advise of the availability of legal aid or of access to duty counsel. The accused was then patted down but nothing was found.

The accused was then strip searched in the parking lot. An officer looked down the accused's boxer shorts and saw what he thought was the butt or the magazine of a gun. The accused's pants were then unzipped and dropped to his ankles, but no gun was found. Following this search, the accused was placed in the rear seat of the police car. The accused's car was then searched and a debt list, cash, a grinder, and several cellphones near the driver's seat were found. Police also located two ziplocked bags of marijuana, a scale, and ammunition in a backpack on the rear seat.

An officer then questioned the accused about whether he had a gun. The officer told the accused that if he turned over what he had in his pants, he would be released. The accused admitted he had a loaded gun, and he was asked to retrieve it. When he could not do so, the officer used a knife to cut the gun from the accused's pant leg. The accused was arrested and cautioned after the gun was found. He was then strip searched again at the police station. The accused's cellphone was also searched without a warrant. Old messages were reviewed and photographs of messages considered relevant to drug trafficking were taken. He was charged with several firearm offences, possessing property obtained by crime and possessing cannabis for the purpose of trafficking.

"The first strip search was plainly not authorized by law. It is clear ... that a lawful arrest does not automatically confer the authority to strip search someone, even incident to the arrest. ... [The officer] wrongly believed that he could strip search every male he arrested for any kind of drug offence routinely, despite s. 8 of the Charter ... . To make matters worse, the strip search was conducted in public, and in a highly invasive manner."

Ontario Court of Justice

The judge admitted the evidence obtained during the accused's roadside strip search, his interrogation without counsel, the search of his vehicle and the search of his cellphone under s. 24(2). The accused was convicted of carrying a concealed weapon; unauthorized possession of a firearm; unauthorized possession of a firearm in a motor vehicle; possession of a prohibited or restricted firearm with ammunition without a license; possession of property obtained by crime; and possession for the purpose of trafficking. The trial judge considered the strip search **"degrading and unjustified"** and reduced the length of the accused's sentence by 100 days as a result.

Ontario Court of Appeal

The Crown conceded that the seizures of the handgun and marijuana were temporally and contextually connected to *Charter* breaches under ss. 7, 8, and 10(b) including:

- The police failure to formally caution the accused following his arrest;
- The police failure to advise the accused of the availability of legal aid or duty counsel;
- Questioning the accused for over twenty minutes before he could consult with counsel;
- Strip searching the accused; and
- Searching the accused's cellphone without a warrant.

The Crown also conceded that the trial judge erred in his s. 24(2) analysis by not considering all of the *Charter* breaches that occurred and in failing to apply the proper analysis. In the Crown's view, the text messages retrieved from the cellphone search should have been excluded from the trial. But the Crown suggested that the gun and marihuana were admissible. The gun would have been inevitably found since, once the bullets were found in the car, the accused would have been lawfully searched. And the evidence obtained from the search of the car was admissible since it was lawfully conducted.

The Court of Appeal disagreed. Even though the search of the car was lawful, each *Charter* breach was ***"very serious"*** and cumulatively they were egregious:

> The first strip search was plainly not authorized by law. It is clear ... that a lawful arrest does not automatically confer the authority to strip search someone, even incident to the arrest. [The officer's] actions must be understood in this light. He wrongly believed that he could strip search every male he arrested for any kind of drug offence routinely, despite s. 8 of the Charter — a factor that the Crown acknowledges exacerbates the serious nature of the breach. To make matters worse, the strip search was conducted in public, and in a highly invasive manner.
>
> The [accused] was questioned by the police for 20 minutes without being provided the right to counsel. This involved informational and implementational breaches of the right to counsel. The [accused] was not told of his right without delay and was not given a chance to exercise it. He was induced to incriminate himself and admitted to having a gun in his pants as a result. The police persuaded the [accused] to turn over the gun on the false promise that he would be released. These were serious breaches of the [accused's] s. 7 and 10(b) Charter rights.

"The police misconduct was extremely serious. It involved the significant violation of not one but several constitutional rights, all governed by well-established caselaw. Admitting the evidence connected to these breaches would bring the administration of justice into disrepute in the long term ... ."

> The warrantless search of the [accused's] cellphone involved the police reviewing the [accused's] incoming and saved messages and photographing eight messages that were used as evidence of drug trafficking. This search was in violation of s. 8 of the Charter, as made clear by the Supreme Court in *R. v. Fearon* ... with which the police should have been familiar. [reference omitted, paras. 16-18]

As for the impact of the *Charter* breaches on the accused's protected interests, it was significant both as individual breaches and in sum:

> ... The strip search was conducted in public and was highly invasive. Among other things, [the officer] looked down into the [accused's] shorts. ... The delay in providing the [accused] with his right to counsel seriously undermined the [accused's] right to silence and resulted in him providing incriminating evidence. The search of the [accused's] cellphone was a significant intrusion into his privacy.
>
> In summary, this was not a case of a simple mistake that resulted in evidence being discovered. This was a series of serious rights violations, committed in apparent ignorance of well-established law, arising out of the [accused's] arrest for smoking a marijuana joint. These violations had a significant impact on the [accused's] Charter-protected interests. [para. 20-21]

Despite the strong public interest in adjudicating this case involving drug trafficking and serious firearms offences, as well as the cogency and reliability of the evidence, the seriousness of the *Charter* breaches and their significant impact on the accused resulted in the exclusion of the evidence:

> The police misconduct was extremely serious. It involved the significant violation of not one but several constitutional rights, all governed by well-established caselaw. Admitting the evidence connected to these breaches would bring the administration of justice into disrepute in the long term, despite the lawfulness of the search of the [accused's] car and its connection to evidence that might have been discovered lawfully in any event. [para. 22]

The accused's appeal was allowed, his convictions were set aside and verdicts of acquittal were entered.

Complete case available at www.ontariocourts.on.ca

TELLING TRUTH IN RESPONSE TO SPONTANEOUS QUESTION DID NOT ELICIT STATEMENT

R. v. Gignac, 2020 ONCA 42

The accused was arrested by police at 3:01 a.m. and indicated he did not wish to give a statement until after he had consulted counsel. The arresting officer continued to read from a pre-printed card and asked the accused twice whether he wished to make a statement. The accused indicated that he did not. He was handcuffed and placed in a vehicle to await transport to the police station.

Shortly after, the accused asked the arresting officer whether his wife was going to be arrested. The arresting officer told the accused that ***"there [was] a search warrant being executed...at his home"*** and that he ***"couldn't really give an answer as to whether or not [the accused's] wife was actually going to be arrested"***. The accused then said there was a safe in the living room of his home, the safe had cocaine in it, and the cocaine was his. The accused also provided the combination to the living room safe. When police searched the safe they found drugs, including cocaine and fentanyl patches.

Ontario Court of Justice

The accused brought a *Charter* motion seeking the exclusion of evidence under s. 24(2). In his view, the police breached his *Charter* right to counsel under s. 10(b). The judge found the accused was not a credible witness and dismissed his application for exclusion. The judge did not, however, determine whether the police testimony by itself could establish a *Charter* violation and result in the exclusion of the evidence. The accused was subsequently convicted of drug offences related to drugs found in the safe.

Ontario Court of Appeal

The accused argued that the trial judge erred in failing to exclude the statement he made shortly after his arrest because police breached his s. 10(b) *Charter* right to counsel. He contended that his rights were breached because the arresting officer asked twice whether he wanted to make a statement, even though he said he wanted to speak to counsel and the officer's response to his question about his wife amounted to an elicitation of a statement.

The Crown admitted that the arresting officer breached s. 10(b) by twice asking the accused whether he wished to make a statement after the accused indicated he wished to consult counsel. The Crown also conceded that there was a temporal connection between these breaches and the accused's statement such that s. 24(2) was engaged. However, the Crown submitted that the officer's truthful response to the accused's spontaneous question was not an elicitation of a statement from him. In the Crown's view, the accused's statement ought to have been admitted for the following reasons:

- The individual good faith of the officer who read the rights to counsel and posed the questions from a pre-printed card did so some two years before the Supreme Court of Canada decision in *R. v. G.T.D.*, 2019 SCC 7 ruled on this issue;
- The was an absence of any causal connection between the *Charter* violations and the incriminatory statements made;
- The violations' had a negligible effect on the accused's *Charter* protected interests;
- The evidence was reliable; and
- Their was a strong societal interest in a trial on the merits.

The Ontario Court of Appeal described the circumstances of the accused's giving of his statement as follows:

> The [accused] spontaneously asked police if his wife was going to be arrested. The officer answered truthfully that a search warrant was then being executed at the [accused's] home and that the officer did not know whether the [accused's] wife was to be arrested. This truthful answer cannot be construed as an attempt by the officer to elicit evidence from the [accused]. The officer's answer to the [accused's] question did not therefore violate the [accused's] s. 10(b) Charter rights.

Nevertheless, the Court of Appeal found that the Crown's concessions regarding the *Charter* breaches, and their temporal connection to the accused's incriminatory statements, triggered s. 24(2). However, the Court of Appeal refused to exclude the evidence, finding its admission would not bring the administration of justice into disrepute:

> **Seriousness of the Charter infringing conduct**
>
> There is no real dispute that the arresting officer acted in good faith. We acknowledge that the

"The [accused] spontaneously asked police if his wife was going to be arrested. The officer answered truthfully that a search warrant was then being executed at the [accused's] home and that the officer did not know whether the [accused's] wife was to be arrested. This truthful answer cannot be construed as an attempt by the officer to elicit evidence from the [accused]."

officer's pre-printed card, which indicated what was to be read to an arrested person, raises concerns about systemic failures to protect Charter rights. However, as the Alberta Court of Appeal noted, there was a degree of legal uncertainty on this issue that tempered the seriousness of the breach. Although G.T.D. was based on long established Supreme Court of Canada jurisprudence, the decision only brought clarification some two years after the arrest in this case.

Impact on the [accused's] Charter protected interests

The police must hold off from attempts to elicit evidence from an accused until he or she has had a reasonable opportunity to consult counsel. This case is different from G.T.D., in which the accused made incriminatory statements in response to the questions posed from the flawed standard caution.

Here, there was no causal connection between the Charter violations and the [accused's] incriminatory statements. The [accused] clearly understood that he did not have to speak to police and asserted his right to consult counsel. He refused to make any statement after asserting his wish to speak to counsel, despite the two questions about whether he wished to make a statement after that assertion. The breaches up to that point had no impact on his Charter protected interests.

Societal interest in a trial on the merits

There is no doubt the statement was voluntary. It was reliable evidence. The combination opened the living room safe in which the drugs were found. The statement was strong evidence of the [accused's] knowledge of the contents of the safe and control of those contents. Twelve 75 microgram per hour Fentanyl patches, as well as cocaine and other drugs, were in the safe. This court has reiterated the dangers that Fentanyl poses to the community on several occasions. [references omitted, paras. 13-16]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

DRE DEMAND DID NOT TRIGGER THE RIGHT TO RE-CONSULT COUNSEL

R. v. Tahmasebi, 2020 ONCA 47

After the accused drove his car onto a stranger's driveway, stopped and remained in the car, the homeowner called police. Two police officers responded to the scene. One of the officers, who stopped behind the accused's car, knocked on the driver's side window several times. The accused rolled it down. He appeared to be confused and drowsy. When asked where he was going, the accused answered that he lived close by and was just taking a nap. As the officer returned to his cruiser intending to turn on its video camera to do an impaired driving investigation, the accused's car rolled backwards and pinned the officer against his cruiser. The officer was injured.

The accused was arrested for dangerous driving causing bodily harm. He was placed in the back of a police cruiser and read his rights, including his right to counsel under s. 10(b) of the *Charter*. The accused said he understood his rights, asked to speak to a lawyer and explained in his own words the meaning of the caution he had received. The accused was transported to the police station where he told a Staff Sergeant that he was taking an opioid analgesic. The accused was arrested for impaired driving causing bodily harm and re-read his rights to counsel. Police called duty counsel and told the lawyer that the accused faced dangerous driving and impaired driving charges. The accused spoke to duty counsel for about eight (8) minutes.

A drug recognition expert (DRE) officer spoke to the accused, made a drug evaluation demand, and the accused said he understood it. The DRE Officer then asked the accused if he had spoken to counsel. He initially replied no but when told he had been seen on the phone speaking to duty counsel responded, ***"[o]h, that was a lawyer?"*** He then confirmed speaking to duty counsel. The DRE proceeded to conduct the drug evaluation.

"Section 10(b) of the Charter states that upon arrest or detention, everyone has the right to 'retain and instruct counsel without delay and to be informed of that right'. Its purpose is 'to support the detainee's right to choose whether to cooperate with the police investigation or not, by giving him access to legal advice on the situation he is facing. This is achieved by requiring that he be informed of the right to consult counsel and, if he so requests, be given an opportunity to consult counsel'."

After the DRE determined that the accused's ability to drive was impaired by drugs, a urine sample was demanded. The DRE explained the demand to the accused and warned him that failure to provide a urine sample would result in another charge. The accused asked to speak to a lawyer again, but the DRE responded that the accused had already spoken to a lawyer who had been advised of the charges and police were not required to provide another consultation with counsel. The accused refused to comply with the demand and he was also then charged with refusing to provide a urine sample when he knew or ought to have known that his operation of a motor vehicle caused an accident that resulted in bodily harm to another person.

Ontario Court of Justice

The accused argued, among other things, that his right to counsel under s. 10(b) of the *Charter* had been violated. He said that he had not understood his rights when they were read to him. Furthermore, he contended that he was entitled to a further consultation with counsel when the DRE made a demand for a urine sample.

The judge, however, rejected both of these submissions. First, the judge found the accused's own words at the roadside demonstrated he understood his right to counsel at all times and his right to remain silent. Second, the judge concluded that the demand for a urine sample did not give rise to a right for a further consultation with a lawyer.

The accused was found guilty of impaired driving (by drugs) causing bodily harm and refusing to comply with a demand to provide a urine sample *simpliciter*. The judge was not convinced that the accused knew or ought to have known the officer had suffered bodily harm at the time he refused to provide the urine sample. The accused was sentenced to 90 days in jail and prohibited from driving for two (2) years.

Ontario Court of Appeal

The accused revived his s. 10(b) argument that his right to counsel was breached because he was denied the opportunity to re-consult counsel. This time he suggested the right to re-consult was triggered when the DRE demand was made rather than just when the demand for the urine sample was made.

Right to Re-Consult Counsel

Justice Zarnett, authoring the Court of Appeal's unanimous decision, described the purpose of s. 10(b) and when a second consultation with counsel arises:

> Section 10(b) of the Charter states that upon arrest or detention, everyone has the right to "retain and instruct counsel without delay and to be informed of that right". Its purpose is "to support the detainee's right to choose whether to cooperate with the police investigation or not, by giving him access to legal advice on the situation he is facing. This is achieved by requiring that he be informed of the right to consult counsel and, if he so requests, be given an opportunity to consult counsel".
>
> While "normally, s. 10(b) affords the detainee a single consultation with a lawyer…in some circumstances, a further opportunity to consult a lawyer may be constitutionally required". A

> request to re-consult with counsel is not in itself sufficient. "What is required is a change in circumstances that suggests that the choice faced by the accused has been significantly altered, requiring further advice on the new situation, in order to fulfill the purpose of s. 10(b) of providing the accused with legal advice relevant to the choice of whether to cooperate with the police investigation or not". [references omitted, paras. 19-20]

The Supreme Court of Canada has recognized at least three (3) situations in which a second consultation with counsel would be constitutionally required because a further opportunity to consult is necessary to fulfill the purpose of s. 10(b):

1. **New Non-Routine Procedures:** When new non-routine procedures (such as participating in a line-up or submitting to a polygraph) are proposed by the police that do not generally fall within the expectation of the advising lawyer at the time of the initial consultation, an opportunity to consult counsel again must be provided. This category did not apply in this case, however, ***"because what occurred after the [accused] was charged with impaired driving causing bodily harm and had his initial consultation with duty counsel — namely the DRE demand and, based on the result of the drug evaluation, the urine sample demand – were procedures that were 'within the expectation of the advising lawyer at the time of the initial consultation',"*** said Justice Zarnett. ***"The procedures would be within the expectation of a lawyer advising a person charged with impairing driving."*** He continued:

> The statutory relationship between the procedures of a DRE demand and a urine sample demand on the one hand, and the offence of impaired driving on the other, does not permit the conclusion that the procedures fall outside the expectation of a lawyer advising a person who has been arrested or detained on a charge of impaired driving. That such demands might be made, and their consequences, would fall directly within the expected topics of advice counsel would give a person charged with impaired driving. [para. 26]

The foreseeable consequences of an impaired driving arrest, including a DRE demand and what might flow (an oral fluid or urine sample demand), should have been expected by competent counsel such that they could have provided legal advice during the initial consultation. ***"There was … a 'linear progression' from one to the other, a progression expressly contemplated by the Code,"*** said Justice Zarnett. "***What occurred here, after the initial advice of counsel, was neither the result of changed circumstances or new developments. The procedures undertaken by the police were not, viewed in the context of an impaired driving investigation, non-routine such as to fall outside of what would be expected to be covered by the initial advice the [accused] received."***

2. **Change in Jeopardy:** Another opportunity to consult counsel must be provided if ***"the investigation takes a new and more serious turn"*** making the initial advice inadequate in light of ***"the actual situation, or jeopardy, the detainee faces"***. This occurs because an initial consultation with counsel would be ***"tailored to the situation as the detainee and his lawyer then understand it"*** and based on what they were told as to the reasons for the detention.

This category, however, did not apply either. Here, the investigation did not take **"a new and more serious turn"** after the initial consultation. There was no discrete change in the purpose of the investigation, no different and unrelated offence nor a significantly more serious offence than that contemplated at the time of the s. 10(b) warning:

> The consequences of foreseeable investigative procedures in an impaired driving investigation — the prospect that compliance with either a DRE demand or oral fluid or urine sample demand may yield evidence that incriminates the accused and that non-compliance may be an offence —

> is not a new jeopardy arising from a new and more serious turn of events. It is not a discrete change in the purpose of the impaired driving investigation to an offence not contemplated at the time the [accused] exercised his right to counsel. Just as the procedures themselves are foreseeable at the time of the initial consultation, the jeopardy arising from them is also foreseeable and within the expected subject matter of the initial consultation. [para. 35]

3. **Lack of Understanding or Undermining of Counsel**: If the circumstances indicate that the detainee did not understand his right to counsel, or if police undermined the legal advice received by the detainee by ***"distorting or nullifying it"***, another opportunity to consult counsel must be provided. Here, the trial judge found the accused understood his right to counsel and there was no suggestion of the police having undermined any advice. Nor were there any objective factors that ***"renewed legal consultation was required to permit [the accused] to make a meaningful choice as to whether to cooperate with the police investigation or refuse to do so."***

A New Category?

Although the categories in which a right to re-consult may arise are non-exhaustive, the Court of Appeal refused to recognize a new category in this case. There was not a change of circumstances that made a second consultation necessary to ensure that s. 10(b) has achieved its purpose:

> [N]either a DRE demand under what was then s. 254(3.1), nor an oral fluid or urine sample demand under what was then s. 254(3.4), is a change of circumstances from those facing a person detained on a charge of impaired driving. A person who has received legal advice (assumed to be sufficient and correct) after such a charge does not face a new or emergent situation when either demand is made. Because the demands are foreseeable and the initial advice would be expected to address them and their consequences, it would not be appropriate to create a new category of cases in which there is an entitlement to a second consultation with counsel to cover the circumstances in the case at bar. [para. 39]

There was no breach of the accused's s. 10(b) right to counsel and therefore it was unnecessary to consider whether a remedy was available under s. 24 of the *Charter*.

Complete case available at www.ontariocourts.on.ca

How the Accused Responded

The Ontario Court of Appeal decision in Tahmasebi is short on detail about how the accused responded to the police informing him of his right to counsel. However, the trial court ruling 2017 ONCJ 816 provides some insight.

When the officer arrested the accused, he was read his full rights to counsel. When asked if he understood, the accused said, "Yes, sir".

When asked if he wanted to speak to a lawyer, the accused said, "Yes, please".

After giving the accused the caution, the officer asked him to explain it back. The accused said, "Means if I say something, it can be used against me".

The trial judge, in deciding that the accused did not have the right to re-consult counsel in this case, stated:

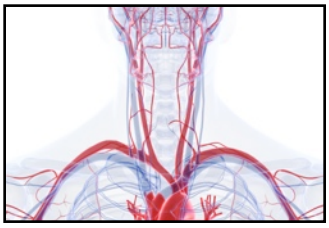
> A second request to consult counsel, without more, is not sufficient to retrigger the s. 10(b) right. What is required is a change in circumstances that suggests that the choice faced by the detainee has been significantly altered, requiring further advice on the new situation, in order to fulfill the purpose of s. 10(b). ... Existing jurisprudence has recognized that changed circumstances may result from: new procedures involving the detainee; a change in the jeopardy facing the detainee; or reason to believe that the detainee may not have understood the initial advice of the right to counsel. The categories are not closed. [para. 65]

The judge went on to describe a lawyer who would not anticipate and include advice about the probable outcomes of the known statutory scheme arising from a charge of impaired driving, including testing, as exercising "professional negligence".

BC TO IMPLEMENT NEW AND REVISED PROFESSIONAL POLICING STANDARDS

On February 27, 2020 some new or revised British Columbia Provincial Policing Standards will come into effect. These standards require the chief constable, chief officer or commissioner to ensure their police force's policies and procedures are consistent with the standards. New and reviewed standards include the following.

Neck Restraints - 1.5.1



This new standard requires officers authorized to use the ***"vascular neck restraint"*** as a use of force technique to be trained and demonstrate proficiency in its use (1.5.1 (1)). A ***"vasular neck restraint"*** is defined as a ***"physical-control technique which applies compression of the vascular tissue along the lateral aspects of the neck, which results in temporary decreased cerebral blood flow, and may result in temporary loss of consciousness."***

Officers must also be requalified to apply the vascular neck restraint in the following circumstances:

- *If the police force permits the use of the vascular neck restraint in circumstances other than those where there are reasonable grounds to believe that lethal force is justified, each officer authorized to apply the vascular neck restraint must re-qualify every year, at a minimum, in applying this technique.* (Standard 1.5.1 (2)(a))
- *If the police force only permits the use of the vascular neck restraint in circumstances where there are reasonable grounds to believe that lethal force is justified, each officer authorized to apply the vascular neck restraint must re-qualify every three years, at a minimum, in applying this technique.* (Standard 1.5.1 (2)(b))

The Neck Restraint standard prohibits ***"the intentional use of chokeholds, unless the officer has reasonable grounds to believe that lethal force is justified"*** (1.5.1 (3)). A ***"chokehold"*** is defined as ***"a physical-control technique that applies pressure to the front of the neck and trachea/windpipe and restricts a person's ability to breathe."***

Written records of the neck restraint training and re-qualifications must also be maintained.

Emergency Vehicle Operations - 3.2.4

This new standard requires all police officers to have successfully completed the BC Emergency Vehicle Operation (EVO) Training prior to operating an emergency vehicle. Furthermore, every front-line police officer and front-line supervisor must successfully complete an online course once every three years.

Intermediate Weapons - 1.2.2

This revised standard now requires that ***"each intermediate weapon in the inventory of their police force is maintained in good working order"*** (1.2.2 (2.1)) and ***"each intermediate weapon is securely stored when not in use"*** (1.2.2 (2.2)). In addition, officers can only carry their issued intermediate weapons when on assigned duty unless otherwise authorized in writing or by policy (1.2.2 (5.1).

An ***"intermediate weapon"*** is defined as ***"a device intended or designed to be used as a weapon, but for which the use is not intended or likely to cause serious injury or death. Impact weapons, aerosols and conducted energy weapons fall within this category. Intermediate weapons may also be referred to as less-lethal weapons."***

Firearms and Ammunition - 1.1.1

This revised standard now requires officers to use only approved holsters (1.1.1 (5.1)). Depending on the police entity, this approval must be made by the chief constable, chief officer, commissioner or their delegate. In addition, officers must be provided with training for each type of holster they are issued (1.1.1 (5.2)).

Officers are also only allowed to carry their issued firearms when on assigned duty, unless otherwise authorized in writing or by policy (1.1.1 (5.3)). This standard further requires that ***"each firearm and all ammunition is securely stored when not in use"*** (1.1.1 (6.2)).

Reporting and Investigation Following the Use of Force - 1.7.2

Standard 1.7.1, which was effective January 30, 2012, will be repealed in its entirety and replaced with new standard 1.7.2. Some of the differences between standard 1.7.1 and 1.7.2 include:

Several **new definitions** have been added.

NEW! **"Display"** – *the act of pointing, aiming or showing an intermediate weapon or a firearm at or to a person without discharging it, for the purpose of generating compliance from a person.*

NEW! **"Draw"** – *the act of un-holstering or removing an intermediate weapon or a firearm from the holster without discharging it, as a preparatory step so that it is ready for use should it become necessary (i.e., not used to generate compliance).*

NEW! **"Intermediate weapon discharge/application"** – *the act of firing or applying an intermediate weapon against a person. This includes situations where the discharge was intentional or not, and situations where the intermediate weapon is discharged but malfunctions or is unsuccessful in reaching the intended person.*

NEW! **"Physical control"** – *physical techniques used to control a person that do not involve the use of a weapon.*

NEW! **"Physical control-hard"** – *physical techniques that are intended to impede a person's behaviour or to allow application of a control technique; and have a higher probability of causing injury. They may include empty hand strikes such as punches and kicks.*

NEW! **"Physical control-soft"** – *soft techniques are control oriented and have a lower probability of causing injury. They may include restraining techniques, joint locks and non-resistant handcuffing.*

NEW! **"Specialty munitions"** – *munitions that require specialized training and certification by officers and may include extended range impact munitions, impact rounds containing chemical agents, breaching munitions, Noise Flash Diversionary Devices, and munitions designed specifically for crowd dispersal.*

NEW! **"Police dog bite"** – *a police dog's use of mouth and teeth to grab or hold a person's body or clothes.*

NEW! **"Use-of-force report"** – *the information that must be provided, in a provincially-approved format, when an officer applies force against a person.*

NEW! **"Vascular neck restraint"** – *physical control technique which applies compression of the vascular tissue along the lateral aspects of the neck, which results in temporary decreased cerebral blood flow, and may result in temporary loss of consciousness.*

NEW! **"Weapon of opportunity"** – *an ordinary object that in its regular use is not intended as a weapon, but in a specific encounter is at hand for improvised use as a weapon (e.g., flashlight).*

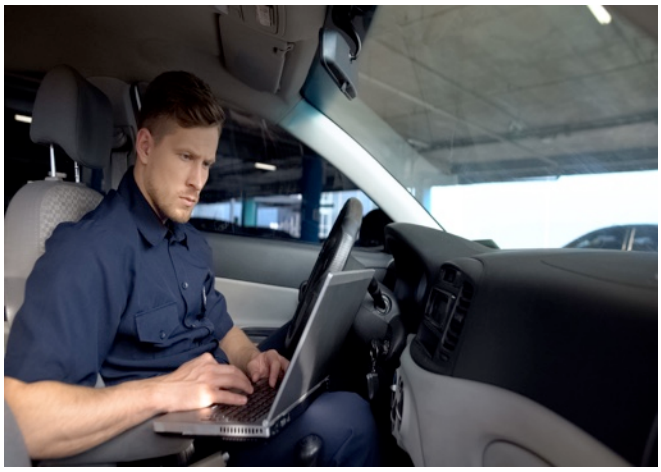
Reportable use-of-force

This standard requires the reporting of use-of-force under the following circumstances (1.7.2 (1)):

- Use of physical control-soft, if an injury occurred to either the person or the officer from the application of that force;
- Use of physical control-hard;
- Vascular neck restraint;
- Intermediate weapon display or discharge/ application;
- Firearm display or discharge;
- Police dog bites (intentional and unintentional);
- Use of specialty munitions; and
- Use of weapons of opportunity.

These use-of-force reports must be:

- Recorded in a provincially-approved manner and format (1.7.2 (2));
- Completed within 48 hours of the incident unless there are exceptional circumstances warranting an extension (1.7.2 (3)). An annotation to the standard states, ***"Timeline for completion of use of force reports – In normal circumstances these are to be completed within 48 hours of the incident. In exceptional circumstances, such as an in-custody death incident, a longer time period may be appropriate. Extensions are to be approved by the Chief Constable, Chief Officer, or Commissioner."***



- Linked to the relevant PRIME file (1.7.2 (4)); and
- Reviewed by a supervisor or use-of-force instructor fullness and compliance with policy (1.7.2 (5)).

If the force used was not compliant with policy, it must be reported to the chief constable, chief officer, commissioner or their delegate (1.7.2 (6)).

Force resulting in injury or death

When the force used results in death or injury to any person is must be reported to B.C.'s Office of the Police Complaint Commissioner (OPCC) as required by s. 89 of BC's *Police Act* and to B.C.'s Independent Investigations Office (IIO) under the *Memorandum of Understanding (MOU) respecting investigations between the Independent Investigations Office and Royal Canadian Mounted Police and Municipal Departments of BC and Transit Police and Stl'atl'imx Tribal Police* (1.7.2 (7)).

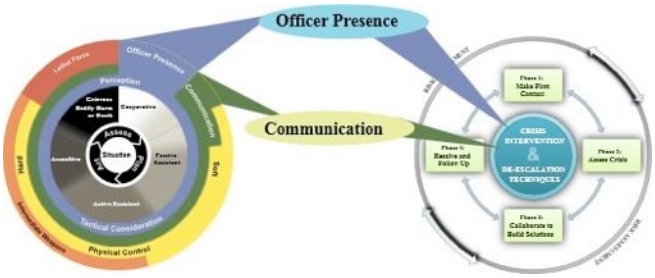
Reporting excessive use of force

The standard now places an affirmative duty on ***"any any officer who has reasonable grounds to believe that they have witnessed excessive use of force by another officer"*** to report the incident to a supervisor or senior officer as soon as reasonably practicable (1.7.2 (5)). If the incident does not require reporting to the OPCC or the IIO, an investigation must be undertaken and a report submitted to the chief constable, chief officer, commissioner or their delegate (1.7.2 (11)).

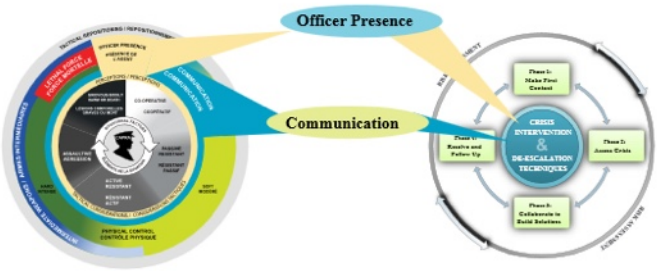
Use-of-Force Models - 1.9.1

This revised standard now requires a police force to use one of two approved use-of-force models:

1. National Use of Force Framework (NUFF) & Crisis-Intervention & De-escalation (CID) model to be used by a police force.



2. Incident Management and Intervention Model (IMIM) & Crisis-Intervention & De-escalation (CID).



CEW Testing - 1.3.5

The protocols for testing a CEW described in the *Test Procedure for Conducted Energy Weapons Version 2.0* and attached as Appendix "A" to the revised standard have been updated to include:

- The addition of the Taser X2 and X26P;
- Altered sampling rates and triggering settings;
- The requirement for gap for X2 testing;
- The addition of a bibliography; and
- A clarified definition of net charge for different units.

More on the Provincial Policing Standards here.

CANADA's TOP 10 STOLEN VEHICLES IN 2019

According to the Insurance Bureau of Canada, the 2007 Ford F350 was the vehicle most often stolen in Canada in **2019**. Their annual list of **Top 10 Stolen Vehicles** is based on actual insurance claims data collected from nearly all automobile insurance companies in Canada.

Canada's Top 10 Stolen Vehicles - 2019	
Rank	Vehicle
1	**2007 FORD F350 SD 4WD**
2	**2006 FORD F350 SD 4WD**
3	**2005 FORD F350 SD 4WD**
4	**2004 FORD F350 SD 4WD**
5	**2006 FORD F250 SD 4WD**
6	**2003 FORD F350 SD 4WD**
7	**2018 LEXUS RX350/RX350L/RX450H/ RX450HL 4DR AWD**
8	**2005 FORD F250 SD 4WD**
9	**2002 FORD F350 SD 4WD**
10	**1998 HONDA CIVIC SI 2DR COUPE**

Source: Insurance Bureau of Canada, "Top 10 Stolen Vehicles", accessed on February 15, 2019.

OCCUPANT DETAINED WHEN ISOLATED & QUESTIONED DURING SEARCH WARRANT

R. v. McSweeney, 2020 ONCA 2

After receiving a report that child pornography images had been uploaded to a social networking site, police investigated further and determined that the uploads originated from an internet account registered to a specific address. The accused's wife was the subscriber, and the home was occupied by the accused and his family. The police prepared a search warrant for the home to seize electronic storage devices, computers, and other devices capable of accessing the internet. The warrant was executed at approximately 6:03 a.m. when nine police officers entered the house, some in uniform while others wore vests identifying them as police.

Police knocked on the door and the accused's wife allowed the officers entry. The accused, who was upstairs in the shower, came downstairs shortly after police arrived. A detective showed the accused the warrant and allowed him read it. The detective then asked the accused whether he knew why police were at his house. The accused denied knowing anything about child pornography. While the accused continued to read the warrant, the detective asked him whether he could direct him to a computer in the house that might have child pornography on it. The accused replied, ***"I'm not saying anything until I get my thoughts together."***

The family was gathered in the living room so police could secure the scene and ensure that electronic equipment was no longer transmitting, and to make areas containing electronics "off-limits". The detective explained to the family what would be taking place during the search. They were told that they were not permitted to use their electronic devices, including cellphones. A police officer was stationed in the living room while this discussion took place and she remained there with the family throughout the search. The accused's wife was allowed to go to the kitchen to use the land line for making a call.

At about 6:29 a.m., the accused's wife, who was not a suspect, was asked to come to the front porch of the home to give an audio statement and she agreed to do so. The accused remained in the living room while his wife was questioned for about 20 minutes. At about 6:53 a.m., the accused, who was considered a suspect, was asked to come to the porch to give a recorded statement. He had not been cautioned or informed of his right to counsel. In his statement, the accused told police he should be the only one questioned. After the interview, the accused was arrested, cautioned, informed of his right to a lawyer, and taken to the police station where he spoke to duty counsel. The detective then took a second statement from the accused. Throughout most of the interview, the accused maintained that he wished to remain silent but when asked whether there was ***"any chance that anybody else in the house is involved"***, he replied, ***"[a]bsolutely not."***

Ontario Court of Justice

In giving his evidence, the detective admitted he should have cautioned the accused and informed him of his right to counsel before questioning him at the home. He said it was a mistake not to do so because the accused was considered to be a suspect. The judge, however, concluded the accused had not been detained during the search of his home.

The judge found there was no evidence the accused had been physically detained nor psychologically detained. ***"Not only was [the accused] free to come and go during the search, he was present when his wife asked to use the landline telephone and get the children ready for school and these requests were granted,"*** said the judge. ***"In reaching the conclusion that [the accused] was not detained I have rejected the submission that because an officer remained in the living room with the family, [the accused] felt he was under police guard and not free to leave. There was no evidence to support this submission. Also, [the accused] never asked to leave the living room even though he saw his wife and children***

leave and go about their daily business." Since there was no detention, the officer was not legally required to inform the accused of his right to counsel under s. 10(b).

As for the absence of a caution, it was only one of the factors to be considered in determining whether the accused's statement was **voluntary**. Moreover, the judge noted the accused appeared to be well-aware of his right to remain silent. Since there was no detention, the accused's s. 10(b) rights were not engaged. The police had not improperly elicited a confession on the porch; it was voluntary. This statement was admissible and did not taint the second statement which was also admissible. In any event, the two statements were not connected to each other since the second statement was made after a fresh start. The accused was convicted of possessing child pornography and distributing it.

Ontario Court of Appeal

The accused argued, in part, that he was detained at the time of his first statement and therefore his s. 10 (b) right to counsel without delay was triggered. He also submitted that his second statement at the police station was obtained in a manner that breached s. 10(b) and therefore both statements ought to have been excluded under s. 24(2).

s. 10(b) Charter

The s. 10(b) right to counsel is engaged only on arrest or detention. Chief Justice Strathy, writing the Court of Appeal's decision, outlined the meaning of s. 10(b). He stated:

> The s. 10(b) right attaches immediately on detention, subject to concerns for officer safety. It creates the right to retain and instruct counsel without delay and the right to be informed of that right, in order to effectively exercise it. A detained person who chooses to exercise their right must be given a reasonable opportunity to do so, and police must refrain from eliciting incriminating evidence from the detained person until he or she has had a reasonable opportunity to consult with counsel.
>
> [...]
>
> An individual's s. 10(b) right is thus intimately connected to their control over their own person. While an individual confronted by the authority of the state ordinarily has the option to simply walk away, this choice can be removed by physical or psychological compulsion, resulting in detention. Once detained, however, "the individual's choice whether to speak to the authorities remains, and is protected by the s. 10 informational requirements and the s. 7 right to silence". [references omitted, paras. 28-30]

In determining whether an individual's right to counsel has been triggered, a court must first determine whether a detention has occurred. Chief Justice Strathy stated:

> Detention can by physical or psychological. Psychological detention occurs where a person has a legal obligation to comply with a police direction, or where "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". In determining whether someone has been psychologically detained, the inquiry is an objective one, having regard to how a reasonable person would perceive the state conduct in the circumstances. An objective

"The s. 10(b) right attaches immediately on detention, subject to concerns for officer safety. It creates the right to retain and instruct counsel without delay and the right to be informed of that right, in order to effectively exercise it. A detained person who chooses to exercise their right must be given a reasonable opportunity to do so, and police must refrain from eliciting incriminating evidence from the detained person until he or she has had a reasonable opportunity to consult with counsel."

"There is no question that during the execution of a search warrant police are entitled to segregate the occupants of the premises to ensure officer safety, to prevent the loss or destruction of evidence, and to maintain the integrity of the search. They may give appropriate directions to that end."

> inquiry recognizes the need for police themselves to appreciate when detention occurs, so they can fulfill their Charter obligations to detained persons. [references omitted, para. 33]

Detention When Executing a Search Warrant in a Home

This case involved a police/citizen encounter through the exercise of police authority during the lawful execution of a search warrant. ***"There is no question that during the execution of a search warrant police are entitled to segregate the occupants of the premises to ensure officer safety, to prevent the loss or destruction of evidence, and to maintain the integrity of the search,"*** said Chief Justice Strathy. ***"They may give appropriate directions to that end."*** However, the police are limited in what they can do. He went on to adopt a statement from *R. v Owen*, 2017 ONCJ 731, where it was written:

> [O]nce the police have "cleared" the house and ensured that they have accounted for all the occupants, they must have a basis for any continued detention of any occupant(s). They are not permitted to simply keep the occupants in a room, incommunicado, while they go about their search of the house. Once police have ensured their safety, they are not justified in holding the occupants in a room unless the occupants are being arrested or otherwise be[ing] lawfully detained. Provided the occupants are not interfering with the search, they are permitted to stay in and move about the residence; or, they may leave.

In some cases, ***"where police have acted solely to ensure the integrity of the search, where the interference with liberty was modest, and where any questioning was not focused on the person's involvement in a crime, courts have found no detention."***

Was there a Detention?

The Court of Appeal found the trial judge had erred by failing to apply the objective test in determining ***"whether a reasonable person in the [accused's] circumstances would conclude by reason of the state conduct that he or she had no choice but to comply."*** Rather, ***"she treated the exercise largely as a subjective inquiry, asking whether there was evidence of the [accused's] state of mind."***

In this case, the Court of Appeal found the accused was psychologically detained, at the very latest, when he was asked to come to the porch to give a statement. The encounter had lasted about 50 minutes up until that point. Focused and accusatory statements were made to the accused, and he had been sequestered under guard and then asked to come to another area of the home to make a recorded statement. A reasonable person in the accused's situation would have concluded that they were obliged to comply:

- **Circumstances giving rise to the encounter.**
  - ➡ The police were not acting solely to ensure the integrity of the search, but were engaged in a focused investigation.
  - ➡ The accused was singled out for focused investigation.
  - ➡ Accusatory questions were posed that invited self-incrimination. Asking ***"Do you know why we are here?"*** and ***"can you tell us the location of computers in this house with child pornography on them?"*** would cause a reasonable person in the accused's position to conclude that they were a suspect, perhaps the prime suspect, in a police investigation into child pornography in their own home.
  - ➡ The police were not merely executing the search warrant, they were targeting and questioning a suspect.

- ➡ The family was segregated in one area of the home, without the use of phones and electronic devices. ***"While the police were justified in clearing the house to ensure the integrity of the search, the prolonged sequestering of the family in the living room was unnecessary for that purpose,"*** said the Appeal Court. ***"There was no suggestion that they attempted to interfere with the search or were anything other than co-operative. The fact that the [accused's] wife found it necessary to ask for permission to use the land line in the kitchen, speaks to a perception that she was not free to do so without permission. The same is true of her request to allow her children to get ready for school."***
- ➡ While his wife was being interviewed outside on the porch, the accused was left sitting in the living room with his children and a police officer continued to stand guard over them.
- ➡ The accused was asked to come out on the porch to speak to the detective and give a recorded statement.

- **The nature of the police conduct.**
  - ➡ Although there was no physical contact, the detective used language that was targeted and accusatory.
  - ➡ The warrant was executed by nine police officers at 6:03 a.m., a time when most people are just waking up and when working people with children are getting ready for their busy day. ***"This would cause a reasonable person to feel the weight of the state in their home, the most private of places."***
  - ➡ The encounter lasted about 40 minutes before the accused was invited to give a statement on the porch.

- **The particular characteristics of the individual.**
  - ➡ The accused was a mature, educated, and articulate adult with some appreciation of his rights in the face of the officer's inquiries.

Admissibility

Not only was the accused's first statement obtained as a result of a s. 10(b) breach, his second statement was also so obtained even though he had spoken to counsel and had been cautioned prior to it being taken. Chief Justice Strathy concluded that the second statement was temporally, contextually and causally connected to the first statement, which had been obtained as a result of a *Charter* breach:

> The statements were relatively close in time to each other. About four hours elapsed between the end of the first statement in the [accused's] home and the beginning of the second statement at the police station. In the meantime, the [accused] went through what must have been a head-spinning and stressful process of arrest, transportation to the police station, parading and processing at the station, waiting, and consulting with duty counsel. In the context of this case, the passage of time was not sufficient to sever the link between the two statements.
>
> The statements were also linked contextually. At the end of the first statement, [the detective] told the [accused] that the questioning would continue at the station: "[W]hen I come back to the station, I'd like to sit down and chat with you, but that, talk to your lawyer first, ok?" While the [accused] did speak to counsel, [the detective] was the only person present at the second interview. The officer's presence served to connect the two statements. [paras. 61-62]

This connection was also confirmed when, at the beginning of the recorded statement at the second interview, the detective said the second statement was a continuation of the earlier statement which was cut short because the accused wished to talk to duty counsel. In addition, the officer continued to employ the same investigative techniques used in the first interview such as gaining the accused's trust by being considerate of his well-being and using the implicit threat that if the accused was not forthright, he would have to interview his children.

"In my view, informing the [accused] of his rights and providing access to duty counsel did not serve

to remove the taint of the initial Charter infringement or to sever the nexus between the two statements," said Chief Justice Strathy. ***"The presence of the officer who was responsible for that breach, and who had taken the first statement a few hours earlier, the reference to the earlier statement and the use of the same interview techniques created a situation in which both interviews can reasonably be described as 'all part of the same interrogation process'."***

After balancing the factors to consider under s. 24(2), both statements were excluded from evidence:

> The state conduct was willful and in disregard of the [accused's] asserted Charter rights. It had a serious impact on those rights and on his attempt to exercise them. While society has a strong interest in the adjudication of the charges on their merits, the exclusion of the evidence will not preclude the Crown from proceeding with the charges, if it chooses to do so, relying on forensic evidence obtained from the computers themselves. This is not a case in which the Crown's case will be gutted by the exclusion of the improperly-obtained evidence. It may be more challenging to prove, but it has not been suggested that it would be impossible. [para. 83]

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

Complete case available at www.ontariocourts.on.ca

NO ARREST, DETENTION or REASONABLE GROUNDS: s. 146(2) YCJA INAPPLICABLE

R. v. Joseph, 2020 ONCA 73

Police received a 911 call at 9:18 pm reporting a stabbing. The deceased had been stabbed 17 times in total. The next day, by 3:48 am, the police had obtained the deceased's phone records and identified the phone numbers that he had been in contact with in the two hours before he was killed. Among others, the deceased's phone had been in contact with a phone that was registered to the accused's mother. These phones had exchanged 29 text messages and connected on four calls in the time leading up to when the deceased was killed. But the police did not know the content of those text messages.

The police attended at the accused's mother's home the next day, still well less than 48 hours since the homicide. They spoke with the accused's mother, told her that they were investigating a homicide, and inquired about the phone. The accused's mother confirmed that the phone number was registered to her but that her son, the accused, was not at home. He was 17-years old. The police left a business card and asked the mother to have her son contact them. The police then proceeded to another address that corresponded to a different number with which the deceased's phone had been in contact on the day of the homicide.

Shortly after they had left the accused's home, the officers got a call from the accused. They asked him to come into the police station to speak with them and he agreed to do so. Not long after that discussion, the accused arrived at the police station with his mother. An officer met the accused and his mother at the station and told him that they were investigating a homicide and that they would like to speak with him about any information he may have. He agreed to do so and his mother was present. He was never given a full s. 10(b) caution but was simply told, ***"you also have … your right if you want, you can call a lawyer … or you can call a lawyer for any question you may have regarding this or anything down the road"***.

Similarly, he was never given a full caution concerning the right to remain silent. He was simply told by an officer, ***"I can't force you to say anything, only you know if you do have information that would be great to help us"***. During a 26-minute interview, the police made numerous inquiries about the deceased, including about whether the accused knew him, what he knew about him, their relationship and when they last had contact. While the accused admitted that he had communicated with the deceased on the day of the stabbing, his interview was exculpatory. He admitted to having about four phone calls with

the deceased but vastly understated the number of text messages they had shared and the timing of those messages. The accused was ultimately charged with first degree murder.

Ontario Superior Court of Justice

The accused sought the exclusion of his statement because, in his view, the police failed to comply with s. 146(2) of the *Youth Criminal Justice Act* (*YCJA*) and his statement was involuntary. He submitted that the police had reasonable grounds to believe he committed an offence and that he was detained when questioned. Thus, he contended s. 146(2) was triggered.

The judge ruled that the police did not have reasonable grounds for believing that the accused had committed an offence. He held that the **"reasonable grounds for believing"** threshold was the same as that found in s. 495(1)(a) of the *Criminal Code* and was something more than **"reasonable suspicion"** or **"possible guilt"**. At the time the interview took place, the only information connecting the accused to the deceased were phone records which revealed a good deal of contact between the two on the day of the homicide. This, however, did not give rise to reasonable grounds to believe that the accused was involved in the killing. It didn't even amount to a reasonable suspicion that the accused was the perpetrator of the offence. Nor was the accused psychologically detained at any point during the interview. He called the police of his own free will; attended at the police station of his own free will and left after the interview of his own free will; his mother was in attendance the whole time; the police questioning was entirely exploratory and of a general nature; and, when he inquired, the accused was specifically told he did not have to answer specific questions and decided not to answer one of them.

The judge also concluded that the accused's statement was voluntary. There were no inducements that would have overborne his will. Nor was there anything in the interview to suggest an atmosphere of oppression, a lack of an operating mind, or any trickery involved in the taking of the statement. The mere fact that the accused was not given a full caution about the right to counsel or the right to remain silent did not matter because the police were under no obligation to afford those cautions; the accused had not been detained or arrested. The accused's statement to police was admitted and he was convicted of second degree murder by a jury based on all of the evidence presented. He was sentenced as an adult and given a life sentence with parole eligibility after seven years.

Ontario Court of Appeal

The accused argued, among other things, that the trial judge erred in admitting the statement he gave to police. He submitted that the police failed to comply with s. 146(2) of the *YCJA* - a provision governing the admissibility of statements from young persons - and in concluding his statement was voluntary. He suggested that, as a **"suspect"**, the police were obligated to caution him about his right to silence and the right to counsel. Further, he asserted that the police induced him to provide a statement.

s. 146(2) of the YJCA

Justice Fairbairn, authoring the Court of Appeal's decision, concluded that because the accused was 17-years old at the time he gave his statement he was a **"young person"** under the *YCJA*. The *YCJA* has provisions that supplement the common law relating to the admissibility of statements of young persons:

> In defined circumstances, s. 146(2) provides numerous additional protections, beyond those provided at common law, to young persons giving written or oral statements to persons in authority. The provision responds to and cares for the accepted vulnerabilities of young persons. ...
>
> Section 146(2) makes a young person's statement presumptively inadmissible unless the Crown dislodges that presumption. To this

> end, the provision has been described as an admissibility rule that is "exclusionary by nature, but inclusionary by exception". It places the onus on the Crown to demonstrate beyond a reasonable doubt one of two things: (a) why the provision does not apply; or, (b) if the provision applies, that its statutory requirements were met.
>
> There are three statutory prerequisites to the operation of s. 146(2): (a) the youth is arrested; (b) the youth is detained; or (c) the "peace officer or other person has reasonable grounds for believing that the young person has committed an offence". [references omitted, paras. 20-22]

In this case, the Court of Appeal agreed with the trial judge that none of the statutory prerequisites upon which to trigger the operation of s. 146(2) existed. Therefore, the police were not statutorily obliged to meet the s. 146(2) criteria:

- **No Arrest:** The accused was not under arrest at the time that he gave his statement to the police.
- **No Reasonable Grounds for Believing the Accused Committed an Offence.** ***"'[R]easonable grounds for believing that the young person has committed an offence' in s. 146(2) is synonymous with the threshold test for arrest without warrant,"*** said Justice Fairbairn. ***"The s. 495(1)(a) threshold test for arrest without warrant is time worn and well understood. The officer must have a subjective belief that the individual committed (or is about to commit) an indictable offence and that belief must be objectively reasonable in the circumstances. In other words, the circumstances known to the police at the time of the arrest must be capable of permitting a reasonable person, 'standing in the shoes of the police officer', to believe that grounds for arrest exist."*** She continued:

> The police did not subjectively believe that they had grounds to arrest the [accused] either when he arrived for or left the interview. The evidence about the officers' subjective states

BY THE BOOK:

s. 146(2) ***Youth Criminal Justice Act***

When statements are admissible

s. 146 (2) No oral or written statement made by a young person who is less than eighteen years old, to a peace officer or to any other person who is, in law, a person in authority, on the arrest or detention of the young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offence is admissible against the young person unless

(a) the statement was voluntary;

(b) the person to whom the statement was made has, before the statement was made, clearly explained to the young person, in language appropriate to his or her age and understanding, that

  (i) the young person is under no obligation to make a statement,

  (ii) any statement made by the young person may be used as evidence in proceedings against him or her,

  (iii) the young person has the right to consult counsel and a parent or other person in accordance with paragraph (c), and

  (iv) any statement made by the young person is required to be made in the presence of counsel and any other person consulted in accordance with paragraph (c), if any, unless the young person desires otherwise;

(c) the young person has, before the statement was made, been given a reasonable opportunity to consult

  (i) with counsel, and

  (ii) with a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person, as long as that person is not a co-accused, or under investigation, in respect of the same offence; and

(d) if the young person consults a person in accordance with paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

"'[R]easonable grounds for believing that the young person has committed an offence' in s. 146(2) is synonymous with the threshold test for arrest without warrant. The s. 495(1)(a) threshold test for arrest without warrant is time worn and well understood."

> of mind, though, did not drive the result in this case. Rather, the trial judge correctly focused on the facts that would have objectively supported a belief that the [accused] was arrestable at the time of the interview. Necessarily, those facts needed to be known by the police at the time that the interview took place and not at some later point in time.
>
> The trial judge's analysis was almost entirely informed by the objective reality of the situation as known by the officers less than 48 hours after the deceased had been killed. While the case against the [accused] undoubtedly strengthened over time, including the discovery of the [accused's] and deceased's DNA on a hat found close to the scene of the murder, the DNA results were not known at the time of the interview. I agree with the trial judge that at that time, there were simply insufficient grounds to believe that the [accused] had "committed an offence" within the meaning of s. 146(2) of the YCJA.
>
> To use police parlance, while the phone contact made the [accused] a "person of interest" to them, it did not make him arrestable. There could have been any number of reasons why the [accused] had contact with the deceased on the day of the homicide, many of which would not point toward him being a party to the homicide. While there was much to trigger a police desire to speak with the [accused] (and, for that matter, the other individual who had clearly been in contact with the deceased's phone on the day of the homicide), the phone contact alone did not furnish grounds to believe the [accused] was culpable in the homicide. Phone contact – the content of which is unknown – with a person who is killed shortly after will undoubtedly attract police attention. Standing on its own, though, that contact does not give rise to a reasonable belief that the communicator killed the other person. [paras. 30-32]

There were no reasonable grounds for believing that the accused had killed the deceased. Section 146(2) of the YCJA was not triggered on this basis.

- **No Detention:** The accused was not psychologically detained at the time of the interview. The Court of Appeal rejected the accused's submission that there was a more robust test for psychological detention under s. 146(2) of the *YCJA* than s. 9 of the *Charter* because of the unique vulnerabilities of young people. ***"There is no special test to be applied when determining whether a young person is detained under the YCJA,"*** said Justice Fairbairn. ***"[The test for psychological detention] requires that the individual circumstances of the alleged detainee, including the age of the detainee, be taken into account in assessing whether she or he was detained."*** And further:

> This test for psychological detention already accounts for the alleged detainee's specific individual circumstances, including her or his age. The test allows for the [accused's] youth to be taken into account when determining whether the youth perceived that he or she had no choice but to comply. ... That test for detention is directly transferrable to the s. 146(2) YCJA context.

"There is no special test to be applied when determining whether a young person is detained under the YCJA. ... [The test for psychological detention] requires that the individual circumstances of the alleged detainee, including the age of the detainee, be taken into account in assessing whether she or he was detained."

"[W]hile a caution may assist someone with deciding whether to speak with the police, and therefore may inform a voluntariness analysis, the absence of a caution is only a factor to consider in determining the voluntariness of a statement. It is not a prerequisite to the voluntariness of that statement."

> Approaching the test for detention differently in the s. 146(2) YCJA context would create unnecessary confusion in the law and inject uncertainty into on-the-ground policing. I see no reason why the Grant test for detention, one that specifically accounts for the age of the alleged detainee, is not equally appropriate in the YCJA context. Nothing more is required. [references omitted, paras. 39-40]

In addition to the factors identified by the trial judge in determining that there was no detention, the Appeal Court added the following:

> ... While the [accused] was young, he was almost eighteen years of age. ... [T]here was nothing inherently intimidating about the interview process. Indeed, at one point the [accused] took charge of the interview and told the officers to "skip" a certain line of questioning that he did not wish to answer. The interview was not adversarial in nature. While the interview room door was closed, there is no suggestion it was locked. The video recording that the trial judge viewed demonstrates a polite environment, where the police clearly informed the [accused] that he did not have to answer any questions if he did not wish to do so. Although unnecessary, the [accused] was repeatedly told he could speak with a lawyer if he wished to do so, but he chose not to do so.
>
> None of this suggests the conduct of a person who believed he had no choice but to comply. [para. 42-43]

Voluntariness

Justice Fairbairn ruled that there is no requirement to caution a suspect who is not detained or arrested. ***"I disagree with the proposition that the police are obliged to caution a suspect, simply because he or she is a suspect, and that the failure to do so will render a statement involuntary,"*** she said. ***"Section 10(b) of the [Charter] requires that an accused be informed of the right to counsel at the time of arrest or detention. Moreover, the residual constitutional protection afforded to the right to silence under s. 7 of the Charter also only arises after detention, when the superior power of the state is imposed upon the individual."*** She continued:

> ... [The accused] was neither detained nor arrested at the time of the interview. Accordingly, even if he was a suspect at the time of the interview, a characterization that the trial judge specifically rejected, the police were under no constitutional obligation to caution him.
>
> The [accused] says, though, that even if the caution were not constitutionally required, the failure to caution him rendered his statement involuntary under the common law confessions rule because he did not know that he could refuse to speak with the police.
>
> I reject the proposition that involuntariness flows directly from the absence of a caution, even where the interviewee is a youth. [para. 51-53]

And further:

> ... [W]hile a caution may assist someone with deciding whether to speak with the police, and therefore may inform a voluntariness analysis, the absence of a caution is only a factor to consider in determining the voluntariness of a statement. It is not a prerequisite to the voluntariness of that statement.
>
> As the [accused] was neither detained, nor arrested, I agree with the trial judge that his statement was not rendered involuntary through the lack of a caution. [references omitted, paras. 55-56]

Despite there being no s. 10(b) compliant caution, the accused had been told that he could speak with a lawyer if he wished to do so and that he did not have to answer questions if he did not wish to do so. Moreover, Justice Fairbairn agreed there were no improper inducements. Suggesting that the accused could be a witness depending on what he said, advising him it was his one opportunity to tell the truth, and telling him that the purpose of the recording was for police "records only" did not cross the line:

> The first impugned statement – that depending on what he said, the [accused] could be a witness – relates to an inquiry that was initiated by the [accused], not the police. In any event, it was an honest answer to the [accused's] question about whether he was a witness. At that stage, the police did not know whether he was a witness to something or not. As the officer said, it would depend on what he told the police. The second impugned statement – that it was the [accused's] one chance to tell the truth – could have been phrased better, but was made in the context of the officer informing the [accused] that it is an offence to lie to the police.
>
> Even if these police statements could be viewed as inducements, they were not improper in nature. There is nothing wrong with offering an interviewee an inducement to speak. The voluntariness of a statement is not thrown into doubt simply because an accused is encouraged to speak, including through inducements. The question is whether such inducements cause the interviewee's will to be overborne. It is the "strength of the inducement", the threat or promise – informed by all of the circumstances, that informs whether the will of the accused is overborne.
>
> As reviewed previously, the interaction between the police and the [accused] in this case demonstrates that the [accused's] will was never overborne. Even if the impugned police comments could be construed as inducements as the [accused] suggests, he was in full control throughout the interview. This was clearly displayed at one point in the interview when the [accused] queried whether he had to answer a particular question. He had already been told that he could not be forced to say anything. The police reinforced this fact, assuring the [accused] that he did not have to answer anything he did not wish to answer. The [accused] then told the police to "skip" that question. As noted by the trial judge, this is not the behaviour of someone whose will has been overcome.
>
> Finally, the [accused] argues that the police misled the [accused] about the purpose of the recording because he was told that the videotape would be for police "records only". That comment must be set in its proper context. It only came up when the [accused's] mother expressed concern that the video would make its way onto television and she did not want her "face to go on T.V.". It was in response to that expression of concern by the mother that the officer said that the videotape was for police records only. She was also told that this was the way that the "Toronto Police do their interviews" and that they wished to have a "true version of a statement" so that there are no "questions down the road."
>
> I do not agree that the police misled the [accused] about the purposes to which the recording could be put. The [accused] was told shortly afterwards that he may be a witness in this matter, although it would all depend on what he had to say. Accordingly, at a minimum, he knew that the statement could be relevant to a criminal proceeding and that it was being recorded for accuracy so that there was no question as to what he said down the road.
>
> Moreover, it is difficult to conceive of this impugned statement as an inducement to speak. Like the above impugned passages, there was no quid pro quo, let alone an overcoming of the [accused's] will. There is no suggestion that the comment constitutes a police trick that would undermine the integrity of the criminal justice system. [references omitted, paras. 61-66]

The statement accused's statement was voluntary and his appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's Note: Additional details obtained from *R. v. P.J.*, 2015 ONSC 6057.

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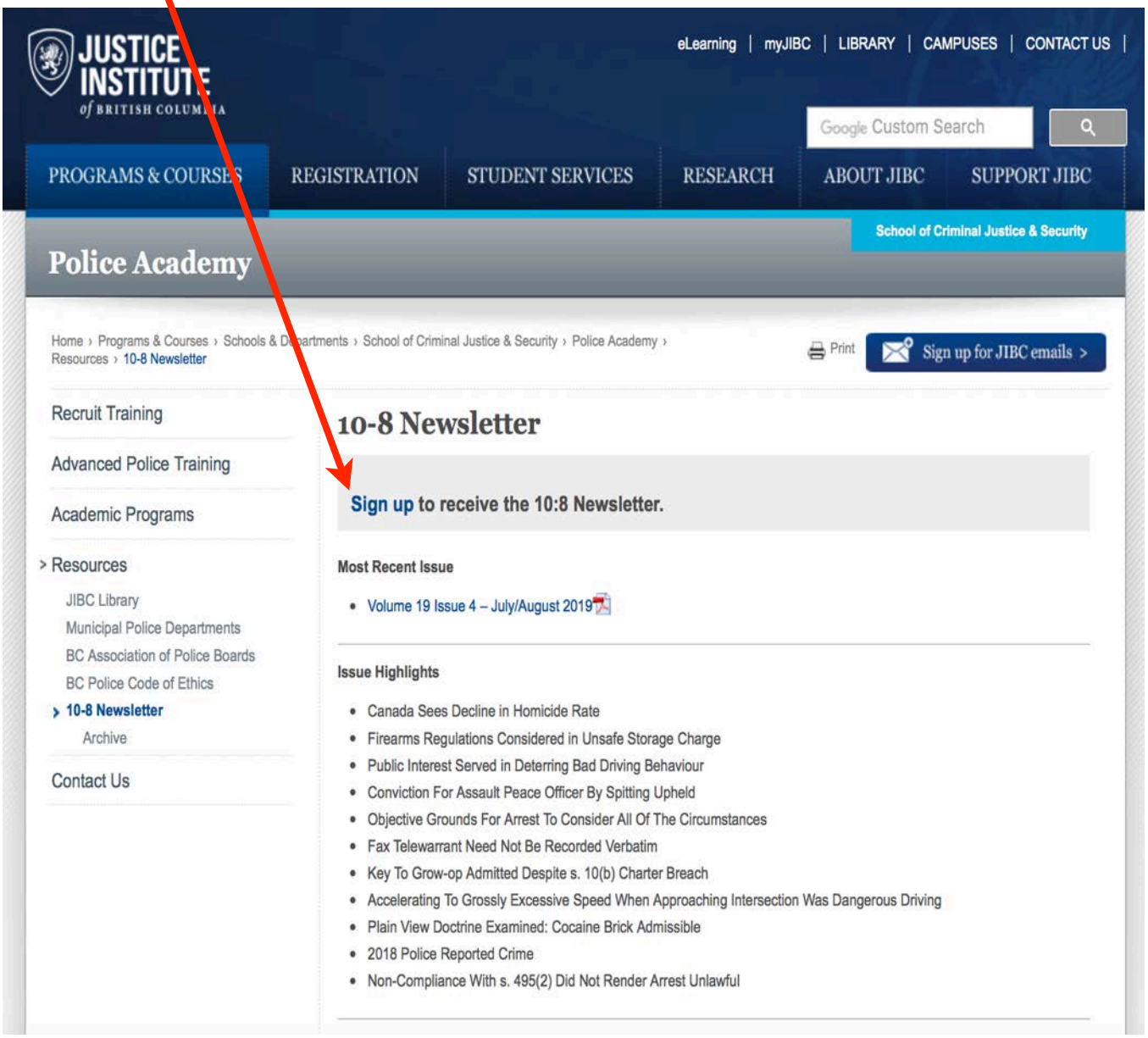

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In 1998 the Government of Canada proclaimed the last Sunday in September as Police & Peace Officers' National Memorial Day. On this day every year Canadians are given an opportunity to formally express appreciation for the dedication of Law Enforcement Officers who make the ultimate, tragic sacrifice to keep communities safe.

Sunday, September 27, 2020 at 1:00 pm
Ceremony at the BC Legislature in Victoria, BC

Law Enforcement participants to form up in the 800 block of Government Street at 12:00 pm.

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