JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

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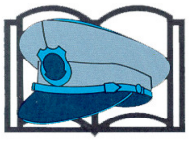

CANADIAN POLICE & PEACE OFFICER MEMORIAL SERVICE

Sunday, September 27, 2020
Parliament Hill
Ottawa, Ontario

See page 25

BC LAW ENFORCEMENT MEMORIAL SERVICE

Sunday, September 27, 2020
BC Legislature
Victoria, BC

See page 36

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BC POLICE ARMED WITH NEW ENFORCEMENT POWERS IN FIGHT AGAINST COVID-19

BC's government has enacted new measures using the extraordinary powers of the *Emergency Program Act* (EPA) - see Ministerial Order M134. Police and other provincial enforcement officers may now issue $2,000 violation tickets for owners or organizers contravening the provincial health officer's (PHO) order on gatherings and events. Police will also be able to issue $200 violation tickets to individuals not following the direction of police or enforcement staff at events or who refuse to comply with requests to follow PHO orders or safe operating procedures, or respond with abusive behaviour.

MOST CANADIAN's AGREE IN POLICE POWER TO ARREST FOR VIOLATING SOCIAL DISTANCING RULES

According to a Leger survey released in July 2020 a majority of Canadians agree that the police should have the right to issue fines or arrest people who do not respect social distancing measures or do not wear masks in places where governments make mask wearing mandatory. The percentages agreeing with such police powers is higher that Canada's neighbour to the south.

Should the police have the right to issue fines or arrest people who do not respect social distancing rules?

Response	BC	AB	MB/SK	ON	QC	ATL	Canada	U.S.
Yes	56%	51%	66%	66%	63%	62%	62%	52%
No	33%	35%	23%	25%	27%	22%	27%	34%
Don't know/prefer not to answer	12%	14%	11%	9%	10%	10%	11%	15%

Should the police have the right to issue fines or arrest people who do not wear masks in places where governments make wearing masks mandatory?

Response	BC	AB	MB/SK	ON	QC	ATL	Canada	U.S.
Yes	59%	66%	76%	70%	69%	62%	68%	58%
No	32%	28%	20%	23%	25%	23%	25%	31%
Don't know/prefer not to answer	8%	6%	4%	7%	6%	15%	7%	11%

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IT'S TIME TO SPEAK UP ABOUT MENTAL HEALTH.

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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

SEARCH OF VEHICLE FOR IDENTIFICATION PROPER AS AN INCIDENT TO ARREST

R. v. Law, 2020 ABCA 267

After seeing a vehicle being driven at a high rate of speed in a residential area (estimated at about 100 km/h), police followed it as it made several turns. The vehicle was described as being driven in an evasive manner before it came to a stop in a residential cul-de-sac. The accused exited the vehicle and called out to police that the vehicle was not registered. Since the vehicle had BC licence plates, the police knew immediately that if the vehicle was unregistered, it was also uninsured.

The accused was ordered back into the vehicle. But before returning to the driver's seat, the accused stood beside the open vehicle door, reached inside, and appeared to be moving items around. The police again ordered the accused to re-enter the vehicle which he eventually did. The police saw the accused's head bobbing up and down and it appeared he was leaning forward in his seat.

One officer approached the driver's side of the vehicle and opened the door. The accused was holding a few items on his lap, including a tablet and a notebook. He told the officer he did not have his driver's licence on him but provided a name, which was later learned to be false. At 3:52 a.m. the officer advised the accused he was being arrested for failing to have his driver's licence. He was handcuffed and placed in the back of a police car.

A backup officer looked for identification in the vehicle. She leaned into the open driver's side door and saw the butt of a shotgun protruding about one to two inches from under the driver's seat. A double-barrel sawed-off shotgun, with the stock cut off to form a pistol grip, was removed from the vehicle and two rounds were unloaded from it. The vehicle was searched further and a knife was found sitting on the front seat and four live rounds of ammunition were found loose in the vehicle. After police found the shotgun, the accused provided his real name. A computer check revealed the accused had 11 outstanding warrants and was the subject of a recognizance requiring him to remain at his residence 24 hours a day and not be in a motor vehicle without the registered owner present. He was also prohibited from possessing weapons.

At 4:22 a.m. the accused was Chartered and cautioned for breaching a recognizance and breaching a firearms prohibition. At 4:44 a.m. he was given the opportunity to retain and instruct counsel at the police station. At 10:02 a.m. he was arrested for the specific offences related to possessing the prohibited sawed off shotgun. The police did not attempt to elicit information from the accused in the period from 4:22 a.m. to 10:02 a.m. The accused was charged with numerous offences.

Alberta Provincial Court

The arresting officer explained the delay from 04:22 a.m. to 10:02 a.m. when the accused was arrested for the specific offences related to the prohibited firearm. The officer said he wanted to confirm that he was laying the correct weapons charges. However, he acknowledged that he knew he would be charging the accused with possessing a firearm and unsafe storage.

The judge concluded that the accused's ss. 8 and 9 *Charter* rights had not been breached. As for s. 9, the judge held the police had *"ample articulable cause"* to detain the accused. These grounds included:

- The vehicle was travelling at excessive speeds in a residential neighbourhood.
- The activity was occurring at 3:50 a.m.
- The driver briefly appeared to be attempting to evade the police vehicle.
- As soon as the vehicle stopped, its driver exited the vehicle and began to approach the police truck, which the officer considered unusual and suspicious behaviour.
- The driver shouted out that the vehicle was not registered.

- When ordered to re-enter his vehicle, the driver instead stood outside, leaned in, and appeared to be rummaging about inside it.
- When the driver re-entered the vehicle, his head continued to bob up and down and he appeared to be leaning forward and down repeatedly.
- Because the vehicle had BC licence plates, no registration meant that the vehicle had no insurance.
- When the arresting officer approached and opened the driver's door and requested documents, the accused said he did not have his license with him.
- The arresting officer knew that if he believed on reasonable grounds that an unregistered vehicle had been driven and that the driver could not produce satisfactory identification, he was arrestable under s. 169 of Alberta's *Traffic Safety Act* (*TSA*).

As for the search and seizure, the judge opined that the accused had no standing to bring a s. 8 challenge because he had not established a reasonable expectation of privacy in the vehicle. However, the judge ruled that s. 10(a) and (b) had been violated. Between the time when the accused had been arrested at 4:22 a.m. for the breaches and 10:02 a.m. when he was informed of the specific firearms charges, the accused had not been informed of the full extent of his jeopardy. Therefore, he was unable to obtain meaningful legal advice when he spoke to a lawyer.

Nevertheless, despite the s. 10 *Charter* breaches, the judge admitted the evidence of the shotgun, ammunition and knife into evidence because they had been obtained before the s. 10 breaches occurred. In the judge's view, the evidence had not been obtained in a manner that infringed or denied the accused's rights. And, even if the evidence was obtained in such a manner, the evidence was admissible under s. 24(2). The accused was convicted of numerous offences related to weapons, recognizance breaches and possession contrary to an order. He was sentenced to 8.5 years in prison less pre-sentence custody.

BY THE BOOK:

Alberta's *Traffic Safety Act*

Arrest without warrant

s. 169(1) A peace officer may arrest a person without warrant if the peace officer, on reasonable grounds, believes that

(a) the person has committed an offence in respect of any of the provisions set out in subsection (2), and

(b) the person

(i) will continue or repeat that offence if not arrested, or

(ii) has provided the peace officer with inadequate or questionable information as to the person's identification.

(2) For the purposes of subsection (1), the following are the provisions for which a person may be arrested without a warrant:

(a) sections 51(a) and 94 relating to the operation of a motor vehicle without having a subsisting operator's licence;

(b) section 52(1)(a) and (d) relating to the operation of a motor vehicle without having a subsisting certificate of registration;

(i) section 115(2) and the Rules of the Road relating to the speed of motor vehicles;...

Alberta Court of Appeal

The accused argued the trial judge made several errors. These errors included a finding that there were no ss. 8 or 9 *Charter* breaches and that the evidence of the shotgun, ammunition and knife ought to have been excluded under s. 24(2). In the accused's view, he had been arbitrarily detained under s. 9 and subjected to an unreasonable search under s. 8. As a result, the evidence obtained from these breaches, in

"Reasonable grounds have both a subjective and objective component. An arresting officer must subjectively have reasonable grounds to base the arrest. In addition, these grounds must be justifiable from an objective point of view. The existence of the subjective reasonable grounds must be assessed on the totality of facts known to the arresting officer at the time of the arrest. The objective component is assessed 'through the eyes of the reasonable person with the experience and knowledge of the arresting officer'."

conjunction with the s. 10 (a) and (b) breaches already found, should have resulted in the evidence being excluded.

Arbitrary Detention?

Although he did not dispute that his initial detention was not arbitrary, the accused argued his arrest was arbitrary because it was unlawful. He submitted that the arresting officer did not have the lawful grounds to arrest him under either Alberta's *TSA* or s. 495(1) of the *Criminal Code*, and the trial judge did not properly analyze the issue. The Crown, on the other hand, contended that the police had the necessary grounds to detain and arrest the accused under s. 169 of the *TSA*.

The Court of Appeal concluded that the police had the necessary grounds to arrest the accused under s. 169 on the facts as found by the trial judge. The Court of Appeal stated:

> Reasonable grounds have both a subjective and objective component. An arresting officer must subjectively have reasonable grounds to base the arrest. In addition, these grounds must be justifiable from an objective point of view. The existence of the subjective reasonable grounds must be assessed on the totality of facts known to the arresting officer at the time of the arrest. The objective component is assessed "through the eyes of the reasonable person with the experience and knowledge of the arresting officer".
>
> Reasonable grounds are more than mere suspicion but do not require proof on a balance of probabilities. [references omitted, paras. 26-27]

Even though he did not formally arrest the accused under s. 169 of the *TSA*, the arresting officer subjectively believed he had reasonable grounds to arrest the accused for driving an unregistered motor vehicle. The trial judge found the arresting officer knew the vehicle was not registered and the accused did not have his license with him. As well, the arresting officer knew he had the grounds to arrest the accused under s. 169 of the *TSA* if he believed that the vehicle was unregistered and the driver could not produce satisfactory identification. As for the objective component, the Court of Appeal continued:

> Moreover, the trial judge's factual findings establish that the arresting officer's subjective belief was objectively reasonable. The reasonable person with experience and knowledge of the arresting officer would have had the following constellation of facts before her in deciding whether to arrest:
>
> 1. The [accused] was observed speeding, as he was driving the vehicle at twice the posted speed limit in a residential area.
> 2. The [accused] was driving an unregistered motor vehicle which in turn was an uninsured motor vehicle.
> 3. The [accused] could not provide adequate identification because he had no driver's licence, no registration, no insurance or any other identification although he was observed rummaging in the vehicle prior to his arrest.
>
> Either the speeding or the driving of the unregistered vehicle, combined with the [accused's] failure to provide adequate identification, satisfy the elements of section 169 of the Traffic Safety Act permitting an arrest without warrant.

> In conclusion, based on the factual findings made by the trial judge the arresting officer had the subjective reasonable grounds to arrest the [accused] under the Traffic Safety Act and those grounds are justifiable from an objective point of view. Thus, the arrest was authorized by law and therefore not an arbitrary detention. ... [paras. 31-33]

Unreasonable Search or Seizure?

The Court of Appeal found it did not need to decide whether or not the trial judge was correct in finding the accused had a reasonable expectation of privacy in the vehicle. Even if he had standing to bring a s. 8 *Charter* claim, the search was reasonable as an incident to arrest. Not only was the arrest lawful, but the search of the vehicle was truly incident to the accused's arrest:

> In this case, once the [accused] stopped and told the officers the car was unregistered and he did not have a licence, the police began to investigate him for driving an unregistered and uninsured vehicle, having no driver's licence, and failing to provide any, let alone adequate, identification. Upon the arrest of the [accused], the police purpose for the search of the vehicle was to look for identification of the [accused] as it would be reasonable to expect to find identification in the vehicle, as well as any information respecting ownership. The shotgun, knife and ammunition were found in plain view while the police reasonably searched for identifying information. Thus, the seizure of the shotgun, ammunition and knife was a lawful seizure incident to the arrest of the [accused]. [para. 41]

s. 24(2) Charter

The Court of Appeal concluded the trial judge did not err in admitting the evidence, a decision that attracted deference as long as the trial judge considered the proper factors and did not make any unreasonable findings. In this case, the trial judge was found to have applied the correct legal tests and the proper s. 24(2) factors in his analysis.

The accused's appeal was dismissed.

Complete case available at www.canlii.org

REASONABLE SUSPICION SATISFIED: NO ENTRAPMENT

R. v. Li, 2020 SCC 12

Police received an anonymous Crime Stoppers tip involving a phone number that the tipster alleged belonged to a dial-a-dope operation. The tipster also stated that the operation involved the sale of cocaine from a tan Honda Odyssey minivan and the vehicle's licence plate number was provided. The officer taking the tip recorded the information in a document, called a "Swan" sheet. Police database queries related to the phone number were negative. A check of the licence plate number showed it was registered to an Odyssey minivan. A PRIME (Police Records and Information Management Environment) query revealed the registered owner of the licence plate had an extensive history of suspected drug trafficking through dial-a-dope operations, including several recent reports. Motor vehicle records also revealed the registered owner had five other vehicles registered in his name.

When police placed a call to the phone number it rang twice, then disconnected. The officer recorded on the "Swan" document that he had a reasonable suspicion that the phone number was a dial-a-dope drug line.

Police subsequently selected the phone number for an attempted undercover drug purchase. An officer called the phone number. It was answered by a man. The officer asked how the man was doing, and he responded that he was "good". The man then asked who was calling, and the officer said it was "J" or "Jen". The man said "Okay". He did not ask any follow up questions, so the officer stated that she wanted "half of soft", a street term for half a gram of powder cocaine. The man said that he could meet her, and they arranged to meet at a supermarket. About half an hour later, they met in the parking lot and negotiated a purchase of 0.75 grams of powder cocaine for $80. Over the following months, the police made an additional 21 drug purchases as part of their investigation. The accused was involved in 16 of these transactions.

British Columbia Provincial Court

The accused pled guilty to one count of trafficking in cocaine. However, he argued that he was entrapped and the proceedings should be stayed. The judge agreed. When the officer made her initial phone call, the police did not have a reasonable suspicion the accused was a drug trafficker or that the phone number was affiliated to a dial-a-dope operation. ***"Nothing in the original tip was corroborated or linked by external police investigation,"*** said the judge. ***"While the police may have had a mere suspicion, this is not sufficient. The police did not corroborate the original tip either connecting [the accused] personally with the vehicle or telephone number in the Crime Stopper tip, or connecting the phone number and vehicle or registered owner of that vehicle. The tip contained no other information to corroborate such as names, descriptions, or accents."***

Further, ***"the police did not achieve an objectively reasonable suspicion through investigative steps after calling the phone number and giving the opportunity to commit the offence,"*** said the judge. When the officer called the phone number, she engaged the accused in a criminal transaction for cocaine without taking investigative steps or gaining additional information.***"[The officer's] request for a half of soft was not an investigative step at an opportunity to traffic. It was a request for a particular type and amount of drugs. She engaged in transactional language that only required [the accused] to say yes for the offence to be complete. She offered him an opportunity to traffic by offer without reasonable suspicion."*** As a consequence, a stay of proceedings was entered.

British Columbia Court of Appeal

The Crown challenged the trial judge's ruling on entrapment. The Court of Appeal first reviewed the rules of entrapment. It noted that entrapment can occur in the following ways:

1. the authorities provide an opportunity to a person to commit an offence:
   - without a reasonable suspicion the person is already engaged in the particular criminal activity; or
   - the police undertake a *bona fide* investigation directed at an area where it is reasonably suspected that criminal activity is occurring.
2. with a reasonable suspicion but they go beyond simply providing an opportunity and induce the commission of an offence.

Reasonable Suspicion

Justice Grobermen, speaking for the Court of Appeal, concluded that the trial judge failed to consider the tip as a whole rather than separating the information into parts. There was no need for the tip to identify the accused personally by name nor were the police required to establish, independently of the tip itself, that the telephone number belonged to a dial-a-dope operation. Rather, it was only necessary that the police establish a reasonable suspicion that the number called was one dedicated to drug trafficking through a dial-a-dope operation given the details of the Crime Stoppers tip and the preliminary information uncovered in police investigations:

> While the Crime Stoppers tip was from an anonymous informant of unknown reliability, aspects of the tip enhanced its credibility. The tip referred to a vehicle that the police were able to connect to a person who appears to have been involved in several dial-a-dope operations. The police were entitled, in the circumstances, to attach considerable weight to the tip. [para. 18]

> In summary, the judge erred in requiring specific corroboration of all elements of the tip. Such corroboration was unnecessary. Rather, what was required was that the police had sufficient information to harbour a reasonable suspicion that they were calling a phone number attached to a drug trafficking operation. [para. 24]

"[W]hen investigating a suspected dial-a-dope operation, the police must have reasonable suspicion over the individual or over the phone number or over a combination of both, before they can ask to purchase drugs from the person answering the phone."

The police officers also operated as a team, rather than as separate individuals, and the officer making the telephone call was entitled to take action based on the advice of her colleagues.

The Appeal Court noted that ***"the reasonable suspicion standard is not an onerous one."*** It is something more than a mere suspicion but less than reasonable and probable grounds. In some cases, the standard will not have been met where the police have acted on anonymous tips of indeterminate credibility and no attempt had been made to investigate. In other cases, ***"very limited confirmatory evidence has been held to be sufficient to transform an anonymous tip (or a tip of uncertain credibility) into 'reasonable suspicion'."*** In this case, the Court of Appeal concluded that the reasonable suspicion standard had been satisfied:

> [S]ome details of the tip were confirmed: the correspondence between the licence plate number and the Honda Odyssey, and the apparent involvement of the vehicle's owner with dial-a-dope operations. Those elements of confirmation were sufficient to give the police reasonable suspicion that the number they called was associated with a dial-a-dope operation. [para. 32]

Thus, the police had a reasonable suspicion before providing the accused with the opportunity to sell cocaine to an undercover officer.

A Bona Fide Investigation?

The police were also involved in a *bone fide* investigation in which they could approach a person and attempt to purchase drugs. Here, the police were undertaking a *bona fide* investigation where it was reasonably suspected that criminal activity was occurring. ***"The police had information that was sufficient to label the telephone number 'suspicious',"*** said Justice Groberman. ***"The limited inquiries made by [the police officer] can properly be characterized as investigative in nature. The actual transaction to purchase the drug occurred later, and only after negotiations at the [supermarket]."***

The Crown's appeal was allowed, the stay of proceedings lifted, and the matter was remitted back to the trial court for sentencing.

Supreme Court of Canada

In a short oral judgement, the nine-member unanimous panel of the Supreme Court of Canada dismissed a further appeal by the accused. Justice Martin stated:

> We recognize that neither level of court in this appeal had the benefit of this Court's reasons in R. v. Ahmad, 2020 SCC 11. As explained in Ahmad, when investigating a suspected dial-a-dope operation, the police must have reasonable suspicion over the individual or over the phone number or over a combination of both, before they can ask to purchase drugs from the person answering the phone.
>
> Applying this framework and considering the totality of the circumstances, the police had reasonable suspicion, before making the call, that the phone number was being used for drug dealing. The police used a Swan sheet to record what actions they took to verify this tip. The tip was that a specific phone number was being used in a dial-a-dope operation to sell cocaine, the sales took place near a particular mall, and involved a tan Honda Odyssey with a specific licence plate. In addition to the phone number, the tip provided details such as which drug was for sale, the area of operation, a vehicle description, and licence plate number. The

police confirmed the assertion of illegality by connecting this car and licence plate, and five other vehicles, to a person with an extensive and recent history of suspected dial-a-dope drug dealings.

Finding no entrapment, a verdict of guilty was entered and the matter was remitted for sentencing.

Complete case available at www.scc-csc.ca

Editor's Note: Additional details obtained from *R. v. Li,* 2019 BCCA 344. For a summary of *R. v. Ahmad*, 2020 SCC 11 see "In-Service: 10-8" Volume 20 Issue 3.

NO REQUIREMENT TO REFRAIN FROM ELICITING EVIDENCE DUE TO LACK OF DILIGENCE

R. v. Catellier, 2020 QCCA 850

While investigating the attack on a man in his home, the accused was arrested at 10:45 am by an officer. He was advised of his right to counsel and given the official warning. The accused did not express a desire to contact a lawyer. He was transported to the police station where he requested to speak to counsel of choice at 11:40 a.m. At 11:42 a.m., a police officer called the accused's counsel of choice but there was no answer. The officer left a message and told the accused he did so. The accused was placed in a cell. At 1:40 p.m., the investigator went to the accused's cell and led him to an interview room. She explained the reason for his arrest and made sure he understood. At 1:41 p.m., she again read him his rights. The accused told the investigator that he had already asked to speak to counsel of choice. The investigator then learned from a colleague that the lawyer of choice had still not called back.

The investigator, in her own words, offered the accused an opportunity to contact another lawyer or duty counsel. The accused stated that he understood this offer, but he refused it and insisted on speaking with his lawyer of choice. The investigator warned the accused he need not say anything and whatever he did say would be used as evidence against him. The investigator then interviewed the accused and he provided an incriminating statement. He was charged with break and enter, and assault with a weapon.

LEGALLY SPEAKING:

Prosper Warning

The "Prosper Warning" is named after a Supreme Court of Canada case *R. v. Prosper*, [1994] 3 S.C.R. 236 and was described in *R. v. Willier*, 2010 SCC 37.as follows:

> [W]hen a detainee, diligent but unsuccessful in contacting counsel, changes his or her mind and decides not to pursue contact with a lawyer, s. 10(b) mandates that the police explicitly inform the detainee of his or her right to a reasonable opportunity to contact counsel and of the police obligation to hold off in their questioning until then. This additional informational obligation, referred to in this appeal as the duty to give a "Prosper warning", is warranted in such circumstances so as to ensure that a detainee is informed that their unsuccessful attempts to reach counsel did not exhaust the s. 10(b) right, to ensure that any choice to speak with the police does not derive from such a misconception, and to ensure that a decision to waive the right to counsel is fully informed. [para. 32]

Court of Quebec

The judge concluded, among other things, that the police did not breach the accused's s. 10(b) *Charter* right to counsel. The judge found the police had respected the duties imposed under the implementational component of s. 10(b): (1) the duty to provide the accused with a reasonable opportunity to exercise his right to counsel and (2) the duty to refrain from eliciting evidence until he had a reasonable opportunity to consult counsel. These duties were first triggered at 11:40 a.m. when the accused asked to speak to his counsel of choice. During the two hour period from 11:40 a.m. to 1:40 p.m., the accused had not acted

diligently. He refused to speak to other counsel. Furthermore, the judge concluded that a Prosper warning was not necessary since the accused had not acted diligently by refusing to consult counsel other than his counsel of choice. The accused's statement was admitted and he was convicted of breaking and entering a dwelling house and committing an assault, and assault while carrying a weapon. He was sentenced to 47 months.

Quebec Court of Appeal

The accused argued that the trial judge erred in holding that the police did not breach his s. 10(b) right to counsel. In his view, his incriminating statement ought to have been excluded as evidence under s. 24(2).

Right to Counsel

Justice Healy, speaking for the unanimous Court of Appeal, found the trial judge did not err in his s. 10(b) analysis. First, there was no breach of the implementational component:

> In these circumstances, the judge correctly concluded that the two-hour waiting period was reasonable and that, accordingly, by refusing to speak with other counsel, the [accused] had not acted diligently. The reasons for her decision reveal that she undertook a contextual review, taking into account all of the relevant factors. The reasonableness of the period of time and the diligence of an accused are highly factual and depend on the circumstances as a whole. The trial judge correctly applied the applicable rules of law and held that, with respect to the facts before her, the opportunity provided to the [accused] was reasonable. There is no reason to interfere with this conclusion. Given the [accused's] categorical refusal at 1:42 p.m., which amounts to an explicit waiver of the right to retain counsel without delay, [the investigating officer] was no longer under a duty to refrain from eliciting evidence from him. [references omitted, para. 17]

Prosper Warning?

Sometimes the police are obligated to provide an arrestee with additional informational. In this case, the Court of Appeal found this additional information was provided by the investigator at 1:41 p.m. ***"Her words corresponded perfectly with the additional informational obligation"*** said Justice Healy:

> The [accused] was informed that he could consult with counsel other than [his counsel of choice]. The notice, given by [the investigator] at approximately 1:41 p.m., was in substance the equivalent of a Prosper warning, and the judge concluded that the [accused] understood its meaning. This factual finding does not warrant the intervention of this Court. Ultimately, whether or not the [accused] could have been more diligent in the exercise of his right to counsel matters little. The police officers fulfilled all of their obligations, both the informational obligation and the implementational duty. [para. 21]

The accused's appeal was dismissed.

Complete case available at www.canlii.org

Editor's Note: Additional details taken from *R. v. Catellier*, 2018 QCCQ 4121.

POLICE ACTED ON MORE THAN INSTINCT: DETENTION & PAT-DOWN LAWFUL

R. v. Wolfson, 2020 QCCA 856

Just after midnight police officers entered a Montreal strip club. They saw three men, two of whom were already known to them. An officer saw one of the men attempting to conceal a satchel. The officer grabbed it and discovered a firearm inside. Once back-up arrived, the police arrested the three men.

While the men were escorted outside the club, an officer noticed an interaction between one of the

men and the accused who was seated near the exit. The police suspected the accused was acting as a "watchman" for the arrested men. This suspicion was based on the accused's clothing, his position in the bar and his actions. The police shone a flashlight at him and he then rushed towards the bar. But an officer held him back by grabbing the sleeve of his coat.

The accused was escorted into a hallway leading to the exit. Once there, the accused said he wanted to speak with his lawyer. The police explained to him that he could exercise his right to counsel after being searched. He was then informed that he was being held for investigation and was suspected of being armed. Given his lack of cooperation, he was handcuffed. A pat-down search led to the discovery of a motel room key, a gun magazine and a .40-caliber Glock 22 pistol. The accused was arrested for illegal possession of a firearm.

A ballistic expert subsequently confirmed that the firearm found as a result of the pat-down was used in a murder and an attempted murder. This evidence formed part of the case against the accused on charges of murder, attempted murder and possessing a loaded restricted firearm.

Quebec Superior Court

The judge ruled the police had reasonable suspicion to detain the accused. The police were acting on more than intuition or instinct. The actions of the accused and his clothing drew the attention of the police, leading them to believe that he was a "watchman" for the men who had just been arrested.

The incidental search was also reasonable. The discovery of a gun magazine during the non-intrusive pat-down search allowed the police to continue their search for a gun, which was found concealed in the back of the the accused's pants and was not initially visible, given the coat he was wearing.

The judge concluded the accused's ss. 8 or 9 *Charter* rights had not been breached. Moreover, even if the accused's rights had been violated, the judge would have admitted the evidence in any event. The gun was admissible and the accused was convicted.

Quebec Court of Appeal

The accused argued, among other things, that the trial judge erred in dismissing his motion to exclude the firearm and magazine. He claimed the police had no reasonable suspicion allowing them to detain him for investigation and there was no threat to the safety of the officers authorizing them to conduct a search. Thus, he suggested his s. 8 *Charter* rights were breached.

Investigative Detention

The police have the power to detain for investigative purposes provided the detention was carried out within the limits established by the common law. In doing so, the police must have reasonable grounds to suspect, in light of all the circumstances, that that person is involved in a particular crime and that it is necessary to detain. "Reasonable grounds to suspect" is a lower standard than "reasonable grounds to believe" since it refers to the possibility and not the likelihood of a crime. Further, reasonable suspicion cannot be justified by a mere subjective belief. Reasonable suspicion must be based on objectively discernible facts and analyzed on the totality of circumstances. It takes more than general suspicions or suspicions only related to a particular place or activity for the threshold to be crossed.

In this case, the trial judge undertook a detailed analysis of the circumstances surrounding the accused's detention. The judge found the police did not act by intuition or instinct, but rather acted on the basis of objectively observable facts which included: the interaction between the accused and one of the three men arrested for possessing a gun; the positioning of the accused at the time of the arrest of the three men; the wearing of a mid-length coat in an overheated place; the absence of consumption; his attitude during the arrest of the

three men; his flight when he was targeted by a flashlight; and his reaction when he was stopped by the police. These factors were specific enough to provide police with reasonable grounds to suspect thim of criminal activity. The circumstances, as a whole, objectively indicated the possibility, if not the likelihood, of criminal behavior. The police acted within the powers conferred on them by the common law and the accused's detention was lawful.

The accused's s. 10 *Charter* rights were also respected during the brief period of detention. The police told the accused of the reason for his detention in accordance with s. 10(a). They explained he could exercise his right to counsel under s. 10(b) once the safety search was completed. Although the accused did not exercise his right to counsel "without delay", this was justified by the imminent security threat that existed at the time of detention. In these circumstances, the preventive pat-down search had to be carried out quickly to defuse the risk of danger.

Protective Search

Under the common law there is a limited power to search incidental to an investigative detention. A police officer who has reasonable grounds to believe that their safety or that of others is threatened may conduct a preventive pat-down search. This power is justified by the police duty to protect life and safety. However, vague or non-existent concerns can not justify a search, nor can the police proceed solely on the basis of an instinct or intuition. Rather, the police must act on known facts and reasonable inferences related to the situation. The search must also be conducted in a reasonable manner. A search will be deemed reasonable if the way it was executed was reasonably necessary to eliminate the looming security threat to police or others.

Here, the police had reasonable grounds to believe that their safety, or that of others, was at risk. The police had just observed an interaction between the accused and one of the men who had just been found in possession of a firearm. The accused was suspected of acting as a "watchman" for the trio and was being detained for this reason. His reaction to detention, including his body language and nervousness, gave the police reasonable grounds to believe that he was armed, an imminent threat that needed to be defused. As a result, the police could lawfully carry out a security search.

Handcuffing

The Court of Appeal also concluded the force used, both during the detention and during the search, was reasonable. The use of handcuffs was reasonably justified in the circumstances. The police testified that the accused was not cooperative and that they feared for their safety. The manner of search was reasonably necessary to eliminate the security threat.

Since there were no ss. 8 or 9 *Charter* violations, it was not necessary to consider the accused's request for exclusion of the evidence under s. 24(2).

Complete case available at www.canlii.org

ARRESTEE DID NOT EXHAUST s. 10(b) RIGHT WITH INITIAL CONSULTATION

R. v. Dussault, 2020 QCCA 746

At 2:10 p.m. the accused was arrested for murder and arson. He was promptly advised of his right to counsel and of the right to silence. At 2:27 p.m. he requested to speak with a lawyer. At 2:36 p.m. the accused arrived at the police station and at 2:45 p.m. he was shown a list of lawyers. From this list he chose to speak with a lawyer whom he did not know. A police officer telephoned the lawyer at 2:47 p.m. and informed the lawyer that the accused had been arrested for murder, arson and possessing drugs. The lawyer told the officer that, in view of the charges, he would come to the police station to consult with the accused.

At 2:51 p.m., the accused spoke to the lawyer in private on the phone. At 3:00 p.m. the accused knocked on the door and informed an officer that

the lawyer wished to speak with him. The officer spoke to the lawyer for about three minutes. During this exchange the lawyer told the officer that, in light of the seriousness of the offences, he wished to see the accused in person. The officer then returned the telephone to the accused so the lawyer could speak again with him. This conversation ended at 3:04 p.m. and the accused was returned to his cell.

Despite the lawyer's assertion that he would come to the station, the police decided the accused had already exercised his right to counsel. He had spoken to his lawyer by phone and the lawyer would not be permitted to further consult with the accused at the police station. When the officer in charge of cells received a telephone call from the lawyer that he would be arriving shortly, the lawyer objected when told no such meeting would occur and said he would nevertheless come to the police station. When he arrived at the police station, the lawyer was advised a second time that he could not meet with the accused and he was directed to wait.

The investigators then consulted with a Crown prosecutor who, after some research, advised police that that in her opinion the accused had already exercised his right to counsel when he spoke by telephone with his lawyer. The prosecutor said that she could not direct the police how to proceed but, in her view, they were not obliged to allow the accused a further opportunity to consult with his lawyer before he was questioned. She added that the lawyer was not entitled to be present at the interrogation.

The investigators decided not to permit further consultation between the accused and his lawyer before proceeding with questioning. Meanwhile, when he asked three times whether his lawyer had arrived at the station, the police declined to tell the accused that his lawyer was at the station or that his lawyer had asked to speak with him. At 8:52 p.m. the accused was taken for an interview. He continued to express his expectation that his lawyer would come to the station and he was reluctant to proceed with the interview. The interviewer persisted despite the accused's repeated assertions that he did not wish to say anything further and that he wanted the interview to stop. The accused subsequently provided an incriminating statement.

Superior Court of Quebec

The judge concluded that the accused had exercised his right to counsel by the end of the telephone call with his lawyer. The judge found the police had discharged the implementation duties imposed upon them by s. 10(b) of the *Charter* and, accordingly, the statement obtained from the accused was not obtained unconstitutionally. The accused was convicted of second-degree murder.

Quebec Court of Appeal

The accused claimed that the police violated his right to counsel by refusing to allow him to continue his consultation with counsel at the police station and proceeded to interrogate him. He submitted that his consultation was not complete because it was interrupted when his lawyer informed him that he would come meet him at the police station. The telephone call with his lawyer did not fulfil or exhaust his right to the effective assistance of counsel. In his view, the police should have allowed him to consult with his lawyer upon the lawyer's arrival at the station. The refusal of police to allow him to continue consulting was a violation of the implementational duty under s.10(b) and his incriminating statement should have been excluded under s. 24(2). He claimed that his consultation with his lawyer was not complete because it was interrupted when he was informed that his lawyer would come to the police station. Accordingly, the accused suggested that the implementational duties on the police continued and required them to refrain from questioning him until after he completed his consultation with counsel at the police station.

The Crown, on the other hand, asserted that the police fully respected the accused's right to counsel and his right to silence. The accused confirmed he understood his rights and exercised his right to counsel. In the Crown's opinion, the police had

fulfilled their constitutional obligations and were justified when they refused to allow the lawyer access to the accused for a second time.

Right to Counsel

Generally, s. 10(b) affords a detainee with a single consultation with a lawyer because the right to counsel is not absolute and continuous. However, in some circumstances, additional implementational duties are triggered on police to permit a detainee a further opportunity to consult a lawyer. Such circumstances include when there is an objectively observable change in circumstances, when new developments arise, or when there is an indication that a detainee who has waived his right to counsel may not have understood his right.

Here, the police did not want to give the accused an opportunity to speak with his lawyer after the telephone conversation but before proceeding with an interview. They deliberately took measures, including misrepresentations to the accused, to prevent the continued consultation with counsel. They not only refused to allow the lawyer access to the accused so the consultation could continue but they concealed from the accused that the lawyer had come to the station.

Justice Healy, speaking for the Court of Appeal, concluded that the accused's consultation by telephone with his lawyer did not exhaust the right under s. 10(b) because the consultation he was entitled to was incomplete. The implementation duties under s. 10(b) obliged the police in this case to allow a continuation of the consultation. The police should have refrained from interrogating the accused until he had spoken with his lawyer at the police station.

Moreover, the accused had been diligent in asserting his right to counsel. Apart from the lawyer's request that the police refrain from questioning him until after he met the accused at the police station, the evidence demonstrated that the accused expected to meet the lawyer at the station to continue the consultation that began on the telephone. But the police deliberately frustrated this consultation. They told the lawyer twice that he could not see the accused. The accused had also asked whether his lawyer had arrived at the station but was told that the lawyer was not, when in fact he was present.

Since the consultation with his lawyer was incomplete, the accused's right to counsel was not exhausted and the implementational duties imposed on the police continued until the accused could consult with counsel at the police station. Although a lawyer cannot assert the right to counsel on an accused's behalf — the right belongs to the accused — the police took the narrowest and restrictive view of the scope of the right to counsel to obtain strategic advantage, rather than a purposive interpretation. Otherwise, as an example, the right to counsel would be exhausted if an arrestee reached counsel by telephone and the lawyer said no more than they would come to the police station to advise the arrestee more fully.

The s. 10(b) right requires investigators to facilitate the effective assistance of counsel. In this case, the effective assistance of counsel was denied when investigators determined not to permit a continuation of the consultation that began on the telephone. Not permitting the consultation to continue at the police station was inconsistent with the implementation duties under s. 10(b). The police prevented a consultation that had begun on the telephone but had not been completed. The implementation duty imposed on the police required them to allow the initial telephone consultation on the telephone to continue to its completion at the police station. And there was no urgency to override this consideration.

s. 24(2) Charter

The Court of Appeal excluded the accused's incriminating statement under s. 24(2). In its view, the admission of the statement would bring the administration of justice into disrepute.

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

Complete case available at www.canlii.org

PENILE SWAB EVIDENCE ADMITTED DESPITE CHARTER BREACH

R. v. Cortes Rivera, 2020 ABCA 76

Following the report of a sexual assault involving penile penetration ,the accused was arrested by police and, through a Spanish translator, was advised of his right to counsel. He spoke a lawyer at the police station and was placed in a dry cell. He was strip searched and, while naked, a penile swab was taken (about 10 hours after the alleged assault). The swab procedure was conducted by one police officer in the presence of two other officers.

The accused was not offered the opportunity to perform the penile swab himself nor was an interpreter present during this procedure. He declined later opportunities to speak further with a lawyer. After the taking of the swab, the accused provided a statement to the police through an interpreter. He was charged with sexual assault.

Alberta Court of Queen's Bench

At trial an expert testified that DNA consistent with the victim was found on the penile swab taken from the accused. The judge, among other holdings, found the police conducted the penile swab as an incident to arrest. The police had reasonable grounds to believe that a penile swab would afford evidence of the offence for which the accused was lawfully arrested. The swab was taken 10 hours after the alleged assault and any suggestion that the victim's DNA believed to be in the accused's genital region would be destroyed was mere speculation.

As for the process of taking the swab itself, the judge noted it was: authorized by a supervisor; conducted at the police station in a private area by a trained officer who wore gloves and used a sterile cotton swab; and the purpose, process, and legal authority were explained to the accused. Moreover, the officers present were of the same gender as the accused and both the strip search and penile swab were conducted as quickly as possible — the swab took only 15 seconds or less to complete. The judge opined that the failure to offer the accused the opportunity to take the swab himself was reasonable given the "language barrier" and the female interpreter was not present when the swabbing occurred.

But the judge found three separate s. 8 *Charter* breaches in relation to the taking of the penile swab:

1. the unnecessary presence of a third officer during the taking of the swab;
2. the accused was left fully naked during the taking of the swab; and
3. the police failed to make a complete record of the process they followed.

On these points, the judge stated:

> The Accused removed his own clothing. [The Detective] was able to provide evidence on the reasons for and manner in which the strip search and swab were conducted. However, he did not recall some details, including whether the Accused was completely naked during the

> penile swab. [The Detective's] notes also did not include the state of dress of the Accused during the swab. There was differing evidence on this point. [The Detective's] recollection was that the Accused kept his shirt on. [The swabbing officer's] evidence was that because the strip search and the penile swab were being done at the same time, the Accused was entirely naked when the swab was done. As the guidelines address the state of dress of the Accused, it is an important detail and a proper record should include this information. It appears from the evidence that the Accused was completely undressed at one point during the combined process, contrary to the guidelines in both Golden and Saeed.
>
> Further, three officers were present during the taking of the swab. Again, [the Detective] was taking notes of and overseeing the search process. [The swabbing officer] was conducting the search and swab. [The swabbing officer] requested that [a third officer] be present during the search for his safety. The Accused had by then been frisk searched and was being cooperative. [The detective] confirmed that having a third officer present may have been unnecessary. His experience since that day has been that there are usually only two officers present during a penal swab. Thus, the guideline in Saeed was exceeded by one officer. [*R. v. Cortes Rivera*, 2017 ABQB 275, paras. 121-122]

Despite these aspects not complying with the guidelines set out by the Supreme Court of Canada, the judge nevertheless admitted the results of the swab as evidence under s. 24(2) of the *Charter*. The accused was convicted of sexual assault.

Alberta Court of Appeal

The accused argued, in part, that trial judge erred in admitting the results of the penile swab into evidence despite having found a s. 8 *Charter* breach in relation to the circumstances in which the penile swab was taken. But the Court of Appeal disagreed. Of note, the Supreme Court of Canada decision in *R. v. Saeed*, 2016 SCC 24, which outlined the proper protocol to be followed in taking penile swabs, had not yet been delivered at the time the swab was taken from the accused. A majority wrote:

> Prior to the receipt of Saeed the retrieving of a penile swab was typically undertaken incidental to arrest, such as occurred here. Some degree of privacy was maintained in this case as the swab was taken in a cell, albeit in the presence f more police officers than necessary for the task. [The Detective] testified he forgot to audio record the taking of the swab as it was his first one; there is no suggestion of malice or improper purpose in the failure to create a more complete record. [The accused's] trial counsel did not raise the reasonableness of the strip search that led to him being naked when the swab was taken. It is not surprising, therefore, that the trial judge did not address it as a concern in her decision. The analysis by her of these Charter breaches was reasonable in the circumstances at the time.
>
> While it would have undoubtedly been preferable for a male interpreter to have been located who could have been present during the swabbing process, that would have added another set of eyes to the intrusion on [the accused's] privacy, and the process to conduct the swabbing was explained in advance to him through the interpreter.
>
> The trial judge concluded that given the brief duration and manner of the swab, the breach was not serious and did not have a significant impact on [the accused's] interests, with the result that the truth-seeking function was better served by admission of this evidence. [paras. 50-52]

The trial judge's determination under s. 24(2) was owed deference and the accused's appeal was dismissed. Justice Slatter in a separate opinion, although dissenting in part, agreed with the majority on the admission of the penile swab.

Complete case available at www.canlii.org

Editor's Note: Additional details taken from *R. v. Cortes Rivera*, 2017 ABQB 275.

LEGALLY SPEAKING:

Penile Swabs

In *R. v. Saeed*, 2016 SCC 24, the Supreme Court of Canada upheld the taking of a penile swab from a sexual assault arrestee for the purpose of collecting the victim DNA. In doing so, the Court outlined the following:

1. The arrest itself must be lawful.
2. The swab must be truly incident to the arrest, in the sense that the swab must be related to the reasons for the arrest, and it must be performed for a valid purpose. The valid purpose will generally be to preserve or discover evidence.
3. In addition to the reasonable grounds for arrest, the police must also have independent reasonable grounds to believe that a penile swab will afford evidence of the offence for which the accused was arrested. Whether reasonable grounds have been established will vary with the facts of each case. Relevant factors include the timing of the arrest in relation to the alleged offence, the nature of the allegations, and whether there is evidence that the substance being sought has already been destroyed.
4. The penile swab must also be conducted in a reasonable manner.

A number of factors were provided to guide police in reasonably conducting penile swabs incident to arrest:

- The penile swab should, as a general rule, be conducted at the police station.
- The swab should be conducted in a manner that ensures the health and safety of all involved.
- The swab should be authorized by a police officer acting in a supervisory capacity.
- The accused should be informed shortly before the swab of the nature of the procedure for taking the swab, the purpose of taking the swab, and the authority of the police to require the swab.
- The accused should be given the option of removing his clothing and taking the swab himself, and if he does not choose this option, the swab should be taken or directed by a trained officer or medical professional, with the minimum of force necessary.
- The police officer(s) carrying out the penile swab should be of the same gender as the individual being swabbed, unless the circumstances compel otherwise.
- There should be no more police officers involved in the swab than are reasonably necessary in the circumstances.
- The swab should be carried out in a private area such that no one other than the individuals engaged in the swab can observe it.
- The swab should be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time; and
- A proper record should be kept of the reasons for and the manner in which the swabbing was conducted.

EVIDENCE INADMISSIBLE: PRODUCTION ORDER ISSUED ON WRONG LEGAL STANDARD

R. v. West, 2020 ONCA 473

An instant messaging application for mobile devices (Kik) detected an uploaded image of child pornography as a profile picture for one of its accounts with the user name "mikeandvikes". This upload was reported to the National Child Exploitation Coordination Centre, which notified the police. Kik's report included information about when the image was uploaded, the account's username, the type of device used for the upload — a Samsung Model SM-T530NU — and the Internet Protocol ("IP") addresses associated to it. The report also included disclaimers stating that the information it contained had not been verified by Kik.

The police determined that both IP addresses belonged to Cogeco Cable and were leased to users in Hamilton. The police sent a preservation demand to Cogeco, requesting that it preserve any subscriber information associated with the two IP addresses. Cogeco agreed to do so for one IP address but the other one was no longer on file.

A police officer drafted an Information to Obtain (ITO) for a general production order under s. 487.014 of the *Criminal Code*. The affidavit appended to the ITO stated ***"the information set out herein constitutes the grounds to suspect"*** that the offences of distributing and possessing child pornography, contrary to ss. 163.1(3) and 163.1(4) of the *Criminal Code,* had been committed. Cogeco provided the subscriber information associated with the second IP address to police which revealed the subscriber was the accused. Using this information, the police sought a search warrant for the accused's home to find electronic devices, stored data capable of being read by a computer, photographic film, digital images, video, computer files or documents associated with the accused or the "mikeandvikes" account, and any cellular telephones capable of accessing the Internet or storing images or video.

When the warrant was executed, the police seized digital devices and media, including a total of 19,687 files containing child pornography, and information showing that the accused was the owner of the "mikeandvikes" Kik account. Of the files located, 10,804 were unique (i.e., not duplicates of other files). These files were found on five different devices: two laptop computers, two cell phones, and a USB drive. The accused was subsequently arrested and charged with possessing, distributing and accessing child pornography.

Ontario Court of Justice

The accused argued his rights under s. 8 of the *Charter* had been infringed. In his view, there were insufficient grounds to obtain either the production order or the search warrant. He wanted all of the evidence excluded under s. 24(2).

The judge, however, found no s. 8 breach. The judge found the information provided by Kik was *"probably accurate"* and that the search warrant ITO was comprehensive, reliable, reasonable, and sufficient to permit the issuance of the warrant. He also found that ***"sufficient information was presented to establish a reasonable suspicion permitting the issuance of the production order".*** The accused was convicted of accessing, possessing and distributing child pornography. He was sentenced to three years' in prison.

Ontario Court of Appeal

The accused appealed his conviction again contending his rights under s. 8 of the *Charter* were infringed and the evidence against him should have been excluded under s. 24(2). He suggested, in part, that both the production order and the search warrant were not validly issued.

"[The officer] was negligent in failing to apply the correct legal standard in his affidavit. The standard of reasonable grounds to believe, ... the requisite legal standard[,] was well established and [the officer] should have been aware of this."

Production Order

The accused asserted that the production order was issued on the basis of the wrong legal test. Section 487.014 of the *Criminal Code* provides the that a production order can be issued on the basis of ***"reasonable grounds to believe"***. In this case, however, the officer swore in the affidavit to obtain the production order that ***"the information set out herein constitutes the grounds to suspect"***. Justice Tulloch, speaking for the unanimous Court of Appeal, stated:

> [The officer] misstated the standard another four times throughout his affidavit. He never asserted that he had evidence to satisfy the actual standard for the issuance of the production order – reasonable grounds to believe. Despite this clear flaw, the issuing justice authorized the production order.
>
> The error was also missed by the trial judge. In fact, the trial judge's conclusion for upholding the production order tracked the wording of the affiant, asserting that the ITO presented sufficient information to "establish a reasonable suspicion permitting the issuance of the production order." Beyond this clear error, the trial judge's reasons were also otherwise inadequate, as they provided no substantive analysis. The trial judge thus failed to properly carry out his role of determining whether the issuing justice could have concluded that the statutory threshold was met. [references omitted, paras. 22-23]

Justice Tulloch then determined that there was no basis on which the production order could have been issued. "***In my view, it was an error for the issuing justice to issue the order, given that the officer never subjectively asserted that he had the grounds necessary to satisfy the statutory requirements,"*** said Justice Tulloch. ***"There is no way to reasonably read the ITO and come away with any conclusion other than that there were reasonable grounds to suspect that an offence had been committed, that the information sought was in a person's control, and that the information would afford evidence of the commission of the offence. This is insufficient to permit the issuance of a production order."*** The production of the accused's subscriber information to police therefore amounted to a s. 8 *Charter* violation.

Search Warrant

Since the production order should not have been issued, the information gleaned from it was excised from the ITO for the search warrant. Without the excised production order information, the search warrant ITO fell short:

> In reviewing the ITO, it is clear that the warrant could not have been issued as, without the subscriber records, the police would not have been aware that the [accused] was associated with the second IP address. Without this information, the police would not have been able to provide a location for the search or any details regarding the specific target. Under these circumstances, the statutory requirements under s. 487(1) could not have been met, as there would be no "building, receptacle or place" to search. The search of the [accused's] home and electronic devices was therefore unlawful and a violation of the Charter. [reference omitted, para. 28]

s. 24(2) Charter

The Court of Appeal concluded that the admission of the evidence would bring the administration of justice into disrepute.

First, the *Charter*-infringing police conduct was serious such that a court should dissociate itself from the conduct. ***"In this case, [the officer] was negligent in failing to apply the correct legal***

standard in his affidavit," said Justice Tulloch. "***The standard of reasonable grounds to believe,... the requisite legal standard[,] was well established and [the officer] should have been aware of this."***

Second, the impact of the breach on the *Charter*-protected interests of the accused was serious. The police searched areas — the accused's subscriber information, his home and his electronic devices — that attracted a heightened expectation of privacy.

Finally, society's interest in the adjudication of the case on its merits by admitting the reliable and critical evidence did not outweigh the first two factors.

The evidence obtained under both the production order and the search warrant was excluded under s. 24(2) of the *Charter*, the accused's appeal was allowed and acquittals were entered.

Complete case available at www.ontariocourts.on.ca

POLICE MAY INTERVIEW WITNESS WITHOUT A WARRANT: NO s. 8 CHARTER BREACH

R. v. Molyneaux, 2020 PECA 2

The mother of a young child checked the accused's cell phone while he was asleep and looked through his messages. The accused had been left in charge of the child the previous night. In the course of her surreptitious browsing of the accused's cell phone, the mother opened its photo gallery and saw a number of pictures of her child, without any underwear, focussed on her legs, buttocks and vagina. The mother then deleted the photos.

The mother later confronted the accused. He said that his phone acted up sometimes, it possibly fell out of his pocket, the camera opened and it must have taken random pictures. A few weeks later the mother told Child and Family Services (CFS) about the photos. CFS passed this information on to police, who then interviewed the mother. The accused was subsequently contacted and requested to attend the police station for an interview. When he arrived, he was arrested and his cellphone was seized. He was told he could either sign a consent form or the police would obtain a warrant to search his phone. He signed the consent and a forensic search of his cellphone revealed the photos as described by the mother. The accused was charged with possessing and making child pornography.

Prince Edward Island Provincial Court

Unfortunately, the Crown failed to tender the photos obtained from the forensic examination as evidence. The judge therefore found it unnecessary to determine the reasonableness of the police forensic examination of the accused's cell phone. However, the judge accepted the testimony of the mother about what she saw on it. The accused was convicted of both possessing and making child pornography.

Prince Edward Island Court of Appeal

The accused alleged the police conduct in approaching the mother and requesting her to disclose the informational contents of his cellphone constituted a search under s. 8 of the *Charter*. Although the mother was not acting as an agent of the state when the police requested her to speak to them, they were seeking information about the contents of his cell phone. He argued that contacting the mother and obtaining a statement from her about what she saw on the his cellphone was a search because the police were looking for the informational contents of his cellphone, the contents of which he had a high degree of privacy. In his view, this police action amounted to an unreasonable search and the trial judge ought to have excluded the evidence under s. 24(2). The Crown, on the other hand, suggested that the mother's evidence was completely independent of any *Charter* breach.

"An invocation of s.8 involves the following process: first, the court must ascertain whether there has been a search or seizure and if so, whether or not the search or seizure was reasonable. To be reasonable the search must be authorized by law and conducted in a reasonable manner."

Was There a Search?

Justice Mitchell, on behalf of the Court of Appeal, first described s. 8 as follows:

> ... An invocation of s.8 involves the following process: first, the court must ascertain whether there has been a search or seizure and if so, whether or not the search or seizure was reasonable. To be reasonable the search must be authorized by law and conducted in a reasonable manner. If the search or seizure was not reasonable, then the court must embark on a s.24(2) analysis to determine whether or not the evidence obtained as a result of the unreasonable search or seizure should be excluded. ... [reference omitted, para. 15]

And further:

> Section eight of the Charter is only engaged when the claimant has a reasonable privacy interest in the object or subject matter of the state action and the information to which it gives access. The burden is on the claimant on a balance of probabilities to show a reasonable expectation of privacy. Whether a person has a reasonable expectation of privacy must be assessed in the "totality of the circumstances".
>
> In considering the totality of the circumstances, there are four lines of inquiry;
>
> (1) what is the subject matter of the search;
> (2) did the claimant have a direct interest in the subject matter;
> (3) did the claimant have a subjective expectation of privacy in the subject matter;
> (4) if so, was the claimant's subjective expectation of privacy reasonable.
>
> Only if the answer to question four is "yes" will the claimant have standing to assert his s.8 right.
>
> The reasonable expectation of privacy is fact-sensitive and fact-specific. The specific circumstances are crucial. Nonetheless, the reasonable expectation of privacy standard is normative rather than simply descriptive. That is, the facts and circumstances must be considered in conjunction with the applicable norms. ... [references omitted, paras. 36-39]

In this case, the Court of Appeal rejected the accused's submission that there was a search in speaking with the mother. Judicial authorization was not required prior to asking her what she knew. The police had a duty to investigate. The mother first revealed that she had seen the photographs to CFS. CFS then passed the information on to the police. The police contacted the mother and asked her to come for an interview. There was no compulsion. The mother attended the interview and told police what she saw. The actions of the police in requesting an interview did not constitute a search:

> The very thought that police would require judicial authorization before interviewing

"Section eight of the Charter is only engaged when the claimant has a reasonable privacy interest in the object or subject matter of the state action and the information to which it gives access. The burden is on the claimant on a balance of probabilities to show a reasonable expectation of privacy. Whether a person has a reasonable expectation of privacy must be assessed in the 'totality of the circumstances'."

> witnesses because that witness might provide information which could in turn lead to the police obtaining personal information is counter-intuitive if not absurd. In drug cases, for example, informants are critical. Informants provide the police with very personal and private information about their targets: where they live, details of conversations overheard, phone numbers, with whom they associate, their habits, their plans, and other very personal information. Police do not obtain prior judicial authorization before speaking to informants. The Charter protection for individuals arises when the police act on the information received and conduct a search and seizure. A search and seizure requires prior judicial authorization, speaking with informants does not. ... [para. 35]

And further:

> The investigative technique used by the police was the usual one; speaking to a potential witness. Having heard from one source, CFS, that an individual may be witness to a crime or may have information relevant to a crime, the police sought to interview her. It was, in fact, their duty to investigate the matter. [The mother] was free to speak to the police or to remain silent. Society's conception of the proper relationship between the investigative branches of the state and the individual surely must allow the police to speak to a witness without prior judicial authorization.
>
> I do not believe that the subject matter of the "search" was [the accused's] cell phone or the contents thereof. The police were seeking information that might reveal whether or not a crime occurred, and if so, whether or not they should pursue further investigation. The subject of the search was [the mother's] memory of what she saw the morning of December 31, 2017. [paras. 43-44]

Had the officer used the mother's statement in an Information to Obtain and obtained a search warrant, there would have been no *Charter* breach. The mother's statement to the police was completely independent of any *Charter* breach. ***"[The mother], as an individual, was free to share what she saw and what she thinks with whomsoever she pleases subject only to the laws of defamation and hate speech,"*** said Justice Mitchell. ***"[The accused] has no reasonable expectation that [the mother] would keep anything she saw private. This is especially so because it involved photographs of her four-year-old daughter's vagina."*** He continued:

> While [the accused] does have a direct interest in the subject matter of his cell phone, he has no direct interest in [the mother's] memory of what she saw or in the freedom she has to tell whomsoever she pleases.
>
> [The accused] would not have had a reasonable expectation that [the mother] would keep private what she saw on his cell phone. He, no doubt, had a hope that she would not tell anyone but he had no reasonable expectation that she would keep it to herself.
>
> It is clear to me that the subject matter of this search was what [the mother] saw and her memory thereof. In my view [the accused] did not have a subjective expectation of privacy, and if he did it was clearly unreasonable.
>
> In the facts and circumstances of this case and applying a normative approach, I believe that the proper relationship between the police and the individual permits the police to interview a potential witness without prior judicial authorization. I conclude that [the accused] did not have a reasonable expectation of privacy in the subject matter of the police interview. The subject matter of the police interview was what [the mother] saw and her recollection of what she saw. A person has no reasonable expectation that an ex-girlfriend/boyfriend/spouse would keep private what they saw or heard. [paras. 54-57]

Since the accused had no reasonable expectation of privacy in the contents of an interview between a witness and the police, s. 8 was not engaged. The accused's appeal was dismissed.

Complete case available at www.canlii.org

Update

This year's 2020 Canadian Police and Peace Officers' Memorial Service will proceed by a virtual ceremony this year, which will be live-streamed from Parliament Hill on Sunday, September 27, 2020.

The service will include a solemn reading of the names of officers who have made the ultimate sacrifice. Additional details regarding how to join the ceremony virtually will be provided as soon as they become available.

Click thememorial.ca for more information

EVIDENCE EXCLUDED FROM BREACHES OF WELL ESTABLISHED CHARTER RULES

R. v. Adler, 2020 ONCA 246

Officers patrolling the Canadian National Exhibition (CNE) were informed by a woman that she had seen a man (later identified as the accused) filming up the skirt of a young woman using a camera concealed in the head of a stuffed owl. As police approached the accused, they saw him fumble with a stuffed owl's head, place something in his mouth and then swallow.

The accused was arrested at 6:40 p.m. and the police seized the stuffed owl and three digital devices — a video camera, an iPod Touch, and a laptop — incident to arrest. The video camera did not have a memory card leading police to believe that they had seen the accused remove it and swallow it.

Ten minutes after his arrest, the accused was advised of his right to counsel. He told the arresting officer he had the name of a lawyer he wanted to call but did not have the phone number. The officer responded that he would be given an opportunity to speak to duty counsel. The accused was taken to a police station where he was told by the booking officer that he would not be allowed to speak with a lawyer until after the police had searched his apartment. Police were concerned that evidence at his apartment might be destroyed. The accused was subjected to a strip search to determine whether he had secreted another memory card on his person. He was then taken to a dry cell and placed on a bedpan vigil in an effort to recover the swallowed memory card.

The police attended the accused's apartment without a warrant and entered it using the keys found on him. Upon entry, the police saw various devices in plain view, determined that no one was present, and then left to obtain a telewarrant authorizing a night-time entry to search the apartment and seize the devices. But the police did not tell the justice of the peace that they had already entered the apartment. Later that night, the police re-entered the apartment under the telewarrant and found parts of stuffed animals and several devices, including an external hard drive.

At 9:59 p.m., more than three hours after his arrest, the accused was permitted to speak with his lawyer. The following morning the accused was brought before a justice of the peace for a bail hearing. At the bail hearing the Crown requested a three-day adjournment of the bail hearing on the grounds that "further investigation" was necessary. But the police did not inform the Crown, who could then advise the justice of the peace, that the purpose of the adjournment was to facilitate the bedpan vigil. The bail hearing was put over for three days and the accused was detained in custody. He eventually passed the memory card but it was irreparably damaged. No data could be recovered from it.

The police examined the electronic devices seized from the accused's residence for evidence of voyeurism and discovered evidence of child pornography. A second warrant to conduct further searches of the accused's devices for child pornography was obtained. The police then found a video of the accused engaged in a sexual assault on an unconscious victim. The hard drive (seized from the accused's apartment), and an iPod Touch, a laptop, and a digital video camera (seized from the accused upon arrest) also provided evidence. The accused was charged with several offences.

Ontario Court of Justice

The judge found the accused's s. 8 *Charter* rights had been breached. First, the warrantless police entry into his apartment was unreasonable. Second, the telewarrant was invalid and it was quashed. Third, the telewarrant did not expressly authorize the search of the accused's electronic devices. Nevertheless, the judge found there were reasonable and probable grounds to support the telewarrant for a search of the accused's apartment because:

- the accused was likely to return home to view the voyeuristic videos;
- the accused may have used his devices to transmit data to devices in his home;
- the accused likely prepared for the offence at home; and
- the accused likely had committed other voyeurism offences in the past.

Rather than excluding the evidence under s. 24(2), the judge decided to stay the charges related to the CNE events (voyeurism and obstruction charges) but allow the evidence to be admitted on the child pornography and sexual assault charges. Effectively, the judge separated the breaches into two groups and then assigned most of them to the less serious offences. He then stayed those offences but allowed the more serious offences to proceed. Based entirely on the evidence found on the accused's devices, the accused was convicted of possessing child pornography, making child pornography and sexual assault. He was sentenced to 40 months in prison.

Ontario Court of Appeal

The accused argued that the trial judge erred in not excluding the evidence the police obtained as a result of the *Charter* breaches. Justice Nordheimer, authoring the Court of Appeal's decision, noted the police had committed numerous *Charter* violations. These included:

1. The failure to give the accused his rights to counsel in a timely way;
2. The level 3 strip search for which there were no reasonable and probable grounds;
3. The bedpan vigil for which there was no judicial authorization;
4. The unlawful detention when the accused's bail hearing was adjourned based on misleading information provided to the presiding justice;
5. The warrantless entry into the accused's apartment;
6. The unlawful search arising from the invalid telewarrant that was obtained without full disclosure, for which there was no urgency, and which did not require night-time entry; and
7. The unlawful searches of the accused's devices that were undertaken without proper judicial authorization.

As for the trial judge's finding that the grounds for a telewarrant existed, the Court of Appeal disagreed and commented on each of the trial judge's findings as follows:

- **The accused was likely to return home to view the voyeuristic videos:** ***"[I]t is difficult to see how the [accused] could have returned home to view the videos when he was under arrest and being detained. However, even if he could have managed that in some way, it is also difficult to see how that conduct would justify a search of the [accused's] apartment unless it is assumed that he would have transferred any video to another device, such that there would then be an electronic record of it. The [accused] could not have done that himself after his detention, and there was no evidence that the devices found on his person were configured to transfer material automatically or that he did so mechanically."***
- **The accused may have used his devices to transmit data to devices in his home:** ***"[T]here was no evidence that the devices that were found on the [accused] were capable of transmitting data to the [accused's] home. Certainly, there was nothing contained in the ITO to suggest that that was possible. However, even if they could have done so, the evidence would still be there if the police proceeded to obtain a search warrant in the normal course. The [accused] was not in a position while detained to remotely wipe his devices of data, assuming he had the capability to do so. Again, there is no suggestion in the ITO of such a possibility. There was also no reason to believe***

that the [accused] was connected to other persons, in relation to the suspected offences, who would have acted to destroy evidence."

- **The accused likely prepared for the offence at home:** This did not appear in the ITO for the telewarrant and the affiant did not offer any subjective belief that would sustain the telewarrant being issued for this reason. This ***"might have provided a basis for the telewarrant but that would only have justified a search for other stuffed animals or stuffed animal parts. It would not have justified a search for other recording devices since there was no suggestion that other devices were used, or were part of, the CNE offences."***

- **The accused likely had committed other voyeurism offences in the past:** This information did not appear in the ITO for the telewarrant and the affiant did not offer any subjective belief that would sustain the telewarrant being issued for this reason. Further, ***"there was nothing but speculation or stereotypical thinking offered in support of [this] ground."***

Nor was there any information in the ITO that would have established the necessary urgency to justify a telewarrant or to support a night-time entry and search of the accused's apartment.

Good Faith?

The police did not act in good faith throughout their investigation. "***Many of the Charter breaches were clear violations of well-established rules,"*** said Justice Nordheimer. ***"Put at its highest, the police conduct was negligent and undertaken in a state of oblivion regarding the [accused's] rights. At worst, the police acted in multiple flagrant violations of his rights."*** Improper police conduct in this case included:

- The police failed to advise Crown counsel of their real reason for wanting an adjournment of the accused's bail hearing — the bed pan vigil.

- The telewarrant affiant did not disclose that the accused had remained in custody, which made it impossible for him to return home to view the voyeuristic video that the police believed he had just created.

- The affiant described the layout of the accused's apartment but did not disclose that the source for this information was the warrantless entry undertaken by the police earlier that evening.

- The police affiant included in the ITO the fact that ***"[t]here are two previous incidents on file with Toronto Police Services involving this male"***. This suggested to the reader of the ITO that the accused had a history with the police that would support the theory that he had a propensity to commit similar offences, even in the context of the disclosure that he did not have a criminal record. But the affiant did not reveal that these incidents involved the police responding to a threatened suicide by the accused and the accused being the victim of a crime. This was a misleading inclusion regarding the accused's prior contact with the police and there was no legitimate reason for including this reference in the ITO devoid of the information that would put it into a proper context.

In this case, the judge minimized the breaches. The s. 8 violations related to two well established areas in which a person's right to privacy is paramount — in their home and in their electronic devices. The fact that the police did not disturb anyone when they illegally entered the accused's apartment did not lessen the invasion of privacy. Nor could the search of an individual's personal electronic devices be compared to a search of their sock drawer.

s. 24(2) Charter

The Court of Appeal agreed with the accused that the evidence ought to have been excluded. The trial judge failed to properly consider the cumulative effect of the *Charter* breaches. In excluding the evidence, Justice Nordheimer noted ***"the breaches of the [accused's] privacy interest in his home, the privacy interest in his devices, and the privacy***

"The Charter breaches set out above are breaches of well-settled Charter principles. They do not involve grey areas in the law nor do they involve new and novel situations. Rather, they demonstrate a reckless disregard by the police of fundamental constitutional rights of which any police officer ought to be well aware."

interest in his body, were all serious ones. In addition, this was not a case of a single breach of an accused's rights. Rather, in this case, there were multiple breaches": He continued:

> That litany of breaches is remarkable for a single arrest on a single event. In my view, it reflects a sweeping ignorance by the police of the [accused's] constitutional rights. It also demonstrates a course of conduct by the police that taints the ultimate discovery of the evidence underlying the most serious charges, that is, the evidence that was obtained from the searches of the devices, particularly the external hard drive.
>
> All of this improper conduct began with the denial of the [accused's] right to counsel. That denial was based on the same flawed thinking that then led to the warrantless entry into the [accused's] apartment. That flawed thinking reflects unfounded speculation by the police that the [accused] might have connections to other individuals who would attempt to destroy evidence, if they learned of his arrest. [paras. 42-43]

In considering the s. 24(2) factors, Justice Nordheimer wrote:

- **Seriousness of the Charter-infringing police conduct:** ***"The Charter breaches set out above are breaches of well-settled Charter principles. They do not involve grey areas in the law nor do they involve new and novel situations. Rather, they demonstrate a reckless disregard by the police of fundamental constitutional rights of which any police officer ought to be well aware. I would add that the conclusion that the police were reckless regarding the [accused's] rights is the most favourable view one could take of the actions of the police. Viewed unfavourably, the police could be seen as intentionally disregarding the [accused's] rights, due to a particularly negative reaction to the [accused's] actions and the "type" of person he is."*** This favoured EXCLUSION.

- **Impact of the breaches on the accused's Charter-protected interests:** ***"[The accused's] body, his home, and his personal electronic devices, are three areas that attract the highest expectations of privacy. In this case, all three were invaded, all in the context where the accused was also denied his right to counsel. ... The breaches were very serious ones."*** This favoured EXCLUSION.

- **Society's interest in the adjudication of the case in its merits.** ***"[This factor] recognizes society's interest in having an adjudication on the merits of any criminal offence but especially serious criminal offences. At least two of the offences here are serious. Nevertheless, society also has a strong interest in ensuring that the integrity of the administration of justice is maintained. That integrity is undermined by police conduct that violates citizens' constitutional rights. If any person's rights are violated, no one's rights are safe. Nor can the ends be allowed to justify the means."***

Here, admitting the evidence would bring the administration of justice into disrepute. The police conduct in this case was all part of the same investigation and many of the *Charter* violations were committed by the same officer. ***"The police conduct, in this case, was on a single straight line from the start of the investigation to the ultimate collection of the evidence that underlay all of the charges,"*** said Justice Nordheimer. ***"The first breach led to the second breach and then to the third breach and so on. The breaches led to the apartment, then to the devices, and then to finding***

"The state of the police officer's knowledge of the right breached is relevant to the seriousness of a violation. An officer, who violates a Charter right while knowing better, commits a flagrant breach. For those officers who do not know of the relevant right, the reason they do not know can properly influence where on the good faith/bad faith continuum the Charter breach might fall."

what was on those devices. ... The improper conduct of the police tainted all of the evidence." And staying the lesser offences, as the trial judge did, while allowing the more serious offences to proceed, might be viewed as rewarding the improper police conduct.

Questioning Police Legal Understanding

The Court of Appeal noted the trial judge actively prevented the accused from eliciting evidence that might have shown that the police acted in bad faith. During the *voir dire* concerning the search warrant, the trial judge precluded the accused's lawyer from asking the police officers questions about their understanding of the *Charter* on the basis that these were matters for argument. Justice Nordheimer found this to be an error:

> The state of the police officer's knowledge of the right breached is relevant to the seriousness of a violation. An officer, who violates a Charter right while knowing better, commits a flagrant breach. For those officers who do not know of the relevant right, the reason they do not know can properly influence where on the good faith/ bad faith continuum the Charter breach might fall. Ignorance may result, for example, from disinterest or an absence of care on the part of the individual officer, or systemic training deficiencies within the police service. The result was that counsel for the [accused] was prevented from developing the very evidence that went to the issue of the good faith of the police. [para. 27]

The accused's appeal was allowed, the evidence was excluded, his convictions were set aside, and acquittals were entered.

Complete case available at www.ontariocourts.on.ca

SEIZURE OF HISTORIC TEXT MESSAGES DOES NOT REQUIRE INVESTIGATIVE NECESSITY

R. v. July, 2020 ONCA 492

A police task force investigating four murders that took place over a 75 day period identified a prime target in their investigation. While analyzing a cellphone belonging to a murder victim, police discovered many communications between the victim and a number associated with the prime target. The police obtained a production order under s. 487.012 of the *Criminal Code* (now s. 487.014) requiring the third-party telephone service provider to produce all activity records, subscriber information and text messages related to the phone number associated with the prime target over about a five month period. At the time, the telephone service provider retained the content of text messages sent or received by its customers.

After examining the records, the police discovered text messages related to a cellphone number registered to the accused. In these messages, the accused and the prime target discussed the potential sale of firearms and the previous sale of ammunition by the accused to the prime target. Based on these text messages, the police then obtained an authorization under s. 186 of the *Criminal Code* to intercept communications associated with various numbers. The accused was identified as a target and messages sent and received on his cellphone were intercepted, including communications involving the accused selling a revolver with ammunition. After the gun sale took place, the police arrested the purchaser and found him in possession of a loaded gun the accused had sold him. The accused was

subsequently arrested and indicted on four counts of firearms trafficking.

Ontario Superior Court of Justice

The accused argued that the text messages obtained pursuant to the production order were obtained as a result of an unreasonable search and seizure under s. 8 of the *Charter*. He submitted that a production order was unavailable for the seizure of the content of historical private communications unless investigative necessity was established.

The judge, however, dismissed the accused's s. 8 *Charter* application. In the judge's view, since investigative necessity was not a constitutional prerequisite to a wiretap authorization, it was not needed to obtain a production order for historic text messages. The accused then pled guilty to one count of trafficking a firearm and he was sentenced to three years incarceration.

Ontario Court of Appeal

The Court of Appeal recognized the accused had the necessary standing to challenge the validity of the production order and the seizure of the test messages. Put another way, it was accepted that the accused had a reasonable expectation of privacy in the historical text messages stored by the telephone service provider.

The accused then put forward two arguments:

1. The police failed to establish the constitutional requirement of investigative necessity when they obtained a production order for the search and seizure of his historical text messages; and

2. The law authorizing the production order was arbitrary and unreasonable due to the different requirements for the search and seizure of retrospective (historical) as opposed to prospective (future) text messages.

BY THE BOOK:

s. 487.014 *Criminal Code*

General Production Order

s. 487.014 (1) Subject to sections 487.015 to 487.018, on ex parte application made by a peace officer or public officer, a justice or judge may order a person to produce a document that is a copy of a document that is in their possession or control when they receive the order, or to prepare and produce a document containing data that is in their possession or control at that time.

Conditions for making order

(2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to believe that

(a) an offence has been or will be committed under this or any other Act of Parliament; and

(b) the document or data is in the person's possession or control and will afford evidence respecting the commission of the offence.

Was the Authorizing Law Reasonable?

The accused accepted the search and seizure was authorized by law (i.e. historical text messages may be the subject of a production order and the police met all the prerequisites under s. 487.012). However, the accused contended the law itself was unreasonable because it did not require the police to establish investigative necessity when obtaining the production order. He suggested that investigative necessity was a constitutional requirement for the seizure of historical text messages because it was a constitutional requirement for a wiretap authorization. Since the police did not establish investigative necessity in this case, the seizure of the text messages without the need to establish investigative necessity was not reasonable and violated s. 8.

"Based on the controlling and settled jurisprudence, investigative necessity is not a constitutional requirement for wiretap authorizations. As the jurisprudence does not require that investigative necessity be a constitutional requirement for wiretaps, it follows that investigative necessity is not a constitutional requirement for production orders for historical text messages."

Investigative Necessity

The *Criminal Code* allows the police to obtain the contents of stored historical text messages by means of a production order provided the information placed before the judge or justice establishes that there are reasonable grounds to believe that: (i) an offence has been or will be committed; (ii) the document or data is in the person's possession or control; and (iii) it will afford evidence of the commission of the named offence.

After reviewing case law, the Court of Appeal concluded that investigative necessity is not a *constitutional requirement* for a judicial authorization to intercept prospective private communications including text messages (commonly referred to as a wiretap). Rather, investigative necessity is a *statutory precondition*. ***"Based on the controlling and settled jurisprudence, investigative necessity is not a constitutional requirement for wiretap authorizations,"*** said Justice Pepall for the Court of Appeal. ***"As the jurisprudence does not require that investigative necessity be a constitutional requirement for wiretaps, it follows that investigative necessity is not a constitutional requirement for production orders for historical text messages."***

Furthermore, there were other reasons to reject the investigative necessity requirement:

1. A production order has safeguards:
    i. Statutory conditions must be satisfied;
    ii. Issuance is permissive. The presiding justice had discretion to grant or refuse the requested production order even if the statutory conditions are met;
    iii. A presiding justice may impose terms on the production order.
2. An investigative necessity requirement for all seizures of historical text messages would unduly hamper the ability of law enforcement to investigate and prevent crime without a corresponding benefit to a person's legitimate privacy interests.
3. An investigative necessity requirement would be difficult to reconcile with other Supreme Court jurisprudence.
4. Parliament has not enacted any limitation on the ability of law enforcement to use a production order to seek historical text messages.

Prospective v. Retrospective

The accused also argued that the use of a production order to search and seize retrospective (historical) text messages — while not available to seize prospective (future, non-existent) text messages — was an arbitrary distinction that rendered its availability for retrospective text messages unreasonable. This submission, however, was rejected.

"Prospective authorization to intercept future messages engages a different mechanism, unique privacy concerns, speculation and surveillance that may continue over a prolonged period of time, and 'real-time access to information'," said Justice Pepall. ***"Historical searches do not share all of these characteristics."*** Nor is it arbitrary in practice because the police could sidestep Part VI requirements by waiting until immediately after text messages have been exchanged before seeking judicial authorization using a production order. First, sidestepping is not permissible. Just because a search power may be used impermissibly or

unlawfully, the lawful and permissible use of the power does not violate s. 8. And second, there was no evidence about sidestepping in this case or otherwise, and therefore the issue did not arise on these facts.

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

SECOND WARRANT NOT REQUIRED TO SEARCH CELLPHONE

R. v. McNeil, 2020 ONCA 313

Police obtained a search warrant under s. 11 of the *Controlled Drug and Substances Act* (*CDSA*) authorizing the search of a detached garage and a house in relation to possessing heroin and methamphetamine for the purpose of trafficking ofences. The warrant also authorized the police to search for and seize **"Electronic Devices"** and to conduct post-seizure examinations of those devices based on the offences set out in the warrant. The focus of this post-seizure examination was electronic communications between specified dates, including incoming, outgoing, and missed call logs; audio, video, and still photograph files; any location services; data related to the use, ownership, and access of the phone; and data related to the configuration of the mobile phone, including internal and external system or program configuration.

When police executed the search warrant at the garage, they found several people including the accused, who was not known to the officers. She was located at the back of the garage where police also found most of the drugs seized, including heroin, crystal methamphetamine, marihuana and cannabis resin. The police also seized four electronic devices from the garage including one later confirmed as belonging to the accused. Post-seizure forensic examinations of the accused's cellphone revealed text messages confirming she was engaged in drug trafficking.

Ontario Superior Court of Justice

The accused sought the exclusion of the text messages as evidence, alleging her s. 8 *Charter* rights had been breached. However, the judge determined that the ITO provided the necessary reasonable grounds for issuance, including its authorization for the police to conduct a post-seizure examination of <u>any</u> electronic device found during the search. The judge also concluded that the police did not need to specifically identify the accused as a target in the ITO, nor did they need to get a second warrant to search her phone. And, even if there was a s. 8 breach, the judge would have admitted the evidence under s. 24(2).

The judge ruled the accused jointly possessed the heroin and crystal methamphetamine found in the garage for the purpose of trafficking and convicted her.

Ontario Court of Appeal

The accused again submitted, in part, that the examination of her cellphone under the warrant breached s. 8 and the evidence obtained from that examination ought to have been excluded under s. 24(2). In her view, even though the warrant authorized the seizure of her cellphone, the police required a second warrant to forensically search it because the justice issuing the original search warrant could not have been satisfied that there were reasonable grounds to believe that the examination of <u>any</u> electronic device in the garage would afford evidence of the offences. In other words, a cellphone of unknown ownership seized under a warrant required a second warrant to forensically examine it. In addition, the accused claimed that the issuing justice did not properly consider her privacy interests when issuing the original warrant since she was not a target. In fact, she was unknown to the investigating officers until they searched the garage and found her in it. By examining her cellphone after it was seized, she claimed the police infringed her s. 8 rights.

"The standard of 'reasonable grounds to believe' does not require proof on a balance of probabilities, but rather only a credibly-based probability."

Reasonable Grounds

The Court of Appeal concluded there were sufficient reasonable grounds in the ITO for the issuing justice to authorize a forensic examination of any electronic device found during the search of the garage, including the accused's cellphone. Justice Jamal, delivering the opinion of the Court of Appeal, described the reasonable grounds standard as follows:

> The standard of "reasonable grounds to believe" does not require proof on a balance of probabilities, but rather only a credibly-based probability. The ITO must provide "reasonable grounds to believe that an offence has been committed and that there is evidence to be found at the place of the proposed search. … If the inferences of criminal conduct and recovery of evidence are reasonable on the facts disclosed in the ITO, the warrant could be issued".
>
> In making this evaluation, the issuing justice considers the ITO as a whole, in a common sense, practical, non-technical way, and may draw reasonable inferences from its contents. The record on a facial challenge is limited to the ITO.
>
> A court later reviewing the issuance of a warrant does not substitute its opinion for that of the issuing justice. It instead asks whether "there was reliable evidence that might reasonably be believed on the basis of which the warrant could – not would – have issued". This involves the reviewing court asking "whether there is sufficient credible and reliable evidence to permit a justice to find reasonable and probable grounds to believe that an offence has been committed and that evidence of that offence would be found at the specified time and place of search". [references omitted, paras. 32-34]

The Court of Appeal agreed there are unique privacy interests raised by computer searches, including searches of cellphones. ***"These privacy concerns arise because of the immense amount of personal information that computers can store, often automatically generated and retained even after a user thinks it is destroyed, and often shared by different users and stored almost anywhere in the world,"*** said Justice Jamal. As a result, prior authorization for computer searches is required unlike physical receptacles, such as cupboards or filing cabinets, which can be searched under a search warrant authorizing the search of a place without specific prior authorization to search the particular receptacle.

In this case, the trial judge found the ITO was statutorily and constitutionally sufficient. The Court of Appeal agreed with the trial judge that ***"the ITO contained sufficient information to permit the issuing justice to find that there were reasonable grounds to believe that any electronic devices found in the garage would provide evidence of drug trafficking."*** Cumulatively, the confidential informer information, police surveillance and investigator experience provided the necessary reasonable grounds for the issuing justice to authorize a post-seizure examination of any electronic device found in the garage.

Moreover, the ITO did not need to identify the accused as a target of the investigation:

"[A] search warrant is an investigative tool that should be used to unearth as much evidence as constitutionally possible about the suspected offence, rather than just evidence that incriminates a particular target because that can lead to prosecutorial 'tunnel vision'."

> ... The ITO did not need to mention [the accused] or identify her specifically as a target for the warrant to authorize a search of her phone (though it should have done so had such evidence been available). [The accused's] argument reflects a misconception of the statutory requirement for the warrant and the reasonable grounds standard. The police did not have to link the electronic devices to any specific target, but rather to the offences under investigation. Section 11(1)(d) of the CDSA requires the police to demonstrate reasonable grounds to believe that the "thing" sought will afford "evidence in respect of an offence under this Act" (emphasis added). This provision does not require the police to show reasonable grounds to believe that the thing will afford evidence about a specific target or named suspect.
>
> Put another way, a search warrant is an investigative tool that should be used to unearth as much evidence as constitutionally possible about the suspected offence, rather than just evidence that incriminates a particular target because that can lead to prosecutorial "tunnel vision". ...
>
> Here, whether or not any electronic device found in the garage belonged to [the target], the ITO provided evidence supporting a credibly-based probability that any electronic device, if found in the garage – a suspected hub of drug trafficking – would afford evidence of the drug trafficking offences identified in the warrant. [paras. 46-48]

And further:

> This evidence was therefore sufficient to establish reasonable grounds to believe that the electronic devices of any persons in the garage would contain evidence of the offences under investigation, thereby justifying extending the warrant to cover any cellphone found in the garage, no matter whose. The evidence in the ITO was not limited to [the target] and the warrant did not target only him, but rather targeted the offences under investigation.
>
> The issuing justice was therefore not required to consider the specific privacy interests of [the accused], who was then unknown to the police. The issuing justice was, however, required to consider the privacy interests of the class of persons whose cell phones might be seized from the garage and examined in investigating the offences at issue. Here, in view of the information presented in the ITO, I am satisfied that the issuing justice did so. [paras. 50-52]

Was a Second Warrant Required?

The Court of Appeal also ruled the police were not constitutionally required to seek a second warrant to examine the accused's cellphone. It concluded that the ITO disclosed sufficient information to permit the issuing justice to find that there were reasonable grounds to believe that <u>any</u> electronic devices found in the garage would provide evidence of drug trafficking. Because the ITO met this standard, a second warrant to search the accused's phone was not needed. There was no constitutional requirement that the police were required to apply for an additional authorization to search the accused's seized device.

Here, the accused's s. 8 rights had not been breached. The search warrant was constitutionally sound in permitting the police to examine any cellphone located during the search of the garage. The accused did not need to be named in the ITO as a target of the investigation for the warrant to authorize the police to examine her phone, nor were the police required to obtain a second search warrant. Since there was no *Charter* infringements, there was no need to address s. 24(2).

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

"The mind is the only weapon that doesn't need a holster."

~Paul Blart~

2020 British Columbia Law Enforcement Memorial

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.

For complete events information including annual Memorial Golf Tournament, Ride to Remember and Run to Remember visit our website at http://www.bclem.ca
or
For details specific to your agency, contact your Ceremonial Sergeant Major

BC LAW ENFORCEMENT MEMORIAL

Follow us on:

IMPORTANT UPDATE: Due to the current and ongoing Covid-19 crisis, this year's Memorial Service will be a closed service in order to adhere to the restrictions set out by the Ministry of Health. The service itself will be limited to 50 people. More detailed information about a virtual service will be available closer to the date of the event.

click on BCLEM for more information

ROADSIDE 'STRIP SEARCH' NOT UNREASONABLE

R. v. Byfield, 2020 ONCA 515

Plain clothed police officers conducted surveillance on a house after receiving a confidential tip from an untested informer that an individual was selling drugs from it. A vehicle registered to the accused, who was known to an officer from a previous drug investigation, arrived at the house and parked in its driveway. Police saw a man leave the house and get into the passenger seat of the accused's vehicle. The driver and the passenger then switched seats and the car was driven to a nearby plaza where it parked. Within minutes, a male got out of a green car and entered the accused's car in the rear passenger seat on the driver's side. After about a minute, the male got out of the accused's car and returned to the green car.

Believing they had witnessed a drug transaction, the police stopped the accused's car as it was being driven out of the parking lot and arrested both of its occupants including the accused who was in the front passenger seat. The accused was patted down incident to his arrest but nothing was found. A uniformed officer arrived to transport the accused to the police station, which was located about four minutes away. The transporting officer patted the accused down again for the safety of the officer, the public, and the accused, and to prevent the destruction of evidence. During this second pat down, the officer felt a large hard object — about six inches by six inches in size — in the accused's groin area. Believing the object was "non-anatomical", the officer asked the accused what it was. The accused replied, "my dick."

Investigating the bulky object further, an officer pulled out the waistband of the accused's pants and saw he was wearing a red onesie (long underwear). The officer then pulled out the underwear and saw a large baggie, which he removed. This baggie contained four smaller individual bags of cocaine weighing a total of 184 grams. This search lasted 15-20 seconds according to one officer and less than a minute according to another. The accused's genitals were never exposed and none of his clothing was removed. Two male officers, one on each side of the accused, conducted the search at the back of a police car adjacent to a large snowbank where no civilians saw it. The accused was charged with possessing cocaine for the purpose of trafficking.

BY THE BOOK:

s. 495(1)(a) *Criminal Code*

Arrest Without Warrant By Peace Officer

s. 495 (1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence; ...

Ontario Superior Court of Justice

The accused sought the exclusion of the drugs as evidence under s. 24(2) of the *Charter* by alleging his rights under ss. 8 and 9 were violated. He submitted the police did not have the necessary reasonable grounds to arrest him, thereby breaching his right not be arbitrarily detained, and the search that followed was unreasonable.

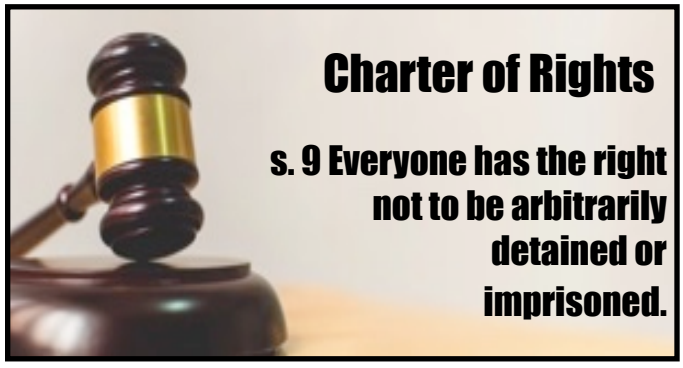
The judge, however, dismissed the accused's application. First, the judge found the police had the requisite reasonable grounds to believe the accused had committed a drug trafficking offence and could be arrested without a warrant under s. 495(1)(a) of the *Criminal Code*. Not only did the officers subjectively believe they had grounds to arrest the vehicle's occupants, their belief was objectively reasonable in the circumstances. These factors included the confidential tip about drug dealing taking place at the residence, other previous (albeit dated) information about drug dealing at the residence, awareness that the

accused was involved in selling drugs and their surveillance observations.

Second, the judge held the personal search in the parking lot resulting in the recovery of the drugs was a ***"strip search"*** even though an officer testified he didn't think it was a strip search. Nevertheless, the judge concluded the strip search was reasonably conducted as an incident to arrest. The judge accepted the concerns offered by police that the search was conducted for officer safety reasons, and to secure or prevent the destruction of evidence.

As for the manner in which the roadside search was performed, the judge found it did not infringe the *Charter*. He stated:

> I am satisfied the roadside strip search of [the accused] was reasonable and did not infringe upon his s. 8 Charter rights for the following reasons:
>
> - The search was conducted in a manner that ensured the health and safety of those involved;
> - The search involved a brief visual inspection of [the accused's] underwear area;
> - The officers conducting the search were of the same gender as [the accused];
> - The number of officers involved was appropriate in the circumstances and was not excessive;
> - [The accused's] genitals or groin area was never exposed;
> - While his underwear was rearranged, the waistband of [the accused's] pants and underwear were pulled out minimally and briefly;
> - No articles of clothing were ever removed from [the accused]. He was not required to pull down his pants;
> - The search was done as quickly as possible (15 to 20 seconds [to] under a minute ...);
> - In the circumstances, authorization from an officer in an authorizing or advising capacity was not necessary;
> - There is no evidence that any member of the public witnessed any part or details of the search;
> - Given the location of [the police] cruiser, the location of [the officers and the accused] at the back of the cruiser, adjacent to the large snowbank in the parking lot, the search was quick, discrete and with due consideration for [the accused's] privacy rights;
> - The search was minimally intrusive and justified the reasonable and probable grounds that [the accused] was trafficking in drugs. Both officer safety and preservation of evidence justified this brief search;
> - There is no evidence to suggest the search was aggressive or humiliating. [*R. v. Byfield*, 2019 ONSC 3954, para. 217]



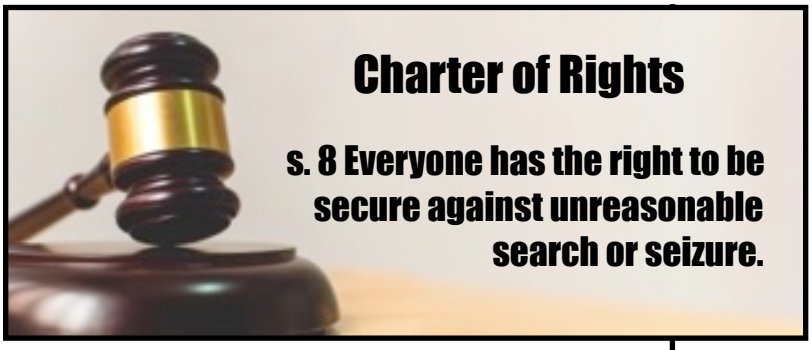
The accused was convicted of possessing cocaine for the purpose of trafficking and sentenced to 24 months' imprisonment, less pre-sentence custody, plus other ancillary orders.

Ontario Court of Appeal

The accused argued that the motion judge erred in concluding that his arrest was lawful and the resultant strip search was reasonable. In his view, his rights under both ss. 8 and 9 of the *Charter* had been breached and the evidence out to have been excluded under s. 24(2).

The Arrest

The accused contended that the grounds offered for his arrest were insufficient. But the Court of Appeal disagreed. The motion judge properly considered the confidential tip by assessing whether it was compelling, credible and corroborated.



"The motion judge was aware of the shortcomings in the background information in the possession of the police," said the Court of Appeal. ***"However, this source of information did not bear the entire load of the reasonable grounds requirement in this case. Prior to making the vehicle stop, the police witnessed what they reasonably believed was a drug transaction."*** The totality of the evidence supported the motion judge's conclusion that the police had the reasonable grounds required by s. 495(1)(a). The arrest was therefore lawful and did not violate s. 9 of the *Charter*.

The Strip Search

The Court of Appeal also upheld the motion judge's ruling that the strip search was not unreasonable. First, the pat down by the transporting officer was appropriate. Second, even though the searching officer mistakenly believed that the mere **"rearrangement"** of clothing did not constitute a strip search, the motion judge did not err in ultimately concluding that the strip search was reasonable in the circumstances.

"The search was conducted in a manner that ensured the health and safety of the [accused]," highlighted the Court of Appeal. ***"It involved a brief (15 seconds to a minute) visual inspection of the [accused's] underwear area; the searching officer was the same gender as the [accused]; the [accused's] genitals were never exposed; no articles of clothing were removed; no member of the public witnessed any part of the details of the search because it was conducted between a police cruiser and a large snowbank; and there was no evidence to suggest that the search was gratuitously aggressive or humiliating."***

Moreover, the transporting officer's safety concerns were legitimate. ***"Given his discovery of the unknown object in the [accused's] groin area, further investigation was reasonable and necessary,"*** said the Appeal Court. ***"We disagree with the [accused's] submission that, because the police station was only four minutes away, the strip search could have waited until then. The strip search was necessary to ensure the safety of all concerned … during this journey to the police station, even if that journey was to be brief."***

Since there were no *Charter* breaches, there was no need to consider s. 24(2). The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's Note: Additional details taken from *R. v. Byfield,* 2019 ONSC 3954.

What is a Strip Search?

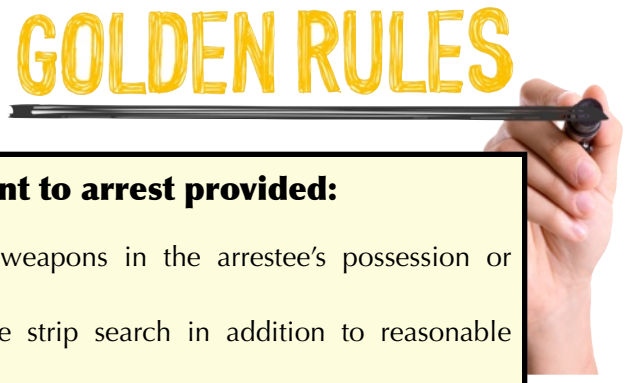
In *R. v. Golden*, 2001 SCC 83 the Supreme Court of Canada adopted the following as meaning of the term "strip search":

> **"[T]he removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments."** [para. 47]

The Supreme Court added:

> **"This definition distinguishes strip searches from less intrusive 'frisk' or 'pat-down' searches, which do not involve the removal of clothing, and from more intrusive body cavity searches, which involve a physical inspection of the detainee's genital or anal regions. While the mouth is a body cavity, it is not encompassed by the term 'body cavity search'. Searches of the mouth do not involve the same privacy concerns, although they may raise other health concerns for both the detainee and for those conducting the search."** [para. 47]

R. v. Golden, 2001 SCC 83



Strip searches can be conducted as an incident to arrest provided:

1. they are conducted for the purpose of discovering weapons in the arrestee's possession or evidence related to the arrest,
2. the police establish reasonable grounds justifying the strip search in addition to reasonable grounds justifying the arrest; and
3. the strip search is carried out in a reasonable manner.

Moreover, a strip search should be conducted at a police station unless there are exigent circumstances requiring it be conducted in the field — prior to being transported to a police station). The Supreme Court of Canada also offered a series of guidelines, which they articulated in the form of questions, to be considered in determining whether a strip search is conducted in a reasonable manner:

1. Can the strip search be conducted at the police station and, if not, why not?
2. Will the strip search be conducted in a manner that ensures the health and safety of all involved?
3. Will the strip search be authorized by a police officer acting in a supervisory capacity?
4. Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?
5. Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?
6. What is the minimum of force necessary to conduct the strip search?
7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
8. Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?
9. Will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact?
10. If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?
11. Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?

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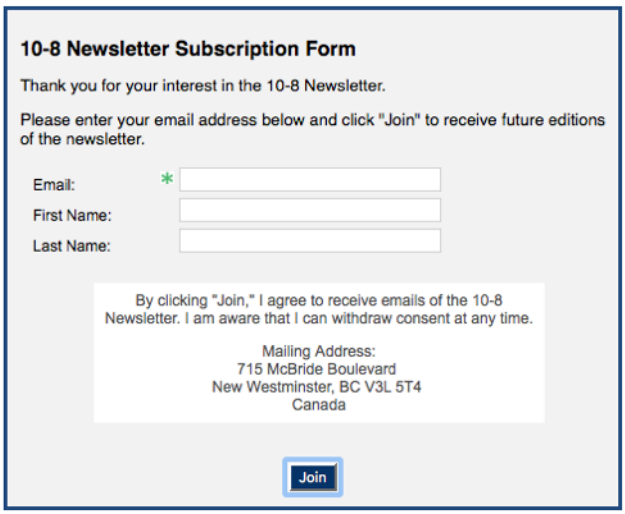

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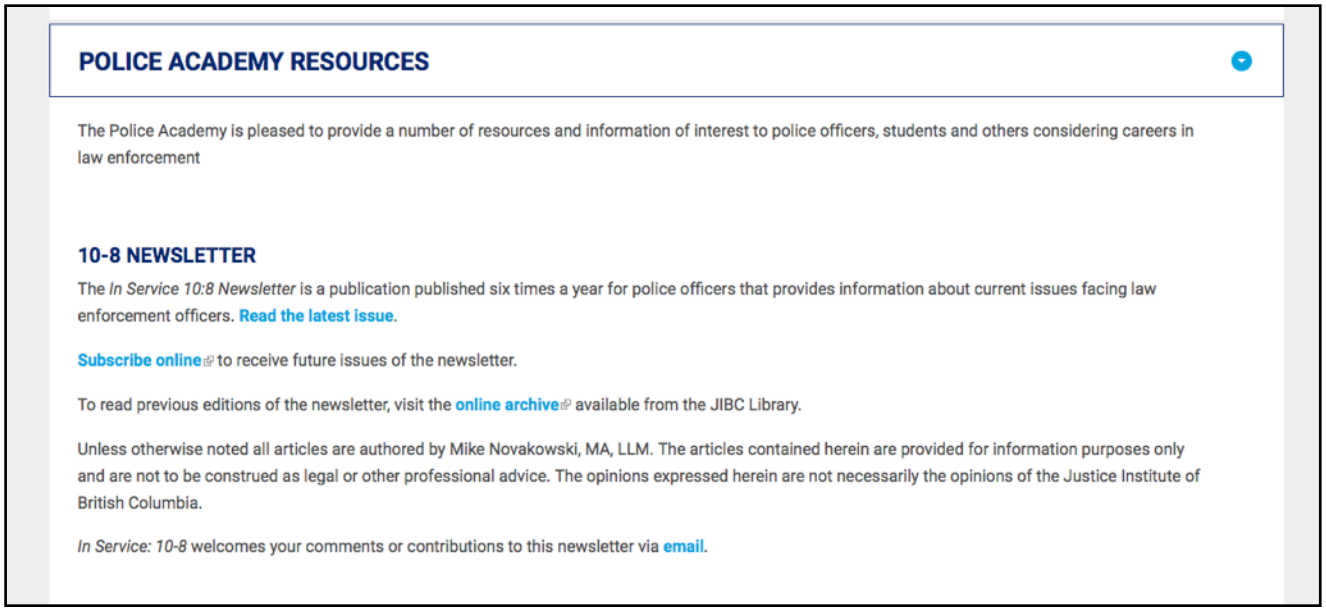

POLICE ACADEMY RESOURCES

The Police Academy is pleased to provide a number of resources and information of interest to police officers, students and others considering careers in law enforcement

10-8 NEWSLETTER

The *In Service 10:8 Newsletter* is a publication published six times a year for police officers that provides information about current issues facing law enforcement officers. **Read the latest issue.**

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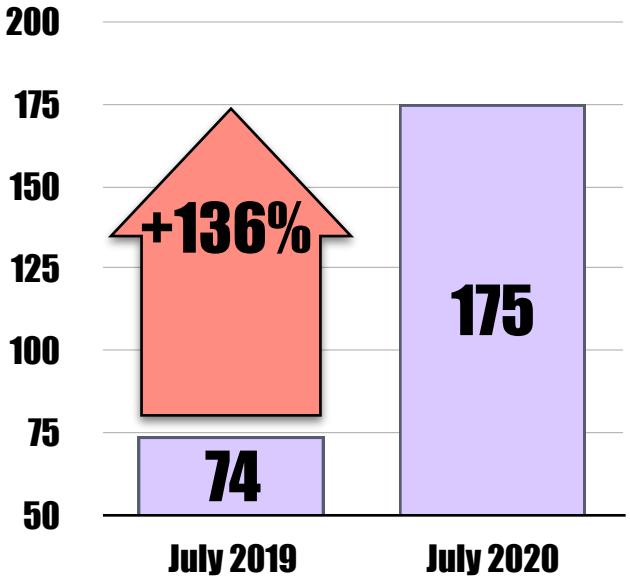
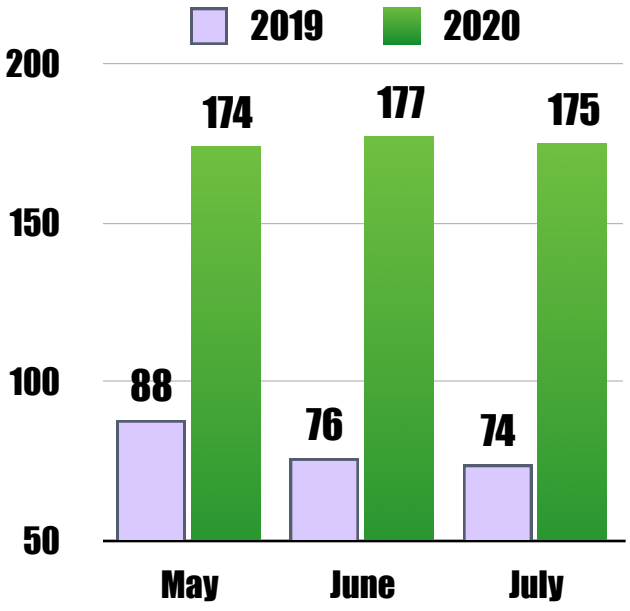
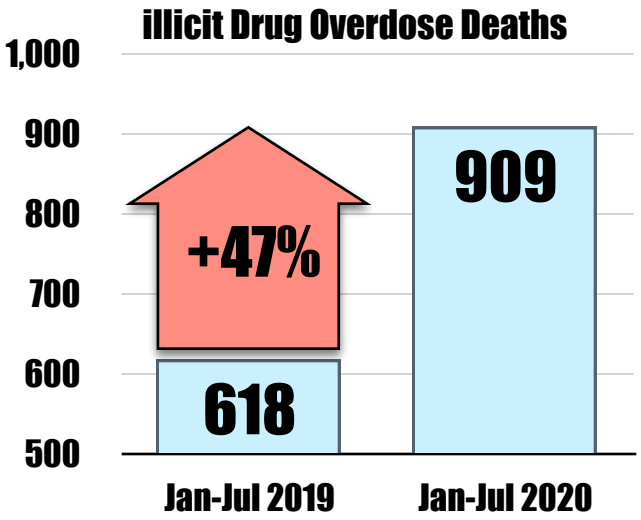
BC ILLICT DRUG TOXICITY DEATHS IN 2020

The Office of BC's Chief Coroner has released statistics for illicit drug toxicity deaths (formerly known as illicit drug overdose deaths) in the province from **January 1, 2010 to July 31, 2020**. In July 2020 there were **175** suspected drug toxicity deaths. This represents a **+136%** increase over the number of deaths occurring in July 2019 and two (**+2**) more deaths than June 2020.





In 2020, there have been a total of **909** suspected drug overdose deaths from January to July. This is an increase of **291** deaths over the 2019 numbers for the same time period (**618**).



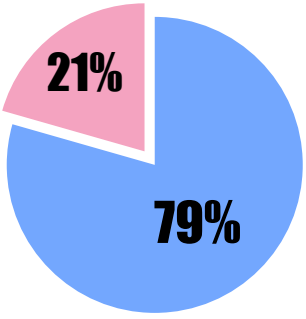
People aged 30-39 have been the hardest hit in 2020 with **214** illicit drug toxicity deaths followed by 40-49 year-olds (**210**) and 50-59 years-old (**197**). People aged 19-29 had **180** deaths while 60-69 year olds had **87** deaths. Vancouver had the most deaths at **223** followed by Surrey (**113**), Victoria (**84**), Kelowna (**33**), Kamloops (**32**) Abbotsford (**26**), and Nanaimo (**24**).

Overall, the 2020 statistics amount to about four (**4**) **people dying every day of the year.**

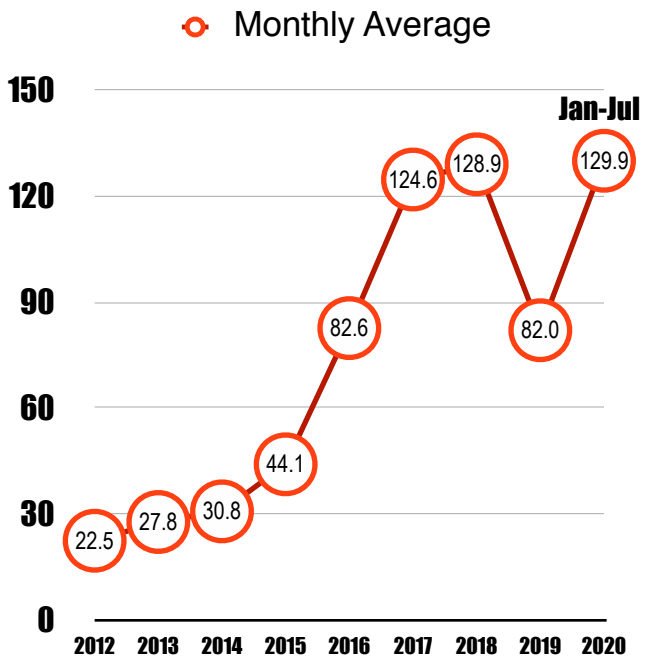
Deaths by gender

Males continue to die at a **4:1** ratio compared to females. From January to July 2020, **772** males had died while there were **187** female deaths.

The January to July 2020 data indicated that most illicit drug toxicity deaths (**85%**) occurred inside while **14%** occurred outside. For **14** deaths, the location was unknown.



Males
Females



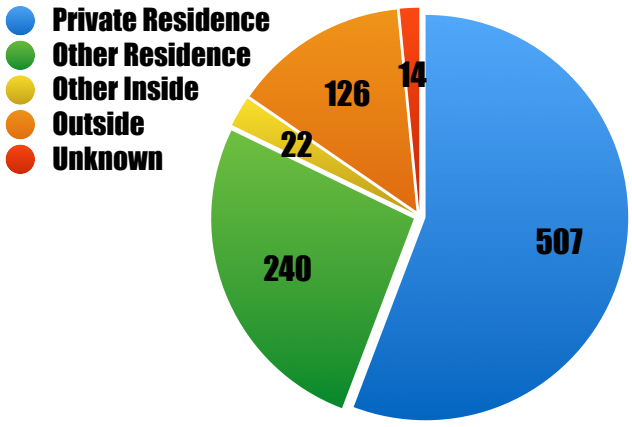
"**Private residence**" includes residences, driveways, garages, trailer homes.

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

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

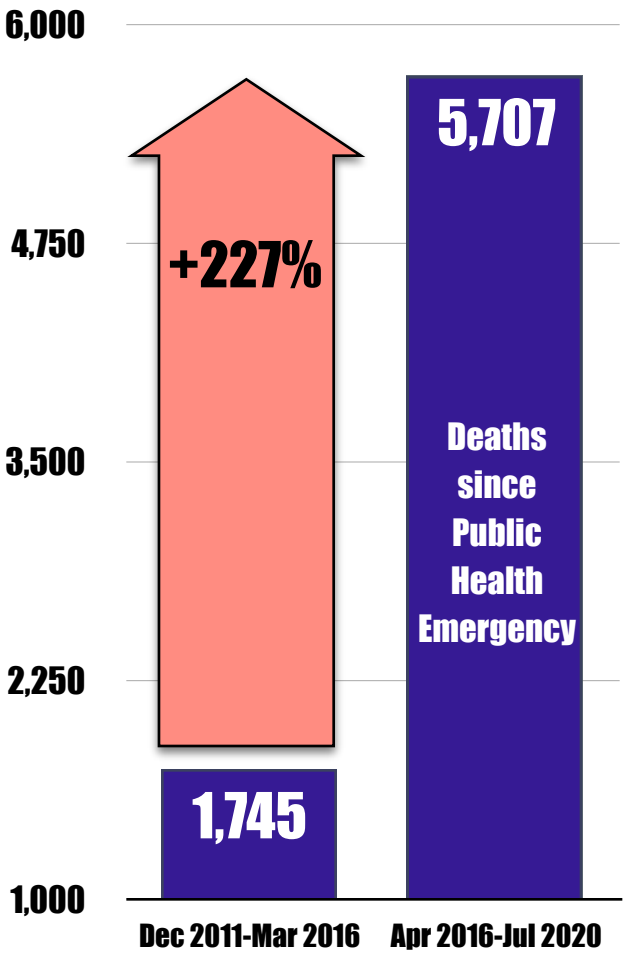
"**Outside**" includes vehicles, streets, sidewalks, parks, wooded areas, campgrounds and parking lots.

Deaths by location: Jan-Jul 2020



DEATHS SINCE PUBLIC HEALTH EMERGENCY

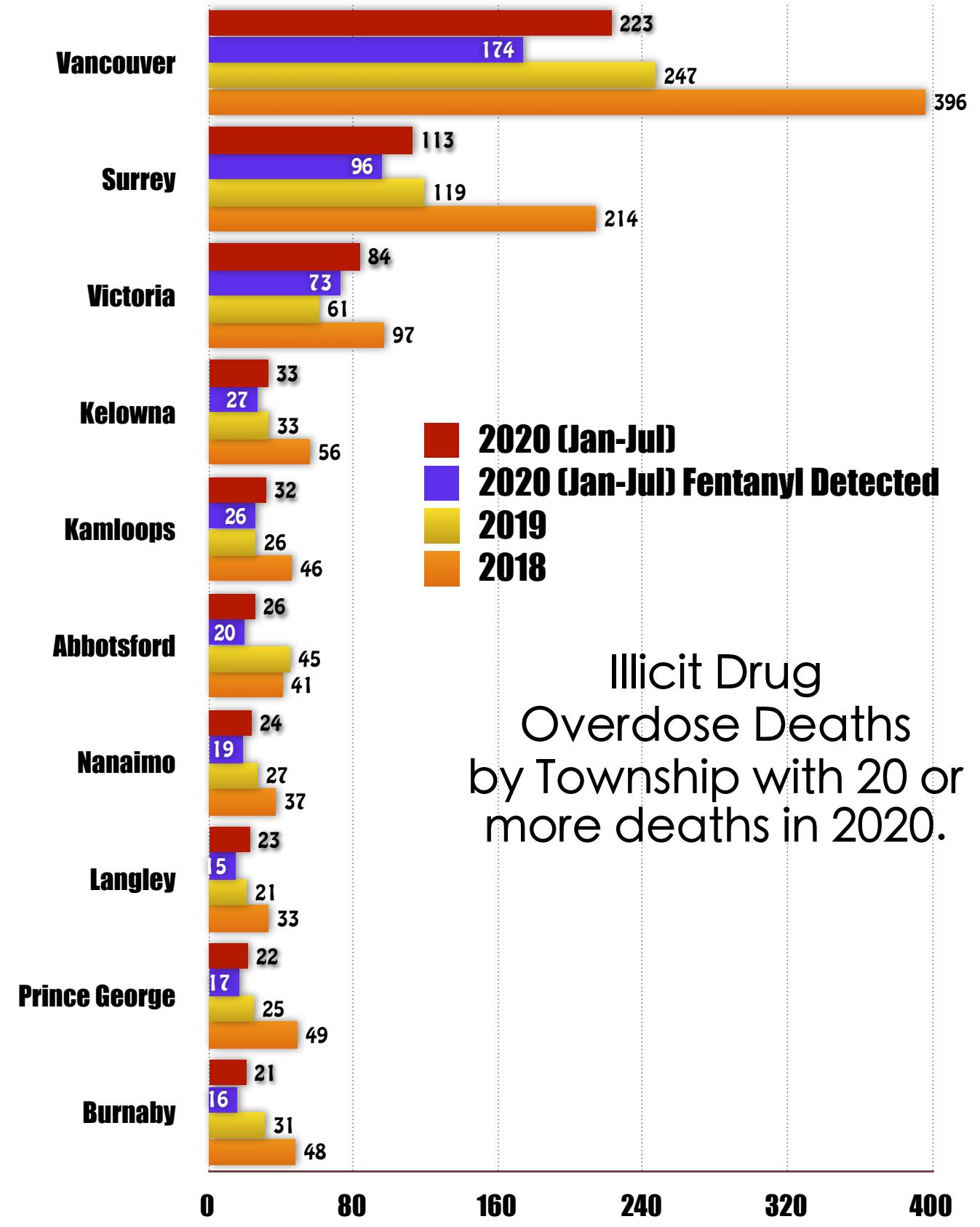
In April 2016, BC's provincial health officer declared a public health emergency in response to the rise in drug overdoses and deaths. The number of overdose deaths in the **52** months preceding the declaration (Dec 2011-Mar 2016) totaled **1,745**. The number of deaths in the **52** months following the declaration (Apr 2016-Jul 2020) totaled **5,707**. This is an increase of more than **220%**.



Source: Illicit Drug Toxicity Deaths in BC - January 1, 2010 to July 31, 2020. Ministry of Public Safety and Solicitor General, Coroners Service. August 25, 2020.

TYPES OF DRUGS

The top five detected drugs relevant to illicit drug overdose deaths from 2016 - 2019 were fentanyl and its analogues, which was detected in **82.8%** of deaths, cocaine (**49.8%**), methamphetamine/amphetamine (**33.9%**), ethyl alcohol (**27.8%**), heroin (**15.0%**) and methadone (**6.6%**). Other opioids (**17.4%**) and other drugs (**16.2%**) were also detected.


Vancouver
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Burnaby
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2020 (Jan-Jul)
2020 (Jan-Jul) Fentanyl Detected
2019
2018
Illicit Drug Overdose Deaths by Township with 20 or more deaths in 2020.
0
80
160
240
320
400