POLICE ACADEMY
715 McBride Blvd. New Westminster B.C. V3L 5T4

IN SERVICE:10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

A newsletter devoted to operational police officers across British Columbia.

IN MEMORIAL

On March 2, 2005, two members of the RCMP attended a rural residence outside of Mayerthorpe, Alberta to keep the peace and assist with a court order seizure of property. As a result of their attendance, evidence was obtained which resulted in a search warrant being sworn and secured for a marihuana grow operation.

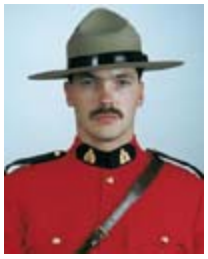
In the morning of March 3, 2005, two uniform members were left to secure the property until Edmonton RCMP Auto Theft Unit members attended the location to conduct a search of the property for stolen goods. Two additional uniform members later attended the residence. At 9:15 a.m., two members of the Edmonton RCMP Auto Theft Unit arrived at the residence and heard shots being fired inside a quonset hut on the property. A male suspect exited the quonset and fired a number of shots at the Auto Theft members, who returned fire. The male was in possession of a rapid fire auto carbine assault style rifle and retreated inside the quonset. Members of Edmonton and Red Deer Emergency Response Teams were immediately deployed along with other Support Units.

Constable Peter Schiemann, Constable Anthony Gordon, Constable Lionide (Leo) Johnston, and Constable Brock Myrol were located inside the quonset, and appeared to have succumbed to gunshot wounds. A male suspect was also deceased within the same building.

**"They are our heroes.
We shall not forget them."[1]**

RCMP
Constable Peter Schiemann
Age: 25
Service: 4 years

RCMP
Constable Anthony Gordon
Age: 28
Service: 2 years



RCMP
Constable Lionide Johnston
Age: 32
Service: 4 years

RCMP
Constable Brock Myrol
Age: 29
Service: 1 year

The preceding information was provided with the permission of the Officer Down Memorial Page: available at www.odmp.org/Canada.

[1] Inscription on Canadian Police and Peace Officer Memorial—Parliament Buildings Ottawa, Ontario.

Volume 5 Issue 2
March/April 2005

HIGHLIGHTS IN THIS ISSUE

Unless otherwise noted, all articles are authored by Sgt. Mike Novakowski, MA (Abbotsford Police). The articles contained herein are provided for information purposes only and are not to be construed as legal or other professional advice. The opinions expressed are not necessarily the opinions of the Justice Institute of British Columbia. "**In Service: 10-8**" welcomes your comments on or contributions to this newsletter. If you would like to be added to our electronic distribution list e-mail Mike Novakowski at mnovakowski@jibc.bc.ca

National Library of Canada Cataloguing in Publication Data

Main entry under title:

In service:10-8. -- Vol. 1, no. 1 (June 2001)-

Monthly.

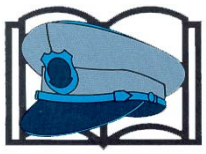
Title from caption.

"A newsletter devoted to operational police officers across British Columbia."

ISSN 1705-5717 = In service, 10-8

1. Police - British Columbia - Periodicals. 2. Police – Legal status, laws, etc. – Canada – Cases – Periodicals. I. Justice Institute of British Columbia. Police Academy. II. Title: In service, 10-8. III. Title: In service, ten - eight.

'IN SERVICE: 10-8' e-LETTERS TO THE EDITOR



Once again, the "*In Service:10-8*" newsletter would like to share some of our readers' comments about the publication.

****

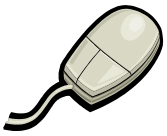
"I first learned about this publication three years ago. I share this publication with all the members who care about their job and those who strive to be a better member"—**Major Crime Constable, RCMP British Columbia**

****

"We really need this type of updating on a regular basis. Without it we are going to have problems in court"—**Police Constable, British Columbia**

****

"Keep up the good work. I really like the fact that In Service is put together in an easy to read and understand style. It is a must read every time a new issue comes out and an excellent resource that all officers should read"—**Police Constable, Manitoba**



All past editions of this newsletter are available online by clicking on the Police Academy link at:

www.jibc.bc.ca

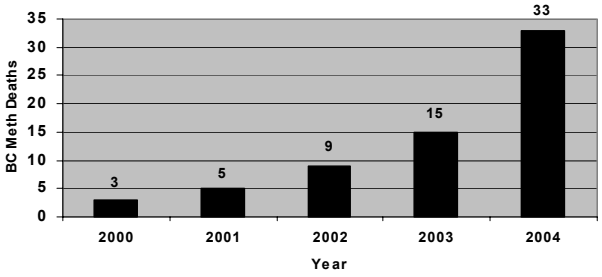
Note-able Quote

on Plain View—*[T]he officer did not have to avert his eyes and pretend, like Sergeant Shultz in the television show, "Hogan's Heroes", that he "knows nothing". That would make a mockery of effective police enforcement. Provided he comes across the evidence inadvertently and what he observes is immediately apparent as evidence of a probable crime, he may immediately seize the material*—NFCA Justice Green[2]

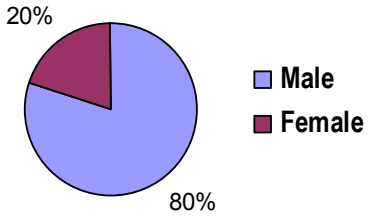
[2] *R. v .Robere,* (1999) Docket: 97/102 (NFCA)

B.C. METH DEATHS RISE

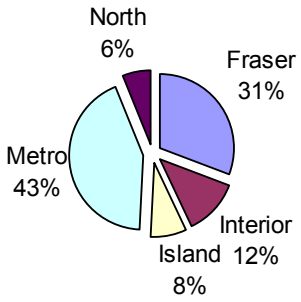
A recent report issued by British Columbia's Chief Coroner shows 2004 deaths in which methamphetamine was present in toxicology results has more than doubled since 2003. In 2000 there were only three methamphetamine death cases, while in 2004 that figure had risen to 33.



Of the 65 deaths over the last five years in which the presence of methamphetamine was found, 52 were male while 13 were female.



The Metro region had the most deaths at 28, followed by the Fraser (20), the Interior (8), the Island (5) and the North (4) regions.



For more information go to www.pssg.gov.bc.ca/coroners.

2004 POLICE STATS UNVEILED

Statistics Canada has recently released its 2004 policing statistics. In 2004, there were a total of 59,906 police officers across Canada. Ontario had the most cops with 23,214 while the Yukon had the least with 121.

Province	Cops	% of Total
Ontario	23,214	38.8%
Quebec	14,411	23.5%
British Columbia	7,193	12.0%
Alberta	5,123	8.5%
Manitoba	2,266	3.7%
Saskatchewan	2,010	3.3%
Nova Scotia	1,615	2.7%
New Brunswick	1,302	2.1%
Newfoundland	766	1.3%
Prince Edward Island	207	0.3%
Northwest Territories	171	0.2%
Nunavut	123	0.2%
Yukon	121	0.2%
RCMP HQ & Training Academy	1,384	2.3%

The 2004 population per police officer statistics were also revealed. In Canada there were, on average, 533.3 residents to every police officer. Nunavut had the lowest ratio at 241 residents to every cop while Newfoundland had the highest at 675 residents.

Province	Pop per Cop
Nunavut	241.0
Northwest Territories	250.4
Yukon	257.9
Saskatchewan	495.2
Manitoba	516.4
Quebec	523.4
Ontario	533.8
New Brunswick	577.1
Nova Scotia	580.2
British Columbia	583.4
Alberta	625.0
Prince Edward Island	666.0
Newfoundland	675.0
Canada	**533.3**

The population per police officer ratio for Canada's 27 Census Metropolitan Areas (CMAs), a Statistic's Canada defined geographic area with a population in excess of 100,000, showed Regina with the lowest population per police officer ratio at 483 residents per cop while Abbotsford had the highest at 777.

CMA	Pop per Cop
Regina	483
Thunder Bay	503
Saskatoon	554
Winnipeg	559
Toronto	579
Montreal	582
Windsor	599
St Catherines-Niagara	630
Trois-Rivieres	641
Edmonton	654
Calgary	655
Halifax	668
Victoria	670
Greater Sudbury	684
Hamilton	688
Gatineau	694
Saguenay	698
Vancouver	704
Kitchener	709
St Johns	723
Saint John	724
Quebec	728
Kingston	739
Sherbrooke	740
London	744
Ottawa	751
Abbotsford	777
Canada	**533.3**

Note: A CMA is not necessarily restricted to its namesake and includes other areas. For example, police services included in the Vancouver CMA are Bowen Island (RCMP), Burnaby (RCMP), Coquitlam (RCMP), Delta, Langley (RCMP), Maple Ridge (RCMP) New Westminster, North Vancouver (RCMP), Pitt Meadows (RCMP), Port Coquitlam (RCMP), Port Moody, Richmond (RCMP), Squamish (RCMP), Surrey (RCMP), Vancouver, West Vancouver, and White Rock (RCMP).

For more information go to www.statcan.ca

ONTARIO FIRST NATIONS CONSTABLES MAY SET UP R.I.D.E. OFF RESERVE

R. v. Decorte, 2005 SCC 9

Two Anishinabek Police Service First Nation constables stopped the accused shortly before 1:00 am at a drinking and driving checkpoint (R.I.D.E. program) just outside the Fort William Reserve in Ontario. The accused had an odour of alcohol on his breath and refused to provide a breath sample. As well, he was also in breach of a recognizance requiring him to refrain from consuming alcohol and to remain in an alcohol free residence between 4:00 pm and 10:00 am. He was arrested and charged with refusing to provide a breath sample and breaching his recognizance.

At his trial in the Ontario Court of Justice, the accused was acquitted of the refusal charge but convicted of the recognizance breach, which was affirmed on appeal by the Ontario Court of Appeal. He launched a further appeal to the Supreme Court of Canada arguing he was arbitrarily detained in violation of s.9 of the *Charter* and that the evidence should have been excluded under s.24(2). In his view, the First Nations officers were not allowed to set up a R.I.D.E. operation under s.48 of Ontario's *Highway Traffic Act* (*HTA*) because they were outside their reserve territory and were not "peace officers" for the purpose of the breath demand section in the *Criminal Code*.

A unanimous Supreme Court of Canada rejected the accused's appeal. The jurisdiction of the constables was determined by statute, regulation, and service agreement. Although the First Nations constables were not "police officers" within the meaning of Ontario's *Police Services Act* (*PSA*), the *PSA* nonetheless attributed them the "powers of a police officer" for the purpose of carrying out their specified

duties—such as preventing crime, preserving the peace, preventing accidents, and apprehending offenders—which are similar to the *PSA* duties of police officers.

Furthermore the constables were not confined to the territorial limits of their First Nation community. They were appointed by the Commissioner of the Ontario Provincial Police "to act as First Nations Constables for the Province of Ontario…for the purpose of performing law enforcement functions in Ontario". In addition, the Anishinabek Police Service Agreement provided for the exercise of police powers in and for Ontario, while their oath of office refers to the discharge of their duties in Ontario. As well, their identification certificate stated they were empowered to exercise their authority in Ontario. Thus, the First Nations constables were empowered to discharge their policing duties outside their Nation's Territory anywhere in Ontario in relation to the First Nation's communities they were employed primarily to serve.

Since the constables were also peace officers as defined in s.2(c) of the *Criminal Code* and were authorized to set up the R.I.D.E. operation under s.48 of the *HTA*, which allows police officers to randomly stop drivers to determine whether or not there is evidence for demanding a breath sample under s.254 of the *Criminal Code*, the detention was authorized by law and passed constitutional muster. The accused's appeal was dismissed and his earlier conviction upheld.

Complete case available at www.scc-csc.gc.ca

Note-able Quote

on Implied Licence—*Can it rationally be asserted that I give an implied licence to a burglar to come to my front door for the purpose of "casing" my house? To the householder unlawfully cultivating, the policeman is no more welcome than the burglar is to me*—BCCA Justice Southin[3]

[3] *R. v. Evans*, (1994) 93 *CCC* (3d) 130 (BCCA)

PLAIN VIEW JUSTIFIES SEIZURE OF ITEMS NOT LISTED IN WARRANT

R. v. Pham,
(2005) Docket:C40282 (OntCA)

Following a break and enter to his jukebox and novelty company in which 11 slot machines were stolen, the owner noticed an advertisement in a newspaper advertising a slot machine for sale. His friend attended the address and saw a slot machine in a storefront that was similar to the one stolen. The owner then also attended the store, met with the accused and recognized two of his stolen slot machines. The owner called police.

A detective prepared a telewarrant application and was granted a search warrant authorizing the search of the storefront between 11:30 pm and 4:00 am for two slot machines and two serial number plates. The police executed the warrant shortly before 1:00 am. and realized that the building contained both a residence and a store. They entered to secure the entire building for officer safety and to preserve evidence. The police found and seized two slot machines and located other stolen property that was seized. A second search four days later also uncovered more stolen property.

The accused was convicted at trial in the Ontario Superior Court of Justice on 11 charges of possession of stolen property under $5000 and one count of possession of stolen property over $5000 after the trial judge ruled the searches did not violate s.8 of the *Charter*. However, the accused appealed to the Ontario Court of Appeal arguing, among other grounds, that there was no basis for the nighttime search, that the search was unreasonable, and that he had been arbitrarily detained.

The unanimous Ontario Court of Appeal rejected these arguments. First, the accused had told the

owner that he had been receiving many calls about the slot machine and one was advertised in the weekend newspaper. The trial judge found that the police were concerned with the fluidness of the stolen goods business and he was reluctant to second-guess their knowledge in this area. The nighttime search was not unreasonable.

Nor were the procedural steps taken by the police unreasonable. Their notification and entry was appropriate. Furthermore, the items seized that were not listed in the search warrant were validly seized on the basis of reasonable grounds to believe that they were stolen goods. They were in plain view as part of the continuing search for the serial plates, which were listed in the search warrant.

Finally, the accused was not arbitrarily detained under s.9 of the *Charter*. Once the police located the first stolen slot machine, his arrest was proper.

Complete case available at www.ontariocourts.on.ca

NO RIGHT TO COUNSEL FOR ROADSIDE DETAINEE

R. v. White, 2005 NSCA 32

A police officer approached a driver that had tried to avoid him and had parked against a snow bank. The officer requested the accused's driver's licence and noted she had difficultly finding it. She admitted to drinking, her eyes were bloodshot, and there was a moderate odour of liquor in the car. A roadside screening demand was read and after five tries at providing a sample, the accused was told she would be charged with refusal. The officer completed the necessary paperwork and drove the accused home.

At her trial in Nova Scotia Provincial Court the accused was convicted of refusing to provide a breath sample contrary to s.254(5) of the *Criminal Code*. However, she appealed to the Nova Scotia Supreme Court contending, among other grounds, that her s.10(b) *Charter* rights had been violated. This appeal was dismissed, but the accused appealed further to the Nova Scotia Court of Appeal. The accused argued that she was entitled to be informed of her right to counsel both before the roadside test and after it was completed.

Justice Chipman, authoring the Nova Scotia Court of Appeal judgment, ruled that the lower court did not err. First, even though a driver who is subject to a roadside demand is detained for *Charter* purposes, the legislation justifies a limitation on the individual's constitutional right to a lawyer provided the sample is taken forthwith. Second, "it was also clear that any issue of *Charter* rights after the roadside test was completed was not relevant to the refusal charge." The appeal was dismissed.

Complete case available at www.canlii.org

POST DRIVING CONDUCT IS EVIDENCE OF IMPAIRMENT

R. v. Smith, 2005 NLCA 1

The accused was convicted of impaired driving in the Provincial Court of Newfoundland and Labrador, but appealed to the Newfoundland and Labrador Court of Appeal contending that evidence of his behaviour after his car was stopped could not be used to support a conclusion that his ability to operate a motor vehicle was impaired. The Newfoundland and Labrador Court of Appeal, however, rejected his argument. Justice Cameron stated:

> The indicia of impairment evident by the observations of the [accused] by the police officer are admissible as going to the question of impairment. Here I refer, for example, to such things as slurred speech, blood shot eyes

and being unsteady on his feet. There are others.

…In this case, on finally stopping his car near a pond on his property, the [accused] quickly exited the car and threw a beer bottle and the car keys into the pond. He then went into the boathouse, from where he had a conversation with the police officer who was outside the boathouse. Next, he left the boathouse and hurried into his residence. He was clearly trying to avoid the police officer. The trial judge demonstrated that he was aware of the need for caution in dealing with post offence conduct. He considered the [accused's] stated concern for being found with an open beer bottle in his car as the reason for his conduct. The trial judge was particularly struck by the throwing of the car keys into the pond, for which he found no credible explanation. The [accused] has not demonstrated an error on the part of the trial judge in considering this post offence conduct. [para. 7-8]

As the Court noted, the Supreme Court of Canada has held that post offence conduct can be used as circumstantial evidence of culpability and there is no special test for determining impairment. In this case there was ample indicia of impairment. The appeal was denied.

Complete case available at www.canlii.org

COMPLIANCE INSPECTION NOT A SEARCH FOR CHARTER PURPOSES

R. v. Diep, 2005 ABCA 54

Conservation officers, whose duty it was to ensure compliance with the Alberta *Fisheries Act*, received information that the accused was keeping Bigmouth Buffalo fish on his premises contrary to his fish farming licence. When arriving to conduct an inspection of the premises, the officers saw him exit a quonset building and lock it up. When asked, the accused said the unheated building contained no fish but was used to fabricate fish tanks.

Two other buildings were checked—one contained fish he was allowed to farm, the other Bigmouth Buffalo fish. He provided a copy of his licence, invoices, and other documents related to his business. The officers noted heat coming from the quonset that the accused said was not heated. They decided to inspect this building, but could not open the lock even with the accused's apparent assistance. After a locksmith arrived to cut the lock, the accused produced a key and the officers entered. Inside they saw more fish tanks and a marihuana grow operation. The accused was arrested and the police were called. A search warrant was obtained and 933 marihuana plants were seized.

The accused was convicted in the Alberta Court of Queen's Bench, but appealed to the Alberta Court of Appeal arguing the actions of the conservation officers was not an inspection, but amounted to a warrantless search that was unreasonable under s.8 of the *Charter* and that the evidence should have been excluded under s.24(2). In his view, once the officers had sufficient evidence to lay a charge, the inspection of the final building was a search requiring *Charter* scrutiny, rather than merely a compliance inspection.

The Alberta high court ruled that the officers were entitled to inspect the premises of a licenced fish farm under Alberta's *Fisheries Act*. As long as the officer's predominant purpose for their enquiry remained the determination of statutory compliance—even though they had already found a breach of the regulatory statute—they could continue their inspection. As the Court noted:

Here the officers were seeking to determine the extent of the compliance, or more appropriately, the lack of compliance of [the accused]. They did not initially lay charges after their first visit to [the accused's] premises. Their inspection was ongoing and was

> incomplete because they were not granted access to one of the buildings. They had only seen 2 of 35 fish tanks for which [the accused] had a licence. They had a concern that if Bigmouth Buffalo fish were in the uninspected building they could be removed before any delayed inspection occurred. When the officers entered the building they concentrated on the tanks and the fish. They literally stumbled on the marijuana plants.
>
> The nature of the activity being regulated is relevant to both expectation of privacy and the need for thorough and complete inspections. Fish farming is an industry whose purpose is to raise fish for human consumption. Its regulation, at a high level, is called for because food safety is a critical and pressing goal. Inspections necessarily involve a myriad of different steps, including inspection for species but also for concerns such as general cleanliness, health of the fish, disposal of dead fish and other waste, temperature controls and many other industry concerns. Although reasonable and probable grounds may exist to lay charges under one section of the Act that does not automatically transform an inspection into a search.
>
> A second pressing objective of the Act is to protect the Alberta ecosystem from the contamination of non-native fish species and parasites that travel with them. Big mouth Buffalo fish, dependant on their place of origin, are a known source of a dangerous parasite. [paras. 10-12]

The accused's assertion that he had a high expectation of privacy in his out buildings—similar to that of a residential garage—was also rejected. The Court stated:

> Buildings in which licenced fish farm activities are being carried out do not attract a high expectation of privacy. Viewing fish farms as equivalent to homes is not a "logical" progression that we are prepared to make. Furthermore, the operation of a fish farm is governed by the licence and the Act. By taking a licence [the accused] is agreeing to abide by the terms of the licence and the regulatory scheme used to enforce it. In the face of this agreement any expectation of privacy is minimal. [para. 13]

The Alberta Court of Appeal held that the officer's inquiry remained an inspection and never became a search. The appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

TAC UNIT's AGGRESSIVENESS UNREASONABLE

Crampton v. Walton et al, 2005 ABCA 81

A police drug unit member received a tip from a confidential informant that a marihuana operation was possibly being grown at a residence. After further investigation the officer formed the belief that the residence contained a grow operation. He swore an information and obtained a search warrant to search for evidence of cultivation. He also had some information that there was a possibility there might be a weapon inside the residence, but it was not sufficient to get a firearms search warrant. Because a weapon might be present, police protocol required the use of the tactical unit.

The tactical unit entered through the plaintiff's unlocked screen door, pointed an assault rifle at him, and announced they had a search warrant. The plaintiff, who had been making a pickle sandwich, was ordered to drop the steak knife he was using. Stunned, he hesitated but dropped the knife and began to kneel on the ground. A tactical officer assisted the accused's descent to the ground and knocked the wind out him. He wet himself, bruised his jaw, injured his rotator cuff and cracked five ribs. The police had faulty intelligence and the wrong suspect—the person named in the warrant was not the plaintiff. They found no drugs or weapons.

The plaintiff sued the police chief and other officers for assault and was awarded $20,000 by the Alberta Court of Queen's Bench. The

police, however, appealed to the Alberta Court of Appeal submitting they were protected from liability under s.25 of the *Criminal Code*.

Once a plaintiff establishes they were assaulted and sustained an injury, the burden shifts to the defendant to justify the assault. Section 25 of the *Criminal Code* protects police officers from criminal and civil liability in the course of enforcing or administering the law provided they act of reasonable grounds and do not use unnecessary force. The Court divided the s.25 analysis into three branches:

1. Were the police required or authorized to perform the action?
2. Did the police act of reasonable grounds?
3. Did the police use unnecessary force?

Required or Authorized by Law?

In this case, the police obtained a warrant that authorized them to enter and search the residence for drugs. Although the warrant did not authorize them to detain, restrain, or arrest the occupants, they arguably would be permitted to restrain the plaintiff for some purpose related to the proper execution of the search warrant since he was present in the residence being searched.

Reasonable Grounds?

In evaluating the basis for the police action and the manner in which it was carried out, a "court must determine whether there was an objectively reasonable basis, given the circumstances faced by the police officer, for the actions undertaken". Justice Fruman, authoring the unanimous judgment, stated:

> Essentially, s. 25(1) is a safe harbour from liability for those who are required to enforce the law. The police are often placed in situations in which they must make difficult decisions quickly, and are to be afforded some latitude for the choices they make…Courts recognize that law enforcement is dangerous; no one wants police officers to compromise their safety. On the other hand, s. 25(1) is not an absolute waiver of liability, permitting officers to act in any manner they see fit…The police are entitled to be wrong, but they must act reasonably. [para. 22, references omitted]

The search warrant, as suggested by the police, did not confirm the existence of reasonable grounds for their actions in executing it. Rather, the search warrant provided reasonable grounds that evidence could be found in the residence. The search warrant by itself, though based on reasonable grounds, did not give the police carte blanche to execute the warrant in any manner they wanted. They were required to establish reasonable grounds for the way they executed the warrant, which included using the tactical team in an aggressive manner in restraining the plaintiff.

The police argued, unsuccessfully, that they were concerned the occupants of the residence were armed, which justified the use of the tactical team. There was no evidence to support this position. The information to obtain the search warrant had been sealed and the officer who obtained it declined to state the basis for his belief that there was a possibility of weapons at the residence. Without this information, the police could not meet their burden in establishing reasonable grounds for executing the warrant in an aggressive manner. Justice Fruman added:

> Unlike many cases in which s. 25(1) is invoked, in this case the police decisions were not made in the heat of the moment, but with the benefit of reflection, discussion and an assessment of risk. The police decided to deploy the tac team and to execute the search warrant in a manner that required [the plaintiff] to be aggressively secured and restrained. They are answerable for these choices. The police need not demonstrate the correct decision was made, but that the decision was made on reasonable grounds based on the circumstances known at the time. Normally, this onus would not be a difficult one to meet when there is a possibility the

> occupants of a residence will be armed. However, in the unusual circumstances of this case, there was absolutely no independent evidence to substantiate that possibility. [para. 40]

Unnecessary Force?

Even if the police acted on reasonable grounds in the aggressive manner they did, they will not be protected from liability if they used excessive force. Justice Fruman described the test as follows:

> Police officers act in dangerous and unpredictable circumstances. No doubt a trained police officer will have instructions and a game plan to follow when entering premises to execute a search warrant. But the officer will have to react to the circumstances that present themselves. Accordingly, police officers will be exempt from liability " if they use no more force than is necessary having regard to their reasonably held assessment of the circumstances and dangers in which they find themselves"…
>
> Police officers are not expected to measure the precise amount of force the situation requires…Nor will they be denied the protection of s. 25(1) if they fail to use the least amount of force that would achieve the desired result. Allowance must be made for an officer, in the exigency of the moment, misjudging the degree of necessary force…Accordingly, the immediate decisions a police officer makes in the course of duty are not assessed through the "lens of hindsight"…[paras. 44-45, references omitted]

In this case, the amount of force used was excessive. The plaintiff was not combative, he did not resist or attempt to flee, and was compliant. The trial judge concluded that the degree of force used was unnecessary in the circumstances.

The police had not established all three branches of the s.25 defence analysis and their appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

POLICE NOT NEGLIGENT IN DRUNK's DEATH

Roy v. Attorney General of BC, 2005 BCCA 88

The family of a man dieing in police custody successfully sued the government when the police were found partly negligent in failing to seek medical treatment for his intoxicated condition. The deceased, who was 56 years old, was arrested for being intoxicated in a public place under British Columbia's *Liquor Control and Licensing Act* after a citizen called to report that a drunk male had stumbled to the ground while trying to get into his car. The attending officer found the male lying on the ground and concluded he was severely intoxicated. He was non responsive, was picked up, carried to, and placed in the back of a police vehicle. He was transported to the police station where he was placed on a blanket and dragged to the "drunk tank".

His personal effects were removed and he was rolled into the recovery position in his cell. Although he had no signs of external injury, he was drowsy, had difficulty communicating, and very limited physical reaction to his surroundings. However, no medical check was performed. About 23 minutes after being booked in, the jail guard checked him and found his snoring and breathing had stopped. Attempts to revive him were unsuccessful and he was later pronounced dead at the hospital. The experts agreed that he died from acute alcohol ingestion, which occurs when large amounts of alcohol are consumed, acting as a central nervous system depressant, and leading to coma, respiratory depression, and eventually respiratory arrest. If timely medical intervention is sought and the alcohol toxicity detected, death can be averted.

At trial in British Columbia Supreme Court, Justice Neilson found negligence on part of the police that contributed to their prisoner's death

(2002 BCSC 1021). She found that police owe prisoners in their custody a duty of care, particularly when intoxicated. In her view, police policy manuals assist the court in determining the standard of care. In this case, police policy required a person of "questionable consciousness" to be medically assessed. As Justice Neilson noted:

> I would expect such an assessment to include, at a minimum, an attempt to converse with the person about how much he or she has had to drink, and what other causes there may be for his or her condition. I would expect some attempt to make him or her respond to basic commands to assess the level of awareness. I would expect the officer do a basic physical examination to determine if the person has suffered any injuries, and whether the vital signs such as pulse and breathing are stable. I would also expect the officer to investigate the circumstances in which he or she was found, including speaking to available witnesses about their observations. [para. 128]

Since the police did not perform an adequate assessment or investigation into their prisoner's state of consciousness or its cause, the police failed to meet the standard of care required. Justice Neilson concluded that if the prisoner had been medically assessed, the progression of his respiratory distress would have been identified and he would have received immediate assistance to save him. Justice Neilson split liability 50/50 between the police and the prisoner—the police for failing to meet the standard of care and the prisoner for his self-induced intoxication.

The Attorney General appealed the judgment to the British Columbia Court of Appeal. In a 4:1 decision, the lawsuit was dismissed. Justice Southin, with Justices Saunders and Lowry concurring, found that the trial judge erred. Although the police owe a duty of care to a prisoner and must take reasonable steps for their safety, the police are not an insurer. The constables in this case believed their prisoner was simply a passed out drunk. He was extremely intoxicated but had no signs of external injury. It never occurred to them that he was of "questionable consciousness" as defined in policy or that he needed medical attention.

Nor could it be expected that police officers would "recognize the difference between a person obviously inebriated who is merely 'passed out' and such a person who is on the verge of central nervous system failure". Although police policy is an important factor for courts to consider in determining the standard of care, the trial judge treated the police policy as statute and also imposed her own standard of care, which required officers to perform a physical examination, check vital signs, and converse with the prisoner. In noting that hindsight cannot be the foundation for liability, Justice Southin wrote:

> I think it right that we remind ourselves of what the principal duty of a peace officer is. It is to keep the Queen's peace, an obligation which includes the prevention of crime and the detection of criminals. Peace officers are not emergency services personnel and cannot be held, unless and until they receive similar training, to a standard which would be appropriate for such persons. [para. 41]

Justice Hall, writing a concurring judgment, agreed with Justice Southin that the police were not negligent. He looked at other cases where the police had been found liable for a prisoner's injuries, but found this case different because it was not obvious the prisoner had any physical injuries. He stated:

> It was simply a case of the police dealing with an individual who appeared to have had a considerable amount to drink–an amount sufficient to cause him to pass out. If peace officers were required to take every individual they find heavily intoxicated to a hospital for assessment, it seems to me that this would have very dramatic implications for both hospitals and police forces. This could have a tendency to prevent police officers assisting in a timely way those in need of assistance. Here the officers took positive steps to place the

> deceased in what they thought was a safe environment; namely, the jail cells, in order to enable him to regain consciousness in a protected environment. Unfortunately, unknown to the officers, Mr. Roy had ingested so much alcohol that he died from the effects of alcohol on his vital functions. But I cannot see from the circumstances in this case that there was anything particular to alert the officers that this deceased was in peril. [para. 53]

A Dissenting Opinion

Justice Oppal was the lone dissent of the five member panel. In his view, the trial judge did not err in finding the officers should have recognized the prisoner was in need of medical treatment. The police policy made it clear that persons of "questionable consciousness" shall first be medically examined before being placed in a cell. There was no discretion available to the officers about what they ought to have done and the fact there were no signs of injury made no difference.

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

TRESPASSING ON ADJACENT PROPERTY DOES NOT RENDER EVIDENCE INADMISSIBLE

R. v. Hok, 2005 BCCA 132

While investigating a marihuana grow operation at a residence, police went onto the neighbour's adjoining property on five occasions at night. From there, the police were able to view the accused's hydro meter spinning, concluding that electricity consumption was high. This information was used, in part, to support the issuance of a search warrant. Prior to the warrant being executed, the accused emerged unexpectedly and was arrested driving away. The keys were taken from the ignition and found to open the door to the grow operation. Police executed the search warrant and the accused was charged with producing a controlled substance and possession for the purpose of trafficking.

At his trial the accused was convicted of both charges. Although the arrest was found to be unlawful because the officers only had reasonable grounds to detain—not arrest—the accompanying search should have been restricted to immediate safety concerns, not the collection of evidence. As such, the seizure of the keys exceeded the ambit of an investigative safety search and resulted in a s.8 *Charter* breach. However, the keys were admitted because the administration of justice would not be brought into disrepute.

The accused appealed to the British Columbia Court of Appeal arguing that the trial court erred in admitting the evidence. In his view, the police committed an offence under s.177 of the *Criminal Code*—trespass at night—when they entered onto his neighbour's property to inspect his hydro meter. This unlawful action, the accused contended, rendered the search a violation of s.8 and the evidence inadmissible.

Without deciding whether the police committed an offence contrary to s.177 of the *Criminal Code*, Justice Southin, authoring the unanimous appeal court judgment, concluded that a court is not permitted to exclude illegally obtained evidence unless it was obtained in breach of the accused's *Charter* rights. In this case, the trespass was against the neighbour, not the accused. However, Justice Southin made the following comment:

> I would not want it to be thought that I find this state of the law pleasing. As a householder, I would not want any peace officer coming onto my property without my leave and licence, whether by day or by night, for the purpose of spying on my neighbours. Otherwise, if he were in "hot pursuit" of a fleeing burglar. [para. 12]

As for the admission of the keys, Justice Southin stated:

> Had the officers not seized the key which they then used to execute the warrant, they would have had to enter the house by breaking down the front door and thereafter go to the basement by breaking down the basement door. Having found the marihuana, they would then have had the lawful right to arrest the [accused], seize the key in question and match it to the locks on the front and basement doors.
>
> To exclude the key in these circumstances would make the administration of justice look silly. [paras. 15-16]

The appeal was dismissed.

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

RISK OF DEPORTATION A FACTOR IN SENTENCING

R. v. Kanthasamy, 2005 BCCA 135

The accused entered a bedroom where a female prostitute was being confined after she had been kidnapped and sexually assaulted by three other men. He then sexually assaulted her and was subsequently convicted of sexual assault and unlawful confinement for his participation in the crime. The accused, a 26-year-old permanent resident of Canada from Sri Lanka, was sentenced to two years imprisonment while the other adult offenders received four year sentences.

Because he received a two year sentence, the accused became inadmissible to Canada under s.36(1)(a) of the *Immigration and Refugee Protection Act*. This section renders a permanent resident inadmissible from Canada if they were convicted of an offence punishable by at least 10 years in prison or if they receive a sentence of at least six months. Furthermore, if a permanent resident receives a sentence of at least two years, they lose their right to appeal a finding of inadmissibility.

The accused successfully appealed his sentence to a unanimous British Columbia Court of Appeal arguing it was unfit. In Justice Donald's view, the serious, but unintended collateral effect of the accused's sentence was a factor to consider in choosing an appropriate sentence. In this case, the difference of one day—two years versus two years less a day—determined whether the accused could appeal his deportation on humanitarian grounds or not. If he could not appeal, his return to Sri Lanka at grave risk of harm and persecution by the Tamil Tigers, a group of insurgents that extorted money from his family and murdered his brother, was inevitable.

Although a two year term also determines whether a prisoner does federal or provincial time or whether a probation order is available, Justice Donald concluded, "the substitution of a term of two years less a day does no violence to the sentence imposed…and avoids an unintended consequence of great significance". The sentence was reduced from two years to two years less a day "to prevent the disproportionate ramifications of a single day of imprisonment."

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

DID YOU KNOW?

…that a recent BC Coroners Service report entitled *"Motor Vehicle Accidental Deaths"* [4] has the community of Surrey at the top of its list for having the most fatalities involving motor vehicles in 2003. The top five British Columbia communities in 2003 were as follows:

Town/City	Motor Vehicle Accident Deaths
Surrey	37
Vancouver	26
Victoria	21
Kelowna	20
Abbotsford	15

[4] Available at www.pssg.gov.bc.ca/ coroners.

REASONABLE GROUNDS UNIQUE TO EACH SITUATION

Trudgian v. Wood, 2005 SKCA 13

Three days after a broomball game among RCMP cadets, a female cadet reported to her superior officer that the plaintiff—also an RCMP cadet—grabbed her breasts in a sexual manner during the game. A city police officer spoke to the complainant the following day and obtained a written statement from her. As well, an RCMP Corporal and Sergeant to whom the complainant spoke after the alleged assault were interviewed. No further investigation was conducted, nor were any of the other broomball participants or the plaintiff interviewed. Less than two hours were spent on the investigation and the accused was arrested. He was charged with sexual assault but later acquitted in the Saskatchewan Court of Queen's Bench.

The plaintiff successfully sued the city police for wrongful imprisonment. Although the trial judge found the arresting officer subjectively believed he had reasonable grounds for the arrest, the grounds were not objectively justified. He awarded the plaintiff $1,500 in pecuniary damages and $50,000 in general damages. He found the plaintiff was traumatized and also experienced difficulties regaining his employment as a corrections officer and getting promoted. The defendants appealed to the Saskatchewan Court of Appeal arguing the trial judge erred in finding that an arrest could not be made solely on the evidence of a complainant. As well, the amount of damages was appealed.

A unanimous Saskatchewan Court of Appeal upheld the lawsuit. An officer can, in some cases, arrest based almost solely on a complainant's statement, but cannot selectively listen to the complainant and decline to look at the rest of the evidence available to them. In examining the existence of reasonable grounds, Justice Gerwing stated:

> The issue of whether reasonable and probable grounds exists is a factual matter and will be decided in each case on the facts, which will almost always be unique. That is, in some instances and with some accuseds, a statement of a complainant which does not give rise to obvious need for further questioning may be found by a trier of fact to be sufficient. In other circumstances, a statement not otherwise supported may be found not to be adequate. No formula can be laid down by trial judges or this Court; it is in each instance for the trial judge to apply the test [laid down by the Supreme Court of Canada in R. v.] Storrey to the facts before him. [para. 11]

Furthermore, "the test for determining whether or not the objective basis exists for the arrest is applied at the moment it is made. Subsequent conduct, even if of diligent nature and in accord with police procedure, cannot retroactively validate an arrest and wrongful detention." The fact the arresting officer later conducted further investigation did not provide justification for the arrest when it was made.

In this case, the trial judge did not err in holding more investigation was needed. Justice Gerwing wrote:

> [The trial judge] focused on the fact the sexual assault occurred in a sanctioned sport witnessed by the entire troop and supervisors. The timing, the nature of the contact and the clothing worn and the fact that the [plaintiff] was carrying a broomball stick at the time were all suggestive to the trial judge that, at least, further investigation ought to have been undertaken. After a review of the evidence before him, we are of the view that there was evidence on which he could conclude as he did and we are not in a position to interfere. [para. 12]

The damage appeal was allowed. The Court of Appeal found $50,000 to be excessive and reduced the general damages to $30,000.

Complete case available at www.lawsociety.sk.ca

COMMON LAW SEIZURE REQUIRES RETURN TO JUSTICE

R. v. Backhouse,
(2005) Docket: C35171 (OntCA)

A masked man entered the victim's home, shooting and killing him, his friend, and seriously wounding a third person. The victim's 12 year old daughter saw the shooting, went next door, and called 911. She reported the accused and his brother were involved because they had threatened to kill her father in the past. Other information was acquired and the police believed they had enough to make an arrest.

Police arrested the accused about two hours after the shooting when he was located at a telephone booth. He was taken to the police station where his clothing was seized and he was provided with a garment to wear. He provided two written statements, but declined to have them audio or videotaped. As well, police conducted a gunshot residue test on the accused's hands. The test was performed by dabbing his hand with two-sided sticky tape—a process taking about 12 minutes. Police then released the accused, believing they did not have enough evidence to hold him but they continued their investigation.

At his trial in the Ontario Superior Court of Justice, the accused was convicted by a jury of first-degree murder, second-degree murder, and attempted murder. He appealed to the Ontario Court of Appeal arguing, among other issues, that the arrest was made without reasonable grounds, the clothing seizure and gunshot residue test were unreasonable, the police failed to complete a return to a justice—thereby rendering the seizure illegal—and failed to adequately record his statements rendering them inadmissible.

Validity of Arrest

The accused submitted the police lacked the reasonable grounds necessary for his arrest and the trial judge erred in so concluding. The Ontario Court of Appeal rejected this argument and found it was open to the trial judge to conclude the police had reasonable grounds to arrest.

A valid arrest requires reasonable grounds to believe a suspect has committed an indictable offence. These grounds must be subjectively held by the officer and must have an objective basis. The police do not need a prima facie case to make an arrest, but cannot ignore the obvious. Here, Justice Rosenberg, writing the unanimous decision, found the arrest lawful:

> Based on the information available to the police in the early hours after the shooting, their decision to arrest the [accused] was reasonable. This was the very epitome of a volatile, potentially dangerous and rapidly changing situation. Three people had been shot, two of them fatally. An armed and dangerous man was at loose in the community. Suspicion immediately and reasonably focused on the [accused] and his brother because of [the daughter's] statement and the well-known animus between the Backhouse and Steptoe families. The [accused] had recently been involved in a court case in which one of the victims of this shooting, Roy, had been a victim. A truck of the kind associated with the Backhouses was thought to have been in the area at the time of the shooting. Officers who knew the [accused] and his brother believed that the [accused] best fit the description given, despite the discrepancies. [para. 66]

Furthermore, releasing a suspect without charge should not be given any weight in assessing whether reasonable grounds existed. "The fact that the police ultimately decided not to charge the [accused] at that time does not undermine the validity of the original arrest," stated Justice Rosenberg. "The courts should avoid an analysis of events that encourage police to

detain suspects unnecessarily for fear that the decision will be held against them when the validity of the arrest is scrutinized".

Clothing Seizure

The accused argued that the seizure of his clothing constituted a strip search. In *R. v. Golden* 2001 SCC 83, the Supreme Court of Canada adopted the following definition of a strip search; "the 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, breast (in the case of a female), or undergarments". In this case, the removal of clothing was not for the purpose of inspecting the accused's private parts or undergarments.

Generally, a valid search incident to arrest requires a lawful arrest, must be related to the reasons for the arrest, and must not be conducted in an abusive fashion. Here the arrest was lawful. The seizure of the clothing was to inspect and examine it for blood or gunshot residue. Only by seizing the clothing could the police preserve the evidence and prevent its disposal.

Further, the seizure was not abusive. Male officers took the accused's clothing without using force. It was quick and without humiliation. Justice Rosenberg stated:

> In my view, where the police have lawfully arrested a suspect in a very recent homicide such as occurred in this case, they are entitled to seize his or her clothing for the purpose of preserving evidence. There are compelling reasons for authorizing such seizures as an incident to arrest for homicide since it is reasonable to suspect that a forensic examination of the clothing might yield evidence. [para. 90]

Gunshot Residue Test

The hand washing for gunshot residue was also found to be valid as an incident to arrest. It was necessary to preserve evidence and had to be conducted within a few hours of handling the firearm. It did not involve the seizure of bodily substances (like DNA samples) and was carried out in a reasonable fashion. There was no force used and the procedure was non intrusive and did not interfere with the accused's dignity or bodily integrity. Justice Rosenberg wrote:

> The state had a legitimate interest in conducting the hand washing in this case to determine whether the [accused] had been handling a firearm. The procedure was conducted within hours of the shooting, within the time that useful results could be expected to be obtained. The [accused's] right to privacy was not seriously compromised by the procedure. He was already lawfully under arrest, the procedure was not intrusive, and it involved only a washing of the surface of the skin. It was far removed from the strip search considered in *R. v. Golden*, or a body cavity search. I note that in *Golden* the Supreme Court held that even strip searches could be conducted as searches incident to arrest, provided certain conditions are met…No such additional conditions are necessary for a hand washing test. [para. 143]

Return to a Justice

The accused also contended that even if the clothing seizure was lawful as an incident to arrest, its continued seizure was unlawful because the police did not make a return to a justice as required by s.489.1 of the *Criminal Code*. The Crown, on the other hand, submitted that s.489.1 was enacted to deal with statutory seizures, but not seizures undertaken pursuant to common law.

In deciding whether or not s.489.1 was broad enough to encompass common law seizures—in this case a search incident to arrest—the appeal court examined several factors; grammatical and ordinary meaning, legislative history and Parliament's intention, the scheme of the Act, and legislative context. In holding that a return to a justice should have been made, Justice Rosenberg concluded:

> Accordingly, in my view, s. 489.1 applied to the seizure of the [accused's] clothing and that clothing should have been brought before a justice or a report should have been made to the justice in accordance with that section. The continued detention of the material seized was accordingly unlawful. It does not necessarily follow, however, that the continued unlawful detention violated the [accused's] *Charter* rights. The initial search and seizure was lawful and complied with the *Charter*…I need not decide whether the subsequent failure to comply with s. 489.1 could render the initial lawful seizure unreasonable. Even if the detention of the clothing did violate the [accused's] rights under s. 8, I would not exclude the evidence obtained by the analysis of the [accused's] jacket. [para. 115]

Statement Voluntariness

Finally, the accused argued that the Crown failed in its burden of proving the statements made to the police were voluntary, in part, by their failure to videotape them. Justice Rosenberg, however, declined to interfere with the trial judge's ruling that there was an adequate record from which a finding of voluntariness could be made. Although an audio or video recording can easily satisfy the Crown's onus in establishing voluntariness, there is no absolute rule requiring recordings. But, as the court had early noted in *R. v. Moore-McFarlane*, (2003) Docket: C31374 & C30881 (OntCA), "where…recording facilities are readily available, and the police deliberately set out to interrogate the suspect without giving any thought to the making of a reliable record, the context inevitably makes the resulting non-recorded interrogation suspect".

In this case, however, the failure to record was not suspect. Rather, the accused agreed to speak to the police only if it was not recorded. But the court cautioned that it would not always be an answer as to why the police failed to record a statement that the suspect refused to participate. A statement could be audio recorded or a suspect's wishes could at least be electronically recorded, to avoid any later dispute. Depending on context, a bare assertion by police officers that the suspect refused to be videotaped or even tape-recorded could be viewed with concern.

The appeal was allowed on other grounds and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

FIREARM ROADBLOCK UNCONSTITUTIONAL

R. v Clayton & Farmer,
(2005) Docket:C37990-C36722 (OntCA)

Police received a 911 call at about 1:25 am from a male located across the street from a large strip club. The caller, who identified himself by name, told police there were about ten black males, casually dressed, congregating outside the strip club and that four of them had handguns. The caller also described four vehicles by colour and model (a tan Lexus, a black Jeep Cherokee, a black GMC Blazer, and a white Acura Legend[5]) that he associated with the group of men. When asked to check, the caller confirmed there was still a crowd in the parking area but that one of the vehicles had left. The gun call was dispatched and police officers responded.

The first officers on scene saw a group of men outside the club, but no weapons. Two officers positioned themselves at the parking lot's rear exit at 1:26 am, intending on stopping and searching any vehicle and its occupants attempting to exit the lot. At 1:27 am the first vehicle—a black Jaguar—arrived, but it did not resemble the description of any of the reported associated vehicles. The vehicle was stopped when police pulled their car in front of it, blocking the exit. The accused Farmer was driving and Clayton was a passenger. Both men were black. The men were told police were

[5] See *R. v. Clayton & Farmer*, [2001] OJ No. 2393 (OntSCJ) for vehicle descriptions.

investigating a gun call and asked them to step out of the vehicle.

Clayton complied, but was evasive when questioned and appeared nervous, while Farmer exited with some reluctance. An officer placed his hand on Clayton to direct him to the back of the car. A struggle ensued and Clayton fled back towards the strip club. Police pursued and Clayton was apprehended trying to enter the club. A bouncer identified him as one of the males having a gun. He was handcuffed and police found a loaded handgun in his pocket. Farmer, who remained at the car, was arrested for possessing the gun found on Clayton and he was handcuffed, and searched. A loaded handgun was found tucked in the back of his pants. Both men were charged with numerous firearms offences.

At their trial in the Ontario Superior Court of Justice both men were convicted after the judge ruled the evidence admissible. In his view, the initial brief detention of the vehicle to screen cars leaving the area was permissible at common law. However, the officers intended on searching the men from the moment the vehicle was stopped without having a reasonable and individualized suspicion they were involved in a crime. Continuing the detention by removing them from the car to search them resulted in their rights to be secure from arbitrary detention and unreasonable search violated. Clayton's s.10(b) right to counsel was also infringed. Despite the breaches, in the judge's view the exclusion of the guns would bring the administration of justice into greater disrepute than to admit them.

Farmer and Clayton then appealed to the Ontario Court of Appeal. Justice Doherty, writing the unanimous judgment, found the *Charter* rights of both accused had been seriously infringed. There was neither statutory authority for the roadblock nor any reasonable individualized suspicion that could justify an investigative detention as described by the Supreme Court of Canada in *R. v. Mann*, 2004 SCC 52. Nor was this a case involving a roadblock similar to the type used by police for highway safety matters. As such, any authority for the type of roadblock undertaken in this case would have to find mooring in the ancillary police power doctrine.

At common law, the ancillary power doctrine recognizes that police conduct interfering with a person's liberty can be justified if the police were (1) acting in the course of their duty and (2) their conduct was a justifiable use of police powers associated to that duty. In assessing whether police conduct is justified a number of factors must be considered, including:

- the duty performed,
- the liberty interfered with,
- the nature and extent of the interference,
- the extent to which some interference with liberty is necessitated to perform the duty, and
- the importance of the duty to the public good.

In this case, the police had a duty to investigate and prevent crime and stopping the car was done while acting in the course of that duty. Justice Doherty noted:

> The police were investigating criminal activity, hoped to apprehend individuals in possession of dangerous weapons and seize those weapons before they could be used in criminal activity to harm others. Criminal conduct involving the use of firearms, especially handguns, is a serious and growing societal danger. The law abiding segment of the community expects the police to react swiftly and decisively to seize illegal firearms and arrest those in possession of them. The risk posed to the community by those in possession of handguns gives an added significance to police efforts to seize those weapons and apprehend those in possession of them beyond the always important police duty to investigate and prevent criminal activity. [para. 41]

However, the court found the police conduct did not pass the second prong of the ancillary power

doctrine—the justifiability factors. Here, the roadblock stop engaged the criminal process against the targets of the roadblock by determining whether the occupants of a stopped vehicle were involved in criminal activity. The detention and searching of all vehicles and occupants leaving the parking area was a profound interference with individual autonomy and privacy. "Being stopped by the police, questioned about guns, told to exit the vehicle, and made to stand against the vehicle in a public place while the police examine the inside of the vehicle, can be a frightening and humiliating experience," said Justice Doherty.

Although he agreed that the use of roadblocks to investigate crimes and apprehend criminals might be a justifiable intrusion on individual liberties in some cases, this was not one such case. Since the police did not have grounds to suspect any specific person, a roadblock could only be justified if there were reasonable grounds to believe a serious crime had been committed and the roadblock may apprehend the offenders. Here, the description provided by the 911 caller was detailed. The perpetrators were described as black males, casually dressed, and the specific make and models of four vehicles connected to the men were provided.

Rather than limiting their stops to persons in vehicles that resembled the description provided by the 911 caller, the police cast too wide a net in stopping all vehicles leaving the parking area without having reasonable grounds to believe stopping motorists not matching the description would result in apprehending the perpetrators and recovering the guns. Had the police narrowed their focus consistent with the information provided, the accused's vehicle would not have been stopped and it would have been free to pass.

Since the police could not justify stopping all vehicles under the ancillary power doctrine, the stop was unlawful and the accused were arbitrarily detained. Questioning them at the vehicle and the examination of the vehicle's interior also violated their rights under s.8. Justice Doherty did note, however, that if he had found the stop constitutional, the police would have been entitled to frisk the occupants if there was reason to suspect they were armed:

> In my view, legitimate police safety concerns justify a "pat-down" search of occupants removed from vehicles at a roadblock where the police have information that provides reasonable grounds to believe that one or more of the individuals detained at the roadblock may be armed. I do not think the police can be put in a position where they may have to turn their back on the occupants of the vehicle without first conducting a "pat-down" search. While my conclusion that a "pat-down" search would be warranted extends the police power, it also significantly increases the interference with individual liberty occasioned by the roadblock stop. As that interference grows, arguments which are said to make the conduct justifiable must become all the more compelling. [para. 67]

Unlike the trial judge, the appeal court ruled the handguns inadmissible as evidence. The *Charter* violations were characterized as significant. The police intended to stop and search all vehicles and their occupants. The accused were "entitled to proceed on their way [but] found themselves in a potentially demeaning and frightening confrontation with police." The fact Clayton and Farmer were in possession of handguns did not minimize the breach—"criminals do not have different constitutional rights than the rest of the community," said Justice Doherty.

The Court was also very critical of police training. Not only did the police fail to consider the relevant factors in assessing the ancillary power doctrine, they did not consider and balance the demands of their duties against interfering with individual liberties. Nor did they have an appreciation for the scope of their search powers. Police ignorance of the limits of their ancillary powers was institutional and

related to their training. Justice Doherty stated:

> The failure of the police force to properly train its officers to exercise their powers in a manner consistent with the *Charter* was made all the more damaging by the absence of effective supervision by more senior police officers. On the findings of the trial judge, the decision to set up the roadblock stop was a more or less spontaneous one made by individual officers unguided by any protocol or by any input from senior officers who might be expected to provide a more tailored response to the circumstances of a particular case. The procedures to be followed at the roadblock stop were also left entirely at the discretion of the officers. There was no plan.
>
> I also cannot accept that the exigencies or urgency of the situation should mitigate the seriousness of the police failure to properly consider the legal limits of their authority. I repeat, this was not a case where the police directed their minds to the proper considerations and reached a conclusion that the court concludes was wrong. Were that the case, the exigencies and urgency of the situation would be relevant. Here, the conduct of the police had nothing to do with the need to make quick decisions. On the training provided to these officers by their police force, once the officers received a "gun call", they were entitled to proceed as they did. On the training provided to these officers, there was no need for any split second decision-making or in fact any decision-making at all.
>
> Having read the evidence of [the officers], I am struck by the failure of their training to address in any way the limits of the ancillary power doctrine. This court, and others including the Supreme Court of Canada, have endeavoured over at least the last decade to articulate the ancillary power doctrine in a way that is consistent with both the principles protected by the *Charter* and in the community need for effective law enforcement. In interpreting that doctrine, the courts have recognized the difficulties inherent in policing, where officers face an infinite variety of fact situations and often must make quick decisions. The case-specific approach developed in these authorities has not penetrated the training of the officers involved in this case. The testimony of these officers strongly suggests that their police force has made no effort to embed the approach to the ancillary power doctrine adopted by the courts into police training. This systemic failure would suggest that the court must deliver its message in a more emphatic way. The exclusion of evidence may provide that added emphasis.
>
> The systemic failings that underlie the conduct of [the officers] make the infringement of the rights of Farmer and Clayton serious. Police training that leaves officers in the field unequipped to engage in the balancing process required by the ancillary power doctrine invites police officers to ignore individual rights whenever those rights get in the way of the execution of police duties. If the rights guaranteed by the *Charter* are to have real meaning and shape the interaction between the police and individuals, police forces must take those rights seriously. Officers must be trained to perform their duties in a manner that is consistent with those rights.
>
> Bearing in mind both the significance of the *Charter* breaches and the abject failure of this police force to train its individual officers to honour *Charter* rights while performing their duties, I would characterize the infringements as serious. [paras. 87-91]

In excluding the handguns as evidence, the court wrote:

> The third component of the s. 24(2) analysis examines the effect of the exclusion of the evidence obtained by the constitutional violation on the repute of the administration of justice. Where the fairness of the trial is not affected by the admission of the impugned evidence, the exclusion of reliable evidence that conclusively establishes that an accused has committed a serious crime must have a negative impact on the way our criminal justice system is viewed by those who depend on it to keep them safe…

> If the handguns are excluded from evidence, Farmer and Clayton will in a very real sense have escaped justice and their serious crimes will go unpunished. This harsh reality cannot be ignored in weighing the negative effect brought about by excluding the evidence. Nor, however, can the negative effect of routinely admitting evidence obtained as a result of institutionally engrained disregard for individual constitutional rights be ignored. The adjudication of any specific case on its merits is important to the repute of the administration of justice. So too is the judicial reaction to constitutional abuses within the criminal justice system…
>
> Where, as in this case, constitutional violations reflect an institutional indifference to, if not disregard for, individual rights, judicial failure to disassociate itself from that conduct must have long-term negative consequences for the proper administration of justice. The courts cannot be seen to at one and the same time wave a judicial finger of disapproval at police conduct that violates individual rights while embracing the evidentiary product of those violations whenever they do not undermine trial fairness.
>
> Courts can best demonstrate that constitutional rights are to be taken seriously by those who exercise powers that may impinge on those rights by excluding evidence obtained by constitutional violations that reflect an institutional failure to equip officers with the training necessary to perform their duties within the strictures of the *Charter*. [paras. 92-95]

The appeal was allowed, the convictions were quashed, and acquittals were entered on all charges.

Complete case available at www.onatriocourts.on.ca

Note-able Quote

Crime doesn't pay…does that mean my job is a crime—Author unknown

FLEEING PASSENGER's DETENTION & SEARCH LAWFUL

R. v. Cooper, 2005 NSCA 47

Police attempted to initiate a traffic stop on a vehicle to check compliance with Nova Scotia's *Motor Vehicle Act* when it accelerated and made several hard turns to evade the officers. As the vehicle traveled down a dead end street, its occupants opened the doors, bailed from the vehicle, and ran on foot. The accused—a passenger in the vehicle—ignored commands to stop and fled through several backyards and hid in an apartment building's foyer where he was found. He was handcuffed by the pursuing officer, walked out into the presence of other officers for safety, and a protective safety search was performed. Police found a butterfly knife in his pocket. When asked to identify himself, the accused provided a false name. He was charged with numerous weapons and other offences.

At his trial in Nova Scotia Provincial Court, the accused was convicted of possessing a weapon for a dangerous purpose and public mischief for providing a false name. The trial judge, relying on the Supreme Court of Canada's judgment in *R. v. Mann*, 2004 SCC 52 ruled that the accused's *Charter* rights had not been violated. She found his detention was not arbitrary because the officer had reasonable grounds to detain him when he fled from the vehicle after its driver took evasive action to elude the police. The judge held the officer would have been ignoring his duty to prevent crime and protect property if he did not chase the accused. The handcuffing, removal from the apartment building, and safety search were all proportionate to the officer's duties and justifiable. Furthermore, the pat down search was not unreasonable and therefore did not breach s.8 of the *Charter*. As such, in the trial

judge's view there was no reason to resort to the exclusionary provision of s.24(2).

The accused appealed his convictions to the Nova Scotia Court of Appeal. In his view, there was no basis for the detention of the vehicle's passenger in this case. He submitted that only the driver could be implicated in resisting the traffic stop. He argued, as a passenger, he was not connected to the motor vehicle offences committed by the driver in eluding police. Since there was no basis for his detention, he contended the trial judge erred in holding there were no *Charter* breaches, which could result in the exclusion of evidence—the knife and the false information he provided.

Justice Fichaud, authoring the unanimous Nova Scotia Court of Appeal judgment, dismissed the appeal. He first recognized that there is no general power of investigative detention, but rather a limited one at common law. A common law investigative detention involves a two-prong analysis. First, the police must have reasonable grounds to detain the individual—this requires more than a hunch, but less than reasonable grounds to justify an arrest. There must be a clear nexus, or connection, between the detainee and a recent or current offence. Justice Fichaud stated:

> Whether there are reasonable grounds for the detention is a "front end" assessment, as stated in *Mann*. The determination is made based on the information available to the police officer at the moment of detention. This is analogous to the principle that, whether there are reasonable grounds for an arrest is determined from the information available to the police officer at the time of the arrest, regardless of the later verdict on the charge for which the arrest was made… The detention occurs when the police officer stops the individual in a manner that involves significant physical or psychological restraint… In my view, this occurred when [the officer] apprehended [the accused] in the lobby of the apartment building after the chase. Whether there were reasonable grounds for this detention depends on the information known to [the officer] at that moment. This includes the facts related to the flight after the signalled traffic stop. It is not limited, as suggested by [the accused's] counsel, only to the facts known to the officers when they initiated the attempted traffic stop…
>
> [T]he standard of reasonableness for detention differs from the standard for an arrest under s. 495(1) of the *Code*… The difference is reflected in the different wordings used in s. 495(1) for an arrest and the Supreme Court's formulation for detention. Section 495(1) states that there must be reasonable grounds that the accused "committed" or is "about to commit" an indictable offence or has been found "committing" a criminal offence. For detention, it is sufficient if there is a "clear nexus" or "connection" between the individual and the recent or current offence, or that the individual is "implicated in the criminal activity"…The different wordings recognise that the police power of detention, limited though it may be, is an investigative and not necessarily a charging power. The "nexus", "connection" or "implication" acknowledges that, at this investigatory stage, there may be a margin, spanned by the connection, between the individual and commission of the offence. [paras. 42-43, references omitted]

The second prong of the test requires a "measuring of the circumstances of the detention against the practical requirements of the officer's performance of his duties".

Reasonable Grounds to Detain

In this case, the police intended to conduct a traffic stop to check general compliance, which is lawful under s.83(1) of Nova Scotia's *Motor Vehicle Act*. When the vehicle fled, the police had a reasonable basis to conclude that there had been an offence under s.83—resisting a traffic stop. As well, the police were in the lawful execution of their duties and were justified in concluding that an offence under s.129 of the *Criminal Code*—resisting a peace officer—had also been committed.

If the driver had been the only one to flee and the accused had done nothing implicative by acting neutral there would have been no reasonable grounds to detain him. However, although the accused was merely a passenger who did not press the accelerator nor steer the wheel while the vehicle evaded police, he opened the car door, bailed out, and ran through backyards to elude police. His conduct, provided police with "an objective basis to suspect [he] was connected or implicated in what the police reasonably believed to be an offence of resisting a signaled traffic stop". As Justice Fichaud noted, "this is not a case of police using a general power of detention to satisfy their curiosity."

Proportionality

In terms of measuring whether the police conduct in detaining the accused was proportionate to the performance of the officer's police duties, Justice Fichaud found no error with the trial judge's ruling. Police duties include preserving the peace, preventing crime, and protecting life and property. The officer's pursuit and detention were within the scope of these duties. Moreover, based on the accused's conduct, it was prudent for the officer to handcuff him—preventing his further flight. And it was also prudent for the lone officer to remove him from the apartment foyer into the presence of other officers before dealing further with him.

The Search

A non-consentual warrantless search in Canada is *prima facie* unreasonable unless the Crown can rebut this presumption by demonstrating it was authorized by a reasonable law and was carried out in a reasonable manner. At common law, a search can be carried out as an incident to a lawful investigative detention provided it is conducted for officer safety reasons—not to locate evidence. As Justice Fichaud noted:

> If the protective search for officer safety becomes an investigative search to locate evidence, the search will lose its lawful character as incidental to detention… [para. 57, references omitted]

The trial judge did not err in ruling that the search locating the butterfly knife in the accused's pocket was genuinely a protective search—the officer testified he was searching for officer safety. In Justice Fichaud's view, "the frisk of [the accused] and seizure of a prohibited weapon clearly is within the police entitlement to 'go about their work secure in the knowledge that risks are minimized to the greatest extent possible'". The search was lawful as an incident to detention and did not violate s.8.

Since the false name provided did not follow any breaches under ss.8 or 9 of the *Charter*, there was no basis for excluding this evidence. The appeal was dismissed.

Complete case available at www.courts.ns.ca

WARRANT NEED NOT BE IN HAND

R. v. Tran, 2005 BCCA 145

The police obtained a search warrant to search a home for electricity theft. Prior to the warrant's arrival at the target residence, a police surveillance team arrested the accused as he was leaving the home. The police, concerned that there may be other persons inside the home who witnessed the arrest and might destroy evidence, entered and found a large marihuana grow operation. The accused was convicted of production and possession of marihuana for the purpose of trafficking in British Columbia Provincial Court. However, he appealed, in part, arguing that the entry by police without the warrant in their hand was unreasonable.

Although s.29(1) of the *Criminal Code* provides that "it is the duty of every one who executes…a warrant to have it with him, where it is feasible

to do so", the British Columbia Court of Appeal rejected the accused's appeal. The unanimous court stated:

> [T]he search was justified on a legitimate belief that evidence may be lost while awaiting arrival of the warrant. It was, in the circumstances, not feasible within the meaning of s. 29(1) to present the warrant at the beginning of the search. As mentioned, the warrant was on its way at the time the surveillance team apprehended the [accused] and they acted out of a concern that if they did not act immediately in securing the premises, evidence could be destroyed. This was not a warrantless search. The warrant existed prior to the entry. [para. 14]

The convictions were upheld.

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

INVESTIGATIVE DETENTION IS LAWFUL CUSTODY FOR ESCAPE CHARGE

R. v. Procknow et al, 2005 BCPC 56

Three police officers attended a restaurant after a woman ran out onto the street and called for help. The restaurant was crowded and a doorman was sitting on top of the accused, who had a bloody hand. After speaking to several witnesses and learning the doorman had been hit with a glass, an officer detained the accused for an assault investigation and handcuffed him. He was searched for weapons and escorted outside the restaurant to a police vehicle.

A crowd gathered outside the restaurant would not move for the officer so he yelled, "police, police, move, move." The officer then began to physically push people out of the way. The accused was shoved to the ground while the officer became involved in an altercation with two other persons. The accused then got up, ran, and was apprehended a few blocks away.

He was charged with assault causing bodily harm, assault with a weapon, and escaping lawful custody. Even though he had not been arrested, Justice Warren found the accused had been in lawful custody at the time he fled. She stated:

> [The accused] testified he understood he was not free to go and assumed he would be taken out to the police car. Although [the constable] could not recall how long he was in the restaurant prior to escorting [the accused] out, he estimated that the time was between a few minutes and up to five minutes. During this time, although [the accused] had not yet been formally arrested, chartered and warned, I am satisfied that in the circumstances he was told why he was being detained and handcuffed, and he was escorted out of the restaurant because of the commotion inside. While en route to the police car, events occurred outside of the control of the accompanying officer which reasonably took precedence for that officer.
>
> I am satisfied that during the brief time between the handcuffing and exiting the restaurant, [the accused's] custodial status was lawful... [paras. 30-31]

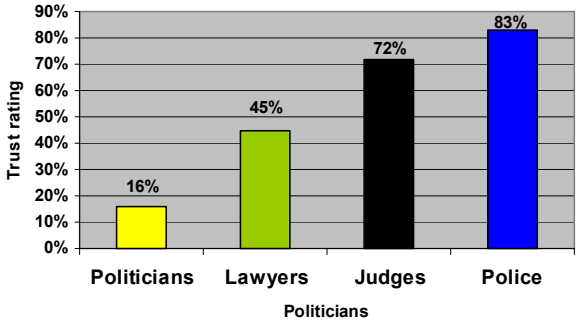
The accused was convicted of escape, despite acquittals on the assault related charges.

Complete case available at www.provincialcourt.bc.ca

COPS TOP JUSTICE SYSTEM

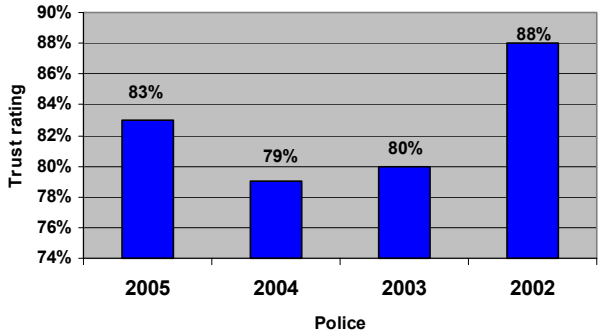
In a March, 2005 Leger Marketing report entitled *"Profession Barometer"*, police officers were the most trusted profession in the criminal justice system[6]. Eighty three percent of Canadians trusted police officers, followed by judges (72%), lawyers (45%); with lawmakers (politicians) dead last at 16%.

[6] The Leger Marketing Report provided trust ratings for 20 professional occupations.



Police

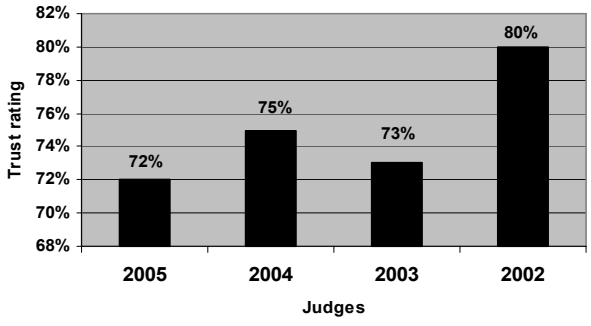
Police officers are four percentage points higher on the trust barometer than last year, but down from 88% in 2002.



The police are trusted most in Atlantic Canada (92%), but least in British Columbia (80%).

Judges

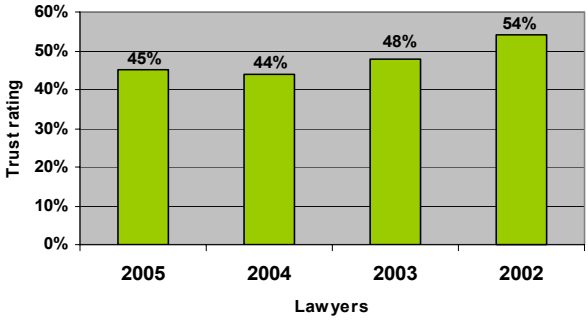
The trust rating for judges dropped three percent from 2004 and is at a four year low at 72%.



Judges are trusted most in Ontario (76%) and Alberta (76%), but least in British Columbia (66%).

Lawyers

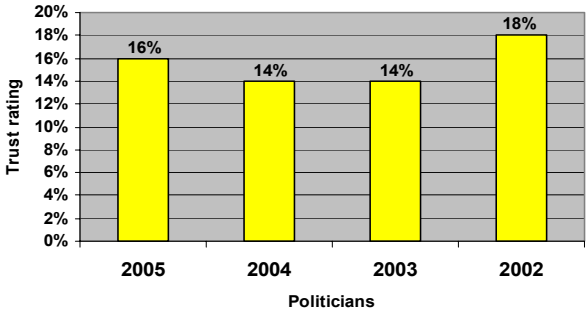
Lawyers are up one percent over last year, but have not broken the 50% mark since 2002.



Lawyers are trusted most in Atlantic Canada (56%), but least in British Columbia (38%).

Politicians (Law Makers)

Politicians have jumped two points and have not been trusted by at least 20% of Canadians in the last four years.



Politicians are trusted most in Atlantic Canada (19%), but least in the Prairies.

Of the other 16 professions identified in the report, firefighters ranked number one overall with a 97% trust rating, ahead of nurses (94%), farmers (91%), doctors (89%) and teachers (88%) rounding out the top five[7].

Complete report available at www.legermarketing.com

[7] The remaining occupations following teachers in order of trust were police officers (83%), judges (72%), notaries (71%), bankers (65%), church representatives (65%), pollsters (65%), journalists (49%), senior public servants (45%), lawyers (45%), insurance brokers (44%), real estate agents (40%), unionists (38%), publicists (37%), car salespeople (18%), and politicians (16%).

DETENTION NOT ARBITRARY: EVIDENCE ADMISSIBLE

R. v. Nguyen, 2005 BCPC 60

Two police officers were patrolling a park known to be frequented by drug dealers when they observed a car parked in a no parking zone and saw a male youth get into the back of the car, stay for only 15 seconds and then exit and walk away with two other males. The officers concluded that a drug transaction had just occurred. They pulled in behind the accused's car and activated their emergency lights.

The officers told the males on foot to remain where they were and approached the accused's car. He was asked why he was parked in a no parking zone and said he had dropped off a friend, but did not know his friend's name. He was sweating. Then an officer noted a small baggie of marihuana lying on the ground next to the youth. Everyone was then detained for an investigation under the *Controlled Drugs and Substances Act*.

The youth provided an unconvincing explanation as to what he was doing in the accused's car. The accused then became very upset when asked what was going on. Fearing he was a threat to safety or likely to flee, the accused was forced to the ground and handcuffed. The youth then told police he had purchased $20 marihuana from the accused. The car was searched and marihuana, cell phones, and notepapers were seized. The accused was then arrested for trafficking marihuana and advised of his rights under s.10 of the *Charter*.

At trial in British Columbia Provincial Court the accused argued his rights under the *Charter* were violated, including ss.8 and 9. Justice Low rejected these submissions. Although the accused was detained when the police stopped his car, it was not arbitrary. The police were entitled to question him about why he was stopped in the no parking zone. Furthermore, there was a reasonable suspicion the occupants of the car were engaged in a drug transaction—the police had reliable information of criminal activity in the park and their observations of the youth were sufficient to meet the threshold for a valid detention. Justice Low stated:

> As required by the Supreme Court of Canada in R. v. Mann…the constables had reasonable grounds to briefly detain [the accused] and the others for the purposes of investigating these matters. While [the accused] was detained, [the officer] found the Youth's Marihuana, confirming his suspicions that an illegal drug transaction had taken place. According to [the officer], he believed at this point he had grounds to arrest [the accused], the youth and [the accused's] passenger. However, he did not arrest anyone; he only advised all present they were detained for an investigation under the *Controlled Drugs and Substances Act*.
>
> A reasonable person looking objectively at the circumstances to this point would conclude that [the officer] had probable cause to believe an offence contrary to the *Controlled Drugs and Substances Act* had occurred. I have concluded [the officer] did not act arbitrarily at this point. He had reasonable grounds to continue the detention of [the accused] and the others.
>
> When [the accused] protested his detention, [the officers] placed him in handcuffs to secure their safety. I have concluded that [the officer] acted reasonably under the circumstances in doing so. Once [the officer] was told by the youth a drug sale had taken place in the car, he believed someone in the car had committed the offence of trafficking in illegal drugs.
>
> Considering all of the circumstances leading up to the search, and in particular the admission by the youth, [the officer] objectively had reasonable and proper grounds for this belief. However, [the officer] did not know whether to arrest [the accused] or his passenger for trafficking. [The officer] decided to search the car to see if he could determine

> specifically who should be arrested. After searching the car and finding the evidence in question, [the officer] arrested [the accused] for trafficking marihuana and advised him of his right to counsel. As a result, I have concluded that the search of [the accused's] car was incidental to an arrest and therefore the evidence in question is admissible. [paras. 12-15, references omitted]

The evidence seized from the car was admissible.

Complete case available at www.provincialcourt.bc.ca

LAWFUL DETENTION UNDERMINED BY UNREASONABLE SEARCH

R. v. Byfield,
(2005) Docket:C39794 (OntCA)

Two plainclothes police officers saw a woman believed to be working as a prostitute get into a van and return to the area 10 minutes later. She then entered a nearby variety store, was seen near a telephone, left five minutes later, and was picked up by a car. The officers knew it was not uncommon for prostitutes to buy drugs with the money made after turning a trick. They followed the car and learned it was not registered in the area and that the registered driver was facing criminal charges. The car was also speeding.

The police pulled over the car, which stopped abruptly. The accused got out and approached the officers. He was told he was stopped for speeding and was ordered to produce his license, ownership papers, and insurance. He was nervous and fidgety. Noting a bulge in his front pocket, the officer touched the accused's crotch area, and felt something in the front of his pants. When asked what was in his pocket, the accused removed a bundle of money. The officer told the accused he could put it back, asking what else he had in his crotch area. At that point the accused fled and threw a plastic bag containing crack cocaine. He was tackled and arrested and charged with possession of cocaine for the purpose of trafficking and possession of crime proceeds.

At trial in the Superior Court of Justice the Crown conceded that the search was unreasonable because the officer touched the accused's crotch area for reasons unrelated to officer safety. Rather, he did so to investigate whether the accused was carrying any contraband. The accused also argued that he had been arbitrarily detained contrary to s.9 of the *Charter*. However, Justice Dyson concluded that the stop was not arbitrary.

Without finding the stop related to highway regulation and safety purposes (speeding), he ruled that the officers reasonably suspected the accused was involved in drug trafficking based upon their experience and observations of the suspected prostitute. Despite the Crown's concession on the s.8 issue, he nonetheless admitted the evidence under s.24(2). In his view, its admission would not affect trial fairness, the violation was minor, and the officers acted in good faith. Furthermore, the securing of the evidence and the breach were too remote to warrant exclusion. Exclusion of the evidence, not its admission, would bring the administration of justice into disrepute. The accused was convicted.

The accused appealed to the Ontario Court of Appeal. Justice Rosenberg, writing the unanimous judgment, allowed the appeal but found the detention itself lawful. In *R. v. Mann*, 2004 SCC 52, the Supreme Court of Canada ruled that the police have the common law power to detain persons encountered on the street if they have reasonable grounds to detain them, a threshold lower than reasonable grounds for arrest. In terms of this case, Justice Rosenberg stated:

> On the trial judge's findings, the police did not stop the [accused] based merely upon a hunch

> or intuition based on experience, nor merely because he was in a high-crime area…The officers were able to articulate the basis for their suspicion and provide a demonstrable rationale that the driver of the vehicle had engaged in a particular crime, namely drug trafficking…The officers offered objective grounds for their suspicions that cannot be dismissed simply as neutral facts. Their conclusion that the woman was a prostitute is consistent with the facts. The subsequent interpretation of her behaviour as indicating that the driver of the Honda was likely a drug dealer is somewhat more problematic. The behaviour was, however, unusual and the officers' interpretation seems neither unreasonable nor based solely on hunches, speculation and guesses…That said, I would characterize this as a close case since the reasonableness of the officers' suspicion rests so heavily on their experience and the basis of that experience was not well demonstrated at trial. [para. 20]

However, a detention that is lawful at its inception may be undermined if the police exercise the power unreasonably. During an investigative detention, the police are only entitled to conduct a pat down search of the detainee if the officer believes on reasonable grounds that their safety, or the safety of others, is at risk—the search power does not exist as a matter of course. In this case, as Justice Rosenberg found, "there is no suggestion…that the initial search near the [accused's] groin area was motivated by officer safety."

Admissibility of Evidence

The appeal court ruled that the trial judge erred in admitting the evidence. Touching the accused near his groin could not be properly characterized as a minor violation and "the courts must take seriously the violation of a suspect's rights in the course of an investigative stop." There was both a close temporal and casual connection between the breach and the securing of the evidence. The stop, detention, and questioning of the accused resulted in the evidence being discovered. It was one transaction, taking a matter of minutes, with no intervening events. Moreover, Justice Rosenberg held:

> This was an intrusive search of the person in circumstances without legal justification. While the officers had reasonable grounds to detain the [accused], they did not have reasonable grounds to arrest or search at the time of the initial search by the first officer and the search was not justified for the purpose of officer protection. [para. 28]

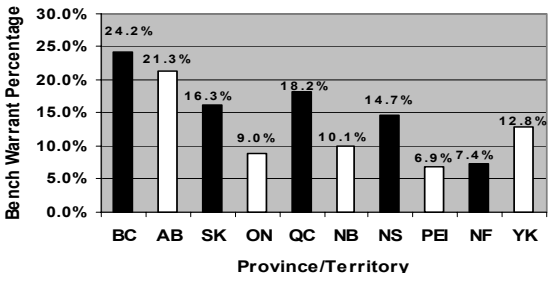
As for the good faith of the police in this case, it could not be claimed "on the basis of a police officer's unreasonable error or ignorance as to the scope of their authority. "

In balancing the seriousness of the breach against the affect of exclusion, the appeal court ruled the evidence should not have been admitted. The appeal was allowed, the convictions set aside, and the accused was acquitted.

Complete case available at www.ontariocourts.on.ca

DID YOU KNOW?

…that in 2003/2004 British Columbia had the highest percentage of adult criminal cases in Canada that resulted in a bench warrant at 24.2%[8]. Alberta was second at 21.3 %, while Prince Edward Island had the lowest percentage of bench warrants at only 6.9%.



[8] Source: Statistics Canada Juristat, Catalogue no. 85-002-XPE, Vol. 24, no. 12. Statistics for Manitoba, North West Territories and Nunavut were not reported.

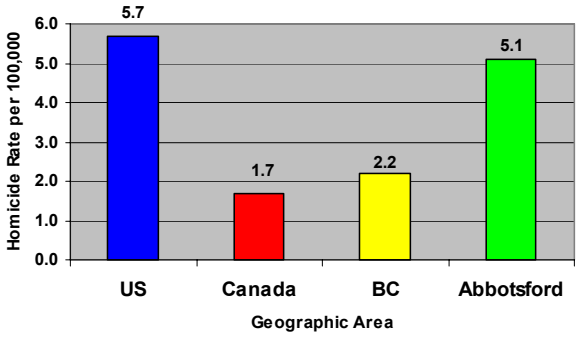
COMPARING CRIME IN YOUR COMMUNITY

Have you ever considered how your community's crime rate statistically compares to other areas, be it the provincial, national or United States (US) average? For this article, the Abbotsford Census Metropolitan Area[9] (CMA), one of Statistics Canada's 27 defined geographic areas with a population in excess of 100,000, was chosen for comparison. The Abbotsford CMA is located in British Columbia's (BC) Fraser Valley, east of Vancouver. All US statistics were obtained from the Federal Bureau of Investigation's *"Crime in the United States 2003"* report while Canadian statistics were obtained from Statistics Canada's *"Juristat: Canadian Crime Statistics, 2003, Vol. 24, no. 6"*. Four crime rates—homicide, break and enter, motor vehicle theft, and robbery—were chosen for comparison[10].

Homicide

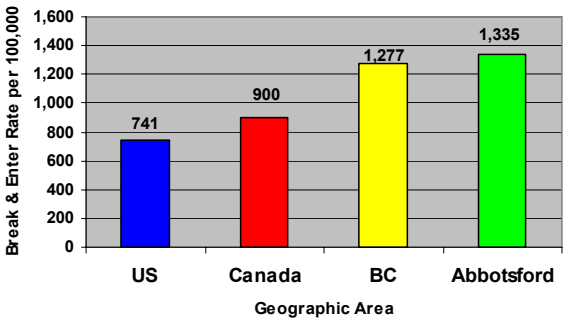
The US murder and non-negligent manslaughter rate was 5.7 "per 100,000 inhabitants." In Canada, the homicide rate "per 100,000 population" was 1.7.

In BC, the rate was higher than the Canadian average at 2.2. Abbotsford was the highest in Canada at 5.1 (equal only to Regina), which was higher than that of 28 US states, including Colorado, Hawaii, Kentucky, New Jersey, New York, Oregon, and Washington.



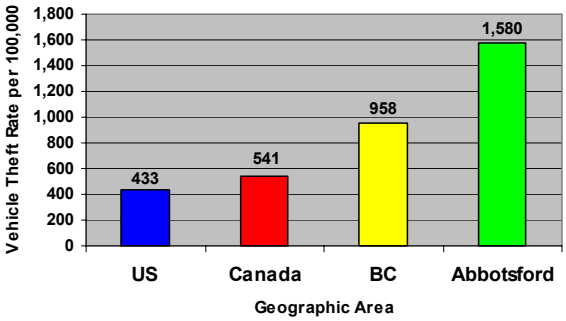
Break & Enter

In the US, the crime of break and enter is known as burglary. The US rate was 741 burglaries per 100,000 inhabitants. In Canada, the average was 900 per 100,000 population and even higher in BC with a rate of 1,277, which is higher than all 50 US states. In Abbotsford the break and enter rate increases to 1,335 per 100,000.



Motor Vehicle Theft

The US motor vehicle theft rate was 433 per 100,000 inhabitants, while in Canada that rate increases to 541. The BC rate is higher still, at 958. Only the state of Arizona and the District of Columbia have higher motor vehicle theft rates than BC. Abbotsford's motor vehicle theft rate was the highest in the nation at 1,580, which by comparison is more than three times the US rate.

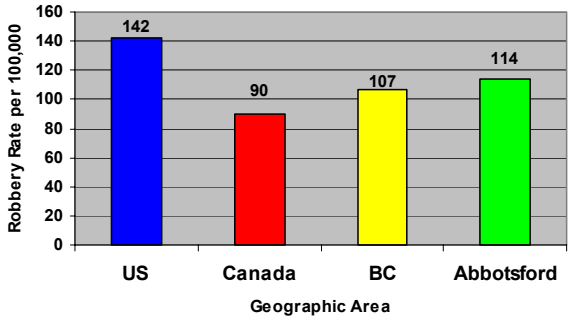


[9] Police Services included in the Abbotsford CMA are Abbotsford and Mission (RCMP)

[10] Available 2003 statistics were used.

Robbery

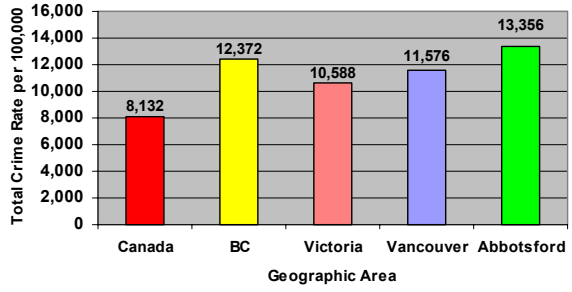
There were 142 robbery crimes per 100,000 inhabitants in the US compared to a rate of 90 in Canada. BC had a rate of 107, higher than the Canadian average, while Abbotsford was even higher at 114.



But how does Abbotsford's crime rate compare to BC's other two CMAs—Victoria[11] and Vancouver[12].

Total Crime Rate

The total crime rate (including violent, property, and other crimes) for Canada, on average, was 8,132 per 100,000 people. The BC average was 12,372. Both Victoria (10,588) and Vancouver (11,576) were above the Canadian average but below BC's. Abbotsford (13,356), on the other hand, exceeded both the Canadian and provincial average.

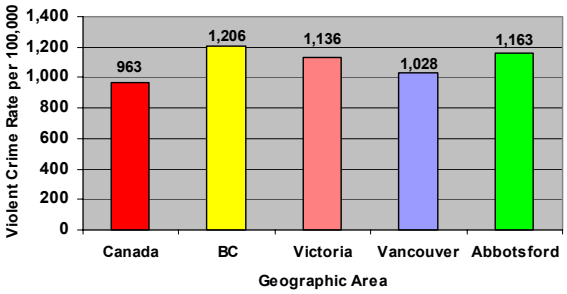


[11] Police Services included in the Victoria CMA are Central Saanich, Colwood (RCMP), Langford (RCMP), North Saanich D.M. (RCMP), Oak Bay, Saanich, Sidney (RCMP), Sooke (RCMP), Victoria, View Royal (RCMP), and West Shore (RCMP).

[12] Police Services included in the Vancouver CMA are Bowen Island (RCMP rural), Burnaby (RCMP), Coquitlam (RCMP), Delta, Langley(RCMP), Maple Ridge (RCMP) New Westminster, North Vancouver (RCMP), Pitt Meadows (RCMP), Port Coquitlam (RCMP), Port Moody, Richmond (RCMP), Squamish (RCMP), Surrey (RCMP), Vancouver, West Vancouver, and White Rock (RCMP).

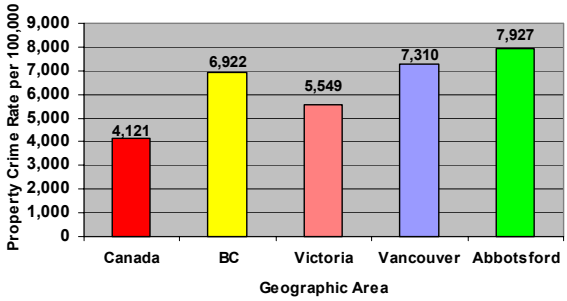
Violent Crime Rate

Violent crime—including homicide, attempted murder, assault, sexual assault, and robbery—had a rate in Canada of 963 offences per 100,000. The provincial average was 1,206 offences per 100,000 and all three of BC's CMA's had violent crime rates above the national rate but below the provincial rate—Victoria (1,136), Vancouver (1,028), and Abbotsford (1,163).



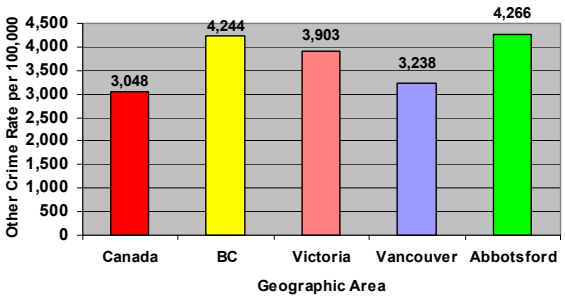
Property Crime Rate

The property crime rate—including break and enter, motor vehicle theft, theft, possession of stolen goods, and fraud—was 4,121 offences per 100,000 people nationally. In BC the rate rose to 6,922. Victoria (5,549) was BC's only CMA with a property crime rate below the provincial average. Vancouver (7,310) and Abbotsford (7,927) exceeded both the BC and Canadian rate.



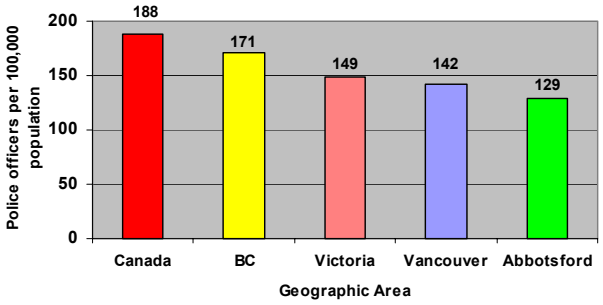
Other Crime Rate

Other crimes—such as mischief, counterfeiting currency, bail violations, offensive weapons, prostitution, and arson—had a rate across Canada of 3,048 offences per 100,000. BC's average rose to 4,244, while Abbotsford's rose even higher to 4,266. Both Victoria and Vancouver were higher than Canada's average, but lower than BC's.



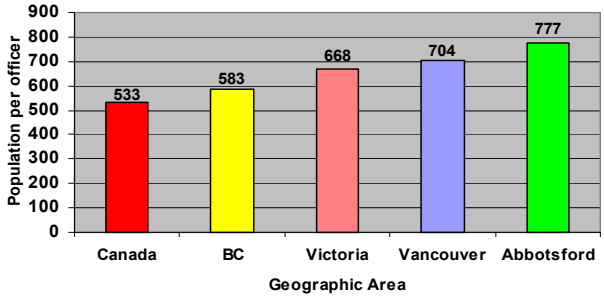
Police Officer Strengths

How does the number of police officers per population compare across these same geographic regions? Across Canada there are on average 188 police officers per 100,000 people[13]. In BC this rate drops to 171 officers per 100,000. In all three BC CMA's, this rate drops further—Victoria (149) and Vancouver (142). Abbotsford had the lowest police officer per population ratio in the nation at 129 officers per 100,000.



[13] 2004 statistics. Source: Police Resources in Canada, 2004 (85-225-XIE).

Another method of demonstrating police strength is population per police officer. In Canada, the rate is 533 residents to every officer. In BC that rate rises to 583 residents per officer. Victoria (668) and Vancouver (704) are even higher with Abbotsford (777) the highest in the nation of all 27 CMAs.



If you would like to compare your community, these and other statistics are available from Statistics Canada or visit the JIBC Library to access these reports.

2006 POLICE LEADERSHIP CONFERENCE APRIL 10-12, 2006

Mark your calendar! The British Columbia Association of Chief's of Police, the Ministry of Public Safety and Solicitor General and the Justice Institute of British Columbia will be hosting the "**Police Leadership 2006 Conference**" April 10 to 12, 2006 at the Westin Bayshore in Vancouver, British Columbia. This is Canada's largest Police Leadership Conference and was sold out in 2004.

This conference will emphasize leadership as an activity, not a position, and provide an opportunity for participants of all ranks from police agencies across Canada, the United States, and beyond to engage with a carefully chosen list of first class speakers. Visit the JIBC Police Academy website at www.jibc.bc.ca for more information.

Call for Instructors
Law Enforcement and Regulatory Training

April 2005

Contact Us
www.jibc.bc.ca/police

Phone: 604.528.5753
Fax: 604.528.5754

Justice Institute of BC
715 McBride Blvd
New Westminster, BC
V3L 5T4

Registration
Greater Vancouver:
604.528.5590

Outside Greater Vancouver:
1.877.528.5591

email: register@jibc.bc.ca

Customized Training in Your Workplace
All of our courses and programs can be customized for delivery in your workplace or community.

Within the Police Academy, Law Enforcement and Regulatory Training Programs provides a wide range of training and development opportunities for public and private sector organizations, as well as individuals working in the fields of inspections, investigations, enforcement, security and regulatory compliance.

We are currently looking for instructors to teach in our Investigation and Enforcement Skills Certificate Program in the following content areas:

Legal Studies:
- Criminal Law
- Administrative Law
- Search and Seizure

General Investigative Skills
Report Writing

Qualifications:
- Current teaching experience considered an asset
- Current or previous law enforcement experience
- Two references

Successful candidates will be asked to attend an interview and provide a 10 minute presentation on a topic of their choice.

If you are interested, please forward a copy of your resume, indicating the content areas of interest, by email to jamos@jibc.bc.ca

For more information on the Investigation and Enforcement Skills Certificate Program, please go to www.jibc.bc.ca/police