POLICE ACADEMY
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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 April 20, 2006 40-year-old Abbotsford Police Department **Constable John Goyer** passed away after a lengthy and courageous battle with Amyotrophic Lateral Sclerosis (ALS), also known as Lou Gehrig's disease, brought on by an on duty fight arresting a suspect.

In September, 2001 Constable Goyer, along with his partner, attended to a threatening report. The suspect in the incident refused to be taken into custody and it was during the resulting violent physical confrontation that Constable Goyer became injured. He underwent several medical tests and it was soon learned that his progressing weakness was brought on by ALS.

Medical professionals and a Worksafe BC adjudicator concluded Constable Goyer's ALS was caused as a direct result of the fight and his employment as a police officer. Cst. Goyer had served as a police officer for eight years.

* * *

On May 5, 2006 37-year-old Windsor Police Service **Constable John Atkinson** was shot and killed while questioning two suspicious men he observed at a convenience store in a residential area. While questioning the men one of them produced a handgun and opened fire.

Despite being wounded, Constable Atkinson was able to return fire as the suspects fled. Two 18-year-old men were arrested a short time later.

Constable Atkinson had served with the Windsor Police for 15 years. He is survived by his wife and two young children.

* * *

On May 14, 2006 41-year-old Sault Ste. Marie Police Service **Senior Constable Don Doucet** was killed in an automobile accident. Constable Doucet was a passenger in police cruiser when it collided with a van. Both officers and the driver of the van were taken to the hospital by ambulance. Constable Doucet was critically injured and succumbed to his injuries shortly after the collision. The police officer who was driving the cruiser was treated for non-life-threatening injuries.

The driver of the van was charged with impaired driving causing death, impaired driving causing bodily harm, and driving with a blood alcohol content exceeding 80mg%.

Constable Doucet was a 12-year veteran and was currently assigned to Patrol Services. He is survived by his wife and two daughters.

The preceding information was provided by the Abbotsford Police and the Officer Down Memorial Page: available at www.odmp.org/Canada

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. Nor are the opinions expressed 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

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

"Thanks for all you do. It is greatly appreciated by many!"—**Police Constable, British Columbia**

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"I have just been forwarded a copy of…In Service: 10-8 and found it very interesting and "readable"… Thank you for your commitment to keeping us informed!"—**Police Constable, RCMP British Columbia**

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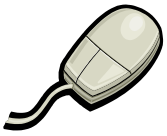
"I've just recently read the "In Service: 10-8" newsletter and found it to be of interest. I would like to be added onto your electronic distribution list, if possible. I am [a] Security Manager…and retired member of the RCMP. I find that some of the articles most certainly apply and will assist our Security Team, where applicable."—**Security Manager, British Columbia**

****

"I would be grateful if you could add me to your publication list. I am the new legal training co-ordinator for the [department],…and your hard work makes…my job much easier. Thanks…"—**Police Constable, British Columbia**

****

"I miss getting the newsletter since I graduated from the JI in January 2004. I go on-line occasionally and read it but I would like to get it at work… The rest of my squad would like to read it also and I can make copies of it there. Thanks very much, it is a very informative read and a good way to stay up to date."—**Police Constable, British Columbia**



All past editions of this newsletter are now available online by clicking on to:

www.10-8.ca

'IN SERVICE' LEGAL ROAD TEST

The "In Service" Legal Road Test is a simple multiple choice quiz designed to challenge your understanding of the law. Each question is based on a case featured in this issue. In this issue, two of the questions are based on statistical information. See page 17 for the answers.

1. Who is most likely to wear a seat belt?
   (a) a 54-year-old woman in Saskatchewan driving a minivan downtown;
   (b) a 32-year-old man in Alberta travelling in the back seat of a SUV in the country;
   (c) a 23-year-old woman in Quebec travelling in the front passenger seat of a pickup downtown; or
   (d) a 73-year-old man from the Northwest Territories driving a passenger car in the country.

2. Questioning a detainee can sometimes be the beginning of a search for the purposes of s.8 of the *Charter*.
   (a) true
   (b) false

3. When a fellow police officer relies on the direction of a colleague to conduct a search, the searching officer must independently have reasonable grounds (subjective/ objective analysis)
   (a) true
   (b) false

4. Which of the following justice system personnel do Canadians trust the most?
   (a) Judges
   (b) Lawyers
   (c) Police
   (d) Politicians (law makers)

SEARCH WARRANT TIME FRAMES: IN or IN AND OUT?

Anyone who has seen a search warrant has noticed that there will be a time frame outlined on its face. This period is inserted by a justice and requires the police to take some action within these parameters. But what action must be taken? Are the police required to be in and out within that time? Or are the police required to just enter in that time and can they carry the search over past the end time listed? Although there is not a lot of case law on this matter, there are a few cases that can provide some guidance for officers and, perhaps, clear up some of the debate.

In *R. v. Cardinal*, 2003 BCSC 158, the police obtained a telewarrant to enter the accused's residence between 5:15 pm and 8:00 pm the same day. At 7:14 pm officers entered the house and remained inside until 11:00 pm. During a *voir dire* in the Supreme Court of British Columbia on a charge of possessing cocaine for the purpose of trafficking, the accused argued the police failed to comply with the warrant by staying in the house until 11:00 pm, three hours past the 8:00 pm expiry. This, he argued, violated his right under s.8 of the *Charter* to be secure against unreasonable search or seizure. Justice Chamberlist, however, ruled that only entry need be gained between the times specified on the warrant. There was no requirement that the search be completed between those times.

In *R. v. Woodall*, [1991] O.J. No. 3563 (OntCJ), the police obtained a search warrant to enter the accused's residence between 6:00 pm and 9:00 pm. Police moved in at 8:48 pm and saw many items. The house was secured and it took a considerable length of time to carry out the

seizure of more than 200 items. The seizures were not concluded until two days later. In the Ontario Court of Justice the accused argued the search warrant became invalid after 9:00 pm. Judge Higgins, however, disagreed:

> In the peculiar circumstances of this case and without ruling that in all situations only entry is required by a specified hour to prevent a search warrant from lapsing, I find that the search warrant first obtained on August 7th…did not lapse at 9:00 p.m that night, and that it remained operative and cloaking all activity conducted until the police finally left the premises with the thus lawfully seized articles on August the 9th. [para. 61]

In *Pars Oriental Rug v. Canada*, [1988] B.C.J. No. 3055 (BCSC), Customs officers obtained a search warrant under the *Customs Act* to search a business between 9:30 am and 6:00 pm. Officers entered at about 10:00 am and began to seize rugs imported into Canada. Some were seized before 6:00 pm while others after. The judge found the entry and search were restricted to the times specified in the warrant and that the entire execution process must be completed within the times indicated. Therefore, after 6:00 pm the warrant was of no force or effect.

The Attorney General then made application in British Columbia Supreme Court arguing that only entry was required between the times specified and that once inside the time constraint disappeared and the authorities could take as much time as reasonably necessary to do the search and make the seizures. Justice Wood, in chambers, did not agree. The wording in the warrant was ambiguous. It read:

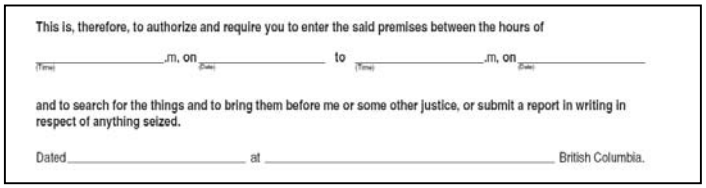
> THIS is, therefore, to authorize and require you between the hours of 9:30 am. July 29th, 1988 to 6:00 p.m… July 29th, 1988 to enter into the said premises and to search for the said things and to seize same, if found.

Justice Wood stated:

> The starting point of this inquiry must necessarily be the language of the warrant itself. Mr. Justice Paris found that language ambiguous. I agree. If as suggested, the time period described therein was intended only to set the limits within which entry into the premises may be effected and the search begun, it would have been reasonable, not to mention grammatically preferable, to place the phrase "between the hours of 9:30 a.m. July 29th, 1988 to 6:00 pm. July 29th, 1988" immediately after the word "premises." Worded the way it is, that clause of the warrant clearly lends itself to the construction that not only the time of entry but also the authorized search and resulting seizures if any, are restricted to the time frame described. [emphasis added, para. 6]

The application was dismissed, while in another application, [1998] B.C.J. No. 3054 (BCSC), the rugs seized after 6:00 pm were ordered returned.

The present wording of a British Columbia *Criminal Code* search warrant is consistent with Justice Wood's analysis that the time frame be grammatically located after the word "premises" in order that entry is only required within the time frame mentioned. British Columbia search warrant wording reads:


This is, therefore, to authorize and require you to enter the said premises between the hours of

_____ (Time) .m. on _____ (Date) to _____ (Time) .m. on _____ (Date)

and to search for the things and to bring them before me or some other justice, or submit a report in writing in respect of anything seized.

Dated _____ at _____ British Columbia.

However, entering too early or staying too late after the search is effectively completed can pose serious problems.

In *R. v. L.S.U.* (1999) Docket:X051691 (BCSC), the police obtained a search warrant to enter the accused's residence between 2:30 pm and 8:30 pm. However, the police entered at 2:18 pm, 12 minutes before the time specified on the warrant, but did not seize anything until 2:34 pm. During a *voir dire* in the Supreme Court of British Columbia Justice Stromberg-Stein found

the search unreasonable. Because police entered before the time specified in the warrant, the search was in effect warrantless and therefore *prima facie* unreasonable. There were no exigent circumstances, no safety concerns, and the search could not otherwise be justified.

In *R. v. Moran*, 21 O.A.C. 257 (OntCA), the police were investigating a murder and applied for a warrant to search the accused's premises. At 9:30 am police found a knife in a shed. Prior to warrant expiry at 9:00 pm, two police officers hid in the attic of the shed to watch and see if the accused would return and approach the knife. At 08:27 am the following morning the accused returned, looked up into the attic, and the officers fled. The trial judge ruled a "trespass occurred substantially after any right of access to the premises afforded by the search warrant had expired and was…without legal justification," violating s.8 of the *Charter*. In determining whether the trial judge properly admitted the evidence on appeal to the Ontario Court of Appeal, Justice Martin stated:

> The privilege or right of the police to be on the [accused's] premises terminated on the expiry of the warrant and they became trespassers at common law by remaining on the [accused's] land after the search had been completed. No request to leave was necessary at common law.

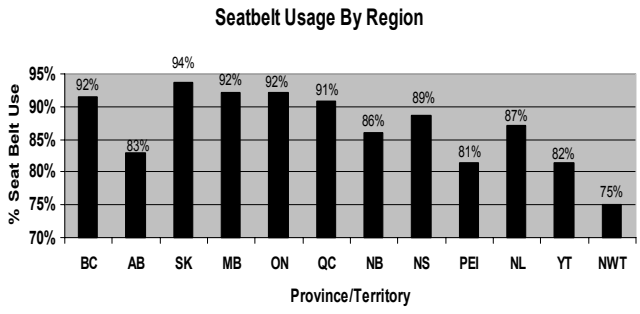
From the preceding case law, depending on the wording of the search warrant, it appears that only entry need be gained within the scope of the time frame outlined on the face of the warrant. Any search may extend beyond the time frame provided it is reasonably necessary for the completion of the search. For example, the area to be searched is large or the removal of items will take a considerable amount of time. If the items listed in the warrant are located, the search is completed and there would be no further practical reason to remain at the location. Under these circumstances it may not be reasonable for the police to stay on the premises.

DID YOU KNOW…

…that Transport Canada recently released its report, *Surveys of Seatbelt Use in Canada*[1]. The 2006 report showing seatbelt usage for 2004-2005 shows that seatbelt usage has risen in Canada by about 3% since the last survey taken in 2002-2003. Other highlights of the survey include:

- Front seat occupants (90.8%) are more likely to wear seatbelts than back seat occupants (84.9%)
- People 50 years of age and older (92.1%) are more likely to wear seatbelts than people aged 25 to 49 (91.8%) and people less than 25 years of age (87.0%)
- Females (93.9%) are more likely to wear seatbelts than males (89.9%)
- Urban vehicle occupants (91.1%) are more likely to wear a seatbelt than rural vehicle occupants (86.9%)
- Drivers of passenger cars, minivans, and SUVs (91.9%) are more likely to wear seat belts than pickup trucks (84.8%)

Of all provinces and territories in Canada, people in Saskatchewan wear their seatbelts most often while people in the Northwest Territories buckle up the least. Results across all regions (except Nunavut) are as follows:



[1] Transport Canada's Surveys of Seat Belt Use in Canada 2004-2005, Fact Sheet TP 2436 E, RS-2006-01E, February 2006

MARIHUANA SMELL & ODD BEHAVIOUR PROVIDE REASONABLE GROUNDS

R. v. Luu & Tran, 2006 BCCA 73

After responding to a parking complaint, a police officer went to a basement suite door to ask the owner of the vehicle to move it. A female voice said "Who's there?" and the officer told her he was a member of the police department and asked her to open the door. The two accused, a male and female, opened the door, stepped onto the landing, and closed the door behind them. While discussing the vehicle, the officer noted a smell of marihuana. He asked the female for identification and she appeared nervous.

She went back into the suite while the male closed the door behind her enough that the officer could not see inside. The officer then smelled an overwhelming odour of bulk marihuana. The male then said something Vietnamese to the female. The officer grabbed the male by the arm and advised him he was under arrest. The male pulled backwards and they both stumbled into the suite. After a violent struggle the male was handcuffed. The female was also arrested and they were both seated on the couch.

The officer quickly searched the suite to ensure no one else was present. In the computer room he saw a large garbage bag and small plastic bags containing marihuana. He called for assistance and read the accused their right to counsel about 20 minutes after entry. They both asked to call a lawyer but an opportunity was not provided because the officer could not afford them privacy. While waiting for a wagon, the officer asked the male where he lived. A search warrant was subsequently obtained and 25 lbs of marihuana bagged in ½ lb quantities was seized.

At trial in British Columbia Provincial Court on charges of marihuana possession for the purpose of trafficking the judge found the warrantless arrests lawful. In his view, the officer had the requisite subjective belief and objective grounds. Further, the initial warrantless search was also lawful. The officer did not deliberately enter the suite, but rather it occurred during the struggle. The additional search of the suite was justified to ensure officer safety. Seeing the marihuana in the computer room was therefore lawful.

The judge found the officer's delay in reading the accused their rights was justified since the officer was alone and maintaining control of the situation until assistance arrived. The further 10 minute delay from the time the accused were read their rights and removed from the scene was also reasonable. The evidence was admissible and the accused were convicted.

Both accused appealed to the British Columbia Court of Appeal arguing the trial judge erred in finding their ss. 8, 9, and 10(b) *Charter* rights were not violated. They argued their arrests and the subsequent search were unlawful and that their right to counsel had been breached.

The British Columbia Court of Appeal dismissed the accused's ss.8 and 9 *Charter* arguments. The officer believed he had reasonable grounds to make an arrest and those grounds were objectively justified. The smell of marihuana may provide reasonable grounds to make an arrest depending on the circumstances. Justice Smith stated:

> I am not persuaded that the trial judge made any error in this reasoning. Ms. Luu's demeanour and Mr. Tran's sudden shift from English to a language foreign to [the officer] were relevant circumstances. An objective observer in the shoes of [the officer] might have attributed Ms. Luu's nervousness to his sudden presence at the door in the dark, as her counsel suggests. However, such an observer might also have reasonably concluded, considering the smell of marihuana and the odd

> behaviour of the [accused] in joining him in such close quarters on the landing and in closing the door behind them, that her apparent nervousness arose from a fear that she was in danger of being implicated in criminal activity. If so, the objective observer, unable to see what was inside the suite, might well be alarmed by the sudden shift of the [accused] Tran from English to a language the observer did not understand. While it might have been open to the trial judge to draw innocent inferences from these matters, the drawing of factual inferences from the evidence was within his exclusive province. His inferences were grounded in the evidence and I would reject the submission that he erred in concluding there were objectively reasonable grounds for the arrests. [para. 23]

Nor was the arrest of the female unlawful because it was made inside a private dwelling without a warrant. The suite was entered because of the struggle, not deliberately, forcibly, or for the purpose of arresting the female. Since there were reasonable grounds for the arrest the accused were not arbitrarily detained. The cursory search that followed for officer safety was also justified.

The delay, however, in providing access to counsel was a s.10 *Charter* breach along with questioning following arrest. Justice Smith explained:

> In my view, the trial judge erred in rejecting this submission on the basis that the delay at the scene was very short and was not unreasonable in the circumstances. In *R. v. Strachan*, [1988] 2 S.C.R. 980, Dickson C.J.C. observed…that once police have the arrest scene under control, there is no reason not to allow the person arrested to telephone a lawyer and that the denial of the s. 10(b) right to counsel begins at that point. Chief Justice Lamer, speaking for the court in *R. v. Manninen*, [1987] 1 S.C.R. 1233…stated that, where a telephone is available, it is the duty of the police to offer the use of it to facilitate contact with counsel, at least in the absence of urgency. There was no urgency here and there were telephones available to be used in the residence where the [accused] were arrested. Moreover, that [the officer] believed he could not offer the [accused] privacy is no answer to his failure to do his duty. In *R. v. Bui*, 2005 BCCA 482, this Court upheld the decision of a trial judge that the failure to give the [accused] in that case the option of contacting counsel without privacy amounted to an infringement of their s. 10(b) rights.
>
> As well, [the officer] questioning of Mr. Tran at the scene, after he had advised Mr. Tran of his right to counsel, was a second infringement of the s. 10(b) right. [para. 30-31]

Despite these violations, the evidence was admitted under s.24(2) and the appeal was dismissed.

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

QUESTIONING CAN BE THE START OF A SEARCH

R. v. Rutten, 2006 SKCA 17

After observing a vehicle driven with a burnt out headlight the police followed it to a car wash, pulled in behind it, and the driver got out. The accused admitted to having a couple of beer after work and said there was no open liquor in the truck. The officer asked if he could take a look inside and was told to go ahead. An open bottle of beer was seen in the console and removed. The officer then asked if there were any drugs in the truck, even though he had no reasonable grounds to believe such.

The officer asked if he could take a look. The accused paused, then reached into the back seat of the truck, removing a Bick's pickle jar and handed it to the officer. There was marihuana, rolling papers, and scissors inside. The accused was arrested for possession of a controlled substance, but was not read his rights.

The officer saw a shaving kit bag on the floor, picked it up and asked the accused if he could take a look in it. The accused said "No", grabbed the bag from the officer and put it back in the truck. The officer put the accused in the police car, advised him of his right to counsel and gave the police warning. He wanted to speak to a lawyer but was told he could do so at the police detachment. The shaving bag was examined and found to contain cocaine. The vehicle was seized and a search warrant was obtained the next day. The shaving bag was found to hold 43.5 grms of cocaine and other evidence.

At trial in the Saskatchewan Court of Queen's Bench, the judge found the accused's rights under s.8 of the *Charter* had not been breached. In her view, the police had the authority to arrest the accused under the *Alcohol and Gaming Regulation Act* and could search incident to that arrest. Furthermore, the judge also found the accused consented to the search.

The accused appealed to the Saskatchewan Court of Appeal arguing, in part, that the search was for drugs while the right to arrest arose in relation to open alcohol and therefore was not valid as an incident to arrest. He also submitted that the consent was not valid. Although he conceded the police could investigate him for the alcohol offence, the accused suggested he was also arbitrarily detained once the police shifted their focus to drugs.

Search Incident To Arrest

Justice Smith, writing the Court's judgment, agreed with the accused. Once the officer asked whether there were any drugs in the truck a search for drugs began. However, questioning the accused about the presence of drugs was not justified as a search incidental to an arrest for an alcohol offence. Justice Smith stated:

> With respect, I am of the view that the learned trial judge erred in concluding that the inquiry as to the presence of drugs in the vehicle fell within authority of the police to search the vehicle incidental to the earlier discovery of one open bottle of beer in the driver's console. It is clear from the transcript that the question to the [accused] related only to the presence of drugs in the vehicle. Nothing in what had happened to that point gave the police reasonable and probable grounds to believe that drugs were present in the vehicle. The officer's question was not an inquiry about the presence of other open alcohol. Nor did the officers make such an inquiry at any point. Neither was it an inquiry about the sobriety of the [accused]. The officers testified that nothing in the [accused's] manner of driving, nor in his responses when talking to him, nor in his physical appearance gave rise to any concerns that he was impaired. Indeed, the officers did not pose any further questions relating to the presence of alcohol or relating to the [accused's] sobriety. He was not asked to perform any sobriety tests.
>
> While it is true that the police had statutory authority to arrest the [accused] in relation to the offence of having an open bottle of beer in his vehicle, they did not do so and in reality had no reason to do so. The [accused] was known to them as a resident and businessman in the village where the detention occurred. There were, as I have said, no concerns about his sobriety. The officers had no concerns about their own safety or the safety of others on the highway. The offence in question was punishable by a fine. As for searching for further evidence on the offence in question, the police had already noted an open case of beer in the truck box. There was only one occupant of the vehicle, the [accused], who showed no symptoms of impairment, and it was unreasonable to expect that there would be other open alcohol in the vehicle. In my respectful view, these facts are open to no other reasonable interpretation than that the police were launching an unrelated investigation, possibly based on unverified rumour, but in any case not supported by reasonable and probable grounds, of a possible offence under the *Controlled Drugs and Substances Act*. [paras. 24-25]

And further:

[T]here is both a subjective and an objective aspect to the question of the purpose of the search said to be incidental to arrest. In the case at bar, the question posed to the [accused] was whether there were any drugs in the truck. When asked why he posed that question, [the officer's] response, on evidence-in-chief, was:

> It's just part of our general inquiries in vehicle stops to ask if there's drugs or alcohol in the truck or if people have been drinking or…

The courts have, on a number of occasions, made it clear that an investigation or inquiry into the possible possession of contraband is not permissible as part of "general inquiries in vehicle stops," absent other grounds for the inquiry…[The officer] conceded that he had no grounds to believe that there were drugs in the truck…

The [Crown] argues that the police were entitled to search for more open alcohol in the vehicle and, in doing so, they would inevitably have found the drugs. I am of the view that this rationale cannot justify the search as one incident to the arrest. The evidence is that this was not the subjective purpose of the officers. [The officer] admitted on cross-examination that, at the time he asked if there were drugs in the vehicle, and then if he could search the vehicle, he did not believe that he had reasonable and probable grounds to search the vehicle. It is impossible to conclude that this officer's subjective reason for searching the vehicle was incidental to an arrest for an open bottle of beer in the driver's console.

Even if, contrary to the evidence, the subjective purpose of the questioning and ensuing search had been in relation to the presence of alcohol in the vehicle, it is not obvious that a search limited in scope to that purpose would have disclosed the drugs which were concealed in a Bick's pickle jar and in a shaving kit, both unlikely places to conceal open bottles of alcohol. [paras. 28-31,]

Consent

As for valid consent to search, the Court found the requirement that a person be aware of their right to refuse a search was not met. Justice Smith held:

> It is my respectful view that the trial judge failed to consider the requirements for valid consent and the onus of proof on the Crown in this respect. The police in this case did not make even minimal efforts to ensure that the [accused] was aware of his constitutionally protected right to refuse a search for drugs. Application of the proper test leads to the conclusion that the consent obtained was not valid and cannot be relied upon to render lawful or reasonable the search for drugs undertaken by the police in the absence of reasonable and probable grounds to believe that drugs were present in the truck. [para. 44]

Arbitrary Detention

The Court, however, rejected the accused's submission that he had been arbitrarily detained when the police made their unlawful enquiry about drugs:

> In the present case, neither the initial detention to speak to the driver about a malfunctioning headlight, nor the subsequent detention in relation to the open beer in the vehicle was arbitrary. Thus, it was not necessary to rely upon s. 1 of the *Charter* to justify the detention and no inquiry into the limits of s. 1 justification was required. *Mellenthin* and *Ladouceur* (Sask. C.A.) are therefore not on point. While I have held that these reasons for detention did not authorize a search for contraband drugs, it is my view that it does not follow that the [accused] was arbitrarily detained in these circumstances. Indeed, that was not the finding in *Mellenthin*, which concluded that the random stop could not in itself justify a search for drugs, but did not address the question of whether the [accused's] s. 9 rights were also infringed in the circumstances of that case. *Ladouceur*, on the other hand, is a finding that the initial stop, for purposes going beyond highway safety concerns, was unlawful.

> In the instant case, the detention of the [accused] was justified, initially pursuant to *The Highway Traffic Act* and subsequently pursuant to *The Alcohol and Gaming Regulations Act, 1997*. The [accused's] argument turns on the fact that in the course of the admittedly lawful detention the police embarked on an unlawful inquiry. I agree that they did, and have found that that constituted an unreasonable search. However, it does not follow that once the police embarked on an inquiry about drugs the detention in relation to the mechanical unfitness of the vehicle and alcohol present in the vehicle became arbitrary. The [accused's] argument would lead to the conclusion that once the police mis-stepped, by embarking on an inquiry not justified by the purposes of the detention, they automatically lost all the legitimate authority they had to detain the [accused] on the original grounds, or to pursue the inquiries in relation to those grounds. I cannot agree with this analysis. The police were still entitled, had they wished to do so, to make further inquiries concerning the presence of alcohol or concerning the mechanical fitness of the vehicle. The point in the present case is not that the detention of the [accused] was arbitrary; it is that the search for drugs was unreasonable. I find no error in the conclusion of the learned trial judge that the [accused] was lawfully detained. [paras. 58-59]

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

Complete case available at www.canlii.org

JUDGE NEED NOT CHECK COMMON SENSE AT DOOR

R. v. Mowry, 2006 NBCA 18

Acting on source information the police attended a remote and uninhabited area of Crown land where they found 175 marihuana plants growing in a clearing. The officers left and returned a few months later. The plants had grown a few feet, were dry, and their leaves were yellow. The following day the police returned and conducted surveillance. The accused and two others arrived and were videotaped for about 12 minutes. In the video tape the accused could be seen moving around the plants and bending over at the waist, however his hands were not in view. The other two men were seen involved in activities such as pruning, carrying a water bucket, or holding a hose.

At trial in New Brunswick Provincial Court the accused was convicted of marihuana production. "Produce" in the *Controlled Drugs and Substances Act* means to obtain a substance by cultivating, which includes any act designed to help raise plants, such as the preparation and use of the soil, the removal of weeds from the vicinity of the plants, and pruning. An appeal to the New Brunswick Court of Queen's Bench was dismissed.

The accused appealed further to the New Brunswick Court of Appeal arguing that the trial judge's verdict was unreasonable because the video did not show what he was doing with his hands—he was not seen touching the plants or handling any watering equipment. Chief Justice Drapeau, writing the unanimous opinion, dismissed the appeal. He stated:

> The trial judge was not required to check her common sense at the courtroom door. A contextual commonsensical appreciation of what [the accused] is shown doing on the videotape leads inescapably to the conclusion that he was engaged in cultivating the cannabis (marihuana) plants that are the subject of the underlying charge and the impugned conviction. It is obvious from the video that [the men] were operating as a team, each doing his part to help the plants' growth. The trial judge properly assessed [the accused's] actions in the context provided by the evidence as a whole, including the actions of his two plantation co-workers. [para. 14]

The conviction was upheld.

Complete case available at www.canlii.org

REASONABLE FORCE OK TO ENSURE DETAINEE NOT ARMED

R. v. Gillies, 2006 BCPC 0053

A police officer patrolling in his police car saw the accused walking in an extremely high prostitution and drug offence area. As the car approached, the accused took a 180 degree turn and began to walk away. The officer pulled up beside the accused and said, "Hey buddy, how you doin? What's your name?" through an open window. The officer saw a silver object protruding from the accused's closed fist. Believing it to be the handle of a knife, the officer ordered the accused several times to drop it. He refused and the officer took him to the ground with a leg sweep. A shiny object and plastic container dropped from the accused's hand.

The accused failed to show his hands despite instructions by the officer. He was struck twice and then handcuffed. The accused was arrested for possession of a dangerous weapon. The officer examined the dropped items, a chrome lighter and a plastic container with cocaine in it. The accused was re-arrested for possession of cocaine for the purpose of trafficking and read his *Charter* rights.

The accused applied to have the evidence excluded in British Columbia Provincial Court arguing he was detained by police without reasonable grounds and that his rights under ss. 8, 9, and 10 of the *Charter* were violated.

Judge A. Rounthwaite first reviewed the applicable case law, noting the following:

> 1. police officers may briefly detain individuals whom they have reasonable grounds to suspect are connected to a particular crime, if the detention is reasonably necessary when viewed objectively, as well as subjectively;
>
> 2. police officers may engage in a protective pat down search of detained individuals where they believe on reasonable grounds that their safety or the safety of others is at risk.; and
>
> 3. where there are reasonable grounds for arrest, viewed subjectively and objectively, officers may arrest and conduct a search incidental to arrest in order to obtain evidence, to prevent escape, or for safety. [para. 6]

She then went on to hold the entire encounter lawful:

> I found [the officer] was entitled to "check" [the accused] by approaching him and engaging in conversation, although [the accused] was not obliged to answer questions.
>
> Upon seeing what he reasonably thought was the handle of a knife held in [the accused's] closed fist, after midnight, in a neighbourhood with a high incidence of prostitution and drug trafficking, [the officer] had reasonable grounds, viewed subjectively and objectively, to suspect he was committing the offence of possession of a dangerous weapon and to detain him for investigation of that offence.
>
> I accepted the officer's evidence that he was vulnerable to a man with a knife as he sat at the open window of a car, and found he had reasonable grounds to believe his safety was at risk. For his own protection, [the officer] was entitled to instruct [the accused] to drop the knife and show his hands, a form of protective search less intrusive than a pat down. When [the accused] failed to show his hands, the officer was entitled to use reasonable force to ensure he was not armed with a weapon. On the evidence in the voir dire, [the officer] did not use more force than was necessary for this purpose.
>
> Although counsel approached this as an investigative detention case, I found on the evidence that the officer also had reasonable grounds, viewed subjectively and objectively, to arrest [the accused] for possession of a dangerous weapon once he formed the belief that [the accused] was in possession of a

knife. On the evidence, [the officer] did not just suspect [the accused] possessed a knife, he believed it, and his belief was reasonable. He was therefore entitled not just to detain [the accused] for investigation, but to arrest him for possession of a dangerous weapon. Instructing [the accused] to show his hands and using force to ensure he was not armed were therefore also justified as part of the arrest and search for weapons incidental to arrest.

I found [the officer] advised [the accused] of his *Charter* rights under s. 10 (a) and (b) as soon as practicable. [paras. 7-11]

Since there were no *Charter* breaches the evidence was admissible.

Complete case available at www.provincialcourt.bc.ca

ONLY DIRECTING MIND NEEDS REASONABLE GROUNDS

R. v. Hall, 2006 SKCA 19

Two police officers reviewed summaries of wiretap conversations obtained during a long-term and ongoing cocaine trafficking investigation. The information indicated that on a particular date the accused and another female would be driving a particular vehicle on a particular highway transporting cocaine. One of the officers told a constable where the vehicle would be going, who was in it, that it would contain cocaine, and provided a vehicle description. However, the officer did not tell the constable what had been said in the wiretaps because she did not want to compromise the ongoing investigation.

The constable saw the vehicle speeding, the passenger not seat belted, and an infant child being moved from the front to the back seat. The constable stopped the vehicle, asked for the accused's driver's licence and told her she was being detained for driving without due care and attention. The other female was arrested on an outstanding warrant and the vehicle was searched. The constable found rolling papers, a knife, and scissors which had marihuana residue. He then arrested the female and the accused for possession of a controlled substance. At the police station the police found two bags of cocaine in the infant's diaper. The accused was charged with possessing cocaine for the purpose of trafficking.

At trial in Saskatchewan Provincial Court the judge restricted the Crown from calling evidence from the officers directing the stop. He then ruled the constable intended to stop and search the vehicle before he pulled it over. In his view, the instruction given to the constable to stop the vehicle was, by itself, insufficient to provide reasonable grounds. The constable was not entitled to simply accept the directing officer's opinion without satisfying himself about the facts. So, even though the constable subjectively believed he had reasonable grounds, the trial judge ruled he did not have the necessary objective foundation. As a result, the evidence was excluded under s.24(2) and the accused was acquitted.

The Crown appealed to the Saskatchewan Court of Appeal arguing the trial judge erred. Justice Gerwing, writing the unanimous appeal court judgment, concluded the trial judge misunderstood the law by limiting the evidence the Crown wished to deduce from the officers. In Justice Gerwing's opinion, "the misunderstanding related to whether or not the constable effecting the search had to have all of the details which would provide reasonable and probable grounds for the search or whether he was entitled to rely on instructions from superior officers who did have full information."

Justice Gerwing noted that the trial judge believed it was necessary for the constable himself to have sufficient information to conclude reasonable grounds existed. However, the Supreme Court of Canada in *R. v. Debot*,

[1989] 2 S.C.R. 1140, had previously ruled that the officer directing the search is the one who requires the reasonable grounds while the officer conducting the search can assume the officer ordering it had the necessary grounds to do so. Justice Gerwing stated:

> Based on Debot, the conclusions of the judge about reasonable and probable cause must be discounted. That is, he did not understand that it was not necessary for [the constable] to have full information to have such reasonable and probable grounds. He declined to hear the evidence which would show that the appropriate officers did have such information. [para. 23]

And further:

> A search of the authorities does not provide much enlightenment on the nature of the precision required for the order to be given by the officer with information to the one who is to effect the search. This is not surprising since, given the exigencies that normally exist, shorthand instructions may be appropriate, and, indeed, normal. It is frequently stated that all of the information must be considered to determine if there has been a Charter breach. [para. 26]

Since the trial judge did not give the Crown an opportunity to lead testimony related to this issue a new trial was ordered. A new trial would allow the issues to be fully analyzed in light of all relevant probative evidence.

Complete case available at www.canlii.org

SEVERED HEAD ADMISSIBLE DESPITE EARLIER EXCLUSION

R. v. Savojipour,
(2006) Docket:C34438 (OntCA)

The accused told police he buried the head and arms of a murder victim in a ravine. The Crown wished to present evidence that the injuries to the head were consistent with a hammer owned by the accused. During a *voir dire* in the Ontario Superior Court of Justice, however, the judge ruled the statement by the accused was inadmissible on *Charter* grounds. Since the inadmissible statement led the police to find the head and arms (derivative evidence), they too were not admissible because they would not have been discovered but for the inadmissible statement. The admission of the found body parts would therefore render the trial unfair. Thus, the discovery of the head or its condition could not be used in court.

The defence, however, made reference to the inadmissible statements. The Crown objected and stated if further reference was made they would seek a new ruling on admissibility. When defence counsel suggested to the forensic pathologist that he took oral swabs the judge directed defence counsel to continue questioning without an answer to the question. Crown objected, suggesting they had been prejudiced because the jury would now know the head had been located and examined. From this, the jury would then infer that the Crown had concealed material evidence.

Furthermore, the accused was expected to testify the victim had been struck on the head by two intruders and the jury might wonder why the Crown had not had the head tested. Or the jury might think the Crown could not rebut the accused's testimony. The trial judge accepted that the defence counsel's mistake was inadvertent, but refused to cure his mistake by a simple jury instruction. Rather, he reversed his earlier ruling excluding evidence about the head and the accused was subsequently convicted of first degree murder.

The accused appealed to the Ontario Court of Appeal arguing, in part, that the trial judge erred in his ruling. The Court of Appeal, however, upheld the conviction. In ruling that the trial judge did not err, the Court held:

> First, he was in the best position to assess the impact of the error in the atmosphere of the trial. In our view, the conduct of the defence gave rise to a material change in circumstances that justified a reversal of the earlier ruling… The evidence that had initially been excluded in order to preserve the fairness of the trial was now admitted to restore the fairness of the trial process. There was clearly a risk that the jury might be misled or presented with a distorted picture. The argument that the "sins" of defence counsel were improperly visited upon the client is not valid. Absent a finding of ineffective assistance of counsel, which is not suggested here, the client is fixed with the steps taken in furtherance of his defence.
>
> Second, we do not propose to second guess the trial judge in concluding that the perception that the Crown was suppressing relevant evidence could not be cured through judicial instruction.
>
> The new ruling made it possible for the jury to know that the [accused] had led the police to the location of the head, a matter of some importance to the defence as it did not want the jury to think that the [accused] had hidden the head and thus prevented the victim's family from holding a proper burial. Furthermore, the [accused] in his testimony stated that when he returned to his apartment he saw the hammer in his apartment and that there was blood on it. This left the possibility that the assailants had used the hammer while the [accused] was absent from the apartment. The matter was clearly and fairly dealt with by the trial judge in his charge. Overall, trial fairness was restored and the [accused] was not prejudiced by the admission of the head of the victim into evidence. [reference omitted, paras. 15-17]

The appeal was dismissed.

Complete case available at www.ontariocourts.ca

Note-able Quote

Correction does much, but encouragement does more—Goethe

PRESENCE OF NON-POLICE PERSONNEL DURING SEARCH NOT UNREASONABLE

R. v. Tran, 2006 BCPC 0054

After police entered a residence with a search warrant and confirmed the existence of a marihuana grow operation, a hydro inspector, two by-law officers, and the fire department were called to the site to deal with safety issues. The grow operation was sophisticated. Wiring was exposed throughout the house, vents had been cut in the walls and ceiling, and rooms had been converted into nutrient and electrical areas. These personnel were allowed to examine the premises without direct supervision. The hydro inspector located a by-pass and a non-occupancy notice was posted by a bylaw officer because the residence was unsafe.

During a *voir dire* in British Columbia Provincial Court on charges of electricity theft and cultivation, the accused argued, among other grounds, that the manner of the search was unreasonable because non-police personnel were allowed into the residence without explicit authorization. Judge Hoy, however, disagreed. "In my view the officers concerns for safety, not only for themselves, but as well the residence and the neighbourhood, are well founded," he said.

In coming to his conclusion Judge Hoy reviewed ss.11(6), 11(8), and 12 of the *Controlled Drugs and Substances Act* (*CDSA*). Section 11(6), in part, allows police executing a warrant to seize items not mentioned in the warrant if they have reasonable grounds to believe the things are offence related property or will afford evidence of a *CDSA* offence. Section 11(8) allows for the seizure of items if there are reasonable grounds to believe they were used in the commission of an offence or will afford evidence of an offence. Section 12 allows the police to enlist the

necessary assistance to exercise the powers described in s.11. In holding the accused's rights not breached, Judge Hoy stated:

> …In order to carry out their duties the police, through s. 12 (a), are given the legal authority to enlist the help of others for the purpose of collecting evidence, not only for offence related property but as well evidence for other potential charges other than that contained in the *CDSA*. For the hydro representative the evidence gathered was relevant not only to the *CDSA* charge but as well the *Criminal Code* offence of theft of electricity. In either instance the hydro representative had not stepped beyond the bounds authorized by legislation whether it be his discovery of the electrical bypass or his making an assessment of the evidence as discovered by the police for the purposes of determining the excess electrical consumption.
>
> Furthermore, the ambit of the assistance provided also includes safety considerations. The police are entitled to ensure that their work is conducted in as safe a manner as possible. Having secured the residence there are, in this instance, obvious dangers in the collection of evidence given the extensive electrical alterations, structural changes from the venting system and the presence of abundant quantities of plant nutrient chemicals. It was a prudent step to enlist the help of a hydro representative, the fire department and the by law enforcement officers to ensure a safe environment in the collection of evidence. The police cannot reasonably be expected to have the expertise of electricians or firemen. They do not possess the knowledge or necessary equipment to address any potential electrical, fire, chemical or structural hazards.
>
> It is noted the police did not directly supervise these individuals who were enlisted to assist them. In spite of this I do not find that the search was thus rendered unreasonable. It was not as if there was a complete void of control over their conduct. The residence was very crowded with 5 officers involved in the search. It is reasonable to state there would be some measure of scrutiny as they would have crossed paths with the police in the course of rendering assistance. [paras. 21-23]

The evidence was admissible.

Complete case available at www. provincialcourts.bc.ca

HOUR LONG INVESTIGATIVE DETENTION NOT UNECESSARILY LENGTHY

R. v. Dao, 2006 BCPC 0051

A police officer, who had been involved in about 200-300 drug investigations, saw a man resembling the broadcasted description of a theft suspect. The man, who looked like a drug user, entered an alley way where prostitution and drug use were common. He approached a vehicle stopped in the alley and spoke to the accused through the driver's window. When the men saw the police car they looked surprised. As a result of the location, what he saw, and the surprised expressions, the officer suspected the accused was engaged in a drug transaction. The officer called for backup as he watched the men speak briefly, go to the truck, remove an oil container, and then go to the hood of the car. The officer believed they were now putting on a show for police.

Once back up arrived the police spoke to the two men. After about an hour the police confirmed the name of the man seen with the accused. He had initially provided a false name and his girlfriend brought identification to the scene, which was fake. Eventually, police determined there were two outstanding warrants for the man's arrest. The arrested man then told police he had met the accused to buy $20 worth of crack cocaine and that he had been buying from him for the past four months. The officer then arrested the accused for possession for the purpose of trafficking, and advised him of his

Charter rights. The accused and his vehicle were searched and drugs and money found.

During a *voir dire* in British Columbia Provincial Court the accused argued his rights under ss.8, 9, and 10 of the *Charter* were violated and the evidence should be excluded under s.24(2).

In summarizing the leading case law about investigative detentions and searching incidental to arrest, Judge A. Rounthwaite explained:

> While the defence must establish a Charter violation on the balance of probabilities, the Crown must prove a warrantless search reasonable. The leading cases on investigative detention and search incidental to arrest…establish the following:
>
> - Police officers may briefly detain individuals whom they have reasonable grounds to suspect are connected to a particular crime, if the detention is reasonably necessary when viewed objectively, as well as subjectively;
> - Investigative detentions must be brief, and police officers must tell detainees the reason for their detention.
> - Where there are reasonable grounds for arrest, viewed subjectively and objectively, officers may arrest and conduct a search incidental to arrest in order to obtain evidence, to prevent escape, or for safety. [references omitted, para. 3]

The judge found the officer was justified in detaining the accused and that its duration —an hour—was not unnecessarily long. The length of the detention was driven by the detainees' conduct. Judge Rounthwaite stated:

> I find at this point [the officer] had reasonable grounds, viewed subjectively and objectively, to suspect [the accused] was committing the offences of trafficking and possession for the purpose of trafficking in drugs. Applying the law…he was therefore entitled to briefly detain [the accused] for investigation. Undertaking the broader inquiry…, I consider that a reasonably based suspicion that a person is engaged in drug trafficking in an area where drug offences are common justifies [the accused's] detention. [references omitted, para. 7]

And further:

> [The accused] was not handcuffed or searched during the detention, nor did he make an incriminating statement.
>
> This detention was not brief, but applying the decision of the BC Court of Appeal in *R. v. Greaves*, where a 40 minute detention was found reasonable and justifiable because the detainee's conduct obstructed the investigation, I accept the Crown's submission that its length was warranted by the officers' need to investigate the inconsistent information the detainees provided to police. [paras. 13-14]

As for the accused's arrest it was also lawful and the searches conducted incidental thereto were reasonable:

> Having considered the law on arrest enunciated… I find [the accused's companion's] statement that he was there to buy cocaine from [the accused], combined with [the officer's] earlier observations and the conduct of the men during the investigation, gave [the officer] reasonable grounds, viewed subjectively and objectively, to arrest [the accused] for possession for the purpose of trafficking. Although [the accused's companion] had lied about his name, this explanation for his presence was far more credible, and far more consistent with the officer's other observations, than the unlikely story that he was there to help [the accused] fix his car. [references omitted, para. 17]

Even if the accused's right under s.10(a) (as conceded by the Crown) was breached because he was not informed of the reason for the detention and assuming his s.10(b) right was also violated because police failed to advise him of his right to counsel, the evidence was nonetheless admissible. Judge Routhwaite ruled:

> Would admission of the evidence bring the administration of justice into disrepute? The evidence was non-conscriptive and its admission would not affect the fairness of the trial. While "good faith cannot be claimed if a *Charter* violation is committed on the basis of a police officer's unreasonable error" …I do not consider the violation serious. During the detention [the accused] was not handcuffed; questioning was limited to his name and relationship with [his companion]; and he made no incriminating statement. [The accused] was told the reason for his arrest at the conclusion of the investigative detention; his right to counsel was explained; and he was given a reasonable opportunity to consult counsel. The charges are serious and exclusion of the evidence would lead to dismissal. In this case I believe exclusion of the evidence would bring the administration of justice into disrepute. Accordingly, I refuse the application to exclude evidence. [para. 23]

The evidence was admissible.

Complete case available at www. provincialcourts.bc.ca

'IN SERVICE' LEGAL ROAD TEST ANSWERS

1. (a) **a 54 year old woman in Saskatchewan driving a minivan downtown** —see Transport Canada's recently released report, Surveys *of Seatbelt Use in Canada* (at p. 5 of this publication). Each discernible marker associated to a person in this example (age, gender, region, location in the vehicle, vehicle type, and locale) suggests they are more likely to be wearing a seatbelt.

2. (a) **true**—see *R. v. Rutten* (at p. 7 of this publication). In this case, the court concluded that asking whether there were any drugs in the truck began a search, but such questioning was not justified as a search incidental to an arrest for an alcohol offence.

3. (b) **false**—see *R. v. Hall* (at p. 12 of this publication). In this case the court concluded that the officer directing the search is the one who requires the reasonable grounds while the officer conducting the search can assume the officer ordering it had the necessary grounds to do so. It is not necessary for the searching officer to have all of the details which would provide reasonable and probable grounds for the search.

4. (c) **Police**—see Leger Marketing report entitled *"Profession Barometer"*, (at p. 19 of this publication).

OBSERVATIONS CONFIRMING INFORMATION PROVIDE REASONABLE GROUNDS

R. v. Murphy,
(2006) Docket:C42133 (OntCA)

A confidential informant provided information to the police describing a male, where and when he would be going to a specific location, and that he would be carrying cocaine while armed. Police set up surveillance at the identified location and observed a male matching the generic description given, heading towards the described location within the specific time frame provided. As the male ran across the street, he appeared to reach into his shirt and hold something in his pants, which the experienced officers believed was a gun. The accused was arrested and searched incidental to arrest. Police found a handgun tucked in the accused's pants as well as cocaine.

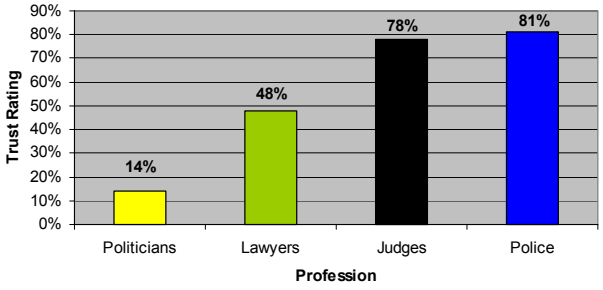
At trial in the Ontario Superior Court of Justice the judge treated the confidential information as equivalent to information from an anonymous and unproven source. However, she concluded that the information provided by the informant along with the police observations of the accused prior to his arrest provided the requisite reasonable grounds. The search that followed was pursuant to that arrest and was constitutional.

In dismissing the accused's appeal, the Ontario Court of Appeal found, in part, that the trial judge did not err in concluding there were reasonable grounds to make the arrest. This was not a case where police surveillance did not confirm any material parts of the informant's tip. Rather, the police observations of the accused as "he ran across the street provided significant confirmation of the informant's statement that the [accused] was armed." The informant's information, along with the officers' observations confirming that information justified the arrest.

Complete case available at www.ontariocourts.ca

COPS TOP JUSTICE SYSTEM, BUT NOT BY MUCH

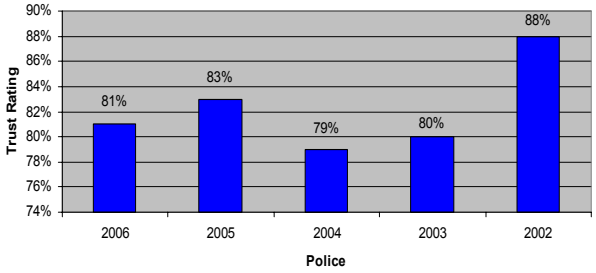
In a March, 2006 Leger Marketing report entitled *"Profession Barometer"*, police officers were the most trusted profession in the criminal justice system[2]. Eighty one percent of Canadians trusted police officers, followed by judges (78%) and lawyers (48%). Lawmakers (politicians) were dead last at 14%.



Police

Police officers were two percentage points lower on the trust barometer than last year and down seven percent from the five year high of 88% in 2002.

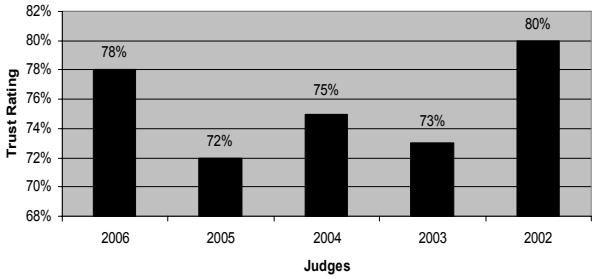
[2] The Leger Marketing Report provided trust ratings for 22 professional occupations.



The police were trusted most in Atlantic Canada (89%), but least in Ontario (78%).

Judges

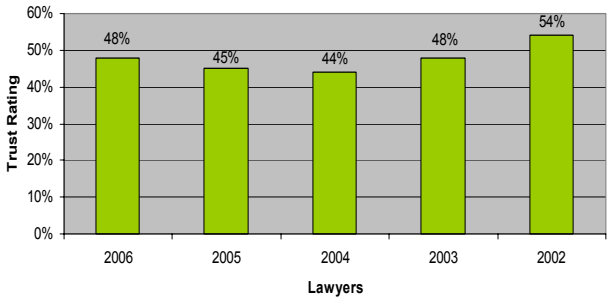
The trust rating for judges rose six percent from 2005.



Judges were trusted most in Atlantic Canada (81%), but least in the Prairies (74%).

Lawyers

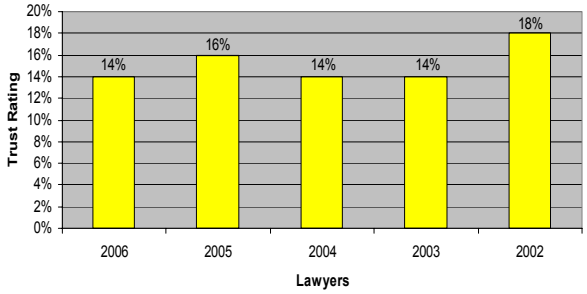
Lawyers were up three percent over last year, but continue at a level below 50% since 2003.



Lawyers were trusted most in Atlantic Canada (52%), but least in Quebec and British Columbia (47%).

Politicians (Law Makers)

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



Politicians are trusted most in Atlantic Canada (26%), but least in the Quebec (10%).

Of the other 18 professions identified in the report, firefighters ranked number one overall with a 96% trust rating, ahead of nurses (95%), farmers (92%), doctors (89%), teachers (88%) and engineers (88%) rounding out the top five[3].

Complete report available at www.legermarketing.com

EVIDENCE FLOWING FROM TAINTED DETENTION INADMISSIBLE

R. v. Chaisson, 2006 SCC 11

A police officer saw a lone vehicle with two occupants parked in the dark at the rear parking lot of a closed gas station just after midnight. Its lights were out and it was not running. There was a 24-hour donut shop and a closed restaurant nearby. The officer pulled up along the passenger side of the parked vehicle about three feet away. The occupants did not initially see the officer, but when they did they were shocked—the driver threw something onto the floor.

The officer asked the men what they were doing and asked them to get out of the car. As the passenger exited, the officer saw, in plain view, a plastic bag containing marihuana on the floor and a small piece of marihuana on the seat. The accused, seated in the driver's seat, was arrested and placed in the back of the police car while the passenger was also arrested and held outside the vehicle. The officer searched the vehicle and found two sets of scales in plain view, more marihuana under the driver's seat and just over a kilogram of marihuana in the trunk. After the search was complete—about twenty minutes after the arrest—the accused was advised of his right to counsel. He was taken to the police station and searched further. In his pockets additional drug items were found.

At trial in the Provincial Court of Newfoundland[4], the accused was acquitted on a charge of possession of marihuana for the purpose of trafficking. In the trial judge's view the accused's *Charter* rights were violated. The detention was arbitrary since the officer was acting only on a hunch (a s.9 breach) and the officer should have cautioned the vehicle's occupants before they were told to get out (a s.10(b) breach). As the judge noted, "But for the detention, the marihuana on the floor would not have been discovered [and b]ut for the marihuana on the floor being discovered, there would have been no right to arrest [the occupants]." The warrantless search was *prima facie* unreasonable and infringed s.8 of the *Charter*. Although, in the words of the trial judge, the officer "served the community well by getting such a large quantity of drugs off the street," the evidence was excluded under s.24(2).

The Crown appealed to the Newfoundland Court of Appeal[5] conceding breaches of the accused's rights under ss. 8 and 9 of the *Charter*, but arguing the trial judge's decision to exclude the evidence under 24(2) was in error. Justice

[3] The remaining occupations following teachers and engineers in order of trust were police officers (81%), judges (78%), notaries (75%), bankers (72%), church representatives (64%), pollsters (63%), economists (62%), senior public servants (50%), journalists (49%), lawyers (48%), insurance brokers (46%), real estate agents (42%), publicists (40%), unionists (38%), car salespeople (19%), and politicians (14%).

[4] 2004 N.J. No. 120

[5] 2005 NLCA 55

Welsh, however, in authoring the unanimous appeal court judgment, rejected the Crown's concessions of the *Charter* breaches. Although the accused was detained when he was asked to get out of the vehicle, Justice Welsh found the detention not arbitrary.

In her view the police are entitled to detain persons for investigative purposes provided they are acting within the scope of their duties recognized under statute or at common law (which includes the preservation of peace, prevention of crime, and protection of public order) and if the detention is necessary for the performance of the recognized duty (that there exists reasonable grounds to detain—formerly known as articulable cause). In holding that the detention of the accused passed constitutional muster, Justice Welsh stated:

> …I conclude that the officer did not arbitrarily detain [the accused] within the meaning of section 9 of the Charter. Given the location of the vehicle, the time of day, and the reactions of [the accused] and the passenger, exhibiting shock and apparently trying to hide something, the officer had reasonable grounds to suspect that the occupants of the vehicle were involved in criminal activity, and that a detention for the purpose of questioning them was necessary. The detention was conducted in a reasonable manner and was very brief in duration. [para. 28]

The seizure of the evidence in this case, Justice Welsh concluded, fell into two categories—plain view and search incident to arrest. Following the seizure of the plain view bag containing marihuana, the officer arrested the accused. The power to search incident to an arrest may include an automobile provided the police are attempting to achieve some valid purpose connected to the arrest, such as protecting or discovering evidence. Here, "the search was conducted in a reasonable manner and for the purpose of discovering and preserving evidence incidental to arrest," said Justice Welsh. Similarly, the search back at the police station was also conducted in a reasonable manner and for a valid purpose incidental to the arrest.

Under s.10(b) of the *Charter* an arrestee is entitled to be advised of his right to counsel without delay (which effectively means immediately) . In this case, the officer did not advise the accused of his rights until some 20 minutes after arrest, which amounted to a breach. But, contrary to the trial judge's decision, Justice Welsh ruled the evidence admissible under s.24(2). The Crown's appeal was allowed, the acquittal set aside, a conviction entered, and the matter remitted back to the trial judge for sentencing.

The accused then appealed to the Supreme Court of Canada. The five member unanimous court allowed the appeal. In the high Court's view, the trial judge was entitled to reach the conclusion he did based on the facts as he found them in holding the accused's rights under ss.8, 9, and 10(b) were violated. Furthermore, the trial judge did not err in finding that the cumulative effect of these breaches warranted the exclusion of evidence under s.24(2). In holding otherwise, the Newfoundland Court of Appeal erred in "substituting its own findings of fact for those of the trial judge." The acquittal was restored.

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

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Note-able Quote

What counts is not necessarily the size of the dog in the fight—it's the size of the fight in the dog—Dwight D. Eisenhower