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 July 7, 2006 Royal Canadian Mounted Police **Constable Robin Cameron** and **Constable Marc Bourdages** had responded to an assault call in Spiritwood, Saskatchewan and were shot in a gun battle after a 27 km. chase. The constables had been in critical condition in a Saskatoon hospital since the shooting, which occurred near the farming community of Mildred, about 140 kms. from Prince Albert.

The suspect fled on foot after the shooting and has since turned himself in. He had been the subject of a massive manhunt after the constables were shot. The suspect's father has been charged with obstructing justice for defying a police order to stay away from a restricted police search area, where the RCMP believed his son was hiding. The suspect faces two charges of first degree murder and a charge of attempted murder of a third officer who had joined the chase, but was not injured.

Both constables succumbed to their injuries within two hours of each other.

Constable Cameron had served with the RCMP for 5 years and was posted to Spiritwood Detachment, F Division. She is survived by her 11-year-old daughter.

Constable Bourdages had served with the RCMP for 5 ½ years and was posted to Spiritwood Detachment, F Division. He is survived by his wife, also a constable with the Royal Canadian Mounted Police, and his 9-month-old son.

With the deaths of Constable Cameron and Constable Bourdages, a total of 15 peace officers have lost their lives to gunfire over the past 10 years. Other officers killed by gunfire include:

2006 Constable John Atkinson

2005 Constable Peter Schiemann
Constable Anthony Gordon
Constable Lionide Johnston
Constable Brock Myrol
Constable Valerie Gignac

2004 Corporal James Galloway

2002 Constable Benoit L'Ecuyer

2001 Constable Jurgen Seewald
Constable Dennis Strongquill

1997 Senior Constable Thomas Coffin
Corrections Officer Dianne Lavigne
Corrections Officer Pierre Rondeau

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

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

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 herein 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

"I am a Police Officer…in Ontario. I am a member of our Training Bureau and was wondering if you could add me onto your list for future 10-8 newsletters. I find them extremely beneficial and insightful. Thanks loads."—**Police Constable, Ontario**

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"I appreciated the use of clear and plain language in explaining court cases in your publication."—**Crown Prosecutor, British Columbia**

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"Thanks for the new issue. It's always a good read."—**Police Constable, British Columbia**

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"We really enjoy 10-8 and find it very useful [and would] hate to miss an edition of it."—**Police Inspector, Ontario**

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"I am still reading your newsletter. It is an excellent "just in time, just the basics" production"—**Crown Prosecutor, British Columbia**

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"I am a Police Officer in Ontario…and, even after 19 years in Policing, find your articles to be a learning experience."—**Police Constable, Ontario**

****

"I have been with the RCMP in this province for 30 years and…one of our…members brought the In-Service 10-8, Volume 5 Issue 4, into our office for reading. I have never seen this publication before and I noted several very informative cases and would ask that you place me on your electronic distribution list so that I can share Service 10-8 with the other members of our unit."—**Corporal, RCMP British Columbia**

"Great work!"—**Police Constable, RCMP British Columbia**

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"I would appreciate being added to your distribution list for your publication "In Service: 10-8". I am a supervising Fishery Officer with responsibilities for the Yukon and north western portion of BC and am greatly interested in keeping abreast of ever changing case law. Thank you very much for your publication."—**Acting Area Chief, Fisheries & Oceans Canada**

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"The edition of your latest newsletter…was just forwarded to me… I found the information well put together and easy to read. Great job!"—**Police Sergeant, Alberta**

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"I'm a Sergeant…and read your newsletter. It was extremely informative and would like to be on your mailing list."—**Police Sergeant, Alberta**

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"We recently had a new member posted in from the island. Along with him, he introduced our section to your newsletter. Normally, our outside link to the Law Enforcement world is the "Blue Line" magazine. Your newsletter was a refresher. I found a number of your articles very informative and valuable training aids. I look forward to future articles."—**Master Corporal, Military Police**

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"I'm fresh out of the JI Police Academy, and…I think your online magazine is great for keeping us up to speed with any new changes and new case law."—**Police Constable, British Columbia**

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"Thanks for your 10-8 Newsletter. It's an excellent publication."—**Police Officer, Ontario**

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

www.10-8.ca

'IN SERVICE' LEGAL ROAD TEST

How much do you know about Canada's top court, the Supreme Court of Canada? See page 14 for the answers.

1. In what year was the Supreme Court created?
   (a) 1867
   (b) 1875
   (c) 1924
   (d) 1949

2. How many judges are on the Supreme Court?
   (a) 5
   (b) 7
   (c) 9
   (d) 11

3. Who was the first woman to be appointed to the Supreme Court?
   (a) Bertha Wilson
   (b) Claire L'Heureux-Dube
   (c) Beverly McLachlin
   (d) Louise Charron

4. Approximately how many appeals does the Supreme Court hear each year?
   (a) 320
   (b) 240
   (c) 160
   (d) 80

5. What colour of robes do the Supreme Court judges wear during hearings?
   (a) red
   (b) blue
   (c) black

6. What is the minimum number of Supreme Court judges required to hear an appeal?
   (a) 3
   (b) 5
   (c) 7
   (d) 9

SECOND SEARCH WARRANT APPLICATION OK

R. v. Duchcherer & R. v. Oakes, 2006 BCCA 171

A police officer applied for a tele-warrant by fax under s.11 of the *Controlled Drugs and Substances Act* (*CDSA*) to search a residence, but it was rejected by a Judicial Justice of the Peace (JJP). The JJP informed the officer of her reasons for rejecting the warrant and noted he could "re-apply with more info." The officer then added three more paragraphs to the information explaining the JJP's reasons for rejecting the warrant and arguing why these reasons were not proper to reject the application. The officer then applied to a British Columbia Provincial Court judge who authorized the search warrant.

A search was carried out and 150 marihuana plants were found hidden behind plywood barriers and the equipment used was indicative of a commercial operation. Both accused were arrested and charged with unlawfully producing a controlled substance. During a voir dire in British Columbia Provincial Court the trial judge concluded the search was warrantless and the evidence ought to be excluded under s.24(2) of the *Charter*. In his view, the JJP rejected the warrant for substantive reasons (the grounds were insufficient) and no new information was added when the officer re-applied for the warrant. Had new information been added, a different judge could have heard the application *de novo* (a new or fresh). However, since there was no new information, the officer was seeking a review of the JJP's earlier decision, something for which no statutory authority existed. Therefore, the judge hearing the second application exceeded his jurisdiction. The Provincial Court Judge wrote:

> In my view, [the officer] had two options. He could have obtained more and better information and re-submitted the ITO to a JJP or Judge. Alternatively, he could have sought judicial review in the Supreme Court. He chose neither option and, for these reasons, the search warrant is invalid and a nullity. The ensuing search of the residence was, therefore, a warrantless one and in the result the Accused persons' rights against unreasonable search and seizure in section 8 of the *Charter* were breached. [para. 42, 2004 BCPC 547]

The evidence was excluded and the accused were acquitted.

The Crown then appealed to the British Columbia Court of Appeal arguing the trial judge erred. The accused, on the other hand, contended that once a search warrant has been rejected any new application without new information is a review or appeal of the earlier application and there is no authority allowing for a re-hearing by another justice (or judge).

Justice Thackray, authoring the unanimous appeal court judgment, sided with the Crown. In this case the officer disclosed in the second application that he had made a previous application for the search warrant before a JJP. The judge hearing the second application was not overruling the justice, but exercising his own discretion at a new hearing. Although an initial warrant refusal may influence a second justice's opinion, the refusal does not govern that second opinion nor cause the second justice to sit in an appellate capacity. Moreover, this was not a case of "judge shopping", abuse of process, or subversion of the judicial system.

Justice Thackray also noted that there is no process of appeal or statutory right to review a rejected search warrant under s.11 of the *CDSA*. A judicial review by prerogative writ in the form of certiorari or mandamus could be sought in Supreme Court but these reviews are limited to jurisdictional issues and not errors of law. Sufficiency of search warrant grounds is not a jurisdictional matter and therefore would not give rise to a judicial review by prerogative writ.

The police were seeking an exercise of discretion and the court was afforded an opportunity to review an error of law within jurisdiction when the police made the second application for the warrant based on the same material.

It also did not make any difference that a "justice" rejected the first application and a "judge" granted the second one. A "justice" is defined in the *Criminal Code* as "a justice of the peace or a provincial court judge." Justice Thackray found both justices and judges had equal jurisdiction when issuing search warrants. The Crown's appeal was allowed, the accused's acquittals were set aside, and a new trial was ordered.

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

POLICE NEED NOT ACCOUNT FOR EVERY MOMENT OF IMPAIRED CHRONOLOGY

R. v. Vanderbruggen,
(2006) Docket:C43848 (OntCA)

The accused was stopped and arrested for impaired driving. Six minutes after arriving at the police station he was searched and placed in a cell. Forty six minutes later he was turned over to the breathalyser operator for testing and a breath test was taken four minutes later. At trial in the Ontario Court of Justice the arresting officer testified that she did not know exactly when the breathalyser technician entered the breathalyser room. She did however, inform the technician of her grounds for making the demand when he entered and then saw him "playing around with the equipment." The arresting officer then left the room, completed some paperwork, and did not see the technician engage in any other duties.

The trial judge concluded the breath test was taken as soon as practicable because the 46 minute delay between arrival at the station and the taking of the first sample was adequately explained. This delay was taken up waiting for the breathalyser technician, the search, informing the technician of the grounds, and preparing the breathalyser. The certificate of analysis was admissible and the accused was convicted of over 80mg%. An appeal to the Ontario Superior Court of Justice was dismissed.

The accused then appealed to the Ontario Court of Appeal arguing the 46 minute delay was unexplained and therefore the Crown could not rely on the presumption of identity under s.258(1)(c)(ii) of the *Criminal Code* because the breath samples were not taken "as soon as practicable." Justice Rosenberg, writing the unanimous Ontario Court of Appeal judgment, first explained the presumption the Crown sought to rely on:

> Section 258(1)(c)(ii) of the *Criminal Code* is part of the scheme to ease proof of the concentration of alcohol in the accused's blood for *inter alia* proving the "over 80" offence in s. 253(b). Section 258(1)(c)(ii) provides that where the breath samples were taken "as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken" then, provided certain other conditions are fulfilled, the prosecution may rely upon the presumption of identity. This presumption simply deems the results of the breath tests to be proof of the accused's blood alcohol level at the time of the offence in the absence of evidence to the contrary. Thus, in this case, although the first test was not taken until more than one hour after the [accused] drove the vehicle, that test is deemed to show what his blood alcohol level was at that time of the driving. [para. 8]

In defining the meaning of "as soon as practicable", he said:

> Decisions of this and other courts indicate that the phrase means nothing more than that the tests were taken within a reasonably prompt time under the circumstances…There is no requirement that the tests be taken as soon as possible. The touchstone for determining whether the tests were taken as soon as practicable is whether the police acted reasonably…
>
> In deciding whether the tests were taken as soon as practicable, the trial judge should look at the whole chain of events bearing in mind that the *Criminal Code* permits an outside limit of two hours from the time of the offence to the taking of the first test. The "as soon as practicable" requirement must be applied with reason. In particular, while the Crown is obligated to demonstrate that—in all the circumstances—the breath samples were taken within a reasonably prompt time, there is no requirement that the Crown provide a detailed explanation of what occurred during every minute that the accused is in custody…[paras. 12-13, references omitted]

In this case, the Crown presented sufficient evidence from which a judge could conclude that the police acted reasonably and that the breath samples were taken as soon as practicable in all the circumstances. "There was an approximate delay of one hour and fifteen minutes from the time of the offence to the taking of the first sample," said Justice Rosenberg. "The following evidence was offered as explanation for this delay: time was taken in arresting the [accused], reading him his rights, transporting him to the station, waiting for the technician to arrive, searching the [accused], conveying the information as to the grounds for the breath demand and waiting for the technician to prepare the breathalyzer." In dismissing the appeal Justice Rosenberg concluded:

> [The Criminal Code presumption] provisions, which are designed to expedite trials and aid in proof of the suspect's blood alcohol level, should not be interpreted so as to require an exact accounting of every moment in the chronology. We are now far removed from the days when the breathalyser was first introduced into Canada and there may have been some suspicion and scepticism about its accuracy and value and about the science underlying the presumption of identity. These provisions must be interpreted reasonably in a manner that is consistent with Parliament's purpose in facilitating the use of this reliable evidence. [para. 16]

Complete case available at www.ontariocourts.ca

CRIMESTOPPERS TIP PROVIDES IMPETUS FOR INVESTIGATION

R. v. Jacobson,
(2006) Docket:C43119 (OntCA)

Police received a Crimestoppers tip from a caller who felt a suspect living at a residence may be cultivating marihuana. The address was provided and the house was described as having heavy blinds, newspapers, a vent in the garage, constant running water, and heavy lights. It was also reported that there was no activity during the day but people could be seen entering in the evening. The occupant of the house was described as a 25 year old white male.

Police followed up the investigation and made several observations confirming much of the information. These included windows covered with heavy blinds or thick sheets and towels, condensation on all the windows, a vent attached to the garage, a roll of heavy clear plastic at the side of the house, and the accused's vehicle in the driveway. Hydro records were also obtained and it was concluded that the hydro consumption at the residence was much higher than neighbouring homes.

A warrant was obtained and executed and the accused was convicted in the Ontario Superior Court of Justice with producing marihuana and possession for the purpose of trafficking. Although she struck the references related to the hydro records from the information to obtain because of inaccuracy, the trial judge concluded that the tip (confirmed in part) and subsequent police investigation provided reasonable grounds upon which the warrant could be granted. The search was reasonable and therefore the evidence was admissible. She said:

> Even if the hydro information is excised from the affidavit, however, it seems to me that there are sufficient grounds upon which the justice could have issued the search warrant. In fact, in those common cases where the hydro has been bypassed, there is no hydro consumption data at all.
>
> It seems to me in this case that the corroborated tip, the observations over four weeks on five separate occasions that the front windows were covered with heavy blinds or towels; that there was condensation on the front windows; that there was no condensation on neighbouring houses even where there was a similar window; that there was a vent on the side of the garage, even if it was covered or not being used, is reliable evidence that might reasonably be believed on the basis upon which the authorization could have issued.

The accused appealed to the Ontario Court of Appeal arguing the warrant was invalid and the evidence should have been excluded under s.24(2). Justice Rosenberg, authoring the unanimous appeal court judgment, agreed that the tip could not be used to form part of the grounds for the warrant; it was not *compelling*, the informer was not known to be *credible*, and police could only *confirm* some of the tip's details.

In discussing the compelling and corroborative nature of the tip Justice Rosenberg stated:

> The tip was not compelling for the following reasons. The informer only had a suspicion of illegal activity. It is significant that the informer describes his or her state of belief as follows: "Caller *feels* a suspect living at 522 Douglas Avenue *may* be cultivating marijuana."… There is nothing to indicate the informer's means of knowledge; certainly there is no indication the informer has been inside the house and observed criminal activity. Rather, the informer was merely describing circumstances that anyone watching the house might observe. And, it is not apparent that the informer had personally made the observations or was passing on an observation made by others.
>
> As to corroboration of the tip, the police were only able to confirm the broad outlines of information and some important information could not be confirmed. For example, the police did not see the vent running 24 hours and did not hear water running all the time. [The officer] went to the house four times and he did not observe any of this. Further, while the informer said there was no activity during the day and only activity late at night, the police did see some activity during the day (vehicles were present). They did not go to the house at night. Since the informer was not accurate about the daytime activity, I do not see how his or her nighttime observations could be relied upon. [paras. 17-18, emphasis in the original]

Rather than forming part of the grounds for the warrant, the Crimestoppers tip was used as part of the narrative to explain why police launched their investigation. "The substantial grounds for the officer's reasonable belief are the fruits of his own investigation," said Justice Rosenberg. "These grounds, omitting the hydro information, can be distilled to: the heavy blinds and towels, the vent, the condensation that was not observed on any other house in the area indicating a large heat source, and the officer's experience that a hydroponics marijuana operation requires lamps that produce large amounts of heat." In holding that this was sufficient upon which a warrant could be issued, the Court stated:

> Without the hydro information this was a close case. However, the police officer's observations, filtered through his experience with marijuana cultivation operations, provided sufficient information upon which the justice of the peace could have issued the warrant. The heavy blinds, the use of the towels, the condensation, and the vent all indicate the house and the garage contained a substantial heat source that the occupant was attempting to shield from view. A reasonable inference, based on the officer's experience, was that the house and garage were being used to grow marijuana. While there could be other inferences, the officer's investigation tended to dispel them. For example, the fact that the blinds, sheet and towels were present for over a month tended to minimize the possibility that the homeowner was merely engaged in some temporary lawful activity such as painting the house or conducting an extensive fumigation operation. There were no trades people's vehicles present that might explain renovations that might have called for the coverings on the windows. It may be that the occupant was preoccupied with his privacy, but this would not explain the condensation or the vent in the attached garage. The standard of reasonable grounds does not require proof beyond a reasonable doubt or even proof on a balance of probabilities. If the inference of specific criminal activity is a reasonable inference from the facts, the warrant could be issued. [para. 22]

The accused's conviction appeal was dismissed.

Complete case available at www.ontariocourts.ca

OFFICER NEED NOT KNOW 'SPECIFIC MODALITY' OF CRIME

R. v. Herman,
(2006) Docket:C44168 (OntCA)

During the accused's trial in the Ontario Superior Court of Justice the arresting officer testified he believed the accused was involved in the offence of possessing stolen property, but conceded he did not know if the accused actually used or only attempted to use the stolen credit card. The trial judge ruled the officer did not understand the specific crime and found he therefore did not have reasonable grounds to arrest the accused. The search that followed violated s.8 of the *Charter* and the evidence was excluded under s.24(2).

The Crown's appeal to the Ontario Court of Appeal was allowed. In a brief oral judgment, the Court ruled that the trial judge erred in finding that the officer did not have reasonable grounds. The trial judge imposed too high a standard on the arresting officer by requiring that he know the specific modality of the crime, especially since the arrest involved two suspects acting together.

Complete case available at www.ontariocourts.ca

PROWLER'S MOTIVE IRRELEVANT FOR TRESPASS AT NIGHT CHARGE

R. v. Priestap,
(2006) Docket:C43808 (OntCA)

Shortly after 9:00 pm the complainant went outside into her backyard to gather laundry when she noticed something hunched over by her deck. The shape moved in a crouched position into the front of her yard. She repeatedly asked "Who's there", and a male voice answered he was looking for something. After further questioning by the complainant, the man stood up and walked towards her, moved quickly by to the front of the house, and then ran away.

The frightened complainant called 911 and the police arrested the accused when he returned to his car parked on the roadway near the complainant's home. He admitted he was in the backyard and tried to provide a lawful excuse

that he was looking to expose a marihuana grow operation in the area. In the car police found a balaclava, duct tape, binoculars, flashlights, a tape recorder, a camera, and a telephone book. Several days later a pair of the complainant's underwear was found in some bushes three doors away.

At trial in the Ontario Court of Justice the accused was convicted of trespassing at night under s.177 of the *Criminal Code*. The trial judge rejected the accused's excuse and concluded he had prowled by "'stealthy traversing' in the sense of furtive, secret or clandestine moving about someone's property," including crouching near the house. There was no need to prove intent to commit an evil act.

The accused successfully appealed to the Ontario Superior Court of Justice. The appeal judge quashed the accused's conviction, holding the Crown needed to prove the accused not only prowled, but prowled with the intention to commit a specific evil act. The Crown then successfully appealed to the Ontario Court of Appeal arguing the appeal judge erred.

Section 177 of the *Criminal Code* states that a person commits an offence if they, "without lawful excuse, the proof of which lies on [them], loiters or prowls at night on the property of another person near a dwelling-house situated on that property." The movements in prowling itself suggest that the prowler is up to no good. It is not necessary for the Crown to prove the additional element of intent to commit another specific act for a conviction of prowling. Justice Lang, for the unanimous Ontario Court of Appeal, stated:

> The purpose of s.177 and its placement in the *Code* assist in interpreting Parliamentary intention. Section 177 was introduced to criminalize "peeping tom" conduct, conduct that the Supreme Court of Canada held was not a criminal offence…The s.177 trespassing at night offence is classified as a "Disorderly Conduct" offence under Part V of the *Code*, along with such offences as vagrancy, causing a disturbance, nudity and indecent acts.
>
> In enacting this section, Parliament specified that loitering or prowling would only be a criminal offence if committed at night near a dwelling house. It follows from this that, on a purposive interpretation of s. 177, Parliament did not intend to criminalize petty trespass, such as individuals entering on private property in the daytime in a manner that did not convey any malevolent purpose. Parliament, however, did intend to protect a resident by criminalizing the invasion of that person's residential property at night in a surreptitious manner when the intruder has no lawful excuse to explain his presence.
>
> This makes sense. Instinctively, an occupant or other observer seeing a trespasser moving stealthily or furtively near a home at night, absent other explanation, would conclude that the trespasser's conduct evidences an intention to avoid detection - perhaps because the trespasser has committed, or is going to commit, or is contemplating committing, a reprehensible act. Whatever the prowler's motive, however, it is the act of prowling itself that is an unwarranted invasion that causes anxiety to the observer, and not any reprehensible act that the trespasser may intend to commit, may have committed, or is contemplating committing.
>
> The prowler's purpose in prowling is not the focus of s. 177 because other provisions of the Code will likely address that purpose [such as attempts to commit crimes or possession of housebreaking instruments]. Moreover, inherent in prowling is the implication that the accused is up to no good. The accused is prosecuted under s. 177 only for prowling, and not for the underlying purpose of such activity.
>
> It is because the offence is prowling and not the contemplation of another specific crime, that Parliament explicitly placed the burden on the prowler to provide a lawful excuse for his or her conduct.
>
> I find further support for this interpretation from the structure of s. 177. It would be

illogical to reason that a prowler cannot be convicted unless the Crown proves the specific evil act intended by the prowler while, at the same time, loitering, a more innocuous activity, can lead to a conviction without proof of any additional specific intention.

The [accused] raises an additional argument that an interpretation of "prowl" without an added element of a specific evil goal would criminalize the conduct of many innocent individuals. To support this argument he raises hypothetical situations including children playing hide and seek in a neighbour's backyard, a teenager retrieving an errant Frisbee from a householder's backyard, or a golfer seeking to retrieve a wayward golf ball from a house adjacent to a golf course. These "innocent" activities, argues the [accused], could not have a "lawful" explanation because they offend against the *Trespass to Property Act*, R.S.O. 1990, c. T.21 (the TPA).

With certain common sense exceptions, the TPA makes it an offence, and therefore unlawful, for a person to enter enclosed residential premises unless the person has the occupier's permission. The onus of proving permission is on the intruder.

To begin with, it is unlikely that such "innocent" activities would take place during the night or that such individuals would stealthily enter into a residential backyard in a surreptitious manner to seek lost equipment. "Night" is defined in s. 2 of the Code as "the period between nine o'clock in the afternoon and six o'clock in the forenoon of the following day" and "dwelling house" is defined as "the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence". Applying those definitions to the hypotheticals raised by the [accused], it is unlikely that an "innocent" individual would prowl in a clearly demarcated residential backyard for such a purpose at night. Accordingly, in my view, this argument does not assist the [accused].

A plain reading of s. 177 leads to the conclusion that an accused commits an offence if he or she intentionally loiters or prowls at night near a residence on another person's property unless the accused establishes a lawful excuse for his or her conduct. The Crown is not required to prove that the accused also had an intention to commit a specific evil act. [references omitted, paras. 25-34,]

The Crown's appeal was allowed and the accused's conviction for prowling at night was restored.

Complete case available at www.ontariocourts.ca

PRESUMPTIVE YOUTH SENTENCING REGIME UNCONSTITUTIONAL

R. v. D.B.,
(2006) Dockets:C42719/C42923 (OntCA)

The accused, a young person under the *Youth Criminal Justice Act* (YCJA), plead guilty to manslaughter in the Ontario Superior Court of Justice. Since manslaughter is a "presumptive offence" under s.2 of the YCJA, an adult sentence is required unless the youth applies for a youth sentence and satisfies the court that such a sentence is appropriate in the circumstances. The accused applied to be sentenced as a youth, but Crown opposed the application.

The accused then challenged the constitutionality of the *YCJA* sentencing regime, including the need for a youth to prove that a youth sentence should be imposed rather than an adult sentence. The trial judge concluded that the presumptive sentencing provisions in the *YCJA* violated s.7 of the *Charter*. The Crown then brought an application to have the accused sentenced as an adult. The accused, however, was sentenced as a youth and given three years of intensive rehabilitative custody and supervision, 30 months committed to custody and the remainder served in the community.

The Crown appealed to the Ontario Court of Appeal arguing, in part, that the trial judge erred in determining the various *YCJA* sentencing provisions violated s.7 of the *Charter* and could not be saved by s.1.

Section 7 states that "everyone has the right to life, *liberty* and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Justice Goudge, writing the decision of the court, found that the accused's liberty interests were engaged by presumptive sentencing because young persons are exposed "to the harsher sentencing regime imposed on adults, rather than the youth sentencing regime." For young persons committing a presumptive offence an adult sentence is the norm while a youth sentence is the exception.

Having found the accused's liberty interests engaged, the Court then examined whether any principles of fundamental justice applied. A "principle of fundamental justice" must be (1) a legal principle (not merely a policy matter), (2) vital or fundamental to society's notion of justice, and (3) must be capable of being identified with precision and applied to situations in a manner that yields predictable results. In this appeal, the Court found there were at least two principles of fundamental justice in play; treating youths separately from adults and the burden of proof upon sentencing.

Fundamental Justice Principle #1: Treating Youths Separately

"It is a principle of fundamental justice that young offenders should be dealt with separately and not as adults in recognition of their reduced maturity," said Justice Goudge. "Put another way, the system of criminal justice for young persons must be premised on treating them separately, and not as adults, because they are not yet adults." This principle meets the criteria governing a principle of fundamental justice.

Treating youths separately is clearly a legal principle because there has been a system of youth criminal justice distinct from adult justice for more than 100 years in Canada (*Juvenile Delinquents Act*: 1908, *Young Offenders Act*: 1985, and *Youth Criminal Justice Act*: 2002). It is also fundamental to society's notion of justice. The *YCJA's* preamble as well as the *International Convention on the Rights of the Child*, of which Canada is a signatory, reflect its fundamental nature.

Finally, "the principle is sufficiently precise to yield a manageable standard against which to measure deprivations of life, liberty or security of the person." The norm is that the youth will presumptively be dealt with separately from adults in recognition of their reduced maturity. In individual cases, where it is shown that the youth should be dealt with as an adult, the principle will not be undercut.

Fundamental Justice Principle #2: Sentencing Burden Proof

The second principle of fundamental justice identified is that "the Crown must assume the burden of demonstrating beyond a reasonable doubt that there are aggravating circumstances in the commission of the offence that warrant a more severe penalty" during the sentencing phase. What this simply means is that the Crown bears the onus of justifying why a more serious punishment is necessary, not the other way around. However, s.72 of the *YCJA* places the onus on the youth to prove that a youth sentence (less severe penalty) is sufficient, rather than the onus being placed on the Crown that an adult sentence (more severe penalty) is appropriate. Furthermore, even if the burden imposed by s.72 is one of persuasion, not proof, the principle is nonetheless violated. The Crown can still have the more serious penalty of an adult sentence without discharging any burden of persuasion.

As a consequence of these two impugned fundamental principles, Justice Goudge concluded that the presumptive sentencing provisions violated the accused's s.7 *Charter* rights because they imposed on the young person the burden of satisfying the judge that they should get a youth sentence, rather than an adult sentence. Furthermore, the infringement could not be justified under the saving provisions of s.1. Although there are cases where the imposition of an adult sentence would be fit, these more serious outcomes are still available, but the onus should not be placed on the youth to escape them. If the onus is placed on the Crown to demonstrate why an adult sentence is appropriate, the objectives of accountability, public protection, and public confidence in the administration of justice can be achieved without violating the youth's s.7 rights. The Crown's appeal on the constitutionality of the *YCJA's* sentencing legislation was dismissed.

Complete case available at www.ontariocourts.ca

Editor's note:

In this case the Ontario Court of Appeal came to the opposite conclusion of R. v. K.D.T., 2006 BCCA 60, where the British Columbia Court of Appeal upheld the youth sentencing regime (see Volume 6 Issue 2, p. 13 of this publication).

KNOWLEDGE OF ACTUAL CRIME NOT NECESSARY FOR DETENTION

R. v. Stewart & Holder, 2006 BCPC 0664

Two police officers patrolling a laneway of a high crime area at 2:30 am saw two men up the block walking away from a building. Each man was carrying two cardboard boxes. There were no delivery trucks or other vehicles in the lane and the men were told to stop. The officers exited their car and noted the boxes were sealed with tape and had freezer condensation on them. The accused were told to place the boxes on the trunk of the police car so the officers could see their hands.

A label on the box was for a restaurant located about 30 ft away. An officer touched the box, found it very cold, and noted the boxes were marked "shrimp" and "salmon." The men were told to stay where they were while police determined where the boxes came from. They were told they were under arrest for break and enter and allowed to walk in the area of the police car, but were not searched nor handcuffed, nor asked for identification. One of the men said they found the boxes in a dumpster.

An officer went to the restaurant and found it had been the target of a break and enter. The men were then taken into custody and subsequently charged with break and enter, theft under, and possession of stolen property.

During a *voir dire* in British Columbia Provincial Court the accused argued they were subject to an arbitrary detention and unreasonable search and seizure and the evidence should be excluded under s.24(2) of the *Charter*. In determining whether the accused were arbitrarily detained, a two prong analysis was required. An investigative detention will not be arbitrary if the detaining officer has reasonable grounds to detain (articulable cause) and the detention is reasonably necessary in all the circumstances.

In this case, Judge Watchuk found the officer's grounds for the investigatory detention were as follows:

1. The time, 2:30 a.m., when the businesses in the area were closed.
2. The observation of two males walking away from the rear of a building with boxes in their hands.
3. There were no vehicles or delivery vehicles in the area.

4. The males did not appear to be employees.
5. The area is known to be a high property crime area.
6. The boxes looked to be frozen. They were sealed with clear tape and showed freezer condensation.
7. The labels on the boxes were from a business in the area.
8. The boxes were cold to the touch.

In the judge's view, these reasons met the requirement for reasonable grounds to detain; they formed a "constellation of discernible facts." She said:

> In arriving at my conclusions, I have considered that there was no knowledge of the officers of the alarm at Moxie's Grill, nor of any report of a break and enter. An investigative detention requires the constellation of reasonably discernible facts. It does not require police knowledge of an actual crime committed. That factor is one of the circumstances which must be considered, but it is not on its own determinative.

Furthermore, the detention was reasonably necessary in all of the circumstances. "The accused were not searched or handcuffed, nor was their identification requested," said Judge Watchuk. "The duration was brief, 10 to 15 minutes." The accused were therefore not arbitrarily detained.

As for the s.8 *Charter* breach application, the accused had no standing to argue their rights had been violated. Even though the boxes were in their possession, the property belonged to the restaurant, not the accused, and they therefore did not have a reasonable expectation of privacy in them. The Court recognized that this was similar to a car thief caught driving a stolen car. Since the car thief has no interest in the vehicle, they cannot argue their s.8 rights were infringed.

Even if the accused did have an expectation of privacy in the boxes, the search was not unreasonable. The information obtained from the boxes (labels and coldness) was in plain view. The evidence was admissible.

Complete case available at www.provincialcourt.bc.ca

JOINT POSSESSION BASED ON ALL CIRCUMSTANCES

R. v. Jones, 2006 NSCA 50

Police stopped a car after observing its occupants, the accused driver and young person passenger, wearing balaclavas. A police officer saw a plastic bag on the front passenger floor in plain view containing 18 tinfoil balls of crack cocaine valued at about $20 each. The accused was searched and police found a cell phone and cash, including four $20 bills.

At his trial in Nova Scotia Provincial Court the accused was convicted of possessing cocaine for the purpose of trafficking. An expert testified that the evidence was consistent with a "dial-a-dope" operation where traffickers use a car to deliver the drugs, disguises to conceal their identity, cell phones or pagers to communicate, a float to make change, and sometimes use young persons or prostitutes to make delivery to the purchaser. The trial judge concluded that the accused "had the requisite knowledge and control in that he was involved in a joint enterprise with his passenger to traffic cocaine."

The accused appealed to the Nova Scotia Court of Appeal arguing there was insufficient evidence to prove he was in possession. Justice Hamilton, writing the judgment for the Court, dismissed the accused's appeal. In first examining the law regarding joint possession she stated:

> Where a person is charged with an offence involving possession of a prohibited drug the Crown bears the onus of establishing that the accused had knowledge of the presence of the drug and that the accused maintained some "measure of control" over the drug…These elements may be proved by objective, relevant

and admissible facts from which a rational inference may be drawn.

……

With respect to joint possession, where a number of individuals are occupying a car containing drugs, the issue of knowledge and consent is often determined by the nature of the relationship and mutual activities of the occupants in relation to the car and its contents…

Evidence indicating a joint enterprise with respect to the drugs permits a finding of consent on the part of those who do not have physical possession of the drugs…[references omitted, paras. 8-11]

Rather than looking at all the circumstances together, the accused tried to explain away each factor by itself. This, according to Justice Hamilton, was the wrong approach. She held:

In attempting to impeach the conclusion reached by the judge, the [accused] attacks each piece of evidence: the balaclavas, the cell phone, the money, [the accused's] furtive glances at the car while being questioned by police submitting that taken separately they could be consistent with an innocent purpose and do not point to [the accused's] "possession" of the drugs.

This argument misses the point. It is the combination of all these factors which [the accused] says are benign, together with the expert testimony on the mechanics of a "dial-a-dope" operation, that the judge was required to, and did, consider, that lead to the conclusion that [the accused] and his passenger were involved in a joint enterprise to traffic in cocaine. [paras. 12-13]

The accused's appeal was dismissed.

Complete case available at www.canlii.org

'IN SERVICE' LEGAL ROAD TEST ANSWERS

1. (b), 2. (c), 3. (a), 4. (d), 5. (c), 6. (b)

COMPELLING, CREDIBLE & CORROBORATED TIP PROVIDES GROUNDS

R. v. Deol, 2006 MBCA 39

A police officer received information from a previously reliable and confidential informant, who was involved in the Canadian drug trade, that the accused was aboard Via Rail Train 2, Car 214, Room 2 and had left Vancouver destined for Sudbury. The informant explained the accused was a drug courier and currently in possession of two pieces of hand luggage containing 50 ounces of cocaine. Other details were provided such as a description of the accused, his record, and that he bought a one way ticket with cash. The officer contacted Via Rail and confirmed the accused purchased a one way ticket from Vancouver to Sudbury and was on Train 2, Car 214, Room 2 (a one person sleeping unit). The officer was also told that the train would be stopping in Winnipeg for about an hour. The police obtained a warrant to search the accused's sleeper room and any of his luggage. At the train station the police found one kilogram of cocaine in the accused's duffle bag located in his room.

At trial the judge found the warrant valid and convicted the accused for possession of cocaine for the purpose of trafficking, sentencing him to four years in prison. The accused appealed to the Manitoba Court of Appeal arguing, in part, that the information in support of the search warrant did not establish reasonable grounds largely because it did not disclose the informer's source of knowledge.

When a reviewing judge examines whether a search warrant could have been granted, they are not to substitute their own view for that of the authorizing judge. Rather, the reviewing judge simply determines whether a search warrant could have been issued based on the

"totality of the circumstances." During a review, the onus is on the accused to establish on a balance of probabilities that the reasonable grounds threshold has not been met. In discussing the totality of the circumstances standard, Justice Hamilton stated:

> Where the "totality of the circumstances" includes information from informers, the heart of the analysis to be done by the reviewing judge is an assessment of reliability, both of the informer and of the tip. Where the alleged presence of reasonable and probable grounds depends largely upon information supplied by a confidential source, certain concerns must be addressed before concluding that the tip was reliable and that reasonable grounds have been established. [para. 9]

This reliability assessment includes the following concerns:

(1) was the tip compelling (including the degree of detail and the specificity of the tip)
(2) was the source credible (including the informer's past performance)
(3) was the tip corroborated (including confirmation by other investigative sources)

In this case the trial judge found that the information was compelling, from a credible source, and had been corroborated, even though the informer's source of knowledge was not disclosed. As Justice Hamilton noted, "while information concerning the specific source of knowledge of the informer is desirable and can be key to the establishment of reasonable and probable grounds, it is not mandatory." The trial judge in this case was entitled to conclude the tip was compelling on the basis of its specificity.

In concluding the warrant was valid, Justice Hamilton wrote:

> When read as a whole, the judge's reasons demonstrate an understanding of the principles established… and a consideration of the facts to those principles. While the tip lacked specificity as to the informer's source of knowledge, on the basis of the compelling nature of the details of the tip, the reliability of the informer, and the extent of corroboration of material facts, the judge was entitled to conclude that the information in the affidavit "meets the criteria for a warrant and provide[s] reasonable and probable grounds for the exercise of the search warrant." His reasons demonstrate that he applied a higher threshold than the applicable test of whether the magistrate could have issued the search warrant. Obviously, therefore, the accused failed to demonstrate, on a balance of probabilities, that the warrant could not have issued. [para. 19]

The accused's appeal was dismissed.

Complete case available at www.canlii.org

DOCK IDENTIFICATION NOT NECESSARY TO PROVE IDENTITY

R. v. Bretti, 2006 NSCA 49

After clocking an Ontario rental car speeding 141 km/h in a 110 km/h zone, the driver and lone occupant of the vehicle was asked for his driver's licence. He produced an Ontario photo driver's licence in the name of "Brian Bretti." A summary offence ticket was issued directing Bretti to appear in court.

When the case was called in Nova Scotia Provincial Court a defence lawyer came forward and told the Court Bretti was present. However, the accused was not identified as the driver in Court by the officer. The accused was nonetheless convicted and his appeal to the Supreme Court of Nova Scotia was dismissed. He again appealed, this time to the Nova Scotia Court of Appeal, arguing the evidence was not sufficient to find identity had been established.

Justice Bateman, writing the Appeal Court's decision, first noted that dock identification is not essential to proving identity. In dismissing the accused's appeal, she stated:

> The accused here is Brian E. Bretti. The driver of the car identified himself as that person by providing a driver's license in that name when asked for his license. There was, therefore, no confusion on who was the accused before the court…. When the case was called in Provincial Court, Mr. Shatford came forward as defence counsel for the named accused and advised that "Mr. Bretti" was present. In the absence of a suggestion by Mr. Shatford that the Mr. Bretti in court that day had been mistaken for the accused Bretti and summonsed in error, it was reasonable for the judge to infer that the accused, Mr. Bretti, was the same Mr. Bretti in court and represented by Mr. Shatford that day…. Finally, there was uncontradicted evidence that the driver who when stopped by [the officer] and asked for "his" license, identified himself by Ontario photo driver's license as Brian E. Bretti. He was the lone occupant of an Ontario rental vehicle which was travelling substantially in excess of the posted speed limit. It was that person to whom [the officer] issued the summary offence ticket. The information that is on the summary offence ticket formed the subject matter or the charge before the court. The judge accepted [the officer's] evidence. There was then evidence from which the judge could reasonably conclude that it was the accused, Bretti, and no other, who committed the crime charged.
>
> The [accused] says, as well, that the identification is faulty because [the officer] did not testify that he compared the likeness on the photo driver's license with the appearance of the driver. The exculpatory premise for this argument would be that the driver of the speeding car, who was not Mr. Bretti, was in possession of Mr. Bretti's photo driver's license and falsely identified himself to [the officer]. This suggestion was not put to [the officer] on cross-examination nor advanced to the Court on Mr. Bretti's behalf. The Crown had made out a *prima facie* case of identity. The requirement is proof of the elements beyond a reasonable doubt, not proof beyond some fantastical possibility.

Complete case available at www.canlii.org

CANINE SNIFF & SEARCH OF BACKPACK UNREASONABLE

R. v. M.A.,
(2006) Docket:C42056 (OntCA)

A high school principal, concerned about the presence of drugs in his school, had offered a standing invitation for police to bring drug detector dogs into the school. Two years later, three police officers with a dog arrived at the school one morning and told the principal they wanted permission to go through the school, which was immediately granted. After students were instructed to remain in their classrooms, the police randomly searched the school.

In a small gymnasium the dog alerted on a backpack lying unattended next to a wall. An officer looked through the contents of the backpack and found 10 bags of marihuana, 10 "magic mushrooms", a pipe, lighter, rolling papers, and a roach clip. As well, the accused youth's wallet and identification were in the backpack. He was charged with possession of marihuana and psilocybin for the purpose of trafficking.

At trial in the Ontario Court of Justice the judge concluded there were two searches: (1) the search using the drug dog and (2) the search of the backpack. He also found the search was not conducted by school authorities, but that the police conducted the search without reasonable grounds. Both searches, he held, were unreasonable. The trial judge also ruled the police search was disguised as a school search and even if it was a school search, there were no reasonable grounds to believe drugs would be found. The evidence was excluded under s.24(2).

The Crown appealed to the Ontario Court of Appeal arguing, in part, that the police were acting as agents of the school, that the dog sniff was not a search (but if it was it was reasonable), and that the backpack search was reasonable.

Police Acting As Agents

Justice Armstrong, authoring the unanimous judgement, ruled that the search was a police search. The police had not been requested by any school authority that day, had not given notice of their intention to search, and neither the principal nor any teacher played an active role in the search. "The fact that some two years earlier the school principal had issued a standing invitation to the police to search the school with the assistance of a sniffer dog does not, in my opinion, turn the search…into a search by school authorities in police uniforms," said Justice Armstrong.

The Search

Justice Armstrong found it unnecessary to decide whether the dog sniff alone amounted to a search. Rather, he concluded the sniff and backpack search fell within the meaning of a search under s.8 of the *Charter*.

Students have a reasonable expectation of privacy in the contents of their backpacks, much like an adult's privacy in the contents of a briefcase. Students backpacks are not searched during the normal course of a school day nor do they expect their backpacks to be searched. The dog was a physical extension of its handler and was connected to the physical search of the backpack. Since the search was warrantless it was *prima facie* unreasonable and the Crown could not rebut this presumption. Further, the search was randomly conducted with the entire student body held in detention. Justice Armstrong wrote:

> To facilitate the search, the entire student population was detained in their classrooms for a period of one and a half to two hours. Although it was the principal who made the announcement to the student body to remain in the classrooms, it is my opinion that a review of the record indicates that he did so to accommodate the police search. There was no credible information to suggest that a search was justified. There were no reasonable grounds to detain the students…. "An officer cannot exercise the power to detain on a hunch, even a hunch borne of intuition gained by experience."
>
> The Supreme Court of Canada has held that there must be a clear nexus between the individual to be detained and a recent or on-going criminal offence…
>
> Quite apart from the detention of the entire student body, of more significance is the unauthorized warrantless random search itself.
>
> In my view, the Crown has failed to rebut the presumption that the search was unreasonable. Even if the presumption of unreasonableness did not apply, it is my opinion that there were no grounds upon which to justify a random search of the kind that was conducted in this case. [references omitted, paras. 57-60]

The evidence was inadmissible and the appeal was dismissed.

Complete case available at www.ontariocourts.ca

VEHICLE SEARCH FOLLOWING PASSENGER'S ARREST OK

R. v. Condon, 2006 BCCA 318

Police received an anonymous tip of a drug deal about to take place. They were provided with a location, the names of two people involved, and reference was made to a red van. Police knew the names provided in the tip. One was a drug dealer who supplied cocaine to traffickers and lived in a lakeside cabin accessible only by boat; the other was having a

relationship with him. Both were on conditional sentence orders for possession for the purpose of trafficking and were not to have contact with each other.

About 40 minutes after receiving the tip police arrived at the location—near a boat launch at a lake—and saw a red van belonging to a drug user. About 15 minutes later a black truck arrived and a boat was seen travelling across the lake towards the boat launch from the direction where the drug dealer named in the tip lived. When the boat arrived on shore, people were seen talking and hugging and the boat then headed back out onto the lake.

Three people got into the red van while two entered the black truck. Both vehicles were stopped by police and the occupants arrested. The driver of the black truck had been arrested several months earlier for drug trafficking and the passenger, the accused, was a cocaine user and "mule". The black truck was searched at the scene and two plastic baggies of cocaine and other drug paraphernalia were found. The truck was then towed to a police office, searched further, and more cocaine was found.

At trial in British Columbia Provincial Court on charges of cocaine possession and possession for the purpose of trafficking the judge found the accused's arrest lawful but the vehicle search unreasonable. Although the tip was anonymous, it was compelling. It provided a specific date, time, location and names of the people involved in the drug transaction. The, search, however was not justified the judge ruled. The occupants were under arrest and could not destroy or tamper with evidence in the truck so a warrant should have been obtained. The evidence was excluded and the accused was acquitted, but the Crown appealed to the British Columbia Court of Appeal.

The Arrest

The Crown submitted the trial judge was correct in concluding the arrest was lawful while the accused argued the tip was not specific enough and there was an insufficient connection between the tip and the black truck. The accused asserted that her arrest was premised on "guilt by association" and the police did not see any transfer of drugs between the people at the boat launch. At most, she contended, the police had enough for an investigative stop which would preclude a vehicle search for contraband.

Justice Kirkpatrick, stating the opinion of the British Columbia Court of Appeal, rejected the accused's argument. "It is clear from the totality of the circumstances that there were both objective grounds for believing that a drug transaction had occurred and that the police had the requisite subjective belief that the persons observed at [the lake] were involved in the drug deal about which they had been informed," she said.

The Search

As for the search, Justice Kirkpatrick found, it was lawful as an incident to arrest. A search incident to arrest may be undertaken for the purpose of protecting the police, protecting evidence, or discovering evidence. Although the police do not need reasonable grounds to conduct the search they do need an objectively valid reason related to the arrest. Vehicles, if in an arrestee's immediate surroundings, may be included within the scope of a search incident to arrest. In this case, the search of the black truck was for the purpose of discovering evidence. In finding the search truly incidental to the accused's arrest Justice Kirkpatrick said, "In my opinion, having regard to the details of the tip, the observations made at the…boat launch, and the police officers' independent knowledge of the individuals observed, there was more than a reasonable basis for [the] search of the truck."

The appeal was allowed, the acquittal set aside, and a new trial ordered.

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

ONLY ONE VALID PURPOSE IN MIND REQUIRED WHEN SEARCHING

R. v. Caprara,
(2006) Docket:C41856 (OntCA),

The accused was stopped by police and provided a false name. He was arrested for failing to identify himself under Ontario's *Highway Traffic Act* and for attempting to obstruct justice. The car he was driving belonged to his brother. Police said they searched the car looking for evidence of the accused's true identity, but instead found drugs.

At trial in the Ontario Superior Court of Justice on four charges of possession of controlled substances for the purpose of trafficking the judge found the stop was made for legitimate road safety concerns. The arrest was lawful and the search was incident to the arrest. Further, the judge ruled, even if the search wasn't for the purpose of finding identifying documents as the police testified, but rather to look for drugs, the search would nonetheless have been lawful as an incident to arrest because the police had reason to believe drugs might be found in the car.

The accused appealed to the Ontario Court of Appeal arguing, in part, that the search for evidence of identity was a pretext for a drug search that they had no right to search for since he had not been arrested for any drug related offence. He also submitted that the search for identification evidence was unnecessary because the police already knew his identity before commencing the search. He further contended the police did not have a reasonable basis for thinking there might be identification evidence in the vehicle. This, the accused argued, rendered the search a breach of his s.8 *Charter* right.

The Court of Appeal disagreed with the trial judge's analysis that the search for drugs was lawful as an incident to arrest:

> On the facts of this case, the police had no right to search for drugs as an incident of the [accused's] arrest because the [accused] had not been arrested for a drug or drug related offence; he had been arrested for failing to identify himself and for attempting to obstruct justice by providing the police with a false name. Accordingly, any search for evidence incident to his arrest had to be restricted to evidence of identification; it could not spill over into a search for drugs… [para. 7]

However, even if the police really had two purposes for searching the car (identity and drugs) as long as one purpose was proper as an incident to arrest the search was lawful. The search for identification evidence was reasonable. The police were not sure of the accused's identity and "it was perfectly reasonable for them to think that there might be a wallet, a briefcase or perhaps a cardholder in the car containing evidence of the [accused's] identity," said the Court. "Furthermore, the area in which the drugs were found (around the floor mat underneath the armrest that separated the two front seats) was one where a wallet or cardholder could reasonably be expected to have been located."

The search for identification evidence was a valid search incident to arrest and did not violate the accused's right to privacy protected by s.8. The appeal was dismissed.

Complete case available at www.ontariocourts.ca

Note-able Quote

Nothing makes a person more productive than the last minute-author unknown

PAT DOWN OF HANDCUFFED DETAINEE REASONABLE

R. v. Duong, 2006 BCCA 325

The police drove by a car parked in a high property crime area known for theft from autos and theft of autos and saw a man seated in the driver's seat looking around inside the vehicle. Twenty minutes later the same vehicle was seen by the same officers parked at the same location but now the man was seated in the passenger's seat looking out the window as if waiting for someone or something.

The officer approached the car, showed his badge, and asked the accused if he had a driver's license. The accused said "yeah" and made a quick movement under the driver's seat and pulled out a wallet. The officer saw a car stereo in plain view with cut wires in the back of the car. When asked who owned the car the accused, in a slow and nervous fashion, said it was his "buddy's." When asked whose stereo it was, the accused's eyes widened, his mouth dropped, and he again replied it was his "buddy's."

The officer didn't believe the accused and asked him out of the car. He was placed under investigative detention for the possible stolen stereo. As he exited the car, the accused clenched his right hand and took an aggressive stance. Initially hesitant, the accused complied with the officer's instruction to place his hands on the car. The officer asked him if he had any weapons or anything sharp on him. The accused responded "No" in a loud and angry voice. He was then handcuffed and patted down for weapons.

As the accused's midsection was patted down, he changed his position and moved closer towards the car. He was repositioned and the officer checked the accused's right pocket after feeling a hard bulge which turned out to be a roll of money. It was left in his pocket. Another bulge on the accused's right hip turned out to be a cell phone. The accused pushed his body against the car when the officer began to pat down his left side. The officer moved the accused away, continued the search, and felt a hard, solid object about 4" by 3" in his left front pocket. Thinking the object might be a knife used to cut stereo wires, the officer reached into the accused's pocket and pulled out a white envelope containing 25 flaps of heroin and cocaine.

At his trial on charges of possession of heroin and cocaine for the purpose of trafficking the judge concluded the officer had articulable cause to detain the accused for the investigation of a potential stolen stereo. The pat down search was proper as it was conducted for officer safety. There were no *Charter* breaches and the evidence was admissible. The accused then plead guilty to the charges, but appealed to the British Columbia Court of Appeal arguing the detention was arbitrary and the search for officer safety was not reasonable.

The Detention

The accused contended that the trial judge only assessed the officer's subjective belief without looking at the objective reasonableness of it. Justice Rowles, authoring the unanimous Appeal Court judgment, rejected this argument. Although the articulable cause standard requires both a subjective and objective element, the trial judge did consider both. The officer's subjective belief that the car stereo might be stolen was not a hunch but was grounded in his observations and knowledge he had that provided the objective foundation for his belief.

First, the officer saw a stereo with cut wires in the back of the car. His experience told him that car stereos are often stolen by pulling them out and cutting the wires. "This observation, in and of itself, presented an immediate and objectively reasonable concern that a property crime had been committed," said Justice Rowles.

Second, the officer "knew that the area in which these events were taking place had a high incidence of property crimes, specifically thefts from cars and stolen cars."

And finally, the accused's "demeanour changed noticeably when answering questions. His initial response about the driver's license was 'quick'. His subsequent responses about the ownership of the car and the stereo were 'slow and nervous'. His facial expression also changed. [The officer] was able to articulate his concerns regarding the change in [the accused's] pattern of speech, facial expressions and demeanour in a way that the trial judge understood and accepted as reasonable."

Justice Rowles ruled the trial judge did not err in concluding the officer had articulable cause to detain the accused.

The Search

The accused also argued that the search was unreasonable because a brief investigative detention does not permit a search for evidence and any safety concern must be objectively verifiable, not merely premised on mere intuition, a hunch, or curiosity. He suggested there were no objectively discernible facts to support the officer's safety concerns and that the pat down search was simply done to search for contraband.

In summarizing the law on searches incident to investigative detention, Justice Rowles wrote:

> There is no dispute that police officers are entitled to take reasonable steps to minimize the risks they face in the performance of their duties…Where a police officer has reason to believe that his or her safety is at risk in the course of an investigative detention, the officer is authorized to conduct a protective pat-down search…A "frisk search" for weapons is a relatively brief and non-intrusive procedure… Moreover, the reasonableness of a police officer's decision to conduct a search for officer safety cannot be judged by a standard that would second-guess the officer's actions with perfect hindsight…The "police perception of reasonable necessity depends very much on the particular circumstances in which the police officer finds himself"… [references omitted, para. 54]

Here, the officer had bona fide safety concerns rendering the pat down search justified. It was entirely reasonable for the officer to infer the accused, the sole occupant of the car containing an apparently stolen stereo, might have a knife used to cut the car stereo wires. Only when the officer felt a hard object that could be a weapon did the search progress beyond a basic pat down.

The fact the accused was handcuffed did not make the search unnecessary. Handcuffing does not necessarily eliminate officer safety concerns, either during the search or after the detainee is released. The officer thought that if the accused had a knife in his pocket he still might have been able to access it even with the handcuffs on. The search in this case was limited in scope and reasonably necessary to ensure the officer's safety. The accused's appeal was dismissed.

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

'HYPOTHETICAL' PERSON ANALYSIS DOES NOT REBUT OVER 80mg% EVIDENCE

R. v. Cave, 2006 NSCA 52

The accused was stooped driving his motorcycle and provided two samples of his breath, both registering 100mg%. He was charged with impaired driving and over 80mg%. At trial in Nova Scotia Provincial Court an expert toxicologist testified that the accused's blood alcohol content straddled the legal limit based on

calculations using the absorption and elimination rates of an average person of the accused's weight and drinking pattern. Based on these average rates, the expert concluded that the accused's blood alcohol at the time of driving would have been somewhere between 32mg% and 112mg%.

The trial judge accepted the expert's testimony as evidence under s.258(1)(d.1) of the *Criminal Code* tending to show the accused's blood alcohol level did not exceed 80mg%. Section 258(1)(d.1) states that a reading over 80mg% is proof that blood alcohol concentration exceeds the statutory legal limit unless there is "evidence tending to show that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed did not exceed eighty milligrams of alcohol in one hundred millilitres of blood." The accused was acquitted, but the Crown appealed the over 80mg% to the Nova Scotia Court of Appeal arguing the expert's testimony was without foundation.

Justice Fichaud, authoring the unanimous judgment, allowed the Crown's appeal. The expert's evidence was based on the statistical average absorption rates and not based on any tests performed on the accused. In rejecting the expert's testimony as "evidence tending to show," Justice Fichaud stated:

> [The expert's] opinion was not based on any test of [the accused]. It was not based on [the accused's] alcohol tolerance, or his rates of absorption and elimination. It was based on population averages, applied to a hypothetical individual of [the accused's] weight who drank alcohol in the amounts and times stated by [the accused]. In my view, [expert's] testimony is without foundation and cannot rebut the statutory presumption…[para. 15, reference omitted]

A new trial was ordered.

Complete case available at www.canlii.org

DID YOU KNOW…

…that as of February, 2006 the RCMP was 23,466 strong, an increase of 905 over 2005. Personnel breakdown, including all ranks and civilians, was as follows[2]:

Position	2004[3]	2005[4]	2006	Change 2005-2006
Commissioner	1	1	1	0
Deputy Commissioner	5	7	7	0
Assistant Commissioner	24	24	25	1
Chief Superintendent	56	52	51	-1
Superintendents	135	143	149	+6
Inspectors	331	346	347	+1
Corps Sergeant Major	1	1	1	0
Sergeant Major	7	6	5	-1
Staff Sergeant Major	1	5	5	0
Staff Sergeants	704	742	780	+38
Sergeants	1,568	1,616	1,666	+50
Corporals	2,777	2,928	2,949	+21
Constables	10,039	10,136	10,265	+129
Other regular members	4	n/a	n/a	0
Special Constables	n/a	82	76	-6
Civilian Members	2,585	2,605	2,813	+208
Public Servants	4,001	3,867	4,326	+459
Total	**22,239**	**22,561**	**23,466**	**+905**

EXPERT OPINION BASED ON POPULATION AVERAGES NOT EVIDENCE TO THE CONTRARY

R. v. Gibson, 2006 NSCA 51

The accused was stopped driving his all terrain vehicle on a highway and provided two samples of his breath, registering readings of 120mg% and 100mg%. At trial in the Nova Scotia Provincial Court an expert in the

[2] Source: http://www.rcmp-grc.gc.ca/html/organi_e.htm [July 9, 2006]
[3] Source: http://www.rcmp-grc.gc.ca/html/organi_e.htm [May 17, 2004]
[4] Source: http://www.rcmp-grc.gc.ca/html/organi_e.htm [December 23, 2005]

absorption and elimination of alcohol testified that the accused's blood alcohol content straddled the legal limit based on calculations using the absorption and elimination rates of an average person of the accused's weight and drinking pattern. Based on these average rates, the expert concluded that the accused's blood alcohol at the time of driving would have been somewhere between 40mg% and 105mg%.

258(1)(d.1) Criminal Code
…where samples of the breath of the accused or a sample of the blood of the accused have been taken as described in paragraph (*c*) or (*d*) under the conditions described therein and the results of the analyses show a concentration of alcohol in blood exceeding eighty milligrams of alcohol in one hundred millilitres of blood, evidence of the result of the analyses is, in the absence of evidence tending to show that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed did not exceed eighty milligrams of alcohol in one hundred millilitres of blood, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed exceeded eighty milligrams of alcohol in one hundred millilitres of blood.

The trial judge accepted the expert's testimony as evidence tending to show the accused's blood alcohol level did not exceed 80mg% under s.258 (1)(d.1) of the *Criminal Code*. Section 258(1) (d.1) states that reading over 80mg% is proof that blood alcohol concentration exceeds the statutory legal limit unless there is "evidence tending to show that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed did not exceed eighty milligrams of alcohol in one hundred millilitres of blood." The accused was acquitted and the Crown's appeal to the Nova Scotia Supreme Court was dismissed. The Crown then appealed to the Nova Scotia Court of Appeal.

Justice Fichaud, authoring the unanimous judgment, allowed the Crown appeal. The expert's evidence was based on statistical average absorption and elimination rates (general population) and not on any tests performed on the accused. In rejecting the expert's testimony as "evidence tending to show," Justice Fichaud stated:

> …An expert opinion, based only on average tendencies of the population instead of the accused's rates of alcohol absorption or elimination, is without foundation. As stated in *Boucher*, it is not "evidence to the contrary" under s. 258(1)(c). Neither, in my view, can it be "evidence tending to show" the accused's lower blood alcohol concentration under s. 258(1)(d.1). [para. 19]

The expert's opinion was based on general population averages applied to a hypothetical person of the accused's weight rather than his personal alcohol tolerance, absorption and elimination rates. The lower courts erred in law by ruling the expert's evidence was a basis for the acquittal. A new trial was ordered.

Complete case available at www.canlii.org

FLIGHT & MANNER OF DRIVING HAD EXPLANATION OTHER THAN IMPAIRMENT

R. v. Lannigan, 2006 PESCAD 10

Police responded to a complaint that a male in a black pickup truck was looking for a fight on Main Street. The truck was spotted, the driver recognized, and officers attempted to stop him. The accused took off, driving dangerously and in a reckless manner eventually abandoning the vehicle and fleeing on foot. A police dog tracked the accused for 45 minutes to a residence located more than one kilometre away. The accused was lying on the couch in the house, his speech was slurred, eyes bloodshot and watery, and he had a strong smell of alcohol on his breath. His ability to walk, however, appeared normal.

The accused was arrested for fleeing police, dangerous operation, and impaired driving. Breath samples were demanded but the accused subsequently refused to provide a sample. An additional charge of refusing a breath sample was added. At trial in Prince Edward Island

Provincial Court the accused was convicted of all charges except for the refusal. In the trial judge's view, the accused's physical symptoms and manner of driving provided a basis for the impaired charge. However, she did not note that the symptoms were not observed until 45 minutes after driving.

An appeal by the accused to the Prince Edward Island Supreme Court was dismissed. The appeal court judge found the Crown's case had been made out. The accused had drank at a bar, drove erratically, had indicia of impairment, and provided no explanation of what happened from the time of driving until his arrest. The accused then appealed the impaired driving conviction to the Prince Edward Island court of Appeal

Chief Justice Mitchell wrote the judgment for the Court. He first summarized the Crown's onus in proving an impaired driving charge:

> In order to obtain a valid conviction on the charge under s. 253(a), the Crown had to adduce evidence sufficient to prove beyond a reasonable doubt that at the time of driving the [accused's] ability to operate a motor vehicle was impaired by alcohol. At no time was there an onus on the [accused] to adduce evidence to prove he was not impaired by alcohol at the time of driving. He was entitled to rely on his constitutional right to be presumed innocent. [para. 24]

In this case, Chief Justice Mitchell found the facts did not provide proof beyond a reasonable doubt that the accused was impaired at the time he was driving. There was no evidence about what the accused had to drink at the bar. Even if he did drink alcohol that did not mean he was driving while his ability to do so was impaired by alcohol. "It is not an offence to drive after having consumed alcohol," said Chief Justice Mitchell. "It is only an offence if the consumption results in some impairment of the ability to drive."

As for the accused's manner of driving Chief Justice Mitchell stated:

> The manner of driving in this case is consistent with an explanation other than impairment by alcohol. The [Summary Conviction Appeal Court judge] seems to rely to some extent on the [accused's] flight and manner of driving as evidence of driving while his ability to do so was impaired by alcohol… However, in this case the fact that the [accused] fled from police cannot be used to infer that his ability to drive was impaired by alcohol at the time of driving. The flight is consistent with another explanation. It could have been a combination of trying to avoid the police after being involved in a fight and the road conditions at the time. It was in connection with his trying to start a fight that the police were called in the first place. Furthermore, the [accused] told [the witness] when he arrived at her home that he had been involved in a fight and that the police were looking for him. He did not say they were looking for him because he was driving while impaired. There was no evidence of improper driving until the police tried to stop the [accused]. The police officers did not testify there was anything wrong with his driving when they first spotted him. The dangerous driving began when they tried to stop him. [para. 28]

Nor did the fact that the accused was impaired by alcohol forty-five minutes after he was driving provide a sufficient basis for concluding that his ability to operate a motor vehicle was impaired by alcohol at the time of driving. There was the possibility that he was not impaired when he first arrived at the house and only became impaired afterwards.

The accused's conviction was set aside and acquittal was entered.

Complete case available at www.canlii.org

Note-able Quote

Abe Lincoln was once asked, 'What would you do if you had eight hours to cut down a tree?' He replied, 'I'd spend the first four hours sharpening the saw—Steven Covey