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.

SEASON'S GREETINGS

The staff at the Police Academy would like to wish our **"In-Service:10-8"** readers and their families all the best for this holiday season. Once again, it has been a pleasure serving British Columbia's police officers, and our other readers across Canada, by bringing them up-to-date on many of the issues facing them daily as they go about protecting and serving the citizens of their communities. May you have a safe and blessed Christmas and all the best in 2009. And remember, "In God we trust…all others we run on CPIC!"

POLICE INVESTIGATIVE TECHNIQUES & PROCEDURES CERTIFICATE PROGRAM

The Police Academy at the Justice Institute of British Columbia (JIBC) has developed and implemented a credit course series with an evaluation process in each course. Upon successful completion of the series of courses, learners will receive a JIBC Certificate of Achievement, called the Police Investigative Techniques and Procedures Certificate.

When learners complete this new 6 course, 30-day certificate, they will have the ability to apply an informed, modern approach to investigating criminal offences. Completion of the course will allow them to be assigned to investigate most criminal offences as well as broaden their understanding of investigative procedures and processes. This certificate is suited for officers who are currently serving, or are planning to enter, an investigative unit at either their home agency or as part of an integrated team.

The Rationale

The Academy has developed this Certificate as part of a four-pronged strategy:

1. Taking existing, well honed skills-based courses that are currently being delivered to serving police officers to create the Certificate, which may be able to ladder into a future degree path program.
2. The Certificate will be a short, student/client-centered credential that responds to the needs of officers and departments to have a credential that is focused on professional accreditation.
3. The Certificate was created in response to the increasing need for officers to justify and articulate actions taken during the course of an investigation and for the JIBC to provide current, relevant training and education to front line officers charged with investigating serious crimes.
4. Officers who enrol in this program will be given credit for courses previously taken at the JIBC that are now contained in the Certificate program as well as be given exposure to other advanced courses being offered through the Police Academy.

This new JIBC certificate will be offered to serving members of all municipal and tribal police departments as well as members of the RCMP. Initially the certificate will be delivered at the JIBC's New Westminster and Victoria Campuses. This may lead to the Certificate being offered on a more regional scale throughout western Canada at a later date.

For further information on the Certificate Program please check out the Police Academy's website:

www.jibc.ca/police

HIGHLIGHTS IN THIS ISSUE

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

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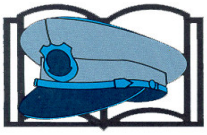
'IN SERVICE: 10-8' e-LETTERS TO THE EDITOR



"I have been getting your publication second hand for about a year. I really enjoy it. It is very well written and the entire content is extremely timely and useful. Keep up the great work!." - **Police Sergeant, Manitoba**

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"I just encountered an old copy of your newsletter online while researching some case law for a student/friend and have spent most of my afternoon reading totally unrelated articles and cases of interest ... Thanks for a great publication." - **Park Warden, Saskatchewan**

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"I love reading [In Service:10-8] and it keeps me up to date on all issues. It's an awesome resource." - **Police Detective, Ontario**

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"I would like to be added to the distribution list for the "In Service:10-8" bulletin. Someone forwarded me a copy of [a previous] edition and I found it very interesting and well-written; I particularly appreciated the 'Legally Speaking' section." - **Criminal Investigations, Canada Border Services Agency, Quebec**

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"[W]ould still appreciate being on the electronic mail list. Thanks again, and keep up the good work. Obviously, lots of coppers, young and old, continue to seek info and can't always get it from their own agencies." - **Police Sergeant, Manitoba**

POLICE LEADERSHIP APRIL 10-13, 2011

Mark your calendars!!! The British Columbia Association of Chiefs of Police, the Ministry of Public Safety and Solicitor General, and the Justice Institute of British Columbia, Police Academy are hosting the Police Leadership 2011 Conference in Vancouver, British Columbia. This is Canada's largest police leadership conference and will provide an opportunity for delegates to discuss leadership topics presented by world-renowned speakers.

www.policeleadershipconference.com

FINGERPRINT EVIDENCE ALONE, ABSENT AN EXPLANATION, PROVES GUILT

R. v. Blair, 2008 BCPC 270

The accused was charged with breaking and entering a garage and committing theft. The garage, located on a very rural, ten acre parcel of land well outside the main city, was adjacent to the road. The accused was not known to the owner of the property nor did he have an invitation or right to be on the property. His fingerprint was found just below a break in a window, which was believed to be the point of entry. The break in the window would provide access to a latch that, if lifted, would allow the window to slide open.

At trial in British Columbia Provincial Court the accused did not explain why his fingerprint was on the window. The judge concluded that the Crown had proven a *prima facie* case for conviction. Having done so, the judge drew an adverse inference from the accused's failure to offer an explanation for the presence of his fingerprints and he was convicted.

Complete case available at www.provincialcourt.bc.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. See page 31 for the answers.

1. What was the most popular method to commit homicide in Canada in 2007?
   (a) Stabbing;
   (b) Shooting;
   (c) Beating;
   (d) Strangulation;
   (e) Fire.

2. Which province had the highest homicide rate in 2007?
   (a) British Columbia;
   (b) Alberta;
   (c) Saskatchewan;
   (d) Manitoba;
   (e) Ontario;
   (f) Quebec.

3. A no knock entry pursuant to a s.11 of the *Controlled Drugs and Substances Act* search warrant requires prior-authorization by a Justice of the Peace to omit announcement.
   (a) True
   (b) False

4. In assessing whether a police officer has reasonable grounds to make a breath demand it is an error for a judge to look at each indicia of impairment in isolation.
   (a) True
   (b) False

5. The odour of freshly-smoked marihuana emanating from a vehicle objectively supports, at minimum, a reasonable suspicion that the driver and / or passenger are engaged in criminal activity (possession of marihuana).
   (a) True
   (b) False

KNOWLEDGE OF GUN UNDER DRIVER's SEAT PROVEN BY CIRCUMSTANTIAL EVIDENCE

R. v. Ali, 2008 ONCA 741

Police searched the accused's vehicle, in which he was the sole occupant, after he was apprehended driving a car a short distance from his home. They found a loaded, sawed-off 12 gauge shotgun under the driver's seat. The gun was resting on its side with the stock, which was not visible from the driver's seat, facing towards the front of the driver's seat with the barrel pointed towards the back of the car. The gun was readily accessible by a simple reach of the driver. No further ammunition or associated paraphernalia was found in the car or in a later search of the accused's home.

At trial in the Ontario Superior Court of Justice the accused conceded he had the necessary degree of control over the shotgun to establish possession under s. 4(3) of the *Criminal Code*, but his knowledge of the shotgun was not adequately proven. The trial judge disagreed. She rejected several alternative explanations the accused suggested in an effort to raise a reasonable doubt, instead inferring the accused knew the shotgun was under the driver's seat by considering the cumulative force of several items of circumstantial evidence, including:

- the gun was located under the driver's seat of the car in a position that would give the driver the most ready access to the stock of the firearm;
- the accused was the only person who drove the car on the day and evening prior to, and the day of, his arrest and the finding of the gun;
- the household routine was that the accused was the primary, if not the exclusive driver of the car; and
- the inherent improbability of another person secreting the weapon under the driver's seat in light of the nature of the item and its ready visibility from the rear seat and window of the vehicle.

The accused was convicted of several firearms offences.

The accused then appealed to the Ontario Court of Appeal arguing the evidence failed to prove the critical element of knowledge of the presence of the sawed-off shotgun in the motor vehicle. The Court, however, disagreed. "The inference drawn by the trial judge of the essential element of knowledge was reasonably open to her on the evidence taken as a whole," said the Court. "She did not impose upon the [accused] the burden of proving a reasonable or possible alternative explanation for the presence of the firearm in the motor vehicle." The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

DRIVING WITHOUT REASONABLE CONSIDERATION PROVEN BY WARN ON ASD

R. v. Dahlquist, 2008 BCPC 241

The accused was stopped at a roadblock about midnight by police checking for driving infractions. An officer immediately noted that his eyes were bloodshot and watery and he had a mild to moderate odour of liquor on his breath. She read the accused the approved screening device demand and he blew a "Warn", which indicated his blood alcohol level was between 50mg% and 100mg%. The officer issued a violation ticket under s.144(1)(b) of the *Motor Vehicle Act,* driving without reasonable consideration for other persons using the highway, and also served him with a s.215 *Motor Vehicle Act* 24 hour driving prohibition. He surrendered his licence and his vehicle was towed away. The accused pled not guilty in British Columbia Provincial Court.

At trial there was no direct evidence presented as to the accused's driving ability. The trial judge, however, found that s.144(1)(b) focuses on the duty of care expected of a driver and not the actual manner of driving, as does s.144(1)(a). In deciding what the standard of care of a reasonable driver is in relation to driving and alcohol, JJP Gordon found it was s.215 of the *Motor Vehicle Act*. In so deciding, the judge stated:

> Section 215 provides for administrative penalties for drivers whose ability to drive are affected by alcohol. The consequence of an officer having reasonable and probable grounds for believing a

driver is affected by alcohol is a 24 hour driving prohibition (an administrative penalty). The Superintendant of Motor Vehicles may further administratively suspend the driver's privileges as a result of the roadside suspension. Can section 215 be considered a marker of the duty of a reasonable driver.

I conclude that it does. I draw the inference that the Legislature has in effect legislated that the minimum standard of care of a reasonable person driving a motor vehicle on a highway is breached if the person drives with a blood alcohol level exceeding 50 mg of alcohol in 100 ml of blood. It is a legislative signal of the minimum duty of care of a driver, a breach of which is a 24 hour driving prohibition and a possible lengthier suspension imposed by the Superintendant. [paras. 11-12]

"[I]t is a reasonable inference to draw that the Legislature has in effect legislated that the minimum standard of care of a reasonable driver using the highway is breached if the person drives while his or her ability to do so is affected by alcohol. It is sufficient evidence of being so affected if the driver is found to have at least 50 mg of alcohol in 100 ml of his or her blood."

In concluding that an ASD warn was sufficient to found a conviction for driving without reasonable consideration, JJP Gordon stated:

> I conclude…that section 215 does set out a standard of care relevant to this case and that standard is breached if a person drives on a highway with a blood alcohol level of 0.05 or above. The consequences imposed on a driver by the Legislature under section 215 are significant enough to signal that it is the duty of a driver, to no less than the others using the road, to not drive when the driver's ability to do so is affected by alcohol.
>
> A test of the breach of the duty, as set out in section 215, is whether a driver's ability to drive is affected by alcohol. If a police officer has reasonable and probable grounds to believe that a driver's ability is so affected, the officer may administratively prohibit that person from driving for a period of 24 hours (presumably, at least in part, to ensure that the effects of the alcohol have passed before the driver gets behind the wheel again). This is the so-called 24 hour roadside suspension.
>
> This case illustrates what can constitute those reasonable and probable grounds for the application of section 215: bloodshot and watery eyes, the odour of liquor on the breath and a reading on the ASD of at least 0.05.
>
> I find that it is a reasonable inference to draw that the Legislature has in effect legislated that the minimum standard of care of a reasonable driver using the highway is breached if the person drives while his or her ability to do so is affected by alcohol. It is sufficient evidence of being so affected if the driver is found to have at least 50 mg of alcohol in 100 ml of his or her blood. [paras. 27-30]

The accused was convicted.

Complete case available at www.provincialcourt.bc.ca

BY THE BOOK:

s.144(1) B.C.'S *Motor Vehicle Act*

A person must not drive a motor vehicle on a highway
(a) without due care and attention,
(b) without reasonable consideration for other persons using the highway, or
(c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

BY THE NUMBERS:

FACTS, FIGURES, and FOOTNOTES

Court Delays

The average time to dispose of traffic cases in British Columbia has increased from 220 days for 2005/2006 to 294 days for 2007/2008. For criminal cases this went from 189 days to 215.

Source: Ministry of Attorney General, 2007/08 Annual Service Report, p. 23.

Road User Fatalities

In 2006 there were 2,892 road user fatalities in Canada. This was down from 2,905 in 2005.

Source: www.tc.gc.ca

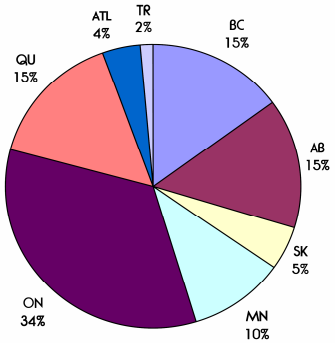
HOMICIDE BY THE NUMBERS: 2007

According to a recently released Statistics Canada report, *"Homicide in Canada, 2007"*, there were 12 fewer homicides last year than the year before (2006). This accounts for a 3% decrease in the homicide rate. Seven provinces reported a decrease in the homicide rate while Manitoba, Ontario and New Brunswick saw an increase. Manitoba had the largest increase in homicide, with 23 more homicides in 2007 than in 2006. Ontario had the most homicides with 201 while Prince Edward Island had none. Twenty percent, about one in five homicides, were gang related.

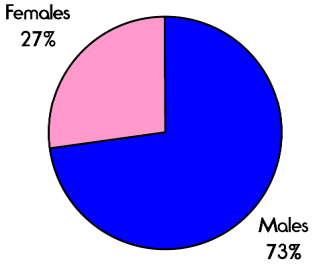
Homicides by Province/Territory

Area	Homicides	Change over 2006	Rate Per 100,000
British Columbia	88	⇩ -20	2.01
Alberta	88	⇩ -7	2.53
Saskatchewan	30	⇩ -12	3.01
Manitoba	62	⇧ +23	5.22
Ontario	201	⇧ +5	1.57
Quebec	90	⇩ -3	1.17
Newfoundland	3	⇩ -4	0.59
Nova Scotia	13	⇩ -3	1.39
New Brunswick	8	⇧ +1	1.07
Prince Edward Island	0	⇩ -1	0.00
Yukon	2	⇧ +2	6.45
North West Territories	2	⇧ +2	4.69
Nunavut	7	⇧ +5	22.50
Canada	594	-12	1.80

Homicide by Region 2007



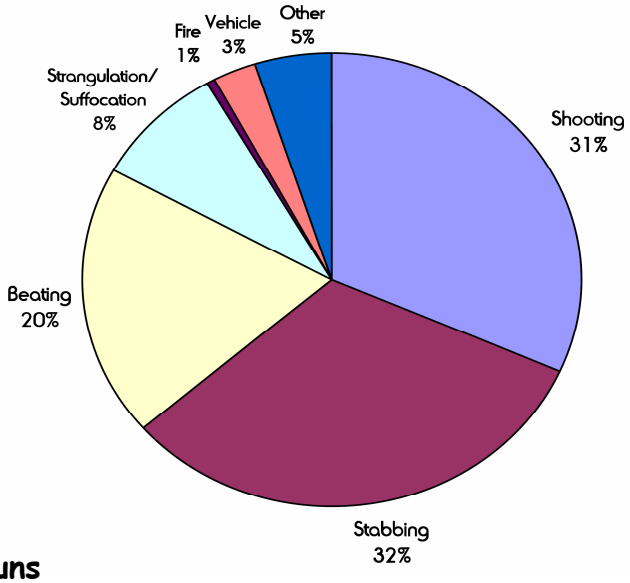
Homicide Victims by Gender



Methods

The most popular method used to commit homicide was stabbing, followed by shooting. Other methods included beating, strangulation / suffocation, fire, vehicles, poisoning, shaken baby syndrome, and unknown causes.

Homicide by Method



Guns

Of the 188 homicides involving firearms, the weapon of choice was a handgun.

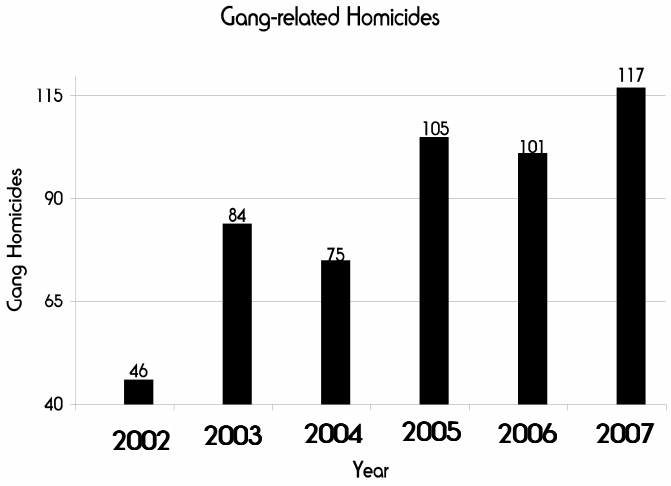
Homicides Involving Firearms

Firearm Type	Number of Victims	%
Handgun 	126	67%
Rifle/Shotgun 	32	17%
Fully Automatic Firearm 	2	1%
Sawed-off Rifle/Shotgun 	17	9%
Firearm-like Weapons	1	0.5%
Unknown Type	10	5%

Source: Statistics Canada, 2008, "Homicide in Canada, 2007", catalogue no. 85-002-X, Vol. 28, no.9

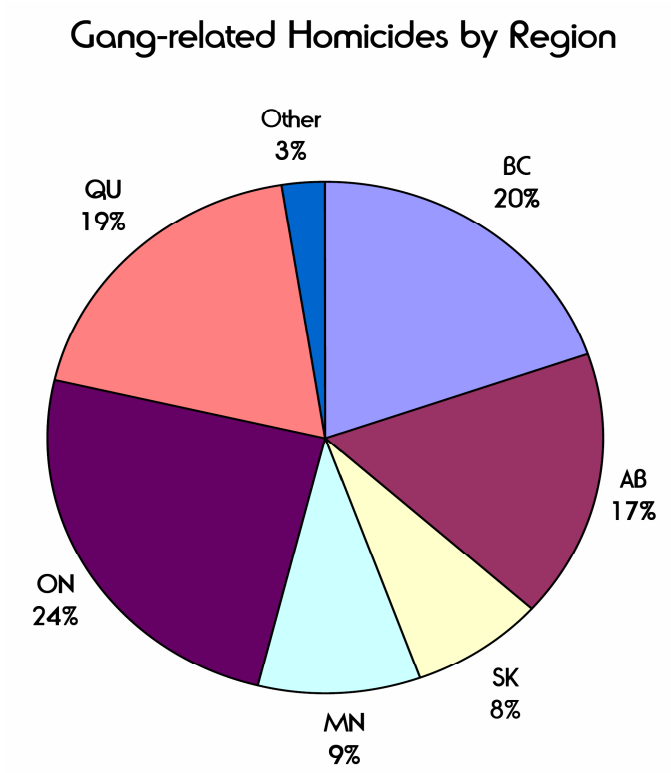
Gang Related Homicides

Gang related homicides, including the killing of gang members or innocent bystanders, is increasing.



In total, 117 of Canada's 594 homicides were reported as gang-related. Ontario recorded the most gang-related homicides at 29, followed by British Columbia (23), Quebec (22), Alberta (20), Manitoba (11) and Saskatchewan (9). Atlantic Canada recorded two while there was only one reported in the Territories.

Firearms were used in 69% of gang-related homicides, compared to 20% that did not involve gangs.



Other Highlights

- 84% of solved homicides were committed by someone known to the victim;
- Manitoba had its highest homicide rate recorded since 1961, when data was first available;
- British Columbia reported its second lowest homicide rate since 1961;
- Quebec's homicide rate was its lowest in 40 years;
- Toronto had 111 homicides, nearly 20% of the national total;
- Of Canada's census metropolitan areas (100,000+ populations), Saskatoon had the highest homicide rate at 3.60 per 100,000 residents, followed by Winnipeg (3.55), Edmonton (3.28), Calgary (3.14), Trois Rivieres (2.73), Regina (2.46), Greater Sudbury (2.46), Vancouver (2.41), and Toronto (2.01). Quebec City recorded no homicides. It was the first time that a census metropolitan area over 500,000 residents did not have a homicide since data was first collected in 1981 ;
- 88.5% of persons accused of homicide are males;
- 74 youth were accused of homicide in 2007, down from 85 in 2006;

SUPPORT THE BADGE: RELATIONAL SURVIVAL FOR POLICE FAMILIES

"The true weight of the badge is not overcome by muscle, not found in the gym, not measured on a scale. This weight requires a strength and conditioning for which few officers are trained. The badge is not just pinned on a chest, it is pinned on a lifestyle." - Police Officer

www.supportthebadge.ca

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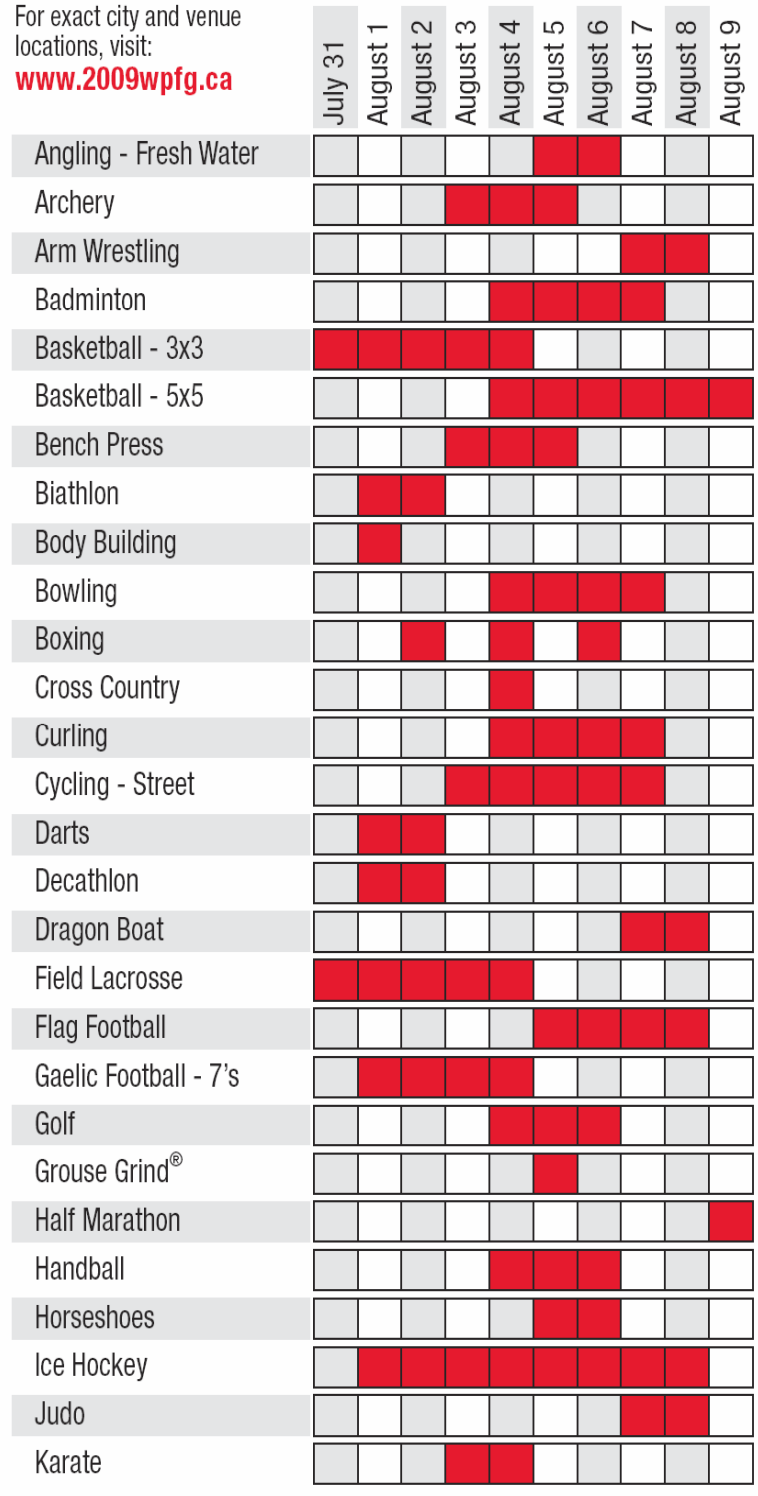

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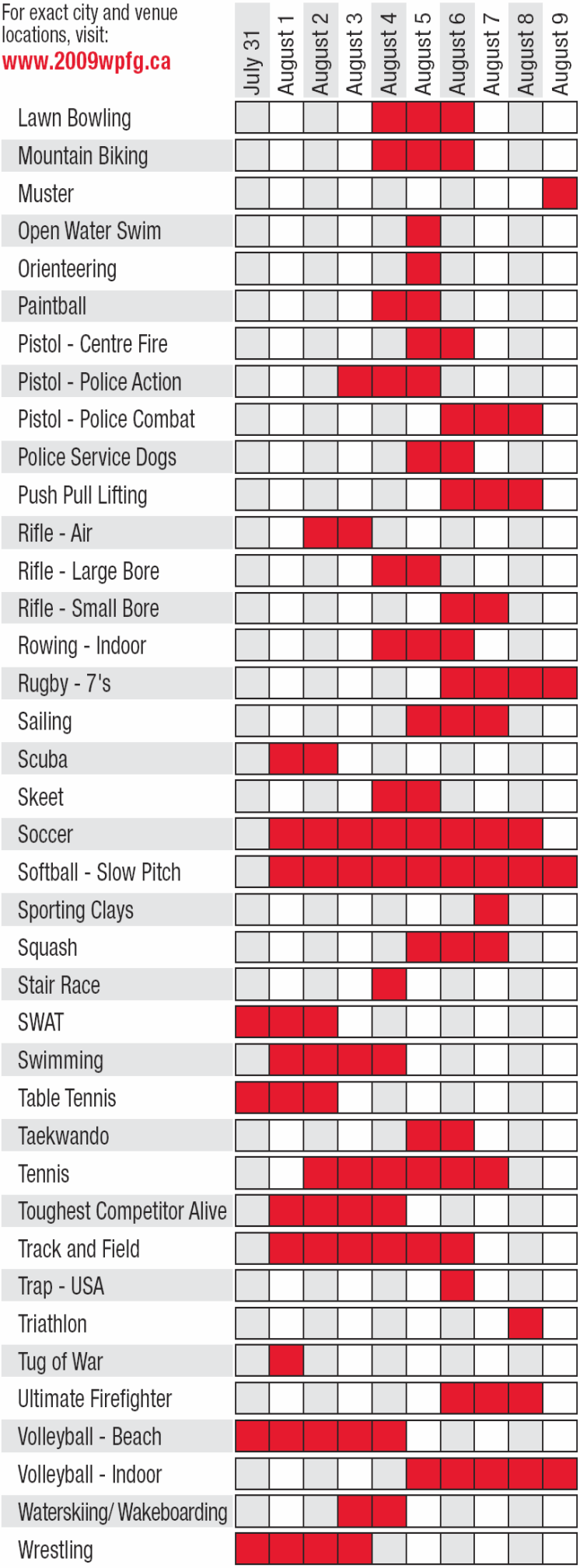


Schedule subject to change.

REFUSAL TO EXIT VEHICLE AMOUNTED TO AN OBSTRUCTION

R. v. Dodd, 2008 BCPC 290

Shortly after 1:00 am a police officer stopped a van being driven without a front licence plate and a rear plate hanging in the back window. After receiving the accused's driver's licence, the officer returned to his police car and determined the accused was in violation of a probation curfew. The officer went back to the van and asked the accused to step out in order to arrest him for the breach. However, the officer did not tell the accused of the breach because he was concerned with his safety and wanted to avoid a police pursuit. The accused had been exhibiting "weird behaviour" and appeared to be very nervous. He was shaking and making sudden motions with his head and arms—looking suddenly to the left or the right and reaching around the van to his left and his right. He was also bending over at the waist.

The accused told the officer he would not exit the van, instead indicating he wanted to call his lawyer first. Following a second refusal to exit the van, the officer reached to open the van door. The accused locked the door, closed the window, refused to get out of the vehicle, and could be seen reaching around inside the vehicle. The accused was again asked to get out, but refused and started the engine. The officer used his baton to break the van's window, opened the door, and pulled the accused out. As a result, the accused was charged with obstructing a peace officer.

At trial in British Columbia Provincial Court the officer testified the accused had been detained during the traffic stop but had not been told he was under arrest until after he was removed from the van. The Crown submitted that it was appropriate for the officer to request the accused exit the vehicle prior to telling him he was under arrest for officer safety reasons and to avoid a possible police pursuit. In its view, it is common at a traffic stop for police to ask a person exit their vehicle and the officer was acting in a reasonable and practical manner. The accused testified he was not going to open the door of his van until he was told why, even though he knew that he was on probation and thought that maybe the incident related to his curfew. In his view, he had no legal duty to exit his vehicle and was entitled to know why he was asked to do so by the police.

Judge Wingham found the officer was acting in the execution of his duty and that the accused was aware of this. The officer had pulled the accused over to investigate a traffic violation he had observed. He asked for the accused's driver's licence and subsequently determined that he was breaching probation—committing a criminal offence. The court stated:

> In this case, I am satisfied that [the officer] was acting within the execution of his duty when he asked [the accused] to exit his vehicle. As a police officer he had a duty to prevent the continuation of an ongoing offence. That offence was the ongoing breach by [the accused] of his probation order. In my view he was reasonably justified in requesting [the accused] to exit the van without telling him that he was under arrest or that he was going to be arrested. His evidence, which I accept, was that [the accused's] physical motions in the vehicle caused him to be concerned that [the accused] might be reaching for an object that he might use as a weapon. He was also concerned that [the accused] would drive away and cause a police pursuit.
>
> [The accused] was in his motor vehicle on a public highway. He was committing a criminal offence at the time. In my opinion [the officer's] conduct was necessary and reasonably justified in the circumstances which he was presented with. [paras. 17-18]

The judge also found the accused was at least suspicious that the officer was investigating a breach of his curfew:

> It was clear, in my view, to [the accused] that [the officer] was engaged in the execution of his duty. The evidence, in my view, establishes that [the accused] knew that [the officer] was acting in the execution of his duty when he asked him to exit his van. He knew that [the officer] had stopped him and he knew why. He knew that [the officer] had taken his driver's licence. He knew that he was on probation and that he had a curfew on his probation order. He knew that [the officer] was continuing his investigation. This was evident by his comments about suspecting that it had to do with his curfew and that he wanted to provide an explanation. He may not have been certain as to why [the officer] was asking him to get out of the van but he knew

> that [the officer] was continuing his investigation. His intention was clearly in my view to prevent [the officer] from continuing that investigation.
>
> [The accused's] actions in locking his door, putting up his window and refusing [the officer's] request to exit the vehicle amount in the circumstances of this case to obstruction of [the officer] in the execution of his duty as contemplated by s. 129(a) of the Criminal Code. [paras. 21-22]

The accused was convicted of obstructing a peace officer.

Complete case available at www.provincialcourt.bc.ca

REASONABLE GROUNDS REQUIRES HONEST BELIEF BASED ON OBJECTIVE MEASUREMENTS

R. v. Bowie, 2008 BCPC 304

Shortly before midnight a citizen was following a vehicle being driven erratically and called 911 to make a report, including providing a personalized licence plate number. The vehicle was drifting over the centre line and crossed over the white line on the right side of the roadway. The citizen subsequently turned off the highway and lost sight of the vehicle. A police officer, experienced in impaired driving investigations, received the radio report and proceeded to the highway where he observed a vehicle that appeared to be swerving within its lane. The officer followed the vehicle for about two kilometers, noting the plate matched and saw the vehicle cross the marked centre line on five occasions and the line on the right side of the road. As well, the vehicle rubbed against the curb dividing opposing lanes of traffic. The officer activated his emergency lights and the vehicle turned into a service station off the highway without signalling.

The officer approached the vehicle and the accused was the driver and sole occupant. She produced her driver's licence without difficulty, but the officer noted her face was flushed, she had red cheeks, and her eyes were blinking more slowly than normal. He also noted a strong odour of liquor on the accused's breath and she admitted to drinking two glasses of wine. She was asked to step from the vehicle and her balance was unsteady and unsure, described as "slightly wobbly. The accused's clothes were not disorganized, her pupils were not dilated or watery, and she was polite and cooperative. Nonetheless, the officer formed the opinion the accused's ability to operate a motor vehicle was impaired by alcohol. She drove erratically, admitted to consuming alcohol, and exhibited physical indicia of impairment. The officer testified only about two minutes elapsed from the time of the pull over to the time the officer formed his opinion. The accused was given the breathalyzer demand and was subsequently charged with impaired driving and over 80mg%.

At trial in British Columbia Provincial Court the accused argued the officer was not entitled to make a breathalyzer demand on such a quick assessment. Rather, he should have considered the observations that would lead to a conclusion the accused's ability to drive was not impaired by alcohol, such as her politeness and cooperativeness, non disorderly clothing, and that she was able to pull her vehicle over in an unremarkable manner.

Judge Rodgers, however, noted that s.254(3) of the *Criminal Code* only requires that a police officer subjectively have an honest belief that the suspect driver has committed the offence and, objectively, reasonable grounds for this belief exist. In rejecting the accused's contention that the officer did not have the requisite belief, Judge Rodgers stated:

> …I find that [the officer] had reasonable and probable grounds, objectively measured, to form the opinion that [the accused's] ability to operate a motor vehicle was impaired by alcohol. His observations of her very erratic driving, the strong odour of alcohol on her breath, her admission of the consumption of alcohol and her unsteady balance were quite sufficient to form the requisite opinion. [para. 19]

The officer had reasonable and probable grounds, objectively measured, to form his opinion and the demand for breath samples was therefore lawful.

Complete case available at www.provincialcourt.bc.ca

Note-able Quote

"The trouble with the laws these days is that criminals know their rights better than their wrongs." - Author Unknown

ODOUR OF BURNED MARIHUANA INSUFFICIENT TO JUSTIFY DOORSTEP ARREST

R. v. Arrance & R. v. Eddy, 2008 BCPC 301

Police attended the accused Arrance's residence to offer him $500 if he would provide information on other people under investigation. An officer knocked on the door and announced himself as a police officer. The door was answered by a man named Piche and, immediately upon the door being opened, the officer smelled an overwhelming odour of burning marihuana. Piche was immediately arrested and the house was cleared to secure the residence for evidence of possession of a controlled substance and for officer safety. Arrance was found in a bedroom and the accused Eddy was found in a bathroom. No marihuana was found on Piche after his arrest and no burning marihuana was found in the house. However, a green leafy substance believed to be marihuana was found in the living room. A search warrant was obtained and various items were seized. Both Arrance and Eddy were charged with breaching their undertakings for having contact with each other and with Piche.

At trial in British Columbia Provincial Court the accuseds argued the police breached their s.8 *Charter* rights by entering the residence without a warrant and without exigent circumstances. In their view, the police cannot enter a residence to effect an arrest unless they have obtained a warrant to do so or when exigent circumstances exist. The Crown, on the other hand, submitted the police approach to the residence to offer money for information was a legitimate purpose and once Piche opened the door he assumed the risk that the odours from the residence would be detected and acted upon. In the Crown's position, the accuseds' s.8 *Charter* rights were not breached and, even if they were, the evidence was admissible under s.24(2).

Judge Brecknell found the police lawfully approached the house. "I have some concerns about the efficacy of police knocking on the doors of suspected criminals with the idea that those answering would turn over colleagues or even competitors for a few pieces of silver," he said. "But I cannot conclude that the police actions were done in bad faith." However, by opening the door Piche was not inviting the officers inside the residence. He was only prepared to engage them at the door.

As for the arrest that followed, it was unlawful. Judge Brecknell stated:

> I am unable to find that [the officer] had the reasonable and probable grounds to arrest Mr. Piche. He did not find him committing an actual crime. He did not say in his evidence that the smell of marihuana coming from the residence was, in his many years of experience, related to circumstances where more marihuana, unburned, was present. He did not say that he smelled marihuana on Mr. Piche. [The officer] did not give the court any information about his subjective beliefs so they could be objectively tested to conclude as to whether or not why he believed there was more marihuana in the residence was reasonable in the circumstances.
>
> Immediately upon smelling the marihuana and arresting Mr. Piche, he and the other RCMP members just barged in without a warrant. Because [the officer] did not give any evidence on whether or not he concluded on any grounds that there was more marihuana in the residence, I am unable to objectively decide whether his actions were reasonable in the circumstances.
>
> …I conclude that [the officer] did not turn his mind to whether or not any marihuana that might be present exceeded or did not exceed 30 grams. he only evidence he gave was that he smelled marihuana, and he acted solely upon the smell. That procedure in these circumstances makes Mr. Piche's arrest prima facie unlawful and any subsequent search a violation of s. 8 of the Charter. [paras. 28-30]

The evidence was excluded under s.24(2) and Crown directed a stay of proceedings on the charges.

Complete case available at www.provincialcourt.bc.ca

FINGERPRINTING FOLLOWING ARREST WAS NOT A 'SEARCH'

R. v. Ferris, 2008 BCPC 266

Police executed a search warrant at a warehouse and found a 44 foot shipping container with 575 marihuana plants inside as well as other items related to growing marihuana. While maintaining surveillance at the warehouse, the accused was arrested for production and possession for the purpose of

trafficking after he pulled his vehicle directly in front of the warehouse, got out, and began to walk the pathway leading to the warehouse. He was advised of his *Charter* rights and taken to the police detachment where he was photographed and fingerprinted and then released on a Promise to Appear. At the time of his arrest it was the police policy to fingerprint an accused before charges were laid. The police then used the accused's fingerprints taken following his arrest as evidence and he was charged with producing a controlled substance and possession for the purpose of trafficking in British Columbia Provincial Court.

The accused argued the taking of fingerprints was a search that violated the *Identification of Criminals Act* if taken before a charge was laid, and therefore amounted to a s.8 *Charter* breach. In his view, the fingerprints that were taken after he was arrested but before he was formally charged and the print evidence were inadmissible under s.24(2). The Crown contended that there was no s.8 violation because the police can fingerprint a person who has been lawfully arrested but not yet charged. Further, the Crown submitted that fingerprinting as an incident to arrest is not a search. And, even if there was a breach, the evidence should be admitted.

After reviewing numerous cases, Judge Giardini concluded that "taking fingerprints pursuant to a lawful arrest, albeit before charges are laid, does not constitute a search." Since there was no search, there was no violation of s.8. However, if the judge was wrong in his conclusion that there was no s.8 breach, the evidence was nonetheless admissible under s.24(2). The accused's application to exclude the evidence of his fingerprints was dismissed.

Complete case available at www.provincialcourt.bc.ca

Editor's note: Be careful using this judgment. In British Columbia, at least, there are differing court opinions of whether fingerprinting is a search, and if it is a search, whether charges must be sworn before such process will be reasonable under s.8 of the *Charter* if taken under the *Identification of Criminals Act*.

DESPITE 13 MINUTE DELAY, DEMAND MADE AS SOON AS PRACTICABLE

R. v. Hedican, 2008 BCSC 754

Two police officers stopped the accused's truck as he began to back up in a parking lot. When asked for his driver's licence, the accused did not produce it nor his registration. An officer believed he was impaired. She smelled a strong odour of alcohol, noted he slurred his words, and had bloodshot eyes and poor motor skills. He was arrested, handcuffed, advised of his rights, and was then placed in the police car.

Some friends or acquaintances of the accused appeared at the same time the officer was trying to search the vehicle for liquor and looking for the registration and identification of the driver. They were obnoxious, noisy, agitated, drunk or impaired and one of them tried to secure the keys of the truck. About ten minutes passed before the officer could restore order, search the vehicle and secure the pickup truck. She then returned to her cruiser and read a formal breath demand. The accused was yelling, cursing, threatening lawsuits and being generally obnoxious. He refused to provide a breath sample and was charged with that offence.

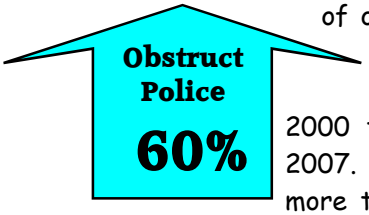
At trial in British Columbia Provincial Court the judge accepted, among other evidence, that the formal demand was made as soon as practicable, despite the 13-minute delay. The accused was convicted of the refusal. He then appealed to the British Columbia Supreme Court arguing, among other grounds, that the formal demand was not made as soon as practicable because of the 13-minute delay.

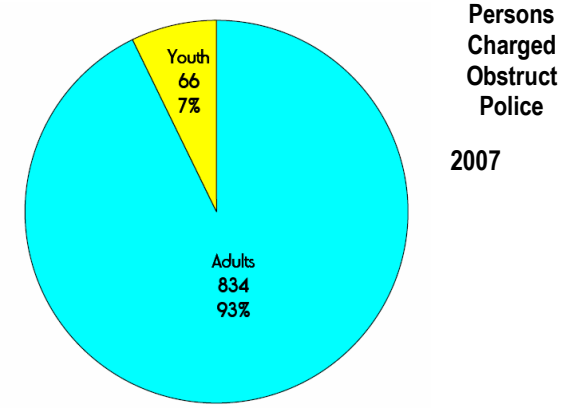
Justice Kelleher concluded the trial judge did not err in deciding that the police officer acted reasonably and made the formal demand as soon as practicable. Although some of the tasks undertaken by the arresting officer could have been done by her partner, s.254(3) of the *Criminal Code* does not require a demand be made as soon as possible. Rather, the demand must be made reasonably promptly in all the circumstances, as was the case here.

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

OBSTRUCTION CHARGES CONTINUE TO RISE

Although the Canadian Centre for Justice Statistics reported in July that Canada's overall crime rate dropped by 7% in 2007, British Columbia's Ministry of Public Safety and Solicitor General again reports that police obstruction charges are on the rise. The number of offences for obstruction have risen from an eight year low of 1,226 in 2000 to a high of 2,022 in 2007. That is an increase of more than 60%. Of the 2,022 reported offences in 2007, 1,823 were cleared, representing a clearance rate of more than 90%. There were 900 persons charged with obstruction, including 834 adults and 66 youths.





Source: Police and Crime, Summary Statistics, 1997-2006, Ministry of Public Safety and Solicitor General

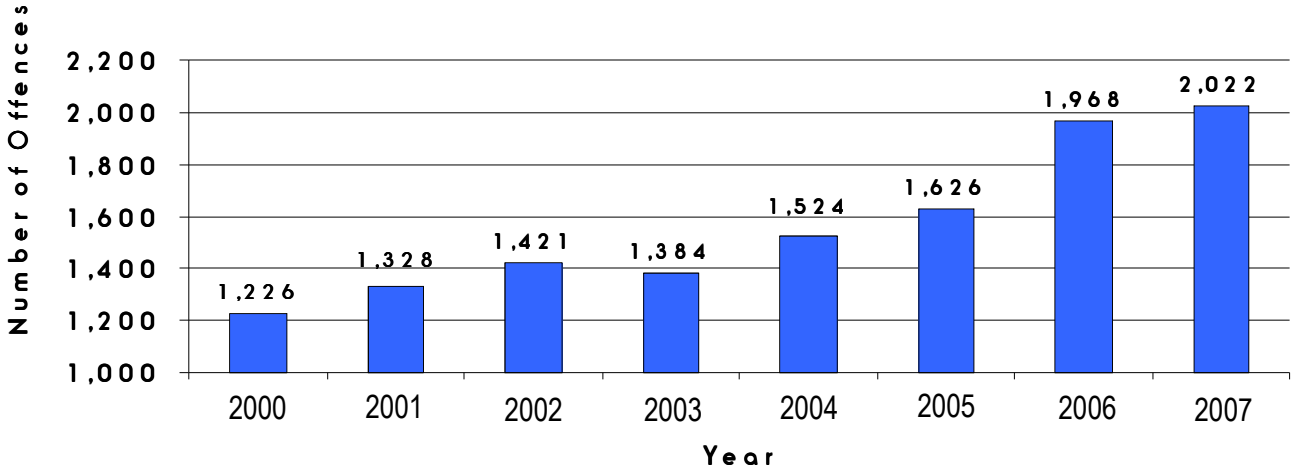
Assault Police

The number of offences of assaulting police dipped in 2007 to 1,115, down slightly from 1,143 in 2006. However, the number of offences still remains high when compared to 2000 numbers when there were only 807 assault police offences reported.

Assault Police Offences	
Year	Number of Offences
2007	1,115
2006	1,143
2005	1,021
2004	922
2003	934
2002	878
2001	834
2000	807

Source: British Columbia Crime Trends, 1998-2007, Ministry of Public Safety and Solicitor General

Obstruct Police Offences: 2000-2007



TEST FOR ARREST INVOLVES SUBJECTIVE-OBJECTIVE ANALYSIS

R. v. McDougall & Coulson, 2008 BCSC 1493

A police officer, a 16 year veteran with considerable experience involving 500 drug investigations, received a telephone call from a reliable informant, who was involved in cocaine trafficking, stating that the accused McDougall, referred to as "Clarence", and another person were trafficking cocaine. He provided their location and described the vehicle as a green Jeep, that McDougall was wearing a black hat and black jacket, and that they were carrying on a "dial-a-dope" operation. The informant, however, did not refer to the accused Coulson by name or describe what he was wearing.

Two officers drove an unmarked police car to the location described and saw a green Jeep in the middle of a Pharmasave parking lot. It was the only vehicle there and the Pharmasave and other stores in the area were closed. The informant confirmed that the green Jeep in the parking lot was the suspect vehicle and an officer then formed a belief that the occupants of the vehicle were trafficking cocaine. The general location in which the Jeep was spotted was a known area for trafficking cocaine and the front seat passenger, wearing a black jacket and ball cap, was talking on a cellular telephone, a common tool in dial-a-dope operations. Police arrested the men and provided them with their *Charter* rights.

Five to 10 minutes after the arrest the Jeep was searched. Police found a Sprite pop can in the middle of the front passenger floor. The can had a false compartment and contained 13 spit balls of cocaine. Other evidence was found in the Jeep including a cell phone, cash, and packaging for a spit ball matching packaging found in the Sprite can. On the accused Coulson police found $320 pocket cash in various denominations. Both accused were charged with unlawfully possessing cocaine for the purpose of trafficking.

During a *voir dire* in British Columbia Supreme Court the accused Coulson challenged the admissibility of the cocaine, among other evidence, seized from the vehicle. In his view he was arbitrarily detained under s.9 of the *Charter* and the searches that followed were unreasonable under s.8. He submitted the evidence should be excluded under s.24(2) of the *Charter*.

Under s. 495(1)(a) of the *Criminal Code* a peace officer may arrest without warrant a person who has committed an indictable offence or who, on reasonable grounds, the officer believes has committed or is about to commit an indictable offence. In deciding whether an arrest is lawful, a court will examine two components; (1) whether the peace officer subjectively believed that they had grounds to make the arrest; and (2) whether objectively there were reasonable grounds to arrest based on the totality of the circumstances.

> "The second question is whether a reasonably objective person standing in the shoes of [the officer] would believe there were reasonable grounds to arrest ... given the totality of the circumstances."

In this case, Justice Scarth found the officer had the requisite subjective belief that he had grounds to arrest the occupants of the Jeep. He had received reliable information matching the contemporaneous, unfolding events in the parking lot. As well, the grounds were reasonable from an objective point of view. Justice Scarth held:

> The second question is whether a reasonably objective person standing in the shoes of [the officer] would believe there were reasonable grounds to arrest the occupants of the Jeep, given the totality of the circumstances. In my judgment, that test is also met, given that [the officer] had received from the informant the location of the drug dealers, particulars of their vehicle, and the name and wearing apparel of one of the drug dealers. The tip received from the informant was relatively contemporaneous with the spotting of the drug dealers' vehicle.
>
> [The officer] testified as to the reliability of the informant on past occasions. Dial-a-dopers are not easy subjects of surveillance given the mobility of their vehicles in which they do their transactions and their use of a cell telephone. [paras. 21-22]

Based on the totality of the circumstances, the officer subjectively and objectively had reasonable grounds to search the accused and the vehicle, and seize the drugs. The accused's application for exclusion was dismissed and the evidence was admissible.

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

2007 SUPREME COURT RULINGS OF INTEREST TO POLICE

Ruling	Vote	Majority Author
Culpability		
R. v. Jackson, 2007 SCC 52: Upheld conviction of accused arrested with four others at a secluded and remote marijuana plantation. Although the mere presence of an accused at the scene of a crime does not prove culpable participation in its commission, Jackson's conviction did not rest merely on his presence at the scene but also included his apprehension at the scene, the rejection of his explanation for being there, the particular nature of the offence, the context in which it was committed, and other circumstantial evidence of his guilt.	5-2	Fish
Right to Silence (s.7 *Charter*)		
R. v. Singh, 2007 SCC 48: Ruled police did not beach the accused's right to silence when they persistently tried to obtain a statement from him after he was arrested for murder and was advised of his s.10(b) rights and privately consulted with counsel. The accused's incriminating admission came freely and did not result from the police systematically breaking down his operating mind or undermining his right to silence.	5-4	Charron
Informer Privilege		
Named Person v. Vancouver Sun, 2007 SCC 43: Upheld the law long recognizing that confidential police informers must be protected from the possibility of retribution by withholding their identity, including information which might tend to identify them, Outside the innocence at stake exception, the rule's protection is absolute and no case-by-case weighing of the justification for the privilege is permitted. A court has no discretion in the matter.	8-1	Bastarache
Negligent Investigation		
Hill v. Hamilton Wentworth Regional Police Service, 2007 SCC 41: Found the police were not negligent in arrest of suspect who spent 20 months in jail for a crime he did not commit. However, court did hold that police are not immune from liability under the law of negligence and the tort of negligent investigation exists in Canada. Police owe a duty of care to suspects in the conduct of their investigations which should be measured against the standard of how a reasonable officer in like circumstances would have acted.	6-3	McLachlin
Reasonable and Probable Grounds-Breath Demand		
R. v. Rhyason, 2007 SCC 39: Rejected an appeal by an accused who argued the police did not have reasonable and probable grounds to read him a breath demand after he struck and killed a pedestrian. Trial judge was relying on more than just evidence of alcohol consumption and properly considered the testimony of the officer about the circumstances of the unexplained accident as well as signs of the accused's impairment. He also reviewed the relevant jurisprudence emanating from similar fact situations and appropriately took into consideration the presence of an unexplained accident.	5-4	Abella
Use Firearm - s.85(1) Criminal Code		
R. v. Steele, 2007 SCC 36: Affirmed the conviction of an accused for using a firearm during the commission of an offence (a home invasion). An offender uses a firearm within the meaning of s.85(1) of the *Criminal Code* where the offender reveals by words or conduct the actual presence or immediate availability of a firearm to facilitate the commission of an offence or for purposes of escape. The weapon must be in the physical possession of the offender or readily at hand. In this case the accused and his accomplices repeatedly referred to a firearm in their physical possession or one readily at hand in order to facilitate a break and enter. They were apprehended within minutes after the 911 calls were made and police found a loaded handgun in their getaway car.	9-0	Fish

Ruling	Vote	Majority Author
Obstructing justice-Police officer		
R. v. Beaudry, 2007 SCC 5: Upheld the conviction of a police officer for obstructing justice for deliberately failing to gather evidence (breath samples) needed to lay criminal charges against another police officer. Although a police officer who has reasonable grounds to believe that an offence has been committed or that a more thorough investigation might produce evidence that could form the basis of a criminal charge may exercise discretion to decide not to engage the judicial process, this discretion is not absolute. Discretion must be justified subjectively (exercised honestly and transparently) and objectively (on valid grounds). However, exercising discretion improperly is not enough to ground a conviction. Rather, the accused needs to act in a manner intended to defeat or obstruct the course of justice and with intent. A simple error of judgment will not be enough for a conviction.	4-1-4	Charron
Confessions Rule		
R. v. Spencer, 2007 SCC 11: Restored the convictions of a man after the appeal court threw out statements he made to police. In determining whether a statement is voluntary several factors are relevant including whether the police made any promises or threatened the accused. A promise renders a statement involuntary only if the quid pro quo provides a strong enough inducement to raise a reasonable doubt about whether the will of the suspect was overborne. In this case, no offer was made to treat the accused's girlfriend leniently and withholding a visit with her until a partial confession was made was not a strong enough inducement to render the accused's statement inadmissible.	5-2	Deschamps
Application of Charter on Foreign Soil		
R. v. Hape, 2007 SCC 26: Dismissed an appeal by a Canadian businessman, suspected of money laundering in the Turks and Caicos Islands, that the Charter applied to the actions of Canadian police in searching his office outside of Canada and therefore the documentary evidence seized should have been excluded. The Charter does not generally apply to searches and seizures in other countries, subject to the Charter's fair trial safeguards. In this case, the police officers were government actors, but the searches carried out in Turks and Caicos were not a matter within the authority of Parliament. And further, the admission of the evidence would not violate the accused's right to a fair trial.	5-3-1	Lebel
Investigative Detention		
R. v. Clayton, 2007 SCC 32: Restored the conviction of two accused stopped by police leaving the parking lot where a report that about ten "black guys" were in front of a strip club displaying handguns. The initial detention was reasonably necessary to respond to the seriousness of the offence and the threat to safety inherent in the presence of prohibited weapons in a public place. The detention was temporally, geographically and logistically responsive to the circumstances known to the police. The continued detention was also justified because both accused came from the scene of the reported crime in the first vehicle to leave the lot within minutes of the 911 call and matched the 911 caller's description. The search, based on legitimate safety concerns, was justified as incidental to their lawful investigative detentions.	5-3	Abella

In the next issue, 2008 cases of interest to police will be reviewed.

www.scc-csc.gc.ca

TIP FROM RELIABLE INFORMER PLUS CONFIRMATION PROVIDES REASONABLE GROUNDS

R. v. McCabe, 2008 NLCA 62

A police officer received a two to four minute telephone call at about 8:05 pm from an informant stating the accused would be driving a green Cavalier, license number AWD 761, containing a quantity of marihuana west from St. John's, Newfoundland on the Trans Canada Highway within the hour. The accused knew the marihuana was in the vehicle but it belonged to the vehicle's passenger, Wayne Baldwin, who intended to sell it. The officer believed the informant. He had supplied information in the past and was a "recreational" drug user with a criminal record, but nothing for deceit such as fraud or perjury. He sounded as though he was giving "first-hand" information and seemed nervous, concerned that providing the information might result in his identification. The tip was also related to information the officer had about the drug trade in the area. He had heard in previous years from other sources, unconfirmed as to reliability, that Baldwin was involved in drug trafficking.

The officer drove to the Trans Canada Highway with another officer to intercept the vehicle. At about 9:25 p.m. police stopped the car and arrested both occupants after the accused identified himself. There was nothing visible in the vehicle and a pat-down search failed to find drugs on either occupant. The vehicle was moved about two hundred yards to an abandoned parking lot and a police dog was used to search the car. The dog indicated there were drugs in the sleeve of a coat on the rear seat of the vehicle. The drugs were seized and the men were released on appearance notices.

At trial in Newfoundland Provincial Court the officer testified he considered obtaining a warrant before stopping the vehicle but did not believe it was practicable because the informant said the activity was to occur within an hour. He believed he had to locate the vehicle or lose the evidence. The trial judge concluded the officer did not have reasonable and probable grounds to search the vehicle. There was no objective information from another source confirming the allegation of unlawful activity, no information confirming the source of the informant's knowledge, the tip lacked detail, and there was very little objective evidence about the source's reliability. However, he did find the informant's information provided the officers with "articulabe cause" justifying the stop as an investigative detention. The initial stop and detention was therefore not arbitrary but the continued detention was not justified. There was nothing in plain view at the time the vehicle was stopped and nothing had been discovered on the occupants to justify further detention. The accused's s.8 *Charter* rights were breached and the marihuana was excluded under s.24(2).

The Crown appealed to the Newfoundland Court of Appeal arguing the trial judge erred in finding a s.8 breach. Justice Barry, authoring the unanimous judgment of the Appeal Court, agreed. Although the trial judge was correct in holding that the search of the vehicle was not justified as incidental to investigative detention since they discovered nothing in plain view or on the pat-down searches, it was lawful as an incident to arrest. He stated:

> To be authorized under the common law doctrine of search incidental to arrest, the search must be truly incidental in that the police must be able to explain, within the purposes recognized in the jurisprudence (protecting the police, protecting the evidence, or discovering evidence) or by reference to some other valid purpose, why they conducted the search. [reference omitted, para. 21]

In finding the police had made a lawful arrest, one based on reasonable grounds, Justice Barry wrote:

> In the present case, whether the police had reasonable grounds for arresting [the accused] depends upon whether the tip received was sufficiently reliable. This Court must carefully scrutinize the facts surrounding the arrest to ensure that the police did not

"To be authorized under the common law doctrine of search incidental to arrest, the search must be truly incidental in that the police must be able to explain, within the purposes recognized in the jurisprudence (protecting the police, protecting the evidence, or discovering evidence) or by reference to some other valid purpose, why they conducted the search."

> exceed or abuse their powers. Here the totality of the circumstances, including the fact that [the officer] had previously received information from the informant, which was confirmed as reliable when it led to a drug seizure, combined with [the officer's] knowledge of drug trade in the area and the information (although of unconfirmed reliability) about Baldwin's involvement in drug trafficking, is sufficient … for establishing adequate reliability of a tip. The degree of detail of the tip, relating to non-criminal aspects of the activity, would not in itself have been sufficient corroboration here. [The officer's] belief that the informer's source of knowledge was firsthand is worthy of some consideration, because of the officer's experience. But it is the indicia of the informer's reliability from past performance, combined with some slight confirmation from [the officer's] other investigative sources, that provides the main basis for finding that, both subjectively and objectively, reasonable grounds for arrest existed. If the informer here had been anonymous the result may well have been different. … [para. 26]

Since securing or preserving evidence relating to the offence for which an accused is arrested are valid purposes to justify a search incidental to an arrest, the search here was valid. The police had reasonable grounds to search for the purpose of securing and preserving the marijuana about which they had received the tip.

The trial judge erred by failing to consider whether the search was valid as an incident to arrest, the Crown's appeal was allowed, and the evidence was admissible. The case was sent back for trial.

Complete case available at www.canlii.org

ARRESTEE MUST EXERCISE RIGHT TO SPEAK TO LAWYER OF CHOICE DILIGENTLY

R. v. Sorenson, 2008 BCSC 354

After pulling the accused over at about 10 p.m., a police officer formed reasonable and probable grounds to believe he was impaired. He was given the conventional police warning and told he had the right to contact legal counsel. At the police station the accused told the officer that he wanted to talk to a lawyer and provided his lawyer's office number. Given the time of night, the officer asked the accused whether he would like to call legal aid if his lawyer did not answer. The accused said "Sure." The guard then made the call because police restricted an arrestee's access to the telephone, which had no dial-out capability. There was no answer when the guard called and a message was left for the lawyer to call back. After waiting five or ten minutes without a response from the accused's lawyer, the guard called legal aid and the accused spoke to a lawyer. The accused then provided two breath samples of 220 mg% and was charged with operating a motor vehicle over 80mg%.

At trial in British Columbia Provincial Court the accused argued that his right to contact counsel of his choice had been breached. He argued that by assuming complete control over his means of contacting counsel, the police were required to do things that a reasonable person in his position would have done to get through to his lawyer of choice, such as locating and calling his lawyer's home number. In other words, police denied the accused an opportunity to contact his lawyer himself and did not themselves take reasonable steps to contact that lawyer. Because the police did not do what the accused would have done, they breached his s. 10(b) *Charter* right. A result, he submitted that the analysis of his breath samples gathered by the police after the breach should be excluded as evidence.

The trial judge ruled that "once [the accused] was unable to speak with his counsel of choice at the number that he had provided, he then agreed to speak with his counsel of second choice, which was the duty counsel lawyer." He did not give any indication that he would prefer to try speaking with his lawyer at his home, which would have definitely triggered a responsibility on the police to either give him a phone book or otherwise assist him in getting that phone number. Rather, the accused was satisfied with his call to duty counsel and his right to counsel had been met. The trial judge found there was no s.10(b) breach and the application to exclude the breathalyzer readings was dismissed. The accused was convicted of over 80mg%.

The accused then appealed his conviction to the British Columbia Supreme Court. He suggested that he was not responsible for asking police to make further efforts to contact his lawyer of choice. In his view, there was a police duty to do more than physically dialling the number he had given to them. Justice Roger framed the accused's argument this way:

> He argued that in addition to acting as his hands to dial the phone, the RCMP should have acted has his brain too. His position amounts to an argument that the RCMP should have assumed his cognitive function. This would make the RCMP responsible to think up alternate methods of contacting counsel and then implement them. The [accused's] position is that, having asked to talk to a particular lawyer, it was fine for him to sit back and do nothing more – he had off-loaded the onus of thinking up how to give effect to his request to the RCMP and he need not have done anything further. [para. 11]

Justice Rogers, however, rejected the accused's argument. There was no doubt he was entitled to an opportunity to retain and instruct counsel, but he had an obligation to exercise his opportunity diligently. Here, the accused gave the police his lawyer's office telephone number. In response to an officer's question, he said he would like to talk to legal aid in the event his lawyer did not respond. He had the capacity to direct the police to make further efforts to contact his lawyer and could not blame the police for his lack of determination to speak to his lawyer of choice. In final remarks, Justice Rogers stated:

> …I make two observations. First, the fact pattern of this case, viz, [the accused] giving the police his lawyer's number and agreeing to talk to an alternate advisor if his first choice was unavailable, would, if [the accused's] argument were accepted, amount to a trap for the police. That trap would lie in the accused's apparent acquiescence to one scenario and the police following that scenario, and then later repudiating that scenario and crying foul. The court cannot in good conscience endorse such a thing.
>
> My second comment is more of an open question: Given that s. 10(b) of the Charter enshrines a person's right to "retain and instruct" counsel, can it be said that a police officer's failure to ferret out and employ all conventional means of contacting an accused's lawyer of choice can amount to a denial of that right in the absence of evidence that those means of contact, had they been employed, would have been productive? In other words, can it be said that an accused's right to retain and instruct counsel is infringed without there being evidence that the lawyer was, in fact, reachable by any given reasonably employed, but unused, modality? [para. 19-20]

The accused's conviction was upheld and his appeal was dismissed.

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

REASONABLE SUSPICION NEED ONLY BE PROVEN ON BALANCE OF PROBABILITIES

R. v. Church, 2008 BCSC 686

An officer was conducting a bar check at about 11 p.m. when he walked past the accused on a boardwalk attached to the building. The boardwalk was constructed of two-by-fours with spaces in between and the accused was wearing high-heeled shoes. She staggered and bumped the officer, which raised his suspicions. He followed her vehicle as it left the parking lot and stopped her. She immediately exited her vehicle without any apparent difficulty and turned to her vehicle to retrieve documents. In doing so, she stumbled and had to stabilize herself using the seat of the vehicle. The officer detected a slight slur in the accused's speech and a moderate odour of liquor on her breath. He formed a suspicion the accused had consumed alcohol and gave an ASD demand. She subsequently provided breath samples in excess of the legal limit and was charged with over 80mg%.

At trial in British Columbia Provincial Court the officer testified he did not necessarily attribute the accused's staggering on the boardwalk or her stumbling after the stop to the consumption of alcohol, given her footwear and the surface she was walking on. The boardwalk was made of two-by-fours and the roadway was gravel or dirt and was uneven in the area in which she was standing. The trial judge found the Crown failed to prove that the officer had the necessary subjective belief to make the ASD demand. Although the officer believed he had a suspicion of alcohol consumption, he never put his mind to whether that alcohol was still in the body of the accused. Thus, the trial judge was not satisfied the officer had the subjective belief for the ASD demand. The resulting fail test on the ASD was inadmissible and therefore the officer did not have reasonable and probable grounds to make the breath demand. As a result, the breathalyzer tests were obtained in breach of s. 8 of the *Charter* and the evidence was excluded under s. 24(2). The accused was acquitted.

The Crown then appealed the acquittal to the Supreme Court of British Columbia arguing the trial judge erred on his *voir dire* ruling that the officer did not have the necessary subjective belief to make the ASD demand.

Justice Curtis noted that the Crown only needed to prove on a balance of probabilities that the officer reasonably suspected, subjectively and objectively, that the accused had alcohol in her body while she was driving. In concluding that the officer did direct his mind to whether the accused had alcohol in her body while she was driving and that he had a reasonable suspicion, both subjectively and objectively, Justice Curtis stated:

> There is no evidence to support an inference that [the accused] consumed alcohol after she stopped driving her vehicle, so if there is evidence that she had alcohol in her body, it would be evidence she had it in her body while she was driving. The trial judge did not find that the evidence presented did not support a reasonable suspicion on an objective basis, rather he found that considering the constable's answer, "I formed the suspicion that she had consumed alcoholic beverage …", "it is consistent with all the evidence that the officer wrongly believed that all the Code required is a suspicion of alcohol consumption without ever putting his mind to whether that alcohol was still in the body of the accused."
>
> Such a conclusion is contrary to the course and purpose of [the officer's] investigation. His attention was drawn to [the accused] as she came out of the bar of the Springwater Lodge because she staggered. When he pulled her over, he observed she had a "slight slurring to her speech" and "a moderate odour of alcohol … I could smell the odour of liquor coming from her breath … the odour of the alcohol or liquor on her breath." [The officer] gave these observations in answer to the question: "And did you notice any indications of her level of sobriety at the time?" Clearly, he was speaking of what appeared to be the effects of alcohol which would have to be in her body at the time to produce such effects. He obviously suspected from what he had seen that she was under the influence of alcohol. He requested a sample for the screening device in order to test for the presence of alcohol in her body because he suspected there was alcohol in her body. His answer, "I formed the suspicion that she had consumed alcoholic beverage based on the odour coming from her breath" is a part of his evidence, but must be considered in relation to the whole of it. [paras. 7-8]

The Crown's appeal was allowed and a new trial was ordered.

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

CDSA SEARCH WARRANT DOES NOT REQUIRE PRE-AUTHORIZED NO KNOCK ENTRY

R. v. Andrews et al., 2008 BCSC 888

A Judicial Justice of the Peace (JJP) issued a telewarrant under s.487.1 of the *Criminal Code* for a s. 11 *Controlled Drugs and Substances Act* (*CDSA*) search. After obtaining the warrant, eight police officers met for a pre-execution briefing and each officer was assigned a role in the execution of the warrant. Officers were aware that a surveillance camera monitored the front entry to the home and a motion sensor worked a bright light in the same area. There was a concern that the occupants of the home would destroy evidence, as cocaine and heroin can be easily flushed down the toilet in many circumstances even if minimal notice of police presence is given. Because of this concern it was decided that police would execute the warrant by "hard entry."

When police arrived at the premises they immediately rushed the front door with a battering ram. As the ram struck the door, officers shouted, "Police. Search warrant. The occupants were not given the chance to answer the door. Police entered the premises and a number of individuals were arrested, including the accused and two men who were caught fleeing through the backyard. A quantity of cocaine and heroin was seized, as was a shotgun found under the bed in the room where the accused Andrews was arrested. She was charged with possessing cocaine for the purpose of trafficking, possessing heroin for the purpose of trafficking, and two firearms offences.

During a *voir dire* in British Columbia Supreme Court, the accused argued the search warrant was invalid because the police failed to apply for authorization to omit announcement before entry, which rendered the warrant fatally tainted, and that it was executed in a manner that breached s.8 of the *Charter* because the officers did not comply with the common law knock/notice rule. The police, on the other hand, testified they had a specific concern with the destruction of evidence if they complied with the knock/notice rule. They believed the premise was a "crack shack" equipped with the front door surveillance camera and the motion sensor lighting.

Although s.529.4 of the *Criminal Code* requires prior authorization to omit announcement before entry while executing entry authorizations or warrants to arrest under ss.529 and 529.1 of the *Code* (a.k.a. Feeney warrants), it has no application to a search warrant issued under s.11 of the *CDSA*. As Justice Bauman noted, "there is no authority for the JJP to pre-authorize entry without announcement in the execution of such a search warrant." Thus, the search warrant was lawfully issued.

"[T]he officers here were not operating on a general policy never to knock and provide notice in the execution of drug search warrants. They rather considered the circumstances specific to these premises, and in that consideration of the circumstances … they concluded that there was a real risk of evidence being destroyed."

As for the manner in which the warrant was executed, Justice Bauman found the police failure in complying with the knock/notice rule was reasonable because they had exigent circumstances. In this case, "the officers here were not operating on a general policy never to knock and provide notice in the execution of drug search warrants," said Justice Bauman. "They rather considered the circumstances specific to these premises, and in that consideration of the circumstances … they concluded that there was a real risk of evidence being destroyed":

> This was not a marihuana grow operation…. With such operations it is often thought unlikely the residents will be able to destroy much of the paraphernalia and product if the police knock and give notice. It is otherwise with a crack house operation like the alleged one at bar, where evidence can be easily destroyed, and the residents have taken precautions, as here, to secure their entry with a surveillance camera and motion sensitive lighting. [para. 20]

The warrant was validly issued and executed in a reasonable manner. There was no breach of s.8 and the fruits of the search were admissible as evidence.

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

FIRE CHIEF JUSTICE OF THE PEACE NOT BIASED

R. v. Stabner, 2008 SKCA 145

Police obtained and executed a search warrant under s.11 of the *Controlled Drugs and Substances Act* issued by the local Justice of the Peace who was also the fire chief and town bylaw enforcement officer. The warrant was based on information provided by a single informant and police found 3.9 pounds of marijuana in the accused's home and a large quantity of currency on his person. He was found guilty in Saskatchewan Provincial Court for possessing marihuana for the purpose of trafficking and possession of crime proceeds.

The accused appealed his convictions to the Saskatchewan Court of Appeal arguing, among other grounds, that the search warrant was invalid and the Justice of the Peace who issued it was not acting impartially.

In upholding the warrant, Justice Lane, delivering the opinion of the appeal court, noted that the judge reviewing the validity of the search warrant, in this case the trial judge, "is only required to inquire into whether there was any basis upon which the Justice of the Peace could be satisfied the relevant statutory preconditions existed. The reviewing judge is not to substitute his or her view for the authorizing judge; instead if the reviewing judge concludes the authorizing Justice of the Peace could have granted the authorization then he or she should not interfere." In finding the information provided by the informant was reliable when considering "the totality of the circumstances" and the Information to Obtain could reasonably support the issuance of the search warrant Justice Lane stated:

> In the case before us we have extensive detail including repeated incidents over a long period of time; a previous incident wherein a police officer did surveillance on the accused and a known drug dealer, witnessed a transaction and after a search of the drug dealer' s vehicle found marijuana and in his videotaped warned statement the dealer told the police officer he had bought the marijuana from the now [accused]; and finally the criminal record of the [accused]. In our view there was sufficient evidence of reliability. [para. 10]

As for the independence of the Justice of the Peace the Court found there was no apprehension of bias:

> The issuing Justice of the Peace herein was not in daily contact with the police and/or subject to its supervision; did not use police resources; and the

> contact between him and the police force generally was when he and the police would show up at the same fire scene when he was there in his capacity as local fire chief. [para. 13]

The informing officer also testified there was no collaboration or cooperation between the local bylaw enforcement officers and the police, stating "they enforce what they enforce and we enforce what we enforce." In the Court's view, "a reasonable person would not believe there is a real danger of bias, or even a reasonable suspicion of bias even though not intended, in the circumstances of this case."

The accused's appeal was dismissed.

Complete case available at www.lawsociety.sk.ca

ERROR TO DISSECT & CONSIDER INDICIA OF IMPAIRMENT IN ISOLATION

R. v. Restau, 2008 SKCA 147

A police officer followed the accused home after seeing him driving an ATV without a helmet. He pulled the ATV into his garage. The officer parked his patrol car and walked up to the garage to issue a ticket for failing to wear a helmet. As they both walked back to the police car to have the ticket written up, the officer noticed the accused was walking unsteadily and his speech was slurred. When in the police car the officer noted the smell of alcohol on the accused's breath. The officer then made a roadside screening demand. The accused was delayed in his response and then answered with slurred speech. The officer set aside the demand for the roadside screening test and made a demand for a breathalyzer sample. The accused was given his right to counsel at the scene but declined to exercise it because he indicated he did not know whom to call.

He was transported to the police detachment and again read his rights to counsel. He was placed in a holding cell containing a phonebook and advised he could call anyone he wanted or Legal Aid. He ultimately decided he wanted to call Legal Aid and the officer dialled the appropriate number and explained the charges to the person who answered. He then turned over the telephone to the accused, left the room, and closed the door. After the telephone call ended, the officer re-entered the holding room and escorted the accused to the breathalyzer room. He was subsequently charged with impaired driving and over 80mg%.

At trial in the Saskatchewan Court of Queen's Bench the accused argued his *Charter* rights under s.8 and 10(b) were breached and the certificate of analysis should be excluded. The trial judge disagreed, admitted the certificate, and convicted him of operating a motor vehicle with a blood alcohol level over 80mg%. He was sentenced to eight months jail, three-years probation, and given a driving prohibition.

The accused then appealed to the Saskatchewan Court of Appeal submitting the trial judge erred in concluding the arresting officer had reasonable and probable grounds to make the breath demand under s.254(3) of the *Criminal Code.* As well, he challenged the ruling that his right to counsel was not violated.

Reasonable Grounds?

The accused argued the officer made a roadside screening demand after seeing his unsteady walk and slurred speech, but changed his mind when the accused delayed his reply to the request and then responded with three slurred words ("Pardon me, yup"). At this point the officer then made a breathalyzer demand without performing the roadside screening test. Since the officer testified he did not have reasonable and probable grounds to make a breathalyzer demand until the slurred response, the accused contended this was not a sufficient indicia of impairment to provide the necessary reasonable and probable grounds. In other words, the trial judge placed undue weight on the slurred response.

The Crown, on the other hand, suggested the test for reasonable and probable grounds was not onerous, but one of reasonable probability—not proof beyond a reasonable doubt nor proof of a prima facie case. In its view, indicia of impairment cannot be dissected and considered in a piecemeal fashion.

Justice Lane, delivering the decision of the Court, first noted the test for establishing reasonable grounds. "Reasonable and probable cause contains both a subjective and objective element," he said. "There must be both an actual belief and that belief must be reasonable – this is a question of law. The prosecution need not establish there is a prima facie case for conviction." In this case there was no dispute the police officer believed he had reasonable and probable

grounds to make the demand—the subjective aspect. Rather, it was the objective element that was in question—whether the evidence known or available to the police officer when he formed his belief supported a finding of reasonable and probable grounds to make a breath demand. In concluding the officer did have reasonable and probable grounds for the demand, Justice Lane stated:

> The [accused] puts much stock on the officer's testimony that until the slurred speech response the officer did not have reasonable and probable grounds to make a breath demand. Therefore it is only the indicia of slurred speech that led to the demand and is not sufficient to establish the objective element.
>
> In our view the [accused] looks at the one indicia in isolation and fails to look at all of the circumstances or in other words, the totality of circumstances. All of the circumstances must be considered and as the [Crown] correctly points out it is an error to dissect and consider the indicia of impairment in isolation.
>
> The trial judge found the officer witnessed the [accused] being unsteady on his feet and slurring his words while walking from the garage to the patrol car. After the officer entered the car he noticed a strong smell of alcohol on the [accused's] breath. At that point the officer was clearly suspicious the [accused's] ability to drive was impaired therefore he decided to make a roadside demand. Immediately after making that demand the officer heard the [accused's] slurred words and hesitant response. The trial judge found this to be a new observation as the words were uttered in a small enclosed environment and the officer testified each separate word was slurred.
>
> In our view the trial judge did not place undue weight on the indicia of the slurred speech. … In other words it was one factor out of several, which led the trial judge to conclude reasonable and probable grounds existed.
>
> The issue is whether a reasonable person would reasonably believe that the [accused's] ability to operate a motor vehicle was impaired on the proven facts of a combination of the smell of alcohol, the unsteady walking, and the slurred speech of the [accused]. Numerous cases were cited by each of the parties exhibiting various factual situations where indicia were found to be sufficient or not sufficient to establish the objective element but each case must turn on its own facts. In our view it was open to the trial judge to find on the evidence that a reasonable observer could have concluded the officer had reasonable and probable grounds to believe the [accused] was driving the ATV while impaired by alcohol. [paras. 13-17]

"Reasonable and probable cause contains both a subjective and objective element. There must be both an actual belief and that belief must be reasonable – this is a question of law. The prosecution need not establish there is a prima facie case for conviction."

Right to Counsel

The accused argued, in part, that the action of the officer in physically dialling the number for him, violated the implementational component of the right to counsel because he was not given an opportunity to properly retain and instruct counsel of his choice. However, Justice Lane also disagreed with this contention. This was not a case where Legal Aid was the only option given to the accused. Here, police made no selection of counsel, nor was any particular counsel suggested. The officer left it up to the accused to choose his own lawyer. The accused's right to select counsel of his choice was not interfered with.

The accused's appeal was dismissed.

Complete case available at www.lawsociety.sk.ca

ODOUR EMANATING FROM VEHICLE PROVIDES REASONABLE SUSPICION

R. v. Webster, 2008 BCCA 458

A police officer on patrol noticed a red Ford Mustang containing two persons stopped near a pub. He saw someone approach the passenger-side window of the Mustang and have a brief interaction with those inside. The Mustang then pulled away as the officer drove up behind it and a distinctive odour of freshly-smoked (or burnt) marihuana was detected, believed to be coming from inside the Mustang. The officer followed the Mustang for about 200 meters, continuing to smell the odour of freshly-smoked marihuana, and decided to stop it to determine whether the occupants

had been smoking marihuana or had any in their possession. The officer activated his emergency equipment and the Mustang promptly pulled over.

The officer approached the open driver's window of the Mustang and could smell the odour of freshly-smoked marihuana coming from inside the vehicle. He continued to detect this odour as he was speaking with the accused, who was the driver, and asked him to produce his driver's licence and registration. As the officer spoke to the accused he noticed what appeared to be a marihuana "joint" behind the passenger's left ear. When the officer asked if there was any marihuana in the vehicle, the passenger motioned to the "joint" and held it out towards the officer. The officer then directed the accused and his passenger to exit the car, arrested them for possession of a controlled substance, read them their right to counsel, and cautioned them about making statements. The car was then searched and the police seized a plastic bag containing 76.7 grams of marihuana, a portable scale, a notebook containing "score sheet" entries, and a plastic bag containing numerous small zip-lock baggies. The men were then arrested for possession of a controlled substance for the purpose of trafficking and again advised of their rights.

> "[T]he odour of freshly-smoked marihuana emanating from a vehicle objectively supports, at a minimum, a reasonable suspicion that the driver and/or passenger are then engaged in criminal activity, namely, possession of marihuana. It is reasonable to suspect that persons who have just used marihuana will have more of that drug in their possession."

At trial in British Columbia Provincial Court the officer testified he arrested the vehicle occupants because of the marihuana joint in the passenger's ear, the smell of freshly-burnt marihuana, and the passenger stating he had marihuana. During the *voir dire* the accused argued the drugs and other evidence should have been excluded under s.24(2) of the *Charter* because police breached his rights under s.9 (arbitrary detention) when they pulled the car over and when he was arrested, and s.8 (unreasonable search or seizure) when police searched the vehicle without a warrant.

The trial judge ruled the accused's rights were not infringed because the officer had "a hunch and suspicion based on some objectivity, namely the continuing smell of burning marihuana" when he stopped the vehicle. This was then elevated to "reasonable and probable grounds by virtue of the passenger, who, in response to a question of where the smell was coming from, had indicated a joint above his left ear." The trial judge found the officer had reasonable and probable grounds that marihuana was on the passenger and the accused was also arrestable because he was in possession under s.4(3) of the *Criminal Code*—where one or more people with the knowledge and consent of the others have possession. The Mustang had been lawfully searched incidental to the arrests and the evidence was admissible. And even if the accused's rights were breached the trial judge would not have excluded the evidence under s.24(2) anyway. The accused then pled guilty to possessing marihuana for the purpose of trafficking.

The accused then appealed the trial judge's ruling on the *voir dire* to the British Columbia Court of Appeal again arguing he was arbitrarily detained when the officer directed him to pull over and stop. He submitted that the odour of freshly-smoked marihuana emanating from the car did not provide legal justification for the officer's action. Instead, he suggested the officer had only a bare suspicion of criminal activity which did not meet the threshold for an investigative detention. He also contended that although there may have been grounds to arrest the passenger for possession of marihuana, the officer did not have grounds to arrest him. In his view, it could not be inferred that he had the requisite knowledge, consent, or control over the joint observed in the passenger's personal possession.

The Initial Detention

The three member panel of the British Columbia Court of Appeal upheld the trial judge's decision. Under the common law, police officers have the power to detain a person for investigation if they have reasonable grounds to suspect the detainee is involved in on-going criminal activity. "A 'reasonable' suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds", said Justice Frankel. He continued:

> In my view, the odour of freshly-smoked marihuana emanating from a vehicle objectively supports, at a

> minimum, a reasonable suspicion that the driver and/or passenger are then engaged in criminal activity, namely, possession of marihuana. It is reasonable to suspect that persons who have just used marihuana will have more of that drug in their possession. In addition, when the odour of freshly-smoked marihuana is emanating from a vehicle, it is reasonable to suspect that the driver's ability to operate that vehicle is impaired by a drug, an offence contrary to s.253(1)(a) of the Criminal Code … In light of this, [the accused] was lawfully detained for investigation. [para. 31]

The Arrest

Under s.495(1)(b) of the *Criminal Code* a peace officer may arrest a person found committing a criminal offence. This means "the arresting officer must have reasonable grounds to believe that the person to be arrested is apparently in the process of committing a crime in his or her presence". In this case, the decision to arrest the accused "was not based solely on the odour of freshly-smoked marihuana emanating from the Mustang, but on that odour taken together with what appeared to be a marihuana 'joint' behind [the passenger's] left ear." These factors, in combination, objectively supported the officer's belief that he had come across a crime in progress.

The accused's submission that the passenger was the only person that could be lawfully arrested was also rejected. The definition of "possession" in s.4(3) of the *Criminal Code* includes "where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them." In holding the accused's arrest lawful Justice Frankel stated:

> With respect to deemed possession under s. 4(3)(b), "there must be knowledge, consent and a measure of control on the part of the person deemed to be in possession". All these elements are present with respect to the standard required to arrest [the accused] on the basis of "finds committing".
>
> With respect to "knowledge", given the odour of marihuana in the Mustang, it cannot seriously be suggested that there is no objective basis to support a reasonable belief that [the accused] was aware that marihuana had very recently been smoked in his vehicle. Further, and more importantly, it cannot seriously be suggested that there is no objective support for a reasonable belief that [the accused] was aware of the "joint" behind [the passenger's] left ear.
>
> Turning to "consent and control", what must be kept in mind is that for a person to be deemed to be "in possession" of an item, he or she need not have in fact exercised power over it; all that is required is an ability to exercise some power….
>
> ……
>
> …In the context of a voir dire to determine whether someone was lawfully arrested on the basis of "finds committing", what the Crown needs to establish is that the facts as they appeared to the arresting officer, when viewed objectively through the lens of common sense, support a reasonable belief that the person arrested was in a position to exercise some measure of control over the item in question. In my opinion, the facts in this case objectively support [the officer's] belief that [the accused] was in a position to exercise some measure of control over the marihuana [the passenger] openly had in his possession…. [references omitted, paras. 40-45]

Since the vehicle occupants were lawfully arrested, the police had the common law power to search the vehicle's interior incidental to those arrests to determine whether any additional drugs were present. Since there were no *Charter* violations there was no need to resort to s.24(2) and the evidence was admissible. The accused's appeal was dismissed.

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

BY THE BOOK:

s.495(1) *Criminal Code*: Power of Arrest

A peace officer may arrest without warrant

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

(b) a person whom he finds committing a criminal offence; or

(c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

REASONABLE SUSPICION ELEVATED TO REASONABLE BELIEF DURING TRAFFIC STOP

R. v. Baddock, 2008 BCCA 48

A police officer received phone numbers for dial-a-dope operations from an informant believed to be reliable. The officer phoned one of the numbers and set up a meet for 15 minutes after the call. A small, white car was to attend at a McDonald's restaurant, located in a small mall with other stores. Within the time expected, the accused and his passenger arrived at the McDonald's in a small, white Honda Civic and parked in front of it, but neither the driver nor the passenger left the vehicle which remained parked for about two minutes before leaving. The police officer followed the car and pulled it over, believing its occupants were associated with the telephone call he had made to the dial-a-dope operation. As the officer approached the vehicle he called the dial-a-dope number again and noted the accused's phone was vibrating. The accused was arrested and the car was searched. Police found cocaine in a coin compartment between the steering wheel and the driver's side door and underneath a mat in the driver's side area of the vehicle.

During a *voir dire* in British Columbia Supreme Court the accused argued there were insufficient objective grounds to arrest and, at best, only a detention and safety search of the accused was authorized. As a result of the ss.8 and 9 *Charter* breaches, he submitted the evidence should be excluded under s.24(2). The trial judge, however, concluded the officer had reasonable grounds to make the arrest. First, he found the officer subjectively believed grounds existed. Second, he ruled the necessary objective grounds existed as well. The informant's information had face validity because he had assisted the police in other investigations. It was also tested this time when the officer phoned the number and engaged in a drug transaction. And the appearance of the small, white Honda within the time expected, parking for a short time without attending any of the stores and then driving off added to the circumstances implicating the accused. The police were authorized to detain the accused and pull the vehicle over. Then the suspicion was heightened to reasonable and probable grounds on phoning the original number that resulted in the drug transaction and the police officer's observation of the accused's telephone receiving a call. The trial judge concluded the search of the vehicle was subsequent to a legal arrest and the evidence was admissible. The accused was convicted of possessing cocaine for the purpose of trafficking.

The accused then appealed to the British Columbia Court of Appeal contending, in part, that the trial judge erred in failing to find his rights under ss. 8 and 9 of the *Charter* were violated when his vehicle was stopped and searched and in not excluding the evidence.

The "police may detain an individual for investigative purposes if there are reasonable grounds to suspect in all of the circumstances that the individual is connected to a particular crime and that such a detention is necessary." And a lawful arrest in this case required the officer have a subjective belief that the driver of the vehicle had committed an offence and that the officer's subjective belief was objectively reasonable.

> "[P]olice may detain an individual for investigative purposes if there are reasonable grounds to suspect in all of the circumstances that the individual is connected to a particular crime and that such a detention is necessary."

Justice Levine, rendering the unanimous opinion of the Appeal Court, concluded the trial judge did not err in finding the police had reasonable grounds to detain the accused for investigative purposes when they pulled him over. Thus, there was no s.9 breach at the time of the stop. And when the officer again called the number and the accused's telephone received the call, this elevated the officer's reasonable suspicion to reasonable and probable grounds justifying the arrest. This was so even though the officer acknowledged that he did not take steps to confirm the number he called was in fact connected to the accused's cell phone and it could have been a coincidence that he received a call from another telephone at the time the officer approached the vehicle.

The police may search a vehicle pursuant to a lawful arrest where the object or purpose of the search is correlated to the reasons or grounds for the arrest.

Since the arrest was lawful, the search for evidence following the arrest was also lawful and did not breach s.8 of the *Charter*.

The accused's appeal was dismissed.

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

ROADSIDE PAT-DOWN REASONABLE ON BASIS OF DRIVER's VIOLENT BACKGROUND

R. v. Harada, 2008 BCSC 1346

Police saw a vehicle driving at a very low rate of speed through an intersection shortly before 1:00 am and followed it. Its brake lights flashed several times and the vehicle pulled beside the curb, came to a stop, and then pulled out onto the street. The vehicle then pulled back beside the curb and came to a stop again. Concerned that the driver might be confused and in need of assistance, or that the driver might be impaired, the officers decided to speak to the driver. The police car came to a stop parallel to the vehicle and asked the driver what he was doing. The accused said he was coming to see a friend and it was noted his eyes were glazed over and he appeared confused. Concerned the accused may be impaired, an officer told him to wait. The police car was backed up and pulled behind the accused's vehicle. An "N" sticker that was not properly displayed was seen.

> "Police in British Columbia have a general power to conduct roadside stops of vehicles under section 73 of the Motor Vehicle Act. The limitation on this power is that the stop must be for a traffic related purpose such as checking the driver's licence and insurance, the mechanical fitness of the vehicle, or the sobriety of the driver. The roadside stop may be entirely random, but must relate to driving a car."

The two officers exited the police car. One spoke to the driver, obtained a driver's licence showing the accused was a new driver, pointed out the improperly displayed "N" sticker and asked the accused if he had been drinking. The accused replied "No." A second officer had approached the vehicle on the passenger side and noticed an unopened bottle of beer in a pouch on the back of the passenger seat. Both officers returned to their police car and decided to require a breath sample for an approved screening device (ASD). The accused's name was checked on the police computer and it was learned he was "violent", as having been involved in a violent assault three years earlier and an incident where a replica handgun and pellet gun were recovered from him shortly before this stop. The accused was asked to exit his vehicle and brought back between the two vehicles where the ASD demand was read.

One officer began to prepare the ASD while the other asked the accused to remove his hands from his pockets and whether he had any weapons or sharp objects on him. He said "no", but the officer nonetheless had safety concerns arising from the information received from the police computer. A pat down search was conducted and the officer detected a hard object in the accused's right front pant pocket which felt long and hard, like a knife. When asked whether it was a knife the accused said "No, I don't think so. Let me check," and he began to reach into his pocket. The officer immediately held the accused's wrist, stopping him form reaching in the pocket. The officer then reached into the pocket and withdrew a knife. Upon pulling out the knife, the officer loudly said "this is a knife" to alert his partner. The accused was taken to the ground for the safety of everyone present and handcuffed.

The knife was examined and was determined to be a prohibited weapon—its blade could be opened by spring action after pressing a button. He was arrested for possessing a prohibited weapon and a plastic baggie containing drugs was seen on the ground. He was then arrested for possessing drugs for the purpose of trafficking and immediately provided his *Charter* warning. The ASD was presented the accused but he blew zero. He was searched and several items of drugs were found. In his vehicle police found two cell phones, one ringing frequently where individuals asked for drugs. He was charged with four counts of possession of a controlled substance for the purpose of trafficking and a *voir dire* was held in British Columbia Supreme Court to determine if the accused's *Charter* rights were breached and whether the evidence should be excluded under s.24(2) of the *Charter*. He alleged that he had been unlawfully detained, given a demand for an approved screening

device (ASD) without reasonable suspicion, and then unreasonably subjected to a pat down search followed by an illegal search of his pocket.

The Stop

In determining that the police were entitled to initially stop the vehicle under provincial legislation, which rendered the stop lawful and therefore did not a breach of s.9 of the Charter, Justice Dillon stated:

> Police in British Columbia have a general power to conduct roadside stops of vehicles under section 73 of the Motor Vehicle Act. The limitation on this power is that the stop must be for a traffic related purpose such as checking the driver's licence and insurance, the mechanical fitness of the vehicle, or the sobriety of the driver. The roadside stop may be entirely random, but must relate to driving a car.
>
> Police stopped [the accused's] vehicle in the early morning hours on Sunday after observing erratic driving that led officers to question whether the driver was just lost or was possibly inebriated. [An officer] then decided to do a proper vehicle stop and noticed that the N sticker, required to be apparent on the vehicles driven by all new drivers, was not completely visible. A new driver is not allowed to have any alcohol in his body when driving. [The second officer] had noticed glazed eyes and confusion that led him to consider that a sobriety check was necessary. Consequently, police told [the accused] to wait. All of this was authorized under the Motor Vehicle Act. [references omitted, paras. 17-18]

The ASD Demand

The judge also concluded the officers were entitled to demand the accused provide a breath sample for analysis by the ASD. Section 254(2) of the *Criminal Code* allows a demand to be made for roadside screening device if there are reasonable grounds to suspect, based on the totality of the circumstances, that the driver has alcohol in his body. In this case, the police had a proper basis to reasonably suspect the accused had alcohol in his body. Although neither officer smelled alcohol on the accused's breath, they both testified they had a suspicion that he had alcohol in his body. "The manner of driving suggested that the driver did not know what he was doing, the driver was observed to have a glazed and confused look, there was a bottle of beer within reach of the driver, it was early morning after a Saturday night, and the driver was under a requirement to have consumed no alcohol," said Justice Dillon. "In all of these circumstances, I conclude that there existed the basis for a reasonable suspicion so that the ASD demand was lawful."

And bringing the accused back to the police vehicle to administer the ASD, instead of doing it at the side of his car as he suggested, did not take the detention outside the ambit of minimal intrusion. He was within five meters of his car and there was no time delay. Further, there was no evidence moving the accused to the rear of his car was a fishing expedition so he could be patted down for the ulterior purpose of searching for drugs.

The Search

The pat down search of the accused was also reasonable. The officer was concerned for safety in light of the information received from the police database that classified the accused as violent with a recent incident involving replica weapons. "A police officer is entitled to conduct a pat down search when he has reason to believe that his safety is at risk," said Justice Dillon. "The reasonableness of the pat down search is to be determined on the totality of the circumstances":

> Here, there was recent information that [the accused] was violent or potentially violent. This information was not contested. Although [the accused] denied that he had a weapon and was otherwise cooperative, [the officer] was not acting solely on a hunch when he decided that a pat down was necessary to ensure his safety. He had reason to believe that he was dealing with a potentially dangerous individual just after midnight. In R. v. Mann …the court said that officer cannot act solely on a hunch, but must respond based upon reasonable and specific inferences drawn from known facts. The officer was not conducting a fishing expedition here with the information at hand.
>
> The officer then conducted a pat down search for this reason and discovered a hard long object that caused him

"[The officer] was not acting solely on a hunch when he decided that a pat down was necessary to ensure his safety. He had reason to believe that he was dealing with a potentially dangerous individual just after midnight"

concern. He asked the accused if he had a knife and was given an uncertain answer. This raised further concern for safety as the accused had now basically denied that he had weapons twice and the officer was faced with a reasonable inference that the accused had a knife.

The search progressed beyond the pat down once the officer felt what he thought was a knife, the accused was ambivalent as to whether it was a knife, and then the accused moved to reach into his pocket. The pocket search … was warranted by the officer's feeling of a hard object that he thought could be a knife in a situation that was not based upon mere curiosity. The officer had a reason to go beyond the pat down search. I conclude that the officer had a reasonable basis to reach into [the accused's] pocket.

The aftermath of discovery of the knife and the conclusion that it was a prohibited weapon was to place the accused on the ground. When he was raised to his feet, the officer told him that he was under arrest for possession of a prohibited weapon and moved towards the police car. The baggie containing drugs was then discovered where the accused had been on the ground. He was then told that he was under arrest for possession of drugs for the purpose of trafficking and was given the Charter warning. The search of the vehicle subsequent to arrest was not challenged. [paras. 26-29]

The seizure of the knife and drugs was lawful and there were no *Charter* breaches. And even if the accused's rights were violated the judge would have admitted the evidence under s.24(2). The evidence was admitted and the accused was convicted on three counts of possessing a controlled substance for the purpose of trafficking.

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

NEW YEARS RESOLUTIONS

Insp. Kelly Keith, Atlantic Police Academy

Well pretty soon the gyms will be full of people that made news years resolutions. I never liked going to the gym at this time of year because it was busy and there were long waits at some of the equipment. On the positive side, I knew it would only last for about 3 weeks and then 90 % of the people that started will have quit. Let's take a look at some of the key factors to keep you motivated to train!

Goals - You need to ensure that you make each day count!!! Going to the gym without a plan is like getting your car on the road and knowing your destination but having no idea how to get there. You need to set both short term – one month goals and long term 6-12 month goals. The goals MUST be achievable. Then reward yourself when you achieve them. Each and every time you go to the gym you should know in advance what it is you're going to do once you get there. This being said, if a piece of equipment is being used or you go to another gym, simply do another exercise that works that same muscle part. If the barbells are all being used, just change to dumbbells. Surround yourself with reminders; reminders that will motivate you each day to get to the gym. Entering into some type of competition is what I generally need to keep motivated.

Nutrition - This is a monster piece of the equation. In order to achieve any goals you may have set, you will need to ensure that your nutrition is in-line with your goals. A key to success is cleaning out your fridge and cupboards of anything that is not consistent with your goals. You will need to ensure you eat 5-6 meals a day and include a clean variety of protein and carbohydrates (fats usually take care of themselves in the carbohydrates and protein you eat). After a hard workout try to eat a clean portion of carbohydrates and protein to enhance your recovery for the next workout. Last, but not least, you must go to the gym with some fuel – FOOD - in your tank. Ensure you at least have pre-workout food approximately 30 – 60 minutes before you go to the gym. Many people have "cheat" days where they allow themselves to indulge once per week in whatever they wish. Again, the key to this is not to have these foods in the house for the rest of the week.

Injury Prevention - Injuries will set you back and can even be the tipping point in failing to meet your goal - quitting. Ensure you raise your body temperature and warm-up before going hard. Also, ensure that you stretch at the end of your workout to increase the range of motion and decrease soreness. Increase the strength in your stability muscles that often get overlooked. Finally, take a break from training when you need to.

Success – Change your program often. Don't be afraid to shock your body! For example, if you generally do three sets of eight repetitions of a certain exercise throw in a day where you do three sets of 15 – 20 repetitions. Keep everything fresh and your tempo high.

Rest – If you workout hard you must rest hard! The harder you workout the more sleep you will require. If you truly want success do not skip this step!

As Benjamin Franklin said: "By failing to prepare, you are preparing to fail!" Start Preparing!

About the Author - Insp. Kelly Keith is a 20 year veteran of law enforcement. He presently teaches Physical Training, Use of Force and Tactical Firearms to Corrections, Law and Security, Conservation Officers and Police Cadets at the Atlantic Police Academy. Kelly is a second degree black belt in Jiu-Jitsu and a Certified Personal Trainer, Strength and Conditioning Instructor, and a Certified Sports Nutrition Specialist. He can be reached by email at KKeith@pei.sympatico.ca

'IN SERVICE' LEGAL ROAD TEST ANSWERS

1. (a) **Stabbing**—see *Homicide By The Numbers* (at p. 6 of this publication).
2. (d) **Manitoba**—see *Homicide By The Numbers* (at p. 6 of this publication).
3. (b) **False**—see *R. v. Andrews et al.* (at p. 21 of this publication).
4. (a) **True**—see *R. v. Restau* (at p. 23 of this publication).
5. (a) **True**—see *R. v. Webster* (at p. 24 of this publication).

MAXIMUM SENTENCE DID NOT REQUIRE 'WORST OFFENDER, WORST OFFENCE'

R. v. Solowan, 2008 SCC 62

The accused pled guilty in British Columbia Provincial Court to three offences and was sentenced as follows; take auto without consent (three months), possess stolen property (six months), and fail to stop for police (six months). The possession offence and the fail to stop were both hybrid offences for which the Crown elected to proceed summarily. The six month sentence given for these offences was the maximum sentence permissible under the law. In total, the accused was sentenced to 15 months.

His argument to the British Columbia Court of Appeal that he received the maximum six month sentence for a summary proceeding without being found to be the worst offender committing the worst offence was rejected. The Court of Appeal held that the accused had not been subject to the maximum sentence because the offences had not been proceeded by indictment. Nevertheless, the Court of Appeal found the sentence of 15 months excessive and reduced the possession charge sentence to three months. This resulted in a global sentence of 12 months - not 15. The accused then appealed to the Supreme Court of Canada.

In a unanimous judgment, the Supreme Court held that the imposition of a maximum sentence is not constrained by the "worst offender, worst offence" scenario. Instead, a maximum sentence may otherwise be appropriate, considering the principles of sentencing set out in the *Criminal Code*, including the principle of proportionality and imposition of the least restrictive sanction.

However, the Supreme Court noted it would be an error in law to conclude the fitness of a sentence imposed for a hybrid offence proceeded summarily is to be considered against the maximum sentence available had the Crown elected to proceed by indictment:

> A fit sentence for a hybrid offence is neither a function nor a fraction of the sentence that might have been imposed had the Crown elected to proceed otherwise than it did. More particularly, the sentence for a hybrid offence prosecuted summarily should not be "scaled down" from the maximum on summary conviction simply because the defendant would likely have received less than the maximum had he or she been prosecuted by indictment. Likewise, upon indictment, the sentence should not be "scaled up" from the sentence that the accused might well have received if prosecuted by summary conviction. [para. 15]

Rather, the *Criminal Code* sentencing principles apply to both indictable and summary offences and a court is bound by the Crown's election in determining the appropriate punishment. The British Columbia Court of Appeal's decision was affirmed.

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

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