JIBC

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

IN MEMORIAM

On December 29, 2009 51-year-old Constable Ireneusz (Eric) Czapnik was ambushed and stabbed to death while sitting in his patrol car outside of the Ottawa Hospital Civic Campus at 4:30 am. He was writing reports when he was targeted and attacked.

The suspect who attacked him was a suspended constable with the Royal Canadian Mounted Police. Two paramedics and several civilians subdued the suspect until responding officers took him into custody.

Constable Czapnik had served with the agency for two years. He is survived by his wife, daughter, and three sons.

Source: Officer Down Memorial Page available at www.odmp.org/canada

'IN SERVICE: 10-8' TURNS TEN

The Justice Institute of British Columbia Police Academy's "In Service: 10-8" newsletter now spans a decade. Billing itself as a "peer read" publication, it started in 2001 as an "off-the-corner-of-the-desk" information source that was initially distributed to independent municipal police departments in British Columbia. Today, the newsletter is read from coast to coast to coast. There are readers now spanning all ten provinces and the three territories. It is highlighted on many police training web pages and hundreds and hundreds of police and peace officers as well as many others, subscribe to the email distribution list. Our commitment continues in providing our readers with relevant and current information.

"Police tend to enjoy more public confidence than courts, the prison system and parole system."

"Confidence in the Justice System in British Columbia: The Problem, Consequences and Potential Remedies", released January 2010 by the British Columbia Branch of the Canadian Bar Association, prepared by Professor Neil Boyd, at p. 6.

Be Smart & Stay Safe

Highlights In This Issue

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Unless otherwise noted all articles are authored by Mike Novakowski, MA. 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 herein are not necessarily the opinions of the Justice Institute of British Columbia. "In Service: 10-8" welcomes your comments 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.

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

2010 FRASER VALLEY CRIMINAL JUSTICE CONFERENCE at p. 25

OOPS

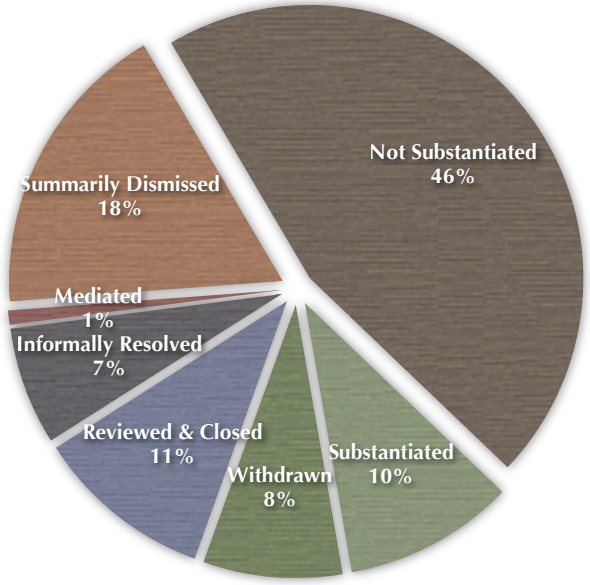
In the Volume 9 Issue 6 (November/December 2009) edition of "In Service:10-8" the *R. v. Quinn* case referenced on page 21 was incorrectly cited. The correct citation is 2009 BCCA 267.

CONCLUDED BC POLICE COMPLAINTS DIP

A recently released report by BC's Office of the Police Complaint Commissioner reveals that the total number of police misconduct allegations concluded in 2009 dropped to 960 from 989 the previous two years. Complaints may be concluded in the following manner:

- **Withdrawn** - the complainant may withdraw their complaint at any time during the process;
- **Reviewed & Closed** - Service and Policy complaints or informal complaints that are non-lodged are reviewed and closed by the OPCC;
- **Informally Resolved** - A complaint may be informally resolved through the investigator. Both parties must sign a consent letter and have 10 days to change their minds;
- **Mediated** - A complaint may be resolved through professional mediation. Both parties must sign a consent letter and have 10 days to change their minds;
- **Summarily Dismissed** - Following a preliminary review, a complaint may be summarily dismissed if:
  - there is no likelihood further investigation would produce evidence of a disciplinary default;
  - the incident occurred more than 12 months prior to filing the complaint; or
  - the complaint is frivolous or vexatious;
- **Not Substantiated** - Following an investigation the Discipline Authority determines there is no evidence to support the allegation of misconduct;
- **Substantiated** - Following an investigation the Discipline Authority determines the allegation is supported by the evidence.

2009 Concluded Complaints



Corrective or Disciplinary Measures

The *Code of Professional Conduct Regulation* allows the Discipline Authority to impose one or more of the following corrective or disciplinary measures on a police officer after finding a disciplinary default:

- verbal reprimand;
- written reprimand;
- direction to undertake professional counseling;
- direction to undertake special training or retraining;
- direction to work under close supervision;
- suspension without pay for up to 5 days;
- transfer or re-assignment;
- reduction in rank;
- dismissal.

Source: www.opcc.bc.ca

ALLEGATIONS OF POLICE MISCONDUCT REVIEWED & CONCLUDED

Year	Total Allegations Concluded	Withdrawn	Reviewed & Closed	Informally Resolved	Mediated	Summarily Dismissed	Not Substantiated	Substantiated
2009	960	79	101	67	8	170	438	97
2008	989	71	100	43	1	134	523	117
2007	989	167	54	35	1	167	477	88

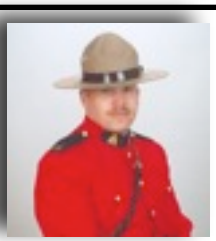
ON-DUTY DEATHS RISE

On-duty peace officer deaths in Canada rose by two last year, equal to the 2007 total. In 2009, four peace officers lost their lives on the job. This is twice the 2008 total when only two on-duty peace officers deaths were recorded, as reported by the Officer Down Memorial Page.

Motor vehicles, not guns, continue to pose the greatest risk to officers over the last 10 years. Since 2000, 31 officers have lost their lives in circumstances involving vehicles, including automobile and motorcycle accidents (23), vehicular assault (3), and being struck by a vehicle (5). These deaths account for 46% of all on-duty deaths, which is more than twice the next leading cause of gunfire (15) in the same 10 year period. On average, seven officers lost their lives each year during the last decade, while 2002 had the most deaths at 12.

2009 ROLL OF HONOUR

Constable James Lundblad
Royal Canadian Mounted Police
End of Watch: May 5, 2009
Cause of Death: Automobile Accident



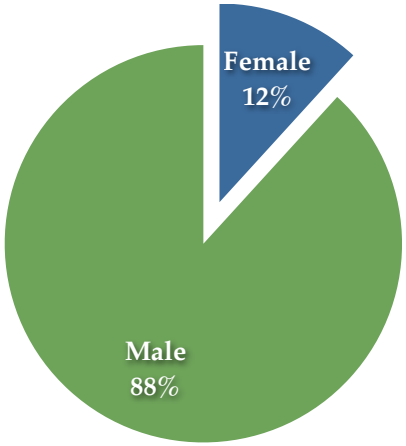
Constable Alan Hack
Ontario Provincial Police
End of Watch: July 6, 2009
Cause of Death: Automobile Accident

Constable Melanie Roy
Service de Police de la Ville de Levis
End of Watch: September 7, 2009
Cause of Death: Automobile Accident

Constable Ireneusz (Eric) Czapnik
Ottawa Police
End of Watch: December 28, 2009
Cause of Death: Stabbed

2009 Average Tour: 3 years 8 months
2009 Average Age: 36
2009 by Gender: 1 female, 3 male

Last ten years by Gender: 8 female, 60 male.



On-Duty Deaths 2000-2009 by Gender

Canadian Peace Officer On-Duty Deaths (by cause & year)											
Cause	**2009**	**2008**	**2007**	**2006**	**2005**	**2004**	**2003**	**2002**	**2001**	**2000**	**Total**
Aircraft accident					2		2		1	2	**7**
Assault						1					**1**
Auto accident	3	1		1	2	1	3	6	2	1	**20**
Drowned					1				1		**2**
Duty related illness				1							**1**
Fall										1	**1**
Gunfire			3	3	5	1		1	2		**15**
Heart attack		1			1	2		1		1	**6**
Motorcycle accident							1			2	**3**
Natural disaster								1			**1**
Stabbed	1					1					**2**
Struck by vehicle								3		2	**5**
Training accident									1		**1**
Vehicular assault			1	1		1					**3**
Total	**4**	**2**	**4**	**6**	**11**	**7**	**6**	**12**	**7**	**9**	**68**
Female	1	0	0	1	1	1	0	2	1	1	8
Male	3	2	4	5	10	6	6	10	6	8	60

POLICE ASSAULTS

According to a recently released Statistics Canada report, "*Measuring Crime in Canada: Introducing the Crime Severity Index and Improvements to the Uniform Crime Reporting Survey*," there were 6,497 incidents of assaulting a police officer in 2007 involving 8,160 victims. For other assaults in 2007, there were 156,247 victims of common assault (level 1), 51,258 victims of assault with a weapon/ cause bodily harm (level 2) and 3,434 victims of aggravated assault (level 3).

Source: Statistics Canada, 2009, Measuring Crime in Canada: Introducing the Crime Severity Index and Improvements to the Uniform Crime Reporting Survey, Catalogue no. 85-004-X, April 2009.

In British Columbia, there were 983 assaults against the police in 2008, down from 1,130 in 2007. Of those 983 assaults, 951 were cleared (97%). Of the 712 persons charged with assaulting police 649 were adults while 63 were youths. Assaults against other officers, however, was 119 in 2008, up from 98 in 2007. The clearance rate for assaults against other officer was 87%. Obstructing police offences reached 1,961 in 2008, also down from 2007 which totaled 2,041. The 2008 clearance rate for obstruction offences was 92%. Of the 1,019 persons charged with obstruction, 956 were adults and 63 were youths.

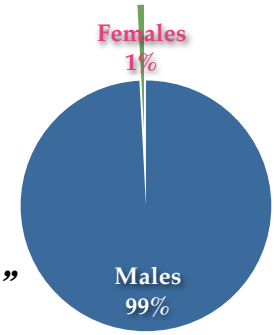
Source: BC Police Services Division, 2009, British Columbia Crime Trends 1999-2008, available at www.pssg.gov.bc.ca. [accessed January 9, 2010]

U.S. ON-DUTY DEATHS DOWN

During 2009, the U.S. lost 120 peace officers, down 18 from 2008. The top cause of death was gunfire (47) followed by automobile accidents (33), vehicular assault (9) and heart attack (7).

The state of Texas lost the most officers at 11 - once again losing the most officers for the fourth consecutive year - followed by California (8), Florida (8), North Carolina (7), Pennsylvania (7), U.S. Government (7), and Washington State (7). The average age of deceased officers was 37 years while the average tour of duty was 9 years and 10 months service. Men accounted for more than 99% of officer deaths while women made up less than 1 %.

Source: http://www.odmp.org/year.php [accessed January 2, 2010]



"It Is Not How These Officers Died That Made Them Heroes. It Is How They Lived."

Inscription at the National Law Enforcement Officers Memorial, Washington, D.C.

2009 U.S. Peace Officer On-Duty Deaths	
Cause	**Total**
Accidental	1
Aircraft accident	4
Assault	2
Automobile accident	33
Duty related illness	2
Gunfire	47
Gunfire (accidental)	2
Heart attack	7
Motorcycle accident	4
Struck by vehicle	6
Vehicle pursuit	3
Vehicular assault	9
Total	**120**

U.S. On-Duty Deaths by Year (2000-2009)											
Year	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	Total
Deaths	120	138	193	156	164	164	147	159	242	163	1,646
Avg. age	37	39	39	38	38	40	37	39	38	39	n/a
Avg. tour	9 yrs, 10 mos	11 yrs, 3 mos	11 yrs, 3 mos	11 yrs, 5 mos	11 yrs, 1 mos	12 yrs, 9 mos	10 yrs, 4 mos	10 yrs, 10 mos	11 yrs, 4 mos	11 yrs, 1 mos	n/a
Female	1	12	8	9	5	9	6	15	12	6	83
Male	119	126	185	147	159	155	141	144	230	157	1,563

DEADLIEST DAYS

March 21, 2009 (California) Four members of the Oakland Police Department were shot and killed. Two motorcycle officers were shot following a traffic stop and then, about two hours later, two SWAT team members were shot and killed after the gunman was tracked to an apartment building just a few blocks from the original shooting scene. Another SWAT team member managed to shoot and kill the suspect, a parolee who had been convicted of assault with a deadly weapon and was also wanted on a no-bail warrant.

November 29, 2009 (Washington) Four members of the Lakewood Police Department were shot and killed in an ambush attack as they sat in a coffee shop doing paperwork and planning their upcoming shift. A lone gunman walked in and opened fire on the officers, who were in full uniform and wearing protective safety vests. They were all veteran law enforcement officers with between eight and 14 years of experience each. The suspect was a career criminal who had recently been released from jail and had an extensive criminal history in both Washington state and Arkansas. He was subsequently killed by police.

Source: www.nleomf.org/facts/enforcement/deadliest.html

RESEARCH REPORTS VIEWS

Illegal Firearms

"Police and other agencies interviewed note that the number of firearms seized by the police has dramatically increased in the last ten years. Officers who are aware of what occurs at the street level consistently state that, while ten years ago finding an illegal firearm was a relatively rare event for a regular member, now it is a relatively common occurrence." Tony Heemskerk and Eric Davis (November 2008) *A Report on the Illegal Movement of Firearms in British Columbia,* at p. 1.

CANADA's TOP TEN STOLEN VEHICLES

On December 9, 2009 the Insurance Bureau of Canada released its annual list of the most frequently stolen vehicles in Canada. According to the report there is an increasing involvement of organized crime in auto theft as evidenced by the appearance of high-end models on the list.

Source: Insurance Bureau of Canada www.ibc.ca

TOP 10 STOLEN AUTOS			
	YR	MAKE	MODEL
1	2000	Honda	Civic SiR 2-door
2	2003	Cadillac	Escalade ESV 4-door AWD
3	1999	Honda	Civic SiR 2-door
4	2006	Chev/GMC	Trailbazer SS 4-door 4WD
5	2002	Cadillac	Escalade EXT 4-door AWD
6	2005	Cadillac	Escalade ESV 4-door AWD
7	1997	Mitsubishi	Eclipse Spyder 2-door
8	2000	Audi	S4 Quattro 4-door
9	2006	Hummer	H2 4-door AWD
10	2005	Cadillac	Escalade 4-door AWD

MORE ON CANADA's AUTO THEFT

Statistics Canada reported that there were 125,271 theft of motor vehicles in 2008. This was down from 145,071 in 2007, a drop of 15%.

MOTOR VEHICLE THEFT CANADA, 2008			
Area	Number	Rate	% change 2007 to 2008
MAN	9,013	746	-39%
NWT	317	732	+6%
AB	21,968	613	-8%
SK	5,534	545	-1%
NU	169	537	-20%
BC	22,829	521	-17%
YK	170	513	+24%
QU	31,091	401	-15%
ON	30,722	238	-12%
NB	1,283	172	-5%
NS	1,577	168	-16%
PEI	165	118	-2%
NL	433	85	-29%
Canada	125,271	376	-15%

Several census metropolitan areas saw substantial decreases in motor vehicle theft. These areas were led by Winnipeg (-44%), St. John's (-39%), Moncton (-31%), London (-23%), Ottawa (-23%), Vancouver (-22%), and Halifax (-20%). Other CMAs however, saw an increase. These included Guelph (+20%), Kelowna (+18%), and Peterborough (+12%).

Source: Statistics Canada, 2009, *Police-reported Crime Statistics in Canada, 2008*, Catalogue no. 85-002-X, July 2009.

POLICING ACROSS CANADA: FACTS & FIGURES

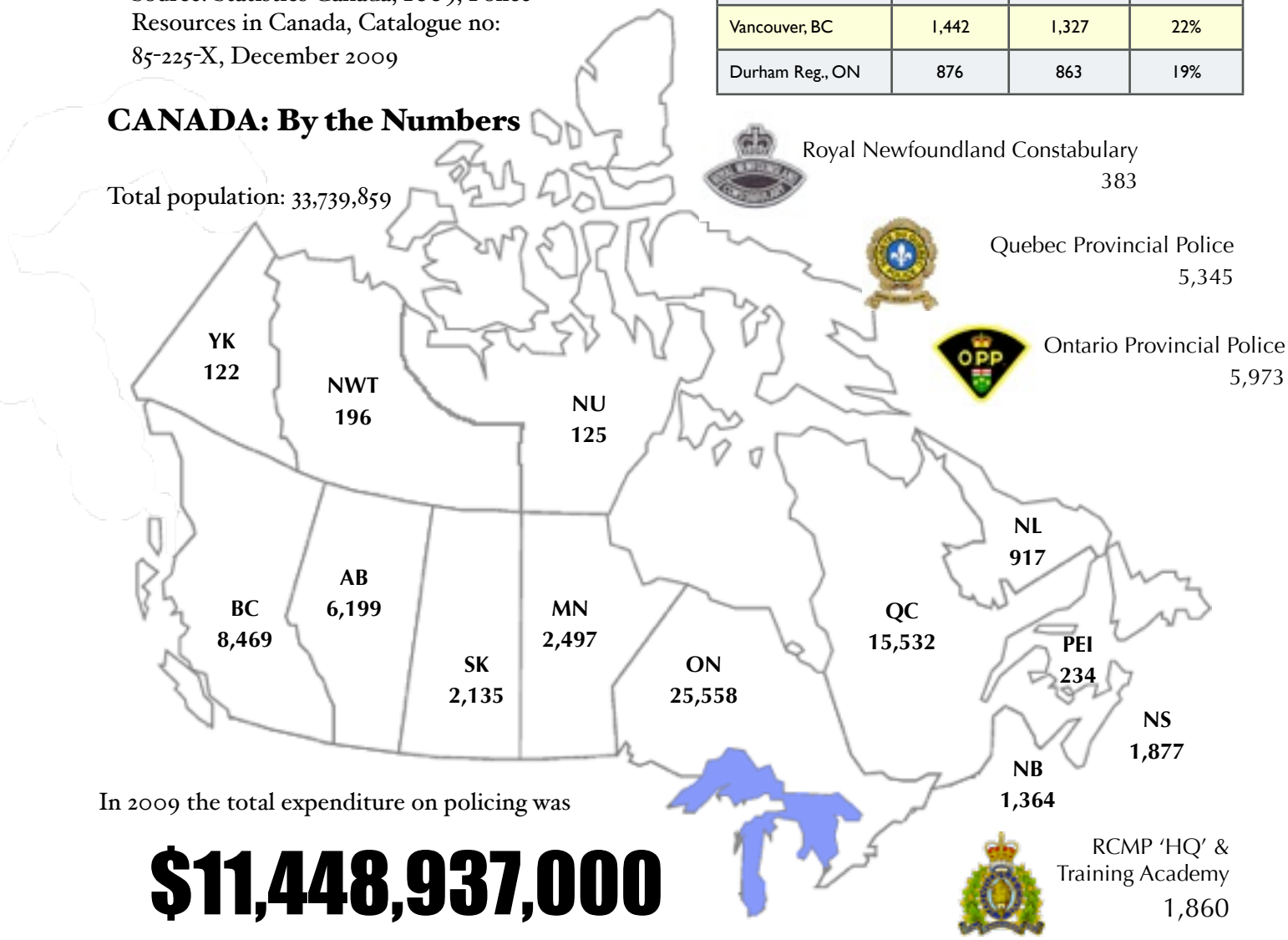
According to a 2009 report recently released by Statistics Canada, there were 67,085 police officers across Canada last year, an increase of 1,802 (+1.5%) over 2008. This was the third largest annual increase in 30 years. Ontario had the most police officers (25,558), up +1.4% while the Yukon had the least at 122. WIth a population of 33,739,859, Canada's average cop per pop ratio was 199 police officers per 100,000 residents.

Source: Statistics Canada, 2009, Police Resources in Canada, Catalogue no: 85-225-X, December 2009

Canada's Largest Municipal Police Services 2009			
Service	Officers		% Female
	Actual	Authorized	
Toronto, ON	5,633	5,548	17%
Montreal, QC	4,563	4,597	30%
Peel Reg., ON	1,749	1,869	16%
Calgary, AB	1,723	1,748	15%
Edmonton, AB	1,457	1,487	19%
York Reg., ON	1,370	1,402	17%
Winnipeg, MN	1,358	1,328	14%
Ottawa, ON	1,277	1,349	23%
Vancouver, BC	1,442	1,327	22%
Durham Reg., ON	876	863	19%

CANADA: By the Numbers

Total population: 33,739,859



Royal Newfoundland Constabulary
383

Quebec Provincial Police
5,345

Ontario Provincial Police
5,973

RCMP 'HQ' & Training Academy
1,860

In 2009 the total expenditure on policing was

$11,448,937,000

CMA Police Officers & Crime Severity Index		
CMA	Officers-2009	Crime Severity Index-2008
Toronto, ON	9,828	64
Montreal, QC	6,989	91
Vancouver, BC	3,527	119
Calgary, AB	1,814	85
Edmonton, AB	1,753	122
Winnipeg, MN	1,418	124
Ottawa, ON	1,350	69
Hamilton, ON	1,098	77
Quebec, QC	1,018	64
Kitchener, ON	739	69
St. Catherines-Niagara, ON	707	80
London, ON	703	85
Halifax, NS	688	96
Windsor, ON	597	75
Victoria, BC	531	101
Saskatoon, SK	457	138
Gatineau, QC	420	76
Regina, SK	411	163
St. John's, NL	327	86
Barrie, ON	288	64
Thunder Bay, ON	260	107
Abbotsford-Mission, BC	256	143
Greater Sudbury, ON	255	74
Sherbrooke, QC	240	77
Brantford, ON	228	104
Kingston, ON	223	68
Trois-Rivieres, QC	214	78
Saint John, NB	211	103
Peterborough, ON	195	66
Guelph, ON	191	58
Saguenay, QC	178	59
Kelowna, BC	171	126
Moncton, NB	150	73

GENDER

There were 12,805 female officers in 2009 accounting for 19.1% of all officers or roughly 1 in 5. This is up from 16.5% in 2004, 12.9% in 1999, 9.1% in 1994 and 5.8% in 1989. Quebec had the highest percentage of women (22.5%) while Nunavut had the least (12.0%). The RCMP HQ and Training Academy were 20.9% female.

Area	% Female
QC	22.5%
BC	21.1%
NL	18.3%
ON	17.9%
AB	17.6%
SK	17.1%
NB	15.5%
NS	14.9%
MN	14.5%
NWT	14.3%
PEI	13.2%
YK	12.3%
NU	12.0%

The number of women in all ranks continued to rise. Senior officers were 8.3% female, more than doubling over the last ten years. Non-commissioned officers were 14.4% female, also more than double the percentage from a decade ago. Constables were 21.4% female. This is also up from last year.

Overall, the representation of women in policing continues to increase. In 2009, the number of women increased (+5%) at a faster pace than men (+2%).

OTHER FA$T FACT$

- Police expenditures rose for the twelfth consecutive year;
- Costs for policing translates to $344 per Canadian;
- Among provinces, Ontario ($294) and Quebec ($273) reported the highest per capita costs for municipal and provincial policing. Prince Edward Island ($168) and Newfoundland ($199) had the lowest.
- Among territories, Nunavut ($775) had the highest cost per capita followed by the Northwest Territories ($664) and the Yukon ($461).

Based on total expenditures on policing in 2008.

RCMP

The RCMP had the largest presence in British Columbia with 5,944 officers, followed by Alberta (2,659), Ontario (1,397) and Saskatchewan (1,172).

Canada's Largest Municipal RCMP Detachments 2009			
Service	Officers		% Female
	Actual	Authorized	
Surrey, BC	557	594	21%
Burnaby, BC	257	274	28%
Richmond, BC	215	237	23%
Kelowna, BC	146	153	23%
Coquitlam, BC	131	142	28%
Langley Township, BC	123	128	27%
Prince George, BC	121	127	22%
Red Deer, AB	129	123	31%
Kamloops, BC	120	123	22%
Nanaimo, BC	123	123	22%

According to Statistics Canada, the majority of RCMP officers, 6,447 or 36%, provided provincial police services. This was closely followed by RCMP municipal policing (4,674 or 26%) and federal policing (4,483 or 25%). Another 2,414 officers were involved in RCMP Headquarters and the training academy (1,860) and other services, such as National Police Services and Departmental and Divisional Administration.

RCMP On-Strength Establishment as of September 1, 2009	
Rank	**# of positions**
Commissioner	1
Deputy Commissioners	8
Assistant Commissioners	26
Chief Superintendents	56
Superintendents	186
Inspectors	433
Corps Sergeant Major	1
Sergeants Major	6
Staff Sergeants Major	16
Staff Sergeants	928
Sergeants	2,090
Corporals	3,570
Constables	11,594
Special Constables	74
Civilian Members	3,607
Public Servants	6,102
Total	**28,698**

Source: www.rcmp-grc.gc.ca/about-ausujet/organi-eng.htm

RCMP Officers by Level of Policing - Canada 2009 (numbers do not include 1,860 members at HQ & Training Academy)														
Level / Region	BC	AB	SK	MN	ON	QC	NB	NS	PEI	NL	YK	NWT	NU	Total
Municipal	3,066	960	181	186	-	-	208	64	9	-	-	-	-	4,674
Provincial	1,749	1,289	695	591	-	-	519	719	100	402	99	173	111	6,447
Federal	946	351	238	176	1,351	948	139	174	22	102	16	12	8	4,483
Other	183	59	58	28	46	40	34	40	12	30	7	11	6	554
Total	5,944	2,659	1,172	981	1,397	988	900	997	143	534	122	196	125	16,158

The RCMP is Canada's largest police organization. As of September 1, 2009 the force's on-strength establishment was 28,698. This includes 18,915 police officers, 74 special constables, 3,607 civilian members and 6,102 public servants.

The RCMP is divided into 15 Divisions with Headquarters in Ottawa. Each division is managed by a commanding officer and is designated alphabetically.

RCMP DIVISIONS		
Region	Division	Area
Pacific	E	British Columbia
	M	Yukon Territory
North West	D	Manitoba
	F	Saskatchewan
	G	Northwest Territories
	V	Nunavut Territory
	K	Alberta
	Depot	Regina, SK
Central	A	National Capital Region
	O	Ontario
	C	Quebec
Atlantic	B	Newfoundland
	H	Nova Scotia
	J	New Brunswick
	L	Prince Edward Island

Source: www.rcmp-grc.gc.ca/about-ausujet/organi-eng.htm

MALICIOUS PROSECUTION TURNS ON OBJECTIVE GROUNDS

Miazga v. Kvello Estate, 2009 SCC 51

A Saskatchewan Crown prosecutor with 12 years experience was contacted by a police officer about an ongoing sexual assault investigation. The case involved disclosures of sexual abuse made by three children against their foster parents and members of their extended family, as well as allegations of abuse against their biological parents and their mother's boyfriend. The police officer asked the prosecutor for his opinion as to whether charges should be laid. The prosecutor reviewed the allegations and the officer's file and ultimately advised that if the officer believed the allegations then charges should be laid. The officer subsequently swore an Information against the three accuseds.

During the course of the preliminary inquiry it became apparent that one of the children had lied to the court about keeping notes of the alleged abuse. The prosecutor consulted with his superiors and was instructed to continue with the prosecution if he believed the essential aspects of the children's stories. Following the preliminary inquiry, the biological parents and mother's boyfriend were committed for trial. At trial the judge convicted the three accused on several counts of sexual assault but the trial judge urged that the children not be made to endure another criminal proceeding against the others.

Considering the judge's comments and the children's credibility becoming increasingly uncertain, the prosecutor negotiated a plea bargain in which a member of the foster parents' extended family pled guilty to four charges of sexual assault. The 70 counts of sexual assault against the foster parents were stayed. The convictions entered at trial against the biological parents and mother's boyfriend were upheld by a majority of the Saskatchewan Court of Appeal, but were overturned by the Supreme Court of Canada and a new trial was ordered. Several years following the stay of proceedings, all three

children recanted their allegations against the foster parents who then commenced a civil suit for malicious prosecution against a number of individuals involved in the proceedings including the prosecutor.

At trial in the Saskatchewan Court of Queen's Bench, the judge concluded that the prosecutor had initiated the proceedings against the plaintiffs, that the proceedings had terminated in favour of the plaintiffs, that he did not have reasonable and probable grounds to proceed against the plaintiffs and that he had acted maliciously in doing so. An appeal to the Saskatchewan Court of Appeal was dismissed. The majority was of the view that the prosecutors decision to proceed absent reasonable and probable grounds - he did not have a subjective belief in the probable guilt of the plaintiffs - was itself sufficient to make out malice.

Malicious Prosecution

Crown prosecutors do not enjoy absolute immunity from a civil suit for malicious prosecution in private law. To succeed in an action for malicious prosecution, a plaintiff must prove that the prosecution was:

1. initiated by the defendant;
2. terminated in favour of the plaintiff;
3. undertaken without reasonable and probable cause; and
4. motivated by malice or a primary purpose other than that of carrying the law into effect.

The tort of malicious prosecution targets the decision to initiate or continue with a criminal prosecution. Malicious prosecution will only be made out where there is proof that the prosecutor's conduct was fuelled by "an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve." Malice does not include recklessness, gross negligence or poor judgment. It is only where the conduct of the prosecutor constitutes "an abuse of prosecutorial power", or the perpetuation of "a fraud on the process of criminal justice" that malice can be said to exist

In explaining the four part test, Justice Charron, writing the judgment for the unanimous Supreme Court of Canada, stated:

> Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the defendant. This element identifies the proper target of the suit, as it is only those who were "actively instrumental" in setting the law in motion that may be held accountable for any damage that results. As against a Crown prosecutor, the initiation requirement will be satisfied where the defendant Crown makes the decision to commence or continue the prosecution of charges laid by police, or adopts proceedings started by another prosecutor.
>
> The second element of the tort demands evidence that the prosecution terminated in the plaintiff's favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay. However, where the termination does not result from an adjudication on the merits, for example, in the case of a settlement or plea bargain, a live issue may arise whether the termination of the proceedings was "in favour" of the plaintiff. ...
>
> Of course, criminal proceedings may terminate in favour of an accused for a number of reasons and an accused's success in a criminal proceeding does not mean the prosecution was improperly initiated. The third element which must be proven by a plaintiff — absence of reasonable and probable cause to commence or continue the prosecution — further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused...

> Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff's case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant's conduct in setting the criminal process in motion was fuelled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain: between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect. ... [references omitted, paras. 53-57]

Reasonable and Probable Cause

In order for a claim of malicious prosecution to be successful, the onus is on the plaintiff to prove the absence of reasonable and probable cause for initiating or continuing a prosecution. In earlier jurisprudence (*Nelles v. Ontario*, [1989] 2 S.C.R. 170), the reasonable and probable cause standard - or probable guilt standard - was defined as:

> Reasonable and probable cause has been defined as "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed".

This standard was later elaborated on in *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9 as:

> To say that a prosecutor must be convinced beyond a reasonable doubt of an accused person's guilt before bringing charges is obviously incorrect. That is the ultimate question for the trier of fact, and not the prosecutor, to decide. However, in our opinion, the Crown must have sufficient evidence to believe that guilt could properly be proved beyond a reasonable doubt before reasonable and probable cause exists, and criminal proceedings can be initiated. A lower threshold for initiating prosecutions would be incompatible with the prosecutor's role as a public officer charged with ensuring justice is respected and pursued.

This "probable guilt" standard, however, is lower than the "reasonable prospect of conviction" standard found in most Crown policy manuals across Canada. In a criminal trial, given the burden of proof, belief in "probable" guilt means that the prosecutor believes, based on the existing state of circumstances, that proof beyond a reasonable doubt could be made out in a court of law:

> [T]he standard found in most Crown policy manuals across the country governing the exercise of prosecutorial discretion to commence or continue a criminal proceeding is generally higher than the reasonable and probable cause requirement under the third element of the test for malicious prosecution. In Crown policy manuals, the initiation or continuation of a prosecution is generally not recommended unless there exists a reasonable prospect of conviction and it is in the public interest to pursue the criminal proceeding. It is within the realm of prosecutorial discretion to set appropriate standards and, as discussed above, the civil action is not a vehicle for embarking upon a judicial review of its exercise in particular cases. Accordingly, there is nothing discordant about a lower standard grounding civil liability. [para. 64]

Although it is well established that the reasonable and probable cause inquiry comprises two components; a subjective component (an actual belief on the part of the prosecutor) and an objective component (the belief must be reasonable in the circumstances), the third inquiry of the tort of malicious prosecution should turn solely on the existence or absence of objective grounds:

> If the court concludes, on the basis of the circumstances known to the prosecutor at the relevant time, that reasonable and probable cause existed to commence or continue a criminal prosecution from an objective

> standpoint, the criminal process was properly employed, and the inquiry need go no further.
>
> In carrying out the objective assessment, care must be taken in retroactively reviewing the facts actually known to the prosecutor at the relevant time — that is, when the decision to initiate or continue the proceeding was made. The reviewing court must be mindful that many aspects of a case only come to light during the course of a trial: witnesses may not testify in accordance with their earlier statements; weaknesses in the evidence may be revealed during cross-examination; scientific evidence may be proved faulty; or defence evidence may shed an entirely different light on the circumstances as they were known at the time process was initiated.
>
> If a judge determines that no objective grounds for the prosecution existed at the relevant time, the court must next inquire into the fourth element of the test for malicious prosecution: malice. [references omitted, paras. 75-77]

Although the absence of a subjective belief, regardless of the actual facts, will not satisfy the third element of the tort, the presence or absence of the prosecutor's subjective belief in sufficient cause is nonetheless a relevant factor on the fourth element of the test, the inquiry into malice.

Malice

The malice element of the test for malicious prosecution considers a defendant prosecutor's mental state in respect of the prosecution at issue. Malice is a question of fact, requiring evidence that the prosecutor was impelled by an "improper purpose":

> In order to prove malice, a plaintiff must ... bring evidence that the defendant Crown was acting pursuant to an improper purpose inconsistent with the office of the Crown attorney. As we have seen, in deciding whether to initiate or continue a prosecution, the prosecutor must assess the legal strength of the case against the accused. The prosecutor should invoke the criminal process only where he or she believes, based on the existing state of circumstances, that proof beyond a reasonable doubt could be made out in a court of law. It follows that, if the court concludes that the prosecutor initiated or continued the prosecution based on an honest, albeit mistaken, professional belief that reasonable and probable cause did in fact exist, he or she will have acted for the proper purpose of carrying the law into effect and the action must fail.
>
> The inverse proposition, however, is not true. The absence of a subjective belief in sufficient grounds, while a relevant factor, does not equate with malice. It will not always be possible for a plaintiff to adduce direct evidence of the prosecutor's lack of belief. As is often the case, a state of mind may be inferred from other facts. In appropriate circumstances, for example when the existence of objective grounds is woefully inadequate, the absence of a subjective belief in the existence of sufficient grounds may well be inferred. However, even if the plaintiff should succeed in proving that the prosecutor did not have a subjective belief in the existence of reasonable and probable cause, this does not suffice to prove malice, as the prosecutor's failure to fulfill his or her proper role may be the result of inexperience, incompetence, negligence, or even gross negligence, none of which is actionable. Malice requires a plaintiff to prove that the prosecutor wilfully perverted or abused the office of the Attorney General or the process of criminal justice. The third and fourth elements of the tort must not be conflated.
>
> [A] demonstrable "improper purpose" is the key to maintaining the balance ... between the need to ensure that the Attorney General and Crown prosecutors will not be hindered in the proper execution of their important public duties and the need to provide a remedy to individuals who have been wrongly and maliciously prosecuted. By requiring proof of an improper purpose, the malice element of the tort of malicious prosecution ensures that liability will not be imposed in cases where a prosecutor proceeds, absent reasonable and probable grounds by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence. ... [references omitted, paras. 78-81]

And further:

> The court must consider the relevant evidence and decide whether, on a balance of probabilities, the prosecutor was in fact motivated by an improper purpose. Consistent with the approach courts must take in every case, this requires an assessment of the "totality of all the circumstances". The need to consider the "totality of all the circumstances" does not mean that the court is to embark on a second-guessing of every decision made by the prosecutor during the course of the criminal proceedings. It simply means that a court shall review all evidence related to the prosecutor's state of mind, including any evidence of lack of belief in the existence of reasonable and probable cause, in deciding whether the prosecution was in fact fuelled by an improper purpose, as alleged.
>
> Evidence of the prosecutor's lack of subjective belief in reasonable and probable cause may assist in proving that the prosecution was driven by an improper purpose. However, for the reasons explained earlier, malice cannot simply be inferred from a finding of absence of belief in reasonable and probable cause alone, as the latter is equally consistent with prosecutorial conduct that is not actionable. Care must be taken not to transpose principles derived in the context of private prosecutions, where an inference of malice from absence of cause does not carry the same difficulties, to cases involving Crown defendants.
>
> As noted above, the tort of malicious prosecution was born in the context of prosecutions between private parties, and the malice component of the tort developed accordingly. In many of the historical cases, the parties in a malicious prosecution action had a pre-existing relationship, and the surrounding circumstances were such that it was possible to infer an improper motive from the groundlessness of the prosecution alone. As a result, courts in early cases of malicious prosecution were prepared to infer malice from a finding that the prosecution was initiated absent reasonable and probable grounds. Indeed, the circumstances of these cases easily gave rise to the question: why else would a private person initiate a prosecution based entirely on facts not believed to be true, or worse still, known to be false?
>
> While it may have made sense in the context of historical private prosecutions to infer malice from absence of reasonable and probable cause in certain circumstances, a public prosecution presents a very different context. A finding of absence of reasonable and probable grounds on the objective standard is entirely equivocal in terms of a Crown prosecutor's purpose, particularly given that reasonable prosecutors may differ on whether a certain body of evidence rises to the requisite threshold. Likewise, a conclusion that a prosecutor lacked a subjective belief in sufficient cause but proceeded anyways is equally consistent with non-actionable conduct as with an improper purpose. To permit an inference of malice from absence of reasonable and probable grounds alone would nullify the very purpose of the malice requirement in an action for malicious prosecution and risk subjecting Crown prosecutors to liability when they err within the boundaries of their proper role as "ministers of justice".
>
> In summary, the malice element of the test for malicious prosecution will be made out when a court is satisfied on a balance of probabilities, that the defendant Crown prosecutor commenced or continued the impugned prosecution with a purpose inconsistent with his or her role as a "minister of justice". The plaintiff must demonstrate on the totality of the evidence that the prosecutor deliberately intended to subvert or abuse the office of the Attorney General or the process of criminal justice such that he or she exceeded the boundaries of the office of the Attorney General. While the absence of a subjective belief in reasonable and probable cause is relevant to the malice inquiry, it does not dispense with the requirement of proof of an improper purpose. [references omitted, paras. 85-89].

In this case, the trial judge found that the prosecutor lacked reasonable and probable grounds from an objective standpoint, and that the prosecutor did not possess a subjective belief in the existence of grounds when he decided to proceed against the

plaintiffs. Although the trial judge found the children's allegations were incredible and that no prosecutor could possibly accept their bizarre allegations (absent corroborating evidence) nor believe the children to be credible witnesses, the police officer believed the children and several judges at both the trial and appellate levels accepted and relied upon the same allegations by the children in convicting their biological parents. Relying on the findings of those courts did not constitute improper "bootstrapping". On bootstrapping, Justice Charron stated:

> I wish to add a general comment about "bootstrapping". Generally speaking, in an action for malicious prosecution, "bootstrapping" occurs when a prosecutor argues that he or she had reasonable and probable grounds to commence or continue a prosecution on the basis of subsequent judicial determinations made at the preliminary inquiry or the trial itself. While a determination of guilt at a criminal proceeding is not determinative of the reasonable and probable cause question under the third prong of the test for malicious prosecution, it is a relevant factor that may be properly considered in ascertaining the existence or absence of reasonable cause. Giving weight to antecedent judicial determinations works to ensure consistency between the criminal and civil justice systems. ... Absent a fundamental flaw in the criminal proceedings relied upon, it is perfectly reasonable that antecedent judicial determinations may support a finding by a civil court that there existed reasonable and probable cause for an impugned criminal prosecution. [para. 97]

And neither the plaintiffs nor the courts below had pointed to any such improper purpose that impelled the prosecutor to prosecute the plaintiffs beyond a holding that he did not have a subjective belief in reasonable and probable cause.

The prosecutor's appeal was allowed and the plaintiff's action was dismissed.

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

PROSECUTORIAL CHARGE STANDARDS

There are many legal standards or degrees of certainty within the law. These include reasonable suspicion, reasonable belief, balance of probabilities, clear and convincing evidence, and proof beyond a reasonable doubt. But within many prosecutorial manuals, there are charge approval standards which take on a different language.

In some jurisdictions the police decide whether charges are preferable (eg. Ontario). In these cases, prosecutors will determine whether to continue the prosecution or to terminate it. In other provinces there is a Crown approval process (eg. British Columbia). In those cases, the Crown will decide whether to commence a prosecution in the first instance. The Crown take their duty in deciding to prosecute very seriously as evidenced by these preambles found in select prosecutorial manuals:

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> "Deciding whether to prosecute is among the most important steps in the prosecution process. Considerable care must be taken in each case to ensure that the right decision is made. A wrong decision to prosecute and, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system." - **Federal**

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> "If a Crown attorney does not believe the evidence supports a conviction, he or she will not prosecute. The Crown attorney is not the victim's lawyer nor is he or she the lawyer for the police or complainants. Rather, a Crown attorney's duty is to ensure that justice is served by presenting all available legal proof of the facts to the court." - **Manitoba**

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> "The decision to prosecute or to discontinue a prosecution is among the most significant of the decisions that will be made by a Crown prosecutor. Prosecutions which are not well founded in law or fact, or which do not serve the public interest, may needlessly expose citizens to the anxiety, expense and embarrassment of a trial. On the other hand, the failure to effectively

prosecute a meritorious case can directly impact public safety. Both situations tend to undermine the confidence of the community in the criminal justice system. As such, considerable care must be taken in each case to ensure that the best possible decision is made." - **Alberta**

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"The decision to continue or terminate a prosecution can be one of the most difficult for Crown counsel to make. The community relies upon Crown counsel to vigorously pursue provable charges while protecting individuals from the serious repercussions of a criminal charge where there is no reasonable prospect of conviction." - **Ontario**

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"The decision to initiate or continue a prosecution is one of the most important duties of Crown Counsel." - **British Columbia**

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"The decision to prosecute or to discontinue a prosecution is the most important decision that a prosecutor makes in the criminal justice process. Such decisions must reflect sound knowledge of the law and careful consideration of the interests of victims, the accused and the public at large. Prosecutions which are not well founded in law or fact, or which do not serve the public interest, may unfairly expose citizens to the anxiety, expense and embarrassment of a trial. The failure to effectively prosecute guilty parties can directly impact public safety. Wrong decisions tend to undermine the confidence of the community in the criminal justice system." - **Nova Scotia**

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There are two general considerations when deciding to prosecute. First, there is an evidential threshold. Is there sufficient evidence to begin or continue with criminal proceedings? Second, if the evidence is sufficient, then the prosecutor will decide whether or not the public interest is best served by the prosecution. Just because a criminal investigation meets the evidentiary test does not mean it must be automatically prosecuted.

EVIDENTIAL THRESHOLD

Depending on the jurisdiction, the evidential standard varies.

Federal - reasonable prospect of conviction

The Public Prosecutions of Canada requires a "reasonable prospect of conviction":

> In the assessment of the evidence, a bare prima facie case is not enough; the evidence must demonstrate that there is a reasonable prospect of conviction. This decision requires an evaluation of how strong the case is likely to be when presented at trial. This evaluation should be made on the assumption that the trier of fact will act impartially and according to law. (15.3.1)

The Federal Deskbook outlines a number of criteria to consider when determining whether there is sufficient evidence for a proceeding:

- the availability, competence and credibility of witnesses and their likely impression on the trier of fact;
- the admissibility of evidence implicating the accused;
- any defences that are plainly open to or have been indicated by the accused; and
- any other factors which could affect the prospect of a conviction such as the existence of a Charter violation that will undoubtedly lead to the exclusion of evidence essential to sustain a conviction.

Federal prosecutors are also advised that:

> this evidential standard must be applied throughout the proceedings – from the time the investigative report is first received until the time of trial. When charges are laid, the test may have to be applied primarily against the investigative report, although it is certainly preferable – especially in borderline cases - to look beyond the statements of the witnesses. Later in the proceedings, especially after a preliminary inquiry, counsel may be able to make a more effective assessment of some of the issues, such as the credibility of witnesses. Assessments of the strength of the case may be difficult to make, and of course there can never be an assurance that a prosecution will succeed. Nonetheless,

> counsel are expected to review the decision to prosecute in light of emerging developments affecting the quality of the evidence and the public interest, and to be satisfied at each stage, on the basis of the available material, that there continues to be a reasonable prospect of conviction. If counsel are not so satisfied, they may direct that a stay of proceedings be entered."

BC - substantial likelihood of conviction

In British Columbia, the charge approval standard is a "substantial likelihood of conviction." The BC Crown Policy Manual defines this as:

> A substantial likelihood of conviction exists where Crown Counsel is satisfied there is a strong, solid case of substance to present to the Court. In determining whether this standard is satisfied, Crown Counsel must determine:
>
> 1. what material evidence is likely to be admissible;
> 2. the weight likely to be given to the admissible evidence; and
> 3. the likelihood that viable, not speculative, defences will succeed.

In exceptional cases (eg. high risk violent or dangerous offenders or where public safety concerns are paramount) a BC prosecution may proceed even where there is not a substantial likelihood of conviction. Instead, the evidentiary test is reduced to one of a "reasonable prospect of conviction." This test is described as higher than a prima facie case and requires the approval of the Regional or Deputy Regional Crown Counsel. As well, the evidentiary considerations are modified.

> A weighing of admissible evidence and viable defences is not required. Crown Counsel should consider:
>
> 1. what material evidence is arguably admissible;
> 2. whether that evidence is reasonably capable of belief; and
> 3. whether that evidence is overborne by any incontrovertible defence.

Ontario - reasonable prospect of conviction

Ontario, like the Public Prosecutions Service of Canada, requires a reasonable prospect of conviction as the evidentiary threshold. In the Ontario Crown Policy Manual, a reasonable prospect of conviction is described as:

> The threshold test of "reasonable prospect of conviction" is objective. This standard is higher than a "prima facie" case that merely requires that there is evidence whereby a reasonable jury, properly instructed, could convict. On the other hand, the standard does not require "a probability of conviction," that is, a conclusion that a conviction is more likely than not.

If the Ontario prosecutor "determines there is no reasonable prospect of conviction, at any stage of the proceeding, then the prosecution of that charge must be discontinued."

Alberta - reasonable likelihood of conviction

In Alberta the reasonable likelihood of conviction test "permits a prosecution to be commenced or continued only if the Crown prosecutor has sufficient evidence to believe that a reasonable jury, properly instructed, is more likely than not to convict the accused of the charge(s) alleged." The Alberta Crown Manual described the charge standard as follows:

> To be clear, this standard contains both a subjective and objective element. The Crown prosecutor must believe that a conviction is likely and that belief must be reasonable in the circumstances. In circumstances in which there are multiple accused or multiple counts, Crown prosecutors must apply the evidential threshold to each accused and each charge. A prosecution should only proceed against those accused and on those charges that meet the threshold test. Crown prosecutors must not simply adopt the views and enthusiasm of others, such as the complainant or investigator. Prosecutors must critically assess the Crown's evidence and must take into consideration reliable defence evidence. While no single answer is

determinative, the most important of the questions that must be asked as regards the evidence are the following.

- Are there inherent (e.g., as with in-custody informants) or other concerns respecting the accuracy, credibility or reliability of any of the Crown's witness?
- Do any of these witnesses have improper motives that may affect his or her credibility?
- Is there evidence that may support or detract from the credibility of any of these witnesses?
- If the identity of the offender is in issue, of what strength is the evidence identifying the accused as the offender?
- Are there grounds for believing that some inculpatory evidence will likely be excluded?
- If the case depends in part on an admission by the accused, is there evidence that might support or detract from the reliability of this statement?
- Has the accused attempted to explain his (alleged) conduct or present a defence? If so, is it clear that the explanation or defence (by itself or in the context of other evidence or information) will be sufficient to raise a reasonable doubt?

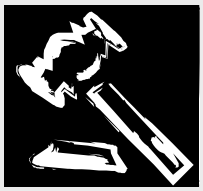
Nova Scotia - realistic prospect of conviction

In Nova Scotia a prosecution will go forward only where the prosecutor is satisfied that the evidence provides a "realistic prospect of conviction":

> The decision in regard the existence of a realistic prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. The prosecutor is required to find that a conviction is more than technically or theoretically available – the prospect of displacing the presumption of innocence must be real. ... The extent to which the evidence must exceed what is necessary for a prima facie case cannot be expressed in mathematical terms and the concept cannot be applied with scientific precision. There are, however, some indicators as to where the evidentiary threshold lies. First, it must be noted that even when a prima facie case exists, a conviction will be set aside by an appellate court ... if there is not sufficient, reliable evidence with probative value to satisfy the court that any conviction based on the evidence was reasonable. This may require something well beyond a prima facie case, and all cases which are prosecuted are expected pass this hurdle. ... It is recognized that even the most experienced prosecutors may have great difficulty in assessing the strength of a case, particularly when only a summary of the evidence is available. Nevertheless, prosecutors are often able to conclude that an acquittal is clearly more likely than a conviction. This leads to the second indicator of where the appropriate threshold lies: if, having regard to the amount

LEGALLY SPEAKING:

Policy v. Malicious Prosecution Standard



"[T]he standard found in most Crown policy manuals across the country governing the exercise of prosecutorial discretion to commence or continue a criminal proceeding is generally higher than the reasonable and probable cause requirement under the third element of the test for malicious prosecution. In Crown policy manuals, the initiation or continuation of a prosecution is generally not recommended unless there exists a reasonable prospect of conviction and it is in the public interest to pursue the criminal proceeding. It is within the realm of prosecutorial discretion to set appropriate standards and ... the civil action is not a vehicle for embarking upon a judicial review of its exercise in particular cases. Accordingly, there is nothing discordant about a lower standard grounding civil liability." - Supreme Court of Canada in *Miazga v. Kvello Estate*, 2009 SCC 51 at para. 64.

> and nature of the evidence, the prosecutor concludes that an acquittal is clearly more likely than a conviction, the case should not be prosecuted. The cases in which there is a realistic prospect of conviction will, of course, include those cases in which the prosecutor determines that a conviction is more likely than not to occur.

In assessing the strength of a case and determining whether or not there is sufficient evidence upon which to found a prosecution, the Nova Scotia prosecutor must lean towards the admissibility of evidence when the matter is not clear. As well, prosecutors must give a limited consideration to defences which are plainly open to the accused, or which have come to the attention of the prosecutor. But it is not necessary for the prosecutor to anticipate and consider every possible defence or to accept at face value all information provided by the accused. A proper assessment of the strength of the case may involve the following questions:

- Are there grounds for believing that some evidence may be excluded?
- If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused?
- Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable?
- Has a witness a motive for telling less than the whole truth?
- Are there matters which might properly be put to a witness by the defence to attack his or her credibility?
- Based on objective indicators, what sort of impression is the witness likely to make?
- How is the witness likely to stand up to cross-examination?
- If there is conflict between eye witnesses, does it go beyond what one would expect and hence materially weaken the case?
- If there is a lack of conflict between eye witnesses, is there anything which causes suspicion that a false story may have been concocted?
- Are all the necessary witnesses competent to give evidence?
- Where child witnesses are involved, are they likely to be able to give sworn evidence or to give evidence based upon a promise to tell the truth?
- If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the accused?
- Where two or more accused are charged together, is there a reasonable prospect of the proceedings being severed? If so, is there sufficient evidence against each accused should separate trials be ordered?

PUBLIC INTEREST

Once the evidential standard has been met, the Crown then must consider whether the public interest requires a prosecution. The factors to consider will generally vary from case to case.

Federal

The Federal Deskbook acknowledges that "the more serious the offence, the more likely the public interest will require that a prosecution be pursued." But the application of and weight to be given to the relevant factors will depend on the circumstances of each case. Public interest factors include:

- the seriousness or triviality of the alleged offence;
- significant mitigating or aggravating circumstances;
- the age, intelligence, physical or mental health or infirmity of the accused;
- the accused's background;
- the degree of staleness of the alleged offence;
- the accused's alleged degree of responsibility for the offence;
- the prosecution's likely effect on public order and morale or on public confidence in the administration of justice;

- whether prosecuting would be perceived as counter-productive, for example, by bringing the administration of justice into disrepute;
- the availability and appropriateness of alternatives to prosecution;
- the prevalence of the alleged offence in the community and the need for general and specific deterrence;
- whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive;
- whether the alleged offence is of considerable public concern;
- the entitlement of any person or body to criminal compensation, reparation or forfeiture if prosecution occurs;
- the attitude of the victim of the alleged offence to a prosecution;
- the likely length and expense of a trial, and the resources available to conduct the proceedings;
- whether the accused agrees to co-operate in the investigation or prosecution of others, or the extent to which the accused has already done so;
- the likely sentence in the event of a conviction; and
- whether prosecuting would require or cause the disclosure of information that would be injurious to international relations, national defence, national security or that should not be disclosed in the public interest.

Irrelevant criteria to public interest include:

- the race, national or ethnic origin, colour, religion, sex, sexual orientation, political associations, activities or beliefs of the accused or any other person involved in the investigation;
- Crown counsel's personal feelings about the accused or the victim;
- possible political advantage or disadvantage to the government or any political group or party; or
- the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

British Columbia

In BC, the Crown Policy Manual recognizes that hard and fast rules cannot be imposed because the public interest is determined by the particular circumstances of each case and the legitimate concerns of the local community. Factors which BC Crown Counsel are expected to consider include:

Factors Favouring a Prosecution

- the allegations are serious in nature;
- a conviction is likely to result in a significant sentence;
- considerable harm was caused to a victim;
- the use, or threatened use, of a weapon;
- the victim was a vulnerable person, including children, elders, spouses and common law partners;
- the alleged offender has relevant previous convictions or alternative measures;
- the alleged offender was in a position of authority or trust;
- the alleged offender's degree of culpability is significant in relation to other parties;
- there is evidence of premeditation;
- the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor;
- there is a significant difference between the actual or mental ages of the alleged offender and the victim;
- the alleged offender committed the offence while under an order of the Court;
- there are grounds for believing that the offence is likely to be continued or repeated;
- the offence, although not serious in itself, is widespread in the area where it was committed;
- the need to protect the integrity and security of the justice system and its personnel;
- the offence is a terrorism offence;

- the offence was committed for the benefit of, at the direction of or in association with a criminal organization.

Factors Against a Prosecution

- a conviction is likely to result in a very small or insignificant penalty;
- there is a likelihood of achieving the desired result without a prosecution by the Criminal Justice Branch. This could require an assessment of the availability and efficacy of any alternatives to such a prosecution, including alternative measures, non-criminal processes or a prosecution by the Federal Prosecution Service. Crown Counsel need not conclude, in advance, that a prosecution must proceed in the public interest if a referral for an alternative measure is not acceptable. Information with respect to the suitability of a candidate for diversion or alternative measure is a factor to be taken into consideration by Crown Counsel in reaching a final charge assessment decision;
- the offence was committed as a result of a genuine mistake or misunderstanding (factors which must be balanced against the seriousness of the offence);
- the loss or harm can be described as minor and was the result of a single incident, particularly if caused by misjudgment;
- the offence is of a trivial or technical nature or the law is obsolete or obscure.

Additional Factors to Consider

- the youth, age, intelligence, physical health, mental health, and other personal circumstances of a witness or victim;
- the personal circumstances of the accused, including his or her criminal record;
- the length and expense of a prosecution when considered in relation to the social benefit to be gained by it;
- the time which has elapsed since the offence was committed;
- the need to maintain public confidence in the administration of justice.

Ontario

Personal, professional or "political" consequences of a screening decision should never affect an Ontario Crown Counsel's decision, nor should stereotypes about certain categories of witnesses such as child witnesses, witnesses with mental disabilities, and complainants of spouse/partner abuse or sexual offences, affect Crown Counsel's judgment.

Alberta

In Alberta, Crown prosecutors are advised to "carefully balance the factors that favour a prosecution against the factors against such proceedings," while noting that "it would be impossible to articulate and catalogue all of the possible public interest factors that might inform every decision to prosecute."

Factors Favouring a Prosecution

- the conduct was serious, because, for example:
  - weapons were used
  - violence was used or threatened
  - the conduct was planned, premeditated and/or motivated
  - there was significant harm, loss or injury caused to the complainant and/or the community
  - the victim was vulnerable (e.g., a child, a senior, a spouse, a person who was dependent upon the accused, a person who serves the public)
  - the offence involved an abuse of a position of authority or trust
  - the offence was directed at the administration of justice;
- the accused's degree of culpability and responsibility was significant (especially if in relation to any other parties who were involved in the conduct);
- the offence was motivated by discrimination against the complainant's ethnic or national origin, sex, religious beliefs, political views or sexual orientation;

- owing to a previous related record or other antecedents, it is likely that, absent a prosecution, the accused will continue or repeat the conduct (i.e., there is a need for individual deterrence); and/or
- there exists a need to denounce the conduct and deter others.

Factors Militating Against a Prosecution

- the offence is of a trivial or technical nature;
- a conviction is likely to result in a very small or insignificant penalty;
- the consequences of a prosecution or conviction would be unduly harsh or oppressive for the accused;
- the accused has remedied the loss or harm (although accused persons must not avoid prosecution solely because they make restitution);
- the accused has demonstrated genuine remorse and has steps taken towards rehabilitation (the significance of which must be assessed in the context of the seriousness of the offence);
- the desired result could be achieved through an alternative to prosecution;
- the law that is alleged to have been breached is obsolete or obscure; and/or
- a prosecution could publicize information that that could harm confidential informants, ongoing investigation, international relations or national security, or other important local and national interests.

Additional Factors

- the circumstances of the accused, including his or her age, maturity, mental health, criminal antecedents (including other outstanding charges or extant court orders) and background;
- the likely effect of a prosecution on public morale and the public's confidence in the justice system;
- the length and expense of the trial when considered in relation to the seriousness or triviality of the offence, the likely sentence that would result from a conviction, and the attendant public benefit(s);
- the degree of past or anticipated cooperation of the accused in the investigation, apprehension or prosecution of others (see also, the guidelines and practice memoranda pertaining to Informants);
- the willingness and ability of witnesses, including – where necessary – the complainant, to testify in the proceedings;
- the time which has elapsed since the offence was committed;
- the availability of compensation, restitution, or reparation to any person or body upon a successful prosecution, including any entitlement criminal compensation, reparation or forfeiture if a prosecution action is taken; and/or
- whether, due to the passage of time, the alleged offence is triable only on indictment.

Nova Scotia

Nova Scotia also recognizes that not every case where there is sufficient evidence to provide a realistic prospect of conviction requires a prosecution. The following example is used:

> There would be a public outcry, if, for instance, prosecution resources were expended in prosecuting a theft case in which it was alleged, based on circumstantial evidence, that the accused had entered an orchard two years ago and picked an apple without the owner's permission. On the other hand, if the accused had been caught red-handed, yesterday, by apple growers concerned with widespread damage to orchards by intruders, prosecution might be appropriate.

Instead, a consistent, principled basis is required for determining the public interest. Although public interest factors will vary from case to case, factors to consider include the following:

- the gravity, or, conversely, the triviality of the alleged incident or that it is of a 'technical' nature only (generally, the more grave the incident, the

more likely that the public interest will require prosecution);
- the age, intelligence, physical health, mental health or special infirmity of the alleged offender, a witness or victim;
- the staleness of the alleged offence;
- the degree of culpability of the alleged offender in connection with the offence (particularly in relation to any other alleged parties to the offence);
- the obsolescence or obscurity of the law;
- whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
- the availability and efficacy of any alternatives to prosecution;
- the prevalence of the alleged offence and the need for general deterrence;
- whether the consequences of any resulting conviction would be unduly harsh and oppressive;
- any entitlement of people or agencies to compensation, reparation or forfeiture if prosecution action is taken;
- the attitude of the victim of the alleged offence to a prosecution;
- the likely length and expense of a trial;
- whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
- the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
- the necessity to maintain public confidence in Parliament, the Legislature and the administration of justice.

As well, in general, "the more grave the incident, the more likely that the public interest will require prosecution." Where one or more of the following elements are present, the gravity of the offence will be increased:

- the perpetrators used a weapon, violence or threats of violence;
- the victim was a judicial official, peace officer, or someone preserving public safety;
- the criminal activity was directed at the administration of justice;
- the incident involved premeditation or planning;
- the offence was carried out by a gang or group organized for that purpose;
- the matter involved the corruption of an official;
- the alleged offender was subject to court supervision at the time of the incident;
- the incident was part of a pattern of criminal behaviour, or behaviour likely to be repeated by the offender.

Factors to not Consider

The following factors are to be excluded from consideration in determining whether the public interest is best served by a prosecution:

- the alleged offender's race, religion, sex, national origin, or political associations;
- personal feelings concerning the victim or the alleged offender;
- any partisan political advantage or disadvantage which might flow from the decision to undertake or stop a prosecution; or
- the possible effect on the personal or professional circumstances of those responsible for the charging decision.

References:

Federal - The Federal Prosecution Service DESKBOOK (date modified 2008-12-24)
www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/toc.html
Manitoba - Manitoba Prosecution Service
www.gov.mb.ca/justice/prosecutions/mbprosecutionservice.html
BC - Crown Counsel Policy Manual (effective date October 2, 2009)
www.ag.gov.bc.ca/prosecution-service/policy-man/index.htm
Ontario - Crown Policy Manual (March 21, 2005)
www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/default.asp
Nova Scotia - Crown Attorney Manual: Prosecution and Administrative Policies for the PPS (edited February 29, 008)
www.gov.ns.ca/pps/ca_manual.htm
Alberta - Crown Prosecutors' Policy Manual (May 20, 2008)
http://justice.alberta.ca/programs_services/criminal_pros/Publications%20Library%20%20Criminal%20Prosecutions/Crown Prosecutors' PolicyManual.aspx/DispForm.aspx?ID=3

RESEARCH REPORTS VIEWS

Spousal Violence

"Spousal violence is a power-based crime. It is a crime based on the abuse of power, usually by the male partner in the relationship, directed at the female partner. Therefore, it is also a gender-based crime. The use of fear – through the use of physical and emotional violence and both explicit and implicit threats – is always part of the dynamics of spousal violence against women.

Investigation and assessment of what is going on in any case of spousal violence must take account of these dynamics. Investigation and assessment in these cases cannot be undertaken outside of this context. For example, while women may use violence in their relationships ... , this violence must be seen within the context of which partner has the most power in the relationship; who has the most potential for harming the other; what has been the ongoing dynamic of violence, fear, and coercion in the relationship; who has been most seriously injured; and who is the primary rather than the first aggressor." - Linda Light (July 2009) *Police-reported Spousal Violence Incidents in B.C. in which Both Partners are Suspects/Accused: An Exploratory Study* at pp. 4-5. *www.pssg.gov.bc.ca/victim_services/publications/policy/PoliceReportedSpousalIncidentsDualSuspects.pdf*

The **Fraser Valley Criminal Justice Conference** will be held at the **Ramada Plaza and Conference Centre** in Abbotsford, British Columbia from **April 27-30, 2010**. The 2010 Conference Topic is **"Youth, Communities and the Criminal Justice System."** Speakers will include Supt. Dan Malo, Andrée Cazabon, Dr. Irwin Cohen, Dr. Matt Logan, Crystal Meth Society, Glen Flett, Dr. Lohrasbe, Sgt. Chris Thompson, Rosalind Currie, Diane Sowden, Dr. Ray Corrado, Dr. Mary Ellen O'Toole, Det. Judy Dizy, Det. Chris Eeg, Gil Johnston, and Victor Porter. For more information visit:

www.fvcjc.ca

Fraser Valley Criminal Justice Conference 2010
Youth, Communities and the Criminal Justice System
April 27-30, 2010

TUESDAY, April 27, 2010

5:00 pm- 7:00pm	**Registration**	
7:00 pm - 9:00 pm		Evening Welcome Reception

WEDNESDAY, April 28, 2010

8:00 am - 8:30 pm	Registration and Continental Breakfast		
8:30 am - 9:00 pm	Opening Ceremonies/ Welcoming Remarks Deputy Chief Rick Lucy		
9:00 am - 12:00 am	***Understanding Gangs*** Keynote Address: Gil Johnston (SIO) and Supt. Dan Malo		
12:00pm - 1:00 pm	Lunch		
1:00pm - 2:00 pm	***Gangs in Prison*** Gil Johnston	***Criminal Investigations and Computer Forensics*** Det. Chris Eeg	***Risk Profiles for Serious and Violent Youth Offending*** Dr. Ray Corrado and Dr. Irwin Cohen
	Move to Afternoon Break Out Session		
2:30 pm - 3:30 pm	***Active Shooters*** Sgt. Chris Thompson	***Crystal Meth- A Community Response*** METH BC	***Youth Violent Offender Programming in British Columbia: An Overview*** Dr. Heather Gretton and Dr. Grant Burt
3:30 pm - 4:30 pm	Meet the Speakers and Questions		

The Early Bird registration fee is $329 for payments received prior to January 15th, 2010. Thereafter, a regular registration fee of $399 will apply. The Ramada Inn Hotel is providing accommodations for approximately $120/night on a first come, first serve basis.

The full three-day conference will entail keynote addresses and break-out sessions that are carefully orchestrated to best suit a varied audience. One of the key goals of the conference is to bring together professionals in the field that can speak from their experiences and established expertise to assist in early intervention, prevention, and risk management. The participants will have an opportunity to network and build partnerships to meet individual organizational goals, as well as the common objective of reducing crime in our communities.

Fraser Valley Criminal Justice Conference 2010

Youth. Communities and the Criminal Justice System

April 27-30, 2010

THURSDAY, April 29, 2010

8:00 am - 9:00 am	Continental Breakfast		
9:00 am - 12:00 pm	***Engaging with Youth*** **Andrée Cazabon - Filmmaker and former street youth**		
12:00 pm - 1:00 pm	Lunch Break **TCO 2 Presentation**		
1:00 pm - 2:00 pm	***It Can Happen to Anyone*** Diane Sowden	***BC's Office to Combat Trafficking in Persons*** Victor Porter and Rosalind Currie	***Youth, Homicide and Aggression*** Dr. Michael Woodworth
	Move to Afternoon Break Out Session		
2:30 pm - 3:30 pm	***It Can Happen to Anyone*** **(Part II)** Dianne Sowden	***Project Resiliency*** D. Bassi, P. Thomas, D. Pearn, C. Pettit	***Fishing Upstream*** Dr. Matt Logan and Glen Flett
3:30 pm - 4:30 pm	Meet the Speakers and Questions		

FRIDAY, April 30, 2010

8:00 am - 9:00 am	Continental Breakfast
9:00 am - 12:00 pm	***The Mission Oriented Shooter:*** ***Case Studies of the Worst School and Campus Shootings; Implications for Law Enforcement, Mental Health and School Professionals*** Dr. Mary Ellen O'Toole
12:00 pm - 1:00 pm	Lunch Break **Honourable Kash Heed** **Minister of Public Safety and Solicitor General**
1:00 pm - 2:00 pm	***False Allegation of Child Abduction:*** ***Lessons since Susan Smith*** Kathleen E. Canning
	Break
2:15 pm - 4:00 pm	***Psychiatric Issues in Murder cases*** Wendy Dawson, QC, Dr. Matt Logan, Dr. Lohrasbe
3:30 pm - 4:30 pm	Meet the Speakers and Questions

POLICE OFFICER RATED ONE OF WORST JOBS

According to a recent report in which 200 jobs were comprehensively analyzed, the job of police officer was ranked 180, near the bottom of worst jobs. The data for each job was divided into five key categories:

- work environment;
- physical demands;
- stress;
- income; and
- hiring outlook.

Each job received a score in each individual category which were then added together and then ranked from one to 200.

"Of course every employee is different, and what you consider a 'dream job' might be someone else's idea of a career nightmare," said Andrew Schneider, author of the online article "Jobs Rated 2010: A Ranking of 200 Jobs From Best to Worst".

Below is a list of several selected jobs. The entire list is available online at www.careercast.com.

Ranking of Best to Worst Jobs

Rank	Job	Work Environment	Physical Demands	Stress	Income	Hiring Outlook
1	Actuary	179.440	3.97	20.187	$85,229	24.79 (very good)
7	Paralegal Assistant	263.820	5.79	23.084	$46,152	22.52 (very good)
29	Parole Officer	381.060	6.47	26.463	$46,169	12.19 (good)
52	Social Worker	550.420	5.47	47.633	$46,174	23.24 (very good)
57	School Principal	432.990	5.62	51.718	$84,121	7.71 (poor)
62	Judge (Federal)	655.980	5.09	46.676	$152,027	4.77 (poor)
80	Attorney	1261.500	6.09	64.337	$111,217	12.67 (good)
108	Guard	812.060	12.55	29.918	$24,129	16.79 (very good)
116	Teacher	709.600	11.87	51.003	$49,136	12.36 (good)
134	Undertaker	1015.400	15.15	46.962	$52,210	13.10 (good)
157	Corrections Officer	1646.750	13.41	64.694	$38,156	17.56 (very good)
175	Highway Patrol Officer	1733.400	17.63	60.651	$51,167	12.17 (good)
180	Police Officer	1877.850	22.63	93.893	$51,167	12.17 (good)
188	Firefighter	3314.030	43.23	110.936	$44,227	13.77 (good)
195	Garbage Collector	1368.320	36.55	42.760	$31,183	6.83 (poor)
200	Roustabout	1731.450	36.89	65.548	$31,133	-6.17 (very poor)

POLICE ACTED IN GOOD FAITH: RELIABLE EVIDENCE ADMITTED

R. v. Blake, 2010 ONCA 1

The police obtained a search warrant to search the accused's residence. The information to obtain the warrant included confidential information originating from anonymous Crime Stoppers' tips, known confidential informants of unproven reliability, and known confidential informants of proven reliability. As a result of the search the police found a large amount of cash, two pieces of crack cocaine, each weighing about 27 grms. (hidden in the mattress of a bed), a note describing an apparent drug transaction, and other paraphernalia known to be commonly used by drug traffickers (e.g. an x-acto knife blade and plastic baggies).

> "The graver the state's misconduct the stronger the need to preserve the long-term repute of the administration of justice by disassociating the court's processes from that misconduct ... by excluding the evidentiary fruits of the state misconduct."

At trial in the Ontario Superior Court of Justice the judge ruled the police had breached the accused's *Charter* rights under s.8. Because the police and the Crown were under a legal obligation to protect the identity of confidential informants, some of the information supporting the warrant was edited. The redacted version of the information had nothing that could possibly identify various confidential sources. The judge found the remaining information did not provide reasonable grounds on which a justice, acting reasonably and judicially, could be satisfied that the statutory prerequisites to the issuance of a search warrant had been met. Consequently, the Crown could not rely on the search warrant as justification for the constitutionality of the search. Without the warrant, the search was unreasonable and violated the accused's rights under s.8. Applying the s.24(2) analysis of the day, the judge admitted the evidence. The evidence was real non-conscriptive evidence that did not effect trial fairness. And although the s.8 breach was "very serious", the police had acted in "good faith" in their attempt to acquire legal authorization to conduct the search. Finally, the evidence was crucial to the Crown's case and the the charges were serious. The accused was convicted of possessing crack cocaine for the purpose of trafficking and breaching his probation.

The accused then appealed to the Ontario Court of Appeal arguing the evidence should have been excluded, particularly since the Supreme Court of Canada reformulated the approach to s. 24(2) in *R. v. Grant,* 2009 SCC 32. In describing *Grant* as taking "a judicial wire brush to the 20 years of jurisprudential gloss that had built up around s. 24(2) and scrubb[ing it] down to the bare words of the section," Justice Doherty found the evidence was still admissible. In *Grant* there were three relevant lines of inquiry identified in balancing of the interests at play when s.24(2) is invoked:

- ☑ the seriousness of the *Charter*-infringing state conduct;
- ☑ the impact of the *Charter* violation on the *Charter*-protected interest of the accused; and
- ☑ society's interest in the adjudication of the case on its merits.

Seriousness of the Breach

"The inquiry into the nature of the state conduct that resulted in a *Charter* breach seeks to place that conduct along a continuum of misconduct," said Justice Doherty, authoring the judgment of the Court. "The graver the state's misconduct the stronger the need to preserve the long-term repute of the administration of justice by disassociating the court's processes from that misconduct. That disassociation is achieved by excluding the evidentiary fruits of the state misconduct."

Here, the trial judge found the police acted in "good faith." They tried to acquire legal authorization for

the search and were clearly aware of the need to obtain a warrant and proceeded accordingly. They did not act negligently or in ignorance of any of the applicable *Charter* requirements. A finding of "good faith" reduces the need for the court to disassociate itself from the state conduct that resulted in the *Charter* infringement and supports the admissibility of the challenged evidence. Justice Doherty also stated:

> I can see no possible criticism of the police conduct on this trial record. Throughout the process that culminated in the seizure of the evidence, they acted exactly as they were obligated to under the law. They were required to obtain a warrant before entering the residence. They did so. They were required to make full disclosure to the justice of the peace. There is no suggestion that they did not do so. The police, and later the Crown, were legally obligated to protect the identity of the confidential informants by removing all material from the information that could identify the informants before making that material available to the defence. They did that. Given the manner in which the s. 8 claim was litigated, the police acted not only in good faith, but as required by the law. The police conduct in this case does not fit anywhere on the misconduct continuum described in Grant. …
>
> The police conduct in this case is somewhat analogous to the conduct considered in cases where the police have gathered evidence according to the law as it was understood at the time the evidence was gathered only to have the law changed or declared unconstitutional at some subsequent point, but before the evidence is tendered at trial…. In those cases, the police acted not only in good faith, but in accordance with the law as it stood at the time. Under the Collins approach, real evidence obtained in this manner was inevitably admitted.
>
> The nature of the state conduct resulting in the constitutional infringement in this case seems to fall outside the paradigm described in Grant. If it is within that paradigm, it is clearly at the far end of the spectrum favouring admissibility. The [accused] has not availed himself of the various options open to him that would potentially have allowed further assessment of the police conduct. In these circumstances it would be inappropriate to presume that the police did anything other than conduct themselves in accordance with the applicable legal rules. [references omitted, paras. 25-27]

Impact of the Breach

In this case, the impact of the breach on the *Charter*-protected interest of the accused pointed strongly toward exclusion of the evidence. This was a "very serious breach" of the accused's constitutional rights. He had a high expectation of privacy in his own residence which was compromised by an intrusive and extensive police search. "The powerfully-negative impact on the core of the [accused's] legitimate privacy interests creates the risk that the admission of the fruits of the search could bring the administration of justice into disrepute," said Justice Doherty. He continued:

> The seriousness of the impact of the breach on the [accused] is not mitigated by the fact that the police may have had reasonable and probable grounds when they obtained the warrant, but were unable to demonstrate those grounds at trial because of the confidential-informant privilege. The Crown chose to proceed on the redacted information. The assessments of whether there was a breach and of the impact of that breach on the [accused] must be measured against the substance of that redacted information. Assessed from that perspective, this was an extensive, unjustified search of the [accused's] home. [para. 29]

Society's Interest in Adjudication

Here, society's interest in an adjudication on the merits would be seriously undercut where highly reliable and important evidence was excluded. The the crack cocaine was entirely reliable and essential to the Crown's case. The charge was also a serious one, although the seriousness of the charge will "cut both ways" when assessing society's interest in an adjudication on the merits.

The nature of the state conduct and society's interest in an adjudication on the merits militated strongly in favour of admitting the evidence while the impact on the accused's s.8 rights pointed strongly toward exclusion. However, on balance, "the exclusion of reliable crucial evidence in circumstances where the propriety of the police conduct stands unchallenged would, viewed reasonably and from a long-term perspective, have a negative effect on the repute of the administration of justice." The evidence was admissible. The Court did warn, however, that if there were a taint of impropriety, or even inattention to constitutional standards, to be found in the police conduct, the scales may be tipped in favour of exclusion, given the very deleterious effect on the accused's legitimate privacy interests. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

OFFICER KNEW OR OUGHT TO HAVE KNOWN THE LAW: HANDGUNS EXCLUDED

R. v. Reddy, 2010 BCCA 11

At about 5:30 p.m. a police officer received a radio dispatch that someone called 9-1-1 to report that two "suspicious males" had been sitting in a vehicle parked on the street for several hours. The vehicles were described as an older model Dodge and a newer model Mercedes. The caller thought the men might be selling drugs and wanted the police to check them out. The officer drove to the area and saw two vehicles matching the description—the Dodge was parked behind the Mercedes. As he drove by, the officer noticed two men sitting in the front seat of the Dodge. He drove around the block and pulled his vehicle in behind. The officer approached the driver's side, while a another officer, who arrived as backup, approached the passenger side.

The driver's seat of the Dodge was fully reclined and the front passenger seat was upright. The accused, seated in the driver's seat, was wearing a thin red track jacket. He was asked to produce identification but said he didn't have any. He did, however, provide his name, date of birth, and address. The officer recalled the accused's name in connection with an incident about eight months earlier where the accused was a passenger in a vehicle being driven by a prohibited driver and in which six machetes were found under the driver's seat. When asked what he was doing, the accused said he was waiting for a friend, who lived nearby, to return home and pointed to the house. The officer recognized the house as the residence of a person whom he knew to be a drug dealer. The accused said it was too hot to wait inside the house, so he had come outside. He said that he had been sitting in the Dodge for about seven minutes before the police officers arrived.

A computer check disclosed that the Dodge was registered to an older Asian male and that the accused had a probation order with a condition that he not possess any cellular telephones or pagers, nor was he to be in a vehicle containing cellular telephones or pagers. The officer returned to the driver's side of the Dodge and directed the accused to step out of the vehicle. The officer told the accused that he had conditions for cell phones or pagers and that car was going to be checked to ensure there were none in it. The accused asked if he could remove his jacket, as it was hot out. The officer agreed. The accused struggled to take-off the jacket and draped it over the driver's seat. As the accused was getting out of the Dodge, the officer directed him to stand beside the curb. When the officer crouched down to look under the driver's seat, the accused bolted. He was told to stop but kept running. The officer began to pursue, but changed his mind because there were no arrest warrants outstanding, the conditions of probation were not particularly stringent, and he knew the accused's identity. The officer went back to the Dodge to search it for a cell phone or pager and picked up the accused's jacket. It felt heavy and in each pocket was a loaded handgun—a Beretta .380 pistol and a Colt .45 pistol.

At trial in British Columbia Provincial Court the officer said he decided to detain the accused "for investigation" and search the Dodge for cellular telephones and pagers. He considered that the 9-1-1

caller reported that two men had been waiting in a vehicle for several hours, but the accused said that he had only been in the vehicle for seven minutes. He said he wanted to search under the seats or in the glove box for cell phones or pagers but that there was nothing that indicated to him that the accused was about to commit an offence. The trial judge found the accused had been detained when he was directed to exit the vehicle so it could be searched, but that it was a lawful investigative detention. The accused's articulable cause to detain for further investigation was based on the following:

- The accused said they were there for seven minutes. There was no reason to prefer the information from the anonymous complainant, but there was a basis for suspicion.
- The accused had no identification on him, nor was he the owner of the motor vehicle.
- The accused said he was waiting for a friend in the nearby house, which the officer believed was a house associated with drug dealing.
- The officer had dealt with the accused some months previously where he had been a passenger in a car driven by a prohibited driver that had approximately six machetes under the driver's seat.
- The accused was on probation to keep the peace, be of good behaviour, and not possess cell phones, pagers, nor be found in a motor vehicle containing these things.

As for the search, the trial judge also found it to be proper. Although there was nothing specific suspected, the officer was concerned about whether the accused was in compliance with his probation order and whether there were weapons in the vehicle, among other things. "The courts rely on the police to monitor compliance with probation orders and the public relies on the police to maintain order," said the judge. "In the circumstances here, where a search of the vehicle and not the person would be only moderately intrusive, and where the vehicle was not even owned by the accused, a search, even for such cause and even though no specific offence was suspected, was justified." But in this case the accused also fled the scene, which demonstrated a consciousness of guilt. "With the added ingredient of the flight," noted the judge, "there is no question that the police had good cause to search the vehicle." Since there were no *Charter* breaches the handguns were admissible. And even if the *Charter* was violated, the judge would have nonetheless admitted the guns under s. 24(2). The accused was convicted of two charges of carrying a concealed weapon and two charges of carrying a firearm in a careless manner.

"A reasonable person directed by a police officer to get out of a vehicle would not question or challenge the officer's authority, but would comply in the belief that he or she had no other option."

The accused then appealed to the British Columbia Court of Appeal contending, among other grounds, that his rights under s.8 (unreasonable search or seizure) and s.9 (arbitrary detention) of the *Charter* were breached and that the handguns should have been excluded under s.24(2). In his view, he was detained when he was directed to get out of the car. Furthermore, he submitted that the officer had only a hunch he might be in breach of his probation order. The Crown, on the other hand, suggested the accused was neither physically nor psychologically detained and, even if he was, it was not arbitrary.

Detention

Justice Frankel, authoring the majority judgment of the Court, first reviewed the test for determining whether a person has been detained. He noted it is "an objective one, although the particular circumstances and perceptions of the individual involved may be relevant." Whether any particular encounter gives rise to detention depends on what occurred in the case.

Here, the officer was engaged in something more than preliminary investigative questioning. He did more than ask whether the accused was in possession of any cellular telephones or pagers. He told the accused that he was going to check the Dodge for cellular telephones and pagers and directed him to step out of the vehicle and stand beside

the curb. The accused complied by getting out and moving where he was directed. And the fact the accused fled from the scene did not contradict the notion of psychological detention. At the time of flight the accused had already been detained. He had complied with two directions; to get out of the vehicle and stand at the curb. "A reasonable person directed by a police officer to get out of a vehicle would not question or challenge the officer's authority, but would comply in the belief that he or she had no other option," said Justice Frankel. "That [the accused] did not remain at the curb for very long does not negate the fact that he was detained at the beginning of his encounter with [the officer]."

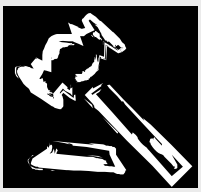
The police have a common law power to detain a person for investigation if they have reasonable grounds to suspect that the detainee is involved in on-going criminal activity. And an officer invoking the power of investigative detention must subjectively believe that the requisite standard has been met. As well, the officer's belief must be objectively reasonable. In this case the officer wanted to search the vehicle for cellular telephones and pagers. However, there was nothing in the officer's evidence that he subjectively suspected that the accused was committing any offence. And even if he expressly said that he subjectively suspected that there were cellular telephones and/or pagers in the Dodge, that suspicion would not have been objectively reasonable:

> The fact that [the accused], who properly identified himself, was sitting in someone else's vehicle outside the home of a known drug dealer, and that his statement as to how long he had been there conflicted with information provided by an unknown 9-1-1 caller, does not, in my view, support a reasonable suspicion that he was in breach of the terms of his probation order. Nor does the additional fact that some eight months earlier [the accused] had been a passenger in a vehicle in which machetes had been found, lend support to a reasonable suspicion that [the accused] was in breach of the probation order. [para. 69]

Instead, the officer's decision to detain and search was based solely on the probation order containing a no cellular telephones/no pagers condition and

LEGALLY SPEAKING:

Detention



"In summary...,

1. Detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, inter alia, the following factors:

a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.

b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication." - Supreme Court of Canada Chief Justice McLachlin and Justice Charron in *R. v. Grant, 2009 SCC* 32 at para. 44.

that he wanted to check the vehicle for those items. All he had was a hunch or a bare suspicion. This was not sufficient to rise to the level of suspicion necessary to permit a police officer to interfere with someone's liberty. Since there was no lawful basis for detention, it was arbitrary and breached s.9 of the *Charter*.

Search

Searching the vehicle to ensure compliance with a probation order on nothing more than a hunch was unlawful. Justice Frankel noted:

> [T]here is no support for the proposition that, when the police have a bare suspicion that a person in a vehicle is in breach of a condition of a probation order, they have authority to search that vehicle for evidence of that breach. Further, even when police officers lawfully detain someone reasonably suspected of being in breach of a probation order, they do not have a general power to search incidental to that detention for evidence of the suspected breach. It is clear … that police officers may only conduct relatively non-intrusive protective searches incidental to a lawful investigative detention, and that such searches can be undertaken only when the officers have a reasonable basis for believing that their safety, or the safety of others, is at risk. More specifically … "[the decision to search] cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition". [refernces omitted, para. 73]

Here, the officers only (and stated) purpose was to determine whether the accused was in breach of the no cellular telephones/no pagers condition of his probation order. There was no recognized warrantless search power, either common law or statutory to search in these circumstances. Nor did the accused's flight from the scene make a difference. Although "flight can be both a subjective and objective factor in a reasonable belief or a reasonable suspicion determination," the officer's bare suspicion had not been elevated to a subjective reasonable suspicion that the accused was in breach of a condition of his probation order, and that cellular telephones or pagers would be found in the vehicle. And even if he did have both subjective and objective grounds for a reasonable suspicion by reason of flight, the officer never detained on the basis of that suspicion:

> More importantly, in my view, [the accused's] flight cannot be considered at all in determining whether a reasonable suspicion existed regarding his involvement in criminal activity. The reason for this is that [the accused] was fleeing from an unlawful detention. As discussed above, [the officer] exceeded his powers when he directed [the accused] to get out of the Dodge and stand near the curb. [The accused] had every right to disregard those directions, and it would be wrong to use his eventual disobedience of them against him. What occurred is comparable to a situation in which someone who refuses to comply with an order that a police officer has no authority to give is arrested for obstruction, and then searched incidental to that arrest. As the officer was not in the execution of his duty when he gave the direction, the arrest would be unlawful, and so would the search. [para. 78]

Standing

The Crown's submission that the accused had no standing to object to the search on the basis he had no privacy interest in the Dodge was rejected. Whether or not he had a personal privacy interest in the vehicle, he had a privacy interest in his jacket at the time it was searched. He removed his jacket and was not giving up his privacy interest in it. Nor did he deliberately absent himself at the time of the search, abandon the jacket, or renounce any ownership interest in it. His actions (flight) taken in response to an unlawful investigative detention against him could not be used to support a finding that he abandoned any privacy interest he had in items left behind. "To accept the Crown's argument that [the accused], by acting as he did in the face of an unlawful detention, lost his privacy interest in the jacket, would be to turn the law on its head," said Justice Frankel. "It would mean that a person who refuses to submit to an unlawful interference with his or her constitutional rights would, by that act of refusal, be abandoning other constitutional rights.

This is illogical, unprincipled, and not in keeping with a purposive interpretation of the *Charter*." The search of the jacket violated the accused's s.8 *Charter* rights.

Exclusion of Evidence

Here, the majority excluded the evidence. Using the three lines of inquiry under s.24(2) the admission of the evidence would bring the administration of justice into disrepute:

1. the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct);
2. the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little); and
3. society's interest in the adjudication of the case on its merits.

Seriousness of the Breach

Wilful or reckless disregard for *Charter* rights will tend to support exclusion of evidence. And where the departure from *Charter* standards is major in degree, or where the police knew (or should have known) that their conduct was not *Charter*-compliant a court will be more concerned about dissociating itself from the police conduct and excluding the evidence. If, on the other hand, a breach was of a merely technical nature or the result of an understandable mistake, dissociation is much less of a concern.

In this case, the officer effected an investigative detention for no other purpose than to search the Dodge for cellular telephones and pagers. This all occurred 11 months after the Supreme Court of Canada had released its seminal judgment on investigative detention in *R. v. Mann*, 2004 SCC 52 where the Court accepted that the police have the power, at common law, to detain individuals for an investigative purpose in the absence of grounds for an arrest, and also have a limited power to conduct incidental protective searches. But in doing so, the Court delineated the thresholds that must be met before either of those powers can be exercised. Thus, the police officers were not operating in circumstances of considerable legal uncertainty:

> The critical factor in situating [the officer's] conduct along that fault line [blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for Charter rights] is that at the time of his encounter with [the accused] he either knew, or ought to have known, that he did not have the power (a) to detain someone for investigation on a bare suspicion that that person might be in breach of a condition of a probation order, or (b) to conduct a search incidental to an investigative detention that is unconnected to any safety concerns. Whatever uncertainly may have existed with respect to those aspects of investigative detention had been swept away by Mann. Although … instant knowledge of court decisions is not to be attributed to the police, they are expected to comply with those decisions within a reasonable time. … In [R. v. Brydges], the Supreme Court held that, by reason of s. 10(b) of the Charter, the police have a duty to advise a detainee of the existence and availability of legal aid plans and duty counsel. However, to give the police time to take the steps necessary to implement that decision the Court provided a 30-day transitional period.
>
> I am not suggesting that 30 days is the outside limit with respect to the time within which the police are expected to bring their practices into conformity with pronouncements by the Supreme Court of Canada. In Brydges, the Court was of the view that 30 days was "sufficient time for the police forces to react, and to prepare new cautions". Other decisions may well take longer to implement such as, for example, where it is necessary for police forces to update their operations manuals, and provide training. However, in my view, 11 months was ample

"Although … instant knowledge of court decisions is not to be attributed to the police, they are expected to comply with those decisions within a reasonable time."

> time for police officers to bring their investigative-detention practices into conformity with the dictates of Mann. Accordingly, I consider the violation of [the accused's] rights to lie at the serious end of the breach-spectrum. [references omitted, paras. 101-102]

Impact of the Breaches

The accused "could reasonably expect that he would not, in the absence of lawful authority, be directed to get out of the vehicle in which he was sitting, and have his jacket searched." The breaches were a significant, but not egregious, intrusion on the accused's *Charter*-protected interests.

Society's Interest in Adjudication

The guns were highly reliable evidence and critical to the prosecution of serious offences. The public had an interest in the successful prosecution of persons who unlawfully carry loaded handguns. On the one hand "the dangers that such conduct creates cannot be overstated [but] the public also expects those engaged in law enforcement to respect the rights and freedoms we all enjoy by acting within the limits of their lawful authority."

In balancing all the factors, the majority concluded that the repute of the administration of justice would be adversely affected by admitting the handguns. The law relating to investigative detentions was clear. "This failure to act in accordance with the limits set by the highest court in the land that tips the s.24(2) scales towards exclusion." The handguns were excluded and the accused was acquitted.

A Different View

Justice Hall was of the view that the detention of the accused was lawful. Although the officer should have advised the accused of his rights under s.10(b) at the time of detention (when told to get out of the car), there were no ss.8 or 9 breaches. This was not a random stop or groundless search of a vehicle nor was it a situation where the police had no reason to suspect any criminal activity. The officer was focussed on possible possession of paraphernalia prohibited by the terms of his probation. "The information in hand, including the proximity of the parties to the drug house, made it entirely appropriate for the officer to undertake a search of the vehicle," said Justice Hall.

As for the s. 10(b) breach it was primarily theoretical since almost immediately upon exiting the car, the accused fled. "His actions were not indicative of any likelihood that he would have been interested in consulting counsel," said Justice Hall. "His action of running away from the scene also afforded a sensible reason for the officer to carry on with some examination of the vehicle, for it was a fair inference that the car contained something illegal that motivated the [accused] to flee, presumably to escape apprehension." He added:

> The police did not act in an oppressive or cavalier fashion and had an articulated reason to detain the accused and enter upon a search of the vehicle. The fruits of the search were the two handguns found in the jacket the [accused] had just removed and left in the vehicle. It perhaps bears observing that if the police had been supine in this instance and not pursued an investigation and, later, one of the guns was employed (not, unfortunately, an uncommon scenario in the drug world), the public would be extremely critical of such police action or more properly inaction. [para. 144]

In weighing all of the s.24(2) factors, the nature of the police conduct, the search being relatively non-intrusive (search of a vehicle) and the nature of the offence disclosed, the evidence should have been admitted. The lapses of police conduct were not at the extreme end of the scale, the search was in no way personal or intrusive, and the guns were highly reliable. "A factor here in considering the repute of the administration of justice is that there has been an unfortunate level of gun violence in the Lower Mainland area of British Columbia in the recent past. To order the exclusion of the evidence in this case would in my opinion do harm to the repute of the administration of justice, whereas the admission of the evidence would enhance the repute of the administration of justice." Justice Hall would have dismissed the appeal and upheld the convictions.

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

POLICE MUST PROVE ARREST LAWFUL FOR EXCEPTION TO WARRANT REQUIREMENT

R. v. Besharah, 2010 SKCA 2

A police officer randomly stopped a motorist for the purposes of a sobriety check. On approaching the vehicle the officer smelled a strong odour of raw cannabis marijuana and arrested the accused for possession. He then searched the vehicle to locate the marijuana. After about 30 minutes the police found 19.6 grms. of marihuana inside a black duffel bag lying in the box of the accused's truck. Ecstasy was also found.

At trial in Saskatchewan Provincial Court the accused sought to challenge the admissibility of the evidence arguing he had been subject to a warrantless search, a presumptively unreasonable one under s.8 of the *Charter*. The Crown argued that the search was incident to lawful arrest so no warrant was required. The trial judge placed the onus on the accused to establish the unlawfulness of his arrest, but found the arrest was lawful because the officer smelled raw marihuana and the accused failed to establish, on a preponderance of the evidence, that the search and seizure was unlawful. The accused was convicted of possessing marihuana and possessing ecstasy for the purpose of trafficking.

> "[T]he statement that "searches of the person incident to arrest are an established exception to the general rule that warrantless searches are prima facie unreasonable", does not mean that the mere allegation, by the police or the Crown, that a search was incident to a lawful arrest is sufficient to remove any onus from the Crown where the lawfulness of the arrest ... is challenged by the accused."

On appeal by the accused to the Saskatchewan Court of Queen's Bench the convictions were overturned. The appeal judge ruled that the accused was denied the opportunity to challenge the credibility of the arresting officer, rendering the trial unfair. Had he been permitted to cross examine the officer, the defence would have raised the following circumstances to challenge the officer's credibility:

- Suggesting the officer knew or knew of the accused before the vehicle stop and had earlier dealings with him;
- Questioning whether a sobriety check was the real reason for the stop;
- The officer testified to "a very strong and overpowering smell of raw marihuana" but his notes only said "odour of mj";
- Following arrest, it took about half an hour to locate a relatively small amount of marihuana, inconsistent with a "strong and overpowering" odour.

As a result, a new trial was ordered. The Crown then appealed to the Saskatchewan Court of Appeal arguing, in part, that the onus on proving an unlawful arrest fell on the accused.

The initial burden on proving a *Charter* violation lies with the accused (applicant) but that burden may shift to the Crown. Once an accused has demonstrated that a search was warrantless, the burden then shifts to the Crown to show that it was reasonable. A search will be reasonable if it is (1) authorized by law, (2) the law is reasonable, and (3) the manner in which the search was carried out was reasonable.

In this case, the Crown contended that once it was asserted that the search was conducted an an incident to a lawful arrest it is brought within an exception to the presumption that a warrantless search is unreasonable. Thus, the accused needed to establish that the officer lacked the necessary reasonable grounds to justify the arrest. Justice Smith however, delivering the opinion of the Saskatchewan Court of Appeal, disagreed.

In the Court's view, rather than the accused establishing that the officer did not have reasonable

grounds, the Crown needed to establish that requirements for a lawful arrest had been met—that the officer had reasonable grounds to believe the accused was committing or had committed an indictable offence:

> [T]he statement that "searches of the person incident to arrest are an established exception to the general rule that warrantless searches are prima facie unreasonable", does not mean that the mere allegation, by the police or the Crown, that a search was incident to a lawful arrest is sufficient to remove any onus from the Crown where the lawfulness of the arrest (or whether the search was truly incident to the arrest) is challenged by the accused. Rather, the point of the statement is simply to confirm that the common law power of search incident to arrest is sufficient to satisfy the first two of the criteria set out in Collins, that the search is authorized by law and that the law itself is reasonable, sufficient to displace the presumption of unreasonableness, where the lawfulness of the arrest and that the search was properly incidental to the arrest are established. [emphasis in original, para. 25]

And further:

> Where the lawfulness of the police arrest is put at issue on a Charter challenge, as it was here, the onus must fall on the Crown through police witnesses to establish that the police had subjectively and objectively reasonable and probable grounds for the arrest, for, as a practical matter, this proposition is asserted and relied upon by the Crown and is within the peculiar knowledge of the police. Thus, fairness requires that the burden of proving this matter fall on the Crown and that the accused have an opportunity to challenge the police evidence by way of cross-examination. This logic applies where the police have justified a search of the accused as a search incident to arrest, whether or not the accused has also challenged the lawfulness of the arrest pursuant to s. 9 of the Charter. While it is true that search incident to a lawful arrest is an exception to the general rule that a warrantless search is prima facie unreasonable, it is for the Crown to establish that the pre-requisites for the exception have been satisfied. [para. 35]

Here, the trial judge erred in holding that the accused had the evidential and persuasive burden to establish that the police officer lacked reasonable grounds for his arrest. In addition, the trial judge erred in placing the onus on the accused to establish the unlawfulness of his arrest in the circumstances of this case. The Crown's appeal was dismissed and the order for a new trial was upheld.

Complete case available at www.canlii.org

LEGAL LESSON LEARNED

Search Incident To Arrest

- A warrantless search is presumptively unreasonable;
- However, a search incident to lawful arrest is an exception to this long standing presumption;
- In establishing that the search was valid as an incident to arrest the onus is on the Crown (of course through police evidence) to establish that the arrest was based on reasonable grounds. The onus is not on the accused to establish that reasonable grounds did not exist.

R. v. Besharah, 2010 SKCA 2

"Where the lawfulness of the police arrest is put at issue on a Charter challenge, as it was here, the onus must fall on the Crown through police witnesses to establish that the police had subjectively and objectively reasonable and probable grounds for the arrest, for, as a practical matter, this proposition is asserted and relied upon by the Crown and is within the peculiar knowledge of the police."

OFFICER NEED NOT QUESTION DRIVER ABOUT LAST DRINK

R. v. Smith, 2009 SKCA 139

The accused was stopped a few blocks from a bar where he had been. He said he had consumed four or five drinks and the last one was about five minutes before leaving the bar. An approved screening device (ASD) test was administered and the accused failed. The breathalyzer demand was then made and the accused was taken to the police detachment where he subsequently provided samples of breath over the legal limit.

At trial in Saskatchewan Provincial Court the officer testified he did not know how much time had elapsed from the time the accused left the bar until he was stopped. The officer also said he was aware of the 15 minute waiting period recommended in the ASD user's manual from the time of last drink to minimize the possibility of residual alcohol providing a falsely high reading. The ASD user's manual was also put into evidence. By filling in the time gaps of the evidence with speculation, the trial judge concluded that the test was administered within 11 or 12 minutes after the accused consumed alcohol. Since the ASD test was conducted within 15 minutes of the accused consuming alcohol the officer did not administer the ASD test in compliance with s.254(2) of the *Criminal Code*. Without the ASD fail results, the officer would not have had the necessary grounds for a breathalyzer demand. The accused's *Charter* rights were breached, the certificate of analysis was excluded, and he was acquitted.

The Crown's appeal to the Saskatchewan Court of Queen's Bench was successful. Although there was the possibility that the accused had consumed alcohol within 15 minutes of the test, the possibility did not preclude the officer from relying on the accuracy of the results. The appeal judge found there was no evidence as to how much time elapsed between the accused leaving the bar and being stopped by the police. Further, the officer was alive to the issue of residual mouth alcohol but could not establish if exactly 15 minutes had elapsed since he had no way of knowing how long the accused had been in his truck before being stopped. There was no *Charter* breach and a new trial was ordered.

On appeal by the accused to the Saskatchewan Court of Appeal, the accused's appeal was dismissed. The onus of proving a *Charter* breach lay with the accused, which he failed to do. Justice Sherstobitoff, writing the judgment of the Court, stated:

> The first [principle relevant to this case] is that an investigating officer need not question a suspect with respect to when he last drank. The second is that the mere possibility that a suspect may have drunk alcohol within the 15 minutes preceding the administration of the ASD test, does not preclude an officer from requiring a suspect to take the test and to rely on the result, where the officer acts bona fide. [references omitted, para. 7]

Here, there was no evidence as to how much time had elapsed between the time the accused left the bar and the time he was stopped. The trial judge erred in finding the officer knew or should have known that the accused had ingested alcohol within 15 minutes preceding the test. The accused was the only person who knew this but he chose not to say anything to the officer or give evidence in the *voir dire* at trial. The officer did not need to do more by way of enquiry and acted bona fide in administering the test. The accused's appeal was dismissed.

Complete case available at www.canlii.org

DETENTION NOT ARBITRARY: AMPLE FOUNDATION FOR CONTINUED DETENTION

R. v. Simms, 2009 ABCA 260

The police tracked the accused to a rink after he was was involved in an accident and left the scene. He had a bad gash on his forehead, displayed many signs of intoxication such as a strong odour of alcohol, trouble standing,

speaking, or holding a simple object, and he was uncooperative. When an ambulance attended he refused treatment. The police took the accused to the hospital where a doctor sewed up a wide, bleeding gash to his forehead. When he tried leaving the hospital through doors clearly marked "no exit", he walked into a glass wall. He could not walk straight or talk properly. At the police station, the accused at first refused the offer to use a phone to call a lawyer, but later accepted it and placed a call. He remained uncooperative and did not provide a breath sample. His truck was still parked in a parking lot, and he did not ask to have anyone pick him up. Since there was a little dog in the truck, and it was below freezing, police called the accused's wife and told her where the truck was. The wife did not ask or suggest about coming to get her husband. He was charged with impaired driving and dangerous driving.

At trial in Alberta Provincial Court the officer testified that it would not be safe for the accused, or for others, that he be released on his own. He could go back to the parking lot and drive his truck or, based on his earlier conduct, could easily hurt himself if left unattended. Although the officer believed that it would be safe to release the accused into the custody of some sober, responsible adult, the question did not arise - no one asked about it nor suggested it, nor did the officer raise the topic with the accused or his wife. With respect to the wife, the officer said he preferred to let the wife raise the topic of bringing her husband home rather than volunteering the suggestion. The judge held that the post-investigative detention of the accused in cells was not arbitrary and was lawful since it was necessary in the public interest to prevent the commission of another offence. The accused's request for a stay of proceedings was dismissed. He was convicted of the impaired driving charge.

The accused appealed to the Alberta Court of Queen's Bench arguing the trial judge erred in examining only the subjective belief of the investigating officer without verifying whether there was an objective basis for that belief. The accused's appeal, however, was dismissed.

The accused then appealed to the Alberta Court of Appeal arguing, in part, that the lower court erred in finding that the officer had an honest, reasonably held belief that his continued detention was necessary, that such a belief, if honest, was not objectively reasonable, and that the accused or his family had the onus of requesting his release.

Arbitrary Detention

The Alberta Court of Appeal concluded there was no s.9 *Charter* breach. The detention in this case was not without grounds or without evidence, nor illogical or capricious. "The circumstances at and before arrest, and what the constable saw at the rink, and then the hospital, gave ample foundation for his conclusion that it would be unsafe for all concerned to let the accused out on his own," said the Court. Nor did the trial judge overlook the second branch of the test for detention under s.497 of *Criminal Code* - reasonable grounds for the officer's belief. She discussed the appropriate authorities and the evidence proved the reasonableness of the detention. And further:

> Section 497 of the Criminal Code was not the only legal basis to detain the accused. Alberta's Gaming and Liquor Act..., s. 115 allows release of someone found intoxicated in a public place (as here) who is not charged with that. But that is to take place once the detainee has recovered enough that he is not likely to injure himself or be a danger, nuisance or disturbance to others, or once there is an undertaking by someone else to care for the detainee. Plainly neither branch was satisfied here. [para. 17]

Onus to Request Release

The accused's suggestion that the police had a legal duty to tell the detainee that he would be released from custody if he produced a suitable, sober adult to take him home was also rejected. The Court stated:

> Showing such a duty in circumstances described by section 497 of the Criminal Code might be an uphill fight, for two reasons.
>
> (a) Counsel can find no authority for such a duty, and

(b) The analogy of s. 10(b) of the Charter is prayed, but fails. That section expressly gives a duty to tell the suspect about the right to counsel, whereas s. 9 of the Charter does not mention informing the accused about any right.

The defence submissions here encounter a bigger problem. There can be a Charter breach only if s. 9 of the Charter is violated. A mere breach of the Criminal Code is not what the accused's counsel alleges, and besides it would do him no good on this appeal. He wants a Charter remedy. And the Code does not impose a duty to inform.

Section 9 of the Charter forbids only arbitrary detention. If there is no detention, there cannot be arbitrary detention. If some previous omission is complained of, it cannot be detention (let alone arbitrary detention) unless it had some sort of role or effect in creating a later detention. [paras. 23-25]

In this case there was "no evidence that the accused could or would have got anyone to take him home, nor even that he wanted to. His wife did not raise the topic when she spoke to the police and did not even ask a question. And she did not testify at trial. Nor did anyone testify that she or any other friend, relative or employee was available, had a vehicle, had a driver's licence, or was willing to take the accused home. The accused failed to prove a *Charter* violation.

Complete case available at www.albertacourts.ab.ca

BY THE BOOK:

s. 115 Alberta's *Gaming and Liquor Act*

Taking intoxicated person into custody

s.115(1) No person may be intoxicated in a public place.

(2) If a peace officer on reasonable and probable grounds believes that a person is intoxicated in a public place, the peace officer may, instead of charging the person with an offence, take the person into custody to be dealt with in accordance with this section.

(3) A person in custody pursuant to subsection (2) may be released from custody at any time if on reasonable and probable grounds the person responsible for the custody believes that

(a) the person in custody has recovered sufficient capacity that, if released, the person is unlikely to injury himself or herself or be a danger, nuisance or disturbance to others, or

(b) a person capable of taking care of the person taken into custody undertakes to take care of that person.

WHAT'S NEW FOR POLICE IN THE LIBRARY

The Justice Institute of British Columbia Library is an excellent resource for learning. Here is a list of it's most recent acquisitions which may be of interest to police.

Counselling for post-traumatic stress disorder
Michael J. Scott and Stephen G. Stradling.
London; Thousand Oaks, Calif.: SAGE Publications, 2006.
RC 552 P67 S35 2006

JUSTICE INSTITUTE of BRITISH COLUMBIA
LIBRARY

Elder abuse: the hidden crime
written by Judith Wahl and Sheila Purdy; illustrations by Yvonne Nowicka].
Toronto, Ont.: Advocacy Centre for the Elderly, c2008.
HV 6626.3 W234 2008

Families, youth and delinquency: the state of knowledge, and family-based juvenile delinquency prevention programs

Julie Savignac.
Ottawa: National Crime Prevention Centre, c2009.
HV 9069 F365 2009

For our own safety: examining the safety of high-risk interventions for children and young people

edited by Michael A. Nunno, David M. Day, & Lloyd B. Bullard.
Arlington, VA: Child Welfare League of America, c2008.
HV 965 F67 2008

Hidden evidence: the story of forensic science and how it helped to solve 50 of the world's toughest crime

David Owen.
Richmond Hill, Ont.: Firefly Books, 2009.
HV 8073 O93 2009

High-rise security and fire life safety

Geoff Craighead.
Amsterdam; Boston: Butterworth-Heinemann/ Elsevier, c2009.
TH 9745 S59 C73 2009

"Operation Praetorian": a new look at twenty first century police leadership development

by Edward Illi.
[Victoria, B.C.] : Royal Roads University, c2007.
HV 8160 S23 I456 2007

Reasonable use of force by police: seizures, firearms, and high-speed chases

David A. May & James E. Headley.
New York: P. Lang, c2008.
HV 7923 M39 2008

Stalking, threatening, and attacking public figures: a psychological and behavioral analysis

edited by J. Reid Meloy, Lorraine Sheridan, Jens Hoffmann.
Oxford; New York: Oxford University Press, c2008.
HV 6594 S742 2008

Training strategies for crisis and hostage negotiations: scenario writing and creative variations for role play

by Arthur A. Slatkin.
Springfield, Ill.: Charles C. Thomas, c2009.
HV 8058 S55 2009

Traumatic stress in police officers: a career-length assessment from recruitment to retirement

by Douglas Paton ... [et al.].
Springfield, Ill.: Charles C. Thomas, c2009.
HV 7936 J63 T73 2009

Youth & crime

John Muncie.
Los Angeles; London: SAGE, c2009.
HV 9145 A5 M87 2009

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Library Hours:

- Monday, Thursday, Friday 8am-5pm
- Tuesday & Wednesday 8am-8pm (extended hours until April 28th)
- Saturday 9am-4pm (until June)

UNENCLOSED SPACE NOT A 'PLACE'

R. v. Ausland, 2010 ABCA 17

Two men were observed backing a tractor unit up to a chain between two cement posts. This chain, secured by a padlock, was the only thing that controlled access and egress to an unfenced yard used for the purpose of storing trailers. No physical barriers impeded pedestrian access but the yard was patrolled by security guards and cameras. The men cut the chain and backed the tractor unit up to a trailer parked in the lot. The tractor and trailer were connected and

the unit was ready to be pulled. But police arrived in response to an emergency call and intercepted the thieves. Although nothing was removed from the yard the accused was charged with breaking and entering a place and committing a theft therein, and theft over $5,000.

At trial in Alberta Provincial Court the judge found the storage yard to be a "place" and convicted the accused of breaking and entering. He was also found guilty of theft over $5,000 but that charge was stayed under the Kienapple principle.

The accused then appealed to the Alberta Court of Appeal arguing, in part, that he did not break and enter a "place" as defined in s.348(3) of the *Criminal Code*. Under the *Criminal Code*, a "place" is defined to mean, among other things, "a building or structure or any part thereof, other than a dwelling house." This definition required the Crown to prove that the yard was a "structure" within the statutory meaning of "place".

Although the Court of Appeal accepted that the word "structure" had a broad and liberal interpretation, it concluded the unenclosed parking lot was not a "structure":

> It is apparent from [case law] that the courts, in dealing with the break and enter sections of the Code, have interpreted the word "structure" to include, in certain circumstances, spaces enclosed by a fence. In our view, however, to extend the meaning further to include unenclosed spaces, like the yard in the present case, would go too far and rob the word "structure" of any effective meaning. At the very least, a structure must be something that can be broken into and entered. In this case, entry to the lot could have been gained by simply walking around the barrier created by the chain. … The fact that the yard is patrolled does not convert an open space into a structure. [para. 11]

Thus, the trial judge erred in convicting the accused of breaking and entering by holding that the unenclosed storage yard was a "place". However, the offence of theft over $5,000 was proven. Even though the trailer was not removed from the yard, the definition of "theft" includes moving something or causing it to move or to be moved, or beginning to cause it to become movable with the intent to steal it. Here, the accused was in the course of causing the trailer to become movable. The conviction of break, enter and theft was set aside and a conviction for theft was entered.

Complete case available at www.albertacourts.ab.ca

BY THE BOOK:

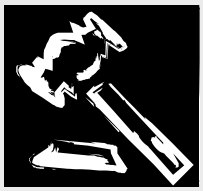
"Place" - s.348(3) Criminal Code

"place" means
(a) a dwelling-house;
(b) a building or structure or any part thereof, other than a dwelling-house;
(c) a railway vehicle, a vessel, an aircraft or a trailer; or
(d) a pen or an enclosure in which fur-bearing animals are kept in captivity for breeding or commercial purposes.

Thus, a place for the purpose of break and enter under s.348 does not include a motor vehicle. But under s.98, a place for the offence of breaking and entering to steal a firearm "means any building or structure — or part of one — and any motor vehicle, vessel, aircraft, railway vehicle, container or trailer."

LEGALLY SPEAKING:

Circumstantial Evidence



"Any one piece of Crown circumstantial evidence may leave a huge doubt. But eight or ten may yield an ironclad case for the Crown." - Alberta Court of Appeal Justice Cote in *R. v. Currie*, 2008 ABCA 374 at para. 20.

DRA TECHNOLOGY BREACHES HOMEOWNER'S PRIVACY INTEREST

R. v. Gomboc, 2009 ABCA 276

While investigating an unrelated matter in a neighbourhood, a police officer noticed that the windows of the accused's house were covered with condensation, the curtains stained with moisture, and the roof was free of snow, distinguishing it from the surrounding homes. Two drug unit officers were assigned to investigate and noted the smell of "growing" marihuana, condensation on the windows, considerable moisture being vented through the chimney and under the deck, unusual ice buildup around the vents located on the roof when the weather turned cold, and the house appeared to be sweating profusely. These observations led police to believe that the accused had a marihuana grow operation in his home.

The officers requested the electrical service provider in the area install a digital recording ammeter (DRA), which would create a record of when the electrical power was consumed at the accused's property. The DRA is attached at the power box or transformer site of the powerline feeding into a residence. No warrant was used and, after a five-day period, police were provided with a graph printout suggesting the electrical use was consistent with a marihuana grow operation. Using this information and their earlier observations the police obtained a search warrant and found a marihuana grow operation consisting of two–stages involving hundreds of marihuana plants. The police seized 165.3 kgs. of bulk marihuana, 206.8 grms. of processed and bagged marihuana, as well as numerous items related to the grow operation. In addition, the police seized various documents confirming the accused's ownership and use of the premises. He was charged accordingly.

At trial in the Alberta Court of Queen's Bench the accused argued the DRA evidence breached his rights under s.8. of the *Charter* because its use involved an unwarranted and unreasonable search and that the evidence obtained should have been excised from the information to obtain the search warrant. Without the DRA information, he claimed the search warrant could not have issued and all the evidence discovered in execution of the warrant should be excluded under s.24(2). The Crown conceded that without the DRA record, there was insufficient evidence to secure a search warrant but that its use was not a search or seizure. Thus, no judicial authorization was required to install the DRA and record the power consumption.

The trial judge ruled that a resident of a house did not have a reasonable expectation of privacy in computerized electricity records maintained by the utility company and the information provided by the DRA was not of such a personal or confidential nature to give rise to a reasonable expectation of privacy. The *Alberta Code of Conduct Regulation* pursuant to the *Electrical Utilities Act*, in the judge's view, diminished any reasonable expectation of privacy with respect to electrical consumption information and permitted disclosure of electricity consumption by a utility to the police for the purpose of investigating an offence, if the disclosure was not contrary to the express request of the customer. The accused was convicted of producing marihuana and possessing marihuana for the purpose of trafficking.

Justice Martin, writing the majority opinion of the Alberta Court of Appeal, concluded that "the information obtained from the DRA was subject to a reasonable expectation of privacy, that its collection and disclosure to the police amounted to a search, and that the search was unreasonable in the absence of prior judicial authorization." In his view, the accused had a subjective expectation of privacy that was objectively reasonable and it was violated by police conduct. Using the "totality of the circumstances test", the majority focused on the accused's informational privacy in activities taking place in his home.

Comparing it to FLIR technology, which the majority noted was non intrusive and basically meaningless, DRA technology is not only different but more intrusive and more revealing:

> Here, the expert evidence confirmed that a DRA records the flow of electricity to a residence over a period of time. In doing so, it measures the amount of electricity being used at a given point, based on one amp increments. While the DRA does not indicate the source of electrical consumption within the residence, it produces information as to the amount of electricity being used in a home and when it is being used, all over a significant period of time. A pattern of excessive electrical use over a 12-hour or 18-hour cycle indicates to the police that a marihuana grow operation is likely being undertaken at the subject property, as marihuana is typically grown indoors using 12 or 18-hour light cycles.
>
> DRA information must, as a matter of common sense, also disclose biographical or private information; for example, the approximate number of occupants, when they are present in the home, and when they are awake or asleep. This applies to all homes, regardless as to whether they are being used for marihuana grow operations. …
>
> Even if the DRA records did not disclose personal information, the information obtained may nonetheless be of the type that is subject to a homeowner's reasonable expectation of privacy. .. As my colleague has observed, information that does not disclose "core 'biographical' information," such as electrical signals emanating from a home, may nonetheless remain subject to an expectation of privacy where it is reasonably intended to remain private. [references omitted, paras. 16-18]

The accused's expectation of privacy was also objectively reasonable. "In my view, the informed homeowner would share the [accused's] expectation of privacy, particularly in the absence of any judicial oversight," said Justice Martin. He continued:

> [T]he police wanted the DRA information to find out what was happening in the [accused's] home – a place where the [accused's] expectation of privacy was high and objectively reasonable.
>
> In my opinion, the expectation of privacy extends beyond simply the information as to the timing and the amount of electricity used. It is also objectively reasonable to expect that the utility would not be co-opted by the police to gather additional information of interest only to the police, without judicial authorization. Indeed, I expect that the reasonable, informed citizen would be gravely concerned, and would object to the state being allowed to use a utility to spy on a homeowner in this way.
>
> It is useful to recall that the [accused's] relationship with the utility provider was born of modern necessity; it was not feasible for him to generate his own electricity or to go without. So the [accused] agreed to a standard electrical service arrangement with Enmax, whereby the latter would supply electricity to the his home in exchange for payment for that service. In this way, Enmax received access to the [accused's] property to install the necessary equipment to supply his house with electricity, and continued to have restricted access to check and maintain the equipment. It is reasonable to infer that access would not otherwise have been allowed. … Given that access would not have been available to the police without the [accused's] consent or invitation (and there is no evidence to suggest that either would have been granted), it is my view that an informed homeowner would strongly object to the police use of the utility's access and technology to generate a record of electrical use solely for the benefit of a police investigation. [paras. 21-22]

And the information obtained by a DRA was found to be significantly different than the billing records routinely produced and retained by a utility company in the normal course of its business. In this case, the police were not interested in monthly billings or other pre-existing information gathered by the utility. Instead, police asked the utility to use DRA technology that it would not normally use to generate information that the utility had no interest in. Nor did the *Regulations* diminish the accused's expectation of privacy. "In my opinion, the *Regulations* must be strictly construed, and not interpreted to imply the homeowner's consent in allowing the utility to gather, at the behest of the state, information that is not useful to his or her relationship with the utility," said Justice Martin. "The *Regulations* cannot mean that the utility can be

used, without judicial authorization, as an investigative arm of the police to gather evidence about what is happening inside the home, unless the consumer has forbidden it."

> Trespassing on a homeowner's property is conduct the police themselves are not permitted to engage in … and I do not understand that the Regulations were intended, nor constitutionally able, to empower police agents to do what they themselves can not legally do. In my opinion, the Regulations do no more than permit the utility to share pre-existing customer information with the police unless the customer has objected.
>
> If it were otherwise, the police could recruit any agency with limited access to a home to exploit that access to gather information for them. For example, the mailman to look into the windows while at the house delivering mail and report his observations; or the cable TV provider to report the viewing habits and preferences of the subscriber. Such unauthorized state surveillance of its citizens is offensive to the basic tenets of our society and would render the protection of a reasonable expectation of privacy over one's home, illusory. [paras. 24-25]

The accused's reasonable expectation of privacy was violated by the warrantless search conducted by the utility at the behest of the police and, absent exigent circumstances, was a presumptively unreasonable warrantless search which could not be justified. The accused's appeal was allowed, his conviction was quashed, and a new trial was ordered.

A Second Opinion

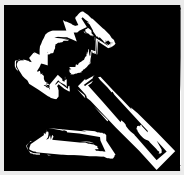
Justice O'Brien disagreed with the majority judgment and concluded the accused did not have a reasonable expectation of privacy in the DRA information which outweighs the state's interest in enforcing drug laws. In his view, a customer does not have a reasonable expectation of privacy in electrical data relative to his or her residential usage. Further, the investigative technique employed by the police was external to the residence and involved obtaining information concerning electrical usage and patterns of use, which then gave rise to an inference of a grow operation within the residence. Additionally, the regulatory regime in Alberta concerning the usage of electricity negated any confidentiality on the part of a customer vis à vis the police, relative to his or her usage thereof. A customer could not have a reasonable expectation of privacy relative to electrical use consumption, when the *Regulation* expressly provided that any such information may be provided to the police.

And even if this was a *Charter* "search" it was not unreasonable. The use of the DRA was authorized by law—statute and common law. The search was authorized by legislation—the *Regulation* allowed disclosure of customer information for the purpose of investigating an offence. And the search was also authorized by the common law. In this case, the police did not request the installation of the DRA because of a "hunch" or "intuition". Rather, the police had gathered objectively discernible facts to support a reasonable suspicion to believe that a marihuana grow operation would be discovered at the residence. Justice O'Brien would have dismissed the accused's appeal.

Complete case available at www.albertacourts.ab.ca

LEGALLY SPEAKING:

Tainted Search Warrants



"Warrants based solely on tainted information are invalid. However, where … the warrant was procured on the strength of both tainted and properly obtained information, the court must determine whether it would have issued without the improperly obtained information. If the warrant would have issued without the tainted information, it remains valid, although a s.24(2) analysis could still be necessary if a sufficient temporal connection exists between the Charter breach and the evidence gathered following that breach." - Alberta Court of Appeal Justice Martin in *R. v. Gomboc*, 2009 ABCA 276 at para. 28, references omitted.

Jurisprudence Jolt

IN BRIEF: This section provides a peek of what's happening in appeal courts across the country.

Manitoba Court of Appeal

JUDGES FACTUAL ERRORS WERE PALPABLE BUT NOT OVERRIDING

After receiving reliable information from an informant, the police tailed a multi-kilogram cocaine dealer and saw what they believed was a drug transaction with the accused. The two had met at a gas station and left in separate vehicles. The accused was stopped and arrested, along with his passenger. Police searched the accused's truck and found six ounces of cocaine. The judge found the police had the necessary grounds for arrest and the search was lawfully conducted incident to that arrest. A conviction of possessing cocaine for the purpose of trafficking followed.

On appeal, Manitoba's top court upheld the conviction. A trial judge's factual findings of fact are to be considered by an appeal court on the standard of "palpable and overriding error" while the application of the proper test or legal principles to the findings of fact are reviewed on a "standard of correctness". Here the trial judge applied the correct legal test - whether the officer subjectively had reasonable grounds for arrest and whether the grounds for the belief existed objectively. On the other hand, the trial judge did make some factual errors that were palpable. But they were not overriding. Neither of the factual errors were signifiant enough to detract from the objectively reasonable grounds resulting from the source information and surveillance. **R. v. McKay, 2009 MBCA 121**

Alberta Court of Appeal

STRIP SEARCH DID NOT WARRANT STAY ON MISCHIEF CHARGES

Police officers attended a hospital to mediate a situation where an intoxicated 17-year-old youth was causing problems at a hospital. She went into a bathroom, lit a piece of paper on fire, and held it up to the sprinkler system, triggering it and causing $229,000 damage to the health center. The accused was arrested by police, but resisted. She kicked out the window of a police car. During a strip search at the police station she threw her clothes at police, fought, screamed and resisted. She also punched an officer in the face. She was charged with two counts of mischief (health center and police car window) and one count of assaulting police.

The trial judge found all charges were proven but entered a stay on the assault charge. He concluded the strip search was a routine one that could not be justified. Even though the officer testified he was searching for matches or a lighter, or possible weapons, the judge ruled there were not reasonable grounds for the strip search and found a s.8 *Charter* breach. The accused then argued before Alberta's highest court that the mischief charges should have also been stayed. But the Appeal Court disagreed. A stay of proceedings is an extraordinary remedy that should be reserved for extreme cases. "While the police should be held accountable for their conduct, it does not follow that the [accused] should be unaccountable for hers," said the Court. **R. v. L.L.S., 2009 ABCA 172**

Saskatchewan Court of Appeal

CRIMINAL LAW APPLIES TO FIRST NATION RESERVES

Police executed a search warrant on First Nation's land and found 5,974 marihuana plants in various stages of development. The grow operation was sophisticated and suggested a yield of more than 1,100 pounds of marihuana with a production value as high as $7.5M. Three men were found guilty but appealed their convictions on several grounds to the Saskatchewan Court of Appeal including the jurisdiction of a trial court over native people, the lack of intent to commit a crime, and issues relating to the search warrant.

Saskatchewan's high court rejected all of the accuseds' submissions. "The criminal law applies to First Nations

people whether on reserve of not," said Justice Richards for the unanimous court. The suggestion that the men did not intend to break the law but only planned to produce "medicine" and industrial hemp was also dismissed. The question was not whether they intended to break the law but whether they intended to produce and possess marihuana in contravention of the *Controlled Drugs and Substances Act (CDSA)*. "The validity of a conviction is not contingent on proof that an offender specifically set out on a course of action which he knew to be a violation of the criminal law." Nor did the search warrant require authorization by a Queen's Bench judge before entry onto an Indian Reserve. Section 11 of the *CDSA* empowers a "justice", which includes a justice of a peace or a provincial court judge, to issue a search warrant . **R. v. Agecoutay et al, 2009 SKCA 100**

Ontario Court of Appeal

ENOUGH FOR ACUSED TO BELIEVE HE IS CHATTING WITH PERSON UNDER 14

The accused entered a chat room and struck up a conversation with a police detective posing as a young 13-year old girl. Sexually explicit conversation ensued and the accused sent a video of himself masturbating to ejaculation. At trial the accused said he believed that the person to whom he was communicating was at least 18 years old. The judge did not believe the accused's evidence and found there was no reasonable effort to determine the age of the person he was dealing with. The accused was convicted of luring a child under s.172.1(1)(c) of the *Criminal Code*.

The Ontario Court of Appeal upheld the accused's conviction. Section 172.1(1)(c) can apply to communications with a person who is not, in fact, under the age of 14. It is enough that the accused believed he was exposing himself to someone under 14. This interpretation accords with the nature of the offences created by and purpose of s.172.1, and the interpretation of the language of s.172.1(1)(c). Furthermore, s.173(2) (exposure) applies to images sent over the internet. The phrase "in any place" found in s. 173(2) does not require an accused expose themselves in the same physical location as the victim of the exposure. There is nothing in the language of s.173(2) that suggests the perpetrator and the victim must be in the same place. "The phrase 'in any place' speaks to the location where the perpetrator exposes himself," said Justice Doherty, writing the Court's opinion. "Section 173(2) does not speak to the location of the victim when the crime occurs much less require the victim be in the same place as the perpetrator." **R. v. Alicandro, 2009 ONCA 133**

CASE QUOTE

"The [accused's] interpretation of s. 172.1(1)(c) would significantly undermine the object of that statutory provision in a second way. If the [accused's] interpretation is accepted, communications between an accused and a police officer who an accused believes to be a young person could not result in a conviction under s. 172.1(1)(c). A review of the case law demonstrates that police officers posing as young persons is almost the exclusive manner in which this provision is enforced. This is hardly surprising. Children cannot be expected to police the Internet. The state is charged with the responsibility of protecting its children. That responsibility requires not only that the appropriate laws be passed, but that those laws be enforced. The [accused's] interpretation would render the section close to a dead letter." R. v. Alicandro at para. 38.

Ontario Court of Appeal

ACTIONS OF DRIVER HAD MORE THAN ONE REASONABLE EXPLANATION

The accused was charged after she was involved in a single vehicle accident in which her passenger was killed. She admitted consuming alcohol and an officer smelled alcohol on her breath, her speech was slurred and she went limp, among other observations. The trial judge concluded that the the only reasonable explanation for the accused going limp was medical and not indicia of impairment. Because of this, the breathalyzer demand was invalid, the accused's s.8 *Charter* rights breached, and the accused was ultimately acquitted of all charges.

The Ontario Court of Appeal, however, set aside the acquittals. The trial judge erred in her objective portion of her s.8 analysis. The evidence demonstrated that there was another reasonable explanation for the accused going limp - her consumption of alcohol. This explanation, along with the other observations

provided an objective basis for the demand. But since the trial judge did not determine whether the officer had the subjective belief needed to make the breathalyzer demand, a new trial was ordered. - **R. v. Duris, 2009 ONCA 740**

Ontario Court of Appeal

SINGLE ACT OF INSUBORDINATION WOULD NOT AFFECT OFFICER'S CREDIBILITY

The Ontario Court of Appeal has ruled that a single finding of insubordination would not have affected a trial judge's assessment of an officer's credibility. The officer had previously refused to give a statement to officers investigating other drug cases. The previous act of insubordination would not have tainted the trial judge's finding that it was the accused who was driving a van dangerously. The dangerous driving conviction was upheld. - **R. v. Scrivanich, 2009 ONCA 721**

Ontario Court of Appeal

NO AUTHORITY FOR REVIEWING JUDGE TO EXCLUDE CORRECT INFORMATION

During a murder investigation police received a good deal of information suggesting that the accused and another man were responsible for the murder. A homicide detective applied for and was granted a wiretap authorization to intercept private communications. The trial judge found the detective's preparation of the affidavit was a reckless disregard for the truth and the role of the authorizing judge. He then chose to excise all information - not just erroneous information - relative to motive and opportunity from the affidavit and found there was not enough information remaining upon which to issue the intercept. Under s.24(2) the evidence of the intercept was excluded. The Crown called no evidence and the accused was acquitted.

A Crown challenge to the trial court's ruling before the Ontario Court of Appeal was successful. In reviewing a judicial authorization, the reviewing court is to determine whether the authorization could have been issued. It is not the role of the reviewing judge to determine whether they would have issued the authorization. In other words, they are not to substitute their view for the issuing judge's. "Nor is the review to take on the markings of a trial, where the truth of the allegations is explored," said Justice MacPherson for the Court. Instead, the review is simply an evidentiary hearing to determine the admissibility of relevant evidence about the offence obtained under a presumptively valid court order. And although the reviewing judge must exclude erroneous information from an affidavit supporting a wiretap authorization, there is no authority for a reviewing judge to exclude correct information. "The proper approach is for the reviewing judge, after excluding the erroneous information, to assess the affidavit as a whole to see whether there remains a basis for the authorization in the totality of the circumstances." In this case the trial judge erred by not conducting the review of the wiretap authorization in this way. **R. v. Ebanks, 2009 ONCA 851**

CASE QUOTE

"[T]he test on a review of a wiretap authorization is not whether there were reasonable grounds to lay charges against the individual but rather whether there were reasonable grounds to believe that interception of his communications may assist in the investigation of the offence....It was not necessary for the trial judge in effect to conduct a trial as to whether the reliability of the anonymous tipsters, the reliability and veracity of what the witnesses told the police, and the other evidence could be established beyond a reasonable doubt." R. v. Ebanks at para. 33

Ontario Court of Appeal

SUSPECT AWARE OF JEOPARDY: NO NEED TO RE-ADVISE OF RIGHT TO COUNSEL

A woman was found dead in a ditch along a rural side road and her horse was found running loose nearby. Police initially concluded she died as a result of a riding accident. Her husband was not a suspect at the time. Fifteen years later police reopened the case, being skeptical about the accident theory. Police persuaded the husband to voluntarily attend the police station to take a polygraph test and he ultimately confessed to the killing. He was found guilty of second degree murder and sentenced to life in prison.

The accused argued on appeal that he was detained and his jeopardy significantly changed during the

polygraph interview - when he admitted to hitting his wife when she got off her horse - and therefore should have been re-advised of his right to counsel. The Ontario Court of appeal disagreed. The accused was aware he was a suspect in the homicide and had been made aware that he could access legal advice during the polygraph examination consent form procedure. There was a sufficient factual connection between the s.10(b) caution given to the accused and his detention. "The [accused] was told and understood at all times that he was being questioned as a suspect and that his jeopardy was with respect to an offence of homicide – he was asked repeatedly whether he had done anything to cause his wife's death," said Justice Blair for the Appeal Court. "Thus, his status was as a murder suspect, and the nature of his jeopardy did not change after his first admission." As well, he had been properly advised of his *Charter* right to counsel and to remain silent at the outset of the interview and reminded of his s.10(b) rights more than once thereafter. The evidence was clear that he understood both the full informational component of his right to counsel, and how to implement that right, at all times and could have exercised that right at any time during the interview, but chose not to do so. - **R.v Chalmers, 2009 ONCA 268**

Ontario Court of Appeal

ABSENCE OF GROUNDS IMMATERIAL TO APPLICATION OF PRESUMPTION OF IDENTITY

Absent a *Charter* application, where an accused has provided breath samples pursuant to a demand made under s.254(3) of the *Criminal Code* and the peace officer did not have reasonable grounds for making it, the Crown is nonetheless entitled to avail itself of the presumption of identity in s.258(1)(c). In two cases before the Ontario Court of Appeal, trial judges had rendered convictions of driving over 80mg% when certificates of analysis were admitted even though the officers making the breathalyzer demand lacked the reasonable grounds necessary to do so. The Ontario Superior Court of Justice, however, overturned these convictions. It found that the Crown was not entitled to rely on the presumption of identity where it failed to prove the existence of reasonable grounds to make the breath demand. The reference to "demand" under s.258(1)(c) means a valid demand-one made by a peace officer on reasonable grounds. The appeal judgments ordered new trials.

The Ontario Court of Appeal, however, reinstated the convictions. When a peace officer makes a demand under s.254(3) and the demand is acceded to (a sample is provided) the existence of reasonable grounds for making the demand is irrelevant for the purposes of s. 258(1)(c) and does not affect the admissibility of the certificate. Thus, the Crown need not prove that the officer had reasonable grounds for making a breath demand in order to rely on the presumption of identity found in s.258(1)(c). The Crown's appeal was allowed and the convictions were restored. It should be noted, however, that accused persons can challenge the admissibility of the test results under s.8 of the *Charter* and seek to have those results excluded under s.24(2). As well, the absence of reasonable grounds for belief of impairment may afford a defence to the charge of refusal to provide a breath sample. - **R. v. Charette, 2009 ONCA 310**

CASE QUOTE

"The presumption embodied in s. 258(1)(c) is commonly referred to as the presumption of identity. If applicable, the presumption of identity relieves the Crown from having to prove that the accused's blood alcohol level at the time of the offence was the same as at the time of testing. In those cases where the presumption of identity is not available, the accused's blood alcohol level at the time of the offence must be proven in the ordinary way. Normally, this will require expert testimony from a toxicologist." - R. v. Charette at para. 4.

Ontario Court of Appeal

CONDUCT CREATED RISK OF DANGER: CARE OR CONTROL PROVEN

The accused drove her car into a deep, steep ditch and it could not be driven back up to the road. A police officer attended and found the accused standing by the driver's door. The car was not running and the keys were not in the car. The car was not damaged and could have been driven once pulled from the ditch. The accused was looking for her cell phone to arrange for a tow truck. The accused failed a roadside test and was arrested for over 80mg%; she subsequently provided two breath tests over the legal limit. At trial the judge found the accused was in care or control and she was convicted. In the judge's view the accused retained care or control of the vehicle and there was a risk she would continue her

interrupted journey home once the vehicle was pulled from the ditch. On appeal to the Ontario Superior Court of Justice the accused's conviction was overturned. In the appeal judge's opinion the correct test was whether the accused engaged in conduct that created a risk of danger, not whether there was a risk that the accused would engage in conduct that would create danger or a risk of danger.

On appeal by Crown, the accused's conviction and sentence imposed at trial was restored. The Ontario Court of Appeal found the trial judge had assessed whether the accused's conduct in relation to the motor vehicle was such that it created a risk of danger. The Court of Appeal held that the trial judge concluded that "there was a risk that upon her vehicle being pulled from the ditch, the [accused] would continue her interrupted journey home, thereby causing the risk of danger that s.253(b) of the Criminal Code is designed to prevent." - **R. v. Banks, 2009 ONCA 482**

Ontario Court of Appeal

OFFICER REMOVED ANY MEANINGFUL CHOICE TO CONSENT BY THREATENING USE OF K9

At about 1:30 am the 19-year-old accused was stopped for running a red light. He was with two friends and produced his driver's licence, registration, and military identity card. He was fidgety, nervous and flustered, and the officer became suspicious. The accused was asked to step from the vehicle. When asked by the officer if the vehicle could be searched the accused said "no problem." When asked if the trunk could be searched the accused said "do you have a warrant" to which the officer asked "do I need a warrant." The accused then read a consent to search form - which included a warning about the right to counsel - but refused to sign it. The officer threatened to have a canine unit attend and sniff out any drugs or weapons. The accused capitulated and opened the trunk. In the trunk was a locked metal box which the accused was told to open. In it was a loaded .22 calibre handgun - a prohibited firearm. At trial the accused was convicted for possessing a loaded prohibited firearm under s.95(1) of the *Criminal Code*. Even assuming the accused was arbitrarily detained, the trial judge found the accused had freely consented to the search of his trunk, thereby waiving his right to be free from unreasonable search and seizure under s.8 of the *Charter*. The firearm and ammunition was therefore not the product of any *Charter* breach.

capitulate |kəˈpi ch əˌlāt| - cease to resist an opponent or an unwelcome demand; surrender.

The Ontario Court of Appeal held that the trial judge erred in finding the search lawful and not a breach of s. 8 of the *Charter*. The accused did not freely consent to the search of his trunk and waive his s.8 *Charter* rights. First, the accused was not fully aware of his rights. Even though he read the consent to search form he was confused by some of the language in it; he was not fully apprised of his rights and did not have all of the information required to prove a valid waiver. Second, the circumstances supported the accused's contention that he was not going to let the police search his trunk without a warrant but ultimately gave up because he felt he had no other choice. Also, the accused's consent was not fully informed because the officer misled him to believe that if he did not consent to the search of his trunk he could be lawfully detained pending the arrival of the canine unit. The officer had no lawful authority to hold the accused beyond the time required to finalize the traffic ticket. The officer said he had no cause to search the trunk and no basis for obtaining a warrant to do so; he was acting on a "gut instinct" and had no reasonable basis for suspecting the accused had a gun of other contraband in his possession. The message the officer was sending was "You can refuse to consent but it will do you no good because I will bring in the canine unit regardless." This removed any meaningful choice the accused had available to him. The search amounted to a violation under s.8 of the *Charter*, the accused's conviction was set aside, and a new trial was ordered. - **R. v. Bergauer-Free, 2009 ONCA 610**

Ontario Court of Appeal

GROUNDS FOR INVESTIGATIVE DETENTION BASED ON MORE THAN CONCLUSORY STATEMENT

Ontario's top court has dismissed an appeal by an accused who argued his rights under ss. 8 and 9 of the *Charter* were violated by police when he was detained. The officer's reasonable grounds for an investigative detention did not rest upon purely "conclusory" statements attributed to a confidential source. Rather, the officer who received the confidential information explained why he considered the source and the information to be

reliable and that it was corroborated by other independent knowledge which he outlined. Moreover, the confidential information was supported by the surveillance observation made prior to the stop. - **R. v. O'Hara, 2008 ONCA 819**

British Columbia Court of Appeal

OFF THE RECORD STATEMENT AT SUSPECT'S REQUEST OK

After being arrested for several offences, including extortion, unlawful confinement, and abduction, the accused was advised of his right to counsel, that he was not obliged to say anything, and that anything he said could be used as evidence. He spoke to a lawyer and was then taken into an interview room. He was told by police that the room was video and audio taped. After a short conversation, the accused said he would not talk on the record - which meant he was "not gonna talk on video or nothing". He was then taken to the front atrium area of the police detachment where he spoke to police for 10 to 15 minutes. The conversation was not electronically recorded and the officer made no notes as he was speaking with the accused. When he was returned to the cell the accused said he would deny speaking to the officer if he was called to testify. Shortly thereafter the officer dictated his recollection of the conversation and made notes and ultimately prepared a typed report.

At trial in British Columbia Supreme Court the judge found the accused's off-the-record statement was not obtained by trickery and thereby did not violate his right to silence, was not induced, and was voluntary beyond a reasonable doubt. On appeal, a majority of British Columbia's high court upheld the trial judge's ruling on the voir dire. First, the accused was sophisticated in dealing with the police and had agreed to speak off the record to influence the investigation while at the same time maintaining deniability. The accused defined the off-the-record statement as one not electronically recorded; there was no impression that it could not be used against him. Second, the contemporaneous recording of a police interview with a suspect is not a requirement of the common law confessions rule, although it is highly desirable and is a practice that is encouraged by courts and commissions of inquiry. And finally, there was no deliberate conduct by the officer that warranted a special instruction by the judge concerning the dangers of relying on an unrecorded statement. Where it was open to the police to record an interview but they choose deliberately not to do so, then it is important for the jury to be instructed that this is an important factor in deciding whether to accept the testimony of the police regarding the statement. But here, it was the accused who did not want to be recorded and the officer simply acceded to this request. The accused's appeal was dismissed. In a dissenting opinion, Justice Mackenzie opined that the off the record agreement was an inducement that made the accused's unrecorded statements inadmissible as having been obtained by hope of advantage under the confessions rule. - **R. v. Narwal, 2009 BCCA 410**

New Brunswick Court of Appeal

SOURCE INFORMATION COMPELLING, CREDIBLE, & CORROBORATED: WARRANT UPHELD

After receiving information from confidential informants that the accused was transporting cocaine from Alberta, the police surveilled his vehicle as it was traveling through New Brunswick toward PEI. Once he deviated from the normal route leading to PEI the police stopped his vehicle and arrested him. The accused's vehicle was towed to the police detachment. A search warrant was obtained and the search of the vehicle revealed cocaine. The trial judge upheld the warrant. Although he excised some information from the ITO, he found the remaining source information compelling, the sources were previously found to be credible, and police confirmed some of the information, in part, through independent police investigation. The trial judge was satisfied that the issuing judge had sufficient information before him, even without the excised portion, that he could have granted the warrant. The accused then appealed, contending the trial judge applied the wrong test in determining the validity of the warrant. In his view, the trial judge should not have asked himself whether the issuing judge had sufficient information such that he 'could' have granted the warrant, but rather whether the issuing judge 'would' have issued the warrant.

The New Brunswick Court of Appeal disagreed. Even without the excised paragraph there remained ample information in the ITO to support the warrant. In deciding whether there is sufficient evidence to establish grounds for a search warrant, a judge must consider the totality of the circumstances. Here, the information from one of the sources alone was

sufficiently compelling, credible, and corroborated that on the totality of the circumstances there were reasonable grounds to believe that cocaine would be found in the accused's car. Even after removing the excised paragraph and the information from a second source, there nevertheless remained sufficient reliable information to support the warrant. - **R. v. Arsenault, 2009 NBCA 29**

Ontario Court of Appeal

FAILING TO CONSIDER RELEVANT EVIDENCE FATAL TO TRIAL JUDGMENT

The police executed a Feeney warrant and arrested the accused at his home. The arrest warrant was for trafficking in a controlled substance and possession of proceeds of crime. The investigation was part of a large scale operation to arrest members of an alleged street gang. Three people answered the door, including the accused, and said no one else was in the home. At trial police said they could hear footsteps coming from the upper levels of the residence, heard voices, and smelled marihuana. Incident to the arrest the police said they searched the residence for safety reasons and found a large quantity of cocaine on a bedroom floor. Police obtained a search warrant and ultimately seized 109 grms. of crack, 249 grms. of powder cocaine and cash. A witness for the accused testified there were no sounds of footsteps and that police came into the residence and immediately ran upstairs. The Crown took the position that exigent circumstances precipitated the warrantless search while the accused submitted that there were no exigencies and that the safety search was a manufactured pretence in the course of a shakedown. The trial judge found that the Crown had not established the reasonableness of the safety search conducted as an incident to arrest; therefore it was unreasonable and a breach of s.8 of the *Charter*. In the judge's view the evidence of the police officers was contradictory, leaving an irreconcilable conflict in the police evidence. The lead investigator said he emphasized certain safety concerns to the arresting officers at a pre-arrest briefing that the accused was known to cary a gun. One of the arresting officers testified he was unaware of that fact. The evidence was excluded.

The Ontario Court of Appeal, however, ordered a new trial. The trial judge failed to consider relevant evidence. "The officers at the scene of the arrest gave evidence of their observations at the scene that precipitated a quick 'safety' search of the upstairs," said the Court. "That evidence, if accepted, justified the search. The conflict with the evidence of the lead officer ... was at best neutral and arguably supportive of the credibility of the arresting officers' evidence concerning the reason for their search. The trial judge's failure to consider this body of evidence constitutes reversible error." However, there was evidence from the accused's witness that the search was unjustified and in breach of s.8. Thus the order of a new trial. - **R. v. Okash, 2009 ONCA 37**

Ontario Court of Appeal

VEHICLE STOP NOT A PRETEXT TO COVER FOR OTHER GENERAL CRIMINAL INVESTIGATION

Undercover police officers became suspicious of a vehicle when they observed it parked "out of place" in a neighbourhood known for drugs and crime. The car appeared to be occupied only by a female driver. After observing the vehicle for about 30 minutes the officers saw the accused get into the passenger side of the car. The car left the area with the police following directly behind it. A short while later, the officers noticed a small child "bouncing up and down" in the backseat, apparently not in a child car seat, and they stopped the vehicle. The accused did not acknowledge or respond to police, but kept staring straight ahead, breathing very heavily. The officer could not see the accused's right hand and he did not respond to a question about it. The officer opened the passenger door so he could see the accused's hand and saw an obvious bulge in the accused's pants. The accused's right hand was touching his pocket area and cupped over something. Concerned about the safety of the child, the driver and his partner, the accused was asked to get out of the car. After emerging from the vehicle, the accused attempted to move his hip area away from the officer and kept touching his pocket area, in spite of the officer's request that he not do so. The officer then took the accused to the police car and conducted a pat down search, retrieving a Smith and Wesson .44 calibre handgun. The trial judge found the stop was a legitimate use of police powers under Ontario's *Highway Traffic Act* and not a ruse or gimmick to facilitate a separate criminal investigation. The accused was convicted of weapon offences.

On appeal to the Ontario Court of Appeal the accused argued that although the police had the authority under

s.216(1) of the *Highway Traffic Act* to stop the vehicle for a seatbelt violation, they used it as a false justification or ruse to engage in an unconstitutional stop to allay their suspicions of criminal activity in what was a high crime area. He said the trial judge erred by misapprehending the evidence because there were alleged discrepancies concerning the officers' ability to observe whether the child was bouncing up and down out of the car seat due to the car's window tint. But the Court of Appeal disagreed. Neither police officer testified the tinted windows were an impediment to their ability to see inside the car when they were following it. "There was ample basis in the record to support the trial judge's finding that the incident relating to the child seat belt infraction was not fabricated, that the stop was justified under the *Highway Traffic Act*, and that the stop for that purpose was not simply a pretext or ruse to cover for some other general criminal investigation," said the Court. The accused's appeal was dismissed. - **R. v. Johnson, 2009 ONCA 668**

Saskatchewan Court of Appeal

IN TOTAL, INDEPENDENT POLICE CORROBORATION OF INDIVIDUAL CONFIDENTIAL SOURCES NOT REQUIRED

A full time plumber - who was an auxiliary (special) RCMP constable in his free time - attended the accused's home to install a dishwasher. In preparing for the plumbing work, the plumber shifted a large garbage bag that was open at the top and saw small, clear plastic bags containing marihuana. The plumber reported these observations to a regular RCMP member and prepared an information to obtain a search warrant, identifying the plumber only as informant "A". Further inquiries revealed secondary information from two other sources suggesting drugs would be found on the accused's premises. A search warrant was obtained and police found 1.5 kgs. of packaged marihuana, magic mushrooms, cannabis resin, and $40,000 in small bills as well as scales and other drug paraphernalia. During a *voir dire* the accused argued that the police failed to make full and frank disclosure of the plumbers status as a special constable and that he was acting as a peace officer and state agent when he observed the marihuana and reported it to police. As a result, he submitted that the information provided by the plumber should be excised, the search warrant invalidated, and the evidence seized excluded at trial. But the trial judge ruled that when the plumber saw the marihuana he was acting as a private citizen, not an instrument of the state, and therefore there was no reason why he could not be considered a confidential informant with informer privilege. The accused was convicted on several counts of possession for the purpose of trafficking.

The Saskatchewan Court of Appeal upheld the convictions. The plumber's status as a special constable was not a material fact that had to be disclosed. And the plumber's "tip related to direct, first-hand observation gained by personal attendance at the residence". Treating the plumber's tip as confidential information, its quality was compelling and was not based on gossip, rumour or general bar-room discussion. "A single credible informant is capable of meeting the required standard" for the issuance of a warrant, said Justice Wilkinson for the unanimous Appeal Court. Here, however, there were also two other informants that offered information. Although these sources were of unknown reliability, their information corroborated the plumber's information and vice versa. In the totality of the circumstances, independent police corroboration of the confidential information from the individual sources was not required. In this case, sufficient material facts were disclosed to meet the legal standard for reasonable grounds to issue the search warrant. The accused's appeal was dismissed. - **R. v. McElroy, 2009 SKCA 77**

Supreme Court of Canada

VEHICLE STOP NOT A PRETEXT TO COVER FOR OTHER GENERAL CRIMINAL INVESTIGATION

A majority of the Supreme Court of Canada has ruled that a remedy under s.24(1) of the *Charter* can include the exclusion of evidence. While normally a remedy under s.24(2), exclusion of evidence under s.24(1) "will only be available in those cases where a less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process and the integrity of the justice system." In this case, the trial judge ordered the exclusion of late disclosed evidence rather than granting a stay of proceedings. The accused was acquitted of importing cocaine and possession for the purpose of trafficking. A majority of the Ontario Court of Appeal found the trial judge failed to consider whether a less severe remedy could have cured the prejudice and set aside the acquittal, ordering a new trial. A majority of the Supreme Court

of Canada dismissed a further appeal, finding the judge did not impose an appropriate and just remedy when an adjournment and disclosure order would have sufficiently addressed the prejudice to the accused while preserving society's interest in a fair trial. - **R. v. Bjelland, 2009 SCC 38**

Nova Scotia Court of Appeal

NO PRIVACY INTEREST IN FLIGHT TICKETING INFORMATION

Members of an "Operation Jetway" program designed to curtail drug trafficking by monitoring the traveling public at airports, were on duty at the Halifax International Airport. Drug couriers were known to travel on discount carriers on overnight flights. Two police officers attended the Westjet office and viewed the passenger manifest of the incoming Westjet overnight flight from Vancouver. They were looking for passengers traveling alone who had purchased a one way ticket with cash shortly before departure and checking a single bag. The accused was the last passenger listed who fit the indicators. When the accused arrived, a sniffer-dog indicated the presence of drugs in his bag and he was arrested for possession of a controlled substance when he collected his bag from the luggage carousel. Three kilograms of cocaine was found in his bag. The trial judge excluded the evidence because he found that the police viewing of Westjet's electronic passenger records that revealed the accused' ticketing information was an unreasonable search under s.8 of the *Charter*. The accused was acquitted.

On a Crown appeal the Nova Scotia Court of Appeal ordered a new trial. Using the totality of the circumstances test the accused did not have a reasonable expectation of privacy in the ticketing information (the flight number, his name, the walk-up cash purchase of a one-way ticket, and the single checked bag). "The ticketing information did not reveal intimate details of his lifestyle or personal choices and was not specific and meaningful information intended to be private and concealed," said Appeal Court. There was no intrusion into the accused's home, onto his private real property, or into his private personal property. And although the information was obtained in a private corporate office out of public view, all of the accused's activities that were recorded in the ticketing information were conducted in public when he purchased the ticket by cash, checked the single bag, and boarded the flight in Vancouver. Nor did PIPEDA in this case advance the accused's claim of a reasonable expectation of privacy. Viewing the ticketing information and applying a drug courier profile was not an unreasonable evidence gathering technique. No intimate details were revealed about the accused's lifestyle and personal choices nor was there any direct link to such information provided. Thus, without a reasonable expectation of privacy in the ticketing information there was no s.8 breach and the evidence was admissible. - **R. v. Chehil, 2009 NSCA 111**

CASE QUOTE

"Society demands privacy but also protection from crime. A balance must be struck between respecting an individual's right to privacy yet recognizing the necessity of interfering with that right in the legitimate interests of law enforcement." - R. v. Chehil at para. 10.

British Columbia Court of Appeal

PLACING HOLD ON ACCESS TO LAWYER HAD NO EFFECT BECAUSE ARRESTEE NOT DILIGENT

After surveilling three properties, the police stopped a moving van in which the accused was an occupant. The van was driving from one house to another and had 316 marihuana plants in it, street valued at $40,000. A search warrant was executed on the destination house of the van and police found 1,139 grms. of drying marihuana and evidence of an ongoing, somewhat sophisticated grow operation. At trial the accused challenged the grounds for his arrest, including the initial stopping of the van which led to his detention and search. As well, he argued that the police breached his right to counsel under s.10(b) of the *Charter* because they ordered a "hold" on telephone calls to counsel after his arrest and he could not use the telephone until several hours later. The trial judge found no *Charter* breaches regarding the accused's arrest, search, or right to counsel and convicted him of drug charges. But the accused appealed, arguing the trial judge erred in finding there were objective reasonable grounds for his arrest and that there was no violation of his right to counsel.

The British Columbia Court of Appeal disagreed. The police officer directing the stop and arrest of the accused had reasonable grounds to do so. The officer

had information from a combination of sources; B.C. Hydro, a source, information relating the accused to other targeted residences and other marihuana grow operations, and surveillance of the target residences. And even if the details of the information identified by the accused was excluded from consideration of whether there were objectively reasonable grounds for the arrest, the remaining evidence of what the officer knew when he ordered the arrest supported it. The knowledge and experience of the police officer was also relevant in considering the information available to him when assessing whether there was an objectively reasonable belief in the grounds for an arrest. The trail judge correctly applied the applicable test in determining whether the officer had reasonable grounds for arrest. As for ordering a "hold" on calls to counsel it had no effect on the accused's right to counsel because he did not exercise it. Had he asked to call counsel during the "hold" period and his request was refused, that would have been a breach of his s. 10(b) rights. However, he did not diligently pursue his right to counsel and therefore could not claim his personal rights were violated. The Appeal Court did agree, however, that placing a "hold" on calls to counsel and delaying the right of an arrestee who wanted to speak to a lawyer would be considered a very serious breach except in the most rare circumstances. - **R. v. Budd, 2009 BCCA 595**

CASE QUOTE

"There can be no doubt...that depriving an arrested person who has exercised his right to contact counsel of that right, where there are no exigent circumstances, is a serious violation of s.10(b) of the Charter." - R. v. Budd at para. 32.

Quebec Court of Appeal

SUBJECTIVE BELIEF CRITICAL TO REASONABLE GROUNDS

Following a lengthy police investigation involving informants, wiretaps, and physical surveillance, the police set up on an apartment they believed was a stash for drugs. The accused exited the apartment, got into a vehicle, and was stopped by police as he left. The accused was arrested and in his coat pocket police found 8.8 grms. of cocaine and they recovered a key to the apartment and a safe. The apartment was secured, a search warrant was sought for it, and, when executed, another 400 grms. of cocaine was discovered inside a safe. At the police station another 8.8 grms. of cocaine fell to the ground from the accused's coat. In Quebec District Court the accused was convicted of possessing cocaine for the purpose of trafficking (400 grms. inside the apartment) and trafficking in cocaine (approx. 16 grms. found on his person). The trial judge concluded that the arrest was lawful and the search of the accused was incidental to a lawful arrest. He then appealed to the Quebec Court of Appeal arguing the police did not have reasonable grounds to believe he had drugs on him nor inside the apartment at the time of the arrest.

The Quebec Court of Appeal found the arrest unlawful. The legal standard for assessing reasonable grounds to believe uses both objective and subjective requirements. The subjective requirement involves a court taking into account what the police subjectively believed, not replacing the police reasons for what someone else could have considered. Here, the police said they arrested the accused solely because they believed he committed the crime of drug possession on the day of his arrest, not because they believed he had committed a criminal act prior to that day. The police had no more that suspicion that the accused was in possession of drugs. Thus, the only subjective belief in evidence was limited to drug possession the day of his arrest, which was not objectively reasonable. Thus, the detention was arbitrary and the search that followed was unreasonable. However, the drugs were nonetheless admitted as evidence. Had they subjectively believed the accused had, in the months preceding, been conspiring to traffic drugs such belief would have been objectively reasonable. If this were the case, the arrest would have complied with s.495 of the *Criminal Code* and the search would have been reasonable. The Court of Appeal opined that it would be surprising if the police did not themselves have such subjective grounds, but did not explicitly state them in justifying their intervention, which impacted the determination of the violation. As well, drug trafficking is a serious crime and the use of the evidence would not bring the administration of justice into disrepute. - **R. v. Bolduc, 2009 QCCA 1267**

RELATED REMARKS

"An arrest stated for one described offence cannot be validated by a later reliance upon another offence for which it might have been, but was not, made." R. v. Huff (1979), 50 C.C.C. (2d) 324 (Alta.C.A.)

Ontario Court of Appeal

TATOO TELLS TALE

The Ontario Court of Appeal has found that a lower court erred in excluding an expert's evidence identifying the potential meanings of a teardrop tattoo within the urban street gang culture. The accused, who had a teardrop tattoo, had been charged with a gang related murder. As part of the Crown's evidence, it sought to call a sociologist to provide his opinion as to the meaning of the accused's teardrop tattoo, which had been inscribed on his face about four or five months after the murder. In the sociologist's opinion, tattoos are used to communicate with fellow gang members and sometimes rival gang members. A teardrop tattoo, according to the expert, had one of three possible interpretations within gang culture:

- the death of a fellow gang member or family member of the wearer of the tattoo;
- the wearer of the tattoo had served a period of incarceration in a correctional facility; or
- the wearer of the tattoo had murdered a rival gang member.

The accused's acquittal was quashed and a new trial was ordered. - **R. v. Abbey, 2009 ONCA 624**

Quebec Court of Appeal

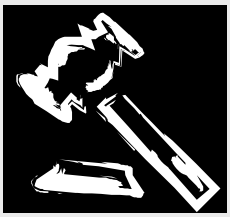
POLICE EXCEED SCOPE OF INSTALL BY LOOKING FOR HIDDEN COMPARTMENT; GUN EXCLUDED

Police obtained a warrant to install an electronic listening device into the accused's vehicle so his private communications could be intercepted. While doing so, they noticed switches on the steering wheel and a smaller than normal cavity between the two front seats - it appeared to be a false bottom. Although they were not going to place equipment in this location they decided to investigate further and removed a piece of the console. They discovered a secret compartment where they found a loaded firearm. They test fired the gun at a laboratory, rendered the gun inoperable, and placed it back where they found it. Many months later the accused was arrested and charged with possession of the prohibited firearm. The trial judge found the search to be illegal. The search for the compartment was not related to the installation of the listening device, nor was it connected to a safety concern. However, he found the police acted in good faith and the evidence was admitted under s.24(2) of the *Charter*. On appeal, the Quebec Court of Appeal tossed the evidence.

In this case, a majority of the Appeal Court concluded that the police intentionally and without justification opened the console of the car, knowing it was not authorized by the warrant. They knew the install equipment should not be housed in the area they inspected. And there was no urgency. The accused was outside the country at the time. As for admissibility, the evidence was excluded. The violation was serious. The police did not adhere to the limitations of the warrant - the install of a listening device. They did not make a mistake nor have an honest belief they were entitled to do what they did. The police deliberately decided to transform their mission from one of installation to one of investigation. Nor did they even have reasonable cause to believe the car contained an illegal object. The accused's conviction was quashed and an acquittal was entered. The lone dissenting judge would have upheld the admissibility of evidence under s.24(2) and dismiss the appeal. - **R. v. Beaulieu, 2009 QCCA 797**

LEGALLY SPEAKING:

Informer Privilege



"Police work, and the criminal justice system as a whole, depend to some degree on the work of confidential informers. The law has therefore long recognized that those who choose to act as confidential informers must be protected from the possibility of retribution. The law's protection has been provided in the form of the informer privilege rule, which protects from revelation in public or in court of the identity of those who give information related to criminal matters in confidence. This protection in turn encourages cooperation with the criminal justice system for future potential informers." - Supreme Court of Canada Justice Bastarache in *Named Person v. Vancouver Sun, 2007 SCC 43* at para. 16.

ONUS ON CROWN TO JUSTIFY WARRANTLESS SAFETY SEARCH PURSUANT TO INVESTIGATIVE DETENTION

R. v. MacQuarrie & Yamamoto, 2009 BCSC 1832

Two uniformed police officers received information from a hotel security guard that he believed he saw a drug transaction take place near the hotel. He had seen a male loitering in the driveway of the hotel parkade and asked him to leave. The male left, but got into a silver Honda Civic, which drove a short distance away and stopped. The security guard then saw a quick "hand-to-hand" transaction between the male and the female driver, after which the male got out and the vehicle drove away. The guard noted the licence plate number of the vehicle as "971DRP" and described the driver as "Native-looking" with long black hair.

The officers found the information matched their experience with a dial-a-dope drug transaction and they were also familiar with the hotel being a past location for this type of drug activity. The officers attended the registered owner's address, which was nearby, to investigate the report. They saw a silver Honda Civic with no front plate driven by a "Native-origin-looking woman" with long dark hair pull into the parkade. The accused MacQuarrie saw the police cruiser and appeared shocked. The vehicle turned into the first available parking space and its rear licence plate matched the report. The officers parked the police car behind the vehicle and got out. As they approached the vehicle a man, the accused Yamamoto, arrived in the parkade on foot.

MacQuarrie was observed bending forward in the seat with her hands out of sight. An officer instructed her to sit up and show her hands because, in his experience, people often try to conceal contraband or weapons when they have been surprised by the police and the under the vehicle seat is a suitable place to hide such items or for which to access them. The officer advised MacQuarrie why they were there, including the observation that had been made of the alleged drug transaction. The officer, concerned about safety, shone his flashlight into the interior of the vehicle and saw a large amount of money on the floor of the driver's side. The officer then told MacQuarrie she was being detained for a drug investigation. Because she was still leaning forward with her hands concealed, the officer directed MacQuarrie to exit the vehicle. As she did this she threw a cell phone into the back seat and, now with the driver's door open, the officer could also see a large white rock of crack cocaine. MacQuarrie was arrested and *Chartered*. The vehicle was searched incidental to arrest and police found $230 on the floor, the cell phone, a backpack in the rear of the vehicle with $20 bills in an unzipped compartment and another $995.

Yamamoto, who had arrived on foot, was constantly telling the officers that they did not have the right to search the vehicle, that it belonged to his girlfriend, and that the accused was his girlfriend's friend. As the officer searched the vehicle Yamamoto appeared to be trying to distract the officer by approaching the vehicle and talking to him. Police repeatedly told Yamamoto to keep back. Because Yamamoto attempted to distract him, his arrival in the parkade at the same time as the accused, his statements about the ownership of the vehicle, and his connection to the owner, the officer suspected he was connected to the offence for which the accused had just been arrested. Yamamoto was placed under investigative detention in relation to the drug offence and was asked to produce identification. Yamamoto turned away from the officer and placed his hands into the pockets of his jacket. He was

> "Removing a subject from his or her vehicle during an investigative detention in the interests of officer safety has been viewed as the functional equivalent of a protective pat-down search… Because searches incidental to a power of investigative detention are obviously warrantless, the onus is on the Crown to justify them."

asked to remove his hands from his pockets and patted down. As the officer tried to pat down Yamamoto's left jacket pocket, Yamamoto attempted to place his hand over that pocket. When the pocket was patted down the officer felt marble-sized lumps within it, consistent with the larger rock of cocaine discovered in the vehicle. Believing this was dugs, the officer arrested Yamamoto for possession for the purpose of trafficking. During a search incident to that arrest, the officer removed cocaine and heroin from Yamamoto's jacket pocket.

During a *voir dire* in British Columbia Supreme Court, the accuseds argued that the requirements for a valid investigative detention were not met because the facts provided to the officer by the security guard and the subsequent observations were insufficient to support their detentions. Thus, they contended that their rights under ss.8 (search and seizure) and 9 (arbitrary detention) of the *Charter* were breached. Justice Schultes, however, disagreed. Noting the standard to be satisfied to justify an investigative detention requires a reasonable suspicion he stated:

> Removing a subject from his or her vehicle during an investigative detention in the interests of officer safety has been viewed as the functional equivalent of a protective pat-down search… Because searches incidental to a power of investigative detention are obviously warrantless, the onus is on the Crown to justify them…
>
> In this case, I conclude [the officer] did have a reasonable suspicion that each accused was connected to a particular crime, one that went beyond a mere suspicion. While it is true that [the security guard] did not witness the entire offence of drug trafficking from beginning to end, including an original telephone order for drugs, he did observe quite a distinctive pattern of behaviour that was consistent in all its features with the attributes of a dial-a-dope transaction. In addition, [the officer] was entitled to take into account the past use of that hotel site for similar transactions in forming his suspicions. Having received this information, it was prudent for the officers to go to the address of the registered owner of the vehicle to see if it could be located or the registered owner could provide further information.
>
> Ms. MacQuarrie's arrival at the parkade in the same vehicle that had been described as being involved in this transaction, the extent to which her appearance conformed to the very basic description that had been provided of the female driver, and her shocked expression upon seeing the officers there all added to the reasonableness of [the officer's] suspicion and made it appropriate for him to approach the vehicle. Once he came to the driver's window, his observation of the cash scattered on the floor, which I have found occurred before she exited the vehicle, when added to his previous observations, provided reasonable grounds to suspect that she was engaged in the offence of possession for the purposes of trafficking. The officer safety issues raised by the position of her hands and the possible availability to her of weapons made it reasonable to remove her from the vehicle for the purpose of detaining her. [references omitted, paras. 25-27]

Since the investigative detention was lawful, the discovery of the rock of cocaine when the vehicle door was opened provided proper grounds to arrest the accused for the offence of possession for the purpose of trafficking and a search the interior of the vehicle incident to that arrest was proper. It was also reasonable for the officer to suspect Yamamoto was involved in the crime of possessing drugs for the purpose of trafficking:

> He had appeared in the parkade as the vehicle arrived. His unsolicited statement to the officers linked him both to the owner of the vehicle and to Ms. MacQuarrie as its current driver and his contact with the officers made it reasonable to infer that he wanted to distract [the officer] during his search of the vehicle. I find, therefore, that his investigative detention was also lawful. The discovery of the drugs in Mr. Yamamoto's pocket occurred during the kind of pat-down search that was contemplated in Mann and, once they had been discovered, his arrest was certainly justified.

There were no *Charter* violations and the evidence was admissible.

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

IN MEMORIAM

Royal Canadian Mounted Police Chief Superintendent Douglas Coates (57 years) and Sergeant Mark Gallagher (50 years) were killed when a 7.0 magnitude earthquake struck Port-au-Prince, Haiti on January 12, 2010.

Both officers were among 82 other Canadian police officers who were assigned to the RCMP's International Peace Operations Branch and had been deployed to Haiti to help train local law enforcement officers. When the earthquake struck, the buildings that Sergeant Gallagher and Chief Superintendent Coates were in collapsed, killing them.

Chief Superintendent Coates had served with the RCMP since 1978 and is survived by his wife and three children.

Chief Superintendent Douglas Coates

Sergeant Mark Gallagher

Sergeant Gallagher had served with the RCMP for 11 years and had previously served with the Moncton, New Brunswick, Police Service for 14 years. He is survived by his wife and two children.

Source: Officer Down Memorial Page available at www.odmp.org/canada