JIBC

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

IN MEMORIAM

On November 14, 2010 25-year-old Sûreté du Québec Constable Sébastien Coghlan-Goyette was killed in an automobile accident while responding to an emergency call. During the response his patrol car struck a deer, the impact causing his vehicle to leave the roadway and hit a tree.

Constable Coghlan-Goyette and a student ride-along both sustained severe injuries. They were transported to a local hospital where they succumbed to their injuries a short time later.

Constable Coghlan-Goyette had served with the Sûreté du Québec for three years.

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

On January 12, 2011 35-year-old Toronto Police Service Sergeant Ryan Russell was struck and killed by a stolen snowplow while attempting to arrest its driver. The plow had been stolen earlier in the morning and was located using the plow's onboard GPS. Sergeant Russell was struck as he attempted to stop the plow. Other officers shot and wounded the suspect a short time later after locating the vehicle again.

Sergeant Russell had served with the Toronto Metropolitan Police Service for 11 years. His is survived by his wife and young son.

POLICE OFFICERS MURDERED IN THE LINE OF DUTY

From 1961 to 2009, 133 police officers have been murdered in the line of duty. All but four of them were men. Homicides against police officers have occurred in every province and territory except Prince Edward Island and the Yukon. Ontario had the most police officers murdered (44), followed by Quebec (41), Alberta (14), British Columbia (10), Saskatchewan (7), Manitoba (6), New Brunswick (5), Nova Scotia and Nunavut (2), and Newfoundland and Northwest Territories (1). Almost one-quarter (23%) of all killings occurred during a robbery investigation. Nine in ten police officers were shot. Rifles or shotguns (including sawed-off) accounted for 56% of the firearms used against police while handguns accounted for 44%. Most officers whom were shot (8 in 10) were not wearing a protective vest. All but five of the 133 murders have been solved.

Source: Statistics Canada, Fall 2010, Police officers murdered in the line of duty, 1961 to 2009, catalogue no. 85-002-X, Vol. 30, no.3.

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

JIBC ALUMNI COMING SOON!

see back cover for more information

JUSTICE INSTITUTE of BRITISH COLUMBIA LIBRARY

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.

Action research.
Ernest T. Stringer.
Los Angeles : Sage Publications, c2007.
HV 11 S835 2007

Association management evaluation toolkit: recognizing success and identifying opportunities for improvement.
James B. Pealow.
Toronto: Canadian Society of Association Executives, 2007.
HD 62.6 P398 2007

Combating violence & abuse of people with disabilities: a call to action.
by Nancy M. Fitzsimons.
Baltimore : Paul H. Brookes Pub., c2009.
HV 1568 F58 2009

Competency-based training basics.
William J. Rothwell and James M. Graber.
Alexandria, Va. : ASTD Press, c2010.
LC 1031 R684 2010

Crisis communications: a casebook approach.
Kathleen Fearn-Banks.
New York : Routledge, 2011.
HD 59 F437 2011

Developing quality technical information: a handbook for writers and editors.
Gretchen Hargis ... [et al.].
Upper Saddle River, N.J.: Prentice Hall Professional Technical Reference, c2004.
T 11 D417 2004

Doing action research in your own organization.
David Coghlan and Teresa Brannick.
Los Angeles, Calif. ; London : SAGE, 2010.
H 62 C5647 2010

The failure of risk management: why it's broken and how to fix it.
Douglas W. Hubbard.
Hoboken, N.J. : Wiley, c2009.
HD 61 H76 2009

Focus groups: a practical guide for applied research.
Richard A. Krueger, Mary Anne Casey.
Los Angeles : SAGE, c2009.
H 61.28 K78 2009

Fundamentals of social research.
Earl Babbie, Lucia Benaquisto.
Toronto : Nelson Education, [2009], c2010.
H 62 B223 2009

Gamestorming: a playbook for innovators, rulebreakers, and changemakers.
Dave Gray, Sunni Brown, and James Macanufo.
Beijing ; Cambridge [Mass.] : O'Reilly, 2010.
HD 66 G73 2010

Learn like a leader: today's top leaders share their learning journeys.
editors, Marshall Goldsmith, Beverly Kaye, Ken Shelton.
Boston : Nicholas Brealey Pub., 2010.
HD 30.4 L396 2010

Learning in 3D: adding a new dimension to enterprise learning and collaboration.
Karl M. Kapp, Tony O'Driscoll.
San Francisco, CA : Pfeiffer, c2010.
HD 58.82 K37 2010

Missing women, missing news: covering crisis in Vancouver's Downtown Eastside.
David Hugill.
Halifax [N.S.] : Fernwood, c2010.
HQ 150 V3 H84 2010

Nice teams finish last: the secret to unleashing your team's maximum potential.

Brian Cole Miller.

New York: American Management Association, c2010.

HD 66 M543 2010

The now habit at work: perform optimally, maintain focus, and ignite motivation in yourself and others.

Neil A. Fiore.

Hoboken, N.J. : John Wiley & Sons, c2010.

BF 637 S8 F56 2010

On the farm: Robert William Pickton and the tragic story of Vancouver's missing women.

Stevie Cameron.

Toronto : A.A. Knopf Canada, c2010.

HV 6535 C33 P64 2010

Police use of force: a global perspective.

Joseph B. Kuhns and Johannes Knutsson, editors ; foreword by David H. Bayley.

Santa Barbara, Calif. : Praeger, c2010.

HV 7936 F6 P65 2010

Power friending: demystifying social media to grow your business.

Amber Mac.

New York : Portfolio, 2010.

HF 5415.1265 M316 2010

Public health in the workplace.

Jamie Knight and Laura Karabulut.

Toronto : Carswell, 2010.

HD 7659 06 K64 2010

A quality of life approach to career development.

Geoffrey S. Peruniak.

Toronto : University of Toronto Press, c2010.

HD 6955 P477 2010

Real leaders don't do PowerPoint: how to sell yourself and your ideas.

Christopher Witt; with Dale Fetherling.

New York : Crown Business, c2009.

PN 4129.15 W58 2009

Social media for trainers: techniques for enhancing and extending learning.

Jane Bozarth.

San Francisco : Pfeiffer, c2010.

LB 1044.87 B693 2010

Study smarter, not harder.

Kevin Paul.

North Vancouver, B.C. : International Self-Counsel Press, c2009.

LB 1049 P37 2009

Surprising studies of visual awareness. Volume 2

Daniel J. Simons.

Champaign, IL : VisCog Productions, c2008.

1 videodisc (DVD) : digital, col. ; 4 3/4 in.

Menu-driven interface to access the demo you want; viewer instructions to experience the demos for yourself; presenter instructions to help you use the demos; scientific explanations for each demo; credits and citations for further information. A new set of demonstrations and videos on visual memory.

QP 491 S977 2008 D1070 (Restricted to in-house.)

Surviving the baby boomer exodus: capturing knowledge for Gen X and Gen Y employees.

Ken Ball and Gina Gotsill.

Boston, MA : Course Technology, c2011.

HD 6280 B344 2011

Superconnect: the power of networks and the strength of weak links.

Richard Koch and Greg Lockwood.

Toronto : McClelland & Stewart, 2010.

HM 741 K68 2010

The truth about leadership: the no-fads, heart-of-the-matter facts you need to know.

James M. Kouzes, Barry Z. Posner.

San Francisco, CA : Jossey-Bass, c2010.

HD 57.7 K684 2010

The why of work: how great leaders build abundant organizations that win.

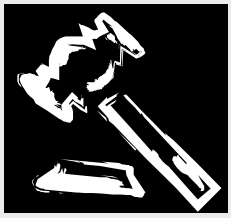
Dave Ulrich, Wendy Ulrich.

New York : McGraw-Hill, c2010.

HD 57.7 U458 2010

LEGALLY SPEAKING:

Incidental or Collateral Crime



"Section 21(2) extends liability for crime in two respects. The first has to do with the persons whose participation in an unlawful enterprise may attract liability. And the second relates to the offence for which participants in an unlawful criminal enterprise may be held liable.

The persons to whom s. 21(2) extends liability are those whose participation in the offence actually committed would not be captured by s. 21(1). These persons have participated in a prior unlawful enterprise with others and either knew or, in most cases at least, should have known that one (or more) of the other participants in the original enterprise would likely commit the offence charged in pursuing their original purpose.

The offence to which s. 21(2) extends liability is not the original "unlawful purpose" to which the subsection refers. The "offence" of s. 21(2) is a different crime, one that a participant in the original "unlawful purpose" commits in carrying out that original purpose. And so it is that we sometimes say that s. 21(2) extends liability to those engaged in one unlawful purpose to incidental or collateral crimes: crimes committed by any participant (in the original purpose) in carrying out the original purpose that the other knew or should have known would likely be committed in pursuing the original purpose.

Under s. 21(2), the liability of a party to a common unlawful purpose for an incidental crime committed by another participant requires proof of the party's participation in the original unlawful purpose, the commission of the incidental crime by another participant and the required degree of foresight of the likelihood that the incidental crime will be committed. Consistent with general principle, each of these essential elements, earlier described as "agreement", "offence" and "knowledge", must be supported by an adequate evidentiary record to warrant submission of this basis of liability to the jury. What we require is some evidence on the basis of which a reasonable jury, properly instructed, could make the findings of fact necessary to establish each element of this mode of participation."– Ontario Court of Appeal Justice Watt in *R. v. Simon* 2010 ONCA 754 at paras. 40-43, references omitted.

POLICE MAY SEARCH VEHICLE FOR IDENTIFYING DOCUMENTS

R. v. Burachenski, 2010 BCCA 159

Two uniformed motorcycle officers conducting speed enforcement flagged down the accused for doing approximately 80 km/h in a 50 km/h zone. He did not immediately stop. Instead, he pulled over some four to five car lengths down the road. Both officers associated this behaviour with someone who was unlicensed or prohibited. The accused had no driver's licence in his possession, no other identification, and said he was not the registered owner of the vehicle. An officer looked at the accused to see if he had a bulge in his pocket which might be a wallet, but there was none. Concerned that the information provided was inaccurate, police began to check it out. The officer believed he could arrest the accused in order to confirm his identification for the *Motor Vehicle Act* offence, but did not actually arrest him. Rather, he searched the SUV for identification and, upon opening the middle console, saw what he believed to be flakes of marihuana, flaps of crystal methamphetamine, and a container of ecstasy.

On finding the drugs the officer formed the view that he could arrest the accused for offences under the *Controlled Drugs and Substances Act* so told him he was being detained for drugs. A pouch of marihuana was found and the accused was again told he was being detained for drugs. He was handcuffed. In the meantime, an officer continued searching the vehicle for identification and for more drugs, finding marihuana and rock cocaine under the driver's floor mat. Behind the front seat, in the foot well on the passenger side, he located a box that contained marihuana and hashish. The total value of the drugs was $740 and consistent with possession for the purpose of trafficking. Two cell phones were also found; they rang 30 times over the next 8 hours with callers requesting meetings. There was also a text message on one of the cell phones belonging to the accused which was consistent with drug trafficking.

At trial in British Columbia Provincial Court, the accused testified that the drugs were not his and that

he did not know they were in the car. He said the car had belonged to his girlfriend, but she gave it to him because he needed it for work. He said other people used the car and suggested that they left the drugs and one of the cell phones in it. The trial judge found that the accused had been *de facto* arrested for an investigation into drug possession, the search lawful, and no s. 8 *Charter* breaches. The judge concluded the evidence did not raise a reasonable doubt and the accused was convicted on six counts of possessing a controlled substance for the purpose of trafficking. He was sentenced to nine months to be served conditionally in the community.

The accused then appealed to the British Columbia Court of Appeal arguing, in part, that his s. 8 *Charter* rights were violated in relation to the search that exposed the drugs in his possession. He submitted that the entire search was unlawful because the police decided to arrest him and take him to jail immediately upon stopping him. He contended that the police should have patted him down to see if he had identification, and if not, checked via the police radio whether the name he provided was accurate. Further, he suggested the police had no basis for searching his car and when they found the drugs in the console of the vehicle, they should have stopped searching, and called in a police drug dog to locate the drugs.

> "The law is clear that the police are entitled to search a vehicle for identifying documentation when it is not produced by a driver who is being investigated for an offence."

In an oral judgment the Court of Appeal disagreed. The accused was travelling at 80 km/h per hour in a 50 km/h per hour zone and the police were therefore entitled to stop him for a traffic violation. The accused said that he did not have any identification documents in his possession and the vehicle he was driving did not belong to him. An officer looked for a bulge in his pocket which might be a wallet but could not see one.

The Arrest

The officer subjectively believed that he had grounds to arrest, which were objectively reasonable since the accused produced no identification and had apparently committed an offence. "Police officers are entitled to arrest traffic offenders when it is necessary to establish their identity," said Justice Bennett speaking for the Court. The officer began looking in the vehicle for identification documents and asked his partner to use the police radio to try to confirm the accused's identity.

The Search

As for the search, the court noted that "the law is clear that the police are entitled to search a vehicle for identifying documentation when it is not produced by a driver who is being investigated for an offence." Once the drugs were found the officer was still looking for identification papers and also for any further drugs. Since the accused had been *de facto* arrested for an investigation into the possession of drugs the continued search of the vehicle for evidence was a search incidental to arrest. The search was lawful, there was no evidence that it was conducted unreasonably, and there was no violation of s. 8. Whether the accused was properly given his right to counsel under s. 10(b) was not before the Court. The accused's appeal was dismissed.

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

ONE HAND v. THE OTHER

On the one hand "trial judges are presumed to know the law with which they work day in and day out." (*R. v. Burns*, [1994] 1 S.C.R. 656, see also *R. v. McFadzen*, 2011 ABCA 53 (sentencing), *R. v. Osei-Agyemang*, 2011 ABCA 2 (parole ineligibility), *R. v. Settle*, 2010 BCCA 426 (*mens rea* for offence)). **On the other hand** the Newfoundland Court of Appeal recently emphasized that the Crown and defence counsel have a "responsibility in providing relevant case law to assist the court" (*R. v. Adams*, 2011 NLCA 3).

DE FACTO ARREST NOT JUSTIFIED: EVIDENCE EXCLUDED

R. v. Orr, 2010 BCCA 513

A Marihuana Enforcement Team executed an electricity theft search warrant at a dwelling house. Although the residence was under surveillance for about two hours before the warrant was executed no one was seen to enter or leave the premises. One of the officers pounded on the front door and yelled, "Police. Search warrant", but there was no response. After waiting a few minutes he yelled the same commands, but again there was no response. As police used a ram on the front door a male voice from inside said something like "I'm coming". When the accused opened the door he was directed to show his hands, step out of the house, and was guided to the floor of the front porch. He was casually dressed and barefoot. He was told he was being detained for theft of hydro and that police had a warrant to search the house. A cursory search for weapons was conducted. He was asked to stand up, handcuffed, and a copy of the search warrant was placed in his shirt pocket. Other members of the team entered and cleared the residence finding a 358 plant marihuana grow operation. At this point the accused was arrested for production of marihuana, read his rights, and given the police warning. He was charged with producing marihuana and possession for the purpose of trafficking.

At trial in British Columbia Provincial Court the officer testified he detained the accused for officer safety purposes - he did not know if there were other people in the residence and he did know what, if any, risks he faced. Another officer testified that everyone who answered the door would be arrested and handcuffed. The trial judge held that the take-down and handcuffing of the accused before the discovery of any illegal activity in the residence was not merely an investigative detention but rather a *de facto* arrest. No electrical by-pass had been found inside the residence and there was no evidence of hydro theft at the time of the *de facto* arrest. Nor had a marihuana grow operation been found. There were no suspects and the accused was a stranger to police with nothing to tie him to the suspected hydro theft. The judge concluded that the arresting officer did not subjectively have the requisite grounds to arrest the accused nor were the objective grounds present. The *de facto* arrest was unlawful and arbitrary and breached s. 9 of the *Charter*. The second arrest for production of marihuana was also arbitrary since the accused was only arrested because he was in the residence and opened the door. There was nothing to link him to the residence other than his presence and nothing to link him to the marihuana grow operation. Although the offence was serious and there is always some concern about the safety of police officers in this type of investigation, the judge found the *Charter* breach was also serious, the police had not acted in good faith, and the balance in this case tipped in favour of the rights of the individual rather than the societal interest in detecting and punishing crime. Evidence was excluded under s. 24(2) and the accused was acquitted.

The Crown appealed the acquittals to the British Columbia Court of Appeal arguing the trial judge erred in finding the accused arbitrarily detained and that the evidence should not have been excluded. In the Crown's view the police briefly detained the accused at first, which was followed by an arrest for marihuana production. But Justice Low, speaking for the Court, disagreed. He concluded that the conduct of the arresting officers went well beyond a mere pat-down search attendant to an investigative detention which supported the trial judge's opinion that the accused was under *de facto* arrest. As for the second arrest, the trial judge did not err in finding it too arbitrary. There must be some connection between the person being arrested and the crime under investigation:

> When the ultimate arrest was effected, the arresting officer had conducted no investigation as to the use of the house generally, apart from being informed of the presence of a grow operation, or as to the connection of the [accused] to the residence, apart from the fact that he had answered the door dressed casually and barefoot. In my opinion, something more was needed to connect the presence of the

> [accused] in the house to the illegal drug activity. It would not have taken much more but the arresting officer chose to continue the investigation with the [accused] under arrest, rather than in less intrusive and restrictive investigative detention. In so doing, he effected an unlawful arrest in breach of the [accused's] rights under s. 9 of the *Charter*. [para. 14]

As for the trial judge's s. 24(2) analysis, the Court of Appeal was satisfied she weighed the appropriate factors in excluding the evidence. The Crown's appeal was dismissed.

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

ARREST DOES NOT REQUIRE PRIMA FACIE CASE FOR CONVICTION

R. v. Ash, 2010 BCCA 470

The accused was stopped by police for failing to wear a seat-belt, an offence under British Columbia's *Motor Vehicle Act*. The officer noticed a jar in plain view on the front seat console which contained a liquid he believed was "hash oil" (cannabis resin oil). He continued dealing with the seat-belt infraction. When he returned to the vehicle the container was gone. The officer then asked the accused to exit the vehicle whereupon he was arrested for possessing a controlled substance. A search of the vehicle incidental to the arrest uncovered drugs, a knife, bear spray, a baton and a significant amount of money. He was charged with drug and weapons offences.

At trial in British Columbia Supreme Court the accused challenged the admissibility of the items found in his car on the basis that there were no reasonable grounds for the arrest and the search violated his rights under s. 8 of the *Charter*. The trial judge concluded that the arrest was lawful and admitted the evidence. The accused was convicted of several offences.

The accused then appealed, submitting that the arrest was not reasonable. In his view, the officer did not have a subjective belief that he was in possession of the hash oil. Further, he contended that the trial judge failed to apply the proper test for assessing the grounds of arrest by conflating the subjective belief of the police officer with the required objective standard.

Justice Chiasson, speaking for the unanimous Court of Appeal, first noted that s. 495(1)(a) of the *Criminal Code* "authorizes a peace officer to arrest without a warrant when on reasonable grounds he or she believes an indictable offence has been committed or is about to be committed." This provision requires the arresting officer to subjectively have reasonable grounds upon which to base the arrest. As well, those grounds must be justifiable from an objective point of view - a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable grounds for the arrest. The police are not, however, required to demonstrate anything more than reasonable grounds. A prima facie case for conviction is not needed before making an arrest.

In this case, it was apparent to the officer that the accused was the owner and driver of the vehicle and the hash oil container was in the front seat console beside him. The officer testified that he found the accused in possession of the hash oil. It was clear that the officer reasonably believed the accused was in possession of the drug. "The issue is not whether the Crown would be able to prove possession," said Justice Chiasson, "but whether the officer had reasonable and probable grounds for believing he did so." The Court of Appeal held that the officer's subjective belief was also objectively reasonable. The Court rejected the accused's assertion that the reasonableness of the officer's belief was to be assessed from the point of view of a neutral arbiter free of the predilections and biases of police. Instead, the proper approach is to view the grounds from the point of view of a reasonable police officer in the

"The issue is not whether the Crown would be able to prove possession, but whether the officer had reasonable and probable grounds for believing he did so."

arresting officer's shoes, including a consideration of their experience and training. The accused's appeal was dismissed.

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

MOTORIST NOT ARBITRARILY DETAINED IF GROUNDS CAN BE CLEARLY EXPRESSED

R. v. Adams, 2011 NLCA 3

As drinking establishments were closing at about 3:30 a.m on a Saturday a police officer drove onto the parking lot of a shopping plaza which contained restaurants and a bar. He saw the accused's vehicle pull out of a parking stall near the bar, drive slowly along the parking lot, and turn onto the street. There was no traffic coming but the vehicle turned very slowly and awkwardly. Although no offences were committed under Newfoundland's *Highway Traffic Act*, given the hour of the night, the proximity to the bar, the officer's experience, and observing a slow and awkward turn, the officer decided to pull the vehicle over to "check the situation out." After the stop the accused subsequently provided breathalyzer readings of 110mg% and 130mg%.

At trial in Newfoundland Provincial Court the judge found the stop was not arbitrary. He held the police officer "had a good reason for wanting to see what was going on." There was no s. 9 *Charter* breach, the breathalyzer evidence was admitted, and the accused was convicted of operating a motor vehicle while his blood alcohol content exceeded 80 mg%.

On appeal to the Newfoundland Supreme Court the breathalyzer evidence was excluded, the accused's conviction was set aside, and an acquittal was entered. The appeal judge concluded the accused's detention was based on nothing more than a hunch and was therefore arbitrary, breaching s. 9 of the *Charter*. As well, relying on *R. v. Mann*, the appeal judge ruled that there was no nexus between the accused's driving and a criminal offence. The Crown then appealed to the Newfoundland Court of Appeal.

A breach of s. 9 of the *Charter* requires a detention to be "arbitrary". The threshold for stopping a motorist, however, is relatively low and a motorist will not be arbitrarily detained if the officer has reasonable grounds that can be clearly expressed for stopping a particular, as opposed to any, vehicle. It must also be recognized that stopping motorists occurs in a different context than the investigative detention doctrine outlined in *Mann*, where the Supreme Court of Canada was dealing with police stopping an individual walking down a street, not driving a car. Justice Welsh, speaking for the New Brunswick Court of Appeal stated:

> [W]hen balancing the interests between the individual's right to privacy and legitimate police functions, the factors to be considered are different when the detention involves an individual walking down the street in an area where the police are searching for the perpetrator of an offence from when the driver of a motor vehicle is stopped for highway safety reasons such as impairment by alcohol. The concept of the nexus described in Mann has no practical application to the stopping and detention of a motorist as occurred in this case. [para. 16]

Other Courts have recognized a distinction between a pedestrian and a motorist when balancing the competing interests of individual liberties and legitimate police functions, such as:

- Motorists have a lower expectation of privacy in their vehicles than they do in their home;
- Driving is highly regulated. Drivers know that they may be stopped for reasons pertaining to highway safety—as in a drinking-and-driving roadblock;

"Given the social policy considerations associated with drinking and driving offences ... the courts have adopted a relatively low threshold for determining what constitutes reasonable grounds for stopping a motorist for highway safety reasons such as impairment by alcohol."

- There is minimal intrusion on the individual motorist's Charter rights. The detention is generally brief and of minimal inconvenience, unless incriminating evidence turns up;
- The goal of roadside screening is to screen drivers at the road stop, not later at the scene of an accident;
- There is a broader societal concern in dealing with the carnage caused by those who commit offences involving drinking and driving. Drunk drivers pose a menace; and
- Driver's exceeding the permissible blood alcohol content present a continuing danger to themselves, passengers in the vehicle and other highway users.

In this case the appeal judge erred by relying on the decision in *Mann* and injecting into his analysis the requirement for a nexus between the individual to be detained and a recent or on-going criminal offence. This factor had no practical application in the circumstances. The appeal judge also failed to consider the relevant case law regarding the detention of motor vehicles.

Here, the officer saw the accused execute a turn that was "very slow and awkward, unusual." The bar was closing, the accused had been parked in the vicinity of the bar, and it was the officer's experience that it was not uncommon to encounter individuals "who've had too much to drink that are out driving." Although the police officer would not have had reasonable grounds for stopping the accused's vehicle without seeing the unusual turn, the "confluence of all these factors" constituted reasonable grounds, clearly expressed, for stopping the accused's vehicle as distinct from other vehicles in the vicinity. "Given the social policy considerations associated with drinking and driving offences, particularly the dangers posed to users of the highways, the difficulties inherent in identifying motorists who have exceeded the permissible blood alcohol content, and the minimal intrusion on privacy rights, the courts have adopted a relatively low threshold for determining what constitutes reasonable grounds for stopping a motorist for highway safety reasons such as impairment by alcohol," said Justice Welsh. "In the particular circumstances of this case, it cannot be said that the police officer stopped [the accused's] vehicle arbitrarily. He testified as to objective criteria he used to establish reasonable grounds for stopping that particular vehicle. While the amount of information was minimal, it was sufficient to satisfy the requirements of section 9 of the Charter."

The Court of Appeal found there was no basis on which to exclude the breathalyzer readings, the over 80mg% offence had been proven beyond a reasonable doubt, and the accused was guilty. The Crown's appeal was allowed, the acquittal set aside, and the conviction restored.

Complete case available at www.canlii.org

Editor's note: The Newfoundland Court of Appeal found the stop in this case was not arbitrary. However, even if it was it would likely have been saved as a reasonable limit under s. 1 of the *Charter*. Vehicle stops which are random, such as those authorized by provincial motor vehicle legislation, have been upheld as reasonably justified under s.1 of the *Charter* so long as they are conducted for a purpose related to highway safety or driving a car, such as checking driver's licences, insurance and registration, sobriety of the driver, and/or the mechanical fitness of the vehicle (see for example R. v. Ladoucer [1990] 1 S.C.R. 1257 (S.C.C.)).

INFORMATION MORE THAN MERE HUNCH OR EDUCATED GUESS: ARREST LAWFUL

R. v. McKenzie, 2011 ONCA 42

After receiving information from a reliable confidential informer that someone named "Dave" was involved in gun smuggling and gun trafficking, the police launched a short investigation but could not confirm the information in the tip. Several months later the police received a second tip from another confidential informer of unknown reliability about "Dave". This tip had more information - Dave was entrenched in the gun subculture in the region; he was involved in smuggling firearms from the United States and trafficking them at the rate of 30 to 40

firearms per month; and one of the guns had been used in a fatal shooting. An address for "Dave" was provided, which was the same as the accused. An intensive investigation was then conducted by the Provincial Weapons Enforcement Unit.

Police obtained dial number recorder (DNR) warrants for the accused's various telephones and engaged in intermittent physical surveillance of him. The information gathered from the DNR warrants showed a significant volume of telephone traffic, which was analyzed and demonstrated the accused had frequent contact with a number of persons who had been charged with and, in some cases, convicted of firearms offences. The information also showed that the accused was in frequent contact with a man named Roger Peddie, who lived in the region and frequently stayed with his girlfriend residing in Kitchener. The police also obtained a tracking warrant for the accused's automobile. Finally, the police obtained information from a third confidential informer that the accused would be travelling to Kitchener to pick up firearms from "Roger" in a day or two. The police were able to verify that the accused had travelled to Kitchener and also confirmed that Roger Peddie crossed the Canada-U.S. border with a woman who was not his girlfriend. Meanwhile the police observed the accused meet with two men, one of whom he had been in frequent telephone contact with and had a record for a firearms offence. The other man appeared to be carrying a concealed firearm. In addition, the woman who had crossed the border with Peddie returned alone to Canada. A cursory check of the automobile at the border did not result in any firearms or other contraband being found. The next day the accused's vehicle was tracked to the area of Peddie's girlfriend's home in Kitchener.

> "The careful and lengthy investigation provided information that passed the threshold from a mere hunch or educated guess to reasonable and probable grounds."

Believing they had reasonable grounds that the accused was now in unlawful possession of firearms, they followed his vehicle. He engaged in counter-surveillance. He made sudden lane changes, unexpected turns, and took a circuitous route. He was stopped in a "high-risk takedown" and was arrested at gunpoint. His vehicle was searched and police found a small amount of drugs in the car and various firearms (a fully automatic machine pistol with three over-capacity magazines and a silencer, two pistols, and a revolver) in the vehicle's door panels.

At trial in the Ontario Superior Court of Justice the accused was convicted on eight counts (numerous firearms offences and one count of illegal possession of drugs). The judge found that the police officers had reasonable grounds to arrest the accused and the search that followed did not breach his *Charter* rights. Even if there was a *Charter* violation, the judge would not have excluded the evidence under s. 24(2). Taking into account pre-sentence custody, a sentence of six years imprisonment was imposed. The accused then challenged his conviction to the Ontario Court of Appeal.

The Arrest and Search

The Court of Appeal dismissed the accused's arguments. Not only did the police have the requisite subjective belief that the accused was in unlawful possession of firearms, the requisite objective grounds were also established on the totality of the evidence:

> By the time of the arrest, the police had information from three independent sources that the [accused] was engaged in unlawful trafficking in firearms. As predicted by the second informer, the [accused] was shown to be involved in the gun subculture in the Durham Region. The activities in early June 2007 suggested that the person believed to be the source of the [accused's] firearms was travelling to the United States after meeting with the [accused]. Then, Peddie's companion returned alone to Canada the day before the [accused] went to Peddie's girlfriend's neighbourhood. Finally, the counter-surveillance observed by the police confirmed that the [accused] was probably in possession of contraband shortly after going to a residence associated with Peddie in Kitchener.

> This constellation of objectively discernable facts showed that the police had reasonable grounds to believe that the [accused] was in unlawful possession of firearms when he was arrested and his vehicle searched. The careful and lengthy investigation provided information that passed the threshold from a mere hunch or educated guess to reasonable and probable grounds. [paras. 7-8]

Evidence Admissibility

The Court of Appeal also agreed that even if there was a violation of the accused's *Charter* rights the evidence should not be excluded under s. 24(2). "As to the seriousness of the *Charter*-infringing conduct," said the Court, "if the police fell short of reasonable grounds, it was only to a minor degree. Any violation of the [accused's] rights tends to fall on the less serious end of the continuum... The good faith of the police is demonstrated by the frequent resort to lawful means of investigation including judicially authorized DNR and tracking warrants. The actual arrest was conducted quickly and professionally. As to the impact on the [accused's] protected interests, admittedly there was a significant intrusion into the [accused's] liberty interest given his arrest in public at gunpoint. The intrusion into his privacy rights was less significant. The search of a motor vehicle on a public street is less of an intrusion into privacy interests than other intrusions, such as search of a private dwelling. Finally, as to the societal interest in an adjudication on the merits, ... the seriousness of the charged offences must not take on disproportionate significance. However, given the reliability of the evidence that was critical to the successful prosecution of these very serious offences, there was a strong societal interest in an adjudication on the merits." Although the impact on the accused's *Charter*-protected interests tended to favour exclusion, the seriousness of the *Charter*-infringing conduct and the societal interest in an adjudication on the merits favoured admissibility. On balance, the Court noted, the evidence was properly admitted and the accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

RANDOM TEST SHOPPING IS NOT ENTRAPMENT

R. v. Clothier, 2011 ONCA 27

A convenience store had been randomly chosen for a spot compliance check from a master list of tobacco vendors. A tobacco enforcement officer went to the store with a 17-year-old test shopper. The test shopper went into the store and bought a package of cigarettes from the 19 year-old accused, a clerk working the counter. At no time did the accused ask the test shopper for age identification. After the test shopper left the store the enforcement officer entered, informed the accused that he had sold tobacco to an underage person, and issued a certificate of offence under s. 3(1) of Ontario's *Smoke Free Ontario Act*, which prohibits the sale of tobacco to any person under the age of 19.

At trial before a Justice of the Peace the accused argued he was entrapped. He claimed the charge against him should be stayed because the test shopping had been done without a reasonable suspicion that he, or the store, had previously sold tobacco to minors. The trial judge found there had been no entrapment and using test shoppers was an appropriate investigative technique for regulatory offences. The accused was convicted and fined $50. His appeal to the Ontario Court of Justice was dismissed. The appeal judge ruled the tobacco enforcement officer had conducted a *bona fide* inquiry and was entitled to do so without a reasonable suspicion. He dismissed the appeal. The accused then appealed to the Ontario Court of Appeal submitting the doctrine of entrapment, which developed in the criminal law, also applied to regulatory offences. The Crown, on the other hand, took the opposite view and contended that entrapment did not apply.

Entrapment

Entrapment is an aspect of the abuse of process doctrine and reflects judicial disapproval of unacceptable police or prosecutorial conduct in investigating crimes. The doctrine of entrapment

seeks to balance two competing objectives: (1) the police must have considerable leeway in the techniques they use to investigate criminal activity but (2) at the same time their power to investigate should not be untrammeled. "The police should not be allowed to randomly test the virtue of citizens by offering them an opportunity to commit a crime without reasonable suspicion that they are already engaged in criminal activity; or worse, to go further and use tactics designed to induce citizens to commit a criminal offence," said Justice Laskin. "To allow these investigative techniques would offend our notions of decency and fair play." When entrapment is proven the essential elements of the offence have been made out but a court will stay the proceedings because fair play would be offended and the administration of justice would be brought into disrepute.

"The police should not be allowed to randomly test the virtue of citizens by offering them an opportunity to commit a crime without reasonable suspicion that they are already engaged in criminal activity; or worse, to go further and use tactics designed to induce citizens to commit a criminal offence."

Entrapment can occur in two ways:

1. Government authorities provide a person with an opportunity to commit a crime without having a reasonable suspicion that the person is already engaged in criminal activity or they are acting in the course of a *bona fide* investigation. An investigation will be *bona fide* when it is directed at a geographic area where criminal activity is reasonably suspected. When police have a reasonable suspicion that criminal activity is occurring in an area they are entitled to provide any person in the area with the opportunity to commit the offence. Thus, police can lawfully act only on reasonable suspicion, either of an individual's or an area's criminal activity.

2. Government authorities, though having a reasonable suspicion or acting in the course of a *bona fide* investigation, go beyond providing an opportunity to commit a crime by inducing the commission of an offence.

In this case the accused did not suggest that anyone threatened him or induced him to sell cigarettes to the test shopper.

Smoke Free Ontario Act

The Court of Appeal rejected the notion that a reasonable suspicion should be required for compliance checks under the *Smoke Free Ontario Act*. Here, the Crown conceded that the authorities acted without a reasonable suspicion. They neither reasonably suspected that the accused or the stores in the area were engaged in illegal activity before using the test shopper. But Justice Laskin ruled that the authorities could undertake a *bona fide* investigation into whether stores in the area were selling tobacco to minors without a reasonable suspicion.

The *Smoke Free Ontario Act* is a regulatory statute promoting public health and safety. "It establishes a legislative regime for controlling the display, promotion, packaging, sale and use of tobacco, including when, how, where and to whom tobacco can be sold," said Justice Laskin. "The offences under the Act are strict liability offences, which means that due diligence is a defence but negligence is not. All offences are punishable by a fine, or, on multiple convictions, by a prohibition on the sale of tobacco for up to 12 months. No one can be imprisoned for a breach of the statute." Section 3(1) prohibits the sale or supply of tobacco to a person under 19 while s. 3(2) requires vendors to check for identification when the customer appears to be under 25.

The reasonable suspicion requirement does not apply to the offence of selling tobacco to a minor and government authorities can use random test shopping to monitor compliance with the statute as long as the random test shopping is done in good faith. It cannot be done in a discriminatory way (such as targeting only stores owned by a particular ethnic group) or for an improper purpose. The twin rationales underpinning the reasonable suspicion

branch of the entrapment doctrine in criminal law have no relevance to a charge under the *Smoke Free Ontario Act*:

1. Permitting the state to offer a person an opportunity to commit a crime without a reasonable suspicion that the person is engaged in criminal activity amounts to random virtue testing and is an unjustifiable invasion of individual privacy. But this does not apply to stores selling tobacco because:

   (i) Stores selling tobacco operate in a regulated commercial environment. The store and their employees have a responsibility to the public in exercising reasonable care to ensure that selling tobacco to minors does not occur. People selling tobacco products have a greatly diminished expectation of privacy as some form of monitoring will be necessary to ensure that they meet their due diligence responsibilities. "The monitoring is done, not to punish past conduct, as would be the case for an offence under the criminal law, but to deter harmful conduct in the future," said Justice Laskin. "In other words, to prevent harm to the public from the illegal sale of tobacco to minors."

   (ii) Using random test shopping in not virtue testing, but rather compliance testing. "Virtue" is irrelevant to the strict liability offence of selling tobacco to a minor. A person can be convicted for merely being negligent.

   (iii) Test shopping takes place at a store that sells tobacco to the public as part of the store's ordinary business. The opportunity to commit an offence when the test shopper asks to buy a package of cigarettes is no different from the opportunity presented when any underage customer asks to buy cigarettes. The test shopper does not present the store or its employees with an opportunity to commit an offence that they would not otherwise encounter in the ordinary course of their business. Any invasion of the store owner's or employee's expectation of privacy is minimal at best.

2. The rationale that prohibits the police offering a person an opportunity to commit a crime without a reasonable suspicion that they had already engaged in criminal activity because those who would not otherwise be involved in criminal activity might commit criminal offences also does not apply. "The opportunity provided to the store clerk to violate s. 3(1) when the test shopper asks to buy cigarettes is exactly the same as the opportunity provided when any underage person comes into the store and asks to buy cigarettes," said Justice Laskin. "Test shopping does not provide an opportunity to the store clerk that is not routinely available in the course of the store's business."

Since neither rationale underpinning the reasonable suspicion requirement of the entrapment doctrine applies to a charge of selling tobacco to a minor, government authorities may engage in random test shopping to monitor compliance with the statute. They need not have a reasonable suspicion of illegal activity before using this investigative technique. Furthermore, "random test shopping is the most effective way to achieve the government's purpose of ensuring compliance with the statute and deterring future illegal sales of tobacco. Surveillance ... is largely ineffective. And expecting minors who have purchased tobacco to cooperate with the authorities by reporting an offence or giving them information is highly unrealistic. Prosecution for an offence may have some deterrent effect. But deterrence comes mainly from the threat of detection occasioned by random test shopping."

The discretion to use random test shopping, however, is not unfettered nor unreviewable by a court. Random test shopping must be done in good faith, used for a proper purpose, and carried out *bona fide* and without discrimination. If not, a court retains jurisdiction to stay proceedings under the general abuse of process doctrine. In this case, the test shopping was *bona fide*. The store targeted was randomly chosen from a master list of stores in the area.

Complete case available at www.ontariocourts.on.ca

ON-DUTY DEATHS RISE

On-duty peace officer deaths in Canada rose by three last year, equal to the 2007 total. In 2010 seven peace officers lost their lives on the job. This is 75% higher than the 2009 total when only four 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 2001, 29 officers have lost their lives in circumstances involving vehicles, including automobile and motorcycle accidents (23), vehicular assault (3), and being struck by a vehicle (3). These deaths account for 44% of all on-duty deaths, which is almost twice the next leading cause of gunfire (16) 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.

2010 ROLL OF HONOUR

Superintendent Doug Coates
Royal Canadian Mounted Police
End of Watch: January 12, 2010
Cause of Death: Natural Disaster

Sergeant Mark Gallagher
Royal Canadian Mounted Police
End of Watch: January 12, 2010
Cause of Death: Natural Disaster

Constable Artem (James) Otchovski
Peel Regional Police Service
End of Watch: March 1, 2010
Cause of Death: Automobile Accident

Constable Vu Pham
Ontario Provincial Police
End of Watch: March 8, 2010
Cause of Death: Gunfire

Constable Chelsey Robinson
Royal Canadian Mounted Police
End of Watch: June 21, 2010
Cause of Death: Automobile Accident

Constable Michael Potvin
Royal Canadian Mounted Police
End of Watch: July 13, 2010
Cause of Death: Drowned

Constable Sébastien Coghlan-Goyette
Sûreté du Québec
End of Watch: November 14, 2010
Cause of Death: Automobile Accident

"They Are Our Heroes.
We Shall Not Forget Them."

2010 Average Tour: 9 years 1 month
2010 Average Age: 36
2010 Deaths by Gender: 1 female, 6 male
2010 Deaths by Cause:

- **automobile accident - 3**
- **natural disaster - 2**
- **drowned - 1**
- **gunfire - 1**

2010 Deaths by Province:

- **Federal (RCMP) - 4**
- **Ontario - 2**
- **Quebec - 1**

Last 10 years by Gender:

- **female - 8**
- **male - 58**

Canadian Peace Officer On-Duty Deaths (by cause & year)

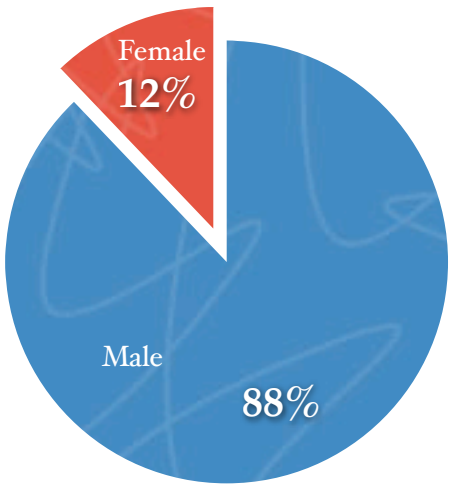
Cause	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	Total
Aircraft accident						2		2		1	**5**
Assault							1				**1**
Auto accident	3	3	1		1	2	1	3	6	2	**22**
Drowned	1					1				1	**3**
Duty related illness					1						**1**
Gunfire	1			3	3	5	1		1	2	**16**
Heart attack			1			1	2		1		**5**
Motorcycle accident								1			**1**
Natural disaster	2								1		**3**
Stabbed		1					1				**2**
Struck by vehicle									3		**3**
Training accident										1	**1**
Vehicular assault				1	1		1				**3**
Total	**7**	**4**	**2**	**4**	**6**	**11**	**7**	**6**	**12**	**7**	**66**
Female	1	1	0	0	1	1	1	0	2	1	8
Male	6	3	2	4	5	10	6	6	10	6	58

POLICE ASSAULTS

According to a Statistics Canada "*Police-reported crime statistics in Canada, 2009*," there were 9,822 incidents of assaulting a police officer in 2009 compared to 9,806 in 2008. For other assaults in 2009, there were 181,570 reports of common assault (level 1), 53,481 assaults with a weapon or bodily harm (level 2) and 3,619 offences of aggravated assault (level 3).

Source: Statistics Canada, Summer 2010, Police-reported crime statistics in Canada, 2009, Catalogue no. 85-002-X, Summer 2010.

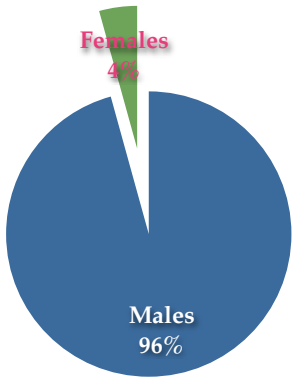
On-Duty Deaths 2001-2010 by Gender



U.S. ON-DUTY DEATHS INCREASE

During 2010 the U.S. lost 163 peace officers, up 29 from 2009. The top cause of death was gunfire (59) followed by automobile accidents (44), vehicular assault (13) and heart attack (13).

The state of Texas lost the most officers at 19 - once again losing the most officers for the fifth consecutive year - followed by California (11), U.S. Government (11), Illinois (10), Florida (9), Georgia (9), Louisiana (6), Maryland (5), Mississippi (5), and Missouri (5). The average age of deceased officers was 40 years while the average tour of duty was 11 years and 9 months service. Men accounted for almost 96% of officer deaths while women made up 4 %.



Source: http://www.odmp.org/year.php [accessed February 19, 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.

U.S. Peace Officer On-Duty Deaths		
Cause	**2010**	**2009**
9/11 Related illness	-	5
Accidental	1	1
Aircraft accident	2	4
Assault	5	1
Automobile accident	44	34
Duty related illness	-	4
Boating accident	1	-
Drowned	2	-
Fall	2	1
Gunfire	59	47
Gunfire (accidental)	2	2
Heart attack	13	10
Heat exhaustion	1	-
Motorcycle accident	5	3
Struck by vehicle	7	8
Training accident	1	-
Vehicle pursuit	4	3
Vehicular assault	12	9
Total	**161**	**132**

U.S. On-Duty Deaths by Year (2001-2010)											
Year	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	Total
Deaths	163	132	149	199	159	165	165	148	159	242	1,681
Avg. age	41	39	40	39	38	38	40	37	39	38	
Avg. tour	11 yrs. 9 mos.	11 yrs, 5 mos	11 yrs, 9 mos	11 yrs, 4 mos	11 yrs, 5 mos	11 yrs, 1 mos	12 yrs, 10 mos	10 yrs, 4 mos	10 yrs, 10 mos	11 yrs, 4 mos	
Female	7	2	12	9	9	5	9	6	15	12	86
Male	154	130	137	190	150	160	156	142	144	230	1,595

RESEARCH REPORTS VIEWS

Domestic Violence

"No matter which form it takes, the dynamics of abuse in domestic violence situations differ significantly from other crimes. The victim is known in advance, the likelihood of repeat violence is common and interactions between the justice system and the victim are typically more complex than with other crimes." *Violence Against Women in Relationships, Police December 2010* at p. 3. www.endingviolence.org/files/uploads/VAWIR_Policy_December_2010.pdf

CANADA's TOP TEN STOLEN VEHICLES

On December 16, 2010 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	1999	Honda	Civic SiR 2-door
3	2002	Cadillac	Escalade 4-door 4WD
4	2004	Cadillac	Escalade 4-door 4WD
5	2005	Acura	RSX Type S 2-door
6	1997	Acura	Integra 2-dor
7	2000	Audi	S4 Quattro 4-door AWD
8	2003	Hummer	H2 4-door AWD
9	2006	Acura	RSX Type S 2-door
10	2004	Hummer	H2 4-door AWD

MORE ON AUTO THEFT

Statistics Canada reported that there were 108,172 motor vehicle thefts in 2009. This was down from 125,568 in 2008, a drop of 15%.

MOTOR VEHICLE THEFT CANADA, 2009			
Area	Number	Rate	% rate change 2008 to 2009
NU	191	593	+9%
NWT	233	536	-27%
MAN	6,528	534	-28%
SK	5,326	517	-3%
AB	18,246	495	-20%
BC	19,614	440	-15%
YK	130	386	-25%
QU	27,517	351	-13%
ON	27,175	208	-13%
NB	1,288	172	0
NS	1,311	140	-17%
PEI	157	111	-8%
NL	456	90	+4%
Canada	108,172	376	-15%

Several census metropolitan areas saw substantial decreases in motor vehicle theft. These areas were led by Winnipeg (-34%), Abbotsford-Mission (-33%), Peterborough (-33%), Calgary (-28%), Saint John (-26%), Thunderbay (-23%), Halifax (-22%), and Regina (-22%). Only three CMAs saw an increase, Trois Rivieres (+8%), Saskatoon (+5%), and Saguenay (+2%).

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

POLICING ACROSS CANADA: FACTS & FIGURES

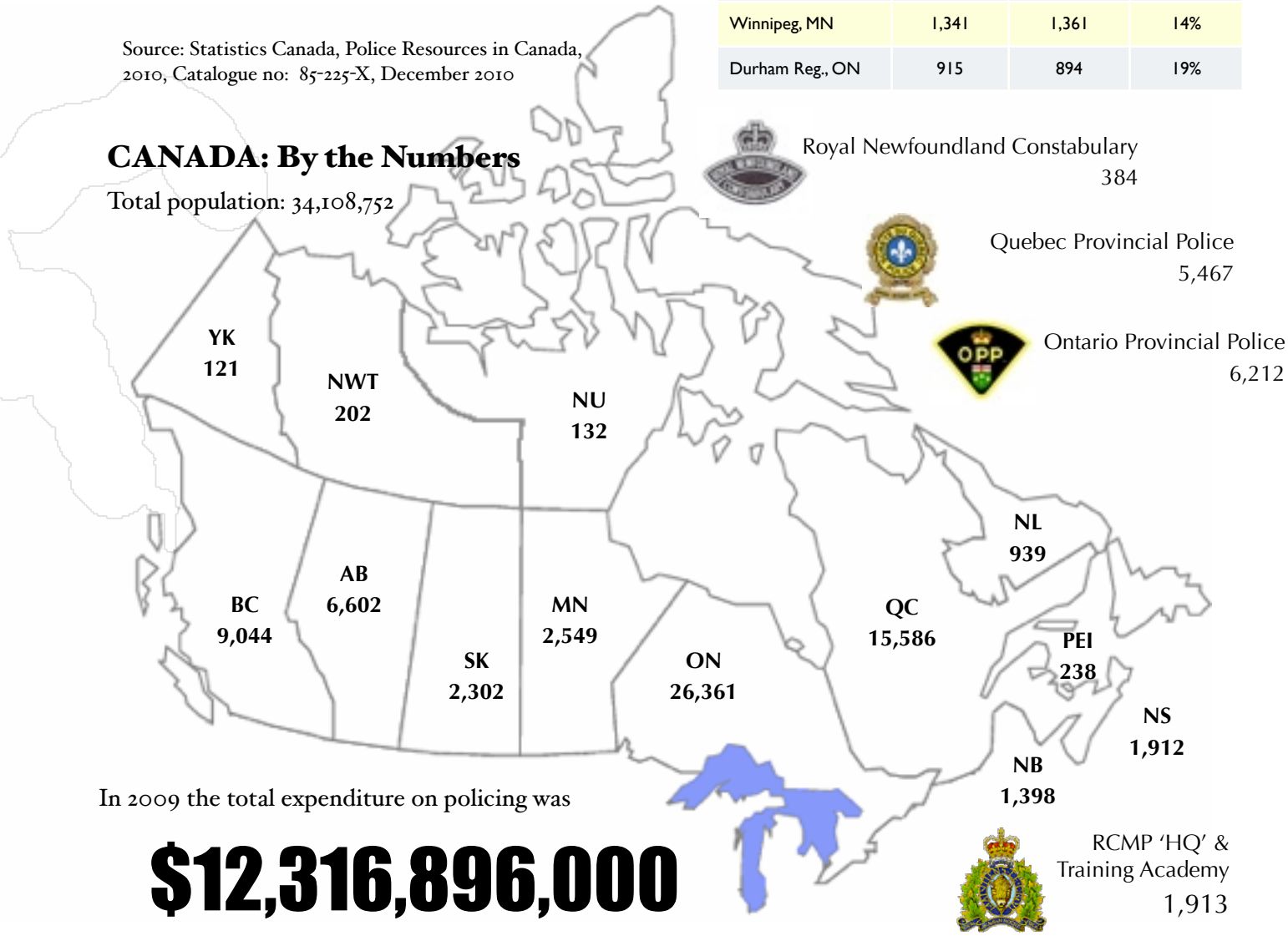
According to a 2010 report recently released by Statistics Canada there were 69,299 active police officers across Canada last year, an increase of 1,874 over 2009. This was the sixth consecutive year of growth. Ontario had the most police officers at 26,361, while the Yukon had the least at 121. With a national population of 34,108,752, Canada's average cop per pop ratio was 203 police officers per 100,000 residents. This is 8% lower than Australia, 11% lower than England, and 17% lower than the United States.

Source: Statistics Canada, Police Resources in Canada, 2010, Catalogue no: 85-225-X, December 2010

Canada's Largest Municipal Police Services 2010			
Service	Officers		% Female
	Actual	Authorized	
Toronto, ON	5,774	5,588	18%
Montreal, QC	4,486	4,589	30%
Calgary, AB	1,882	1,872	16%
Peel Reg., ON	1,855	1,895	16%
Edmonton, AB	1,628	1,568	19%
Vancouver, BC	1,427	1,327	22%
York Reg., ON	1,425	1,433	17%
Ottawa, ON	1,351	1,372	23%
Winnipeg, MN	1,341	1,361	14%
Durham Reg., ON	915	894	19%

CANADA: By the Numbers

Total population: 34,108,752



Royal Newfoundland Constabulary
384

Quebec Provincial Police
5,467

Ontario Provincial Police
6,212

RCMP 'HQ' & Training Academy
1,913

In 2009 the total expenditure on policing was

$12,316,896,000

CMA Police Officers & Crime Severity Index		
CMA	Officers-2010	Crime Severity Index-2009
Toronto, ON	10,091	62
Montreal, QC	6,903	90
Vancouver, BC	3,968	110
Calgary, AB	1,982	78
Edmonton, AB	1,932	115
Ottawa, ON	1,427	67
Winnipeg, MN	1,408	127
Hamilton, ON	1,088	74
Quebec, QC	1,005	61
St. Catherines-Niagara, ON	766	76
Kitchener-Cambridge-Waterloo, ON	761	74
London, ON	758	87
Halifax, NS	695	97
Windsor, ON	596	71
Victoria, BC	538	92
Saskatoon, SK	497	132
Gatineau, QC	419	74
Regina, SK	414	144
St. John's, NL	325	91
Barrie, ON	301	64
Abbotsford-Mission, BC	273	111
Greater Sudbury, ON	255	81
Sherbrooke, QC	248	71
Brantford, ON	237	106
Kingston, ON	232	66
Thunder Bay, ON	227	110
Trois-Rivieres, QC	211	80
Saint John, NB	207	96
Peterborough, ON	195	65
Guelph, ON	191	59
Kelowna, BC	191	121
Saguenay, QC	179	77
Moncton, NB	158	76

GENDER

There were 13,330 female officers in 2010 accounting for 19.2% of all officers or roughly 1 in 5. This is up from 17.3% in 2005, 13.7% in 2000, 9.8% in 1995, 6.4% in 1990, 3.6% in 1985, and 2.2% in 1980. Quebec had the highest percentage of women (23%) while Nunavut had the least (12.9%). The RCMP HQ and Training Academy were 21.7% female.

Area	% Female
QC	23.0%
BC	20.9%
ON	18.0%
NL	17.8%
SK	17.3%
AB	17.1%
NS	16.0%
PEI	15.5%
NB	15.3%
NWT	14.9%
MN	14.4%
YK	14.0%
NU	12.9%

The number of women in all ranks continued to rise. Senior officers were 8.7% female, more than doubling over the last ten years. Non-commissioned officers were 15.2% female, also more than double the percentage from a decade ago. Constables were 21.4% female. This is the same as last year.

Overall, the representation of women in policing continues to increase. In 2010 the number of women increased (+4%) at a faster pace than men (+3%).

OTHER FA$T FACT$

- Police expenditures rose for the 13th consecutive year;
- Costs for policing translates to $365 per Canadian;
- Among provinces, Ontario spend the most on policing ($3,959,838,000) followed by Quebec ($2,166,316,000), British Columbia ($1,282,258,000), Alberta ($1,012,236,000) and Manitoba ($355,523,000). The Yukon ($22,117,000), Prince Edward Island ($29,520,000) , Nunavut ($37,573,000) and the Northwest Territories ($45,066,000) spent the least

Based on total expenditures on policing in 2009.

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 2010			
Service	Officers		% Female
	Actual	Authorized	
Surrey, BC	598	623	21%
Burnaby, BC	287	280	27%
Richmond, BC	224	237	24%
Codiac Regional, NB	154	144	16%
Kelowna, BC	148	155	25%
Coquitlam, BC	141	140	23%
Prince George, BC	136	127	21%
Nanaimo, BC	136	124	19%
Wood Buffalo, AB	136	147	25%
Red Deer, AB	135	151	25%
Langley Township, BC	124	127	31%
Kamloops, BC	123	123	20%
Chilliwack, BC	100	106	31%

According to Statistics Canada, the majority of RCMP officers provided provincial police services (6,756). This was closely followed by RCMP municipal policing (4,956) and federal policing (4,569). Another 1,913 officers were involved in RCMP Headquarters and the Training Academy.

RCMP On-Strength Establishment as of September 30, 2010	
Rank	**# of positions**
Commissioner	1
Deputy Commissioners	7
Assistant Commissioners	26
Chief Superintendents	60
Superintendents	185
Inspectors	446
Corps Sergeant Major	1
Sergeants Major	7
Staff Sergeants Major	17
Staff Sergeants	950
Sergeants	2,153
Corporals	3,653
Constables	11,834
Special Constables	74
Civilian Members	3,733
Public Servants	6,145
Total	**29,292**

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

RCMP Officers by Level of Policing - Canada 2010 (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	3,260	1,016	200	191	-	-	219	61	9	-	-	-	-	4,956
Provincial	1,828	1,285	783	645	-	-	552	754	101	419	97	180	112	6,756
Federal	928	362	260	186	1,395	958	132	177	24	106	18	11	12	4,569
Other	352	61	55	34	53	44	34	38	13	30	6	11	8	739
Total	6,368	2,724	1,298	1,056	1,448	1,002	937	1,030	147	555	121	202	132	17,020

The RCMP is Canada's largest police organization. As of September 30, 2010 the force's on-strength establishment was 29,292. This includes 19,340 police officers, 74 special constables, 3,733 civilian members and 6,145 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

BY THE BOOK:

Canadian Bar Association
Code of Professional Conduct, 2009

Duties of Prosecutor

When engaged as a prosecutor, the lawyer's prime duty is not to seek a conviction, but to present before the trial court all available credible evidence relevant to the alleged crime in order that justice may be done through a fair trial upon the merits. [at p. 65]

Duties of Defence Counsel

When defending an accused person, the lawyers duty is to protect the client as far as possible from being convicted except by a court of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence charged. Accordingly...the lawyer may properly rely upon all available evidence or defences including so-called technicalities not known to be false or fraudulent. [at p. 66]

LEGALLY SPEAKING:

Drug Trafficking & Sentencing

"Cocaine is a particularly insiduous drug, one that wreaks havoc not only upon all who are addicted to it and those near them, but also upon society at large. Trafficking in cocaine is a crime known to breed other crime." – Alberta Court of Appeal Justice Watson in *R. v. Nishikawa* 2011 ABCA 39 at para. 10, references omitted.

RE-ENACTMENT NOTHING MORE THAN A STATEMENT BY CONDUCT

R. v. Ashmore, 2011 BCCA 18

The police obtained a wiretap authorization and began an undercover operation following a murder. The accused was befriended by an undercover officer in a "Mr. Big" style operation and told the officer how he had strangled the victim and that the killing had been carried out at the request of the victim's common law spouse. He, along with three others, was arrested at about 3pm on a Friday. He was told he was being arrested for first degree murder; he faced the possibility of life imprisonment; he had the right to retain and instruct counsel in private without delay; he could call any lawyer of his choosing; there was a 24-hour telephone service available if he wished to speak to a legal aid duty counsel in private; he may be monitored by audio-video surveillance while in custody, except while speaking with counsel in private; and he had the right to remain silent, but that anything he said may be given in evidence. He said that he did not have a lawyer and he wished to speak with legal aid duty counsel. He was taken to police headquarters, and was processed and booked into the cellblock area.

At police headquarters the accused was taken to a private telephone room. Police confirmed that he wanted to speak with legal aid duty counsel and an officer placed a call to the 24-hour legal aid number, leaving a message asking for a return call. A lawyer returned the call, was told that the accused had been arrested for first degree murder, and a private two and one-half to three minute conversation followed. After the call the accused indicated that he was satisfied with the opportunity he had been given to contact counsel. He spent the night in a cell and at about 9 am the following morning (Saturday) he participated in a teleconference hearing before a Judicial Justice of the Peace (JJP) who ordered him detained in custody in accordance with s. 515(11) of the *Criminal Code*. He was to be conveyed "to a prison in the Province of British Columbia being either a federal institution, a provincial institution or a police lockup" and to appear before a Provincial Court judge on Monday. After the hearing the accused was returned to his cell. At 1:15 pm that day he was interviewed for two hours at police headquarters. Part way through the interview the police played a video clip of the accused admitting to the undercover officer that he participated in the murder. After seeing the clip the accused confessed his involvement and described in detail his role and the roles of the other parties. At the end of the interview he agreed to participate in a re-enactment. He was then returned to his cell.

About three hours later the accused was taken from his cell to a different interview room at police headquarters for a re-enactment. He was advised that it was up to him whether he participated in it and that he had the right to consult with a lawyer. He said that he wished to speak with his girlfriend's lawyer and was told that those arrangements could be made. When he then stated "Let's just do the re-enactment", the officer advised him that his participation was "strictly voluntary" and confirmed with the accused that he was "sure" he did not want to speak with a lawyer. The officer also confirmed that he had a right to consult a lawyer before participating in the re-enactment, was not obliged to say anything, and anything he did say may be given in evidence.

Using a drawing of the apartment the accused described how events unfolded. Further re-enactments then proceeded in three stages: (1) at another police station furniture was arranged to replicate the room in the apartment where the murder occurred and the accused demonstrated how the victim had been killed and how his body had been removed from the apartment; (2) at the apartment building where the murder occurred the accused demonstrated how the body had been taken down a stairwell and placed in a vehicle; and (3) where the body was dumped the accused demonstrated how he had disposed of it. On the way back to police headquarters the officer suggested that the accused call his mother, which he did the following day on Sunday (Mother's Day). During this conversation the accused admitted his involvement in the murder. It was recorded.

At trial in British Columbia Supreme Court the accused was convicted of first degree murder by a jury. He did not deny participating in the murder, but argued that it was not planned and deliberate. The evidence of the accused's statements and the re-enactments was admitted. He then appealed to the British Columbia Court of Appeal challenging the admissibility of his statements and the re-enactments. He argued, among other grounds, that he should have been given further s. 10(b) *Charter* advice before being shown the video clip of his statement to the undercover officer and again before being asked to participate in the re-enactments. As well, he contended that after the JJP hearing he was in the custody of the court and the police could no longer interview him without again giving him s. 10(b) rights.

"The police practice of disclosing information, be it true or false, to encourage a detainee to talk does not, without more, re-trigger s. 10(b) rights."

Right to Counsel

The Court of Appeal concluded that the accused was not required to be given another opportunity to contact counsel before being confronted with the video clip from the undercover operation or before being asked to participate in the re-enactment. Neither of these events re-triggered the informational and implementational components of s. 10(b) because they were not new (non-routine) procedures. When the officer played the video clip he "did no more than accurately disclose evidence the police had already gathered," said Justice Frankel. "The police practice of disclosing information, be it true or false, to encourage a detainee to talk does not, without more, re-trigger s. 10(b) rights."

As for the re-enactment, the accused was re-advised of his right to consult a lawyer and chose not to do so. Even if he wasn't re-advised of his right to counsel, a re-enactment is not to be considered "a new (non-routine) procedure that falls outside of the expectations of counsel advising a detainee. A re-enactment is nothing more than a statement by conduct. It involves a person demonstrating, rather than simply recounting, how events unfolded. It can hardly be said, for example, that [the accused's] response to 'Tell me how you strangled Mr. Sabine' is of a different character than his response to 'Show me how you strangled Mr. Sabine'." Furthermore, "even if a re-enactment could be considered to be a new procedure, a request to participate in one was not a matter on which [the accused] required further legal advice," said the Court of Appeal. "Although [the accused's lawyer] did not specifically use the word 're-enactment', he did counsel [the accused] against participating in a line-up or a lie detector test, and to be aware that the police might ask him to participate in some form of 'test' as a ruse to get him to talk. Given that advice and the strong general admonition [the accused] received with respect to providing any information to the police, he was in a position to be able to make a meaningful choice about whether to participate in the re-enactment."

"A re-enactment is nothing more than a statement by conduct. It involves a person demonstrating, rather than simply recounting, how events unfolded."

The accused also submitted that once an arrestee is remanded to the custody and supervision of the court and detained, the police must re-advise him of his rights in accordance with s. 10(b) before interviewing him. But the Court rejected this argument, finding that a remand order did not have the effect of shielding an accused from otherwise lawful investigative action. "A remand order, by itself, neither confers new constitutional rights on a detainee, nor imposes limitations on what lawful investigative techniques may be used by the police," said Justice Frankel. And further:

> [W]hen [the accused] was interviewed at police headquarters … he was lawfully detained, as the warrant of committal authorized his detention at "a police lockup". The fact that [the accused] was questioned in interview rooms rather than in a cell is, in my opinion, of no consequence. In the circumstances of this case, it would be drawing too fine a

> distinction to say that the lawfulness of a detention is vitiated because a detainee is interviewed in another part of the building in which he is being lawfully held or, to use the other example ..., participates in an identification parade (i.e., a line-up) that takes place outside the cellblock area of a lockup or provincial jail.
>
> As [the accused's] position vis-à-vis the investigation was the same before and after the remand order was made, the police were not required to re-advise him of his rights under s. 10(b) of the Charter. [paras. 104-105]

There was no material change in the accused's situation after his consultation with a lawyer such that a new s. 10(b) warning be given because of the remand.

Arbitrary Detention During Re-enactments

The Court of Appeal found the police had breached the accused's s. 9 *Charter* rights to be free from arbitrary detention when he was moved from police headquarters and participated in the re-enactments at the other police station, the apartment, and the body dump location:

> The warrant of committal authorized the police to convey [the accused] to "a prison in the Province of British Columbia being either a federal institution, a provincial institution or a police lockup and deliver him/her to the keeper thereof". It did not give the police the unilateral right to remove [the accused] from one of those places and keep him in their custody elsewhere for investigative purposes. The Crown has not referred to anything that would validate their actions. Accordingly, when [the accused] was taken from police headquarters solely for the purposes of the re-enactment, he was being unlawfully detained. Such a detention is constitutionally "arbitrary". [para. 106]

However, although there was a temporal and tactical connection between the accused's arbitrary detention and his participation in the re-enactment, the evidence was admitted anyways under s. 24(2). So too was the accused's telephone conversation with his mother, which was also temporally and tactically connected to the accused's participation in the re-enactment. The admission of this evidence would best serve the long-term interests of the administration of justice.

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

WHY IS THIS IMPORTANT?

In the 2010 Supreme Court of Canada trilogy of *Sinclair, Willier, McCrimmon*, one of the questions the Court needed to address was at what point a detainee, who has been properly accorded their right to counsel at the outset of their detention, has the constitutional right to further consultations with counsel. The majority opined that a detainee has a renewed right to counsel and should be given an opportunity to speak to a lawyer again where there is a change in circumstances such as:

- ✓ new "non-routine" procedures involving the detainee (eg. participation in a physical lineup or polygraph);
- ✓ a change in the jeopardy facing the detainee (the investigation takes a new and more serious turn as events unfold); or
- ✓ reason to question the detainee's understanding of their s. 10(b) right to counsel.

Since these decisions other provincial appellate courts have looked at different circumstances to determine whether a renewed right to counsel was triggered. Here are some circumstances where courts have found an additional opportunity to speak with a lawyer did not arise:

- recording an arrestee's voice during an interview for later voice comparison purposes to a wiretap coversation was not a new "non-routine procedure (*Wu*, ABCA);
- participating in a re-enactment was not a new "non-routine" procedure. A re-enactment is nothing more than a statement by conduct (*Ashmore*, BCCA);
- playing a video clip from a Mr. Big operation did not re-trigger the right to counsel. It did nothing more than accurately disclose evidence the police had already gathered (*Ashmore*, BCCA);
- police practice of disclosing information, be it true or false, to encourage a detainee to talk does not, without more, re-trigger s. 10(b) rights (*Ashmore*, BCCA);
- following a remand the detainee's position vis-à-vis the investigation is the same before and after the remand such that the police are not required to re-advise the detainee of their rights under s. 10(b) of the *Charter* (*Ashmore*, BCCA).

What Did the Accused's Lawyer Tell Him?

Do you ever wonder what a lawyer says to a client? During the *Ashmore* case the accused called his lawyer to testify. The lawyer said he frames the legal advice he gives in a positive manner so as to inform those under arrest what they should do. Here is what he said he told the accused:

- That he had the right to remain silent. (This was repeated two or three times.);
- That he should not say anything to the police beyond identifying himself;
- That the police were entitled to ask him all the questions they want, and would do so, but that he should repeatedly say he does not want to talk to them;
- That he should assert his right to silence by using expressions such as: "I don't want to talk to you"; "I have nothing to say to you"; and "My lawyer told me not to talk to you". (This was repeated two or three times.);
- That he should not listen to the police as they will exaggerate evidence, misplay evidence, lie about what evidence they have, and try to trick him;
- That the police might put someone in his cell and "bug" his conversations;
- That he should act on the basis that the police are listening to all his conversations, except those with a lawyer;
- That he should not provide the police with, or consent to the warrantless taking of, any bodily samples, such as hair, spit, blood, tissue, or anything from which a DNA sample could be obtained;
- That he should be careful of any waste, such as blowing his nose into a tissue. Waste should either go into the toilet or be cared for;
- That in the event that the police obtain a warrant for a bodily sample, he should say "I am not consenting but I will comply with the warrant";
- That the police were entitled to take his photograph but that he should not participate in any line-ups or take any lie detector (polygraph) tests;
- That the police might ask him to participate in a test as a ruse to get him to talk;
- That if he wanted to apply for legal aid, then he should do so at the earliest opportunity;
- That the legal aid office was closed on the weekend but a legal aid lawyer would be available to him at the courthouse; and
- That in a murder case the police have 24 hours to take an accused before a judge or justice of the peace, but there is no chance of being released before going to court. He should speak to a legal aid lawyer when he gets to court to start the process of seeking release.

R. v. Ashmore, 2011 BCCA 18

STARTING SENTENCE FOR WHOLESALE COCAINE TRAFFICKING IS 4 1/2 YEARS

R. v. Nishikawa, 2011 ABCA 39

The accused sold 0.5 grams of cocaine to an undercover officer for $80 then, after he was targeted for investigation police stopped his vehicle and found 10 ounces of cocaine with an estimated street value of $47,000. He pled guilty in Alberta Provincial Court. On sentencing the Crown sought a four-year prison term while the defence proposed a conditional sentence. The judge imposed a conditional sentence of 10 months for trafficking and 2 years less a day for possession for the purpose of trafficking, to be served concurrently.

The Crown then successfully appealed the sentence submitting it was demonstrably unfit. The Alberta Court of Appeal has set starting points for trafficking in cocaine, whether at the commercial or wholesale level, which can be adjusted for the offence and the offender. The sentence for commercial trafficking in cocaine at something more than a minimal scale starts at three (3) years while the starting point at the wholesale trafficking level is four and a half (4.5) years. In this case the possession offence was for trafficking at a wholesale level. Although at the low end of the range, the Court of Appeal imposed a sentence of 30 months imprisonment after considering the accused's guilty plea, his favourable pre-sentence report, his family history, and his positive efforts in overcoming his addiction.

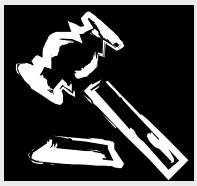
Complete case available at www.albertacourts.ab.ca

"Cocaine is a particularly insidious drug, one that wreaks havoc not only upon all who are addicted to it and those near them, but also upon society at large."

R. v. Nishikawa, 2011 ABCA 39

LEGALLY SPEAKING:

Drug Couriers & Sentencing



"The reality of the drug trade is that the supply chain depends on a wide variety of individuals, all of whom are indeed vital to the criminal enterprise as a whole. That certainly includes the couriers of the drugs, especially the couriers of large quantities of hard drugs. These couriers are not on the periphery of drug trafficking; they are integral to it, constituting, as they do, an indispensable part of the illegal distribution and sale of drugs. It must be remembered that trafficking in a prohibited drug includes transport and delivery of that drug. By including these activities in trafficking, Parliament signalled the high level of culpability that must attach to those carrying out these roles".– Alberta Court of Appeal Justice Watson in *R. v. Nishikawa*, 2011 ABCA 39 at para. 10.

POLICE CARELESSNESS RESULTS IN EXCLUSION

R. v. Dhillon, 2010 ONCA 582

Police obtained and executed a search warrant. They were looking for containers of stolen paint, bills of lading, shipping documents, and four handguns and ammunition even though the only offence alleged in the search warrant was related to the stolen paint. Police found $371,670 in counterfeit money, a loaded handgun, ammunition and an extra magazine, and cargo from four separate tractor trailer thefts. At trial the Crown redacted from the Information to Obtain significant portions of the details provided by the confidential informant. The judge quashed the warrant but admitted the evidence under s. 24(2) of the *Charter*. The accused was convicted of several firearm, counterfeit, and possession of stolen property offences.

The Ontario Court of Appeal, however, overturned the trial judge's ruling and excluded the evidence. The police were careless. The affiant officer made an erroneous statement that surveillance officers saw containers of paint in the accused's garage. His suggestion that he was rushing to complete the paperwork for the search warrant was not an excuse for inserting this erroneous detail. "Significant carelessness on the part of the police that leads to the issuance of an invalid search warrant must nonetheless be placed on the serious side of the state misconduct spectrum," said Justice Simmons.

Plus, although the police made efforts to comply with the *Charter* by applying for a warrant, the invalid warrant authorized a search of a dwelling house which, in this case, was a factor pointing strongly to the exclusion of evidence. As Justice Simmons noted, "It is well-established that a dwelling house attracts a high expectation of privacy and that an illegal search of a person's home constitutes a significant breach of the person's right to be free from unreasonable search and seizure."

Similarly, even though the seized items were reliable, highly probative, and central to the prosecution's case, these important factors did not outweigh the significant harm to the long-term repute of the administration of justice that would be occasioned by the admission of the evidence. This was an intrusive search of the accused's home and the warrant was issued because of significant carelessness in preparing the Information to Obtain. The accused's convictions were set aside and acquittals substituted.

"It is well-established that a dwelling house attracts a high expectation of privacy and that an illegal search of a person's home constitutes a significant breach of the person's right to be free from unreasonable search and seizure."

Complete case available at www.ontariocourts.on.ca

DISTURBANCE REQUIRES MORE THAN CROWD OBSERVING POLICE MAKE ARREST

R. v. Swinkels, 2010 ONCA 742

In the early morning hours two police officers were patrolling downtown just as the bars were closing. While they were driving they heard someone yell obscenities from within a large crowd of about 15 to 20 people outside a bar. The officers pulled over to investigate and, as they exited their vehicle, the accused came quickly towards one of the officers yelling further obscenities. Both of the accused's arms were straight out and his middle fingers were up. Believing he was about to be assaulted or grabbed, the officer took the accused by his shirt, pulled him to the ground, and arrested him for causing a disturbance.

At trial in the Ontario Superior Court of Justice on a charge of causing a disturbance the accused was convicted. The trial judge concluded there was a disturbance caused by the accused. He caused a crowd to gather and several members of the public were disturbed. A further appeal to the Ontario Superior Court of Justice was dismissed. The accused then appealed to the Ontario Court of Appeal.

Causing a Disturbance

The *actus reus* for causing a public disturbance by using obscene language has two components.

1. the accused must have engaged in one of the enumerated acts, which includes "screaming, shouting, swearing, or using insulting or obscene language."
2. the accused's actions must have caused "an externally manifested disturbance of the public peace, in the sense of interference with the ordinary and customary use of the premises by the public." Said another way, an accused's actions must involve "violent noise or confusion disrupting the tranquillity of those using the area in question."

BY THE BOOK:

Causing a Disturbance

s. 175(1)(a)(i) Criminal Code

Every one who (a) not being in a dwelling-house, causes a disturbance in or near a public place, (i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language … is guilty of an offence punishable on summary conviction.

Here, the accused was engaged in one of the enumerated acts. But his conduct did not result in an "externally manifested disturbance." "Generally speaking ... shouting obscenities at police officers is not a disturbance in and of itself," said Justice LaForme speaking for a two judge majority. The objective of s. 175(1)(a) is not to protect individuals from emotional upset, but to protect the public from disorder calculated to interfere with the public's normal activities. In this case, a large crowd gathered around a bar at closing time. The officer testified that the scene was "a normal bar type crowd" and the patio was always packed with very intoxicated people. It was a warm summer's night, the streets were packed, and there was ongoing yelling in the area. The downtown core was extremely busy when the bars close.

In this case, the packed and noisy streets just after bar closing formed the context and surroundings under which the disruptiveness of the accused's conduct was to be measured. What could be expected at this time and place would be different than what one would expect in the library or super market. The presence of the crowd around or near the accused was not a disturbance. The crowd was already there. The police testified the crowd they saw was a normal

"Generally speaking … shouting obscenities at police officers is not a disturbance in and of itself."

bar type crowd and the accused was in it when he shouted obscenities. Police said his conduct did not cause a fight or upset others around him. As well, the crowd gathered around the officers only after the police engaged the accused and during the arrest. "A 'public disturbance' requires more than a crowd observing – or even shouting anti-police sentiments at – police officers in the course of arrest," said Justice LaForme. "In order to satisfy the *actus reus* of causing a public disturbance by using obscene language, the offending language must cause an externally manifested disturbance." The evidence in this case, however, failed to demonstrate such a disturbance. The two police officers on scene were the only two witnesses to testify and said the "large group of onlookers" congregated only after the police had begun to effect the arrest. The accused's appeal was allowed, his conviction set aside, and a new trial was ordered.

A Second View

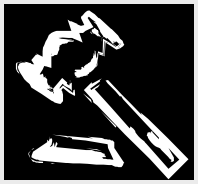
Justice Lang disagreed with the majority. In his opinion the trial judge did not err by misinterpreting or misapplying the law. He was aware that an externally manifested disturbance was necessary and concluded that such a manifested disturbance had occurred after considering the location and volume of the accused's remarks, and the context, including the nature, degree of intoxication and volatility of the crowd and the time and circumstances of the event. Further, the trial judge found the crowd was not gathering in reaction to the accused' subsequent arrest, but instead because of the accused's actions beforehand.

Complete case available at www.ontariocourts.on.ca

"A 'public disturbance' requires more than a crowd observing – or even shouting anti-police sentiments at – police officers in the course of arrest."

LEGALLY SPEAKING:

Disturbance



"[T]he law is clear that yelling and swearing in a public place is not in itself a criminal offence. Equally, the existence of emotional disturbance, such as [the officer's] belief that the defendant's language was vulgar, aggressive and inappropriate, is insufficient to establish a disturbance within section 175(1)(a)." – Ontario Court of Justice in *R. v. Osbourne*, 2008 ONCJ 134 at para.21.

CONSUMPTION OF ALCOHOL CAN BE A FACTOR IN DANGEROUS DRIVING

R. v. Settle, 2010 BCA 426

The British Columbia Court of Appeal has ruled that a trier of fact may take into consideration the consumption of alcohol by an accused in deciding if they are guilty of dangerous driving causing bodily harm, even if they are acquitted of operating a motor vehicle while impaired in the same circumstances arising from the same incident. The *actus reus* for the offence of dangerous driving concerns the manner of an accused's driving, not its consequences. The *mens rea* for the offence is a marked departure from the standard of care of a reasonably prudent driver in all of the circumstances facing an accused. It is a modified objective test that does not require proof of subjective intent. Instead the test involves the objective foresight of a reasonably prudent driver of the risk of harm created by the accused's deliberate conduct. Evidence of an accused's actual state of mind (intentional conduct), if available, is a relevant consideration. So too is evidence of reckless or wilfully blind conduct. Thus, evidence of an accused's voluntary consumption of alcohol may be relevant in establishing the *mens rea* of dangerous driving. "Where such conduct demonstrates a

recklessness in creating a risk or danger to other users of the highway it may, when considered with the evidence of driving conduct, establish a pattern of disregard for the safety of other users of the highway that amounts to a marked departure from the standard of care of a reasonably prudent driver." In dismissing the accused's appeal the Court found that "it was open to the trial judge to find that the manner of the [accused's] driving, on this stretch of road, at this time of night, was objectively dangerous and that, when considered with the evidence of the [accused's] consumption of alcohol that day, amounted to a marked departure from the standard of care of a reasonably prudent driver in all of the circumstances."

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

PROLONGED ROADSIDE DETENTION PENDING WARRANT EXECUTION NOT ARBITRARY

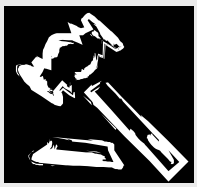
R. v. Trieu, 2010 BCCA 540

Police obtained a search warrant relating to a suspected theft of hydroelectricity at a residence in the accused's name. They were also investigating and had warrants to search three other homes along the same street for suspected theft of electricity. Officers attended with the search warrant and set up surveillance in unmarked vehicles along the street where the home was located at about 9 a.m. The front door and garage were being watched and no one had been seen coming or going until 12:15 p.m. when a car driven by a male was seen leaving the garage of the property. Shortly thereafter the vehicle was pulled over and its driver, the accused, was advised that the police had a search warrant for electrical theft at the property he had just left. The officer asked the driver for his licence, which showed the address for which the search warrant had been obtained. The accused was told that he was being detained for "theft of hydro investigation" pending the execution of the search warrant. When he was advised of his right to counsel he said he wanted to exercise it, but was not permitted to contact a lawyer at that time. The officer did not want the accused to make any phone calls until the warrant was executed nor could he provide privacy at the roadside. Upon entering the home police found a large marijuana grow operation and several documents linking the accused to the residence. After the preliminary results of the search were noted, the accused was arrested for producing marijuana and was again advised of his *Charter* rights to consult counsel. Approximately 25 minutes elapsed from his initial detention until his arrest. He was then taken to the nearby police detachment where he was permitted to contact counsel. About 45-50 minutes had elapsed from the time of his detention until he was given an opportunity to contact counsel. He was subsequently released from custody on a Promise to Appear.

At trial in British Columbia Supreme Court the judge found, among other things, that the accused's s. 10(b) *Charter* rights had been breached because of the delay in permitting him to contact counsel. However, no evidence had been obtained as a result of that breach. In all the circumstances the judge concluded that there was no justification for the exclusion of evidence under s. 24(2). The accused was convicted of producing marihuana and possession for the purpose of trafficking. He then

LEGALLY SPEAKING:

Proving Possession of Grow-op



"Evidence that establishes mere knowledge of the criminal conduct taking place in the residence is not enough. There must also be evidence from which it can be inferred that the accused person owned the marijuana crop, cultivated the crop, aided or abetted somebody else in the criminal operation, or otherwise had some control over the crop."– British Columbia Court of Appeal Justice Low in *R. v. Bi*, 2011 BCCA 10 at para. 2 in the context of whether an accused found to be living in the upstairs of a house was criminally implicated in the grow operation police found in the basement.

appealed to the British Columbia Court of Appeal arguing, in part, that his roadside detention prior to the execution of the search warrant breached s. 9 of the *Charter* because it was not based on proper grounds and was unjustifiably prolonged.

Arbitrary Detention

The accused argued that he had been detained simply as a result of a policy determined at the outset of the investigation to detain any person or persons seen leaving the residence. He submitted that the mere fact that he was seen leaving a residence associated with an apparent theft of electricity, without more, was an insufficient basis to detain him at that time and amounted to nothing more than a police hunch that he had some involvement in the suspected theft. But Justice Prowse, speaking for the Court of Appeal, rejected this approach:

> [W]hile it is not suggested that the information available to the police constituted reasonable grounds for arresting [the accused], I am satisfied that it constituted reasonable grounds for suspecting that he was involved in the criminal offence of theft of electricity in the residence he was seen leaving. He was the only individual seen in relation to this single family residence over the course of approximately four hours of surveillance, during the last two hours of which both the front door and garage door were under constant surveillance. This was not a fleeting connection. Nor was this a case where many individuals were connected with the residence, and all were arrested simply by virtue of that connection ... . Here, the police did not purport to arrest [the accused] when they first detained him; rather they placed him under what amounted to investigative detention.
>
> Nor do I accept that what occurred here amounted to a "standardless sweep" based on a blanket policy adopted to simply detain everyone seen leaving any of the four residences under investigation for electrical theft, without regard to any other circumstances. [The officer] referred to a "possible takedown" of "suspects"; not the automatic detention or arrest of anyone seen leaving the premises. The evidence does not go as far in this respect as to amount to an automatic and indiscriminate policy whereby mere presence for any length of time at or near the premises triggered automatic detention or arrest. Here there was evidence of theft of electricity at the property, and [the accused] was seen leaving the property in the circumstances I have described, which involved his presence there for a considerable period of time, and the absence of any other persons associated with the residence. [references omitted, paras. 64-65]

"[T]he further relatively short period of detention was necessary to ensure that the police were not placed in jeopardy should [the accused] alert any occupants of either his own or the other residences of the impending searches."

The initial roadside detention was not arbitrary and therefore did not breach the accused's s. 9 *Charter* rights.

Prolonged Detention

The accused also argued that his continued detention for some 25 minutes was no longer reasonably necessary in the circumstances since the police had ascertained his identity and checks turned up no previous criminal record. In his view this was more than a brief detention, amounted to a *de facto* arrest, and was therefore arbitrary. The Crown, on the other hand, contended that the accused's continued detention was necessary to enable the orderly execution of the search warrant, which was conducted immediately following his detention. Further, the police were involved in parallel investigations of three other residences on the same block at the same time such that the accused's immediate release could have imperilled all of the investigations. More importantly, the Crown suggested, the accused's release could have endangered the officers involved in executing the warrants since he could have alerted any occupants of those premises to the police presence. The Crown also pointed out that the police did not handcuff the accused, a clear indication that they did not regard him as being under arrest. The Crown also said that, in

light of all the circumstances, the 25-minute lapse from detention to arrest did not turn the lawful detention into one which was arbitrary or otherwise unlawful.

Primarily for the reasons of the Crown, Justice Prowse was not satisfied that the accused's continued detention amounted to an arbitrary detention in the circumstances, nor did it give rise to a *de facto* arrest:

> In my view, the further relatively short period of detention was necessary to ensure that the police were not placed in jeopardy should [the accused] alert any occupants of either his own or the other residences of the impending searches. It is also significant that his further detention was only until the police safely entered and secured the residence. At that point, given their discovery of an active grow operation, [the accused] was arrested. [para. 73]

Despite the other *Charter* breaches found, the evidence was admitted, the accused's appeal was dismissed, and his convictions upheld.

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

Side Bar

Hydro Meter Checks

The search warrant relating to theft of hydroelectricity that the police relied upon in *Trieu* was largely based upon information obtained from meter tests conducted on and off the property by a BC Hydro technician. The technician went onto the property at 10:15 pm to conduct a service check. He read the meter attached to the outside of the accused's garage and then compared those readings with the electrical load on the underground service box located about 10 feet off the property.

The technician's right to attend on private property to check Hydro equipment was found in the *BC Hydro and Power Authority Electrical Tariff*, enacted pursuant to regulatory powers found in s. 125 of the *Utilities Commission Act*, which stated:

> The Authority's agents and employees shall have at all reasonable times, free access to the equipment supplied with electricity and to the Authority's meters and apparatus and the wires leading therefrom on the customer's premises to ascertain the quantity or method of use of service.

The technician had been responding to a report of an overloaded transformer causing flickering lights in the neighbourhood, but DID NOT testify to that as the reason for conducting the service test. Had he done so, the British Columbia Court of Appeal would have had no problem accepting the technician's entry onto the property at 10:15 pm as being at a reasonable time. An overloaded transformer or the threat of power failure would justify entry onto private property to address public concerns. But the evidence was that the service check was only ROUTINE. Hence, the Court of Appeal found the technician's attendance on the property in these circumstances at 10:15 pm was unreasonable.

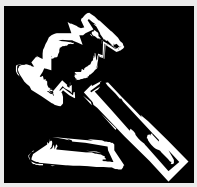
> The fact that entry is restricted under the Tariff to reasonable times is a clear indication that not all times are considered reasonable, and that Hydro employees cannot attend on private property at will, regardless of the circumstances. In my view, reasonable residents of private property are likely to conclude that strangers entering onto their property at 10:15 at night without invitation are up to no good. The presence of an apparent intruder on their property might dispose them to call 911, or, in a worst-case scenario, take matters into their own hands. In other words, unannounced entry onto private property late at night could well result in breaches of the peace, or in emergency services being deployed and public expense incurred, without good reason. [para. 48]

The explanation that Hydro did not have sufficient staff to attend to all Hydro business during daylight hours was not accepted. "*I do not consider it to be a basis for finding that any hour of the night or day is a reasonable time for checking meters on private property*," said Justice Prowse. "*Absent situations calling for immediate attention ... , mere convenience cannot justify attendance on private property late at night.*"

R. v. Trieu, 2010 BCCA 540

LEGALLY SPEAKING:

Investigative Detention



"[The common law investigative detention power] flows from the ancillary powers doctrine and the duties of police to preserve the peace, prevent crime and protect life and property. The power is not, however, a general power to detain whenever such a detention will assist the police in the execution of their duties. In order that an investigative detention not be arbitrary and thereby offend s. 9 of the Charter, it must fulfill two conditions. First, the police must have "reasonable grounds to detain" in the sense that they reasonably suspect that the individual detained was involved in a crime under investigation. There must be both a subjective and objective basis for that belief. Second, the detention must be "reasonably necessary" in all the circumstances, including the nature of the liberty interfered with and the public purpose the interference serves.."– British Columbia Court of Appeal Justice Lowry in *R. v. Greaves*, 2004 BCCA 484 at para. 33.

TEN-EIGHT TURNS ELEVEN

"In Service: 10-8" is now into its eleventh year of publication. It started in 2001 and has become a popular read among Canada's law enforcement community. Here are some of the comments the newsletter has received from its readers.

"I love the read." - Constable, Nova Scotia

"I find your articles very interesting, and easy to understand." - Educator, Alberta

"The whole set up is fantastic. ... Thanks a million." - Detective, Alberta

"Impressive newsletter, keep it up." - Corporal, New Brunswick

"I find the newsletter very informative and look forward to each issue." - Constable, British Columbia

"I thoroughly enjoy the magazine." - Sergeant, Ontario

"I truly enjoy your publication and read it whenever I can. I am particularly interested in the case law section." - Constable, British Columbia

"I often use your Case Law articles for training purposes for our frontline officers as they address current issues." - Sergeant, Ontario

"A fellow officer passed on previous copies of the newsletter which are fantastic learning tools." - Police Officer, Ontario

"[I] read the newsletter religiously when available. It's a fantastic source and a great way to stay current on case law and its applications." - Military Officer, Canada

"I always love reading 10-8." - Crown Counsel, British Columbia

"This newsletter is GREAT reference material for front line." - Police Officer, Ontario

"The articles are very good." - Constable, Alberta

"Thanks for putting out such a great newsletter. It's great reading I can apply on the job." - Constable, British Columbia

"I found the newsletter to be informative as well as an engaging read and I am currently plowing through the archives." - Border Services Officer, Canada

"[I] find the 10-8 Newsletter very informative and beneficial to effective policing knowledge." - Constable, British Columbia

"Great read!" - Constable, Prince Edward Island

"The publication is excellent and I find it extremely helpful." - Constable, British Columbia

POLICE LEADERSHIP 2011 CONFERENCE

APRIL 11-13, 2011

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. This police leadership conference will provide an opportunity for delegates to hear leadership topics discussed by world-renowned speakers.

Register Today

Conference keynote speakers include ...

General Rick Hillier (Ret)

Rick Hillier's passion, leadership and outspoken nature have captured the hearts and minds of Canadians across the country. A man who takes pride in his country, his team and the significance of his mission, General Hillier is one of Canada's most celebrated leaders.

Hillier tells it like it is - with confidence and a straight-talking manner. As Chief of the Defence Staff, Canada's highest ranking position in the Canadian Forces, he oversaw our country's most important mission in Afghanistan. Since retiring from that role, he's become more active in business and community programs, as organizations see the value in learning from and engaging with such a strong leader, motivator and team builder as Rick Hillier.

Considered one of Canada's most charismatic and influential soldiers, General Rick Hillier will challenge convention and inspire pride in being Canadian, all while sharing his trademark Newfoundland charm and humour.

For more information and to register:
www.policeleadershipconference.com

Gordon Scobbie

Assistant Chief Constable, West Midlands Police, UK, Social Media Lead, Association of Chiefs of Police Officers (ACPO) **"UK Policing 2.0. - The Citizen and Digital Engagement"**

Gordon joined Strathclyde Police in 1980, serving operationally in uniform and CID through the ranks, as well as in other areas of the business including Force Personnel, introducing a national performance appraisal system for Scotland and being the first police force in the UK to achieve accreditation for investors in people. He then served for 3 years at the Scottish Police College delivering leadership training before returning to force to establish a disclosure bureau to provide conviction and non conviction information on those wishing to work with children and vulnerable adults.

He then served as an operational Chief Inspector before transferring to West Midlands Police on promotion in October 2004 as Superintendent, Operations Manager at Coventry City Centre . He was then promoted to Commander at Solihull in August 2006 and following completion of the Strategic Command Course he was successful in his application to join West Midlands Police as Assistant Chief Constable. Gordon has been in post since June 2009, holding the Citizen Focus portfolio.

Rex Murphy

Rex Murphy is one of Canada's most respected opinion leaders. His witty intellect and profound insight into issues affecting Canadians are the reasons why they tune in regularly to his weekly CBC radio show, Cross Country Checkup, watch him on CBC TV's The National, and read his column in The National Post. He has a unique ability to examine a topic and articulate it in the most profound yet digestible way. Murphy's audiences become so engaged they don't even realize it's happening.

Cross Country Checkup is Canada's only national open-line radio program, broadcast live across the nation every Sunday afternoon. Each week, Murphy moderates a lively discussion on an issue of national interest or importance and invites listeners to call in with their opinions and thoughts.

Rex Murphy is a stimulating speaker, accomplished storyteller, and knows what makes Canadians tick. His innate ability to speak on a variety of topics makes him a great fit for anyone looking for a fresh and honest perspective on the issues facing them today. Each speech made by Murphy is customized to your topic and audience.

Plus Ryan Walters, David Kennedy and Julian Fantino.

REGISTRATION

The registration fee for the Police Leadership 2011 Conference is $385 (plus applicable taxes). The registration cut off date is March 21, 2011.

The conference fee includes a reception on Monday evening, lunches on Tuesday and Wednesday, and a banquet dinner on Tuesday. Each participant will receive a "welcome package" upon registration. Register early, as the number of delegates are limited and past conferences have sold out prior to the registration cut-off date.

Banquet Dinner Entertainment

Ron James

Stand-up comedian and host of The Ron James Show on CBC.

One of this country's most popular and treasured comedians, Ron James has been called "more Canadian than warm mitts on a radiator," by Rick Mercer, and "devastatingly funny and clever" by The Globe and Mail. A straight-talking stand up from the East Coast, James has honed his unique brand of intellectual everyman comedy for the past thirty years. In 2009, after a string of hit CBC specials, he launched his own CBC variety show, *The Ron James Show*, which quickly became the network's biggest new comedy show in years.

Prior to hosting his own CBC show, Ron James spent nine years with Second City, and starred in several CBC specials, including *Quest for the West* and *The Road Between My Ears*, which is the CBC's bestselling comedy DVD. His specials routinely draw nearly a million viewers. He's been nominated for a Genie Award, won a Gemini as part of the writing team on *This Hour Has 22 Minutes*, and was voted the inaugural Canadian Comedian of the Year. James was also the only comedian invited to perform when Conan O'Brien brought his Late Night show to Canada.

Simply put, Ron James is one of the funniest, most kinetically charged comedians this country has produced. With rapid-fire jokes and a poet's sensitivity to language, his stand-up sets may be the best gauge going for what it means to be Canadian and what it feels like to live with a unique brand of self-awareness that is shared, coast to coast, by over 30 million people. Razor-sharp, clean, and accessible, James cuts a wide swath through contemporary culture. He draws belly laughs, elicits chin-scratching flashes of insight, and collects rapturous ovations by telling stories from across Canada. Some of the stories are about him; but mostly, they're about us.

Advanced Strategic Communications Seminar

Social Media and Policing in the Digital Age

With the introduction of Social Media networks, how people get information has changed forever. There is no longer a single source of accurate information. People are relying on their peers for information and trusting what they learn online rather than traditional media or corporations. Social media is fast, interactive, unrestricted, and free-wheeling. It has democratized communication. It has also changed policing.

Facebook, Twitter, and YouTube are not only ways to deliver information about the police agency but also an effective investigative tool and key in operational strategies. However, the policing world has to manage the competing interests of security, reputation, privacy, and public interest.

The Advanced Strategic Communications Seminar is a two-day pre-conference workshop that will bring social media pioneers to speak about how to tap into this technology and how to develop social media strategies that can be adapted to the policing environment.

When: April 10-11
Where: Westin Bayshore, Vancouver, BC
Cost: $585 plus HST
Space is limited to 200 participants

Speakers and Topics

Della Smith, Q Workshops Inc.
"Social Media: Promise or Peril"

Tim Burrows, Toronto Police Service
"Media Relations Officer"

Ron "Cook" Barrett, Capitol Region Gang Prevention Center
"Gang Prevention Specialist for NY"

David Toddington, Toddington International Inc.
"Social Media Intelligence Gathering"

Kim Bolan, The Vancouver Sun
"The Real Scoop Blog on Crime"

Assistant Chief Constable Gordon Scobbie
West Midlands Police, UK
"UK Policing 2.0 - The Citizen and Digital Engagement"

Mary Lynn Youn, UBC School of Journalism
"Canada's Media is Changing in a Digital Age"

Chris Gailus, Global TV
"Anchor 6:00 News"

Kyle Friesen, DOJ
"Risks and Pitfalls"

Eric Weaver, DDB Canada Advertising
"Social Marketing: A Profound Cultural Shift"

Delegates are responsible for booking their own rooms. The Westin Bayshore has a block of rooms reserved for the Police Leadership 2011 Conference delegates. Reservations should be made by requesting the "Police Leadership Conference" rate. This room rate is being held until March 17, 2011. Book early as the conference rate can only be guaranteed for this block of rooms. If you want more information on the hotel and amenities, you can visit the hotel website at **www.westinbayshore.com**.

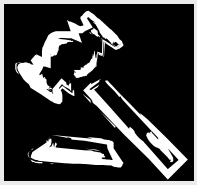
In addition, to the conference dates of April 11th to 13th, 2011, the Westin Bayshore has extended conference rates from April 9 to 17, 2011 for those delegates who want to extend their stay either before or after the conference and enjoy the conference rates extended to Police Leadership 2008 Conference delegates only. Rates are $180 in the main building and $182 in the tower (based on single occupancy).

The Westin Bayshore, Vancouver, British Columbia
HOTEL FAX: (604) 691-6980
HOTEL TELEPHONE: (604) 682-3377
TOLL FREE 1 800 WESTIN 1
E-MAIL: bayshorereservations@westin.com

HOTEL RESERVATIONS

LEGALLY SPEAKING:

Child Pornography Sentencing



"Sadly, possession of child pornography facilitated through the internet is on the rise. It is an abhorrent crime that victimizes the most vulnerable members of our society and hence the need for sentences to reflect denunciation and deterrence. ... A message must go out that this sort of conduct will not be tolerated."– Ontario Court of Appeal in *R. v. Nisbet*, 2011 ONCA 26 at paras. 1-3, upholding a sentence of six months after police examined the accused's computer and found a number of files showing children aged 4 to 14 being depicted in all types of sexual activity with other children and adult males.

OFFICER SAFETY CONCERNS MUST BE MORE THAN GENERALIZED & NON-SPECIFIC

R. v. Chuhaniuk, 2010 BCCA 403

The police obtained a telewarrant authorizing them to search only the accused's "residence" for evidence of electricity theft. The property was in a rural area, consisted of several acres, and had several outbuildings located a considerable distance from the residence. A search team was assembled and during the briefing all officers were made aware that the warrant was limited to the residence. Some officers were instructed to go the front and back doors while others were tasked with securing the outbuildings. Upon their arrival at the property police used bolt cutters on a locked driveway gate. When police knocked at the residence an occupant answered the door. She was detained while the accused, located at the rear of the residence, was arrested. Other officers immediately approached outbuildings, not covered by the warrant, to allay their "safety concerns". At a shed, an officer saw two electrical meters mounted at its front and smelled growing marihuana. He could not see inside because there were no windows and the doors were locked. He obtained a key from the occupant and opened the shed. He saw equipment sometimes used in the marihuana production.

> "[I]f police officers have reasonable grounds to be concerned that there is a possibility that someone who poses an immediate risk to their safety or the safety of others is in such other place or premises, then they can take reasonable steps to minimize that risk."

The officer then went to a garage on the property and again detected the odour of marihuana. He entered using a key and heard muffled voices coming from a small room where he found a radio playing. He saw a trap door, opened it, and found an underground bunker where he discovered a marihuana grow-operation. A second officer checked a summer house by walking around it and looking through the windows. He heard music coming from its basement, announced his presence, and entered, detecting a strong odour of marihuana. No one was inside but the officer noticed marihuana and paraphernalia associated with marihuana production. Following the discovery of the grow-operation the accused and his wife were arrested for marihuana production and advised of their rights. A second telewarrant under the *Controlled Drugs and Substances Act* (*CDSA*) was obtained now authorizing the police to search the "Residence and Outbuildings" on the property. Police located over 1,200 marihuana plants and growing equipment such as lights, timers, air filters, and fans in the bunker, and 170 marihuana plants, bags of marihuana, $14,000 in cash, and various documents from the summer house.

At trial in British Columbia Supreme Court the accused argued that police lacked authority to approach and enter the outbuildings without a warrant, breaching his s. 8 *Charter* right to be free from unreasonable search and seizure in doing so. He further contended that the evidence seized from the outbuildings after the second warrant was obtained should have been excluded. The Crown, on the other hand, submitted that there had been no s. 8 breach because the police were acting under the exigent circumstances exception found in s. 11(7) of the *CDSA* and officer-safety concerns justified the warrantless entry of the outbuildings.

The judge found the initial warrant only authorized a search of the main residence on the property, not the outbuildings. He acknowledged that the need for the police to discharge their duties safely could give rise to exigent circumstances, but in this case there were none that would justify the warrantless entries of the outbuildings. After considering s. 24(2) of the *Charter* the judge admitted the evidence of the grow operation in the bunker but the marihuana, cash, and documents seized from the summer house were excluded. The accused was convicted of producing marihuana and possessing marihuana for the purpose of trafficking. He was sentenced to a year in jail.

Outbuildings Security-Checks

The accused then appealed his convictions to the British Columbia Court of Appeal. He accepted that the police had lawful authority to come onto his property under the authority of the first warrant to enter and search his residence. However, he submitted that the police had no authority to examine and enter the outbuildings solely out of a concern for their safety. The Crown, on the other hand, contended that a search warrant authorized the police to enter onto the property named in the warrant and go anywhere on that property. The only limitation imposed, in the Crown's view, was which places on the property the police could physically enter and search. In its factum on the appeal the Crown wrote:

> Common sense dictates that where the police have a warrant to search a particular residence at a particular municipal address, the warrant authorizes the police to enter onto the property (or "place") as specified in the warrant, and to survey the property, including any outbuildings, without necessarily entering into those outbuildings. The warrant authorizes the police to enter onto the property, and into the residence, but not into the outbuildings. This gives the police authority to examine the exterior of the residence and if necessary survey the property to ensure they are not presented with safety risks in approaching, entering and searching the residence.

The Court of Appeal had a different view however. Justice Frankel, writing the opinion of the Court, found that the officers' actions in conducting the security checks of the outbuildings, from the outset, amounted to a "search", were unlawful, and violated s. 8 of the *Charter*. Although the police honestly believed they needed to conduct a cursory search of the outbuildings to ensure their safety, the safety concerns were not objectively reasonable. There was no information to suggest that occupants "were violent or in possession of weapons or that they associated with known criminals. Accordingly, the common-law power to minimize any risks associated with the execution of a warrant was not engaged."

> While I agree with the Crown that the police had authority to be on the McCoubrey Road property and, as discussed below, that they were entitled to take reasonable steps to ensure their own safety and the safety of others, I do not agree that the warrant clothed them with unfettered authority to "survey" the entire property and "clear" all structures on it. Having said that, I wish to make it clear that I am not saying that it would be unlawful for a police officer to approach another building for the purpose of communicating with someone. For example, had [the corporal] not received a response to his knock on the [man residence] door, he would not have been precluded from going to the outbuildings to try to find someone who could assist him in gaining entry to the residence. This case, however, falls to be decided on what the police did, and their purpose in doing it. [para. 55]

And further:

> I know of no authority for the proposition that a warrant to search one building on a property, without more, gives the police the right to examine the exterior and interior of other buildings on that property without entering them. This is no doubt because to reach such a conclusion would be to seriously diminish the privacy interests the Charter is intended to protect. To accept the Crown's submission would mean that officers could attempt to look into every building on a property, even ones located

"[T]he police, in the course of executing that warrant, have the authority, at common law, to inspect and enter other places or premises on that property to the extent reasonably necessary to protect themselves and others. However, they cannot take such action as a matter of course, or on the basis of generalized, non-specific, concerns. Before acting, they must have a reasonable basis for believing there is a possibility that their safety, or the safety of others, is at risk.."

> a considerable distance away from the building named in the warrant and with no apparent connection to the criminal activity under investigation. For example, on the Crown's theory, had there been a cabin in the woods well away from the clearing in which the [main] residence was located, the police would have been entitled to approach it, examine the exterior, and look through the windows.
>
> This does not mean that the police cannot take reasonable steps to protect themselves and others during the execution of a search warrant. I recognize, as the Crown pointed out in its submissions, that the execution of warrants can give rise to officer-safety concerns and that those concerns can be heightened when the place being searched is on a multi-structure rural or semi-rural property. However, the interests of law enforcement must be balanced with the rights of members of the public.
>
> In my view, when a warrant has been issued to search one place or premises on a particular property, the police, in the course of executing that warrant, have the authority, at common law, to inspect and enter other places or premises on that property to the extent reasonably necessary to protect themselves and others. However, they cannot take such action as a matter of course, or on the basis of generalized, non-specific, concerns. Before acting, they must have a reasonable basis for believing there is a possibility that their safety, or the safety of others, is at risk. [paras. 57-59]

This approach is similar to that taken with respect to the authority of the police to conduct searches incidental to investigative detentions. In those cases, the police have a common-law power to detain a person for investigation and, in certain circumstances, the police can conduct a limited protective search of a detainee. Similarly, the approach taken with respect to unannounced (i.e., no knock) forced entry into a dwelling-house in the execution of a search warrant was also instructive. In such cases, a no-knock entry can be made in response to concerns for police and occupant safety based on an individualized assessment of the circumstances. The Court continued:

> There can be no question that police officers are acting in the exercise of a lawful duty when they execute a search warrant. The critical issue is whether conducting what I would call "security checks" of places or premises on the same property as the place or premises covered by a warrant is a justifiable use of a power associated with that duty. In my view it is. ... "[P]olice officers are entitled to take reasonable steps to minimize the risks they face in the performance of their duties". Accordingly, if police officers have reasonable grounds to be concerned that there is a possibility that someone who poses an immediate risk to their safety or the safety of others is in such other place or premises, then they can take reasonable steps to minimize that risk. [para. 65]

Exigent Circumstances

Under s. 11(7) of the *CDSA* there is an "exigent circumstances" exception to obtaining a warrant. Exigent circumstances can include situations where there is an imminent danger of the loss, removal, destruction or disappearance of evidence if the search or seizure is delayed or where immediate action is required for the safety of the police:

> Clearly, when police officers have the grounds necessary to obtain a warrant and a reasonable basis to believe that the evidence being sought will be lost or destroyed before a warrant can be obtained, they can act without a warrant. ...
>
> Similarly, ... there will be situations where safety concerns will satisfy an exigent circumstances exception to a warrant requirement. [references omitted, paras. 70-71]

But not all officer safety concerns will exempt the need for a search warrant. "While safety concerns can trigger a statutory exigent circumstances exception to a warrant requirement, it does not follow that such concerns will always satisfy those exceptions. Those concerns must make obtaining a warrant impracticable," said Justice Frankel. "I do not accept that officer-safety concerns that arise only upon, and as a result of, the commencement of a search are sufficient to justify that search being conducted without a warrant."

> As for s. 11(7) of the CDSA, it does not apply with respect to the shed and the garage for two reasons. The first is that [the officer] began his security checks of those buildings before he had reasonable grounds to believe they contained drugs or evidence of drug-related offences. Accordingly, the first requirement of that provision—reasonable grounds to obtain a warrant—was not met. As for the second requirement—the impracticability of obtaining a warrant—even after [the officer] detected the odour of marihuana outside the shed and garage, there was nothing to indicate that any evidence in those buildings could be lost or destroyed before a warrant could be obtained.
>
> In so far as the summer house is concerned, [the other officer] similarly did not have reasonable grounds to obtain a warrant when he began his security check of that building. Those grounds only came to light after he entered the premises. [paras. 75-76]

As for officer safety, there was no doubt it is often a concern in marihuana grow operations. Although the Crown need not prove a probability of potential violence to investigators, there must be reasonable grounds for the possibility of violence before exigent circumstances exist for officer safety reasons.

Admissibility

Although all of the evidence was obtained in violation of s. 8, the Court of Appeal found the evidence from the shed and garage admissible. Police acted out of an honest, but mistaken belief that entry was necessary in the interests of officer safety to check the outbuildings. They then obtained a second warrant after they first entered before conducting a full search of the outbuildings. The expectation of privacy in the shed and garage was low and the production and distribution of marihuana were serious offences, with the public having an interest in the successful prosecution of those who engage in large-scale commercial marihuana-related activity. The accused's appeal was dismissed.

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

BY THE BOOK:

Drug Search Warrants

s. 11 *Controlled Drugs and Substances Act*

(1) A justice who, on ex parte application, is satisfied by information on oath that there are reasonable grounds to believe that

(a) a controlled substance or precursor in respect of which this Act has been contravened,

(b) any thing in which a controlled substance or precursor referred to in paragraph (a) is contained or concealed,

(c) offence-related property, or

(d) any thing that will afford evidence in respect of an offence under this Act or an offence, in whole or in part in relation to a contravention of this Act, under section 354 or 462.31 of the Criminal Code

is in a place may, at any time, issue a warrant authorizing a peace officer, at any time, to search the place for any such controlled substance, precursor, property or thing and to seize it.

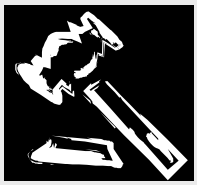
... ...

(7) A peace officer may exercise any of the powers described in subsection (1), (5) or (6) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain one.

"Although marihuana is not a "hard" drug, its production and distribution are serious offences. The public clearly has an interest in the successful prosecution of those who engage in large-scale commercial marihuana-related activity."

LEGALLY SPEAKING:

Search Warrants



"In carrying out [the analysis of the information in an ITO] it is important to keep in mind throughout the analysis that the warrant is presumed to be valid and the correct question is whether the [accused] has established that there was no basis for its authorization. This point cannot be stressed too much. The presumption means that the decision of the issuing justice must be upheld unless the applicant meets the burden of demonstrating its invalidity." – Ontario Court of Appeal Justice Juriansz in *R. v. Campbell*, 2010 ONCA 588 at para. 45.

GOOD FAITH REQUIRES AN HONESTLY HELD REASONABLE BELIEF

R. v. Caron, 2011 BCCA 56

A police officer on highway patrol duty "clocked" a vehicle on radar traveling at 165 km/h per hour in a 100 km/h zone. He activated his emergency lights and siren and pursued that vehicle. At one point the vehicle slowed to 120 km/h and crossed over a double-yellow centre line and into the on-coming lane to pass a truck. The officer followed the vehicle for approximately two kilometers before it pulled over. The accused, who was the driver and sole occupant of the vehicle, was arrested for dangerous driving. He was advised of his rights, handcuffed, and placed him in the rear of the police vehicle. The officer went back to the accused's vehicle to look for its registration. He opened the glove compartment but did not find the registration. Instead, he found a digital camera. He turned it on and scrolled through the photographs in its memory thinking that there might be photographs of the accused's speedometer showing a high rate of speed. This belief was based on his previous experience encountering people taking pictures of themselves engaged in criminal activity. However, he had not seen the accused holding a camera or reaching for the glove compartment. He also felt the accused was so focused on his driving that he did not notice the police car behind him.

After scrolling through some "family photos" on the camera, the officer came across several photographs of the accused and others with firearms. After seeing the photographs the officer's concern for his own safety was heightened because it appeared the accused had access to firearms. He was also concerned about the possibility of firearms being left inside the vehicle as it was going to be taken to a local towing company's lot. He then searched the vehicle and found a cardboard box containing $60,000 (30 bundles x $2,000) inside the hatch-back. He also found a backpack containing a loaded 9 mm semi-automatic pistol.

At trial in British Columbia Supreme Court the accused was convicted of unauthorized possession of a restricted weapon in a motor vehicle (the loaded pistol) and possession of property obtained by crime (the money). Even if the officer had a subjective basis as to why he examined the contents of the digital camera to gather evidence of driving at high speeds, it was not objectively reasonable. "It seems to me that this comes very close to the line and I am concerned that absent evidence of wide practice that persons actually photograph their speedometer while they are speeding, I think that it would be dangerous to permit that type of search to continue," said the trial judge. "It is close to the line of what might be legitimate versus indiscriminate fishing for evidence." Nonetheless, the trial judge admitted the pistol and money as evidence under s. 24(2) of the *Charter*. The evidence was non-conscriptive and would not undermine trial fairness. As well, the judge found the officer acted in good faith with an honest subjective belief that the camera may have contained photographs of the vehicle's speedometer, which, among other things, mitigated the seriousness of the *Charter* breach. The offences were very serious, the gun and cash were crucial to the Crown's case, and the exclusion of the evidence

would bring the administration of justice into disrepute.

The accused then appealed to the British Columbia Court of Appeal arguing the trial judge erred in admitting the evidence. The Crown, on the other hand, suggested the trial judge did not make a mistake in his ruling.

Good Faith & the Search

In this case the trial judge ruled that the officer was acting in good faith when he undertook his warrantless search of the digital camera even though there was no objectively reasonable prospect that evidence of dangerous driving would be located in it. The officer sincerely believed the camera's inspection might disclose evidence regarding the speedometer speed of the vehicle. However, Justice Frankel, speaking for the British Columbia Court of Appeal, held the officer was not acting in good faith, contrary to the trial judge's finding. "'Good faith' and its polar opposite, 'bad faith' (or 'flagrant' disregard), are terms of art in the s. 24(2) lexicon," he said. "The absence of bad faith does not equate to good faith, nor does the absence of good faith equate to bad faith. To fall at either end of this spectrum requires a particular mental state." Since good faith connotes an honest and reasonably held belief, if the belief is not reasonable the officer will not be acting in good faith.

In this case, the search was warrantless, purportedly undertaken under the common law power to search a vehicle incidental to arrest, and the Crown bore the burden of proving it was reasonable. Although the officer believed the camera might contain photographs of the car's speedometer, there was no evidence the officer also believed he was entitled to examine the camera pursuant to the power of search incidental to arrest. Without a finding that the officer believed he was engaged in a lawful search, he could not be said to have acted in good faith. And even if he had testified that he believed he was lawfully entitled to examine the camera for evidence of dangerous driving, such a belief would not have been objectively reasonable. The reasonable grounds standard does not apply to searches incident to arrest, but there is still a "reasonable basis" requirement. The officer did not elaborate on the circumstances of previously seeing photographs of speedometers at high rates of speed. He never saw the accused holding a camera or reaching for the glove compartment. It was only speculation that the accused used the camera to take a photograph of his speedometer and then placed the camera in the glove compartment. The officer never turned his mind to whether there was a reasonable prospect such evidence would be found in the circumstances in which the camera was discovered.

Here, the officer "either knew, or ought to have known, that before conducting a search incidental to arrest he was required to consider whether, on the specific facts of his investigation, there was a reasonable prospect that what he wished to search for would be found," Justice Frankel said in the s. 24(2) analysis. "The legal framework for searches incidental to arrest was established ten years before this case arose. It is [the officer's] failure to consider whether the examination of the camera fell within the parameters set by the Supreme Court of Canada that makes the breach here more serious than one which is the result of mere inadvertence or an error in judgment." Thus, the trial judge erred in considering good faith as a mitigating factor in his s. 24(2) analysis. The accused's appeal was allowed, the evidence was excluded, the convictions set aside, and acquittals entered.

Had the examination of the camera been lawful, the photographs the officer saw would have justified a search for firearms on the basis of safety concerns even though the accused was handcuffed and seated in the back of a police vehicle. In the photographs the accused was using a pistol in what appeared to be an unlawful manner. Although the officer did not know when or where the photographs were taken, his concern that the accused had access to firearms was legitimate and provided a reasonable basis for searching the vehicle:

> That [the accused] was restrained before his vehicle was searched did not have the effect of negating the concerns that [the officer] had for his own safety. By definition, a search incidental to arrest takes place after someone is taken into custody and has had his or her immediate ability to harm others substantially diminished. However, the opportunity for harm is not

completely eliminated as there is always a possibility that the arrestee will break free and seek to use a weapon in the immediate vicinity. A search intended to lessen that possibility falls within the valid objectives of the criminal justice system.

As well, it was legitimate for [the officer] to be concerned about a vehicle that might contain firearms being towed to a relatively insecure storage facility. If there were firearms is the vehicle, and if those firearms fell into the wrong hands, then the public would be at risk. [paras. 49-50]

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

JIBC ALUMNI COMING SOON!

Many of you will have fond – or at least vivid - memories of your formative training experiences prior to becoming a police officer. For many of you those recollections are unforgettable, but distant. We came to policing with diverse backgrounds, training and experience, but we bonded through common experiences and challenges. Many of us have developed life-long friendships and connections. In some cases as a result of assignment duties, family commitments and the like, we have drifted apart. We sincerely look forward to your support in helping us to establish an organization of a Justice Institute of British Columbia Police Alumni, not only to help people to stay connected, but also to reconnect.

Through an alumni organization we can keep everyone informed about new developments in policing, educational programs, and upcoming events. This will be an amazing opportunity to build and rekindle relationships and expand knowledge through networking. Despite the name, this is not limited to alumni of JIBC. There are many members who received training at the BC Police College and other predecessor organizations to the JIBC and we are encouraging them all to become members.

The objects of the JIBC Police Alumni are being defined but will include keeping members informed about what is happening at the JIBC, such as new developments in policing and educational programs, including the new graduate certificates in Criminal Investigation and Intelligence.

We also hope the JIBC Police Alumni will be able to access and develop the legions of outstanding untapped policing leaders and mentors who represent policing at its best. In this regard, we hope to encourage many opportunities for our alumni, such as encouraging and mentoring new police recruits, promoting educational excellence, and reaching out to our communities to support policing education and to show policing in a positive light.

A further object will be to support education and training. We hope to encourage a variety of opportunities for lifelong learning, such as a new motorcycle course and a Bachelor's degree program, to name a few. We believe that by working together in diverse ways we can foster a spirit of loyalty and pride in our association and make a positive difference in the world.

Please contact - if you are interested.

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Stay posted for further information in upcoming newsletters.