

A newsletter devoted to operational police officers in Canada.

TRUST IN POLICE SLIDES, BUT COPS STILL TOPS IN CJS

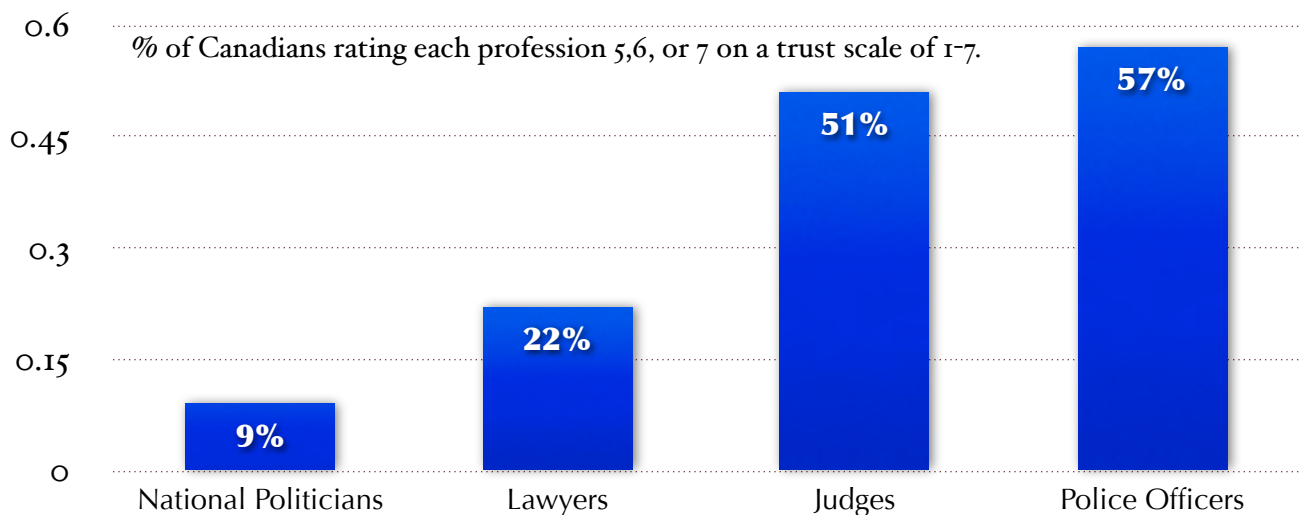
Although Canadians' trust in police has waned over the last several years, more people still trust the police than they do judges, lawyers, or law makers. In an Ipsos Reid poll released in January 2011 entitled "A Matter of Trust", the data reveals that police officers ratings in the trust survey is currently at 57% of Canadians. This is down 16 points from a rating of 73% in 2003. The trust in lawyers slid 7 points from 2003; they now sit at 22%. The trust in national politicians remained unchanged at 9% while judges had a trust rating of 51%. So, as in years past, police continue to top the trust ratings for professions involved in the criminal justice system.

Pharmacists were the most trusted profession at 79% followed by doctors (75%), airline pilots (75%), Canadian soldiers (72%), and teachers (65%). Car salespeople were the least trusted at 8% followed by national politicians (9%), union leaders (17%), local

municipal politicians (17%), chief executive officers (19%), and new home builders (19%).

In an earlier poll from December 2010, also conducted by Ipsos Reid for Postmedia News and Global National, similar results were noted. In this poll, police officers had a trust rating of 55%, judges 51%, Lawyers 31%, and national politicians 25%.

In an international survey conducted by the Gfk Group ("Gfk Trust Index 2010"), the police had a trust rating of 75% among the European countries participating. Germany and Italy had the highest trust in the police at 86% while Romania had the lowest at 54%. Judges sat at 62%, highest in Germany (83%) and lowest in Bulgaria (32%). Lawyers came in at 46%, highest in Germany (72%) and lowest in Bulgaria (31%). Finally, politicians ranked the lowest overall at 14%. The Netherlands trusted their politicians the most (32%) while Italy rated them at 7%. Overall, the fire service were most trusted at 94% followed by teachers and doctors (84%), postal workers (82%), and the military (81%).



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ONLINE SOCIAL NETWORKING COURSE

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JIBC ALUMNI COMING SOON

see page 39

JIBC ANNOUNCES TWO NEW GRADUATE CERTIFICATES

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 its most recent acquisitions which may be of interest to police.

Academic writing: an introduction.

Janet Giltrow ... [et al.].

Peterborough, ON: Broadview Press, c2009.

PE 1408 G558 2009

Between two worlds: the inner lives of children of divorce.

Elizabeth Marquardt.

New York, NY: Three Rivers Press, c2005.

HQ 777.5 M3746 2005

Canadian families: diversity, conflict and change.

[edited by] Nancy Mandell, Ann Duffy.

Toronto, ON: Nelson Education, 2010.

HQ 560 C358 2010

The conduct of public inquiries: law, policy, and practice.

Ed Ratushny.

Toronto, ON: Irwin Law, 2009.

KE 4765 R38 2009

The courage to heal: a guide for women survivors of child sexual abuse.

Ellen Bass & Laura Davis.

New York, NY: Harper, c2008.

HQ 72 U53 B37 2008

Creating a sense of presence in online teaching: how to "be there" for distance learners.

Rosemary M. Lehman, Simone C. O. Conceição.

San Francisco, CA: Jossey-Bass, 2010.

"How can faculty create a strong E presence for their online classes? This volume highlights the need for creating a presence in the online environment. The

authors explore the emotional, psychological, and social aspects from both the instructor and student perspective. It provides an instructional design framework and shows how a strong presence contributes to effective teaching and learning. Filled with illustrative examples and based on research and experience, the book contains methods, case scenarios, and activities for creating, maintaining, and evaluating presence throughout the cycle of an online course."- LB 1044.87 L439 2010

A designer's log: case studies in instructional design.

Michael Power.

Edmonton, AB: AU Press, c2009.

LB 2361 P682 2009

Evidence-based training methods: a guide for training professionals.

Ruth Colvin Clark.

Alexandria, VA: ASTD Press, c2010.

HD 8038 A1 C53 2010

The executive and the elephant: a leader's guide for building inner excellence.

Richard L. Daft.

San Francisco, CA: Jossey-Bass, c2010.

BF 637 L4 D34 2010

The experiential learning toolkit: blending practice with concepts.

Colin Beard.

London, UK; Philadelphia, PA: Kogan Page, 2010.

BF 318.5 B427 2010

Facilitating group learning: strategies for success with diverse adult learners.

George Lakey.

San Francisco, CA: Jossey-Bass, c2010.

LC 5225 L42 L35 2010

Feeding your leadership pipeline: how to develop the next generation of leaders in small to mid-sized companies.

Daniel R. Tobin.

Alexandria, VA: ASTD Press; San Francisco: Berrett-Koehler, 2010.

HD 30.4 T635 2010

Full-body flexibility.

Jay Blahnik.

Champaign, IL: Human Kinetics, c2011.

RA 781.63 B56 2011

.....
Graphics for learning: proven guidelines for planning, designing, and evaluating visuals in training material.

Ruth Colvin Clark, Chopeta Lyons.

San Francisco, CA: John Wiley, 2011.

LB 1043.5 C53 2011

.....
A guide to copyrights.

Gatineau, QC: Canadian Intellectual Property Office, [2008].

KE 2799.2 G85 2008

.....
Handbook of practical program evaluation.

Joseph S. Wholey, Harry P. Hatry, Kathryn E. Newcomer, editors.

San Francisco, CA: Jossey-Bass, c2010.

H 97 H358 2010

.....
How learning works: seven research-based principles for smart teaching.

Susan A. Ambrose ... [et al.]; foreword by Richard E. Mayer.

San Francisco, CA: Jossey-Bass, c2010.

LB 1025.3 H68 2010

.....
How to study in college.

Walter Pauk, Ross J. Q. Owens.

Boston, MA: Cengage Learning, [2010], c2011.

LB 2395 P385 2010

.....
Information literacy programs in the digital age: educating college and university students online.

compiled by Alice Daugherty and Michael F. Russo.

Chicago, IL: Association of College and Research Libraries, 2007.

ZA 3075 I538 2007

.....
Interviewing as qualitative research: a guide for researchers in education and the social sciences.

Irving Seidman.

New York, NY: Teachers College Press, c2006.

H 61.28 S45 2006

The invisible gorilla: and other ways our intuitions deceive us.

Christopher F. Chabris and Daniel J. Simons.

New York, NY: Crown, 2010.

BF 321 C43 2010

.....
Leaders make the future: ten new leadership skills for an uncertain world.

Bob Johansen.

San Francisco, CA: Berrett-Koehler Publishers, c2009.

HD 57.7 J635 2009

.....
Leadership matters.

Rick Hillier.

Toronto, ON: Harper Collins Canada, 2010.

HD 57.7 H545 2010

.....
Liespotting: proven techniques to detect deception.

Pamela Meyer.

New York, NY: St. Martin's Press, 2010.

BF 637 D42 M49 2010

.....
Looking at law: Canada's legal system.

Patrick Fitzgerald, Barry Wright, Vincent Kazmierski.

Markham, ON: LexisNexis Canada, 2010.

KE 444 F588 2010

.....
Love is letting go of fear.

Gerald G. Jampolsky ; foreword by Carlos Santana; illustrated by Jack Keeler.

Berkeley, CA: Celestial Arts, c2010.

BF 575 L8 J33 2010

.....
The minute taker's handbook.

Jane Watson.

Toronto, ON: CSAE=SCDA, c2009.

HF 5734.5 W38 2009

.....
More time for you: a powerful system to organize your work and get things done.

Rosemary Tator and Alesia Latson.

New York, NY: American Management Association, c2011.

HD 69 T54 T38 2011

Networking for people who hate networking: a field guide for introverts, the overwhelmed, and the underconnected.

Devora Zack.

San Francisco, CA: Berrett-Koehler Publishers, c2010.

HD 69 S8 Z34 2010

.....
The new social learning: a guide to transforming organizations through social media.

Tony Bingham and Marcia Conner; foreword by Daniel H. Pink.

Alexandria, VA: ASTD Press; San Francisco : Berrett-Koehler Publishers, c2010.

HQ 784 M3 B56 2010

.....
Parenting apart: how separated and divorced parents can raise happy and secure kids.

Christina McGhee.

New York, NY: Berkley Books, 2010.

HQ 759.915 M394 2010

.....
Power speak: engage, inspire, and stimulate your audience.

Dorothy Leeds.

Franklin Lakes, NJ: Career Press, c2003.

PN 4121 L44 2003

.....
Program evaluation: alternative approaches and practical guidelines.

Jody L. Fitzpatrick, James R. Sanders, Blaine R. Worthen.

Upper Saddle River, NJ: Pearson Education, c2011.

LB 2822.75 W67 2011

.....
Putting children first: proven parenting strategies for helping children thrive through divorce.

JoAnne Pedro-Carroll.

New York, NY: Avery, 2010.

HQ 777.5 P43 2010

.....
The relaxation response.

by Herbert Benson ; with Miriam Z. Klipper.

New York, NY: Avon Books, [2000].

RA 785 B48 2000

Responding to crises in the modern infrastructure: policy lessons from Y2K

Kevin F. Quigley.

New York, NY: Palgrave Macmillan, 2008.

HD 61 Q54 2008

.....
Successful onboarding: a strategy to unlock hidden value within your organization.

Mark A. Stein and Lilith Christiansen.

New York, NY: McGraw-Hill, c2010.

HF 5549.5 I53 S737 2010

.....
The systematic design of instruction.

Walter Dick, Lou Carey, James O. Carey.

Upper Saddle River, NJ: Merrill/Pearson, c2009.

LB 1028.38 D53 2009

.....
The tolerability of risk: a new framework for risk management.

edited by Frédéric Boudier, David Slavin and Ragnar E. Löfstedt.

London, UK; Sterling, VA: Earthscan, 2009.

HD 61 T65 2009

.....
Violence against women in Canada: research and policy perspectives.

Holly Johnson & Myrna Dawson.

Don Mills, ON: Oxford University Press Canada, 2011.

HV 6250.4 W65 J64 2011

.....
Visual meetings: how graphics, sticky notes, & idea mapping can transform group productivity.

David Sibbet.

Hoboken, NJ: John Wiley & Sons, c2010.

HD 66 S564 2010

.....
Wellbeing: the five essential elements.

Tom Rath, Jim Harter.

New York, NY: Gallup Press, c2010.

BF 637 S8 R37 2010

.....
Women in public administration: theory and practice.

edited by Maria J. D'Agostino, Helisse Levine.

Sudbury, MA: Jones & Bartlett Learning, c2011.

HQ 1390 D34 2011

LEGALLY SPEAKING:

GENERAL DETERRENCE



"Section 718 of the Criminal Code provides that general deterrence is one of the objectives of sentencing.

This Court has confirmed that general deterrence is of primary importance in drug trafficking cases.

... ..

The Criminal Code provides that deterrence is an objective in sentencing (s. 718(b)). It is not open to a sentencing judge to bypass that provision, and conclude that general deterrence is irrelevant or ineffective. The Crown does not have to prove that actual general deterrence will in fact result from any particular sentence in a particular case. It is also an error of principle for a trial court to discount the deterrent effect of any particular kind of punishment provided for in the Code, such as imprisonment, because he or she believes that imprisonment has not been proven effective. The deprivation of liberty by imprisonment is the most severe form of punishment available in Canada today; harsher penalties of previous times have been abolished. It is an error to eliminate imprisonment as a possible sentence because of the sentencing judge's subjective doubts about its general efficacy".- Alberta Court of Appeal in *R. v. Tran*, 2010 ABCA 317 at para. 8, 12 in sentencing an accused afresh from the starting point of three (3) years for possessing cocaine for the purpose of trafficking.

Note-able Quote

"Leadership and learning are indispensable to each other." - John F. Kennedy

GOOD FAITH BELIEF MUST BE REASONABLY HELD

R. v. Caron, 2011 BCCA 56



A highway patrol officer "clocked" a vehicle on radar traveling at 165 km/h in a 100 km/h zone. He activated his emergency lights and siren and pursued the 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 in the rear of the police vehicle. The officer went back to the accused's vehicle to look for its registration and opened the glove compartment, but did not find the documents. 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, and 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 heightened because it appeared the accused had access to firearms. He was also concerned about the possibility of firearms being left inside the vehicle when it was towed to the local towing company's lot. He 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). The judge found that, even if the officer had a subjective basis as to why he examined the contents of the digital camera for confirmatory evidence of driving at high speeds, his belief 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 judge. "It is close to the line of what might be legitimate versus indiscriminate fishing for evidence." Nonetheless, the trial judge admitted the gun 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 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 admissibility ruling.

Good Faith & the Search

Even though there was no objectively reasonable prospect that evidence of dangerous driving would be located in the camera, the trial judge ruled that the officer was acting in good faith. In his view, the officer sincerely believed that the inspection of the camera might disclose evidence regarding the speedometer speed of the vehicle. However, contrary to the trial judge's finding, Justice Frankel of

"[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."

Court of the Appeal held the officer was not acting in good faith. "'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 officer's belief is not reasonable they will not be acting in good faith.

Here, the search was warrantless. It was purportedly done under the common-law power to search a vehicle incidental to arrest. 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 cannot 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. Although the reasonable grounds standard does not apply to searches incident to arrest, 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. 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 were set aside, and acquittals were entered.

Safety Concerns

Had the examination of the camera been lawful, the Court of Appeal opined that 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 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 in 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

CELL PHONE SEARCH FOR OWNERSHIP OK

R. v. Manley, 2011 ONCA 128



Following robberies of a Mr. Sub restaurant and a music store, police received confidential information identifying the accused as a suspect in the music store robbery. A CPIC check revealed there was an outstanding warrant for him on a break and enter. They also had information he had stolen cell phones and used them with stolen access cards. The accused was arrested for the music store robbery and the outstanding arrest warrant for break and enter offence. He was frisked incidental to the arrest. Police found a concealed knife and a cell phone, as well as two GM car keys (one modified to break into cars), a hypodermic needle, handcuffs and a handcuff key, binoculars, and local garbage bag tags. The police examined the cell phone to identify its lawful owner. There was nothing on the exterior of the phone to identify its owner so it was opened. The officer pushed various scroll and other buttons in order to observe the saved data in the phone and, in the process, found a photograph of the accused holding a sawed off shotgun, which was taken the day after the music store robbery. The phone was losing power so, in order to preserve the image, it was downloaded and copied. A warrant was subsequently obtained to search the contents of the phone.

At trial the accused did not challenge the lawfulness of his arrest but argued the photo should be excluded as evidence because it was unlawful for the police to examine the phone's contents without a warrant. The subsequent warrant the police did obtain, it was argued, was tainted by the earlier warrantless search. The Ontario Superior Court of Justice, however, ruled that the search was reasonable. The judge found that the search and seizure conducted at the time of arrest was carried out for three reasons: (1) for the safety of the police and the public since the accused was suspected of committing crimes with weapons; (2) to check the ownership of items in the accused's possession; and (3) to check for evidence and to protect it from destruction. The search warrant was valid and, even if there was a *Charter* breach, the photo would have been admissible under s. 24(2). The accused was convicted by a jury of several offences related to the two retail robberies and sentenced to eight years' imprisonment.

The accused challenged the trial judge's ruling to the Ontario Court of Appeal arguing, in part, that the trial judge erred in holding that the police were entitled to search the saved data in the phone without a warrant as an incident to arrest. In his view, the only thing taken in the robbery had been cash and there was no reasonable prospect that searching the cell phone would provide evidence of the robbery. Further, he contended that even if the police had grounds to believe that the cell phone had been stolen, they had no power to search the saved data in the cell phone without a warrant. The Crown, on the other hand, suggested that the accused was also arrested for a break and enter and the police had information that he had used stolen cell phones in the past; therefore the police were entitled to conduct a cursory warrantless inspection of the cell phone, including its stored data, to ascertain ownership of the phone and determine whether it was stolen. This was a valid purpose connected to the arrest. If the phone was not the

"[I]ncident to a lawful arrest, the police have the power to search the person arrested without a warrant for the purpose of ensuring officer safety, and, if there is 'some reasonable prospect of securing evidence of the offence for which the accused is being arrested', to secure and preserve that evidence."

accused's, it could serve as evidence of a break and enter and the rightful owner could be informed that the phone had been recovered. In addition, the Crown submitted that the police were entitled to conduct warrantless searches of cell phones seized as an incident to a lawful arrest.

Justice Sharpe, authoring the opinion of the Court of Appeal, agreed, at least in part, with the Crown. He first summed the power of search incident to arrest in this way:

It is common ground that incident to a lawful arrest, the police have the power to search the person arrested without a warrant for the purpose of ensuring officer safety, and, if there is "some reasonable prospect of securing evidence of the offence for which the accused is being arrested", to secure and preserve that evidence. [para. 33]

He then accepted the Crown's first but narrow submission that the police were entitled to search the phone to establish its ownership:

The [accused] was arrested for break and enter and, when arrested, he was in possession of a number of unusual and suspicious items. The police had information from a confidential informant that in the past the [accused] had stolen cell phones. Ownership of the cell phone was relevant to the offences for which the [accused] had been arrested. In my view, this combination of circumstances provided the police with a lawful basis for conducting a cursory search of the cell phone to determine whether it had been stolen. As I can see no basis to interfere with trial judge's factual finding that the first officer came upon the photograph while conducting a search of the cell phone to determine its ownership, I would uphold the trial judge's determination that the cursory search of the cell phone was lawful.

I wish to emphasize, however that my decision rests on two points. First, that the police had a legitimate interest in determining whether the cell phone had been stolen and second, that the police did not search the stored data in the cell phone for any other purpose. According to the testimony on the voir dire that was accepted by the trial judge, the cell phone's telephone number was identified after the discovery of the photograph. A telephone number is sufficient information from which the ownership of a phone may be determined. Had the examination of the phone continued after the telephone number had been found, this would be a different case. If the telephone number had been written or inscribed on the exterior of the cell phone or visible or easily found when the phone was opened, any further search obviously could not be justified as a cursory inspection to determine ownership. Likewise, in a case where there was no reason to doubt the arrested party's ownership of the phone and no link between ownership and the offence for which the person was arrested, a search of the stored data in the phone could not be justified on the basis that the police were simply trying to determine who owned the phone. [paras. 37-38]

As for the Crown's more general proposition, that the police could just search a cell phone incident to arrest, Justice Sharpe found it "neither necessary nor desirable to attempt to provide a comprehensive definition of the powers of the police to search the stored data in cell phones seized upon arrest." However, he did make the following caution:

... I would observe it is apparent that the traditional rules defining the powers of the police to conduct a search incident to arrest have to be interpreted and applied in a manner that takes into account the facts of modern technology. ... Cell phones and other similar handheld communication devices in common use have the capacity to store vast amounts of highly sensitive personal, private and confidential information – all manner of private voice, text and e-mail communications, detailed personal contact lists, agendas, diaries and personal photographs. An open-ended power to search without a warrant all the stored data in any cell phone found in the possession of any arrested person clearly raises the spectre of a

serious and significant invasion of the Charter-protected privacy interests of arrested persons. If the police have reasonable grounds to believe that the search of a cell phone seized upon arrest would yield evidence of the offence, the prudent course is for them to obtain a warrant authorizing the search.

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

ONLY A CONNECTION OR LINK BETWEEN OFFENCE AND CRIMINAL ORGANIZATION REQUIRED

R. v. Drecic, 2011 ONCA 118



The accused was charged with trafficking in cocaine in association with a criminal organization, trafficking in GHB, and trafficking in cocaine. He was a full patch member of the Hells Angels. He pled guilty in the Ontario Superior Court of Justice except to the criminal organization charge. During his trial he was convicted. The trial judge found that the drugs were purchased by another member of the Hells Angels, who was acting as a police agent, and were for further distribution and trafficking for profit. He also found that the accused was the middle man, facilitating the agent in obtaining these drugs from a reliable source. Although the drug supplier was not himself a member of the Hells Angels, the accused introduced him to the police agent. The accused was able to use his position as a Hells Angels member to warrant the reliability of the drug supplier and the police agent to each other. The trial judge held that the accused's membership in the Hells Angels was the catalyst that brought the parties together and it played an integral role in the ensuing drug transactions. "Rules of the club ensure that when members deal with each other or third parties there will be no rip offs," said the judge. "All of these benefits were at play in the various drug transactions conducted by [the accused]".

The accused then appealed to the Ontario Court of Appeal arguing the criminal organization had to be "directly involved" in the underlying offence or play a "direct and integral role in it". But the Court of Appeal disagreed. "[T]he "in association with" requirement of s. 476.12(1) of the Code will be made out so long as there is a connection or link between the underlying offence and the criminal organization," said the Court of Appeal. "In our view, the findings upon which the trial judge concluded that the requisite link had been made out were reasonable inferences available to him on the evidence. ... Finally, no issue can be taken with the trial judge's finding that the Hells Angels Motorcycle Club is a criminal organization. The evidence in that regard is overwhelming." The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

CHARTER BREACH MINOR: EVIDENCE ADMISSIBLE

R. v. MacDuff, 2011 BCCA 2



Two employees of an energy company conducted a service check at a residence and discovered that electricity was being stolen by the occupant. The test lasted 6.2 seconds and disclosed that 19,225 watts of electricity was stolen during that brief time. They filed a police report outlining the amount of wattage they believed was being stolen. A police officer applied for a telewarrant to search the premises on the basis of the theft report from the energy company as well as other investigations he conducted. The Information to Obtain stated that the telewarrant was being applied for "because it is impracticable for the Informant to appear personally because: 'There are no JJPs available at the local courthouse today, or any time this week.'" The police executed the search warrant at the accused's residence and found a sophisticated, multiple room grow operation in the basement. There were 1,619 marihuana plants in two stages of production, valued between \$94,000 - \$141,000 per crop. The police also found a hydro bypass used to steal electricity.

At trial in British Columbia Provincial Court the officer amplified the evidence regarding the impracticability of appearing in person. He said he called the courthouse prior to starting the paperwork for the warrant to see if there was a Judicial Justice of the Peace (JJP) available. He was told that there were none available that day nor would there be any available for the rest of the week. However, the officer made no inquiries about the availability of a judge to hear the warrant. The trial judge quashed the telewarrant because s. 487.1(4) requires that the officer include a statement of the circumstances that make it impracticable for him to appear personally before a justice, which the officer failed to do. However, the trial judge admitted the evidence pursuant to s. 24(2) of the *Charter*. The accused was convicted of producing marihuana, possessing marihuana for the purpose of trafficking, and theft of electricity.

The accused appealed to the British Columbia Court of Appeal submitting the trial judge erred in admitting the evidence under s. 24(2). The Crown, on the other hand, suggested the trial judge did not err.

Justice Bennett, speaking for the Court of Appeal, upheld the admissibility of the evidence. Although the impact of the breach on the *Charter*-protected privacy interests of the accused was serious - the police searched his home - the *Charter* violation was relatively minor. "The police officer obtained a warrant from a member of the judiciary," said Justice Bennett. "He provided the JJP with all of the information he had obtained. He ensured that there was no JJP who could hear his application in person within a reasonable time frame. His only error was to fail to confirm that a judge was unavailable to hear the application, based on his (correct) understanding that judges were not to be asked to issue daytime warrants. The trial judge found no bad faith on the part of the officer. This conduct is at the minor end of the *Charter* breach spectrum." As well, the evidence seized was highly reliable and key to the prosecution, without it there was no case. These factors weighed in favour of the inclusion of evidence and the accused's appeal was dismissed.

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

UTTERANCES MORE THAN SMALL SNIPPETS OF A CONVERSATION

R. v. Yates, 2011 ABCA 43



The accused was arrested three days after a man was killed from a gunshot wound to the back of his head. The deceased's trailer was then set on fire.

The accused was taken to the police detachment where he exercised his right to speak to counsel. The next day he admitted to the investigating officers that he shot the victim and set fire to the residence. He also admitted his guilt when being fingerprinted and processed and was overheard making inculpatory statements while talking to another prisoner at the detachment. About a month later, while being transported with two other prisoners in a sheriff's van from the correctional center to the courthouse, a sheriff overheard comments made by the accused to the other prisoners. The sheriff was not paying special attention to the beginning of the conversation between the prisoners until he realized the accused was talking about the crime. The sheriff overheard the accused and recorded the following statements in his notebook within an hour after they were made:

- * "He was skidding on my sister, so I shot him in the fucking head."
- * "It was the only honourable thing to do."
- * "I got my rifle, I got an AK-47A, and I hid it the night before."
- * "I went over there the next day, when I was sober, and talked to him."
- * "I asked him why he had to be such a fucking goof."

The Alberta Court of Queen's Bench trial judge concluded that these utterances could be admitted into evidence as they were voluntary. The accused was found guilty by a jury of first degree murder. However, he appealed his conviction arguing, among other grounds, that the trial judge erred in admitting the utterances overheard in the prisoner's van as recorded by the sheriff because they were fragmented, not recorded verbatim, and incomplete in terms of context.

The Alberta Court of Appeal dismissed the accused's appeal. The statements made by the accused were more than partial thoughts. Although the sheriff did not hear the entire conversation in the prisoner van, he paid special attention once he determined the accused was speaking about his crime. The comments recorded were longer and more numerous than just a small snippet of a statement. There was context to the utterances from which the true meaning of the accused's words could be inferred.

Complete case available at www.albertacourts.ab.ca

SUPREME COURT TAKES LONGER TO DECIDE CASES

In the *"Bulletin of Proceedings: Special Edition, Statistics 2000 to 2010"* the workload of the Supreme Court of Canada was reported. In 2010 the Supreme Court heard 65 appeals, down from 72 in 2009. This was the second lowest number of appeals heard by Canada's top court in a single year during the last decade (58 appeals were heard in 2007).

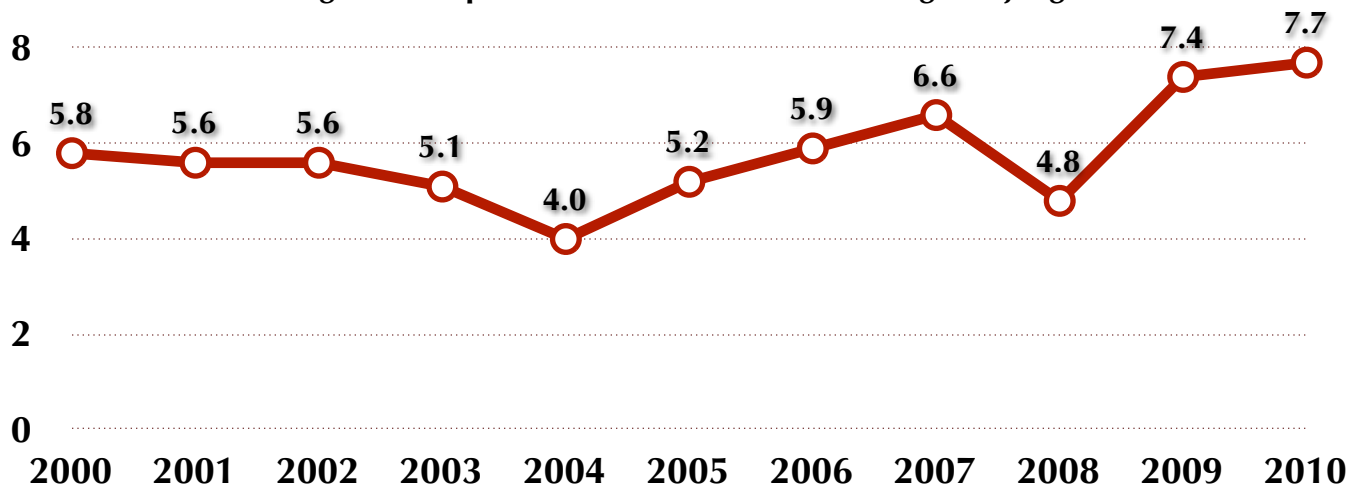
Case Life Span

The time it takes for the Court to render a judgment from the date of hearing the case is at an eleven year high. In 2010 it took 7.7 months for the Court to announce its decision after hearing arguments, up from 7.4 months in 2009. Overall it takes 18.8 months, on average, for the court to render an opinion from the time an application for leave to hear a case is filed. This too is up from the previous year (18.2 months).

Applications for Leave

Ontario was the source of most applications for leave to appeal at 139 cases. This was followed by Quebec (117), British Columbia (66), the Federal Court of Appeal (61), Alberta (29), Nova Scotia (13), New Brunswick (11), Newfoundland (9), Manitoba (8), Saskatchewan (5), Prince Edward Island (4), Nunavut (2), and Northwest Territories (1). No applications for leave came from the Yukon.

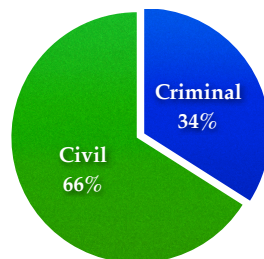
Average Time Lapses (in months) between hearing and judgment



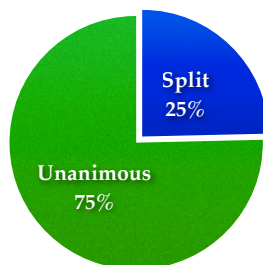
Appeals Heard

Of the 65 appeals heard in 2010, the Federal Court of Appeal was the origin of the most appeals of any source at 18, followed by British Columbia (13), Ontario (10), Alberta (10), Quebec (9), Saskatchewan (3), and Manitoba (2). No appeals originated from New Brunswick, Nova Scotia, Northwest Territories, Prince Edward Island, Yukon, Newfoundland, or Nunavut.

Of the appeals heard in 2010, 66% were civil while the remaining 34% were criminal. Eleven percent (11%) of the criminal cases dealt with *Charter* issues, down from 15% in 2009.

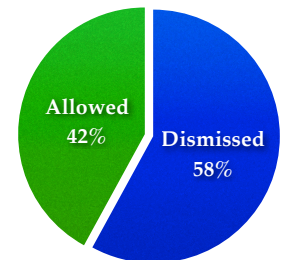


Fifteen (15) of the appeals heard in 2010 were as of right. This source of appeal includes cases where there is a dissent on a point of law in a provincial court of appeal. The remaining 50 cases had leave to appeal granted. This is where a three judge panel gives permission to the applicant for the appeal to be heard.



Appeal Judgments

There were 69 appeal judgments released in 2010, down from 70 in 2009. Only four decisions last year were delivered from the bench while the remaining 65 were delivered after being reserved. Twenty nine (29) of the appeals were allowed while 40 were dismissed. The court was more unanimous than the previous year. In 2010, 75% of the Court's decisions were unanimous. The remaining 25% were split.



Source: www.scc-csc.gc.ca

ONTARIO COURT OF APPEAL FAST FACTS: 2010

- court made up of 22 full-time judges and two supernumerary judges.
- appeals were 38% civil, 32% criminal, 23% inmate, 7% family.
- of all appeals 280 were allowed, 722 were dismissed, and 315 were disposed of otherwise. Disposed of otherwise includes appeals in which the parties have settled their matter or matters have been dismissed on consent prior to the hearing.

Source: Court of Appeal For Ontario, Annual Report 2010

POLICE BELIEVED THEY HAD GROUNDS FOR ARREST: EVIDENCE ADMITTED

R. v. Deenah, 2010 ONCA 775



A police officer was patrolling a high crime area to check the sobriety of drivers leaving bars. An officer saw a vehicle leave a restaurant at about 2:53 am. Police bulletins indicated there had been drugs, drug trafficking, and guns around this restaurant. He followed the vehicle with the intention of pulling it over and checking the driver's sobriety. The vehicle turned right at an intersection without coming to a full stop at a red light. Police pulled the vehicle over and the accused appeared to be leaning away as if to mask the odour of alcohol on his breath. The officer smelled alcohol in the vehicle but the accused said he had not been drinking. A passenger, leaning forward, said he had been drinking, not the accused. The officer was a little suspicious of the passenger's behaviour because he would answer the questions put to the accused. While scanning the inside of the vehicle with his flashlight the officer saw two small, white rock substances that were "possibly crack cocaine" on the floor mat. The officer asked the accused to step from the vehicle and come to the police car so he could determine where the smell of alcohol was coming from. The accused was arrested for possessing a controlled substance, patted down, and found to be wearing a bullet proof vest. The passenger was also arrested for possessing a controlled substance and the vehicle was searched. Police located a loaded revolver, a loaded semi-automatic handgun, 23 grams of crack cocaine, 5.3 grams of powdered cocaine, digital scales and \$345. At cells the accused was also issued a ticket for running the red light. The analysis of the two small white pieces from the floor mat revealed they did not contain crack cocaine.

"There is a difference between unfairly second-guessing the police officers, and subjecting the basis for the arrest of members of the public to a reasonable legal standard, which the police should always try to meet."

An Ontario Superior Court justice rejected the accused's argument that he had been arbitrarily detained. The accused submitted that the sobriety check and *Highway Traffic Act (HTA)* infringement were after-the-fact rationalizations to justify a racially motivated stop to investigate possible criminal activity. But the judge disagreed. She found that the police were entitled to stop the car observed leaving a bar late at night to determine if evidence existed to make a breath demand under the *Criminal Code*. Furthermore, the accused drove through a red light without stopping, an *HTA* infraction. The officer did nothing wrong in asking the accused to come back to the police car to determine whether there were grounds for a roadside test. The officer smelled alcohol and was trying to determine the source of the odour. The judge concluded that the initial stop and questioning regarding sobriety and the *HTA* infraction, as well as asking him to exit the vehicle, amounted to a lawful detention and did not breach s. 9 of the *Charter*.

The search, however, was a different matter. A search incidental to arrest requires a lawful arrest. Here, the accused argued the arrest was illegal because the police did not have reasonable grounds to make it. In determining whether reasonable grounds exists, the arresting officer must subjectively have reasonable grounds and the grounds must also be justifiable from an objective point of view. But in this case the judge was not persuaded that there was a reasonable subjective or objective basis for arresting the accused or the passenger for possessing a controlled substance. The judge stated:

As has often been written, traffic stops can be abused by the police for improper purposes. The police are generally aware that they cannot search a car without lawful authority, and a search often flows from the arrest of the driver of the motor vehicle for a criminal offence.

The power to arrest in the circumstances of traffic stops can be misused by the police in order to carry out the search of a motor vehicle that the police have no lawful right to search. The Courts must be vigilant as to the basis of the

police officer's grounds for arrest. On the other hand, I agree with those Courts that have stated that trial judges cannot in essence, "arm chair quarterback" the police officers who have to make quick decisions based on the information they have in often urgent situations. [paras. 78-79]

And further:

Certainly, taking all of the factors together, including the size and description, or lack thereof, of the two white pieces, I am not satisfied the officers had either the subjective or objective components of reasonable and probable grounds to arrest the applicants for possession of a controlled substance.

.....
In this case, I find that the police officers, with all the information available to them at that time simply did not have enough grounds to arrest the applicants for possession of a controlled substance. There is a difference between unfairly second-guessing the police officers, and subjecting the basis for the arrest of members of the public to a reasonable legal standard, which the police should always try to meet. [para. 83-85]

Since the accused was not lawfully arrested the search of the vehicle was unlawful and breached s. 8 of the *Charter*. However, the judge admitted the evidence under s. 24(2). Although she found the police acted without the required reasonable grounds to arrest, the police acted believing they had the grounds primarily based on the two small white pebble like substances seen on the floor mat of the vehicle. In her view, the police officers were mistaken about the legal effect of the evidence available to them, but they did not fabricate the evidence in order to carry out a search of the vehicle. Nor did they act in bad faith. There was no flagrant police misconduct, systemic or institutional failure, or inadequate training. Plus the judge considered that the police were patrolling a high crime area. The accused was convicted.

The accused then appealed his conviction and the pre-trial ruling to the Ontario Court of Appeal. Whether or not there was a s. 9 breach, the Court of Appeal ruled the evidence would still be admissible

under s. 24(2). The officers believed they had authority to arrest the accused. The motions judge found that the officers acted in good faith. She did not at any point reject their evidence that they believed they had the necessary grounds for arrest. Furthermore, it was open to the judge to consider the fact that these events took place in a high crime area as part of her assessment of police conduct under s. 24(2). The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's Note: Facts and motion judge's ruling taken from *R. v. Deenah & Honnigan*, [2007] O.J. No. 1298 (ONSCJ).

911 ENTRY, DETENTION, PAT DOWN & ARREST ALL LAWFUL

R. v. Mehari, 2011 ABCA 67



After being assaulted and threatened with a knife, a young woman escaped from an apartment and called 911. She told the 911 operator that she believed her female acquaintance was still in the suite against her will with a number of black males, one of whom had a knife and threatened them with it. She was concerned for her friend's safety. Two police officers interviewed the caller in person shortly after she made the 911 call. She did not know the apartment building's address but described where the building was and how to get to the unit. One of the interviewing officers was familiar with the building as described. It was known to him as a "run-down drug flop-house type ... of apartment complex". Backup officers were requested and they went upstairs using the directions provided. They could hear men's voices and music coming from the suite. The officers were discussing a course of action when a man attempted to exit the apartment. All four officers entered with their weapons drawn, having concerns for their safety and that of the woman they believed was being held inside against her will. There were five men and a woman in the apartment. All were detained to investigate the unlawful confinement complaint. A caucasian man and

woman were released while the other four men, all dark-complexioned, were ordered to lay face-down on the floor and were handcuffed, while shotguns were trained on them. The apartment was sparsely furnished and drug paraphernalia and two cellular phones were in plain sight.

"The police may briefly detain a person where they have a reasonable suspicion that the person is implicated in a recent or ongoing criminal offence."

While one of the other men was patted down, the accused was observed moving his hand from his back to his front right pocket. He repeated this gesture despite being told to stop. Believing he was in possession of a weapon, an officer patted the accused's right front pocket, feeling a hard irregular object he believed to be a controlled substance. He was arrested for possessing a controlled substance and searched. Police found 38.9 grams of crack cocaine in rock form in a clear plastic baggie in his pocket and two tightly rolled bundles of currency totalling \$1,925. He was rearrested for trafficking in a controlled substance and possessing proceeds of crime. Neither the accused's clothing nor his appearance matched that of the knife-wielding assailant described by the caller, but he was of somewhat similar height, skin colour, and age.

At trial in Alberta Provincial Court the judge ruled that the accused's *Charter* rights had not been breached. She found the warrantless search was lawful since police had reasonable grounds to believe that an occupant was in distress and entry was necessary to protect life and prevent serious injury. In her view the 911 call and the subsequent interview of the caller provided such grounds. As for the lack of an actual address, it was irrelevant. The caller had provided specific information regarding the interior layout of the apartment building which allowed the police to know the location complained of in the 911 emergency call. The 911 call also provided the authority necessary to subsequently detain and pat-down the accused. The police had reasonable grounds to detain him for investigative purposes and to suspect he may be connected to the crime alleged by the 911 caller. As for the search, it too was lawful. Although the power to detain for investigative purposes does not automatically give

police the right to search an individual, the trial judge found that officer safety made it lawful to handcuff the accused and perform a pat-down search. The arresting officer had both subjective and objective reasonable grounds to arrest the accused for possessing a controlled substance and to search his pocket in relation to the crime for which he was arrested. The evidence was admitted and the accused was convicted of possessing cocaine for the purpose of trafficking.

The accused appealed, arguing that the trial judge erred in holding that: (1) the warrantless entry and search of the apartment was lawful; (2) the officers were entitled to conduct a pat-down search; and (3) the officer had reasonable and probable grounds to arrest him. Acknowledging that these events occurred relatively quickly, the Court of Appeal noted there were four stages which culminated in the accused's arrest for the drug offence:

- I. the warrantless entry of the apartment in response to the 911 call;
- II. the investigative detention;
- III. the pat-down search; and
- IV. the pocket search.

These stages involved challenges to both ss. 8 (unreasonable search and seizure) and 9 (arbitrary detention) of the *Charter*.

Stage I: Warrantless Apartment Entry

In certain limited circumstances the police may enter a home without a warrant, such as when police are responding to a 911 call. In such cases, "the importance of the police duty to protect life warrants and justifies a forced entry into a dwelling in order to ascertain the health and safety of a 911 caller. The public interest in maintaining an effective emergency response system is obvious and significant enough to merit some intrusion on a resident's privacy interest. However, ... the intrusion must be limited to the protection of life and safety. The police have authority to investigate the 911 call and, in particular, to locate the caller and determine his or her reasons for making the call and provide

such assistance as may be required. The police authority for being on private property in response to a 911 call ends there. They do not have further permission to search premises or otherwise intrude on a resident's privacy or property. [T]he interference must be necessary for carrying out the police duty and it must be reasonable. A reasonable interference in circumstances such as an unknown trouble call would be to locate the 911 caller in the home. If this can be done without entering the home with force, obviously such a course of action is mandated. Each case will be considered in its own context, keeping in mind all of the surrounding circumstances." (citing *R. v. Godoy*)

So even though this case dealt not with the caller's safety, but that of her friend, a higher threshold need not be placed upon the police before they act. "The decision to enter the premises ought not to be based upon the location of the caller," said the Court of Appeal. "Rather, it should be based on the reasonableness of the decision to enter the premises assessed against all of the circumstances, notably the extent to which interference with individual liberties is necessary to perform the officer's duty, the liberty interfered with and the nature and extent of the interference." It was not necessary for the officer to have taken the caller to the neighbourhood and confirm the apartment building. The caller had given specific information about the location of the apartment within the building and a description of the layout of the building which enabled an officer to identify the building and the apartment as one with which he was familiar. Nor did anything turn on the fact the officers spent time in the hallway outside the apartment. "The officers were dealing with a complaint of a hostage situation where the caller had indicated that there were a number of men in the apartment, one of whom was armed with a knife," said the Court of Appeal. "The decision to await backup was reasonable and the entry without

backup was only prompted by one of the men leaving the apartment."

Stage II: Investigative Detention

"The police may briefly detain a person where they have a reasonable suspicion that the person is implicated in a recent or ongoing criminal offence," said the Court. Citing *Mann*, "police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary." The trial judge found that there were reasonable grounds to suspect that the accused may have been connected with the crime reported by the 911 caller. Even though his clothing did not match those described by the caller, there were valid reasons for the police suspicion: the accused had similar skin colour and was

approximately the same age as the man described by the caller; the reported crime involved stolen drugs; and the apartment was littered with drug paraphernalia. The initial detention was lawful, as was the accused's continued detention through and including the search. The purpose of the officers' warrantless entry into the apartment was to investigate the confinement of a hostage. This would include the period of time during which the police were confirming the identities of the detainees in order to determine whether the knife-wielding suspect was in the apartment.

Stage III: Pat-down Search

Where a person has been lawfully detained, a police officer may engage in a protective pat-down search of the individual. But unlike the search power incidental to arrest, the power to search incidental to an investigative detention is very narrow. "It arises from the general duty of the police to protect life,"

"[A search incidental to an investigative detention] arises from the general duty of the police to protect life. It does not exist as a matter of course. The officer must believe on reasonable grounds that his safety or the safety of others is at risk."

said the Court. "It does not exist as a matter of course. The officer must believe on reasonable grounds that his safety or the safety of others is at risk." Here, the pat-down search did not go beyond the scope of what was authorized. The trial judge was satisfied that the pat-down search was conducted for officer safety, even though the accused was face down and handcuffed behind his back. The officer was concerned that the accused was trying to reach for something in his pocket that might be a weapon.

Stage IV: Reasonable Grounds for Arrest

The police officer was acting on more than merely a hunch or intuition that what he felt in the accused's pocket was drugs. Reasonable grounds for an arrest "is based not only upon a police officer's subjective belief, but also in light of what a reasonable person in the position of the officer would conclude." In this

"[Reasonable grounds for an arrest] is based not only upon a police officer's subjective belief, but also in light of what a reasonable person in the position of the officer would conclude."

case, the officer had previous experience in conducting pat-down searches and was familiar with the tactile sensation of touching keys, wallets, money, cell phones and controlled drugs. There were also a number of objective factors including that the 911 call had described a dispute over missing drugs, the apartment was littered with drug paraphernalia and the accused kept trying to get at something in

his pocket. The trial judge applied the proper legal test. She correctly assessed both the subjective and objective elements of reasonable grounds.

Complete case available at www.albertacourts.ab.ca

www.10-8.ca

Heroes & Rescue Award winners Gala 2010



The JIBC Foundation Gala on December 1, 2010 at the Hotel Vancouver.

Agencies involved in 2010 Olympic Security

- Abbotsford Police Department
- Akwesasne Mohawk Police Service
- Alberta Sheriffs Service
- Barrie Police Service
- BC Conservation Officer Service
- Belleville Police Service
- Brandon Police Service
- Bridgewater Police
- British Columbia Sheriffs Service
- Bromont Police Service
- Calgary Police Service
- Camrose Police Service
- Canadian Forces
- Cape Breton Regional Police
- Central Saanich Police Service
- Charlottetown Police Department
- Chatham-Kent Police Service
- Cornwall Community Police Service
- Corps of Commissionaires
- Dakota Ojibway Police Service
- Delta Police
- Deux-Montagnes Police Service
- Dryden Police Service
- Durham Police Service
- Edmonton Police Service
- Estevan Police Service
- Fredericton City Police Force
- Gananoque Police Service
- Granby Police Service
- Greater Sudbury Police Service
- Greater Vancouver South Coast Transit Authority Police Service
- Guelph Police Service
- Halifax Regional Police
- Halton Regional Police Service
- Hamilton Police Service
- Hanover Police Service
- Kawartha Lakes Police Service
- Kingstons Police Service
- Lac Seul Police Service
- Lacombe Police Service
- LaSalle Police Service
- Laval Police Service
- Lethbridge Police Service
- London Metropolitan Police Service
- London Police Service
- Longueuil Police Service
- Medicine Hat Police Service
- Mont-Tremblant Police Service
- Moose Jaw Police Service
- Morden Police Service
- Nelson Police Department
- New Glasgow Police
- New Westminster Police Service
- Niagara Parks Police Service
- Niagara Police Service
- Nishnawbe-Aski Police Service
- North Bay Police Service
- Oak Bay Police Department
- Ontario Provincial Police
- Ottawa Police Service
- Owen Sound Police Service
- Oxford Police Service
- Peel Regional Police Service
- Perth Police Service
- Peterborough-Lakefield Community Police Service
- Police de Roussillon
- Port Hope Police Service
- Port Moody Police Department
- Prince Albert Police Service
- Rama Police Service
- RCMP
- Regina Police Service
- Riviere-du-Loup Police Service
- Rothesay Regional Police Force
- Saanich Police Department
- Saint John City Police Force
- Saint-Georges Police Service
- Saint-Jean-sur-Richelieu Police Service
- Sarnia Police Service
- Saskatoon Police Service
- Saugeen Shores Police Service
- Sault Ste. Marie Police Service
- Service de police de la ville de Montreal
- Shelburne Police Service
- Sherbrooke Police Service
- South Simcoe Police Service
- St Thomas Police Service
- St-Eustache Police Service
- Ste-Marie Police Service
- Stirling-Rawdon Police Services
- Stratford Police Service
- Strathroy-Caradoc Police Service
- Taber Police Service
- Therese-de-Blainville Police Service
- Thetford Mines Police Service
- Thunder Bay Police Service
- Timmins Police Service
- Toronto Police Service
- Treaty Three Police Service
- Trenton Police Department
- Trois-Rivieres Police Service
- Truro Police
- United Chiefs and Council of Manitoulin Anishnaabe Police Service
- Vancouver Police Department
- Victoria City Police Department
- Ville De Quebec Police Services
- Ville de Saguenay Police Service
- Waterloo Regional Police Service
- West Grey Police Service
- West Nipissing Police Service
- West Vancouver Police Department
- Weyburn Police Service
- Windsor Police Service
- Wingham Police Service
- Winkler Police Service
- Winnipeg Police Service
- York Regional Police Service

PURPOSIVE APPROACH USED IN CARTRIDGE MAGAZINE INTERPRETATION

R. v. Cancade, 2011 BCCA 105



The accused ordered seven magazine casings from a U.S. mail order supplier for delivery to a Canadian mailing address. When he attempted to pick them up he was arrested. The magazine casings, sometimes referred to as shells or containers, had a 30-round capacity but did not have an internal spring, a bottom plate, or a follower plate, all parts that would be needed to be installed in order to make the casings functional as magazines. The accused, knowledgeable in weapons, intended to make alterations to the casings so they would comply with Canadian law, which requires a casing only have a maximum five (5) round capacity.

At trial in British Columbia Provincial Court the accused argued the casings were only components which could become either prohibited or lawful devices. Since the casings were simply the outside of a magazine, he submitted the objects seized were not operable and did not fall within the definition of a cartridge magazine. The Crown, on the other hand, suggested that the items as imported met the definition of a prohibited device, were capable of becoming operable with the addition of readily available parts, and had not been altered before importation to comply with the regulations. The trial judge ruled that the imported items fell within the definition of cartridge magazine contained in s. 84 of the *Criminal Code*. In her view, the definition of cartridge magazine included the shell, or container, though not completely assembled into a functional magazine. "The fact that these casings were not immediately capable of feeding ammunition into a firing chamber without the addition of several parts is immaterial," she said.

"The modification required to make these shells functional was, by all accounts, simply the addition of three readily available and easily installed parts." Convictions of importing and possessing a prohibited device followed.

The accused then appealed, again submitting that the casings were not prohibited under s. 84. He argued for a strict interpretive approach to the legislation. In his view, an object which has the future capacity with alternation and no present capacity to feed ammunition into the firing chamber of a firearm was not a "cartridge magazine" in law. He submitted that by comparing the French and English versions of the relevant weapons legislation it was clear that the verb used in the French version was present tense, meaning the magazine needed present capacity. He suggested the trial judge erred when she found the word "may" in the English version spoke not only to a present capacity but also a future capacity. The Crown, however, contended that the French version of the definition could encompass a future ability of the device to be rendered easily serviceable to feed bullets into a firearm. In the Crown's view, a purposive approach to construing the legislation was needed, taking into account the intent of Parliament to keep dangerous high capacity weapons out of public circulation.

"[A] purposive approach to this legislative provision is the proper one to be adopted here ... in construing this legislation having regard to the intention of Parliament to severely restrict the availability of high capacity weapons and their appurtenances."

Justice Hall, writing for the unanimous British Columbia Court of Appeal, rejected the accused's interpretive approach which would have supported a strict construction of the relevant provisions. Instead, he adopted a purposive approach to the legislation. "I consider a purposive approach to this legislative provision is the proper one to be adopted here ... in construing this legislation having regard to the intention of Parliament to severely restrict the availability of high capacity weapons and their appurtenances," said

Justice Hall. The trial judge did not err in finding the accused was in possession of a prohibited cartridge magazine and guilty of ss. 91(2), 92(2) and 104(1)(a) offences under the *Criminal Code*. The accused's appeal was dismissed.

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

CROSS-EXAMINATION PERMITTED TO ASSIST IN ASSESSING BASIS FOR WARRANT

R. v. Vi, 2010 BCCA 496



The police obtained a search warrant for a home and found a marihuana grow operation. In British Columbia Provincial Court the accused sought to attack the validity of the warrant

but his application to cross-examine the police officer who swore the Information to Obtain (ITO) before a judicial justice of the peace (JJP) was dismissed. The trial judge said that permission to cross-examine the informant would be granted if he was satisfied that it was necessary to enable the accused to make full answer and defence. Although the judge accepted that cross-examination would likely disclose that there was a good deal of information known to the informant that he did not disclose in the ITO, the judge opined that "it is not incumbent on an informant to put down everything he found or did not find, or pursued or did not pursue, in the course of his investigation. He need only provide facts which in total will support the issuance of the warrant, and the issuing authority (here the [JJP]) is entitled to rely on the accuracy of those facts." Since there was nothing to indicate that the informant, a police officer with 25 years of police experience, would abandon or recant his averments in the ITO, the application to cross examine was denied. The accused was convicted of producing marihuana and possessing it for the purposes of trafficking.

On appeal to the British Columbia Court of Appeal, the accused's convictions were set aside and a new trial was ordered. Justice Donald, delivering the unanimous Court of Appeal judgment, concluded the trial judge used the wrong test. "If it were necessary to demonstrate that cross-examination will cause a deponent to concede he did not have reasonable grounds that an offence has occurred, a practically impossible task, then there would never be an opportunity to cross-examine on the information to obtain," he said. "All the defence must show is a reasonable likelihood that it will assist the court in assessing the basis of the warrant."

In this case, the accused wanted to expose weaknesses in the ITO by demonstrating that the officer did not make full and frank disclosure or his observations did not support reasonable grounds. But he was prevented from doing so because the trial judge held that a informant need only put down enough to support the warrant, which, along with the "recantation" test, found no support in law.

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

ALTERNATIVE REASONING JUSTIFIES ADMISSION

R. v. Murray, 2011 ONCA 174



It is not unusual for courts to use alternative reasoning in concluding that even though the police violated a person's *Charter* rights the evidence should nonetheless be admissible. A recent Ontario Court of Appeal decision provides an example of how courts use this approach. In this particular case the accused was appealing his conviction. He was arguing that his arrest was unlawful and therefore the drugs police seized should have been excluded as evidence against him:

Assuming, without deciding, that the arrest of the [accused] in the circumstances was unlawful, given the knowledge the police officers had, they were fully justified in taking control of the [accused] and taking steps to ensure their safety as part of a lawful investigative detention. In this context, the police would have been entitled to conduct a protective pat-down search of the [accused]. Had this been done, the officers would inevitably have discovered a digital scale in the [accused's] left pants pocket. They would also have felt a large bulge, soft in texture, in his right pants pocket. Further investigation would have revealed that the [accused] had eight prior trafficking and/or possession convictions. In combination, this would have afforded the police ample reasonable grounds to arrest and search the [accused], at which point the drugs in his right hand pocket would have been discovered.

Thus, even if the police lacked reasonable grounds to arrest the [accused] when and as they did, he would have been lawfully arrested in any event and the drugs seized. Consequently, the impact on the [accused's] Charter rights is minimal. Given that there is no finding that the police deliberately or flagrantly breached the [accused's] Charter rights and having regard to society's interest in an adjudication on the merits, the evidence in our view would have been admitted. [paras. 1-2]

The accused's appeal was dismissed.

Complete case available at www.courts.on.ca

JOINT SENTENCING SUBMISSION REJECTED

R. v. Thow, 2010 BCCA 538



After pleading guilty to 20 counts of fraud over \$5,000 in British Columbia Provincial Court, the accused was sentenced to nine years imprisonment on each of five counts and seven years on the remaining 15 counts with all the sentences to be served concurrently, less time spent in custody. The total amount of the frauds was more than \$10 million. The nine year sentences were more than the seven years put forth in a joint submission of counsel. So the accused appealed.

Justice Low, delivering the opinion of the British Columbia Court of Appeal, disagreed that the judge erred by imposing a sentence greater than the joint submission. "It is well understood that a sentencing judge is not bound to follow a joint submission as to the appropriate sentence to be imposed but the judge should give appropriate weight to such a submission," said Justice Low. "The court has an overriding discretion and must impose a fit sentence." In this case, the joint submission was presented in Provincial Court on the basis that the maximum sentence on each count of fraud was ten years. However, the maximum sentence for the five counts drawing the nine year sentence had been raised to 14 years when parliament amended the *Criminal Code*. Thus, there was a legal flaw in the joint submission and, "as a matter of law, the

sentencing judge could not be bound by the legal fiction included in the joint submission that the maximum was ten years." Nor was the sentencing judge required to invite further submissions when she determined that the maximum was higher for the five counts than submitted by counsel. "There was nothing that could have been said by counsel," said Justice Low. "The law had changed, the maximum penalty had been increased and the court had to give effect to the will of Parliament." The accused's appeal was dismissed.

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

s. 150.1(4) CC: 'ALL' REASONABLE STEPS MUST BE TAKEN

R. v. Mastel, 2011 SKCA 16



The accused, a 41 year old male, met the complainant, a young girl, when she was 13 years of age. Over the course of about two years they had numerous conversations with each other. When the accused was 43 he met the then 15 year old, grade 10 complainant at his home one evening. She drank some coolers he provided and the two ended up kissing. She then performed oral sex on him which was followed by intercourse. The accused was subsequently charged with sexual assault and sexual touching of a person under the age of 16 contrary to the *Criminal Code*.

At trial in Saskatchewan Provincial Court the judge found the accused had an honest belief the complainant was 16 years of age or older. The judge also found that this was a case in which no further inquiries were necessary to determine the age of the complainant even with the significant discrepancy in their ages.

The Crown appealed the accused's acquittal arguing the trial judge erred in law in his application of s. 150.1(4) of the *Criminal Code* and that the accused was required to take positive steps to ascertain the age of a potential sexual partner. Here, the Crown submitted that that accused took no steps and was willfully blind to the fact that the complainant was underage.

Justice Lane, authoring the decision for the Saskatchewan Court of Appeal, agreed with the Crown that the trial judge erred in law and misdirected himself as to the proper legal test under s. 150.1(4). In a prosecution involving s. 150.1(4) the Crown is required to prove the accused failed to take "all reasonable steps to ascertain the age of the complainant." The word "all" is significant. Here, the evidence failed to establish the accused took "all reasonable steps to ascertain the age of the complainant." As Justice Lane noted, the accused took no steps:

The requirement the accused take all reasonable steps to ascertain the age of the complainant was added to the Criminal Code to test "the foundation of an honest belief".

The requirement the accused take all reasonable steps is "more than a casual requirement. There must be an earnest inquiry or some other compelling factor that obviates the need for an inquiry"

In this case, the evidence cannot lead to the conclusion the [accused] took all reasonable steps to ascertain the age of the complainant or that, in the circumstances, no steps were necessary. The [Crown] established the [accused] failed to take any steps to determine the age of the complainant and, on the evidence, it was palpable and overriding error for the trial judge to conclude that, in these circumstances, no steps were necessary. The trial judge misdirected himself as to the interpretation and application of s. 150.1(4). [references omitted, paras. 20-22]

The Crown's appeal was allowed, the accused's acquittal was set aside, a conviction was entered, and the matter was sent back to the trial judge for sentencing.

Complete case available at www.canlii.org

Note-able Quote

"Do not follow where the path may lead. Go instead where there is no path and leave a trail." - Ralph Waldo Emerson

BY THE BOOK:

Mistake of Age

s. 150.1(4) Criminal Code



It is not a defence to a charge under section 151 [sexual interference] or 152 [invitation to sexual touching], subsection 160(3) [bestiality in the presence of a child] or 173(2) [exposure], or section 271 [sexual assault], 272 [sexual assault with a weapon/cause bodily harm] or 273 [aggravated sexual assault] that the accused believed that the complainant was 16 years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

SUBPOENA REQUIRES WITNESS TO ATTEND & TO GIVE EVIDENCE

R. v. Abdullah & Amyotte, 2010 MBCA 79



In 2005 an innocent bystander was shot and killed in a gang-related shooting. Abdullah and Amyotte each gave a videotaped statement to the police identifying the shooters. The shooters were charged with murder and other offences. As anticipated material witnesses, Abdullah and Amyotte were each served with a subpoena to attend to give evidence. But they refused to be sworn or affirmed and did not testify. The presiding judge at the murder trial explained to each of the accused that they could be liable for contempt by refusing to be sworn or affirmed, but he did not cite them for contempt of court, nor were they charged with contempt for refusing to testify. However, each was subsequently charged with attempting to obstruct justice under s. 139(2) of the *Criminal Code* by refusing to testify and disobeying

a court order ("a subpoena that directed him to attend and give evidence") under 127(1).

At trial in Manitoba Provincial Court they were acquitted. Although satisfied the Crown had proven the *actus reus* for the offence of obstructing justice, the judge had a reasonable doubt as to whether they had the necessary intention to attempt to obstruct justice. They both stated that their earlier videotaped statements were false and they did not want to perpetuate the lies by testifying at the murder trial. On the charge of disobeying a court order the judge was of the view that a subpoena issued under the *Criminal Code* only required the recipient to attend court; it did not require they testify. "Although a subpoena is on its face a lawful order of the court, I am not satisfied that it actually directs a witness to testify," she said. "An examination of the wording of the sections appears to suggest that a subpoena is merely a court order that procures attendance for the purpose of testifying. It does not appear to specifically order a person to testify." Further, the trial judge also was of the view that the Crown had not proven beyond a reasonable doubt that the accuseds had refused to testify. "The wording of the particular offence ... required ... proof of an actual refusal to testify as opposed to a simple lack of testimony," she said. The Crown appealed the trial judge's ruling to the Manitoba Court of Appeal.

Attempt to Obstruct Justice

If a person does not fulfill their duty to testify they can be cited or charged for contempt of court. Although a finding of contempt followed by sentencing is the usual outcome, it is not the only consequence. "A person who is obliged to testify, but refuses to be sworn or affirmed to give evidence, can also be charged with obstruction of justice pursuant to s. 139(2) of the Code," said Justice Hamilton, authoring the unanimous appeal judgment. "In such event, the Crown must prove beyond a reasonable doubt the elements of the offence (the *actus reus* and the *mens rea*). The Court of Appeal concluded that the trial judge erred when she found the Crown had not proven beyond a reasonable doubt that the accuseds had the necessary intent to attempt to obstruct justice by refusing to be sworn or affirmed to testify:

DUTY TO TESTIFY

"A person has a general duty to testify when called upon to do so, except in clearly defined cases (as for example, spousal non-compellability). ... This duty is owed not just to the courts, but to society as a whole, and is essential to the proper administration of justice." [at para. 34] *"The duty to testify has no discretion attached to it."* [at para. 58] - *R. v. Abdullah & Amyotte*, 2010 MBCA 79.

Being a specific intent offence, the accused must not only intend to act in a way that tends to obstruct, pervert or defeat the course of justice, but he must specifically intend to obstruct, pervert or defeat the course of justice by his acts. What this means is that the acts in question must have been done with the purpose of perverting or obstructing the course of justice or with knowledge or awareness that the acts in question would or might lead to a perversion or obstruction of justice.

Intention is not to be confused with motive. Motive is the reason why someone does something. It is possible to have a specific intention for doing an act that is different from the motive for that same act. If a person robs a bank to pay for medical treatment, the intention would be to commit the offence of robbery, while the payment of the medical expenses would be the motive. Motive is not an element that the Crown must prove, so it is important to differentiate between the required intention, which forms a part of the offence that the Crown must prove, and motive, which does not. In this case, the accused stated that they did not want to testify because of safety concerns for their families and because they did not want to be branded as rats within their gang. These are both clearly motives. The accused also offered, as a reason for not testifying, that they did not want to lie and that the videotaped statements were false. ...

Intention should also not be confused with desiring or wanting a particular outcome. A person can intend a particular outcome, in the sense that he or she knows or foresees it, even if he or she does not want or desire that it occur. [references omitted, paras. 39-41]

Here, the refusal to testify due of the untruthfulness of their videotaped statements made to police might have explained the reason or motive for not testifying, but it could not have raised a reasonable doubt about the intent to attempt to obstruct justice. Justice Hamilton continued:

Abdullah and Amyotte were not charged with wilfully attempting to obstruct justice for refusing to testify about a truthful videotaped statement. They were charged with wilfully attempting to obstruct justice for refusing to testify. Simply put, the truthfulness or falsity of the videotaped statements was irrelevant to these charges. Even if the videotaped statements had been put into evidence before the trial judge and she was able to determine that the statements were indeed false, Abdullah and Amyotte would not have been relieved from fulfilling their duty as witnesses and giving truthful testimony.

The failure or refusal of an accused to testify because he does not want to lie on the stand by “standing by” an earlier false statement given to the police is simply not capable, in law, of raising a reasonable doubt about his or her specific intent to wilfully obstruct the course of justice. A witness in a trial is put on the stand to tell the truth, not to perpetuate a lie or to “stand by” earlier lies. A person cannot refuse to be sworn or affirmed to give testimony for the purpose of not perpetuating a lie without also intending to obstruct the course of justice. In doing so, the clear inference is that the person intended or knew that his acts would tend to obstruct the course of justice, whatever the stated motive or desired outcome. [paras. 56-57]

And further:

Even if Abdullah and Amyotte honestly believed that they were required to testify at the [murder] trial in a manner consistent with their earlier videotaped statements, and therefore did not testify in order to prevent what they contend would have been an injustice, such a misunderstanding would be characterized as a mistake of law (and not a mistake of fact) and would provide no defence. Ignorance of the law is no excuse for the commission of a crime. See s. 19 of the Code. More specifically, ignorance of the law will not afford a defence to a charge

BY THE BOOK:

Obstructing Justice

s. 139(2) Criminal Code



Every one who wilfully attempts in any manner ... to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Disobeying a Court Order

s. 127(1) Criminal Code

Every one who, without lawful excuse, disobeys a lawful order made by a court of justice ... is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding two years; ...

of wilfully attempting to obstruct the course of justice. [reference omitted, para. 59]

The Court of Appeal set aside the acquittals and entered convictions for attempting to obstruct justice.

Disobeying a Court Order

Subpoenas were served on both Abdullah and Amyotte pursuant to the *Criminal Code*. The subpoenas commanded them to appear “to give evidence”. The Court of Appeal found the trial judge erred in holding that a subpoena only compels a witness to attend court, but does not compel the witness to testify. A subpoena has a dual purpose. It requires the witness “to attend” and “to give evidence.”

As for the trial judge distinguishing between not testifying and refusing to testify, the Court of Appeal also concluded that she erred in this respect. “Given

that a subpoena requires a witness to both attend and testify and that a subpoena is an order of the court, a person who has been subpoenaed and who declines to take an oath or affirmation and declines to testify does so in disobedience to a court order," said Justice Hamilton. She continued:

Thus, by refusing to take an oath or affirmation, Abdullah and Amyotte did not testify or "give evidence" and thereby disobeyed the subpoena. The actus reus of the offence was complete. No specific "refusal" to testify is required at law to found the essential elements of the offence of disobeying a court order, which is a general intent offence. The court order here was the subpoena that directed the accused to "attend to give evidence." All the Crown was required to prove with respect to each accused was that he knew that there was a court order requiring him to give evidence and that he voluntarily did not give evidence. The evidence, accepted by the trial judge, was that Abdullah and Amyotte had been served with subpoenas which required them to attend to give evidence. Both attended, but declined to be sworn or affirmed, thereby declining to give testimony. The offence was complete here as soon as they declined to be sworn or affirmed to testify. [para. 82]

The accuseds' acquittals for disobeying a court order were also set aside and verdicts of guilty were imposed. However, both the obstruct justice offence and the disobey court order offence stemmed from the same conduct and were comprised of substantially the same elements. As a result, the disobey a court order convictions were stayed pursuant to the Kienapple principle.

Complete case available at www.canlii.org

Side Bar

"Other Mode of Proceeding"

The Manitoba Court of Appeal also ruled that the charge of attempting to obstruct justice did not fall within the proviso under s. 127(1) of the *Criminal Code* as an "other mode of proceeding ... expressly provided by law." Therefore, a charge under s. 127(1) was available and a conviction could be entered.

While the charge of attempting to obstruct justice can be another mode of proceeding to address the same conduct as the charge of disobeying a court order, it is not an "other" Code offence that "expressly provides" another punishment or proceeding for "disobeying a court order." Rather, it expressly provides a punishment or proceeding for attempting to obstruct justice, an offence that contemplates many different types of conduct. Thus, ... s. 139(2) does not fall within the meaning of the proviso in s. 127(1) and the Crown was entitled to prosecute the accused under both ss. 139(2) and 127(1). [para. 97]

However, the Court noted that had Abdullah or Amyotte failed to attend court, rather than refused to testify, as required by the subpoena, the proviso would seem to apply. Section 708 of the *Criminal Code* states that "a person who, being required by law to attend or remain in attendance for the purpose of giving evidence, fails, without lawful excuse, to attend or remain in attendance accordingly is guilty of contempt of court." A person can be fined up to \$100 and/or be imprisoned for up to 90 days. *R. v. Abdullah & Amyotte*, 2010 MBCA 79

LEARNING LEGAL LINGO: Kienapple Principle

"[F]or the Kienapple rule to apply: there must be both a factual and legal nexus between the several charges. Multiple convictions are only precluded under the Kienapple principle if they arise from the same "cause", "matter", or "delict", and if there is sufficient proximity between the offences charged. This requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element contained in the offence for which a conviction is sought to be precluded by the Kienapple principle." — *R. v. Prince*, [1986] 2 S.C.R. 480

ELIMINATION RATE & PLATEAU: ASSERTIONS OF SCIENTIFIC KNOWLEDGE

R. v. Paszczenko; R. v. Lima, 2010 ONCA 615



Paszczenko was arrested after police attended a motor vehicle accident involving a rear-end collision. He displayed the usual symptoms of drinking – a strong smell of alcohol; unsteadiness on his feet; bloodshot and glassy eyes; and slurred speech. He provided two breath samples registering 125mg% and 122mg%. Both readings were truncated (read down) to 120mg%. Since both samples were not taken within two hours of the offence the Crown was not entitled to rely upon the presumption set out in s. 258(1)(c) of the *Criminal Code*. Section 258(1)(c) provides that the results of breath tests are proof of the concentration of alcohol in an accused's blood at the time of the offence. Instead, the Crown tendered an expert's toxicology report that projected the accused's blood alcohol content (BAC) to have been between 130mg % and 180mg% at the relevant time.

At trial in the Ontario Court of Justice the accused's argument that the "rate of elimination" and the "plateau" assumptions had not been proven was rejected. The judge applied the best evidence rule to the expert's report and accepted the calculations set out in it. The accused was convicted of over 80mg%. On appeal by the accused to the Ontario Superior Court of Justice his conviction was set aside. The appeal judge concluded that there was no evidentiary basis upon which the trial judge could accept and rely upon the plateau assumption.

Lima failed an approved screening device test. He also exhibited common indicia of impairment. There was an odour of alcohol on his breath, his eyes were glassy, and his speech slightly slurred. He was taken to a police station where he provided two samples of his breath registering readings of 118mg% and 103mg%, truncated to 110mg% and 100mg%. The tests were administered more than two hours after the occurrence because a Portuguese language duty counsel lawyer was needed. The Crown could not rely on the s. 258(1)(c) presumption so an expert's

toxicology report was filed which projected a BAC of between 110mg% and 160mg% at the time of the incident.

At trial in the Ontario Court of Justice the judge concluded that the Crown had proven there was no bolus or post-incident drinking and that the elimination rate and plateau assumptions were so widely used and acknowledged in the toxicologist's area of expertise that there was no need to lead evidence to support them. The accused was convicted of over 80mg%. On appeal by the accused to the Ontario Superior Court his conviction was upheld.

Issue

Both of these cases were appealed to the Ontario Court of Appeal. In each case the toxicology experts relied on four assumptions in their reports when calculating the BAC's of each accused. These assumptions were; (1) **no bolus drinking**, (2) **no post-incident drinking**, (3) **elimination rate**, and (4) **plateau**. In Lima the accused attacked the proof required to establish the "no bolus drinking" assumption (proof of the "plateau" and the "elimination rate" assumptions were also alive), while the Crown appeal in Paszczenko centred on proof of the "plateau" and the "elimination rate" assumptions.

The Crown bears the onus to prove the facts underlying an expert's report, including the assumptions upon which the expert relies. But how is Crown required to prove these assumptions? Put another way, in what manner is the Crown required to prove the facts underlying the four assumptions used in expert toxicology reports for over 80mg% cases when the Crown is precluded from relying upon the presumption contained in s. 258(1)(c)? That was the question the Ontario Court of Appeal was tasked with deciding. The results of these cases are summarized in the following evidential grid (at p. 28). As a result, the Crown's appeal in Paszczenko was allowed, the order for a new trial was set aside, and his conviction was restored. With Lima, his appeal was dismissed and his conviction upheld.

Complete case available at www.ontariocourts.on.ca

OVER 80 mg% STANDARD ASSUMPTIONS EVIDENTIARY GRID		
Assumption	Description	Proof
No bolus drinking	Bolus drinking generally describes the consumption of large quantities of alcohol immediately or shortly before driving. In such cases, a driver's BAC may have been below 80mg% at the time of driving/care or control but still register an over 80mg% in a read-back calculation done later because the BAC was still rising at the time of the incident. Thus, no bolus drinking means there was no rapid consumption of large quantities of alcoholic beverages shortly prior to the incident.	<p>Burden on Crown to prove by case specific evidence (foundational facts).</p> <p>Crown must establish that an accused has not engaged in bolus drinking. A trier of fact (judge or jury) may rely on a common sense inference that people do not normally ingest large amounts of alcohol just prior to, or while, driving. Bolus drinking is a relatively rare phenomenon and no bolus drinking is largely a matter of common knowledge and common sense about how people behave.</p> <p>To overcome the common sense inference, there is a practical evidentiary burden on an accused. This does not require an accused persuade or convince the judge or jury there was bolus drinking, but merely to point to something in the evidence that puts the possibility they engaged in bolus drinking. So, in cases where there is no evidence of bolus drinking the common sense inference there was no bolus drinking may be drawn.</p>
No post-incident drinking	No alcohol consumption took place after the incident but prior to the breathalyzer tests.	Burden on Crown to prove by case specific evidence (foundational facts).
Elimination rate	The elimination of alcohol from the body generally continues at a relatively constant rate which ranges from approximately 10mg % to approximately 20mg% per hour.	An assertion of scientific knowledge that need not be proven by case specific evidence led at trial. Rather, it is a matter of scientific knowledge on which the expert is entitled to rely without further proof by the Crown. The elimination rate is information acted upon by an expert as a result of their expertise.
Plateau	After the BAC rises rapidly within approximately 30 minutes of the last drink a person's BAC will remain at a relatively constant plateau for approximately two hours, before declining. The BAC plateau is a period of time in which there is no significant change in the BAC due to the rate of absorption of alcohol into the body being approximately equal to the rate of elimination of alcohol from the body. The BAC is neither rising nor falling and the assumed elimination rate is not factored into the read-back calculation which favours an accused.	An assertion of scientific knowledge that need not be proven by case specific evidence led at trial. Rather, it is a matter of scientific knowledge on which the expert is entitled to rely without further proof by the Crown. Plateau is information acted upon by an expert as a result of their expertise.

OBSERVE & REPORT

What assisted the common sense inference against bolus drinking being drawn in the *Lima* case? It hinged much on the evidence of police. Here are some of the factors the Ontario Court of Appeal considered:

- he was stopped while driving his vehicle in an unusual fashion;
- he exhibited signs of driving while intoxicated at the time (smell of alcohol on his breath; red, bloodshot and glassy eyes; flushed face);
- there was no alcohol in his car, and he had no access to alcohol from the time of his arrest to the time of the breathalyzer tests;
- there was no change in the indicia of alcohol consumption during the period between his arrest and the administration of the breathalyzer tests; and
- there was no evidence he had just come from an establishment serving alcoholic beverages.

BREACHING INFORMER PRIVILEGE RESULTS IN STAY

R. v. X.Y., 2011 ONCA 259



The accused was arrested and, while being interviewed, asked that the recording equipment be turned off. The master recording system was turned off but a secondary system continued to operate and recorded the entire interview. Assured that the conversation was no longer being recorded, the accused disclosed that he was an informer and identified his police handler. At the end of the interview the officer turned over the recording disk of the interview to an administrative assistant for transcription. When the officer received the

transcription of the interview it was obvious that the discussion about the informer activities had been recorded and transcribed. However, he had done nothing in the interim to confirm or refute the accused's claim to be a police informer and simply included the full transcript in the materials provided to the prosecutor for disclosure to defence counsel. The officer never spoke to a superior officer about the "off record" discussion, never sought legal advice from the Crown, nor took any steps to ensure the confidentiality of the informer discussion. The full transcript was turned over to the prosecutor. The prosecutor did not ask the police about the accused's informer discussion or whether any steps had been taken to confirm the claim. The transcript, in both electronic and paper form, was turned over to various defence counsel as part of disclosure. More than a year later, when the prosecutor told defence counsel that the Crown intended to *voir dire* the accused's interview, the breach of informer privilege was pointed out. The prosecutor quickly tried to recover all documents that contained the text of the interview and notified the accused that the interview would not be tendered for admission as evidence at trial. The accused sought entry into the witness protection program but was rejected. While in custody he was assaulted. The attacker told him he had seen some disclosure and called him a "rat". Threats of future harm were also made.

The accused made a pre-trial motion in the Ontario Superior Court of Justice seeking a stay of proceedings on the basis of abuse of process for the official misconduct in breaching informer privilege. But this was rejected. The trial judge found the police and prosecutorial conduct in disclosing the full interview was inadvertent and unintentional. Continuing the prosecution would not result in an unfair trial, nor have any material effect on the case because of the significant and diligent efforts the prosecutor made to remedy the breach and attempt to reconstitute the privilege. In the judge's view, there was nothing that would suggest a repetition of the investigative and prosecutorial conduct in the future and the societal interest in a trial on the merits of the charges tipped the scales against entering a stay of proceedings.

On appeal to the Ontario Court of Appeal, a stay was entered for several reasons:

- The police and prosecutorial conduct in breaching informer privilege was grossly negligent. Both the police and prosecution are under a duty to protect informer privilege and defaulted on their obligations by disclosing the accused's status and some of the information provided. Even if the recording was done inadvertently, it was clear the transcript included significantly more than the brief preliminary questioning about the offence charged. "The officer who received the transcript was at the interview, thus knew the nature of the discussion that took place," said the Court of Appeal. "The officer did nothing to ensure that informer privilege was not breached. The officer took no steps to separate the informer activities discussion from the rest of the interview, for example, to place it in a sealed packet, to solicit the advice of senior officers, to seek legal advice from the prosecutor or even to confirm the informer status of the [accused]. When the prosecutor received the interview transcript from the police, the earlier breach of privilege was exacerbated. The prosecutor took no steps to confirm the [accused's] status as an informer, or edit the interview before disclosure to several defence counsel. In the result, disclosure included material that not only revealed the [accused's] activities as an informer, but included the substance of what the [accused] disclosed during the interview."
- Informer privilege is a class privilege and protects not only an individual informer from possible retribution, but also lets potential informers know that their identity will also be protected. Although the trial judge had evidence of retribution, actual and promised, he "did not consider the overall impact of the disclosure such as occurred here on current and prospective informers. Official conduct such as occurred here could have a significant impact on future disclosures by current and prospective informers to the detriment of the administration of justice overall."

- Once informer privilege has been lost it cannot be restored to its original vitality. In this case, the trial judge attached too much significance to the prosecutor's attempts to remedy the breach and reinvigorate the privilege.

Because of this stay, the accused was ordered released from custody.

Complete case available at www.ontariocourts.on.ca

MORE ON INFORMER PRIVILEGE

Here are some more points the Court of Appeal made about Informer Privilege in *R. v. X.Y.*:

- Informer privilege provides an all but absolute bar against revealing any information that might tend to identify a confidential informer.
- Courts have no discretion once the existence of the privilege is established.
- The duty imposed to keep an informer's identity confidential applies to the police and to the prosecutor.
- A judge is under a duty to protect the informer's identity.
- Informer privilege accords no place for the judicial balancing of benefits enuring from the privilege against any countervailing considerations.
- Since the privilege is jointly "owned" by the Crown and the informer, the Crown has no right to disclose the informer's identity without the informer's consent.
- The principle does not permit the Crown to reveal any information that might tend to identify an informer as part of the Crown's disclosure obligations.
- Even the right to make full answer and defence, of which the right to disclosure is an essential feature, does not alone trigger an exception to informer privilege.
- Informer privilege is not a rule of evidence, confined to the courtroom. Rather, it is an amalgam of an evidentiary rule and a principle of immunity and secrecy at work not only in, but also outside judicial proceedings.

SHORT COURT CORNER:

Small on Facts, Big on Principle

Here is a quick taste of some recent appellate court decisions. If you are interested in what you read the entire judgments are available online at www.canlii.org

BABY-SITTER MAY CHALLENGE WARRANT



A trial judge did not err when he gave standing to a baby-sitter to attack a search warrant. Whether a person has a reasonable expectation of privacy for s. 8 of the *Charter* is context driven. The accused was in the premises at the time of the search and the trial judge found that he had possession and control and the ability to admit or exclude others from the premises in the context of his baby-sitting duties. Ontario Court of Appeal: *R. v. Pham*, 2011 ONCA 271.

ILLEGAL STRIKE NOT STATE MISCONDUCT



The accused was facing six charges when he was remanded for a bail hearing. Unfortunately, the return date for his bail hearing coincided with an illegal strike at the detention centre and his bail hearing did not proceed. A few days later his surety did not appear and he was not released on his own recognizance. Later, while the accused was still in custody, the trial judge stayed the charges after finding the four day delay breached the state's obligation to bring the accused before the court in a timely manner and deprived him of his right to retain and properly communicate with counsel. Although the trial would not be unfair, the judge found the accused's ability to make full answer and defence was impacted and the conduct of the correctional officers in mounting an illegal strike was an affront to the administration of justice such as to shock the conscience of the community. On appeal, the Ontario Court of Appeal disagreed. The stay of proceedings was set aside because there

was no evidence that state misconduct caused or contributed to the illegal strike by detention centre staff. "The illegal strike, standing alone, is not state misconduct," said the Court. Plus, the delay was relatively brief, there was no evidence the accused was actually prejudiced, and the state did not conduct itself in a manner that rendered the proceeding unfair or otherwise damage the integrity of the judicial system. The accused was given seven days to surrender or a warrant would be issued. Ontario Court of Appeal: *R. v. Ward*, 2011 ONCA 267.

"The illegal strike, standing alone, is not state misconduct."

BREATH TESTS ADMISSIBLE EVEN IF RIGHTS BREACHED



Even if the accused's s. 10(b) *Charter* rights were violated, the breathalyzer tests she provided of 130mg% and 120mg% would nonetheless be admissible under s. 24(2). An Ontario Court of Justice held the accused's right to counsel was not breached and convicted her. On appeal, the Ontario Superior Court of Justice jumped past the s. 10 (b) determination and went directly to a s. 24(2) enquiry. He noted that a breach of s. 10(b) does not necessary lead to the virtual automatic exclusion of breath tests. There was no suggestion the arresting officer acted in bad faith. He gave the accused the standard advice that had been developed to conform with Supreme Court of Canada judgments. He was not acting in an abusive or high handed manner. And he never re-advised the accused of her rights at the police station because she made it clear she would not contact counsel due to the late hour. Furthermore, the havoc caused by drinking and driving remains a matter of wide public concern. The tests were reliable, they were not borderline, and were essential to the Crown's case. The appeal judge found the readings admissible. A further appeal was dismissed by the Ontario Court of Appeal. It agreed with the appeal judge. Ontario Court of Appeal: *R. v. Jackson*, 2011 ONCA 279.

FLIGHT FROM POLICE MAY BE PROBATIVE OF GUILT



After receiving a 911 call reporting a suspicious person circling four cars and scraping sounds being heard, police saw the accused briskly walking away from a vehicle. When he looked over his shoulder he broke into a run. An officer yelled for him to stop but he continued to run until a police dog caught him. In considering the totality of the evidence and finding the accused guilty of mischief, the trial judge included the evidence of this flight from police. "Taking flight from a uniformed police officer with a dog, especially when ordered to stop, was consistent with a consciousness that he had been observed committing an offence," said the trial judge. The accused appealed. He submitted before the British Columbia Court of Appeal, among other things, that the reason he ran was because he was scoping vehicles to find something of value to steal. Thus, his unusual post-offence conduct was equally consistent with prowling vehicles and should therefore not have been considered in finding him guilty of the mischief. Justice Kirkpatrick, delivering the opinion for the Court of Appeal, disagreed. The accused did not testify at trial nor admit to any offence, and the trial judge did not place undue emphasis on the accused's flight. Properly considered, it was among several pieces of circumstantial and direct evidence probative of the accused's culpability. British Columbia Court of Appeal: **R. v. Kim, 2011 BCCA 127.**

"Taking flight from a uniformed police officer with a dog, especially when ordered to stop, was consistent with a consciousness that he had been observed committing an offence."

911 CALL ADMISSIBLE AS EVIDENCE



The accused and his live-in girlfriend engaged in a physical altercation at their residence following a night of drinking at a bar. The complainant

was badly injured. She called 911 shortly after midnight. She was moaning and crying. When asked who hurt her, she responded "my boyfriend". She gave the operator the accused's name, spelled it, and gave details of his appearance. She said her head was split open, that "there is blood everywhere," and that "I got beat bad". The complainant was transported to hospital where she told the police that she had been hit on the head with a hammer. At trial in the Alberta Court of Queen's Bench the complainant had no independent memory of the 911 call, nor could she recall her conversation with the police at the hospital. The emergency room physician described the complainant's injuries. The accused said he acted in self defence. After the complainant had bitten his penis he pushed her and she struck her head on the wall or door frame. He denied striking her on the head with a hammer. The judge admitted the 911 call and the complainant's statement to police. The accused was convicted of assault with a weapon and aggravated assault but appealed. Although his appeal was allowed on other grounds, the Alberta Court of Appeal found the 911 call and the statements the complainant made to police admissible. The trial judge took into account the complainant's level of intoxication and found that the 911 call revealed that she was not so incapacitated that her replies on the tape were unreliable. The 911 call was placed shortly after the assault and was thus sufficiently contemporaneous to be a spontaneous outburst which could not have been concocted. As a result, it formed part of the *res gestae* and was properly admitted as such. Furthermore, the statements were properly admitted through the principled approach to hearsay evidence. The 911 call met the test of necessity because the complainant had little memory of the assault. It also met the test of threshold reliability given the confirming evidence of the witnesses in the bar, the fact that the call had been recorded, and that the complainant's statements were confirmed to some extent by the photographic and medical evidence. The statements were recorded in a "reasonably diligent manner", there was no evidence of bias, the questions were not leading nor suggestive, and the statements were consistent in material respects to the 911 call. Alberta Court of Appeal: **R. v. Villeda, 2011 ABCA 85.**

OFFICER'S OBSERVATION MORE THAN FLEETING GLANCE



The accused was seen by an off-duty police officer as a passenger in a car passing something to a male near a phone booth. This activity fit the profile of a drug transaction. The next day the accused was chased by the same officer, now on-duty, for running a stop sign, but did not pull over. Instead he fumbled around with something in his car as he fled. When he was stopped and searched the police found cash and a cell phone. Ten to fifteen minutes later a ziplock bag containing seven cocaine spitballs was found on the road which the accused had just passed in his vehicle. The next day the officer answered a call placed to the accused's telephone asking to purchase a "spit ball". The accused was convicted of possessing cocaine for the purpose of trafficking and failing to stop for police in the Yukon Supreme Court. His appeal, however, was rejected. Justice Ryan, for a unanimous Appeal Court, disagreed with the submission that the officer's identification of the accused as a passenger the day before his arrest was unreliable. "Because he thought he had witnessed a drug deal, [the officer] made a point of observing who was in the Toyota," stated Justice Ryan. "He said that he saw the same person the next day in the Toyota, now as driver, and that that person was [the accused]. This is not a case of a fleeting glance. [The officer] made a point of observing who was in the vehicles. In these circumstances the trial judge was entitled to accept and rely on [the officer's] observations as part of the overall circumstances of the case." Furthermore, the significance of the drugs being found on the roadway, after the accused was arrested, was examined in context. Although such evidence on its own might be open to question, "the trial judge did not look at the individual items of evidence in isolation one from the other, but examined it as he is mandated to do, as a whole. When examined as a whole, the bits of evidence took on a larger meaning for the trial judge." The accused's conviction was not unreasonable. Yukon Court of Appeal: **R. v. Guan, 2011 YKCA 3.**

TOP ONTARIO COURT REFUSES TO FUDGE SENTENCING NUMBERS



The accused was convicted of criminal negligence causing death while street racing and failing to stop at the scene of an accident. Although both offences attract a maximum punishment of life imprisonment the accused was sentenced to 25 months in prison (30 months less 5 months for time spent in pre-trial custody) on the criminal negligence count and 12 months consecutive for the failing to stop count, for a total of 37 months. Because he received a sentence of two years or more, under Canada's *Immigration and Refugee Protection Act* the accused would not be entitled to appeal the deportation order he was facing as a result of the sentence he received on the criminal negligence causing death conviction. So he asked the Ontario Court of Appeal to realign his sentences so he would not be barred from appealing a deportation order. He did not want an overall global reduction in his total 37 month sentence. He merely wanted the individual sentences rejigged so no single sentence exceeded two years. He requested that the criminal negligence sentence be reduced to 23 months and the fail to stop sentence be increased to 14 months (19 months less 5 months for time spent in pre-trial custody) - still an overall sentence of 37 months. However, Justice Moldaver, speaking for the Court of Appeal, would have nothing to do with it. "Courts ought not to be imposing inadequate or artificial sentences at all, let alone for the purpose of circumventing Parliament's will on matters of immigration," he said. "The 30-month penitentiary sentence imposed on the [accused] for the offence of criminal negligence causing death while street racing was not unfit; indeed, if anything, I think it was lenient." The accused's sentence appeal was dismissed. Ontario Court of Appeal: **R. v. Badhwar, 2011 ONCA 266.**

"Courts ought not to be imposing inadequate or artificial sentences at all, let alone for the purpose of circumventing Parliament's will on matters of immigration."

FLAG MAN IN STREET RACE TO FACE NEW TRIAL



A trial judge failed to properly consider or apply the *Criminal Code* provisions under s. 21 when he acquitted an accused for acting as the “flag man” and signaling the start of a three car street race which resulted in one of the drivers losing control, colliding with a lamp post, and dying as a result. The accused, a 16-year-old youth, and the two surviving drivers were charged with criminal negligence causing death while street racing. The Ontario Court of Justice granted a directed verdict of acquittal after finding that dropping a jacket to start the race was not sufficient to constitute the offence of criminal negligence causing death. The Crown appealed to the Ontario Court of Appeal. Establishing the **actus reus** for aiding an offence of criminal negligence causing death under s. 21(1)(b) requires the Crown to show that an accused did something (or in some cases omitted to do something) that assisted another in committing the offence. As for the **mens rea** of aiding criminal negligence it involves two elements; the criminally negligent act (or omission) and the consequence that the act or omission caused bodily harm or death. As for the first *mens rea* element, “it is necessary that an aider do something with intent to assist conduct that is criminally negligent and know sufficient details of the assisted conduct to render that conduct criminally negligent. Thus, the conduct that the aider knows he or she is assisting must constitute a marked and substantial departure from what is reasonable in the circumstances. ... [I]t is not necessary that the aider know the law, nor that he or she appreciate the legal consequences of the conduct being assisted. Rather, the aider will have aided the commission of the offence if he or she intentionally assists conduct which constitutes the offence and knows the principal intends to commit it. In those circumstances, it may be said that an aider did something “for the purpose of” assisting the commission of the offence.” As for the second *mens rea* element (the consequences), the mental element is objective foresight of bodily harm. “It is not necessary that an aider have subjective foresight of the consequence of the criminally negligent act

he or she is assisting. Rather, it is sufficient to show that a reasonable person, in all the circumstances, would have appreciated a consequence – bodily harm that is not trivial or transient – would result.” In this case, dropping the jacket was an act that assisted the car drivers to participate in a street race. Street racers threaten the lives and safety of others in the area. As for *mens rea*, there was evidence that the accused intended to assist the street race and knew the details of how it would take place. It was open to a court to conclude that the street race was a marked and substantial departure from what was reasonable in the circumstances and it could have been foreseeable that bodily harm could result. The Crown’s appeal was allowed, the accused’s acquittal was set aside, and a new trial was ordered. Ontario Court of Appeal: **R. v. M.R., 2011 ONCA 190.**

MORE ON CRIMINAL NEGLIGENCE

There are several sections in the *Criminal Code* that deal with criminal negligence. In s. 219(1) criminal negligence is defined as doing anything or omitting to do anything that someone has a duty to do and showing wanton or reckless disregard for the lives or safety of other persons. However, there is no offence of criminal negligence *simpliciter*. A person will only be liable for criminal negligence if death or bodily harm results.

CRIMINAL NEGLIGENCE OFFENCES

section	description	punishment
220	criminal negligence cause death	max. life 4 yrs. min. if firearm used
221	criminal negligence cause bodily harm	max. 10 yrs.
249.2	criminal negligence cause death (street racing)	max. life
249.3	criminal negligence cause bodily harm (street racing)	max. 14 yrs.
662(5)	dangerous driving as included offence	
662(5)	flight cause bodily harm or death as included offence	

CRIMINAL NEGLIGENCE OFFENCE GRID

based on *R. v. M.R.*, 2011 ONCA 190

	Principal Offender	Aider
PHYSICAL ELEMENT <i>Actus Reus</i>	<ul style="list-style-type: none"> The conduct or omission represents a marked and substantial departure from the conduct of a reasonably prudent person in the circumstances. 	<ul style="list-style-type: none"> The accused did something (or in some cases omitted to do something) that assisted another in committing the offence.
MENTAL ELEMENT <i>Mens Rea #1</i> (the criminally negligent act or omission)	<ul style="list-style-type: none"> A modified objective test Must consider the facts existing at the time in light of the accused's perception of those facts and assess whether the accused's conduct, in view of his or her perception of the facts, constituted a marked and substantial departure from what would be reasonable in the circumstances. A court should consider whether the accused either adverted to the risk involved and disregarded it, or failed to direct his or her mind to the risk and the need to take care at all. In most cases, the mental element can be inferred from the accused's conduct or omission. 	<ul style="list-style-type: none"> An aider must do something with intent to assist conduct that is criminally negligent and know sufficient details of the assisted conduct to render that conduct criminally negligent. The conduct that the aider knows he or she is assisting must constitute a marked and substantial departure from what is reasonable in the circumstances. It is NOT necessary that the aider know the law, nor that he or she appreciated the legal consequences of the conduct being assisted. Rather, the aider will have aided the commission of the offence if he or she intentionally assists conduct which constitutes the offence and knows the principal intends to commit it.
<i>Mens Rea #2</i> (the consequences of the act or omission: bodily harm or death)	<ul style="list-style-type: none"> Objective foreseeability that bodily harm would ensue. It is NOT necessary that the principal subjectively foresaw death as a consequence of his or her acts. 	<ul style="list-style-type: none"> Objective foresight of bodily harm. It is sufficient to show that a reasonable person, in all the circumstances, would have appreciated a consequence – bodily harm that is not trivial or transient – would result. It is NOT necessary that an aider have subjective foresight of the consequence of the criminally negligent act he or she is assisting.

CONSPIRACY TO COMMIT MURDER IS A YCJA 'VIOLENT OFFENCE'



Following his conviction for conspiracy to commit murder the accused, a youth, was sentenced to 12 months custody and 6 months conditional supervision. He supplied the Tylenol 3 used to drug the deceased so that it would be easier to drown her, offered to assist with an alibi, and encouraged another to commit the murder. He then appealed his sentence, submitting that conspiracy to commit murder was not a violent offence under s. 39(1)(a) of the *Youth Criminal Justice Act* and therefore the judge imposed an illegal custodial sentence. The Ontario Court of Appeal disagreed with the accused and concluded that conspiracy to commit murder was a violent offence. The meaning of "violent offence" in s. 39(1) is harm-based (which focuses on its effects), rather than force-based (which focuses on the means employed to produce the effects). The harm-based rationale captures offences deserving of a custodial sentence which might not be captured by the force-based approach. A violent offence under is an offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm. "Conspiracy to commit murder, like attempted murder, falls within what would ordinarily be considered a violent offence," said Justice Rosenberg, writing the Court of Appeal's decision. "I recognize that not all cases of conspiracy to commit murder may necessarily fall within the harm-based approach...; but in my view the facts of this case fall within the definition in that the [accused] caused or at the very least attempted to cause bodily harm to the deceased by supplying the Tylenol 3 and encouraging [his friend] to commit the murder." However, on other grounds, the accused's sentence was reduced to 8 months in custody and 4 months conditional supervision. Ontario Court of Appeal: **R. v. J.F., 2011 ONCA 220.**

"Conspiracy to commit murder, like attempted murder, falls within what would ordinarily be considered a violent offence."

Side Bar

"Liability as a Party to Conspiracy"

The Ontario Court of Appeal also ruled that the being a party to conspiracy under s. 21 of the *Criminal Code* was an offence. In order for a person to be liable as a s. 21(1) party to conspiracy the Crown must prove an agreement by at least two other people to commit a substantive offence. If the accused is a party to the conspiracy by encouraging someone to join the conspiracy or aiding or abetting the furtherance of its object, the risk of the commission of the criminal offence has sufficiently materialized to warrant criminal sanction. If no agreement materializes, the alleged party's conduct would at most be an attempt to conspire, which is not a crime.

Reach

The reach of party liability to conspiracy includes abetting as well as aiding or abetting a person to become a member of the conspiracy:

Aiding a conspiracy within the meaning of s. 21(b) is no less harmful than abetting. Liability for aiding a conspiracy would require proof that the accused did or omitted to do something for the specific purpose of aiding another to commit the offence of conspiracy. That degree of mens rea imports a sufficient level of fault to warrant criminal liability. [I]t would not be enough that the accused's acts had the effect of aiding the conspiracy, the accused must also have the requisite mens rea. [para. 23]

Furthermore, liability as a party to conspiracy is not limited to acts for the purpose of aiding or abetting the actual formation of the agreement or aiding or abetting someone to join the conspiracy. Party liability includes aiding or abetting pursuit of the unlawful object.

R. v. J.F., 2011 ONCA 220

PRE-COURT PHYSICAL LINE-UP 'POLLUTED'



The British Columbia Court of Appeal has described the pre-court identification of an accused used during the investigation of several sexual offences as "fraught with problems". After refusing to participate in a physical line-up the accused was forced into one. A number tag was put over his head and a police officer held him in a headlock. Five police officers and two other prisoners acted as foils in the line-up, which lasted about three minutes. The accused moved his head about and was very uncooperative. Eleven complainants viewed him in the police lineup. A photograph of the procedure was taken by police (see below). Identification by the complainants ranged from tentative to non-existent. He was released from custody the following day and another woman was later sexually assaulted. An array of photographs was shown to her. There were head and shoulder photographs of six other men included in the array. The accused's photograph, taken from the waist up, showed him standing in front of a jail cell with the arm of a uniformed police officer in the foreground, unlike any of the foils. The backgrounds of the foils were either blank or otherwise neutral. In addition, each of the six foils were, by appearance, at least ten years younger than the accused. He was the only one with a full moustache or curly hair. The

foils all had hair length at least to the collar and over the ears, while the accused's hair was cut back and higher on the forehead. The witness made a conditional identification and the accused was again arrested. Later, the accused was identified in court. He was convicted on five counts of indecent assault, two counts of attempted rape, and three counts of rape. He was declared a dangerous offender and sentenced to an indefinite period of incarceration. Justice Low, in quashing the accused's convictions, found the photographic line-up fatally unfair. The photograph of the accused stood out unfairly and would have focussed the witness on him. Furthermore, the physical line-up should not have been conducted at all because it became a "farce". "There is no telling what influence the prominent display of the [accused] by the police officers during that event ultimately had on the six complainants when they were asked in court if they could identify the assailant," said Justice Low. "Police investigators should have prepared a proper and fair photographic line-up instead of forcing the [accused] to participate in the physical line-up. ... [T]he pre-trial identification procedures were seriously flawed and unfair. ... The process of identification was polluted so as to render in-court identification of the [accused] on each count highly questionable and unreliable on the reasonable doubt standard." After serving nearly 27 years in prison the accused was acquitted and released. British Columbia Court of Appeal: **R. v. Henry, 2010 BCCA 462.**



Online Social Networking for Criminal Investigations and Intelligence May 30, 2011

This one day (8 hour) course is designed for criminal intelligence analysts, special agents, and other investigators that encounter drug trafficking, diversion, and related crimes. Investigators with any level of familiarity with the Internet and computers, from beginning to advanced, will find this course beneficial.

The program gives investigators an up-to-date understanding of how social networking sites work and how members act and interact. Investigators will learn what information is available on various sites and how to integrate that information into criminal investigations and criminal intelligence analysis. Too often, investigators and analysts overlook or underutilize this valuable resource. Social networking sites are virtual communities. As in any large community, criminal organizations, fraud, violent crime, and victimization exist. Investigators need to understand these communities along with the tools, tricks, and techniques to prevent, track, and solve crimes.

Date: Monday, May 30, 2011

Time: 0800-1630 hrs

Where: JIBC New Westminster

Presenter: Charles Cohen

Cost: \$100 plus HST (includes networking lunch)

Register: Registration can be made directly through the JIBC – Registration Department at: (604) 528-5590. Please quote registration number POLADV711 Online Social Networking for Criminal Investigations/Intelligence.

Students receive course material, including legal process contact information, preservation letters, boilerplate compliance documents, and resource guides.

NOTICE: Course contains graphic content including profanity, and sexual and violent images.

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.



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Specific entrance requirements are needed for admission to either certificate

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JIBC announces two new Graduate Certificates in Tactical Criminal Analysis and Intelligence Analysis

As law enforcement agencies struggle with limited resources, the need for improved crime and intelligence analysis has increased. These new **online** graduate programs prepare both current and aspiring law enforcement professionals to design and apply strategies to solve modern problems that challenge crime and intelligence analysts daily.

The curriculum focuses on developing the skills required to collect and analyze crime data to forecast criminal profiles; documenting suspicious relationships between people, organizations and events; and using statistical techniques to solve crime. Significant emphasis is also placed on the need to effectively and clearly communicate findings and prepare recommendations for decision-makers.

You will enjoy state-of-the-art learning resources; networking opportunities with employers in both the public and private sectors; and exposure to faculty with significant experience in the field.

Courses Include:

- Intelligence Theories and Applications
- Intelligence Communications
- Advanced Analytical Techniques
- Tactical Criminal Intelligence
- Competitive Intelligence
- Analytical Methodologies for Tactical Criminal Intelligence
- Analyzing Financial Crimes

The Justice Institute of British Columbia (JIBC) is Canada's leading public safety educator - a dynamic not-for-profit public post-secondary institution recognized nationally and internationally for innovative education in the areas of justice and public safety. The JIBC offers a range of applied and academic programs (certificates, diplomas, and degrees) that span the spectrum of safety - from prevention to response and recovery.

www.jibc.ca