JIBC

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

REASONABLE SUSPICION: FOILS ENTRAPMENT CLAIM

R. v. Germain, 2012 SKCA 9

Police knew for some time that the accused was licensed to grow marijuana in his home for his personal use in connection with a medical condition. They also received information from an anonymous source that he was selling marihuana to kids in town and anyone else who came to his door. The information disclosed that the accused was licensed to grow marihuana for his own use, identified him by name and the town in which he lived. The police received such information on two occasions, but it was uncertain whether it originated from the same person. The police confirmed with Health Canada that the accused held a current licence to grow and use marijuana in his home and also ran a criminal record check. They discovered that he had a criminal record, including a dated conviction for possessing a restricted drug. Acting on this information, the police launched an undercover investigation by going to the accused's home to see if he would sell them some marijuana, which he did.

At trial in Saskatchewan Provincial Court the accused was convicted. The judge, however, stayed the convictions on the basis of entrapment. In the judge's view, the police did not act on a reasonable suspicion in going to the accused's home and buying marijuana from him.

The Crown appealed and the lower court's ruling was overturned. The Saskatchewan Court of Appeal found the trial judge was wrong in concluding that the police were not acting on a reasonable suspicion. Justice Cameron, delivering the Appeal Court's opinion, found the information "was sufficient ... to furnish the police with reasonable cause to suspect the accused was implicated in the criminal activity under investigation, namely trafficking in marijuana." Since the police had a reasonable suspicion, their conduct in purchasing marijuana from the accused did not amount to entrapment.

The Crown's appeal was allowed, the convictions recorded at trial were entered, and the matter was remitted back to the trial judge for sentencing.

Complete case available at www.canlii.org

LEGALLY SPEAKING:

Crime Control

"One need not be referred to evidence to acknowledge the ubiquitous nature of criminal activity in our society. If the struggle against crime is to be won, the ingenuity of criminals must be matched by that of the police; as crimes become more sophisticated so too must be the methods employed to detect their commission." - Supreme Court of Canada Chief Justice Lamer in *R. v. Mack*, [1988] 2 S.C.R. 903 at para. 16.

Highlights In This Issue

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see page 40

JUSTICE INSTITUTE of BRITISH COLUMBIA LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

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

Alone together: why we expect more from technology and less from each other.
Sherry Turkle.
New York, NY: Basic Books, c2011.
HM 851 T86 2011

Beyond learning by doing: theoretical currents in experiential education.
Jay W. Roberts.
New York, NY: Routledge, 2012.
LB 1027.23 R63 2012

Brain rules: 12 principles for surviving and thriving at work, home, and school.
John Medina.
Seattle, WA: Pear Press, 2009, c2008.
QP 376 M43 2009

Conflict 101: a manager's guide to resolving problems so everyone can get back to work.
Susan H. Shearouse.
New York, NY: American Management Association, c2011.
HD 42 S54 2011

Continuing education in BC's public post-secondary institutions.
Bob Cowin.
[New Westminster, BC: B. Cowin, 2010.
Presents a summary of key dates and changes in continuing education in BC from 1900 to 2010, with a particular focus on post-secondary institutions. Includes a discussion of Langara College on pages 57-58 ; in PDF pages 67-68.
LA 418 B7 C693 2010

Critical thinking, thoughtful writing: a rhetoric with readings.
John Chaffee, Christine McMahon, Barbara Stout.
Boston, MA: Wadsworth Cengage Learning, c2012.
PE 1408 C395 2012

First Nations 101.
Lynda Gray.
Vancouver, BC: Adaawx Publishing, 2011.
E 78 C2 G724 2011

How to talk so people listen: connecting in today's workplace.
Sonya Hamlin.
New York, NY: Collins, c2006.
HF 5718 H284 2006

The mobile academy: mLearning for higher education.
Clark N. Quinn.
San Francisco, CA: Jossey-Bass, [2011], c2012.
LB 2395.7 Q56 2011

Seeing systems: unlocking the mysteries of organizational life.
Barry Oshry.
San Francisco, CA: Berrett-Koehler Publishers, c2007.
HM 701 O855 2007

Street-level bureaucracy: dilemmas of the individual in public services.
Michael Lipsky.
New York, NY: Russell Sage Foundation, c2010.
HV 41 L53 2010

Thinking through crisis: improving teamwork and leadership in high-risk fields.
Amy L. Fraher.
New York, NY: Cambridge University Press, 2011.
HD 49 F734 2011

Unmasking the face: a guide to recognizing emotions from facial clues.
Paul Ekman and Wallace V. Friesen.
Cambridge, MA: Malor Books, 2003.
BF 637 C45 E38 2003

OBVIOUS NEXUS AMONG PERSON, DRUG & LOCATION JUSTIFIES SEARCH WARRANT

R. v. Soto, 2011 ONCA 828

A confidential informant tipped off a police officer about where the accused was living and that he was trafficking in "large" amounts of cocaine. The source also said the accused had just got out of Millhaven Penitentiary. The officer set up surveillance on the accused's apartment building and saw him come out and enter the passenger side of a white Lincoln that drove up. When the car drove off, the officer followed and checked the licence plates, discovering that the car had been reported stolen. The car pulled up in front of a different building and someone came up to its passenger side. Although the officer could not see what was exchanged, he believed that he had observed a hand-to-hand drug transaction between the accused and an unknown male. Later, a second officer, assisting with surveillance, saw the car stop in front of another building and an unknown male go to the passenger side. Although he did not see an actual exchange, he saw their hands touch and believed he had seen a hand-to-hand drug transaction. The unknown male walked away from the Lincoln and it drove off. In neither incident was the unknown male pursued or apprehended.

Police lost site of the vehicle for a short time but it was located in a residential area. The occupants ran into a nearby construction site and the accused was subsequently located and arrested for possessing stolen property. The police also found a cellphone in the his possession as well as $600 and a second cellphone he had stashed while trying to evade police. While the accused was in custody, the police obtained a telewarrant to search his apartment for cocaine, but instead found a loaded .40 calibre handgun. The Information to Obtain (ITO) the search warrant included; (1) the address provided by the source was the same address on file in CPIC for the accused, (2) the accused was on statutory release from prison for robbery related offences, and (3) the accused had 16 convictions including weapons offences, drug possession and trafficking narcotics.

> "[I]f a person leaves his residence, then almost immediately engages in two drug transactions, it follows that there is a good chance that there are drugs in his residence."

At trial in the Ontario Superior Court of Justice on several firearms related charges, the accused sought to quash the search warrant and exclude the gun as evidence. He argued, in part, that there was no nexus between the place to be searched (apartment) and the evidence to be found (drugs). While there may well have been reasonable grounds to think that he would have drugs on his person, the accused suggested there were no reasonable and probable grounds to believe that drugs would be found in his residence. The trial judge disagreed, finding the information sufficient to support reasonable grounds. "[The officer's] information was that [the accused] was dealing cocaine," said the judge. "He saw [the accused] leave the building, get into the car, and then ... he and [the other officer] each observed what they believed to have been two hand-to-hand drug transactions. (That is, they each saw one.) As [the accused] had not stopped anywhere else along the way before these transactions, it is reasonable to believe that he would have had the drugs on his person when he left the apartment."

This was not a case where the police were relying on only the statements of the informant. The tip was the impetus for the investigation. The police officer had personally spoken with the source and swore that the source had been reliable in the past. As well, the officer was able to corroborate some of the source's information, such as where the accused was living and that he was recently released from prison. Plus, the police believed they saw two hand-to-hand drug transactions involving the accused. And he had two cellphones, which, in the officer's experience, are often used by drug dealers (one phone for business and the other for normal use). "At the end of the day," said the judge, "the point is that there were reasonable and probable grounds in the circumstances to think that [the accused] had drugs on his person when he left [his apartment building] and got into the

Lincoln, and a reasonable inference that, as a dealer, he would have a supply in the apartment." The accused was convicted of four firearms offences.

The accused then appealed to the Ontario Court of Appeal arguing the trial judge was wrong to find that the ITO for the search warrant established reasonable grounds to believe evidence relating to drug offences would be found at the residence. In his view, the tip from the confidential informant was neither compelling nor sufficiently corroborated, the search warrant was invalid, s. 8 of the *Charter* was breached and the evidence of the loaded firearm should have been excluded under s. 24(2). But the Court of Appeal disagreed, holding the trial judge exercised sound reasoning. The trial judge spoke to "an obvious nexus among a person, drug and location, namely, if a person leaves his residence, then almost immediately engages in two drug transactions, it follows that there is a good chance that there are drugs in his residence." Further, the confidential informant's tip was sufficiently compelling to support the ITO. "The informant was a known credible source," said the Court of Appeal. "He spoke directly to the police officer affiant, and the police sought and obtained other information to confirm many of the factual details provided by the informant." The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: facts of case taken from *R. v. Soto*, 2010 ONSC 1734.

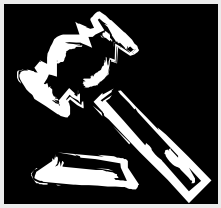
"The informant was a known credible source. He spoke directly to the police officer affiant, and the police sought and obtained other information to confirm many of the factual details provided by the informant."

Note-able Quote

"I believe that all illegal organizations should be outlawed." - Ian Paisley

LEGALLY SPEAKING:

Search Warrant Review



"In order to comply with s. 8 of the Charter, prior to conducting a search the police must provide 'reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search'. The question for a reviewing court is 'not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence' to permit an issuing justice to authorize the warrant. In conducting this analysis, the reviewing court must exclude erroneous information from the ITO and may have reference to material properly received as 'amplification' evidence. The accused bears the burden of demonstrating that the ITO is insufficient." - Supreme Court of Canada Justice Charron in *R. v. Campbell*, 2011 SCC 32 at para. 14.

CDSA SEARCH WARRANT NEED NOT NAME PEACE OFFICER

R. v. Pitre, 2011 NBCA 106

Police obtained a search warrant under s. 11(1) of the *Controlled Drugs and Substances Act* (*CDSA*) from a Provincial Court judge authorizing unnamed peace officers to search the accused's residence for cocaine, marihuana and marihuana growing equipment. On execution of the warrant, police found a sophisticated marihuana grow operation in the basement along with other evidence. While the warrant was being executed, the accused arrived and was arrested for producing marihuana and possession for the purpose of trafficking.

WHAT POLICE FOUND

R. v. Pitre, 2011 NBCA 106

- A three-stage hydroponic marihuana grow operation consisting of 23 marihuana plants.
- Mylar on all the walls.
- Numerous ballasts, fans, high voltage lights, venting and strings tethering the plants to the ceiling.
- An active drip emitter system consisting of tubing, which regulates the amount of nutrient solution delivered to each individual container, and lava rock. Excess liquid was drained from the container and returned to the reservoir and reused. Drip emitters can be used with a semi-porous medium such as ceramic beads, lava rock, and gravel.
- Two bags of marihuana in the freezer of the house, two bags of marihuana in the utility trailer in the yard, two bags of lava rock, money counters, two sets of digital scales, mini bags, score sheets, $2,210 in Canadian currency, $62 in American currency, 28 pesos and $284 in Canadian coins.
- Books entitled:
  - "Crime School: Money Laundering";
  - "The Indoor Gardener – Hydroponic and Aeroponic Gardening"; and
  - "Police Powers including Search Warrants."
- Personal documentation including the accused's birth certificate, passport and correspondence indicating he was living at the residence.
- Keys to the accused's truck.
- Keys to the residence.
- Traces of tetrahydrocannabinol and cannabinol on one set of scales and traces of cocaine on the other.
- An expert described the operation as commercial in scope and valued the marihuana seized at $57,500 (at the pound level), $92,000 (at the ounce level) and $206,080 (at the gram level).

At his trial in New Brunswick Provincial Court the accused challenged the legality of the search. He contended that the warrant was facially invalid because it failed to comply with s. 11 since it did not identify, by name, the officer or officers authorized to execute the search. Furthermore, he argued the warrant was sub-facially invalid because the information to obtain (ITO), after editing the objectionable parts, did not disclose reasonable grounds for the affiant's subjective belief that the things to be searched for were in the place to be searched. The trial judge rejected these submissions, upheld the validity of the warrant, convicted the accused for producing marihuana and possessing it for the purpose of trafficking. He was sentenced to concurrent jail terms of 14 months and subjected to a firearms prohibition and DNA sample order.

The accused appealed to the New Brunswick Court of Appeal arguing the trial judge erred. In his view, a *CDSA* search warrant must identify, by name, the peace officer(s) authorized to carry out the search. Further, he again submitted that the ITO, after redaction, did not provide the necessary reasonable grounds. The Court of Appeal, however, disagreed. Chief Justice Drapeau, writing the Court's opinion, broadly described the requirements for obtaining a search warrant under s. 11(1) of the *CDSA* as follows:

> [This] provision requires a demonstration by information on oath that there are reasonable grounds to believe there is in the place to be searched: (1) a controlled substance in respect of which the CDSA has been contravened; or (2) a thing that will afford evidence of any such contravention. Section 11(1) goes on to state that, in those circumstances, the warrant may issue "authorizing a peace officer, at any time, to search the place for any such controlled substance […] or thing and to seize it".

Must a specific officer be named?

As for whether a specific officer must be named in a s. 11 warrant, the Court of Appeal concluded that it "need not identify by name the peace officer or officers authorized to carry out the search." Chief Justice Drapeau stated:

> Section 11 does not prescribe the use of a particular form for a search warrant. In my view, a duly signed search warrant purporting to issue pursuant to s. 11 of the CDSA will generally pass facial muster if it: (1) is directed at named or unnamed peace officers from the issuing judge's jurisdiction; (2) identifies "an offence with sufficient precision to apprise anyone concerned of the nature of the offence"; (3) describes the things "to be seized with enough specificity to permit the officers executing the warrant to identify them and link them to the offence"; and (4) pinpoints the place to be searched "with sufficient accuracy to enable the reader to know [for] what premises it authorizes the search". [reference omitted, para. 15]

Reasonable grounds?

The accused, in challenging the existence of reasonable grounds, isolated each strand of information in the redacted ITO and submitted that none provides a compelling basis for the reasonable grounds required by s. 11(1) of the *CDSA*. The Court of Appeal found this approach to be inappropriate. "The law requires the reviewing court to consider all of those strands contextually," said Chief Justice Drapeau, "and to determine whether, having regard to the totality of the circumstances revealed by the ITO, the issuing judge could conclude to the existence of the requisite reasonable grounds."

The correct standard of review?

Although the reviewing judge of a search warrant is not to substitute their view for that of the authorizing judge, the accused argued that since the ITO was edited (in this case to protect the identity of confidential sources) that is exactly what the reviewing judge was to do. In other words, instead of determining whether the search warrant could have been issued the reviewing judge was to determine whether the warrant would have issued. But Chief Justice Drapeau again disagreed. The standard of review for the substantive sufficiency of an ITO is the same, whether the ITO has been edited or not. In opining that the "would" and "could" tests are not markedly different, at least for practical purposes, he explained:

> [T]he reviewing court never knows what the warrant judge would have done if the atrophied ITO had been put to him or her. For there to be a meaningful and principled review at trial of the sufficiency of the ITO ..., the issue must be whether the authorizing judge, acting judicially, could have given his or her imprimatur on the basis of what remains of the information on oath he or she was provided. To my mind, the "acting judicially" component of the test brings into the mix an objective standard: could the issuing judge, acting judicially, have issued the warrant on the basis of the information provided in the atrophied ITO? ...
>
> In my respectful opinion, any judge would have issued the contested search warrant if, having regard to the information in the downsized supporting ITO and acting judicially, he or she

BY THE BOOK:

Search Warrant: ***CDSA***

s.11 (1) A justice who, on ex parte application, is satisfied by information on oath that there are reasonable grounds to believe that

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

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

(c) offence-related property, or

(d) any thing that will afford evidence in respect of an offence under this Act

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

...

(4) An endorsement that is made on a warrant...is sufficient authority to any peace officer to whom it was originally directed and to all peace officers within the jurisdiction of the justice by whom it is endorsed to execute the warrant and to deal with the things seized in accordance with the law.

> could have done so. Let me be blunt, absent exceptional circumstances, the judge who refuses a warrant despite a showing of the requisite reasonable grounds has not acted judicially. Happily, in the real world, a judge would only very exceptionally deny a search warrant where "the material satisfies the authorizing legislation" ...
>
> [I]t is difficult, if not impossible, to imagine a situation where the differently formulated standards might lead to divergent outcomes. They certainly do not in the case at hand and, ... on any of the standards of review mentioned in these reasons, the information summarized therein amply supports the sub-facial validity of the warrant. [paras. 34-36]

The accused's appeal was dismissed.

Complete case available at www.canlii.org

POLICE ACTED ON REASONABLE SUSPICION: ENTRAPMENT NOT PROVEN

R. v. Lalumiere, 2011 ONCA 825

Two threat assessments conducted by the police in 2003 and 2006 concluded that the accused was in the worst one percent of domestic violent offenders and had a 70% likelihood of assaulting his ex-wife at least once in the next five years. In 2007 a confidential informant told police that the accused wanted to hire someone to kill his ex-wife and her boyfriend. He was in jail at the time for uttering threats and breach of probation and had accumulated 23 prior convictions for offences involving his ex-wife and her boyfriend, ranging from breaches of his probation orders and recognizances to assault, uttering threats and criminal harassment. About six weeks later, as part of an undercover operation, a police officer posed as a member of the Hells Angels and met the accused in the visitor's area of the institution in which he was incarcerated. The undercover officer said he understood that the accused wanted two people to disappear. The accused confirmed this but said he could not pay until after his release in December. The undercover officer gave the accused his telephone number and told him to call. When the accused did not call during the next two weeks, the undercover officer returned to the institution and again raised the subject of having two people killed. The accused agreed to pay the undercover officer $5,000 and telephoned him later that evening to provide details about the habits, vehicles and locations of the intended victims. After the undercover officer cautioned the accused that there would be no turning back, he agreed to proceed. This telephone call was recorded by police.

At trial in the Ontario Superior Court of Justice the accused was convicted by a jury on two counts of counselling to commit murder. He then brought a motion seeking a stay of proceedings on the grounds that he was entrapped. The trial judge dismissed the motion, finding that the police acted on a reasonable suspicion that the accused planned to commit an offence. His history, which included criminal convictions, ignoring court orders, threats to kill, and threat assessments suggesting he was at a high risk of assaulting his ex-wife and her boyfriend, provided an "air of reality" to the confidential informant's report that the accused was attempting to hire someone to kill them. Since the police had a reasonable suspicion that the accused intended to commit an offence, they were permitted in providing him with an opportunity to do so. Further, nothing the police did induced him into trying to hire someone to kill his former spouse and her boyfriend.

The accused then challenged the entrapment ruling before the Ontario Court of Appeal. But Justice Simmons, delivering the opinion for the Court of Appeal, found the trial judge did not err. "The police acted on reasonable suspicion and did no more than give the [accused] the opportunity to commit the crime," he said. "Given the [accused's] history of criminal conduct directed at the victims and the threat assessments conducted by the police, the police were justified in giving credence to the tip received from the confidential informant. In my view, the undercover officer's conduct in this case stopped short of inducement." The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

DOCUMENTATION INCLUDES ELECTRONICALLY STORED INFORMATION

R. v. Vu, 2011 BCCA 536

After receiving a report from B.C. Hydro that a service check of a residence found that only 4,886 watts of an actual 30,600 watts of power was being recorded by the electrical meter, police sought and obtained a s. 487 of the *Criminal Code* search warrant to investigate theft of electricity. The warrant authorized the police to search not only for equipment used to divert electricity but also for "[d]ocumentation identifying ownership and/or occupancy." When the police executed the warrant they found a large (1,000+ plant), commercial marihuana grow-operation in the basement and noted the residence was occupied only on a transient basis. An electrical bypass was located in the garage next to the electrical panel. Inside the house, there was a laptop computer sitting on a desk. Beside the desk was a desktop computer, which was connected to a security video camera recording the comings and gongs to the residence from the front of the house and along the driveway. Police checked the recordings stored in the desktop and examined the laptop computer to determine if it contained any documents or photographs that might assist in determining who was in control of the premises. An MSN Messenger (an on-line chat) and Facebook (a social networking service) were active.

Using the laptop's search tools for documents, photographs and videos, police located a resumé (and took a photo of it), an email address, and a telephone number. A cellular telephone located in the living room was also examined. Its number was determined and a photograph, believed to be the accused, was found in it. Both computers and the cellular telephone were seized and removed from the residence. A series of still photographs were taken of the surveillance video stored in the desktop computer depicting the comings and goings from the residence during the five days prior to the execution of the warrant. Using the serial number from a computer modem seized from the residence, police were able to determine who the registered subscriber was from the Internet Service Provider. Based on their investigation the police believed that the accused controlled the residence where the grow-operation was found and a warrant was issued for his arrest. He was subsequently arrested on the warrant when his name was checked during an unrelated matter through a police database. The accused was charged with production of marihuana, possession for the purpose of trafficking and theft of electricity.

At trial in British Columbia Supreme Court the admissibility of the security photographs, the resumé photograph, the cellular telephone photograph and the information obtained from the MSN Messenger and Facebook pages became an issue. The judge held that the ITO did not support reasonable grounds to believe that documentation showing ownership and/or occupancy of the residence would be found inside the premises. The officer did not say he believed this to be so nor were there any facts to support such a belief. Nor did the judge accept that the justice of the peace could have inferred that documents evincing ownership or occupation would be found in the residence. The trial judge also ruled that the police were not authorized to search the computers and cellular telephone, holding the searches to be unreasonable. "It is no longer conceivable that a search warrant for a residence could implicitly authorize the search of a computer (or a cellular telephone containing a memory capacity akin to a computer) that may be found in the premises even where the warrant specifically grants an authority to search for documentary evidence of occupation or ownership," she said. In her opinion, a warrant must expressly authorize a search for documents in electronic form. Although the judge admitted the images from the desktop computer, the evidence obtained from the laptop and the cellular telephone was excluded. The judge was not satisfied beyond a reasonable doubt that the accused had knowledge and control of the grow-operation. All charges were subsequently dismissed.

The trial judge's ruling was challenged before the British Columbia Court of Appeal. The Crown argued that there was a basis on which the authorizing justice could have included documentary evidence

in the list of things to be searched for and that the warrant did authorize the police to search computers and cell phones for documents showing ownership or occupancy.

Search Warrant Purpose?

The Court of Appeal first addressed the purpose of a search warrant. As Justice Frankel noted, "search warrants can be used not only to obtain 'evidence' of criminal activity that can be placed before a court, but also to gather information to assist in the investigation of such activity." He cited previous jurisprudence that emphasized the thing sought in the warrant need not itself be evidence of the crime, but could be something that when taken by itself or in relation to other things, be evidence of the commission of the crime.

"[S]earch warrants can be used not only to obtain 'evidence' of criminal activity that can be placed before a court, but also to gather information to assist in the investigation of such activity."

Documentation?

The warrant did authorize the police to search for documentation that could assist in determining who was in control of the premises. Even though the affiant police officer did not expressly state his belief that "[d]ocumentation identifying ownership and/or occupancy" would be found in the residence, the absence of an express statement by the informant as to that belief is not fatal if the grounds in the ITO are capable of satisfying a justice of the peace as to the existence of a particular reasonable belief. "The reasonable-grounds standard is well known," said Justice Frankel. "Determining whether that standard has been met involves 'a practical, non-technical, and common-sense assessment of the totality of the circumstances'. Further, and of significance here, it has long been accepted that a justice of the peace is entitled to draw reasonable inferences from the grounds set out in an ITO." He continued:

> ... I agree with the Crown that it was open to the justice of the peace to draw the inference that there would likely be documentation inside the residence that would assist the police in determining who was in control of the 84th Avenue premises. I do not accept [the accused's] submission that such an inference would amount to a "quantum leap of logic".
>
> What the ITO disclosed is that the place to be searched was a residence (i.e., a place in which it is usual for persons to live either permanently or temporarily) and that municipal records indicated that the property was registered to a person of that address. In addition, another person had subscribed for electrical service to that property approximately one month before. Lastly, there was information that a substantial portion of the electricity being used inside the residence was being stolen, which strongly suggested that someone was carrying on activity there.
>
> The totality of the circumstances was such that it was open to the justice of the peace to reasonably infer that it was likely that documents that would assist the police in determining who was in control of the 84th Avenue premises would be found there. A residence, even one used for criminal activity, is a place in which such documentation can be expected to be found. Although ... persons involved in theft of electricity at a residence have an incentive not to leave any identifying documents in the premises, experience shows they often act otherwise. [references omitted, paras. 41-43]

Moreover, the police were not required, as the accused suggested, to take other investigative steps before seeking the warrant, such as conducting surveillance to determine if there were any persons regularly coming and going from the residence or to see if mail was being delivered there. "A warrant is to be judged on the basis of the grounds that are set out in an ITO," said Justice Frankel, "not on the basis of what steps the police could have taken to acquire additional grounds."

Finally, the phrase "[d]ocumentation identifying ownership and/or occupancy" was not impermissibly vague. "Although that phrase does encompass a broad range of material it does not, having regard to the context, run afoul of the rule that requires some degree of specificity in the

description of the things for which those executing a warrant are entitled to search," said Justice Frankel:

> Describing the things to be searched for with some specificity serves to control the manner in which a warrant is executed. It places spatial limits on where those executing the warrant may search, as they are only entitled to search where the things listed on the warrant might reasonably be expected to be found. American courts sometimes refer to this as the elephant in the matchbox doctrine, i.e., a warrant to search for an elephant does not authorize the police to look inside a matchbox. Such descriptions also serve to limit what the police can seize under the authority of the warrant. In addition to guiding the police, they serve the important function of allowing those affected by the execution of a warrant to ascertain whether the police have kept within its limits.
>
> ...
>
> In an investigation such as was being conducted in the case at bar it is neither practicable nor possible to require either the police or the justice of the peace to describe with exactitude the "documentation" that could assist in determining who is in control of a residence. Such a list would be endless ... [paras. 47, 51]

Noting other trial decisions, the Court found the type of documents that could assist in establishing control over a premises could include medication receipts, envelopes, utility bills, a state of title certificate, mortgage statements, a home insurance document, tax returns, a cheque book, a credit card, a debit card, an expired driver's licence, a bank statement, a Christmas card, passport or a book inscribed "This book is the property of" followed by a name. In this case, the description of the "documentation" to be searched for was as specific as it needed to be.

Electronically-Stored Information?

The authority to search for "documentation" extends to electronically-stored information and, therefore, the warrant authorized the examination of the computers and the cellular telephone. The word "document" is to be interpreted having regard to existing technology. "Today we live in an age in which computers, smartphones, and other devices capable of storing information in electronic form are ubiquitous," said Justice Frankel. "We also live in an age when it is generally understood that those devices are capable of storing documents":

> I am, accordingly, of the view that the warrant on its face authorized the examination of electronic devices found within the ... residence for electronically-stored information that could assist the police in determining who was in control of that premises. An electronically-stored version of, for example, a resumé or photograph, is as much a document as a paper (i.e., hard copy) version of the same item. [para. 58]

Further, the warrant need not specifically authorize the search of a computer or similar device, such as a cellular telephone. In other words, there was no requirement that a computer or similar device be expressly stated on the face of a warrant. Rather, a search warrant can implicitly authorize the search.

> [The accused] submits that "courts have long recognized that computers may contain extensive private information relating to an individual, containing documents, videos, and photographs of a highly personal nature". While this is so, it does not follow that a warrant must specifically authorize the examination of devices that may contain an electronically-stored version of a thing listed on the face of a warrant. A warrant authorizing a search of a specific location for specific things confers on those executing that warrant the authority to conduct a reasonable examination of anything at that location within which the specified things might be found. Just as it cannot be said that a warrant to search for documentary evidence relating to a fraudulent scheme would not apply to a four-drawer filing cabinet, the existence of which the police learn of after entering a residence, neither can it be said that such a warrant would not apply to a computer, the existence of which the police learn of after entering a residence. Both are likely repositories of the things for which authorization to search has been given.
>
> [The accused's] argument that a warrant must specifically authorize the search of a computer rests principally on the fact that computers generally contain large and varied amounts of personal, confidential, and sometimes sensitive information, such as correspondence,

"A warrant authorizing a search of a specific location for specific things confers on those executing that warrant the authority to conduct a reasonable examination of anything at that location within which the specified things might be found."

> photographs, financial records, and medical information. However, I do not accept that the law governing search warrants needs special rules to deal with computers and similar devices.
>
> It is important to keep in mind that the principles of search and seizure already place limits on how a warrant can be executed. As mentioned above, those executing a warrant are entitled to search only those areas in which the things listed on the warrant might reasonably be expected to be found. With respect to electronic devices, this means that a device must reasonably be expected to contain at least one of the things listed on the warrant before it can be examined at all. Further, the scope of the examination of a device will be limited to searching for those things listed on the warrant. Put otherwise, the fact that the police have authority to search a device for one thing does not mean they have authority to search it for other things. Nor ... does it mean that the police will have the authority to "scour the entire contents of [a] hard drive".
>
> ...
>
> ... When the police, in the course of executing a warrant, locate a device that can reasonably be expected to contain an electronically-stored version of a thing they have been authorized to search for, they can examine that device for the purpose of determining whether it contains that thing (i.e., information), but only to the extent necessary to make that determination. [paras. 63-65, 68]

Reasonable searches?

The Court of Appeal concluded all of the computer and cell phone searches were reasonable. Despite the testimony of several officers that their standard practice was to examine non-password protected computers and cellular telephones for evidence of ownership or occupancy when executing a search warrant, what matters is what they did in this case. "Even assuming that computers and cellular telephones were improperly searched on other occasions, that has no bearing on the lawfulness of what was done in the case at bar," said the Court.

laptop computer: the computer was searched for files containing photographs and documents that could contain information as to who was using that computer and assist in determining who was in control of the premises. This was authorized by the warrant. The MSN Messenger and Facebook pages, which were running, also fell within the type of "documentation" covered by the warrant, even if the officer had to open the pages by clicking on their respective ions. "Both programs were running, whether an icon had to be clicked to make an active page visible is of no significance," said Justice Frankel. However, he would not decide whether the officer "could have looked for further information accessible through the active pages, e.g., by accessing portions of the Facebook page that were not already loaded on the computer."

cellular telephone: the cellphone was examined to determine its number and to see what photographs it contained. These items fell within the types of "documentation" covered by the warrant. And there is no suggestion the telephone was examined for any other purpose or other types of electronically-stored information.

desktop computer: Although the trial judge admitted the photographs of persons coming from and going to the residence found on the security-system computer photographs under s. 24(2), the examination of this computer would have been reasonable, "as the video recordings were examined solely for the purpose of determining whether they could provide information as to who was in control of the premises."

The warrant authorized the police to search for documentation that could assist in determining who was in control of the premises, including documentation contained in the computers and cellular telephone. The evidence obtained from the examination of those devices should have been admitted. The Crown's appeal was allowed, the accused's acquittals were set aside and a new trial was ordered.

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

ENTRAPMENT: INVESTIGATION v. OPPORTUNITY

R. v. Olazo & Storteboom, 2012 BCCA 59

After stopping a motorist for a traffic infraction, a police officer agreed not to issue a ticket in exchange for information about a local dial-a-dope business. The motorist provided a phone number. He said it was an active drug line in the area, operated on a 24 hour/7 day basis and gave the names of "Dave" and "Chris" who worked the line on different shifts, one of whom was either Chinese or Hispanic. The motorist said they used a Chevy Cavalier and a gold Ford Explorer. The following day the police officer asked a female colleague to call the number and see if a drug purchase could be arranged. At about 2:00 a.m., a telephone call was made and the two agreed to meet at a Home Depot for the purchase of two "40s" (rocks of crack cocaine) for $70. Police went to the meeting place, but no one appeared. The officer again called the number and the male explained that he saw police cars in the area and would not stop. They then agreed to meet in a different place but no one showed up there either. Later, another officer made several calls to the number, a meeting was arranged in a parking lot and cocaine was sold to an undercover officer.

At trial in British Columbia Provincial Court the accuseds pled guilty to trafficking cocaine, possessing cocaine for the purpose of trafficking and possessing heroin for the purpose of trafficking, but raised the defence of entrapment. The judge found that the motorist was not known to the officer, so his reliability as an informant was uncertain. The officer made no inquiries as to how the motorist knew about the information he was providing, so the reliability of the information was also uncertain. The driver was obviously motivated by a personal benefit to provide the information and none of the details of the motorist's information were ever confirmed, corroborated or investigated to check out its reliability prior to the solicitation for drugs. The trial judge found that by making direct telephone contact without first verifying any of the information provided to the informant, the police operated on mere suspicion rather than the reasonable suspicion standard required to justify providing an opportunity to commit an offence. The entrapment defence succeeded and stays of conviction were entered.

The Crown appealed, among other grounds, that the trial judge failed to appreciate the nature and effect of the first telephone call. Rather than an opportunity to commit an offence, the Crown argued that the call was a step in the investigation leading to reasonable suspicion.

Entrapment

There are two ways in which the defence of entrapment becomes available:

1. the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry; or

2. although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.

In this case, the key issue was whether the police had a reasonable suspicion before providing the accused with an opportunity to commit an offence. Justice Donald, writing the opinion of the Court of Appeal, said this about reasonable suspicion:

> Reasonable suspicion has been defined by what it is not – something more than mere suspicion and less than reasonable and probable grounds – and it has been likened to "articulable cause". ...
>
> From what I have gleaned from the cases, a tip from an informant of unknown reliability will create a reasonable suspicion when some "objective" or "extrinsic" piece of information in the tip is confirmed.
>
> Confirmation of the tip must precede the offer. Were it otherwise, determining reasonable suspicion would be a bootstrapping exercise and ex post facto reasoning would allow the opportunity made on mere suspicion, if taken up, to raise the level to the requisite standard.

"Entrapment law distinguishes investigation from opportunity. Steps taken to investigate the reliability of a tip, falling short of providing an opportunity to commit an offence, will not give rise to the defence."

> Entrapment law distinguishes investigation from opportunity. Steps taken to investigate the reliability of a tip, falling short of providing an opportunity to commit an offence, will not give rise to the defence. [references omitted, paras. 16-19]

In determining whether police activity was merely investigation or the presentation of an opportunity to commit a crime (which requires a reasonable suspicion), a narrower interpretation of opportunity than just making a phone call and pretending to be a buyer was endorsed. "Police can achieve a level of reasonable suspicion by engaging in the preliminaries of a drug transaction without risking entrapment," Justice Donald said. In this case, the officer's "initial questions designed to set up a deal, if the recipient of the call were willing, could be seen as investigative steps rather than opportunity. The two of them fairly quickly came to terms and arranged a meeting. But by that time, the tip had been confirmed in two important ways: someone answered at 2:00 a.m. (a 24-hour line), and the male responded positively to the opening query expressed in terms familiar to drug traffickers and otherwise obscure to ordinary persons (it was a dial-a-dope line)." At this stage of police activity, the officer acquired a reasonable suspicion that she was speaking to a person engaged in trafficking and she could go on to provide the opportunity for a transaction.

The Court of Appeal rejected the accuseds' assertion that the police set out to make a drug deal and that their motive in making the call was not to investigate the reliability of the tip but to conclude a transaction. Justice Donald found the motive of the police in placing the call was irrelevant. "The authorities make it clear that reasonable suspicion is an objective standard," he said. "For the purposes of entrapment, the pertinent question is whether, objectively speaking, the police had a reasonable suspicion that the suspect was engaged in the drug trade when they presented an opportunity to traffic."

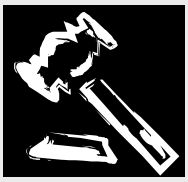
Although the tip itself may not have been enough to "arouse reasonable suspicion, the tip was sufficiently detailed and specific to justify placing a call as the next step in the investigation." This was not a case where the police were conducting a random investigation by making cold calls to phone numbers with virtually nothing to go on.

The trial judge erred in excluding the first call placed by police in deciding whether an opportunity based on reasonable suspicion was provided. The call confirmed the tip and then the police acted on reasonable suspicion. There was no entrapment. The Crown's appeal was allowed, the entrapment ruling was set aside, and the accuseds convictions were restored.

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

LEGALLY SPEAKING:

Criminal Harassment



"The requirements of criminal harassment are in section 264 of the Criminal Code. .... The prohibited act or acts which must be proven are in subsection 264(2) and include repeated following, repeated communication, watching and besetting or threatening conduct. The mental element which must be proven is that the appellant knew that the prohibited acts complained of would harass (trouble, torment, worry, plague, bedevil or badger) the complainants or that the appellant was reckless to the fact that his acts might cause the complainants harassment. The Crown must also prove that the complainants feared for their safety and that such fear was reasonable in all of the circumstances." - Alberta Court of Appeal in *R. v. Katzenback*, 2011 ABCA 318 at paras. 14-17.

ON-DUTY DEATHS DROP

On-duty peace officer deaths in Canada dropped by four last year. In 2011 three peace officers lost their lives on the job as reported by the Officer Down Memorial Page.

Once again motor vehicles, not guns, posed the greatest risk to officers and continue to do so as the last 10 years suggest. Since 2002, 30 officers have lost their lives in circumstances involving vehicles, including automobile and motorcycle accidents (21), vehicular assault (5), and being struck by a vehicle (4). These deaths account for 48% of all on-duty deaths, which is more than twice the next leading cause of gunfire (14) in the same 10 year period. On average, six officers lost their lives each year during the last decade, while 2002 had the most deaths at 12.

Source: http://canada.odmp.org [accessed February 19, 2010]

2011 ROLL OF HONOUR

Sergeant Ryan Russell
Toronto Metropolitan Police Service
End of Watch: January 12, 2011
Cause of Death: Vehicular Assault

Constable Garrett Styles
York Regional Police Service
End of Watch: June 28, 2011
Cause of Death: Vehicular Assault

Officer Vincent Roy
Police de Bromont
End of Watch: December 1, 2011
Cause of Death: Struck by Vehicle

Sergeant Ryan Russell

Constable Garrett Styles

Officer Vincent Roy

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

2011 Average Tour: 9 years
2011 Average Age: 34
2011 Deaths by Gender: 3 male
2011 Deaths by Cause:
- ✳ **vehicular assault - 2**
- ✳ **struck by vehicle - 1**

2010 Deaths by Province:
- ✳ **Ontario - 2**
- ✳ **Quebec - 1**

Last 10 years by Gender:
- ✳ **female - 7**
- ✳ **male - 55**

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

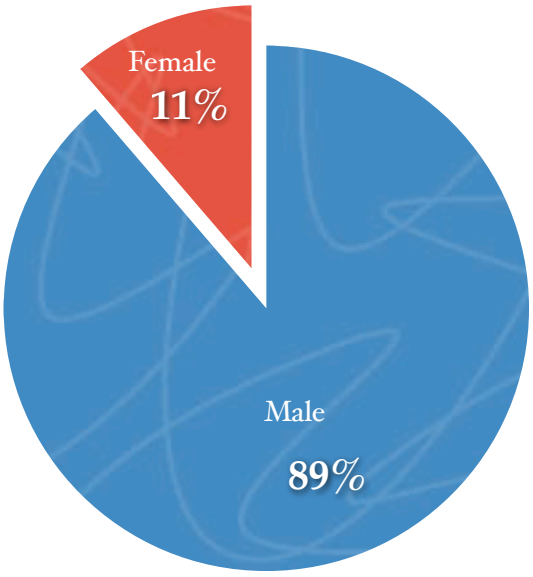
Cause	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	Total
Aircraft accident							2		2		**4**
Assault								1			**1**
Auto accident		3	3	1		1	2	1	3	6	**20**
Drowned		1					1				**2**
Duty related illness						1					**1**
Gunfire		1			3	3	5	1		1	**14**
Heart attack				1			1	2		1	**5**
Motorcycle accident									1		**1**
Natural disaster		2								1	**3**
Stabbed			1					1			**2**
Struck by vehicle	1									3	**4**
Vehicular assault	2				1	1		1			**5**
Total	**3**	**7**	**4**	**2**	**4**	**6**	**11**	**7**	**6**	**12**	**62**
Female	0	1	1	0	0	1	1	1	0	2	7
Male	3	6	3	2	4	5	10	6	6	10	55

POLICE ASSAULTS

According to a Statistics Canada "*Police-reported crime statistics in Canada, 2010*," assaulting a police officer rose (+45%) from 2009 to 2010. In 2010 there were 17,377 assault police officer offences compared to 11,837 the previous year. This increase may be attributable to new offences of assault with weapon/CBH to a peace officer and aggravated assault against peace officer which were recently added to the *Criminal Code*. These offences would have previously been reported under the general assault with weapon/CBH or aggravated assault provisions. For other assaults in 2010, there were 173,843 reports of common assault (level 1), 51,340 assaults with a weapon or bodily harm (level 2) and 3,410 offences of aggravated assault (level 3).

Source: Statistics Canada, 2010, "Police-reported crime statistics in Canada, 2009", Catalogue no. 85-002-X,released on July 21, 2011.

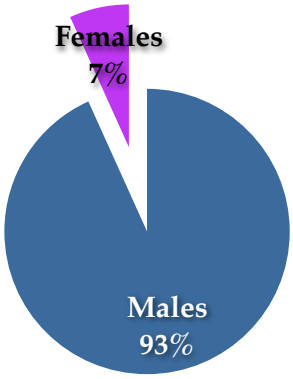
On-Duty Deaths 2002-2011 by Gender



U.S. ON-DUTY DEATHS INCREASE

During 2011 the U.S. lost 163 peace officers, up 2 from 2010. The top cause of death was gunfire (59) followed by automobile accidents (44), vehicular assault (13) and heart attack (13).

The state of Texas lost the most officers for the fifth consecutive year at 13 - equal to Florida and the U.S. Government - followed by California (10), Georgia (10) North Carolina (7), Missouri (6), Ohio (6), Tennessee (6), Michigan (5), New Jersey (5), and Virginia (5). The average age of deceased officers was 40 years while the average tour of duty was 12 years and 8 months service. Men accounted for almost 93% of officer deaths while women made up 7 %.



Source: http://www.odmp.org/year.php [accessed January 19, 2011]

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

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

U.S. Peace Officer On-Duty Deaths		
Cause	**2011**	**2010**
911 relatd illness	-	2
Accidental	-	1
Aircraft accident	1	2
Animal related	1	-
Assault	5	5
Automobile accident	35	42
Boating accident	-	1
Drowned	4	1
Duty related illness	7	-
Explosion	1	-
Fall	-	2
Gunfire	66	59
Gunfire (accidental)	4	2
Heart attack	10	13
Heat exhaustion	1	1
Motorcycle accident	4	5
Stabbed	2	-
Struck by vehicle	4	7
Training accident	1	1
Vehicle pursuit	4	4
Vehicular assault	12	13
Weather/natural disaster	1	-
Total	**163**	**161**

U.S. On-Duty Deaths by Year (2002-2011)											
Year	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	Total
Deaths	163	161	138	151	200	160	165	165	149	159	1,681
Avg. age	40	41	40	40	40	38	39	40	38	39	
Avg. tour	12 yrs. 8 mos.	11 yrs. 7 mos.	11 yrs, 11 mos	11 yrs, 10 mos	11 yrs, 3 mos	11 yrs, 5 mos	11 yrs, 1 mos	12 yrs, 10 mos	10 yrs, 4 mos	10 yrs, 10 mos	
Female	11	6	3	12	9	9	5	9	6	15	85
Male	152	155	135	139	191	151	160	156	143	144	1526

POLICING ACROSS CANADA: FACTS & FIGURES

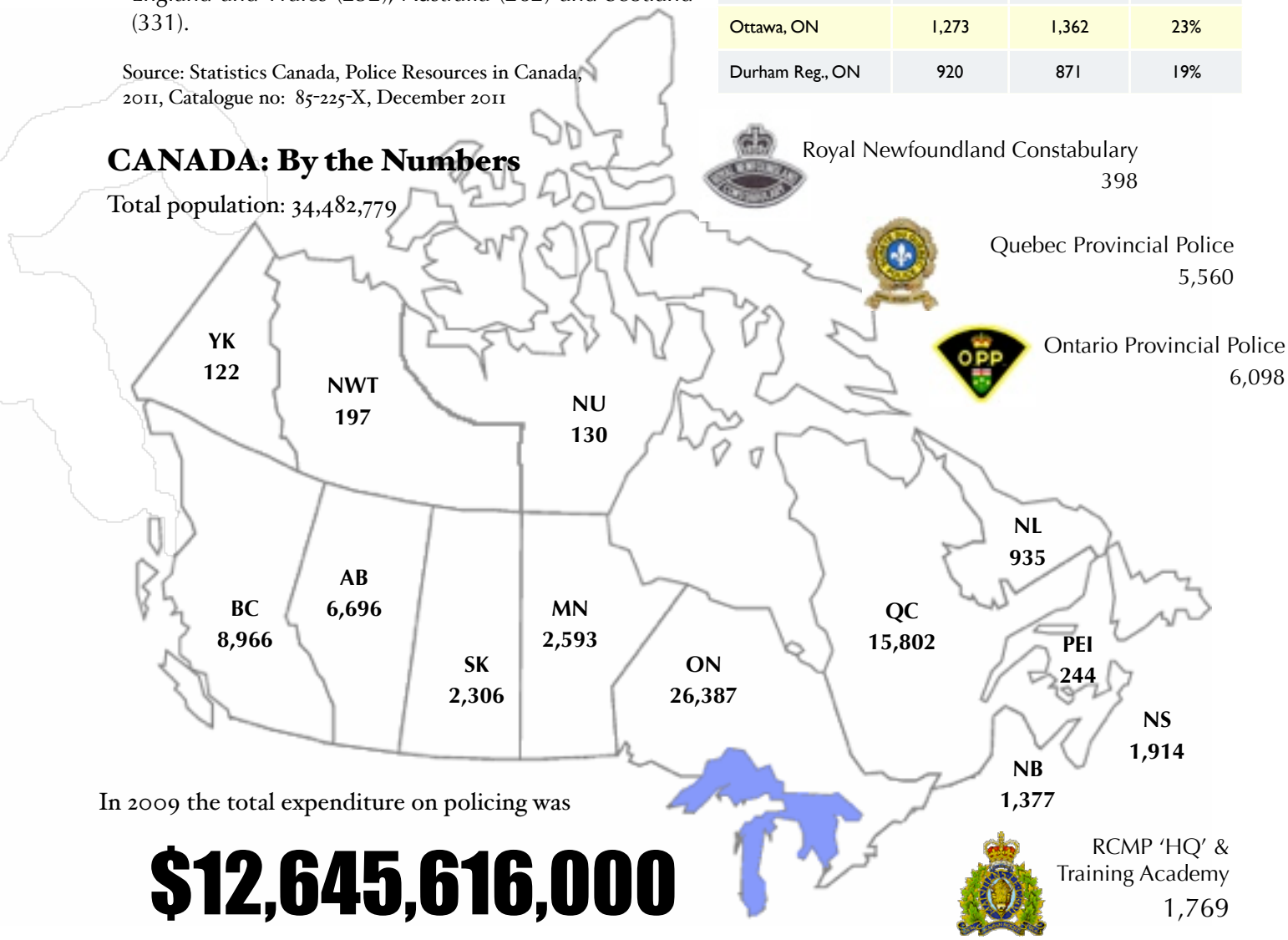
According to a report recently released by Statistics Canada, there were 69,438 active police officers across Canada in 2011 - a slight increase of 188 over 2010. This was the eighth consecutive year of growth. Ontario had the most police officers at 26,387, while the Yukon had the least at 122. With a national population of 34,482,779, Canada's average cop per pop rate was 201 police officers per 100,000 residents. This rate was the same as Japan, but lower than the United States (242), England and Wales (252), Australia (262) and Scotland (331).

Source: Statistics Canada, Police Resources in Canada, 2011, Catalogue no: 85-225-X, December 2011

Canada's Largest Municipal Police Services 2010			
Service	Officers		% Female
	Actual	Authorized	
Toronto, ON	5,776	5,587	18%
Montreal, QC	4,533	4,585	30%
Peel Reg., ON	1,908	1,922	16%
Calgary, AB	1,883	1,938	15%
Edmonton, AB	1,607	1,588	19%
York Reg., ON	1,466	1,461	17%
Winnipeg, MN	1,393	1,393	14%
Vancouver, BC	1,376	1,327	22%
Ottawa, ON	1,273	1,362	23%
Durham Reg., ON	920	871	19%

CANADA: By the Numbers

Total population: 34,482,779



Royal Newfoundland Constabulary
398

Quebec Provincial Police
5,560

Ontario Provincial Police
6,098

RCMP 'HQ' & Training Academy
1,769

In 2009 the total expenditure on policing was

$12,645,616,000

CMA Police Officers & Crime Severity Index		
CMA	Officers-2011	Crime Severity Index-2010
Toronto, ON	10,213	57.8
Montreal, QC	7,021	83.7
Vancouver, BC	3,955	101.2
Calgary, AB	1,988	76.5
Edmonton, AB	1,930	102.0
Winnipeg, MN	1,460	122.3
Ottawa, ON	1,346	60.1
Hamilton, ON	1,110	70.9
Quebec, QC	961	56.1
London, ON	765	82.4
St. Catherines-Niagara, ON	761	69.8
Kitchener-Cambridge-Waterloo, ON	757	68.0
Halifax, NS	689	96.8
Windsor, ON	597	66.1
Victoria, BC	556	83.7
Saskatoon, SK	496	128.1
Regina, SK	425	131.4
Gatineau, QC	413	69.3
St. John's, NL	336	101.9
Barrie, ON	307	60.1
Abbotsford-Mission, BC	280	99.8
Greater Sudbury, ON	260	84.2
Sherbrooke, QC	248	70.7
Kingston, ON	236	62.3
Brantford, ON	235	99.1
Thunder Bay, ON	232	111.3
Saint John, NB	206	91.9
Kelowna, BC	201	113.1
Peterborough, ON	198	67.8
Trois-Rivieres, QC	190	69.4
Guelph, ON	190	50.4
Saguenay, QC	179	73.4
Moncton, NB	156	71.8

GENDER

There were 13,605 female officers in 2011 accounting for 19.6% of all officers, or roughly 1 in 5. This is up from 17.3% in 2005, 13.7% in 2000, 9.8% in 1995, 6.4% in 1990, 3.6% in 1985, and 2.2% in 1980. Quebec had the highest percentage of women (23.7%) while the Yukon had the least (12.3%). The RCMP HQ and Training Academy were 21.1% female.

Area	% Female
QC	23.7%
BC	21.2%
NL	18.6%
ON	18.4%
SK	17.7%
AB	17.3%
NS	15.9%
PEI	15.6%
NB	15.3%
MN	14.8%
NU	13.8%
NWT	13.2%
YK	12.3%

The number of women in all ranks continued to rise. Senior officers were 9.5% female, more than doubling over the last ten years. Non-commissioned officers were 15.8% female, also more than twice the percentage from a decade ago. Constables were 21.6% female. This is a slight increase over last year.

Overall, the representation of women in policing continues to increase. In 2011 the number of women increased (+285) while the number of male officers decreased (-97).

OTHER FA$T FACT$

- Police expenditures rose for the 16th consecutive year, more than doubling since 1994;
- Costs for policing translates to $371 per Canadian;
- Among provinces, Ontario spent the most on policing ($4,206,322,000) followed by Quebec ($2,231,974,000), British Columbia ($1,336,248,000), Alberta ($1,134,759,000) and Manitoba ($378,078,000). The Yukon ($26,124,000), Prince Edward Island ($30,480,000), Nunavut ($40,423,000) and the Northwest Territories ($48,154,000) spent the least

Based on total expenditures on policing in 2010.

RCMP

The RCMP had the largest presence in British Columbia with 6,116 officers, followed by Alberta (2,817), Ontario (1,479) and Saskatchewan (1,278).

Canada's Largest Municipal RCMP Detachments 2011			
Service	Officers		% Female
	Actual	Authorized	
Surrey, BC	596	621	18.2%
Burnaby, BC	302	274	26.8%
Richmond, BC	229	229	22.2%
Codiac Region, NB	152	144	18.4%
Wood Buffalo, AB	150	147	24.0%
Kelowna, BC	149	155	23.4%
Nanaimo, BC	146	134	21.2%
Coquitlam, BC	138	140	23.9%
Red Deer, AB	137	151	29.9%
Prince George, BC	134	127	22.3%
Langley Township, BC	127	130	29.1%
Kamloops, BC	122	122	24.5%
Chilliwack, BC	102	102	25.4%

According to Statistics Canada, the majority of RCMP officers provided provincial police services (6,702). This was closely followed by RCMP municipal policing (5,020) and federal policing (4,509). Another 2,386 officers were involved in RCMP Headquarters and the Training Academy.

RCMP On-Strength Establishment as of September 1, 2011	
Rank	**# of positions**
Commissioner	1
Deputy Commissioners	9
Assistant Commissioners	25
Chief Superintendents	51
Superintendents	186
Inspectors	440
Corps Sergeant Major	1
Sergeants Major	3
Staff Sergeants Major	16
Staff Sergeants	942
Sergeants	2,140
Corporals	3,672
Constables	11,717
Special Constables	78
Civilian Members	3,760
Public Servants	6,194
Total	**29,235**

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

RCMP Officers by Level of Policing - Canada 2011 (numbers do not include 1,769 members at HQ & Training Academy)														
Level / Region	BC	AB	SK	MN	ON	QC	NB	NS	PEI	NL	YK	NWT	NU	Total
Municipal	3,301	1,050	189	194	-	-	215	62	9	-	-	-	-	5,020
Provincial	1,804	1,342	786	615	-	-	513	738	105	414	98	175	112	6,702
Federal	846	358	258	198	1,371	972	155	193	27	91	16	13	11	4,509
Other	165	67	45	34	108	49	36	46	11	32	8	9	7	617
Total	6,116	2,817	1,278	1,041	1,479	1,021	919	1,039	152	537	122	197	130	16,848

The RCMP is Canada's largest police organization. As of September 1, 2011 the force's on-strength establishment was 29,235. This includes 19,203 police officers, 78 special constables, 3,760 civilian members and 6,194 public servants.

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

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

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

CANADA's TOP TEN STOLEN VEHICLES

On December 14, 2011 the Insurance Bureau of Canada released its annual list of the most frequently stolen vehicles in Canada. According to the report there is an increasing involvement of organized crime in auto theft as evidenced by the appearance of high-end models on the list.

Source: Insurance Bureau of Canada www.ibc.ca

TOP 10 STOLEN AUTOS			
	YR	MAKE	MODEL
1	2009	Toyota	Venza 4-door
2	1999	Honda	Civic SiR 2-door
3	2000	Honda	Civic SiR 2-door
4	2006	Ford	F350 Pickup Trick 4WD
5	2002	Cadillac	Escalade EXT 4-door AWD
6	2006	Chevrolet	TrailBlazer SS 4-door 4WD
7	2007	Ford	F350 Pickup Trick 4WD
8	2001	Pontiac	Aztek 4-door AWD
9	1998	Acura	Integra 2-door
10	1999	Acura	Integra 2-door

CORONER URGES SEATBELT USE

B.C.'s Coroners Service has recently completed a detailed study of 85 fatal motor vehicle crashes in the province's Interior. The results showed that only 47% of those who died were restrained at the time of crash.

- 62% were drivers and 35% were passengers. In 2% of cases, it could not be determined definitively who had been the driver in the crash.
- 62 % were male and 38 % were female although gender made little difference as to whether or not someone wore their seatbelt.
- impaired drivers were significantly LESS likely to have been wearing their seatbelt. In cases in which impairment was a factor, only 25% of those who died had been wearing their seatbelts.

Source: http://www.newsroom.gov.bc.ca

SEARCH FOR IP ADDRESS INFORMATION REASONABLE

R. v. Trapp, 2011 SKCA 143

An undercover police investigator monitoring peer-to-peer file-sharing on the Internet searched for images or videos of child pornography. She browsed a computer's shared folders and discovered that they contained child pornography files. She generated an Internet Protocol (IP) history for the corresponding IP address and determined that the Internet Service Provider (ISP) was SaskTel, a Crown corporation. The investigator faxed a letter to SaskTel Security requesting any information relating to the IP address under s. 29.2 of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*). SaskTel faxed the accused's name and account information, which included his address, subscription services, telephone number, e-mail address, login name, cell phone number and television programming. Using this information, police were able to obtain the accused's date of birth, driver's licence number, registered vehicles, and a physical description through Saskatchewan's driver licensing and vehicle registration database. A warrant to search the accused's residence was obtained and a computer was seized from a bedroom. An examination of the computer by a forensic computer analyst confirmed there was child pornography in a shared folder. He was charged with several child pornography offences.

At trial in Saskatchewan Provincial Court the accused sought the exclusion of the evidence obtained under the search warrant because his s. 8 *Charter* rights, among others, had been breached when police obtained information about him from SaskTel. The judge concluded that the accused's reasonable expectation of informational privacy under s. 8 was not infringed by police because they had acted in accordance with s. 29(2)(g) of *FIPPA* in the course of the investigation. The accused was convicted of several offences under the *Criminal Code:* making child pornography available - s. 163.1(3); accessing child pornography - s. 163.1(4.1); and two counts of possessing child pornography - s. 163.1(4). He was sentenced to 13 months incarceration plus three years probation. He was also given a three-year s. 161 order, a DNA order and a 20-year sex offender registry order.

The accused appealed to the Saskatchewan Court of Appeal arguing that the police required a warrant to obtain his account information from SaskTel relative to the IP address, which revealed intimate details of his lifestyle and personal choices. In his view, he had a reasonable expectation of privacy while surfing the internet and police violated s. 8 of the *Charter* by obtaining his account information without a warrant. The Crown, on the other hand, submitted that the accused had no reasonable expectation of privacy in his account information in these circumstances. The Crown suggested that the subscriber information was not acquired biographical information and, in any event, the accused had no subjective or objective expectation of privacy.

Was there a search?

Before determining whether the accused enjoyed a reasonable expectation of privacy, the majority of the Saskatchewan Court of Appeal outlined the framework for determining whether s. 8 of the *Charter* was breached. Justice Cameron, authoring the majority judgment, stated:

> "[Section 8 of the Charter's] principal purpose lies in protecting persons from unreasonable state intrusion upon their privacy or, expressed positively, to protect the person's reasonable expectation of privacy in relation to the state."

Section 8 of the Charter guarantees the right of everyone to be secure against unreasonable search or seizure. That being so, its principal purpose lies in protecting persons from unreasonable state intrusion upon their privacy or, expressed positively, to protect the person's reasonable expectation of privacy in relation to the state. This makes it necessary,

> when the section is invoked, to assess the person's interest in being left alone by the government against the government's interest in intruding upon the privacy of the person for the purpose of law enforcement. [para. 5]

In assessing whether a s. 8 breach occurred, courts will first need to determine whether the police conduct amounted to a "search". The onus of establishing that a search has occurred lies with an accused (the person invoking the s. 8 protection). A "search" will occur if the conduct of the police intrudes upon the person's reasonable expectation of privacy. This will require a subjective expectation of privacy that is objectively reasonable on the totality of the circumstances. Privacy interests include **personal privacy** (concerning one's body and bodily integrity), **territorial privacy** (the places one occupies, such as the home or the workplace), and **informational privacy** (the information about self that one may or may not wish to have disclosed). In cases featuring allegedly confidential and private information about a person in the hands of a third party, the totality of the circumstances includes: the nature of the privacy interest asserted by the person; the precise nature of the subject matter of the alleged search; the relationship between the third party and the person; the legal framework governing disclosure of the information; the intrusiveness of the alleged search; and such other factors as may bear upon the strength or weakness of the expectation of privacy at issue. If there is no reasonable expectation of privacy, there is no search.

In this case, the majority concluded that the police conduct constituted a search. It found that the accused enjoyed a reasonable expectation of privacy in the information sought and obtained by the police from SaskTel regarding the IP Address it had assigned to him in relation to his access to the Internet. This information was then used for the purposes of furthering their investigation and obtaining a search warrant to search the accused's home, seize his computer, and search it for evidence. He had both a subjective expectation of privacy in that information, which was objectively reasonable having regard for the totality of the circumstances.

BY THE BOOK:

Asking for Information: ***Criminal Code***

s.487.014(1) Power of peace officer—For greater certainty, no production order is necessary for a peace officer or public officer enforcing or administering this or any other Act of Parliament to ask a person to voluntarily provide to the officer documents, data or information that the person is not prohibited by law from disclosing.

Was the search reasonable?

If it is established that the conduct of the police amounted to a search, the second step of the inquiry asks whether the search was reasonable. A warrantless search is presumptively unreasonable and the Crown bears the burden of establishing reasonableness. A search will be "reasonable" if it is authorized by law, the law is reasonable, and the search is carried out in reasonable manner.

In this case, the majority found the search was authorized by law - s. 487.014 of the *Criminal Code*. This provision permits a police officer, without a "production order", to request a person to voluntarily provide information about another, provided the person of whom the request is made is not prohibited by law from disclosing such information. Here, the police had reasonable and probable grounds to believe that an offence had been committed and that SaskTel was in possession of information affording evidence of it. Plus, the police had every reason to believe that SaskTel was not prohibited by law from disclosing this information. As well, SaskTel voluntarily released the information on the request of the police. Since the accused never challenged the constitutionality of the section, the law itself was assumed to be reasonable. Further, the search was conducted in a reasonable manner. Since the search was reasonable there had been no *Charter* breach. The accused's appeal was dismissed.

A Different View

Justice Ottenbreit offered a different opinion. Although he assumed that there was a subjective expectation of privacy in the accused's name, address, and phone number respecting his IP address, the totality of the circumstances weighed against an objective expectation. In his view, there was no reasonable expectation of privacy and, therefore, no search had occurred. Since there was no search there was no s. 8 *Charter* breach. He too would have dismissed the accused's appeal.

Complete case available at www.canlii.org

NO PRIVACY INTEREST IN IP ADDRESS INFORMATION

R. v. Spencer, 2011 SKCA 144

By using file-sharing software, a police officer discovered files containing child pornography in the shared folder of a computer and identified its Internet Protocol (IP) Address. He determined the IP Address was assigned to Shaw Communications, a public corporation. He then sought the disclosure of customer the identifying information relevant to the IP Address under the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*). In response, Shaw provided the name, address, telephone number, account number and current billing particulars relevant to the IP Address, which turned out to be the accused's sister. Using this information, police prepared and obtained a warrant to search the residence located at the address provided by Shaw. The accused also resided at this address. When the search warrant was executed, the police discovered a significant quantity of child pornography in a shared folder on the accused's computer. This material consisted of 441 distinct images and 112 videos.

At his trial in Saskatchewan Provincial Court the accused argued that the letter from police to Shaw requesting the IP Address information amounted to an unreasonable search and seizure, violated s. 8 of the *Charter*, and the evidence should have been excluded. The judge found that the accused had no reasonable expectation of privacy in the circumstances. The accused was convicted of possessing child pornography and making child pornography available.

Say one

Justice Caldwell concluded that the accused's expectation of privacy in the IP information that was disclosed to police was not reasonable when viewed in the totality of the circumstances from the perspective of a reasonable and informed person concerned about the protection of privacy. In his view, the contractual terms of the agreement his sister had with Shaw, along with the statutory terms of *PIPEDA*, negated an expectation of privacy. He stated:

> It is clear from the terms of the Service Agreement that [the accused's] sister had given her express, informed consent to Shaw to disclose the Disclosed Information to the police in the circumstances of this case. This fact moves the scales considerably more in favour of a finding that [the accused] did not hold an objectively reasonable expectation of privacy in the Disclosed Information.
>
> However, even if [the accused's] sister had not consented to the disclosure of her personal information, in these circumstances the disclosure would have been permitted under s. 7(3)(c.1)(ii) of PIPEDA. Section 7(3) of PIPEDA supplements the basic rule prohibiting disclosure in the absence of informed consent by setting forth certain disclosure activities which are permitted without the knowledge or consent of the individual in question. ... [paras. 38-39]

And further:

> In summary, neither its contractual relationship with [the accused's] sister, as set out in the Services Agreement, nor PIPEDA prohibited Shaw from disclosing the Disclosed Information in the circumstances of this case; rather, each clearly provided Shaw with the discretion to disclose information to the police in these exact circumstances, and Shaw had [the accused's] sister's express, informed consent to do so. The sum of these factors militates very strongly

BY THE BOOK:

Disclosure without knowledge or consent

s. 7(3)(c.1) PIPEDA

For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is organization;

... ...

(c.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that

(i) it suspects that the information relates to national security, the defence of Canada or the conduct of international affairs,

(ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law, or

(iii) the disclosure is requested for the purpose of administering any law of Canada or a province.

> against a finding that [the accused's] privacy expectation was reasonable. [para. 42]

Even if the accused did hold an objectively reasonable expectation of privacy in the disclosed information, Justice Caldwell would have found the search reasonable. The "search" was reasonably conducted and was authorized by a reasonable law. There was no s. 8 *Charter* violation.

Say two

Justice Ottenbreit would also dismiss the accused's appeal. He too opined there was no privacy interest in the information police had obtained from Shaw:

> In my view, the Disclosed Information in this case merely establishes the identity of the contractual user of the IP address, who in this case was not the accused. The potential that the Disclosed Information might in this case eventually reveal much about the individual and the individual's activity is, in my view, neither here nor there. In my respectful view, the fact that the Disclosed Information is of such a quality that it is capable of being used to assist in obtaining a search warrant which will lead to revealing to the police more intimate details about a person once the warrant is granted and executed, does not take it beyond what it is at this stage – simply name, address and telephone number. Theoretically, all the assertions in an information to obtain a search warrant have the potential of revealing to the police more intimate details of a person once the search warrant is granted and executed. In this respect the Disclosed Information has, in my view, no different special quality than any other piece of information that the police may receive prior to the warrant which furthers their investigation. [para. 110]

Say three

Justice Cameron doubted Justice Caldwell's assessment that the contractual or statutory terms negated an expectation of privacy but nonetheless would have dismissed the accused's appeal. Even if the accused enjoyed a reasonable expectation of privacy in the information the police sought and obtained from Shaw, the search was reasonably conducted under the authority of s. 487.014(1) of the *Criminal Code*.

The accused's conviction appeal was dismissed.

Complete case available at www.canlii.org

CUFFED & CONFINED IN POLICE WAGON NOT NECESSARILY A DE FACTO ARREST

R. v. Chaif-Gust, 2011 BCCA 528

The police obtained a s. 11 *Controlled Drugs and Substances* warrant to search for a marihuana grow operation at a residence believed to be uninhabited. The premises was rundown, it's windows were all covered by drapes or sheets, there were no items in the yard and surveillance had revealed no activity in or around it. Prior to entry, the police used a public address system to announce their presence and advise any occupants that the police had a search warrant and they were to "come to the front door now." Within a minute, the accused was seen leaving by the back door with another man. They were ordered to the ground, handcuffed and locked in the police wagon. The detaining officer returned to his containment duties while others searched the house, finding the premises almost entirely dedicated to a marijuana grow operation and the front door barricaded shut. Once the residence was cleared, the detaining officer returned to the police wagon and arrested the accused for producing marihuana and possession for the purpose of trafficking, some 42 minutes after his initial detention. The officer obtained the accused's name, birth date, and address, and advised him about the right to counsel. He indicated he wanted to speak to a lawyer and was searched incidental to his arrest; a key that opened the only door allowing access to the house was found in his pocket. He was transported to the police station, booked into jail, photographed and fingerprinted. However, he was not allowed to contact a lawyer until some 5 1/2 hours after he was arrested.

At trial in British Columbia Provincial Court the detaining officer testified that he was instructed at the pre-search briefing that anyone coming out of the house would be taken into custody and then arrested once the police had confirmed the existence of an offence. The judge concluded that the accused's detention was lawful. She stated:

EVIDENCE

- the entire residence was dedicated to growing marihuana, except the kitchen, living room, and bedroom.
- three level home.
- basement = four grow rooms.
- main floor = two grow rooms.
- attic = one "grow room" plus a large generator
- fluorescent lights, plastic reflective sheeting, and ducting.
- smell of marihuana overpowering and persuasive.
- estimated value of the crop discovered was between $276,000 and $696,000.
- front door barricaded from inside.
- ground floor basement door sealed shut.
- only access in or out was the upper rear door leading to the main floor kitchen.
- no beds or evidence anyone used house as a residence.
- no personal items were found in the house connected to the accused or his co-accused.
- accused's fingerprints not located anywhere in the house.
- co-accused fingerprints found on pieces of equipment associated with the grow operation.
- accused was found in possession of a key to the only door allowing access to the house.
- residence was in a state of disrepair, worn and uncared for, and windows were all covered with drapes or sheets.
- lawns were brown and unattended.
- no items in the yards (patio furniture, garden furniture, or children's toys) to suggest that anyone lived in the residence.
- during surveillance, no activity had ever been seen in or about the residence.
- no activity seen at the residence the day prior to the warrant's execution.

> i. The police had reasonable grounds to believe that a marihuana grow-op was inside the residence. This was established by the issuance of a search warrant to search the residence for this purpose.
>
> ii. The presence of the accused inside this residence and his departure from the residence via the rear door of the residence in apparent defiance of the police direction that the occupants come to the front door gave rise to

> a reasonable suspicion that the accused might have been implicated in the illegal grow-op inside the residence. I note here that, at the time of the accused's detention, neither [the lead investigator] nor [the detaining officer] were aware of the fact that the front door was barricaded shut, such that the accused could only come out of the rear door.

LATIN LEGAL LINGO
***de facto* = in reality**

She further found that the investigative detention was not a *de facto* arrest. Even though the nature and extent of the interference with the accused's liberty were significant it was justified in the circumstances. The officer needed to safely control the men while he continued containment duties. Handcuffing the men and locking them in the police wagon was a necessary and reasonable step. The police never intended to arrest the men or attempted to interrogate or search them. Even the 42 minute delay did not convert the detention into a *de facto* arrest.

As for the arrest, the police believed the residence was used solely to grow marihuana. The residence was worn and uncared for, the windows were covered with drapes or sheets, the lawns were brown and unattended, there was nothing in the yard to suggest anyone lived there and no activity was seen during surveillance. It was reasonable to believe that anyone at the residence was likely tending to the grow. In the judge's view, the accused was lawfully arrested after the grow operation was found. However, she found the police breached the accused's rights under s. 10 because they did not inform him of the reason for his detention, did not advise him of his right to counsel, and did not permit him access to a lawyer. Although these breaches were serious and flagrant, the key that opened the access door and the photograph used to identify the accused in court were admitted under s. 24(2). The accused was convicted of producing marihuana and possessing it for the purpose of trafficking.

The accused appealed to the British Columbia Court of Appeal arguing his detention was arbitrary, amounted to a *de facto* arrest and breached his s. 9 *Charter* rights. Furthermore, he suggested that his formal arrest was unlawful because police lacked reasonable grounds he was associated to the grow operation. Thus, the search incidental to arrest was unreasonable under s. 8 of the *Charter*. As a result of the ss. 8, 9, and 10 breaches, he submitted that the key and photograph should have been excluded.

Detention

Chief Justice Finch first addressed the police power to detain for investigation. He stated:

> [A] police officer has the authority to detain a person for investigative purposes provided that two conditions are met. First, the detention must be "viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence." Second, the decision to detain must pass a test of "overall reasonableness" with respect to "all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference." [para. 34]

He then went on to conclude that not only did the trial judge use the correct legal test in determining the lawfulness of the accused's detention, she also properly applied the test to the facts of the case. In his view, there was ample evidence for the trial judge to find that the requirements for a lawful detention were satisfied:

> With respect to the initial lawfulness of the detention, the trial judge found that the police had an objectively reasonable suspicion that the [accused] might be implicated in a marijuana grow operation at the moment they detained him. They had a reasonable basis to believe that there was a grow operation inside the house, as a result of prior observations. These same observations had led the police to believe, on reasonable grounds, that the house was not used as a residence, enabling them to make the further inference that anyone present in the building was there for the purpose of tending the grow operation. The fact that the [accused] and his co-accused left the house through the back door, when the police had ordered them out

> through the front, provided additional grounds for reasonable suspicion that the two men were implicated in the production of marijuana — reasonable, because the police were not yet aware, and had no reason to suppose, that it was not possible to leave through the front door. [para. 39]

Justice Finch also ruled that the detention remained lawful and non-arbitrary for its entire duration. Here, the trial judge determined that the police experienced difficulty in searching the interior of the house. There were many grow rooms in the house and the search was more time consuming than it may otherwise have been due to its cluttered condition. "The police had to satisfy themselves that there were no other persons in the building so that it could be secured," said Justice Finch. While the Court agreed that "the time required to search an entire residence will usually justify a longer detention of the building's occupants than would a simple street check, the length of the detention cannot be disproportionate to the requirements of the investigation involved." The Appeal Court rejected the accused's contention that police understaffing and insufficient resourcing should not have been considered in determining whether the detention was justified. Although a shortage of manpower or operational convenience cannot justify a disproportionate period of detention, "it will not always be possible to foresee the conditions to be encountered during a search, nor to make an accurate estimate of the manpower necessary to complete it in a timely fashion."

"The use of handcuffs or a police wagon do not, in and of themselves, render an otherwise reasonable detention a de facto arrest."

As for the detention being a *de facto* arrest by the manner it was carried out - confined in a locked wagon while handcuffed - Justice Finch found there was no evidence that the police intended from the outset to arrest anyone who came to the door of the house they were searching. "The use of handcuffs or a police wagon do not, in and of themselves, render an otherwise reasonable detention a de facto arrest," he said.

The Arrest

The police power to arrest without a warrant is found in s. 495(1) of the *Criminal Code*: "A peace officer may arrest without warrant (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence." Reasonable grounds requires both a subjective belief that must be justifiable from an objective point of view. The police need not demonstrate anything more than reasonable grounds.

Once the grow operation was located, the police established the existence of an indictable offence. However, the only link between the offence and the accused was his presence on the property. Was this enough to constitute subjective and objective reasonable grounds for arrest? The Court said yes. The investigating officer had concluded that the house was not being used as a residence. Since its only apparent purpose was a grow operation, it was reasonable for the police to infer that anyone present at the house was there for the purpose of tending the grow operation. The accused's arrest and search was lawful.

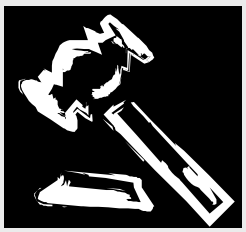
s. 10 Charter

The police did not respect the requirements of ss. 10(a) and (b) of the *Charter* when the accused was detained and arrested. He was not informed of the reason for his detention when he was first ordered to the ground and handcuffed, nor was he advised of his right to counsel at this time. Then, although he was told of the reason for his arrest and right to counsel when he was formally arrested, he was not permitted to contact counsel for a further 5 1/2 hours. Despite these breaches, the evidence of the key taken from the accused's pocket as well as his photograph taken at booking was admitted. The accused's appeal was dismissed and his conviction upheld.

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

LEGALLY SPEAKING:

Possession v. Production



"Knowledge and control are the key elements in any form of possession. The offence of production is not an included offence necessarily encompassed by proof of possession. Production requires active participation in the growing of the marijuana. However, an individual may be guilty of production either as a principal or a party who aids or abets."– British Columbia Court of Appeal Chief Justice Finch in *R. v. Chaif-Gust*, 2011 BCCA 528 at para. 75..

ALL KNOWN INFORMATION CONSIDERED IN REASONABLE GROUNDS ASSESSMENT

R. v. Darby, 2012 ABCA 27

Police caught a car prowler in the process of breaking into the accused's Nissan Murano SUV. He was sitting in the vehicle and admitted to stealing valuables. When looking in the vehicle for documents with the owner's current contact information, police located a set of keys draped over a loaded, unregistered handgun in the centre console. It's serial number had been removed. When the vagrant was arrested, his backpack was searched. Police found a Blackberry in it, believed to be taken from the SUV. When the Blackberry was turned on to identify its owner, numerous text messages related to criminal activity, including weapons possession, drug trafficking and kidnapping were noted. The gang unit was contacted and the accused became the target of a more intensive investigation, including surveillance. Police saw the accused act suspiciously, including making meets with various individuals. They also learned he had rented two apartments. At one of these apartments, the manager made a lawful entry and found a stolen, sawed off shotgun inside. The apartment was otherwise empty and was seemingly uninhabited. Police believed this was a stash pad, used to store illicit drugs, cash, firearms and other contraband. Police formed the belief that the accused was a drug and firearm trafficker and obtained a general warrant, signed by a Provincial Court judge, to make covert entries into his apartments to look for evidence of illicit activities. The warrant itself did not describe the investigative technique or procedure it authorized, nor list the items to be searched for or conditions of any search or seizure. Instead, it referred to the attached ITO which spoke to these issues. The warrant further authorized entries if the police had "reasonable grounds to believe that any controlled drugs or substances or the proceeds of crime from the sale of controlled drugs or substances or firearms will be found at the location." The police also executed a separate general warrant at an apartment the accused abandoned and found a secret access paneling located in a bedroom closet likely used to store drugs and weapons. Police now believed he was using his primary apartment to store his drugs and/or firearms. When the accused was arrested - about two months after the SUV break-in and a month after the warrant was issued - he was found in possession of $855, a Blackberry, and two additional cellphones. Police then searched his primary apartment and found eight kilograms of cocaine, $150,000 in cash, body armour and a handgun. He was charged with numerous drug and weapons offences.

The accused challenged the validity of the warrant in the Alberta Court of Queen's Bench. He argued, among other grounds, that the evidence in the ITO was insufficient and that the grounds police relied upon to execute the warrant was inadequate. The trial judge concluded that the officer had reasonable grounds to believe the accused was involved in drug and weapons trafficking when they obtained the general warrant as well as when they entered the apartment to search it. The accused's *Charter* rights had not been breached and, even if they were, the evidence was admissible under s. 24(2). The accused was convicted on most of the charges.

The accused then contended before the Alberta Court of Appeal that the police lacked reasonable grounds to execute the warrant when they searched his residence. In his view, the ITO did not provide reasonable grounds that drugs would be found in his apartment a month after it was prepared. Furthermore, he suggested that the police surveillance failed to provide anything more than a suspicion that he was involved in drug trafficking. Thus, he contended, when the police entered his apartment they lacked reasonable grounds to believe they would find drugs and just got lucky.

The Court of Appeal, however, disagreed. In assessing whether the police had the requisite reasonable grounds when they searched the accused's apartment, all of the information known to the investigators at that time must be considered. This not only includes the information contained in the ITO but also the "amplification" information procured during the voire dire and the evidence derived from police surveillance, which "solidified and reinforced their view, or, in other words, their '... reasonable grounds to believe ... .'" The Court noted:

- After the accused gave up possession to his second apartment, the police executed a separately issued general warrant on that property and found a secret "access paneling" located in the bedroom closet, which was likely used to store drugs or weapons. That led police to believe that after abandoning that apartment the accused was using his primary apartment to store his drugs and/or firearms.

- The accused was observed to be using a rental car, even though he had two other vehicles at his disposal. He also transferred his Jeep's registration to another vehicle, although he continued to use the Jeep. These practices were consistent with established drug trafficking practices as testified to by the police.

- When he was arrested prior to the execution of the warrant on his apartment, the appellant had in his possession $855 in cash, a Blackberry and two additional cell phones.

In sum, the Court of Appeal ruled that the trial judge did not err in finding that the police had the requisite reasonable belief when they executed the general warrant and searched the accused's apartment.

Furthermore, the fact that the general warrant did not list the authorized device, investigative technique or procedure, nor set out the terms and conditions, render it a nullity. The warrant referred to the "attached ITO" which addressed those issues. Although this may not have been a good practice, it did not impact the accused's privacy interests. Incorporating portions of the ITO by reference did not detract from the underlying objectives and interests that the authorizing provisions were designed to protect. The warrant was immediately sealed to preserve the ongoing investigation and the accused was aware when arrested that his place was searched based on the warrant. He also ultimately received disclosure of all relevant information. Furthermore, incorporating the ITO by reference did not mislead the authorizing judge or the reviewing court and the investigating officers were well acquainted with the terms of the warrant. The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

LINE BETWEEN INVESTIGATION & OPPORTUNITY TO COMMIT CRIME IS FINE

R. v. Bayat, 2011 ONCA 778

After being contacted by the vice-principal of a high school, a cyber crime unit detective entered into an investigation involving a 16-year-old female student who had entered into a sexual relationship with a 22-year-old male she had met on the Internet. After several interviews with the complainant and her friends, who were unwilling to assist in the prosecution, police learned that the accused had consensual sex and videotaped the acts, showing the video to at least one of the complainant's friends. The detective obtained the accused's hotmail address for MSN messenger and,

posing as a 13 year old girl named "Natasha," sent a message asking to be added as a "friend". The next day the detective was accepted as a friend and the accused initiated an exchange with "Natasha." He asked her who she was, how she got his address and to let him see her via webcam. "Natasha" replied that her mom would not let her have a webcam, but a picture of herself swimming in a pool was sent. The picture was actually a colour photograph of a female police member taken when the officer was about 13-years-old. Once the picture was received, an exchange occurred and later the accused arranged to meet with "Natasha." He was arrested by police at a pay-phone near the proposed meeting spot.

At trial in the Ontario Superior Court of Justice the detective testified that he commenced the investigation because he believed the accused was possibly producing and distributing child pornography. Child pornography is defined in s. 163.1(1) of the *Criminal Code* as including images of persons under the age of 18 years. Since the sexual activity was consensual and the complainant was 16-years-old, no sexual offence had been committed. The accused was found guilty of child luring under s. 172.1, but the charge was judicially stayed on the basis of entrapment. The judge found that police entrapped the accused because the police did not have a reasonable suspicion he was involved in a particular crime when they first communicated with him nor were they involved in a bona fide enquiry:

- ***absence of a reasonable suspicion.*** The judge opined that the detective, posing as "Natasha," required a reasonable suspicion at the time he made first contact with the accused. Since the detective did not have a subjective belief that the accused was engaged in child luring, the requisite reasonable suspicion was not met.

- ***absence of a bona fide inquiry***. The judge disbelieved the detective and made an adverse finding of credibility against him on whether he was engaged in a bona fide investigation. In the judge's view, the officer's claim that he was engaged in a child pornography investigation was inconsistent with his method of investigation.

The Crown challenged the judicial stay of proceedings to the Ontario Court of Appeal.

Entrapment

On the reasonable suspicion branch of entrapment, the police must not offer a person the opportunity to commit a crime unless they have a reasonable suspicion that the person is already engaged in criminal activity. In such a case, a court must make two findings:

(1) the police provided an opportunity to commit an offence; and
(2) the police did so without a reasonable suspicion.

In the Crown's view, police never provided the accused with an opportunity to commit an offence and, if they did, such opportunity was not given until well into the communication at a time when the officer had a reasonable suspicion that the accused was engaged in child luring by reason of his own messages to "Natasha".

Justice Rosenberg, delivering the Court of Appeal's opinion, agreed with the Crown. Noting that "the line between proper investigation and providing an opportunity to commit an offence can be a fine one." He said:

> The issue is a difficult one and the line between simple investigation and offering an opportunity to commit an offence will sometimes be difficult to draw. In my view, the trial judge erred in failing to consider whether the officer's conduct in simply opening up a dialogue with the [accused] constituted an opportunity to commit an offence. ... [T]he trial judge held that the reasonable suspicion had to exist from the moment the officer contacted the [accused]. He failed to consider whether that initial contact was an offer of an opportunity to commit an offence. In my view, it was not. The initial contact was no more than a step in an investigation, the equivalent of a knock on a door.

THE INTERNET EXCHANGE

natasha: ***did u see my pic***
accused: ***ya***
natasha: ***wat u think***
accused: ***ur cute but too young***
natasha: ***im 13 now but i was 12 in the pic***
accused: ***oh ok but still young lol***
natasha: ***for wat lol***
accused: ***to talk to me***
natasha: ***oh how old r u***
accused: ***22***
natasha: ***oh thats kewl but if y don wanna whatever***
accused: ***i dont care***
natasha: ***k its kewl wit me***

.....

accused: ***do u like to hav fun***
natasha: ***ya of corse lol***
accused: ***wat kinda fun***
natasha: ***anything i guess is kewl***
accused: ***how about with a guy:P***
natasha: ***wat u mean***
accused: ***u know getting naughty n having fun with a guy***
natasha: ***oh lol sure thats kewl***
accused: ***lol ok u do that alot***
natasha: ***ya a few time***
accused: ***wat have u done***
natasha: ***everything***
accused: ***like***
natasha: ***naughty stuff lol what u done***
accused: ***ru a virgin***
natasha: ***i did it once***
accused: ***with who***
natasha: ***my ex bf***
accused: ***how was it***
natasha: ***it hurt a bit but it was fun***
accused: ***ya i know***
natasha: ***what have u done***
accused: ***so wat hav u done other then that***
natasha: ***u first lol***
accused: ***i've done everything***
natasha: ***k wat u don***
accused: ***everything in sex lol***
natasha: ***kewl lol what u like most***
accused: ***tight girls n sexy n cute ones like u***
natasha: ***relly u like me?***
accused: ***like to get to know u***
natasha: ***kewl me to***
accused: ***thats good***
natasha: ***yuppers***
accused: ***hav u give a head***
natasha: ***no i never done that have u had that done to u***
accused: ***ya***
natasha: ***lol was it fun***
accused: ***yes very***
natasha: ***lol guys like that***
accused: ***lol ya will u do it to me:P***
natasha: ***ummmm k but i dont know wat u look like lol***

> [The detective], in the guise of Natasha, offered to be added as a "friend" to the [accused's] MSN account. This act could not be construed as an opportunity to commit the offence of child luring. After the initial contact was made, the [accused] took the initiative in opening up communications with Natasha. The [accused] asked to view Natasha. The photograph provided by the officer in response to this request was neutral. It could in not be construed as sexually provocative or as offering an opportunity to commit an offence. The [accused] took the lead in engaging in ever more explicit sexual discussions even though by then he believed that Natasha was a child. The officer gave the [accused] several opportunities to withdraw from the discussion. However, the respondent chose to carry on.
>
> Counsel for the [accused] argues that the officer's conduct in targeting the respondent through his MSN account was materially different from the usual method used by the police of entering a chat room. While I appreciate that there is a difference, in my view, it is not a legally material distinction. In the chat room type of investigation, police officers initially make themselves available to chat with everyone in the chat room, and then may enter a dialogue with particular individual. In this case the police officer made himself available to chat with a particular individual from the outset. In both situations, if it is the accused who takes the lead in directing the conversation, the element of offering an opportunity to commit the offence of child luring is not made out. There is a difference between simply providing an opportunity to chat or talk, and providing an opportunity to commit the offence of child luring. [reference omitted, paras. 19-21]

The police did not cross the line between proper investigation and providing an opportunity to commit an offence. Since no opportunity to commit an offence was provided, entrapment was not made out. The Crown's appeal was allowed, the stay of proceedings was set aside and the case was sent back to the trial judge for sentencing.

Complete case available at www.ontariocourts.on.ca

TELEPHONE RECORDS ORDER MAY BE OBTAINED WITHOUT RECORDER WARRANT

R. v. Mahmood, 2011 ONCA 693

Police were investigating the violent robbery of a jewelry store. When the store owner opened for business, two people, one wearing a burka, entered the store and produced handguns. The owner was forced at gunpoint into an office and bound, while a third person was admitted into the store. Surveillance camera's were removed and the robbers left with $500,000 in jewelry and $35,000 in cash. A plastic bag marked "Amira Islamic Fashions" was found on the store floor and police learned that three men had purchased a burka about three weeks before the robbery. As a result of their enquiries one of the accused was identified as involved in the purchase of the burka. Police obtained a "tower dump warrant" under s. 487 of the *Criminal Code* to search cellular telephone companies for account information including name, home and business address, date of birth, date and time of call and all telephone numbers dialed or received. This warrant targeted all customers accessing cell towers located near the jewelry store between 10:20 am and 11:50 am on the day of the robbery. The police thought that cell phone traffic near the store, around the time of the robbery, might help them track down the robbers. When the warrant was executed, information about 7,000 cell phone customers involved in more than 9,000 calls was obtained. As a result of this information, police were able to identify potential suspects and establish surveillance. Then they got another conventional search warrant for the cell phone records of a few people they thought could be involved in the robbery. Police continued physical surveillance and background checks of their suspects and subsequently obtained more conventional search warrants for the homes of the suspects. The ITO for these warrants included the contents of the ITOs from the tower dump and subscriber warrants. Police were able to recover currency, gold and jewelry stolen during the robbery.

At trial in the Ontario Superior Court of Justice the accuseds challenged the grounds upon which the search warrants were issued. In their view, the tower dump warrant lacked the necessary reasonable grounds for belief and therefore their s. 8 *Charter* rights were breached. If the information from the tower dump warrants was excised from the ITOs for the subscriber and residential warrants, they too could not be sustained. As a result, the accuseds' sought the exclusion of all of the evidence obtained from the warrants under s. 24(2). The trial judge concluded that cellphone subscribers have a reasonable expectation of privacy in records maintained by their cell phone providers and were therefore protected under s. 8. He found the ITO for the tower dumps failed to disclose the reasonable grounds required by s. 487. The seizure was unreasonable and the records were excluded. After excluding the tower dump information from the subscriber warrants, the judge also found the subscriber warrants could not be sustained. However, the trial judge opined that even after excising all of the cellular telephone data gathered under the tower dump warrant, the information gathered by traditional police methods could have supported a telephone records warrant under s. 492.2(2) of the *Criminal Code* on the basis of the less onerous standard of a reasonable suspicion. The subscriber records were admitted under s. 24(2). Finally, the judge held that the residential warrants could not have been issued if the tower dump information was excised, but the evidence seized from the homes was also admitted under s. 24(2). The accuseds Mahmood, Fundi and Sheikh were convicted by a jury of several offences arising out of the robbery. A fourth accused had already pled guilty and appeared as a witness for the Crown.

The accuseds then appealed to the Ontario Court of Appeal arguing, among other grounds, that the evidence of their cell phone records and the things found in the search of their homes should have been excluded. In their view, the trial judge was wrong in concluding that police could have obtained the subscriber records under s. 492.2(2) and that this alternative constitutional means lessened the seriousness of the s. 8 breach.

"Cell phone use is ubiquitous. Users and their phones become one, inseparable. Users talk to other users. Any time. Anywhere. Conversations - some brief, others lengthy - end. But something of them remains. Cell phone companies keep records. Of calls made and received. Of time and length. Of subscribers whose phone was used to make or receive a call. And those records, essential for billing purposes, can help to find out where the caller made or the recipient got the call. Sometimes, records kept by cell phone companies help police investigate crimes." [paras. 1-3]

BY THE BOOK:

Telephone Records Order: ***Criminal Code***

Information re number recorder

s.492.2(1) A justice who is satisfied by information on oath and in writing that there are reasonable grounds to suspect that an offence under this or any other Act of Parliament has been or will be committed and that information that would assist in the investigation of the offence could be obtained through the use of a number recorder, may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant.

(a) to install, maintain and remove a number recorder in relation to any telephone or telephone line; and

(b) to monitor, or to have monitored, the number recorder.

Order re telephone records

(2) When the circumstances referred to in subsection (1) exist, a justice may order that any person or body that lawfully possesses records of telephone calls originated from, or received or intended to be received at, any telephone give the records, or a copy of the records, to a person named in the order.

s. 492.2(2) Telephone Records Orders

The accuseds submitted, in part, that orders issued under s. 492.2(2) supplement number recorder warrants issued under s. 492.2(1) and could only be issued in conjunction with a number recorder warrant. Since there was no number recorder warrant under s. 492.2(1) in this case, no telephone records order under s. 492.2(2) was available. Further, they suggested that a telephone records order could only authorize the seizure of records existing contemporaneously with the operation of the number recorder and did not permit the seizure of records for calls made prior to the issuance of the number recorder warrant. The Crown, on the other hand, submitted that a telephone records order, issued on the less stringent standard of reasonable suspicion, was not dependent on the issuance of a number recorder warrant under s. 492.2(1). In its view, a telephone records order could be issued together with, or independently of, number recorder warrants and could include information about both prior or future telephone use.

Justice Watt, authoring the Court of Appeal's decision, summarized the telephone records order provisions as follows:

> In general terms, s. 492.2(1) authorizes a justice to issue a number recorder warrant provided the justice is satisfied by an information on oath and in writing that there are reasonable grounds to suspect that an offence against a federal statute has been or will be committed, and that information that would assist in the investigation of that offence could be obtained through the use of a number recorder, as defined in s. 492.2(4). The warrant looks forward for a period not exceeding 60 days and gathers information about telephone numbers and locations from

which calls are made, at which they are received or to which they are intended.

An order under s. 492.2(2) may only be made "when the circumstances referred to in subsection (1) exist." An order under s. 492.2(2) requires production, to a person named in the order, of records of telephone calls originated from, or received, or intended for reception, at any telephone. The use of the present tense "possesses" in subsection (2) appears to refer to records extant at the time the order is made, thus including records that catalogue previous calls.

... ...

A number recorder is a device that can be used to record or identify a telephone number or the location of a telephone from which a call originates or at which the call is received or is intended to be received: Criminal Code, s. 492.2(4). The recorder is activated when the subscriber's telephone is taken "off the hook". Electronic impulses from the monitored telephone are recorded on a computer printout tape that discloses the number called when an outgoing call is placed. The number recorder does not record whether the receiving telephone was answered by a person, or the substance of any conversation. For incoming calls, the number recorder records only the number calling and how long the monitored telephone was "off the hook" when answered. [references omitted, paras. 103, 104, 107]

The Appeal Court then went on to interpret the meaning of s. 492.2(2). It found a telephone records order not only included circumstances in which a number recorder warrant was issued under s. 492.2(1), but also permitted "a production order for existing records of previous calls, provided the justice was satisfied that there were reasonable grounds to suspect an offence under a federal statute had been or would be committed, and that information that would assist in the investigation of that offence could be obtained through an examination of the records." In Justice Watt's view, "historical information contained in the records may well assist investigators, for example, to obtain a number recorder warrant, a general warrant for video surveillance or an authorization to intercept private communications." Plus the standard for issuing an order under s. 492.2 is lower than what is

Reasonable Expectation in Informational Privacy: A Refresher

In Mahmood, the Ontario Court of Appeal provided a review of s.8 of the Charter and informational privacy:

The s. 8 Charter guarantee of security from unreasonable search or seizure protects only a reasonable expectation. To determine whether an investigative procedure invades a reasonable expectation of privacy requires consideration of all the circumstances, especially whether a subjective expectation of privacy exists and whether, if it does, the expectation is objectively reasonable in the circumstances.

The privacy interests protected by s. 8 include personal privacy, territorial privacy and informational privacy...

Informational privacy has to do with how much information about ourselves and our activities we are entitled to shield from the curious eyes and ears of the state: Informational privacy is the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.

Section 8 protects the biographical core of personal information that individuals, in a free and democratic society, would wish to maintain and control from dissemination to the state. This biographical core includes, but is not confined to information that tends to reveal intimate details about an individual's lifestyle and personal choices.

Section 8 does not protect all information that an individual may wish to keep confidential. On the other hand, merely because the information for which protection is sought is commercial in its nature does not exclude it from the protection of s. 8.

Where concerns about informational privacy emerge, the quality of the information said to be protected by the guarantee in s. 8 is important:. Relevant factors that inform whether information will fall within or beyond the interest protected by s. 8 ... include, but are not limited to:

i. the nature of the information itself;

ii. the nature of the relationship between the party releasing or holding the information and the party asserting confidentiality;

iii. the place where the information was obtained; and

iv. the manner in which the information is obtained.

It is worth remembering that all reasonable expectations of privacy are not equal. Some are of a greater magnitude than others. The degree of personal privacy reasonably expected at customs on entry to Canada, for example, is lower than in most other situations. Likewise, a comparatively low expectation of privacy attaches to premises or documents used or produced in the course of activities which, though lawful, are state regulated, and thus routinely inspected by state officials. Business records raise much weaker privacy concerns than personal papers.

The minimal nature of the intrusion by which information is obtained may also be of importance in assessing whether a reasonable expectation of privacy has been established, especially where the activity monitored is itself subject to a reasonable expectation of privacy. [references omitted, paras. 90-97]

required for a s. 487 warrant:

> The standard "reasonable grounds to suspect" in s. 492.2(1) is less exacting than "reasonable grounds to believe" that is required for a conventional search warrant. The standard is objective in nature and has been adopted by Parliament for searches in areas that involve lesser expectations of privacy.
>
> In the search context, a "suspicion" has been characterized as an expectation that the targeted individual is possibly engaged in some criminal activity. A "reasonable suspicion" means something more than a mere suspicion and something less than a belief based on reasonable and probable grounds. A sincerely held subjective belief is not a reasonable suspicion. To be reasonable, a suspicion must be supported by factual elements about which evidence can be adduced and permit an independent judicial evaluation. [references omitted, paras. 113-114]

This ground of appeal was dismissed and the admission of the evidence was upheld. The accuseds' convictions were affirmed.

Complete case available at www.ontariocourts.on.ca

"A "reasonable suspicion" means something more than a mere suspicion and something less than a belief based on reasonable and probable grounds. A sincerely held subjective belief is not a reasonable suspicion. To be reasonable, a suspicion must be supported by factual elements about which evidence can be adduced and permit an independent judicial evaluation."

Note-able Quotes

"I do not like this word bomb. It is not a bomb it is a device which is exploding." - Jacques Le Blanc, French Ambassador.

...

"The streets are safe in Philadelphia, it's only the people who make them unsafe." - Frank L. Rizzo, ex-police chief and mayor.

CIVILIAN WITNESSES PROVIDE EVIDENCE OF IMPAIRMENT

R. v. Walton, 2011 BCCA 535

At trial in British Columbia Provincial Court two civilian witnesses in a common law relationship, Ms. Mitchell and Mr. Tingey, provided evidence relevant to an impaired driving investigation. Both knew the accused as the neighbour of the friend they were visiting that evening with their baby.

Ms. Mitchell had talked to the accused outside their friends' home. She testified he was slurring his speech and staggering, and tried to put his arm around her. She said he was "definitely intoxicated". On cross-examination she said she did not know if his mouth was dry, which may have affected the way he was speaking. As Ms. Mitchell was putting her baby in the back seat of her parked car, the accused reversed his truck toward her vehicle. She yelled at him to stop about five times but he drove into it. She went to the driver's side of his vehicle and yelled at him through the window. He did not open it nor apologize, and just drove away. Ms. Mitchell said she had worked at a McDonald's Restaurant on and off for about seven years and had dealings there "quite often" with at least a handful of people who were impaired by alcohol. She said she determined whether customers were impaired by their speech, the way they talked, whether they are staggering and "the obvious".

Mr. Tingey testified that the accused drove up to his friends' home in his truck and was "clearly intoxicated". He needed help getting out of the truck and could not walk straight. Mr. Tingey said about an hour later the accused left his residence and drove away. Later he returned and backed into their car while he was trying to park. On cross-examination, Mr. Tingey agreed the accused could have had trouble getting out of his truck because the truck had a problem with the door lock. Mr. Tingey said that his parents were alcoholics and, as a result, he had often dealt with people who were impaired. In his experience, people impaired by alcohol stagger, slur and are unable to communicate. He

described them as "not normal" and said they may be aggressive.

After the collision, the police were called but had no dealings with the accused. Although the trial only lasted an hour, the provincial court judge convicted the accused of having care or control of a vehicle while impaired. He ruled that the evidence was overwhelming and the indicia of impairment, as related by the witnesses, was persuasive beyond a reasonable doubt. Both civilian witnesses had considerable experience with those who were impaired by alcohol.

Before the British Columbia Court of Appeal, the accused challenged his conviction. In his opinion, the conviction was based on mere suspicion of impairment by alcohol. The difficulty he had getting out of his truck, walking and talking could have been caused by medical conditions or something other than impairment by alcohol or a drug. Further, he said there was no evidence the witnesses saw him drinking alcohol, smelled it on his breath or heard him say anything that indicated he had been drinking.

The British Columbia Court of Appeal, however, was unable to agree with the accused. "It is fair to say that the indicia of impairment by alcohol generally include evidence that points to consumption of alcohol – seeing the accused drinking, an admission that he was drinking, or an odour of alcohol emanating from his breath or body," said Justice Neilson for the Court. "Nevertheless, there is no particular test or checklist of factors for determining impairment for the purposes of s. 253(1)(a) of the Criminal Code, nor is there any definitive behaviour or factor required to establish that condition. Typically, the fact-finder will consider evidence of the driving pattern, the physical appearance of the accused, his or her conduct, particularly the ability to walk and communicate, and evidence suggesting ingestion of alcohol. This evidence must be examined as a whole, with a view to determining whether the conduct of the accused shows a marked departure from the norm. The evidence of signs and symptoms suggesting impairment by alcohol may be given by lay witnesses, who may also provide their opinion as to the driver's possible impairment based on those observations."

Here, the two civilian witnesses each had experience in dealing with people who were impaired by alcohol; one because of family reasons and the other due to employment contacts. Furthermore, it was also important that both knew the accused prior to the events underlying the charge. They had a benchmark by which to measure his conduct on the evening in question. The accused's assertions that there were other possible explanations for his behaviour was speculative; there was no evidentiary basis for them. The only cause of the accused's impairment put forward by Crown was his consumption of alcohol. The two civilian witnesses referred to the accused as "intoxicated", a term universally used to describe impairment by alcohol. And there was no evidence to substantiate the other explanations put forward by the accused on cross-examination. The accused's appeal was dismissed.

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

"[T]here is no particular test or checklist of factors for determining impairment for the purposes of s. 253(1)(a) of the Criminal Code, nor is there any definitive behaviour or factor required to establish that condition. Typically, the fact-finder will consider evidence of the driving pattern, the physical appearance of the accused, his or her conduct, particularly the ability to walk and communicate, and evidence suggesting ingestion of alcohol. ... The evidence of signs and symptoms suggesting impairment by alcohol may be given by lay witnesses, who may also provide their opinion as to the driver's possible impairment based on those observations."

BULLET POINTS

Fingerprints

Fingerprints found on the window where the burglar gained entry could, in the circumstances of this case, justify the inference that the accused was the burglar. The location on the window where the print was found, the direction of the handprint on the window, evidence from the print indicating the hand was moving along the window and the fact that the window opened by sliding horizontally in the direction the hand was pointing supported the inference that the accused was in the act of opening the window, not just touching it. A reasonable trier of fact could be satisfied beyond a reasonable doubt that the accused was the burglar who gained entry through the window. ***R. v. Menard*, 2012 ONCA 29**.

Identification: Recognition Evidence

"While recognition evidence may be more reliable than eyewitness identification of a stranger, special caution must still be taken when using it to identify an offender, as it is still merely a statement of a witness's opinion about what he or she saw. Like all identification evidence its weight or reliability will depend on such circumstances as the nature, length and memorable features of the witness's previous contact with the accused." ***R. v. Pierce*, 2011 BCCA 485.**

"In Association With" Criminal Organization

The accused's conviction for trafficking in cocaine in association with a criminal organization was upheld. Although he argued that the transaction in question was a one-time occurrence and had nothing to do with his and the other participant's membership in the Hells Angels, the trial judge properly concluded that the transaction was "in association with" the Hells Angels; (1) the accused and the police agent were both full patch members of the Hells Angels; (2) they met on a social cruise function held by the Hells Angels; (3) the police agent obtained the accused's pager number through the Toronto Clubhouse; and (4) the wiretaps indicated that there were to be further transactions. ***R. v. Bodenstein*, 2011 ONCA 737.**

Tipping Off Informant

There is no bright line rule that prohibits a Crown prosecutor from disclosing to a police officer the arguments defence counsel will make in support of their challenge to a search warrant. In this case, defence counsel had filed a factum outlining the legal arguments he intended to advance and the subjects to be explored in the cross-examination of a police officer who prepared and swore the ITOs for search warrants. The defence lawyer had asked the prosecutor not to provide the police officer with a copy of the factum nor discuss the areas he would be cross-examined on. The prosecutor, however, met with the officer and mentioned some of the general areas or subjects upon which the officer would be cross-examined. Although their is no bright line rule; "each case depends and must be decided on its own facts. What would be improper in one case may be entirely appropriate in another." ***R. v. Mahmood*, 2011 ONCA 693.**

Standard of Review for a Search Warrant

"A reviewing judge does not substitute his or her view for that of the justice who issued the warrant. Rather, the reviewing judge considers the record before the issuing justice, the ITO, trimmed of any extraneous or unconstitutionally obtained information, but amplified by evidence adduced on the hearing to correct minor technical errors in drafting the ITO, to determine whether there remains sufficient credible and reliable evidence to permit the justice to issue the warrant". ***R. v. Mahmood*, 2011 ONCA 693.**

Drug Possession for Trafficking

The accused's conviction of possessing cocaine for the purpose of trafficking was upheld. He was the driver and sole occupant of the car. A clear plastic bag containing a one gram rock of cocaine and five flaps of heroin weighing 0.1 grams each was in close proximity to, and likely in plain view of, the driver. It was between the driver's seat and console. "In the absence of any evidence of how the drugs may have come to be present in the car without the [accused's] knowledge, or any denial of control or knowledge, it was open to the judge on the facts to conclude that the only reasonable inference to draw was that the [accused] had possession of the drugs," said the Court of Appeal. It was also open to the trial judge to conclude possession for the purpose o trafficking even though there was only a small amount of drugs found. There was an absence of drug paraphernalia for personal use. This, in combination fo other factors - a rental car, multiple cell phones, small denominations of money, location and packaging of drugs - together were indicia of drug trafficking. ***R. v. Mulligan-Brum*, 2011 BCCA 410**

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