JIBC IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

BC POLICE HAVE NEW POWER TO INSPECT MOTORCYCLE HELMETS

Police in British Columbia now have a new authority to inspect motorcycle helmets. Legislation enacted under BC's *Motor Vehicle Act* (*MVA*) allows police to inspect motorcycle helmets at the roadside to ensure they meet approved standards.

s. 194(8) Without a warrant, a peace officer may (a) demand that a person produce a motorcycle safety helmet to allow the peace officer to determine whether the motorcycle safety helmet complies with subsection (3) ...

Subsection (3) requires a person operating a motorcycle on a highway or riding as a passenger on it to wear a motorcycle safety helmet that is designated as approved by regulation or meets the prescribed standards and specifications. Under the *Designation of Motorcycle Safety Helmets Regulation*, the following are such helmets:

$138 ticket

- Snell Memorial Foundation 2005 Standard for Protective Headgear For Use with Motorcycles and Other Motorized Vehicles;
- Snell Memorial Foundation 2010 Standard for Protective Headgear For Use with Motorcycles and Other Motorized Vehicles;
- Federal Motor Vehicle Safety Standard No. 218; Motorcycle helmets (United States of America), also known as FMVSS 218 (49 CPR 571.218);
- United Nations Economic Commission for Europe (ECE) ECE Regulation No. 22 - Uniform provisions concerning the approval of protective helmets and of their visors for drivers and passengers of motor cycles and mopeds.

Section 194 also permits the seizure of non-approved helmets:

s. 194(8) Without a warrant, a peace officer may ... (b) seize the motorcycle safety helmet if, on production of the motorcycle safety helmet, the peace officer has reasonable grounds to believe that a person has contravened subsection (3) or (4).

Subsection (4) requires a motorcycle operator to not allow a person under the age of 16 to ride on the motorcycle without wearing an approved helmet.

$138 ticket

Obstruction

An *MVA* obstruction charge is triggered when a person "obstructs or attempts" to obstruct a peace officer demanding inspection of or seizing a non approved helmet.

$276 ticket

s. 194(9) A person commits an offence if the person obstructs or attempts to obstruct a peace officer acting under the authority of subsection (8).

Highlights In This Issue

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

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.

Assessment [videorecording]: show what you know.

New Westminister, BC: Justice Institute of British Columbia, c2011.

1 videodisc (DVD, 120 min.): sd., col.; 4 3/4 in.

Alice Cassidy reviews the interconnection between the following: learning objectives; choice of assignments, tests, and other ways for students to demonstrate their learning; and grading rubrics and associated feedback. She also discusses how to evaluate simulations, the potential for self, peer, or co-assessment and the techniques for authentic assessment such as the use of portfolios.

LB 2822.75 C377 2011 D1318

Blowing smoke: rethinking the war on drugs without prohibition and rehab.

Michael J. Reznicek.

Lanham, MD: Rowman & Littlefield Publishers, c2012.

HV 5825 R484 2012

Body language I [videorecording]: beyond words.

Stage Fright Productions.

written by Kathleen O. Ryan and Louise Schrank.

Lake Zurich, IL: Learning Seed; Orangeville: McIntyre Media [distributor], 2008.

1 videodisc (ca. 24 min.): sd., col.; 4 3/4 in. (DVD).

This program is an informative look into the fascinating world of nonverbal communication. It guides viewers through the land of space wars, tongue showing, mirrored postures and the many layers that make up unspoken communication.

BF 637 N66 B633 2008 D1340

Body language II [videorecording]: reading people.

Stage Fright Productions.

written by Kathleen O. Ryan and Louise Schrank.

Lake Zurich, IL Learning Seed, 2008.

1 videodisc (24 min.): sd., col.; 4 3/4 in. (DVD).

This program shows how to become a "people reader" attuned to non-verbal clues. Paralanguage, eye behavior, cultural differences, touch, space and time are explained.

BF 637 N66 B639 2008 D1341

The book of road-tested activities.

Elaine Biech, editor.

San Francisco, CA: Pfeiffer, c2011.

HD 30.26 B66 2011

Bullying, suicide, and homicide: understanding, assessing, and preventing threats to self and others for victims of bullying.

Butch Losey.

New York, NY: Routledge, c2011.

BF 637 B85 L67 2011

Changing adolescence: social change and its role in adolescent mental health.

Ann Hagell.

Bristol: Policy, 2012.

RJ 503 H344 2012

Distance education: a systems view of online learning.

Michael G. Moore, Greg Kearsley.

Belmont, CA: Wadsworth Cengage Learning, c2012.

LC 5805 M66 2012

Everyone communicates, few connect: what the most effective people do differently.

John C. Maxwell.

Nashville, TN: Thomas Nelson, c2010.

HF 5718 M393 2010

Have a nice conflict: how to find success and satisfaction in the most unlikely places.

Tim Scudder, Michael Patterson, Kent Mitchell.

San Francisco, CA: Jossey-Bass, c2012.

HD 42 S38 2012

I know who you are and I saw what you did: social networks and the death of privacy.

Lori Andrews.

New York, NY: Free Press, 2012.

HM 851 A66 2012

Kids pick up on everything: how parental stress is toxic to kids.

David Code.

United States: c2011.

HQ 769 C63 2011

Leadership in dangerous situations: a handbook for the Armed Forces, emergency services, and first responders.

edited by Patrick J. Sweeney, Michael D. Matthews, and Paul B. Lester.

Annapolis, MD: Naval Institute Press, c2011.

HD 57.7 L43 2011

The manager's pocket guide to mega thinking and planning.

Roger Kaufman.

Amherst, MA: HRD Press, c2011.

HD 30.28 K377 2011

Quality management systems: requirements.

British Standards Institution.

London: British Standards Institution, 2008.

TS 156 Q83 2008

Racing thoughts [videorecording] = Ça tourne dans ma tête.

A film by Louiselle Noël.

Montréal, QC: National Film Board of Canada, 2010.

1 videodisc (73 min.): sd., col.; 4 3/4in.

Special features: Interview with Dr. Stan Kutcher, interview with the director.

A film about children who live with mental illness and their loved ones who make the courageous decision to open up about their stories. Their voices are complemented by that of the director, who was diagnosed with bipolar disorder as an adult and powerfully evokes the initial symptoms, which emerged in her childhood.

RC 454 R118 2010 D1332

Restoring the honouring circle: taking a stand against youth sexual exploitation.

New Westminster, BC: School of Community and Social Justice, Justice Institute of British Columbia, 2011.

HQ149 B7 H88 2011

Riding with Madonna [videorecording].

Odd Squad Productions.

Vancouver, BC: Odd Squad, c2012.

1 videodisc (48 min.): sd., col.; 4 3/4 in. (DVD).

Linda Stewart is a Vancouver Police Officer with a long history, not to mention a strong passion for street policing. She goes to work early to help keep our city safe. Linda is an experienced hostage negotiator. This film looks at the career, future and extraordinary personality of an inspirational policewoman.

HV 8023 R535 2011 D1394

Scenario planning in organizations: how to create, use, and assess scenarios.

Thomas J. Chermack.

San Francisco, CA: Berrett-Koehler, c2011.

HD 30.26 C48 2011

The separation guide: know your options, take control, and get your life back.

David Greig.

North Vancouver, BC: Self-Counsel Press, c2011.

HQ 838 G74 2011

Social engineering: the art of human hacking.

by Christopher Hadnagy; foreword by Paul Wilson].

Indianapolis, IN: Wiley, c2011.

HM 668 H33 2011

Visual teams: graphic tools for commitment, innovation, & high performance.

David Sibbet.

Hoboken, NJ: John Wiley & Sons, c2011.

HD 66 S565 2011

OFFICER'S HONEST BELIEF MUST BE SUPPORTED BY OBJECTIVE FACTS

R. v. Brown, 2012 ONCA 225

A police officer was driving his cruiser near an intersection with his partner seated beside him. He saw the accused, a 6'7" male wearing a distinctive green baseball cap, fully extend his right arm with a closed fist towards a second person of unknown gender. This second person did not extend their hand towards the accused or reciprocate in any way to his gesture but turned around abruptly and walked away at a fast pace. The accused crossed the street and kept his closed right hand by his side. The arresting officer's partner, however, did not see any of this behaviour. Based on the officer's experience of seeing hand-to-hand transactions, the way the accused held his hand and the area being known for crime, the officer believed the accused was concealing drugs in his hand. The accused was arrested after each officer grabbed one of his arms on the busy public sidewalk, searched him incidental to arrest and found cocaine, marijuana and a considerable amount of cash.

Ontario Court of Justice (trial)

The accused argued that his arrest and subsequent search violated his s. 9 *Charter* rights and the drugs should be excluded as evidence under s. 24(2). But the judge disagreed. The officer testified that he believed he had reasonable and probable grounds to arrest the accused based on the observations he made from the police car. The judge concluded there were reasonable and probable grounds to investigate and detain the accused, search him and, upon finding drugs, arrest him. The accused was convicted of possessing cocaine, possessing cocaine for the purpose of trafficking and possessing marijuana.

"[T]here must be something in the conduct observed by the officer, placed in the context of the rest of the circumstances, that lends some objective justification or verification to the officer's belief."

Ontario Court of Appeal

The accused again alleged the officer did not have reasonable and probable grounds. The Ontario Court of Appeal agreed, determining that the issue was not whether there were grounds to detain and eventually search the accused, but whether the officer had grounds to arrest the accused when he physically confronted him on the street.

Arrest

The Court of Appeal accepted that the officer honestly believed the accused was in possession of drugs and had attempted a hand-to-hand transaction. Further, it was agreed that the officer's prior experience with drug dealing was properly taken into account. However, the officer's subjective belief was not objectively reasonable:

> In our view ... there must be something in the conduct observed by the officer, placed in the context of the rest of the circumstances, that lends some objective justification or verification to the officer's belief. Section 495 of the Criminal Code and, more importantly, s. 9 of the Charter demand that the belief be "reasonable", meaning that a reasonable person standing in the shoes of the police officer be able to see the grounds for the arrest. Without this objective component, the scope of the police power to arrest would be defined entirely by the police officer's perception of the relevant circumstances. The individual's constitutional right to be left alone by the state cannot depend exclusively on the officer's subjective perception of events regardless of how accurate that perception might be. The issue is not the correctness of the officer's belief, but the need to impose discernable objectively measurable limits on police powers.
>
> The [accused's] interaction with the person facing him on the city sidewalk does not, in our view, provide any objective basis upon which to believe that the two persons were engaged in a drug transaction. Nor does the fact that the two persons then walked away from each other make that interaction any more suspicious. [The officer's] evidence that

> the second person may have walked away from the [accused] because he or she caught sight of the police cruiser is speculation. [paras. 14-15]

In concluding that the totality of the circumstances did not provide an objectively reasonable basis for the arresting officer's belief, the Court of Appeal noted:

- The arresting officer's partner, who was in a better position to see the "suspicious" conduct as a passenger in the police cruiser, did not notice anything about the accused. And even if he had witnessed the movements described by the arresting officer, he testified he would not have arrested the accused. Instead, he said he would have spoken to the accused or briefly detained him for investigative purposes.
- The arresting officer did not explain why the way in which the accused held his right hand both during and after the interaction with the other person was of some particular significance in the drug world. Without such an explanation, these actions did "not elevate the circumstances to reasonable and probable grounds to arrest."
- The evidence supporting the officer's contention that this took place in a high crime area was thin. The officers were assigned to patrol this area as part of an anti-violence intervention strategy. Criminal activity, including drug activity, had apparently increased in the area. However, "the area targeted by the police activity was broad and the concerns were not particularized to drug activity or the specific location where these events occurred," said the Court of Appeal. "There was no evidence that the corner where the arrest occurred was considered to be a high drug activity area."

So although the arresting officer had an honest belief that he had reasonable and probable grounds for the arrest, the belief was not objectively reasonable. The arrest was therefore unlawful and breached the accused's s.9 *Charter* right not to be arbitrarily detained.

The Evidence

Balancing the factors under the s. 24(2) framework, the evidence was excluded. Although the evidence was reliable, the police conduct was serious and there was a significant impact on the accused's liberty.

Seriousness of Police Conduct

Although the officer honestly believed he had grounds to arrest, his actions demonstrated "a significant disregard for the [accused's] right to be free from arbitrary detention." In finding that the officer's conduct favoured exclusion, the Court stated:

> [The arresting officer] did not turn his mind to the possibility of exercising police powers short of actual arrest. He would not agree that any further investigation was appropriate. On any reasonable view and, we add, the view of his partner, further investigation was entirely appropriate before resorting to the coercive actions of an arrest.
>
> [The arresting officer] explained his perspective in these terms:
>
> > We're able to effect an arrest and release unconditionally if need be. Worst case, scenario, if there is nothing further to investigate the individual can be released unconditionally. As in with this case, where there is further investigation warranted, it works out to a win-win situation.
>
> It is apparent that [the arresting officer] sees arrest as the best tool when investigating crime. He arrested in this case, as he apparently routinely does, without considering other options because in his mind, if it turns out there are no grounds for the arrest, the individual will be released. To [him], there is no harm in an arrest if it is brief. The officer does not appear to understand that arrest is a serious intrusion on the personal autonomy of the person arrested.
>
> [The arresting officer's] failure to consider less intrusive means of investigating and his somewhat cavalier attitude towards the exercise of his powers of arrest make this s. 9 violation a serious one. [paras. 23-26]

Impact of Breach

The impact of the breach on the accused's *Charter* protected interests also supported exclusion. "The police interference caused by his arrest was neither fleeting nor technical," said the Court. "The officers each grabbed the [accused's] hand or arm and made an arrest on a busy public sidewalk. The police action was highly intrusive of the [accused's] liberty and privacy interests." Plus, the impact of the breach was still significant even if police could have briefly detained the accused for investigative purposes:

> While we doubt that the grounds existed even for an investigation detention, we are prepared to assume that the officer had those grounds for the purposes of a s. 24(2) analysis. The existence of a basis to detain does lessen the negative impact of the improper arrest on the [accused's] rights, however, it does not change the fact that he was physically restrained on a public thoroughfare by two police officers who had no grounds to do so. The interference remains significant even if some lesser interference was appropriate. [para. 28]

Society's Interest

Since the evidence of the seized drugs was entirely reliable and essential to the Crown's case, society's interest in an adjudication on the merits of the case favoured its admission.

On balance, the Court of Appeal concluded that the admission of the evidence would bring the administration of justice into disrepute. The accused's appeal was allowed, the evidence was excluded, the convictions were quashed and an acquittal was entered.

Complete case available at www.ontariocourts.on.ca

Police Leadership Conference - p. 30

Online Graduate Certificates - p. 38

BC Law Enforcement Diversity Network - p. 40

INFORMATION PLUS OBSERVATIONS PROVIDES REASONABLE GROUNDS

R. v. Caravaggio, 2012 ONCA 248

A police officer had information from an unnamed previously reliable informant, who was known to be involved in the drug subculture, that the accused was selling drugs from his vehicle. The informant provided details as to the accused's description, the colour and specific make of his car and his residence. The police officer corroborated this information by running a CPIC check to determine the accused's identification and address. He also went to a location near the accused's residence where he saw a man, matching the accused's description, in a car as described by the informant. The car, with motor running, was parked in an alley near a café known for drug-dealing. A male was seen leaning through the car's window speaking to the accused. The accused was arrested, searched and drugs were found in his possession.

Ontario Superior Court of Justice (trial)

The judge concluded that the police officer had reasonable and probable grounds for the arrest. The search was incident to arrest and there was no *Charter* breach. The drugs were admissible as evidence and the accused was convicted of trafficking. He was sentenced to 15 months in jail.

Ontario Court of Appeal

The accused submitted that the trial judge erred in finding the arrest lawful and therefore the search was unreasonable as incident to arrest. The Ontario Court of Appeal, however, rejected this argument. "While the officer could not say that he observed a drug transaction between the [accused] and the other man, their interaction certainly was suspicious and at least consistent with a drug transaction," said the Court. "When combined with the information obtained from the informant, the officer's observations of the [accused], his vehicle and its location, there was sufficient basis for the trial judge to find that the officer had reasonable and probable

grounds to arrest the [accused]." Nor were the trial judge's reasons inadequate. He confronted the inconsistencies in the evidence of the police officers and, despite those inconsistencies, explained why he found reasonable and probable grounds. The accused's appeal was dismissed and his conviction was upheld.

Complete case available at www.ontariocourts.on.ca

SUPREME COURT JUDGE ANNOUNCES RETIREMENT

OTTAWA: On May 18, 2012 The Right Honourable Beverley McLachlin, Chief Justice of Canada, announced that Justice Marie Deschamps has written to the Minister of Justice, the Honourable Robert Nicholson, to inform him that she will retire from the Supreme Court of Canada. Justice Deschamps's retirement will be effective August 7, 2012.

"Justice Deschamps has made a very significant contribution to the Supreme Court and, more broadly, to the administration of justice in Canada. We will miss her wisdom, intelligence, keen wit and boundless energy. She has been a wonderful colleague and will always be a good friend", said Chief Justice McLachlin.

For her part, Justice Deschamps said, "I feel privileged to have been given the opportunity to participate in the work of the Court. I will leave behind a group of empathetic, respectful and dedicated judges. After 37 years working mostly in courtrooms, including 22 years on the Bench, I feel that it is time to explore other ways to be of service to society. There is so much to do, in so many areas."

Justice Deschamps was appointed to the Supreme Court of Canada on August 7, 2002, after having served on the Quebec Court of Appeal and the Quebec Superior Court.

Chief Justice McLachlin concluded by saying "I am certain that the Canadian government will give necessary care and consideration to the prompt appointment of a new justice of the Supreme Court of Canada."

Source: News.Release.@Supreme.Court

SUFFICIENTLY CORROBORATED INFORMATION JUSTIFIES SEARCH

R. v. MacDonald, 2012 ONCA 244

Police received a Crime Stoppers tip from an anonymous source that the accused, a known gun carrier and drug dealer, had drugs and guns at his home. The tipster claimed that he had seen the accused "flashing his gun". Finally, the tipster said that the accused could be found at his mother's or his uncle's house and that he was driving a rented car. The tipster said the accused was born on January 24 (no year provided), used the alias "Morrison" and lived with his surety in Etobicoke. He was described as a non-white male, 6'2", 160 pounds, with long black hair and brown eyes. He also had a tattoo of a spider web on his hand. The police were able to confirm much of the information provided by the tipster (see the information/ corroboration grid).

Based on this information, the police obtained a warrant to search the residence where the accused lived – his uncle's place. Police also requested night time entry because they wanted to ensure they had enough time to gather the resources necessary to execute the warrant and, in their view, any delay could result in the loss of evidence or endanger the public (ie. the firearm). Before police arrived and searched around 3:00 am, the accused had been arrested for breaching his recognizance. They found two loaded handguns in the house and he was charged with illegally possessing them, breach of recognizance and several other offences.

Ontario Court of Justice (trial)

The judge ruled there were sufficient reasonable grounds for the search warrant. Although the police might have done more, what they did do was reasonable considering they had information about guns on the street. The police investigation provided some reasonable corroboration of the information received from the anonymous tipster and, considering the totality of the circumstances, the warrant could have been issued by the authorizing justice. The evidence was admitted and the accused

was convicted. He was sentenced to two years less a day and three years probation but appealed.

Ontario Court of Appeal

Justice Laskin, delivering the Court of Appeal's decision, first outlined the legal framework for issuing a search warrant.

> The justice issuing the warrant must have reasonable grounds to believe that an offence has been committed. The standard is one of reasonable probability. The material in support of the warrant must raise a reasonable probability of discovering evidence of a crime.

Where the application for the warrant is based largely on information coming from a confidential informant, the court must make three inquires:

- Was the information predicting the crime compelling?
- Was the source of the information credible?
- Was the information corroborated by the police before conducting the search?

INFORMATION-CORROBORATION GRID

Information (about accused)	**Corroboration**
His date of birth is "January 24".	Police databases confirm a date of birth - January 24, 1988.
He is male, non white, 6' 2" and 160 pounds, with black long hair and brown eyes.	CPIC describes him as male, non white, 6' 4" tall and 146 pounds.
He has a tattoo of a spider web on his hand.	CPIC describes him having a tattoo of a spider web with flames on his left hand.
He is a drug dealer and has drugs in his house.	In January 2006, the accused was found in possession of 6.58 grams of crack cocaine and was charged with possession for the purpose of trafficking. He was ultimately convicted of possessing cocaine.
The tipster saw him "flashing his gun" and he has guns at his house.	The accused had a lengthy criminal record. His record listed several serious offences of violence, including assault, robbery, assault with intent to resist arrest, aggravated assault, carrying a concealed weapon and escaping lawful custody. In January 2006, he was found in possession of a loaded AK 47 assault rifle that had been converted to fire ammunition in fully automatic mode. He was convicted of possession of a prohibited firearm. The police affiant, a member of the Guns and Gangs Task Force, knew that it is very common for drug traffickers to arm themselves. The accused was bound by two separate firearms prohibition and probation orders that prohibited possession of a weapon.
He uses the alias "Morrison".	CPIC listed "Morrison" as his alias.
He resides at his surety's house.	The accused was currently before the court charged with aggravated assault and several related offences. The allegations pertained to a stabbing in which he allegedly chased down the victim and stabbed him in the back and slashed his face. As a result of these charges, he was bound by a recognizance that required him to reside with his uncle under house arrest. On April 7 and April 8, 2008, police observed him coming and going from his uncle's house.
His surety's house is in Etobicoke.	His uncle's house was located at 54 Alhart Drive, in the north-west area of Toronto near Islington Ave and Albion Rd.
He usually hangs out at his mother's house or at his uncle's house.	Police occurrence reports confirm that he has resided with his mother in the east end of Toronto and had been investigated by the police in that area on numerous occasions.
He drives a rental vehicle.	On April 7 and April 8, 2008, police observed the accused driving a vehicle registered to a car rental company. On April 8, 2008, police observed him attending at the car rental outlet and exchanging one rental car for another.
He is affiliated with a gang.	No corroboration.

> These are not watertight inquiries. It is the "totality of the circumstances" that must meet the reasonable probability standard.
>
> So, for example, where, as in this case, the police rely on information coming from an anonymous source, the second inquiry is problematic. The court has no way to assess the credibility or reliability of the source. Thus, the quality of the information (the first inquiry) and the amount of corroboration (the third inquiry) must compensate for the inability to assess the credibility of the source. A higher level of verification is required. [references omitted, paras. 6-8]

Since the credibility of the source could not be determined in this case, the totality of circumstances assessment needed to focus on whether the tipster's information was sufficiently compelling and whether it was sufficiently corroborated. The accused suggested the information provided by the tipster was not particularly compelling while the Crown contended that it was very compelling. Justice Laskin, taking middle ground on this issue, found the information was "reasonably compelling":

> First, although a good deal of the information was biographical, and thus likely widely known, it was nonetheless very detailed. The tipster provided specific information about the [accused's] appearance, date of birth, place of residence, alias, bail status, family connections and driving practices. Second, the tipster had first-hand knowledge that the [accused] was involved with guns. He saw the [accused] "flash" a gun." [para. 19]

With the source being anonymous, more confirmation than otherwise was required. But "the police were not obliged, before conducting the search, to confirm the very criminality alleged by the tipster." In finding that police sufficiently corroborated the information, Justice Laskin noted that police confirmed much of the tipster's information:

- police record and data banks confirmed the accuracy of the detailed biographical information given by the tipster; and
- police investigation confirmed that the accused had in the past possessed both drugs and guns, was a known violent offender, and was bound by two separate firearms prohibitions and probation orders prohibiting the possession of guns.

Although each one of these facts by themselves would likely not be sufficient to justify the warrant, the accused's record together with the confirmation of the detailed biographical information given by the tipster reasonably supported the trial judge's conclusion that the authorizing justice could have granted the authorization.

Night Time Search

"Night time searches of a private residence should be carried out only in exceptional cases," the Court of Appeal said. The authorizing justice in this case did have a reasonable basis to authorize such a search. "When the authorization was granted, the [accused] was not in custody," said Justice Laskin. "The grounds in the affidavit provided a sound basis to allow the warrant to be executed at night." In addition, the police were not required to delay their search until daytime because the accused was taken into custody prior to the warrant's execution:

> The police were justified in not delaying the search and instead conducting it in the middle of the night. The [accused] did not live alone; he shared the residence with others. The police had reasonable and probable grounds to believe there were firearms in that residence. And even though the [accused] was in custody, he had the opportunity to contact the other occupants and tell them to hide or remove the guns. Thus, the police had a legitimate concern that if they waited to execute the warrant, they would compromise public safety and put the community at risk. [para. 28]

Plus, there were some factors mitigating against the intrusiveness of the search. The police told the accused about their proposed search before they carried it out. There was no evidence that a "no knock" entry was conducted, or that police had their guns drawn, or even that they frightened anyone. The night time search was not unreasonable and therefore there was no s. 8 *Charter* breach. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

COURT SHOULD BE CAUTIOUS IN SECOND GUESSING OFFICER SAFETY

R. v. Naidu, 2012 BCCA 150

After a motor vehicle accident happened at about 2:30 am, police arrived on scene at 2:42 am. At 2:52 am an Approved Screening Device (ASD) demand was read to the accused and he failed at 2:53 am. After forming an opinion that the accused was impaired by alcohol, the officer arrested the accused at 2:55 am and then read him the breath demand at 3:07 am. The accused was polite and cooperative throughout. During the 12 minutes between forming his reasonable and probable grounds and giving the breath demand, the officer did the following:

1. Arrested the accused, placed him in handcuffs and sat him in the back seat of the police cruiser;
2. Discussed the wrist pain the accused was experiencing;
3. Checked his driver's licence status, CPIC record and PRIME record. The officer wanted to determine whether the accused had any outstanding arrest warrants, history of violence with the police, contagious diseases or driving prohibitions; and
4. Read him his *Charter* rights using the official warning.

The accused was taken to the police station where he provided two breath samples of 130 mg% each.

British Columbia Provincial Court (trial)

The trial judge concluded that the 12 or so minutes between the officer forming the opinion and reading the breath demand was reasonable. The officer had explained he did not know the accused, knew nothing about his background or whether he had any involvement with weapons. Since he was going to drive the accused to the station, the officer needed to know the accused's background and the activities he undertook were related to the investigation. "The police officer used the time in question to check for outstanding warrants and other information regarding any known interactions with the police and information regarding contagious diseases," said the judge. The demand was made as soon as practicable and the accused was convicted of over 80 mg%. A conviction for impaired driving was stayed.

British Columbia Supreme Court

The accused argued that the trial judge erred in concluding that the breath demand was made "as soon as practicable" under s. 254(3) of the *Criminal Code*. But the appeal judge disagreed, ruling that the trial judge did not err in interpreting this requirement under the law. "The computer queries were related to the investigation of the [accused] and took a reasonable amount of time," he said. "I am unable to say that there was any unreasonable delay." Nor did the trial judge err in applying the law to the facts. Just because the accused was polite, cooperative and secured in handcuffs in the back of the partitioned police vehicle, he had failed an ASD test and was arrested. The officer testified he needed to know as soon as possible whether he was dealing with someone with a contagious disease or someone with a history of violence toward the police. "In my view, the court should be cautious in second-guessing a police officer's judgment with respect to his personal safety," said the appeal judge. The trial judge did not err in finding it was reasonable for the officer to make the safety checks before making the demand. The accused's appeal was dismissed.

TIME LINE

MVA	ON-SCENE	ASD DEMAND	ASD FAIL	ARREST	BTA DEMAND
2:30 am	2:42 am	2:52 am	2:53 am	2:55 am	3:07 am

British Columbia Court of Appeal

A further appeal by the accused was dismissed. Justice Lowry, delivering the unanimous Court of Appeal judgment, concluded, for the same reasons as the appeal judge, that no error had been made in upholding the accused's conviction.

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

DETENTION JUSTIFICATION REQUIRES MORE THAN HUNCH

R. v. Bruyere, 2012 ONCA 329

A police officer received information from a sergeant in charge of a drug investigation that a man named Hyatt had just completed a drug transaction at a hotel and was couriering the drugs back to Fort Frances. The police officer followed a vehicle occupied by two unidentified men leaving the hotel. Suspecting that one of the occupants may be Hyatt, the officer instructed that the vehicle be pulled over as it travelled on the TransCanada Highway toward Fort Frances. The vehicle was stopped, the accused was driving and Hyatt, a passenger, was arrested. A search following the arrest resulted in the discovery of cocaine.

Ontario Court of Justice (trial)

The judge found the officer did not have sufficient grounds to justify an investigative detention of the vehicle's occupants at the roadside. In the judge's view, the officer ordering the stop did not have reasonable grounds to suspect that Hyatt was in the vehicle. Instead, he found the officer had nothing more than a hunch. The judge ruled that the accused was arbitrarily detained at the roadside (a s. 9 *Charter* breach) and that the search of his vehicle which led to the discovery of the cocaine was unreasonable. The evidence, however, was admitted under s. 24(2). The judge found that exigent circumstances existed and, because the sergeant in charge of the drug investigation "likely had enough information to detain the vehicle ... on an investigative detention basis", the unconstitutionality of the stop was mitigated. The accused was convicted of three drug related offences.

Ontario Court of Appeal

The accused argued that the trial judge erred in not excluding the evidence after properly finding a *Charter* breach. The Crown argued, on the other hand, that the judge erred in finding a *Charter* violation in the first place, but properly admitted the evidence in any event. In the Crown's submission, the sergeant in charge of the investigation who provided the information about the drug transaction did have sufficient grounds to justify the accused's detention. The sergeant's reasonable suspicion therefore rendered the accused's detention constitutional under s. 9.

The Court of Appeal concluded that neither officer had sufficient grounds to justify the detention. "Whether one looks at [the officer's] grounds for detaining the vehicle, [the sergeant's] grounds for detaining the vehicle, or combines the two, the result is the same," said the Court. "The stop was arbitrary in that there were no reasonable grounds to suspect that Hyatt was in the vehicle before the officers stopped the vehicle." Thus, the evidence discovered in the search of the vehicle which followed immediately after the identification and arrest of Hyatt constituted evidence obtained in a manner that infringed the accused's rights under s. 9 of the *Charter*.

The accused's appeal was allowed, his convictions were quashed and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

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see page 40

CRIME SCENE REENACTMENT REPETITION OF CONFESSION

R. v. Evans, 2012 BCCA 209

The accused was taken into custody in Calgary after turning himself in with a lawyer. He was arrested for the strangulation murder of a Vancouver sex-trade worker but he refused to say anything about it on the advice of counsel. He was flown to Vancouver where the crime took place, driven from the airport to his lawyer's office and spoke in private for over an hour. He was then taken to the police lockup and placed in an interview room. His lawyer attended and they spoke for 20 to 30 minutes. A detective then interviewed the accused for about two hours. He described how he met the victim, killed her and attempted to hide her body. He also discussed his travel to Calgary. The detective suggested that the accused perform a reenactment of the killing as a form of "catharsis", but that they would not go to the crime scene. The accused sought legal advice by telephone and was given privacy for that purpose. The detective then suggested that they go to the accused's apartment to find a hooded shirt he said he had taken. After trying to find the hooded shirt (which was not found), the detective said they would go to the crime scene. They went to the deceased's apartment and the accused reenacted his meeting with her, the killing and his attempt to conceal the body. This was videotaped. He was charged with second degree murder.

catharsis: the purging of emotions or relieving of emotional tensions.

British Columbia Supreme Court (trial)

The accused argued that his jeopardy changed when police decided to expand its investigation from a videotaped interview at the police station to a videotaped re-enactment at the deceased's apartment. In his view, he sought legal advice in relation to the intended location of the re-enactment being at a place other than the crime scene. Had he known the re-enactment was to take place at the crime scene and not elsewhere, he would not have consented to doing it. This change in jeopardy, he contended, required the police to re-advise him of his right to counsel and provide him with another opportunity to consult with a lawyer. The trial judge disagreed. There was no new jeopardy. The accused had given a full confession to the crime and the reenactment was simply an extension of that confession. Thus, there was no s. 10(b) *Charter* breach and the crime scene reenactment was admitted. A jury found the accused guilty of second-degree murder.

British Columbia Court of Appeal

The accused argued, among other grounds, that the trial judge erred in not finding a s. 10(b) *Charter* breach and admitting the evidence of the crime scene re-enactment. He opined that his jeopardy changed because he did not have an opportunity to obtain legal advice about the re-enactment taking place at the crime scene. But Justice Low, speaking for the Court of Appeal, found the trial judge did not err:

> It seems to me that the re-enactment was nothing more than a repetition of the earlier confession with the [accused] pointing out where he and [the deceased] were during the events in the bedroom, as captured by the police re-enactment video. In this sense, the judge was correct in describing it as an extension of the earlier confession.
>
> I am unable to find fault with the judge's reasoning and I would not give effect to the [accused's] argument. The [accused] knew he was facing a murder charge before the detective proposed the re-enactment and he knew the extent of his jeopardy had not changed when he agreed to go to the crime scene for the re-enactment. By then, he had received legal advice at least four times. He must have known that he could cease co-operating with the police investigation whenever he chose to do so. None of the cases relied upon by the [accused] with respect to this argument make a point in his favour. They are clearly distinguishable. All involve situations where the police, in withholding information from the accused, materially affected the accused's understanding of the extent of his jeopardy... . Nothing of that sort occurred here. This is so whether [the detective] changed his mind about going to the crime scene or deliberately misled the [accused]

> as to what he intended. There was no breach of the [accused's] s. 10(b) rights as a result of the re-enactment's taking place at the crime scene rather than elsewhere. [paras. 36-37]

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

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

BURDEN ON ACCUSED TO PROVE, NOT CROWN TO DISPROVE, CHARTER BREACH

R. v. Furlong, 2012 NLCA 29

The accused was driving a motor vehicle when she was stopped by police. A roadside breathalyzer test was administered followed by a breathalyzer demand. She was also informed of her right to counsel. She said she understood and that she did not wish to speak to a lawyer. The accused provided breath samples registering over the legal limit. She was charged with impaired driving and over 80mg%.

Newfoundland Provincial Court (trial)

Because there was no evidence elicited from the officer of what information he gave to the accused concerning Legal Aid, either through direct examination or cross examination, the accused argued her right to counsel under s. 10(b) of the *Charter* was violated. The Crown, on the other hand, claimed that the accused had not proven that her *Charter* right to counsel had been breached just because the officer did not testify that he told her she could contact Legal Aid and how to do it. The judge ruled there was no evidence that Legal Aid information had been given and therefore the accused's s. 10(b) right had been infringed. The breathalyzer certificate was excluded under s. 24(2) and both charges were dismissed for lack of evidence.

"Section 10 of the Charter accords positive rights. If an accused person claims a breach of a Charter right, he or she must assert the right, and prove its breach on the balance of probabilities."

Newfoundland Supreme Court

The Crown submitted that the trial judge shifted the burden of proving a *Charter* breach from the accused and was requiring the Crown prove that the accused's right to counsel had not been breached. The appeal court judge, however, dismissed the Crown's appeal and upheld the lower court ruling. There was no evidence supporting compliance with the informational component of s. 10(b). Since there was no evidence from the officer respecting Legal Aid, the accused's right to counsel was deficient.

Newfoundland Court of Appeal

On further appeal by Crown, a unanimous Court of Appeal concluded that the absence of evidence concerning information about Legal Aid was insufficient to prove the right to counsel given by the officer was deficient and breached the accused's s. 10(b) rights. "Section 10 of the Charter accords positive rights," said Justice Hoegg for the Court. "If an accused person claims a breach of a Charter right, he or she must assert the right, and prove its breach on the balance of probabilities." Discharging this burden of proof requires more than the officer failing to give evidence that the right to counsel he gave her was complete. The burden is on the accused to prove a breach, not on the Crown to establish that there was no breach. The Court of Appeal stated:

> Proof on the balance of probabilities requires evidence. If there is no evidence respecting whether an accused has been informed of his or her right to counsel, including whether he or she has been informed of the availability of Legal Aid and how to contact it, then there is no proof that the crucial aspect of the Charter right was provided or not. In the absence of such evidence, a court cannot conclude that the information provided to [the accused] was deficient and that her s. 10(b) right was breached. [para. 23]

And further:

> Charter rights are not like the elements of an offence. An offence is a charge of the Crown against an accused person. So, the Crown always has the burden to prove each element of the charge in order to prove the offence. The right to counsel is a Charter right accorded to an accused. An accused must assert the right and evidence must be adduced to prove its breach, in much the same way as a plaintiff prosecutes a civil claim against a defendant, ie. a plaintiff who claims that he or she has been wronged by a defendant must adduce evidence to prove the wrong in order for the claim to succeed. [para. 26]

Here, the officer did not testify about Legal Aid information at all, nor was he asked any questions about it. Had he testified that he had not provided Legal Aid information, then the accused could rely on this evidence to prove that the information provided was deficient and a breach resulted. If the officer had said he had given Legal Aid information but the accused disagreed, she could adduce evidence to support her position by either cross-examining the officer or by calling additional evidence, including choosing to testify in her own defence. Since there was no evidence on the Legal Aid aspect of the s. 10(b) right, the trial judge erred when he inferred from the absence of evidence about it that it had not been given.

"[The officer's] lack of testimony on the aspect of the right to counsel concerning Legal Aid does not prove that he did not provide the Legal Aid information to [the accused]," said Justice Hoegg. "It cannot be otherwise, for ... a court cannot assume that things happened or did not happen in the absence of evidence. Neither can a court infer that things happened or did not happen in the absence of facts from which a reasonable inference can be drawn." The accused failed to prove her right to counsel did not include Legal Aid information and therefore it could not be said she suffered a breach of s. 10(b). The Crown's appeal was allowed and a new trial was ordered on the over 80mg% charge.

Complete case available at www.canli.org

POLICE REASONABLY REACTED TO DANGER: ENTRY JUSTIFIED

R. v. MacDonald, 2012 NSCA 50

After receiving a noise complaint from occupants across the hall from the accused's apartment, a concierge of a condominium building called police. He had unsuccessfully asked the accused several times to turn down his music. When police arrived they could hear loud music within 30 feet of the apartment. They went to the door to simply tell the accused to turn it down. Police rang the door bell and knocked. When the accused answered and was asked to turn down the music, he responded, "Go fuck yourself" and slammed the door. When the music got louder the officer called for back-up and a sergeant attended to assist. The sergeant knocked on the door, then kicked it, yelling police. When the accused partially opened the door the sergeant saw something "black and shiny" in his right hand, which was somewhat obscured behind his right leg. The accused did not respond when asked, "what have you got in your hand?"; instead he stared at the officer. Thinking it could be a knife, the sergeant pushed on the door to open it and saw the object was a handgun. A struggle ensued and police successfully disarmed the accused of his loaded 9 mm Beretta. He was charged with several gun-related offences.

Nova Scotia Provincial Court (trial)

The accused challenged the police entry into his home, asserting it was an unlawful search and breached his s. 8 *Charter* right. But the trial judge disagreed, holding the police action was justified in the interests of "officer safety". He said:

> I am satisfied that there is an exemption with respect to officer entry into the home for purposes of officer safety, particularly in these circumstances where the pushing of the door is only a minor intrusion over the threshold by means of an arm. I accept [the sergeant's] evidence, it was only after he saw a firearm come up from behind the leg that he reacted by immediately entering the home of [the accused] for purposes of gaining control over the situation.

The accused was convicted of careless handling of a firearm, possessing a weapon for a purpose dangerous to the public peace and possessing (without authorization) a loaded restricted firearm. The accused was sentenced to three years in prison.

Nova Scotia Court of Appeal

The accused appealed his convictions arguing, among other grounds, that the trial judge erred by failing to find a *Charter* breach when police entered his home. In his view, the police, without a warrant, charged into his apartment, wrestled him for the gun and arrested him, when all they had to do was issue him a ticket for a breach of the noise by-law.

Approaching the Apartment

Chief Justice MacDonald, with Justice Saunders concurring, found the initial approach to the apartment was lawful. "The police were well within their rights to knock on the door to tell [the accused] to keep the noise down," he said. "Knocking at someone's door for a legitimate purpose does not constitute a search."

Pushing the Door

Pushing the door further open was subject to *Charter* scrutiny. A warrantless search of a dwelling is *prima facie* illegal and the onus is on the Crown to justify police entry. In doing so, the Crown would need to prove that police action was reasonable by establishing that:

1. it was authorized by statute or common law,
2. the law was reasonable; and
3. the search was carried out reasonably.

In this case, the trial judge found the police action was justified on an "officer safety" basis. The majority agreed, finding a police officer may have a very limited common law power to reasonably react to danger in appropriate circumstances. Determining whether police have a common law power to act involves a two-prong test - whether the action (1) fell within the general scope of the officer's duty and (2) was a justifiable use of power within that duty. But "the room for the police to trespass outside of their statutory authority is extremely limited. Specifically it must be restricted to situations where the police, in addition to acting within the general scope of their authority, must have no other feasible less intrusive alternative and the manner of carrying out the impugned activity must also be reasonable," said Chief Justice MacDonald. He continued:

> Here, it appeared to be the judge's view, and I agree, that this case represents one such rare circumstance. Specifically, [the sergeant's] action of opening the door further in order to protect the safety of all present that evening was authorized. Furthermore, this additional action was, as the judge found, reasonable in the circumstances. After all and as noted the police were justified in their actions up to the time [the accused] voluntarily opened his door. They were legitimately at his door late at night responding to a noise complaint. Furthermore, the situation was tense by that time with [the accused] having previously hurled profanities towards the authorities. Then when [the accused] did open his door, [the sergeant] saw him hiding something black and shiny that he feared may have been a knife. In these circumstances, pushing the door would appear to be the only feasible alternative. Specifically, by that instant, it would have been too late for less intrusive measures such as retreating or issuing a noise violation ticket. Thus by simply pushing the door further open, in my view, [the sergeant] acted reasonably in his effort to see what [the accused] may have been hiding.
>
> Nor can we seriously question the police action immediately following [the sergeant's] "pushing" of the door. After all, upon "pushing" the door further open, [the sergeant] immediately saw the gun pointed in his direction. ...

"[T]he room for the police to trespass outside of their statutory authority is extremely limited. Specifically it must be restricted to situations where the police, in addition to acting within the general scope of their authority, must have no other feasible less intrusive alternative and the manner of carrying out the impugned activity must also be reasonable."

> Furthermore, the judge accepted that "it was only after [the sergeant] saw a firearm come up from behind the leg that he reacted by immediately entering the home of [the accused] for purposes of gaining control over the situation".
>
> So, despite the fact that [the accused] may not have intentionally pointed the gun at [the sergeant], no one can reasonably fault the officer for reacting as he did upon the gun being revealed. [paras. 32-35]

The appeal on the alleged s. 8 *Charter* breach was dismissed. Other grounds of appeal, however, were allowed and, as a result, the possession of a loaded restricted firearm without authorization conviction was set aside. The accused's overall sentence was reduced to 18 days (time served), a two year probation term was imposed and his 10-year prohibition order was replaced with a five year ban.

A Different View

Justice Beveridge disagreed with his colleagues. In his view the police conduct amounted to a serious *Charter* breach. "The issue is not whether [the sergeant] acted reasonably in pushing open the door," he said. "The issue is did he have lawful authority to do so. That would only materialize if he had reasonable grounds to believe that his safety, or the safety of others, was at risk and his search in pushing open the door was reasonably necessary in the circumstances. Absent a new-found power to enter a private dwelling based on a suspicion that officer safety concerns are triggered, the conclusion is inescapable that the [accused's] reasonable expectation of privacy protected by s. 8 of the Charter was infringed or denied." Justice Beveridge would have excluded the evidence under s. 24(2), quashed the convictions and entered acquittals on all charges.

Complete case available at www.canlii.org

PRETEXT STOP ARBITRARY: EVIDENCE EXCLUDED

R. v. Turpin, 2012 SKCA 50

A member of a roving traffic unit, who had his drug sniffing dog with him, saw an older-model motor home on the TransCanada Highway weave from the center line over the fog line about six times. Although the motor home did not cross the center line and was not speeding, the officer was concerned the driver may have been drinking and pulled it over. A CPIC check indicated the vehicle had not been reported stolen. The accused produced his driver's licence and registration as requested and the officer, at this point, was satisfied there was no basis for suspecting the accused was impaired. However, the accused was unusually nervous and CPIC entries indicated he had convictions for a "take auto without consent" some 22 years earlier, and assault and assault police officer in 1988.

A backup officer arrived and approached the motor home, apparently detecting a strong odour of Bounce fabric softener, coming from its interior. This officer noted that the accused was unusually nervous and learned he had being driving for 12 hours, travelling from Vancouver (a source of illegal drugs) to Thunder Bay (a destination for illegal drugs). He was going to visit his sister for a couple of weeks and had about $2,000 in his wallet. The backup officer decided to pursue an investigation into the "true identity" of the motor home. According to the officer, the dashboard VIN plate appeared relatively old but rivets securing it were shiny and the area surrounding it was clean. In his experience and training, this could mean that the VIN number plate had been tampered with or changed. He compared the dashboard VIN number to a number on the federal safety certification label on the doorpost but they did not match. In reality, the officer had misread the label.

The accused was arrested for possessing stolen property and VIN tampering, advised of his right to counsel and given police warnings. He was placed in the back of a police car. The motor home was

searched for evidence related to the stolen property investigation. Police said they were looking for additional labels, paint colour changes or information that might confirm the true owner and identity of the vehicle. A drug sniffing dog was also used and made a positive hit for drugs. Police discovered various compartments containing 45 kilograms of cocaine worth between $1.1 million and $2.5 million and 262 pounds of marijuana worth between $470,000 and $733,000. The accused was re-arrested and subsequently charged with possessing cocaine and marijuana for the purpose of trafficking

Saskatchewan Court of Queen's Bench (trial)

The judge concluded that the arresting officer did not have a reasonable suspicion that the motor home was stolen when the accused was arrested. In his view, the arresting officer lacked the necessary subjective belief and was acting on nothing more that a hunch based on intuition. Most of the officer's observations had nothing to do with the fact the vehicle was stolen but related to what he believed were indicators of drug possession. The judge found that the arrest for the purported reason that the motor home had been stolen was really a pretext to justify searching the vehicle for drugs. The judge also considered the makeup of the specialized roving traffic unit - all experienced members in contraband interception - as a background consideration in assessing the credibility of the arresting officer. In the end, the trial judge concluded there had been violations of both ss. 8 (unreasonable search) and 9 (arbitrary detention) of the *Charter*. The drugs were excluded under s. 24(2) and the accused was acquitted.

"In order for an arrest to be lawful, two conditions must be met. First, the arresting officer must believe he or she has reasonable and probable grounds on which to base the arrest. Second, those grounds must be reasonable and probable when viewed objectively."

Saskatchewan Court of Appeal

The Crown appealed the accused's acquittal, advancing a number of arguments. These arguments included:

- the accused was lawfully arrested and the search of the motor home was incidental to that arrest;
- the accused was lawfully detained and the search of the motor home was incidental to the detention; and
- the accused was lawfully detained for highway traffic purposes and the police were entitled to use their highway traffic authority to search the motor home and check the VIN numbers.

Lawful arrest/search?

The trial judge's decision that police did not have reasonable grounds to justify an arrest was upheld. "In order for an arrest to be lawful, two conditions must be met," said Justice Richards. "First, the arresting officer must believe he or she has reasonable and probable grounds on which to base the arrest. Second, those grounds must be reasonable and probable when viewed objectively." In this case, the trial judge ruled that the officer did not subjectively have reasonable and probable grounds for the arrest and there was no reason to interfere with this assessment. Since the arrest was unlawful, any search incidental to it was also unlawful.

Lawful investigative detention/search?

The Crown submitted that, absent a lawful arrest, the accused was lawfully detained on the basis of a reasonable suspicion that he was in possession of a stolen motor home. "'Reasonable suspicion' ... represents a lower threshold than the standard of 'reasonable and probable grounds' associated with the power of arrest," said Justice Richards. Thus, the argument went, the accused could have been lawfully detained in circumstances which could not sustain a valid arrest. However, "as with the authority of the police to effect arrests, an officer purporting to invoke the power to detain for investigatory purposes must subjectively believe he or she has the requisite basis for interfering with an

"The search of the motor home which led to the discovery of the drugs in this case was far from a 'protective pat-down.' It involved police officers lifting carpet, looking under the dash and the hood of the vehicle and opening cupboards and storage compartments. It was not undertaken out of concerns for safety and was thus in no way properly incidental to an investigative detention."

individual's liberty." Again, the trial judge found the officer did not have a subjective reasonable suspicion that the motor home had been stolen. Therefore, the stop was not a lawful investigative detention.

The Crown alternatively submitted that, by the time the drug dog was deployed, the police had a reasonable suspicion there were drugs in the motor home and therefore could detain him for a sniffer dog search. The problem with this, however, was that evidence revealing a reasonable suspicion that the motor home was being used to transport drugs was obtained after the accused's arrest. "The Crown cannot apply information acquired by way of an unlawful search to retroactively validate the arrest which led to it," said the Court of Appeal. "While there might have been a reasonable suspicion that the motor home contained drugs by the time the sniffer dog was deployed, that suspicion was built on a platform of evidence obtained by way of the unlawful search of the motor home." Thus, both the sniff search and any detention arising to carry it out breached the *Charter*.

Furthermore, "even if there was a valid investigative detention in relation to suspected drug offences, it would not have carried an entitlement to conduct a full scale search of the motor home." The search power incidental to an investigative detention is narrow and limited to a protective pat-down:

> The search of the motor home which led to the discovery of the drugs in this case was far from a "protective pat-down." It involved police officers lifting carpet, looking under the dash and the hood of the vehicle and opening cupboards and storage compartments. It was not undertaken out of concerns for safety and was thus in no way properly incidental to an investigative detention. [para. 95]

SPECIALIZED UNITS

The Saskatchewan Court of Appeal commented generally on the issue of using a "roving traffic unit" comprised of police officers experienced in recovering illegal drugs through traffic stops. Two of the police officers in this case were handlers of the only single profile drug sniffer dogs in Saskatchewan and several had attended the Pipeline Convoy Course, a program designed to enhance the skills of officers so as to make them better able to detect "travelling" criminals. Although the Crown suggested that the trial judge improperly saw something nefarious in the police decision to deploy a traffic unit composed of personnel with these sorts of backgrounds, Justice Richards did not see it that way:

> In considering this concern, it is important to confirm at the outset that, in and of itself, there is nothing improper or untoward about the police deploying traffic officers or units with specialized training, equipment or expertise, including training, equipment or expertise relating to the detection of drug crimes. The law does not require police officers involved in traffic work to be blind to the possibility that motorists might be involved in a variety of illegal or criminal activities. ...
>
> However, this is not to say that the make-up of a traffic unit of the sort involved in this case must be wholly disregarded in a judge's fact-finding in relation to the reason for a traffic stop or the bona fides of police actions. A trial judge attempting to ascertain whether an arrest was a pretext for conducting a drug search is surely entitled to consider, as one part of the full matrix of relevant facts, that the police officer who made the arrest was a member of a traffic unit comprising (among other things) the only two single profile drug dogs in the province. That is no more than common sense.
>
> The point to remember, however, is that the use of a specialized traffic unit is not itself objectionable. The Charter protects against arbitrary detentions and unreasonable searches. So long as these limits on their authority are respected, the Charter does not prevent the police from using specialized or specifically-trained traffic units. Nor should it. The public quite properly expects law enforcement personnel to use the most effective techniques possible when combating crime. [paras. 50-52]

Rather than finding the trial judge's use of the roving traffic unit, in itself, improper, Justice Richards concluded the judge could take the make-up of the unit and the training of its members as merely one of the multiple background considerations in assessing the arresting officer's credibility.

LEGALLY SPEAKING:

Impairment

"A conviction for impaired driving will rest where there is sufficient evidence to conclude beyond a reasonable doubt that an accused has driven while his or her ability to operate a motor vehicle was impaired by alcohol or a drug. To meet its burden of proof, the Crown may lead evidence of alcohol consumption and aberrant driving; but, given the nature of an impaired ability to drive, the standard may be met in the absence of evidence of aberrant driving through sufficient evidence of, among other things, a deterioration of the accused's judgment or attention, a loss of motor co-ordination or control, increased reaction times, or diminished sensory perceptions, brought on by the voluntary consumption of alcohol or a drug." - Saskatchewan Court of Appeal Justice Caldwell in *R. v. Thomas*, 2012 SKCA 30 at para. 13.

Lawful detention/search for highway traffic purposes?

The Court of Appeal also ruled that the accused was not validly detained in relation to highway traffic matters under Saskatchewan's *Traffic Safety Act* (*TSA*). Section 278 of the *TSA* only sets out a driver's general obligation to provide registration certificates and other information. Section 279(2) is concerned with vehicle safety and roadworthiness and applies when a driver or owner is ordered to submit a vehicle to examinations or tests. However, no demand was ever made to the accused. "Moreover, at least from the time of his arrest and afterward, [the accused's] detention on the roadside had nothing to do with highway traffic issues," said Justice Richards. "[The officer's] own testimony indicated that he was concerned solely with criminal activity during this time period." Thus, his detention was not authorized under the *TSA* and any search powers which might have existed were not engaged.

The trial judge's s. 24(2) *Charter* analysis excluding the evidence was upheld and the Crown's appeal was dismissed.

Complete case available at www.canlii.org

FOUND-IN NOT ENOUGH FOR CONVICTION

R. v. Lai, 2012 BCCA 202

When police executed a search warrant the accused was found sleeping in a house used as a marihuana grow operation. His motor vehicle was parked outside and a vial of pills with his name on it was on the kitchen counter. There was no other evidence that he was involved in the marihuana production. The house and B.C. Hydro contract were registered to someone else.

British Columbia Provincial Court (trial)

The accused did not testify. However, his co-accused, who was also found sleeping in the home, said that they were at the house to pick up the accused's motor vehicle. They stayed over at the house because they were tired of driving from the city where they lived. The trial judge did not believe this story but did believe that they had recently arrived at the house prior to their arrest. The judge inferred both accuseds' participation in the operation from being found in a "bunker" - a dwelling almost entirely dedicated to the growing of marihuana. In his view, only someone maintaining the operation would sleep in it. The judge found that the operation was automated and did not require full-time attendance to feed and water it,

presumably to deal with the fact that the accused were from out of town. They were convicted of producing marihuana.

British Columbia Court of Appeal

The accused Lai successfully appealed his conviction. "The case against the [accused] comes down to his temporary presence in a house used to grow marihuana," said Justice Donald for the Court of Appeal. "Maintenance of the operation is not the only inference; he could have slept over for a number of reasons. There is no circumstantial evidence that he did anything to 'produce', including 'cultivating, propagating or harvesting', marihuana." Just because the judge disbelieved the co-accused's story did not enhance the prosecution's case against the accused. The web of circumstances was not so compelling that he had to provide an answer or stand condemned. The accused's appeal was allowed and his conviction was set aside.

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

GUN ABANDONED: s. 8 CHARTER NOT ENGAGED

R. v. Stevens, 2012 ONCA 307

A confidential informant told police that the accused was a drug dealer and kept a handgun and ammunition at his residence. The informant said he had been in the residence and saw the gun during a certain time period. An Information To Obtain (ITO) was drafted and a telewarrant was obtained. Police executed a "stealth search" in the middle of the night. Moments before they entered, police outside the residence saw someone throw a white sock out the window with something in it. The sock landed in an adjacent yard and was determined to contain a semi-automatic firearm. The accused was the sole occupant of the residence and no other drugs or weapons were found inside.

"Having thrown the handgun out the window into a neighbour's yard, the [accused] no longer had any reasonable expectation of privacy respecting the gun."

Ontario Court of Justice (trial)

Although there were errors in the ITO, the judge declined to determine the validity of the warrant. Instead, she held that the gun was discarded into an area where the accused had no reasonable expectation of privacy and that he had abandoned it. There was no s. 8 *Charter* breach and the accused was convicted of unauthorized possession of a firearm, careless handling of a firearm and failure to comply with a condition of his recognizance.

Ontario Court of Appeal

The accused unsuccessfully argued that the validity of the search warrant must be determined before deciding whether the gun was properly abandoned. The Court of Appeal agreed, holding that the firearm had been abandoned:

> In the factual circumstances here, the trial judge was not required to determine the legality of the search. In order to engage a person's rights under s. 8 of the Charter, that person must first establish a reasonable expectation of privacy. Having thrown the handgun out the window into a neighbour's yard, the [accused] no longer had any reasonable expectation of privacy respecting the gun. He no longer had possession or control over the gun; instead, he attempted to divest himself of possession or control of it. Indeed, he gave up the ability to regulate access to it when he threw it away. Furthermore, he offered no evidence of any subjective expectation of privacy in it. ...

Usually, it is only after the [accused] has established a reasonable expectation of privacy and the court is considering whether the search was an unreasonable intrusion on that right to privacy that there is a need to consider the reasonableness of the search and whether there has been police misconduct. Here, as the trial judge had correctly held that the gun had been abandoned, s. 8 was not engaged, and the trial judge was not obliged to consider the validity of the telewarrant or the legality of the police search.

> Having regard to this conclusion, it is unnecessary for us to address the balance of the arguments put forward by amicus as they all relate to the legality of the search (e.g. whether the trial judge erred in holding there was no cognizable legal nexus between the execution of the warrant and the seizure of the firearm and whether the validity of the ITO and therefore the search warrant would have had a bearing on the issues whether the police acted in good faith for the purpose of a s. 24(2) analysis). [references omitted, paras. 8-10]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

MULTIPLE CONVICTIONS FOR SOIRA ORDER CAN BE IMPOSED TOGETHER

R. v. Burns, 2012 SKCA 52

The accused was convicted on four charges of sexual assault proceeded by indictment under the *Criminal Code*. Sexual assault is a "designated offence" under s. 490.011(a).

Saskatchewan Provincial Court (trial)

The judge sentenced the accused to four concurrent terms of four years and eight months imprisonment, imposed a 10-year firearm prohibition and a DNA order. Although the accused had been convicted of more than one "designated offence", the judge interpreted s. 490.013(2.1) as not applying because the sentence was concomitantly pronounced for multiple designated offence convictions and the accused's criminal record disclosed no prior convictions for a designated offence. The judge declined to order a lifelong *Sex Offender Information Registration Act* (*SOIRA*) order, instead imposing compliance for 20 years.

Saskatchewan Court of Appeal

The Crown appealed the sentencing judge's order arguing he misinterpreted the application of multiple designated offence convictions to the circumstances of this case. When an offender is convicted of a designated offence, the sentencing judge must order an offender to comply with *SOIRA*. A *SOIRA* order ends 20 years after it was made if the maximum term of imprisonment for the offence is 10 or 14 years but applies for life if the person is convicted of more than one applicable designated offence. "The meaning of the section is plain: offenders who commit multiple designated offences will be subject to a lifetime SOIRA compliance order," said Justice Caldwell. "Nothing in the Criminal Code suggests the lifetime duration of the order rests on the offender being sentenced separately for each offence. In our view the clarity of the section is such that there is no need to resort to other principles of statutory interpretation"

The sentencing judge's narrow application of s. 490.013(2.1) was rejected and a more broad interpretation was adopted to include an offender committing multiple designated offences regardless of whether the sentences for those offences were imposed separately or all together.

Complete case available at www.canlii.org

"[O]ffenders who commit multiple designated offences will be subject to a lifetime SOIRA compliance order. Nothing in the Criminal Code suggests the lifetime duration of the order rests on the offender being sentenced separately for each offence."

LEGALLY SPEAKING:

Impaired Driving v. Over 80mg%

"Impaired driving and driving "over 80" are separate criminal offences. Operating a motor vehicle with a BAC over the legal limit is not an essential element of impaired driving. Accordingly, it is logically and legally possible for a jury to acquit on an "over 80" charge and convict on an impaired driving charge." - Ontario Court of Appeal in *R. v. Best*, 2012 ONCA 421 at para. 11, reference omitted.

NO DETENTION: POLICE ASKED ONLY PRELIMINARY QUESTIONS WHEN EXECUTING WARRANT

R. v. Boca, 2012 ONCA 367

Police identified an IP address for a computer that was sharing child pornography files. After determining the computer's location (municipal address) they obtained a search warrant for the residence. Upon entering its basement, police found three bedrooms that were separately rented out by the owner. The accused was seated on a couch in the common area. Another man emerged from his room while the third tenant was not at home. The police spoke to the two men and showed them the warrant. The accused identified his bedroom. Police determined that there was a computer in the common area and another in the accused's bedroom. The other man was allowed to leave when the police learned he did not own or use a computer.

A cursory examination of the accused's computer was performed and it was found to contain child pornography. The accused was called into the room where the officer confronted him with the images and questioned him about them. He initially denied all knowledge of the images but subsequently admitted he was responsible for them. He was immediately arrested, read his right to counsel and cautioned. He indicated he understood and was transported to the police station. Two broken USB drives were found in his pocket on a search incident to arrest and he admitted they contained child pornography. He said he had broken them on the way over to the police station. Upon booking he declined another opportunity to consult counsel. Later, he again was informed of his right to counsel and given the opportunity to exercise it but declined. He subsequently described, in a 37-minute recorded interview, how he accessed and made child pornography available using a Limewire program on his computer.

> "[I]n the context of executing a search warrant for child pornography at a residence occupied by numerous tenants, the police were entitled to ask some preliminary questions to determine how to proceed."

Ontario Court of Justice (trial)

The accused submitted that his s. 10(b) Charter right to counsel had been violated and sought to have his various inculpatory statements excluded from evidence under s. 24(2). He claimed he was first detained when police spoke to him and showed him the warrant. The trial judge found that at the time of the first statement (identifying his bedroom) the accused was not detained and therefore no s. 10(b) breach occurred. However, the judge concluded that the accused was detained at the time of the second statement (when he was called into the room and confronted about the images) and therefore that statement was obtained from a s. 10(b) violation. As for the third statement (recorded at the police station), there was no violation. The judge refused to exclude any of the statements under s. 24(2) and the accused was convicted on 10 counts of distributing child pornography and 11 counts of possession of child pornography.

Ontario Court of Appeal

The accused continued to argue that his s. 10(b) right to counsel was breached and that the trial judge erred in admitting all three statements he gave to police. But the Court of Appeal disagreed. The Court stated:

> In our opinion the trial judge did not err in admitting the first and third statements. In relation to the first statement, in the context of executing a search warrant for child pornography at a residence occupied by numerous tenants, the police were entitled to ask some preliminary questions to determine how to proceed. The [accused's] identification of his room arose during this preliminary stage. He was neither physically detained nor subjected to any coercive demand or direction. As a result the [accused's] right to counsel under s. 10(b) was not infringed.

> The trial judge found that the third statement was not tainted by the breach of the [accused's] s. 10(b) right to counsel in relation to the second statement. We agree. Prior to the third statement, the [accused's] right to counsel was addressed on several different occasions. The [accused] chose not to contact counsel. The [accused] understood his rights and did not want to exercise them. The third statement was given in a different location, several hours after the alleged breach of the [accused's] right to counsel in relation to the second statement, and the [accused] does not submit that the statement was involuntary. The fact that the [accused] had already made several incriminating admissions in his second statement, standing alone, is not a basis from which to infer that the third statement is tainted. [paras. 13-14]

Even if the second statement was inadmissible the third statement was not tainted and the accused was properly convicted. His appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

SAME CASE: GUNS IN, DRUGS OUT

R. v. Campbell, 2012 ONCA 394

After receiving an anonymous Crime Stoppers tip that the accused was dealing drugs and had firearms at his apartment, police could only corroborate information relating to his background. His drug dealing or weapons possession could not be verified. A warrant to search his apartment was obtained and police entered at night, weapons drawn and without warning. They tossed two distraction devices inside during the process. Firearms, ammunition, illegal drugs, a gravity knife, and cash were seized and the accused was charged with 21 firearm and drug-related offences.

Ontario Superior Court of Justice (trial)

The Crown conceded that the Information to Obtain (ITO) the search warrant fell short of the reasonable grounds standard to believe that evidence of drugs and firearms would be found in the accused's home. The judge found a number of acts of serious police misconduct but that they resulted from carelessness, not recklessness or a wilful disregard for the accused's *Charter* rights. Although the officers showed bad judgment, they did not act in bad faith. The judge excluded the evidence of the non-firearm related offences under s. 24(2) but admitted the evidence related to the firearm offences. He said:

> The public interest in gun offences distinguishes the gun-related evidence from the rest. The public is sufficiently concerned with gun related offences to permit the conclusion that admitting the evidence of those offences will not in the long term bring the administration of justice into disrepute. The public interest in the drug and other offences suggested by the seized evidence is not so acute that it permits the conclusion that, despite the seriousness of the state infringing conduct and its impact on [the accused's] Charter rights, exclusion of the evidence would bring the administration of justice into greater disrepute than its admission. [para. 84, [2009] O.J. No. 4132 (Ont.S.C.J.)]

The accused was convicted of 10 firearm related charges including possession of a loaded restricted firearm, careless storage of a restricted weapon, possession of a prohibited weapon and possession of a loaded prohibited weapon.

Ontario Court of Appeal

The accused submitted that the trial judge misapplied the s. 24(2) legal analysis to the facts of the case. First, he alleged the judge erred in finding that the police officers did not act in bad faith. Second, he argued the judge overemphasized the seriousness of the firearm offences. The Court of Appeal, however, did not accept either submission.

The trial judge did not approach his analysis in a piecemeal fashion. Instead, he carefully considered the relevant factors and conducted his analysis based on the totality of the evidence. "It was open to the application judge to find that despite the seriousness of the state misconduct, the officers did not act in bad faith," said the Court of Appeal. "He was alive to all of the factors that properly weighed in this analysis. The seriousness of Charter-infringing

state conduct can be seen to fall on a spectrum from blameless conduct, through negligent conduct to conduct demonstrating a blatant disregard for Charter rights. From his reasons, it is clear that the trial judge did not consider the breaches to fall at the serious end of the spectrum. On the facts found by him, to the extent the police actions fall short of good faith, they do not fall far short."

The Court also rejected the contention that the trial judge overemphasized the seriousness of the firearm-related offences. The trial judge expressly acknowledged the seriousness of both the firearm and drug offences. Rather than overemphasizing the seriousness of firearm offences when referring to their "certain character", he was speaking to the heightened public interest in their prosecution. He noted the increasing incidents of gun crime in Canada and the need for society to be protected from criminals armed with deadly handguns. Thus, society had an even greater interest in the adjudication of the firearm offences than the drug offences. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

IN *(admissible)*	**OUT** *(excluded)*
☑ Glock 9 mm semi-automatic	☒ gravity knife
☑ North American Arms Inc. 22 calibre revolver	☒ C$9,538
☑ Glock high-capacity magazine with 17 rounds of ammunition	☒ US$1,580
☑ 241 rounds of ammunition	☒ 48.76 grams of crack cocaine
	☒ 485.19 grams of marihuana
	☒ 2.77 grams of hash oil

Source: [2009] O.J. No. 4132 (Ont.S.C.J.)

CIRCUMSTANTIAL EVIDENCE CAN PROVE PRESUMPTION OF IDENTITY APPLIES

R. v. O'Meara, 2012 ONCA 420

A police officer conducting RIDE stops spoke with the accused and smelled alcohol coming his breath. The accused said he had been drinking the previous evening. An ASD demand was given and the accused registered a fail. He was arrested for "over 80", given an approved instrument demand and transported to the police station where he consulted with duty counsel. He was taken to the breath room where a qualified breath technician concluded that the instrument was functioning properly. Two breath samples - 181 mg % and 188 mg% - were obtained.

"RIDE" Reduced Impaired Driving Everywhere

Ontario Court of Justice (trial)

The judge was satisfied that the officer had reasonable grounds to make the arrest and breath demand because the accused failed the ASD. Although the breath technician did not specifically testify that the breath samples had been analyzed by the approved instrument, the judge found as much, based on the evidence of an approved, duly tested instrument capable of conducting the required analysis being used. The accused was convicted of operating a motor vehicle with a blood alcohol concentration exceeding 80 mg%.

Ontario Superior Court of Justice

The accused argued that the Crown failed to meet the statutory preconditions for relying on the results of the breath samples under s. 258(1)(c)(iv) of the *Criminal Code*. While there was evidence that a

breath sample was received from the accused directly into an approved instrument, he suggested that there was no evidence that an analysis of the sample had been made by means of the instrument since the breath technician did not testify that the instrument analyzed the samples. In his view, this precondition could not be proven by circumstantial evidence. The Crown, on the other hand, submitted that explicit testimony by the breath technician that the instrument "analyzed" the sample was not required because there was evidence that the process occurred and that the instrument provided a result.

The appeal judge found the trial judge erred in concluding that there was circumstantial evidence the approved instrument had analyzed the samples. Therefore, the presumption under s. 258(1)(c) was not available. "There was virtually no evidence to prove beyond a reasonable doubt that the samples were, in fact, analyzed as required by s. 258(1)(c)(iv) by the instrument," she said. The accused's appeal was allowed and an acquittal was entered.

Ontario Court of Appeal

The Crown argued that the appeal judge erred in law by finding that the statutory presumption found in s. 258(1)(c) was not available on the evidence. Justice Brown, speaking for the Court of Appeal, described the s. 258(1)(c) presumption this way:

> Section 258(1)(c) of the Criminal Code creates what is commonly referred to as a "presumption of identity". This presumption, if applicable, relieves the Crown of the burden of proving that the accused's blood alcohol level at the time of the offence was the same as it was at the time of testing. Where this presumption is not available, the accused's blood alcohol level at the time of the offence is normally proven by evidence from a toxicologist.
>
> In order to rely on the presumption, the Crown must meet the statutory preconditions specified in s. 258(1)(c)(ii)-(iv) of the Criminal Code. The samples must be taken as soon as practicable, the first sample must be taken within two hours of driving, and there must be at least a 15 minute interval between samples (s. 258(1)(c)(ii)); the samples must be received from the accused directly into an approved container or into an approved instrument operated by a qualified technician (s. 258(1)(c)(iii)); and "an analysis of each sample [must be] made by means of an approved instrument operated by a qualified technician" (s. 258(1)(c)(iv)). [paras. 27-28]

"Section 258(1)(c) of the Criminal Code creates what is commonly referred to as a 'presumption of identity'. This presumption, if applicable, relieves the Crown of the burden of proving that the accused's blood alcohol level at the time of the offence was the same as it was at the time of testing."

Circumstantial evidence can establish the s. 258(1)(c)(ii)-(iv) conditions the Court of Appeal ruled:

> ... In the instant case the trial judge relied on circumstantial evidence to infer that the samples were analyzed by an approved instrument and found that the presumption was applicable. This inference was available. The qualified breath technician testified that the breath samples were taken by an approved instrument (i.e. an Intoxilyzer 8000C); the approved instrument was in proper working order (as determined by a number of diagnostic tests); the [accused] provided two suitable samples of his breath directly into the instrument; and the instrument produced results of 188 mg and 181 mg of alcohol in 100 ml of blood. The breath technician's evidence on these points was not challenged at trial.
>
> ... In this case there was evidence that the breathalyser used was an approved instrument and that results were properly obtained. None of this evidence was contested by the [accused]. In my view, there was ample circumstantial evidence from which the trial judge could properly conclude, as she did, that the [accused's] breath samples went through an analysis by means of an approved instrument. Admittedly, the breath technician did not specifically testify that the breathalyser instrument in question analyzed the accused breath samples. However, that is a reasonable inference the trial judge could draw from the fact that the approved instrument provided results

of the breath samples. [paras. 33-34]

The appeal judge erred in law in finding that the presumption in s. 258(1)(c) was not available in the circumstances of this case. The Crown's appeal was allowed and the accused's conviction was restored.

Complete case available at www.ontariocourts.on.ca

LEGALLY SPEAKING:

Consent - Sexual Assault

"The Criminal Code explicitly provides that there can be no consent if the complainant is incapable of consenting to the activity (s. 273.1). Capacity to consent to sexual activity requires something more than the capacity to execute baseline physical functions. The question is the degree to which intoxication negates comprehension or volition. A drunk complainant may retain the capacity to consent. Mere drunkenness is not the equivalent of incapacity. Nor is alcohol-induced imprudent decision making, memory loss, loss of inhibition or self control. A drunken consent is still a valid consent. Where the line is crossed into incapacity may be difficult to determine at times. Expert evidence may assist and even be necessary, in some cases, though it is not required as a matter of law." - Alberta Court of Appeal in *R. v. Haraldson*, 2012 ABCA 147 at para. 7, references omitted.

SERIOUS BREACH SIGNIFICANTLY IMPACTING CHARTER INTEREST RESULTS IN EXCLUSION OF BREATH TEST

R. v. Berger, 2012 ABCA 189

After the accused failed an ASD test at the roadside, he was arrested, advised of his right to contact a lawyer and given a breath demand. He indicated that he wanted to contact a lawyer and was taken to the police station, given the telephone number for Legal Aid and placed in a phone room. He made various telephone calls for several minutes. After observing the accused hang up the phone, the officer entered the room. He told the officer the Legal Aid line was busy and asked him what to do. The officer said "Keep trying" and observed that the accused was visibly frustrated. The accused tried for a few more minutes and again spoke to the officer about not being able to get legal advice. The officer told him that he had two options; (1) continue attempts to contact legal advice or (2) choose to provide a sample of breath. The officer did not tell him that he could "hold off" giving a breath sample until he had spoken to a lawyer. The officer then read a waiver, stating that the police could not take a statement or ask for participation in any process that provides evidence until the accused was certain whether he wanted to exercise his right to contact a lawyer. The accused replied that he did not want to waive his right to contact a lawyer but said "it's impossible to get that right". The accused was presented to the breathalyzer and provided a sample of his breath. He was returned to the phone room and, after six minutes, successfully obtained legal advice. He later gave a second breath sample. Both samples exceeded the legal limit.

Alberta Provincial Court (trial)

The Crown conceded that the accused's s. 10(b) *Charter* right had been violated. His actions did not amount to an unequivocal waiver of s. 10(b) so there had been a breach of its informational component. The judge, however, concluded that the breach was

merely technical and at the low end of the scale. He found the arresting officer was acting in good faith throughout:

- the officer informed the accused of his rights and how to use the phone;
- the officer provided access to available telephone numbers;
- there was no evidence the accused felt pressured or coerced to hurry along; and
- the officer was forthright honest and fair to both sides when answering questions on the stand.

The judge found the Crown had discharged its burden of showing that the accused had been given a reasonable opportunity to contact counsel and that society's interest in an adjudication on the merits of the case favoured admission of the certificate of analysis under s. 24(2). The breathalyzer results were admitted and the accused was convicted of over 80 mg%.

Alberta Court of Queen's Bench

The appeal judge concluded the trial judge was correct and dismissed the accused's appeal.

Alberta Court of Appeal

The accused again appealed the trial judge's decision arguing the certificate of analysis should have been excluded as evidence because of the admitted *Charter* breach.

Contrary to the trial judge's characterization of a technical breach, the Court of Appeal found the violation much more serious. The trial judge misunderstood the nature of the conceded *Charter* breach. He had described it as a breach of the informational component of s. 10(b) rather than its true character, a breach of the implementational component. The police took a breath sample in the face of an express refusal to waive the right to counsel. There was no explanation for the breach and the officer had other options by which to obtain the evidence without a *Charter* violation occurring. He could have waited and readily achieved his objective without a *Charter* breach:

> Indeed, at the time the first breath sample was given there was no need to act quickly to preserve evidence. Only 34 minutes had elapsed between the time he was first observed by the officer and the time the waiver was read to him. There was still plenty of time to obtain breath samples within the prescribed two-hour time limit in s. 258 of the Criminal Code; even the passage of that time would not excuse taking breath samples without giving a diligent accused the right to first consult counsel. It would have been easy to avoid the problem by simply allowing the [accused] more time, on a busy evening, to contact a lawyer before presenting him to the breathalyzer. The breach is put in further context by the knowledge that the [accused] was in fact able to contact counsel after a further 6 minutes when returned to the telephone room on his request, a request which further emphasized his unwillingness to waive that right. [para. 18]

Furthermore, the law of waiver was clear and there was no evidence the officer was unfamiliar with it. "The officer simply grasped an opportunity to gather incriminatory evidence rather than allow the [accused] additional time to attempt to gain legal advice," said the Court of Appeal. "A forthcoming attitude on the stand, short of providing this evidence, and providing the [accused] with timely access to a telephone, cannot support a finding of good faith in the absence of this critical explanation."

The impact on the accused's Charter protected interests was also significant. "The evidence would not have been harvested but for the Charter breach, and that it was essential to substantiate the charge," said the Court of Appeal. This was so even though

"This case illustrates that Charter breaches can arise other than in the context of dramatic circumstances or crimes yielding penitentiary consequences, yet yield the same result, here the exclusion of evidence leading to acquittal."

the accused's choices in complying with the demand were limited:

> While any lawyer contacted by the [accused] would have told him that his options were limited with regards to non-participation in the face of a breathalyzer demand, that does not excuse a Charter violation. The lawyer could have provided other critical advice, including the importance of remaining silent, strategies for interrogation and practical advice about securing release from custody.
>
> More importantly, to accept the argument that the Charter breach would not have mattered because both refusing to blow, and achieving a fail rating after blowing result in a criminal consequence, would be to insulate s. 10(b) Charter breaches in the course of an investigation of an over .08 charge from any consequence because the accused person has little choice but to eventually provide a breath sample in any event. That is not the law. [paras. 24-25]

Although the truth seeking function of the s. 24(2) analysis favoured admission, the seriousness of the breach and the significant undermining of the accused's right to counsel warranted exclusion of the evidence:

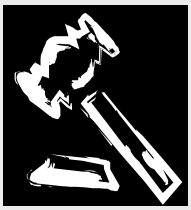
> The apparently innocuous nature of the Charter breach which occurred in this case evidences the importance of diligence in protecting Charter rights. While the arresting officer appeared to take steps to ensure protection of the [accused's] right to counsel, upon closer examination he ignored that right, in the face of an express refusal to waive it, to take advantage of an evidence-gathering opportunity. This case illustrates that Charter breaches can arise other than in the context of dramatic circumstances or crimes yielding penitentiary consequences, yet yield the same result, here the exclusion of evidence leading to acquittal. [para. 27]

The accused's appeal was allowed and his conviction was quashed.

Complete case available at www.albertacourts.ab.ca

LEGALLY SPEAKING:

Uttering Threats



"The actus reus is the uttering of the threat to cause serious bodily harm, and the mens rea is the utterance with the intention the words will intimidate or be taken seriously. In considering the actus reus, it is necessary to determine whether the words are indeed a threat prohibited by the Criminal Code. This ... engages analysis of the words used by the accused. In seeking to discern whether the words expressed a threat, the objective standard ... is applied – would a reasonable person consider that the words uttered were a threat? ... [para. 33]

If the expression of a prohibited threat is established, the trier of fact must consider the mens rea – did the accused utter the words as a threat? Otherwise stated, did he ... intend to intimidate or have the words taken seriously? As in other situations where there is no direct evidence of intention, intent is a matter to be inferred from the evidence. In this task the trier of fact gains some assistance from considering, objectively, the meaning a reasonable person would take from the words." [para. 35] - British Columbia Court of Appeal Justice Saunders in *R. v. Armstrong*, 2012 BCCA 248, references omitted.

POLICE LEADERSHIP CONFERENCE ★ 2013

British Columbia Association of Chiefs of Police

April 7 - 9, 2013

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- Trade Show - April 8 & 9, 2013

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Speakers

Rick Mercer chronicles, satirizes and ultimately celebrates all that is great and irreverent about this country. Known as "Canada's Unofficial Opposition," Mercer is our most popular comic, a political satirist who knows exactly what matters to regular Canadians and what makes them laugh. Born in St. John's, Newfoundland, Mercer has won over 25 Gemini Awards.

Assembly of First Nations National Chief **Shawn A-in-chut Atleo** is a Hereditary Chief from the Ahousaht First Nation. In July 2009, Atleo was elected to a three-year mandate as National Chief to the Assembly of First Nations. Atleo has been a tireless advocate for First Nations by spending time in First Nations in every region of the country.

Craig Kielburger co-founded, with his brother **Marc**, Free The Children in 1995 at only 12 years of age. Today, he remains a passionate full-time volunteer for the organization, now an international charity and renowned educational partner that empowers youth to achieve their fullest potential as agents of change.

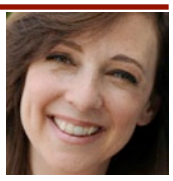
Wendy Mesley is a regular contributor to CBC News: The National, CBC Television's flagship news program, appearing throughout the week in a regular segment that asks provocative questions about the news stories Canadians are talking about. She also contributes to CBC News: Marketplace, CBC Television's award-winning prime-time investigative consumer show.

Richard Rosenthal was appointed BC's first Chief Civilian Director of the Independent Investigations Office on January 9, 2012. He has extensive experience in civilian oversight of law enforcement having served for 15 years as deputy district attorney for Los Angeles County, where he worked on various assignments.

Ian McPherson is a Partner, Advisory Services with KPMG in Toronto and the former Assistant Commissioner of Territorial Policing at the Metropolitan Police Service in London, UK. Ian is with KPMG's Global Centre of Excellence for Justice and Security, leading its work throughout North America.

Major-General (ret'd) **Lewis MacKenzie** is considered the most experienced peacekeeper on the planet. MacKenzie has commanded troops from dozens of countries in some of the world's most dangerous places. In Sarajevo, during the Bosnian Civil War, he famously managed to open the Sarajevo airport for the delivery of humanitarian aid.

Dr. John Izzo has devoted his life and career to helping leaders create workplaces that bring out the best in people, plus discover more purpose and fulfillment in life and work. For over 20 years, he has pioneered employee engagement, helping organizations create great corporate cultures and leading brands through transformations that create both customer and employee loyalty.



In an increasingly social world, **Susan Cain** shifts our focus to help us reconsider the role of introverts - outlining their many strengths and vital contributions. Like *A Whole New Mind and Stumbling on Happiness*, Cain's book, *Quiet: The Power of Introverts In a World That Can't Stop Talking*, is a paradigm-changing lodestar that shows how dramatically our culture has come to misunderstand and undervalue introverts.

BY THE BOOK:

s. 95 *Criminal Code*

Possession of prohibited or restricted firearm with ammunition

(1) Subject to subsection (3), every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, without being the holder of

(a) an authorization or a licence under which the person may possess the firearm in that place; and

(b) the registration certificate for the firearm.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, three years, and

(ii) in the case of a second or subsequent offence, five years; or

(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.

Exception

(3) Subsection (1) does not apply to a person who is using the firearm under the direct and immediate supervision of another person who is lawfully entitled to possess it and is using the firearm in a manner in which that other person may lawfully use it.

UNLOADED FIREARM WITH AMMUNITION NOT INCLUDED IN POSSESSING LOADED ONE

R. v. Wong, 2012 ONCA 432

After receiving information from an anonymous source that the accused stored drugs he dealt at his residence, police set up surveillance and subsequently obtained a CDSA search warrant. The warrant was executed and police found drugs, cash, scales and packaging materials. A sawed-off .22 calibre rifle and ammunition were also found inside a tennis racquet case in the accused's bedroom. The ammunition was in this case but not loaded in the rifle. The accused was charged with several offences including possession of a loaded firearm.

Ontario Court of Justice (trial)

The trial judge held that s. 95 of the *Criminal Code* created two modes of committing the same offence. He found that a person who possesses a loaded firearm necessarily possesses an unloaded firearm with usable ammunition at hand. Possessing an unloaded firearm together with usable ammunition, was therefore included in the offence of possessing a loaded firearm. The accused was convicted and sentenced to three years in prison.

Ontario Court of Appeal

The accused argued that possessing an unloaded prohibited or restricted firearm together with readily accessible ammunition was not an included offence in possessing a loaded prohibited or restricted firearm. In his view, the elements of both offences are not the same and the second part of s. 95(1) was not an included offence but rather a separate one. The Crown, on the other hand, submitted that a person possesses a prohibited firearm that is loaded with ammunition also possesses a firearm "together with readily accessible ammunition". It suggested that s. 95(1) described two ways of committing one offence. It is an offence to possess a loaded prohibited firearm or an unloaded prohibited firearm

with readily accessible ammunition. Both modes of committing the offence are found within the same subsection of the *Criminal Code* with the latter mode being an included offence in the first.

Justice Weiler, delivering the Court of Appeal's opinion, agreed with the accused and rejected the Crown's position. In this case, the information particularized the offence as possession of a "loaded prohibited firearm" contrary to s. 95(2). The evidence showed that the firearm was not loaded but that the ammunition was found alongside it in the same tennis racquet case. Rather than s. 95(1) creating one offence with two modes of commission, it created two offences:

1. possession of a loaded firearm; and
2. possession of an unloaded firearm with readily accessible ammunition.

The Meaning of "Loaded"

The second offence described in s. 95(1) requires that the firearm be unloaded, in addition to being "together with readily accessible ammunition." The Court of Appeal said this:

> The term "unloaded" has a distinct meaning: it is the opposite of the term "loaded" in the first part. Although the term "loaded" is not defined in s. 95 or anywhere else in the *Code*, regulations to the *Firearms Act*, ... contain a definition of the term "unloaded" which reads:
>
> > "unloaded", in respect of a firearm, means that any propellant, projectile or cartridge that can be discharged from the firearm is not contained in the breach or firing chamber of the firearm nor in the cartridge magazine attached to or inserted into the firearm.
>
> By virtue of the federal *Interpretation Act*, ... s. 15(2)(b), "where an enactment contains an interpretation section or provision, it shall be read and construed as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears." The Interpretation Act defines the term enactment as "an Act [of Parliament] or regulation or any portion of an Act or regulation". Therefore, the regulations to the Firearms Act are enactments and the definition of "unloaded" contained in those regulations applies to s. 95(1) of the *Criminal Code*. Both enactments, though concerned with different aspects, deal with the same subject matter – gun control. Further, there is nothing in the *Code* to suggest that this definition is inappropriate or contraindicated. Indeed, the definition accords with the ordinary meaning one would ascribe to the word "unloaded", and by extension, "loaded" when used to refer to a firearm. [paras. 49-40]

Included Offences

"An offence is 'included' if its elements are embraced in the offence charged," said Justice Weiler. "In other words, all of the essential elements of the offence must be part of the offence charged." He continued:

> [I]t will not always be true that a person who possesses a loaded firearm has necessarily possessed an unloaded firearm together with usable ammunition. For example, a person, X, unlawfully possessing a loaded gun will not necessarily be the same person who possessed the unloaded gun with readily accessible ammunition. Another person, Y, may have been in possession of the gun, lawful or otherwise, with readily accessible ammunition, and loaded the gun. X may come along and steal Y's loaded gun. Y may give X the gun in loaded condition. Y may even lose the loaded gun and X may find it. In each of these circumstances, the person guilty of unlawful possession of a loaded firearm does not necessarily commit the offence of possession of an unloaded firearm with readily accessible ammunition.

Thus, the offence of possessing an unloaded firearm with readily accessible ammunition is not an included offence of possessing a loaded firearm. The accused's appeal on this charge was allowed and the conviction was set aside the loaded firearm charge.

Complete case available at www.ontariocourts.on.ca

VALID YOUTH WAIVER REQUIRES UNDERSTANDING OF CHARGES

R. v. W.C.K., 2012 ABCA 185

The accused, a 16-year-old youth, was arrested for break and enter and breach of probation occurring earlier that morning. He was Chartered and cautioned and indicated he wanted to call a lawyer. While he was in the telephone room, the police obtained further information implicating him in the dangerous driving of stolen vehicles the previous evening. The police did not inquire into whether the accused had successfully contacted counsel (he had not), obtained legal advice or contacted his parents or other suitable adult. Nor did they inform him of the new, more serious charges that were being investigated. The accused agreed to the interview process but he had not been advised that he was going to be charged with dangerous driving and possession of stolen property. Using a form developed to accomplish the objectives of s. 146 of the *Youth Criminal Justice Act*, an officer took the young offender through the form, which was videotaped. He was then told he was being charged with possession of stolen property and dangerous driving. The accused subsequently provided an inculpatory statement.

Alberta Provincial Court (trial)

The judge found that s. 146 had not been complied with before the accused gave his inculpatory statement. In the judge's view, police failed to provide s. 10 *Charter* rights with respect to the more serious offences before he gave a statement. Thus the waiver was invalid. The statement was excluded and the accused was acquitted of dangerous driving and possession of stolen property.

Alberta Court of Appeal

The Crown suggested that the trial judge confused a valid s. 146 waiver with a breach of the *Charter* and the Court of Appeal agreed. The trial judge should have first determined whether s. 146 had been

BY THE BOOK.

Youth Criminal Justice Act: s. 146

146. (1) Subject to this section, the law relating to the admissibility of statements made by persons accused of committing offences applies in respect of young persons.

Marginal note: When statements are admissible

(2) No oral or written statement made by a young person who is less than eighteen years old, to a peace officer or to any other person who is, in law, a person in authority, on the arrest or detention of the young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offence is admissible against the young person unless

(a) the statement was voluntary;

(b) the person to whom the statement was made has, before the statement was made, clearly explained to the young person, in language appropriate to his or her age and understanding, that

(i) the young person is under no obligation to make a statement,

(ii) any statement made by the young person may be used as evidence in proceedings against him or her,

(iii) the young person has the right to consult counsel and a parent or other person in accordance with paragraph (c), and

(iv) any statement made by the young person is required to be made in the presence of counsel and any other person consulted in accordance with paragraph (c), if any, unless the young person desires otherwise;

(c) the young person has, before the statement was made, been given a reasonable opportunity to consult

(i) with counsel, and

(ii) with a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person, as long as that person is not a co-accused, or under investigation, in respect of the same offence; and

(d) if the young person consults a person in accordance with paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

Marginal note: Exception in certain cases for oral statements

(3) The requirements set out in paragraphs (2)(b) to (d) do not apply in respect of oral statements if they are made spontaneously by the young person to a peace officer or other person in authority before that person has had a reasonable opportunity to comply with those requirements.

Marginal note: Waiver of right to consult

(4) A young person may waive the rights under paragraph (2)(c) or (d) but any such waiver

(a) must be recorded on video tape or audio tape; or

(b) must be in writing and contain a statement signed by the young person that he or she has been informed of the right being waived.

"Obtaining statements from a young accused engages three different levels of legal protection: (1) the common law voluntary confessions rule, (2) the constitutional right to silence and the right to counsel under section 10 (a) and (b) of the Charter, and (3) the specific provisions of the YCJA."

satisfied. Then, if it had been, determine whether there was a s. 10 *Charter* breach attracting a s. 24 remedy. "The two analyses are related and have many commonalities, but they are not the same," said the Court of Appeal. It continued:

> The Crown must establish a valid waiver beyond a reasonable doubt. Where compliance with the informational component is established beyond a reasonable doubt, the trial judge is expected to infer, in the absence of evidence to the contrary, that the young person understood those rights. The test for informational compliance is objective. The establishment of a Charter violation rests with the person asserting the breach. Whether there was a breach, and its seriousness if so found, are critical findings in determining whether any remedy ought to be granted, and, if so, what that remedy ought to be. While they may ultimately result in the same conclusion, they ought not be conflated or confused. [references omitted, para. 11]

And further:

> Obtaining statements from a young accused engages three different levels of legal protection: (1) the common law voluntary confessions rule, (2) the constitutional right to silence and the right to counsel under section 10 (a) and (b) of the Charter, and (3) the specific provisions of the YCJA. The Supreme Court of Canada and appellate courts across Canada have repeatedly held that the purpose of these layers of protection is to provide enhanced procedural and evidentiary safeguards to young persons accused of a criminal offence. [references omitted, para. 13]

The validity of a s. 146 waiver can be divided into three fact driven inquiries, each of which must be established by the Crown beyond a reasonable doubt:

1. Was the waiver voluntary?
2. Did the police adequately explain to the young person the right to consult counsel and a parent and to have any person consulted present during the giving of the statement?
3. Did the young person appreciate the consequences of waiving those rights?

A waiver under s. 146 requires that a youth understand the charges against them because, without that information, they cannot give a fully informed waiver. In this case, the accused was taken through a very important part of the waiver process without knowing the charges against him, which tainted the entire process. So, although the trial judge's analysis was flawed, the result was reasonable and the Crown's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

FAILURE TO INVESTIGATE B&E WOULD BE EGREGIOUS ABDICATION OF POLICE DUTY

R. v. Grégoire, 2012 QCCA 846

Police received an anonymous 911 call at 1:23 am reporting a break and enter at a home. The caller also said that there were marijuana plants at the address given. The operator contacted the detachment responsible for the area and but there was no such address. Later it was learned that there was a matching address in a nearby town. Police officers, unaware "plants" were mentioned when the 911 call was made, attended the premises at about 8:52 am and immediately noticed there was a broken window, scattered broken glass from the side of the garage, a screen window that had been removed and a black sheet of

paper covering a window. An officer displaced the paper with a slight move of his hand and discovered a marijuana grow operation inside. He immediately withdrew from the area and a search warrant was subsequently obtained and executed. The accused rented the premises.

Court of Quebec (trial)

The judge found that the officer did not enter the premises once he observed the presence of marijuana plants from the exterior and therefore no s. 8 *Charter* breach occurred. The accused's motion to exclude the evidence was dismissed and he was convicted of producing marihuana.

Quebec Court of Appeal

The accused argued that the displacement of the black sheet of paper over the window at the premises, which allowed the police to see the marijuana, constituted a warrantless search. It was presumptively unreasonable and violated s. 8 of the *Charter* regardless of the subsequent issuance of the warrant. The Crown agreed the search was warrantless but suggested it was justified.

In support of his position, the accused advanced several submissions:

- There was no emergency since over seven hours elapsed between the time of the 911 call and police attendance at his house.
- The warrantless search could not be justified on any other basis, such as incidental to arrest, invitation to knock, "plain view" or "plain smell". By moving the black sheet of paper, the police officer was carrying out an investigative measure, as opposed to observing or sensing something that required no investigation.
- Anyone could place a 911 call and report whatever they wanted. Therefore, the police must exercise caution about information they receive in such circumstances, especially from an anonymous caller. The mere fact that police have an obligation to investigate the commission of alleged crimes and to ensure the security of persons and property does not mean that they can ignore the rights and freedoms that they are to safeguard pursuant to their mandate.
- Since it should have been apparent upon arrival that a break and enter was no longer in progress and no perpetrators were to be apprehended, police powers were limited to knocking on the door to speak to the occupant. On the assumption there would have been no reply, they would have been duty bound to simply leave the premises without any further investigation of a break and enter or for any other purpose.
- Moving the black sheet of paper constituted a serious violation of s. 8 and a further perimeter search of the premises that followed was demonstrative of more violations.
- Since the evidence of the presence of marihuana was obtained illegally, the subsequently issued search warrant was invalid and the evidence gathered as a result ought to have been excluded under s. 24(2).

In determining whether the police acted within their common law powers when they interfered with the accused's liberty or property, the Quebec Court of Appeal considered the two questions developed from the English *Waterfield* case:

1. Did the conduct fall within the general scope of any duty imposed by statute or recognized at common law; and

2. Did the conduct, albeit within the general scope of such a duty, involve an unjustifiable use of powers associated with the duty.

In this case, Justice Hilton, delivering the unanimous judgment, concluded that the police officers were acting within the general scope of their statutory duties under s. 48 of Quebec's *Police Act* when they responded to a report of a break and enter and examined the exterior of the premises, even seven hours after it was reported. Even though there was no emergency when the police officers arrived at the exterior of his residence, their conduct was still lawful. "Flexibility must be given to them in the exercise of their duties and the reality of the

"The failure of police officers to investigate a break and enter by conducting a perimeter investigation, simply because they did not arrive at the scene in a timely fashion, would be an egregious abdication of their general police mandate to ensure the safety of property."

situations in which they find themselves," said Justice Hilton. "In my opinion, this case illustrates what constitutes allowable police discretion. ... The fact that there was no emergency given the lapse of time does not diminish their obligation to ensure security on the premises." He further stated:

> The unusual situation of investigating a break and enter several hours after its commission that is immediately apparent from a broken window upon arrival on the premises, necessitates the exercise of police discretion. The failure of police officers to investigate a break and enter by conducting a perimeter investigation, simply because they did not arrive at the scene in a timely fashion, would be an egregious abdication of their general police mandate to ensure the safety of property. [para. 34]

The Court of Appeal found the police action was lawful:

> Here, a window had been broken, and without knowledge of who put the black sheet of paper on it or why, it was reasonable for [the officer] to displace it to determine the cause and manner of the window having been broken. The window frame in which a window had been broken is certainly an area of the premises in which the officers could reasonably expect to find evidence of the break and enter. Further, the subsequent walk around the building to verify whether any doors had been broken into is reasonable in light of the report of a break and enter.
>
> ... ...
>
> In my view, the police conduct in issue should be seen as a justifiable use of police power. Their duty to ensure the safety of property and investigate reports of crime is essential to the public good. The interference, as such, was minimal, and did not involve [the officers] entering the residence, but rather simply displacing a sheet of paper on a window and walking around perimeter of the residence to ascertain whether any doors may have been broken into. The broken window was immediately apparent to [the officer] upon exiting his vehicle, confirming to him that he was conducting an investigation of a break and enter, according to the evidence at hand and adapting it to the circumstances. [paras. 41,43]

The trial judge correctly found that the police action was justified under the circumstances. There were no *Charter* breaches and there was no need to resort to s. 24(2). However, even if s. 24(2) applied, the evidence was nonetheless admissible. The accused's appeal was dismissed.

Complete case available at www.canlii.org

BY THE BOOK:

s. 48 of Quebec's *Police Act*: The Mission

The mission of police forces and of each police force member is to maintain peace, order and public security, to prevent and repress crime and, according to their respective jurisdiction as set out in sections 50 and 69, offences under the law and municipal by-laws, and to apprehend offenders.

In pursuing their mission, police forces and police force members shall ensure the safety of persons and property, safeguard rights and freedoms, respect and remain attentive to the needs of victims, and cooperate with the community in a manner consistent with cultural pluralism. Police forces shall target an adequate representation, among their members, of the communities they serve.

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This course is an introduction to law enforcement terminology, practices, concepts, analysis, and intelligence. The course will introduce the student to the discipline of crime analysis and law enforcement intelligence through the study of the intelligence cycle and the intelligence determinants. The role and responsibilities of an analyst within each sub-topic will be addressed. Additionally, the utilization of analytical software will be introduced.

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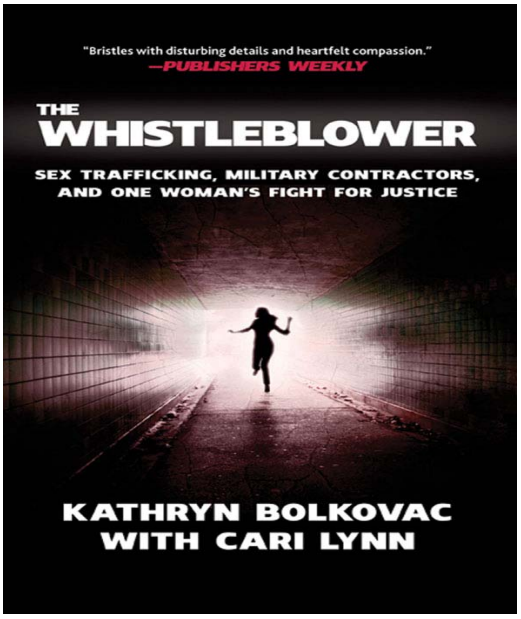

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