JIBC

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

IN MEMORIAM

On July 20, 2012 38-year-old Royal Canadian Mounted Police Constable Derek Pineo was killed in a single vehicle crash when his patrol car struck a moose near Wilkie, Saskatchewan at about 2:00 am. Constable Pineo had served with the RCMP for five years. He is survived by his wife, three children, and parents.

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

On August 10, 2012 Municipal District of Foothills Protective Services (Alberta) Community Peace Officer Rod Lazenby was beaten and killed during a confrontation with a subject on a rural ranch who was illegally housing over 30 dogs.

Officer Lazenby had gone to the ranch to speak to the man about the repeated offence when a confrontation occurred and Officer Lazenby was critically injured. The subject involved in the confrontation with Officer Lazenby then drove him to a police station in Calgary. Officer Laznby was transported to a nearby hospital where he was pronounced dead.

The subject who assaulted Officer Lazenby was charged with first degree murder.

Officer Lazenby had served with the Municipal District of Foothills for three years after retiring from the Royal Canadian Mounted Police with 35 years of service. He is survived by his wife and five children.

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

IN SERVICE: 10-8 ONLINE

All back issues of the newsletter are available online at www.10-8.ca. If you would like to be added to the electronic distribution list for the newsletter simply send an email to mnovakowski@jibc.ca.

When the newsletter is completed it will be sent directly to your email address so you won't miss out on any of the case law featured in each issue.

www.10-8.ca

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

The ABCs of evaluation: timeless techniques for program and project managers.

John Boulmetis, Phyllis Dutwin.

San Francisco, CA: Jossey-Bass, 2011.

HD 31 B633 2011

The adult learner: the definitive classic in adult education and human resource development.

Malcolm S. Knowles, Elwood F. Holton III, Richard A. Swanson.

Amsterdam; Boston: Elsevier, 2011.

LC 5225 L42 K56 2011

Becoming a master student.

Dave Ellis, Doug Toft (contributing editor), Debra Dawson.

Toronto, ON: Nelson Education, c2012.

LB 2343.3 E44 2012

Coaching for leadership: writings on leadership from the world's greatest coaches.

editors, Marshall Goldsmith, Laurence S. Lyons, Sarah McArthur.

San Francisco, CA: Pfeiffer, c2012.

HD 30.4 C63 2012

Co-active coaching: changing business, transforming lives.

Henry Kimsey-House, Karen Kimsey-House, Phillip Sandahl.

Boston, MA: Nicholas Brealey Pub., 2011.

HF 5549.5 C53 K56 2011

Combating memory loss: common problems and treatments.

Boston, MA: Massachusetts General Hospital, 2011.

RC 394 M46 C55 2011

Creative thinking skills. [videorecording]

Burnaby, BC: Distribution Access [distributor], c2010.

1 videodisc (DVD) (26 min.): sd., col.; 4 3/4 in.

English captions for the deaf and hearing impaired.

Creativity can be the difference between success and failure. When all solutions escape you, creative thinking can provide another perspective.

This program explores how we as individuals can become more creative and develop a questioning mindset, enhancing our ability to generate, challenge, test and reinvent ideas.

BF 408 C743 2010 D1412

The developing mind: how relationships and the brain interact to shape who we are.

Daniel J. Siegel.

New York, NY: Guilford Press, c2012.

BF 713 S525 2012

An employer's guide to surveillance, searches and medical examinations.

John C. O'Reilly, Katherine Ford.

Toronto, ON: Carswell, c2012.

HF 5549.5 E428 O74 2012

Evaluating research articles from start to finish.

Ellen R. Girden, Robert I. Kabacoff.

Thousand Oaks, CA: SAGE Publications, c2011.

Q 180.55 E9 G57 2011

A first-rate madness: uncovering the links between leadership and mental illness.

Nassir Ghaemi.

New York, NY: Penguin Press, 2011.

RC 537 G479 2011

The five levels of leadership: proven steps to maximize your potential.

John C. Maxwell.

New York, NY: Center Street, 2011.

HD 57.7 M394 2011

The four styles. [videorecording]

production services provided by TS Media Inc.

[S.l.]: EIC Incorporated; Port Perry, ON: Owen-Stewart Performance Resources Inc. [distributor], c2008.

1 videodisc (22 min.): sd., col.; 4 3/4 in. (DVD) + 1 CD-ROM (4 3/4 in.)

Accompanying CD-ROM contains leader's guide, section breakdown in PDF and Microsoft PowerPoint presentation. Scientific research shows that people communicate, think and behave differently. Generally they fall into four categories: suportives, emotives, reflectives and directives. In this 3-part program you will learn about these four behavior styles and what's included in them, learn how to identify these styles in others and how to change your behavior to better communicate with others.

HF 5718 F687 2008 (Restricted to in-house.) D1431

Hungry: fuelling your best game.

Ryan Walter.

Surrey, BC: Heads-Up Communications Corp., c2011.

BF 637 S8 W35 2011

Incognito: the secret lives of the brain.

David M. Eagleman.

Toronto, ON: Viking Canada, c2011.

BF 315 E24 2011

Legal help for British Columbians: a guide to help non-legal professionals make legal referrals for their clients.

Cliff Thorstenson.

[British Columbia]: Courthouse Libraries BC, c2012.

KEB 174 T46 2012

Meetings, bloody meetings. [videorecording] produced by Video Arts Limited.

London: Video Arts; Mississauga, ON: RG Training [distributor], c2012.

1 videodisc (33 min.): sd., col.; 4 3/4 in. (DVD).

Title from disc.

Title of accompanying manual: Meetings, bloody meetings: making meetings more productive.

written by Pat Mitchell.

Manual publication date: 2012.

Enhanced DVD features include: course leader's guide (PDF file); presentation slides (PPT files); group training workbook, self-study workbook, objectives and programme outline, certificate (Word files).

This updated version of the classic film illustrates the five basic principles for conducting productive meetings. In a nightmarish court, a cynical manager is found guilty of failing to prepare himself and inform others about the meeting agenda.

HD 2743 M43 2012 D1423

The mentor's guide: facilitating effective learning relationships.

Lois J. Zachary.

San Francisco, CA : Jossey-Bass, c2012.

LB 1731.4 Z23 2012

The polyvagal theory: neurophysiological foundations of emotions, attachment, communication, and self-regulation.

Stephen W. Porges.

New York, NY: W. W. Norton, c2011.

QP 401 P67 2011

The post-traumatic stress disorder sourcebook: a guide to healing, recovery, and growth.

Glenn R. Schiraldi.

New York, NY: McGraw-Hill, c2009.

RC 552 P67 S326 2009

Quiet: the power of introverts in a world that can't stop talking.

Susan Cain.

New York, NY: Crown Publishers, c2012.

BF 698.35 I59 C35 2012

Twelve steps to a compassionate life.

Karen Armstrong.

Toronto, ON: Knopf Canada, c2011.

BL 624 A74 2011

Working in high risk environments: developing sustained resilience.

edited by Douglas Paton and John M. Violanti.

Springfield, IL: Charles C. Thomas, c2011.

HF 5548.85 W678 2011

ABSENCE OF SUBJECTIVE SUSPICION FATAL TO DETENTION'S LEGALITY

R. v. Dhillon, 2012 BCCA 254

Police were dispatched to the parking lot of a Subway restaurant in response to a fight complaint involving a group of 12 South Asian males and found several South Asian males out front of it. There was also a BMW with its passenger door open parked at an angle to the linear parking stalls, suggesting someone might have left it in a hurry. A police officer informed the group that he was investigating a complaint about a fight. The men said there was no fight and there was no evidence of one. The complaint was concluded as unfounded but the officer recognized an individual in the group from previous dealings and police intelligence as someone involved in violent criminal activity and associated with firearms. He became suspicious that weapons might be present. Upon inquiring as to the BMW's ownership, the accused came forward and, when asked if he had any identification, produced his driver's licence from the middle console of the vehicle. The officer saw a pair of scissors and some rolling papers in the console. In his experience those items were typically associated with marijuana use but he did not see or smell any burnt or fresh marijuana. The possibility of drugs in the vehicle again made the officer suspicious that there might be weapons in it.

Although he had not seen any drugs or weapons inside the main body of the vehicle, the officer decided to search the trunk where he found a Norico assault rifle (an AK-47 knock-off) covered in towels. A 30-round magazine was attached. The accused was arrested, handcuffed, patted-down and placed in the back of a police vehicle. About four minutes had elapsed between the accused identifying himself as the vehicle's owner and his arrest. Shortly thereafter, two men associated with a criminal gang arrived. They were known to carry handguns, wear body armour and were previously involved in shootings. More backup was summoned and all the men were handcuffed and searched. Forty-five minutes later the officer advised the accused why he was arrested and told him about his right to counsel. Then, about an hour later, he was provided access to a telephone at the police station for the purpose of contacting legal counsel.

British Columbia Provincial Court (trial)

The officer acknowledged that he did not have reasonable grounds to obtain a search warrant, nor to arrest or detain the accused for investigative purposes and therefore did not have authority to conduct a search for officer safety reasons. (Instead, he claimed he had the accused's consent, which was later found to be invalid). The trial judge, however, concluded that there were no *Charter* violations. She found the accused was lawfully detained pursuant to an investigative detention. The presence of drug paraphernalia in the vehicle, the manner in which the vehicle was parked and the presence of a known violent offender in the group of males gave the officer both subjective and objective grounds to detain the group of men, including the accused, for investigation in relation to the fight complaint. "It would be naive and unrealistic to expect that the police when investigating an assault would accept the word of a group of people there when they deny an assault ever took place, especially given the known violent person within the group," said the judge. "Up to the point where the accused is arrested, interference with his liberty was minimal, only to the extent required for the officers to do their duty in checking out a potential assault."

Since the accused was lawfully detained for investigative purposes, the search of his vehicle for officer and public safety reasons was reasonable as incidental to the detention. As for the 45-minute delay in providing a reason for detention and advising the accused of his right to retain and instruct counsel, it was not intentional but due to the volatility and potential danger of the situation. Plus, even if the accused's rights were breached, the firearm would have been admitted as evidence under s. 24(2) anyway. The accused was convicted of four firearm and weapon related offences; possessing a firearm without a licence, carrying a

concealed weapon, being an occupant of a motor vehicle knowing there was a prohibited weapon and possessing a prohibited device.

British Columbia Court of Appeal

The accused argued that the trial judge erred in characterizing the search as incidental to an investigative detention. In his view, the officer did not subjectively believe that he had reasonable grounds to detain him and therefore his detention was arbitrary under s. 9 of the *Charter*. The vehicle search, he suggested, was also unlawful and breached s. 8 of the *Charter*. Thus, the firearm should have been excluded as evidence. The Crown, on the other hand, submitted that even if there was no lawful investigative detention, the search was still reasonable as a justifiable use of police powers in the exercise of the police duty to preserve the peace, prevent crime and protect life and property.

The Detention

Justice Smith, authoring the Court of Appeal's unanimous judgment, described the test for detention this way:

> Detention for Charter purposes exists where there is "a suspension of the individual's liberty interest by a significant physical or psychological restraint". Psychological detention occurs where an individual "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist". The determination of whether there has been detention is an objective test. Where there has been no physical restraint and no legal obligation to comply with a demand by a police officer, the question is whether "a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply". [references omitted, para. 30]

A detention will not be arbitrary under s. 9 of the *Charter* if it is authorized by law, either statute or common law. Under the common law, the police may lawfully detain someone for an investigation if they have reasonable grounds to suspect that the targeted individual is involved in criminal activity. Reasonable suspicion is more than a hunch and includes both subjective and objective elements. In addition to the requirement of a reasonable suspicion, the detention must also be reasonably necessary in order to justify what would otherwise be an unreasonable interference with an individual's liberty.

In this case, the Court of Appeal found there was no detention. The officer said he did not detain the accused nor was there any control exerted over him. The accused was not physically restrained or directed to go anywhere or do anything other than to step away from the vehicle when it was being searched. And even if the accused could have been lawfully detained, that is not what the police did. Instead, they arrested him. "When the police have wrongfully arrested someone, their actions cannot be defended on the basis that they could have detained this person on some other basis," said Justice Smith. "In deciding whether the police infringed Charter rights they are to be judged on what they did, not what they could have done."

Moreover, the officer did not have reasonable grounds to detain as the trial judge mistakenly found. The officer did not form a subjective belief that the accused had been or was involved in a fight and found nothing to support the complaint, which was concluded as unfounded. Nor did the officer claim to search the vehicle incidental to an investigative detention. Rather, he acknowledged he only had a bare suspicion that he might find drugs and/or weapons in the trunk of the vehicle, which did not rise to the level of reasonable grounds for detention. "The law requires both a subjective and an objective basis for an investigative detention,"

"When the police have wrongfully arrested someone, their actions cannot be defended on the basis that they could have detained this person on some other basis. In deciding whether the police infringed Charter rights they are to be judged on what they did, not what they could have done."

"Where there exist reasonable grounds to suspect that a detained individual is connected to a particular crime, officer or public safety concerns may justify a search incidental to that detention, which will typically involve a pat-down search of the detained individual. A lawful search incidental to an investigative detention requires 'reasonable grounds' (i.e., an objective basis) for concerns about officer and/or public safety, and that the search be 'reasonably necessary' to ensure the preservation of the officer and/or public safety."

said the Court. "Even if the trial judge's finding that there was an objective basis for detention were accepted, the complete absence of a subjective basis in this case is fatal to the finding that there was a lawful investigative detention."

The Search

Investigative Detention: In some cases a detained person may be searched. "Where there exist reasonable grounds to suspect that a detained individual is connected to a particular crime, officer or public safety concerns may justify a search incidental to that detention, which will typically involve a pat-down search of the detained individual," said Justice Smith. "A lawful search incidental to an investigative detention requires 'reasonable grounds' (i.e., an objective basis) for concerns about officer and/or public safety, and that the search be 'reasonably necessary' to ensure the preservation of the officer and/or public safety." However, since the officer's concern that the accused might possess drugs and/or weapons did not rise to the level of reasonable suspicion, the search of the vehicle could not be justified as incidental to an investigative detention for officer and/or public safety reasons.

***Waterfield* Doctrine:** The authority to conduct the search on the basis that it was reasonably necessary for officer and public safety reasons based on the *Waterfield* doctrine was also rejected. The Crown had tried to argue that the officer had a duty to search the trunk for the protection of the public and the officers present because of the nature of the suspected crimes and the potential for a high risk of violence. "To date, no court has recognized a police power to search based on a standard lower than that of objectively reasonable suspicion," noted Justice Smith. "While I am not persuaded that a free-standing power to search for officer safety reasons should be recognized, if such a power were to be recognized, in my view it would, at a minimum, require this level of objectively reasonable grounds." Here, the officer admitted he had nothing more than a bare suspicion to support his concerns for officer and public safety. He also admitted that the vehicle could have been secured until more officers arrived, which ran directly counter to the argument that the search was necessary for public safety reasons. Thus, the search was neither objectively reasonable nor necessary, failing the second branch of the *Waterfield* doctrine:

> In short, while the Waterfield doctrine has developed a robust history in Canada, it has been limited by constitutional constraints and, in particular, by a requirement that police show an objectively reasonable basis for the exercise of any powers. This criterion is reflected in the second branch of the Waterfield doctrine, which requires that police conduct not involve an "unjustifiable use of police powers". Canadian courts, to date, have held the exercise of a common law police power is only justified where its use is objectively reasonable and necessary. Thus, even if the Waterfield doctrine could be found to support the use of police powers based on concerns about safety rather than concerns about the commission of specific criminal offences, in my view at the very least those safety concerns would have to be objectively reasonable before they could serve as a free-standing justification for the use of police search powers. [para. 70]

s. 24(2) Charter

As a result of the *Charter* breaches, the firearm was excluded under s. 24(2). The *Charter*-infringing conduct was serious and the impact on the accused's *Charter*-protected interests was significant.

The accused's appeal was allowed, his convictions were quashed and acquittals were entered. There was no need to address the accused's s. 10 *Charter* arguments.

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

More on the Waterfield Doctrine

The English *Waterfield* or ancilliary powers doctrine is used to determine whether a police officer was acting lawfully at common law. The test has two branches:

- Whether the police conduct, which involved a *prima facie* unlawful interference with a person's liberty, fell within the general scope of any duty imposed by statute or recognized at common law, such as preventing life or protecting property?
- Whether the police conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty? The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.

Examples of its use:

- the power of investigative detention on the basis of a reasonable suspicion. *R. v. Mann*, 2004 SCC 52
- the power to forcibly enter a private home to investigate a 911 call and provide assistance to the caller. *R. v. Godoy*, [1999] 1 S.C.R. 311
- the power to detain people (by stopping a vehicle) based on the existence of reasonable grounds to believe there were handguns in a public place, which posed a genuine risk to public safety. *R. v. Clayton*, 2007 SCC 32
- the power to use a sniffer-dog to search luggage on the basis of a "reasonable suspicion" standard. *R. v. Kang-Brown*, 2008 SCC 18

POLICE EXCEED IMPLIED LICENCE TO KNOCK: SMELLING STINK BREACHED PRIVACY

R. v. Atkinson, 2012 ONCA 380

The accused entered an apartment uninvited through an open balcony door. The suite belonged to an acquaintance who she met at Cocaine Anonymous and lived in the same building. She refused to leave when asked, but grudgingly did so when the request was repeated. The next day the accused again entered the apartment uninvited, this time walking into a bedroom and asking for a "ten piece" of crack. She refused to leave when requested and had to be escorted out. Then, sometime during the middle of the night, a burglar entered the apartment and the following day a flat screen television was found missing. Feces was seen on a table beneath the balcony, on the balcony, and on the kitchen and living room floors. None of the footprints were closer than about three feet from where the television had been.

Police attended the apartment and looked around, discovering a lot of "dark feces". It appeared someone had stepped in dog feces left on the balcony of the apartment and proceeded to track it around. The officer considered the accused as a person of interest, having entered the apartment uninvited and unannounced the previous two days. However, he concluded he did not have reasonable and probable grounds to believe that she was the burglar. The officer went to the accused's home, walked up to the door of the enclosed verandah/mudroom and knocked. The accused answered the door and, when questioned, denied any knowledge of the television theft. The officer noticed a pair of black shoes close by with something stuck to their bottom. He took a step or two inside, picked up the shoes, looked at them and lifted them towards his nose. He smelled feces. The accused acknowledged, but then quickly denied the shoes were hers. The shoes were seized and the accused was charged. The television was never recovered.

Ontario Court of Justice (trial)

The officer conceded that in order to smell the deposit stuck to the shoes he needed to pick them up. He considered he had an implied invitation to enter the verandah/mudroom and walked in without any objection from the accused. When the accused denied taking the television she told the officer he could enter her house and showed him that the television was not there. The Crown conceded that the officer breached s. 8 of the *Charter* in seizing the shoes and that they should be excluded as evidence.

Although the shoes themselves were excluded, the officer's observations of the shoes, both visual and olfactory, were admitted and the accused was convicted of break and enter and two counts of unlawfully in a dwelling house for the two earlier entries to the same apartment.

Ontario Court of Appeal

The accused argued, among other grounds, that the officer's observations in seeing and smelling the adherent fecal matter on the shoes were inadmissible. In her view, each observation amounted to a "search" under s. 8 of the *Charter* and lacked any statutory or common law authority. There was no warrant or consent. Further, the "plain view" doctrine, which only permits a seizure (not a search), did not apply because the officer was not lawfully present in the verandah/mudroom. Nor was the feces either readily apparent or inadvertently discovered. The Crown, on the other hand, despite the trial concession of an unlawful seizure, now submitted that the officer was lawfully in the verandah/mudroom to pursue his burglary investigation and the material on the shoes was clearly visible from the entrance. Crown suggested the officer was entitled to pick up the shoes, look at the material and smell it. This was not an unreasonable search the Crown contended.

> "The common law recognizes an implied licence for all members of the public, including police officers, to approach the door of a residence and to knock. Thus, an occupier is deemed to grant the public, including the police, permission to approach the door and to knock."

The officer's initial approach to the home, his entry and his conduct in picking up the shoes, looking at them and smelling them was both a search and a seizure the Court of Appeal concluded. And since there was no warrant, the onus shifted to the Crown to establish a lawful basis for the police action, which they failed to do. The officer exceeded the implied licence to knock doctrine, the accused gave no valid consent, nor was the plain view doctrine applicable. The officer's observations of and about the material on the accused's shoes breached s. 8 of the *Charter*.

The Door Knock

Like all members of the public, a police officer has an implied invitation to knock at a person's door to facilitate communication with an occupant. This invitation to knock waives the privacy interest the occupant might otherwise have in the approach to the door of their home. Justice Watt, authoring the unanimous Court of Appeal judgment, described it this way:

> The common law recognizes an implied licence for all members of the public, including police officers, to approach the door of a residence and to knock. Thus, an occupier is deemed to grant the public, including the police, permission to approach the door and to knock. Police who act in accordance with this implied invitation do not intrude on the occupant's privacy. Unless rebutted by some clear expression of intent, the implied invitation effectively waives the privacy interest that an individual might otherwise have in the approach to the door of his or her dwelling.
>
> This implied invitation to knock extends no further than is required to permit convenient communication with the occupant of the dwelling. It follows that only those activities reasonably associated with the purpose of communicating with the occupant are authorized by the "implied licence" to knock.
>
> Where state agents approach a dwelling with the intention of gathering evidence against an occupant, they have exceeded any authority implied by the invitation to knock and become engaged in a search of the occupant's home. Likewise, where police specifically advert to the possibility of securing evidence against an accused by "knocking on the door", they have exceeded the authority conferred on them by the implied licence to knock.

> In some circumstances, police officers lawfully present at the door of a residence may lawfully enter the premises. An invitation to enter may be implied from the circumstances, for example from the words and conduct of a person in charge of the place. An implied invitation to enter furnishes lawful authority for the police to be in the residence or other place.
>
> When determining whether to imply an invitation to enter a residence from the words and conduct of a homeowner in a brief interaction with a police officer, we should not lose sight of the dynamics of the police-citizen relationship. The essence of the policing function puts citizens on an uneven footing with police. We should not too readily imply an invitation to enter from the absence of objection or mere compliance, any more than we would equate consent with acquiescence or compliance in equivalent circumstances. [references omitted, paras. 45-49]

In this case, Justice Watt found the officer exceeded the boundaries of implied invitation to knock and engaged in a search of the accused's home. Although the officer considered the accused a "person of interest" and did not have reasonable grounds to arrest, he asked questions and took action from which it could be reasonably inferred he "approached the home in the hope of obtaining evidence linking the accused to the burglary."

Consent

The officer stepped into the enclosed verandah/mudroom after claiming he had an "implied invitation" to enter, suggesting the accused offered no objection. But the evidentiary record was insufficient to support a finding that the accused had an adequate informational basis upon which she could truly relinquish her right to privacy. Justice Watt described the issue of consent like this:

> A consent search is lawful, thus reasonable. A valid consent requires that the consenting party have the required informational foundation for a true relinquishment of the right.
>
> The consent must be voluntary and informed. To be voluntary, the consent, which may be express or implied, must not be the product of police oppression, coercion or other conduct that negates the consenting party's freedom to choose whether to allow police to pursue the course of conduct requested or to deny them that right. To be informed, the consenting party must be aware of
>
> i. the nature of the police conduct to which the consent relates;
>
> ii. the right to refuse to permit the police to pursue the conduct; and
>
> iii. the potential consequences of giving consent.
>
> [references omitted, paras. 55-56]

Plain View

The common law "plain view" doctrine allows the warrantless seizure of things in plain view provided (1) the seizing officer is lawfully in the place of seizure, (2) the evidentiary nature of the item is immediately apparent to the officer through the unaided use of their senses and (3) the evidence is discovered inadvertently. Here, however, the officer was not lawfully present and the plain view doctrine therefore did not apply.

s. 24(2) Charter

Despite the *Charter* breach the evidence was nonetheless admissible. The officer acted in good faith and the breach involved conduct comprising a single brief transaction in an area of the premises which was outside the main living area and visible from the entrance. The impact of the breach on the accused's *Charter*-protected interests was minimal. Territorially, the area searched was a covered verandah/mudroom, not the main living area of the residence, and entry was by a door that all members of the public had a licence to approach and knock. The shoes were visible from the doorway and the officer only needed to take a step or two, pick them up, look at them and smell the adherent material. Informationally, the unaided observations of sight and smell indicated that someone wearing the shoes had stepped in feces. This revealed little about the

"A consent search is lawful, thus reasonable. A valid consent requires that the consenting party have the required informational foundation for a true relinquishment of the right."

intimate details of the accused's lifestyle and personal choices and was nothing more than a passerby could infer from a casual meeting on a street corner. Finally, the circumstantial evidence provided a link between the accused (her shoes) and the break and enter (the apartment).

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

s. 349(2) Presumption

In *R. v. Atkinson*, 2012 ONCA 380 the accused also argued that the trial judge failed to properly apply the statutory presumption of intent in s. 349(2) of the *Criminal Code*. This presumption deems that an intruder who unlawfully enters or is unlawfully present in a premise, absent evidence to the contrary, was there with the intent to commit an indictable offence. From the evidence of the *actus reus*, the judge presumes the *mens rea*. The Court of Appeal described the presumption as follows:

> *The presumption in s. 349(2) ... helps the Crown prove the requisite fault element, the intent to commit an indictable offence in the premises unlawfully entered. For the purposes of the subsection, "evidence to the contrary" is evidence, which may emerge from the Crown's case or be adduced as part of the defence case, that is not disbelieved by the trier of fact and tends to negate the accused's intention to commit an indictable offence in the premises.*
>
> *In prosecutions to which s. 349(2) applies and in which "evidence to the contrary" is given, the trial judge is required to consider that evidence, along with the rest of the evidence adduced at trial, in determining whether Crown counsel has proven the mens rea required for a conviction beyond a reasonable doubt.* [references omitted, paras.105-106]

And further:

> *To rebut the presumption of unlawful intent in s. 349(2), "evidence to the contrary" must tend to show that the intruder or occupier had no intention of committing a crime in the premises. As with any evidence adduced at trial, it is for the presiding judge to assess this evidence, to determine whether she or he believes all, some or none of it. If the "evidence to the contrary" is neither rejected nor disbelieved, it falls to the Crown to prove the existence of the relevant intent beyond a reasonable doubt on the evidence taken as a whole.* [reference omitted, para. 108]

Although there was evidence in the Crown's case capable of amounting to "evidence to the contrary" within s. 349(2), the judge used circumstantial evidence of subsequent conduct as a basis upon which to infer a prior state of mind. The judge's rejection of the "evidence to the contrary" left the presumption of unlawful intent intact and the Crown's case unanswered.

INTENTIONAL ACT CAN ESTABLISH NECESSARY RISK FOR CARE or CONTROL

R. v. Coleman, 2012 SKCA 65

After receiving a complaint about a black or dark-coloured Jetta bearing a specific licence plate number being driven in an erratic manner, police located it at about 10:30 pm parked on the side of the road. The keys were in the ignition, the engine was not running, its headlights were off and the accused was sleeping in the driver's seat. When an officer knocked on the window a couple of times, the accused awoke, mouthed the words "oh fuck", reached toward the keys in the ignition with his right hand and put his left hand on the steering wheel. The officer then opened the driver's door of the vehicle to stop the accused from driving and to speak with him. She detected a strong odour of alcohol and asked the accused several times for his driver's licence and registration. His speech was slurred and deliberate, and his movements were jerky. He also fumbled getting his licence and said that he had been at a bar. His breath smelled of alcohol. The accused was arrested and placed in the back of a police car where he promptly fell asleep. He provided breath sampels over the legal limit and was subsequently charged with having care or control while impaired by alcohol and over 80mg%.

Saskatchewan Provincial Court (trial)

The accused said he had two beers at the bar after work and then left at 6:30 pm to drive home. As he began to fall asleep he pulled over at about 7:00 pm to nap for about five minutes, but ended up sleeping for three hours. He tried to explain the indicia of impairment observed by police but the judge disbelieved him. The judge concluded that the accused had been driving as late as about 10:00 pm. His seat had been in an upright position, the vehicle had been pulled off the highway (not blocking traffic) and was not otherwise in a dangerous position. The keys were in the ignition, the engine was not running, the emergency brake was engaged and the gearshift was

"The relevant risk does not relate solely to the possibility of an impaired driver acting inadvertently to put a vehicle in motion. It also includes the possibility of such a driver acting intentionally in this regard."

in neutral. Further, to put the car into motion the accused would have had to depress the clutch and shift into gear. He also found that the accused had reached for the steering wheel and key for the purpose of starting the vehicle.

Because the judge found that the accused had stopped his vehicle intending to have a nap, the presumption in s. 258(1) of the *Criminal Code* had been displaced. However, on the whole of the evidence, the Crown had proven beyond a reasonable doubt that the accused had been in *de facto,* or actual, care or control of his car. In the judge's view, the accused had used the fittings or equipment in an intoxicated state when he reached for the steering wheel and key in the ignition. This constituted a risk of setting his vehicle in motion so that it could become dangerous:

> In this case, I accept that the accused was sitting upright in the driver's seat sleeping. When [the officer] woke him up he reached for the steering wheel and the key in the ignition to start the vehicle. It matters not whether it was inadvertent or intentional. The fact is, this is what he did and only the officer's quick response in opening the car door stopped the accused from actually starting the vehicle.

The accused was convicted of care or control while impaired.

Saskatchewan Court of Queen's Bench

The accused successfully appealed his conviction. An appeal judge emphasized that the law should not discourage a drinking driver from pulling their vehicle off the road. He concluded that the accused had not been in care or control of his vehicle. "In order to set the vehicle in motion, there would have had to have been numerous steps taken," said the judge. "In sum, the accused was simply sleeping in his car and it was completely turned off. … [I]t cannot be reasonably said that the accused was engaged in the process of the use of the fittings or equipment of the vehicle. There was no risk of inadvertently setting the vehicle in motion." The accused's conviction was overturned and a not guilty verdict was substituted.

Saskatchewan Court of Appeal

A further appeal by the Crown was successful. Justice Richards, delivering the opinion of the Saskatchewan Court of Appeal, noted that care or control was defined by the Supreme Court of Canada nearly 30 years ago in *R. v. Toews*, [1985] 2 S.C.R. 119 as: "acts of care or control, short of driving, are acts which involve some use of the car or its fittings and equipment, or some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous." Since then, Justice Richards opined, the case law has "emphasized that the central consideration in relation to 'care and control' is the risk that the accused person will create a dangerous situation, whether by putting the vehicle in motion or some other way." He continued:

> The relevant risk does not relate solely to the possibility of an impaired driver acting inadvertently to put a vehicle in motion. It also includes the possibility of such a driver acting intentionally in this regard. The reason for this is self-evident. Impaired drivers have a diminished capacity to make safe judgments. They frequently act, deliberately, in ways which endanger themselves and the public. [para. 24]

The Queen's Bench judge had focused exclusively on the question of whether the accused might have inadvertently put his vehicle in motion without considering the risk of him making a deliberate decision to drive:

> Significantly, this is not a case where a driver, realizing he is impaired, decides to pull off the road in order to avoid endangering himself or

the public. To the contrary, [the accused] denied having been intoxicated and testified that he had consumed only two beers some four hours before being awakened by the police. He said he had pulled over, not because he was drunk, but because he was sleepy. He did not intend to park until he had sobered up. Rather, he said he had merely paused on his way home for a "five-minute nap". All of this demonstrates that [the accused's] course of conduct posed a genuine risk to the public. He was behind the wheel of his car and he was of a mind to deliberately put it in motion even though he was impaired. The learned Queen's Bench judge appears to have overlooked or given no consideration to this key fact.

The risk that [the accused] would deliberately have chosen to drive is underlined by his actions on being awakened by the police. As found by the trial judge, [the accused] "reached for the steering wheel and the key in the ignition to start the vehicle" and "only the officer's quick response in opening the door stopped him from actually starting the vehicle." This, too, confirms in clear terms the risk to the public posed by the possibility of [the accused] making a deliberate decision to drive his vehicle.

... The answer to the care and control question does not turn merely on whether a driver starts a vehicle or is behind the wheel of a vehicle with a running motor. Indeed, an intention to drive is not a necessary element of the offence created by s. 253(1). As counsel ultimately conceded, the proper analysis of the point turns on an assessment of the full constellation of factors relevant to the risk of the accused putting the vehicle in motion or otherwise creating a danger to the public. As the Supreme Court said in Toews, there must be "some course of conduct" in relation to the vehicle which could create a danger.

Here, [the accused] did pull off the highway and park on a side road. He did turn off the engine of his vehicle, engage the emergency brake and go to sleep. But, on the other hand, he denied or did not understand that he was impaired. He stopped only for a five minute nap. He did not recline his seat. He left the keys in the ignition and he tried to start his vehicle on being awakened by the police. As a result, the trial judge made no error in weighing the collective significance of these considerations so as to find [the accused] guilty on the s. 253(1) charge. [reference omitted, paras. 28-31]

Finally, the Court of Appeal disagreed with the Queen's Bench judge in finding that, for policy reasons, s. 253(1) of the *Criminal Code* should be interpreted or applied so as not to penalize impaired drivers who pull their vehicles off the road:

> In my respectful view, this line of thinking cannot be accepted. The legislative objective behind s. 253(1) of the Criminal Code is clear. In light of the obvious dangers involved in mixing motor vehicles and alcohol, Parliament made it an offence for an individual, whose ability to operate a motor vehicle is impaired by alcohol, to be in care and control of a vehicle. The idea, it seems to me, was to wholly avoid having intoxicated individuals in positions where they can put vehicles in motion (or otherwise endanger the public) in the first place. It was not to create an incentive for drunk drivers to pull over.
>
> Accordingly, I conclude that the Queen's Bench judge erred by analyzing the issues before him with a view to giving effect to the policy idea that s. 253(1) of the Code should not be applied so as to penalize impaired drivers who take their vehicles off the road. An impaired person behind the wheel of a parked vehicle might pose a less acute danger to the public than an impaired person behind the wheel of a moving vehicle. But, that does not mean the latter situation is risk free. Parliament has attempted to address both issues by aiming criminal sanctions not just at those individuals who drive while impaired, but also at those who assume care and control of a vehicle while impaired. Section 253(1) of the Criminal Code is directed at the very root of the impaired driving problem. Its object is to stop intoxicated or otherwise impaired individuals from endangering themselves and the public by having care or control of a motor vehicle. [reference omitted, paras. 33-34]

The Crown's appeal was allowed and the accused's conviction was reinstated.

Complete case available at www.canlii.org

TANGENTIAL DETENTION REQUIRES RIGHT TO COUNSEL

R. v. MacDonald, 2012 ONCA 495

Shortly after midnight police officers stopped the accused's van after clocking it on radar travelling at 121 km/h in a 90 km/h zone. One officer approached the accused (on the driver's side) while a second officer approached the passenger side where he observed, through the passenger-side window, a brown cardboard box in the large open area at the back of the van. The box was about 20" x 10" x 14" and had some lettering on it which aroused suspicions that the box contained contraband cigarettes. When asked what was in the box, the accused initially said he did not know but when asked again said it contained cigarettes. Police called a senior investigator at the provincial Ministry of Revenue, to obtain authorization to detain and search the vehicle pursuant to s. 24(1) of Ontario's *Tobaco Tax Act* (*TTA*). The revenue investigator concluded that there were reasonable and probable grounds to believe that the vehicle contained evidence of a *TTA* contravention, and granted authorization to detain and search the van and seize any products or paperwork relating to the purchase, sale and transportation of cigarettes. A police search revealed a bag containing 310 grams of marijuana and a fanny pack containing $4,872.75 in cash. The cardboard box contained 50 plastic bags, each containing 200 unmarked cigarettes. The accused was charged with offences which included possessing marihuana for the purpose of trafficking under the *Controlled Drugs and Substances Act* (*CDSA*) and possessing more than 200 unmarked cigarettes under the *TTA*.

Ontario Court of Justice (trial)

The accused argued that his *Charter* rights were violated, including ss. 8 and 10. But the trial judge found there was no search when the police asked the accused about the contents of the box. The judge also found the authorization to search provided by the revenue investigator was valid. In his view, the information available was "sufficient, on the subjective and objective standard, to support reasonable and probable grounds of an infraction under the Tobacco Tax Act." As for s. 10, the judge found that the accused was detained under the *TTA* when the officer walked back to the police cruiser with the intent of seeking authorization to search the van pursuant to s. 24(1). Although he should have advised the accused that he was being detained under the *TTA* and of his rights under s. 10, it was of no consequence because no evidence was collected

BY THE BOOK:

s. 24(1) of Ontario's *Tobacco Tax Act*

s. 24 (1) For any purpose relating to the administration and enforcement of this Act and the regulations, any person authorized for the purpose by the Minister who has reasonable and probable grounds to believe that the vehicle, trailer attached to a vehicle, vessel, railway equipment on rails or aircraft contains evidence of any contravention of this Act,

(a) may, without warrant, stop and detain any vehicle, including any trailer attached to the vehicle, any vessel, railway equipment on rails or aircraft;

(b) may examine the contents thereof including any cargo, manifests, records, accounts, vouchers, papers or things that may afford evidence as to the contravention of this Act or the regulations;

(c) subject to subsections (2), (2.2) and (2.4), may seize and take away any of the manifests, records, accounts, vouchers, papers or things and retain them until they are produced in any court proceedings; and

(d) may use any investigative technique, procedure or test that is, in the person's opinion, necessary to determine whether cigarettes found during a detention are marked or stamped in accordance with this Act and the regulations.

pursuant to that breach. The accused was convicted and was sentenced to four months in jail plus 12 months probation for the *CDSA* conviction and given a $4,205 fine for the *TTA* conviction.

Ontario Court of Appeal

The accused appealed his *CDSA* conviction arguing, among other grounds, that the questions about the cardboard box was an unreasonable search under s. 8 of the *Charter* and triggered a requirement that the police inform him about his rights under s. 10. Furthermore, he submitted that the judge erred in finding the authorization under the *TTA* proper. In the accused's view, his utterances, the marihuana and the cigarettes ought to have been excluded under s. 24(2).

"s. 10 Charter rights crystallized when the nature of the questioning shifted towards a TTA investigation."

TTA Search

Justice MacPherson, delivering the Court's opinion, concluded that the search was properly authorized under s. 24 of the *TTA*. There was sufficient information provided by police to the revenue investigator to furnish the requisite reasonable and probable grounds to believe that a search of the van would produce evidence of a *TTA* contravention. Plus, as the trial judge concluded, the officer was properly authorized in law to receive sub-delegated power from the revenue investigator to conduct the search.

Detention

Justice MacPherson concluded that the accused's "s. 10 Charter rights crystallized when the nature of the questioning shifted towards a TTA investigation". Generally, a person is detained when they are stopped by police for a highway related infraction, but the need to advise them of their s. 10(b) *Charter* right to counsel is suspended as a reasonable limit under s. 1. "The case law makes it clear that a roadside stop of a vehicle for possible violations of the Criminal Code (e.g. impaired driving) or provincial regulatory offences under statutes like the [Highway Traffic Act (HTA)] (e.g. speeding) is a detention," said Justice MacPherson. "Furthermore, the Supreme Court of Canada held … that the implicit limitation on the s. 10(b) right to counsel that is inherent to roadside stops was justifiable under s. 1 of the Charter."

So in this case, the accused was detained for the speeding infraction under the *HTA,* remained detained and was not free to leave the scene until this process was completed. However, when the officer questioned the accused about the contents of the box—related to his suspicion that it contained illegal cigarettes—the accused was placed in a new jeopardy under the *TTA* which triggered his s. 10 right to consult counsel. Because he was detained under the *HTA* and he could not leave the scene he could reasonably be expected to feel compelled to respond to questions from the police. "Before answering the question, which had nothing to do with his speeding offence, he should have been advised of his right to consult counsel" the Court said in holding a s. 10(b) *Charter* breach.

s. 24(2) Charter

Although the *Charter* breach was not serious — the officer was not involved in a fishing expedition nor was the single question particularly intrusive — and the evidence reliable, the impact on the accused's *Charter* protected interests favoured exclusion. There is a general rule that statements taken in breach of the *Charter* will be excluded. "Since the police officers would not have had reasonable and probable grounds to search the van without the [accused's] answer to the question about the contents of the box, it follows that the marijuana and cigarettes would not have been found by the police had the [accused] not made the self-incriminating response," said the Court. The accused's answer to the question, the marijuana and the cigarettes were inadmissible. The accused's appeal was allowed and an acquittal on the charge of possessing marijuana for the purpose of trafficking was entered. The TTA charge was subject to a separate appeal route.

Complete case available at www.ontariocourts.on.ca

COMMANDS TO SHOW HANDS & GET OUT OF VEHICLE NOT A DE FACTO ARREST

R. v. Madore & Madeira, 2012 BCCA 160

Police officers became suspicious after they saw the accused Madore, believed to be a high-level marihuana trafficker, drive his truck onto a logging road. They stopped a logging truck on the road and spoke to its driver, receiving more information that increased their suspicions. They drove a short distance up the logging road and saw Madore's truck parked just off the roadway. Madore, holding a bag, was standing near the open passenger door of a Jeep Cherokee which was occupied by the accused Madeira sitting in its driver's seat. Police stopped their cars and got out quickly. One of the officers , with her gun drawn in the ready position at her hip, directed Madore to show his hands, drop the bag he was holding and arrested him. Madeira was ordered out of the Jeep by another officer, who opened the driver's door and detected the odour of "freshly harvested marihuana bud". In the process, Madeira threw a cell phone or PDA out of the vehicle's window. He was also arrested. Police found 20 kg of marihuana (the bulk of it in the rear of the Jeep and some in the bag Madore had dropped upon his initial detention) and $105,455 in the Jeep.

> "An arrest is a more serious infringement of personal liberty than a detention, and it requires a more compelling justification on the part of police."

British Columbia Provincial Court (trial)

The judge found that both men had been arbitrarily detained under s. 9 of the *Charter* when the officers got out of their vehicles and gave directions to them. The police lacked both subjective and objective grounds to arrest or detain the men. However, the judge did not go so far as to hold the detentions amounted to *de facto* arrests and admitted the evidence under s. 24(2). The trial judge ruled that Madeira had been arbitrarily detained, but lawfully arrested. The smell of marihuana was admitted under s. 24(2) against Madiera and provided the reasonable grounds necessary to believe he had committed an indictable offence. The arrest being lawful permitted a search incidental to that arrest.

As for Madore, he had been arbitrarily detained which was prolonged and turned into an unlawful arrest. The judge rejected the testimony of the officer arresting Madore that she had smelled marihuana and found she did not have reasonable grounds. She was an experienced police officer and knew the importance of making personal notes, but failed to make a note or reference to smelling marihuana before arresting Madore in either the report to Crown counsel or in the ITO. The evidence found in the vehicle and the bag was nevertheless admitted. In the judge's view, Madore would have been lawfully arrested anyways following the search of Madiera. Both men were convicted of possessing marihuana exceeding three kilograms for the purpose of trafficking.

British Columbia Court of Appeal

The accuseds argued that the trial judge erred in refusing to exclude evidence that was obtained in violation of the *Charter* breaches. Several arguments were made including:

- ***A Layered s. 24(2) Approach***: the trial judge distinguished between evidence obtained by the police prior to the accuseds' initial detention and evidence obtained after their detention. He relied on the former to afford reasonable and probable grounds for the accuseds' arrest;
- ***De facto arrest***: the trial judge did not characterize Madeira's initial detention as an arrest; and
- ***Search***: the trial judge found the opening of the Jeep's door did not violate Madeira's rights under s. 8 of the *Charter*.

"[W]here police lacked sufficient grounds to detain, they would necessarily have had even less basis to carry out an arrest. In this sense, an arbitrary de facto arrest should weigh more heavily than an arbitrary detention within the s. 24(2) analysis."

s. 24(2) Layered Approach

The accuseds submitted that the trial judge improperly conducted two discrete inquiries under s. 24(2). The first enquiry being the admissibility of the sensory observations (smell) made after the initial unlawful detentions, which formed the grounds for Madiera's lawful arrest. The second being the admissibility of the real evidence found in the Jeep and Madore's bag. In the accuseds view, the judge should have made a single, comprehensive consideration of all the *Charter* breaches together rather than disconnecting their initial unconstitutional detentions from the ultimate decision to admit or exclude the evidence. But the Court of Appeal disagreed. "The smell of marihuana in the air was not obtained illegally," said Chief Justice Finch. "The judge made no error in concluding that Mr. Madeira's arrest, and the search incidental to that arrest, were not unlawful."

De Facto Arrest

On a s. 24(2) analysis, whether an accused was arrested, or merely detained, can be a significant factor. "An arrest is a more serious infringement of personal liberty than a detention, and it requires a more compelling justification on the part of police," said Chief Justice Finch. "In cases such as this one, where police lacked sufficient grounds to detain, they would necessarily have had even less basis to carry out an arrest. In this sense, an arbitrary de facto arrest should weigh more heavily than an arbitrary detention within the s. 24(2) analysis."

Here, there was no *de facto* arrest. "The facts of the present case disclose no such categorical attempt to take the [accuseds] into custody," said the Court. "[The officer] told Mr. Madore to show his hands, while [another officer] directed Mr. Madeira to get out of the car. Such commands are more consistent with an effort to prevent the [accuseds] from taking any immediate action than with putting them under arrest." Thus, the initial detention was not a *de facto* arrest.

Search

A person alleging a *Charter* breach must prove it on a balance of probabilities. In this case, Madiera did not lead any evidence that he had a reasonable expectation of privacy in the Jeep. Although he was found in it, he offered no evidence about who owned it or that he had the permission of the owner to occupy it. Rather, he suggested he had no relationship with it.

The *Charter* appeal was dismissed but Madore's conviction for possessing marihuana for the purpose of trafficking was substituted with a simple possession conviction. There was no evidence that the weight of the marihuana he dropped exceeded three kilograms. Police never weighed the marihuana in the bag separately from the marihuana in the Jeep and the Crown failed to prove both men controlled all the marihuana together.

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

FACT FOUND IN SENTENCING HEARING DID NOT ESTOP CROWN FROM PROCEEDING

R. v. Punko & Potts, 2012 SCC 39

After a multi-faceted, multi-year police investigation into the activities of the East End Chapter of the Hells Angels, a number of criminal offences were prosecuted. Some of the offences fell within the jurisdiction of the provincial Crown, while others fell to the federal Crown. The provincial Crown proceeded first against the accuseds Punko and Potts, among others, on charges of extortion, uttering threats, counselling mischief, and unlawful possession of explosive substances and firearms. Some of the offences were allegedly committed for the benefit of, at the

direction of, or in association with a criminal organization, namely the Hells Angels. Following a 10 month trial on the provincial charges, a jury found each accused guilty of a number of offences. However, all men were acquitted of the criminal organization counts. Meanwhile, the federal Crown also initiated various drug-related offences, including methamphetamine production and trafficking, and it was again alleged that they had done so for the benefit of, at the direction of, or in association with a criminal organization.

British Columbia Supreme Court

On the federal prosecution the accuseds made pre-trial motions arguing that the Crown should be estopped from leading evidence that the Hells Angels was a criminal organization because the issue had already been decided by the jury in the provincial prosecution. The motions were granted and the judge held that the Crown should be estopped from seeking to prove that the Hells Angels was a criminal organization in the federal case.

British Columbia Court of Appeal

The Crown appealed the Supreme Court ruling which was overturned and a new trial was ordered. Justice Kirkpatrick, writing for the court, found the jury's verdict did not necessarily result from a finding that the Hell's Angels were not a criminal organization. Instead, individual jurors may have reached their decisions on the verdict by different routes.

Supreme Court of Canada

The accuseds then appealed to Canada's highest Court. They argued that the Crown was estopped from seeking to prove the East End Chapter of the Hell's Angels was a criminal organization. In their view, the earlier jury trial resulting from the provincial prosecution already decided the issue when it returned a verdict of acquittal on the criminal organization counts.

What is the doctrine of issue estoppel?

In Canadian criminal law, issue estoppel merely ensures that an accused will not be required to answer questions that have already been determined in his or her favour. It prevents relitigation of an issue that was decided in the accused's favour in a prior trial and serves three purposes:

1. fairness to the accused who should not be called upon to answer questions already determined in his or her favour;
2. the integrity and coherence of the criminal law; and
3. the institutional values of judicial finality and economy.

Issue Estoppel

The doctrine of issue estoppel is part of Canadian criminal law but it is to be narrowly applied. Not every issue raised in a previous trial will be the subject of issue estoppel. "The Crown is precluded from relitigating only those issues that were decided in favour of the accused at the earlier trial," said Justice Deschamps on behalf of the Court. "Moreover, the resolution of an issue in favour of the accused must be 'a necessary inference from the trial judge's findings or from the fact of the acquittal'." Where there was a jury trial, the finding in favour of the accused must be logically necessary to the verdict of acquittal. But if there is more than one logical explanation for a jury's verdict, the verdict cannot successfully be relied on in support of issue estoppel if one of these explanations did not depend on the jury resolving the relevant issue in favour of the accused.

In this case, the trial judge "erred in law in drawing inferences on a balance of probabilities — a question of burden of proof — rather than considering whether a finding regarding the criminal nature of the organization was logically necessary to the acquittal — a question of logic and law." The original jury acquitted the accused on all the criminal organization counts. This did not, however, mean that the jury must have found that the Hells Angels was not a criminal organization. Rather, two distinct defences had been raised and therefore there were at least two logical explanations for the not guilty verdict on each of the criminal organization counts:

1. the Crown had failed to prove that the Hells Angels was a criminal organization; and

2. none of the substantive offences were committed for the benefit of, at the direction of, or in association with the Hells Angels.

Thus, a judge could not infer from the verdict that the jurors necessarily found the Hells Angels was not a criminal organization. There were alternate routes to the verdict. "In a multi-issue jury trial, it will be rare for an acquittal to ground issue estoppel," said Justice Deschamps. "Such an acquittal will often have more than one possible basis and different jurors may have reached a unanimous verdict by different routes." Nor could findings of fact made by the judge for the purpose of sentencing be relied upon to support issue estoppel.

A Slightly Different View

Justice Fish agreed with the reasons of the majority but would not foreclose the possibility that, as a matter of principle, a factual finding made by a sentencing judge could never estop the Crown from relitigating an issue in a subsequent proceeding. "To constrain the doctrine as my colleague does is to create the possibility of conflicting judicial determinations, each purporting to be final, and each made in proceedings between the same parties," he said. "Where the earlier finding was made in the accused's favour, it is precisely this sort of inconsistency that damages the integrity and coherence of the criminal justice system."

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

SOMETHING MORE THAN BALD STATEMENT NEEDED TO ESTABLISH IMPRACTICABILITY

R. v. Scott, 2012 BCCA 99

After receiving an anonymous tip from a source of unknown reliability about a marihuana grow operation at the accused's rural property, police investigated further and an officer prepared an Information to Obtain (ITO) a search warrant. He applied for a telewarrant on the understanding that "there is no Justice of the Peace in Princeton." When executing the warrant police searched three buildings on the property: a mobile home, a cabin and a large shed divided in two. They found 13 mature marihuana plants, 583 marihuana clones and over 8,500 grams of dried marihuana valued between $126,245 and $229,505, depending on how it was marketed. When the accused's mobile home was searched they found receipts for chemicals and fertilizer used for the grow operation, as well as growing instructions.

British Columbia Provincial Court

The accused challenged the telewarrant, in part, alleging the preconditions for its issue had not been satisfied. But the trial judge dismissed the accused's application to quash the warrant. The officer had an honest belief that there was no justice available in Princeton. Moreover, there was no evidence to the contrary and Princeton was a remote community with judges infrequently attending there. Since the warrant was valid, it was unnecessary to embark on a s. 24(2) *Charter* analysis. The evidence was admissible and the accused was convicted of producing marihuana and possessing it for the purpose of trafficking.

British Columbia Court of Appeal

The accused argued, among other grounds, that the conditions for a telewarrant were not met. Under s. 487.1 of the *Criminal Code* a peace officer, when submitting a request for a telewarrant, is required to establish it was impracticable to appear personally before a justice to obtain the warrant. Further, this section requires the officer to include in the ITO "a statement of the circumstances that make it impracticable." Was the statement "there is no Justice of the Peace in Princeton" sufficient to fulfill this requirement? Justice Neilson, speaking for the Court, concluded that it was.

"A bald statement as to the unavailability of a justice will not suffice as a statement of the circumstances

"A bald statement as to the unavailability of a justice will not suffice as a statement of the circumstances creating impracticability. There must be something more to permit the issuing justice to assess the reasonableness of the officer's belief that an application for a warrant in the usual course is impracticable."

creating impracticability," she said. "There must be something more to permit the issuing justice to assess the reasonableness of the officer's belief that an application for a warrant in the usual course is impracticable." This requirement may be met by a statement that establishes there are no justices available in the community where the officer is posted. The officer testified it was always his practice to check a board posted at the detachment that identifies dates on which Provincial Court regularly sits in Princeton. Plus, the issuing justice or the reviewing justice may take judicial notice of concrete local circumstances in assessing the adequacy of the officer's statement.

Here, the trial judge noted the closest resident judge was located in Penticton, 112 km away, and the Provincial Court sat in Princeton only several days each month. The trial judge found the officer honestly believed there wasn't a judge or a justice of the peace available in Princeton and there was no evidence that there was in fact a justice available. The officer's statement that "there is no Justice of the Peace in Princeton" was facially sufficient to satisfy s. 487.1(4)(a). The amplification evidence, although not to be used to strengthen the Crown's position, indicated that the officer "undertook inquiries about the availability of a justice and his statement as to impracticability was not simply boilerplate." The amplification evidence distinguished this case from other situations where a failure to comply with s. 487.1(4)(a) had been demonstrated. The accused's appeal was dismissed.

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

OTHER ASSERTIONS & THEIR OUTCOMES

"because there is no available justice locally" without any inquiry as to the availability of a justice in Grand Forks, BC nor any effort to explain in the ITO why it was impracticable to travel to a nearby community to appear in person before another justice was fatal to the telewarrant: *R. v. Ling*, 2009 BCCA 70; see also **"local justice not available"** insufficient: *R. v. Smith*, 2005 BCCA 334. **"there are no Judicial Justices of the Peace or Judges available"** without evidence that a justice would have been available in a community near Trail, BC was not sufficient to communicate the impracticability of appearing in person: *R. v. Farewell*, 2006 BCSC 372

"there is no Justice of the Peace in the community before whom I may appropriately make this application in person" went beyond simply stating a justice was unavailable and made it clear there was no justice in the community. This was sufficient: *R. v. Berry*, 202 BCSC 1742

"because there is no local J.P. services available" with amplification evidence the nearest justice from Kimberley, BC was 30 km away in Cranbrook, BC met the s. 487.1 requirements. The trial judge was entitled to take judicial notice that the two communities were separated by rugged unorganized territory: *R. v. Erickson*, 2002 BCSC 785

Lesson learned = explain why you believe no justice is available in the ITO

BY THE BOOK:

s. 487.1 ***Criminal Code***

s. 487.1 (1) Where a peace officer believes that an indictable offence has been committed and that it would be impracticable to appear personally before a justice to make application for a warrant in accordance with section 256 or 487, the peace officer may submit an information on oath by telephone or other means of telecommunication to a justice designated for the purpose by the chief judge of the provincial court having jurisdiction in the matter.

....

(4) An information submitted by telephone or other means of telecommunication shall include

(a) a statement of the circumstances that make it impracticable for the peace officer to appear personally before a justice;

....

OFFICER HAD NO GREATER EXPERTISE THAN JUDGE

R. v. Cranham, 2012 ONCA 457

A plain clothes detective observed a drug trafficker from a distance of two to three feet while a drug transaction took place. Another officer, some 60 to 70 feet away, took surveillance photographs and made notes describing the trafficker as 45-years-old, wearing blue jeans, a long black parka, a black toque and black sunglasses. The trafficker's hair was not visible in the surveillance photographs. Later that day, the detective confirmed that the individual in the surveillance photographs was the trafficker. A bench warrant for the accused, who resembled the person in the surveillance photograph, was issued. The arresting officer who took the accused into custody three days after the offence "believed" and was "pretty certain" or "certain" that the accused was also the trafficker in the surveillance photographs. At the time of arrest the accused was wearing big square sunglasses and his cheeks were sunken. However, neither the detective nor the photographing officer was shown a line-up with the accused. Nor did they confirm he was the trafficker in the surveillance photographs at this time.

Ontario Court of Justice (trial)

The plain clothes detective identified the accused in court as the trafficker he observed some nine months earlier. He noted that the accused had gained some weight and his cheeks, which were a little bit sunken at the time of the offence, where a little fuller. He also was confident that his ability to make an in-court identification was not compromised because the trafficker wore a toque and large sunglasses during the offence. The detective had not recorded in his notes, nor did he remember, that the trafficker had worn a toque. Further, his notes also indicated the trafficker wore a leather jacket, not a long parka as indicated in the surveillance photos. As well, the accused's hair was dirty blond and not brown as recorded by the detective. The officer taking the surveillance photographs testified that he was certain that the accused was the trafficker, even though he said he was thinner during the offence. This officer also agreed that the accused had a light blue tattoo on his left hand but no tattoo was visible on the left hand of the trafficker in the surveillance photographs. The arresting officer also testified that the accused was heavier than at the time of his arrest.

The judge was unable to identify the accused as the trafficker captured in the surveillance photographs. "For me to even consider finding him guilty on the basis of my personal observation and what I see in the photographs, would be a total miscarriage of justice," he said. But the judge went on to accept the evidence of the officers and relied on their opinion that the accused was the trafficker. "Police officers are more highly trained to make observations of circumstances, that is, surrounding circumstances, individuals who are involved (in) life-style activities than the average citizen, especially officers with any period of training," he said. "These officers stated, every one of them, as they stood, or sat here in the witness box, they had no difficulty in identifying [the accused] as the person in the photographs, and therefore, the person who was involved in the transaction." The judge found identify had been proven beyond a reasonable doubt and the accused was convicted of trafficking twenty dollars of crack cocaine.

Ontario Court of Appeal

The accused argued that the trial judge erred in relying on the opinions of the officers that he was the trafficker in the surveillance photographs when the judge was unable to do so himself based on his own observations. In-dock identification is to be given very little weight because of its inherent frailties, particularly where the person identified is a stranger to the witness.

"Many wrongful convictions have resulted from faulty eyewitness testimony. Identification findings are subject to closer appellate scrutiny than other findings of fact."

"Many wrongful convictions have resulted from faulty eyewitness testimony," said the Court of Appeal. "Identification findings are subject to closer appellate scrutiny than other findings of fact."

In this case, the Appeal Court found "there was no basis for concluding that [the police officers] had any greater expertise, particular advantage, or special knowledge, in identifying whether the [accused] was the trafficker in the surveillance photographs." The arresting officer did not know the accused and had not observed the trafficker before the arrest. The officer did not make notes about what the accused was wearing at the time of arrest and no photograph of him at the time of his arrest was offered as evidence. The photographing surveillance officer did not know or recognize the trafficker and was at too great a distance to observe him. The plain clothes detective, who was in a position to observe the trafficker, also did not know or recognize him. Although the detective confirmed the person in the surveillance photographs was the trafficker, he only briefly saw him once some nine months before court. He did not remember that the trafficker wore a toque and some of his observations were inaccurate. The trial judge, by relying on the opinions of the officers despite his own conclusion that he could not identify the accused as the trafficker, gave more weight to the very in-dock identification that he had cautioned should be given very little weight. The accused's appeal was allowed and his conviction was quashed.

Complete case available at www.ontariocourts.on.ca

NEW ARREST POWER FOR BREACHING PAROLE

On June 13, 2012 the *Corrections and Conditional Release Act* (*CCRA*) was amended, adding a new power for a peace officer to arrest an offender without a warrant for breaching a condition of their release. How is this new? Prior to June 13, a peace officer could only arrest an offender without warrant if they believed on reasonable grounds that there was a warrant of apprehension for the offender. An "offender" is a person sentenced to a penitentiary but outside of it by reason of parole, statutory release or unescorted temporary absence (UTA). Now police do not need to rely on the existence of a warrant. Police can arrest an offender who has committed a breach of their parole, statutory release or UTA or the police find an offender committing a breach.

This is not a new offence like breach of probation or breach of bail, so there is no new charge attached to this provision. It is merely an arrest authority. Once an arrest is made, police will then need contact parole authorities to determine whether the offender will be recommitted to custody and serve the remaining unexpired portion of their sentence.

BY THE BOOK:

s. 137.1 ***Corrections and Conditional Release Act***

Arrest without warrant - breach of conditions

A peace officer may arrest without warrant an offender who has committed a breach of a condition of their parole, statutory release or unescorted temporary absence, or whom the peace officer finds committing such a breach, unless the peace officer

(a) believes on reasonable grounds that the public interest may be satisfied without arresting the person, having regard to all the circumstances including the need to

(i) establish the identity of the person, or

(ii) prevent the continuation or repetition of the breach; and

(b) does not believe on reasonable grounds that the person will fail to report to their parole supervisor in order to be dealt with according to law if the peace officer does not arrest the person.

Note-able Quote

"Great minds discuss ideas; ordinary minds discuss events; small-minds discuss other people." - author unknown

2011 POLICE REPORTED CRIME

In July 2012 Statistics Canada released its *"Police reported crime statistics in Canada, 2011"* report. Highlights of this recent collection of crime data include:

- there were **1,984,916** crimes (excluding traffic) reported to Canadian police in 2011; this represents **109,959** fewer crimes reported when compared to 2010.
- the total crime rate dropped **-6%**. This includes a violent crime rate drop of **-4%** and a property crime rate drop of **-8%**.

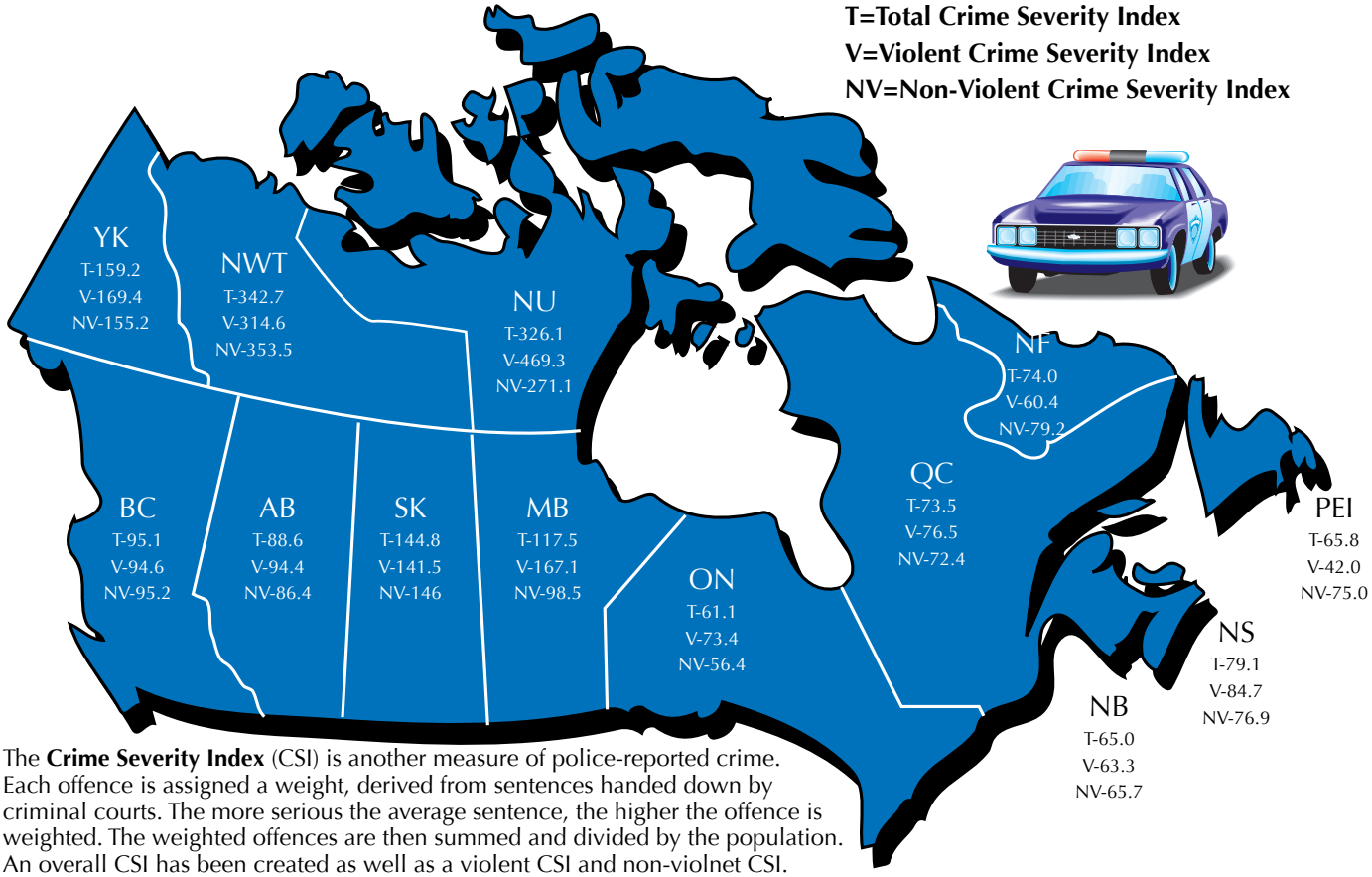
Source: Statistics Canada, 2012, "Police-reported crime statistics in Canada, 2011", Catalogue no. 85-002-X,released on July 24, 2012.

Police-Reported Impaired Driving Offences

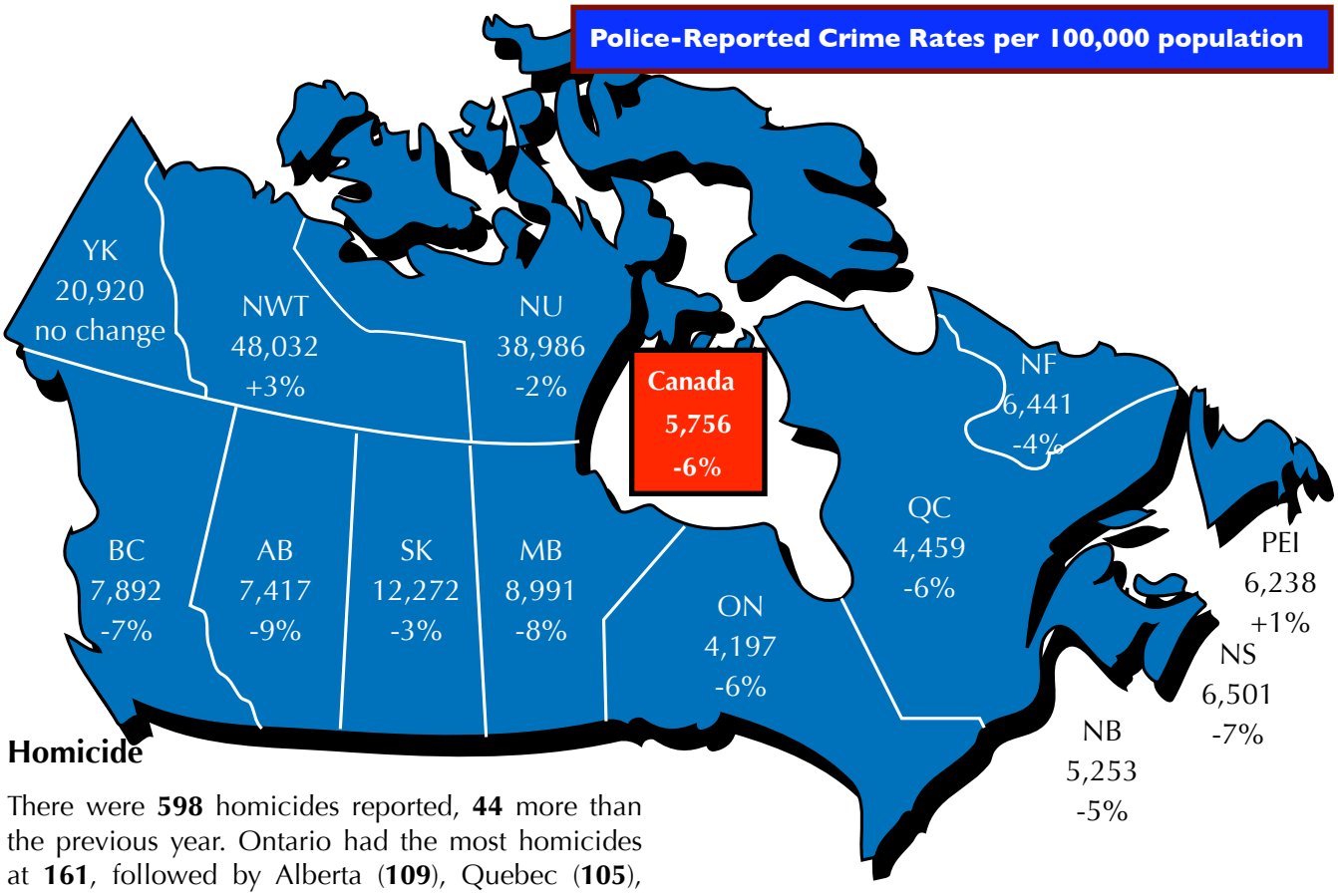
Province	Rate	Impaired Driving Offences	Rate change 2010 to 2011
SK	683	7,229	+9%
PEI	493	719	-3%
AB	450	17,001	-1%
BC	412	18,835	+15%
NF	362	1,849	-13%
NS	328	3,097	-10%
MB	322	4,031	+7%
NB	296	2,233	-16%
QC	211	16,820	+2%
ON	130	17,326	-1%

Police-Reported Crime Severity Indexes

T=Total Crime Severity Index
V=Violent Crime Severity Index
NV=Non-Violent Crime Severity Index



The **Crime Severity Index** (CSI) is another measure of police-reported crime. Each offence is assigned a weight, derived from sentences handed down by criminal courts. The more serious the average sentence, the higher the offence is weighted. The weighted offences are then summed and divided by the population. An overall CSI has been created as well as a violent CSI and non-violnet CSI.



Homicide

There were **598** homicides reported, **44** more than the previous year. Ontario had the most homicides at **161**, followed by Alberta (**109**), Quebec (**105**), and British Columbia (**87**). The Yukon reported no homicides while Prince Edward Island only reported one homicide followed by the Northwest Territories at three and Newfoundland at four. As for provincial or territorial homicide rates, Nunavut had the highest rate (**21.0** per 100,000 population) followed by the Northwest Territories (**6.9**), Manitoba (**4.2**), Alberta (**2.9**) and Nova Scotia (**2.3**). As for Census Metropolitan Areas (CMA), Winnipeg, MB had the highest homicide rate at **5.1**. The Canadian homicide rate was **1.7**.

Top CMA Homicide Rates per 100,000

CMA	Rate	CMA	Rate
Winnipeg, MB	5.1	Peterborough, ON	2.4
Halifax, NS	4.4	Saskatoon, SK	2.2
Edmonton, AB	4.2	St. John's, NS	2.1
Thunder Bay, ON	3.3	Vancouver, BC	1.8
Regina, SK	3.2	London, ON	1.8
Saint John, NB	2.9	Gatineau, QC	1.6

Canada's Top Ten Reported Crimes

Offence	Number
Theft Under $5,000 (non-motor vehicle)	497,452
Mischief	315,977
Break and Enter	181,217
Administration of Justice Violations	177,159
Assault-level 1	172,770
Disturb the Peace	117,476
Impaired Driving	90,277
Fraud	89,801
Theft of Motor Vehicle	82,411
Uttering Threats	71,945

Robbery

In 2011 there were **29,746** robberies reported, resulting in a national rate of **86** robberies per 100,000 population. Manitoba had the highest robbery rate followed by Saskatchewan, British Columbia and Ontario.

Police-Reported Robberies

Province/ Territory	Rate	Robberies	Rate change 2010 to 2011
MB	178	2,231	+1%
SK	103	1,085	-16%
BC	98	4,465	-10%
ON	86	11,511	-2%
QC	85	6,768	+4%
AB	77	2,917	-11%
NS	50	468	-5%
YK	38	13	-24%
NU	36	12	-16%
NWT	32	14	-41%
NF	22	110	-32%
NB	18	136	-5%
PEI	11	16	-28%
CANADA	**86**	**29,746**	**-3%**

- Winnipeg, MB had the highest CMA rate of robbery in Canada (**266**), **+3%** higher than its 2010 rate. Saguenay, QC had the lowest rate (**19**) for the third year in a row. Two CMAs reported jumps of +30% in robbery rates; Barrie, ON and Greater Sudbury, ON.
- Five CMAs reported declines in robberies of -25% or more; Saint John's, NL (**-43%**), Guelph, ON (**-26%**), Sherbrooke, ON (**-26%**), Regina, SK (**-25%**) and Victoria, BC (**-25%**).

Top Ten CMA Robbery Rates per 100,000

CMA	Rate	CMA	Rate
Winnipeg, MB	258	Montreal, QC	142
Saskatoon, SK	199	Toronto, ON	128
Regina, SK	196	Edmonton, AB	118
Thunder Bay, ON	149	Calgary, AB	109
Vancouver, BC	147	Halifax, NS	95

Break and Enter

In 2011 there were **181,217** break-ins reported to police. The national break-in rate was **526** break-ins per 100,000 people. The Northwest Territories had the highest break-in rate (**1,710**) followed by Nunavut (**1,666**).

Police-Reported Break-ins

Province/ Territory	Rate	Break-ins	Rate change 2010 to 2011
NWT	1,710	747	-4%
NU	1,666	555	-18%
SK	858	9,079	-9%
MB	744	9,305	-10%
BC	650	29,723	-6%
QC	632	50,395	-7%
NF	614	3,136	-8%
YK	554	192	-22%
NS	504	4,764	-10%
AB	490	18,534	-19%
PEI	472	689	-7%
NB	447	3,379	-8%
ON	379	50,719	-9%
CANADA	**526**	**181,217**	**-9%**

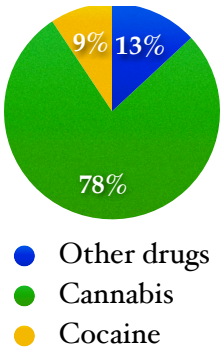
- Break-ins accounted for about **15%** of all property crimes.
- **63%** of break-ins were to a residence, **28%** to a business location, and **10%** to other locations, such as a school, shed or detached garage.
- Residential break-ins dropped **-7%** while business break-ins declined **-11%.**
- From 2001 to 2011, the break-in rate dropped by **-42%.**
- Among CMAs, St. John's, NL reported the highest break-in rate (**781**) while Toronto reported the lowest (**276**). Only London, ON (**+12%**) reported a double digit increase in the break-in rate, while 17 CMA's all reported double digit drops including Saint John, NB (**-31%**), Edmonton, AB (**-26%**), Halifax, NS (**-24%**), Kelowna, BC (**-23%**), Calgary, AB (**-23%**), Gatineau, QC (**-22%**), Sherbrooke, QC (**-22%**), Saskatoon, SK (**-21%**), St. Catherines-Niagara, ON (**-20%**), Victoria, BC (**-17%**), Winnipeg, MB (**-16%**) and Guelph, ON (**-16%**).

Top Ten CMA Break-in Rates per 100,000			
CMA	**Rate**	**CMA**	**Rate**
St. John's, NL	781	Vancouver, BC	689
Thunder Bay, ON	777	Saskatoon, SK	669
Regina, SK	763	Winnipeg, MB	663
Greater Sudbury, ON	756	London, ON	656
Trois-Rivieres, QC	747	Abbotsford-Mission, BC	644

Drugs

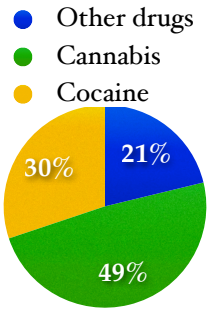
In 2011 there were **113,164** drug-related offences coming to the attention of police. These offences included possession, trafficking, production or distribution.

Possession Offences by Drug Type



- possession offences accounted for **79,150** of these crimes - cannabis (**61,406**); cocaine (**7,392**); and other drugs (**10,352**). Other drugs include heroin, crystal meth, and ecstasy.

Trafficking, Production & Distribution Offences by Drug Type



- Trafficking, production, and distribution offences totaled **32,974** - cannabis (**16,548**); cocaine (**10,251**); and other drugs (**7,215**).
- British Columbia had the highest drug related offence rates of all 10 provinces for cannabis while Saskatchewan topped the list for cocaine and Prince Edward Island was tops for other drugs.

Drug-related Crime Rates by Province per 100,000 population			
Province	**Cannabis rate**	**Cocaine rate**	**Other drugs rate**
BC	424	98	68
SK	328	117	64
NS	261	36	48
NF	218	47	67
QC	201	26	64
AB	201	77	34
NB	194	33	51
ON	172	37	42
MB	167	70	31
PEI	116	19	85

- The territories continue to have some of the highest drug-related crime rates in Canada.

Territory	Cannabis rate	Cocaine rate	Other drugs rate
NWT	1,243	275	78
NU	1,239	9	42
YK	387	127	20

- Overall, drug offences were up in 2011 (**+3%**) from 2010, mainly due to a **+7%** rise in cannabis offences.

Motor Vehicle Theft

In 2011 there were **82,411** motor vehicle thefts reported to police, down **-12%** from 2010 and down **-56%** from a decade ago.

- on average there were **226** vehicles stolen per day in Canada in 2011.
- the motor vehicle theft rate was **239** per 100,000 population.
- the most vehicles reported stolen was in Quebec (**22,397**) while Prince Edward Island had the fewest vehicles stolen (**120**).

Police-Reported Motor Vehicle Thefts

Province/ Territory	Rate	Motor Vehicle Thefts	Rate change 2009 to 2010
NWT	488	213	-4%
SK	470	4,967	-2%
NU	450	150	-28%
AB	356	13,461	-13%
YK	329	114	-30%
MB	313	3,919	-31%
BC	288	13,186	-18%
QC	281	22,397	-8%
NB	161	1,215	-3%
ON	155	20,768	-9%
NS	138	1,308	+2%
NF	116	593	+6%
PEI	82	120	+3%
CANADA	**239**	**82,411**	**-12%**

- Most CMAs reported declines in motor vehicle thefts. Several reported double digit decreases including Victoria, BC (**-38%**), Sherbrooke, QC (**-38%**), Winnipeg, MB (**-37%**), Gatineau, QC (**-29%**), St. John, NB (**-28%**), Kingston, ON (**-25%**), Abbotsford-Mission, BC (**-22%**), Peterborough, ON (**-22%**) and Vancouver, BC (**-21%**).

Top Ten CMA Vehicle Theft Rates per 100,000

CMA	Rate	CMA	Rate
Saskatoon, Sk	579	Edmonton, AB	367
Brantford, ON	523	Montreal, QC	335
Regina, SK	489	Hamilton, ON	334
Kelowna, BC	437	Calgary, AB	319
Abbotsford-Mission, BC	431	Winnipeg, MB	318

- Six CMAs saw an increase in their motor vehicle theft rates; Saskatoon, SK (**+23%**), Guelph, ON (**+23%**), Moncton, NB (**+12%**), Brantford, ON (**+10%**), Barrie, ON (**+4%**) and Halifax, NS (**+2%**).

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

Source: Insurance Bureau of Canada www.ibc.ca

TOP 10 STOLEN AUTOS - Canada 2011

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

Note-able Quote

"Do not follow where the path may lead. Go instead where there is no path and leave a trail." - Harold R. McAlindon

LAWFUL PROBATION ORDER 'KNOTT' NULLIFIED BY NEW SENTENCE

R. v. Knott, R. v. D.A.P., 2012 SCC 42

Case 1: *R. v. Knott*

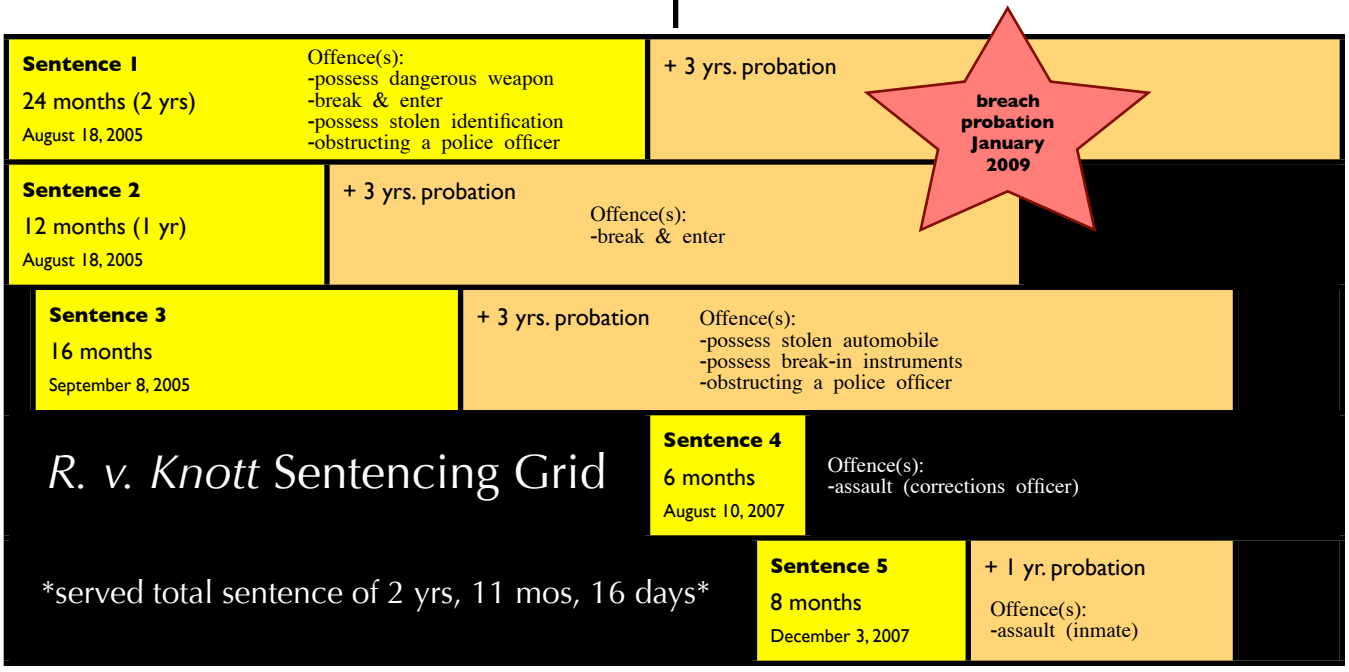
In 2005 the accused pled guilty to possessing a weapon dangerous to the public peace (an axe), breaking and entering a residence, possession of stolen identification and obstruction of a police officer. He was sentenced to 24 months in prison followed by three years probation. He was also sentenced to a one year concurrent sentence on a second charge of breaking and entering with another three-year probation order. The following month, in a separate proceeding, he pled guilty to charges of possessing stolen property (an automobile), possessing break-in instruments and obstructing a police officer. He was sentenced to 16 months in prison, to be served concurrently with his other sentences, followed by three years of probation. During his incarceration he assaulted a corrections officer and was sentenced to six months to be served consecutively to the sentence he was serving. Four months later he was sentenced to eight months of incarceration plus a year probation for assaulting an inmate. After serving a total sentence of two years, 11 months, and 16 days he was released and subsequently breached a condition of his 2005 probation order; operating a vehicle without the registered owner present. He was sentenced to 60 days for this breach. By the end of 2007, the accused had accumulated four separate probation orders.

Case 2: *R. v. D.A.P.*

The accused pled guilty to sexually assaulting the 13-year-old daughter and 9-year-old son of his common-law spouse. He was sentenced to a conditional sentence of two years less a day plus three years of probation. Several months later he pled guilty to breaking and entering and unlawful confinement; he had forced entry into the residence of his former partner, the mother of the sexual abuse complainants. His conditional sentence was converted to incarceration and he was also sentenced to three years' in prison on one of the new charges and six months on the other, to be served concurrently.

British Columbia Court of Appeal

Both accused sought to have their probation orders quashed because of the long-standing practice of merging sentences under s. 139 of the *Corrections and Conditional*



Sentence 1 24 months (2 yrs) less a day CSO June 3, 2008	+ 3 yrs probation
Sentence 2 36 months (3 yrs) + CSO (sentence 1 above) converted to incarceration February 19, 2009	

R. v. D.A.P. Sentencing Grid

Release Act (*CCRA)* for the purpose of determining whether a probation order could be imposed. In some cases, an otherwise lawfully imposed probation order was rendered invalid if an offender received sentences that were cumulatively in excess of two years, regardless of when the sentences were imposed. This was so because s. 731(1) of the *Criminal Code* only allows for the imposition of a probation order following a term of imprisonment not exceeding two years. Section 139 of the *CCRA* deems a person to have been sentenced to one sentence commencing at the beginning of the first of those sentences and ending on the expiration of the last sentence to be served. Thus, by applying s. 139 probation orders where nullified when an offender received a cumulative sentence in excess of two years. The Crown, on the other hand, challenged the law relating to the retroactive invalidation of lawfully imposed probation orders as a result of these sentencing merger provisions.

A division of five judges of the British Columbia Court of Appeal was empaneled to hear the case and unanimously reached three conclusions:

1. When a judge imposes a sentence at one sitting which, either individually or cumulatively, exceeds two years (eg. consecutive sentences imposed at the same time by the same judge) probation cannot be added to the sentence.

2. If an offender is already serving a sentence and a subsequent sentence is imposed which, when combined with the unexpired portion of the prior sentence will bring the total of the sentences beyond two years, a probation order should not follow, except in the rarest of cases. However, a probation order may be imposed with a consecutive term of imprisonment if the remanent of the prior sentence combined with the new sentence does not exceed two years.

3. If an offender was sentenced to a term of custody with a probation order and is subsequently sentenced so that the aggragate sentence exceeds two years, the preexisting probation order is not invalidated. The only exception is if the offender is subsequently sentenced to life imprisonment because then he or she will be under supervision for life.

Supreme Court of Canada

The accuseds again argued, this time before the Supreme Court of Canada, that their probation orders ought to be quashed. Since s. 731(1)(b) of the *Criminal Code* permits an order of probation on an offender sentenced to "imprisonment for a term not exceeding two years" the accuseds submitted that the "term" of imprisonment relates to the aggregate of the custodial sentence imposed by the judge and all other sentences currently being served or later imposed for other offences on the offender. The Crown, on the other hand, contended that the "term" of imprisonment refers to the actual term of imprisonment imposed by a judge at a single sitting.

The seven member unanimous Supreme Court agreed with the Crown. First, the merger provisions of s. 139 of the *CCRA* do not apply to an offender's eligibility for a lawful sentence. Section 139 is for administrative purposes relating to parole and remission. It does not merge sentences imposed

against the same offender on different occasions for the purposes of determining whether a probation order may be struck down for a combined sentence exceeding two years. Second, s. 731(1)(b) is unambiguous. "The ordinary meaning of s. 731(1)(b) is perfectly clear," said Justice Fish. "A probation order may not be made where the *sentencing court* imposes a term of imprisonment exceeding two years. In determining whether two years has been exceeded, one looks at the term of imprisonment ordered by *the sentencing court on that occasion* — not at *other* sentences imposed by *other* courts on other occasions for *other* matters." Thus, the availability of a probation order depends on the term of imprisonment imposed at the time the probation order is made.

Furthermore, s. 731(1)(b) merely allows a judge to impose a probation order and does not say when a probation order comes into force nor does it anywhere else in the *Criminal Code* state that a probation order must come into effect within two years of it being made. Instead, s. 732.2 addresses when a probation order is effective:

> A probation order comes into force
>
> (a) on the date on which the order is made;
>
> (b) where the offender is sentenced to imprisonment under paragraph 731(1)(b) or was previously sentenced to imprisonment for another offence, as soon as the offender is released from prison or, if released from prison on conditional release, at the expiration of the sentence of imprisonment; or
>
> (c) where the offender is under a conditional sentence order, at the expiration of the conditional sentence order.

In situations where an offender is sentenced to incarceration not exceeding two years but does result in continuous custody for more than two years when combined with other sentences imposed on the same offender by the same judge at the same sitting, a probation order cannot be imposed. This is so because the total sentence at one sitting exceeds the two year rule under s. 731(1)(b).

However, s. 731(1)(b) does not prohibit the imposition of a fresh probation order when an offender is given a sentence not exceeding two years but when combined with a previous or remanent sentence does exceed two years. But the fresh probation order must still be a fit sentence in the circumstances. "In considering whether a fresh probation order is appropriate, the sentencing court must thus take into account the particular circumstances of the offence, the character and needs of the offender, and the purpose and relevant principles of sentencing," said Justice Fish. "Unexpired prior sentences remain an important consideration, though not necessarily decisive, in determining whether a probation order is appropriate."

In this case, the accuseds' probation orders were valid when they were made and "no prior or subsequent sentences imposed on either [accused] had, or could have had, the effect of invalidating any of their probation orders, either prospectively or retrospectively." The appeals were dismissed.

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

Editor's Note: Additional facts in this case summary were obtained from *R. v. Knott*, 2010 BCCA 386.

MORE ON PROBATION

- Under s. 731(1)(b) of the *Criminal Code* a court that sentences an offender to a term not exceeding two years may direct the offender to comply with the conditions of a probation order. Thus, a probation order may not be made where the sentencing court imposes a term of imprisonment exceeding two years.
- Probation orders are intended to facilitate an offender's rehabilitation and are an effective and efficient alternative to unnecessary institutional confinement.
- "Sentencing courts may impose separate but concurrent probation orders, attached to different counts. This may be done to add supplementary conditions appropriate in the circumstances of different offences, or to ensure that the offender will remain subject to probation if one of the probation orders is later set aside or rendered inoperative."
- No probation order may continue for more than three years from the date on which it came into force - s. 732.2(2)(b) *Criminal Code*.

ONE CASE, THREE SEPARATE OPINIONS

R v. Pearson, 2012 ABCA 239

The accused was stopped for speeding after his vehicle was clocked on radar travelling 103 km/h in a 90 km/h zone. The officer told the accused he was being stopped for speeding and asked for his driver's licence, vehicle insurance, registration and vehicle rental agreement. The accused had a British Columbia driver's licence with an address near Vancouver. When asked where he was coming from and going to, the accused said he rented the vehicle in Edmonton and drove to Vancouver to drop off his fiancé and was returning the rental vehicle to Edmonton. The officer noted the vehicle had been rented in Edmonton at 9:00 am the previous day and the accused had made a very long journey in a very short period of time. The accused was questioned about his travel choices and provided odd explanations. When returning the accused's documents, the officer leaned into the vehicle's window and noticed that the accused's hands were trembling. He also smelled the intermittent faint odour of raw marijuana. As the questioning continued the accused became more nervous. Although he was not convinced that marihuana was actually located in the car because the odour was faint, the officer became suspicious that there might be drugs in it.

Timeline

10:24 pm - vehicle stop for speeding
10:50 pm - drug sniffing dog arrives
10:55 pm - accused arrested
11:10 pm - accused rearrested for PPT
11:22 pm - scene cleared

The officer asked the accused to get out of the vehicle. He told him that he was being formally detained for possession of a controlled substance. The officer also said that a police dog would attend to sniff around the vehicle. The accused was verbally cautioned that he did not have to say anything and he had a right to contact counsel. The accused was placed in the back seat of the police vehicle and, within minutes, a trained narcotics sniffer dog attended. The dog twice positively indicated the presence of drugs in the area of the passenger side doors. The accused was arrested for possession of a controlled substance, read his *Charter* rights and given the police caution again. The vehicle was searched and a backpack containing four bricks of cocaine weighing 4.2 kgs. was found in the rear hatch area. The accused was then rearrested for possessing cocaine for the purpose of trafficking.

Alberta Courts of Queen's Bench

The Crown conceded breaches of ss. 10(a) and (b) of the *Charter* when the officer continued to question the accused after smelling marijuana but argued the officer's initial inquiries were related to the purpose of a traffic stop under Alberta's *Traffic Safety Act* (*TSA*). The judge found the officer was entitled, under the *TSA*, to ask for information and documents, including the rental agreement, in order to ensure everything was in order. The officer properly advised the accused he was being stopped for speeding as required by s. 10(a) but a s. 10(b) right to counsel warning was not required at this time. Furthermore, questions about where the accused was coming from and going to were exploratory in nature and not correlated to any specific crime, so no further ss. 10(a) or 10(b) warnings were required. The officer then detected the odour of marijuana during the traffic stop, which had not been unnecessarily prolonged at this point. However, once the odour of marihuana was smelled, the purpose of the detention changed and the questioning that followed breached ss. 10(a) and (b) of the *Charter*.

As for the use of the sniffer dog, only a reasonable suspicion was required that the accused was in possession of a controlled substance. This was met by the fleeting smell of marijuana, the accused's British Columbia address, the use of a rental vehicle and the long journey in a short period of time. The dog's positive indication of drugs elevated the reasonable suspicion to reasonable and probable grounds for arrest and the subsequent search of the vehicle was lawful as an incident to arrest. The judge also held that it was irrelevant that the officer suspected there was marijuana when it was cocaine that was actually found since the police are not required to determine which drug had been detected

by the dog. Thus, no s. 8 *Charter* breach occurred. As remedy for the s. 10(a) and (b) breaches, the judge excluded only the statements the accused made about the economics of his trip. The accused was convicted of possessing cocaine for the purpose of trafficking.

Alberta Court of Appeal

"[T]he fact a peace officer was concurrently conducting a traffic enquiry while observing grounds for a drug related offence does not make that detention arbitrary."

The accused appealed his conviction arguing the judge mistakenly concluded, among other grounds, that he was not arbitrarily detained contrary to s. 9 of the *Charter* when the officer continued to investigate him after the original traffic investigation was concluded. In his view, the original detention for speeding – justified initially – quickly exceeded what was permitted and went beyond the purpose of the original traffic stop to became investigatory in nature. He further submitted that the dog sniff of his vehicle and backpack were unreasonable under s. 8. He suggested that his s. 8 right was violated because the officer did not have a reasonable suspicion to believe that he had committed a criminal offence when he requested the assistance of a sniffer dog. Further, the grounds used to support the supposed reasonable suspicion were obtained in a manner that violated his rights.

The Crown, on the other hand, argued that the accused was properly detained pursuant to a lawful traffic stop that evolved into a criminal investigation and at no time was he arbitrarily detained. Further, there were still sufficient grounds to uphold the reasonableness of the accused's continued detention even without the excluded conversation. This included the smell of marijuana coming from the vehicle, itself sufficient to satisfy the standard of reasonable suspicion. The positive indication by the dog of the presence of drugs provided the grounds for the accused's arrest and subsequent search of the vehicle was lawful.

Three Alberta Court of Appeal justices heard the case and wrote separate but concurring opinions.

Say One

Justice McDonald found the accused's initial detention for speeding was justified under the *TSA*. Any further detention beyond the traffic stop would require reasonable grounds to detain. This reasonable suspicion standard imports both a subjective and objective standard. Although the officer felt the the faint, intermittent smell of marijuana in this case was not sufficient to justify an arrest under the s. 495(1)(b) of the *Criminal Code*, "it was sufficient to meet the lower standard of reasonable suspicion which is all that was required on these facts to justify the intervention of a drug sniffer dog." Plus, "the fact a peace officer was concurrently conducting a traffic enquiry while observing grounds for a drug related offence does not make that detention arbitrary." Thus, there was no s. 9 breach.

As for a drug dog sniff, it is authorized where the police have a reasonable suspicion that there are illegal drugs present. The trial judge found the officer's decision to call for a drug detecting dog was based on more than a hunch and satisfied the reasonable suspicion standard. The smell of raw marihuana was a significant subjective and objective factor which alone created a reasonable suspicion. Justice McDonald saw no basis to interfere with the trial judge's ruling.

Despite the conceded ss. 10(a) and (b) breaches, the trial judge's s. 24(2) analysis admitting the cocaine was upheld.

Say Two

Justice Hunt disagreed with Justice McDonald that there was no ss. 8 or 9 breaches. As for the s. 9 breach, she said this:

> The officer's evidence makes it apparent that although the traffic stop was originally valid, it became a detention for the purpose of

investigating a possible drug offence. When he began that investigation, the officer had nothing more than a hunch or suspicion arising from the date of the car rental, the driver's address and the direction in which he was travelling. The power to detain cannot be exercised on the basis of a hunch. Hunches are no substitute for the proper Charter standard (reasonable grounds) when dealing with a subject's liberty.

"The power to detain cannot be exercised on the basis of a hunch. Hunches are no substitute for the proper Charter standard (reasonable grounds) when dealing with a subject's liberty."

> The officer testified that he did not have reasonable grounds until he smelled marijuana. (It should be noted that no marijuana was found by the officer or the sniffer dog). It follows that the originally valid detention had become arbitrary and the [accused's] section 9 right to be free from arbitrary detention was breached. [references omitted, paras. 77-78]

When the purpose of the detention shifted to criminal activity the officer was required to immediately inform the accused of that fact and advise him that he had a right to counsel. Justice Hunt found that this obligation arose before the officer detected the smell of marijuana, which was sooner than the trial judge found.

Since the smell of marihuana was detected after the ss. 9 and 10 breaches, it could not be used to provide the necessary reasonable suspicion upon which to base the sniffer dog search. Justice Hunt wrote:

> [C]an evidence obtained during breaches of Charter rights (in particular, the odour of marijuana) be used to provide the basis of a reasonable suspicion so as to justify the use of a sniffer dog? If the answer is no, the search by the sniffer dog was unreasonable as was the ensuing search of the rental car once the dog indicated the presence of contraband.
>
> There does not appear to be any jurisprudence specifically on this point. It seems counter-intuitive to permit evidence obtained during Charter breaches to provide the foundation for further police activity that–without information obtained from earlier Charter breaches–would clearly have breached other Charter rights. Such an approach would simply encourage the police to breach Charter rights in the hopes of finding something to justify their behaviour that, without the first Charter breaches, would otherwise be illegal. That is hardly the promise of the Charter.
>
> Possible support for this view comes from the emphasis the Supreme Court has put on looking at "the entire chain of events during which the Charter violation occurred in the course of obtaining evidence." ... In this case, the search that led to the discovery of the contraband was connected temporally, contextually and causally to the earlier Charter breaches. A chain of events perspective suggests it would be inappropriate to use the smell of marijuana to provide reasonable suspicion for justifying the sniffer dog search, since the earlier breaches permitted detection of the odour. In other words, one thing led inexorably to another. [refrences omitted, paras. 80-82]

Justice Hunt found the sniffer dog and vehicle searches were unreasonable. However, like Justice McDonald, she also ruled the contraband was admissible under s. 24(2).

Say Three

Justice O'Ferrall too would dismiss the appeal, agreeing with the trial judge's reasoning. Unlike Justice Hunt, he found no other *Charter* breaches other than what Crown had earlier conceded:

> In my view, the critical change in the nature of the initial detention, which was not arbitrary, did not occur until the investigating officer detected the odour of raw marihuana. Although I found Justice Hunt's step-by-step analysis of the investigating officer's authority to detain and question to be logically attractive, I am not sure one can so precisely conclude that the Traffic Safety Act detention in this case ended and the Controlled Drugs and Substances Act detention

"[I]f a mere unsubstantiated and loosely-held suspicion of a non-traffic-related offence in the mind of a police officer stopping a vehicle for an apparent traffic violation triggers a change from a Traffic Safety Act detention to a criminal detention, then the police would be compelled to advise Traffic Safety Act detainees of their Charter rights even before they begin administering or enforcing that Act. And that cannot be right."

began when the investigating officer started to suspect there might be some drug trafficking going on. The effluxion of a mere eight minutes from the time of the stop until the investigating officer properly advised the accused that he was being detained on suspicion of drug possession does not permit precise pinpointing of the transition. Furthermore, if a mere unsubstantiated and loosely-held suspicion of a non-traffic-related offence in the mind of a police officer stopping a vehicle for an apparent traffic violation triggers a change from a Traffic Safety Act detention to a criminal detention, then the police would be compelled to advise Traffic Safety Act detainees of their Charter rights even before they begin administering or enforcing that Act. And that cannot be right. [para. 112]

Say All

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

Complete case available at www.albertacourts.ab.ca

RANDOM PROBATION SEARCH PROVISION PERMISSIBLE

R. v. Unruh, 2012 SKCA 72

The accused pled guilty to possessing child pornography contrary to s. 163.1(4) of the *Criminal Code*. A joint sentencing submission was presented by Crown and defence counsel asking for a sentence of five years in jail followed by three years probation. The accused planned to live with his parents upon his release. Included in the joint submission was a probation term whereby the accused "*shall submit to a search of his person, residence, vehicle or computer or computer-related device found in his possession, without warrant, by any police officer checking to ensure compliance with the terms of this order.*" The lawyers suggested the residual clause in s. 732.1(3)(h) of the *Criminal Code* allowed a sentencing judge to impose such a term as part of a probation order. Section 732.1(3)(h) permits the Court to order that a probationer *"comply with such other reasonable conditions as the court considers desirable … for protecting society and for facilitating the offender's successful reintegration into the community."* Any such random search was to occur between the hours of 8:00 am and 8:00 pm. The accused and his parents unequivocally and "wholeheartedly" consented to the inclusion of the search clause in the probation order.

Saskatchewan Provincial Court

Despite the voluntary consent of the accused and his parents, the sentencing judge declined to include the random search term because she said she did not have jurisdiction to do so. In her view, the Supreme Court of Canada in *R. v. Shoker,* 2006 SCC 44 directed that the provisions of the *Criminal Code* concerning the imposition of optional probation conditions do not contemplate the imposition of random searches.

Saskatchewan Court of Appeal

The Crown argued that a sentencing judge could include the random search clause in the probation order. Justice Herauf, writing the Saskatchewan Court of Appeal's decision, agreed. He found the sentencing judge too broadly interpreted the *Shoker* decision and a more narrow reading of it was required. "In our view, the Supreme Court made it abundantly clear that the decision in *R. v. Shoker* applied only to the 'compelled seizure of bodily samples as an enforcement mechanism'," he said. "The decision does not state that all

conditions under s. 732.1(3)(h) of the Criminal Code that have a monitoring or enforcement aspect are without jurisdiction." Plus, the unequivocal consent of the probationer and his parents to the residual clause in s. 732.1(3)(h) had to be considered as part of the circumstances.

The Crown's appeal was allowed and the random search term was included in the probation order with the condition that any search must take place between the hours of 8:00 am and 8:00 pm.

Complete case available at www.canlii.org

BY THE BOOK.

s. 732.1(3) ***Criminal Code***

Optional conditions of probation order

The court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following:

(a) report to a probation officer ...;

(b) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the probation officer;

(c) abstain from

(i) the consumption of alcohol or other intoxicating substances, or

(ii) the consumption of drugs except in accordance with a medical prescription;

(d) abstain from owning, possessing or carrying a weapon;

(e) provide for the support or care of dependants;

(f) perform up to 240 hours of community service over a period not exceeding eighteen months;

• • • • • • • • •

(h) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for protecting society and for facilitating the offender's successful reintegration into the community.

OLDER CANADIANS HAVE LOWEST RATE OF VIOLENT VICTIMIZATION

In March 2012 Statistics Canada released its *"Victimization of older Canadians, 2009"* report. Highlights of this recent collection of data included:

- Older Canadians (**aged 55+**) reported the lowest rates of violent victimization, 10 times lower that the rate reported by the youngest age group (15 to 24 years of age).
- Theft of household property (**31%**) was the most common form of non-violent crime reported by older households, followed by break and enter (**29%**), vandalism (**28%**) and theft of motor vehicle (**13%**).
- Older Canadians (**46%**) were almost twice as likely to report violent incidents to police than younger Canadians (**28%**).
- Wanting to stop the incident or receive protection was the most commonly cited reason why older Canadians reported violent victimization to police (**75%**). This was followed by feeling a sense of duty to notify police (**71%**) and a desire to see the offender arrested and punished (**60%**). As for not reporting to police, the most commonly cited reasons included having dealt with the incident in another way, feeling the police could not do anything about it, feeling that the incident wasn't important enough or that it was a personal matter.
- Older victims of violence were more likely than younger victims to experience emotional consequences. Those 55 and older reported anger, confusion and fear as the most common emotional reactions.
- The majority of older Canadians (**91%**) stated that there were satisfied with their personal safety.

Source: Statistics Canada, 2012, "Victimization of older Canadians, 2009", Catalogue no. 85-002-X,released March 8, 2012.

POLICE LEADERSHIP CONFERENCE ★ 2013

British Columbia Association of Chiefs of Police

April 7 - 9, 2013

The British Columbia Association of Chiefs of Police, the Ministry of Public Safety and Solicitor General, and the Justice Institute of British Columbia, Police Academy are hosting the Police Leadership Conference in Vancouver, British Columbia. This is Canada's largest police leadership conference. This Police Leadership Conference will provide an opportunity for delegates to hear leadership topics discussed by world-renowned speakers.

Leadership in policing is not bound by position or rank and this conference will provide delegates from the police community with an opportunity to engage in a variety of leadership areas. The Police Leadership Conference will bring together experts who will provide current, lively, and interesting topics on leadership. The carefully chosen list of keynote speakers will provide a first class opportunity at a first class venue to hear some of the world's outstanding authorities on leadership, the challenges facing the policing community and how to overcome those challenges.

Conference Location

The Westin Bayshore
1601 Bayshore Drive
Vancouver, BC
V6G 2V4

Important Dates

- Conference Dates - April 7 to 9, 2013
- Delegate Reception - April 7, 2013
- Main Plenary Sessions - April 8 & 9, 2013
- Trade Show - April 8 & 9, 2013

The Service of Policing: Meeting Public Expectation

www.policeleadershipconference.com

2013 ★ POLICE LEADERSHIP CONFERENCE

British Columbia Association of Chiefs of Police

POLICE LEADERSHIP CONFERENCE 2013

British Columbia Association of Chiefs of Police

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.

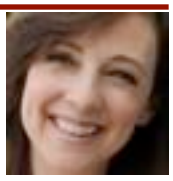
Wendy Mesley is a regular contributor to CBC News: The National, CBC Television's flagship news program, appearing throughout the week in a regular segment that asks provocative questions about the news stories Canadians are talking about. She also contributes to CBC News: Marketplace, CBC Television's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

FACTS - FIGURES - FOOTNOTES

39%

The percentage of Canadians who believe that there has been an increase in the amount of crime in their community over the last five years. This compares to 35% of Britons and 45% of Americans.

Only 27% of Canadians fear becoming a victim of crime while 39% of Britons and 35% of Americans have the same fear. People in Britain were more likely (18%) to report having been a victim of crime in the past two years and calling the police as compared to 13% of Canadians and 12% of Americans.

Source: Angus Reid Public Opinion, released April 26, 2012.

Health Care

Health care and hospitals was the most important problem or concern cited by 31% of Canadians polled. This was followed by 26% of Canadians citing the economy, 18% for unemployment, 10% for education and schools and only 8% for crime, violence, or gangs.

Source: Angus Reid Public Opinion, released April 26, 2012.

19%

The percentage of Canadians who agree that the prison system in Canada does a good job in helping prisoners become law abiding. In the same poll, 61% agreed the criminal courts did a good job in determining guilt or innocence while 38% said the justice system treats people fairly.

Source: Angus Reid Public Opinion, released April 26, 2012.

Municipal Police

The element of the Canadian justice system that most people have complete or a lot of confidence in. Thirty nine percent of Canadians said they had confidence in the internal operations and leadership of their municipal police force, compared to 38% for the RCMP, 31% for the Supreme Court of Canada and only 19% for criminal courts in their province.

British Columbia residents had the lowest confidence level in their provincial courts (10%), the RCMP (27%) and their municipal police force (28%). Albertans had the lowest confidence in the Supreme Court of Canada (16%) but the highest in their municipal police (47%) and the RCMP (42%). Manitoba and Saskatchewan had the most confidence in their provincial courts (27%) while Quebec had the highest confidence in the Supreme Court of Canada (42%).

Source: Angus Reid Public Opinion, released April 26, 2012.

68%

The percentage of Canadians supporting the use of alternative penalties - such as fines, probation or community service - rather than prison for non-violent offenders. Twenty eight percent opposed alternative penalties for non-violent offenders while 4% were unsure. When looking at different types of offences, 78% of Canadians supported non-prison alternatives for personal marihuana use, followed by 37% for credit card fraud, 31% for drunk driving and 21% for arson.

Source: Angus Reid Public Opinion, released April 26, 2012.

18 years of age

The age at which the rate of those accused of a *Criminal Code* offence in 2010 peaked in Canada. After age 18, the rate of those accused of crime generally decreased with age.

Source: Statistics Canada, Canadian Centre for Justice Statistics, Uniform Crime Reporting Survey.

135,647

The number of youth accused of committing a crime in Canada in 2011. Most of them (66,662) were accused of committing a property crime followed by 42,799 committing a violent crime and 26,186 committing other crimes. Most of these (57%) were diverted from the justice system while the remainder (43%) were formally charged.

Source: Statistics Canada, 2012, "Police-reported crime statistics in Canada, 2011", Catalogue no. 85-002-X,released on July 24, 2012..

REPORTS - RESEARCH - REVIEWS

Private Residence

The most common location for youth to commit crime (32%). This was followed by commercial establishments (23%), including stores, office buildings and gas stations, and outdoor public spaces (23%), such as streets, parks and parking lots.

Source: Statistics Canada, 2010, "Where and when youth commit police-reported crimes, 2008", Catalogue no. 85-002-X,released Summer 2010.

After School

The peak time for youth crime. During after school hours (3 to 6 pm) 22% of violent youth crime was committed along with 20% of non-violent youth crime. In the early afternoon (noon to 3 pm) 24% of youth drug offences were committed while 28% of traffic violations were committed at night-time (9 pm to midnight).

Source: Statistics Canada, 2010, "Where and when youth commit police-reported crimes, 2008", Catalogue no. 85-002-X,released Summer 2010.

Northwest Territories

The province or territory with the highest youth crime rate at 36,168 *Criminal Code* (non-traffic) incidents per 100,000 youth population. This was followed by:

- Nunavut = 25,235
- Yukon = 18,133
- Saskatchewan = 16,997
- Manitoba = 9,330
- Nova Scotia = 8,985
- Alberta = 6,918
- New Brunswick = 6,445
- Newfoundland = 6,327
- Prince Edward Island = 5,303
- British Columbia = 4,623
- Ontario = 4,561
- Quebec = 3,800

Source: Statistics Canada, 2010, "Where and when youth commit police-reported crimes, 2008", Catalogue no. 85-002-X,released Summer 2010.

36%

The number of officers reporting they attended an information session on professional standards. For those members attending an information presentation about professional standards, they had much more positive views of the Professional Standards Office (PSO). Only 21% of those not attending an information session had positive views on the performance of the PSO while nearly 41% of those who did attend had positive views. Similarly, 53% of survey respondents attending information sessions felt that members of the PSO treated officers fairly while only 33% of those not attending did so. For those police members attending the information sessions, they were more likely to agree that PSO members:

- try their best to expedite investigations while respecting due process (47% v. 28% of those not attending);
- want to help members avoid making mistakes others have made (45% v. 29% of those not attending);
- are open minded (45% v. 25% of those not attending); and
- welcome feedback from officers (30% v. 15% of those not attending).

Additionally, for those attending the information sessions, they agreed they:

- had more respect for what PSO members do (50%);
- learned how to avoid errors in judgment which could lead to negative repercussions (47%);
- were more willing to seek advice from a PSO member (42%); and
- were more willing to report wrongdoing to a PSO member (30%).

Only 9% of those attending an information session had a more negative view of the PSO, while 61% said they did not.

Source: CACP, CACP Professionalism in Policing Research Project Survey Results.

FACTS - FIGURES - FOOTNOTES

Impaired Driving

The most common type of offence completed in adult criminal court. In 2010/2011 there were 48,033 impaired driving offences. This was followed by theft (42,566), common assault (37,604), fail to comply with order (37,247), breach of probation (31,157), major assault (20,929), uttering threats (17,652), drug possession (16,363), mischief (14,691) and fraud (14,415).

Impaired driving also had the highest conviction rate with 84% of adult cases resulting in a guilty finding. Only 13% of impaired driving cases were stayed or withdrawn, 3% of cases resulted in an acquittal and 1% were classified as other outcomes, such as not criminally responsible or unfit to stand trial.

Source: Statistics Canada, 2012, "Adult criminal court statistics in Canada, 2010/2011", Catalogue no. 85-002-X,released on May 28, 2012.

402,980 The number of completed cases in adult criminal court in 2010/2011 involving 1,196,917 *Criminal Code* and other federal statute charges.

Source: Statistics Canada, 2012, "Adult criminal court statistics in Canada, 2010/2011", Catalogue no. 85-002-X,released on May 28, 2012.

74% The percentage of Vancouver's street-involved youth aged 15-25 who transitioned to become regular injection drug users after experimenting with drug injection for the first time. Of these 74%, 60% progressed to regular injecting within one month of their first injection while 84% transitioned within one year. The same *BC Centre for Excellence in HIV/AIDS* study also showed 83% of young females became regular injectors, making them more vulnerable to addiction following experimentation than males at 71%. Neither age nor the type of drug (heroin, cocaine or methamphetamine) significantly impacted the probability of becoming a regular intravenous drug user.

Source: Addiction and Urban Health Research Initiative, BC Centre for Excellence in HIV/AIDS, 2012, "Most Vancouver street-involved youth who experiment with injection drugs become regular drug injectors," released July 19, 2012.

Firefighters

The most trusted profession in Canada. According to two Ipsos Reid polls taken in December 2011 and June 2012, 88% of Canadians said they trusted firefighters, which topped the list of 40 professions. Only 57% of those polled said they trusted the police, which was down 12 points from a similar poll in 2007. This was one of the largest declines of any profession. However, police officers were still more trusted than judges (52%), lawyers (25%) and lawmakers (national politicians - 10%).

Profession	% Trust	Profession	% Trust
Firefighters	88%	Church Leaders	33%
EMTs	86%	TV & Radio personality	31%
Nurses	85%	Journalists	31%
Pharmacists	78%	Environmental Activists	30%
Doctors	75%	Travel Agents	28%
Canadian soldiers	74%	Pollsters	27%
Airline Pilots	73%	Lawyers	25%
Farmers	71%	Auto Mechanics	23%
Dentists	67%	Taxi Cab Drivers	20%
Teachers	65%	New Home Builders	21%
Chefs	58%	CEOs	19%
Police Officers	57%	Municipal Politicians	17%
Daycare Workers	56%	Union Leaders	16%
Judges	52%	Actors	14%
Accountants	48%	National Politicians	10%
Chiropractors	43%	Bloggers	9%
Airport Security Guards	42%	Psychics	9%
Plumbers	40%	Advertising Executives	8%
Financial Advisors	34%	Car Salespeople	6%
Charity Leaders	34%	Telemarketers	3%

Source: Ipsos Reid on behalf of Postmedia News and Global Television.

REPORTS - RESEARCH - REVIEWS

Probation

The most common sentence imposed in adult criminal court. In 2010/11 probation was imposed, either on its own or in combination with other sanctions, in 45% of all guilty cases. The median length of a probation order was 365 days. Probation was most often imposed in criminal harassment cases (90%) and least often for homicide (7%) and impaired driving (10%).

Source: Statistics Canada, 2012, "Adult criminal court statistics in Canada, 2010/2011", Catalogue no. 85-002-X,released on May 28, 2012.

Probation was also the most common sentence imposed by youth courts in 58% of guilty cases. Youth probation was most often imposed in youth criminal harassment cases (84%). The median length of youth probation was 365 days.

Source: Statistics Canada, 2012, "Youth court statistics in Canada, 2010/2011", Catalogue no. 85-002-X,released on May 28, 2012.

Prince Edward Island

The province most likely to sentence an impaired driver to custody. Ninety-three percent of impaired drivers in Prince Edward Island were sentenced to a custodial term compared to 8% for Canada. The Canadian median length of a custodial sentence for impaired driving was 33 days. Fines were levied against 89% of convicted impaired drivers with the median fine being $1,000.

Overall, custodial sentences were more frequently imposed in Prince Edward Island (63% of the cases) but the median length of these sentences was the shortest in Canada (14 days). The median length of custody for Canada as a whole was 30 days.

Source: Statistics Canada, 2012, "Adult criminal court statistics in Canada, 2010/2011", Catalogue no. 85-002-X,released on May 28, 2012.

57%

The conviction rate for cases completed in youth court. In 2010/11 there were 29,908 guilty findings out of 52,904 cases in youth court. Of the remaining cases, 42% were stayed or withdrawn, 1% resulted in acquittal and 1% were classified as other outcomes like not criminally responsible or unfit to stand trial.

Source: Statistics Canada, 2012, "Adult criminal court statistics in Canada, 2010/2011", Catalogue no. 85-002-X,released on May 28, 2012.

Motor Vehicle Theft

The *Criminal Code* offence least likely to be cleared by police. In 2010, theft of motor vehicle was cleared in only 13.5% of police reported incidents - 7.4% were cleared by charge and 6.1% were cleared by other means, such as diversion.

Top 5 Cleared Offences

Offence	cleared by charge	cleared otherwise	total cleared
Administration of justice violations	85.7	9.9	**95.6**
Assault police officer	78.5	16.5	**94.9**
Other violations causing death	82.4	9.9	**92.3**
Forcible confinement/kidnapping	80.9	6.2	**87.1**
Other assaults	73.4	9.2	**82.6**

Source: Statistics Canada, 2012, "Police-reported clearance rates in Canada, 2010", Catalogue no. 85-002-X,released on June 7, 2012.

Gang Related Homicide

There is a lower probability of clearing a gang related homicide than other types. Between 2000 and 2010, 42% of gang related homicides were solved by police while 88% of non-gang related homicides were solved. Similarly, homicides involving a firearm (56%) were less likely to be cleared by police than non-firearm related homicides (88%). The overall homicide clearance rates have also been declining over the last 50 years. In the mid-1960s about 95% of homicides were cleared while today only about 75% are solved. This could be due to a sharp increase in gang related homicides between 1993 and 2008, which are generally more difficult to solve.

Source: Statistics Canada, 2012, "Police-reported clearance rates in Canada, 2010", Catalogue no. 85-002-X,released on June 7, 2012.

Saskatchewan

The province with the highest police reported clearance rate at 59.2% of cases. British Columbia had the lowest clearance rate at 29.8%.

Source: Statistics Canada, 2012, "Police-reported clearance rates in Canada, 2010", Catalogue no. 85-002-X,released on June 7, 2012.

JIBC

ONLINE GRADUATE CERTIFICATE PROGRAMS
INTELLIGENCE ANALYSIS | TACTICAL CRIMINAL ANALYSIS

Foundational Courses:

- Intelligence Theories and Applications
- Advanced Analytical Techniques
- Intelligence Communications

Specialized Courses:

- Competitive Intelligence
- Analyzing Financial Crimes
- Tactical Criminal Intelligence
- Analytical Methodologies for Tactical Criminal Intelligence

Entrance Requirements:

Proof of completion of bachelor degree; **OR**

A minimum of two years of post secondary education plus a **minimum of five years** of progressive and specialized experience in working with the analysis of data and information. Applicants must also write a 500 – 1000 word essay on a related topic of their choice **OR**

Applicants who have not completed a minimum of 2 years post-secondary education must have **eight to ten years** of progressive and specialized experience in working with the analysis of data and information (Dean/Director discretion). Applicants are required to write a 500-1000 word essay on a related topic of their choice.

For detailed requirements please visit the JIBC Website.

Justice Institute of British Columbia, Canada | www.jibc.ca |graduatestudies@jibc.ca

JIBC

Foundational Courses

(students enrolled in either graduate certificate are required to complete the foundational courses)

Intelligence Theories and Applications

A survey course that introduces the student to the discipline of intelligence and provides the student with an understanding of how intelligence systems function, how they fit within the policymaking systems of free societies, and how they are managed and controlled. The course will integrate intelligence theory with the methodology and processes that evolved over time to assist the intelligence professional. The course will develop in the student a range of advanced research and thinking skills fundamental to the intelligence analysis process.

Intelligence Communications

The skill most appreciated by the intelligence consumer is the ability to communicate, briefly and effectively, the results of detailed analytic work. This course, through repetitive application of a focused set of skills to a body of information of constantly increasing complexity, is designed to prepare intelligence analysts to deliver a variety of intelligence products in both written and oral formats.

Advanced Analytical Techniques

Topics include: drug/terrorism/other intelligence issues, advanced analytic techniques (including strategic analysis, predicative intelligence etc.), collection management, intelligence sources, management theory (large organizations), attacking criminal organizations, crisis management, negotiation techniques, strategic planning, local/regional updates and briefing techniques.

Specialized Courses

(students enrolled in either graduate certificate are required to complete the foundational courses)

Intelligence Analysis

Competitive Intelligence
This course explores the business processes involved in providing foreknowledge of the competitive environment; the prelude to action and decision. The course focuses on supporting decisions with predictive insights derived from intelligence gathering practices and methodologies used in the private sector. Lectures, discussions, and projects focus on the desires and expectations of business decision-makers to gain first-mover advantage and act more quickly than the competition.

Analyzing Financial Crimes
This course examines the nature and scope of financial crimes and many of the tools used by law enforcement in the preparation of a financial case. Included in this course is a detailed treatment of the following: laws which serve to aid in the detection and prosecution of these crimes, the types of business records available, types of bank records available, an examination of offshore business and banking operations, and the collection and analysis of this information, with emphasis placed on Net Worth and Expenditure Analysis. In addition, special treatment is given to the detection and prosecution of money laundering, various types of money laundering schemes, and the relationship of money laundering to terrorism.

Tactical Criminal Analysis

Tactical Criminal Intelligence
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.

Analytical Methodologies for Tactical Criminal Intelligence
The course reviews the key requirements for intelligence in law enforcement and homeland security. The course focuses the use of advanced analytic methodologies to analyze structured and unstructured law enforcement data produced by all source collection. Students will apply these concepts, using a variety of tools, to develop descriptive, explanatory, and estimative products and briefings for decision-makers in the field.

The BC LAW ENFORCEMENT DIVERSITY NETWORK

Presents

DIRTY PROMISES / HONOURABLE LIES: The Courage to Cross the Line

*** RESTRICTED TO LAW ENFORCEMENT PERSONNEL ONLY ***

Wednesday, November 7, 2012
8:00 am to 5:00 pm
(Registration 7:30 am to 8:00 am)
Justice Institute of British Columbia
715 McBride Boulevard, New Westminster, British Columbia

Law enforcement and communities face many challenges. The first step to making change is creating awareness and understanding. With the goal to promote enrichment through diversity, the BC Law Enforcement Diversity Network invites you to participate in this year's forum.

Keynote speakers:

Kathryn Bolkovac

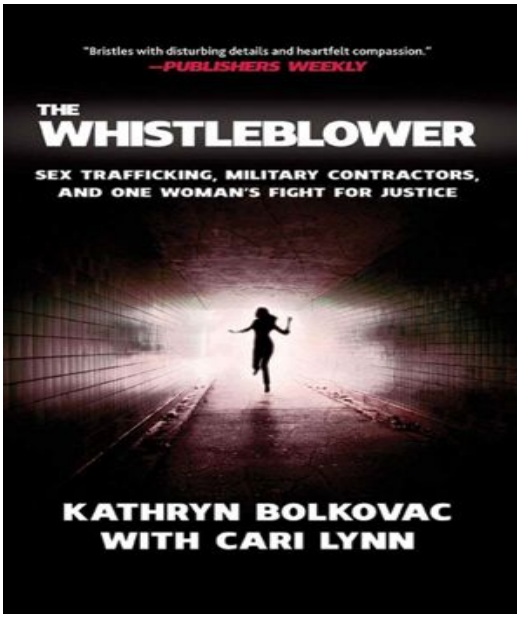
Former Nebraska Police Investigator
"The Whistleblower: Sex Trafficking, Military Contractors, and One Woman's Fight for Justice"

Staff Sergeant Chris Scott

Kingston Police Department
Lead Investigator: Shafia Homicides

RCMP Constables Lepa Jankovic & Husam Farah with Lead Crown Prosecutor

Canada's Largest Known
Human Trafficking Ring Unraveled



Pre-registration is required

$175.00 (before Sept. 30, 2012) ♦ $225.00 (after Sept. 30, 2012)

For additional information, please visit our website at www.bcledn.net

The BC Law Enforcement Diversity Network is a sub-committee of the British Columbia Association of Chiefs of Police