JIBC IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

IN MEMORIAM

On November 13, 2012 28-year-old Royal Canadian Mounted Police Constable Adrian Oliver was killed in an automobile collision in Surrey, British Columbia at approximately 5:00 am. He was driving an unmarked police car and returning back to the detachment when he was involved in a collision with a large transport truck.

Emergency responders attended and tried to remove Cst. Oliver from his car and provide medical assistance. Despite their efforts Cst. Oliver passed away. The driver of the truck was not injured.

Cst. Oliver was born in British Columbia and was a second generation Mountie, with his dad currently serving in Ottawa and his brother also a member of the RCMP serving in the Lower Mainland.

Cst. Oliver was a valued member of "C" Watch at Surrey Detachment and had served his entire 3 ½ year career in Surrey. He was an outstanding police officer, with a great attitude and commitment to serve others.

Source: BC RCMP available at http://bc.rcmp-grc.gc.ca

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

inscription on Canada's Police and Peace Officers' Memorial, Ottawa

Highlights In This Issue

National Library of Canada Cataloguing in Publication Data

Main entry under title:

In service: 10-8. -- Vol. 1, no. 1 (June 2001)

Monthly

Title from caption.

"A newsletter devoted to operational police officers across British Columbia."

ISSN 1705-5717 = In service, 10-8

1. Police - British Columbia - Periodicals. 2. Police - Legal status, laws, etc. - Canada - Cases - Periodicals. I. Justice Institute of British Columbia. Police Academy. II. Title: In service, 10-8. III. Title: In service, ten-eight.

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 subscribe at:

www.10-8.ca

POLICE LEADERSHIP APRIL 7-9, 2013

Coming soon!!! 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 2013 Conference in Vancouver, British Columbia. This is Canada's largest police leadership conference and will provide an opportunity for delegates to discuss leadership topics presented by world renowned speakers.

"The Service of Policing: Meeting Public Expectations"

www.policeleadershipconference.com

see pages 28-29

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 22 immutable laws of branding: how to build a product or service into a world-class brand.

Al Ries and Laura Ries.

New York, NY: HarperBusiness, c2002.

HD 69 B7 R537 2002

The anxiety & phobia workbook.

Edmund J. Bourne.

Oakland, CA: New Harbinger Publications, c2010.

RC 531 B67 2010

Appreciative inquiry in higher education: a transformative force.

Jeanie Cockell, Joan McArthur-Blair.

San Francisco, CA: Jossey-Bass, 2012.

LC 1100 C63 2012

The art of teaching [videorecording]: **best practices from a master educator.**

Patrick N. Allitt.

Chantilly, VA: Teaching Co., c2010.

4 videodiscs (ca. 720 min.) : sd., col. ; 4 3/4 in. + 1 course guidebook (xvi, 81 p. ; 19 cm.)

Course guidebook includes professor biographies, statement of course scope, lecture outlines and notes, glossary and bibliography. Teaching is more than a job-- it's a responsibility, one of the greatest responsibilities in civilized society. Teachers lay bare the mysteries of the world; train minds to explore, question, investigate, and discover; and ensure that knowledge is not lost or forgotten but passed on to future generations. Teachers shape lives in limitless ways, both inside and outside of the classroom. But teaching is no easy task. It's an art form that requires craft, sensitivity, creativity, and intelligence. Whether the classroom consists of 3 students or 300, it's important to be as effective and successful a teacher as possible, both for the students and for professional and personal growth. This program is designed to help develop and enhance teaching style; provide methods, tools, and advice for handling all manner of teaching scenarios; and help viewers achieve new levels of success as teachers.

LB 1025.3 A46 2010 D1494

Best laid plans: the tyranny of unintended consequences and how to avoid them.

William A. Sherden.

Santa Barbara, CA: Praeger, c2011.

BF 448 S44 2011

Boundless potential: transform your brain, unleash your talents, reinvent your work in midlife and beyond.

Mark Walton.

New York, NY: McGraw-Hill, c2012.

BF 724.65 M53 W35 2012

Combining e-learning and m-learning: new applications of blended educational resources.

[edited by] David Parsons.

Hershey, PA: Information Science Reference, c2011.

LB 1044.84 C56 2011

Elements of crisis intervention: crises and how to respond to them.

James L. Greenstone, Sharon C. Leviton.

Belmont, CA: Brooks-Cole, c2011.

RC 480.6 G719 2011

Facilitating with ease!: core skills for facilitators, team leaders and members, managers, consultants, and trainers.

Ingrid Bens.

San Francisco, CA: Jossey-Bass, c2012.

HD 66 B445 2012

How Canadians govern themselves.

Eugene A. Forsey.

Ottawa, ON: Library of Parliament, 2012.

JL 65 F67 2012

Lead by greatness: how character can power your success.
David Lapin.
[US]: Avoda Books, c2012.
HD 57.7 L375 2012

The leadership challenge: how to make extraordinary things happen in organizations.
James M. Kouzes, Barry Z. Posner.
San Francisco, CA: Jossey-Bass, c2012.
HD 57.7 K68 2012

Lean but agile: rethink workforce planning and gain a true competitive edge.
William J. Rothwell, James Graber, Neil McCormick.
New York, NY: American Management Association, 2012.
HF 5549.5 M3 R662 2012

Managing for people who hate managing: be a success by being yourself.
by Devora Zack; illustrations by Jeevan Sivasubramaniam.
San Francisco, CA: Berrett-Koehler, c2012.
HD 38.2 Z335 2012

Managing stress : emotion and power at work.
Tim Newton with Jocelyn Handy and Stephen Fineman.
London; Thousand Oaks: Sage Publications, 1995.
BF 575 S75 N48 1995

More jolts!: 50 activities to wake up and engage your participants.
Sivasailam "Thiagi" Thiagarajan and Tracy Tagliati.
San Francisco, CA: Pfeiffer, c2012.
HD 30.26 T487 2012

Personality style at work: the secret to working with (almost) anyone.
Kate Ward.
New York, NY: McGraw-Hill, c2012.
BF 698.9 O3 W37 2012

Practical research: planning and design.
Paul D. Leedy, Jeanne Ellis Ormrod.
Boston, MA: Pearson, [2012], c2013.
Q 180.55 M4 L43 2012

Trauma, psychopathology, and violence: causes, consequences, or correlates?
edited by Cathy Spatz Widom.
New York, NY: Oxford University Press, c2012.
RC 552 P67 T73 2012

The trustworthy leader: leveraging the power of trust to transform your organization.
Amy Lyman.
San Francisco, CA: Jossey-Bass, c2012.
HD 57.7 L94 2012

JIBC POLICE ACADEMY APPOINTS NEW DIRECTOR

Mr. Steve Schnitzer has accepted the position of Director, Police Academy, effective November 5, 2012. Steve has been the Interim Director in the Police Academy since February 2012. He joined the JIBC as a Program Director in the Justice & Public Safety Division in September 2010 after retiring from a 30 year career with the Vancouver Police Department.

In the Vancouver Police Department Steve had a varied career where operationally he had significant expertise in major event planning and public order events. As a result of his expertise he was designated the Venue Commander for BC Place Stadium and Canada Hockey Place during the 2010 Olympic and Paralympic Games. Steve ended his career with the Vancouver Police Department as the Superintendent in charge of Personnel Services, which oversaw Human Resources, Professional Standards, and Recruiting and Training.

Steve earned a Masters degree in Leadership and Training at Royal Roads University in 2007 and brings significant leadership experience, knowledge and skills to this role.

SEEING THE RISK & TAKING THE CHANCE IMPARTS KNOWLEDGE

R. v. Schepannek, 2012 BCCA 368

The accused was visiting her common law inmate husband at a provincial correctional facility. During the visit she passed her husband a package which was later found to contain hashish and marihuana, as well as tobacco. A video taken from surveillance cameras at the visiting area captured her making the delivery. She took the package from her underwear and passed it over the partition to her husband. He then hid it on his person. The accused was charged with trafficking in hashish and marihuana.

British Columbia Provincial Court

The accused admitted she passed her husband the package, but denied knowing it contained drugs. She said her husband telephoned her, said he was in trouble and needed her help by bringing tobacco to him on a future visit to the correctional facility. She testified she knew it was against the facility's rules because tobacco is considered contraband. Nevertheless, she agreed to meet a man, who she did not know nor had ever met or seen before, in the parking lot of a community school. He passed her a sock and said, "Give this to Jimmy". The meeting was brief and nothing else was said. The accused took the package home, removed it from the sock, threw the sock away and left the plastic package on top of her fridge unopened. She claimed she did not know the package contained drugs, and thought it was tobacco.

The accused suggested she had an honest, but mistaken belief and therefore the *mens rea* of possession had not been proven beyond a reasonable doubt. The judge found the Crown had not proven actual knowledge beyond a reasonable doubt but had established recklessness—the conduct of one who sees the risk but takes the chance. She was reckless as to the nature of the substance in the package and this was so at all material times after it came into her possession. She was convicted of trafficking in both hashish and marihuana.

British Columbia Court of Appeal

The accused argued, among other grounds, that the trial judge erred in treating recklessness (*mens rea*) as establishing that she had legal knowledge that illicit drugs were in the package.

Recklessness

The test for recklessness, as described by the Supreme Court of Canada in *R. v. Sansregret* (1985), 18 C.C.C. (3d) 233 (S.C.C.), is:

> It is found in the attitude of one who, aware that there is danger and that his conduct could bring about the result prohibited by the common law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance. It is in this sense that the term "recklessness" is used in the criminal law ... The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.

The Court of Appeal found there was sufficient evidence upon which the judge could conclude knowledge had been proven. The judge could infer recklessness from the nature of the husband's request, and the unusual meeting and hand-off of a package in a sock said to contain a substance represented to be simply tobacco, a product readily available in commercial establishments. Plus, the accused's own testimony was that she knew the package could contain cocaine or a weapon and she "decided not to look inside". The accused's appeal was dismissed.

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

Sidebar: To establish *mens rea*, or the knowledge element of the possession offence, the Crown was required to prove that the accused had legal knowledge that illicit drugs were in the package. This could be established by proving either:

1. **Actual knowledge**;
2. **Recklessness** — seeing the risk and taking the chance; or

3. **Wilful blindness** — becoming aware of the need for some inquiry but declining to make the inquiry because a person does not wish to know the truth.

POSSESSION PROVEN DESPITE DRUG's REMOVAL

R. v. Wall, 2012 NLCA 67

The accused went to a vacant apartment rented by his cousin where he received delivery of a package addressed to "J. Wahl". The package was delivered by an RCMP officer dressed in a Canada Post uniform. The package had been earlier intercepted by authorities and found to contain 7 ½ pounds of marihuana. The marihuana had been removed before the package was delivered and was replaced with lawn grass. Shortly after delivery was accepted, the police entered the house and found the accused alone. The package was open and its contents were found on the ground outside a window of the house. The accused was charged with trafficking and possessing marihuana for the purpose of trafficking (PPT).

Newfoundland Provincial Court

The accused testified he was in the apartment to do some repairs so that his cousin could get the security deposit back. He said he had no knowledge of the package and its marihuana content. The accused's cousin did not testify, but the landlord did, stating he did not know the accused, had not given him permission to be in the house and was unaware that anything needed to be fixed for return of the security deposit. The trial judge disbelieved the accused's testimony and found he "had no legitimate business being at this particular address" and it "would be an astronomical coincidence, it would be a coincidence beyond any reasonable or rational belief whatsoever that he could be there and that package was delivered at that particular point in time". The judge inferred the accused made arrangements to receive the package and accepted it believing it contained drugs. The accused was convicted of both offences and sentenced to two 12-month concurrent conditional sentences.

Newfoundland Court of Appeal

The accused argued, among other things, that possession of the drugs had not been made out at law since he received a package containing no marihuana. The Crown conceded the conviction for trafficking was unreasonable, it was set aside, along with the sentence, and an acquittal was entered. As for the PPT count, "possession" was a necessary element. The Court of Appeal noted that in some parts of Canada the police practice is to remove all of the drugs from an intercepted shipment while in other parts of Canada the practice is to remove almost all of the drugs, but leave a small amount in order to meet the requirement for "possession".

In this case, the accused never had personal possession of the marihuana—it had been removed from the package. However, possession can also be proven constructively or jointly. "For constructive possession, two elements are required: the accused must have knowledge and 'some measure of control over the item to be possessed'," said Justice Rowe speaking for the Court of Appeal. "For joint possession, three elements are required: 'knowledge, consent and a measure of control on the part of the person deemed to be in possession'." Here, the requirements for joint possession by the accused were made out because the requisite knowledge, consent and control could be inferred. He accepted delivery of the package believing it contained drugs and opened it. The appeal on the PPT conviction was dismissed. As for the sentence, it remained intact since the penalties imposed ran concurrently.

"For joint possession, three elements are required: 'knowledge, consent and a measure of control on the part of the person deemed to be in possession'."

Complete case available at www.canlii.org

Sidebar: The Court in Wall referred to its earlier ruling of *R. v. Bonassin*, 2008 NLCA 40. Bonassin was convicted of possessing cocaine and marijuana for the purpose of trafficking. As in Wall, the police

in Bonassin intercepted a parcel (this time a computer), removed the drugs and had the package delivered containing an equivalent weight in books. The trial judge concluded that Bonassin intended to take the parcel which he believed contained drugs. On appeal, two judges agreed that the accused was guilty of joint possession because he entered into an agreement with another person regarding the drugs before they were removed by the police. In upholding the convictions, the majority noted that there are generally three components of possession:

1. **knowledge of the item**,
2. **intention or consent to have possession of the item**, and
3. **control over the item**.

In the majority's view, it was not necessary that Bonassin take actual possession of the drugs. Instead, the three elements of knowledge, consent, and control were established.

"By permitting delivery of the 'fake' parcel, the police identified Bonassin as a participant in the trafficking scheme," said Justice Welsh. "Joint possession of the drugs by Bonassin at the relevant time, that is, prior to seizure of the parcel by the police, was proved beyond a reasonable doubt, and convictions were properly entered." Bonassin and the sender had knowledge of the drugs, intended or consented to have possession of them and had control over them until they were seized by the police.

Justice Rowe disagreed, finding there was no evidence that the accused exerted "control" over the drugs and therefore joint or constructive possession had not been proven. Instead he would have found Bonassin guilty of attempted PPT because all the elements of PPT had been established except for the fact that the drugs did not come into his possession - they had been removed.

TROLLING FACEBOOK HELPS WITH IDENTIFICATION EVIDENCE

R. v. T.A.H., 2012 BCCA 427

A 16-year-old youth, in company a friend, was robbed of a cell phone and wallet by three young males. During the altercation the victim felt one of the males looked familiar. He had seen him in the area a short time prior to the robbery and thought he had seen him before that date, perhaps in connection with school. Then, after the incident, the victim and his friend checked Facebook photos to find the identity of this person. They did find one picture that looked exactly like the person, discovered his name and realized he had earlier attended the victim's middle school. The incident was reported to police. A civilian also turned over some of the victim's identification to the police soon after the robbery. This person had seen three young males going through a wallet in a parking lot not long after the robbery.

British Columbia Provincial Court

The victim pointed out the accused in court as one of the robbers. He said that the accused looked familiar and he was sure it was him after seeing his picture on Facebook. The victim's friend also testified. He described the events of the robbery and said the Facebook process occurred two or three hours after the robbery. He said he was "pretty sure" the person whose photos were on Facebook was one of the robbers. The accused, on the other hand, did not testify.

The trial judge concluded that the Crown had proven the accused's identity beyond a reasonable doubt as being involved in the robbery. Even though the victim and his friend did the Facebook viewing together, they were very cautious in giving their evidence and understood the difference between their own personal opinion and that which was shared. "This identification, it is said, was much like a police officer giving a witness a single photograph and asking, 'Is that the man,' some who, in a general

way, matched the description," said the judge. "There is some element of truth to that, in my view, but there is also some truth to this being as much like a photo array where a witness is permitted to look at one photograph after another until making an identification. I say that because it was not presented to them, that is, the image, they found it, and then they found others." The accused was convicted of robbery.

British Columbia Court of Appeal

The accused appealed, arguing that the process of the victim and his friend looking at Facebook photos together rendered the quality of the identification unsafe to convict on or not properly supported by the evidence. But the Court of Appeal disagreed. Rather than this being a case where a witness is asked to identify a stranger never seen by him before the offence, this was instead a "recognition" case. Justice Hall, speaking for the Court of Appeal, stated:

> This was not a case where a police officer showing photos might have influenced a witness consciously or unconsciously. The two young men immediately after the event trolled through images on Facebook and recognized the [accused] as a person earlier known to them. Like the trial judge, I am satisfied that there was no impropriety in the methodology employed by the two young people. While it might have been a better practice to have each do the photo examination separately, the judge found that the witnesses were cautious in giving evidence and each made their own decision about identity. [para. 11]

The trial judge did not err in his consideration of the evidence or that the accused's guilt had been proven beyond a reasonable doubt. The judge carefully and appropriately analyzed the issue of identification. The accused's appeal was dismissed.

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

Note-able Quote

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

POLICE BREACH PRIVACY BY SEARCHING TEACHER'S WORK ISSUED COMPUTER

R. v. Cole, 2012 SCC 53

The accused, a high-school teacher, was responsible for monitoring student use of school networked laptops. He was supplied with a laptop owned by the school board and accorded domain administration rights on the school's network. This permitted him to access the hard drives of the students' laptops. The use of the accused's work-issued laptop was governed by the school board's Policy and Procedures Manual, which allowed for incidental personal use. The policy stipulated that teachers' email correspondence remained private, but was subject to access by school administrators if specified conditions were met. It did not address privacy in other types of files, but it did state that "all data and messages generated on or handled by board equipment are considered to be the property of [the school board]." The school's Acceptable Use Policy — written for and signed by students — also applied *mutatis mutandis* to teachers. This policy not only restricted the use of student laptops, but also warned users not to expect privacy in their files.

Latin Legal Lingo

"mutatis mutandis" - with the necessary changes in points of detail; the gist remains the same.

While performing maintenance activities on the accused's laptop, a school board technician found a hidden folder containing nude and partially nude photographs of an underage female student. The technician notified the principal, who directed him to copy the photographs to a compact disc (CD). The principal seized the laptop and school technicians eventually gained access to it, making a CD containing the accused's temporary Internet files, which contained pornographic images. The following day, a police officer attended and took possession of the laptop and the two CDs: one CD contained photographs of the nude student; the other CD contained the accused's temporary Internet files. The officer reviewed the contents of both CDs at the police station and then sent the laptop away

for forensic examination. A mirror image of the hard drive was created for that purpose. The accused was charged with possessing child pornography and unauthorized use of a computer.

Ontario Court of Justice

The accused brought a pre-trial motion seeking exclusion of the computer evidence pursuant to s. 24(2) of the *Charter*. The trial judge found that the accused had a reasonable expectation of privacy in the contents of his laptop. The warrantless search violated the accused's s. 8 *Charter* rights and all of the computer evidence was excluded.

Ontario Superior Court of Justice

The Crown challenged the decision of the trial judge. The appeal judge found that the accused did not have a reasonable expectation of privacy and therefore there were no *Charter* breaches. The Crown's appeal was allowed, the lower court's decision was set aside and the matter was remitted back for trial.

Ontario Court of Appeal

On further appeal by the accused, the Ontario Court of Appeal held that he did have a reasonable expectation of privacy in the informational content of the laptop, but that this expectation was "modified to the extent that [the accused] knew that his employer's technician could and would access the laptop as part of his role in maintaining the technical integrity of the school's information network". The initial remote access by the technician was not a "search" for s. 8 *Charter* purposes. The search and seizure of the laptop by the principal and the school board (assuming the *Charter* applied) were authorized by law and were reasonable. Further, the creation of the CD with the photographs was not unreasonable and, since the accused had no privacy interest in the photographs themselves, the search and seizure by the police of the this CD also did not breach s. 8. The accused, however, retained a continuing reasonable expectation of privacy in the laptop and the CD with his temporary Internet files turned over to police. Just because the seizure by school officials was reasonable, the police were not endowed with the same authority and the school board could not consent to the police search by the police. As the police had no other lawful authority, a s. 8 breach was established. The laptop and the mirror image of its hard drive were excluded under s. 24(2) of the *Charter* as was the CD containing the Internet files. However, since the CD containing the photographs should have been admissible, a new trial was ordered.

Supreme Court of Canada

The Crown argued again that the accused had no reasonable expectation of privacy in his employer-issued laptop and therefore its seizure and the copying of its mirror image and the Internet files were not unreasonable. Justice Fish, speaking for the Court on whether there was a *Charter* breach, noted that s. 8 "guarantees the right of everyone in Canada to be secure against unreasonable search or seizure. An inspection is a search, and a taking is a seizure, where a person has a reasonable privacy interest in the object or subject matter of the state action and the information to which it gives access." He continued:

> Privacy is a matter of reasonable expectations. An expectation of privacy will attract Charter protection if reasonable and informed people in the position of the accused would expect privacy.
>
> If the claimant has a reasonable expectation of privacy, s. 8 is engaged, and the court must then determine whether the search or seizure was reasonable.
>
> Where, as here, a search is carried out without a warrant, it is presumptively unreasonable. To establish reasonableness, the Crown must prove on the balance of probabilities (1) that the search was authorized by law, (2) that the authorizing law was itself reasonable, and (3) that the

> authority to conduct the search was exercised in a reasonable manner. [references omitted, paras. 35-37]

The test for determining whether a person has a reasonable expectation of privacy depends on the "totality of the circumstances." This involves a four part inquiry:

(1) **an examination of the subject matter of the alleged search:** The Court found the subject matter of the search was not the devices themselves but the informational content (data) on the laptop's hard drive, its mirror image and the Internet files CD (**informational privacy**);

(2) **a determination as to whether the claimant had a direct interest in the subject matter:** This could be inferred from the accused's use of the laptop to browse the Internet and store personal information on its hard drive;

(3) **an inquiry into whether the claimant had a subjective expectation of privacy in the subject matter:** Again, the Court found this could be inferred from the accused's use of the laptop to browse the Internet and store personal information on its hard drive; and

(4) **an assessment as to whether a subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances:** Although there is no definitive list of factors to consider, the Court found the accused's subjective expectation of privacy was objectively reasonable because the information was highly revealing and meaningful about his personal life. This was so even though it involved a work-issued laptop and not a personal computer in a private residence. Just because the accused did not own the computer, which was a relevant consideration, ownership was not determinative. In this case, there were factors pulling in opposite directions - some supporting the objective reasonableness of privacy (the nature of the information and his personal use of the work-issued laptop) and others against (he didn't own it, policy and practice, and technology - the contents of his hard drive were available to other users and technicians with domain administration rights when connected to the network).

On balance, Justice Fish found the accused did have an objectively reasonable subjective expectation of privacy, although it was diminished from what one might have in a personal computer in their home.

More Note-able Quotes on Privacy

"Canadians may reasonably expect privacy in the information contained on their own personal computers. In my view, the same applies to information on work computers, at least where personal use is permitted or reasonably expected. Computers that are reasonably used for personal purposes — whether found in the workplace or the home — contain information that is meaningful, intimate, and touching on the user's biographical core. Vis-à-vis the state, everyone in Canada is constitutionally entitled to expect privacy in personal information of this kind. While workplace policies and practices may diminish an individual's expectation of privacy in a work computer, these sorts of operational realities do not in themselves remove the expectation entirely: The nature of the information at stake exposes the likes, interests, thoughts, activities, ideas, and searches for information of the individual user." - Justice Fish @ paras. 1-3

"The closer the subject matter of the alleged search lies to the biographical core of personal information, the more this factor will favour a reasonable expectation of privacy. Put another way, the more personal and confidential the information, the more willing reasonable and informed Canadians will be to recognize the existence of a constitutionally protected privacy interest. Computers that are used for personal purposes, regardless of where they are found or to whom they belong, "contain the details of our financial, medical, and personal situations" This is particularly the case where, as here, the computer is used to browse the Web. Internet-connected devices "reveal our specific interests, likes, and propensities, recording in the browsing history and cache files the information we seek out and read, watch, or listen to on the Internet". - Justice Fish @ paras. 46-47

Since he had a reasonable expectation of privacy in his Internet browsing history and the informational content of his work-issued laptop, any non-consensual examination by the police was a "search" and any taking was a "seizure".

The School Search

Assuming school officials were state agents for *Charter* purposes (a decision left for another day), the principal had a statutory duty to maintain a safe school environment under Ontario's *Education Act* and therefore, by necessary implication, a reasonable power to seize and search a school-board-issued laptop if the principal believed on reasonable grounds that the hard drive contained compromising photographs of a student.

The Police Search

The school's implied power of search and seizure, however, was not endowed to the police:

> The police may well have been authorized to take physical control of the laptop and CD temporarily, and for the limited purpose of safeguarding potential evidence of a crime until a search warrant could be obtained. However, that is not what occurred here. Quite the contrary: The police seized the laptop and CD in order to search their contents for evidence of a crime without the consent of [the accused], and without prior judicial authorization.
>
> ... ...
>
> In taking possession of the computer material and examining its contents, the police acted independently of the school board. The fact that the school board had acquired lawful possession of the laptop for its own administrative purposes did not vest in the police a delegated or derivative power to appropriate and search the computer for the purposes of a criminal investigation. [references omitted, paras. 65-67]

And further:

> Where a lower constitutional standard is applicable in an administrative context, as in this case, the police cannot invoke that standard to evade the prior judicial authorization that is normally required for searches or seizures in the context of criminal investigations. [para. 69]

In this case, the accused "throughout, retained a reasonable and 'continuous' expectation of privacy in the personal information on his work-issued laptop." The school board was legally entitled to tell the police what it discovered on the laptop, but it did not afford the police warrantless access to the personal information contained within it. "This information remained subject, at all relevant times, to [the accused's] reasonable and subsisting expectation of privacy," said Justice Fish. The police, instead, could have obtained a warrant to search it.

Consent

The employer, as a third party, could not validly consent to the warrantless search or seizure of a laptop issued to one of its employees. "For consent to be valid, it must be both voluntary and informed," said Justice Fish. "The adoption of a doctrine of third party consent in this country would imply that the police could interfere with an individual's privacy interests on the basis of a consent that is not voluntarily given by the rights holder, and not necessarily based on sufficient information in his or her hands to make a meaningful choice." The majority rejected the notion that the school (a third party) could validly consent to a search or otherwise waive a constitutional protection on behalf of another (the accused).

Admissibility - s. 24(2)

A six member majority admitted the evidence. The officer did not act negligently or in bad faith. The case law governing privacy expectations in work computers was still unsettled at the time. The officer believed, "erroneously but understandably, that he had the power to search without a warrant." The *Charter* breach was therefore not egregious or high on the scale of seriousness. The accused had a diminished, but subsisting expectation of privacy and the evidence was discoverable - the police had reasonable grounds to obtain a warrant. Finally, the laptop, mirror image of its hard drive, and CD containing the temporary Internet files were all highly reliable and probative physical evidence and their exclusion would have a marked negative

impact on the truth-seeking function of the criminal trial process. The admission of the evidence would not bring the administration of justice into disrepute.

The Crown's appeal was allowed, the Ontario Court of Appeal's exclusionary ruling set aside and a new trial was ordered.

A Lone Dissent on Admissibility

Justice Abella, although agreeing there was a *Charter* breach, would have excluded the CD containing the temporary Internet files and the copy of the hard drive. In her view, the detective had years of experience investigating cyber-crime and failed to follow established *Charter* jurisprudence which made the breach serious. His exclusive reliance on ownership to determine whether a warrant was required was unreasonable and could not be relied upon to establish good faith for the purposes of s. 24(2).

Moreover, there were no exigent circumstances or other legitimate reasons for police to proceed without a warrant. Rather, the detective had ample time to obtain a warrant and reasonable grounds to do so. Plus, the search was highly intrusive regardless of whether there was a diminished expectation of privacy. Finally, the importance of the reliable evidence in this case was speculative at best.

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

R. v. Cole, 2012 SCC 53 ADMISSIBILITY/EXCLUSION GRID

	Court Level			
Evidence	Ontario Court of Justice	Ontario Superior Court of Justice	Ontario Court of Appeal (3:0)	Supreme Court of Canada (6:1)
Laptop (+ mirror image of hard drive)	Excluded (s. 24(2)	Admitted (no breach)	Excluded (s. 24(2)	Admitted (s. 24(2))
CD 1 (nude photographs)	Excluded (s. 24(2)	Admitted (no breach)	Admitted (no breach)	Admissibility not challenged
CD 2 (temporary Internet files)	Excluded (s. 24(2)	Admitted (no breach)	Excluded (s. 24(2)	Admitted (s. 24(2))
Outcome	Acquitted	New trial	New trial	New trial

"Computers that are reasonably used for personal purposes — whether found in the workplace or the home — contain information that is meaningful, intimate, and touching on the user's biographical core. Vis-à-vis the state, everyone in Canada is constitutionally entitled to expect privacy in personal information of this kind."

Justice Fish in R. v. Cole, 2012 SCC 53 at para. 2

STAY UPHELD FOR EXTRAJUDICIAL PUNISHMENT

R. v. Bellusci, 2012 SCC 44

The accused, a prisoner, was being transported from a courthouse to a penitentiary in a van driven by a guard. He was chained, shackled and handcuffed. When he became abusive, insulting and crude, the guard disclosed to other prisoners in the van that the accused was a rapist, thereby placing him in danger. The accused, in response, threatened to rape the guard's wife and children. As the guard opened the cell door on the van, the accused forced the door open, injuring the guard. The guard then assaulted the accused and injured him while he was chained, handcuffed and shackled in a secure cell in the van. The accused's injuries included imprints of wire mesh with petechiae, deformation of the left forearm, and bumps on his head and neck. He stayed overnight for observation in the prison infirmary. As a result of the incident, the accused was charged with assault causing bodily harm, assaulting a peace officer and intimidation of a justice system participant.

petechiae: tiny purple or red spots on the skin resulting from hemorrhages under the skin's surface.

Quebec Court

The accused was acquitted of both assault charges, the judge having been left with a reasonable doubt about guilt. But he was found guilty on the intimidation charge by threatening to sexually assault the guard's wife and children. The judge, however, also concluded that the accused's s. 7 *Charter* rights had been breached. After considering other remedies, such as a reduction in sentence and the possibility of legal or disciplinary proceedings against the guard, a stay of proceedings was entered under s. 24(1). In the judge's view, the prison guard had recklessly provoked the accused to threaten him and then, in response to the threats, grievously assaulted and unlawfully punished the accused while he was chained, shackled and handcuffed. The disclosure to the other prisoners that the accused was a sex offender jeopardized his personal safety while imprisoned. The accused's threats, however reprehensible, would then likely not have been made but for the guard's unjustifiable disclosure. The guard's behaviour in administering the unlawful extrajudicial punishment would shock the public and a stay of proceedings was the only appropriate remedy.

Quebec Court of Appeal

On Crown appeal the stay of proceedings was quashed and the matter was remitted back for trial. The Quebec Court of Appeal found the trial judge committed a reviewable error by overlooking the "non sequitur" between the state misconduct and the stay of proceedings and failed to consider the availability of less drastic remedies.

non sequitur: it does not follow; an inference or conclusion that does not follow from the premises or evidence

Supreme Court of Canada

On the accused's appeal, the Supreme Court of Canada reinstated the stay of proceedings. It found the trial judge had correctly identified and applied the proper principles of law. The accused was revengefully attacked by a state agent while chained, handcuffed, shackled and confined to his cell in a secure prison van. In addition, his injuries were not trivial. The judge was also alive to the difficult position of prison guards, which could not justify the disclosure. He was also troubled by the further tarnishing of the justice system when other prison guards showed reticent and "sclerotic solidarity" in their testimony. "Having found that [the accused] had been provoked and subjected by a state actor to intolerable physical and psychological abuse, it was open to the trial judge to decline to enter a conviction against him," said Justice Fish, in delivering the unanimous seven member judgement.

Furthermore, the trial judge did consider alternative remedies. He carefully and correctly considered all the relevant principles and, in finding no other remedies appropriate, balanced the competing interests at play including the difficult position of prison guards, the importance to the justice system

of ensuring their protection, the seriousness of the charges against the accused, the integrity of the justice system, and the nature and gravity of the *Charter* violation. Although Justice Fish may have granted a lesser remedy himself, trial judges are vested with a broad discretion under s. 24(1) and appellate intervention was unwarranted in this case. As he noted, it is not the role of appellate courts to simply substitute their own exercise of discretion for that of a trial judge just because they would have granted a more generous or more limited remedy.

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

Other cases where stays were granted as a remedy for mistreatment by law enforcement officers

- **Possession for the purposes of trafficking**. The police tasered an accused who was handcuffed, fully restrained and compliant. - *R. v. Walcott* (2008), 57 C.R. (6th) 223 (Ont. S.C.J.).
- **Driving while disqualified**. The police used excessive force in arresting the accused, striking his head several times against a vehicle, causing permanent injuries requiring surgery. - *R. v. Maskell*, 2011 ABPC 176, 512 A.R. 372.
- **Assaulting police and resisting arrest**. Five police officers pepper-sprayed and kneed the accused several times; the accused struck his head on the concrete and suffered a broken jaw. The trial judge was also concerned that police testimony was untruthful. - *R. v. Jackson*, 2011 ONCJ 228, 235 C.R.R. (2d) 289.
- **Impaired driving and dangerous driving**. Although provoked by unruly behaviour, foul language, and the "resistive stance" of the accused , the police used excessive force in striking the accused while he was handcuffed and presented no threat. - *R. v. Mohmedi*, 2009 ONCJ 533, 72 C.R. (6th) 345.
- **Breaking and entering and possession of concealed weapons and housebreaking tools**. The police used excessive force in tasering the accused, who was 15 years old, during a strip search at the police station. - *R. v. J.W.*, 2006 ABPC 216, 398 A.R. 374.
- **Failing to comply with a condition of release (abstaining from alcohol)**. The police conducted an unreasonable strip search and tasered the accused despite the situation being under control, causing bruises, abrasions, burn marks, a broken tooth and bruises to the face. - *R. v. R.L.F.*, 2005 ABPC 28, 373 A.R. 114.
- **Assaulting a peace officer**. Despite the violent behaviour of the accused, the police used excessive force in pepper-spraying him while he was handcuffed and lying face down on the floor with a foot on his head. - *R. v. Wiscombe and Tenenbein*, 2003 BCPC 418 (CanLII).
- **Dangerous driving and refusing a breathalyzer test**. The accused was forced to remain seated in his own excrement longer than necessary, denied proper clean-up facilities, subjected to rude and ridiculing remarks, and arbitrarily and unnecessarily detained. - *R. v. Murphy* (2001), 29 M.V.R. (4th) 50 (Sask. Prov. Ct.).
- **Impaired driving**. The accused was handcuffed for no reason and pepper-sprayed in the eyes for insulting a police officer. - *R. v. Spannier*, 1996 CanLII 978 (B.C.S.C.).

PATTING DOWN & SECURING MOTORIST IN POLICE CAR NOT REASONABLY NECESSARY

R. v. Aucoin, 2012 SCC 66

The 19-year-old accused was stopped driving shortly after midnight in a downtown area during a busy Apple Blossom weekend. The licence plate on his car was registered to another vehicle. While speaking to the accused, who was a newly licensed driver and prohibited from having any alcohol in his body, the officer smelled alcohol and demanded a roadside screening test. The accused was asked to step out of his vehicle and go back to the police car for the screening test. He sat on the rear seat with the door open and his legs and feet outside. Although the screening test indicated a result below the legal limit (20mg%), the accused was still in breach of the zero alcohol tolerance for a newly licenced driver. The officer decided to issue the accused a ticket for having alcohol in his system, so he wanted to put him in the back seat of the police car while he wrote the ticket in the front seat. The accused's vehicle was going to be impounded and the officer was concerned he could walk away and disappear into a crowd while he was writing the

ticket. The officer did a safety pat-down and felt something hard and square in the accused's left front pocket. When asked what it was, the accused said it was his wallet. The officer accepted this answer and continued the pat-down, feeling something soft in the accused's right front pocket. When asked what it was the accused replied ecstasy. He was arrested and two small baggies containing 100 green pills (which later turned out not to be a controlled substance) and eight bags of cocaine were removed from his pocket. As this was taking place two other police officers arrived in separate vehicles. The accused was subsequently charged with cocaine possession for the purpose of trafficking (PPT) as well as PPT a substance held out to be ecstasy.

New Brunswick Provincial Court

The trial judge found the officer's actions were reasonable and did not breach s. 8 of the *Charter* given the very unusual circumstances that night. First, it was late at night and there was no natural lighting in the area. The officer needed the police car light to see what he was doing as he wrote out the ticket. Second, the accused had alcohol in his body and the officer could not allow him to return to the car where he would continue the offence of being a newly licensed driver while prohibited from having any alcohol in his system. Third, the annual Apple Blossom festival was underway and there were many people around that night. The officer was concerned the accused, if left alone on the street, could have just walked away. In light of these factors, the judge ruled that it was reasonable for the officer to seat the accused in the police car while the ticket was written and to pat him down in the process. There were no *Charter* breaches, the evidence was admitted and the accused was convicted of PPT cocaine. He was sentenced to two years in prison.

Nova Scotia Court of Appeal

A majority of the Nova Scotia Court of Appeal upheld the trial judge's ruling, finding the pat-down search lawful. In the majority's view, it was reasonable for the officer to detain the accused in the rear of the police car and also reasonable for the officer to pat him down for weapons. Justice Beveridge, however, in a dissenting opinion was of the view that the accused's s. 8 *Charter* rights had been breached. In his opinion, the officer's subjective belief that the accused might walk away was not objectively justified. Nor was the officer justified in placing the accused in the back of the police car or patting him down - there was no reason to believe he posed a safety risk. Justice Beveridge also found the accused had been subject to an unlawful detention and that his s. 10(b) rights were violated. He would have allowed the accused's appeal, set aside the conviction and entered an acquittal.

Supreme Court of Canada

The accused again appealed, this time to the Supreme Court of Canada arguing that his s. 8 rights had been breached by the pat-down search. And the Court agreed. All seven judges hearing the case concluded that the police were not justified in searching the accused in this case. But they were divided on whether the evidence should have been admitted.

The Search

Justice Moldaver, writing for five members of the Court, first noted that this was not an investigative detention case. Rather than being an investigatory detention for a criminal matter, this was a detention for two relatively minor traffic infractions under Nova Scotia's *Motor Vehicle Act*. The accused was initially detained because his licence plate was registered to a different vehicle, then further detained because he was a newly licensed driver with alcohol in his body. The nature and extent of his detention, however, was then altered in a "dramatic way" when he was patted down and secured in the back of the police car. This action increased the restrictions on the accused's liberty interests and intruded into his privacy interest.

In Justice Moldaver's view, the case was not about whether the officer had the authority to detain the accused in the rear of the police car but whether he was justified in exercising it as he did. In other words, was it reasonably necessary, in the particular

circumstances of the case, to place the accused in the backseat knowing he would be patted-down? In his opinion it was not. Securing the accused in the police car - which fundamentally changed the nature of his ongoing detention - was not reasonably necessary in the totality of the circumstances. The officer had other options, or reasonable means, by which he could have addressed his concerns that the accused would disappear into the crowd. Backup was close at hand, as evidenced by the arrival of other officers while the accused was being searched, and the officer could have "waited an extra minute or two to do the paper work, without impinging on the [accused's] right to be released as soon as practicable." Justice Moldaver stated:

> Without wishing to second-guess the actions of the police and recognizing, as I do, that the police are often required to make split-second decisions in fluid and potentially dangerous situations, I am nonetheless of the view that [the officer's] actions, though carried out in good faith, were not reasonably necessary. [para. 40]

Detaining the accused in the back of the police car was an unlawful detention since there were other reasonable means by which the officer could have addressed his concern that the accused might flee. But for that decision - to place him in the rear of the police car - there would have been no pat-down search. Since the search was warrantless it was presumptively unreasonable, which had not been rebutted by the Crown, breaching the accused's s. 8 *Charter* rights.

s. 24(2) Charter

The majority ruled the evidence admissible. The officer acted in good faith. Although the impact on the accused's privacy interests was significant, society's interest in having the case tried on its merits tipped the scales in favour of admission. The accused's appeal was dismissed.

Not An Outright Ban

The majority was clear, however, that there may be cases (although rare) where it may be reasonably necessary to secure a motorist detained for a straightforward motor vehicle infraction in the rear of a police car. In such cases, where the facts support a finding of reasonable necessity, there is no further balancing needed between an individual's right to be free from state interference and the public's interest in effective law enforcement, a position posited by the minority.

A Different View by Two

Justices Lebel and Fish agreed with the majority that the search was unreasonable. In their view it was not reasonably necessary to detain the accused in the rear of the police car. The detention was unlawful and therefore arbitrary. Instead, the accused could have stood on the sidewalk to await his ticket:

> Generally speaking, detaining an individual in the locked rear seat of a police car in order to write out a ticket for a motor vehicle infraction will rarely strike an appropriate balance between the public's interest in effective law enforcement and its interest in upholding the right of individuals to be free from state interference. Had there been reasonable grounds to believe that [the accused] might flee, with the result that the detention could be said to be necessary, the overall reasonableness of the decision to detain would then need to be assessed in light of the totality of the circumstances, including the nature and extent of the interference with liberty and the importance of the public purpose served by that interference. The seriousness of the offence is therefore a relevant consideration. In my view, where the public purpose served by the interference is the enforcement of a regulatory offence and the interference involves the police assuming complete control over an individual's movements, the balance will generally not favour recognizing a police power. [references omitted, para. 86]

Since the detention was unlawful the protective pat-down search was unreasonable. But even if the detention was lawful the search would nonetheless be unreasonable. There were no reasonable grounds for the officer to believe his safety of the safety of others was as risk. Plus, the search exceeded the scope of one that was reasonably designed to locate weapons. The item the officer felt was soft and could

not justify a concern for officer safety and the questioning that followed it. In the minority's opinion, the evidence should be excluded under s. 24(2). The *Charter*-infringing conduct was serious and the impact on the accused's *Charter* protected interests was significant.

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

LOW VIRAL COUNT & CONDOM USE NEGATES REALISTIC POSSIBILITY OF HIV TRANSMISSION

R. v. Mabior, 2012 SCC 47

The accused had sex with nine complainants but did not tell them he was HIV-positive. On one occasion he said that he had no sexually transmitted diseases. On some occasions he wore condoms while other times he did not. Sometimes the condoms broke or were removed, and in some cases the precise nature of the protections taken was unclear. The complainants all consented to sexual intercourse with the accused but said that they would not have consented if they had known he was HIV-positive. None of them contracted HIV. The accused was charged with 10 counts of aggravated sexual assault (and other related offences) involving the nine complainants based on his failure to disclose to them that he was HIV-positive.

Manitoba Court of Queen's Bench

The accused called evidence that he was under treatment and not infectious, or presented only a low risk of infection. The judge took the approach that any risk of HIV transmission, however small, constituted "significant risk of serious bodily harm." The judge entered convictions on six of the aggravated sexual assault counts where it was established that his viral load was not undetectable or no condom was used. He acquitted the accused on the other four counts finding that sexual intercourse using a condom when viral loads were undetectable did not place a sexual partner at "significant risk of serious bodily harm."

Manitoba Court of Appeal

The accused's appeal of his six convictions resulted in four of them being overturned and acquittals being entered. The Manitoba Court of Appeal held that "significant risk" connoted a high risk of HIV transmission. In applying this high risk approach, the Court of Appeal held that condom use reduced the risk of HIV transmission "below the level of significance." In its view, either low viral loads or condom use could negate the significant risk required for a conviction. The remaining two convictions were upheld.

Supreme Court of Canada

The Crown appealed the four acquittals to the Supreme Court of Canada. In an unanimous seven member opinion, the Supreme Court ruled that a person may be found guilty of aggravated sexual assault (s. 273 of the *Criminal Code*) if they fail to disclose their HIV-positive status before intercourse and there is a realistic possibility that HIV will be transmitted. However, the Supreme Court clarified that if the HIV-positive person has a low viral count as a result of treatment and there is condom protection used, the threshold of a realistic possibility of transmission is not met and an acquittal will follow.

Fraud Vitiating Consent

Under s. 265 of the *Criminal Code* sex without consent is sexual assault. In *R. v. Cuerrier*, [1998] 2 S.C.R. 371 the Supreme Court had earlier established that failure to advise a partner of one's HIV status may constitute fraud vitiating consent. Although HIV can be controlled by medication, it is a serious and life-endangering incurable chronic infection that, if untreated, can result in death. Non-disclosure can amount to fraud because both its elements are established:

(1) **a dishonest act:** misrepresentation or failing to disclose HIV status; and

"Failure to disclose (the dishonest act) amounts to fraud where the complainant would not have consented had he or she known the accused was HIV-positive, and where sexual contact poses a significant risk of or causes actual serious bodily harm (deprivation). A significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV."

BY THE BOOK:

Assault & Sexual Assault Provisions: *Criminal Code*

s. 265 (1) A person commits an assault when (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly; ...

(2) This section applies to all forms of assault, including sexual assault . . . and aggravated sexual assault.

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of ... (c) fraud; ...

s. 273 (1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

(2) **a deprivation:** denying the complainant knowledge which would have caused her to refuse sexual relations that exposed her to a significant risk of serious bodily harm.

Furthermore, since HIV poses a risk of serious bodily harm, the failure to advise a sexual partner of one's HIV status may lead to a conviction for aggravated sexual assault under s. 273(1) of the *Criminal Code,* which attracts a maximum sentence of life imprisonment.

So just when does non-disclosure of HIV status amount to fraud vitiating consent for the purposes of sexual assault? When sexual relations with an HIV-positive person pose a "significant risk of serious bodily harm." In defining what a significant risk of serious bodily harm is, Chief Justice McLachlin stated:

> [A] "significant risk of serious bodily harm" connotes a position between the extremes of no risk (the trial judge's test) and "high risk' (the Court of Appeal's test). Where there is a realistic possibility of transmission of HIV, a significant risk of serious bodily harm is established, and the deprivation element of the Cuerrier test is met. [para. 84]

She then noted the following considerations in finding that the requirement of "significant risk of serious bodily harm" should be read as requiring disclosure of HIV status if there is a realistic possibility of HIV transmission:

- A "significant risk of serious bodily harm" cannot mean any risk, however small. This would set the threshold for criminal conduct too low.
- A standard of "high" risk does not give adequate weight to the nature of the harm involved in HIV transmission. This would set the threshold for criminal conduct too high and might condone irresponsible and reprehensible conduct.
- There is an inverse relationship between the degree of harm and risk of transmission. The more serious the nature of the harm, the lower the probability of transmission need be to amount to a "significant risk of serious bodily harm."
- A standard of a realistic possibility of HIV transmission avoids setting the bar for criminal conviction too high or too low and strikes the appropriate balance between the complainant's interest in autonomy and equality and the need to prevent over-extension of criminal sanctions.

If there is no realistic possibility of HIV transmission, failure to disclose that one has HIV will not constitute fraud vitiating consent to sex under s. 265(3)(c).

Realistic Possibility of HIV Transmission?

Just when does the non-disclosure of HIV-positive status not entail a realistic possibility of HIV transmission? The Supreme Court found that there will not be a realistic possibility of HIV transmission if (1) the accused's viral load at the time of sexual relations was low and (2) condom protection was used.

Low viral count (as opposed to undetectable): The transmissibility of HIV is proportional to the viral load (the quantity of HIV copies in the blood). Antiretroviral therapy can shrink the viral load rapidly, but does not eliminate it altogether. Thus, a sexual partner can still be exposed to a realistic possibility of transmission.

Condom use: Although the Supreme Court found it "undisputed that HIV does not pass through good quality male or female latex condoms" it also noted that "condom use is not fail-safe, due to the possibility of condom failure and human error." Thus, condom protection alone does not preclude a realistic possibility of transmission.

The risk of transmission resulting from the combined effect of condom use and a low viral load is extremely low such that the risk is reduced to a speculative possibility rather than a realistic possibility. Since the requirement of significant risk of serious bodily harm will not be met with a low viral count and condom use, there is no deprivation and failure to disclose HIV status will not constitute fraud vitiating consent under s. 265(3)(c). Chief Justice McLachlin concluded:

> To summarize, to obtain a conviction under ss. 265(3)(c) and 273, the Crown must show that the complainant's consent to sexual intercourse was vitiated by the accused's fraud as to his HIV status. Failure to disclose (the dishonest act) amounts to fraud where the complainant would not have consented had he or she known the accused was HIV-positive, and where sexual contact poses a significant risk of or causes actual serious bodily harm (deprivation). A significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV. On the evidence before us, a realistic possibility of transmission is negated by evidence that the accused's viral load was low at the time of intercourse and that condom protection was used. However, the general proposition that a low viral load combined with condom use negates a realistic possibility of transmission of HIV does not preclude the common law from adapting to future advances in treatment and to circumstances where risk factors other than those considered in the present case are at play.
>
> The usual rules of evidence and proof apply. The Crown bears the burden of establishing the elements of the offence — a dishonest act and deprivation — beyond a reasonable doubt. Where the Crown has made a prima facie case of deception and deprivation as described in these reasons, a tactical burden may fall on the accused to raise a reasonable doubt, by calling evidence that he had a low viral load at the time and that condom protection was used. [paras. 104-105]

Results

As a consequence of the Supreme Court's analysis, three of the four convictions entered by the trial judge were maintained. In three of the cases the accused had a low viral load at the time of intercourse but did not use a condom. In the fourth case where a conviction was registered, the accused had a low viral load and used a condom. This negated a realistic possibility of transmission and therefore did not expose the complainant to a significant risk of serious bodily harm. An acquittal was entered in this one case.

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

LEGALLY SPEAKING:

Sentencing: Firearms Offences

"[F]irearms, and in particular handguns, are extremely dangerous when possessed for an illicit purpose. That purpose can only be to threaten or inflict serious bodily harm or death. Sentences for these types of offences must reflect society's absolute rejection of such unacceptable conduct." - British Columbia Court of Appeal Justice Smith, *R. v. Guha*, 2012 BCCA 423 at para. 30.

DELAY JUSTIFIED: DETENTION NOT ARBITRARY

R. v. Viszlai, 2012 BCCA 442

A detective called another police detachment to arrest the accused, a Scout leader, at a Scout jamboree for some previous sexual offences. The detective asked that the accused be held in custody overnight so she could interview him the following morning. He was taken into custody at 7:03 pm and advised of his right to counsel. He was driven to the police station, booked and spoke to legal aid in private at 7:52 am. He told the arresting officer that he was satisfied with the advice he had received. The following morning the investigating detective drove from Victoria to Nanaimo, then flew to Sechelt and interviewed the accused from 9:50 am to 11:50 am. Before starting the interview, the detective advised the accused of the reason for his arrest, the right to counsel and that he was not obliged to say anything. He admitted to sexually assaulting two victims and wrote out an apology to them. The accused was then released on a Promise to Appear (PTA) at 12:50 pm, about 18 hours after he was arrested.

British Columbia Supreme Court

The accused argued he was arbitrarily detained because he was held overnight to be interviewed the following morning. In his view, he should have been released by police sooner or taken before a JJP for a hearing. The judge rejected this, finding that the accused had been lawfully arrested and detained. The arrest was not planned and the delay in taking a statement from the accused was justified. "In the circumstances, [the police] actions cannot be regarded as a deliberate attempt to circumvent the rights of the accused to be released as soon as practicable," said the judge. The accused's statement was admissible and he was convicted by a jury of sex offences.

British Columbia Court of Appeal

The accused again argued he was arbitrarily detained, suggesting his continued post-arrest detention became unlawful because he should have been released as soon as practicable by either police (under ss. 497 and 498 of the *Criminal Code*) or appear before a JJP without unreasonable delay. After all, he claimed, the police released him on a PTA at the end of the interview which evidenced that he was not considered a public risk. He suggested the police could not detain an arrestee for the purpose of facilitating an interview.

This argument, however, was rejected by the Court of Appeal. Both ss. 497(1.1) and 498(1.1) contain a provision that authorizes the continued detention of an arrestee when there are reasonable grounds to believe it is necessary in the public interest to secure and preserve evidence of or relating to the offence. This evidence includes a statement. "The police are not required to release a person who has been lawfully arrested when there are reasonable grounds to believe that the continued detention of that person is needed for the purpose of obtaining evidence," said Justice Frankel. "Nothing in the language of the exception differentiates one investigative technique from another, nor does it differentiate one form of evidence from another." Nor was it necessary for the detective to have another officer in Sechelt do a surrogate interview. The detective was responsible for the investigation, was a member of a specialized investigative unit, and took expeditious steps to travel to Sechelt. The 15 hour delay in taking a statement after arrest in these circumstances did not render the detention arbitrary. The police acted reasonably.

The accused's appeal was granted on other grounds.

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

POINTS TO PONDER - Viszlai Case

- Whether the delay in releasing someone amounts to an arbitrary detention is fact driven. In other words, it depends on the circumstances.
- This case does not mean that you can always detain someone for 15 hrs before taking a statement. The facts matter.
- Be prepared to explain the delay in interviewing.
- A statement is considered evidence for the exceptions to *Criminal Code* release provisions when it is necessary in the public interest to "secure or preserve evidence of or relating to the offence."

REMAND DID NOT RENEW RIGHT TO COUNSEL

R. v. Bhander, 2012 BCCA

Following a shooting, the accused was arrested for one count of murder and one count of attempted murder. He was deliberately arrested on a **Friday** to be held in custody over the weekend. He was advised of his right to counsel, right to silence and transported to the police station. He spoke to counsel on the phone and also had a 40 minute face-to-face meeting at the police station with a lawyer. Counsel told police he wanted to speak again with the accused if charges were laid. Police asked the accused if he had received and understood the legal advice provided and he replied in the affirmative. Police tried to conduct a short interview with the accused, but he repeatedly invoked his right to silence and said any questions should go to his lawyer.

On the following day (**Saturday**), the accused was charged only with first degree murder. His lawyer participated in the remand hearing and asked that the accused go to the Surrey Pre-trial Centre pending his court appearance on Monday. The JJP found he had no jurisdiction to direct the location of the accused's custody over the weekend but did make a recommendation that he be held at the Pre-Trial Centre. The police, however, made no effort to comply with the recommendation. Shortly after the remand hearing the accused was interviewed by police for 4 hours and 15 minutes. His lawyer's articling student attended at the police station while the interview was in progress and asked to see the accused so further legal advice could be provided, but police refused his request.

Then on **Sunday**, the accused's counsel again tried to arrange a meeting with the accused by leaving a message with police but he did not receive a call back. The accused also asked the jail guard if he could call his lawyer to "make sure he's at court tomorrow" but this was not facilitated. On Sunday evening the accused was again interviewed, this time for about 2 ½ hours. He initially exercised his right to silence but then was shown some evidence, including a set of keys found at the scene. He then began to provide an account of the shooting, admitting he had shot the deceased. Before the confession the accused said, "And it's going against for what my lawyer told me to do, and stuff like that right?"

British Columbia Supreme Court

The trial judge noted that the arrest was made on Friday so police could "optimize their ability to coordinate resources and undertake various investigative procedures" while the accused was in custody. But he found no *Charter* violations and admitted the confession. The accused was convicted of second degree murder by a jury.

British Columbia Court of Appeal

The accused appealed, in part, that the confession was obtained following *Charter* breaches and should be inadmissible under s. 24(2). These violations included:

s. 10(b): Change in Jeopardy

The accused asserted that when he was charged with first degree murder and remanded in custody this was an "objectively observable" change in jeopardy requiring a renewed right to speak to a lawyer. But the Court of Appeal disagreed. There was no change in circumstances that required a further opportunity to consult counsel. The accused had been arrested for murder and attempted murder and charged with first degree murder. This did not alter or elevate the general nature of the jeopardy he faced. "The fact of the remand order did not change [the accused's] jeopardy from that for which he was arrested," said Justice Saunders for the Court.

s. 10(b): New Non-Routine Procedure

The accused submitted he was subjected to a new "non-routine" procedure when remanded which required a renewed right to speak to a lawyer. But the remand was not such a new "non-routine"

procedure involving a detainee, like a polygraph examination or participation in a line-up. His detention expectations may have changed but this did not support a renewed right to counsel.

s. 9 Charter: Arbitrary Detention

The accused said he was arbitrarily detained when police continued to question him after the judicial remand and made no attempt to move him to the pre-trial centre as recommended by the JJP. The Court of Appeal also rejected this submission. The police did not violate any terms of the remand order —it authorized further detention without specifying the location for the detention. Plus, the accused's position regarding the investigation was the same before as after the remand order. The remand order itself did not trigger a fresh right to counsel.

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

GROUNDS VIEWED CUMULATIVELY PROVIDED BASIS FOR WARRANT

R. v. Tran, 2012 BCCA 386

Police obtained a search warrant based on information from two unnamed neighbours, searches of data banks kept by the police and other government sources, and some observations by police officers who attended the area. The ITO included the following information:

From Neighbours

- Both told the police that no one resided at the residence and that the blinds were always closed.
- One said that the house had been up for sale two years previously and that when it did not sell the owners did some renovations on the place.
- Both said that they detected an odour of marihuana in the immediate vicinity of the house.
- One said that every night between 5 pm and 7 pm an Asian family consisting of a man, woman and two children arrived at the house and stayed for only one or two hours.
- One neighbour said that there was a lock box on the front door that "had been there forever" and that people used the garage to enter the residence, not the front door.

From Police Observations

- A police officer drove to the residence on the same day that the first neighbour contacted the police and observed a vehicle parked in the driveway. He found that the vehicle was registered to a Thi Kim Vu whose residence was listed as an apartment in Langley.
- The police attended the house on a couple of occasions and could smell an odour of marihuana in the air. They checked the houses on either side of the suspected residence and confirmed that those houses did not contain marihuana grow operations.
- The police confirmed that the blinds on the front of the house were closed, that there was a lock box near the front door and that the vehicle registered to Thi Kim Vu was parked by the residence.

From Data Searches

- A registry search disclosed that the house was registered to a Lan T. Vu. A further search revealed that the account holder of Hydro services was listed as Vu.
- One of the two neighbours called to tell the police that there was a vehicle at the residence which attended daily. Motor vehicle records indicated the licence plate's owner was the accused, who had the same Langley address as Thi Kim Vu, the owner of the other vehicle seen at the residence.
- The accused had 2006 convictions in Alberta for theft and production of marihuana.
- Lan T. Vu was present at the residence in 2006 when Abbotsford police inspected the house. The report showed that there was evidence of "a previous grow operation but not enough to lay charges."

Police entered the property and found an indoor marihuana grow operation.

British Columbia Supreme Court

The trial judge found the individual pieces of information were insufficient to provide the necessary grounds for the warrant's issuance, but when considered together did meet the reasonable grounds threshold that the residence likely housed a grow op. The judge stated:

> While each of these pieces of information comes with a caveat, the caveat sometimes amounting to a significant reservation, and sometimes being more in the nature of a quibble, nonetheless each of them adds something to the grounds. In my view, no single piece of information is sufficient, however, considered in total they are additive to the degree necessary for the conclusion that an authorizing Judicial Justice of the Peace could judicially assess them as amounting to reasonable grounds, or in other words, as providing a reasonable probability of discovery of evidence of the suspected offence; and in this case, that the residence likely housed a grow-op

The accused was convicted of producing marihuana, and possessing marihuana for the purpose of trafficking.

British Columbia Court of Appeal

The accused appealed his convictions on the ground that the trial judge erred in concluding that the search of the house was made pursuant to a valid search warrant because it was not properly supported by reasonable grounds. In his view, the evidence obtained by executing the warrant should have been excluded under s. 24(2). But the Court of Appeal disagreed. Although the trial judge acknowledged that each piece of information on its own was not particularly strong, he examined the evidence and applied the proper tests in concluding reasonable grounds existed. The accused's appeal was dismissed.

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

"[A reasonable suspicion] must exist before the opportunity to commit an offence is provided."

REASONABLE SUSPICION TRIGGERS OPPORTUNITY TO COMMIT CRIME

R. v. Gladue, 2012 ABCA 143

Police received a tip from a first time informant with a criminal record that a phone number was being used to sell crack cocaine in a dial-a-dope scheme. The police, without taking steps to verify the tip, called the phone number to arrange a cocaine purchase. An officer spoke to an unidentified male and, to determine if he was a drug dealer, asked him if he was "working" or "rolling". The male responded positively and asked "Who are you?". The officer replied "Johnny" and then the male asked what he wanted. The officer asked if he could get "four for a hundred" (meaning four half-gram pieces of crack cocaine for $100). The male said it would cost $110, agreed to meet at a specified location and sold the officer about two grams of cocaine.

Alberta Court of Queen's Bench

The accused pled guilty to trafficking in cocaine but the judge entered a stay of proceedings on the basis of entrapment. He found the police did not have a reasonable suspicion that the accused was already engaged in criminal activity before they called the dial-a-dope number. Police did not know him personally nor was there evidence they were aware of his name. Moreover, even during the call, the police did not develop a reasonable suspicion before providing him with an opportunity to commit a crime. The words "rolling" or "working" were capable of an interpretation that did not necessarily suggest a drug interaction. Plus, there was no expert evidence on drug trafficking terminology. In the judge's view, the knowledge gained during the phone call was "too imprecise and too vague to bolster the already insufficient suspicion of the police prior to the call." An acquittal was entered.

"Entrapment may be found when 'the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry'. The bona fide inquiry exception permits the police to present an opportunity to commit a crime to a person associated with a location where it is reasonably suspected that criminal activity is taking place."

Alberta Court of Appeal

The Crown argued that the trial judge misinterpreted the test for entrapment, applied too high a standard for reasonable suspicion and failed to find that the police were engaged in a bona fide investigation. The Court of Appeal first described the test for entrapment:

> Entrapment may be found when "the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry". The bona fide inquiry exception permits the police to present an opportunity to commit a crime to a person associated with a location where it is reasonably suspected that criminal activity is taking place. Although a reasonable suspicion that a person is engaged in criminal activity can be developed during the course of an investigation of a tip, it must exist before the opportunity to commit an offence is provided. [references omitted, para. 9]

In addition, the court noted that it was not necessary that the identity of the person be pre-established. The police can acquire a reasonable suspicion of a person without knowing who they are.

In this case, the officer provided the accused with an opportunity to commit a crime during the initial phone call when he asked if he could get "four for a hundred". It was at this point - before the opportunity was provided - that a reasonable suspicion the accused was engaged in criminal activity had to exist. The "unverified tip, received from a first time informant with a criminal record, was not enough to raise a reasonable suspicion," said Justice Costigan for the Court of Appeal. Nor was the conversation, with the use of the words "rolling" or "working", enough to elevate the circumstances beyond mere suspicion.

The Court of Appeal also rejected the Crown's submission that the police were engaged in a bona fide investigation of a unique digital location, similar in concept to a geographic location, in calling the dial-a-doper number. "Assuming, without deciding, that a phone can be equated to a specific physical location, the requirement for a reasonable suspicion must still be met," said Justice Costigan. Since the reasonable suspicion requirement was not met, the Crown's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

Supreme Court of Canada

The Crown sought leave to appeal the Alberta Court of Appeal's judgement before the Supreme Court of Canada. The Crown's application, however, was dismissed by a panel of three Supreme Court justices without reasons. *R. v. Gladue*, [2012] S.C.C.A. No. 305

POLICE DUTY TO INFORM OF RIGHTS: DETAINEE'S DUTY TO PURSUE THEM

R. v. MacGregor, 2012 NSCA 18

Sometime after midnight the accused was stopped at a police checkpoint. When an officer noted a smell of alcohol the accused said he had a couple of drinks earlier in the evening. He also said that he had used mouthwash prior to leaving his office, about 15 to 30 minutes before being stopped. The officer believed the accused had alcohol in his body and gave the

approved screening device (ASD) demand. The accused failed the ASD and the breathalyzer demand followed. The accused was then arrested for impaired driving and informed of his right to counsel. He said that he understood his rights and when asked if he would like to speak to counsel, said, "Not right now, thank you". The officer then said:

> *I'll let you know that if you change your mind at anytime tonight during this whole process, that you want to talk to a lawyer, just let myself or any other officer know, and we will make sure that you get in contact with a lawyer, okay?*

The accused responded "Yeah." When the officer provided information about legal aid the accused indicated he understood. The standard police caution was also given. At the police station the accused did not ask to speak to a lawyer nor was he asked if he wanted to consult one. He was introduced to a breath technician and provided two breath samples above the legal limit. He was charged with impaired driving and over 80mg%.

Nova Scotia Provincial Court

The accused testified that he didn't want to speak to a lawyer at the roadside because he didn't have a cell phone and he was not offered one, nor was there any privacy at that point. He said he intended to call a lawyer when he arrived at the police station, expecting that he would be given an opportunity to do so. But he never told the police this because he was in an unfamiliar setting and was merely doing what he was asked to do. Had he been offered a telephone, he claimed he would have called a lawyer. The trial judge concluded that the accused's response "not right now" was equivocal, that he had not waived his right to counsel and that the police were obligated to either provide him with a reasonable opportunity to call a lawyer or obtain a clear and unequivocal waiver from him. Since the police did neither, s. 10(b) of the *Charter* was breached and the evidence of the breathalyzer results were excluded under s. 24(2). The accused was acquitted.

Nova Scotia Supreme Court

On appeal by Crown, a Nova Scotia Supreme Court judge found that the "not right now" response was an adequate waiver of the accused's right to counsel. In his view, even though the accused understood his rights and intended to call a lawyer, there was no evidence that anything interfered with his opportunity to ask to speak to counsel before he submitted to breathalyzer testing. He further held that there was no additional obligation upon the police to reiterate the offer of contacting counsel at the police station. In the alternative, the appeal judge opined that the breath test results were admissible under s. 24(2). He ordered the case sent back to the trial judge.

Nova Scotia Court of Appeal

The accused then challenged the appeal judge's ruling to the Nova Scotia Court of Appeal.

s. 10(b) Charter

Section 10(b) provides that "Everyone has the right on arrest or detention ... (b) to retain and instruct counsel without delay and to be informed of that right." This imposes two duties on the police, Justice Bryson on behalf of the Court of Appeal said:

> There are two elements to a s. 10(b) right. The first is informational and the second implementational. In other words, a detained person has to be properly informed about his or her rights. The second element requires that the detained person has to be given an opportunity to consult a lawyer if he or she chooses to do so. [para. 23]

Informational Duty

The Court of Appeal agreed with the lower courts that the accused's response "not right now" was equivocal. However, unlike the trial judge's conclusion that the police had to either obtain a waiver or reiterate the right to speak to counsel at the police station, Justice Bryson was of the view that police had properly discharged their duties. "The police certainly had no obligation to seek and

obtain a waiver from [the accused]," he said. "Their obligation was to convey to [the accused] that his right to counsel was ongoing. This is precisely what they did." The police reply to the accused's "not right now" was appropriate and could not be clearer:

- It recognized that the accused did not want to call a lawyer then and there;
- It recognized that he may wish to call a lawyer later on that evening "during the process";
- It confirmed that the accused's right to consult counsel was ongoing through the process, and was not limited to "then and there" in the police cruiser;
- It told the accused how to implement his right to consult counsel. He need only advise police at any time during the process. Police would then ensure that he got in contact with a lawyer.

Once the accused was aware of his rights, he had an obligation to pursue them. There was no evidence to indicate a lack of understanding, a failure to adequately inform, nor an indication that the accused thought he had lost the right to speak to a lawyer once he got to the police station. The police had met the duty to inform the accused of his s. 10(b) rights.

Implementational Duty

Once police have discharged the informational component of a s. 10(b), the implementation component arises only when the accused expresses a desire to exercise those rights. In this case the accused never testified that he had no opportunity to express a desire to call a lawyer. There was ample time for the accused to utter a few words in order to exercise his right to consult counsel. Throughout his time in custody he was in the presence of police officers, but said nothing to them. "The fact that he was in unfamiliar circumstances and probably found the experience novel and intimidating, may explain his subjective state of mind," said Justice Bryson. "But it is not objective evidence that there was no opportunity to call a lawyer." The accused's right to counsel was not breached. The accused's appeal was dismissed and a new trial was ordered.

Complete case available at www.canlii.org

NO HARD & FAST RULES FOR INVESTIGATIVE ARTICULABLE CAUSE

R. v. Tran, 2012 NBCA 74

The accused was stopped in a vehicle checkpoint campaign on the TransCanada Highway. A police officer, with 21 years of experience and attached for the last eight years to a Roving Traffic Unit that conducts major motor vehicle check stop operations, noticed a number of "indicators" that made him suspicious the accused was transporting contraband:

- He had a British Columbia driver's license—a contraband-source province;
- He was driving a car rented in Montreal—in the officer's experience those who transport contraband do not want to have their personal vehicles seized so they rent;
- He explained that he had moved from British Columbia to Montreal because of the trouble with the Olympics;
- He was travelling to Moncton because a new casino had opened and he believed one could win more easily at that location, as opposed to a more established casino.
- The passenger in the front right seat was extremely nervous.
- There was a pillow and blanket in the back seat —if there is contraband in a vehicle, the occupants often sleep in the car to protect it.
- A CPIC search revealed the accused had a firearm prohibition from British Columbia, a drug trafficking charge from Manitoba and an outstanding warrant for an impaired driving charge from Quebec, suggesting the accused had changed his place of residence often.

This constellation of indicators matched patterns the police officer had seen repeatedly during his career and they were consistent with a person travelling with contraband. A subsequent search of the accused's vehicle uncovered 20 pounds of marihuana in a suitcase in the trunk. The accused was charged with possessing cannabis for the purpose of trafficking.

New Brunswick Provincial Court

The officer testified that the constellation of indictors matched patterns he had seen repeatedly during his career and were consistent with a person travelling with contraband. Although the police officer testified that no single indicator by itself was indicative of criminal activity, the trial judge found the indicators cited were capable of innocuous explanation and collectively were inappropriate to give rise to reasonable and probable grounds for the search. The judge concluded the police were on a "fishing expedition" and the search was unreasonable. The detention was also found to be arbitrary since the accused was detained on the pretence of questioning him on his CPIC record. The evidence was excluded under s. 24(2) and the accused was acquitted.

"There are no hard and fast rules concerning investigative detention and the assessment of articulable cause, and no fixed checklist of factors: the matter of sufficiency of grounds must be resolved on a case by case basis."

New Brunswick Court of Appeal

The Crown appealed the trial judge's ruling arguing, among other grounds, that the police did not lack the necessary "reasonable grounds to suspect" the accused was involved in criminal activity before detaining him. In the Crown's view, the judge focused on the individual grounds as opposed to using a "totality of circumstances" assessment. Justice Larlee, delivering the unanimous Court of Appeal ruling, agreed. Determining whether the police had "reasonable grounds to suspect" that a person was involved in criminal activity involves both an objective and subjective standard. The objective reasonableness of the detaining officer's grounds "must be assessed from the standpoint of the reasonable person 'standing in the shoes of the police officer'". "There are no hard and fast rules concerning investigative detention and the assessment of articulable cause, and no fixed checklist of factors," said Justice Larlee. "The matter of sufficiency of grounds must be resolved on a case by case basis." He continued:

> Reasonable suspicion is a lower standard than that of reasonable and probable grounds. It does not demand absolute certainty or even reasonable probability. It means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds. The standard is often contrasted with indiscriminate police conduct based on a hunch, intuition, or speculation, none of which are sufficient to support an objectively reasonable suspicion. [para. 8]

In this case, the trial judge explained away each of the individual grounds rather than considering the totality of the circumstances (grounds or indicators). "Rather than asking whether the existing grounds were sufficient to establish reasonable suspicion, the trial judge erred in law by taking each and every indicator given by the police officer and speculating about its potential interpretation without considering the global context," said Justice Larlee. For example, the trial judge speculated on, trivialized and attempted to explain away the indicators.

Here, Justice Larlee found "the cumulative effect of the indicators noted by this experienced police officer met the threshold of reasonable grounds to suspect." The accused's detention was not arbitrary and the evidence was admissible. The Crown's appeal was allowed, the accused's acquittal was set aside and a new trial was ordered.

Complete case available at www.canlii.org

"Reasonable suspicion is a lower standard than that of reasonable and probable grounds. It does not demand absolute certainty or even reasonable probability. It means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds."

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

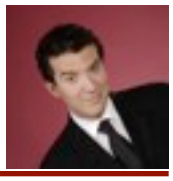
2013 ★ POLICE LEADERSHIP CONFERENCE

British Columbia Association of Chiefs of Police

POLICE LEADERSHIP CONFERENCE 2013

British Columbia Association of Chiefs of Police

Speakers include



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.

Clarence Joseph Louie, first elected as Chief of the Osoyoos Indian Band in December 1984, has consistently emphasized economic development as a means to improve his people's standard of living. Under his direction (20+ years), the Band has become a multi-faceted corporation that owns and manages nine businesses and employs hundreds of people.

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.

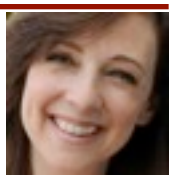
Wendy Mesley is a regular contributor to CBC News: The National, CBC Television's flagship news program, appearing throughout the week in a regular segment that asks provocative questions about the news stories Canadians are talking about. She also contributes to CBC News: Marketplace, CBC Television's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

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.

DNA CANVASS 'A PERMISSIBLE INVESTIGATIVE PROCESS'

R. v. Osmond, 2012 BCCA 382

Following the discovery of a 13-year-old girl's badly injured and partially unclothed body in a bushy area near her home, police canvassed young male persons in the community to obtain DNA samples. The girl had been beaten, strangled, raped and died as a result of multiple injuries. During the accused's second interview an investigator explained that he wished to take a consent sample of blood from him for the purposes of DNA analysis in order to narrow the group of potential suspects. The investigator explained to the accused that the lab would analyze and profile his DNA and compare it to any suspect DNA on the victim's body. He explained that if the DNA matched, the accused would be charged with murder. The accused said he understood and a "Biological Evidence Consent Form" was reviewed. In reviewing the form, the accused was told that he was being investigated for murder and he could speak with a lawyer. But he chose not to call one. He also confirmed that he fully understood he was under no obligation to provide a DNA sample, if the sample matched he would be arrested and charged with murder, the results could be used in court and he was voluntarily giving a sample. He again confirmed that he did not want to talk to a lawyer.

British Columbia Supreme Court

The trial judge concluded that the accused had not been detained under s. 10(b) of the *Charter* and therefore the police did not need to advise him of his right to counsel. In any event, however, the accused was sufficiently advised about his right to counsel. Furthermore, the judge ruled that the accused's consent to the seizing of his blood sample was fully informed. He understood: (1) why police took a blood sample (to try and match it to any substance found on the victim's body) (2) the uniqueness of DNA and how it could implicate a suspect, (3) that if his DNA matched he would be charged with murder and it could be used in court, (4) he was giving the sample voluntarily and (5) that he could speak to a lawyer at no charge if he wished to do so. The judge also rejected the accused's notion that random police requests from large samples of non-suspects in the community (described as "mass virtue testing") was an unacceptable intrusion of privacy regardless of consent. The judge found the taking of the DNA sample did not infringe on the accused's right to be presumed innocent when police did not have grounds to get a DNA warrant. The judge concluded that the manner in which the DNA canvass was conducted did not offend the *Charter* and the DNA evidence was admitted. It linked the accused to semen found with the victim's blood on a mattress and material extracted from a wash of the victim's fingernail clippings. He was convicted of first degree murder - the killing occurred concurrently with a sexual assault.

British Columbia Court of Appeal

The accused appealed submitting, in part, that the DNA evidence should have been inadmissible. In his view, a general DNA canvass of young male persons in the community for potential suspects was an unacceptable practice and violated the *Charter*. He suggested that such police conduct was analogous to entrapment - similar to "random virtue testing." The Court of Appeal, however, rejected this view:

> Here there was a small community and it seemed highly likely that the killer could be a resident of the area. The police had a reasoned belief that the DNA canvass they proposed could lead to the identification of a suspect in the homicide. This was a very different case and a much more closely focussed investigation. ... In my opinion, the DNA canvass by the police was a permissible investigative process in the circumstances of this case. [para. 22]

The accused was neither detained nor placed under any improper duress during the process of obtaining his DNA and he voluntarily furnished a sample of his blood. The accused's appeal was dismissed.

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