JIBC

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

IN MEMORIAM

On Friday May 31, 2013 23-year-old Saskatchewan Environment and Resource Management Conservation Officer Justin Knackstedt was struck and killed by a vehicle. Officer Knackstedt and several other officers were diverting traffic at the scene of an earlier accident when RCMP constables received reports of a car being driven erratically in the area. A constable spotted the vehicle stopped in traffic backed up from the earlier accident and made contact with the driver. As the constable spoke with the driver the man suddenly drove into the area that was closed to traffic and struck Officer Knackstedt, killing him. The driver continued to flee until crashing into a ditch where he was apprehended.

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

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

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

British Columbia Police & Peace Officers' Memorial Service

Sunday, September 29th, 2013

British Columbia Legislature

Victoria, BC

Canadian Police & Peace Officers' 36th Annual Memorial Service

Sunday, September 29th, 2013

Parliament Hill

Ottawa, Ontario

The Psychopathy of an Active Shooter: Profiling, Predicting, Preventing, Responding...

Dedicated to all Victims, Survivors and Responders

see page 38

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.

Upcoming Conferences

The WAVR-21:
A Scientifically-Based Instrument for Assessing Workplace Violence Risk
September 10-11, 2013
JIBC
New Westminster, British Columbia

Canadian Identification Society Annual Educational Conference
September 23-26, 2013
Vancouver, British Columbia

34th Canadian Congress on Criminal Justice
October 2-5, 2013
Vancouver, British Columbia

24th Annual Problem-Oriented Policing Conference
October 7-9, 2013
Dayton, Ohio

The Psychopathy of An Active Shooter:
Profiling, Predicting, Preventing, Responding
November 6, 2013
JIBC
New Westminster, British Columbia

see page 38

see pages 39-40

JUSTICE INSTITUTE of BRITISH COLUMBIA LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

The JIBC Library is an excellent resource for learning. Here is a list of its most recent acquisitions which may be of interest to police.

Advanced presentations by design: creating communication that drives action.

Andrew V. Abela, Ph.D.

San Francisco, CA: Pfeiffer, A Wiley Imprint, 2013.

HF 5718.22 A24 2013

Canadian political structure and public administration.

Geoffrey J. Booth, Laura E. Booth, Andrew J. Rowley.

Toronto, ON: Emond Montgomery Publications, 2013.

JL 75 B66 2013

Culture savvy: working and collaborating across the globe.

Maureen Briget Rabotin.

Alexandria, VA: American Society for Training & Development, 2011.

HF 5549.5 M5 R325 2011

Fear your strengths: what you are best at could be your biggest problem.

Robert E. Kaplan, Robert B. Kaiser.

San Francisco, CA: Berrett-Koehler Publishers, 2013.

HD 57.7 K365 2013

Group dynamics for teams.

Daniel Levi.

Thousand Oaks, CA: SAGE, 2013.

HD 66 L468 2013

Leading out loud: a guide for engaging others in creating the future.

Terry Pearce; foreword by Randy Komisar.

San Francisco, CA: Jossey-Bass, 2013.

HD 57.7 P4 2013

Making elearning stick: techniques for easy and effective transfer of technology-supported training.

Barbara Carnes.

Alexandria, VA: ASTD Pr., 2012.

LB 1028.5 C376 2012

Proposals that work: a guide for planning dissertations and grant proposals.

Lawrence F. Locke, Waneen Wyrick Spirduso, Stephen J. Silverman.

Thousand Oaks, CA: SAGE, 2013.

Q 180.55 P7 L63 2013

The rules of work: a definitive code for personal success.

Richard Templar

Harlow, UK: Pearson Business, 2013.

HF 5386 T34 2013

Scenario-based e-learning: evidence-based guidelines for online workforce learning.

Ruth Colvin Clark.

San Francisco, CA: Pfeiffer, a Wiley imprint, 2013.

HF 5549.5 T7 C588 2013

Smart trust: creating prosperity, energy and joy in a low-trust world.

Stephen M.R. Covey and Greg Link; with Rebecca R. Merrill.

New York, NY: Free Press, c2012.

HF 5387 C677 2012

So good they can't ignore you: why skills trump passion in the quest for work you love.

Cal Newport.

New York, NY: Business Plus, 2012.

HF 5381 N497 2012

There is an I in team: what elite athletes and coaches really know about high performance.

Mark de Rond.

Boston, MA: Harvard Business Review Press, 2012.

HD 66 R648 2012

FINDS COMMITTING = RGB PERSON APPARENTLY COMMITTING OFFENCE

R. v. Ashby, 2013 BCCA 334

A police officer clocked a vehicle travelling 94 km/h in an 80 km/h zone. It was also being driven outside the tracks that had been made in the snow by other vehicles. The driver's window was down about one-quarter the way and the sun roof was open part-way, even though it was -21 Celsius. The officer was concerned about the accused's level of sobriety and pulled the Hyundai over. The vehicle was a rental and the officer noted a strong odour of vegetative green marihuana, similar to the smell of marihuana in a grow operation. He noted a red bag on the passenger's seat, fast food wrappers on the floor and an odour of men's cologne. The officer asked the accused for her driver's licence and the rental agreement. A computer search revealed she had a conviction for possessing a narcotic about 22 years earlier. When the officer returned to the vehicle to issue a warning ticket, he arrested the accused for possessing marihuana, advised her of the right to counsel and patted her down. She was not permitted to speak to counsel at the roadside, instead access was provided at the police station. As a result of searching her vehicle, about 21 kgs. of marihuana was found in the trunk and $17,000 in the travel bag on the front passenger seat. The accused was subsequently charged with possessing marihuana for the purpose of trafficking.

British Columbia Supreme Court

The officer testified he was familiar with three distinct marihuana related odours:

- burnt (ie. smoked),
- bud (ie. harvested) and
- plants (ie. vegetative/growing).

He said the odour, along with other possible indicators of drug-related activity, provided him with the necessary grounds to believe that the accused was then in possession of marihuana. These possible indicators of drug related activity included:

- a ***rented vehicle*** - often used by drug couriers to avoid detection and seizure of their own vehicles. Also used to deny knowledge of any drugs that may be found;
- the ***smell of men's cologne*** - often used by drug couriers to mask the smell of marihuana;
- the ***fast-food wrappers*** - as drug couriers do not wish to stop for very long or leave their vehicles unattended they will pick up food from drive-through or fast-food restaurants; and
- the ***partially open driver's window*** and sun-roof in minus 21 degree weather - the accused may have been trying to vent the smell of marihuana from the vehicle.

The trial judge concluded that the arrest was lawful under s. 495(1) of the *Criminal Code*. First, he found that the "the strong odour of vegetative marihuana ... was sufficient on its own to support a reasonable belief that [the accused] was in possession of marihuana, or had committed the indictable offence of being in possession of marihuana." Plus, there were other indicators that added significance to the odour and informed the officer's decision to arrest. In the judge's view, the arrest was justified under both s. 495(1)(a) (*reasonable grounds to believe an indictable offence had been committed*) or s. 495(1)(b) (*finds committing a criminal offence*) and the search of the vehicle incident to that arrest. As for s. 10(b) of the *Charter*, the judge concluded the accused's right to counsel was not infringed. Finally, even if the accused's rights had been breached, the judge would have admitted the evidence under s. 24(2). She was convicted of possessing marihuana for the purpose of trafficking.

British Columbia Court of Appeal

The accused argued that Her arrest was unlawful. In her view, the officer did not have reasonable grounds to believe that an indictable offence had been committed or was about to be committed (s. 495(1)(a)) nor make sufficient observations to support a reasonable inference that she was committing the crime of possessing marihuana (s. 495(1)(b)). As well, she contended her right to counsel had been infringed because, in part,

she was not permitted to contact a lawyer by cellphone at the roadside.

The Arrest

Although the trial judge upheld the legality of the accused's arrest under both ss. 495(1)(a) or (b), Justice Frankel, delivering the unanimous Court of Appeal judgment, found the arrest only justifiable under s. 495(1)(b). Possession of more than 30 grams of marihuana, a dual or hybrid offence, is deemed an indictable offence at the investigative stage but possession of 30 grams or less is only a summary offence. In this case, the officer subjectively believed the accused was in possession of marihuana but he had no idea how much marihuana was involved and did not testify he believed more than 30 grams were present. "Absent a subjective belief that the amount of marihuana present was more than 30 grams, [the officer's] powers of arrest were limited to those applicable to summary conviction offences," said Justice Frankel. "He only went as far as saying that he believed some unknown amount of marihuana was present." Thus, the accused's arrest could not be supported under s. 495(1)(a).

Under s. 495(1)(b) - **finds committing a criminal offence** - the officer was required to have reasonable grounds to believe the accused was apparently committing the offence of possessing marihuana in his presence. "An arrest will be lawful if the arresting officer subjectively believes he or she has the requisite reasonable grounds and those grounds are objectively reasonable," said justice Frankel. In this case, since there were additional factors considered by the arresting officer, it was unnecessary for the Court of Appeal to determine whether the odour of marihuana by itself was sufficient to support a reasonable belief. The Court concluded that "the factual matrix that existed at the time the arrest decision was made satisfies the objective criterion." Although some of the factors considered by the officer "standing alone can be consistent with non-criminal activity, their combined effect, when viewed through the lens of a police officer's experience, cannot be ignored." Here, the Court found that a reasonable person standing in the officer's shoes would believe that the accused was apparently committing the offence of possessing marihuana:

> In addition to detecting the strong odour of vegetative marihuana emanating from the Hyundai, [the officer] observed a number of things which, based on his experience, were consistent with [the accused] being a drug courier. It was the cumulative effect of what his senses perceived—the totality of the circumstances—that gave rise to his belief that she was in possession of marihuana. When all of [the officer's] olfactory and visual observations are assessed on a practical, non-technical, and common sense basis, his decision to arrest is objectively justified. [reference omitted, para. 59]

WHAT WAS FOUND

Police located the following items in the Hyundai:

- **three garbage bags in the trunk**: slightly more than 21 kilograms of marihuana inside 41 vacuum-sealed Ziploc bags; inside each vacuum-sealed bag were two plastic bags each containing approximately 500 grams of marihuana;
- **blue duffel bag in the trunk:** clothing and a sealed Ziploc bag containing two plastic bags, each containing 510 grams of marihuana;
- **red bag on the passenger seat:** female clothing and toiletries, several bundles of cash (i.e., $100, $50, and $20 bills) bound with elastic bands totalling $17,000;
- **front area of the vehicle:** empty and full energy drink cans and fast-food wrappers;
- **toque on the passenger seat** contained a bottle of cologne, a $10 bill, two full energy "shots" and a cellular telephone.

"Notwithstanding that each of those factors standing alone can be consistent with non-criminal activity, their combined effect, when viewed through the lens of a police officer's experience, cannot be ignored."

"An arrest will be lawful if the arresting officer subjectively believes he or she has the requisite reasonable grounds and those grounds are objectively reasonable."

Right to Counsel

As part of her s. 10(b) Charter argument, the accused suggested that she should have been allowed to contact counsel at the roadside by cellphone. But the Court of Appeal rejected this submission. Here, the officer explained that he would not allow her to use a cellular telephone for reasons of officer safety:

> Officer: *When people are hauling contraband, often there's another vehicle, a protection vehicle, so – or they could call a friend or call someone else. When I'm by myself dealing with this vehicle, I am focused on that vehicle, so I'm not focused on any other vehicle. So if I give access and she calls her blocker vehicle and the blocker vehicle comes around me, that's an officer safety issue.*

Although s. 10(b) provides that an arrested or detained person has the right "to retain and instruct counsel without delay" - which has been interpreted as "immediately" - concerns for officer and public safety could excuse immediate compliance with the implementational component. Justice Frankel stated:

> In the case at bar, it was neither reasonable nor practical for [the officer] to implement access to counsel at the roadside. He had just arrested [the accused] for a drug-related offence and had reason to believe there were drugs in her vehicle. Until back-up arrived, he was solely responsible for maintaining control of both her and the vehicle. Once back-up ... arrived, [the officer] did a cursory search of the Hyundai and, upon finding marihuana, immediately drove [the accused] to the detachment, five minutes away. The delay here was plainly minimal. [para. 73]

The accused's appeal was dismissed.

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

Canadian Police & Peace Officers' 36th Annual Memorial Service
Sunday, September 29th, 2013
Parliament Hill
Ottawa, Ontario

SINGLE PHONE CALL TO BUY DRUGS INADMISSIBLE AS HEARSAY

R. v. Baldree, 2013 SCC 35

While investigating a suspected break-in at an apartment, police arrested the accused for drug offences and seized from him a cell phone and cash. When the phone rang at the police station, an officer answered it and the caller asked for the accused. The officer said he was running the show now and the caller provided an address and requested an ounce of weed for $150. The police, however, made no effort at all to contact the caller at the address provided and no delivery was made. The accused was charged with possession for the purpose of trafficking.

Ontario Superior Court of Justice

Despite the accused's objection that the evidence of the telephone call was inadmissible hearsay, the judge found the evidence to be "non-hearsay." He concluded that the phone call was not tendered for the truth of the fact that the accused was a drug trafficker but that it was circumstantial evidence of an individual engaged in drug trafficking. Since the evidence was not hearsay, it was unnecessary to weigh its probative value against its prejudicial effect. The call was admitted as substantive evidence that the accused was engaged in drug trafficking and he was convicted of possessing marijuana and cocaine for the purposes of trafficking.

Ontario Court of Appeal

The accused appealed, arguing the drug purchase phone call was presumptively inadmissible as hearsay, did not fall within any of the listed or principled exceptions and, even if it was non-hearsay, its prejudicial effect outweighed its probative value. Two of three judges, writing separate opinions, set aside the accused's conviction and ordered a new trial. Justice Feldman concluded

that the phone call was not admitted as circumstantial evidence but rather as hearsay that the accused was a drug dealer, which was untested by cross-examination. The telephone call was not admissible because it could not withstand scrutiny under the principled approach to the hearsay rule. Plus, its probative value was outweighed by its prejudicial effect. Justice Blair, who also ordered a new trial, was uncertain whether the evidence constituted hearsay. However, he found it failed on both an assessment of its necessity and reliability and on weighing its probative value against its prejudicial effect. Justice Watt, in dissent, opined that the evidence of a single drug purchase call was properly admissible as non-hearsay. In his view, even if the drug purchase call was improperly admitted at trial, the conviction should nevertheless be upheld.

Supreme Court of Canada

The Crown appealed, arguing that the drug purchase phone call was not hearsay and was admissible as evidence. All nine judges, however, agreed that the call was hearsay and inadmissible as it failed to satisfy any of the traditional exceptions to hearsay nor meet the principled approach, but two separate opinions were delivered.

What is hearsay?

Justice Fish, writing the eight member majority decision, noted the following points about hearsay:

- An out-of-court statement by a person not called as a witness in the proceedings is properly characterized as hearsay where it is tendered in evidence to make proof of the truth of its contents.
- Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule.
- There are traditional exceptions to the hearsay rule as well as a principled approach supported by indicia of necessity and reliability.
- The exclusionary rule for hearsay applies to "express hearsay" and "implied hearsay".

He stated:

> The defining features of hearsay are (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant. …
>
> In short, hearsay evidence is presumptively inadmissible because of the difficulties inherent in testing the reliability of the declarant's assertion. Apart from the inability of the trier of fact to assess the declarant's demeanour in making the assertion, courts and commentators have identified four specific concerns. They relate to the declarant's perception, memory, narration, and sincerity. [references omitted, paras. 30-31]

Why is cross examination so important?

Cross examination provides the opportunity to probe the declarant for potential errors, allowing the assertion imputed to the declarant to be evaluated with the benefit of observing their demeanour. Cross-examination can test the declarant with regard to:

- **PERCEPTION** - the declarant may have misperceived the facts to which the hearsay statement relates;
- **MEMORY** - even if correctly perceived, the relevant facts may have been wrongly remembered;
- **NARRATION** - the declarant may have narrated the relevant facts in an unintentionally misleading manner; and
- **SINCERITY** - the declarant may have knowingly made a false assertion.

In this case, the majority concluded that the Crown was not offering the officer's testimony of the phone call as circumstantial evidence that the accused was a drug trafficker but rather as hearsay (proof of the truth of its contents). Although the assertion was not explicit that the accused was a drug dealer (the accused sells drugs), it was implicit (the caller

wanted to purchase drugs). There was no distinction in substance and the presumption of inadmissibility applied equally:

> There is no principled or meaningful distinction between (a) "I am calling [the accused] because I want to purchase drugs from him" and (b) "I am calling [the accused] because he sells drugs". In either form, this out-of-court statement is being offered for an identical purpose: to prove the truth of the declarant's assertion that [the accused] sells drugs. No trier of fact would need to be a grammarian in order to understand the import of this evidence. [para. 43]

So, was the evidence admissible under a listed or principled exception to the hearsay rule? The Court found it was not. First, there was no traditional exception that permitted its admissibility. Second, it failed on the principled approach of necessity and reliability. Neither requirement was satisfied:

✱NECESSITY

- The police made no effort to secure the evidence of the caller.
- They never sought to interview or even find the caller, though he gave them his address.
- There was no explanation offered as to why no efforts were made to locate the caller.

✱RELIABILITY

- There was no basis to say that the caller's belief was reliable without testing the basis for that belief by cross-examination.

Although this single phone call was not admitted, Justice Fish made it clear that he was not proposing a categorical rule for all drug purchase calls:

> For example, where the police intercept not one but several drug purchase calls, the quantity of the calls might well suffice in some circumstances to establish reliability — indeed, while "[o]ne or two might [be] mistaken, or might even have conspired to frame the defendant as a dealer", it would "def[y] belief that all the callers had made the same error or were all party to the same conspiracy."
>
> Moreover, the number of callers could also inform necessity. The Crown cannot be expected, where there are numerous declarants, to locate and convince most or all to testify at trial, even in the unlikely event that they have supplied their addresses — as in this case. And it is important to remember that the criteria of necessity and reliability work in tandem: if the reliability of the evidence is sufficiently established, the necessity requirement can be relaxed. [references omitted, paras. 71-72]

Since the verdict may have been different had the telephone call not been admitted, the Crown's appeal was dismissed. The judgment setting aside the accused's conviction and ordering a new trial was affirmed.

A Second View

Justice Muldaver agreed with the majority that the drug purchase call was inadmissible, acknowledging that the Supreme Court was now characterizing evidence as hearsay that had "long been received by courts as circumstantial evidence." However, he was concerned about the majority's approach to necessity. Instead, he found the real concern and focus on admissibility should be reliability. He questioned the majority's view that the police, in the name of necessity, should be required to track down unknown and often unknowable declarants (callers) who are unlikely to be found and unlikely to be forthcoming and cooperative even if they are found:

> Although it is true the police in this case had the benefit of the caller's address, the caller's identity was still unknown. Surely, the police were not going to show up at 327 Guy St. and ask who there was looking to buy drugs from [the accused]. Apart from officer safety concerns, the likelihood of the police finding the declarant would seem slim. And the prospect of the declarant being forthcoming and cooperative, if found, would seem even slimmer. An undercover drug buy would be even more problematic, given the number of officers who would be needed to see it through and the obvious risks to the officer safety inherent in such an operation.
>
> Under either option, the game would hardly be worth the candle. And that, in my view, provides

> a full answer to the concern that the police offered no explanation as to why they made no efforts to locate the declarant. With respect, no explanation was necessary — common sense provides one. If there is little chance of finding the declarant, and little chance that, if found, he or she will be forthcoming and provide the police with evidence in a better form than the call itself (such as a K.G.B. statement or testimony in court), the necessity criterion will have been met.
>
> Equally problematic is the suggestion by my colleague that even where there are multiple callers, the police could be expected to go out and seek to persuade at least some of them to testify … . With respect, absent evidence of collusion, I see that as being wasteful. It amounts to little more than tipping our hat to necessity for necessity's sake. That has not been, and should not be, what the test for necessity requires. [paras. 106-108]

He also noted that multiple calls, rather than a single one, may be more reliable as "common sense tells us that the probability of numerous callers all being mistaken is unlikely." But he cautioned against the notion that only multiple calls could be reliable and would not foreclose the possibility that even a single drug purchase call may, in different circumstances, meet the required threshold for admissibility under the principled approach to hearsay.

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

LOCAL CIRCUMSTANCES OF JP's AVAILABILITY MAY BE CONSIDERED IN TELEWARRANT

R. v. Lacelle, 2013 ONCA 390

Police sent an application at 10:20 pm to obtain a telewarrant to search a home. In the ITO the affiant stated "There is no Justice of the Peace available at this time" but he did not take any steps to determine whether this was true. Nor did he know that it was factually true at the time he signed it. In other words, the officer swore to a statement that he did not know to be true, but which was nonetheless true. The warrant was approved by the Justice of the Peace (JP), executed and drugs and money were seized.

Ontario Court of Justice

The officer admitted that he did not take any steps to ascertain the truth of whether no JP was available, nor did he know it to be true at the time the warrant was sought. The statement, however, factually turned out to be true. The officer's supervisor, who reviewed the draft ITO, testified that after 5:00 pm the courthouse in the area was closed. In his view, there was no use in checking with the courthouse for a JP as opposed to getting a telewarrant. The judge concluded that the impracticability standard had been met, there was no s. 8 *Charter* breach and the request for the telewarrant was reasonable. The accused was convicted.

Ontario Court of Appeal

The accused argued that the telewarrant was inappropriately issued because the statement, "There is no Justice of the Peace available at this time," was insufficiently particular to justify the warrant's signing. In his view, something more was required. But the Court of Appeal disagreed. An issuing justice and the reviewing justice may take "judicial notice of concrete local circumstances in assessing the adequacy of the officer's statement." Here, the Court found the affiant's approach to obtaining the warrant was somewhat casual and his lack of knowledge and training troubling – this was his first ITO, he did not know the statutory requirements for an ITO or a telewarrant and he used a precedent. But "the context provided circumstantial guarantees that the statement that a JP was not available was true in fact." "There was nothing in the context to suggest to the officer that the statement might not be true; for example, it is circumstantially unlikely that [the affiant] would have been pursuing a telewarrant in the middle of the day when J.P.s are available in Cornwall, or that his supervising officer would have failed to question that statement," said the Court of Appeal. "It was, however, during the evening. The receiving J.P. in Newmarket would also have been

aware of the unavailability of J.P.s in Cornwall given the time of the night."

As an alternative argument, the accused urged excision of the offending statement because the affiant had no personal knowledge of its truth when he swore the information, which made the statement false. In his view, if the statement were excised, there would not be reasonable grounds to issue the telewarrant. The seizure was therefore unlawful, the evidence inadmissible under s. 24(2) of the *Charter* and an acquittal should follow. But, even assuming the evidence was obtained illegally, the Court of Appeal would have found the evidence nonetheless admissible.

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

CONCERN FOR DESTRUCTION OF DIGITAL EVIDENCE JUSTIFIED NO-KNOCK

R. v. Burke, 2013 ONCA 424

As part of Project Salvo, a national investigation into child pornography being shared over the "Gnutella" peer-to-peer network, police obtained a search warrant for the accused's apartment. The accused's IP address had been identified as a user from whom child pornography could be downloaded. The investigator viewed two child pornography video files, confirmed they were being offered for download by the accused's IP address, and obtained his municipal address from the internet service provider. The ITO also stated that the lead investigator was aware that data files were highly disposable as they could be quickly hidden, disguised on a hard drive, password protected or encrypted. When police executed the warrant, officers kicked in the accused's unlocked door, entered with guns drawn and yelled at him to get down on the floor. At least eight officers were involved, some wearing masks. The accused, a computer programmer for a high-tech firm, was at home alone watching TV. He was arrested, handcuffed, escorted outside and a search of his computer revealed child pornography. A copy of the search warrant was left in his apartment. He was charged with possessing child pornography.

Ontario Superior Court of Justice

The accused said he was terrified and believed, if he made a wrong move, that he could be killed. He was handcuffed, told he was under arrest, escorted outside and advised police were executing a search warrant. The lead investigator testified, on the basis of her specialized training and experience, that digital files could be easily destroyed or encrypted. For this reason, as a matter of policy, she would notify the Tactical Unit whenever a search warrant for child pornography files was to be executed. She said she would brief tactical officers so they could determine how entry would be made based on available information. In this case, police decided to use a "dynamic" or mechanical entry (no-knock), rather than knocking on the door and announcing police, because of the ease with which the evidence could be disposed.

The judge accepted the reason for the no-knock entry. She found the element of surprise by the police was essential, given the nature of the materials sought, and concluded that "[t]he risk that the computer that contained the pornographic images might be permanently compromised warranted a no-knock entry." The search was not unreasonable, no s. 8 *Charter* breach occurred and the accused was convicted of possessing child pornography.

Ontario Court of Appeal

The accused submitted, among other grounds, that the manner in which the search was carried out was not reasonable. Generally, when the police execute a search warrant on a person's home they must knock, announce their authority and announce the reason for entry. They may, however, depart from the "knock and announce" principle only in exigent circumstances, including if there is a need to prevent the destruction of evidence, to ensure the safety of the police or the occupants or if in hot pursuit. In assessing the

reasonableness of how a search was conducted, the Ontario Court of Appeal noted the following principles as outlined in *R. v. Cornell*, 2010 SCC 31:

- When the police depart from the knock and announce principle, the onus rests with the Crown (police) to justify why they did so.
- The search as a whole must be assessed in light of all the circumstances.
- The Crown must prove that the police had reasonable grounds to be concerned about issues of officer or occupant safety or the destruction of evidence.
- The Crown must demonstrate evidence that existed at the time of the entry; it is prohibited from relying on *ex post facto* justifications.
- Courts must consider three things when assessing whether a search was conducted in a reasonable manner

    1. the police decision to enter must be judged by "what was or should reasonably have been known to them at the time, not in light of how things turned out to be";
    2. there is some scope available to the police in deciding the manner in which they enter the premises. The police "cannot be expected to measure in advance with nuanced precision the amount of force the situation will require." The role of the reviewing court is to balance the rights of suspects with the need for safe and effective law enforcement; it is not to be a "Monday morning quarterback",
    3. an appeal court must accord substantial deference to the trial judge's assessment of the evidence and findings of fact. - "[T]he question for the reviewing judge is not whether every detail of the search, viewed in isolation was appropriate. The question for the judge … is whether the search overall, in light of the facts reasonably known to the police, was reasonable." Further, the courts should not attempt to micromanage the police's choice of equipment.

Here, the accused submitted that the Crown failed to adduce any evidence capable of supporting the use of a no-knock. He suggested that the police needed information specific to the residence or its inhabitants to justify such an entry. Rather than requesting the assistance of the tactical unit based on an individualized assessment, he argued that the police were relying on a blanket policy. In his view, there was no urgency, the police had been in possession of the information on which they acted for some time and there was no articulated concern in the ITO about violence or the presence of weapons. As well, the police had earlier used a ruse to attend at the accused's premises and they knew he appeared to live alone in a one bedroom apartment on a ground floor and had no prior criminal record. He also highlighted the notion that a person's home and computer are two most intimate places.

Justice Weiler, delivering the Court of Appeal's decision, found the lead investigator's evidence that digital files may be quickly rendered inaccessible and easily destroyed warranted, as held by the trial judge, the element of surprise accompanying a no-knock entry:

> … I do not agree that these individual tactics of the police made the overall search unreasonable. The police concern for destruction of evidence would not have ended with the no-knock entry. The police did not know whether the [accused] would be using his computer at the time of entry, or if he would be near his computer. They also did not know if he would necessarily be alone in the apartment.
>
> The police had a much better chance of preventing destruction of the digital files by having enough officers present that they could simultaneously take control of the different rooms in the apartment and the suspect, as well as any possible visitors. It was also reasonable to have additional officers stationed outside the back and front of the apartment to ensure that no one entered or attempted to leave the apartment while the search warrant was being executed. The warrant did not restrict the number of persons permitted to access the location of the search. [paras. 53-54]

"The police had a much better chance of preventing destruction of the digital files by having enough officers present that they could simultaneously take control of the different rooms in the apartment and the suspect, as well as any possible visitors."

Nor did the tactics used in executing the warrant – a swarm of heavily-armed police, some wearing masks with their guns drawn – render the search unreasonable:

> In addition, I am not prepared to say that the use of drawn weapons and masks rendered the overall search unreasonable. The [accused] acknowledged that it was apparent that the persons in his apartment were the police. While he was understandably extremely frightened by the officers, there is no evidence that the police used any gratuitous or spiteful violence towards him. He was arrested and safely removed from his residence within minutes of police entry. He knew why the search was being carried out and knew that the police were authorized to carry out the search. The police left behind a copy of the warrant in the [accused's] apartment. [paras. 55]

And further:

> It may be that it is standard practice for the tactical unit of the police force to conduct a forced entry with guns drawn and with some officers wearing masks. In the absence of a concern for police safety, the element of intimidation accompanying the use of masks and drawn weapons may be unnecessary and is a cause for judicial concern. However, I am sensitive to Cromwell J.'s caution in Cornell, that, "[h]aving determined that a hard entry was justified, I do not think that the court should attempt to micromanage the police's choice of equipment" ... . And as Cromwell J. made it clear, the role of the reviewing court is limited to assessing whether the search overall was reasonable. [para. 58]

Furthermore, the police did not cause any deliberate or unnecessary damage to the accused's property, other than minor damage to the front door, and they did not seize any materials beyond those identified in the ITO. The fact that the accused did not have a prior criminal record did not alleviate police concerns that he could readily destroy evidence. As was noted in *Cornell*, "A person without a criminal record could destroy evidence as easily as a person with a criminal record." Plus, "the [accused's] lack of a prior criminal record would not provide assurance to police that he would react peacefully when confronted by police officers performing a no-knock entry."

The trial judge's finding on the validity of police entry was reasonable. The unannounced entry was justified because of the risk that evidence (digital files) could be destroyed. The no-knock entry did not violate the accused's rights under s. 8 of the *Charter*. The police had legitimate concerns regarding the destruction of evidence and the elements of surprise and speed, which did not cease with entry, enabled the team to sweep all the rooms almost simultaneously and to quickly restrain the suspect. There was no violence or unnecessary destruction of property. The search was carried out in a reasonable manner. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Analysis

The onus is on an accused to prove on a balance of probabilities that a search was unreasonable. The absence of a warrant presumptively establishes unreasonableness. In the case of a warrantless search, the Crown then bears the burden of proving the search reasonable. For a search to be reasonable within the meaning of s. 8 of the Charter, the search must be:

- authorized by law,
- the law itself must be reasonable, and
- the search must be carried out in a reasonable manner.

HANDCUFFING DURING SAFETY SEARCH COMPATIBLE WITH INVESTIGATIVE DETENTION

R. v. Curry, 2013 ONCA 420

Six Toronto Anti-Violence Initiative Strategy (TAVIS) officers decided to do a walkthrough around an apartment located in an area with a high crime rate. The area was known for criminal gangs and violence, and a shooting had occurred at the building nine days earlier. The suspect in the shooting was described as a black male with a slim build carrying a silver revolver. He was wearing a black hoody and a grey hat with ear flaps. One witness also described the suspect as wearing his hair in dreadlocks. The TAVIS officers were in uniform and arrived at about 10:46 pm. The accused, in company two other males, exited from the front doors of the building at about 10:48 pm. All three were young black males with their heads covered. Byfield had a black hood covering his head and was carrying a red pouch or purse. Turner was wearing a black toque and carrying a white plastic shopping bag. The accused was wearing a grey hat with ear flaps.

As the men walked to the curb of the driveway where a taxi was parked, three police officers followed. As Byfield opened the rear passenger door and was about to get into the taxi an officer saw a bulge at his waist. After a brief conversation the officer heard another officer shout, "Check his waistband." Byfield's outer shirt was lifted and the butt of a silver handgun was seen tucked into his waistband. The officer yelled "gun". As this occurred, another officer immediately grabbed Turner, pulled him to the ground and drew his firearm. Turner was handcuffed, searched and police found a loaded handgun in his jacket pocket and 17 rounds of ammunition in a pant pocket. The accused was also grabbed, taken to the ground and handcuffed. A gun was found down the front of his pants. All three men were subsequently arrested and charged with a number of criminal offences, including possession of a loaded restricted firearm.

Ontario Superior Court of Justice

The three accused argued they were arbitrarily detained under s. 9 of the *Charter* and subject to unreasonable searches under s. 8. The judge found that Byfield had not been detained until the officer took physical control of him and lifted up his over-shirt. The detention, however, was based on a reasonable suspicion that justified a pat search for weapons. The lifting up of Byfield's over-shirt, while not technically a "pat search", was the functional equivalent of one. No s. 8 *Charter* breach occurred. As for Curry and Turner, they were not detained until the officers heard "gun" and reacted by taking them to the ground, handcuffing them and searching them for weapons. The "preliminary investigative questioning" that occurred before this did not constitute detention. "I am satisfied, in all these circumstances, that Curry was only asked the same kinds of 'exploratory' questions as Turner and Byfield were asked and that he was 'delayed' from entering the taxi for less than a minute, … without engaging s. 9 and s. 10 *Charter* rights," said the judge. The judge went on to hold that the officers believed there was a reasonable suspicion (or reasonable "possibility") that Curry and Turner were armed with a gun based on "objective grounds" and on a "demonstrable rationale." The officer "had incomplete information and she was suddenly in a dangerous situation requiring an immediate decision," said the judge. "She had sufficient grounds, in my opinion, to briefly detain Curry and conduct a pat search for weapons." Neither Turner nor Curry had their ss. 8 or 9 *Charter* rights infringed.

The judge also rejected Turner and Curry's argument that forcefully throwing them to the ground, followed by handcuffing, was not a common law detention but rather an arrest. The judge ruled that, in this case, taking Curry and Turner to the ground did not indicate a "de facto arrest" but rather an exercise of the common law duty "to protect life". "A quick pat search for weapons, as in the present case, is entirely compatible with a common law detention," said the judge. "Furthermore, briefly handcuffing a suspect to safely enable a pat search for weapons and/or to prevent flight has been held

to be compatible with a common law detention. … [T]he police were, in reality, exercising common law powers of investigative detention and not statutory powers of arrest." Since there were no *Charter* violations there was no need to consider s. 24(2). However, had there been *Charter* breaches, the evidence would have been admissible. All three men were convicted.

Ontario Court of Appeal

The accused Curry appealed his conviction arguing the police arrested him when they took him to the ground and handcuffed him, thereby breaching s. 9 of the Charter and unlawfully searched him in breach of s. 8. But the Court of Appeal disagreed, upholding the trial judge's ruling that the accused was not prevented by police from entering the taxi and therefore was not detained at that point. Also, the Court of Appeal agreed with the trial judge that when the police took the accused to the ground, they were acting in the exercise of their common law duty to protect life:

> The take down of the [accused] occurred after a police officer observed a gun in the possession of one of the [accused's] co-accused and shouted a warning to the other police officers. The officers attending to the [accused] did not know who had the gun. Their decision to take the [accused] to the ground after they heard the word "gun" shouted out by a fellow officer was made in a volatile and rapidly evolving situation. In the circumstances, this decision was both eminently reasonable and a lawful exercise of the officers' common law detention power. [para. 6]

Finally, the trial judge did not err in finding that the subsequent handcuffing and search of the accused were carried out pursuant to the police common law power of investigative detention. The police conduct in this case did not breach ss. 8 or 9 of the *Charter*. The accused's conviction appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: Additional facts taken from *R. v. Byfield*, 2012 ONSC 2781

Circumstances Justifying Byfield's detention & triggering the cascading events:

1. He had a surprised or shocked look on his face when he first saw the police;
2. He then avoided eye contact with the police, when he walked past;
3. He shifted the right side of his body away from the police, pulling his right shoulder back and quickening his pace;
4. He moved his right hand to his waist area and adjusted something near the right side of his groin;
5. He was coming out of a building where there had been a shooting in the previous week and it was in a high crime area;
6. After reaching the taxi, he was very nervous and continued to keep the right side of his body away from the officer;
7. As he opened the taxi door and went to get in, the officer saw a bulge at his waist, underneath his baggy over-shirt; and
8. Another officer approached and told the officer to "check his waistband".

What the trial judge said:

Some of the above circumstances relied on by the police, had they stood alone, would be neutral. For example, the fact that Byfield avoided eye contact, walked away, and was nervous cannot carry much incriminating weight. However, the other circumstances provided "objective grounds" and a "demonstrable rationale" for belief that the accused was "possibly" armed with a concealed weapon. Furthermore, the officers' impressions or conclusions were supported by objective facts and by their training. It is the "totality" or the "whole" of the facts relied on by the officers that must be assessed, rather than dissecting each observation in isolation.

I am satisfied that the totality of the eight circumstances relied on by [the officer] amounted to "reasonable suspicion", at common law, justifying a brief detention and a pat search for weapons. ... [paras. 80-81]

see R. v. Byfield, 2012 ONSC 2781

2012 POLICE REPORTED CRIME

In July 2013 Statistics Canada released its *"Police reported crime statistics in Canada, 2012"* report. Highlights of this recent collection of crime data include:

- there were **1,949,160** crimes (excluding traffic) reported to Canadian police in 2012; this represents **35,630** fewer crimes reported when compared to 2011.
- the total crime rate dropped **-3%**. This includes a violent crime rate drop of **-3%** and a property crime rate drop of **-3%**.

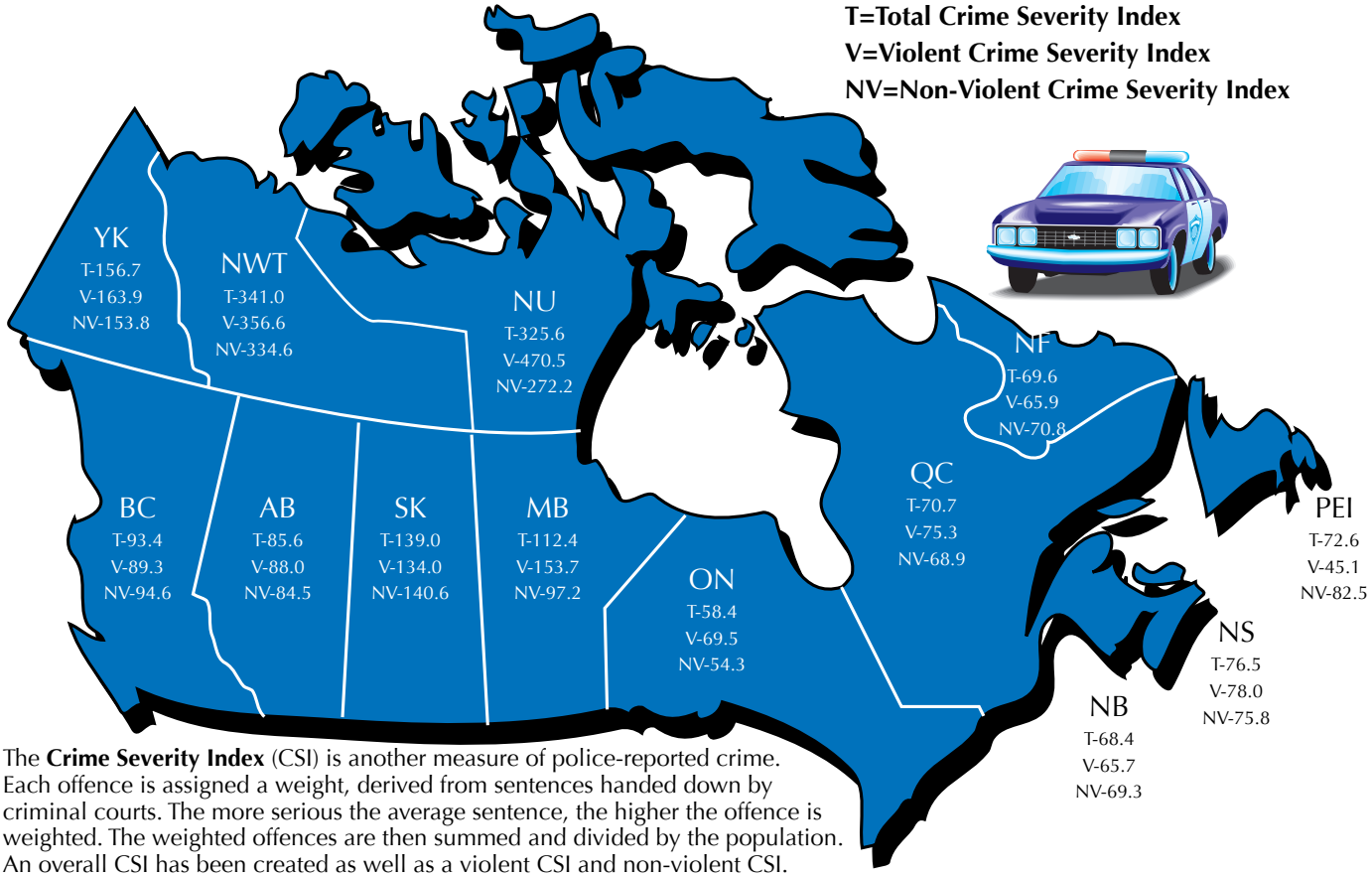
Source: Statistics Canada, 2013, "Police-reported crime statistics in Canada, 2012", Catalogue no. 85-002-X,released on July 23, 2013.

Police-Reported Impaired Driving Offences

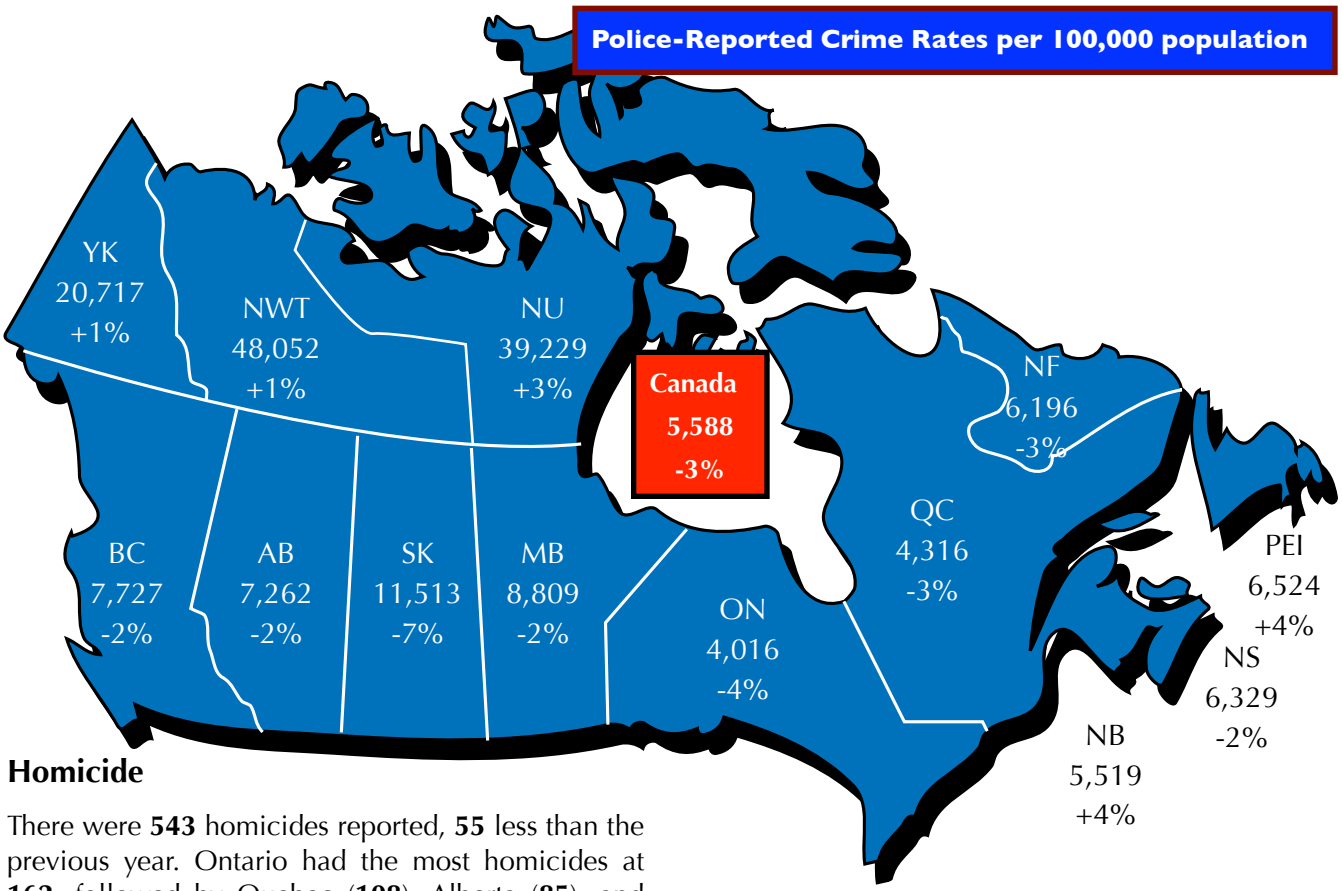
Province	Rate	Impaired Driving Offences	Rate change 2011 to 2012
SK	725	7,834	+7%
AB	417	16,156	-5%
NF	361	1,852	+1%
PEI	329	480	-33%
BC	311	14,395	-24%
MB	297	3,761	-7%
NB	288	2,176	-3%
NS	284	2,693	-13%
QC	206	16,575	-2%
ON	127	17,169	-1%

Police-Reported Crime Severity Indexes

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



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



Homicide

There were **543** homicides reported, **55** less than the previous year. Ontario had the most homicides at **162**, followed by Quebec (**108**), Alberta (**85**), and British Columbia (**71**). The Yukon reported no homicides while Newfoundland only reported three homicides followed by the Northwest Territories and Nunavut at five each. As for provincial or territorial homicide rates, Nunavut had the highest rate (**14.8** per 100,000 population) followed by the Northwest Territories (**11.5**), Manitoba (**4.1**), Saskatchewan (**2.7**) and Alberta (**2.2**). As for Census Metropolitan Areas (CMA's), Thunder Bay, ON had the highest homicide rate at **5.8**. The Canadian homicide rate was **1.6**.

Top CMA Homicide Rates per 100,000

CMA	Rate	CMA	Rate
Thunder Bay, ON	5.8	Abbotsford-Mission, BC	2.2
Winnipeg, MB	4.1	Saskatoon, SK	2.1
Regina, SK	3.1	Gatineau, QC	1.9
Halifax, NS	2.9	London, ON	1.6
Edmonton, AB	2.7	Peterborough, ON	1.6
Saguenay, QC	2.7	Vancouver, BC	1.5

Canada's Top Ten Reported Crimes

Offence	Number
Theft Under $5,000 (non-motor vehicle)	496,781
Mischief	305,520
Administration of Justice Violations	180,652
Break and Enter	175,712
Assault-level 1	169,996
Disturb the Peace	112,513
Impaired Driving	84,483
Fraud	78,433
Theft of Motor Vehicle	77,939
Uttering Threats	70,383

Robbery

In 2012 there were **27,680** robberies reported, resulting in a national rate of **79** robberies per 100,000 population. Manitoba had the highest robbery rate followed by Saskatchewan, British Columbia and Ontario.

Police-Reported Robberies

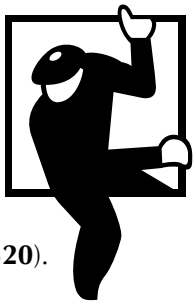
Province/ Territory	Rate	Robberies	Rate change 2011 to 2012
MB	168	2,130	-5%
SK	96	1,036	-7%
BC	98	4,508	-1%
ON	79	10,736	-8%
QC	72	5,783	-15%
AB	69	2,675	-11%
NS	46	441	-6%
YK	30	11	-17%
NU	18	6	-50%
NWT	53	23	+56%
NF	28	142	+29%
NB	22	164	+18%
PEI	17	25	+47%
CANADA	**79**	**27,680**	**-8%**

- Winnipeg, MB had the highest CMA rate of robbery in Canada (**240**), **-7%** lower than its 2011 rate. Kingston, ON had the lowest rate (**22**). Three CMAs reported jumps of more than 30% in robbery rates; Guelph, ON (**+51%**), St. John's, NF (**+47%**) and Sherbrooke, QC (**+32%**).
- Three CMAs reported declines in robberies of -30% or more; Barrie, ON (**-38%**), Greater Sudbury, ON (**-36%**) and Thunder Bay, ON (**-30%**).

Top Ten CMA Robbery Rates per 100,000

CMA	Rate	CMA	Rate
Winnipeg, MB	240	Toronto, ON	118
Saskatoon, SK	162	Thunder Bay, ON	100
Vancouver, BC	132	Edmonton, AB	96
Regina, SK	124	Kelowna, BC	88
Montreal, QC	119	Abbotsford-Mission, BC	88

Break and Enter



In 2012 there were **175,712** break-ins reported to police. The national break-in rate was **504** break-ins per 100,000 people. The Nunavut had the highest break-in rate (**1,846**) followed by Northwest Territories (**1,520**).

Police-Reported Break-ins

Province/ Territory	Rate	Break-ins	Rate change 2010 to 2011
NU	1,846	622	+14%
NWT	1,520	659	-11%
SK	790	8,532	-8%
MB	731	9,263	-1%
BC	650	30,028	no change
QC	573	46,125	-9%
PEI	571	834	+20%
YK	568	205	+5%
NF	545	2,792	-11%
NS	508	4,824	+1%
AB	499	19,343	+2%
NB	480	3,630	+7%
ON	362	**48,855**	**-5%**
CANADA	**504**	**175,712**	**-4%**

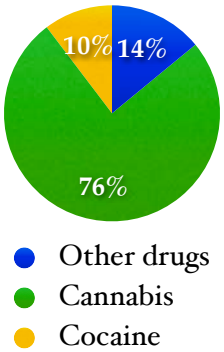
- Break-ins accounted for about **15%** of all property crimes.
- Break-ins dropped **-4%** from the previous year.
- There was one break-in every three (3) minutes.
- Residential break-ins dropped **-7%** while business break-ins declined **-11%.**
- From 2002 to 2012, the break-in rate dropped by **-43%.**
- Among CMAs, Brantford, ON reported the highest break-in rate (**743**) while Toronto reported the lowest (**256**). Only four CMA's reported double digit increases in their break-in rate - Brantford, ON (**+21%**), Moncton, NB (**+17%**), Kelowna, BC (**+14%**) and Guelph, ON (**+10%**) - while 10 CMA's all reported double digit drops including Thunder Bay, ON (**-30%**), Halifax, NS (**-21%**), Greater Sudbury, ON (**-21%**), Trois Rivieres, QC (**-20%**), Quebec, QC (**-20%**), Kingston, ON (**-19%**), Saguenay, QC (**-17%**), Abbotsford-Mission, BC (**-12%**), Regina, SK (**-11%**) and London, ON (**-10%**).

Top Ten CMA Break-in Rates per 100,000			
CMA	**Rate**	**CMA**	**Rate**
Brantford, ON	743	Winnipeg, MB	644
St. John's, NL	717	Trois-Rivieres, QC	599
Vancouver, BC	696	Greater Sudbury, ON	596
Regina, SK	679	Gatineau, QC	578
Saskatoon, SK	657	London, ON	589

Drugs

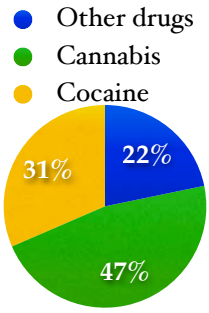
In 2012 there were **109,455** drug-related offences coming to the attention of police. These offences included possession, trafficking, production or distribution.

Possession Offences by Drug Type



- possession offences accounted for **75,937** of these crimes - cannabis (**57,429**); cocaine (**7,847**); and other drugs (**10,661**). Other drugs include heroin, crystal meth, and ecstasy.

Trafficking, Production & Distribution Offences by Drug Type



- Trafficking, production, and distribution offences totaled **33,518** - cannabis (**15,674**); cocaine (**10,553**); and other drugs (**7,291**).
- British Columbia had the highest drug related offence rates of all 10 provinces for cannabis while Saskatchewan topped the list for cocaine and Prince Edward Island was tops for other drugs.

Drug-related Crime Rates by Province per 100,000 population			
Province	**Cannabis rate**	**Cocaine rate**	**Other drugs rate**
BC	382	94	74
SK	319	172	72
NS	251	37	49
AB	191	77	35
QC	184	26	64
NB	172	36	49
NF	167	41	68
ON	164	38	42
MB	153	78	30
PEI	127	27	86

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

Territory	Cannabis rate	Cocaine rate	Other drugs rate
NWT	1,061	238	72
NU	1,148	18	42
YK	343	141	42

- Overall, drug offences were down in 2012 (**-5%**) from 2011.

Motor Vehicle Theft

In 2012 there were **77,939** motor vehicle thefts reported to police, down **-7%** from 2011 and down **-57%** from a decade ago.

- on average there was one motor vehicle theft every seven minutes.
- the motor vehicle theft rate was **223** per 100,000 population.
- the most vehicles reported stolen was in Quebec (**20,820**) while the Yukon had the fewest vehicles stolen (**147**).

Police-Reported Motor Vehicle Thefts

Province/ Territory	Rate	Motor Vehicle Thefts	Rate change 2011 to 2012
NU	466	157	+5%
NWT	457	198	-7%
YK	407	147	+25%
SK	401	4,327	-15%
AB	356	13,799	-1%
MB	294	3,725	-5%
BC	272	12,584	-5%
QC	258	20,820	-8%
NB	151	1,143	-6%
ON	141	19,047	-9%
NS	140	1,327	+2%
PEI	109	159	+28%
NF	99	506	-15%
CANADA	**223**	**77,939**	**-7%**

- Most CMAs reported declines in motor vehicle thefts. Several reported double digit decreases including Abbotsford-Mission, BC (**-38%**), Saskatoon, SK (**-37%**), Thunder Bay, ON (**-31%**), Saguenay, QC (**-25%**), Guelph, ON (-23%), Trois-Rivieres, QC (**-20%**), Brantford, ON (**-19%**), Barrie, ON (**-18%**), Kitchener-Cambridge-Waterloo, ON (**-17%**) and St. John's, NF (**-15%**).

Top Ten CMA Vehicle Theft Rates per 100,000

CMA	Rate	CMA	Rate
Regina, SK	473	Calgary, AB	323
Kelowna, BC	433	Hamilton, ON	318
Brantford, ON	423	Montreal, QC	312
Saskatoon, Sk	364	Winnipeg, MB	301
Edmonton, AB	326	Vancouver, BC	294

- Eight CMAs saw an increase in their motor vehicle theft rates; Windsor, ON (**+30%**), Peterborough, ON (**+14%**), Greater Sudbury, ON (**+12%**), Ottawa, ON (**+9%**), Kingston, ON (**+2%**), and Calgary, AB, Victoria, BC and London, ON all **+1%**.

MOST POPULAR AUTO THEFT TARGETS

On December 13, 2012 the Insurance Bureau of Canada released its annual list of the most frequently stolen vehicles in Canada. According to the report there is an increasing involvement of organized crime in auto theft as evidenced by the appearance of all-terrain vehicles on the list.

TOP 10 STOLEN AUTOS - Canada 2012

	YR	MAKE	MODEL
1	2000	Honda	Civic SiR 2-door
2	1999	Honda	Civic SiR 2-door
3	2006	Chevrolet	TrailBlazer SS 4-door 4WD
4	2007	Ford	F350 SD 4WD PU
5	2005	Cadillac	Escalade 4-door AWD
6	2006	Ford	F350 SD 4WD PU
7	2002	Cadillac	Escalade 4-door 4WD
8	2005	Ford	F350 SD 4WD PU
9	2004	Ford	F350 SD 4WD PU
10	1999	Acura	Integra 2-door

Source: Insurance Bureau of Canada www.ibc.ca

ODOUR PLUS PROVIDES REASONABLE SUSPICION FOR ASD

R. v. Mitchell, 2013 MBCA 44

At about 2:00 am a police officer pulled a vehicle over after seeing it being driven without its headlights on. The accused was driving and there were three passengers. The officer noted the accused had "slightly glassy eyes" and there was a "smell ... of alcohol from inside the vehicle." When asked if he had any alcohol to drink, the accused said, "Yeah, a couple of beers at a friend's house, earlier." But the officer did not ask when the accused had been drinking, whether the passengers in the vehicle had been drinking nor when the drinking had begun or stopped. An approved screening device (ASD) demand under s. 254(2) of the *Criminal Code* was made and the accused failed at the roadside. He was arrested and a breathalyzer demand was given. He was taken to the police station and readings of 110mg% were obtained. He was charged with driving over 80mg%

Manitoba Provincial Court

The trial judge found that the accused's s. 8 *Charter* rights had been breached because the threshold for a reasonable suspicion under s. 254(2) (ASD demand), although very low, was not satisfied by the simple admission of having consumed alcohol. In his view, the officer should have done a more thorough investigation. "Absent the accused's admission that he had consumed alcohol at some point on that particular day, it is very difficult for the court to draw the conclusion ... subjectively, that the officer should have had reasonable suspicion this individual had alcohol in his body at the material time," he said. "The observations of the officer at the time of the stop required, at least in my view, a further investigation and not ... the decision of the officer to leap directly to an approved screening device because there was alcohol somewhere within that automobile." The judge nevertheless admitted the breath samples under s. 24(2) and convicted the accused of driving while over 80mg%.

Manitoba Court of Queen's Bench

The appeal judge agreed that the accused's s. 8 *Charter* rights had been breached and the officer could have done a better investigation by making enquiries into his drinking history. "The smell of alcohol from inside the vehicle could clearly have been coming from its other occupants with [the accused] simply acting as the designated driver," said the appeal judge. "This must all be evaluated in the context of the constable's stopping the vehicle, attending at the driver's window, securing [the accused's] driver's license/vehicle registration, and making the determination to conduct the ASD test all within the passage of three minutes or less." The appeal judge, however, excluded the breath samples as evidence and entered an acquittal.

Manitoba Court of Appeal

The Crown contended that the trial judge and the appeal judge both erred in finding that the accused's s. 8 rights had been breached. In its view, the accused's admission of alcohol consumption by itself was sufficient to provide objective grounds for an ASD demand and that there was no requirement to do a follow-up investigation about drinking history. In addition, the Crown submitted the officer had more than a mere admission of alcohol consumption. The vehicle did not have its lights on and there was an odour of alcohol emanating from it. The accused, on the other hand, suggested that when he said he had two beers earlier, his answer was a qualified, ambiguous one. Without further clarification as to when he was drinking or other indicia of consumption, there were insufficient grounds to justify the ASD demand.

After considering the important investigatory function and purpose of the ASD, Justice Monnin, writing the Court of Appeal's opinion, considered the meaning of the words "reasonable grounds to suspect that a person has alcohol … in their body"

as found in s. 254(2). Citing earlier case law, Justice Monnin noted the following:

- There are two components to reasonable grounds – whether the police officer had a subjective belief, honestly held, that he had reasonable grounds to demand a breath sample and whether a reasonable person in the position of the police officer would conclude that there were reasonable grounds for the demand;
- In weighing the evidence, the court should take into account the totality of the circumstances known to the police officer and should not examine and test each piece of evidence and each factor individually;
- The question is not whether the facts, circumstances and inferences ultimately prove to be true, but whether it was reasonable for the police officer to believe, at the time, that the facts and circumstances were true, to draw the inferences that were drawn and to rely on them at the time of the breathalyzer demand;
- Reasonable grounds to suspect is a less demanding standard than reasonable grounds to believe;
- Reasonable suspicion requires only that the belief be one of a number of possible conclusions based on the supporting facts, not a probability.

In this case, the Court of Appeal found there was more than the mere admission of alcohol consumption by the on which to assess the objective element of a reasonable suspicion under s. 254(2):

> I am not prepared to go as far as saying that a simple admission of alcohol consumption by a driver is, in and of itself, sufficient to provide reasonable grounds on which to base an ASD demand, as each case must be considered on its own facts. From a common sense perspective, however, it would be rare, if ever, that there would be an admission of alcohol consumption with nothing else – i.e., evidence as to why the vehicle was stopped, when (especially the time of the day and of the year) and where it was stopped, what was the driver's condition, how did he or she react to the police, what were the driver's exact words and how were they spoken, etc. These are all important factors to take into account. It is important to remember that it is the totality of the circumstances known to the officer, viewed together, that must be considered in determining whether there was a reasonable basis for his or her suspicion. Each indicia or piece of evidence is not to be examined in isolation.

BY THE BOOK:

Testing for presence of alcohol: ***Criminal Code***

s. 254(2) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, operated or assisted in the operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol:

...

(b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

"It is important to remember that it is the totality of the circumstances known to the officer, viewed together, that must be considered in determining whether there was a reasonable basis for his or her suspicion. Each indicia or piece of evidence is not to be examined in isolation."

> In this case, the trial judge might have found the manner in which the officer conducted his investigation to be wanting, but the facts remain that the accused was driving at night, on a busy thoroughfare, without lights, that there was an odour of alcohol emanating from the car and the accused, in answer to a legitimate question in the circumstances, acknowledged that he had consumed alcohol. ... Both the trial judge and the appeal judge erred by focussing on the words of the accused's admission without considering them in the context of all of the evidence known to the officer. In so doing, each misapplied the applicable legal principles, thereby committing an error of law. In my view, after considering all of the evidence known to the officer, he had reasonable grounds to make the ASD demand when he did. It was an error in law by the appeal judge to find otherwise.
>
> For the reasons I have already stated, rarely will there be a need for a police officer to obtain an alcohol consumption history from a driver. That is not what the legislation requires or what was intended by it. As explained earlier, the purpose of s. 254(2) is to provide an investigative tool that briefly detains a driver with minimum inconvenience and intrusion. [paras. 35-37]

The appeal judge erred in finding a s. 8 *Charter* breach. The police met the statutory "reasonable suspicion" standard for making the ASD demand. The accused's conviction at trial for driving over 80mg% was reinstated.

Complete case available at www.canlii.org

British Columbia Police & Peace Officers' Memorial Service
Sunday, September 29th, 2013
British Columbia Legislature
Victoria, BC

Note-able Quote

"Punishment is the last and the least effective instrument in the hands of the legislator for the prevention of crime." - John Ruskin

CONFIDENTIAL INFO + OBSERVATIONS & INFERENCES PROVIDE GROUNDS

R. v. Fortune, 2013 ONCA 421

A police officer received information from a number of confidential informants and one anonymous tipster that the accused was selling heroin from his residence. A telewarrant under the *Controlled Drugs and Substances Act* (*CDSA*) was applied for and granted. The ITO covered a nine month period and included information about several heroin purchases from the accused at his residence. Each of the informants was a heroin user or addict with previous convictions and a familiarity with the drug trade. At least two of them had provided information to police on prior occasions which resulted in the arrests of several people and a conviction of one of those arrested for a trafficking offence involving heroin. As well, the ITO contained information from another confidential informant and an anonymous tipster that the accused and his girlfriend were selling heroin from their apartment in August 2009. This information was consistent with previous source information so police surveilled the accused's residence. Shortly after a suspected heroin supplier met with the accused, vehicular and foot traffic to his residence increased with visitors remaining for only a few minutes. Upon executing the warrant, police located 4.39 grams of heroin, over $3,000 cash and trafficking paraphernalia, including a scale, tin foil and nearly six dozen baggies.

Ontario Court of Justice

The accused challenged the validity of the search warrant arguing there was insufficient information upon which the justice of the peace (JP) could have granted the warrant. The judge, noting that he was not to substitute his own view for that of the issuing JP, found there was reliable evidence in ITO that might reasonably be believed and sufficient to support the granting of the search warrant for heroin was in the residence. The accused was convicted of

possessing heroin for the purpose of trafficking and possessing proceeds of crime. He was sentenced to two years less a day and probation for three years, a 10-year weapons prohibition and forfeiture of the money and drug paraphernalia seized.

Ontario Court of Appeal

The accused argued that the ITO only supported a reasonable suspicion that heroin might be present in his home and did not rise to the level of a credibly-based probability, the standard required for the issuance of a CDSA search warrant. In his view, (1) his reputation as a suspected heroin dealer, (2) the appearance of an alleged but unconfirmed heroin supplier at his home and (3) increased vehicular and foot traffic at his home after the alleged heroin supplier left were, neither alone nor in combination, sufficient factors capable of establishing the credibly-based probability that heroin would be found.

The Ontario Court of Appeal, however, disagreed. "The ITO included information from four different confidential informants, as well as an anonymous tipster, along with the results of various police investigations and physical surveillance of the [accused's] residence and activities contemporaneous with his arrest on August 26, 2009," said the Court. "[I]t was open to the justice of the peace to conclude from a consideration of the contents of the redacted ITO, together with reasonable inferences arising from that information, that there were reasonable grounds to believe that the [accused] was trafficking in heroin from his residence on August 26, 2009, and that a search of the premises would yield the drug, assorted paraphernalia associated with trafficking, and the proceeds of trafficking activity." The reviewing judge properly concluded that the ITO contained sufficient reliable information on the basis of which the telewarrant could have issued, the search did not breach s. 8 of the *Charter* and the items seized were properly admitted in evidence.

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

PROPER CONSIDERATIONS FOR VOLUNTARINESS OWED CONSIDERABLE DEFERENCE

R. v. Benham, 2013 BCCA 276

After a 35-year-old woman was found strangled in her home, the accused was arrested for murder, but later released without being charged. The deceased and the accused had a daughter together and were living with each other (along with the accused's father) for a month following a lengthy separation. Although not charged with murder, the accused was charged with breaching a provision of an undertaking for having contact with the deceased. The undertaking pertained to charges of assault that had been laid against the accused several months earlier. He plead guilty to the breach charge, was given a short seven day jail sentence and reported to a probation officer upon his release. The probation officer told the accused that she wished to review the bail order and the peace bond with him, and asked him why he had breached the no-contact order by attending the deceased's residence. He told the probation officer that he had gone to his daughter's birthday party, decided to stay overnight (which was demonstrably untrue because he was living there) and, when he woke in the morning, he found the woman dead beside him on the bed. He also told the probation officer that he took his daughter into another room to watch a video and asked his father to call paramedics and police. He was subsequently charged with first degree murder.

British Columbia Supreme Court

During a *voir dire* to determine the admissibility of the accused's statement to the probation officer, the judge ruled that the probation officer was not a person in authority such that the Crown was required to establish beyond a reasonable doubt that the statement was voluntary. In the judge's view, there was no evidence as to the accused's understanding of the probation officer's role nor whether he believed she had some ability to influence the investigation or prosecution of a murder charge.

At the time the statement was made, the accused was not charged with murder nor did the probation officer play a role in the investigation or prosecution of any crimes other than the breaches. Furthermore, even if the probation officer was a person in authority, the statement was nonetheless voluntary. There were no inducements (threats or promises) nor any oppressive circumstances. As well, when the accused made his statement he was not charged with murder, the probation officer was not conducting an interview in relation to the death and the accused was aware of his rights because he had talked to his lawyer and received advice. The judge also found the accused "clearly had an operating mind." The Crown had proven voluntariness beyond a reasonable doubt and the statement was admissible. As a result of this evidence, along with other circumstantial evidence including significant forensic evidence, the accused was convicted of second degree murder.

British Columbia Court of Appeal

The accused contended, among other grounds, that the trial judge erred in admitting his statement made to the probation officer. In his view, the evidence overwhelmingly supported the fact that he subjectively believed he was required to answer the probation officer's questions and that he believed she had a role to play in the murder investigation and prosecution. Since he was not told he was free to refuse to answer the probation officer's questions, he suggested a reasonable doubt existed about whether his responses were voluntary. The Court of Appeal, however, disagreed. Justice Frankel, writing the Court's opinion, first found it unnecessary to determine whether the probation officer was a person in authority. Assuming she was, the trial judge did not err in finding the accused's statement voluntary. Provided judges properly instruct themselves on the law regarding voluntarines and the factors to consider in determining the issue, they are owed considerable deference to their findings. In this case, the Court of Appeal was not entitled to re-weigh the evidence and come to a different conclusion. The trial judge's findings were open to her on the evidence.

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

WARRANTLESS ENTRY: OBJECTIVE BASIS MUST SUPPORT SUBJECTIVE BELIEF

R. v. Jones, 2013 BCCA 345

A mother called 911 and asked for an ambulance after her visiting daughter, who was bipolar, refused to leave the house when asked to do so. While her daughter remained in the house, the mother went outside and waited in her vehicle for the ambulance to arrive. The ambulance requested police attendance. An officer was dispatched to a "mental health issue between a daughter and a mother" and told the daughter was "freaking out." When the officer arrived, the mother was outside sitting in her vehicle. She confirmed her daughter was the only person in the house. She said her daughter was upstairs "freaking out" and wanted her removed. She gave the officer a key to the residence and waited in her vehicle. She did not give the officer permission to search the house and, if asked, would have refused entry for that purpose. The officer waited five minutes for back-up and nothing untoward was noted during this time.

The officer entered the house and saw the daughter sitting on the stairs. She was quite passive and left the residence when asked without incident. When asked if anyone else was in the house, she said no. When it became clear the officer intended to look around in the house she told him her mother would not want him to do so and he should ask her permission. Although there was no indication of criminal activity or the presence of someone else in the house, the officer decided to search the residence because (1) there was a policy to enter at 911 calls and clear the residence, making sure the situation was fully investigated and (2) to ensure that everything was "all right" and there was no one else in the residence who was either injured or in distress. During the 15-minute search, the officer found a marihuana grow operation contained in three rooms of the house. A warrant was obtained and executed. Police recovered 413 marihuana plants and 788 grams of dried marihuana. The mother (accused) was subsequently charged with drug offences.

British Columbia Supreme Court

The accused argued that the warrantless search of her home breached her s. 8 *Charter* rights. The Crown, on the other hand, submitted (1) the police had express or implied permission to enter and search the residence, (2) under the circumstances the accused had no reasonable expectation of privacy and (3) the search was justified under the general common law power that enables the police to search premises without a warrant where there are public safety concerns. The trial judge rejected the Crown's first two suggestions. The accused had not given the police permission to search her home, only access limited to locating and removing her daughter. Once this was accomplished, the accused maintained her expectation of privacy within her home. The judge did, however, find that police could forcibly enter a private dwelling where there were safety concerns regarding the occupants or the public. Although not every 911 call will lead to a situation in which the police have the authority to search a residence, in the circumstances of this case, the judge found the officer's actions were reasonable. The judge said he "was justified in continuing a search of the premises to determine that there were no other persons involved in the situation who needed assistance, and that there were no other hazards in the house that had occurred as a result of the mental health episode that the accused said had occurred." The evidence was admissible and the accused was convicted of producing marihuana and possessing marihuana for the purpose of trafficking.

British Columbia Court of Appeal

The accused challenged the trial judge's ruling. She argued the search of her residence was not justified by the common law police power to conduct searches related to public safety concerns. In her view, the standard for determining whether the officer's entry into her home was justified was objective; it must be both necessary and reasonable for public protection. She suggested that the trial judge applied a lower standard - a "possibility" of a public safety risk relying only on the officer's subjective view of risk, not an objective view. There was no evidence that anyone else was in the home, injured or needed assistance. The Crown, to the contrary, asserted that the officer acted within the permissible scope of his duties. He was not required to be certain of a risk before entering. In its opinion, lack of information may be a compelling reason to justify police entry and the officer's search was minimally intrusive. He entered only to see if anyone needed help, did not use force and his search was quick and efficient.

Forcible Entry

Citing the Supreme Court of Canada's judgment in *R. v. Godoy*, [1999] 1 S.C.R. 311, Justice Neilson, speaking for the Court of Appeal, noted "the police have a common law duty to protect the public from health and safety risks in responding to [911] emergency calls, and the performance of that duty may, in some circumstances, permit them to forcibly enter and search private premises without authority." However, whether a warrantless search is justified will depend on the circumstances of the individual case. Although Justice Neilson acknowledged that the importance of protecting life and safety will require the police to err on the side of caution, the correct standard to apply is objective. There must be a reasonable basis for a police officer's subjective belief that a public safety concern requires a search.

In this case, the trial judge erred in holding that there was an objective basis to support the officer's search:

- There was no suggestion of criminal activity in the 911 call - an ambulance, not police, was requested;
- The call did not reveal any precise safety threat or risk. The information – a "mental health issue" and a daughter "freaking out" – was nebulous.
- Nothing on the officer's arrival indicated exigent circumstances. He waited several minutes for back-up to arrive and, during that time, neither saw nor heard anything to indicate immediate action was required.
- When the officer approached the house, no mental health risk emerged. He immediately located the daughter just inside the front door

and observed nothing else of concern in the house. She was passive and cooperative, came out without protest, answered his questions lucidly and told him her mother would not want him to search the house.

- Several "possibilities" enumerated by the trial judge to justify the search were speculative and there was no evidence to objectively support them. These possibilities included (1) there may have been other persons involved or something untoward happening upstairs, (2) she could have been making plans to harm herself and had only been interrupted by the officer entering the premises or (3) she could have been in the process of creating a hazard, such as setting fire to the premises, which would have created a dangerous situation for both herself and anyone else who might have re-entered the premises.
- Although the limited information initially available to the officer did not eliminate the potential that this was a grave and volatile mental health situation, within minutes of his arrival the situation was significantly transformed. The daughter was not "freaking out" or volatile, ambulance personnel were present or en route to handle any mental health concerns and the accused, while upset, was secluded from her daughter and secure in her car.

Once the officer located the 911 caller (the accused), determined the reason for her call, and provided the requested assistance by removing her daughter, his authority to be in the house ended.

Plus, the trial judge failed to consider alternatives available to the officer before he decided to search further in an effort to ensure "everything was all right". He could have waited until the accused calmed and then questioned her and her daughter about the events leading up to the 911 call. Or he could have asked the accused to enter the residence and ensure all was well, and then arranged for the daughter to leave the area in whatever manner was appropriate.

In this case, there was no objective indicia of criminal activity or an identifiable threat to public safety in the 911 call or the circumstances that greeted the police on their arrival, such as the presence of a gun or other weapon, an assault or other injury, or an injury related to an operating drug lab. The absence of such concrete indicators of crime or threat to public safety did not justify an immediate search to "make sure everything was all right". The search was not a necessary and reasonable violation of the accused's rights under s. 8 of the *Charter*.

On a final note, the Court of Appeal recognized that the reasonableness of police action will be factually driven and any such analysis involves weighing privacy interests against public safety:

> I acknowledge the Crown's submission that allowing this appeal may have a chilling effect on police response to public safety concerns arising from 9-1-1 calls. I also recognize the difficulties these situations present to the police in that they require rapid judgment calls in situations where all the circumstances are not known, whereas the courts examine them in a tranquil setting with the benefit of hindsight. As a result, I agree it is appropriate to err on the side of caution in permitting a citizen's privacy rights to trump the objectives of public protection and safety. Nevertheless, not every 9-1-1 call engages issues of public protection, and the requirement that a search be both reasonable and necessary does not constitute an unwarranted interference with the duty of police to protect the public. It remains to analyze each situation on its own facts in an effort to balance these competing interests. [para. 42]

Admissibility

The Court of Appeal excluded the evidence under s. 24(2) of the *Charter*. Although the marihuana plants and product seized by police were highly reliable evidence and society had a significant interest in having the case adjudicated on its merits, the s. 8 breach was serious, the intrusion into the accused's home had a significant impact on her Charter-protected privacy rights. Without the evidence, the Crown's case collapsed. The accused's appeal was allowed, her convictions set aside and acquittals were entered.

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

RANDOM STOP PURPOSE MUST RELATE TO ROAD SAFETY INTEREST

R. v. McCammon, 2013 MBCA 68

At about 2:00 am two patrol officers saw the accused's vehicle on a road leading to a park on the outskirts of the city. The officers thought the vehicle was suspicious, being in the area late at night, and pulled it over. A computer check revealed the vehicle had not been reported stolen. An officer asked the driver what she was doing in the park at that time. The officer learned she had been drinking and asked her to provide a breath sample into an approved screening device. She failed the test and was arrested. She was taken back to the police station, provided breath samples over the legal limit and was charged with driving over 80mg%.

Manitoba Provincial Court

The trial judge ruled that the true purpose of the traffic stop was to check for suspicious activity and not for reasons related to road safety. It was a car being driven late at night in an area where there were not a lot of vehicles around. In his view, the officer could not rely on the provisions of Manitoba's *Highway Traffic Act* (s. 76.1) as authority for the stop. Since there was no other lawful basis for the stop, it was arbitrary and breached s. 9 of the *Charter*. The breath samples were excluded under s. 24(2) and the accused was acquitted.

Manitoba Court of Queen's Bench

The Crown argued, in part, that the trial judge erred in finding no lawful basis for the vehicle stop and therefore a s. 9 breach occurred. The appeal judge noted that motor vehicle stops do not have to be based upon suspicion of a driving infraction, but can be completely random as long as the purpose for the stop is related to road safety. The validity of such a detention, however, must be assessed at the front-end of the stop - what motivated it to begin with. A stop will not be rendered valid simply because the police pursue highway safety issues once the accused is detained, such as asking for a driver's licence and vehicle registration. In this case, the appeal judge found the trial judge's ruling that the true purpose of the stop - to investigate general suspicion about criminal activity - was not unreasonable. The decision to exclude the evidence was upheld and the Crown's appeal was dismissed.

Manitoba Court of Appeal

The Crown sought leave to appeal before the Manitoba Court of Appeal. But Justice Monnin agreed that the trial judge's finding was not unreasonable. The purpose of the stop was not related to highway safety but rather to rule out or investigate a general suspicion of criminal behaviour. "Highway traffic stop authority cannot be a means to conduct an unfounded general inquisition or a comprehensive check for criminal activity," he said. The police cannot validate an otherwise illegal stop by pursuing highway safety issues once an accused is detained. He also found the Crown's argument that the court should focus on the officers' actions or conduct, rather than their suspicions and thoughts, was ill-conceived. "The trial judge was entitled to assess the police officers' evidence as to the reasons motivating the stop in order to assess whether there was a genuine highway traffic interest in the stop," he said. There was no error in finding that highway traffic concerns were not the motivation for the stop and it was not justified on any other basis, thus a s. 9 *Charter* breach. As for the exclusion of evidence, the appropriate factors were considered in the s. 24(2) analysis which was entitled to deference. The Crown's application for leave to appeal was dismissed.

Complete case available at www.canlii.org

911 CALL JUSTIFIES POLICE ENTRY

R. v. Evon, 2013 ONCA 10

At 10:30 pm police received a lengthy 911 call of shots being fired and flashes being seen near the accused's residence. The 911 call referred to

three males and three females in the area. Only the accused was identified by name. Several police units responded to the call. Most were members of the Emergency Services Unit whose duties include attending high risk calls. The accused was known to all of them either through past contact or from police intelligence. Three males were found in front of the residence and three females were leaving the area. The males were directed at gunpoint to stop and get on the ground. They were detained and patted down. No firearm was located but police continued to be concerned that there might be a gunman or injured person in the residence so they entered it at 10:50 pm. When searching any place where a person could be hiding, an officer saw drugs and drug paraphernalia in plain view in a bedroom. In another bedroom, another officer noticed a duct taped package on a shelf. He initially thought it was a kilogram of cocaine but, after picking it up and looking at it, concluded it was a bundle of money. He returned the bundle to the shelf. The officers exited the house at 11:00 pm and sought and executed a telewarrant the following morning. Cash, bear spray and drugs, including crack cocaine, powder cocaine, ecstasy, Oxycodone and Morphine were seized. The accused was charged with several drug, weapon, property and proceeds of crime offences.

Ontario Superior Court of Justice

The accused argued, among other grounds, that the initial entry into the house was unreasonable and that this tainted the telewarrant. The judge, however, found the investigation of the 911 call fell within the general scope of police powers and was justified in the circumstances. "I found that the police concerns were for an unknown injured person or an unknown person with a firearm," he said. "The basis for the concern was information obtained from a 911 caller. The relevant portions of that call had been confirmed. In my view, the police decision to enter the residence was well grounded both subjectively and objectively." As for the telewarrant, it was properly issued despite a misleading statement and some material omissions. The accused was convicted on many of the charges.

Ontario Court of Appeal

The accused appealed his convictions, submitting the police did not have justifiable grounds to search the house. But the Court of Appeal disagreed. The trial judge's finding was amply supported by the evidence including the specificity of the 911 call, the confirmation of the call, the accused's reputation with police and the officers' evidence. As for the officer examining the package found in the house, he exceeded his authority during the search. However, because the plain view observations of the other officer supported the issuance of the telewarrant, nothing turned on that examination.

Complete case available at www.ontariocourts.on.ca

Editor's note: Additional facts taken from *R. v. Evon*, [2011] O.J. No. 6563 and *R. v. Evon*, [2010] O.J. No. 6286.

EVEN IF DETENTION ARBITRARY, EVIDENCE ADMISSIBLE

R. v. Allison, 2013 ONCA 461

Two members of Toronto's anti-violence police unit (TAVIS) went to an area to proactively talk with individuals. They wanted to ensure community safety because there had been a shooting two days earlier and police were concerned that there may be retaliation. The accused, wearing clothing sometimes associated with gangs including baggy blue jeans and a blue shirt, was seen riding his bicycle about 50 metres from the officer's police car. As an officer approached and said "Hi," the accused looked shocked and suddenly changed body language. He adjusted his waistband and raced away on his bicycle onto the sidewalk at about 30 km/h. When the officers pursued in their vehicle with siren and lights activated, the accused continued to bike away from them at a high rate of speed. About a minute later he fell over his bicycle onto the ground, landing on his back. An officer said, "Show me your hands." When asked why he was running, the

accused said he was carrying a gun. He was handcuffed and patted down. Police found a 9 mm Ruger pistol and ammunition. He was arrested, advised of his right to counsel and charged with six firearm related offences.

Ontario Superior Court of Justice

The accused sought to have the handgun and ammunition excluded as evidence being the product of ss. 8, 9 and 10 *Charter* breaches. The judge found the accused had been detained when police commanded him to show his hands - a reasonable person in his circumstances would have concluded that he had no choice but to comply. The detention was arbitrary since the police did not have reasonable grounds to suspect the accused was connected to a particular crime. They were not investigating a crime, did not associate his clothing to gang activity and he discarded no contraband before the detention. In addition, they may have been mistaken about him reaching for his waistband; they were chasing him in their car as he fled on a bicycle. "[H]e had the right to refuse to answer questions or to go as he pleased," said the judge. "Whether he walked rode his bicycle slowly or quickly should not be a deciding factor. … The decision to leave quickly, on its own, does not, in my view, raise reasonable grounds to suspect that the individual is connected to a known or suspected crime. … [His] decision to leave in the manner he did, rather than stay and refuse to answer questions, does not constitute grounds for the police to detain him." The judge, however, did not find breaches of ss. 8 or 10. "Public safety issues required that [he] be searched as soon as he informed the officers that he had a gun," said the judge. As well, until the gun was safely removed, the police had no reasonable opportunity to advise the accused of his rights. Despite the arbitrary detention, the evidence was admitted under s. 24(2). The breach was neither serious nor deliberate. The officers acted in good faith and their behavior was neither egregious nor abusive. They acted under exigent circumstances with a concern for public safety. The gun was also highly reliable evidence and essential to the trial. The accused was convicted of several weapons offences.

Ontario Court of Appeal

The accused argued that the trial judge erred in her s. 24(2) *Charter* ruling. The Crown, on the other hand, suggested that the trial judge erred in finding a s. 9 breach in the first place. In the Crown's view, the police were justified in detaining the accused for investigative purposes and, in any event, the trial judge properly decided the s. 24(2) issue. The Court of Appeal found it unnecessary to decide whether the trial judge erred in concluding that the accused had been arbitrarily detained. Even assuming a s. 9 breach occurred, the evidence was nonetheless admissible under s. 24(2).

The trial judge's finding that police acted in good faith and their conduct was neither egregious nor abusive was reasonably supported by the following considerations taken together:

- **Context**: The police were patrolling a high crime area where there had been a fatal shooting two days earlier.
- **Change in demeanor**: The accused looked shocked when he first saw the police.
- **Police's perception**: The police believed, albeit apparently mistakenly, that on seeing the officers the accused put his hand to his waist.
- **Flight**: The accused fled by bike immediately on seeing the police.
- **Police questioning**: The trial judge found the question "Why did you run?" innocuous.
- **Period of detention**: The accused was detained only briefly before telling the police that he had a gun.

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: Additional facts taken from *R. v. Allison*, 2011 ONSC 1459.

ONUS ON CROWN TO SHOW COMPLIANCE WITH s. 25 CRIMINAL CODE

R. v Davis, 2013 ABCA 15

A police officer was dispatched to investigate a report that a person armed with a butcher knife was riding a bicycle around a mall parking lot. The officer attended the area and saw a young man, matching the description given, riding a bike. Following the man down a street, the officer sounded his air horn twice and activated the police car's emergency lights. But before the officer could get out his car, the accused charged at the officer with a knife in his hand. Despite resistance from the accused, the officer was able to open his door and exit his car. While the accused held the knife over his head, the officer told him to back up and drop the knife and gave an officer in distress signal over the radio. The accused picked up his bike and walked away. The officer, with revolver drawn, followed him and shouted many times at him to drop the knife. He continued to walk away and, when he faced the officer, was pepper sprayed in the face with no effect.

As the accused continued to walk away, the officer demanded he drop the knife while downgrading the radio alert for assistance. When the accused moved in the direction of a mall where people had been seen earlier, the officer called for a Taser. Concerned his options would be limited if the accused reached a populated area, he decided that he would not let him get near people while still in possession of the knife. When the accused turned to face the officer and raised the knife in the air, he shot him twice; once in the neck and once in the chest. He was taken to hospital for treatment of his life threatening injuries and later charged with possessing a weapon (a knife) for a dangerous purpose, assaulting a police officer and assault with a weapon.

Alberta Court of Queen's Bench

The accused's *Charter* arguments, including breaches of ss. 7 (life liberty and security) and 12 (cruel and unusual punishment) due to excessive force, were

BY THE BOOK:

Protection of persons acting under authority: ***Criminal Code***

s. 25 (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(a) as a private person,

(b) as a peace officer or public officer,

(c) in aid of a peace officer or public officer, or

(d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

...

When not protected

(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

When protected

(4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if

(a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;

(b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;

(c) the person to be arrested takes flight to avoid arrest;

(d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and

(e) the flight cannot be prevented by reasonable means in a less violent manner.

rejected. The judge concluded that the accused bore the onus of demonstrating that his *Charter* rights were breached by establishing on a balance of probabilities that the requirements of s. 25 of the *Criminal Code* had not been met. The onus was not on the Crown to prove the factors justifying the use of force. The judge, nevertheless, did find the officer was justified in acting as he did. The accused's *Charter* rights had not been breached through the use of excessive force. The accused was convicted of all three charges and given a suspended sentence, taking into account that he had been shot and injured.

Alberta Court of Appeal

The accused appealed his convictions arguing, in part, that the trial judge erred in determining whether his *Charter* rights were breached. In his view, the shooting was unnecessary and therefore excessive force was used. Contrary to the trial judge's ruling placing the burden on him to demonstrate the officer did not act reasonably, he contended that once he showed force causing grievous harm was used by police, the evidentiary burden shifted to the Crown to prove that the force was reasonable in all the circumstances and thereby justified by s. 25. He submitted that he met the onus by showing that he suffered grievous bodily harm through the use of lethal force and it was now up to the Crown to prove that it was justified.

Who Bears the Burden?

Justices O'Brien and McDonald agreed that the Crown had the evidentiary burden of showing that s. 25 had been satisfied when the provision is relied upon to justify the level of force used in these and similar circumstances. "The section is designed to protect those engaged in law enforcement from civil and criminal liability when they are required to use force in performing their public duties," said the majority. "It is clear, however, that when the section is invoked in this context, the burden falls on the person seeking to rely on the section's protection to prove that it applies." The justices continued:

> Notwithstanding that the overall burden is on the person alleging a Charter breach, the situation is similar to a civil case where the overall burden lies with the plaintiff. Nonetheless, the law imposes an evidentiary burden on the defendant to prove the application of section 25, where he seeks to use it to justify his conduct. Although not completely analogous, this is also similar to the burden placed on the Crown in an application under section 8 of the Charter. Once an accused shows that a search was unlawful, the burden falls to the Crown to show that the search was nonetheless reasonable. This does not reverse the overall burden of proof on the Charter application, which remains with the accused. It just places an evidentiary burden on the Crown with respect to this aspect of the matter. [para. 47]

Despite the trial judge's misstatement of the law, she nonetheless found the officer's use of force justified on a subjective-objective basis and relied upon the principles of proportionality, necessity and reasonableness. She accepted the officer's subjective belief that he had no other choice, at the point of the final confrontation, but to shoot the accused. He would soon reach a point where he was mingling with the public, putting bystanders in danger, and restricting the officer's options to protect public safety. She also tested the objective nature of the officer's belief and found it to be reasonable.

The accused's appeal was dismissed.

A Second View

Chief Justice Fraser, authoring a dissenting opinion, agreed with the majority that the trial judge erred by holding that the accused bore the burden of establishing

"[I]f the police use excessive force in apprehending a person, and it results in a Charter breach, then the remedies available include a stay in extreme and extraordinary situations. Alternatively, a remedy may be given at the sentencing stage, or the misconduct may give rise to an award of damages."

that the use of deadly force was not justified under s. 25. Although the burden of proving a *Charter* violation rests with the person alleging the breach, he found this does not mean that an accused must prove the force used was excessive. He stated:

> Once an accused has met the burden of establishing that the police used deadly force against him or her, this constitutes a prima facie breach of s. 7 of the Charter. The evidentiary burden then shifts to the Crown to prove that the force used was justified in the circumstances. The test as to whether the use of deadly force was justified requires a combined subjective - objective analysis. The trier of fact must conclude not only that the police officer subjectively believed that the use of force was necessary in all of the circumstances to protect the police officer or others from death or grievous bodily harm, but also that this belief was objectively reasonable.
>
> This being so, it would be unfair to impose on an accused the burden of proving a negative, namely that the deadly force was not justified. Evidence of the subjective belief of the police officer falls squarely within the exclusive knowledge of the police officer and similarly, evidence as to what was considered reasonably necessary in the circumstances from an objective viewpoint may well be linked to police practices and procedures. This evidence is not within either the ready knowledge or control of an accused.
>
> I would add a word of caution. Where an accused establishes a prima facie Charter breach, it is not proper to speak of a burden being imposed on the police. Those cases that refer to the burden shifting to the police are civil ones in which the police were defendants. However, in a criminal trial, the police are neither parties to a prosecution, nor defendants. Where an accused establishes a prima facie breach of s. 7 of the Charter because deadly force has been used against him or her, what is at issue is the police power of the state. The evidentiary burden then shifts to the Crown to prove on a balance of probabilities that the police actions were justified in accordance with the limitations in s. 25 of the Code and thus in compliance with the principles of fundamental justice.
>
> Therefore, once [the accused] established a prima facie breach of s. 7, the evidentiary burden shifted to the Crown to establish that the use of deadly force by the police officer complied with the limitations in s. 25. [references omitted, paras. 78-81]

Since the trial judge erred in imposing the burden on the accused, she conducted her analysis of whether the use of deadly force was justified from the wrong perspective:

> [A]t no time did the trial judge ever consider whether the Crown had established on a balance of probabilities that the police officer's use of deadly force was justified at law. Reasonableness is not only a matter of what a judge in a calm and reflective environment with the benefit of hindsight might now think. But equally reasonableness is not only a matter of what the

"Under the law, police officers are accorded a significant degree of latitude in their use of force to complete an arrest, and appropriately so. Courts have often stressed that police actions cannot be measured to a standard of perfection but must be assessed in light of the dangerous and exigent circumstances in which the police often find themselves. However, police officers do not have an unlimited right to inflict harm on a person, much less deadly force, in the execution of their duties. Under s. 25 of the Criminal Code, police use of force is "constrained by the principles of proportionality, necessity and reasonableness". Indeed, because of the latitude given to the police in exercising their duties, courts must be vigilant in ensuring that the limitations on the police power of the state that do exist are upheld. The rule of law binds everyone in Canada including the police."

> officer at the scene thought. The finality of deadly force demands both accessible and acceptable standards. As I have explained, the trial judge here failed to test the police officer's subjective belief about the necessity for deadly force against the objective standard mandated by law. That failure means that her conclusion about whether the deadly force was justified cannot stand. [para. 97]

Justice Fraser would have ordered a new trial.

Complete case available at www.albertacourts.ab.ca

Editor's note: This case is under appeal to the Supreme Court of Canada.

PROSPECTIVE PRODUCTION OF FUTURE TEXT MESSAGES IS AN INTERCEPT

R. v. TELUS Communications Co., 2013 SCC 16

The police obtained a general warrant under s. 487.01 of the *Criminal Code* with a related assistance order requiring Telus provide copies of any text message sent or received by two named wireless subscribers over a two week period that were stored on Telus' computer database. As well, the warrant required the production of subscriber information identifying any individuals who sent text messages to, or received text messages from, the two targeted subscribers. At the time, Telus would routinely make copies of all text messages sent or received by its subscribers and store them for 30 days.

Ontario Superior Court of Justice

Telus made a motion arguing the warrant was invalid because the police had failed to satisfy the requirement under s. 487.01 (1)(c) that a general warrant could not be issued if another provision in the *Criminal Code* was available to authorize the technique used by police. In its view, the police should have obtained an authorization to intercept private communications and therefore a general warrant was not available. The Crown, on the other hand, submitted that the messages on Telus' computer database were not real-time communications (thus their retrieval not an intercept). The Crown opined that the police were therefore permitted to use the general warrant power to obtain text messages stored on a service provider's computer. The judge found that a general warrant could be used to seize the content of private text messages from a telecommunication service provider and the police had not engaged in an "interception." The judge dismissed Telus' application, but did rescind the part of the warrant requiring production of historical messages predating the issuance of the warrant because a production order was available to obtain them.

Supreme Court of Canada

Telus again appealed and the Supreme Court of Canada was split in its ruling. Three members of the Court ruled that the text messages were private communications and the prospective production of future text messages required an authorization to intercept under Part VI of the *Criminal Code*. Under s. 487.01(1)(c) the Crown is only entitled to use a general warrant where it can be shown that no other provision would provide for a warrant, authorization or order permitting the technique. If there is another provision available, a general warrant can not be used. "Viewed contextually, therefore, s. 487.01(1)(c) stipulates that the general warrant power is residual and resort to it is precluded where judicial approval for the proposed technique, procedure or device or the 'doing of the thing' is available under the Code or another federal statute," said Justice Abella. "In other words, s. 487.01(1)(c) should be broadly construed to ensure that the general warrant is not used presumptively. This is to prevent the circumvention of more specific or rigorous pre-authorization requirements for warrants." Thus, if there was an "intercept," a general warrant could not be used as it would fail the "no other provision" requirement.

Here, "the investigative technique authorized by the general warrant ... allowed the police to obtain prospective production of future text messages on a daily basis for a two-week period directly from a service provider." The majority found Part VI applied to the prospective and continuous production of text

BY THE BOOK:

Information for general warrant: *Criminal Code*

s. 487.01 (1) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if

...

(c) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.

messages and the fact that the messages were stored in Telus' computer did not mean their retrieval was not an "intercept":

> The use of the word "intercept" implies that the private communication is acquired in the course of the communication process. In my view, the process encompasses all activities of the service provider which are required for, or incidental to, the provision of the communications service. Acquiring the substance of a private communication from a computer maintained by a telecommunications service provider would, as a result, be included in that process. [para. 37]

And further:

> Part VI recognizes the dangers inherent in permitting access to the future private communications of a potentially unlimited number of people over a lengthy period of time. Those are the very risks inherent in the investigative technique in this case. An authorization that permits police to obtain the prospective production of future text messages over a two-week period directly from the communications process used by the service provider is precisely what Part VI was intended to protect. In my view, the investigative technique in this case therefore qualifies as "intercepting private communications" under Part VI.

An interpretation of "intercept a private communication" that includes the investigative technique used by police in this case finds support in the statutory definition of "intercept" in s. 183. The definition includes the simple acquisition of a communication. It does not require the acquisition of the communication itself; rather, the acquisition of the "substance, meaning or purport" of the communication is sufficient. Moreover, this interpretation is harmonious with the scheme and objectives of Part VI, which is drafted broadly in order to regulate and control a wide variety of technological invasions of privacy. Finally, it strikes the appropriate balance between the serious invasion of privacy that results from the surreptitious acquisition of private communications and the evolving needs of effective law enforcement.

The police gained a substantial advantage by proceeding with a general warrant. They did not need the Attorney General's request for an authorization; they did not need to show that other investigative procedures had been tried and failed; they did not need to provide any notice to the target individuals; and they did not need to identify which other individuals' private communications may be acquired in the course of the search.

The general warrant in this case purported to authorize an investigative technique contemplated by a wiretap authorization under Part VI, namely, it allowed the police to obtain prospective production of future private communications from a computer maintained by a service provider as part of its communications process. Because Part VI applied, a general warrant under s. 487.01 was unavailable. [paras. 42-45]

Another View By Two - Substantive Equivalent

Justices Moldaver and Karakatsanis also found the warrant invalid, but for different reasons. In their view, if the technique used was not an

intercept, it was substantively the equivalent of one. "What the police did in this case - securing prospective authorization for the delivery of future private communications on a continual, if not continuous, basis over a sustained period of time - was substantively equivalent to what they would have done pursuant to a Part VI authorization," said Justice Moldaver. "It was thus, at a minimum, tantamount to an intercept." The police should have obtained a wiretap authorization; thus, a general warrant was unavailable.

Dissenting Duo

Justice Cromwell, along with Chief Justice McLachlin, concluded that the investigative technique authorized by the general warrant was not an intercept such that it required a wiretap authorization. Nor was the substantive equivalency test part of the "no other provision" analysis. Moreover, even if it was part of the test, the technique used was not the substantive equivalent of a wiretap authorization. The justices concluded there was no bar to the issuance of the general warrant because the "no other provision" requirement had been met.

Telus' appeal was allowed and the general warrant and related assistance order were quashed.

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

NO DETENTION DURING UNDERCOVER TRAFFIC STOP

R. v. Vuozzo, 2013 ABCA 130

As part of a homicide investigation, police engaged in a 24 scenario "Mr. Big" operation in an effort to obtain inculpatory statements from the accused regarding the murder. In one of the scenarios the police arranged a traffic stop. This ruse involved uniformed police officers stopping a vehicle driven by an undercover officer with the accused and his mentor, another undercover officer, as passengers. This stop occurred shortly after the police and the accused had dug a "grave site," also part of the undercover operation.

WHAT IS A 'MR. BIG' OPERATION?

"A Mr. Big operation involves police posing as gang members with a view to recruiting a suspect. The suspect is asked to perform certain tasks with a "criminal element" to prove his faithfulness and honesty to the gang. The objective is to have the suspect reveal information to establish his trustworthiness, his ability to commit potentially criminal acts or acts in furtherance of a crime, and/or his criminal past. This information is obtained with a view to either the rehabilitation of the suspect's record or to establish his credibility as a criminal." -
Alberta Court of Appeal in R. v. Vuozzo, 2013 ABCA 130 at para. 17.

The uniformed officers were to obtain the accused's already known name during the traffic stop and convey the message to him that a Homicide Unit Detective wanted the accused to call him. The undercover officer driving the vehicle was weaving slightly before the pull over and was instructed to perform a roadside screening test. The other undercover officer (the accused's mentor) remained in the vehicle and told the accused to hand over his cell phone, since he was not supposed to have one. In addition, the mentor told the accused "to be truthful about his name because if he lied, and if the police started 'digging on him … it could draw attention to us and ... [his mentor] couldn't be fingerprinted'".

The undercover mentor was first asked for his identification and then the accused was asked for his name and date of birth. The accused and the undercover officers were directed to place their hands on the car. They were patted down and told to sit on the curb and cross their legs. After police data bases were checked, an officer handed the accused a business card with a detective's name and telephone number on it and told him he needed to contact the detective. When the accused asked "Am I going to jail today?", the officer said "No." The officer then gave directions to the nearest liquor store since the men said they were looking to buy beer. The entire length of the stop was about 12 minutes. Two days later the accused met with the boss (Mr. Big). He provided an inculpatory statement, admitting to striking him with a machete and disposing of the body. The accused was subsequently arrested and again admitted to the killing. He was charged with murder.

"Detention situations are those where the individual, who may be a suspect, knows or reasonably believes that she is under a demand or direction emanating from the person she knows to be a state agent. However, the demand or direction from the state agent that has the detention effect must have legal implications for the person. Were it otherwise, every witness to a car crash who is told to wait until the officer has a chance to interview her will be detained in law."

Alberta Court of Queen's Bench

The judge found that the stop and business card provided about contacting the detective were on the accused's mind when he spoke to the "boss." As for the stop, the judge did not find the accused was detained simply by being in the vehicle when it was pulled over. However, the accused was detained when he was directed out of the vehicle, responded to questions about his name and date of birth, and was patted down, directed to put his hands on the hood and sit on the curb. In the judge's view, the traffic stop was a ruse thereby rendering the stop arbitrary. The judge, however, went on to admit the evidence of the conversation with the "boss," holding that there was no link between the ruse and the accused's statements. These statements, along with other evidence, led to a conviction of second degree murder and break and enter with intent to commit an indictable offence.

Alberta Court of Appeal

The accused argued, in part, that he was arbitrarily detained under s. 9 of the *Charter* when the police stopped him during the scenario and that his right to silence under s. 7 was also breached. He submitted that he had been detained the moment the vehicle was pulled over and it was arbitrary because it was not a valid traffic stop. These breaches during the traffic stop, in his view, influenced (tainted) his conversation with the "boss" and the statements that arose through this arbitrary detention should have been excluded under s. 24(2). The Alberta Court of Appeal, however, disagreed. It found the accused had not been detained, arbitrary or otherwise, during the traffic stop scenario.

Detention?

The Court of Appeal noted that not every interaction wherein a police officer engages an individual in conversation or results in a delay or waiting for police, absent significant physical or psychological restraint, is a detention within the meaning of ss. 9 and 10 of the *Charter*. In this case, there were essential legal ingredients involving the accused's interaction with police lacking from the concept of detention:

> Detention situations are those where the individual, who may be a suspect, knows or reasonably believes that she is under a demand or direction emanating from the person she knows to be a state agent. However, the demand or direction from the state agent that has the detention effect must have legal implications for the person. Were it otherwise, every witness to a car crash who is told to wait until the officer has a chance to interview her will be detained in law. [para. 58]

Here, the accused was told to sit and wait while a database search was done. There was no charge or accusation to inform the accused under s. 10(a). Nor was there any demand or direction with legal consequences made to the accused. Nor was there any "power imbalance" permeating the events that required leveling. "Ironically, when the [accused] asked if he was being arrested, [the officer] told him 'no'," said the Court. "There was no significant physical or psychological restraint." The trial judge erred in finding a detention.

Arbitrary?

Even if there was a detention, it would not have been arbitrary:

"[T]here is no law against lying to criminals."

> Case authority involving police officers who stop motorists arbitrarily (in the sense of having no reason to do so) is not, in our view, relevant to this issue. The officers here had plenty of rational reason to want to stop the vehicle and perform this 'scenario' for the [accused's] benefit. The [accused's] real objection is not a lack of basis to stop the vehicle and provide him with information, it is that the play-acting was false, pre-textual, and intended to mislead.
>
> In other words, the stop was not arbitrary in the sense of lacking a basis. It was planned and intentional. Moreover, on this record, it had ample rational justification as part of the ongoing investigation. Seen through a clarifying legal lens, what the [accused] says converted the interaction into an arbitrary detention is the [accused] having been misled by police. This is not a logical basis to convert a rational form of detention into an arbitrary detention, unless on the facts it can be said that what the police did "bears no relation or is inconsistent with" the law which founds the state action. … In any event, arbitrariness raises an objective question. [references omitted, paras. 43-44]

Further, just because the police action was deceptive did not automatically make the stop arbitrary. "The common law does not forbid the police from seeking to loosen the tongue of suspects, even detainees," said the Court. Nor was this case analogous to a conversation orchestrated by undercover police in a totally controlled cell plant scenario. And, even if it was similar, the police were not actively eliciting inculpatory information nor did they obtain any information they did not already have. Instead, they acted to mislead the accused and there was "no law against lying to criminals." This case was a legitimate stratagem and necessary incident of the undercover operation. The Court added:

> At its highest, the [accused] may have thought the 'boss' could help him get out of the jeopardy of a police investigation. That was no basis for exclusion at common law. In light of the foregoing, there is no departure from the common law authority of police to investigate crime (which has long permitted subterfuges). Accordingly, police actions were not rendered so lawless as to be arbitrary in the sense of bearing no relationship to the legal authority on which it was based.
>
> ... The trickery used by the police was authorized by the common law. Being within the limits of the common law ..., the law which allows criminals to be misled is itself not arbitrary. The trial judge therefore erred in law in her conclusion that there was an arbitrary character to what the police did, even assuming it was a detention … . [paras. 51-52]

Right to Silence

Here, the police inquiry about the accused's name and date of birth was not intended to acquire any self-incriminatory evidence. Furthermore, the prompting by the undercover mentor to tell the truth and give his correct name did not emanate from anyone known by the accused to be a police officer. Although the accused might have been entitled to decline to answer, the officer was nevertheless in the execution of his duty and there was nothing wrong with the officer asking the accused for his name. There was no s. 7 *Charter* breach.

s. 24(2) of the Charter

Even if the accused's *Charter* rights were breached, the judge did not err in declining to find the evidence was "obtained in a manner" that infringed Charter rights. And, if the evidence was linked to a Charter breach, it was nonetheless admissible under s. 24(2). Its admission would not bring the administration of justice into disrepute.

The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

"The trickery used by the police was authorized by the common law. Being within the limits of the common law ..., the law which allows criminals to be misled is itself not arbitrary."

The BC LAW ENFORCEMENT DIVERSITY NETWORK

Presents:

The Psychopathy of an Active Shooter: Profiling, Predicting, Preventing, Responding…

Dedicated to all Victims, Survivors and Responders

RESTRICTED TO LAW ENFORCEMENT PERSONNEL ONLY

Keynote speakers:

Frank DeAngelis, Principal Columbine High School

The tragedy at Columbine redefined the nation. Mr. DeAngelis tells his story from the events to the aftermath. This presentation has rarely been given and in it he reveals the leadership lessons he learned in the focus of an international fire storm. This blunt, straight-forward account provides invaluable insights into managing the after-crisis with students, staff, community and never ending media attention. The takeaways from this presentation should be required reading for every principal in the nation.

John-Michael Keyes, Executive Director, The "I Love U Guys" Foundation

Mr. Keyes shares details of the Keyes family response to the tragic killing of his daughter, Emily at Platte Canyon High School (2006). Deliberate decisions about handling national and local media, finances, donations, community healing, support people and organizations, the creation of The "I Love U Guys" Foundation and more. Mr. Keyes outlines not just the immediate aftermath and response, but events that occurred in the years that followed. The narrative tells how The Standard Response Protocol was developed, describes how it works, and why it is fast becoming a standard in many schools and districts.

Sgt. A.J. DeAndrea, Arvada (CO) Police Department Jeffco Regional SWAT (Retired)

Sgt. DeAndrea was Entry Team Leader at Columbine High School (1999) and Team Leader during the Bulldozer Incident in Granby, CO (2004). He helped devise and execute the tactical plan for the Hostage Rescue at Platte Canyon High School (2006). Again in 2006 he was the Team Leader during an Officer Rescue where over thirty rounds were fired. Sgt. DeAndrea was the Patrol Supervisor and Entry Team Leader during the Youth With a Mission shootings (2007). This was an active shooting at a youth mission training center where four young adults were shot, two of whom died.

J. Kevin Cameron, M.Sc., R.S.W.

J. Kevin Cameron is a Diplomat with the American Academy of Experts in Traumatic Stress and a Board Certified Expert in Traumatic Stress. In concert with the Royal Canadian Mounted Police, Behavioral Sciences Unit, he developed Canada's first comprehensive, multidisciplinary threat assessment training program and currently serves on the Canadian Threat Assessment Training Board. He also trains crisis response teams nationally and internationally and consults with schools and communities impacted by trauma.

Wednesday, November 6, 2013 8:00am to 5:00pm
(Registration 7:30am - 8:00am)
Justice Institute Of British Columbia
715 McBride Boulevard, New Westminster, BC

Pre-registration is required
$180.00 (by Sept. 30, 2013) ♦ $230.00 (after Oct. 1, 2013)
For additional information, visit our website at www.bcledn.net

The BC Law Enforcement Diversity Network is a sub-committee of the British Columbia Association of Chiefs of Police with representation from the following participating agencies

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.