



A newsletter devoted to operational police officers in Canada.



## IN MEMORIAM



On Monday, September 16, 2013 50-year-old West Vancouver Police Constable Louis Reinhold Beglaw passed away after suffering a medical emergency while on duty at the West Vancouver Police Department (WVPD) Headquarters.

Constable Beglaw was also a Major in the Canadian Army Militia with the Royal Westminster Regiment and took great pride in being the Officer Commanding A Company. He had served a tour of duty in Bosnia in 2002 with the Multi National Divisional HQ and the Deputy Chief Planner for the Joint Military Affairs Section. Prior to becoming a police officer, Constable Beglaw served as an Inspector with Canada Customs.

In 2003 he achieved his dream of becoming a police officer by joining the WVPD and in 2007 became a Police Service Dog Handler. Constable Beglaw and his faithful partner and companion Police Service Dog 'Capone' went on to become one of WVPD's finest dog teams. He is survived by his wife and two children.

Source: [www.wvpd.ca](http://www.wvpd.ca)



## Constable Adrian Oliver

**Memorial Run (5km & 10 km) and Barbeque**

**November 17, 2013**

**Deer Lake Park**

**Burnaby, British Columbia**

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## Upcoming Events

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## Remembrance Day

November 11, 2013

Communities throughout Canada



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## Graduate Certificates

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JUSTICE INSTITUTE  
of BRITISH COLUMBIA  
LIBRARY

## WHAT'S NEW FOR POLICE IN THE LIBRARY

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

### **The 4 disciplines of execution: achieving your wildly important goals.**

Chris McChesney, Sean Covey and Jim Huling.  
London, UK: Simon & Schuster, 2012.  
HD 30.28 M34 2012

### **The consumer learner: emerging expectations of a customer service mentality in post-secondary education.**

Gillian Silver and Cheryl Lentz.  
Las Vegas, NV: Pensiero Press, c2012.  
LC 5225 A36 S55 2012

### **Creating significant learning experiences: an integrated approach to designing college courses.**

L. Dee Fink.  
San Francisco, CA: Jossey-Bass, [2013].  
LB 2331 F495 2013

### **Decisive: how to make better choices in life and work.**

Chip Heath and Dan Heath.  
Toronto, ON: Random House Canada, [2013].  
BF 448 H42 2013

### **Doing more with teams: the new way to winning.**

Bruce Piasecki.  
Hoboken, NJ: John Wiley & Sons, Inc., [2013].  
HD 66 P52 2013

### **Ethics in action: making ethical decisions in your daily life.**

Jane Ann McLachlan.  
Toronto, ON: Pearson Canada, c2010.  
BJ 1521 M35 2009

### **Leadership conversations: challenging high potential managers to become great leaders.**

Alan S. Berson and Richard G. Stieglitz.  
San Francisco, CA: Jossey-Bass, c2013.  
HD 30.3 B476 2013

### **Managing incompetence: an innovative approach for dealing with people.**

Gabriel Ginebra.  
Alexandria, VA: ASTD Press, c2013.  
HF 5549 G56 2013

### **Master presenter: lessons from the world's top experts on becoming a more influential speaker.**

David Zielinski, editor.  
San Francisco, CA: Pfeiffer, A Wiley Brand, [2013]  
HF 5718.22 M326 2013

### **Needs assessment basics: a complete, how-to guide to help you: design effective, on-target training solutions, get support, ensure bottom-line impact.**

Deborah D. Tobey.  
Alexandria, VA: ASTD Press, c2005.  
HF 5549.5 T7 T59 2005

### **Own the room: discover your signature voice to master your leadership presence.**

Amy Jen Su and Muriel Maignan Wilkins.  
Boston, MA: Harvard Business Review Press, [2013].  
HD 57.7 S82 2013

### **Research design: qualitative, quantitative, and mixed methods approaches.**

John W. Creswell.  
Thousand Oaks, CA: SAGE Publications, c2014.  
H 62 C6963 2014

### **Simply managing: what managers do and can do better.**

Henry Mintzberg.  
San Francisco, CA: Berrett-Koehler Publishers, Inc., [2013].  
HD 31 M457 2013

**www.i0-8.ca**

## ARREST CANNOT BE SAVED BY INFORMATION OF ANOTHER OFFICER

**R. v. Czajkowski, 2013 QCCA 1311**



An informant told police that the accused (aka. Miami Mike) was going to carry out a “burn” - a home invasion to steal money and drugs. It was reported that this would occur the following day at an unknown location. Shortly before the burn, the informant said the accused would be arriving at a specific Tim Hortons restaurant in a blue Chrysler 300 to meet his accomplices, a few black men, in order to finalize their plans. This information was passed on to a detective who arranged for surveillance and SWAT teams to take up positions near the Tim Hortons the next day. From 10:46 am they kept watch on a black man (Walker) who arrived in a black Chevrolet Malibu. At 12:27 pm, a blue Chrysler 300 drove into the parking lot. A white man (later identified as the accused) and a black man (Samuels) exited the Chrysler 300 and went inside the Tim Hortons. The driver (Robinson), another black man, stayed alone in the vehicle. At 12:31 pm, Walker left the Tim Hortons, sat in the front passenger seat of the Chrysler 300 and spoke briefly with Robinson. A few minutes later Walker returned to the Tim Hortons. Robinson followed but returned to the vehicle after three minutes. At 12:47 pm, the remaining men left the Tim Hortons. The accused entered the front passenger seat of the Chrysler 300, while Samuels sat in the back and Robinson sat in the drivers seat. Walker went back inside the Tim Hortons.

Moments later a SWAT van blocked the back of the vehicle and police officers ordered the occupants to put their hands up. Robinson and Samuels complied immediately while the accused fidgeted in his seat, moved his shoulders from left to right and leaned

towards the driver's seat. Police broke the front passenger window and the men were arrested. A vehicle search produced a black and grey tuque near the centre console on the driver's side. A 9mm semi-automatic pistol and two cartridge magazines, one with 11 bullets and the other with 12 bullets, were found inside the tuque.

### Court of Quebec



The accused sought to exclude the evidence on the basis that there were insufficient grounds for his arrest and search of the vehicle. But the judge found that the police officers had reasonable grounds to suspect that the occupants of the vehicle would be involved in a home invasion. Therefore, the police could detain the men (which was not arbitrary) and the vehicle search was reasonable. The judge found the accused's guilt was the only rational inference to be drawn from the circumstantial evidence and he was convicted of several weapons offences. He was sentenced to 5 years in prison less 26½ months credited to pre-trial custody.

### Quebec Court of Appeal



The accused contended that his arrest was unlawful. In his view, the information possessed by the detective did not meet the standard required for an arrest (reasonable grounds to believe).

### Arrest - Reasonable Grounds to Believe

The Crown acknowledged that the police officers arrested the vehicle occupants and did not detain them solely for investigative purposes. Thus, the Crown conceded that the “reasonable grounds to believe” standard applied rather than the lower

“It is settled law that an arresting officer must have reasonable and probable grounds to believe that an indictable offence has been committed or is about to be committed (s. 495 Cr. C.) and that such grounds must be objectively justifiable. There is also a subjective component to the requirement, in that the police officer must actually believe that s/he has sufficient grounds to proceed to an arrest.”



“reasonable grounds to suspect” standard used by the trial judge.

The Court of Appeal then described the test for determining whether there were reasonable grounds for arrest:

It is settled law that an arresting officer must have reasonable and probable grounds to believe that an indictable offence has been committed or is about to be committed (s. 495 Cr. C.) and that such grounds must be objectively justifiable. There is also a subjective component to the requirement, in that the police officer must actually believe that s/he has sufficient grounds to proceed to an arrest. [endnotes omitted, para. 19]

When several officers are involved in an arrest, “it is the police officer who makes the decision to arrest who must possess reasonable grounds, as opposed to an officer who simply executes the order,” said Chief Justice Hesler. “The information possessed by each individual officer cannot be combined or ‘pooled’ in assessing reasonable and probable grounds. A decision to arrest made by an officer without sufficient grounds cannot be saved by the sufficient information possessed by another officer.”

In this case, even if the higher standard of reasonable grounds to believe was used and only the information possessed by the detective was assessed, the requisite standard had been met. The informant was **credible** (having provided reliable information on six or seven prior occasions), the information was sufficiently specific and **compelling** to exclude the possibility of a simple coincidence or a mere rumour and the details were amply **corroborated** by police surveillance. As the Chief Justice noted, “it is not necessary, as a general rule, that a tip be confirmed in its ‘criminal’ aspect.” Here, based on the totality of the circumstances, “a reasonable person placed in the position of [the detective] would have had

## Compelling Tip? Degree of Detail

- The detective knew the accused’s alias (“Miami Mike”) as well as his basic physical description.
- He knew “Miami Mike” was expected to meet three or four black men at that particular Tim Hortons restaurant on that particular date and at that particular time, to finalize plans for a “burn”.
- He knew to expect a blue Chrysler 300.
- **“Even accepting that he may not have known the licence plate number, the information was sufficiently specific and compelling to warrant the attention of the police. It would be difficult to accept a police decision to do nothing in such circumstances.”**

## Corroboration? Confirming the Tip’s Details

- A blue Chrysler 300 carrying a white man and two black men arrived at the Tim Hortons on the expected date at the expected time.
- The occupants later talked with another black man who was waiting at the Tim Hortons. It could not be mere coincidence.
- The detective was told that they would imminently conduct a “burn”; he could consequently infer that they would be armed.
- **“[S]ince the police knew the informant, it was unnecessary for the surveillance team to confirm details relating to the specific criminal activity being planned in order to justify the arrest.”**

reasonable and probable grounds to believe that an indictable offence was about to be committed.”

As for the detective’s **subjective belief** that he had reasonable grounds to arrest the occupants of the vehicle, it was sufficient. Although he stated in cross-examination that he had not obtained a

“[I]t is the police officer who makes the decision to arrest who must possess reasonable grounds, as opposed to an officer who simply executes the order. The information possessed by each individual officer cannot be combined or ‘pooled’ in assessing reasonable and probable grounds. A decision to arrest made by an officer without sufficient grounds cannot be saved by the sufficient information possessed by another officer.”

warrant because the situation was urgent and there were insufficient grounds, the detective directed the arrest only **after** the surveillance team confirmed that the occupants of the vehicle could be the suspects. "Read in context, what the transcript shows is that [the detective] thought that it was impossible to obtain a telewarrant due to the urgency of the situation, since it was only after the surveillance team confirmed the information provided by the informant that he acquired reasonable grounds, and by then, it was indeed too late to obtain a telewarrant," said the Chief Justice.

The arrest was legal and the vehicle search was lawful under the common law power of search incidental to arrest. There were no s. 8 or 9 *Charter* breaches. The accused's appeal was dismissed.

Complete case available at [www.canlii.org](http://www.canlii.org)

## ODOUR PLUS PROVIDES GROUNDS FOR ARREST

**R. v. Taylor, 2013 BCCA 382**



Police stopped the accused for driving his Jeep with frosted windows (obscured visibility). When the officer approached the driver's side of the vehicle he saw that the accused was

manipulating the window (rolled it down and then back up) as if trying to hide something. The officer believed he also saw a fan, pipe and black landscaping carpet in the vehicle's interior. A strong odour of vegetative marihuana was detected emanating from the vehicle through the partially (about 3") open window. The officer, having considerable experience in investigating drug offences, could identify and distinguish the smells of fresh (vegetative) and burned marihuana. He described the odour as "overwhelming", "pungent" and thus indicative of a large quantity. He concluded the accused was attempting to hide the smell of what was likely in the vehicle. The officer also noted that the accused's eyes were bloodshot. He was arrested for possessing marihuana for the purpose of trafficking, directed to step from the vehicle and searched for drugs and weapons. The vehicle was also searched and a black liquor bag

containing a package of vacuum-sealed marihuana weighing 232 grams was found, but no odour emanated from this bag. Other items, including fans and nets with what was believed to be marihuana residue, were also located in the vehicle.

### British Columbia Provincial Court



The accused submitted that he was unlawfully arrested and his vehicle illegally searched, thus breaching his ss. 8 and 9 *Charter* rights. In his view, the odour of marihuana alone, as a matter of law, was insufficient to justify a warrantless arrest. The judge, however, concluded that the smell of vegetative marihuana was a sufficient basis to support an arrest made under either s. 495(1)(a) - **on reasonable grounds** - or s. 495(1)(b) - **finds committing**. She accepted that the strong odour of vegetative marihuana as described by the officer, among other observations, formed the basis for his reasonable belief that the driver possessed marihuana. The arrest was lawful and the source of the odour was immaterial in determining whether the arrest was valid. The accused was convicted of possessing marihuana and was given a 12-month conditional discharge.

### British Columbia Supreme Court



The appeal judge found that the trial judge did not err in concluding that the arrest was lawful. There is a distinction between the odour of burnt marihuana and the odour of vegetative marihuana. Plus, this was not a marihuana odour only case. In addition to the odour, the officer had made a number of other observations. The accused's appeal was dismissed.

### British Columbia Court of Appeal



The accused sought leave to appeal the British Columbia Supreme Court ruling. But Court of Appeal Justice Low refused to grant leave. "I am not persuaded that this is a case in which it can be argued that the appeal judge erred in determining that the trial judge did not err in finding that there were surrounding circumstances that made the strong smell of

“[T]here were surrounding circumstances that made the strong smell of vegetative marihuana a legally sound basis for the arrest and search.”

vegetative marihuana a legally sound basis for the arrest and search,” he said. Each case depends on its own particular facts:

[The accused] wants this court to make it a proposition of law that the odour of marihuana alone can never be sufficient to found a lawful arrest and search. I do not consider that to be a proposition of law and I do not see how the argument could succeed. In a particular case, if the dominant fact supporting the arrest is the odour of marihuana (as it usually will be), the question would be whether the evidence in its entirety was sufficient to support the conclusion that the arresting police officer acted objectively. Each case must be decided on its particular constellation of facts and circumstances, not on a general binding appellate judicial statement as to what evidence is or is not sufficient in all cases.

[The accused] wants this court to isolate a dominant fact and turn it into a proposition of law. I do not think it is any more a viable proposition of law to state that marihuana odour alone cannot form the basis for a lawful arrest and search than it would be to state that such odour alone must always be found to be the basis for a lawful arrest and search. [paras. 16-17]

The accused’s application for leave to appeal was dismissed.

Complete case available at [www.courts.gov.bc.ca](http://www.courts.gov.bc.ca)

“I do not think it is any more a viable proposition of law to state that marihuana odour alone cannot form the basis for a lawful arrest and search than it would be to state that such odour alone must always be found to be the basis for a lawful arrest and search.”

## **GROUND'S BASED ON CUMULATIVE EFFECT, NOT PIECEMEAL ANALYSIS**

**R. v. Crowther & Pastuck, 2013 BCCA 364**



In the early morning hours, two residents of a townhouse complex called police after they saw a man being dragged by his ankles and “stomped on” by two or three other men. Police arrived within minutes and found the victim behind the complex badly beaten. It had been raining outside and the area was muddy. They heard someone shout, “Shut the fuck up,” and saw a light on in a nearby townhouse. An officer approached the townhouse and saw the accused Crowther, who he recognized as being involved in the area’s notoriously violent drug trade, standing at an open window. There was a party at the townhouse and other people were inside. The officer asked Crowther to come to the door and talk but he did not respond. Instead, he tried to close the window. Then Crowther and the others headed toward the front door. When police made their way to the front door the people in the unit moved upstairs. The officer believed Crowther had been involved in the assault and kicked in the front door for the purpose of preserving evidence and preventing potential witnesses from being harmed. Crowther was found hiding under a mattress and Pastuck was hiding behind a woman in a closet. Both men were wearing wet, muddy pants and were arrested. After the arrest, police saw blood on their clothes; Crowther had a blood-stained sock. The victim died three days later and the accuseds were charged with murder.

### **British Columbia Supreme Court**



The judge found the officer had good reason to believe that if he did not immediately enter the premises evidence would be destroyed. But she ruled there was no statutory authorization or common law justification for the warrantless entry. Nevertheless, despite the illegal entry, the judge found the arrests justified. The officer subjectively had reasonable and probable grounds to make the arrests and they were

“The requirement for a police officer to have reasonable grounds before arrest without a warrant protects the citizenry from arbitrary police conduct, while at the same time, protecting society from crime.”

objectively supportable. Both men had fled from police, hid in the residence (mere feet away from the victim) and it was wet and muddy outside (their jeans were wet and muddy). The blood and DNA evidence (which matched the victim) were admitted under s. 24(2) of the *Charter* despite the unreasonable warrantless entry. This, and other evidence, led to convictions of manslaughter.

### British Columbia Court of Appeal



The accuseds argued, among other grounds, that the trial judge erred in finding reasonable and probable grounds for arrest. It was submitted that the totality of the circumstances did not form a sufficient factual nexus to satisfy the **objective** test.

Justice Bennett, authoring the unanimous decision, first noted that “the requirement for a police officer to have reasonable grounds before arrest without a warrant protects the citizenry from arbitrary police conduct, while at the same time, protecting society from crime.” The test for reasonable grounds requires the arresting officer subjectively have reasonable grounds on which to base the arrest and those grounds must be justifiable from an objective point of view:

The assessment of reasonable grounds is made on the basis of the cumulative effect of the evidence, not on a piecemeal analysis. Each factor standing alone may not achieve grounds for arrest, but the question is whether together there are sufficient objective grounds. It is important to keep in mind the purpose of requiring objectively reasonable grounds – to prevent arbitrary arrests. [para. 34]

Justice Bennett found the officer had sufficient reasonable grounds to justify the arrests under s. 495

of the *Criminal Code*. Therefore, the arrests were not arbitrary. The objective grounds included:

- Both men fled when the police approached the premises.
- Both men took significant steps to conceal themselves inside the residence.
- Despite being at a house party, both men were wearing wet and muddy pants as if they had recently been outside where it was wet and muddy.
- The victim had been beaten in a wet and muddy area in very close proximity to the townhouse where the men had been minutes before the officer entered the house.

The Court of Appeal also found the trial judge’s s. 24 (2) admissibility analysis resulting from the s. 8 *Charter* breach (warrantless entry) was amply supported by the evidence. Further, a request for a stay of proceedings under s. 24(1) was inappropriate. The accused’s appeal was dismissed.

Complete case available at [www.courts.gov.bc.ca](http://www.courts.gov.bc.ca)

“The assessment of reasonable grounds is made on the basis of the cumulative effect of the evidence, not on a piecemeal analysis. Each factor standing alone may not achieve grounds for arrest, but the question is whether together there are sufficient objective grounds.”

**Editor’s note:** The accuseds did not argue that the trial judge should have excised the grounds obtained as a result of the warrantless entry from consideration in determining whether the arrest was justified.

### Note-able Quote

“Without rules there is no order, without order there is no safety, without safety there is no freedom.” - Leanne Novakowski



## REASONABLE SUSPICION SUFFICES FOR DOG SNIFF

R. v. Chehil, 2013 SCC 49



A drug enforcement team at the Halifax Airport checked the electronic passenger list of an overnight passenger from Vancouver, BC to Halifax, NS Westjet flight. The accused was one of the last passengers to purchase a ticket, paid for it with cash and checked one bag. These factors led police to suspect he was a possible drug courier based on a profile that couriers often travel alone on overnight flights, purchase a last minute, walk-up ticket in cash and check a single bag. Officers removed his luggage, along with nine other passenger bags, and had them searched by a drug-sniffing dog. The dog indicated a positive hit and the accused's luggage was returned to the conveyor belt. When he collected his bag, he was arrested for drug possession. The locked bag was forced open, manually searched and three kilograms of cocaine was found. The accused was then re-arrested for possessing cocaine for the purpose of trafficking.

### Supreme Court of Nova Scotia



The judge ruled that the accused had a reasonable expectation of privacy in his checked luggage but the police lacked a reasonable suspicion to deploy the drug sniffing dog. He found that only the purchase of the ticket with cash, perhaps at the last minute, could be viewed as suspicious. The remainder of the factors relied upon were open to several neutral explanations. In the judge's view, the police failed to further investigate or consider exculpatory explanations for the other factors. Since there were other potential innocent explanations that could have been revealed through further investigation, absent such investigation there could be no reasonable suspicion of involvement in drug crimes. The judge held that the police were, at best, operating on **intuition** or an **educated guess**. The unauthorized sniff search was unreasonable under s.

8 of the *Charter* and the evidence was excluded under s. 24(2). The accused was acquitted.

### Nova Scotia Court of Appeal



Although the accused retained a privacy interest in his suitcase, the Court of Appeal found the trial judge erred by considering each factor used by police in isolation. Rather than finding potential innocent explanations for each individual factor, the proper test was to determine whether all of the circumstances, looked at in their totality, provided a reasonable suspicion. Whether or not additional steps could have been taken to buttress the grounds supporting reasonable suspicion was irrelevant; the police need only demonstrate they have done enough to establish reasonable suspicion. In this case, the Court of Appeal concluded that the police did have sufficient reasonable suspicion to use the drug sniffing dog. With the positive indication, police then had reasonable grounds to believe the accused was in possession of illegal drugs. His arrest was lawful and the search of his suitcase was reasonable. There were no *Charter* breaches and a new trial was ordered.

### Supreme Court of Canada



The accused argued that police applied the reasonable suspicion standard in a way that would authorize generalized searches of a very large number of travellers. It was submitted that the mechanical application of profile characteristics would capture a high percentage of innocent people or racially marginalized groups. Instead, it was suggested that the police should have to conduct further investigation of individual factors relied upon that were neutral, innocuous and capable of innocent explanation. Thus, the accused contended that the police failed to satisfy the reasonable suspicion standard.

"The reasonable suspicion standard requires that the entirety of the circumstances, inculpatory and exculpatory, be assessed to determine whether there are objective ascertainable grounds to suspect that an individual is involved in criminal behaviour."

## What is Reasonable Suspicion?

A unanimous nine member Supreme Court found there was no need to revise the reasonable suspicion standard, holding it was robust, determined on the totality of the circumstances, based on objectively discernible facts and subject to independent and rigorous judicial scrutiny. In the Court's view, the reasonable suspicion standard prevents the indiscriminate and discriminatory exercise of police powers. "The reasonable suspicion standard requires that the entirety of the circumstances, inculpatory and exculpatory, be assessed to determine whether there are objective ascertainable grounds to suspect that an individual is involved in criminal behaviour," said Justice Karakatsanis, authoring the Court's opinion. "It does not require the police to investigate to rule out exculpatory circumstances."

As a result of this case, the Supreme Court highlighted the following legal principles:

- ◆ Using a dog trained to detect certain kinds of illegal drugs using its sense of smell is a search that does not require prior judicial authorization (a warrant).
- ◆ The common-law authorizes the deployment of a drug-sniffing dog.
- ◆ Sniff searches are ***minimally intrusive, narrowly targeted*** and ***highly accurate***.
- ◆ To deploy a sniffer dog the police must have a reasonable suspicion based on objective, ascertainable facts that evidence of an offence will be discovered.
- ◆ The Crown bears the burden of showing that the objective facts rise to the level of reasonable suspicion such that a reasonable person, standing in the shoes of the police officer, would have held a reasonable suspicion of criminal activity.

- ◆ The constellation of facts must be based in the evidence, tied to the individual and capable of supporting a logical inference of criminal behaviour. The constellation of factors must be assessed at the time of the search, not after. If the link between the constellation and criminality cannot be established by way of a logical inference, the Crown must lead evidence (empirical or statistical or based upon the investigating officer's training and experience) to connect the circumstances to criminality:

An officer's training and experience may provide an objective experiential, as opposed to empirical, basis for grounding reasonable suspicion. However, this is not to say that hunches or intuition grounded in an officer's experience will suffice, or that deference is owed to a police officer's view of the circumstances based on her training or experience in the field. A police officer's educated guess must not supplant the rigorous and independent scrutiny demanded by the reasonable suspicion standard. Evidence as to the specific nature and extent of such experience and training is required so that the court may make an objective assessment of the probative link between the constellation of factors relied on by the police and criminality. The more general the constellation relied on by the police, the more there will be a need for specific evidence regarding police experience and training. To the extent that specific evidence of the investigating officer's experience and training supports the link the Crown asks the court to draw, the more compelling that link will be. [reference omitted, para. 47]

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“Exculpatory, neutral, or equivocal information cannot be disregarded when assessing a constellation of factors. The totality of the circumstances, including favourable and unfavourable factors, must be weighed in the course of arriving at any conclusion regarding reasonable suspicion.”

- ◆ The requirement for objective and ascertainable facts permits an independent after-the-fact review by the court and protects against arbitrary state action.
- ◆ The police must point to particularized conduct or particularized evidence of criminal activity. However, the evidence need not itself consist of unlawful behaviour or evidence of a specific known criminal act.
- ◆ Reasonable suspicion (aka. reasonable grounds to suspect) addresses the **possibility** of uncovering criminality. It is a lower and less demanding standard than reasonable probability (aka. reasonable and probable grounds to believe, reasonable grounds to believe), which addresses the **probability** of uncovering criminality.
- ◆ Since reasonable suspicion deals with possibilities, innocent people may in some cases be reasonably suspected of a crime.
- ◆ Reasonable suspicion must be assessed against the totality of the circumstances:

The inquiry must consider the constellation of objectively discernible facts that are said to give the investigating officer reasonable cause to suspect that an individual is involved in the type of criminal activity under investigation. This inquiry must be fact-based, flexible, and grounded in common sense and practical, everyday experience. A police officer's grounds for reasonable suspicion cannot be assessed in isolation. [reference omitted, para. 29]

Exculpatory, neutral, or equivocal information cannot be disregarded when assessing a constellation of factors. The totality of the circumstances, including favourable and unfavourable factors, must be weighed in the course of arriving at any conclusion regarding reasonable suspicion. [para. 33]

- ◆ Some factors, on their own, will be insufficient to support a reasonable suspicion, but can nonetheless be used as one part of a constellation of factors:

While some factors, such as travelling under a false name, or flight from the police, may give rise to reasonable suspicion on their own, other elements of a constellation will not support reasonable suspicion, except in combination with other factors. Generally, characteristics that apply broadly to innocent people are insufficient, as they are markers only of generalized suspicion. The same is true of factors that may “go both ways”, such as an individual's making or failing to make eye contact. On their own, such factors cannot support reasonable suspicion; however, this does not preclude reasonable suspicion arising when the same factor is simply one part of a constellation of factors. [para. 31]

- ◆ Since the reasonable suspicion standard addresses the possibility of uncovering criminality, it need not be the only inference that can be drawn from a particular constellation of factors. Factors that give rise to a reasonable suspicion may also support completely innocent explanations.
- ◆ The obligation of the police to take all factors into account does not impose a duty on them to undertake further investigation to seek out alternative or possible innocent explanations for constellations of factors giving rise to reasonable suspicion.
- ◆ Reasonable suspicion does not descend to the level of a “generalized suspicion” - a suspicion that attaches to a particular activity or location rather than a specific person:

A constellation of factors will not be sufficient to ground reasonable suspicion where it amounts merely to a ‘generalized’

suspicion because it 'would include such a number of presumably innocent persons as to approach a subjectively administered, random basis' for a search. [para. 30]

In conclusion, Justice Karakatsanis stated:

In sum, when single-profile narcotic dogs are deployed on the basis of reasonable suspicion, the police intrusion must be connected to factors indicating a drug-related offence. Reasonable suspicion does not, however, require the police to point to a specific ongoing crime, nor does it entail the identification of the precise illegal substance being searched for. The reasonable suspicion held by the police need only be linked to the possession, traffic, or production of drugs or other drug-related contraband. [para. 37]

## Profiling

Whether or not reasonable suspicion has been met depends on the particular circumstances of each case. As for drug courier profiles, the Supreme Court cautioned about using profiles in general terms:

In my view, it is unhelpful to speak of profiling as generating reasonable suspicion. The term itself suggests an assessment based on stereotyping and discriminatory factors, which have no place in the reasonable suspicion analysis. Rather, the analysis must remain focused on one central question: Is the totality of the circumstances, including the specific characteristics of the suspect, the contextual factors, and the offence suspected, sufficient to reach the threshold of reasonable suspicion?

The application of the reasonable suspicion standard cannot be mechanical and formulaic. It must be sensitive to the particular circumstances of each case. Characteristics identified by a police profile can be considered when evaluating reasonable suspicion; however, profile characteristics are not a substitute for objective facts that raise a reasonable suspicion of criminal activity. Profile characteristics must be approached with caution precisely because they risk undermining a careful individualized assessment of the totality of the circumstances.

In this case, the profiling alleged consisted of a set of factors that the officers had been taught to look for and had learned through experience to

look for in order to detect drug couriers. Whether or not these factors give rise to reasonable suspicion will depend upon a police officer's reasons for relying on specific factors, the evidence connecting these factors to criminal activity, and the entirety of the circumstances of the case. [paras. 39-41]

## Was There Reasonable Suspicion?

Here, based on their training and experience with prior investigations, the police relied collectively upon nine factors in their decision to deploy the drug sniffing dog:

- the travel was on a one-way ticket;
- the flight originated in Vancouver;
- the accused was travelling alone;
- the ticket was purchased with cash;
- the ticket was the last one purchased before the flight departed;
- the accused checked one piece of luggage;
- the flight was overnight;
- the flight took place mid-to late-week; and
- drug couriers prefer less expensive airlines, such as WestJet.

Plus, in her cross-examination, the officer gave evidence that people meeting this constellation had been proven to be drug couriers in the past.

The Supreme Court agreed that the trial judge erred by assessing the factors individually, rather than in their entirety. When the factors were viewed in their totality, the police had a reasonable suspicion that they would discover evidence of a drug-related crime in the accused's luggage and the sniff search was justified. The sniff search was reasonable and the positive indication by the dog then raised the reasonable suspicion standard to reasonable and probable grounds for arrest.

The accused's appeal was dismissed and the order for a new trial was upheld.

Complete case available at [www.scc-csc.gc.ca](http://www.scc-csc.gc.ca)

**www.10-8.ca**



## SUPREME COURT SPLIT ON WHETHER REASONABLE SUSPICION SATISFIED

**R. v. MacKenzie, 2013 SCC 50**



Clocking the accused on radar at 112 km/h in a 110 km/h zone over the crest of a hill, police saw the front end of his car pitch forward and it slowed to 89 km/h. Wanting to warn him about speeding, the officers made a u-turn and found him pulled over on his own, parked at the roadside two kilometers down the highway. Without apparent prompting, the accused said he was “sorry” and that he knew he had been speeding. The officer confirmed speeding as the reason for the stop and asked for the accused’s driver’s licence and vehicle registration, which were provided. The accused’s hands were shaky and trembling, he was sweating, breathing very rapidly, his carotid artery was quickly pulsing and his eyes had a pinkish colour to them. When asked if he was all right, the accused sought and took some asthma medication which did not result in any noticeable decrease in his rapid breathing. When asked about his trip, the accused said he was coming from Calgary and going to Regina, his home. He seemed to be somewhat confused on when he had traveled to Calgary.

Even though a computer check came back negative, the officer suspected that the accused was involved in a *Controlled Drugs and Substances Act* (CDSA) offence based on his observations and experience, which included a standardized field sobriety-testing (SFST) course, Pipeline and Advanced Pipeline training, and over 5,000 traffic stops involving 150 discoveries of drugs. The accused was asked to step out of the vehicle, advised he was going to be detained for further investigation and told of his *Charter* right to counsel. After a consent search was refused, a drug sniffing dog was deployed and conducted a sniff-search around the exterior of the vehicle. The dog indicated on the back hatch area and the accused was arrested. He was again given his rights. The vehicle was then manually searched and 31.5 pounds of marijuana in three gift-wrapped packages was found in the rear hatch area. The accused was charged with possessing marihuana for the purpose of trafficking.

## Saskatchewan Court of Queen’s Bench



An officer testified, based on his training and experience, that there were a number of factors leading him to believe that the accused might be involved in a CDSA offence:

- (1) erratic driving - an overreaction to police presence (20 km/h below the speed limit and then parking at the roadside before police activated their lights);
- (2) extreme nervousness - the highest nervousness seen in a traffic stop which did not diminish despite the relatively minor reason for the stop;
- (3) physical signs consistent with the marihuana use - a pinkish eye colour and muscle tremors; and
- (4) travel on a known drug pipeline - Calgary was a well known source of drugs which are typically moved from west to east, and the accused appeared somewhat confused about his trip (indicative of trying to make up a story very quickly at the side of the road).

The judge concluded that the officer was, at best, acting on a **hunch** and his “opinions” did not meet the reasonable suspicion standard required for a valid sniffer dog search. Since the marihuana was obtained as a result of a warrantless search based on inadequate grounds, the accused’s rights under s. 8 of the *Charter* were breached and the evidence was excluded under s. 24(2). Without the marihuana as evidence, the accused was found not guilty.

## Saskatchewan Court of Appeal



The Court of Appeal found the trial judge erred in discounting the inferences drawn by the officer as mere “opinion” in determining whether there was reasonable suspicion that the accused was involved in a drug-related offence. In finding this case “very close to the line”, the Court of Appeal was satisfied that the “constellation of objective factors” was sufficient to meet the “reasonable suspicion standard.” The sniffer-dog search was reasonable and the marihuana was lawfully obtained and therefore admissible. The accused’s acquittal was set aside and a new trial was ordered.

## Supreme Court of Canada

Although the accused acknowledged that the police could detain him to investigate speeding under Saskatchewan's *Traffic Safety Act*, he suggested that they could not further detain him to investigate drug offences because they did not have reasonable grounds to suspect he was connected to a particular criminal activity (drug-related offence). In this case, the Supreme Court was split (5:4) on the application of the reasonable suspicion standard to the facts of the case. Five judges concluded that the police did have reasonable grounds to suspect that the accused was involved in a drug-related offence while four did not.

### Reasonable Suspicion Standard Satisfied



Justice Moldaver, writing for himself and four other justices, concluded that the police had reasonable suspicion sufficient to independently justify both the detention of the accused for further investigation and a sniffer-dog search. In this case, the basis for the detention and the basis for the search were the same - reasonable grounds to suspect that the accused was involved in a drug related offence.

The majority recognized, once again, that the "analysis of objective reasonableness should be conducted through the lens of a reasonable person 'standing in the shoes of the police officer'." Part of this meaningful analysis included an officer's training or experience:

Officer training and experience can play an important role in assessing whether the reasonable suspicion standard has been met. Police officers are trained to detect criminal activity. That is their job. They do it every day. And because of that, "a fact or consideration which might have no significance to a lay person can sometimes be quite consequential in the hands of the police". Sights, sounds, movement,

body language, patterns of behaviour, and the like are part of an officer's stock in trade and courts should consider this when assessing whether their evidence, in any given case, passes the reasonable suspicion threshold. [reference omitted, para. 62]

However, police training and experience should not be accepted uncritically by the courts. Nor is deference necessarily owed to a police officer's view of the circumstances because of his or her training or experience in the field. On the other hand, "the police [must] be allowed to carry out their duties without undue skepticism or the requirement that their every move be placed under a scanning electron microscope." Nor must matters within the realm of police training and experience require expert qualifications before their testimony is accepted:

Police officers need not be trained pharmacologists or toxicologists or medical doctors before they can give evidence on the factors that their training and experience has taught them provide reasonable grounds to suspect that someone is engaged in the use of drugs. [para. 57]

In finding the officer's subjective belief objectively reasonable, Justice Moldaver outlined a summary of applicable principles attaching to the reasonable suspicion analysis:

- Reasonable suspicion must be assessed against the totality of the circumstances.
- Characteristics that apply broadly to innocent people and "no-win" behaviour — he looked at me, he did not look at me — cannot on their own, support a finding of reasonable suspicion, although they may take on some value when they form part of a constellation of factors.
- Exculpatory, common, neutral, or equivocal information should not be discarded when assessing a constellation of factors. However,

"Police officers need not be trained pharmacologists or toxicologists or medical doctors before they can give evidence on the factors that their training and experience has taught them provide reasonable grounds to suspect that someone is engaged in the use of drugs."

the test for reasonable suspicion will not be stymied when the factors which give rise to it are supportive of an innocent explanation.

- Reasonable suspicion looks to possibilities, not probabilities. Are the facts objectively indicative of the possibility of criminal behaviour in light of the totality of the circumstances? If so, the objective component of the test will have been met. If not, the inquiry is at an end.
- Assessing whether a particular constellation of facts gives rise to a reasonable suspicion must not devolve into a scientific or metaphysical exercise. Common sense, flexibility, and practical everyday experience are the bywords, and they are to be applied through the eyes of a reasonable person armed with the knowledge, training and experience of the investigating officer.
- The reasonable and probable grounds standard is a more demanding standard than the reasonable suspicion standard. It follows inexorably from this that more innocent persons will be caught under a reasonable suspicion standard than under the reasonable and probable grounds standard. That is the logical consequence of the way these standards have been defined.
- The courts, under the banner of rigorous judicial oversight, must guard against upping the ante for reasonable suspicion to the point that it virtually mirrors the test for reasonable and probable grounds. The police need not have evidence indicative of a reasonable probability of finding drugs under a reasonable suspicion standard. To require more would render the distinction between reasonable and probable grounds and reasonable suspicion all but illusory.

Here, the majority rejected the accused's attempts to isolate and examine each indicator by itself and thereby dismiss them in the reasonable suspicion analysis. For example, the accused suggested: (1) erratic driving (it is common for speeders to slow down quickly when they spot a police radar unit);

(2) nervousness (innocent people show signs of nervousness when they are stopped by the police); (3) hand tremors (as consistent with nervousness as they are with marihuana use); (4) pinkish-coloured eyes (many reasons apart from marihuana use); and (5) travelling route (many innocent people drive the Trans-Canada Highway from Calgary to Regina every day).

The majority found the factors identified by the officer, through the lens of training and field experience in the transportation and detection of drugs, provided the objective basis to support his belief that the accused might be involved in a drug-related offence:

- The accused's noticeable and pronounced sudden decrease in speed;
- He pulled over to the side of the road on his own without being directed by the police to do so.
- His level of anxiety was "some of the highest nervousness" the officer had ever seen in making thousands of traffic stops. It was so pronounced that he ask the accused if he was "all right".
- The requested asthma medication did not abate the extreme degree of nervousness even though he knew he was being investigated for a relatively minor speeding infraction. That seemed unusual especially in the context that a record search revealed the accused had no outstanding tickets or violations that might account for his abnormal state of anxiety.
- From his training and experience as a police officer, the pinkish eye colour and trembling hands were symptoms consistent with a marihuana user — hence the link to drugs and the possibility that the accused was concealing drugs in his car.
- The accused was travelling on the Trans-Canada Highway from Calgary to Regina. From training and experience, the officer knew that this stretch of highway was a drug route. Plus he slipped-up as to the day he left Regina to go to Calgary.
- The officer knew that drug traffickers tend to do fast turnarounds — which is precisely what the

accused admitted to, before attempting to change his initial response to indicate he had spent more time in Calgary.

Since the police had reasonable suspicion that the accused was involved in a drug-related offence, they could use a drug dog to perform a sniff search of the vehicle. There was no s. 8 *Charter* breach and the accused's appeal was dismissed.

### Reasonable Suspicion Standard Not Satisfied



Justice Lebel, authoring a four member dissenting decision, opined that the police lacked the requisite objective grounds for a reasonable suspicion to conduct the dog-sniff search. In her view, even taking into account the officer's training and experience, the constellation of factors available to the police, including neutral and equivocal factors, were insufficient to ground reasonable suspicion:

The police in this case relied on markers that apply broadly to innocent people, or markers only of generalized suspicion, which were at best highly equivocal: slowing down upon sight of the police and pulling over after speeding; acting highly nervous when confronted by the police; sweating on a warm day; breathing rapidly as an asthmatic; having pinkish eyes; using the primary highway route to make a quick turnaround trip between two major cities; correcting an initial response when asked about travel dates; and lacking a criminal record.

When viewed collectively, the factors did not support objective grounds for a reasonable suspicion to detain or conduct the warrantless dog-sniff search of the vehicle. Thus, the search and post-traffic stop detention breached ss. 8 and 9 of the *Charter*. The minority would have upheld the trial judge's decision to exclude the marijuana as evidence. Although the reliability and importance of the evidence to the Crown's case favoured admission, the seriousness of police conduct and the impact of the breach on the accused's *Charter*-protected interests favoured exclusion. The minority would have allowed the accused's appeal.

Complete case available at [www.scc-csc.gc.ca](http://www.scc-csc.gc.ca)

## IS A FIREARM ALWAYS A WEAPON?

R. v. Dunn, 2013 ONCA 539



A private investigator saw the accused pull a pistol out of his jacket pocket, appear to point it at a man and then leave in his car. Police were called and attended the accused's trailer where they found a black handgun resting on a chair in a shed beside the trailer. The handgun was a Crosman Pro77 airgun that fired .177 calibre spherical BBs propelled by means of compressed air from a canister. It was fully functional and loaded with a partly used CO2 cartridge. It had a warning on the side: "**Warning, not a toy, misuse can cause fatal injury. Before using read owner's manual available from Crosman Corp.**" There was no ammunition in the magazine. The accused was charged with several offences including handling a firearm in a careless manner, carrying a weapon for a purpose dangerous to the public peace and carrying a concealed weapon.



### Ontario Court of Justice



A firearms examiner testified that the airgun had an average velocity of 261.41 feet per second (ft/s). He said this type of airgun could be purchased without producing any documentation, as long as the muzzle velocity did not exceed 500 ft/s. The expert also cited a scientific study (pig's eye study) which set a standard for the capabilities of a barrelled object in causing death or bodily injury. This study found that any shot exceeding 214 ft/s was capable of causing serious injury to a pig's eye. As well, the study determined that a projectile travelling at 246 ft/s would penetrate a pig's eye 50% of the time (known as the V50 standard).

The judge, noting that the airgun was not a "real powder fired bullet shooting gun," ruled that the Crown was required to prove it was a weapon as defined in s. 2 of the *Criminal Code*. Since the Crown failed to prove that the airgun was used or



“[A]n object, whether it is a conventional powder-fired gun or a spring or gas fired gun, will fall within the definition of ‘firearm’ in s. 2 provided there is proof that any shot, bullet or other projectile can be discharged from the object and that it is capable of causing serious bodily injury or death to a person.”

intended for use in causing death or injury or to threaten or intimidate, the judge ruled that it was not a “weapon” and therefore not a “firearm.” The accused was acquitted.

## Ontario Court of Appeal



The Crown argued that a barrelled device that meets the *Criminal Code* definition of “firearm” need not also meet the definition of “weapon.” This interpretative issue arose because each definition refers to the other and there were differing views in the case law about whether or not a “firearm” is always a weapon irrespective of whether it meets the definition of “weapon” (by its use or the intent of its possessor). Justice Rosenberg, writing the unanimous decision, framed the question this way:

[B]ecause “firearm” is defined as “a barrelled weapon”, the question arises whether the prosecution must prove not only that the object discharges a shot, bullet or other projectile that is capable of causing serious bodily injury or death, but also that it meets subsections (a) or (b) in the definition of “weapon”; namely, that the object was used, designed to be used or intended for use in causing death or injury to any person or for the purpose of threatening or intimidating any person. Or, is the word “weapon” used in the definition of “firearm” only in a descriptive sense, such that it is not a formal element of the definition requiring proof? The definition of “weapon”, in turn, refers to “firearm”. The concluding phrase in that definition, “without restricting the generality of the foregoing, includes a firearm”, appears to exclude the used, designed or intended for use requirements and deems a firearm to be a weapon.” [para. 16]

Since there were differing case law decisions on this matter, a five (5) judge panel heard the case.

# BY THE BOOK:

## Definitions: s. 2 *Criminal Code*



“**weapon**” means any thing used, designed to be used or intended for use

- (a) in causing death or injury to any person, or
- (b) for the purpose of threatening or intimidating any person

and, without restricting the generality of the foregoing, includes a firearm.

“**firearm**” means a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm.

## Is a Firearm Always a Weapon?

Justice Rosenberg, writing the unanimous decision, ruled that the term “weapon” in the definition of “firearm,” was simply a descriptor and not a formal element. Thus, barreled objects meeting the definition of “firearm” need not also meet the definition in paragraphs (a) or (b) of “weapon”:

In my view, ... an object, whether it is a conventional powder-fired gun or a spring or gas fired gun, will fall within the definition of ‘firearm’ in s. 2 provided there is proof that any shot, bullet or other projectile can be discharged from the object and that it is capable of causing serious bodily injury or death to a person. [para. 34]

Thus, the focus becomes the objects nature as a barreled device and its capability (to cause serious bodily injury or death).

The Court of Appeal noted that certain weapons are deemed not to be firearms if the shot, bullet or other projectile does not exceed a muzzle velocity of 152.4 m/s (500 f/s). However, this velocity threshold deeming weapons as non-firearms is only in relation to specific offences concerning the strict licensing regime of the *Firearms Act* and *Criminal Code* (eg. unauthorized possession, trafficking, importing/exporting, failing to report or false reporting of lost, found, or destroyed firearms). Other offences such as carrying a concealed weapon (s. 90), careless handling (s. 86), and possession for a dangerous purpose (s. 88) are not subject to the 152.4 m/s threshold.

Justice Rosenberg also examined the legislative scheme and found there were three different categories (or groups) of barrelled objects:

**Group One:** Barrelled objects shooting a projectile with a velocity of less than 214 ft./s. (or 246 ft./s., using the V50 standard) are not firearms because they are not capable of serious injury or death; these objects will only be considered weapons, and thus fall within a prohibition such as the concealed weapon prohibition in s. 90, if they meet paras. (a) or (b) in the definition of “weapon”.

**Group Two:** Barrelled objects shooting a projectile with a velocity of more than 214 ft./s. (or 246 ft./s., using the V50 standard) are firearms, because they are capable of causing

serious injury or death, whether or not they also meet paras. (a) or (b) in the definition of “weapon”; these weapons will fall within a prohibition such as that found in s. 90. Nevertheless, they will not be subject to the stricter licensing regime in the Criminal Code and the Firearms Act if they fall within one of the exemptions in s. 84(3), for example, if the velocity of the projectile does not exceed 500 f/s.

**Group Three:** Barrelled objects shooting a projectile with a velocity of more than 500 f/s. These objects fall within the definition of firearm for all purposes of the Criminal Code and the Firearms Act and must be licensed accordingly. Some airguns and most powder-fired bullet shooting guns will fall within this regime. At a minimum, ... Group Three objects do not need to meet the para. (a) or (b) definition of weapon to be deemed to be weapons. [paras. 44-46]

The legislative history, its object (public safety) and the grammatical and ordinary sense of the words used also supported the Court’s view of its interpretation.

The Crown’s appeal was allowed, the accused’s acquittals for careless handling of a firearm, carrying a weapon for a purpose dangerous to the public peace and carrying a concealed weapon were set aside and a new trial was ordered.

Complete case available at [www.ontariocourts.on.ca](http://www.ontariocourts.on.ca)

### Criminal Code sections where a barrelled weapon with a muzzle velocity of 152.4 m/s or less is not considered a “firearm” (see s. 84 (3)(d))

91	Unauthorized possession of firearm	101	Transfer firearm without authority
92	Possess firearm knowing possession unauthorized	103	Importing/exporting firearm knowing it is unauthorized
93	Possess firearm at unauthorized place	104	Unauthorized importing/exporting
94	Unauthorized possession of firearm in motor vehicle	105	Losing or finding without reporting or delivering
95	Possess prohibited/restricted firearm with ammunition	106	Destroying without reporting
99	Weapons trafficking	107	False statements concerning loss, theft or destruction
100	Possess firearm for the purpose of trafficking	117.03	Seizure on failure to produce authorization

## PRIVILEGE SURVIVES DEATH OF INFORMER

**R. v. Anderson, 2013 SKCA 92**



The accused was originally arrested, along with a number of other individuals, following an extensive police investigation. *Operation Avalanche* resulted in two wiretap authorizations yielding a number of incriminating conversations along with more than 40 search warrants or search warrant-type orders being granted. He was released without charges being laid but then, some nine months later, was re-arrested and charged with many drug related offences.

### Saskatchewan Court of Queen's Bench



The accused brought forward several pre-trial motions concerning disclosure, including a submission that the Crown was required to disclose information on a deceased informant. He suspected that a dead informant had provided information to police that was relied upon in search warrants and wiretaps. In his view, the parts of the warrants, authorizations and related disclosure pertaining to this informant should have been unvetted because informer privilege ceased to exist upon death. He argued that his *Charter* rights were breached by this non-disclosure and sought a stay of proceedings under s. 24(1).

The judge rejected the accused's argument without confirming whether or not the informant had died. "Informer privilege belongs jointly to the Crown and the informant and that neither can waive it without the consent of the other," said the judge. "If that privilege is automatically lost upon the informant's death, it may have the effect of discouraging would-be informants from coming forward. It is not much of a stretch to think that the informant might be concerned about his own reputation after his death and about retribution to his family and friends."

Having found that informer privilege did not expire upon the informant's death, the accused's application for unvetted disclosure about the informant was dismissed. He was convicted of several offences and sentenced to seven years in prison.

### Saskatchewan Court of Appeal



The accused appealed his convictions submitting, among other grounds, that the trial judge was wrong to hold that informant privilege survives the death of the informant. But the Court of Appeal disagreed, concluding that the trial judge's ruling was consistent with the law and the policy supporting the privilege:

There are strong policy reasons for maintaining informer privilege beyond death. Informer privilege arises out of the value that informers can have to a police investigation. Informer privilege is necessary for two reasons: (1) protection; and, (2) encouraging others to do the same. ...

Extending the privilege beyond death continues to further the two goals mentioned in the foregoing excerpt. Courts have recognized that protection does not just include the informer personally, but also the family and friends associated with that person. Also, it is critical for the police to be able to represent to the potential informers that informer privilege is "nearly absolute". The ability to maintain a single limited exception to the privilege seems to be consistent with the policy objective of encouraging people to come forward to assist the police. [references omitted, paras. 141-142]

Further, since the innocence at stake exception did not apply, there was no balancing of interests to be determined in whether the privilege should be lifted.

The accused's appeal was dismissed.

Complete case available at [www.canlii.org](http://www.canlii.org)

"There are strong policy reasons for maintaining informer privilege beyond death. Informer privilege arises out of the value that informers can have to a police investigation. Informer privilege is necessary for two reasons: (1) protection; and, (2) encouraging others to do the same."

## FLIGHT PLUS OTHER FACTORS PROVIDE GROUNDS FOR DETENTION

**R. v. Atkins, 2013 ONCA 586**



On New Year's Eve, three uniformed police officers were driving an unmarked police van when they noticed the accused walking along the sidewalk. He looked overdressed for the weather, wearing a heavy, baggy winter coat, layered over a hooded sweatshirt. Many other people nearby were wearing light jackets and some had no jackets at all. The accused appeared noticeably withdrawn (others around him were in a sociable mood) and seemed to be hiding in the crowd and skirting building walls. Deciding to speak with him, an officer called "hey" out the van's open window. The accused glanced back but kept walking. When the officer called "hey buddy" a little louder, the accused turned towards her. She waved for him to come over and then got out of the van along with another officer. The accused took a couple of steps toward the officers as if he was going to speak with them, but then started running towards "a high crime district." A third officer gave chase and caught the accused, handcuffing and searching him. He was found to be carrying a loaded 9 mm handgun and was charged with possessing a restricted firearm and two counts of possessing a firearm while prohibited from doing so.

### Ontario Superior Court of Justice



The accused argued he was arbitrarily detained under s. 9 of the *Charter* when the officer verbally commanded and waved at him to come over to them. But the judge found there was no evidence that the accused knew it was the police beckoning him. Instead, the evidence suggested he did not realize it was the police until the two officers got out of the van. At that point the accused ran before he could

be stopped by officers. In the judge's opinion, there was neither a physical or psychological detention. There was insufficient evidence that the accused believed he was complying with any police command when he took a couple of steps toward the van. Since he did not acquiesce or submit to any deprivation of liberty, there could be no detention. When the police did apprehend the accused they had a reasonable suspicion to detain him and the search that followed was justified on officer safety grounds. There were no *Charter* breaches and the handgun was admissible. The accused was convicted of the firearms offences.

### Ontario Court of Appeal



The accused argued that his interaction with police amounted to a psychological detention. In his view, there was "no question that [he] knew he was dealing with the police (they were in full uniform), stopped as a result of a police demand, started to comply with their demand, and only then fled." But the Court of Appeal disagreed. Where an accused does not actually comply with a demand and flees, there is no detention. Although the fact the accused ran may have been some evidence he believed he had no choice but to comply, there was no acquiescence or submission. Plus, he never testified on the voir dire to provide evidence of his subjective perception about his choices at the moment he was summoned by the officers. And, even if the accused recognized the people in the van as police officers and took two steps toward them in response to their beckoning, it was not shown that such words created a detention. Thus, there was no s. 9 breach during the sidewalk interaction.

As for the detention following the accused's flight, "it was open to the trial judge to find that, in all the circumstances, the officers had the requisite reasonable suspicion to detain the [accused]." The Court cautioned, however, that it was not suggesting that "merely because a person flees from the police,

"While at the instance of the search, the [accused] could not reach any weapon because he was handcuffed, once the investigative detention ended the officer would have to remove the handcuffs and he would have been in immediate danger."



there are grounds to detain the person.” In this case, there was other information in addition to flight that could be relied upon by the officers to hold the requisite reasonable suspicion. Hence, there was no s. 9 *Charter* breach when the accused was apprehended.

As for the pat-down search that followed the detention and led to the discovery of the gun, it was justified on officer safety grounds. “The officers reasonably suspected that the [accused] was in possession of a weapon,” said the Court. “While at the instance of the search, the [accused] could not reach any weapon because he was handcuffed, once the investigative detention ended the officer would have to remove the handcuffs and he would have been in immediate danger.” There was no s. 8 *Charter* violation and the accused’s appeal from conviction was dismissed.

Complete case available at [www.ontariocourts.on.ca](http://www.ontariocourts.on.ca)

## BY THE BOOK:

### Wireless Communication Devices:

#### Ontario’s Highway Traffic Act



s. 78.1(1) No person shall drive a motor vehicle on a highway while holding or using a hand-held wireless communication device or other prescribed device that is capable of receiving or transmitting telephone communications, electronic data, mail or text messages.

### NO NEED TO PROVE CELL PHONE CAPABLE OF RECEIVING OR TRANSMITTING

**R. v. Pizzurro, 2013 ONCA 584**



A police officer saw the accused driving on a highway holding a cell phone in his hand. It looked like he was either typing or reading the information on it. As a result, he was charged under s. 78.1(1) of Ontario’s *Highway Traffic Act*.

### Ontario Justice of the Peace



Although not disputing that the cell phone he had in his hand was a hand-held wireless communication device, the accused contended there was no evidence that it was operational. The JP rejected this argument, finding it was not necessary for the Crown to prove that what the accused was using was an operating cell phone. He was found guilty and fined \$125.

### Ontario Court of Justice



An appeal judge concluded that, as an essential element of the offence under s. 78.1(1), the Crown was required to prove that the cell phone was capable of receiving or transmitting telephone communications, electronic data, mail or text messages. Since the Crown had failed to do so, the accused’s appeal was allowed and the charge was dismissed.

### Ontario Court of Appeal



The Crown argued that it need not prove the cell phone was capable of receiving or transmitting in order to convict. The Court of Appeal agreed. First, s. 78.1(1) applies to two kinds of devices:

- (1) hand-held wireless communication devices (ie. cell phones) and
- (2) other devices prescribed by regulation.

The Court found the capability requirement of receiving or transmitting telephone communications, electronic data, mail or text messages only applied to prescribed devices and not cell phones, which are well known to be capable of doing so. Furthermore, proving that a cell phone held by a driver was capable of receiving or transmitting would be an unreasonable burden:

The significant challenge for law enforcement is readily apparent. There can be no doubt that s. 78.1(1) was targeted principally at cell phones. Observing a driver holding or using a cell phone

while driving would not be enough if this requirement existed. For each case, the police would also have to find ways to immediately acquire and test the cell phone in order to determine that it was capable of receiving or transmitting. I do not think that the legislature would have intended such a burden to be imposed by a section that is otherwise designed to operate in a simple and straightforward way.

It would also be unreasonable for prosecution. Where for example the charge is using a cell phone while driving, to require the Crown, once it has proven the use of a cell phone to communicate, to also prove that the cell phone that was being used to communicate is capable of doing so is unnecessary. It would be unreasonable to read s. 78.1(1) to impose such a burden. [paras. 11-12]

Finally, the legislative purpose of s. 78.1(1) "is best served by applying the requirement that the device be capable of receiving or transmitting only to prescribed devices, but not to cell phones," said the Court of Appeal. "Road safety and driver attentiveness are best achieved by entirely prohibiting a driver from holding or using a cell phone while driving. To hold out the possibility that the driver may escape the prohibition because the cell phone is not shown to be capable of communicating, however temporarily, is to tempt the driver to a course of conduct that risks undermining these objectives."

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

Complete case available at [www.ontariocourts.on.ca](http://www.ontariocourts.on.ca)

"Road safety and driver attentiveness are best achieved by entirely prohibiting a driver from holding or using a cell phone while driving. To hold out the possibility that the driver may escape the prohibition because the cell phone is not shown to be capable of communicating, however temporarily, is to tempt the driver to a course of conduct that risks undermining these objectives."

## **HOLDING CELL PHONE FOR SUSTAINED PERIOD OF NOT NECESSARY**

**R. v. Kazemi, 2013 ONCA 585**



The accused, driving home from work, was stopped at a red light. A police officer saw her with a cell phone in her hand and she was ticketed under s. 78.1(1) of Ontario's

*Highway Traffic Act (HTA).*

### **Ontario Justice of the Peace**



The accused said that the cell phone had dropped to the floor from the car seat when she braked. When she arrived at the red light she picked it up and that is when she was seen holding it. The JP found the accused's admission that she had the cell phone in her hand established that she was holding it for the purposes of s. 78.1(1). A conviction and \$200 fine followed.

### **Ontario Court of Justice**



On appeal the charge was dismissed. The appeal judge concluded that there must be some sustained physical holding of the device in order to meet the "holding" requirement. In his view, the momentary handling of the cell phone in this case was insufficient to prove the charge.

### **Ontario Court of Appeal**



Justice Goudge, speaking for the unanimous Court of Appeal, interpreted the word "holding" in s. 78.1(1), which was not defined in the legislation, to take on its ordinary meaning: "to have a grip on" or "to support in or with the hands". There is no requirement that the cell phone be in one's hand for a sustained period of time. This interpretation is also consistent with the HTA's road safety objective and the legislature's purpose on enacting the provision:

Road safety is best ensured by a complete prohibition on having a cell phone in one's hand at all while driving. A complete prohibition also best focuses a driver's undivided attention on driving. It eliminates any risk of the driver being distracted by the information on the cell phone. It removes any temptation to use the cell phone while driving. And it prevents any possibility of the cell phone physically interfering with the driver's ability to drive. In short, it removes the various ways that road safety and driver attention can be harmed if a driver has a cell phone in his or her hand while driving.

The interpretation of "holding" offered by the appeal judge requires that there be some sustained physical holding. Any holding for a shorter period of time, with the accompanying risks to road safety and driver attention, would be exempt from the prohibition. With respect, I do not think this accords with the ordinary meaning of the word. Nor does it properly reflect the object of the HTA or best achieve the legislature's purpose in enacting the section. Moreover such an interpretation would leave the uncertainty of how long the physical holding must be sustained to be caught by the provision. It would create the enforcement challenge of requiring continued observation of the driver for that period of time if the prohibition is to be effective. [paras. 14-15]

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

Complete case available at [www.ontariocourts.on.ca](http://www.ontariocourts.on.ca)

## **SOPHONOW RECOMMENDATIONS ARE NOT BINDING LEGAL DICTATES**

**R. v. Yigzaw, 2013 ONCA 547**



During the investigation of two robberies some 2 ½ weeks apart, which included common victims, police conducted photographic line-ups. One of the officers conducting the line-ups was an investigating officer and therefore knew which photograph depicted the accused. Four photographic line-ups, one for each suspect, were created and shown to each victim.

Three of the four victims went through the photographic array sequentially while a fourth reviewed all the photographs before making a selection. The photographic line-up procedure was recorded on DVD. All four victims selected the accused's photo as being one of the robbers.

### **Ontario Superior Court of Justice**



The DVDs of the photographic line-up procedure were entered as exhibits at trial and the Crown played each of the four victims' selections of the accused for the jury. After all of the evidence was heard, the accused was convicted of multiple counts of kidnapping and robbery.

### **Ontario Court of Appeal**



The accused challenged his convictions arguing, among other grounds, that the guilty verdicts were unreasonable because, in part, the procedure used in conducting the photo line-up was flawed and therefore the evidence was incapable of supporting a conviction. In his view, the investigating officer knew the accused was a suspect and which photo in the lineup portrayed him. As well, the victims were allowed to go through the photographs and compare them rather than being presented with them sequentially. These aspects, he submitted, were identified as shortcomings in line-up procedures as detailed in the Sophonow Inquiry.

Justice Simmons found the photographic line-up procedure was imperfect. However, she noted the DVDs of the photographic line-up identifications were available for the jury's consideration. Plus, there was no suggestion the investigating officer's conduct was anything other than neutral. As well, the accused never argued that the manner of presenting the photographs to the victims deprived their pre-trial identifications of any probative value. The Court of Appeal also noted that the Sophonow Inquiry recommendations were "neither conditions precedent to the admissibility of eyewitness testimony nor binding legal dictates for the assignment of weight."

The accused's submission that the guilty verdicts were unreasonable was rejected. However, the accused's convictions were set aside and a new trial was ordered. The Court of Appeal found the trial judge erred in his instructions to the jury on the frailties of eyewitness identification by not cautioning the jury about an eyewitness's failure to identify distinguishing features, the minimal weight to be given to in-dock identifications or instructions on how to properly evaluate the photographic lineup evidence.

Complete case available at [www.ontariocourts.on.ca](http://www.ontariocourts.on.ca)

## **REQUEST TO EXIT CAR FUNCTIONAL EQUIVALENT OF SOBRIETY TEST**

**R. v. Visser, 2013 BCCA 393**



At about 11 pm police received a 911 call reporting erratic driving by a "drunk driver." The caller had followed a vehicle for 12 km and had observed it travelling under the speed limit, swerve repeatedly and nearly hit a retaining wall along the side of the road. A police officer stopped a vehicle matching the description and licence plate number provided. The officer, however, did not personally observe the vehicle being driven in an unsafe or improper manner. The driver pulled over immediately upon the officer activating his emergency lights. The officer approached the driver's side of the vehicle and spoke with the accused, the sole occupant, through the rolled-down window. The officer detected an odour of alcohol emanating from inside the vehicle but could not determine whether it was coming from the accused.

The accused was directed to exit the car and accompany the officer back to the police vehicle. When he got out, the accused dropped his wallet, spilling its contents onto the highway. He walked back to the police vehicle where he denied that he had anything to drink after noon that day. The officer detected a smell of alcohol on the accused's breath, noted that his speech was slurred, face was flushed, eyes were bloodshot and he was swaying slightly while standing. Based on these observations, the

officer made an ASD demand under the *Criminal Code*. Upon failing, the accused was "detained" for impaired driving, advised of his right to counsel and a breath demand was made under s. 254(3). He was transported to the police station, spoke to a lawyer, provided breath samples over the legal limit and released on a promise to appear. He was charged with impaired driving and over 80mg%.

### **British Columbia Provincial Court**



The Crown abandoned the over 80mg% charge because of an irregularity in service of the certificate of analysis. On the impaired driving charge, however, the accused was found guilty. The judge admitted the police officer's observations of the accused after he was directed to exit the vehicle as evidence to convict on the impaired driving.

### **British Columbia Supreme Court**



The accused argued that the trial judge erred by admitting the officer's observations as evidence and relying on them to conclude the Crown had proven impaired driving beyond a reasonable doubt. The appeal judge found that when the accused was pulled over he was under investigative detention and was entitled to his s. 10(b) *Charter* right to counsel. However, the police did not have to provide the s. 10(b) warning during the roadside stop if the evidence gathered after the accused was directed to exit his vehicle was only used to establish reasonable grounds for the breathalyzer demand and not, in the absence of a s.10(b) warning, used as evidence to incriminate on the impaired driving charge. In his view, the officer's observational evidence was obtained by "compelled direct participation." He was gathering evidence about the accused's level of sobriety in a criminal investigation (possible impaired driver) by directing him to exit his vehicle, accompany him back to the police cruiser and respond to questions about his alcohol consumption. "Prior to providing the requisite *Charter* advice, the officer is entitled to make observations of the driving or physical appearance of the driver and, in fact, rely upon it as



part of the evidence available to prove any charges,” said the appeal judge. “But once the driver is invited to participate in an activity intended to provide an opportunity for the officer to gather evidence, such evidence can only be utilized to provide the grounds for a breath demand unless the appropriate Charter advice is given and, if desired, an opportunity to contact counsel is first provided.” The accused’s conviction was set aside and a new trial was ordered.

### British Columbia Court of Appeal



The Crown appealed, arguing the officer’s roadside observations were admissible at trial for the purpose of incriminating the accused on the impaired driving charge, and not just limited for the purpose of providing reasonable grounds for a breath demand. Justice Smith, writing the Court of Appeal’s judgment, noted that a police officer may stop a motorist if authorized under statutory authority or their common law duties to protect life and prevent harm. Statutorily, “there is an interlocking scheme of provincial and federal legislation that authorizes police officers to detain motorists suspected of drinking and driving for the purpose of assessing their level of sobriety.”

When a motorist is stopped at the roadside they are detained, which triggers s. 10(b). However, the right to counsel may be suspended for the purposes of roadside screening measures (such as ASD testing, physical sobriety tests and direct questioning about the driver’s consumption of alcohol) if the use of the evidence gathered is limited to establishing reasonable grounds for the breathalyzer demand. If police action after a roadside stop involves measures amounting to the compelled direct participation of a detained motorist in order to obtain evidence of impairment, the observations are only admissible at trial to establish reasonable grounds for the breathalyzer test. If, however, police actions are measures undertaken while carrying out other authorized duties that incidentally produce evidence

of impairment they are admissible at trial to prove guilt. The difference between these two purposes can be difficult to draw and will require careful examination.

Thus, the purpose of the officer’s direction to exit the vehicle after the roadside stop will determine whether the observational evidence gathered is or is not admissible for the purpose of incriminating the motorist of impaired driving in the absence of giving them their s.10(b) right to counsel. Justice Smith stated:

“If the only purpose is to investigate the motorist’s level of sobriety to determine if a criminal offence has been committed, then in my view the officer’s directions amount to screening measures that are the functional equivalent of physical sobriety tests and/or the ASD test.”

If the only purpose is to investigate the motorist’s level of sobriety to determine if a criminal offence has been committed, then in my view the officer’s directions amount to screening measures that are the functional equivalent of physical sobriety tests and/or the ASD test. In such circumstances, the only purpose of the directions can be to assess the motorist’s level of insobriety; the principles derived from [case law] would dictate that such evidence may only be used at trial for the limited purpose of establishing reasonable grounds for a breathalyzer demand. To admit the evidence obtained in this manner to prove guilt on a criminal charge would, in my view, amount to an unjustifiable infringement of the motorist’s s. 10(b) right to counsel. [para. 64]

And further:

A helpful way to apply the rationale of these decisions might be for a court first to determine the investigating officer’s focus or purpose at the roadside stop. If the evidence establishes that the officer formed the opinion from his or her initial interaction with the motorist, that it was necessary to remove the driver immediately from the road for safety reasons, then the investigator’s observations of the driver made thereafter would be available at trial to prove guilt on a subsequent criminal charge. However, if the evidence establishes that the purpose of the investigator’s direction to a motorist to exit his vehicle was to determine whether grounds existed to make a breathalyzer demand, then the

“If the ... officer formed the opinion from his or her initial interaction with the motorist, that it was necessary to remove the driver immediately from the road for safety reasons, then ... observations of the driver made thereafter would be available at trial to prove guilt on a subsequent criminal charge. However, if ... the purpose of the ... direction to a motorist to exit his vehicle was to determine whether grounds existed to make a breathalyzer demand, then the observational evidence obtained thereafter would not be available to prove the guilt for a criminal offence.”

observational evidence obtained thereafter would not be available to prove the guilt for a criminal offence. This might be a fine distinction but I would suggest an intelligible one. [references omitted, para. 69]

The Court of Appeal refused to restrict the limited-use exception of evidence of impairment to actual physical sobriety testing (including an ASD test) and responses to direct questions about the motorist's consumption of alcohol. It rejected the Crown's assertion that evidence obtained as a result of a police officer's direction to exit a vehicle, accompany the officer and answer questions were mere “passive observations” intended to assess the motorist's level of sobriety and should not be held to be evidence obtained by compelled direct participation:

I find it difficult to appreciate the difference between compelling a motorist to exit his vehicle for the purpose of continuing an impaired driving investigation and compelling a motorist to exit his vehicle in order to gather evidence of his sobriety that may later be used in to prosecute the driver for impaired driving. In both instances, the detained motorist does not have the benefit of the s. 10(b) right to counsel, and, in the normal course, must comply with the officer's directions. [para. 68]

Here, the officer was authorized to stop the accused's vehicle based on his common law duty to investigate a complaint of erratic driving by a suspected drunk driver. Since the officer had not personally observed any unsafe or improper driving and the accused had pulled over his vehicle appropriately, the officer had no legal authority under British Columbia's *Motor Vehicle Act* to direct him to exit his vehicle. Once the officer detected the odour of alcohol emanating from the vehicle, the investigation into erratic driving morphed into an investigation of impaired driving under the *Criminal Code*.

Based on the evidence, there was no other authorized investigative activity. The only reasonable inference to be drawn from the officer's request to exit the vehicle was to assess whether there was a basis upon which the officer could make a breathalyzer demand. The officer's observational evidence from the moment he directed the accused to exit his vehicle was inadmissible to prove the accused's guilt on the impaired driving charge. However, the Court noted the case may have been decided differently if the officer believed the accused, while he was seated in the vehicle, was a menace to public safety and that is why he was requested to exit the vehicle. The Crown's appeal was dismissed.

Complete case available at [www.courts.gov.bc.ca](http://www.courts.gov.bc.ca)

“I find it difficult to appreciate the difference between compelling a motorist to exit his vehicle for the purpose of continuing an impaired driving investigation and compelling a motorist to exit his vehicle in order to gather evidence of his sobriety that may later be used in to prosecute the driver for impaired driving. In both instances, the detained motorist does not have the benefit of the s. 10(b) right to counsel, and, in the normal course, must comply with the officer's directions.”

## MEASURES DEPLOYED DURING TRAFFIC STOP MUST BE REASONABLY NECESSARY

**R. v. Adaiken, 2013 ABCA 333**



Shortly after midnight a Calgary police officer pulled over a vehicle for speeding. The officer told the driver that he was speeding and obtained his driver's information.

When the officer returned to his police car to write a speeding ticket, the driver became irate and angry because he did not think he had been speeding. The driver left his vehicle and began walking towards the police car. The officer stepped out of his car, stood behind the driver's door with his hand near his gun and instructed the driver to return to his car. When the driver ignored the direction, the officer further instructed him to get back into his car, or to move to the sidewalk, otherwise he would be arrested. The driver returned to his car and was served a speeding ticket.

### Calgary Police Service



After the driver filed a complaint with the Calgary Police Service, the Chief of Police ruled that the officer exceeded his authority when he told the driver that he would be arrested if he did not return to his car. An official warning was placed on the officer's file.

### Alberta Law Enforcement Review Board



The officer appealed the Chief's ruling to Alberta's Law Enforcement Review Board (LERB), arguing that he acted appropriately in the circumstances. The LERB affirmed the Chief's decision, concluding that the driver maintained a reasonable distance, was not verbally abusive, stopped when instructed to do so and did not physically confront the officer. Since the driver did not commit an offence, the necessary conditions for an arrest did not exist. Thus, the LERB concluded that the officer exceeded his authority when threatening arrest.

### Alberta Court of Appeal



The officer argued that the LERB erred by concluding that he acted unlawfully by directing the driver to get back into his car or face arrest. The Court of Appeal determined that the police authority to direct an individual's movements during the course of a traffic stop required an examination of the common law and the police power to detain:

A police officer may only arrest (or lawfully threaten to do so) if given such authority under statute or at common law.

During traffic stops, police officers have certain statutory powers. For example, an officer may require a driver to bring his vehicle to a stop, furnish information, and remain stopped until permitted by the officer to leave: s 166(2) of the Traffic Safety Act ... . Officers also have the authority to direct traffic: ss 58, 61, and 101(1) of the Use of Highway and Rules of the Road Regulation (Regulation) ...

It is not disputed that police have the power to detain a motorist for a traffic violation. However, there are no specific statutory provisions dealing with the power of a police officer to direct an individual's movements during the course of a traffic stop. We must therefore look to the common law in asking whether the power to detain extends to limiting a motorist's movements and ordering that he/she stay in their vehicle. [references omitted, paras. 8-10]

Recently, a majority of the Supreme Court of Canada in *R. v Aucoin*, 2012 SCC 66 concluded that the manner in which the police exercise a detention must be justified. The question is not whether the police can detain a driver after stopping them for a regulatory infraction, but whether the police are justified in exercising the detention as they did in the circumstances. As the Alberta Court of Appeal put it, "the issue on this appeal is not whether the [officer] had the authority to tell the driver to return to his car or face arrest, but whether the exercise of this power was reasonably necessary in light of the totality of the circumstances." Since the Chief of Police wanted to reconsider this matter, the Court of Appeal agreed to send it back but offered the following guidance:

The determination of whether the [officer] was justified in threatening to arrest the driver for refusing to return to his vehicle and stay there, involves balancing the seriousness of the risk to the public or individual safety with the liberty interests of members of the public. It is important to consider the duty being performed and the nature and extent of the liberty being interfered with.

In this case, the Chief of Police must weigh the fact that the [officer] was performing his duty to enforce traffic safety, with the level of imposition on the driver's liberty – restricting his physical movements to his car for a few moments. This necessarily entails asking whether there were other reasonable means by which the officer could have ensured his safety and enforced his duty.

As the Supreme Court observed [in] Aucoin; "In the context of a straightforward motor vehicle infraction, it will be the rare case in which it will be reasonably necessary to secure a motorist in the rear of a police cruiser."

However, the relevant determination must focus on the specific nature of the situation. In this case, the [officer] states that it was reasonable for him to believe that he was about to be assaulted by the driver who continued to advance on him after being commanded to get back into his car and thus the threat to arrest was necessary in the circumstances. Whether the officer had at his disposal less intrusive measures to ensure his safety and the continuation of his duty to issue the traffic ticket is a question of fact to be left to the Chief of Police.

We would like to add a final comment. We agree with the court in Aucoin that it would be rare case in which it was reasonably necessary for a police officer arrest a motorist at a routine traffic stop. It seems to us that training police officers to be less aggressive and more courteous at traffic stops would avoid most troublesome situations and defuse others. [references omitted, paras. 14-18]

The matter was remitted back to the Chief of Police for reconsideration.

Complete case available at [www.albertacourts.ab.ca](http://www.albertacourts.ab.ca)

## **PURSE A 'THING' TO BE SEARCHED UNDER WARRANT**

**R. v. Le, 2013 BCCA 442**



The police obtained a CDSA search warrant for an apartment and arrested their target after she left the premises. When police executed the warrant they found two women and three children inside. The police made arrangements for these remaining occupants, who were not suspects, to leave so the search could be completed unencumbered. As one of the women left, she picked up her purse from the kitchen table. The purse was taken from her, searched and police found crack cocaine in it. She was charged with possessing cocaine for the purpose of trafficking.

### **British Columbia Supreme Court**



The judge concluded that the search warrant eliminated any objectively reasonable expectation of privacy in any things located in the apartment. The purse, one such thing, was an item in the place searched that was separate from the accused's person. Picking up the purse in the midst of the warrant's execution did not create an objectively reasonable expectation of privacy when there was none while the purse sat on the table. The search of the purse did not interfere with the accused's privacy rights and there was no *Charter* breach. And, even if there was a s. 8 violation, the judge would have ruled the crack cocaine admissible under s. 24(2). The accused was convicted of the lesser and included offence of possessing a controlled substance, the judge being not satisfied she possessed it for the purpose of trafficking.

### **British Columbia Court of Appeal**



The accused argued, in part, that the trial judge erred in concluding that the scope of the search warrant extended to her purse. However, the Court of Appeal rejected this submission, holding that the search warrant extended to the purse after it had been picked up.



“[A] search of the purse while it was on the table was not unreasonable, because it was a ‘thing’ as listed in the search warrant. At the time the search warrant initially was executed it was merely an object in the premises.”

Even though the accused had a reasonable expectation of privacy in her purse (a different finding than the trial judge), “a search of the purse while it was on the table was not unreasonable because it was a ‘thing’ as listed in the search warrant,” said Justice Chiasson. “At the time the search warrant initially was executed it was merely an object in the premises.” The purse was a “thing” that the police were legally authorized to search. The warrant’s reach to the “thing” (purse) did not end just because the accused picked it up and declared ownership. Since there was no challenge to the search warrant or the manner of search, the search of the purse was authorized by law and was reasonable. As the Court of Appeal noted, “[the search] did not become unreasonable simply because the [accused] picked up her purse.”

There was no *Charter* breach and it was therefore unnecessary to consider s. 24(2).

### A Word of Warning

The Court of Appeal cautioned that if a person was already carrying a purse when the warrant was executed, the outcome may have been different. If it was carried, a purse search might be considered a search of the person rather than a search of a “thing” under the authority of the warrant. As the Court of Appeal stated:

It is important to identify what this case concerns and what it does not concern. It does not concern the search of a purse that was on the person of the [accused] at the time the search warrant initially was executed or variants on that fact pattern. These might engage a consideration whether the search warrant extended to the purse as a “thing” in the dwelling-house or whether it did not because searching such an object would be the search of a person. The question is best left to another day.

Complete case available at [www.courts.gov.bc.ca](http://www.courts.gov.bc.ca)

## A Judge’s View on Protecting Peace Officers & Promoting Public Safety

*“This Court emphatically rejects any suggestion that the Court’s sentencing posture should be relaxed to reflect a peace officer’s voluntary acceptance of a risk that he or she may be a target of violence in the line of duty. If there is a risk of violence and a potential for harm, then the Court must recognize the vulnerability of the peace officer and compensate for it by ensuring an increased measure of protection through the sentencing process.”*

*The peace officer provides an essential public service. A deliberate attempt to harm those performing a public duty enhances the moral culpability of such an attack. The peace officer’s willingness to serve and protect others and to risk themselves in doing so is a reason to increase, and not reduce, the sentencing tariff for crimes of extreme violence directed against the peace officer.”*

The Honourable Mr. Justice Kilpatrick in *R. v. Utye*, 2013 NUCJ 14 at paras. 36-37.



**REG #57673**

**ADRIAN  
OLIVER**



**MEMORIAL RUN**

**(5KM & 10KM)**

**&**

**BARBEQUE**

**DATE:**  
**NOVEMBER 17, 2013**

**TIME:**  
**2:00 PM**  
(EARLY BIRD START: 1:30PM)

**LOCATION:**  
**DEER LAKE PARK**  
**6450 DEER LAKE AVENUE**  
**BURNABY, BC**

**TICKETS:**  
\$20 FOR BOTH 5KM & 10KM RUNS (INCLUDES BBQ)  
\$30 RUN & BBQ (SAME DAY REGISTRATION)  
\$20 T-SHIRT ONLY • \$10 BBQ ONLY

**PROCEEDS FROM EACH TICKET  
SOLD WILL BE GOING TOWARDS  
A MEMORIAL BENCH IN  
ADRIAN'S HONOUR.**



**AFTER THE MEMORIAL RUN, WE  
WILL BE UNVEILING THE  
MEMORIAL BENCH PURCHASED  
THROUGH DONATIONS IN  
ADRIAN'S HONOUR.**



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#### 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)  
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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





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