JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

Remembrance Day
November 11, 2014
Communities throughout Canada.

Highlights In This Issue

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Upcoming Courses

Advanced Police Training

Advanced training provides opportunities for skill development and career enhancement for municipal police officers. Training is offered in the areas of investigation, patrol operations and leadership for in-service municipal and RCMP police officers.

JIBC Police Academy

See Course List here.

BCACP/CACP
2015 Police Leadership Conference
April 12-14, 2015
"Leading with Vision and Values"

This is Canada's largest police leadership conference providing an opportunity for delegates to hear leadership topics discussed by world-renowned speakers. Click here

BCLEDN Conference
November 5, 2014
"Radicalization of Terrorists"

see page 4

Graduate Certificates

Intelligence Analysis

or

Tactical Criminal Analysis

www.jibc.ca

see page 36

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.

Children at risk: the case for a better response to parental addiction.

Representative for Children and Youth.

Victoria, BC: Representative for Children and Youth, (2014).

HV 746 B7 T87 2014

Crucial accountability: tools for resolving violated expectations, broken commitments, and bad behavior.

Kerry Patterson, Joseph Grenny, David Maxfield, Ron McMillan, and Al Switzler.

New York, NY: McGraw-Hill, (2013).

HM 1121 C78 2013

Doing action research in your own organization.

David Coghlan & Teresa Brannick.

Los Angeles, CA: SAGE, (2014).

H 62 C5647 2014

Happiness matters [videorecording]**: creating a culture for business to thrive.**

Tony Hsieh; production services provided by Stanford Video; director, Gordon Gurley.

Mill Valley, CA : Kantola Productions, (2011).

1 videodisc (63 min.): sd., color; 4 3/4 in. (DVD).

"Can you build a business model around happiness? If you can deliver happiness to customers through exceptional customer service, from engaged employees who are inspired by a vision of higher purpose, the answer is yes. In this high-spirited talk, Tony Hsieh shares how Zappos fosters its unique culture, starting with hiring and retaining employees based on their commitment to its core values."- Back cover.

HF 5386 H75 2011 D1996

How to be an even better manager: a complete A-Z of proven techniques and essential skills.

Michael Armstrong.

London, U.K.: Kogan Page, (2014).

HD 31 A73 2014

It starts with one: changing individuals changes organizations.

J. Stewart Black.

Indianapolis, IN: Pearson, (2014).

HD 58.8 B547 2014

Leadership and the one minute manager: increasing effectiveness through situational leadership® II.

Ken Blanchard, Patricia Zigarmi, Drea Zigarmi.

New York, NY: William Morrow (2013).

HD 57.7 B56 2013

No accident: eliminating injury and death on Canadian roads.

Neil Arason; foreword by Ralph Nader.

Waterloo, ON: Wilfrid Laurier University, (2014).

HE 5614.5 C2 A67 2014

Reframing organizations: artistry, choice, and leadership.

Lee G. Bolman, Terrence E. Deal.

San Francisco, CA: Jossey-Bass, (2013).

HD 31 B636 2013

What color is your parachute?: a practical manual for job-hunters and career-changers.

Richard N. Bolles.

Berkeley, CA: Ten Speed Press (2014).

HF 5383 B56 2014

Winning from within: a breakthrough method for leading, living and lasting change.

Erica Ariel Fox.

New York, NY: Harper Collins Publishers, (2013).

HD 57.7 F69 2013

Women on ice: methamphetamine use among suburban women.

Miriam Boeri.

New Brunswick, NJ: Rutgers University Press, (2013).

HV 5824 W6 W64 2013

Think Globally Police Locally

BCLEDN
BC Law Enforcement Diversity Network

> presents

MADE IN CANADA

Radicalization of Terrorists

Nov. 5th, 2014 from 9am to 4pm @ The Justice Institute of BC
Registration from 8am to 8:45am • Pre-register at www.bcledn.org
$175 (before or on Sept 30) and $225 (after September 30)
Attendance Restricted to Law Enforcement Personnel Only

Keynote Speakers

Dr. Martin Bouchard

Associate Professor of Criminology & Director of the International Cyber Crime Research Centre (SFU) and Associate Director of Research of TSAS. Bouchard will present on the role of social networks connected to illegal markets, organized crime & more specifically, terrorism.

Dr. Lorne L. Dawson

Chair of the Department of Sociology and Legal Studies at the University of Waterloo and Professor in the Department of Sociology and Legal Studies and Department of Religious Studies. Dawson will discuss the process of radicalization in homegrown terrorists groups.

Mubin Shaikh

Coming from a background of having been a Muslim extremist in earlier years to becoming an undercover operative in several high profile classified cases. Shaikh will provide an extremely unique perspective on radicalization and recruitment as it relates to society today.

Insp. Steve Corcoran

Operations Officer for the E Division National Security Enforcement Team (INSET) and active member of the National Security Program for over 11 years. Corcoran brings a local and front-line perspective on homegrown terrorism and radicalization.

The BC LEDN is a sub-committee of the British Columbia Association of Chiefs of Police with representation from the following participating agencies.

JUSTIFICATION FOR NIGHT SEARCH UPHELD: NO CHARTER BREACH

R. v. L.V.R., 2014 BCCA 349

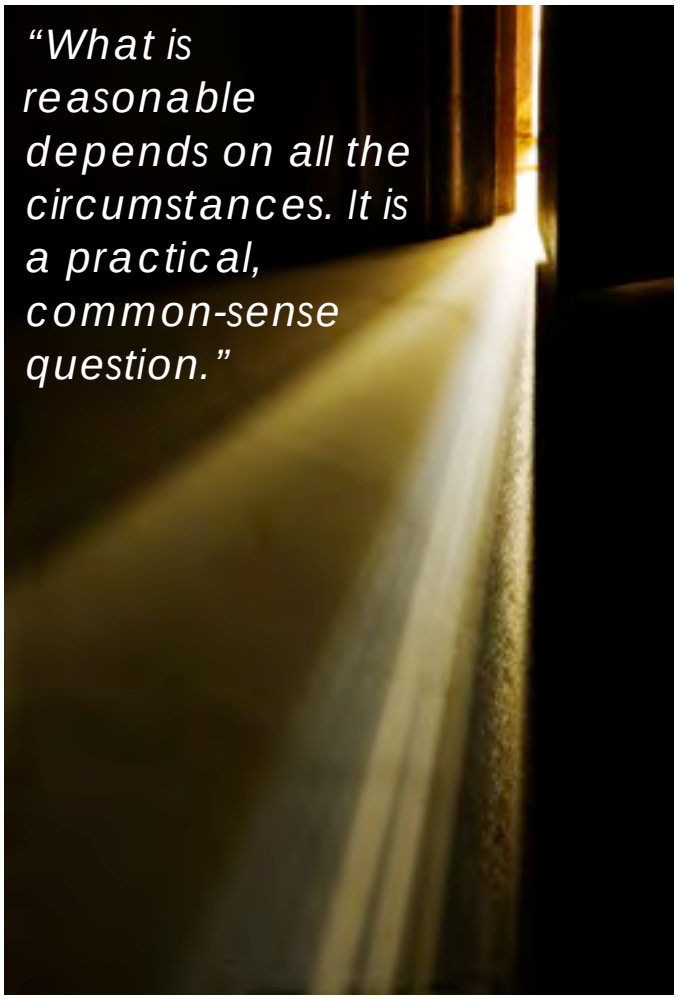
Following an investigation involving sexual offences against two youths, the accused was arrested. While he was in custody, police sought a warrant to search his home during the night for a number of things including computers and devices capable of storing or recording digital photographs, hard copy photographs, and firearms and weapons. The reasons the officer provided in the grounds for the ITO to justify a night search were:

- The accused was in custody for a court appearance and the evidence sought was required prior to his appearance;
- There were police officers maintaining continuity of the residence; and
- The officer was working her last night shift and would not be available for a few days. During this time there would be an opportunity for the loss of evidence if the search warrant was not executed before the accused's release from custody.

Furthermore, the justice of the peace was informed the house would be empty during the proposed hours of the search. The search warrant was granted setting the hours for search as 11:35 pm to 5:30 am. During the search the police seized the accused's computer and various storage devices containing a number of photographs of a naked female, and a video of a male and female having sexual intercourse. Charges were laid including several related to sexual offences.

British Columbia Supreme Court

During a *voir dire* the officer testified, in part, that she believed the accused would go before a judge within 24 hours of his arrest and might be released. She feared that upon release he would remove or destroy evidence. The accused maintained that all of the evidence seized under the warrant should be ruled inadmissible under s. 24(2) of the *Charter* because the search of his house and the seizure of the evidence violated his rights under s. 8 of the *Charter*. He argued, among other things, that the ITO did not meet the statutory requirements under s. 488 of the *Criminal Code* justifying a night search.



The judge, however, noted the issuing justice was aware that the house would be vacant and police did not rouse residents in the middle of the night when executing the search warrant. The judge concluded there were reasonable grounds for a night search, referring to three factors in upholding the search warrant - (1) the evidence was capable of being quickly destroyed, (2) the matter was very serious, and (3) it was certain that there would be no one home when the search warrant was executed. The evidence was admitted and the accused was convicted of several offences.

BY THE BOOK:

Night Search: ***Criminal Code***

s. 488 A warrant issued under section 487 or 487.1 shall be executed by day, unless

(a) the justice is satisfied that there are reasonable grounds for it to be executed by night;

(b) the reasonable grounds are included in the information; and

(c) the warrant authorizes that it be executed by night.

"night" means the period between nine o'clock in the afternoon and six o'clock in the forenoon of the following day. (s. 2 Criminal Code)

Night = 9 pm - 6 am

British Columbia Court of Appeal

The accused argued that the trial judge erred in finding a valid basis for the night search. Under s. 488 of the *Criminal Code*, a s. 487 or s. 487.1 search warrant may only be executed by day unless the justice is satisfied that there are reasonable grounds for it to be executed by night, the reasonable grounds are included in the ITO, and the warrant authorizes that it be executed by night. The accused submitted that he would not have been released from custody before morning. Therefore, there was no realistic concern or threat he could destroy evidence. The police, after all, were watching his house and maintaining continuity of it. In his view, having to maintain continuity of a residence was not sufficient reason for a night search because it was only related to police convenience. Nor did the officer's un-availability due to being off shift serve as a valid basis for authorizing the night search because the officer did not have to take part in the execution of the warrant.

"The criteria in s. 488 contains an objective aspect: in the circumstances known at the time the search warrant was issued, was it reasonable that the search warrant be executed at night?"

Justice Saunders, writing the Court of Appeal's opinion, agreed that "the officer's future availability to search the premises generally would not rise to a reasonable ground for a night search in circumstances in which a co-investigator is, presumably, capable of conducting a search." Maintaining continuity of the residence and concern as to the timing of the accused's release, however, related to the officer's concern for preservation of evidence, a concern that could provide a proper basis for a night search.

In deciding whether there were reasonable grounds for the execution of the search warrant at night, Justice Saunders stated:

> What is reasonable depends on all the circumstances. It is a practical, common-sense question. Good faith on the part of the affiant is important in answering this question, but subjective belief does not provide the whole answer. The criteria in s. 488 contains an objective aspect: in the circumstances known at the time the search warrant was issued, was it reasonable that the search warrant be executed at night?
>
> Section 488 does not set "necessity" as the basis for a night search warrant, but rather engages the situational term "reasonable grounds". A night search may be reasonable in one situation but not in another, depending upon a host of factors. The gravity of the substance of the investigation, the likely occupancy of the residence and degree of disruption to privacy the search may cause, the nature of the items that may be found in a search, and the needs of the investigation are but a few. [paras. 24-25]

"Section 488 does not set 'necessity' as the basis for a night search warrant, but rather engages the situational term 'reasonable grounds'. A night search may be reasonable in one situation but not in another, depending upon a host of factors."

The trial judge did not err in upholding the search warrant because of the three factors he identified (1) the fact that no-one was home during the hours proposed for the search, (2) the seriousness of the matters under investigation, and (3) the disposable nature of the items sought. "While the police still required specific authorization to search at night (s. 488), the absence of any resident is highly relevant, and the judge was correct to consider the diminished degree to which privacy interests would be affected in the circumstances by a search at night," said Justice Saunders. "Likewise, the seriousness of the offence was a proper consideration."

As for the disposable nature of the items sought, there were two relevant reasons given by the police officer in the ITO: (1) the need for police to maintain continuity of the residence, and (2) the possibility the accused would be released:

> The investigating officers considered that the items referred to in the search warrant were of sufficient importance to justify the continuing police presence to establish continuity, and the police officer completing the ITO correctly understood the burden on the police to bring [the accused] before the Provincial Court without delay. The officer had no way of knowing if and when [the accused] might have been released. In the event he was released he could be expected to travel immediately to his residence, risking destruction of items in the residence unless the police were present to prevent this from happening. All of this meant that the investigation required a continuing police presence at the residence until the search began. However, until it began the police officers securing the residence were effectively an idling motor. Such idling might have been of no moment had the residence been occupied and had there been a real risk of rousing sleepers, but such was not the case. In my view, the relative waste in police personnel simply waiting for the crack of day, with no corresponding benefit to any resident, is a factor supporting the judge's ruling. I cannot say the judge erred in finding the officer's concern, when the ITO was sworn, provided reasonable grounds for a night search in all the circumstances. [para. 28]

The Court of Appeal rejected the accused's submission that the search warrant was invalid in authorizing a night search. His appeal was dismissed and his convictions were upheld.

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

22-MINUTE ADVISEMENT DELAY VIOLATED RIGHTS: COCAINE EXCLUDED

R. v. Mian, 2014 SCC 54

Police in Edmonton were investigating a number of gang related homicides and other violence. The investigative team obtained a wiretap authorization that allowed the interception of the private communications of a principal target. One of the calls intercepted related to a drug transaction for the purchase of a half kilogram of cocaine. Visual surveillance of the target revealed interactions with the accused who was driving a grey Chevrolet Malibu and was believed to be the supplier of the cocaine. While surveillance was ongoing, a detective instructed other officers to make a routine traffic stop of the Malibu and to use every effort to find appropriate grounds to search the car without having to rely on the information provided by the detective so that the ongoing homicide investigation would not be compromised. The officers were also told that there were already grounds to arrest the driver which could be relied upon if other grounds could not be found.

As the Malibu left a bar, it was pulled over and the accused was removed from the vehicle. He had a cell phone in his hand, which police removed and a pat-down search revealed $2,710 in cash on his person. After he was secured in the back of a police car, the Malibu was search and cocaine, an additional $1,340 in cash, another cell phone and the accused's wallet was found. Some 22 minutes after the Malibu was pulled over, the accused was advised that he was being arrested for possessing cocaine for the purposes of trafficking. Another two to five minutes passed before he was advised of his *Charter* right to retain and instruct counsel. The

accused was charged with possessing cocaine for the purpose of trafficking and possessing currency obtained by the commission of an offence.

Alberta Court of Queen's Bench

The accused sought the exclusion of all the evidence under s. 24(2) of the *Charter*. He argued he was arbitrarily detained and arrested, subjected to an unreasonable search and seizure, and not properly advised of the reason for his detention and of his right to counsel. Although the arresting officers did not have grounds of their own to arrest the accused and conduct the searches, the judge found they could rely on the grounds gathered by the detective and the surveillance team that the Malibu contained a significant quantity of cocaine. Thus, the accused's detention was not arbitrary and the searches of his person and vehicle were lawful. However, the judge ruled that the accused's s. 10 (a) *Charter* right to be informed promptly of the reasons therefor and his s. 10 (b) right to be informed of his right to retain and instruct counsel without delay had been breached. In the judge's view, there must be exceptional circumstances to justify suspending the rights protected under s. 10 (a) and (b) which did not exist in this case. There was no satisfactory reason for not advising the accused immediately of his rights on arrest and by waiting 22 minutes to inform him of the reason for his arrest and of his right to retain and instruct counsel. The evidence was then excluded under s. 24(2) and the accused was acquitted.

Alberta Court of Appeal

The Crown appealed the accused's acquittal. It argued that the trial judge erred by failing to find exceptional circumstances justified the suspension of s. 10(a) and (b) rights and in excluding the evidence under s. 24(2). The Court of Appeal, however, raised a different issue for consideration and ordered a new trial on the basis that the trial judge relied on impermissible cross examination - allowing a police witness to be questioned about the veracity of evidence given by another officer. The Appeal Court found it inappropriate to engage in an analysis of the other grounds of appeal, including the s. 10 *Charter* issues.

BY THE BOOK:

s. 10(a) & (b): *Charter*

Arrest or Detention

s. 10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right ...

Supreme Court of Canada

The accused appealed the order of a new trial. The Supreme Court revisited the trial judges determination about whether there were breaches of s. 10 (a) and (b) of the *Charter* as well as whether the trial judge erred in his analysis and decision to exclude the evidence.

The Crown suggested that the 22-minute delay in complying with the informational duties under s. 10 was justified by exceptional circumstances. In the Crown's view, a more transparent drug arrest would have compromised the integrity of the separate and ongoing wiretap investigation into gang violence.

But Justice Rothstein, speaking for an unanimous Supreme Court, found there was no basis to overturn the trial judge's conclusion that the accused's s. 10 rights were breached. Even if the need to protect the integrity of a separate, ongoing investigation was an exceptional circumstance that could delay the implementation of s. 10 (a) rights or justify the

suspension of s. 10 (b) rights, exceptional circumstances did not arise on the facts in this case as was found by the trial judge. Justice Rothstein stated:

> The trial judge found as a fact that there was insufficient evidence to support the assertion that immediate compliance with s. 10 of the Charter would have compromised the broader investigation. The trial judge acknowledged that [the detective] testified that the delay was due to concerns about compromising the ongoing investigation. However, the judge went on to find that there was no evidence about why simply advising [the accused] of the reason for his arrest or informing him of his right to counsel would have frustrated the ongoing investigation of [the principal target] and other gang members. Ultimately, the trial judge found that there was no evidence of a "real and present danger that the operation would be frustrated or compromised". The Crown has not established a legal basis for assailing these factual findings. [references omitted, para. 75]

Since there were no exceptional circumstances that would justify police delaying compliance with s. 10 informational duties, the accused's s. 10 (a) and (b) rights were infringed.

As for the exclusion of evidence under s. 24(2), the trial judge was owed considerable deference. He applied the proper test - the seriousness of the *Charter* breach, the impact of the breach on the protected interests of the accused, and society's interest in the adjudication of the case on its merits. The accused's appeal was allowed and his acquittal was restored.

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

RELEASE WITHOUT CHARGE DOES NOT NEGATE REASONABLE GROUNDS

The Manitoba Court of Appeal has upheld the first degree murder conviction of the accused for killing a rival drug dealer. He had argued, among other things, that his arrest was unlawful and therefore a jacket (with gunshot residue) and shoes (with glass-fragment evidence) seized at the time of his arrest were inadmissible as evidence against him. The trial judge found the police had both subjective and objective grounds to arrest him despite releasing him the next day when they concluded they did not have grounds to lay a charge. Manitoba's top Court agreed with this finding. Having insufficient grounds for a charge does not mean that police lacked reasonable grounds to make the arrest. Because the arrest was lawful, the seizure of his jacket and shoes was lawful too. - *R. v. Heickert*, 2014 MBCA 81.

PRODUCTION ORDER MAY ISSUE ON BASIS OF REASONABLE SUSPICION

R. v. Fedossenko, 2014 ABCA 314

Following a single vehicle accident, the accused was taken to hospital by ambulance and was accompanied by police. During transport he told the investigating officer that he had "a few beers earlier." The officer smelled a faint odour of alcohol on his breath and noted that he had red eyes, although he was coherent and not slurring his words. At the hospital, blood samples were taken for medical purposes. Then the officer arrested the accused for impaired driving, read him his *Charter* rights and made a blood demand under s. 254(3) of the *Criminal Code*. The accused complied with the demand and a second set of blood samples were taken.

The following night the officer unsuccessfully applied for a search warrant to obtain the hospital blood samples. His search warrant application was rejected on the basis that he had insufficient grounds to believe an offence had been committed. The officer subsequently received the analysis of the blood samples he demanded, which showed a blood

BY THE BOOK:

Production Order: ***Criminal Code***

s. 487.012(3) Before making an order, the justice or judge must be satisfied, on the basis of an ex parte application containing information on oath in writing, that there are reasonable grounds to believe that

(a) an offence against this Act or any other Act of Parliament has been or is suspected to have been committed;

(b) the documents or data will afford evidence respecting the commission of the offence; and

(c) the person who is subject to the order has possession or control of the documents or data.

alcohol concentration over the legal limit. He then used those results to help obtain a production order under s. 487.012 of the *Criminal Code* for the hospital records related to the blood samples taken for medical purposes. The production order was granted

Alberta Provincial Court

The Crown conceded the evidence obtained through the s. 254(3) blood demand was inadmissible because the justice of the peace who denied the search warrant had already determined there were insufficient reasonable grounds to believe an offence had been committed. The Crown did not attempt to tender this evidence, instead relying solely on the hospital records obtained by the production order to establish the accused's blood alcohol concentration. The accused, however, objected on the basis that the production order was invalid. Since the investigating officer did not have reasonable grounds to believe an offence had been committed, he submitted that police did not meet the requirements of s. 487.012 (3). The Crown, on the other hand, argued all that was required was a reasonable suspicion that an offence had been committed.

The judge agreed with the accused, found the hospital records were obtained in breach of s. 8 of the *Charter* because reasonable grounds for the production order had not been met. The hospital records were excluded under s. 24(2) and the accused was found not guilty of impaired driving.

Alberta Court of Queen's Bench

The appeal judge upheld the trial judge's interpretation of s. 487.012(3) and found the standard for granting a production order was the same as that required for a search warrant under s. 487(1) - reasonable grounds to believe an offence has been committed. The Crown's appeal was dismissed.

Alberta Court of Appeal

The Crown further appealed, again arguing a production order could be issued on the basis of a reasonable suspicion that an offence has been committed and that reasonable and probable grounds was not required.

A View of Two

Justices Picard and Watson, writing the majority opinion, concluded that both lower courts incorrectly interpreted the language of s. 487.012(3) to mean that only reasonable and probable grounds to believe that an offence has been committed is required. Instead, the language of s. 487.012(3) includes reasonable grounds to believe that an offence has been or is suspected to have been committed. This language incorporates the option of reasonable suspicion - a familiar and constitutionally legitimate standard:

> Under the circumstances here, the police were not required to show reasonable and probable grounds to believe the offence was in fact committed in order to meet the requirement in s 487.012(3)(a) of the Code. The purpose of the production order was to verify the reasonable suspicion that the offence was committed. Moreover, in the circumstances of this case, it is clear that this was not an attempt by the police to circumvent their duties or to otherwise cure

"Under the circumstances here, the police were not required to show reasonable and probable grounds to believe the offence was in fact committed in order to meet the requirement in s 487.012(3) (a) of the Code. The purpose of the production order was to verify the reasonable suspicion that the offence was committed."

> an earlier failed attempt to obtain similar evidence but in a different fashion. The tests are simply different. Nothing in this case had the effect of placing the accused's medical interests in direct tension with his constitutional rights. [para. 8]

The Crown's appeal was allowed and a new trial was ordered.

Another Opinion

Justice O'Ferrall, in dissent, would uphold the appeal judge's interpretation of s. 487.012(3). "Reasonable suspicion ... is not sufficient under ... section 487.012(3) (a) for intrusive searches," he said. "A belief based on reasonable grounds is required. A reasonably grounded belief means the person asserting the belief in support of the warrant or production order must subjectively believe that an offence has been or is suspected of having been committed and that there are objectively reasonable grounds for holding that belief. It must be a credibly based belief." Furthermore, even if a different standard were applied, Justice O'Ferrall found there was insufficient admissible evidence to support the issuance of the production order.

Complete case available at www.albertacourts.ab.ca

REASONABLE OPPORTUNITY & DUE DILIGENCE DEPEND ON CIRCUMSTANCES

R. v. Dufault, 2014 ABCA 271

A police officer stopped the accused as part of routine traffic enforcement. He asked her for her driving documents and smelled alcohol on her breath. She confirmed she had consumed alcohol and failed an approved screening device test. She was arrested for impaired driving, given an evidentiary breath demand, advised of her *Charter* rights and asked to speak with a lawyer. At the police station she was placed in a phone room equipped with several phonebooks and a poster with the 1-800 number for Legal Aid. After being in the phone room for about five minutes, the officer noticed that she was not using the phone. He entered the room and the accused explained that she had called the Legal Aid number but it was busy. The officer told her **"the world is full of lawyers, call one"**, then left the phone room.

After about 11 minutes, the accused finished talking on the phone. She told the officer she received legal advice. She did not, however, say she wanted to receive legal advice from Legal Aid specifically, nor did she tell the officer that she had not done so, or that she required a further opportunity to do so. She then provided evidentiary breath samples showing she had a blood alcohol concentration over the legal limit.

Alberta Provincial Court

The accused argued her right to counsel was violated because the officer interfered with her right to counsel of choice. She testified that on the way to the police station she had decided she wanted to call Legal Aid for advice because it was free. After the officer spoke to her in the phone room, she said she felt pressured that she could not call Legal Aid again and that she had to call a lawyer from the phone book, which she did not want to do. But she did not tell the officer that she specifically wanted to receive legal advice from Legal Aid. She said that she received advice from a lawyer she selected from the Yellow Pages. Further, the only reason she wanted to call Legal Aid was because it was free and she did not know the names of any lawyers at Legal Aid, nor the competency of their advice or skill level.

The judge found there was no violation of the accused's right to counsel in the circumstances. Further, the officer's comment that "the world is full of lawyers, call one" was a statement of fact and did not interfere with the exercise of her right to counsel. The officer discharged both his informational and implementational duties as required by s 10(b) and therefore there was no *Charter* breach. The accused was convicted of operating a motor vehicle with a blood alcohol content over 80mg%.

Alberta Court of Queen's Bench

The appeal judge found that the officer provided the accused with a reasonable opportunity to contact counsel by giving her privacy, the telephone and various resources setting out information about available lawyers including the 1-800 number for Legal Aid. The officer's comment about many other lawyers being available was merely encouragement to continue efforts to exercise her right to counsel. The accused's appeal was dismissed.

Alberta Court of Appeal

The accused applied for and sought leave to further appeal arguing, in part, the court below erred in finding that she had been given a reasonable opportunity under s. 10(b) of the *Charter* to retain and instruct counsel of her choice. She also claimed that the trial judge erred in finding that she had not been diligent in exercising her right to consult counsel. Justice Veldhuis, however, dismissed the application for leave.

Questions of "reasonable opportunity" and "due diligence" are matters best left to the trial judge for assessment based on the context or circumstances arising from the evidence. In this case, the accused's only explanation for calling Legal Aid was because it was free and any other lawyer may not be free. Nevertheless, she spoke to counsel she found in the Yellow pages. She never told the officer that she wished to speak with a Legal Aid lawyer as her counsel of choice. The burden was on her to be reasonably diligent in exercising her right to counsel of choice by telling the officer that she wished to speak to Legal Aid, a different lawyer, or required more time. In this case, there was no error made in finding the officer had discharged both his informational and implementational duties as required by s 10(b) of the *Charter*. The grounds of appeal raised by the accused do not arise on the facts nor were they reasonably arguable found Justice Veldhuis.

Complete case available at www.albertacourts.ab.ca

REPORTS - RESEARCH - REVIEWS

"We will argue that at the same time as crime is declining, the cost of dealing with crime by the police, the courts, and the prisons has become greater. At least part of the reason for this increase in costs has been the requirements of the justice system itself. To safeguard the rights of Canadians, the Supreme Court of Canada has imposed a set of evolving requirements on the police and prosecution that make it manifestly more expensive to capture and prosecute. Not to put too fine a point on it, the cost per conviction has risen sharply as a result of the Court's reinterpretation of police and prosecutorial practices even without changes by Parliament to the law." [p. 1]

... ...

"A recent study found that the amount of time needed to complete the paperwork that is an essential part of policing has expanded from about an hour and a half per shift 30 years ago to over four hours per shift now. Further, most general duty police officers now spend more time on paperwork than on patrol and investigation combined. This change seems to be driven by changing legal demands for better and more detailed documentation of events by police and by development of tools such as mobile data terminals that make that documentation more feasible." [p. 62]

"The Cost of Crime in Canada" - Fraser Institute

2013 POLICE REPORTED CRIME

In July 2014 Statistics Canada released its *"Police reported crime statistics in Canada, 2013"* report. Highlights of this recent collection of crime data include:

- There were **1,824,837** crimes (excluding traffic) reported to Canadian police in 2013; this represents **132,390** fewer crimes reported when compared to 2012.
- The total crime rate dropped **-8%**. This includes a violent crime rate drop of **-9%** and a property crime rate drop of **-8%**.

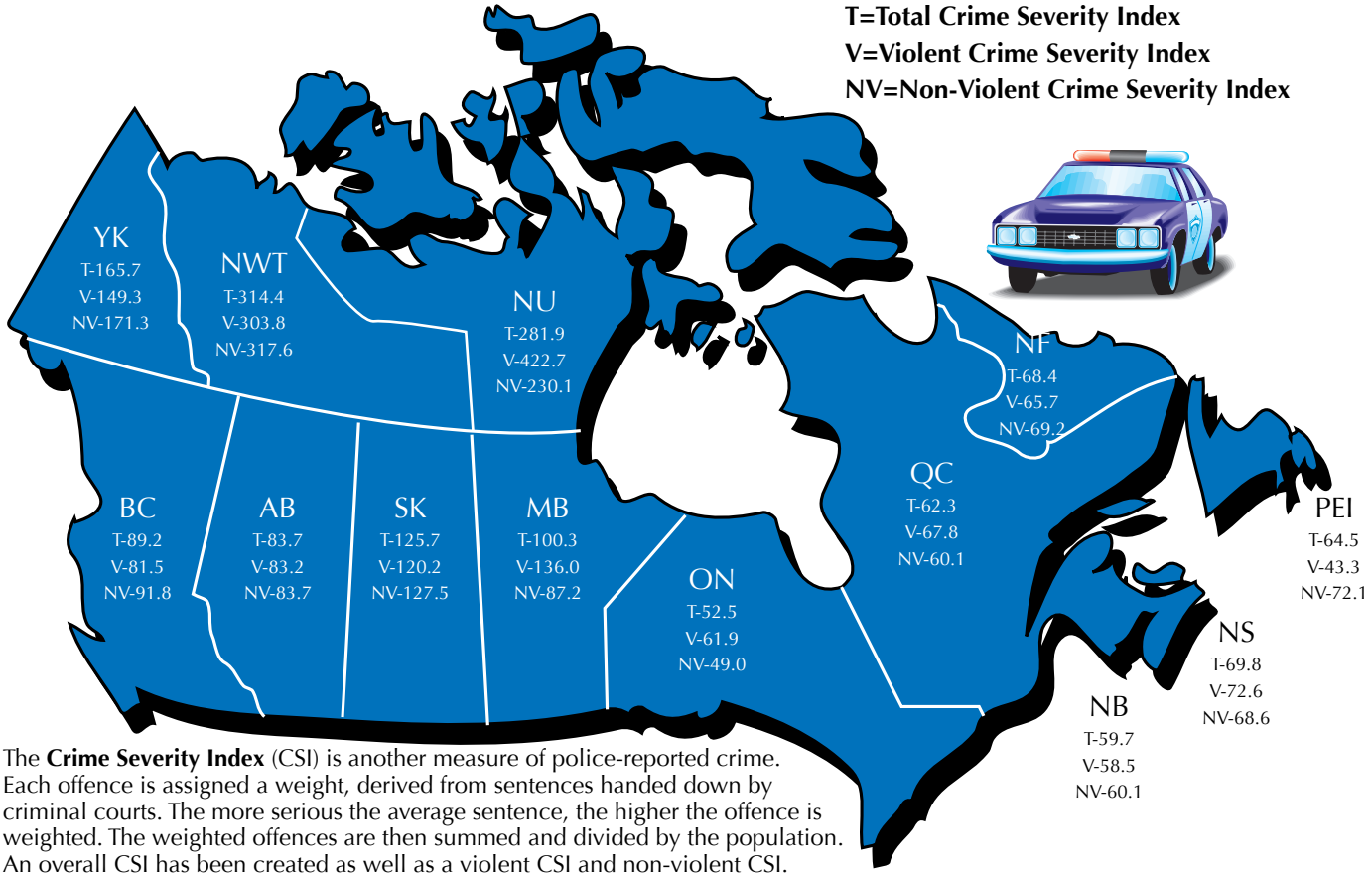
Source: Statistics Canada, 2014, "Police-reported crime statistics in Canada, 2013", Catalogue no. 85-002-X,released on July 23, 2014.

Police-Reported Impaired Driving Offences

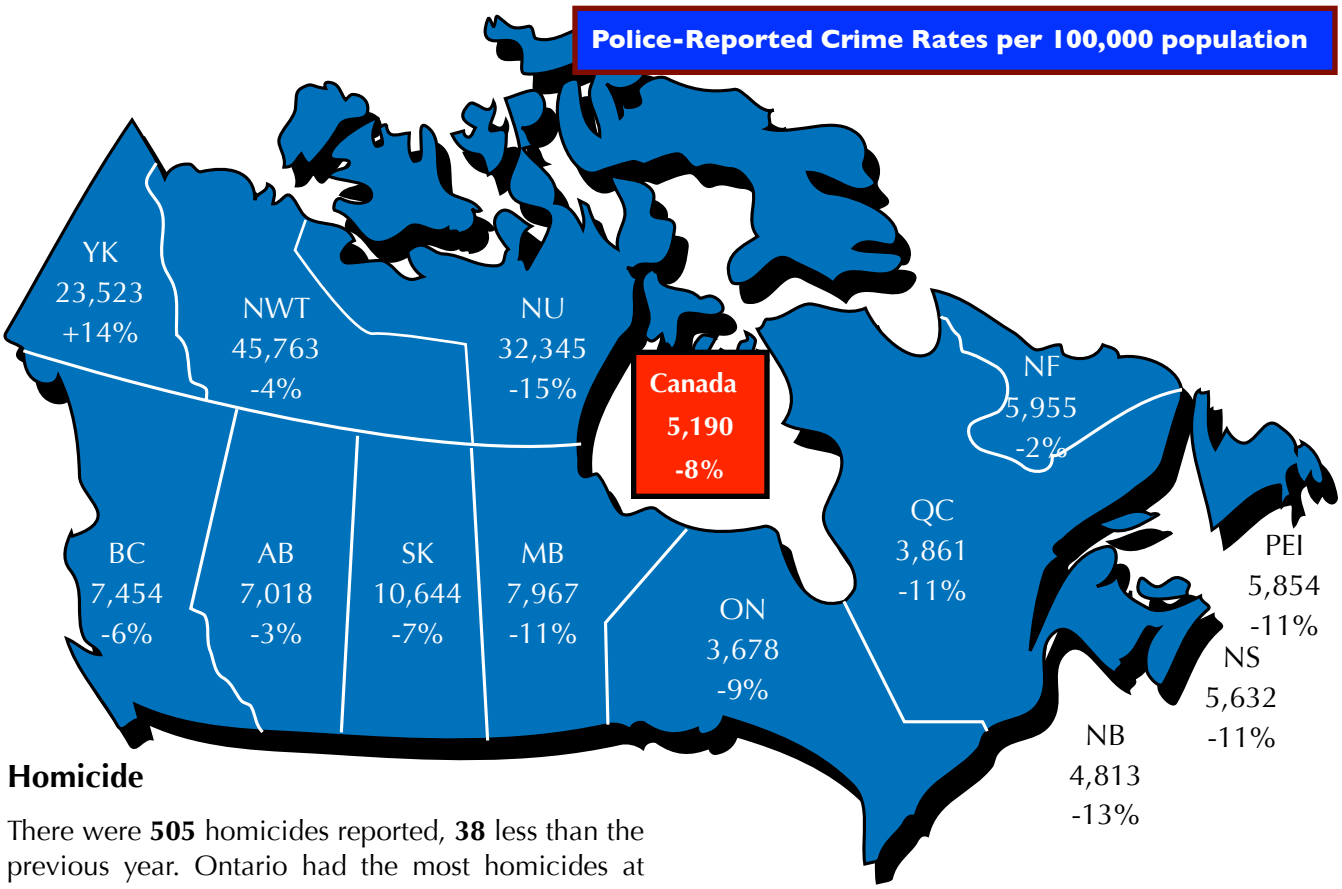
Province	Rate	Impaired Driving Offences	Rate change 2012 to 2013
SK	635	7,041	-11%
AB	364	14,662	-11%
NF	328	1,726	-7%
PEI	307	446	-5%
NS	306	2,875	+6%
BC	304	13,925	-4%
MB	264	3,337	-4%
NB	247	1,868	-14%
QC	191	15,583	-9%
ON	117	15,806	-9%

Police-Reported Crime Severity Indexes

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



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



Homicide

There were **505** homicides reported, **38** less than the previous year. Ontario had the most homicides at **166**, followed by Alberta (**82**), British Columbia (**76**) and Quebec (**68**). The Yukon reported no homicides while Prince Edward Island only reported one homicide followed by the Northwest Territories (**2**) and Nunavut (**4**). As for provincial or territorial homicide rates, Nunavut had the highest rate (**11.24** per 100,000 population) followed by the Northwest Territories (**4.59**), Manitoba (**3.87**), Saskatchewan (**2.71**) and Alberta (**2.04**). As for Census Metropolitan Areas (CMA's), Regina, SK had the highest homicide rate at **3.84**. The Canadian homicide rate was **1.44**.

Top CMA Homicide Rates per 100,000

CMA	Rate	CMA	Rate
Regina, SK	3.84	Calgary, AB	1.75
Winnipeg, MB	3.24	Vancouver, BC	1.72
Thunder Bay, ON	2.46	Abbotsford-Mission, BC	1.69
Edmonton, AB	2.09	Saskatoon, SK	1.67
Hamilton, ON	2.04	Kelowna, BC	1.62
London, ON	1.80	Gatineau, QC	1.55

Canada's Top Ten Reported Crimes

Offence	Number
Theft Under $5,000 (non-motor vehicle)	471,924
Mischief	273,597
Administration of Justice Violations	176,431
Assault-level 1	158,090
Break and Enter	156,357
Disturb the Peace	109,830
Fraud (excluding identity fraud)	79,765
Impaired Driving	78,391
Theft of Motor Vehicle	72,804
Uttering Threats	63,970

Robbery

In 2013 there were **23,213** robberies reported, resulting in a national rate of **66** robberies per 100,000 population. Manitoba had the highest robbery rate followed by British Columbia, Saskatchewan and Ontario.

Police-Reported Robberies

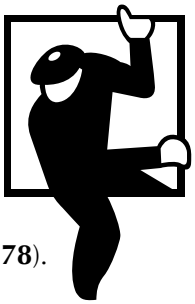
Province/ Territory	Rate	Robberies	Rate change 2012 to 2013
MB	130	1,647	-24%
BC	79	3,600	-21%
SK	78	867	-18%
ON	66	8,912	-18%
AB	65	2,625	-7%
QC	59	4,846	-17%
NWT	55	24	+5%
NS	36	336	-24%
NF	27	142	0%
NB	23	176	+9%
YK	22	8	-28%
NU	20	7	-2%
PEI	16	23	-12%
CANADA	**66**	**23,213**	**-17%**

- Winnipeg, MB had the highest CMA rate for robbery in Canada (**178**), **-28%** lower than its 2012 rate. Kingston, ON had the lowest rate (**12**). Only one CMA reported a jump of more than 30% in its robbery rate; Moncton, NB (**+42%**).
- Four CMAs reported declines in robberies of -30% or more; Kingston, ON (**-47%**), Kelowna, BC (**-39%**), Quebec City, QC (**-39%**) and London, ON (**-37%**).

Top Ten CMA Robbery Rates per 100,000

CMA	Rate	CMA	Rate
Winnipeg, MB	178	Regina, SK	101
Saskatoon, SK	138	Toronto, ON	96
Thunder Bay, ON	115	Edmonton, AB	89
Vancouver, BC	108	Windsor, ON	73
Montreal, QC	102	Calgary, AB	69

Break and Enter



In 2013 there were **156,357** break-ins reported to police. The national break-in rate was **445** break-ins per 100,000 people. The Nunavut had the highest break-in rate (**1,686**) followed by Northwest Territories (**1,378**).

Police-Reported Break-ins

Province/ Territory	Rate	Break-ins	Rate change 2012 to 2013
NU	1,686	600	-6%
NWT	1,378	600	-9%
SK	682	7,559	-13%
BC	621	28,458	-6%
MB	619	7,832	-16%
YK	586	215	+4%
NF	514	2,706	-3%
QC	481	39,247	-16%
AB	479	19,263	-4%
PEI	445	646	-23%
NS	433	4,070	-15%
NB	405	3,065	-15%
ON	311	42,096	-15%
CANADA	**504**	**175,712**	**-4%**

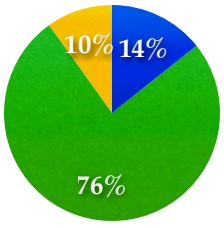
- Break-ins accounted for about **14%** of all property crimes.
- Break-ins dropped **-12%** from the previous year.
- From 2003 to 2013, the break-in rate dropped by **-51%.**
- Among CMAs, Vancouver, BC reported the highest break-in rate (**689**) while Toronto, ON and Barrie, ON reported the lowest (**227**). Only one CMA reported an increase in its break-in rate - Sherbrooke, QC (**+5%**). Ten CMA's reported drops of 20% or more including Moncton, NB (**-29%**), St.. John's, NL (**-25%**), Victoria, BC (**-25%**), Barrie, ON (**-24%**), Gatineau, QC (**-24%**), Saint John, NB (**-24%**) Trois-Rivieres, QC (**-24%**), Peterborough, ON, (**-23%**), Saguenay, QC (**-22%**), and London, ON (**-21%**).

Drugs

Top Ten CMA Break-in Rates per 100,000			
CMA	**Rate**	**CMA**	**Rate**
Vancouver, BC	689	Winnipeg, MB	560
Regina, SK	639	Greater Sudbury, ON	557
Kelowna, BC	635	Abbotsford-Mission, BC	549
Brantford, ON	609	St. John's, NL	511
Saskatoon, SK	589	Thunder Bay, ON	509

In 2013 there were **109,057** drug-related offences coming to the attention of police. These offences included possession, trafficking, production or distribution.

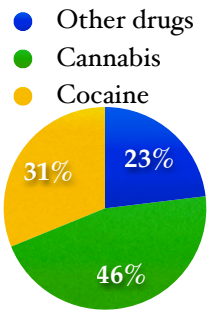
Possession Offences by Drug Type



- possession offences accounted for **77,780** of these crimes - cannabis (**58,965**); cocaine (**7,696**); and other drugs (**11,119**). Other drugs include heroin, crystal meth, and ecstasy.

- Trafficking, production, and distribution offences totaled **33,518** - cannabis (**14,308**); cocaine (**9,749**); and other drugs (**7,220**).

Trafficking, Production & Distribution Offences by Drug Type



- British Columbia had the highest drug related offence rates of all 10 provinces for cannabis and other drugs while Newfoundland topped the list for cocaine.
- Incidents of possession of crystal meth increased from 2,613 in 2012 to 3,345 in 2013 while possession of heroin increased from 779 incidents to 915.
- Overall, drug offences were down in 2013 from 2012 (**-2%**).

Drug-related Crime Rates by Province per 100,000 population			
Province	**Cannabis rate**	**Cocaine rate**	**Other drugs rate**
BC	398	93	85
SK	293	136	61
NS	236	37	52
QC	193	26	57
AB	187	72	39
NF	184	159	58
MB	175	76	34
NB	160	28	47
ON	154	35	43
PEI	80	23	81

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

Territory	Cannabis rate	Cocaine rate	Other drugs rate
NU	1,000	17	34
NWT	930	305	53
YK	302	210	34

Motor Vehicle Theft

In 2013 there were **72,804** motor vehicle thefts reported to police, down **-8%** from 2012 and down **-62%** from a decade ago.

- the motor vehicle theft rate was **207** per 100,000 population.
- the most vehicles reported stolen was in Quebec (**17,776**) while the Prince Edward Island had the fewest vehicles stolen (**120**).

Police-Reported Motor Vehicle Thefts

Province/ Territory	Rate	Motor Vehicle Thefts	Rate change 2012 to 2013
YK	520	191	+29%
NWT	395	172	-13%
AB	395	15,903	+11%
SK	386	4,274	-3%
NU	360	128	-21%
MB	287	3,631	-4%
BC	253	11,583	-9%
QC	218	17,766	-16%
NB	137	1,037	-10%
ON	121	16,410	-15%
NS	114	1,075	-19%
NF	98	514	+2%
PEI	83	120	-25%
CANADA	**223**	**77,939**	**-7%**

- Most CMAs reported declines in motor vehicle thefts. Several reported double digit decreases of more than -20% including Kelowna, BC (**-38%**), Greater Sudbury, ON (**-28%**), Victoria, BC (**-28%**), Guelph, ON (**-25%**), Trois-Rivieres, QC (**-25%**), Quebec City, QC (**-24%**), Sherbrooke, QC (**-24%**), Windsor, ON (**-24%**), Hamilton, ON (**-22%**), Gatineau, QC (**-21%**), Ottawa, ON (**-21%**) and Regina, SK (**-21%**).

Top Ten CMA Vehicle Theft Rates per 100,000

CMA	Rate	CMA	Rate
Brantford, ON	418	Abbotsford-Mission, BC	309
Saskatoon, SK	379	Winnipeg, MB	306
Edmonton, AB	378	Montreal, QC	270
Regina, SK	378	Vancouver, BC	270
Calgary, AB	364	Kelowna, BC	267

- Only five CMAs saw an increase in their motor vehicle theft rates; Edmonton, AB (**+18%**), Abbotsford-Mission, BC (**+14%**), Calgary, AB (**+12%**), Thunder Bay, ON (**+9%**) and Saskatoon, SK (**+4%**).

MOST POPULAR AUTO THEFT TARGETS

On December 19, 2013 the Insurance Bureau of Canada released its annual list of the most frequently stolen vehicles in Canada. According to the report there is an increasing involvement of organized crime in auto theft as evidenced by the appearance of all-terrain vehicles on the list.

TOP 10 STOLEN AUTOS - Canada 2012

	YR	MAKE	MODEL
1	2000	Honda	Civic SiR 2-door
2	2006	Chevrolet	Trail Blazer SS 4-door 4WD SUV
3	2002	Cadillac	Escalade 4-door 4WD SUV
4	2005	Cadillac	Escalade 4-door 4WD SUV
5	2006	Ford	F350 SD 4WD PU
6	2005	Cadillac	Escalade ESV 4-door AWD SUV
7	2006	Acura	RSX Type S 2-door 2D
8	2007	Ford	F250 SD 4WD PU
9	2007	Ford	F350 SD 4WD PU
10	2003	Acura	RSX Type S 2-door 2D

Source: Insurance Bureau of Canada www.ibc.ca

NO-KNOCK ENTRY JUSTIFIED: EXIGENT CIRCUMSTANCES ESTABLISHED

R. v. Lucas, 2014 ONCA 561

Following an extensive investigation (code-named Project XXX) into the Doomstown Crips criminal gang involving wiretap and covert entries, the police executed "take-down warrants." The take-down warrants authorized the police to enter and search many homes without knocking or giving notice to the occupants and, at the same time, arrests them. Pursuant to the 80 take-down warrants, the police arrested 102 people, including Lucas, Rosa and Chau, in the early morning hours during dynamic no-knock entries. Police recovered evidence including cash, marijuana, money counters, cell phones, and documents. The three men, along with others, were charged with numerous firearms and/or drug-related offences.

Ontario Superior Court of Justice

Lucas, Rosa and Chau brought a pre-trial motion, one of many, challenging the execution of the take-down warrants to their homes. They suggested there was an insufficient foundation for dispensing with the requirements of "knock and notice". They wanted the evidence obtained during the take-down search warrants excluded. The judge, however, rejected these submissions and the men were convicted of several charges including conspiracy, firearms, and proceeds of crime related offences.

Ontario Court of Appeal

Lucas, Rosa and Chau contended, among other things, that the trial judge erred in failing to find that the removal of the knock and notice requirements in the take-down warrants violated s. 8 of the *Charter*. They argued that the dynamic entries to their homes were unreasonable.

In its decision, the Court of Appeal noted the requirements for a reasonable search of a dwelling house:

> [T]the police should, except in exigent circumstances, give the occupants notice by knocking or ringing the doorbell, identify themselves as law enforcement officers, and state the lawful reason for their entry. Where the police depart from the "knock and notice" approach, there must be evidence available to them at the time they acted, that they thought it necessary to dispense with knock and notice because they had reasonable grounds to be concerned about harm to themselves or the occupants, or about the destruction of evidence. [reference omitted, para. 254].

Lucas and Rosa first argued that there were no exigent circumstances for the dynamic entries because the police could have arrested them the previous evening while they were at a mall parking lot. They submitted that an earlier arrest would have avoided the necessity for the dynamic entries the next morning. This argument had been rejected by the trial judge and his assessment was agreed with by the Court of Appeal. The trial judge noted that the police needed to take a synchronized approach to the searches and arrests to prevent some targets from

"[T]the police should, except in exigent circumstances, give the occupants notice by knocking or ringing the doorbell, identify themselves as law enforcement officers, and state the lawful reason for their entry. Where the police depart from the "knock and notice" approach, there must be evidence available to them at the time they acted, that they thought it necessary to dispense with knock and notice because they had reasonable grounds to be concerned about harm to themselves or the occupants, or about the destruction of evidence."

alerting others, which could lead to the real possibility that evidence could be destroyed and intended targets could escape. The trial judge found that arresting the two men in the mall parking lot would have compromised a synchronized approach. Furthermore, arresting them in a public place could have put police and public safety at risk; both men were believed to be trafficking guns and drugs to a violent gang. "There was ample evidence before the trial judge that the arrests of Lucas and Rosa in the mall parking lot would have created a real risk of evidence destruction and harm to the police or the public," said the Court of Appeal. "Avoiding these risks does not render the dynamic entry of the residences early the next morning unreasonable."

Second, the men suggested that the executions of the warrants were unreasonable because police did not consider the particular circumstances of each entry. It was argued that the entries were conducted entirely on the basis of an operational plan to coordinate all searches on a "no-knock" basis. This argument too failed because one of the lead investigators testified that the team leader in each case made their own determination prior to executing the warrant. In their view, "no-knock" entries were justified in each case independent of the overall plan.

Finally, Chau contended that the police had no basis to effect a "no-knock" forced entry of his residence. He argued that the police had no information linking him to violence or firearms. Therefore, he submitted there was no basis for concern about officer safety if the police did not use a dynamic entry. The Court of Appeal, however, was unconvinced. The trial judge found that the police had information about a direct connection between Chau with Lucas and Rosa (both who had access to firearms), which raised the possibility that Chau might well have come to possess a firearm from them. The judge also concluded that the police had an additional concern for officer safety if a dynamic entry was not made because there was information indicating that Chau was a high-level dealer in the notoriously dangerous business of drug-dealing, where many possess firearms for their own protection. The Court of Appeal opined that there was ample evidence for the trial judge to find that there were exigent circumstances justifying the use of a no-knock entry to Chau's residence.

The conviction appeals were dismissed.

Complete case available at ww.ontariocourts.on.ca

ARREST & DEMAND REQUIRED SEPARATE ANALYSIS

R. v. Rezansoff, 2014 SKCA 80

After several motorists called 911 to report a truck being driven erratically, a police officer followed the vehicle at speeds between 120 to 140 km/h for about 15 minutes before pulling the vehicle over. The officer, however, did not see erratic driving himself. When he activated his lights, the vehicle drove very slow and stopped in a parking lot. The accused was slow and deliberate as he checked his pockets for identification and his eyes were glassy. The officer noticed an odour of alcohol coming from the truck and a beer case between the two front seats. While the accused was still in the vehicle, he was arrested for impaired driving. He got out of his vehicle and fell into the vehicle's door. He was handcuffed and taken back to the police car. After calling for backup, the officer spoke to the passenger who admitted both he and the driver had been drinking.

The accused was taken to the police station where he was read his rights and a proper demand for a breathalyzer was made. He was given the opportunity to contact a lawyer but declined to do

so. About an hour later it was determined the breathalyzer instrument was not working and the accused was then taken to another detachment. He refused to properly blow into the breathalyzer and a valid breath sample could not be obtained. He was charged with impaired driving, driving while disqualified and refusing to provide a breath sample.

Saskatchewan Provincial Court

The accused pled guilty to driving while disqualified, but challenged the impaired driving and refusal charges. The judge found the police officer did not have reasonable grounds to arrest the accused for impaired driving. Although the judge accepted the police officer had the necessary subjective belief, he found the officer did not have a proper objective basis for that belief. The arresting officer had followed the vehicle for about 30 kms but did not see any bad driving. Further, there was no evidence the smell of alcohol came from the accused's breath.

The judge felt the officer was "jumping the gun" by arresting the accused while he was still in the vehicle. He held the accused's s. 9 *Charter* rights had been breached, excluded all of the evidence before the arresting officer saw the truck and followed it, and entered an acquittal to the impaired driving charge. The judge did, however, admit the post-arrest evidence of the refusal to provide a breath sample under s. 24(2) and convicted him accordingly. The accused was sentenced to three months in jail and given a three year driving ban.

Saskatchewan Court of Queen's Bench

The accused successfully appealed his conviction. The appeal judge ruled that, since the arrest was unlawful, the breath demand was not valid and the accused was under no legal obligation to provide a breath sample pursuant to the faulty demand - he had a reasonable excuse to refuse to comply. This ended the matter and it was unnecessary to determine whether there was a *Charter* breach. However, the appeal judge nevertheless found that there was a s. 9 *Charter* breach and possibly a s. 8 breach as well. The appeal judge, conducting his own s. 24(2) analysis, would have excluded the evidence. The accused's conviction was set aside and an acquittal was entered on the refusal charge.

Saskatchewan Court of Appeal

The Crown challenged the accused's acquittal for refusal, arguing the appeal judge made an error in conflating the lawfulness of the arrest with the lawfulness of the breath demand. In the Crown's view, there were sufficient grounds for a breath demand. The Crown also submitted that because there were sufficient grounds for the arrest as well.

> "The lawfulness of the demand must be determined at the time the demand and the lawfulness of the arrest must be determined at the time of the arrest. Driving while impaired and refusing a breath sample are two separate offences. One does not necessarily follow the other."

Justice Lane, speaking for an unanimous Court of Appeal, agreed that the appeal judge did err by conflating the lawfulness of the arrest and the lawfulness of the demand. "The lawfulness of the demand must be determined at the time the demand and the lawfulness of the arrest must be determined at the time of the arrest," said Justice Lane. "Driving while impaired and refusing a breath sample are two separate offences. One does not necessarily follow the other." The Court of Appeal found that neither court below considered the lawfulness of the demand as a component of a distinct offence. It described the breath demand provision as follows:

> A plain reading of s. 254(3) suggests the precise point at which a peace officer must have reasonable grounds to believe a person is committing or, at any time within the three preceding hours, has committed an offence under s. 253 as a result of the consumption of alcohol does not matter as long as the peace officer has the reasonable grounds to believe at the time of making the demand. [para. 25]

In this case, the factors articulated by the arresting officer were capable of supporting his belief that the accused was impaired at the time of driving. "It is clear that all of the observations both prior to and after the arrest made by the arresting officer would fully support a demand for a breath sample," said Justice Lane. "We are satisfied the post-arrest conduct of the accused and the observations of the arresting officer and the admission by the accused passenger they had both been drinking are sufficient to ground the arresting officer's subjective belief with an objective base." There were no *Charter* breaches and it was not necessary for the Court to address the other grounds of appeal raised by the Crown. The Crown's appeal was allowed and the conviction for refusing to provide a breath sample was restored.

Complete case available at www.canlii.org

SEARCH OF CELL PHONE INCIDENT TO ARREST NOT UNREASONABLE

R. v. Cater, 2014 NSCA 74

During a massive joint police investigation into the activities of a criminal organization known as the Spryfield Mob for a variety of crimes including attempted murder, other violent offences and drug crimes (code named Operation Intrude), police obtained an authorization to intercept the private communications of individuals believed to be involved. The accused, one of the named targets, was arrested as part of the "take-down" day involving about 100 police officers. His cell phone was seized during the booking process at the police station. An officer collected the phone later that day and removed the battery to prevent damaging evidence stored inside. The phone was sent for forensic analysis a week later, and an analysis and subsequent report were completed about 1.5 months later. The police did not obtain a search warrant before sending the phone off for forensic analysis nor was a cursory search performed on the cell phone. Police officers were ordered not to examine the device, or thumb through the text messages or phone calls because doing so could corrupt potential evidence. Forensic analysis resulted in evidence, including text messages, contact information and digital images of firearms, supporting the Crown's case. The accused was subsequently charged with several weapons crimes, including firearms storage, possession and trafficking offences.

Nova Scotia Provincial Court

The judge found the seizure of the accused's cell phone did not breach the *Charter*. He had been lawfully arrested for possessing a restricted firearm (and could have been arrested for weapons trafficking), was legitimately searched incident to his arrest and his cell phone was lawfully seized. The judge also ruled that the police were entitled to have the phone forensically analyzed as an incident to the arrest. The search, he concluded, was also conducted reasonably. No warrant was required.

In the event the evidence was unconstitutionally obtained, the trial judge would have nonetheless admitted it under s. 24(2). First, any breach was inadvertent and not serious. The police officers had acted in good faith and the law with respect to the search of cell phones was evolving at the time of this search. The police testified that the seizure of all arrestees' cell phones was essential to the investigation and, based on their experience, could provide valuable evidence. Second, the search of the cell phone had a modest impact upon the accused's s. 8 *Charter* rights and the subsequent forensic search, in the absence of a warrant,

was a technical breach. The police clearly had the grounds to obtain a warrant and, had they done so, the evidence would have been discovered. Further, the evidence would have been discovered had the police conducted a cursory search of the phone. And the delay between the arrest and the forensic analysis was not excessive or unwarranted. Plus, the cell phone was not a smart phone and it had a very limited capacity, described by the judge as the technological equivalent of an unlocked brief case containing correspondence (text messages), an address book (contact information), and photographs (digital images). Finally, the evidence in his cell phone was valuable to the prosecution and the truth-seeking function of the criminal trial process. The accused was convicted of several of the weapons offences and sentenced to eight years in prison.

Nova Scotia Court of Appeal

The accused challenged his convictions on many grounds including the constitutionality of the cell phone search. In his opinion, the trial judge erred in finding the search reasonable under s. 8 of the *Charter* and the information found during the search should have ben ruled inadmissible under s. 24(2).

But the Court of Appeal disagreed. Although the law about searching cell phones incidental to arrest is unsettled - there is currently a Supreme Court of Canada decision on reserve (*R. v. Fearon*) - Justice Saunders found the trial judge did not err in finding no *Charter* breach. The search of the cell phone was a search incident to the accused's lawful arrest. The contents of the phone as extracted, including the metadata, were admissible. And, even if the warrantless forensic search of the phone was unconstitutional, the evidence should not have been excluded under s. 24(2) as found by the trial judge. She considered the proper factors, her findings were reasonable and her decision to admit the evidence was owed deference.

Complete case available at www.canlii.org

In Service: 10-8

s. 489 AUTHORIZES SEIZURE OF MATERIAL UNRELATED TO WARRANT OFFENCE

R. v. Witen, 2014 ONCA 694

The investigative branch of the Canada Revenue Agency (CRA) obtained and executed a search warrant at the accused's home and office related to criminal tax evasion. The accused was an accountant and corporate tax preparer and the warrant authorized the search for records related to certain businesses. These documents were evidence of a fraudulent scheme in which the accused assisted clients in making false expense claims in their tax returns. The frauds operated over about five years and cost the public purse in excess of $1 million.

Ontario Superior Court of Justice

The accused argued his rights under s. 8 of the *Charter* had been breached and the evidence should have been excluded under s. 24(2). He submitted that investigators seized documents that were not particularized in the search warrant. The seizure of these documents unrelated to the CRA investigation identified in the search warrant, he contended, was unreasonable. The judge concluded, however, that the documents seized fell within the description of the documents to be seized that were contained in the warrant. Alternatively, he found that even if the documents did not fall within the language described in the warrant, s. 489(1)(c) of the *Criminal Code* authorized their seizure. Moreover, even if there was a *Charter* breach, the evidence would be admissible under s. 24(2). The accused was convicted of two counts of fraud, sentenced to three years in prison and fined $448,000.

Ontario Court of Appeal

The accused challenged his convictions arguing authorities improperly seized materials that were not within the description of documents particularized in the warrant. Nor was

"Section 489(1)(c) speaks to any offence and is not limited to the offences in respect of which the warrant was obtained. It requires belief "on reasonable grounds" that the seized material 'will afford evidence in respect of an offence'."

seizure under s. 489 of the *Criminal Code* applicable he claimed. In his view, his rights under s. 8 of the *Charter* had been breached and the evidence should have been excluded under s. 24(2).

The Court of Appeal upheld the trial judge's finding. Section 489(1)(c) allows a person executing a warrant to seize "anything that the person believes on reasonable grounds…will afford evidence in respect of an offence against this or any other act of Parliament". It continued:

> Section 489(1)(c) speaks to any offence and is not limited to the offences in respect of which the warrant was obtained. It requires belief "on reasonable grounds" that the seized material "will afford evidence in respect of an offence". ... . There was, on the record before the trial judge, ample basis to conclude that the person seizing the material believed on reasonable grounds that the seized documents would afford evidence in respect of the commission of a criminal frauds. [para. 23]

The documents were properly seized under s. 489(1)(c). And, even if some of the documents fell outside the power granted by s. 489(1)(c), they were properly admissible under s. 24(2) of the *Charter*. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

BY THE BOOK:

Seizure of Things Not Specified: *Criminal Code*

s. 489 (1) Every person who executes a warrant may seize, in addition to the things mentioned in the warrant, any thing that the person believes on reasonable grounds

(a) has been obtained by the commission of an offence against this or any other Act of Parliament;

(b) has been used in the commission of an offence against this or any other Act of Parliament; or

(c) will afford evidence in respect of an offence against this or any other Act of Parliament.

GROUNDS OBJECTIVELY REASONABLE: LAWSUIT SUMMARILY DISMISSED

Can v. Calgary (Police Service), 2014 ABCA 322

The plaintiff was arrested by police following an investigation into a forcible confinement and extortion. Police interviewed the complainant for more than an hour. He said that the plaintiff, along with others, held him against his will in a warehouse and threatened to kill him and his family members if he did not pay $1 million. The complainant also said that the plaintiff was present at the warehouse and provided the others regularly with information about his wife and children. During these events, the complainant's driver's licence was copied and he was able to speak to his wife on the phone when he was forced to drive to his home. The complainant was able to escape after the man accompanying him used the bathroom.

Police conducted further investigation. The complainant's wife was interviewed and she corroborated his statement. A woman who worked at the warehouse confirmed that the plaintiff had been there on the day in question. Two men who were at the warehouse generally corroborated that the complainant was held against his will and that violence was involved. The plaintiff was not asked

for an interview. A detective ordered his arrest based on the information he had received. The plaintiff was charged with forcible confinement and extortion but the charges were stayed by Crown because the complainant had a criminal record in the U.S. for perjury.

The plaintiff brought a civil action against the Calgary Police Service and several officers (among others) claiming such things as wrongful arrest, false imprisonment, and negligent investigation. In his view, the detective did not have objective reasonable grounds to order the arrest.

Alberta Court of Queen's Bench (Chambers)

Several officers applied for summary judgment. Summary judgment allows a defendant to present uncontroverted facts and law which would make it highly unlikely the plaintiff would succeed in their civil action. If summary judgment is granted, the lawsuit is disposed of before trial. The central issue underlying each of the causes of action in this suit was whether the detective had objective reasonable and probable grounds to arrest the plaintiff. If the detective objectively had reasonable and probable grounds for ordering the arrest, the plaintiff's actions would fail.

A master of the Court of Queen's Bench found the detective had the necessary objective grounds, the arrest was lawful and therefore there was no basis for the lawsuit. Summary judgment was granted.

Alberta Court of Queen's Bench

The plaintiff appealed the granting of summary judgment. A Queen's Bench justice agreed that the detective's subjective belief was objectively reasonable in light of the facts known to him before the arrest. The plaintiff's appeal was dismissed.

Alberta Court of Appeal

The plaintiff again appealed the summary dismissal of his actions against the police. Justices Conrad and O'Brien, writing the majority opinion for the Court of Appeal, noted the two-fold reasonable and probable grounds test for a police officer making an arrest as enunciated by the Supreme Court of Canada in *R. v. Storrey*, [1990] 1 SCR 241. First, the arresting officer must subjectively have reasonable and probable grounds to arrest. Second, those grounds must be justifiable from an objective point of view. The police need not, however, demonstrate anything more than reasonable and probable grounds such as a prima facie case for conviction.

In this case, it was conceded that the officer directing the arrest had the requisite subjective belief that the plaintiff participated in the criminal activities for which he was arrested. The question then, for resolution, was whether the objective standard had been met.

The plaintiff submitted that the police did not have reliable and credible information at the time of his arrest that showed he had participated in the alleged illegal activity. This position, however, was rejected. The victim of the alleged crimes was interviewed on video and audio for more than an hour the day before the arrest. The victim told the officer that he had seen the plaintiff at the warehouse, that the plaintiff had assisted the others by providing information about the victim's wife and children, and he identified the plaintiff as one of the individuals who held him hostage and who was as an active participant in the extortion. Plus, the police interviewed others before the arrest, including the victim's wife and the office assistant at the warehouse. These people tended to corroborate the complaint's statement in certain material aspects and demonstrated the consistency of his allegations. The majority stated:

> While the evidence at the time of [the plaintiff's] arrest concerning his involvement in the alleged criminal activities was not overwhelming, in the sense of establishing a prima facie case for conviction, and additional investigation was ongoing and necessary, such evidence as there was at the time provided the necessary objective justification to support [the detective's] subjective view that [the plaintiff] was a participant in the alleged extortion scheme. Whatever the precise measurement of the degree of certainty required for a warrantless arrest,

> here the information disclosed to [the detective] prior to the time of arrest was sufficient to allow a reasonable person in his position to conclude that there were reasonable and probable grounds to arrest [the plaintiff]. [para. 9]

Since the detective had reasonable grounds for the arrest, there was no genuine issue for trial. Summary judgment was warranted and the plaintiff's appeal was dismissed.

Minority

Justice Wakeling gave much broader reasons in also dismissing the plaintiff's appeal. He too found the facts known by police clearly met the test for a lawful warrantless arrest under s. 495(1)(a) of the *Criminal Code*. "There were objectively verifiable facts that would have caused a reasonable person with the training and experience of [the detective] and who was aware of the information which caused the officer to order [the plaintiff's] arrest to easily conclude with a high degree of certainty – that it was more likely than not – that [the plaintiff] had committed the indictable offences of extortion and unlawful confinement," he said.

Complete case available at www.albertacourts.ab.ca

Editor's Comments: Interestingly, Justice Wakeling also engaged in a lengthy discussion on the degree of certainty required for the standard of reasonable and probable grounds. In his view, the legal standard for a warrantless arrest should be clear and a precise standard should be articulated. However, he noted that the Supreme Court of Canada has declined to define precisely the degree of certainty justifying an arrest and was troubled by this. Justice Wakeling claimed that he would "tackle this thorny problem," although, in the end, he decided it was unnecessary to do so because, in his view, the detective had a high degree of certainty in making the arrest. Below is a grid derived from Justice Wakeling's discussion about the degree of certainty required for the grounds justifying an arrest.

DEGREES OF CERTAINTY

.0001% > 10%	11% > 35%	36% > 50%	51% > 79%	80% >	100% Certainty
extremely low degree of certainty	low degree of certainty	moderate degree of certainty	high degree of certainty	Very high degree of certainty	
Hunch. [para. 133]	Reasonable suspicion. [para. 132]		"At least more likely than not." [para. 131]	"At least four times likely that the arrestee has committed an indictable offence as not." [para. 130]	
An extremely low degree of certainty *"would give unjustifiable priority to law-enforcement value and force too many persons who are innocent of any crime to endure arrest."* [para. 133]	A low degree of certainty would be unacceptable to justify an arrest because it shows insufficient regard for the liberty value. [para. 138]	Reasonable grounds for a warrantless arrest? Justice Wakeling found that moderate and high were the only two degrees of certainty that may make an arrest lawful, but concluded that it was unnecessary to decide with precision which was required because the detective easily had a high degree of certainty. [para. 157]		If a very high degree of certainty was required for a lawful warrantless arrest, *"police officers would be unable to do the job society has assigned to them if they laboured under such onerous standards."* [para. 144]	

***Justice Wakeling**, Can v. Calgary (Police Service), 2014 ABCA 322*

"A reasonable person with [the detective's] experience and training and given the data on which the arrestor relied would have easily concluded with a high degree of certainty that [the plaintiff] had committed the indictable offences of extortion and forcible confinement." [para. 162]

"After [the detective] completed his interview of ... the complainant's wife, he had collected enough information to justify [the plaintiff's] arrest under s. 495(1)(a) of the Criminal Code. The information he had in his possession would justify an objective observer concluding with a high degree of certainty – that it was more likely than not – that [the plaintiff] had committed indictable offences." [para. 163]

"By the time [the detective] issued the arrest order, he had accumulated more than enough information to satisfy even the most cautious reasonable person that there was a high degree of certainty that [the plaintiff] had committed two indictable offences – extortion and forcible confinement." [para. 166]

"There will be another occasion to resolve this issue when the arrestor, objectively assessed, cannot be adjudged to have had reason to believe that it is more likely than not that the arrestee had committed a crime. In such a case, Canadian jurists will have to determine with precision what the degree of certainty must be. How much certainty is required in a society which cherishes individual freedom and personal autonomy?" [para. 157]

NO EVIDENCE RADAR UNIT ACCURATE: SPEEDING CHARGE DISMISSED

Abrametz v. Canada, 2014 SKCA 84

A police officer saw a motor vehicle moving on a highway and visually assessed it traveling at a speed greater than the 100 km/h posted limit. He used a radar unit which reported that the vehicle was traveling at 135 km/h. The officer pulled the vehicle over and issued the driver a ticket for speeding under s. 199(1)(b) of Saskatchewan's *Traffic Safety Act* (TSA).

Saskatchewan Provincial Court

The accused contested his speeding ticket. The officer said that the accuracy of the radar unit had to be regularly checked by means of tuning forks known to generate a prescribed frequency when struck. However, he also said that he had no direct knowledge of the tuning forks he used as having been tested and therefore could not say they were vibrating at the prescribed frequency. He also agreed that his testimony about the accuracy of the radar unit was contingent on him knowing that the tuning forks were vibrating at the prescribed frequency. The Crown never filed a certificate pursuant to the *TSA* confirming the tuning forks the officer used to determine the accuracy of the radar unit had been tested for accuracy. But the officer nonetheless said he believed the radar unit was accurate and he had used it many times.

The accused asked the judge to dismiss the charge because the accuracy of the radar unit was in doubt. He challenged the accuracy of the speed calculated by the radar unit on the ground that its accuracy cannot be established beyond a reasonable doubt in the absence of evidence that the tuning forks used produced the prescribed frequency when struck. Therefore, in his view, the Crown had failed to establish beyond a reasonable doubt that the accused's vehicle was travelling 135 km/h when targeted by the officer. The judge, however, concluded the lack of a certificate for the tuning forks, or the officer not being able to say that the subject tuning forks were accurate, was not fatal to the prosecution. In the judge's view, the officer was able to establish the accuracy of the radar unit by its internal check and his observations based on his training and experience. The accused was found guilty of speeding on the basis that he had been travelling at 135 km/h.

Saskatchewan Court of Queen's Bench

The accused appealed his conviction arguing, in part, that the conviction was unreasonable because the officer admitted that the absence of a tuning fork certificate affected the validity of his evidence about the reliability of the radar unit. The appeal judge disagreed stating:

BY THE BOOK:

Saskatchewan's *Traffic Safety Act*

s. 258(2) In a prosecution for a contravention of this Act, the regulations or a bylaw of a municipality, the following certificates are admissible in evidence as proof, in the absence of evidence to the contrary, of the facts stated in the certificate and of the authority of the person who issued and signed the certificate, without proof of his or her appointment or signature:

(a) a certificate:

(i) stating the result of a test of:

...

(B) a tuning fork identified in the certificate and used for determining the accuracy of a radar set;

...

(E) any other device identified in the certificate and used for or in connection with establishing the speed of vehicles;

(ii) bearing a date:

(A) in the case of a tuning fork, not more than one year before or after the date of the offence charged;

...

(iii) purporting to be signed by a prescribed tester to test devices of the type stated to have been tested; ...

> Whether the certificate was in the officer's pocket or whether the officer was unable to locate the certificate at the detachment does not affect the validity of the officer's evidence that he had used this radar detector between 300 and 400 times without problem, that he had checked the radar detector with the internal check and the tuning forks both at the start of his shift and at the end of his shift and found it working properly. The evidence before the court as presented by a qualified radar detector technician is that it was working properly.

The speeding conviction was upheld and the accused's appeal was dismissed.

Saskatchewan Court of Appeal

The accused again appealed contending, among other things, that the officer's testimony about knowing whether the tuning forks were generating the prescribed frequency was essential to the validity of his evidence rendered his conviction unreasonable.

Justice Klebue, speaking for the Court of Appeal, noted that "the radar unit in question is not an instrument whose performance is deemed by legislation to be accurate." He continued:

> Thus a judge, when relying only on the results generated by a radar unit to ground a conviction for speeding, must be satisfied beyond a reasonable doubt that the results generated by the radar unit were accurate. This will involve, inter alia, being satisfied that the unit was working properly. In the instant case, the Crown did not file in evidence an s. 258(2)(a) certificate confirming the accuracy of the tuning forks used by the officer. Nor did the officer have personal knowledge of whether his tuning forks were vibrating at the required frequency at the relevant time. [para. 26]

In this case, there was no evidence that the tuning forks were tested, certified to be accurate under s. 258(2), or otherwise generated the prescribed frequency when struck. Since the officer agreed at trial that it was "essential" to the validity of his evidence that the court know whether the tuning forks he used to test the radar unit were vibrating at the proper frequency, the judge could not have reasonably arrived at a conclusion that the accused was driving at 135 km/h. The accused's appeal was allowed and his conviction was set aside.

Complete case available at www.canlii.org

DEMAND TO BE MADE AS SOON AS PRACTICABLE, NOT FORTHWITH

R. v. Racine, 2014 SKCA 73

The police received a complaint from a motorist that a blue Ford Explorer was being driven erratically and had driven through a red light. The complainant drove to a service station and the Ford Explorer followed. A police officer attended the service station and found a vehicle matching the complainant's vehicle as well as a running blue Ford Explorer with its driver's door open, but no driver. The accused was near the complainant's vehicle trying to engage its occupants. When he saw the officer, he began to walk toward the Explorer. The officer asked the accused if he was the driver of the Explorer but he replied that he did not know who owned it. The officer then asked the driver of the complainant's vehicle whether this was "the guy". This person said, "Yes, that's him".

The officer told the accused he would have to go to the police cruiser for the purpose of an impaired driving investigation. During this interaction, the officer noted the accused had an odour of liquor on his breath, slurred speech and red and glazed eyes. He had difficulty answering questions, swayed while walking to the police vehicle and some of his sentences did not make sense. Based on his observations and the information provided by the driver of the complainant's vehicle and the dispatcher, the officer opined that the accused was the operator of the Explorer referred to in the call and was intoxicated. The accused was arrested for impaired driving and a breath demand was made. The demand occurred 13 minutes after the officer

arrived at the service station, made his observations, and confirmed his belief that the accused was the driver. Subsequent investigation revealed the accused had provided a false name and the Explorer was stolen.

Saskatchewan Provincial Court

The trial judge concluded, among other things, that the accused was the driver of the Ford Explorer being driven erratically and ruled that the officer had the necessary grounds to make the breath demand. He also found that the demand was properly given. The accused was convicted of refusing to provide breath samples and obstructing a police officer by lying about his name. He was sentenced to 352 days in jail and given a five year driving ban.

Saskatchewan Court of Appeal

The accused challenged the trial judge's determination of whether the officer had reasonable grounds to make the breath demand. He also argued that the demand for the breath sample was not made "forthwith."

Reasonable Grounds

The accused contended that the trial judge failed to apply the correct legal standard - a balance of probabilities - when determining whether the officer had reasonable and probable grounds for the breath demand. Instead, he suggested a lesser standard was applied. Justice Ottenbreit, delivering the Court of Appeal's decision, however disagreed. "The standard of 'reasonable grounds to believe' simply requires the trial judge to determine whether the officer had a subjective belief of impairment and whether the factors articulated by the officer for such belief were reliable and capable of objectively supporting that belief on all the evidence," he said. In this case, he concluded that the trial judge was correct in her assessment, both as to the test for reasonable grounds and her application of it:

> There was ample evidence to support both subjective and objective grounds for the officer's belief that [the accused] was impaired. The officer's personal observations that [the accused] smelled like alcohol, his eyes were red and glazed, he swayed when he walked, he slurred his speech when speaking, he was not responsive to questions, he looked and acted like he was intoxicated and refused to answer any questions about whether he had been drinking all provide cogent objective and subjective grounds for making the breath demand. Added to these grounds is the information that the officer had received from the dispatcher respecting the behaviour of [the accused's] vehicle as reported by [the complainant]. The trial judge did not err in finding that the officer had subjective and objective reasonable and probable grounds for the demand. [para. 15]

BY THE BOOK:

Warrantless Arrest: ***Criminal Code***

s. 254(3) If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as a result of the consumption of alcohol, the peace officer may, by demand made as soon as practicable, require the person

(a) to provide, as soon as practicable,

(i) samples of breath

"The standard of 'reasonable grounds to believe' simply requires the trial judge to determine whether the officer had a subjective belief of impairment and whether the factors articulated by the officer for such belief were reliable and capable of objectively supporting that belief on all the evidence."

Forthwith

Under s. 254(3) of the *Criminal Code*, the demand for breath samples does not need to be made forthwith. Rather, the demand needs to be made as soon as practicable. In this case, as Justice Ottenbriet noted, "the officer made the demand approximately 13 minutes after he arrived, as soon as he came to believe that [the accused] had operated the Ford Explorer while his ability to do so was impaired."

The accused's appeal was dismissed.

Complete case available at www.canlii.org

CROWN BEARS BURDEN OF DEMONSTRATING ACCESS NOT REASONABLY FEASIBLE

R. v. Taylor, 2014 SCC 50

In the early morning hours, the accused attempted to make a turn while driving at high speed, hit a street lamp and rolled his vehicle. Three of his passengers were injured. Following the on scene investigation, the accused was subsequently arrested for impaired driving causing bodily harm, read his *Charter* right to counsel and told he would be provided with a telephone if he wanted to call a lawyer. He said he wanted to talk to his father and his lawyer. A paramedic on scene determined there was nothing wrong with the accused but, out of an abundance of caution, talked him into being transported by ambulance to the hospital for examination by a physician.

After being admitted to the hospital, the accused waited in the hospital hallway and was later moved to a bed for examination. Police were also present. Five vials of blood were taken by hospital staff and sent to the hospital lab for analysis, a procedure the police tracked. The investigating officer, after learning it was unknown when the accused would be released, gave the blood demand and samples were drawn for that purpose. At no time while at the hospital did the police afford the accused an opportunity to contact counsel. The following day the police obtained a warrant to seize the hospital blood for evidentiary purposes and sent it off for analysis. Both the hospital samples and police demand samples were analyzed and provided readings in excess of the legal limit.

Alberta Court of Queen's Bench

The investigating officer testified that he made a mistake in not making his personal cell phone available. As well, he admitted he would have and could have provided an opportunity for the accused to speak to a lawyer at the hospital had he remembered to do so. The judge accepted a Crown concession that the police breached the accused's s. 10(b) *Charter* rights with respect to the police demanded samples because an opportunity to speak with with counsel prior to the demand being made was not provided. But he agreed with the Crown that there was no s. 10(b) prior to the hospital samples being taken. He concluded that no phone needed to be provided at the accident scene, nor was there a reasonable opportunity to provide private access to counsel while the accused was waiting or receiving medical treatment at the hospital. The hospital blood samples were admitted as evidence and the accused was convicted of three impaired driving causing bodily harm counts.

Alberta Court of Appeal

The accused appealed, submitting that the trial judge erred in not finding a *Charter* breach when the officer failed to facilitate access to counsel. Justices Berger and O'Brien agreed, holding that the officer could have made his own cell phone available to the accused at the accident scene or in the hospital. Without the benefit of legal advice before the hospital blood draw, the accused was unable to exercise a meaningful and informed choice about whether he should consent to the hospital samples being taken. The evidence was excluded under s. 24(2) of the *Charter*, the accused's appeal was allowed, his conviction quashed and an acquittal was entered. Justice Slatter, authoring a dissenting opinion, found there was no s. 10(b) breach because the

circumstances at the accident scene and at the hospital precluded a reasonable opportunity to facilitate contact with counsel.

Supreme Court of Canada

The Crown appealed the finding of the s. 10(b) *Charter* breach and the setting aside of the accused's acquittal. It was the Crown's position that the police had properly complied with the right to counsel as guaranteed under s. 10(b).

Justice Abella, writing the five member Supreme Court opinion, outlined the police duty in facilitating a detainee's right to counsel:

> The duty to inform a detained person of his or her right to counsel arises "immediately" upon arrest or detention, and the duty to facilitate access to a lawyer, in turn, arises immediately upon the detainee's request to speak to counsel. The arresting officer is therefore under a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity. The burden is on the Crown to show that a given delay was reasonable in the circumstances. Whether a delay in facilitating access to counsel is reasonable is a factual inquiry.
>
> This means that to give effect to the right to counsel, the police must inform detainees of their s. 10(b) rights and facilitate access to those rights where requested, both without delay. This includes "allowing [the detainee] upon his request to use the telephone for that purpose if one is available". And all this because the detainee is in the control of the police and cannot exercise his right to counsel unless the police give him a reasonable opportunity to do so.
>
> Until the requested access to counsel is provided, it is uncontroversial that there is an obligation on the police to refrain from taking further investigative steps to elicit evidence. [references omitted, paras. 24-26]

R. v. Taylor **Timeline**

1:25 am - Accident
1:31 am - Police on scene
1:41 am - Arrest
1:43 am - s. 10(b) *Charter* given
2:19 am - En-route to hospital
2:43 am - Arrive at hospital
3:05 > 3:12 am - Hospital blood draw
3:13 am - Blood demand
4:53 am - Blood draw pursuant to demand

Justice Abella went on to find that the accused's s. 10(b) rights had been clearly breached in this case because the police failed to provide him with access to counsel at the first reasonable opportunity. The investigating officer testified he would have and could have provided access to a lawyer had he remembered. He never said there were any logistical or medical obstacles to providing access such as a medical emergency, the absence of a phone, or even problems with providing sufficient privacy. Nor were there any urgent or dangerous circumstances that could have limited the officer's implementational duties. There was nothing wrong with the accused and he was only taken to the hospital as a precaution. During the delay while waiting to see a doctor (some 20 to 30 minutes), the police could have made inquiries as to whether a phone was available or whether one was medically feasible. But no such inquiries were made by police.

"The duty of the police is to provide access to counsel at the earliest practical opportunity," said Justice Abella. "To suggest ... that it is presumptively reasonable to delay the implementation of the right to counsel for the entire duration of an accused's

"The duty to inform a detained person of his or her right to counsel arises "immediately" upon arrest or detention, and the duty to facilitate access to a lawyer, in turn, arises immediately upon the detainee's request to speak to counsel. The arresting officer is therefore under a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity."

time waiting for and receiving medical treatment in a hospital emergency ward, without any evidence of the particular circumstances, undermines the constitutional requirement of access to counsel 'without delay'." She continued:

> Not everything that happens in an emergency ward is necessarily a medical emergency of such proportions that communication between a lawyer and an accused is not reasonably possible. Constitutional rights cannot be displaced by assumptions of impracticality. Barriers to access must be proven, not assumed, and proactive steps are required to turn the right to counsel into access to counsel.
>
> An individual who enters a hospital to receive medical treatment is not in a Charter-free zone. Where the individual has requested access to counsel and is in custody at the hospital, the police have an obligation under s. 10(b) to take steps to ascertain whether private access to a phone is in fact available, given the circumstances. Since most hospitals have phones, it is not a question simply of whether the individual is in the emergency room, it is whether the Crown has demonstrated that the circumstances are such that a private phone conversation is not reasonably feasible.
>
> The result of the officers' failure to even turn their minds that night to the obligation to provide this access, meant that there was virtually no evidence about whether a private phone call would have been possible, and therefore no basis for assessing the reasonableness of the failure to facilitate access. In fact, this is a case not so much about delay in facilitating access, but about its complete denial. It is difficult to see how this ongoing failure can be characterized as reasonable. [paras. 33-35]

In short, the police did not take any steps to facilitate the accused's access to counsel before the first set of blood samples were taken. The evidence was inadmissible under s. 24(2), the Crown's appeal was dismissed and the accused's acquittal upheld.

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

Commentary: Use of Police Cell Phone

Must a police officer who has their own cell phone with them use it to provide an arrestee access to counsel? The trial judge didn't think so, concluding that the police did not have an obligation to provide their own cell phone to a detained person. But a majority of the Alberta Court of Appeal thought so. It found that the officer's mistake in not providing his own cell phone, after acknowledging that he could have provided it, gave rise to a s. 10(b) breach.

In a short discussion of this issue, Justice Abella said, "in light of privacy and safety issues, the police are under no legal duty to provide their own cell phone to a detained individual." But, she also ruled, "the police nonetheless have both a duty to provide phone access as soon as practicable to reduce the possibility of accidental self-incrimination and to refrain from eliciting evidence from the individual before access to counsel has been facilitated. While s. 10(b) does not create a "right" to use a specific phone, it does guarantee that the individual will have access to a phone to exercise his right to counsel at the first reasonable opportunity."

"An individual who enters a hospital to receive medical treatment is not in a Charter-free zone."

POLICE ACTED IN GOOD FAITH: EVIDENCE ADMISSIBLE

R. v. Johnston, 2014 ONCA 704

The accused amassed a hotel bill in excess of $20,000 while staying for 56 days at a luxury hotel catering to business executives requiring long-term accommodation. After making numerous unsuccessful attempts for payment, the hotel finally received a cheque for slightly more than $20,000. When the bank didn't honour this cheque, the accused was told the hotel would need a minimum payment of $5,000 or he would be required to vacate immediately. He then gave the hotel only $500 in cash. The manager, believing the hotel was being defrauded, called police. She said the accused had an armed bodyguard, who was a former RCMP officer. Police attended, knocked on the accused's hotel room door but no one responded. When they police attended an alternative exit to the room, they saw the accused leaving and placed him in handcuffs due to a concern about the presence of a firearm. Police entered the hotel room, without a warrant, to check for an armed person. No one was found in the room but they saw a computer, a blackberry, memory sticks, a printer, files containing blank cheques, and various documents. The police seized these items and searched them after obtaining a search warrant. The accused was also arrested and allowed to speak to a lawyer by telephone in the room. He was subsequently charged with uttering a forged document, fraud over $5,000, and three counts of breaching a recognizance.

Ontario Superior Court of Justice

The accused claimed that his rights guaranteed by s. 8 of the *Charter* were violated by the warrantless search of his hotel room, and he sought an order under s. 24(2) excluding the evidence seized by police. The judge held the warrantless search did breach s. 8 but did not exclude the evidence. First, the seriousness of the *Charter*-infringing state conduct favoured admission. The police were acting in good faith. They were responding to a call about evicting a guest with an armed bodyguard and entered the room to conduct a cursory search to determine whether an armed person was present. The items were in plain view and police later obtained a search warrant to search them. They were courteous to the accused and facilitated his right to counsel in private. Second, The impact of the state conduct on the accused's *Charter*-protected interests only "somewhat" favoured exclusion. Although he had a reasonable expectation of privacy in the hotel room, it was reduced because he knew he was facing imminent eviction. Finally, society's interest in an adjudication of the case on its merits favoured admission. The evidence was reliable and integral to the Crown's case. In the judge's view, the admission of the evidence would not bring the administration of justice into disrepute. The accused was convicted of fraud, uttering a forged document and three counts of breach of recognizance. He was sentenced to four years in prison.

Ontario Court of Appeal

The accused appealed his conviction arguing the trial judge erred in her s. 24(2) analysis. The Court of Appeal, however, found the trial judge did not err. She considered the correct legal principles and her findings of fact that she relied upon were open to her to make. The accused's appeal against his conviction was dismissed.

Complete case available at www.ontariocourts.on.ca

BACK-UP OFFICER's EVIDENCE SERVED AS CORROBORATION

R. v. Safarzadeh-Markhali, 2014 ONCA 627

The accused was driving along a busy street in the curb lane followed by a marked police car in the passing lane about two car-lengths behind. The windows of the police car were open and the officer detected a very strong odour of marijuana coming from the accused's car. He pulled up on the driver's side and saw the driver smoking a hand rolled cigarette held in a thumb-and-forefinger, palm forward grip associated with

marijuana. The man immediately removed the cigarette from his mouth, moved it down in front of his body and stared straight ahead. The officer pulled the car over and smelled an overwhelming odour of freshly burnt marijuana on approaching it. He asked the accused to get out of the car, arrested him for possessing marijuana and advised him of his right to counsel. When the accused was searched a loaded 22 calibre pistol was discovered. A backup officer arrived to assist and he also smelled an odour of burnt marihuana when he opened the passenger door of the car. He also saw a half-burnt and apparently recently-smoked marijuana roach between the seat as it was being discovered by the arresting officer. The accused was charged with possessing marijuana and several firearms-related offences, including possession of a loaded prohibited firearm, careless storage of a firearm and possession of a firearm while prohibited from doing so.

Ontario Court of Justice

The accused contended that his rights under ss. 8 and 9 of the *Charter* had been violated. He wanted the loaded handgun found in his possession excluded as evidence. The judge had difficulty with the officer's evidence that he was able to trace the marijuana odour to the accused's car and that he saw him smoking a marijuana joint based on its hand-rolled appearance and the manner in which it was held. Both of these observations, purportedly occurring while travelling at 60 km/h, made the trial judge uneasy. However, the judge found it was "more likely that the manner in which the cigarette was smoked alone confirmed the hunch that the content was marijuana and not tobacco." He accepted that the "thumb-and-index-finger, palm-forward grip" described by the officer was a reasonable sign of marihuana smoking, even though it might not be exclusive to it. Further, the officer's evidence was corroborated by his backup who saw the recently-smoked roach in the car and smelled the strong odour of freshly-burnt marijuana. "On the evidence as a whole, I find it likely that [the officer] smelled a burning joint while driving behind the defendant," the judge concluded. "He investigated his hunch that the smell originated from the defendant's vehicle by pulling up beside it. [He] then observed him smoking in the manner usually used with marijuana joints." The traffic stop was an appropriate exercise of police authority and there were no *Charter* breaches. The arrest was lawful as was the search incidental to it. The accused was convicted of drug and firearms offences, and sentenced to six years in prison, less pre-sentence custody.

Ontario Court of Appeal

The accused appealed his convictions, claiming (among other things) that he was unlawfully detained contrary to s. 9 of the *Charter*. He suggested that the trial judge erred in using the back-up officer's evidence as after-the-fact justification for his detention. Further, he argued the judge erred in taking judicial notice of the manner in which he was holding the cigarette as characteristic of marijuana smoking.

Justice Starthy, writing the Court of Appeal's opinion, did not consider the back-up officer's evidence as after-the-fact justification for the detention. It was merely corroborative. The back-up officer confirmed there was an odour of marijuana in the car as well as a recently-smoked joint. This evidence "served to corroborate [the arresting officer's] evidence that: there was a strong odour of freshly-smoked marijuana in the vehicle; he had observed [the accused] smoking something in a manner consistent with marijuana; and [the accused] had attempted to hide the item when the police cruiser pulled up beside him."

Justice Starthy also concluded that the trial judge did not base his decision on judicial notice.

> In describing the circumstances that led to his decision to stop [the accused's] vehicle, [the arresting] referred not only to his observation of the smell of marijuana, but also to the fact that [the accused] was smoking; that he was holding the object between his right thumb and index finger and smoking it from his lips; that he

observed a puff of smoke from [the accused's] mouth; and that when [the accused] saw him, he removed the cigarette from his mouth, lowered it out of sight and started staring straight ahead. It is apparent that the manner in which [the accused] was holding the joint was simply one of several circumstances that informed the officer's decision to detain him.

The accused had not been unlawfully detained and, as conceded, the search conducted was incidental to arrest. The appeal against his conviction was dismissed.

Complete case available at www.ontariocourts.on.ca

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