JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

Charter Turns 33

The *Canadian Charter of Rights and Freedoms* became law on **April 17, 1982**. That was 33 years ago. Since then, the Courts have been interpreting the *Charter* and considering how it impacts Canadian law. Equally, if not more difficult, is applying this developing jurisprudence to the myriad of circumstances as they arise in life. Well, that is exactly what the police must do. It is their duty to sometimes take abstract constitutional notions and principles (such as privacy) and apply them to daily reality, often in a heartbeat, with little time for reflection, second opinion or timeouts. The call a police officer makes on the street is the one that they, and others, must live with. Training and education is key! That is why **"In Service: 10-8"** is now in its 15th year of publication. We salute all of our readers and thank them for all that they do in maintaining public safety is this great nation.

Highlights In This Issue

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JUSTICE INSTITUTE of BRITISH COLUMBIA | LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

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

Canadian organizational behaviour.
Steven L. McShane, Sandra L. Steen, Kevin Tasa.
Whitby, ON: McGraw-Hill Ryerson, 2014.
HD 58.7 M33 2014

Demarginalizing voices: commitment, emotion, and action in qualitative research.
edited by Jennifer M. Kilty, Maritza Felices-Luna, and Sheryl C. Fabian.
Vancouver, BC: UBC Press, 2014.
HM 571 D44 2014

Diversity in coaching: working with gender, culture, race and age.
edited by Jonathan Passmore.
London, UK; Philadelphia, PA: Kogan Page, 2013.
HF 5549.5 C53 D58 2013

Emotionally intelligent leadership: a guide for students.
Marcy Levy Shankman, Scott J. Allen, Paige Haber-Curran.
San Francisco, CA: Jossey-Bass, 2015.
LB 2346 E469 2015

Fundamentals of social research.
Earl Babbie, Lucia Benaquisto.
Toronto, ON: Nelson Education, 2013.
H 62 B223 2013

How we learn: the surprising truth about when, where, and why it happens.
Benedict Carey.
New York, NY: Random House, 2014.
BF 318 C366 2014

In the line of fire: how to handle tough questions--when it counts.
Jerry Weissman.
Upper Saddle River, NJ: FT Press, 2014.
HF 5718.22 W449 2014

Present with impact and confidence.
Amanda Vickers and Steve Bavister.
London, UK : Teach Yourself, 2010.
HF 5718.22 V53 2010

Show me the numbers: designing tables and graphs to enlighten.
Stephen Few.
Burlingame, CA: Analytics Press, 2012.
HF 5718.22 F49 2012

Social media marketing for dummies.
by Shiv Singh and Stephanie Diamond.
Hoboken, NJ: John Wiley & Sons, Inc., 2015.
HF 5415.1265 S56 2015

The 27 challenges managers face: step-by-step solutions to (nearly) all of your management problems.
Bruce Tulgan.
San Francisco, CA: Jossey-Bass, a Wiley brand, 2014
HD 30.3 T85 2014

The art and science of workplace mediation.
Blaine Donais.
Toronto, ON: Carswell, 2014.
HD 5481 D66 2014

The complete volunteer management handbook.
Steve McCurley, Rick Lynch and Rob Jackson.
Liverpool, UK: Directory of Social Change, 2012.
HN 49 V64 M33 2012

The non-designer's design book: design and topographic principles for the visual novice.
Robin Williams.
San Francisco, CA: Peachpit Press, 2014
Z 246 W634 2015

CAPE 2015

Canadian Association of Police Educators

JUSTICE INSTITUTE of BRITISH COLUMBIA

715 McBride Boulevard
New Westminster, BC

Effective & Defensible Training Through Collaboration

Conference: May 20-22, 2015

Pre-conference Workshop: May 19, 2015

The Canadian Association of Police Educators (CAPE) promotes excellence in law enforcement training and education through the guidance of innovative research, program development, knowledge transfer, network facilitation, and collaborative training initiatives. In the changing landscape of police training many agencies are stretching their resources to do more with less. The goal of the 2015 CAPE conference is to promote discussion on hot topics in police training, highlighting collaboration as a mechanism to achieve effective and defensible training within the current economic climate.

Sessions at the conference are designed to be short, fast-paced presentations followed by facilitated group discussions, panel discussions, or question and answer sessions with panelists to promote interaction and critical thinking. Innovations in police training in BC will be showcased throughout the conference and scheduled updates from various organizations and committees will promote collaboration.

Canadian Association of Police Educators

Effective & Defensible Training Through Collaboration

Conference: May 20-22, 2015
Pre-conference Workshop: May 19, 2015

Presentation topics at the 2015 CAPE Conference include:

- Hot topics in police training:
  - ✓ Mental readiness
  - ✓ Two-tiered policing
  - ✓ The Economics of policing
- Training for Vancouver's Downtown East Side
- The JIBC continuum of training
- Assessing in the real world:
  - ✓ Outcomes based assessment
  - ✓ Reality-based training and assessment
  - ✓ Blended learning: e-learning for outcomes based assessment
- Developing provincial standards:
  - ✓ BC's Certified Use of Force Instructor Course (CUFIC)
  - ✓ BC's Firearms working group
  - ✓ Police Services Division – working towards provincial standards in BC
- Assessment Centre
- National Training Inventory
- Collaboration in Police Training
- BC's Crisis Intervention and De-Escalation training

A limited-capacity pre-CAPE workshop on curriculum mapping will be offered May 19, 2015 where participants will work directly with the BC Police Academy Curriculum Developer to map their curriculum to the Police Sector Council National Framework of Competencies.

There will also be opportunities to network and exchange ideas in an informal setting.

cape-educators.ca

WITHOUT PRIVACY INTEREST, NO STANDING TO CHALLENGE SEARCH

R. v. Steele, 2015 ONCA 169

At about 2:00 am, a police officer decided to stop a vehicle and check for proper documentation and driver sobriety. Although she could see a driver, she could not tell their gender or skin colour nor whether there were any other occupants. After pulling the vehicle over and approaching the driver's door, she noticed there were four black men in the car, including the accused seated as a front passenger. She called for back up and three other officers arrived. They stood at each of the vehicle's other doors. When asked, the driver produced the ownership papers and several expired insurance pink slips but could not produce a driver's licence. He said the car belonged to his friend's mother. Although cooperative and making efforts to find proof of insurance, he appeared nervous. The accused, seated up front, also seemed nervous. He had also been hunched over with his hands underneath the passenger seat as if he were trying to hide something. The officer asked the driver if he would like her to help him find the valid insurance slip. He agreed. The other occupants, including the accused, were asked to get out of the car while the driver remained in the driver's seat. The officer went to the front passenger side of the car. She knelt on the ground and looked inside the glove box for the insurance slip but could not find it. As she rose to leave, she saw part of the butt and barrel of a gun on the floor partially under the front passenger seat. The gun was a loaded, prohibited, semi-automatic firearm. Weapons charges followed.

Ontario Superior Court of Justice

It was agreed that the accused's mother was the owner of the car and had lent it that day to the driver and the accused, her son. The judge concluded that the initial stop of the vehicle was authorized under Ontario's *Highway Traffic Act* (*HTA*), which permits random stops to check driver and vehicle documentation, and driver sobriety. He also found the *HTA* gave police officers the power to search the vehicle for proof of insurance and that the accused had no standing to challenge the driver's consent to the search of the vehicle. Furthermore, there was no evidence of racial bias or racial profiling. When the officer saw the car she could not see the race or gender of the driver, or any other occupants of the vehicle. She only determined the number of occupants and their race after she stopped the car. As well, when she went to the front passenger side and looked into the glove box, she was "intent on finding that valid insurance slip". Finally, even if there had been a *Charter* violation, the evidence was admissible under s. 24(2). The judge found that the accused knew the gun was there, was trying to hide it from police, and was exerting a measure of control over it. He was convicted of possessing a loaded, prohibited, semi-automatic firearm.

Ontario Court of Appeal

The accused appealed his convictions contending, in part, that the gun was found during an unreasonable search. He argued that the search was not authorized by law, the driver's apparent consent to the search was insufficient, and the stop and subsequent search was partially motivated by racial bias. Thus, in his view, the gun should have been excluded as evidence under s. 24(2).

Reasonable Expectation of Privacy

Whether or not a person has a reasonable expectation of privacy depends on the totality of the circumstances. Factors to consider the privacy analysis include the accused's presence at the time of the search; possession or control of the property or place searched; ownership of the property or place; historical use of the property or item; ability to regulate access, including the right to admit or exclude others from the place; the existence of a subjective expectation of privacy; and the objective reasonableness of that expectation. In this case, the Court of Appeal held the accused lacked a reasonable expectation of privacy in the car:

> In the circumstances of the present case, the [accused] did not have a reasonable expectation of privacy in the car. The [accused] was a passenger in the vehicle at the time of the search, and he was authorized by his mother, at the very least, to be a passenger in the vehicle. However, the [accused's] degree of possession or control, historical use, or ability to regulate access to the vehicle is unknown.
>
> In general, it would be objectively reasonable for an individual using a family member's car to have a reasonable expectation of privacy in that vehicle. Here though, the [accused] did not identify himself as a person to whom the car had been loaned, and he did not indicate his connection to the vehicle's owner. He was only a passenger in a vehicle driven by another person who claimed to have borrowed the car. Further, the police had no reason to believe that the [accused] had any connection to the vehicle other than as a passenger. Moreover, the driver was attempting to produce required documentation to police, and had apparent control of the vehicle. Under these circumstances, there is no basis for a person in the [accused's] position to have subjectively expected privacy in the vehicle. [paras. 19-20]

Since the accused had no reasonable expectation of privacy in the car, there was no *Charter* "search" and therefore no s. 8 breach. It was unnecessary to address the issue of consent to search or determine whether the police conduct was reasonable.

The Court of Appeal did note, however, that there was no statutory authority in Ontario permitting the search of the vehicle for proof of insurance. "Some provinces explicitly authorize the search of a vehicle where an officer has reasonable grounds to believe that the vehicle is being operated in violation of regulatory requirements," said Justice Pardu. "However, neither the Highway Traffic Act nor the Compulsory Automobile Insurance Act ... contains any such provision that is applicable in this case."

Racial Bias

The accused submitted that the police stopped and searched the car because one or more of its occupants was black. In his view, this was a random vehicle stop of four black men without any apparent driving misconduct. Further, there were some inconsistencies between the officer's trial evidence, her notes, and her previous testimony that suggested the stop was racially motivated. A stop or search motivated by racial bias or racial profiling will breach the *Charter*. However, in this case, the trial judge did not err in finding no such motivation. The officer gave evidence about when she first saw the vehicle and when she realized that one or more of the occupants was black. There was no basis to interfere with the trial judge's findings of fact that the stop and search were not racially motivated.

s. 24(2) - Admissibility

As for the admissibility of the evidence under s. 24 (2), even if there had been a *Charter* breach the trial judge did not err in concluding that the gun should not be excluded. "Even if the [accused] had had some expectation of privacy in the vehicle, it was highly attenuated," said Justice Pardu. "The officer acted in good faith. The trial judge found that she was not undertaking a search for evidence of a crime, but was attempting to help the driver find proof of insurance. She asked the driver if he wanted her help, and looked in the glove box in reliance on his consent. The societal interest in a trial on the merits was substantial. The gun was highly reliable and probative evidence unaffected by any Charter breach."

The accused's appeal against his conviction was dismissed.

Complete case available at www.ontariocourts.on.ca

AGGREGATE OF CIRCUMSTANCES PROVIDES GROUNDS

R. v. Italiano, 2015 ONCA 179

A police officer had previously received general information from two confidential informers that a man named Michele Santonato was a large scale drug dealer, specifically in cocaine, and operated out of a house at 36 Celt Avenue in Toronto. While watching the house, the

police saw the accused Italiano enter it and emerge a few minutes later carrying a distinctive looking shoebox. It was red and white with stripes. He entered his car and drove away. The police followed. About 15 minutes later, Italiano stopped his car and another man, the accused Abdul-Hamid got into the passenger seat. Abdul-Hamid then got out two minutes later holding the shoebox, entered his own car, and drove away. The police followed Abdul-Hamid, stopped him, and arrested him at gunpoint. Following the arrest, the vehicle was searched and the shoebox was found. It contained one kilogram of cocaine. The men were charged with drug offences.

Ontario Superior Court of Justice

Both men challenged Abdul-Hamid's arrest and subsequent search on the basis that the arresting officer lacked reasonable and probable grounds. Thus, the search incident to arrest was unlawful and the evidence should have been excluded under s. 24(2) of the *Charter*. The judge described the test for reasonable grounds to arrest this way:

> The Criminal Code of Canada and case law indicate that an arresting officer must subjectively have reasonable and probable grounds, but those grounds must also be justified from an objective point of view. A reasonable person, placed in the position of the officer must be able to conclude there were reasonable and probable grounds for the arrest. Reasonable grounds can be equated to reasonable probability. They do not require that the police have a prima facie case before they effect an arrest ... .
>
> Information that would not meet the reasonableness standard on an application for a search warrant may still meet that standard in the context of an arrest.
>
> The dynamics at play in an arrest situation are very different from those on an application for a search warrant. The decision to arrest often must be made quickly in volatile and changing situations. Judicial reflection is not a luxury the officers can afford. The police officer must often make a decision based on available information, which is often less than exact or complete. The law does not expect the same kind of inquiry of police as to whether to arrest someone that it demands of a justice faced with an application for a search warrant.
>
> There must be a constellation of objectively discernible facts amounting to reasonable and probable grounds for there to be a lawful arrest without warrant.
>
> The flow of investigative detention, arrest and search may be a dynamic process. A s. 8 analysis ought not to be reduced to an over-analytical parsing of events into static moments without practical regard to the overall picture.
>
> The totality of the circumstances relied upon by the arresting officer formed the basis for the objective assessment. It would be an error of law to assess each fact or observation in isolation. The objective assessment will include dynamics within which the officer acted and his or her experience. Because a trained officer is entitled to draw inferences and make deductions based on experience, a reviewing court must take these factors into account.
>
> ... ...
>
> The cumulative effect of the factual elements may provide the objective support for the officer's subjective belief he had reasonable and probable grounds to arrest. The whole is greater than the sum of the individual parts. [references omitted, paras. 36-43, 2013 ONSC 1744]

In this case, the judge found the arresting officers had sufficient reasonable and probable grounds to make the arrest based on the information that they received, as well as from their observations and the surveillance conducted:

> The information from the two confidential informants alone or the two confidential informants together but without everything else, would not be a lawful basis to arrest Mr. Santonato and that is not what is before me here. While the confidential informant information regarding Mr. Santonato is not compelling, it has elements of credibility and corroboration. There is surveillance of Mr. Italiano which was a reasonable step for the officers to make from which they drew conclusions and they did not act in terms of arresting anyone until they saw the handoff to [Abdul-Hamid].

> In my view, having reviewed all of the evidence carefully, the confidential informant information, as corroborated to some extent by the surveillance, adds a layer to what was observed by the police and provides a basis for reasonable and probable grounds to arrest [Abdul-Hamid] and I find that they had those grounds. [paras. 50-51, 2013 ONSC 1744]

As for the search incidental to arrest, it was validly conducted:

> Motor vehicles are legitimate objects of search, incident to arrest as they attract no heightened expectation of privacy that would justify an exemption from the usual common-law principles. The search must be truly incidental to the arrest. The police must be attempting to achieve some valid purpose connected to the arrest. It depends on what the police are looking for and why. The only requirement is that there be some reasonable basis for doing what the police did. The police have considerable leeway in circumstances of an arrest which they do not have in other situations. "Truly incidental to arrest" means if justification for the search is to find evidence, there must be some reasonable prospect of securing evidence of the offence for which the suspect is arrested. The limits on search, incident to arrest are no different for motor vehicles than for any other place. The right to search a vehicle, incident to arrest and the scope of the search will depend on a number of factors, including the basis for the arrest, the location of the car in relation to the place of arrest and other relevant circumstances. In this case, Mr. Abdul-Hamid was arrested, I have found, based on lawful authority. I find he did have a degree of expectation of privacy in the vehicle, but the police also had a power to search that vehicle, incident to arrest. In this case, the police were not on a fishing expedition. They were looking for a very distinctive shoebox that had been very recently passed to the applicant. The item was observed and recovered on the floor in the rear passenger area. [The searching officer's] evidence was that the box was not covered. This search was to achieve a valid purpose related to the arrest and provides evidence of the offence for which Mr. Abdul-Hamid was arrested. [para. 55, 2013 ONSC 1744]

There were no ss. 8 or 9 *Charter* breaches, the evidence was admissible, and the accused Italiano and Abdul-Hamid were convicted of trafficking and possessing cocaine for the purposes of trafficking.

Ontario Court of Appeal

Both accused appealed their convictions arguing the police did not have reasonable and probable grounds to arrest Abdul-Hamid and therefore the evidence out to have been excluded. In a short endorsement, the Ontario Court of Appeal upheld the trial judge's ruling.

> The trial judge found that during the investigations the officers involved in the arrest, including the arresting officer and the officer who had the tip from the confidential informants, were part of an investigative team conducting surveillance and they kept in contact by radio. He concluded that based on the information regarding Santonato and the officers' observations, the arresting officer was entitled to order the arrest of Abdul-Hamid. We agree.
>
> In our view, the arresting officer had the requisite reasonable and probable grounds to conduct the arrest. In this case, [the arresting officer] ordered the [accused] Abdul-Hamid's arrest. At the time, this officer had received confidential information communicated through [another officer], that Santonato was a significant drug-dealer. [The arresting officer] could rely on a summary of the information given to him by [the other officer] in deciding whether he had grounds to make the arrest. Santonato was observed at 36 Celt Avenue. The [accused] Italiano went into 36 Celt Avenue and emerged a few minutes later with a shoebox. The shoebox was later seen in the [accused] Abdul-Hamid's possession. He took it in his car and then left. [The arresting officer], who ordered Abdul-Hamid's arrest, made most of these observations in person, and was informed of the rest by his fellow investigating officers.
>
> The Court must consider the totality of the circumstances to determine whether the constellation of factors taken together supports the officer's reasonable and probable grounds. We are satisfied that the evidence established

> the requisite reasonable and probable grounds relied on by [the arresting officer] to make the arrest. [paras. 6-8]

The appeal was dismissed and the convictions upheld.

Complete case available at www.ontariocourts.on.ca

Editor's note: Additional facts taken from R. v. Abdul-Hamid, 2013 ONSC 1744.

PROTESTOR STOP & SEARCH NOT JUSTIFIED

Figueiras v. Toronto (Police Services Board), 2015 ONCA 208

During the second day of the 2010 G20 Summit of world leaders held in Toronto, the applicant and some of his friends went downtown to demonstrate in support of animal rights. As they walked they were stopped by a team of several police officers about one city block north of a security fence that had been set up to enclose the summit site. They were told that if they wanted to cross the street and go any further, they would have to submit to a search of their bags. Although his companions complied, the applicant refused to permit a search of his backpack saying he had nothing to hide and regarded the request as a violation of his civil rights. At one point, the officer said, "Either we look through it, or you can go. What's it going to be?" When the applicant stated "I don't consent to a search," the officer stepped forward, wrapped his arm around the applicant's shoulder, gripped him firmly by the shirt, pulled him in so they were face-to-face and said "You don't get a choice." The officer then pushed the applicant away and said, "Get moving." Other comments made by police included, "There's no civil rights here in this area. How many times do you got to be told that?" and "This ain't Canada right now." The applicant eventually gave up his plans to demonstrate and went home.

"This ain't Canada right now."

Ontario Superior Court of Justice

The applicant applied to the Court for declarations that the police had violated his rights to freedom of expression, peaceful assembly, and liberty under ss. 2 (b) and (c) and 7 of the *Charter*. He also wanted a declaration that the officer grabbing him had committed the tort of battery. Although it was agreed that the officers had no statutory authority to demand the a search in this case, the judge nevertheless found it was authorized under the common law as an ancillary police power. Targeting demonstrators walking down the public street and requiring that they submit to a search of their belongings if they wished to proceed fell within the general scope of the police duty to preserve the peace as well as their power to cordon off the area to protect the foreign dignitaries. As for the police action in fulfilling these duties, the judge found it was reasonably necessary. Tailoring the searches to only suspected demonstrators rendered the police intervention minimally intrusive and was not an abuse of authority. He also analogized these searches to those carried out at courthouses and airports. Finally, the alleged battery was *de minimis* (trifling) at worst and, in any event, was justified under s. 25 of the *Criminal Code*, which permits police to use "as much force as is necessary" in the course of their authorized duties when acting on reasonable grounds.

Ontario Court of Appeal

The applicant appealed the dismissal of his request for a declaration. He maintained that the police violated his *Charter* rights to liberty, freedom of expression, and peaceful assembly.

Common Law Ancillary Powers Doctrine

Under the common law, police officers are given broad duties, such as preserving the peace, preventing crime and protecting life and property, as well as powers ancillary to those duties. However, police powers ancillary to a police duty are limited.

"Effectiveness in the context of police powers is not measured by whether a risk does or does not in fact materialize. Rather, the effectiveness of a given power is determined by considering whether, objectively, the measure serves to materially reduce the risk of a breach of the peace."

Ancillary police action must be reasonably necessary in all of the circumstances for the carrying out of the police duty. In determining whether police conduct falls within a common law ancillary power, the courts utilized a two-part analysis (also known as the Waterfield test):

1. Does the police conduct in question fall within the general scope of any duty imposed on the officer by statute or common law?

2. If so, in the circumstances of the case, did the execution of the police conduct in question involve a justifiable use of the powers associated with the engaged statutory or common law duty? Here, the competing interest of the police duty and the liberty interests of the individual must be balanced.

In this case, the Court of Appeal framed the police power exercised as "the power of individual police officers to target demonstrators and, where no crime is being investigated or believed to be in progress, but with the intention of preventing crime, to require that they submit to a search if they wish to proceed on foot down a public street." As for the liberty interests at stake, they were identified as "the freedom of expression under the Charter and the common law right to travel unimpeded down a public highway."

The parties agreed that the officers' conduct fell within the scope of the police duty to preserve the peace and prevent damage to property or persons. However, the Court of Appeal disagreed with the lower court that the police conduct in interfering with the applicant's liberty was necessary for the police to carry out their duty in keeping the peace.

First, the power the police used was not effective. "Effectiveness in the context of police powers is not measured by whether a risk does or does not in fact materialize," said Justice Rouleau speaking for the Court of Appeal. "Rather, the effectiveness of a given power is determined by considering whether, objectively, the measure serves to materially reduce the risk of a breach of the peace." This team of police officers only targeted those who appeared to be protestors. Of the thousands of people downtown that day, only 70 to 100 were stopped. Furthermore, any would-be troublemakers who were turned back could have taken a different route to get to the security fence.

Second, the warrantless weapons searches of only those appearing to be demonstrators were not rationally connected to their purpose of keeping the peace:

- It was unclear whether the previous day's violence at the Summit was initiated by demonstrators or others who had infiltrated and mixed with groups of demonstrators.
- The previous day's violence was not limited to the area near where the officer's were. It occurred throughout the downtown core.
- The previous day's violence did not involve the use of weapons that might be secreted in a backpack. Rather, uprooted newspaper boxes, street signs, sandwich boards, and bricks pried loose from a paved boulevard were used.

Nor were the stops analogous to searches at courthouses. Unlike these searches, courthouse searches are statutorily authorized, require everyone entering submit, are publicized in advance, do not occur on a public street, and do not target identifiable groups.

Justice Rouleau also found the lower court erred in the Waterfield balancing exercise. For example, the judge equated minimal impairment on the applicant's rights by only considering the amount of people targeted by police (only apparent

demonstrators) rather than minimizing the impact on those targeted:

> The fact is that for a demonstrator such as Mr. Figueiras, the impairment of his rights was in no way lessened because the officers had determined to interfere with only the rights of people "like him." The number of people who are the target of the intrusion is reduced, but the intrusion felt by each target is neither minimized nor reduced. The officers not only stopped and questioned would-be protesters, they also insisted that these would-be protesters submit to a search if they wished to proceed, regardless of the answers they gave in response to the officers' questions. Additionally, it is arguable that by targeting demonstrators and making it known that only demonstrators were being stopped and searched as a condition of passage, those stopped might justifiably feel an even greater sense of state interference, since they knew they were the only ones being targeted. The decision to target demonstrators in no way lessens the impairment of Mr. Figueiras's rights. [para. 24]

As a result, the Court of Appeal concluded that "the police did not have the power to target apparent demonstrators and require that they submit to a search in order to continue down a public street." The interference with the applicant's liberty was not prescribed by law and therefore s. 1 of the *Charter* could not be used to justify the breaches.

Battery

As for the police officer reaching around the applicant and pulling him in, this was more than "de minimis" touching, such as tapping a person on the shoulder to get their attention. Here, the tort of battery, intentionally applying unlawful force to the body of another, had been made out. "The contact with Mr. Figueiras in this case was more than just a 'de minimis' touching," said Justice Rouleau. "It was the kind of unnecessary manhandling that, in my view, would offend the dignity of a person and serve to intimidate that person." Since the officer had no statutory or common law authority for his action, s. 25(1) of the *Criminal Code* could not protect him in using force and shield him from civil liability.

The applicant's appeal was allowed and the Court of Appeal declared that the police violated the applicant's common law right to travel unimpeded on a public highway and his *Charter* right to freedom of expression. The Court of Appeal also declared that the tort of battery had been committed against the applicant.

Complete case available at www.ontariocourts.on.ca

ITO VALIDITY BASED ON ALL INFORMATION

R. v. Whalen, 2015 NLCA 7

Two confidential informers stated that the accused (Denise Whalen) was selling prescription drugs, including Ritalin, morphine and Oxycontin, from her home. They told police that people came to her front door to buy pills, completed the transactions very quickly, and then left. The sources gave the prices she charged for the pills, said how she acquired the drugs, and stated she kept them in a locked safe in her basement. Source A, a paid informer and admitted drug user, had no criminal record and had been providing information for one month, which resulted in one arrest. Source A said that Denise lived at the address with "Billy". Source A described "Billy" as having facial tattoos and a bluish/grey Montana van, which he parked in front of the house. Source B, a drug user with a criminal record (but no dishonesty or deceit offences), said they saw 10 to 15 drug transactions shortly before the search warrant was issued. Source B had been a confidential police informer for approximately 2½ years and provided intelligence on a regular and ongoing basis regarding criminal activity which was consistent with information received from others. Source B's past information, which he had been paid for, had led to the arrest of between five and ten individuals.

That same day the police set up a surveillance team and observed short visits by no fewer than eight people to Denise Whalen's home over a period of 92 minutes. Searches of police data bases confirmed some of the information from Source A: Denise Whalen lived at the address with William "Billy"

Whalen and he had facial tattoos. Police surveillance also confirmed that William Whalen kept his bluish/grey Montana van parked in front of the house, as stated by Source A. The police set out the information obtained from the two confidential informers, described as reliable, and from the police surveillance of Denise Whalen's residence. A search warrant under s. 11 of the *Controlled Drugs and Substances Act* was obtained. The police found drugs and both accused were charged with drug possession offences.

Newfoundland Provincial Court

The judge, reviewing the warrant's issuance, concluded there was insufficient grounds in the ITO for the warrant to be issued. First, he gave little weight to the information provided by Source A because their past performance was very limited (only for a month). Source A couldn't provide the Whalen's surname, and it was unclear how they came upon the information or how they would have access to information that the drugs and cash were locked up in a safe in the basement. Although the information regarding the reliability of Source B was stronger, it was still insufficient to provide the basis for the issuance of a search warrant. Despite some corroboration by independent police database searches that the residence belonged to Denise Whalen, the police surveillance had not yielded any probative evidence of illegal activity. The judge noted it was not possible to infer that two of the four females sighted entering or leaving the home were not residents and there was no corroborative evidence of illegal activity involving Denise. The judge quashed the search warrant and the evidence was excluded.

Newfoundland Court of Appeal

The Crown appealed the warrant's quashing. It argued that the trial judge erred in concluding there was insufficient information in the ITO to support reasonable grounds to believe that an offence had been committed and that evidence of that offence would be found in Denise Whalen's house.

Reasonable Search

A search will be "reasonable" under s. 8 of the *Charter* if it is authorized by law, the law itself is reasonable and the search is conducted in a reasonable manner. When a search warrant is properly issued the search is authorized by law and it is presumed to be valid unless the accused demonstrates its invalidity. Justice Barry, speaking for the unanimous Court of Appeal, stated the test for reviewing the validity of the search warrant as follows:

> In reviewing whether a Provincial Court judge properly issued a search warrant, a reviewing judge must ask whether the accused has shown that there was no justifiable basis according to law upon which the authorizing judge could have granted the warrant. In the present case this question comes down to whether the accused has shown that the authorizing judge did not have sufficient credible information before him to establish reasonable grounds to believe that drugs were being trafficked from the Whalen residence at the time of issuing. [para. 18]

Reasonable Grounds

The concept of "reasonable grounds to believe" is "the point where credibly-based probability replaces suspicion". Grounds for a search must go beyond subjective belief and mere suspicion. The proper test is one of "reasonable probability" rather than "proof beyond a reasonable doubt" or "prima facie case". Nor is a judge reviewing a search warrant to substitute their view for that of the issuing judge. Rather, the reviewing judge is to show a high degree of deference to the issuing judge by determining whether the issuing judge, on the basis of the record, could have granted the warrant. "A reviewing judge does not conduct a rehearing of the application for a warrant," said Justice Barry. "The test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could be issued."

In assessing whether there are reasonable grounds for a search warrant, the totality of circumstances in the ITO are to be considered as a whole, not by "parsing and microscopically examining the words, phrases or paragraphs in isolation."

"A reviewing judge does not conduct a rehearing of the application for a warrant. The test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could be issued."

Three concerns arise when reviewing the sufficiency of information set out in an ITO: was the information predicting the offence ***compelling***, was the source of the information ***credible*** and was the information ***corroborated*** by police investigation. However, corroboration or confirmation of the offence itself is not required.

In this case, the information provided by source B was compelling because it provided specific and convincing detail regarding Denise Whalen's drug trafficking activity including what she was selling, where and how she sold it, and how much she charged. As for Source B's credibility, it was strong:

> The source of the knowledge is the personal observation of "B". Indicia of the reliability of "B" are past performance over 2½ years as well as consistency with information obtained by police from other sources and, to some extent, consistency with searches of police data bases and with the brief surveillance.
>
> In addition, the information supplied by Sources "A" and "B" provides some corroboration for each other's statements. [paras. 40-41]

The credibility of Source B was also enhanced by certain corroborative information. First, although the information of Source A was less reliable than Source B, there was some corroboration because of the similarity of the information regarding the types of drugs, how they were sold, and where they are stored. Further:

> There is also some corroboration from the comings and goings during the police surveillance, consistent with the brevity of the transactions described by the sources, even allowing for the fact that much of the activity may have been nothing more than that of a normal household. At least four individuals made visits to the Whalen premises of such a short duration as to be consistent with the sources' statements regarding the type of activity they observed. Some further corroboration of neutral facts came from the police search of data bases, where the information of the sources regarding the address of Ms. Whalen was confirmed, as well as the presence of Mr. Whalen and his vehicle. [para. 43]

In this case, the trial judge substituted her opinion for that of the issuing judge rather than asking whether there was a basis to issue the warrant. There was sufficient information in the ITO, in the totality of the circumstances, to establish reasonable grounds to believe that drugs would be present at the premises on the day the warrant was executed. The reference by both sources to drugs and money being kept in a safe in the basement, and the specific details regarding the types of pills, moved the corroboration evidence beyond "general public knowledge." It was also a reasonable inference from the information that Denise Whalen kept her stash "topped up" and that illegal prescription pills would be found when the warrant was executed. "Source 'B' supplied information which, considered with the other information, reached that point and permitted the authorizing judge to conclude it was sufficient to establish reasonable grounds to support issuing a search warrant," said Justice Barry. "There was sufficient credible and reliable information in the ITO to justify the Provincial Court judge finding reasonable grounds to believe an offence was being committed and that evidence of that offence would be found at the specified time and place."

The trial judge erred in quashing the search warrant. The warrant was valid, there was no *Charter* breach, and therefore no basis to exclude the evidence found in the search. The Crown's appeal was allowed and the matter was remitted for a new trial.

Complete case available at www.canlii.org

POLICING ACROSS CANADA: FACTS & FIGURES

According to a recent report released by Statistics Canada, there were 68,896 active police officers across Canada in 2014. This represented a decrease of 354 officers over 2013, down 1.6% from the previous year. Ontario had the most police officers at 26,148, while Nunavut had the least at 119. With a national population of 35,540,419, Canada's average cop per pop ratio was 194 police officers per 100,000 residents.

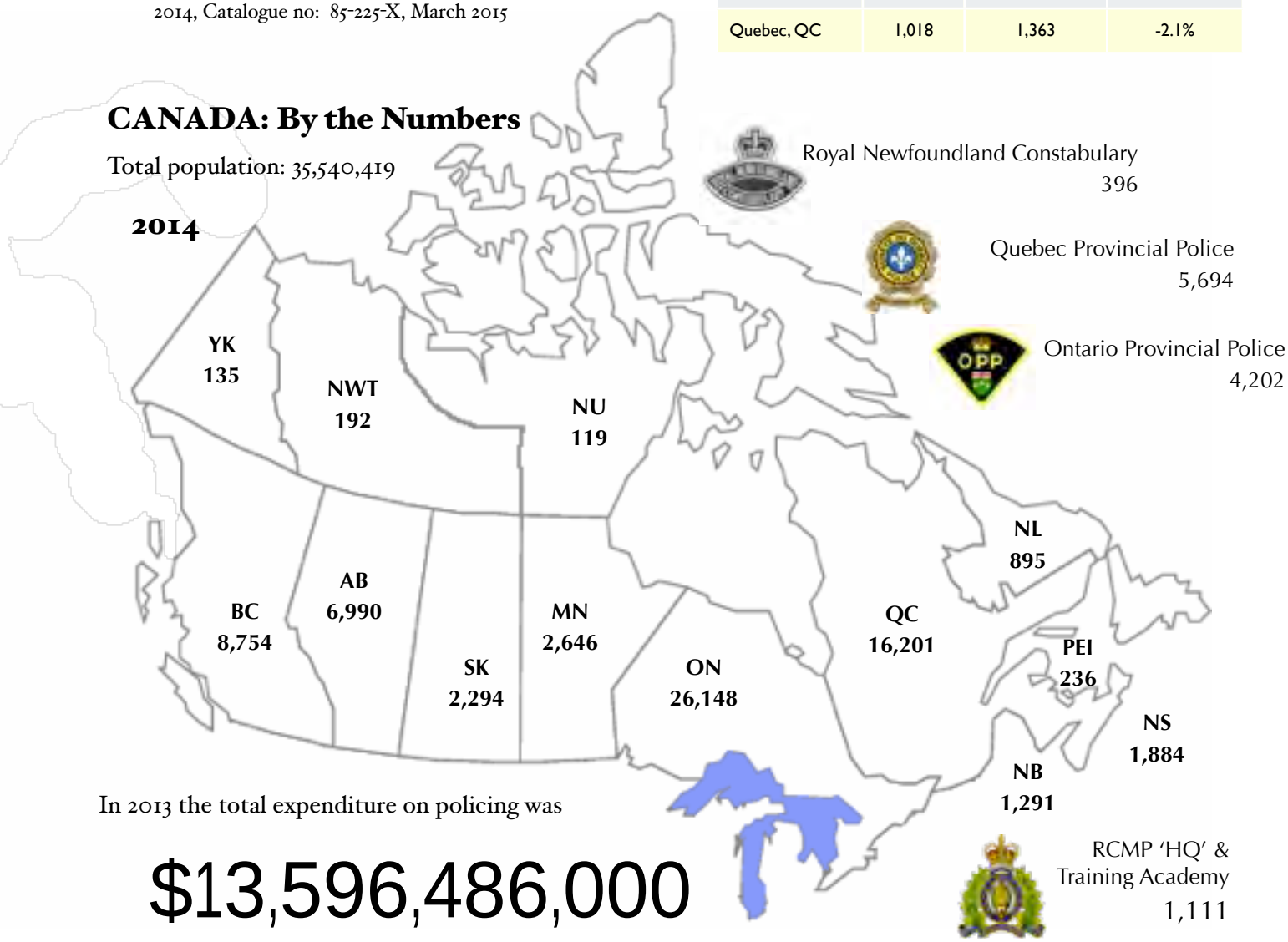
Source: Statistics Canada, Police Resources in Canada, 2014, Catalogue no: 85-225-X, March 2015

Canada's Police Officers by CMA - Top 9			
CMA	Officers		% Change
	Number	per 100,000	2013>2014
Toronto, ON	9,875	167	-2.4%
Montreal, QC	7,420	186	+2.2%
Vancouver, BC	3,551	145	-4.0%
Calgary, AB	2,201	160	-1.6%
Edmonton, AB	1,998	155	-2.9%
Winnipeg, MN	1,535	191	-0.6%
Ottawa, ON	1,375	141	-2.5%
Hamilton, ON	1,120	153	+0.1%
Quebec, QC	1,018	1,363	-2.1%

CANADA: By the Numbers

Total population: 35,540,419

2014



Royal Newfoundland Constabulary
396

Quebec Provincial Police
5,694

Ontario Provincial Police
4,202

RCMP 'HQ' & Training Academy
1,111

In 2013 the total expenditure on policing was

$13,596,486,000

2014 FAST FACTS

- On the snapshot day of May 15, 2014 there were 68,896 police officers in Canada. There were an additional 28,409 civilians, which represented 29% of all police personnel. There were 2.4 officers for every civilian employed. Canada's authorized police strength on the snapshot day was 71,457. The difference between actual and authorized strength was due to unfilled vacancies.
- Manitoba had the highest provincial rate of police strength at 206 officers per 100,000 residents (cop to pop ratio). The Northwest Territories had the highest territorial cop to pop ratio at 440.
- 54% of police officers were 40 years of age or older. 11.5% of police officers were under 30 while only 4.9% were 55 years or older.
- The Winnipeg, MB Census Metropolitan Area (CMA) had the highest police strength at 191 officers per 100,000, followed by Thunder Bay, ON (187) and Montreal, QC (186). The CMA of Saguenay, QC had the lowest police strength at 106.
- For the 2013 calendar year, 73% of officers hired were recruits. The remainder were experienced police officers.
- Recruits have a higher proportion of college certificates/diplomas than experienced officers.
- At the end of the 2013 calendar year, 11% of police officers were eligible to retire. Newfoundland had the highest proportion of officers that could retire at 22%.
- In May, 2014 there were 84 Canadian police officers involved in several United Nations peacekeeping operations.
- Women represented 67% of civilians employed by police services.
- Canada continues to have a lower cop to pop ratio (194) compared to other countries such as:
  - Ireland - 307.2
  - Germany - 293.4
  - France - 290.3
  - Australia - 263.1
  - United States - 221.8
  - Sweden - 215.9

* based on 2012 stats

GENDER

There were 14,175 female officers in 2014 accounting for 20.6% of all officers, or roughly 1 in 5. This is up from 1.3% from the previous year. Quebec had the highest percentage of women (24.7%) while Nunavut had the lowest (8.4%). The RCMP HQ and Training Academy were 26.6% female.

Area	% Female
QC	24.7
BC	21.9
NL	20.1
SK	19.9
ON	19.1
AB	18.7
NS	17.6
NB	16.3
YK	15.6
MN	14.8
PEI	14.0
NWT	11.5
NU	8.4

The number of women in all ranks continued to rise. Senior officers, such as chiefs, deputy chiefs, superintendents, inspectors and other equivalent ranks, were 10.9% female, more than doubling since 2004. Non-commissioned officers, such as corporals, sergeants and staff sergeants, were 17.6% female, more than twice the 2003 percentage. Constables were 22.2% female. This was a slight increase over last year.

Overall, the representation of women in policing continues to rise.

OTHER FA$T FACT$

- Police expenditures rose for the 19th consecutive year, more than doubling since 1994.
- Per capita costs for policing in fiscal 2013 translated to $387 per Canadian (capita).
- Among provinces, the most spent on policing was in Ontario ($4,544,424,000) followed by Quebec ($2,550,320,000), British Columbia ($1,504,0724,000), Alberta ($1,359,093,000) and Manitoba ($452,673,000). The Yukon ($31,091,000), Prince Edward Island ($34,765,000), Nunavut ($48,888,000) and the Northwest Territories ($58,584,000) spent the least. Other RCMP expenditures on such things as HQ, international operations and national policing services amounted to $1,957,255,000.

RCMP

The RCMP is Canada's largest police organization. It is divided into 15 Divisions with Headquarters in Ottawa. Each division is managed by a commanding officer and is designated alphabetically.

RCMP DIVISIONS	
Division	Area
Depot	Regina, SK (Training Academy)
National	National Capital Region
B	Newfoundland & Labrador
C	Quebec
D	Manitoba
E	British Columbia
F	Saskatchewan
G	Northwest Territories
H	Nova Scotia
J	New Brunswick
K	Alberta
L	Prince Edward Island
M	Yukon Territory
O	Ontario
V	Nunavut Territory

RCMP On-Strength Establishment
as of September 1, 2014

Rank	# of positions
Commissioner	1
Deputy Commissioners	5
Assistant Commissioners	25
Chief Superintendents	48
Superintendents	171
Inspectors	347
Corps Sergeant Major	3
Sergeants Major	3
Staff Sergeants Major	13
Staff Sergeants	863
Sergeants	1,890
Corporals	3,480
Constables	11,509
Special Constables	68
Civilian Members	3,956
Public Servants	6,269
Total	**28,651**

Source: www.rcmp-grc.gc.ca/about-ausujet/organi-eng.htm

RCMP Officers by Level of Policing - Canada 2014 (numbers do not include 1,111 members at HQ & Training Academy)

Level / Region	BC	AB	SK	MN	ON	QC	NB	NS	PEI	NL	YK	NWT	NU	Total
Municipal	3,464	1,079	118	182	-	-	208	47	10	-	-	-	-	5,108
Provincial	1,771	1,391	881	624	-	-	475	760	96	400	109	168	106	6,781
Federal	745	317	227	174	1,663	913	134	171	23	83	18	14	6	4,488
Other	136	49	30	28	47	44	26	28	8	16	8	10	7	437
Total	6,116	2,836	1,256	1,008	1,710	957	843	1,006	137	499	135	192	119	16,814

2ND ANNUAL METRO VANCOUVER TRANSIT POLICE

CHARITY GOLF TOURNAMENT

to benefit Special Olympics BC

Thursday, 14 May 2015 at 12:00 PM (tee off)
Westwood Plateau Golf & Country Club
3251 Plateau Boulevard, Coquitlam, BC V3E 3B8

Special Olympics British Columbia

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Cst. Daryl Rainkie (604-307-0145)

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EVIDENCE ADMISSIBLE DESPITE UNREASONABLE CELL PHONE SEARCH

R. v. Adeshina, 2015 SKCA 29

The police stopped a minivan after seeing it travelling 144 km/h in a 100 km/h zone. The accused was in the passenger seat. Police conducted a database search and located an outstanding warrant for the driver's arrest. He was arrested, searched, and found to posses three small plastic bags containing white powder, which appeared to be cocaine. The accused was then asked to step out of the minivan and searched. He was found to possess an LG cell phone and $1,444.71 in cash. The minivan was then searched and police discovered a Blackberry cell phone, a Samsung Galaxy cell phone, and a duffle-bag containing 33 Ziploc bags of marihuana having a net weight of 7,692 grams. The accused was then arrested for possessing a controlled drug for the purpose of trafficking. A cursory search of the text messages on the LG cell phone was made but nothing of consequence to the investigation was discovered. More than 2½ months later the Samsung Galaxy cell phone was removed from exhibit storage, its text messages were checked, and relevant information was recorded. Then, about four months later, the three cell phones were sent to a Tech Crime Unit for examination. Nothing was retrieved from the Blackberry or LG devices but a "data dump" of the Samsung Galaxy resulted in a 682 page report about the data retrieved from its memory. This report revealed the Samsung Galaxy belonged to the accused and that he was connected with the marihuana seized from the minivan. He was charged with possessing marihuana for the purpose of trafficking and possessing proceeds of crime.

Saskatchewan Court of Queen's Bench

The officer explained that the 2½ month delay in searching the Samsung Galaxy resulted from him being on leave for his wedding and then being busy on his return. Nevertheless, the judge found the searches conducted of the cell phone some months after the accused's arrest was too far removed in time to be considered incidental to it. Thus s. 8 of the *Charter* had been breached. However, the judge refused to exclude as evidence all of the information acquired by the police from their searches of the cell phones. Although he found that the impact of the searches on the accused's, Charter-protected interests had been significant, the judge found the Charter-infringing conduct of the police had not been serious and there was a clear societal interest in adjudicating the case on the merits. Balancing these three factors, the judge concluded that the text messages should not be excluded under s. 24(2). The accused was convicted of possessing marihuana for the purpose of trafficking and possessing proceeds of crime.

Saskatchewan Court of Appeal

The accused argued, among other things, that the trial judge's assessment under s. 24(2) was in error and that the text messages ought not to have been admitted as evidence. But the Court of Appeal disagreed. Conducting its own assessment under the s. 24(2) admissibility analysis, the Court of Appeal upheld the admission of the evidence.

- ***Seriousness of the Charter-infringing state conduct*** (admission may send the message the justice system condones serious state misconduct). This was not serious:
  1. The law respecting cell phone searches at the time was unsettled and unclear.
  2. This was not a deliberate *Charter* violation. The officer honestly believed, although wrongly, that he had lawful authority to conduct the searches and acted in a manner consistent with the general policy of his detachment on such matters.
  3. There were compelling reasons to search cell phones in connection with drug arrests and the officer could have obtained a warrant if he had sought one.
  4. Although the forensics examination took place some months after the accused's arrest, the officer offered a reasonable explanation for the delay.

- ***Impact of the breach on the Charter-protected interests of the accused*** (admission may send the message that individual rights count for little). This was very significant. The privacy interests in the contents of computers and mobile devices like cell phones is high. The search of the Samsung Galaxy cell phone was particularly intrusive, involving a comprehensive "data dump".
- ***Society's interest in the adjudication of the case on its merits.*** The evidence of the Samsung Galaxy cell phone's contents was reliable and real evidence connecting the accused to the marihuana. It was extremely important to the Crown's case and was key to the adjudication of the charges against the accused. There was a clear societal interest in seeing this case adjudicated on its merits.

Chief Justice Richards, speaking for the Appeal Court, found this case tipped the balance against excluding the evidence. The evidence was admissible, the accused's appeal was dismissed, and his convictions were upheld.

Complete case available at www.canlii.org

PROPER ADVISEMENT MADE: NO RIGHT TO RE-CHARTER

R. v. Bonnell, 2015 NBCA 6

About two months after a 16-year-old girl went missing, her 29-year-old first cousin was arrested on an unrelated charge of sexual assault. He was also a suspect in the death of his cousin. He was read an arrest script which conveyed his legal rights on both the unrelated sexual assault charge and being the subject of a police investigation into the death of his cousin. He was advised of his right to counsel and warned about his right to silence. He was then transported to a police detachment to facilitate his right to counsel. Despite being urged to call a lawyer and told that murder was a serious crime, he refused to contact counsel. He was subsequently advised of his right to counsel three more times before being interviewed the following day. He later led police to the burial site of his cousin's body in an isolated wilderness area and was charged with first degree murder.

New Brunswick Court of Queen's Bench

The accused claimed that once the interview topic changed from the sexual assault investigation to the homicide, he should have been advised of his right to counsel relating to the murder. The judge, however, disagreed and found that the accused had been clearly and repeatedly told he was the subject of a police investigation into the murder and kidnapping of his cousin, and indignities to her body. There was no change in his jeopardy in any legally significant way. The police were therefore not obligated to provide further notice of the right to counsel when questioning changed form the alleged sexual assault to the murder. Thus, s.10(b) of the *Charter* was not breached. His statements were admissible and he was convicted by a jury of first degree murder. He was sentenced to life in prison with no eligibility for parole for 25 years.

New Brunswick Court of Appeal

The accused appealed his conviction arguing, among other grounds, that his statements should not have been admitted as evidence because the police failed to advise him that his legal jeopardy had changed when the first stage of questioning relating to the alleged sexual assault was completed and questioning about his cousin's disappearance and suspected murder started. In his view, the police were required to stop the interview and provide him with further notice of his *Charter* rights (re-advise him under s. 10(b)). The Crown, on the other hand, argued that the accused had been lawfully arrested and detained regarding the sexual assault allegation and lawfully detained regarding the murder investigation.

Justice Quigg, writing the Court of Appeal's opinion, agreed with the trial judge that there had been no change in the accused's jeopardy. He had been advised repeatedly that he was being investigated for the murder of his cousin and of his rights as a result of that investigation. The evidence was properly admitted and the accused's appeal was dismissed.

Complete case available at www.canli.org

ALBERTA's TOP COURT REFUSES TO RECONSIDER SUSPENDING s. 10(b) RIGHTS DURING IMPAIRED INVESTIGATION

R. v. Caswell, 2015 ABCA 97

A police officer stopped the accused driving a truck. He thought the truck was in a hurry and discovered the vehicle was registered to a woman. The officer told the accused he had pulled him over to check for sobriety and documentation. Although the accused said he had not been drinking, the officer noticed that he covered his mouth when he spoke, looked tired, and was slightly slurring his speech. The officer also detected a moderate smell of alcohol on the accused's breath. The officer told the accused he suspected that he may be impaired and radioed for another officer to bring an approved screening device (ASD). The accused was told to leave his cell phone in his truck when the officer asked him to the police vehicle. The ASD arrived within two minutes and the officer requested a breath sample. The accused said he would not blow until he had spoken with his lawyer on his cell phone. After several minutes of discussion about calling a lawyer, the accused was arrested for refusing to provide a breath sample. After an hour he was released at the scene on a promise to appear but was never allowed to call a lawyer during this time. His truck, which contained his cell phone, was towed and impounded under Alberta's provincial administrative scheme.

Alberta Provincial Court

The officer testified he did not allow the accused to use his cell phone to call a lawyer because he had been taught that detained persons were not allowed to contact a lawyer when faced with an ASD demand. The judge found the officer had no duty to allow the accused an opportunity to contact a lawyer before providing a roadside sample. While s. 10(b) of the *Charter* guarantees the right to retain and instruct counsel without delay upon detention or arrest, she found the law was settled that s. 10(b) rights are suspended while a detained motorist is asked to participate in roadside screening tests. This s. 10(b) suspension is justified as a reasonable limit under s. 1 of the *Charter*. She also rejected the arguments that she could ignore binding precedent (*R. v. Mitchell*, 1994 ABCA 369) by reconsidering earlier case law in view of recent developments in cellular technology and should adopt a "reasonable accommodation" framework. Furthermore, even if there was a s. 10(b) breach, the judge ruled the accused's refusal to comply with the ASD demand was nonetheless admissible. The accused was convicted of refusing to provide an ASD sample.

Alberta Court of Queen's Bench

An appeal judge upheld the trial judge's ruling. The accused's right to counsel had not been breached. The suspension of the right to consult a lawyer when a roadside breath demand is made is justified under s. 1 as long as the test can be done "forthwith". The appeal judge found the societal objectives of detecting and deterring impaired driving and the practical operational realities in doing so continue to be relevant and improvements to cellular technology did not allow for a reconsideration of earlier precedent. Plus, even though it might have been possible for the accused to access legal advice, the overall purpose and justification for suspending the right to counsel during roadside sobriety investigations remained. The accused's appeal was dismissed.

Alberta Court of Appeal

The accused requested permission to further appeal his case and wanted the case of *Mitchell*, an earlier decision of the Alberta Court of Appeal, to be reconsidered. In *Mitchell*, the suspension of the s. 10 (b) right to counsel during an investigative detention for impaired driving was found to be justified under s. 1 of the *Charter*, irrespective of whether the right could be facilitated in the particular circumstances of the case. In the accused's view, the trial judge

erred, among other things, in limiting the scope of the s. 10(b) right to counsel upon investigative detention for impaired driving to situations where the ASD test cannot be conducted forthwith. In seeking a reconsideration of Mitchell, the accused argued:

- If a reasonable opportunity to contact counsel existed when the ASD demand was made, it should be on the Crown to establish in each case that the s. 10(b) suspension of the right to counsel was nevertheless justified pursuant to s 1 of the *Charter*.
- The meaning of "forthwith" in s 254(2) of the *Criminal Code* since *Mitchell* has been given a broad interpretation in the jurisprudence.
- A provincial administrative scheme has added to the length of time a driver may be detained and has increased the severity of the potential consequences flowing from a roadside breath demand.
- The case law on the right to counsel has developed and the importance of this right has been emphasized.

The Crown, on the other hand, submitted that the law was well settled in this area and the right to counsel is suspended during ASD screening so long as it is done "forthwith". In the Crown's view, the increased availability of cell phones did not detract from Parliament's legitimate need to suspend the right to counsel in order to quickly and effectively implement roadside sobriety screening.

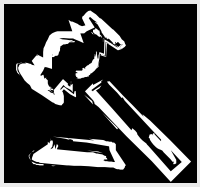
The Majority

Justice Brown, writing the two member majority decision, rejected the accused's application to reconsider *Mitchell*. He summarized the limitation on the right to counsel while detained:

> Parliament limited the right to consult counsel that would normally arise upon detention by imposing the requirement, contained in what is now section 254(2) of the Criminal Code, that a person reasonably suspected to have alcohol or a drug in his or her body and who has operated a motor vehicle within the preceding three hours comply with a peace officer's demand to provide forthwith a sample of breath for analysis by an approved roadside screening device. Parliament's point, recognized in [*R. v. Thomsen*, [1988] 1 SCR 640], was that a roadside screening device test is to be administered "at such time and place as the motorist is stopped, and as quickly as possible". And, owing to (inter alia) the strong possibility of detection of

LEGALLY SPEAKING:

WHAT MITCHELL SAID



"We do not read [Thomsen and other Supreme Court decisions] as saying that where communications are difficult the police need not allow access to a lawyer before demanding a roadside screening sample. We read them as saying that Parliament requires motorists to give roadside screening samples without any chance to obtain legal advice first, and that any violation of the Charter is pardoned by s. 1 of the Charter.

It is not for us to disregard decisions of the Supreme Court of Canada. For a lower court to disregard law laid down by higher courts because the lower court thinks that the reasoning or criteria lack force at different places or different times, is largely to ignore the doctrine of precedent. We cannot and will not do that. …

… And we think that the Supreme Court …, when deciding those cases, were perfectly aware that police sometimes stop motorists for investigation of possible impaired driving at times and in places where communication with a lawyer might be possible. … Even in 1988 … car telephones were fairly common." – Alberta Court of Appeal in *R. v. Mitchell*, 1994 ABCA 369 at paras. 9-11.

"Parliament limited the right to consult counsel that would normally arise upon detention by imposing the requirement, contained in what is now section 254(2) of the Criminal Code, that a person reasonably suspected to have alcohol or a drug in his or her body and who has operated a motor vehicle within the preceding three hours comply with a peace officer's demand to provide forthwith a sample of breath for analysis by an approved roadside screening device."

> impaired drivers and to the deterrent effect of the perceived risk of their detection, the Supreme Court was satisfied that the consequent imposition upon the right to counsel was reasonable and demonstrably justified in a free and democratic society, having regard to the fact that the right to counsel would be operative at the more serious breathalyzer stage. [references omitted, para. 30]

In the majority's view, the changes to the legislative scheme and the proliferation (if not ubiquity) of cell phones was neither a significant development in the law, nor was it a change in circumstances or evidence that has shifted the parameters of the debate in a fundamental way such that *Mitchell* (and thus *Thomsen*) should be reconsidered:

> As to the amendments to the pertinent legislative scheme, "significance" must be considered with reference to the rationale for the rule that scheme establishes. While the legislative changes which the [accused] points to (notably, provincial statutory amendments authorizing seizing and impounding of vehicles) have obviously increased the stakes for someone in the [accused's] position, they are not relevant to the rationale for the decision in Mitchell (nor, for that matter, for the rule in Thomsen). [para. 42]

And further:

> The proliferation of cell phones, however, does nothing to invalidate that starting premise in Mitchell and Thomsen. Even where a cell phone is present, the requirement to provide a breath sample forthwith is inconsistent with the right to consult counsel, so long as such consultation delays the immediate provision of a breath sample upon demand. The applicant's case – in which approximately two minutes passed between the demand and the arrival of the screening device – does not demonstrate otherwise. While he stresses that he had a cell phone, and repeatedly asked to use it to contact a lawyer, no suggestion was made to us that he could necessarily have used it to (1) contact a lawyer, (2) instruct a lawyer and (3) have a reasonable opportunity to obtain legal advice from a lawyer, all before the arrival of the screening device. [para. 44]

This ground of appeal was dismissed.

A Different View

Justice Veldhuis would have granted the accused's leave to appeal and allow *Mitchell* to be reconsidered:

> [The Mitchell] decision is 20 years old; since the case was decided there have been many relevant and significant advances in technology allowing instantaneous communication; changes to the legislative scheme; it is a memorandum of judgment rather than a reserved judgment; and a number of subsequent appellate decisions have established exceptions to the general rule set out in Mitchell. This is a situation where the matter can be revisited based on developments in the law and a change in circumstances that fundamentally shifts the parameters of the debate. Cell phones have profoundly altered the

"Even where a cell phone is present, the requirement to provide a breath sample forthwith is inconsistent with the right to consult counsel, so long as such consultation delays the immediate provision of a breath sample upon demand."

> way of life of Canadian society and certainly the post-1994 generation. [references omitted, para. 15]

Justice Veldhuis opined that this ground of appeal was reasonably arguable and it was clearly an issue of substantial public importance.

Appeal Allowed On Other Grounds

Permission for the accused to appeal his other grounds was allowed by all three judges of the Court of Appeal:

- whether evidence of his refusal while his right to counsel was suspended could be used as evidence for a criminal conviction.
- whether his s. 10(b) right was breached when the police failed to facilitate his right to counsel in the hour between his arrest and release on a promise to appear.

Complete case available at www.canlii.org

ACQUIRING HISTORICAL TEXT MESSAGES DID NOT REQUIRE PART VI

R. v. Belcourt, 2015 BCCA 126

While investigating a home invasion style robbery where a man was shot dead, the police obtained two production orders under s. 487.012 of the *Criminal Code* requiring Telus to produce all incoming and outgoing text messages sent at or around the time of the offence related to two cellular phones – one associated with the accused and the other to another suspect. Some of the text messages included evidence relevant to the incident. The accused and the other man were charged with, among other things, second degree murder.

British Columbia Supreme Court

The accused argued that the police were required to obtain an authorization under Part VI of the *Criminal Code* to lawfully acquire the text messages, rather than a production order as they did. In his view, the acquisition of any text messages could only be authorized under Part VI because all the text messages were "private communications" that were "intercepted" within the meaning of s. 183 of the *Criminal Code*. Thus, the text messages could not be acquired by police without giving the accused the benefit of the privacy protections in ss. 185 and 186.

The judge, noting that Telus kept copies of the text messages on its database for about 150 days and was legislatively allowed to do so, found the seizure of the messages under the production orders was not an interception within the meaning of Part VI. This was not a prospective acquisition of future text messages as found in *R. v. Telus*, 2013 SCC 16, but the stored text messages had already been transmitted and received more than a month before the production order was granted. And, even if the acquisition of the text messages breached s. 8 of the *Charter*, the judge would have admitted them under s. 24(2). The accused was found guilty of second degree murder.

British Columbia Court of Appeal

The accused appealed, in part, arguing that the trial judge erred in not excluding the text messages under the *Charter*. In his view, the production orders allowing the police to acquire his stored text messages from the service provider's database fell within the definition of "interception." Again, he contended that only Part VI could authorize the acquiring of the text messages.

Justice Kirkpatrick, speaking for the Court of Appeal, concluded that the seeking of stored messages in this case was not "prospective":

> ... I appreciate the privacy concerns arising from technology that allows for text messages to be "stored" in a database before they are received by the intended recipient. However, as I understand the evidence, there is a five day "push period" during which the service provider attempts to deliver messages and during which the text message is stored electronically on the server without having been delivered to the

> intended recipient. In this regard, the most notable feature of the electronic storage is that it allows for the message to be continuously and instantaneously re-sent until either it is received or a pre-set time occurs (i.e., the "push period" ends).
>
> I readily concede that the acquisition of a text message by the police in this interim transit period could constitute an interception within the plain meaning of the word. However, this is because the recipient has yet to receive the message, and may never receive the message. In stepping between a sender and recipient to acquire a message and its content before it is received, and when it may never be received, the police are "intercepting" the message in the most literal sense of the word. [paras. 44-45]

Here, however, the police did not "interject themselves in the communication process by using an investigative technique that comes between the sender and receiver of a message." Rather, they sought "to obtain a stored electronic record of a text message after it has been sent and received." Since the stored, historical messages were already in existence, the investigative technique in obtaining them was not "prospective" and was outside the ambit of Part VI:

> The detailed requirements found in Part VI exist to address the fact that the evidence sought to be acquired by the police has not yet come into existence at the time that the judicial authorization for its acquisition is being sought. Indeed, the constitutionality of Part VI derives from the safeguards that are imposed by the role of the judge granting the authorization, which exist because of the danger that the interception of private communications could easily transform into a fishing expedition. Put simply, it is inherent in the nature of Part VI authorization that the investigative technique to be utilized by the police is prospective, which requires a distinct form of judicial authorization in comparison to other search warrant provisions. In my view, applying Part VI to evidence already in existence is a misapprehension of the form of authorization provided for in that section of the Code. [references omitted, para. 47]

The use of the production order in this case did not amount to a breach under s. 8 of the *Charter*. "Privacy rights are not absolute," said Justice Kirkpatrick. "In this case, the acquisition of the historical text messages by police was authorized by law by way of s. 487.012." Since there was no *Charter* violation there was no need to consider s. 24(2). The accused's appeal was allowed, however, on the basis that the trial judge erred by improperly instructing the jury on the murder charge.

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

TECHNICAL BREACH DID NOT WARRANT EXCLUSION OF EVIDENCE

R. v. Shin, 2015 ONCA 189

During a street-level undercover cocaine trafficking investigation dubbed Project Isis, the accused became a target of the investigation based on evidence linking him to other traffickers. Police observed these traffickers entering an apartment building several times over a two month period, where they generally stayed for only a few minutes. As a result of this police surveillance and the execution of general warrants authorizing covert entries into the traffickers' residences, the police believed that the apartment was being used as a "stash house". Based on surveillance and other information, the police sought a general warrant authorizing covert entry into the apartment to, among other things, search it and seize drugs and other items. The general warrant authorized the police to:

> *covertly enter [the Apartment]…[t]o search the premises or storage unit for, to photograph, and to alter or seize any firearms, ammunition, controlled drugs, proceeds of crime (cash) and any other information about, or evidence, of the above-noted offences, including drug packaging, cocaine adulterants, debt lists, weigh scales, cellular telephones or telephone records, banking documents, documents relating to the occupancy of the residence and photographs of the co-conspirators.*

The police entered the apartment, which was unoccupied, opened a locked bedroom door, and found powder cocaine (2369.2 grams), crack cocaine (81.3 grams), methamphetamine (6.1 grams), heroin (2.8 grams), hashish (525.7 grams), marijuana (7454.3 grams), cash ($235,335), and drug trafficking paraphernalia. This included a money counter, digital scales, a vacuum sealer and vacuum seal packaging, latex gloves, empty packaging, and cocaine cutting agent. All of the substances were seized and removed from the apartment. However, three officers remained in the apartment in case the accused returned. The time set out in the warrant had not yet expired.

About half an hour after the seized items had been removed from the apartment, the accused entered, using keys which also opened the locked bedroom door. Police immediately arrested him and seized the keys, which he had dropped on the floor during his arrest. His car was searched incident to arrest. In it, police found documentation in his name, marijuana (4865.3 grams), and $5,200 in cash. He was advised of his right to counsel moments after his arrest and immediately indicated he wanted to speak with a lawyer. However, the arresting officer began to question him. The accused said that the apartment was his, that there was marijuana in his car, and he gave the password to his cell phone. He was taken to a police station and told he could not contact his lawyer until the investigation was complete. He was not permitted to contact counsel for about six hours. Three hours of that delay was due to the execution of other warrants for Project Isis and the other three hours of delay was because a new warrant was needed to address a mistake in it. The accused was charged with possessing marijuana, cocaine and heroin for the purpose of trafficking, and possessing proceeds of crime over $5,000.

Ontario Superior Court of Justice

Police testified that they believed the warrant permitted them to remain in the apartment to see if anyone entered it. Such an observation, in their view, would constitute information about the offence, which the warrant permitted them to gather. Officers also said they believed they had grounds to arrest the accused and to search his car incident to arrest. The lead detective testified that he directed the accused not be permitted to contact counsel. He wanted to ensure officer safety and the protection of evidence during the execution of various search warrants as part of Project Isis.

The accused sought the exclusion of the items seized from the apartment and his car. He also wanted the observations that the police made of him as he came through the front door using his keys to enter the apartment, the data seized from his cell phone on his arrest, and the statements he made immediately following his arrest ruled inadmissible. The judge did find several *Charter* violations:

- s. 8 - the warrant did not authorize the police to remain in the apartment and wait for the accused to return after they had seized the evidence; therefore the search was conducted in an unreasonable manner.
- s. 10(b) - the police delayed the exercise of the accused's right to counsel.
- ss. 8 and 10(b) - the police questioned the accused after he indicated he wished to exercise his right to counsel.

The accused's statements following his arrest were excluded. The data from his cell phone seized at the time of his arrest was also inadmissible because of the improper questioning which led him to reveal the password. The other evidence, however, was admitted under s. 24(2). First, there was no bad faith on the part of the police. Second, there had been a minimal impact on the accused's Charter-protected interests when the police overstayed in the apartment. The accused had a minimal expectation of privacy in the apartment (it was not his residence nor was it a dwelling-place) and the police had lawfully entered it to seize drugs and other evidence. Remaining in the apartment after the evidence had been removed was merely a technical breach. Finally, society's interest in adjudicating the case on its merits favoured admission of the evidence. Most of the evidence was lawfully obtained, highly reliable, crucial to the Crown's case, and its admission would not bring the administration of justice into disrepute. Thus, only

the accused's statements to the police following his arrest and the data from his cell phone were excluded. A jury convicted the accused of possessing marijuana for the purpose of trafficking and possessing proceeds of crime over $5,000. He was sentenced to six years in prison.

Ontario Court of Appeal

The accused appealed his convictions by arguing, among other grounds, that the trial judge failed to exclude the evidence of his entrance to the apartment under s. 24(2). His possession and use of the keys was evidence about his knowledge and control over the apartment. He contended that the trial judge failed to properly consider the admissibility of this evidence and, had he done so, it would have been excluded.

Justice Gillese, delivering the Court of Appeal's opinion, concluded that the trial judge properly considered the key entry evidence. However, even if he hadn't, the result would have been the same - admission of the evidence:

> The Crown has conceded that the Warrant did not authorize the police to remain in the Apartment after the search and seizure. Assuming that the police conduct was overreaching, I do not find it to be a serious breach. Their conduct in remaining in the Apartment to determine who had possession of the drugs and cash was logically and reasonably connected to the core of the authorization under the Warrant. Furthermore, on the findings of the application judge, the police officers' overstaying was not in bad faith and was not a deliberate violation of the Warrant. The overstaying was short in duration, occurred within the time that the Warrant authorized the police to be inside the Apartment, was done without the intention of breaching the terms of the Warrant, was a technique for which ample grounds existed, entailed no breach of privacy beyond that authorized by the Warrant, and was intended to end the investigation with an arrest in a safe and controlled manner.
>
> Accordingly, I view the breach to be honest, minor and technical in nature, falling at the less serious end of the spectrum. The admission of "evidence obtained through inadvertent or minor violations of the Charter may minimally undermine public confidence in the rule of law". Furthermore, the absence of bad faith reduces the court's need to disassociate itself from the police conduct. I do not find that the overstaying would tend to bring the administration of justice into disrepute.Second, the court must consider the impact of the breach on the [accused's] Charter-protected interests. In this case, there can be no serious challenge to the application judge's finding that the [accused] had a diminished expectation of privacy in the stash house. A dwelling used solely for the commercial trade in drugs attracts a diminished privacy interest. The Apartment was a storage and packaging facility for drugs and the illicit proceeds of trafficking in drugs.
>
> The Warrant authorized the police to enter the Apartment, conduct an invasive search and create property damage. There is nothing to suggest that the officers acted improperly in the short period between the seizure of drugs and money, and the [accused's] arrival at the Apartment. In these circumstances, staying inside the Apartment for a short while longer than was authorized is a minimal intrusion. Furthermore, the police gained no special or private information by remaining inside the Apartment. Had they waited in the corridor outside the Apartment or followed the [accused] to it, they would have seen the [accused] use his keys to enter the Apartment. Thus, in my view, the impact of the overstaying on the [accused's] Charter-protected rights was minimal.
>
> Third, the court must consider society's interest in the adjudication of the case on its merits. These were very serious crimes. The keyed entry evidence was real and reliable. In my view, the third Grant factor points squarely to admission of the keyed entry evidence. [references omitted, paras. 66-70]

On balancing the three admissibility factors, the Court of Appeal found the admission of the key entry evidence would not bring the administration of justice into disrepute. The accused's conviction against his appeal was dismissed.

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

ON-DUTY DEATHS DROP

On-duty peace officer deaths in Canada decreased by one last year over 2013. In 2014 five peace officers lost their lives on the job as reported by the Officer Down Memorial Page.

Guns, posed the greatest risk to officers last year. Since 2005, 16 officers have lost their lives to gunfire. However, circumstances involving vehicles, including automobile accidents (16), vehicular assault (5) and being struck by a vehicle (2), posed the most risk to officers over the last decade. These deaths account for nearly 43% of all on-duty deaths, which is much higher than the next leading cause of gunfire in the same 10 year period. On average, five officers have lost their lives every year during the last 10 years, while 2005 had the most deaths at 11.

Source: http://canada.odmp.org [accessed April 17, 2015]

2014 ROLL OF HONOUR

Constable Joseph Prevett
Thunder Bay Police Service, ON
End of Watch: May 7, 2014
Cause of Death: Heart Attack

Constable Fabrice Georges Gevaudan
Royal Canadian Mounted Police, NB
End of Watch: June 4, 2014
Cause of Death: Gunfire

Constable Douglas James Larche
Royal Canadian Mounted Police, NB
End of Watch: June 4, 2014
Cause of Death: Gunfire

Constable David Ross
Royal Canadian Mounted Police, NB
End of Watch: June 4, 2014
Cause of Death: Gunfire

Corrections Officer Rhonda Commodore
Manitoba Corrections, MB
End of Watch: November 6, 2014
Cause of Death: Automobile Accident

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

2014 Average Tour: 14 years
2014 Average Age: 42
2014 Deaths by Gender: female - 1
male - 4
2014 Deaths by Province:

- **New Brunswick - 3**
- **Manitoba - 1**
- **Ontario - 1**

2014 Deaths by Cause:

- **gunfire - 3**
- **heart attack - 1**
- **automobile accident - 1**

Last 10 years by Gender:

- **female - 7**
- **male - 46**

Canadian Peace Officer On-Duty Deaths (by cause & year)

Cause	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	Total
Aircraft accident										2	**2**
Assault			1								**1**
Auto accident	1	2	3		3	3	1		1	2	**16**
Drowned		1			1					1	**3**
Duty related illness									1		**1**
Gunfire	3	1			1			3	3	5	**16**
Heart attack	1						1			1	**3**
Natural disaster					2						**2**
Stabbed						1					**1**
Struck by vehicle			1	1							**2**
Training accident		1									**1**
Vehicular assault		1		2				1	1		**5**
Total	**7**	**6**	**5**	**3**	**7**	**4**	**2**	**4**	**6**	**11**	**53**
Female	1	1	1	0	1	1	0	0	1	1	7
Male	4	5	4	3	6	3	2	4	5	10	46

PEACE OFFICER ASSAULTS

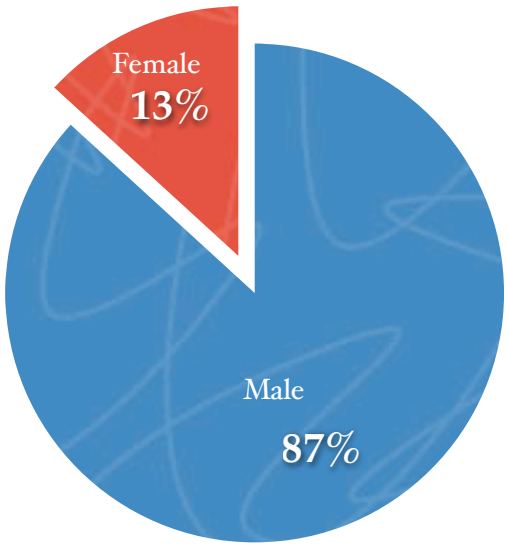
According to a Statistics Canada report, "*Police-reported crime statistics in Canada, 2013*," assaulting a peace officer dropped (-11%) from 2012 to 2013. In 2013 there were 9,722 assault peace officer offences compared to 10,776 the previous year. From 2003 to 2013, assaults against peace officers have dropped 1%.

For other assaults in 2013, there were:

- 158,090 reports of common assault (level 1).
  - ➡ down 8% from 2012.
- 45,672 assaults with a weapon or bodily harm (level 2).
  - ➡ down 9% from 2012.
- 3,190 offences of aggravated assault (level 3).
  - ➡ down -11% from 2012.

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

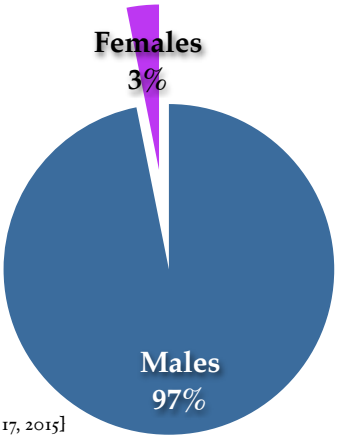
On-Duty Deaths 2005-2014 by Gender



U.S. ON-DUTY DEATHS RISE

During 2014 the U.S. lost 127 peace officers, up 13 from 2013. The top cause of death was gunfire (47) followed by automobile accidents (26), heart attack (19), being struck by a vehicle (5), and vehicle pursuits (5).

California lost the most officers in 2014 at 15 - followed by Texas and New York at 11 each, the U.S. Government (7), Florida (6), Puerto Rico (5), Tennessee (5), Alabama (4), Georgia (4), Indiana (4), New Jersey (4), and Pennsylvania (3). The average age of deceased officers was 40 years while the average tour of duty was 12 years and three months. Men accounted for 97% of U.S. officer deaths while women made up 3%.



Source: http://www.odmp.org/year.php [accessed April 17, 2015]

U.S. Peace Officer On-Duty Deaths		
Cause	**2014**	**2013**
911 related illness	1	6
Aircraft accident	-	1
Assault	2	-
Automobile accident	26	25
Boating Accident	-	1
Bomb	-	1
Drowned	2	2
Duty related illness	3	3
Electrocuted	-	1
Fall	-	4
Fire	1	1
Gunfire	47	31
Gunfire (accidental)	2	2
Heart attack	19	10
Motorcycle accident	4	5
Stabbed	-	2
Struck by vehicle	5	8
Training accident	-	2
Vehicle pursuit	5	4
Vehicular assault	10	5
Total	**127**	**114**

"It Is Not How These Officers Died That Made Them Heroes. It Is How They Lived."

Inscription at the National Law Enforcement Officers Memorial, Washington, D.C.

U.S. On-Duty Deaths by Year (2005-2014)											
Year	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	Total
Deaths	127	114	121	180	177	140	160	204	161	166	1550
Avg. age	40	43	42	41	42	40	40	40	38	39	
Avg. tour	12 yrs. 3 mos.	14 yrs. 3 mos.	12 yrs. 7 mos.	13 yrs. 7 mos.	12 yrs. 2 mos.	11 yrs. 11 mos.	11 yrs. 9 mos.	11 yrs. 5 mos.	11 yrs. 5 mos.	11 yrs. 2 mos.	
Female	4	7	12	12	10	3	15	9	9	5	86
Male	123	114	121	168	167	137	145	194	152	161	1482

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