JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

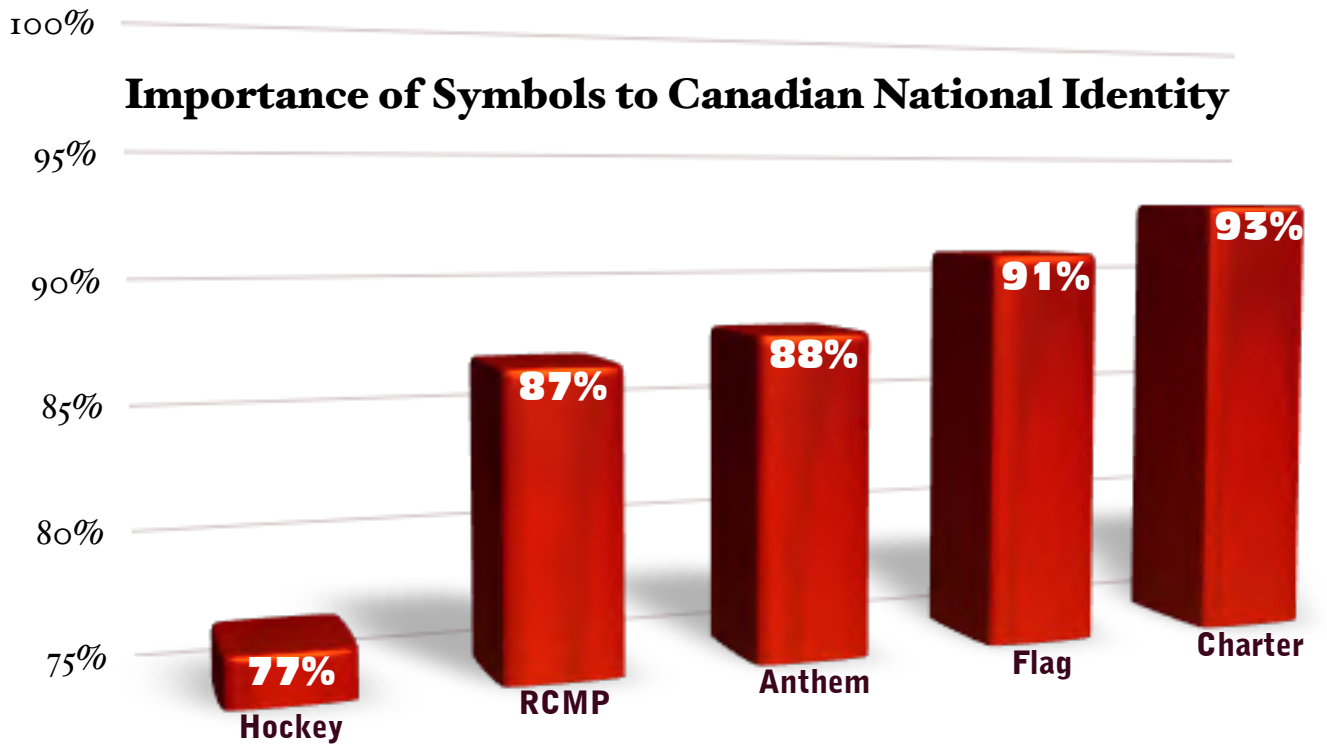
A newsletter devoted to operational police officers in Canada.

CHARTER OUTSCORES HOCKEY AS MOST IMPORTANT NATIONAL SYMBOL

According to a report recently released by Statistics Canada, Canadians ranked the *Charter of Rights and Freedoms* as the top national symbol (93%). The Canadian flag was second at 91%, followed by the national anthem (88%), the RCMP (87%) and hockey at 77%. Other highlights to the survey included:

- Residents of Newfoundland and Labrador were the most likely Canadians to feel that national symbols were important while Quebecers were the least likely.
- Immigrants were more likely than non-immigrants to believe national symbols were very important to national identity.
- The *Charter* was the most important symbol among university-educated Canadians.
- Women were generally more likely than men to perceive national symbols as very important to the Canadian identity.
- 58% of women thought the RCMP was a very important national symbol compared to 52% of men.
- The overwhelming majority of people (92%) believed Canadians collectively shared the value of "respect for the law".

Source: Statistics Canada, 2015, "Canadian Identity, 2013", Catalogue no. 89-652-X2015005, released on October 1, 2015.



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.

Deep diversity: overcoming us vs. them.
Shakil Choudhury.
Toronto, ON: Between the Lines, 2015.
BF 575 P9 C46 2015

Every officer is a leader: coaching leadership, learning, and performance in justice, public safety, and security organizations.
foreword by Beverley Busson; co-authors, Terry D. Anderson, Kenneth Gisborne, Patrick Holliday.
Victoria, BC: Trafford, 2012.
HV 7935 A53 2012

Everything is workable: a Zen approach to conflict resolution.
Diane Musho Hamilton.
Boston, MA: Shambhala, 2013.
BQ 4570 C588 H36 2013

Growing into resilience: sexual and gender minority youth in Canada.
André P. Grace with Kristopher Wells.
Toronto, ON: University of Toronto Press, 2015.
HQ 73.3 C3 G73 2015

Handbook of practical program evaluation.
edited by Kathryn E. Newcomer, Harry P. Hatry, Joseph S. Wholey.
Hoboken, NJ: Jossey-Bass, 2015.
H 97 H358 2015

Leading with cultural intelligence: the real secret to success.
David Livermore.
New York, NY: AMA, 2015.
HD 57.7 L589 2015

The managed heart: commercialization of human feeling.
Arlie Russell Hochschild.
Berkeley, CA: University of California Press, 2012.
BF 531 H62 2012

The mindful way through stress: the proven 8-week path to health, happiness, and well-being.
Shamash Alidina.
New York, NY: The Guilford Press, 2015.
RA 785 A43 2015

Mindful work: how meditation is changing business from the inside out.
David Gelles.
Boston, MA: An Eamon Dolan Book, Houghton Mifflin Harcourt, 2015.
BF 637 M4 G447 2015

S.U.M.O (Shut up, move on): the straight-talking guide to succeeding in life.
Paul McGee.
Hoboken, NJ: Wiley, 2015.
BF 637 S4 M392 2015

SAS survival handbook: the definitive survival guide.
John 'Lofty' Wiseman.
London: William Collins, 2014.
GV 200.5 W584 2014

Strength training past 50.
Wayne L. Westcott, Thomas R. Baechle.
Champaign, IL: Human Kinetics, 2015.
GV 546 W47 2015

World drug report.
United Nations Office on Drugs and Crime.
Geneva: United Nations.
HV 5801 W73

Your first leadership job: how catalyst leaders bring out the best in others.
Tacy M. Byham and Richard S. Wellins.
Hoboken, NJ: Wiley, 2015.
HD 57.7 B94 2015

ID REQUEST NOT NECESSARILY A DETENTION

R. v. Poole, 2015 BCCA 464

The accused was seen by two police officers walk across the street at 3:00 am in a downtown area. The officers made a U-turn in their police car and pulled up alongside him. They rolled their window down and began to speak to the accused. He was asked his name, where he was going, and where he was coming from. He provided his name and identification, which was run through CPIC. An outstanding arrest warrant was discovered. He was arrested and a cursory search was conducted. Police found a loaded, fully cocked handgun concealed in his pants.

British Columbia Supreme Court

The accused argued that he was arbitrary detained under s. 9 of the *Charter* when he was initially stopped. He further submitted that he was not immediately informed of the reasons for his detention or of his right to counsel contrary to ss. 10(a) and (b). Since the detention was arbitrary, he contended that searching him and seizing the gun breached s. 8.

The trial judge disagreed. He found that the accused was not detained when initially stopped by the police but prior to the arrest warrant being discovered and executed. He accepted the evidence of the officers over that of the accused. The officers testified that their conversation with the accused began spontaneously without any verbal cues from either officer when the cruiser window was rolled down. A casual chat followed in which the accused was cooperative and forthcoming. He offered up identification and eventually his criminal past. The encounter was brief, friendly, and would not lead the casual observer to conclude that the accused was being detained. The accused was in his 40s, large in stature, and had a high degree of sophistication when it came to the police. He had extensive dealings with the police over the past 20 years or more. The judge stated:

> Here, the actions of the police were not in the nature of a focussed investigation as the term is understood in Grant, nor was there anything in the actions of the police which can be considered either oppressive, either in language or deed, such as to cause a reasonable person in the situation of the accused to conclude that he had no option but to remain. The encounter was short, approximately five minutes from the initial contact to his arrest. In that brief period, there was no command by the officers which could have reasonably led the accused to conclude he was not able to keep walking or that he was obliged to answer the posed questions.
>
> To conclude otherwise would be to invite the conclusion that every encounter, regardless of how benign and non-intrusive, gives rise to an obligation on the part of the state to advise that person they are free to go or alternatively provide them with the mandated warning of the right to counsel. Such, in my view, is not the law. [paras. 70-71, 2014 BCSC 1308]

There was no detention and the evidence was admissible. The accused was convicted of possessing a firearm dangerous to the public peace, carrying a concealed weapon, and possessing a restricted firearm without a licence or authorization.

British Columbia Court of Appeal

The accused appealed his convictions arguing, among other things, that the trial judge erred in concluding that a detention did not occur before the arrest warrant was executed.

In the accused's view, a pedestrian has an expectation of complete freedom of movement unless a crime is occurring or police are conducting an investigation. He suggested that a pedestrian who is stopped by police as part of general policing

"[A] brief encounter involving police questioning and a request for identification do not necessarily amount to a detention."

"A random stop of a pedestrian absent an investigation or crime may more readily lead to an inference of psychological compulsion, but that does not mean that every such stop amounts to a detention."

duties will always be detained. But Justice Fenlon, writing the Appeal Court's judgment, disagreed. "A brief encounter involving police questioning and a request for identification do not necessarily amount to a detention." She further stated:

> In my view this proposition is not supported by the case law. A random stop of a pedestrian absent an investigation or crime may more readily lead to an inference of psychological compulsion, but that does not mean that every such stop amounts to a detention. [para. 56]

As for the facts in this case, the trial judge applied the correct test in determining whether or not a detention occurred:

> In the present case, based on the trial judge's findings, there was no physical restraint or legal obligation on [the accused] to comply with the police officer's request for his name. The officer was making general inquiries, not singling [the accused] out for focused interrogation. The officers did not initially get out of their vehicle or impede [the accused's] travel, and the encounter was brief. [The accused] was 45 years old at the time, much larger in stature than either police officer, and had considerable past experience with police. [para. 62]

The accused's appeal was dismissed.

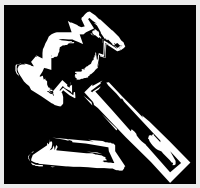
Complete case available at www.courts.gov.bc.ca

What did the accused say?

The accused testified he was directed to stop, told not to move when he requested to do so, asked to explain the contents of his backpack and gave it to the police. The trial judge, however, did not believe him.

LEGALLY SPEAKING:

Detention



"In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, inter alia, the following factors:

a. The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.

b. The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

c. The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication."

Supreme Court of Canada Chief Justice McLachlin in *R. v. Grant*, 2009 SCC 32 at para. 44.

Note-able Quote

"The quality of a person's life is in direct proportion to their commitment to excellence, regardless of the chosen profession." - Vince Lombardi

FLIGHT FROM POLICE PART OF CONSTELLATION OF GROUNDS

R. v. Bourque, 2015 NBCA 68

At about 12:30 pm a complainant reported to police that her adult drug addicted son, who lived with her, had stolen about $50 from her purse that morning and she wanted him evicted from her home. Two police officers attended, met with the son, and confronted him with the theft complaint and drug addiction allegation. He admitted to the theft and acknowledged that he had "a drug problem." He told the police that he buys his drugs from someone named "Pete" in the "Elmwood Drive area." The son eventually consented to leaving his mother's residence and he was driven to a friend's home by one of the officers.

The mother subsequently told the second officer the following:

- She was aware of facts that, in her opinion, demonstrated her son was a regular drug user;
- She believed him to be a drug addict;
- She was convinced he stole the money from her wallet in order to procure drugs;
- She checked her cell phone and understood from the text messages received and sent by her son that an imminent drug sale/purchase transaction was scheduled in the vicinity of the McDonald's restaurant on Morton Avenue; and
- She provided the following description of the individual supplying drugs to her son: a short, slim or skinny, bald man.

As a result of this information, the officer formed the belief that an indictable offence (drug trafficking) was about to be committed in the vicinity of the McDonald's restaurant on Morton Avenue. He immediately proceeded to the area where he saw the accused on the sidewalk. He matched the description provided by the complainant and was the only person at the scene matching the description. After the officer parked his marked police vehicle a few feet from the accused and began to get out, the accused looked at him, turned around, and made his way towards the McDonald's drive-through area. The officer ordered him to halt. He said, "Stop, you're under arrest," but the accused ran away. The officer caught him, threw him to the ground and arrested him. When he was searched, the police found several items of evidence including a marijuana joint, a cell phone, hydromorphone pills, a knife, banknotes hidden in his socks, and bundles of banknotes (totalling several thousand dollars) hidden under his clothing and taped to his waist. He was charged with possessing hydromorphone for the purpose of trafficking.

New Brunswick Provincial Court

The judge found the accused's arrest was unlawful under s. 495(1)(a) of the *Criminal Code* because it was not based upon reasonable grounds. "I am not persuaded that the peace officer had reasonable and probable grounds to believe that this specific individual was about to commit an offence," he said. "In my view, the circumstances of his arrest were not sufficient to conclude the arrest was lawful." Since the arrest was unlawful, the accused's s. 9 *Charter* rights were breached and the search that followed was unreasonable under s. 8. The evidence was excluded under s. 24(2) and the accused was acquitted.

New Brunswick Court of Appeal

The Crown appealed the accused's acquittal because, in its view, the trial judge erred in finding that the accused's *Charter* rights were infringed and that the evidence ought to be excluded. Chief Justice Drapeau, speaking for the Court of Appeal, agreed with the Crown that the trial judge erred in determining whether reasonable grounds for the arrest existed:

> In most instances, the prosecution's case on the issue of arrest lawfulness is based upon a constellation of circumstances which, individually, may be of little or no probative value, but whose cumulative effect demonstrates the existence of the reasonable grounds required under s. 495(1)(a) of the Criminal Code. In this case, however, the judge assessed the probative value of each individual and isolated

> "[T]he prosecution's case on the issue of arrest lawfulness is based upon a constellation of circumstances which, individually, may be of little or no probative value, but whose cumulative effect demonstrates the existence of the reasonable grounds required under s. 495(1)(a) of the Criminal Code."

circumstance relied upon by the prosecution in support of its contention that the arrest was based on reasonable grounds. This approach has been unanimously rejected by appellate courts, all of which favour an assessment of the probative value of the cumulative effect of the relevant circumstances. Had he applied this analytical framework, the judge might have found the grounds required to clothe the [accused's] arrest with the mantle of lawfulness did exist. In this regard, it is important to remember that where there is no submission by the individual targeted, i.e. the person informed by a peace officer he or she is under arrest, the "arrest" occurs only once a peace officer seizes the person or touches him or her with a view to detention. It follows that the bundle of justificatory grounds for the [accused's] warrantless arrest include his attempt to escape from [the officer]. [references omitted, para. 11]

The Crown's appeal was allowed, the accused's acquittal was set aside and a new trial was ordered.

Complete case available at www.canlii.org

s. 10(b) RIGHT UNAFFECTED BY BREATH SAMPLE CONDITION IN RECOGNIZANCE

R. v. Sabados, 2015 SKCA 74

The accused was released on a recognizance of bail for robbery, possessing a weapon for a dangerous purpose, and resisting arrest. He agreed to the conditions of his release which included the following:

(i) *"provide suitable samples of … breath for testing upon the request of a Police Officer who has reasonable grounds to suspect that you are in breach of a condition of this order regarding the consumption of alcohol"*; and

(ii) "not to possess or consume alcohol or drugs that have not been prescribed for you by a medical doctor and not enter or be in any place in which the main purpose is the sale of alcohol, such as bars or liquor stores."

About two (2) months later he was arrested for several new offences resulting from a threatening incident where he brandished a knife and made stabbing motions with it. He was advised he had the right to consult counsel under s. 10(b) of the *Charter*. He said he wanted to retain counsel and a phone call was placed to a lawyer. However, he was unable to contact the lawyer, so he left a message. He was taken to an interview room where he gave a statement regarding the alleged stabbing incident. The officer then detected a lingering smell of alcohol. A demand for a breath sample was made which the accused initially agreed to provide. However, he was not advised a second time of his right to retain counsel respecting the potential charge that could result from failing to provide a breath sample. He changed his mind about providing a breath sample, said he wanted to talk to his lawyer, and ran into a cell and remained there. He was charged with threatening to cause death and assault with a weapon for the knife incident as well as three (3) counts of breaching his recognizance: failing to keep the peace and be of good behaviour, consuming or possessing alcohol or drugs, and failing to supply a breath sample.

Saskatchewan Provincial Court

The accused was acquitted of the charges related to the threatening incident. As for breaching his recognizance, he was convicted of consuming alcohol or drugs and failing to provide a breath sample. The judge rejected the accused's argument that he should have also been acquitted on the charge of failing to provide a breath sample because he had not been given the right to consult counsel under s. 10(b) of the *Charter*. In the judge's opinion, the accused's

"The right to counsel under s. 10(b) of the Charter is engaged whenever an individual is arrested or detained, regardless of the reason for that arrest or detention or the possible evidence that could be produced as a result of that arrest or detention."

right to counsel was altered when he agreed to the condition of his release that he would submit to a breath sample. "[The accused] cannot attempt to set up his Charter rights as if they had been unaltered in defence to the demand made by the police officer pursuant to the court order," said the judge. "In other words, [the bail review judge] altered those rights and made it unconditional that he provide the breath sample. [The accused] was obligated to comply and did not." The officer had a reasonable suspicion of a breach and properly made the breath demand. The accused went into his cell, said "Lock me up," and wouldn't provide a sample. This was an immediate, clear, and unequivocal refusal. As well, the accused did not have a reasonable excuse for refusing to comply with the demand for a breath sample until he consulted with counsel.

Saskatchewan Court of Appeal

The accused challenged only his conviction related to breaching his recognizance by failing to supply a breath sample on the demand of a peace officer. In his view, he had the right to be informed of his right to counsel and to retain and instruct counsel under s. 10(b) of the *Charter* even though he agreed in the recognizance to provide a breath sample upon the request of a police officer who had grounds to suspect he had breached his recognizance by consuming alcohol. In his opinion, s. 10(b) applies to everyone – including people on release conditions – and therefore he had the right upon arrest or detention to be informed of the right to retain and instruct counsel and to do so.

The Crown, on the other hand, contended that the accused, by agreeing to the terms of his recognizance, did not have a right to be informed of his right to counsel. He did not have a right to retain and instruct counsel under s. 10(b) in the circumstances where a police officer had reasonable grounds to suspect that he had breached the term of his recognizance regarding the consumption of alcohol or drugs and demanded a breath sample. In the Crown's view, "by consenting to the search in advance, [the accused] waived his right to attack the validity of the search conducted in strict accordance with the terms of the order."

s. 10(b) Charter

Arrest or detention
10. Everyone has the right on arrest or detention …
(b) to retain and instruct counsel without delay and to be informed of that right ….

Justice Whitmore, authoring the Court of Appeal's opinion, described the right to counsel as follows:

> The right to counsel under s. 10(b) of the Charter is engaged whenever an individual is arrested or detained, regardless of the reason for that arrest or detention or the possible evidence that could be produced as a result of that arrest or detention. [para. 20]

In the circumstances of this case, the Court of Appeal concluded that an accused, by entering into a recognizance that contains a clause that they will provide a breath sample, by that fact alone, did not give up their s. 10(b) rights. Justice Whitmore also refused to read words into the recognizance such that the bail review judge had ordered the accused provide a breath sample without the benefit of s. 10 (b). The accused's right to counsel was unaffected by the term of the recognizance:

> ... s. 10(b) is different than other Charter rights. It rests on the premise that legal advice is a necessary prerequisite before one is required to incriminate oneself.
>
> A police officer who has reasonable grounds to suspect an operator of a vehicle has consumed alcohol may demand a breath sample from the driver pursuant to s. 254(2) of the Criminal Code, yet the driver upon being detained by the police officer has the right to retain and instruct counsel. The Criminal Code is clear on the right to make the demand, but the driver's s. 10(b)

> right is not affected. There is no argument before me that persuades me the recognizance should be treated differently than the provisions of the Criminal Code. [paras. 35-36]

Nor did the accused waive his right to counsel. He was initially informed of his right to counsel and was given an opportunity to call a lawyer. After unsuccessfully attempting to contact his lawyer, he agreed to give a statement and to provide a breath sample. However, he almost immediately thereafter changed his mind and said he wanted to speak with his lawyer. But he was not given another opportunity to do so:

> The Crown is required to prove that [the accused] waived his right to counsel. It has not done so. Section 10 applies whenever a person is arrested or detained regardless of the reasons for that arrest or detention. [The accused] was arrested. He therefore had a s. 10(b) right to consult with counsel. The police had an obligation to refrain from eliciting evidence from him until he had a reasonable opportunity to consult with counsel. [The accused] was initially unsuccessful in contacting his counsel. Even though he then agreed to give a statement and a sample, he subsequently re-asserted his request for counsel. This does not amount to an unequivocal waiver as required by Prosper: his right to counsel was thus breached. He never had an opportunity to consult with counsel. The trial judge was in error in finding that [the accused's] right to counsel was not breached. [para. 45]

Since the accused's s. 10(b) *Charter* right had been breached, a s. 24(2) analysis was necessary.

Admissibility of the Evidence: s. 24(2)

In this case, the Court of Appeal found there was a sufficient temporal link between the s. 10(b) breach and the production of the evidence of refusing to provide a breath sample such that s. 24(2) was triggered.

- **Seriousness of the Charter-infringing state conduct:** SERIOUS. Even assuming the police acted in good faith, the impact on the administration of justice would be negative. "This is particularly so because [the accused] specifically requested counsel and was charged because he would not submit to the breath test until he talked to his lawyer," said Justice Whitmore. "The police attempted to obtain bodily evidence from him without providing him with an opportunity to talk to his counsel after he re-asserted his request for counsel. It was his insistence on exercising his right that led directly to the charge."

- **Impact of the breach on the Charter-protected interests of the accused:** SERIOUS. Because the accused insisted upon his right to counsel, he was charged with breaching his recognizance over and above the charge of breaching his recognizance by consuming or possessing alcohol or drugs.

- **Society's interest in the adjudication of the case on its merits.** The evidence of the refusal to provide a breath sample was reliable evidence of him breaching a bail term. This was crucial to the refusal charge and therefore weighed against the exclusion of the evidence.

In considering all of the factors, the Court of Appeal concluded that admitting the evidence would bring the administration of justice into disrepute.

The evidence was excluded, the accused's appeal was allowed and an acquittal on the charge of breaching his recognizance by failing to supply a breath sample on demand of a peace officer was entered.

Complete case available at www.canlii.org

Note-able Quote

"The way a team plays as a whole determines its success. You may have the greatest bunch of individual stars in the world, but if they don't play together, the club won't be worth a dime." - Babe Ruth

RELIABLE INFO REQUIRES LESS CORROBORATION

R. v. Zettler, 2015 ONCA 613

A police officer received five different tips over a period of one month from a confidential informer. The informer said he had received his information from a participant in drug trafficking. This informant had previously provided information for two search warrants resulting in convictions and information leading to four street arrests, each resulting in convictions. As well, the informer had provided information regarding packaging and pricing of drugs. The informer had never provided information that was later found to be false or misleading. As well, the informer was a drug user, had a criminal record and was paid for the tips. The police officer handling the informant passed on this information to another officer who acted on it.

The final tip was received at 10:30 am on the day of the accused's arrest. This tip reported that the accused, a 25-year-old living outside Toronto, would be driving to Sudbury in a few hours with a large quantity of "oxys" and cocaine to distribute to dealers. He would be travelling in either a black Mazda or a grey Cadillac, bearing plate numbers as provided, by way of Highway 69 and that he would likely be alone in the vehicle. The tip further conveyed that he had the same connections as his father who had been caught earlier that year and who was known to both officers. In addition to the tips, police did some independent research to corroborate the ownership of cars registered to the accused as well as his address. Police confirmed that the accused owned two cars as described and was 25 years of age. Police set up an observation position on Highway 69 just south of Sudbury. The accused was first observed driving alone, northbound in a grey Cadillac at 1:54 pm and was stopped at about 2:00 pm on the highway. The accused was arrested and his vehicle was searched. Police found 360 grams of cocaine packaged in three separate bags and one thousand 80 mg oxycodone tablets in a clear plastic ziploc bag.

Ontario Superior Court of Justice

The accused brought a motion for the exclusion of the evidence. He challenged the warrantless search as unreasonable because it was conducted as an incident to an unlawful arrest for lack of reasonable grounds. He suggested that the arrest was grounded entirely on information provided by an informant that was not credible, compelling, or corroborated.

The judge, however, found that the confidential informer was reliable on the basis of the handler's past dealings with and knowledge of him. In the judge's opinion the police had reasonable grounds to believe that the accused was about to commit an indictable offence on the totality of the circumstances:

> The arresting officer must have subjective and objective reasonable and probable grounds on which to base an arrest. When the police action is grounded on a tip from a confidential informant, the court must consider the totality of the circumstances including whether the information was compelling, whether the information came from a credible source and whether the information was corroborated. [para. 12, 2013 ONSC 6703]

And further:

> The source had provided a number of details regarding the transport of the drugs by [the accused]; on a specific date, at a specific time, and on a specific route into Sudbury. [The investigating officer] had independently corroborated details with respect to vehicle ownership, address and age of [the accused] as he had received the information from [the informer's handler]. [The investigating officer] testified that he also took into consideration the past proven reliability of the source, as conveyed to him directly from an experienced drug officer who was the handler of this confidential informant and with whom [the investigating officer] had worked in the past. As a result, I am satisfied that it was objectively reasonable to rely on the confidential informant's tip that [the accused] would have cocaine and oxycodone in that car. [para. 22, 2013 ONSC 6703]

The arrest was lawful in the circumstances and, therefore, the search incident to arrest was reasonable. The evidence was ruled admissible and the accused was convicted of possessing cocaine and oxycodone for the purpose of trafficking.

Ontario Court of Appeal

The accused appealed his convictions arguing that the informer's tip that triggered the search was his fifth tip relating to the accused and potential drug activity in Sudbury. Since the first four tips did not result in the accused's apprehension, the fifth tip required more scrutiny by the police and efforts to corroborate at least some of the facts contained in the tip should have been enhanced.

The Court of Appeal, however, rejected this submission:

> The police conducted CPIC, RMS and M.T.O. checks in relation to the previous tips and received a good deal of information about the [accused], vehicles and locations. The fact that this information did not lead to contact with the [accused] on previous occasions is, in our view, neutral. It does not establish that the [accused] did or did not engage in drug activities on those occasions.
>
> Importantly, the trial judge was entitled to find that the informant's past reliability weighed in favour of his credibility relating to the triggering tip in this case. Tips from proven reliable informants require less corroboration than tips from anonymous sources or an untried informant.
>
> The simple reality in this case is that the confidential informant appears to have been top notch. He had worked with the Sudbury police officer for several years and had provided information on several occasions leading to several arrests. He was motivated to tell the truth (he was paid only if his information was accurate and led to criminal proceedings). In this case, he provided quite specific information – name of drug courier, car, drugs involved, date, time and location. The police were able to corroborate much of this information before the arrest. [paras. 6-8]

"The simple reality in this case is that the confidential informant appears to have been top notch."

"Tips from proven reliable informants require less corroboration than tips from anonymous sources or an untried informant."

The trial judge applied the correct legal test, considered the relevant factors, and was justified in determining that the arrest was both subjectively and objectively reasonable. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's Note: Additional facts taken from *R. v. Zettler*, 2013 ONSC 6703.

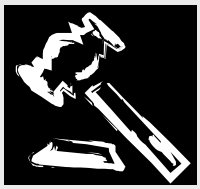
ADMISSION OF ALCOHOL CONSUMPTION SATISFIED ASD REASONABLE SUSPICION

R. v. Sword, 2015 SKCA 116

Just before 2:00 am a police officer observed a vehicle rapidly leave the parking lot of a bar and lounge. The officer followed the vehicle, saw it cross the centre line and then pulled it over to check the driver's sobriety. The accused was driving and he had a passenger with him. The officer could smell an odour of alcohol coming from the vehicle but could not tell who it was coming from. When asked., the accused said he had been drinking. A roadside (ASD) demand was made and the accused blew an "F', meaning his blood alcohol was over 100 mg%. He was then arrested for impaired driving and over 80 mg%, read his rights under the *Charter* and was given the breath demand. He subsequently provided two breath samples resulting in readings of 150 mg% and 130 mg%. He was charged with impaired driving and operating a vehicle with a BAC in excess of 80 mg%.

LEGALLY SPEAKING:

ASD Demand



"[T]he requirements for a valid s. 254 (2)(b) demand essentially are that:

(i) the police officer must subjectively (or honestly) suspect the detained driver has alcohol in his or her body; and

(ii) the police officer's subjective suspicion must be based on a constellation of objectively verifiable circumstances, which collectively indicate that the suspicion that the detained driver has alcohol in his or her body is reasonable."

Saskatchewan Court of Appeal Justice Klebuc in *R. v. Yates*, 2014 SKCA 52 at para. 33.

Saskatchewan Provincial Court

The impaired charge was stayed by Crown but the over 80 mg% charge proceeded. The accused argued he was arbitrarily detained under s. 9 of the *Charter* because the officer did not have sufficient grounds to demand an ASD sample. The judge agreed with the accused because he found the officer was "unable to say at what point in their interaction the accused told him the timing of his last drink." Even though the accused said he consumed alcohol, in the judge's view the Crown was unable to prove that the officer had any basis for believing that the accused had any alcohol in his body at the time the ASD demand was made. Based on the evidence, it was uncertain as to when the statement of recent consumption was made; it could have been made before the ASD demand, before the ASD test, or after the ASD test. The Certificate of Analysis was excluded and the accused was acquitted of driving while over 80 mg%.

Saskatchewan Court of Queen's Bench

The Crown appealed the accused's acquittal arguing, in part, that the trial judge erred in finding that the officer did not have an objectively supported "reasonable suspicion" to make the roadside demand. The appeal judge found that the trial judge used the wrong test to determine whether the police officer had the right to demand a sample of the accused's breath. Rather than determining whether the police officer had reasonable grounds to suspect the accused had consumed alcohol, the appeal judge found the trial judge applied a test that required the officer to believe the accused actually had alcohol in his body. "Specific evidence that the accused had alcohol in his body is not required, nor must the constable have believed the accused had alcohol in his body," said the appeal judge. "What is required is reasonable grounds to suspect the accused had alcohol in his body. This is not a pedantic distinction." The accused's acquittal was overturned and a conviction was entered.

Saskatchewan Court of Appeal

The accused challenged the appeal judge's decision to overturn his acquittal and enter a conviction. Justice Whitmore, speaking for an unanimous Court of Appeal, found the trial judge did articulate the proper legal test of reasonable grounds to suspect that the accused had alcohol in his body. Although he referred to a belief that the accused had alcohol in his body, he nevertheless stated that the officer must "have reasonable grounds to suspect that the accused has alcohol in his body while operating the vehicle before he is entitled to make the demand."

But the trial judge did err when he found the police officer did not have any basis for suspecting the accused had alcohol in his body when the ASD demand was made. In Justice Whitmore's opinion, the trial judge appeared to have mistaken the evidence of the accused's admission that he had consumed alcohol with the evidence as to when he had consumed his last drink:

> The evidence of the police officer, the evidence of the [accused], and the evidence at the voir dire were consistent and clear that the police officer asked the [accused] if he had been drinking, which the [accused] (while he was still in his own vehicle) admitted and this admission was before the ASD demand was made. However, the police officer and the [accused] were both unsure whether the police officer asked the [accused] when he had consumed his last drink—before or after the ASD demand was made ... . [para. 12]

The appeal judge's findings were correct in result and the accused's appeal was dismissed.

Complete case available at www.canlii.org

Editor's Note: Additional facts taken from *R. v. Sword*, 2013 SKPC 43 and *R. v. Sword*, 2015 SKQB 9.

MAN PURSE SEARCH REASONABLE: LOADED HANDGUN ADMISSIBLE

R. v. Sheck, 2015 BCCA 471

After a man survived a shooting outside his residence, the police received information on three occasions from a confidential source that the accused was actively pursuing a plot to murder the man. The informer also said that the accused was regularly carrying a 9mm Glock handgun in a Louis Vuitton shoulder satchel or man purse. Both the man and the accused had been warned of the threat of harm each faced from the other. About four months after the shooting, police surveilled the accused to a restaurant that he entered carrying a man purse. The purpose of the surveillance was to corroborate or refute the source information and to obtain lifestyle information on him. The goal was not to take him into custody but to detain and check him. The police, members of the Integrated Gang Task Force, planned to enter the restaurant and make it look like a random licensed premise check. They would ID the accused and ask him to step outside without being *Chartered* or warned inside the restaurant.

When the police entered the restaurant, they noted the accused was sitting alone in a booth. He was

asked for his identification, which he provided. After his ID was checked, the accused was asked to accompany police outside. He complied, putting his man purse over his shoulder as he left with the officer. Outside the restaurant the officer told the accused he was going to be searched for officer safety. He took the man purse and searched it, finding a loaded Glock 9mm handgun. He was arrested for possessing the handgun, handcuffed and advised of his s. 10(b) *Charter* rights. He said he wanted to speak to counsel of his choice but was not provided with an opportunity to do so until back at the police station some 80 minutes after the initial detention. The accused's cell phone was also searched as was his rental vehicle parked in the restaurant's parking lot. He was charged with possessing a loaded prohibited weapon.

BC Provincial Court

The arresting officer testified that he believed he detained the accused when he made contact with him in the booth, but he did not advise him that he was detained due to safety concerns. He wanted to get the accused outside of the restaurant as soon as possible for the safety of the public.

The accused argued that his rights under ss. 8, 9 and 10 of the *Charter* had been breached. In his view, the searches of his person, cell phone and motor vehicle were unreasonable, his detention was arbitrary, and the police failed to advise him of the reasons for and the right to counsel upon detention.

The judge concluded that the police undertook a valid investigative detention. They were investigating a conspiracy to commit murder and had relatively

specific information that the accused was regularly carrying a Glock firearm inside a Louis Vuitton man purse bag. "The police had the subjective belief in the presence of a firearm," said the judge. "The police actions, the rapid tempo of their activity and the manpower assigned to tasks in the short time frame, all confirm the legitimate subjective beliefs of the police investigators that they were confronting near exigent circumstances." He found the police actions inside the restaurant were a deliberate and planned form of deception, set in place to reduce the risk of harm to the public and the police:

> I find this strategy created an investigatory detention of the accused for a period of about two minutes or less to accomplish the goal of the investigators, seize the suspected firearm and disrupt a conspiracy to commit murder. The search went beyond a pat down of the accused to include the seizure and opening of the bag hanging from a strap on his shoulder. These actions were done without exercising physical force on the accused. [The accused] had not given his informed consent to any form of search. The police did not engage in publicly humiliating or degrading actions in their dealing with the accused while under detention or subsequent arrest. The manner of the search of his person and the bag did not involve any gratuitous intrusions into areas of bodily integrity. They were deliberately low key and calm in their contact with the accused during this investigatory detention phase. There were limited objective bases for the reasonable suspicion regarding possession of the firearm in the bag."

The judge also found the search of the bag to be reasonable:

> [G]iven the heightened scale of the risk to the public, the genuine subjective views of the police, the investigative context and their measured and restrained tactics in effecting a physical detention of the accused, I find that the search of the bag fits within the ambit of the permissible range of intrusion for searches to ensure public and officer safety during investigative detention.

The searches of the accused's cell phone and car were, however, conceded to be unreasonable by the Crown. The Crown also conceded breaches under both ss. 10(a) and (b). The accused was detained in the restaurant but not advised of the detention until minutes later outside the restaurant. As well, there was a delay in providing access to counsel for more than 80 minutes after the detention and arrest. The handgun, however, was nevertheless admitted as evidence under s. 24(2) despite the s. 10 breaches and the s. 8 breaches related to the cell phone and rental car searches.

BC Court of Appeal

The accused argued that the test for a proper search pursuant to an investigative detention had been changed by the Supreme Court of Canada in *R. v. MacDonald*, 2014 SCC 3. He suggested that now there must be "reasonable grounds to believe" (not the lesser "reasonable suspicion" standard) of an imminent threat to safety and that the search was necessary to address that threat. He contended there was no objectively verifiable support for the investigative detention, but it was instead a search for evidence and the licensed premises check was but a ruse to put police in the position to carry the search out.

Investigative Detention

Chief Justice Bauman, authoring the Appeal Court's opinion, reviewed the case law on investigative detention as it has developed since *R. v. Mann*, 2004 SCC 52. He noted that there is a limited police power to detain for investigation where the officer's reasonable suspicion is supported by way of objective reasonable grounds that "there is a clear nexus between the individual to be detained and a recent or on-going criminal offence". A search incidental to an investigative detention is also authorized by the common law provided it is premised on reasonable grounds to believe that one's safety or that of others is "at risk". Further, a search incident to investigative detention can, in some cases, go beyond a pat down to include a search of fanny packs, for example.

Noting *R. v. MacDonald* did not deal with a search incidental to an investigative detention, but a so-called "free-standing" safety search, the Court of

Appeal found it unnecessary to decide whether the Supreme Court re-calibrated the standard that is to be applied in determining the lawfulness of a safety search incidental to an investigative detention such that the test is now more stringent. Because, in this case, the higher standard had been met anyway. The police had the subjective belief in the presence of a firearm. Second, the police had an objectively verifiable basis for their subjective belief. This was not a sham investigative detention masking a bald search for evidence as submitted by the accused. "The 'ruse' simply allowed the police to escort [the accused] safely out of the Earl's Restaurant; it was not the basis for the detention," said Chief Justice Bauman. "The totality of the circumstances founded a legitimate investigative detention." There were no ss. 8 or 9 *Charter* breaches in the accused's detention and safety search.

As for the trial judge's s. 24(2) analysis, assuming there were *Charter* breaches as conceded by Crown, he did not err in finding the evidence admissible. The accused's appeal was dismissed and his conviction was upheld.

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

ENTRY FOLLOWING DISCONNECTED 911 CALL LAWFUL

R. v. Zarama, 2015 ONCA 860

Two police officers responded to a disconnected 911 call in the middle of the night. No one said anything. When the police attended the home from where the call originated, the accused's parents invited the police inside and said their daughter probably made the call. She lived with her parents, suffered from mental health challenges and had not been taking her medication. The parents said the officers would need to speak with the accused to determine why she called and whether she required any help. She was in her bedroom, yelling, and would not open her locked bedroom door.

After the accused's mother picked the lock on the bedroom door, the police entered it. The accused was lying on her bed holding a serrated kitchen knife. She got up and walked towards the officers yelling, "You want this? You want this?" The officers drew their guns and yelled at the accused to drop the knife. The accused moved towards her mother and one of the officers. The officer then dove at the accused and attempted to wrestle the knife from her. She resisted, cutting the officer's lip and scratching the back of his ear and neck.

Ontario Court of Justice

The accused was convicted of aggravated assault and assault with a weapon but was later found to be not criminally responsible.

Ontario Court of Appeal

The accused appealed the findings of guilt. She argued that the officers were trespassing when they entered her bedroom and she was therefore justified in repelling them. The Court of Appeal, however, rejected this argument:

> In our view, the police officers were acting reasonably, and within the scope of their duties, in responding to a disconnected 911 call. Therefore, they were never trespassing.
>
> The officers were entitled to assume that the [accused], as the maker of the 911 call, was in distress. They were also entitled to physically locate the [accused] within the home so that they could determine her reasons for making the call and provide such assistance as might be required. This is so despite the assurances of the [accused's] parents that she was not in need of aid. Consequently, as the [accused] refused to leave her bedroom, the officers had the right to enter it because there was no other reasonable alternative for ensuring that she would receive any needed assistance in a timely manner. [reference omitted, paras. 8-9]

Furthermore, the accused's use of force was not reasonable in the circumstances given what transpired in the bedroom. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

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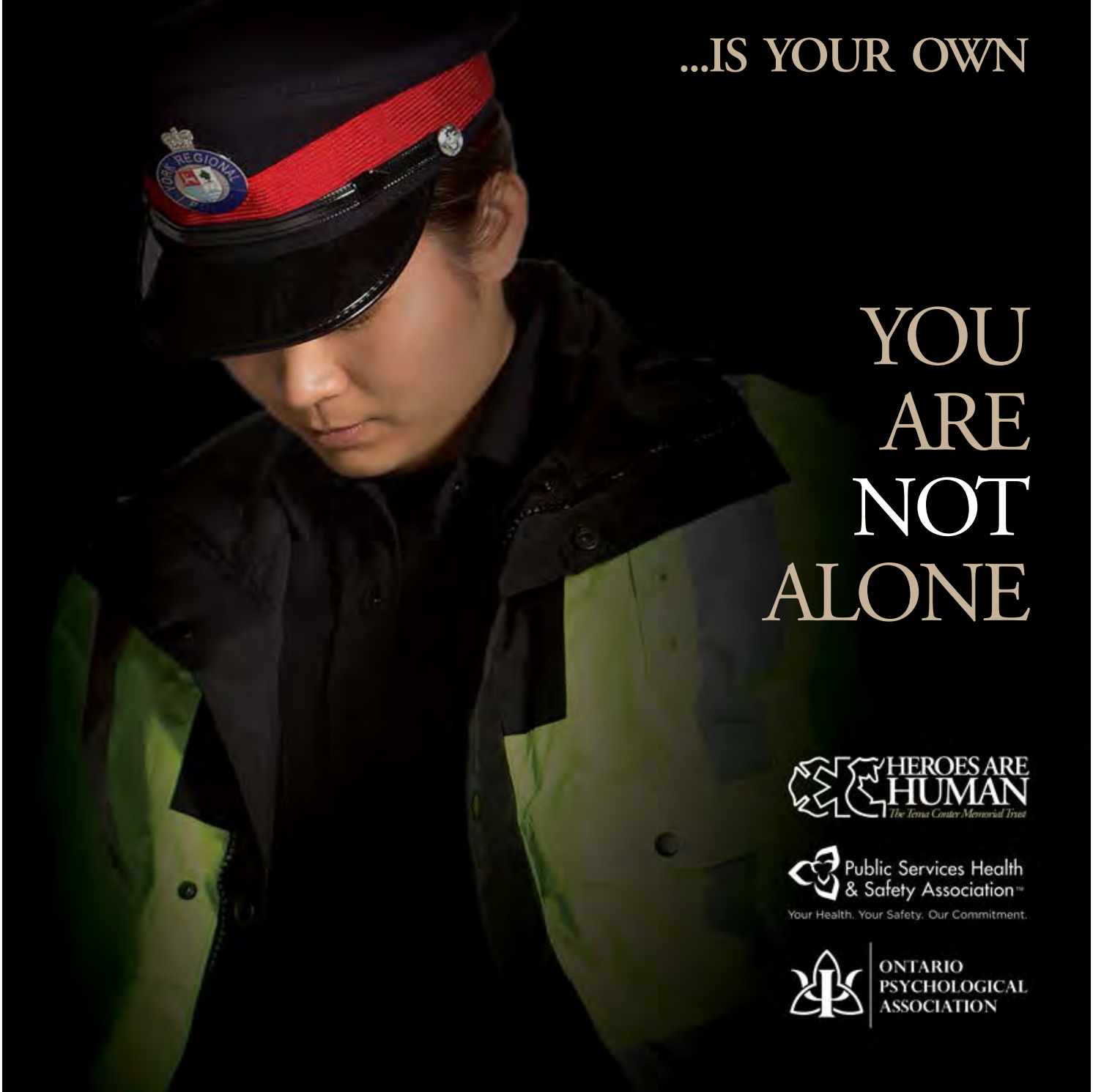

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RCMP STATISTICS

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, 2015

Rank	# of positions
Commissioner	1
Deputy Commissioners	7
Assistant Commissioners	26
Chief Superintendents	58
Superintendents	179
Inspectors	348
Corps Sergeant Major	1
Sergeants Major	1
Staff Sergeants Major	13
Staff Sergeants	812
Sergeants	1,923
Corporals	3,377
Constables	11,491
Special Constables	55
Civilian Members	3,838
Public Servants	6,331
Total	**28,461**

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

SURVEILLANCE CORROBORATES INFORMERS' TIPS

R. v. Bediako, 2015 ONCA 788

Police received specific and current information from three confidential informants (A,B,C) concerning the particular location and movements of individuals and a detailed physical description of them. The information suggested that two men (one who turned out to be the accused) were selling crack cocaine from "Beard's" place. The information also said the men carried guns. Given the similarity in A and B's information, the police confirmed they were not the same person. As well, some of the information provided by the confidential informers was already known to the police from previous investigations. The police also attempted to corroborate the information received through earlier surveillance and a review of police databases.

The police then independently corroborated important details of the information through further surveillance. They observed various individuals coming and going in the area of "Beard's place". They waited until they noted a taxicab pull into the alley behind the building at 11:04 pm and saw a black male (the accused) and a white male (his associate), roughly matching the descriptions provided by the confidential informants, enter the taxi and then leave. When the police saw the taxi travel west, confirming the information that "Leo" and "Shane" resided in the west part of Windsor, the police conducted a high risk take down and arrested the accused and his associate. When the accused was searched at the roadside, the police discovered that he had a loaded .40 calibre Smith and Wesson handgun tucked into his belt and that he was wearing a bulletproof vest.

Ontario Superior Court of Justice

The accused argued that the loaded firearm was obtained as a result of ss. 7, 8 and 9 *Charter* breaches from his arrest and the subsequent warrantless search incident to that arrest. The judge considered whether the police subjectively believed that they had reasonable and probable grounds to arrest the accused for possession of a firearm, and whether those grounds were objectively reasonable in the totality of the circumstances. He examined the strengths and weaknesses of the information provided by the confidential informers and of the confidential informers themselves. Considering the totality of the circumstances, the judge found the

THE INFORMERS

Informer A was described as reliable and confirmed. A was involved in the drug subculture, had no convictions for perjury or misleading police, and had provided assistance to the police in the past that had resulted in the execution of search warrants, arrests, and seizures. A said that two individuals named "Leo" and "Shane" were selling crack cocaine at "Beard's place". Beard was a drug user whose name, address and uniquely bullet-ridden door were previously known to the police; "Leo" and "Shane" were always wearing bullet proof vests and carrying guns; they were staying in the west end of Windsor; "Shane" was described as a black male, 25 years of age, 170 pounds, 5' 10" tall, with a scruffy beard and short black hair.

Informer B was described as reliable and confirmed. B was known by his handler for a number of years, had no convictions for perjury or misleading the police, and had provided information that previously resulted in CDSA warrants, arrests, and charges being laid with drugs being seized. B said "Leo" and "Shane" were selling drugs from "Beard's place", "Leo" and "Shane" had both been seen with vests and guns. B provided a physical description of "Shane". B knew "Leo" and "Shane" and further provided the description of "Leo" as an Iraqi male, 24 years of age, 6 feet tall, 250 pounds.

Informer C said "Leo", also known as "Abdul", was of Iraqi background, of youthful appearance, about 19 years of age, and 6 feet tall. C advised that "Leo" was selling cocaine from "Beard's place". C also related the unusual, specific detail that "Leo" took a taxicab to and from Beard's place from his residence which was located in a westerly direction.

confidential informants and their information to be compelling, credible and corroborated. The judge also concluded that the police did not act prematurely in arresting the two men in the taxi cab. The danger to the public and the police due to the likely presence of firearms justified the arrest and the subsequent warrantless search of the accused incident to his arrest. There were no *Charter* breaches and, even if there were, the gun was admissible under s. 24(2). The accused was convicted on three charges related to possessing an unauthorized, prohibited firearm and cartridge magazine. He was sentenced to four years in prison less credit for time served.

Ontario Court of Appeal

The accused argued that the police acted prematurely on dated, generic information and that they failed to take any steps to corroborate the confidential informers' information. Thus, in his view, the trial judge erred in finding that the police objectively had reasonable and probable grounds to arrest and search him. The Court of Appeal, however, found the police did not arbitrarily or precipitately arrest the men. Rather, they waited until police surveillance confirmed important identifying details provided by the three confidential informers. The Court of Appeal stated:

> The trial judge properly viewed the evidence of the grounds for arrest in the context of the dynamics of an urgent situation likely involving firearms. He correctly concluded that in these circumstances, based on the information that the police had received and the surveillance which confirmed some material details about the [accused], his associate, and their activities, the police had objectively reasonable and probable grounds to arrest the [accused] and his associate and then to search the [accused] incident to his arrest. [para. 19]

The Court of Appeal also found the trial judge's s. 24 (2) analysis was proper if there had been a *Charter* breach. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

CORROBORATED COMPELLING INFO FROM CREDIBLE SOURCE JUSTIFIES ARREST & SEARCH

R. v. Nguyen, 2015 ONCA 753

The police received information from a carded confidential informer. This informer had no criminal record and had previously provided information on two previous occasions that resulted in drug-related arrests. An Asian female told the informer that she had marijuana for sale. The Asian female then drove her silver Dodge Caravan with the licence plate BBTT 163 to a home on Epson Downs Road. She keyed her way into the front door, went into the house and returned promptly with marijuana, green in colour. The Asian female said that she had lots more marijuana if the informer was interested. The informer then left the home.

The police conducted surveillance on a Vietnamese female they saw leave the Epson Downs Road home described by the informer. She entered a Dodge Caravan, licence plate BBTT 163, and was followed to another home on Clair Road. She exited her van and momentarily entered this house while carrying a yellow shopping bag. She then exited the house empty handed, got back into her van, and drove to a third residence on Autumn Hill. She touched something on the van's visor, the garage door opened and she got out of her van. She retrieved a recycling bin and placed it in the garage. She then opened the van's back hatch, retrieved a black gym bag, and took it into the garage. She then drove back to the Clair Road home and took two large waste paper bags that seemed full from another female who arrived in a different vehicle. The accused placed these bags in her van and drove away. She was stopped by police and arrested. Her van was searched incident to arrest and police found 11.48 kgs of marihuana in bags.

The police ran the accused on CPIC and found she had been convicted six months earlier for possessing 6.9 kilograms of marijuana. Police also obtained a warrant to search the three homes the accused visited while under surveillance. In the accused's home on Autumn Hill, police found 13.5 kgs of marihuana and 733 grms. of ketamine. She was charged with drug offences.

Ontario Superior Court of Justice

The accused argued that her arrest and the subsequent searches violated her ss. 8 and 9 *Charter* rights and the drugs should be excluded as evidence under s. 24(2). The judge, however, found the information provided by the informer, coupled with subsequent police surveillance, provided objectively reasonable and probable grounds for the accused's arrest. The informer was a reliable and accurate source of information. The information provided was detailed and was materially corroborated by subsequent police surveillance. As for the search warrant, the judge found it was credibly probable that the accused was storing marihuana in one or more of the three homes she was connected to. She was convicted on three counts of possessing drugs for the purpose of trafficking and sentenced to a term of imprisonment of two years less three days, followed by three years of probation.

Ontario Court of Appeal

The accused appealed her convictions submitting that the police did not have objectively reasonable and probable grounds for her arrest. She also contended that the search warrant for her Autumn Hill home should not have been issued because there was no basis to support the inference that drugs were being stored at it.

The Arrest

The Court of Appeal found the trial judge did not err in concluding reasonable grounds existed for the arrest. "An arresting officer must subjectively have reasonable and probable grounds to make an arrest and those grounds must be objectively justifiable," said the Court. Here, the accused did not challenge the arresting officer's subjective belief that she was in possession of drugs. Instead, she submitted that the officer's grounds for arrest were not objectively justifiable on the totality of the circumstances. The Court of Appeal, however, disagreed. The source was credible, the tip was compelling, and the information was corroborated by police investigation.

"An arresting officer must subjectively have reasonable and probable grounds to make an arrest and those grounds must be objectively justifiable."

Credible source

"The informant was not an anonymous tipster or an untested source," said the Court of Appeal. It continued:

> The informant was known to and carded by police and had no criminal record. As the [accused] acknowledges, on two previous occasions the informant had provided information resulting in drug-related arrests.
>
> Whether or not convictions had yet ensued as a result of those drug-related arrests does not detract from the reliability of the informant. Considerable time often elapses between an arrest and trial and, in any event, an arrest and seizure of drugs may not result in a conviction for any number of reasons unrelated to the reliability of the informant.

And, just because the police spoke to the known and tested informer by telephone and could not observe their demeanor did not diminish the credibility of the tip.

Compelling Information

Although the trial judge did not use the word "compelling" to describe the information provided by the informer, it was compelling. "The information was derived from the informant's direct interaction with the [accused]," said the Court of Appeal:

> It was far from bald conclusory statements or mere rumour or gossip. The combination of the vehicle description, complete with licence plate, the specific address where the target sold the informant marijuana and the physical description of the target was highly compelling.
>
> While the date the police received the tip and the date the informant met with the target were redacted from the Information to Obtain Search Warrant ("ITO"), the compelling nature of the information that was disclosed, coupled with the

subsequent police surveillance, addressed any concerns arising from the absence of this information. [references omitted, paras. 19-20]

Corroboration

The informer's tip was materially corroborated by subsequent police surveillance before the accused was arrested.

House Search

The search warrant for the accused's house was also upheld. The informer's information, police surveillance, the accused's arrest and the CPIC search results amply supported the officer's belief that marihuana would be found:

> The [accused] was engaged in transactions involving large quantities of marijuana. She was observed leaving a yellow shopping bag at the Clair Road residence. She was later observed at the same residence picking up two large yard waste bags of what was confirmed to be marijuana. Another plastic bag containing marijuana was also found in the Dodge Caravan when she was arrested. In between her trips to the Clair Road residence, she was observed removing a black gym bag from the Dodge Caravan and taking it into the Autumn Hill residence, which appeared (and proved) to be her home.
>
> It was a reasonable inference that drugs would be found at the Autumn Hill residence. That inference arises from the deposit of the gym bag at the Autumn Hill residence (whether or not it was done "quickly"); the large quantities of marijuana involved, which necessitated the storage of the drugs; and the evidence that the [accused] had access to that residence. The information from the informant that there had been drugs at the Epson Downs residence does not make the inference that there were drugs at the Autumn Hill residence unreasonable. Drugs can be stored at more than one location. [paras. 35-36]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

EXIGENT CIRCUMSTANCES JUSTIFIED ENTRY INTO HOME

R. v. Kim, 2015 ABCA 274

Police received information from a registered, paid, and known to be reliable confidential informer that a Cambodian man connected to a Calgary gang going by the initials TJ was moving significant quantities of cocaine from Calgary to Brooks to be sold there. The informer also provided a description of TJ's motor vehicle and his home address, as well as information that TJ had recently been released from prison and was on parole having served a sentence for drug trafficking. That and other information provided by the informer was investigated and much of it was confirmed. It led police to the accused, who fit the information the informer had provided. The police began to surveil the accused and observed him conduct transactions commonly engaged in by drug traffickers selling drugs. The police then arrested the accused and two friends outside a restaurant in Brooks. One of the accused's friends left seven rocks of cocaine wrapped in cellophane on the seat of the police car he was placed in after his arrest. The accused was also searched, but no contraband was found on him.

Immediately following the arrests, an investigator went to the accused's home to maintain continuity of it pending the authorization of a warrant to search his residence. Shortly thereafter, the officer in charge of the investigation also arrived at the accused's home. Although there were lights on inside the house, there was no movement and police were

unable to determine if it was occupied. Fearing that the public arrest of the accused might prompt a cohort to call the house and alert an occupant to destroy evidence, the officer went to the door and knocked. When no one answered, the police forced open the door. They conducted a cursory search of the home only to see if it was occupied, but it was not. During their walk-through of the home, the police saw a drug scale and a large amount of cash in plain view in the bedroom. The police left and waited outside for a search warrant, which was in the process of being prepared. The search warrant was authorized the following morning and police re-entered the home and searched it. They found six ounces of cocaine and rock cocaine along with $4,000 in cash. The accused was charged with possessing cocaine for the purpose of trafficking and possessing proceeds of crime.

Alberta Provincial Court

The judge found the accused's arrest was lawful. The information received from the confidential informer, along with police surveillance which indicated activity consistent with drug trafficking, provided a basis upon which to arrest him. The entry into the home was held to be reasonable. The judge accepted the circumstances confronting the police were exigent. This allowed the police to enter the home under s. 11(7) of the *Controlled Drugs and Substances Act* (*CDSA*) without a warrant. The judge found no *Charter* breaches.

Alberta Court of Appeal

The accused argued, among other things, that his rights under the *Charter* were violated. First, he contended that the police did not have reasonable grounds to arrest him; therefore the arrest was unlawful. In his view, a reasonable person not infused with the bias of the investigating officers would not conclude that he was trafficking drugs based on the observations. Second, he contended that his right to be free from unreasonable search and seizure were violated as a result of the warrantless entry into his home.

Arrest

The Court of Appeal upheld the trial judge's finding that reasonable grounds existed on which to justify the arrest:

> The information provided by the informant was detailed and much of it was corroborated by the police before they began their surveillance of the [accused]. That surveillance allowed them to observe the [accused] drive his vehicle to a darkened area behind a gas station, where a man entered his vehicle for approximately 30 seconds, then left. The police testified that this conduct is consistent with the manner in which drug traffickers sell drugs. The [accused] submits it may also be consistent with other, completely innocent, activity. That is so, but the [accused] did not testify and accordingly the trial judge was left to draw the inference he chose; to find that this was drug trafficking activity. We cannot say he erred in so doing. That finding alone would have allowed the police to arrest the [accused]. However, they continued their surveillance and watched while the [accused] and his friends were in a restaurant. There the police again observed the three men engage in conduct they thought indicative of drug trafficking. It ended when friends of the [accused] were seen leaving the restaurant apparently to conduct a sale in the parking lot. [para. 9]

The accused's arrest was therefore lawful.

The Search - Exigent Circumstances

While recognizing this case was a "close call", the Court of Appeal found that the trial judge's decision that the police entry into the accused's residence was motivated by exigent circumstances was not unreasonable. The police feared an occupant may have been alerted to the accused's arrest and asked to destroy evidence. The Court stated:

> The common law allows that when faced with exigent circumstances a police officer may engage in conduct that otherwise would require judicial authorization to be lawful, in order to avoid imminent danger to the officer or another, or to preserve evidence that may otherwise be destroyed. [references omitted, para. 13]

> "The common law allows that when faced with exigent circumstances a police officer may engage in conduct that otherwise would require judicial authorization to be lawful, in order to avoid imminent danger to the officer or another, or to preserve evidence that may otherwise be destroyed."

As well, s. 11(7) of the *CDSA* allows the police to forgo obtaining a search warrant under s. 11(1) in cases of exigent circumstances. The Court of Appeal described the analysis as follows:

> The invocation of this two pronged test is straight forward:
>
> I. Did conditions for obtaining a search warrant exist? If so,
>
> II. Did exigent circumstances make it impractical to wait until a search warrant could be obtained? [para. 15]

The Court also noted that the reasonable belief of the police was the governing factor:

> In assessing the police officer's actions said to have been motivated by exigent circumstances, the court will need to be satisfied that the officer had the subjective belief that immediate action was required to secure and protect evidence, and that that belief was reasonably held. [reference omitted, para. 19]

In this case, the Court of Appeal found the trial judge did not err in concluding exigent circumstances existed.

Police Created Exigencies

The accused also submitted that, if the circumstances were exigent, the police created the exigencies and should not be permitted to benefit from their existence. He contended that the police should have obtained a search warrant before arresting him and thus would have avoided the exigencies altogether. The Court of Appeal, however, disagreed. "It is not practical to mandate standard investigative protocols of the kind sought here," said the Court. "Many police investigations are dynamic and unpredictable and judicially mandated protocols cannot take into account the nuances of every investigation. The better course will be to consider the circumstances confronting the police when the decisions are made and to deny claims of exigent circumstances if police conduct is found to have created them in order to circumvent an accused's Charter rights." In this case, the trial judge

THE EXIGENCIES

"The circumstances facing the police when they decided a warrantless entry into the accused's home was justified to preserve evidence were these.

i. much of the information provided by the confidential informant regarding the [accused] had been confirmed and the police believed the informant to be reliable.

ii. surveillance of the [accused's] residence began at 5:30 p.m. February 2nd, 2011. At approximately 7:23 p.m. the [accused] and another male were observed to leave the residence.

iii. there were not enough officers to maintain surveillance of both the [accused] and his residence.

iv. in the course of their surveillance of the [accused] the police observed activity which to them indicated the [accused] and his companions engaged in two drug sales within the ensuing ninety minutes.

v. the [accused] and two friends were arrested outside a Boston Pizza in Brooks, Alberta at approximately 9:00 p.m. February 2nd, 2011.

vi. just prior to their arrest they had been in the company of other persons who were not arrested or detained.

vii. immediately following the arrests a police officer was dispatched to maintain continuity in the [accused's] home. Other officers soon joined him.

viii. on returning to the [accused's] residence the officers could see no movement inside the house but noted that the interior lights were on.

ix. fearing the home may be occupied and that someone who had witnessed the arrests would call the occupant to destroy evidence, the police went to the door and knocked. No one answered." [para. 20]

made no such finding that the police created the exigencies nor was it raised at trial by the accused.

The accused's appeal was dismissed.

Complete case available at www.canlii.org

"In assessing the police officer's actions said to have been motivated by exigent circumstances, the court will need to be satisfied that the officer had the subjective belief that immediate action was required to secure and protect evidence, and that that belief was reasonably held."

URGENCY NOT A FACTOR IN TELEWARRANT APPLICATION

R. v. Clark, 2015 BCCA 488

A police officer detected an odour of fresh growing marihuana coming from a residence and noticed condensation on some of the windows. He returned to the area several times and also conducted some surveillance. He saw the accused leave the residence and approached him in a nearby parking lot under the ruse of talking to him about shoplifting activities in the area. The accused identified himself, provided his date of birth, and stated he lived at the residence (the officer was investigating). A computer check revealed the accused had a criminal record that included drug-related convictions, two of which were for producing a controlled substance. The officer also received information from a BC Hydro security employee that a service check determined that a substantial amount of electricity was currently being stolen at the residence.

The officer completed an Information to Obtain (ITO) at 2:00 am for a telewarrant application to investigate theft of electricity at the residence. The officer was seeking a warrant to search "by day." In the application the officer stated he was using the telewarrant procedure as it was impracticable for him to appear personally before a justice because he was working a nightshift in the early morning hours and the courthouse was presently closed. After leaving a message through the Justice Centre phone line, the officer received a call from a Judicial Justice (JJ) at 2:10 am asking him why the application could not be made in person during the day at the courthouse. He provided several points and the JJ suggested those reasons be set out in the ITO. The officer revised his ITO and he faxed the completed application to the JJ at 2:35 am. At 3:07 am the officer received a signed telewarrant authorizing him (and other officers) to enter the residence between 2:00 pm and 6:00 pm to search for evidence of electricity theft (ie. the Hydro Meter, the equipment used to divert the electricity, and any documents identifying the owner and/or occupants of the residence).

When the police executed the warrant, they not only found an electrical by-pass but also a large marihuana grow-operation. The police seized 707 marihuana plants, grow-operation equipment, evidence of the bypass, $500 cash and two gold rings believed to be offence-related property. The accused was found inside the home at the time the warrant was executed. He was charged with producing marihuana, possessing marihuana for the purpose of trafficking, and theft of electricity.

British Columbia Supreme Court

The accused suggested that the warrant was invalid, in part, because the JJ had acted inappropriately by providing advice to the officer in the preparation of the ITO. In the judge's view, the JJ was not acting judicially when he guided the officer in the telewarrant application. He found the JJ was predisposed to grant the application he had not yet seen. The judge excised the paragraph from the ITO that addressed the impracticability of an in-person application. Without this, the impracticability requirement of the telewarrant provision had not been satisfied. The warrant was quashed and the search of the residence amounted to a warrantless one. The accused's s. 8 rights had been breached

and the evidence of the drugs and other items was excluded under s. 24(2). The accused was acquitted of all charges.

British Columbia Court of Appeal

The Crown appealed the trial judge's ruling suggesting he erred in finding that the JJ gave improper assistance to the officer submitting the telewarrant. As well, the Crown argued that the judge erred in ruling the evidence inadmissible under s. 24(2).

Judicial Independence & Impartiality

Justice Frankel, speaking for the unanimous Court of Appeal, found the trial judge's inference that the JJ was predisposed to grant the warrant even before he saw it was neither reasonable nor logical. In some cases, "it is permissible for a judicial justice to provide some advice and/or direction to an officer applying for a warrant." Regarding this case, Justice Frankel stated:

> It is apparent that JJ Cyr was on-call at two o'clock in the morning because the Justice Centre was closed. The inquiry he made of [the officer]—in effect, "why can't this wait until normal office hours"—is something any judicial justice or judge likely would ask at that time of day. More importantly, the suggestion made by JJ Cyr to [the officer] was in keeping with what the Supreme Court of Canada has said about how judicial justices should carry out their duties. Impracticability was one of the matters JJ Cyr would have to consider once he received the ITO. He did no more than advise [the officer] fully set out his reasons for using the telewarrant procedure. Whether those reasons were sufficient was something JJ Cyr had yet to consider.
>
> In Hunter v. Southam Inc. ..., the Supreme Court of Canada held that s. 8 of the Charter requires search-warrant applications to be determined by persons who are neutral, impartial, and capable of acting judicially. Judicial justices are presumed to be such persons. On the evidence, it was neither logical nor reasonable to find, by inference, that the presumption of judicial impartiality had been displaced. Put otherwise, there was no basis on which to find JJ Cyr acted other than in keeping with his office. [paras. 60-61]

The trial judge, therefore, erred in excising the paragraph addressing impracticability from the ITO.

Impracticability

The accused argued that even considering the paragraph explaining why the officer did not appear in-person, the impracticability requirement was still not met. In his opinion, there was no urgency for obtaining a warrant in the early morning hours and there was no explanation from the officer why he could not wait until the courthouse opened later that day. But Justice Frankel rejected this submission. The ITO need only support a basis why an in-person application is not practicable. It is not necessary to also show that urgency is a factor:

> I do not agree with [the accused] that to meet the impracticability requirement the facts set out in an ITO must satisfy a judicial justice not only that an in-person appearance is not feasible but also that there is an immediate need for a warrant.

"The telewarrant procedure was designed to make it possible for law enforcement officers to apply for a search warrant 24 hours a day, seven days a week. Whether the application is made in-person or by fax the reasonable-grounds standard must be met before a warrant can be issued. The impracticability-requirement is concerned with whether it is practicable to make an in-person application at the time the application is brought; it does not require that an immediate need for a warrant be demonstrated."

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In this case, the paragraph addressing impracticability could have satisfied a JJ that the ITO disclosed "reasonable grounds for dispensing with an information presented personally and in writing".

Furthermore, even without this paragraph, a JJ could have been satisfied that an in-person application was impracticable with the statement printed on the form. It stated that "the Kelowna Court House is presently closed." Although brief, the statement was completely accurate:

> There was no need for [the officer] to call the Kelowna courthouse to enquire as to whether a judicial justice was available for an in-person application. That a judicial justice would not be available at two o'clock in the morning is plain and obvious, even without reference to the Chief Judge's practice direction.
>
> On the basis of a statement in an ITO to the effect that the local courthouse is closed, a judicial justice could be satisfied that an in-person application is impracticable. Accordingly, given that the accuracy of the statement, "the Kelowna Court House is presently closed", was not challenged on the voir dire, the trial judge erred in holding that the impracticability requirement had not been met. [paras. 80-81]

The telewarrant was properly issued. The Crown's appeal was allowed, the accused's acquittals were set aside and a new trial was ordered.

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

EMERGENCY PREPAREDNESS

98% of Canadians lived in homes with a smoke detector. This was the most commonly reported type of precautionary measure taken by Canadians.

58% of Canadians reported having a wind-up or battery operated radio in their homes. Forty eight percent had an alternate source of heat, 43% kept and alternate source of water and 23% had a back-up generator.

British Columbia

The province where emergency planning activities were most common. In BC, 53% of individuals resided in households that had engaged in a high or moderately high level of emergency planning. Emergency planning activities were less common in Quebec at 40%.

268 The number of 'significant disaster events' occurring between 2000 to 2014 according to the Canadian Disaster Database. Disaster events included:

- Floods
- Wildfires
- Storms/thunderstorms
- Industrial or transportation accidents
- Winter storms
- Hurricanes/tropical storms
- Tornados
- Fires/explosions - non-residential
- Storm surges
- Outbreaks disease/serious illness
- Landslides/avalanches

Source: Statistics Canada, 2015, "Emergency preparedness in Canada, 2014", Catalogue no. 85-002-X,released on October 28, 2015.

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