JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

IN MEMORIAM

On April 5, 2016 32-year-old Royal Canadian Mounter Police Constable Sarah Beckett was killed when her patrol car was struck by a pickup truck in Langford, British Columbia.

She was on patrol at approximately 3:30 am when the collision occurred.

The driver of the pickup truck was taken into custody following the collision.

Constable Beckett had served with the Royal Canadian Mounted Police for 11 years. She is survived by her husband and two children.

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

"She was a great police officer, truly dedicated to serving others."

RCMP Assistant Commissioner Sharon Woodburn

"They are our heroes. We shall not forget them."

inscription, Canadian Police And Peace Officer's Memorial

Highlights In This Issue

NEW JIBC Graduate Certificate in Public Safety Leadership

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Upcoming Courses

Advanced Police Training

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

JIBC Police Academy

See Course List here.

2016

BC LAW ENFORCEMENT MEMORIAL

This year's Memorial Service will be hosted by the Vancouver Police Department and Delta Police Department.

Date & Time:

Sunday, September 25, 2016 at 1:00 PM

Location:

Brockton Oval in Stanley Park, Vancouver, BC

Graduate Certificates

Intelligence Analysis

or

Tactical Criminal Analysis

www.jibc.ca

see pages 23-24

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.

50 top tools for coaching: a complete toolkit for developing and empowering people.
Gillian Jones and Ro Gorell.
London; Philadelphia, PA: Kogan Page, 2015.
HD 30.4 J656 2015

101 great answers to the toughest interview questions.
Ron Fry.
Wayne, NJ: Career Press, Inc., 2016.
HF 5549.5 I6 F75 2016

101 smart questions to ask on your interview.
Ron Fry.
Wayne, NJ: Career Press, Inc., 2016.
HF 5549.5 I6 F757 2016

Becoming a master student.
Dave Ellis, Doug Toft, contributing editor,
Debra Dawson (Western University)
Toronto, ON: Nelson Education, 2016.
LB 2343.3 E44 2016

Behavioral guide to personality disorders (DSM-5).
Douglas H. Ruben, PH. D.
Springfield, IL: Charles C. Thomas Publisher, LTD., 2015.
RC 554 R83 2015

Canadian family law.
Julien D. Payne and Marilyn A. Payne.
Toronto, ON: Irwin Law, 2015.
KE 539 P295 2015

Change management: a guide to effective implementation.
Los Angeles, CA: SAGE, 2016.
HD 58.8 M33 2016

Children's law handbook.
Marvin A. Zuker and Lynn M. Kirwin.
Toronto, ON: Carswell, 2015.
KE 512 Z85 2015

Design as scholarship: case studies from the learning sciences.
Edited by Vanessa Svihla and Richard Reeve.
New York, NY: Routledge, 2016.
LB 1060 D39 2016

Design for how people learn.
Julie Dirksen.
San Francisco, CA: New Riders, 2016.
LB 1060 D57 2016

Engaging minds: cultures of education and practices of teaching.
Brent Davis, Dennis Sumara, and Rebecca Luce-Kapler.
New York, NY: Routledge, Taylor & Francis Group, 2015.
LB 1060 D38 2015

Generation me: why today's young Americans are more confident, assertive, entitled--and more miserable than ever before.
Jean M. Twenge, Ph. D.
New York, NY: Atria Paperback, 2014.
HQ 799.7 T94 2014

Mindful management: the neuroscience of trust and effective workplace leadership.
Dalton A. Kehoe.
Richmond Hill, ON: Communicate for Life, Ltd., 2015.
HD 57.7 K44 2015

The student's survival guide to research.
Monty L. McAdoo.
Chicago, IL: Neal-Schuman, 2015.
ZA 3075 M43 2015

IMPLIED LICENCE APPLICATION DEPENDS ON OFFICER'S PURPOSE

R. v. Parr, 2016 BCCA 99

The accused was arrested at the roadside under BC's *Mental Health Act*. He was transported to a hospital for medical care, his vehicle was impounded and police took charge of his dog. The investigator contacted another detachment, some 3 1/2 hours away, and asked that another police officer assist by attending the accused's property in an effort to locate his fiance, advise her of the situation, and see if arrangements could be made to pick up the dog. The assisting officer knew the accused was also the subject of an ongoing marihuana grow-op investigation. The assisting officer attended the accused's residence at 2:52 am. He found no vehicles present but the lights to the main building and a secondary residence were illuminated.

The officer walked straight to the front door of the house and knocked. A sign on the front door read, "**Please use the side door**." The officer heard a television or radio on inside the house and could smell vegetative marihuana. Since no one answered the front door, the officer walked to the side door and knocked loudly. Again, he could smell vegetative marihuana. A PVC pipe was noted at the side of the house that appeared to be venting air from the basement. With no answer at the side door, the officer went to the secondary residence and noted plastic sheeting and blinds covering some of its windows. This residence did not appear to be occupied and there was no answer to the officer's knocking on a sliding door. He did not do a perimeter search of the property. The officer then left the property and stopped on the highway to see if he could smell marihuana upwind from the property, but he could not.

This olfactory information obtained from the entry onto the accused's property was used in conjunction with the pre-existing grow-op investigation, and a search warrant was obtained and executed. A large marihuana grow operation was located on the property along with some guns. The accused was charged with drug and weapon offences.

BC Supreme Court

The officer testified to the following:

- He attended the accused's property to locate the fiancée, notify her that the accused was on his way to the hospital and see if someone could take custody of the dog.
- He was aware that a drug investigation was ongoing and that he might make observations confirming or dispelling suspicions that the accused's residence housed a marihuana grow-op.
- He had no grounds to be on the property to investigate a potential marihuana grow-op and went straight to the doors to determine if anyone was home.
- He immediately left the property when no one answered.
- He would not have gone to the residence had he not received the request for assistance.
- He did not place a phone call to handle the request because "bad medical news about somebody" was best delivered in person and an unanswered phone call would not confirm that no one was home.
- He denied the suggestion that his motivation for attending the property was, at least in part, to further an ongoing criminal investigation.

The judge concluded that the officer was entitled to enter onto the property under the implied licence to knock doctrine. The purpose of the entry was to communicate with an occupant by notifying next of kin of a medical emergency. The entry was not to

"Where the police knock for the sole purpose of facilitating communication with an occupant, they act within the scope of the implied invitation. In these circumstances, no constitutionally recognized search occurs because the entry does not intrude upon the occupant's reasonable expectation of privacy. The waiver of privacy rights embodied in the implied invitation extends no further than is required to achieve this purpose."

gather evidence in furtherance of the drug investigation. The officer's knowledge of the ongoing drug investigation did not undermine his otherwise valid purpose of communicating with an occupant about the accused's emergency medical condition. Thus, the officer's observations properly formed part of the reasonable grounds for the search warrant. The accused was convicted of producing marihuana, possession for the purpose of trafficking and improperly storing firearms.

British Columbia Court of Appeal

The accused appealed his conviction arguing the trial judge erred in the application of the implied licence doctrine. In the accused's view, the officer was motivated, at least in part, by an investigative purpose when he entered onto the property and smelled the marihuana. This, he asserted, undermined the implied licence doctrine.

Implied Licence (Invitation) to Knock

Under the common law, the "occupants of a home are deemed to have waived their reasonable expectation of privacy for defined purposes'" said the Court of Appeal. It continued:

> Where the police knock for the sole purpose of facilitating communication with an occupant, they act within the scope of the implied invitation. In these circumstances, no constitutionally recognized search occurs because the entry does not intrude upon the occupant's reasonable expectation of privacy. The waiver of privacy rights embodied in the implied invitation extends no further than is required to achieve this purpose. Where the conduct of the police goes beyond that which is permitted by the implied licence to knock, the conditions of that licence are breached and the police approach the dwelling as an intruder. [para. 2]

If the approach to the home for the purpose of communicating is motivated by an investigative purpose, such as smelling for marihuana, the police conduct exceeds the scope of the implied licence to knock principle and the search is subject to s. 8 *Charter* scrutiny.

Justice Fitch, writing the unanimous appeal decision, found the trial judge did not err in concluding that the officer entered onto the property for the limited purpose of communicating with the occupants. His intention was not to further an investigative aim. He stated:

> In my view, it is important to distinguish ... between the purpose for the entry and knowledge on the part of the police of the potential that evidence might be acquired in the course of that entry. Provided the police act for a purpose falling within the scope of the implied invitation to knock principle, and for no other reason, the fact they are aware evidence might be acquired in the course of the entry does not make them "intruders" acting outside the scope of the doctrine. I accept, however, that the existence of an ongoing criminal investigation at the time of the entry, and advertence by the police to the prospect of gathering evidence in the course of that entry, are relevant considerations to be taken into account when determining the purpose for which the entry and knock was undertaken. [para. 55]

Justice Fitch, however, rejected the notion that a dual purpose in approaching the door to knock could not undermine the implied licence doctrine, finding such reasoning "incompatible with the implied licence principle." In other words, the police exceed implied licence and cannot rely on it where they have both a purpose to speak to an occupant (even if this is the "predominant or

primary purpose") while at the same time they have a secondary purpose motivated by an investigative goal such as sniffing for the presence of drugs. Rather, the communication must be the sole purpose for the entry as the trial judge had in fact found in this case. The accused's appeal was dismissed.

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

HELPING PURCHASER DOES NOT NECESSARILY MEAN AIDING SELLER

R. v. Machushek, 2016 SKCA 41

Two undercover officers entered a bar to see if they could further an investigation into cocaine trafficking. They played pool and mingled with a group of people, including the accused. After a few hours of drinking, the officers initiated a discussion with the accused about buying cocaine. When the bar closed, he took the officers back to his home where they used the bathroom and admired woodworking projects. The accused made a call to a drug dealer and then all three drove in the officers' truck to a darkened street to meet the seller. The seller sold each person a gram of cocaine. The accused did not handle the officers' money or the cocaine intended for them, nor did he receive any payment from the seller or the officers. After the buy, the three went back to the accused's home. He asked the officers to come in and party but they declined. Several months later the accused was arrested and charged with two counts of trafficking and two counts of possessing proceeds of crime.

Saskatchewan Provincial Court

The judge found the accused did not commit any acts of trafficking in his own right nor was he a party to the offence. He did not aid (s. 21(1)(b) *Criminal Code*) or abet (s. 21(1)(c)) the seller such that he would have been guilty of the seller's act of trafficking. Rather, the judge held that the accused was "facilitating a buy as a buyer" and that he and the two officers were "joint purchasers." The accused was acquitted of the trafficking charges. He was also acquitted of the proceeds charges because he did not receive any money as a result of the transaction nor had he ever held any of the officers' money.

BY THE BOOK:

Parties to Offence: ***Criminal Code***

s. 21(1) Every one is a party to an offence who
(a) actually commits it;
(b) does or omits to do anything for the purpose of aiding any person to commit it; or
(c) abets any person in committing it.

Saskatchewan Court of Appeal

The Crown appealed the acquittals suggesting that the accused was guilty of trafficking because he aided and abetted the trafficker. In the Crown's view, if the purchase would not have taken place without the assistance of the accused, he should be found guilty of aiding and abetting cocaine trafficking.

Justice Jackson, however, felt this reasoning would set the bar too low in determining what constitutes aiding or abetting drug trafficking. Not every act that assists a purchase of drugs can lead to a finding of guilt for trafficking. Otherwise, a friend who drives a buyer across town to purchase drugs would be guilty of trafficking. "With respect to the *actus reus*, where the facts reveal no more than incidental assistance of the sale through rendering aid to the purchaser, the ... proper charge is not trafficking, regardless of intent," said Justice Jackson. "With respect to the *mens rea*, ... the test is whether the assistance is rendered solely to the purchaser or, cast in different terms, but arriving at the same result, whether the 'acts are designed to aid the purchaser'."

The Court of Appeal provided a summary to assist in determining whether a person committed a trafficking offence:

> [W]hen the charge is trafficking and the theory of the Crown is that the accused is guilty of trafficking either as a principal or as a party, the analytical framework to apply is as follows:

(a) has the accused committed any acts of trafficking in his or her own right?
(b) if no, did any acts or omissions of the accused aid or abet the trafficker in the commission of the offence of trafficking?
(c) if yes, do the facts reveal something more than incidental assistance to the trafficker through rendering assistance to the purchaser?
(d) if yes, did the accused know that the trafficker intended to commit the offence of trafficking?
(e) if yes, did the accused intend to aid or abet the trafficker in the commission of the offence of trafficking? [para. 72]

Here, the trial judge did not err in finding the accused's intent was to aid himself and the police officers in buying cocaine, and not to aid the seller. The Crown's appeal was dismissed.

Complete case available at www.canlii.org

'ANTIQUE FIREARM' NOT ONLY DETERMINED BY AGE

R. v. Kennedy, 2016 MBCA 5

The accused was arrested outside his house trailer for breaching a court-ordered condition that he have no contact with his neighbour. He was patted-down for officer safety incidental to arrest and two loaded handguns were found in his pants' pockets. Both guns were cocked and ready to fire. The guns were very old but testing confirmed that they were functional, although one fired intermittently. Police obtained warrants to search the accused's trailer and found eight guns, 12 magazines and 200 rounds of ammunition including a Clement Arms .32 calibre British Bulldog revolver with five rounds in its cylinder. The accused was charged with breach of recognizance and firearms offences.

Manitoba Court of Queen's Bench

The accused was convicted of several offences but acquitted on a charge under s. 91(1) of the *Criminal Code* for possessing a prohibited firearm without a registration certificate because the British Bulldog revolver was an antique firearm for the purpose of s. 84(3). Section 84(3) deems certain weapons, including an antique firearm, not to be firearm for the purpose of s. 91(1). An antique firearm is defined as including "any firearm manufactured before 1898 that was not designed to discharge rim-fire or centre-fire ammunition and that has not been redesigned to discharge such ammunition." The judge found the "expert witnesses called on behalf of the Crown were unable to determine whether this particular firearm was manufactured before or after 1898." Thus, the Crown failed to prove the essential elements under s. 91(1).

BY THE BOOK:

Antique Firearm: ***Criminal Code***

s. 84(1) antique firearm means
(a) any firearm manufactured before 1898 that was not designed to discharge rim-fire or centre-fire ammunition and that has not been redesigned to discharge such ammunition, or
(b) any firearm that is prescribed to be an antique firearm;

Manitoba Court of Appeal

The Crown appealed the accused's acquittal on the s. 91 (1) charge, among other things, arguing that the trial judge erred in only considering the year of manufacture. Rather, the Crown suggested that the definition of antique firearm also requires that the firearm cannot be designed, or re-designed, to discharge rim-fire or centre-fire ammunition. In this case, a Crown expert testified that the British Bulldog revolver fires centre-fire ammunition. Therefore, the British Bulldog revolver did not fall within the definition of antique firearm.

The Court of Appeal overturned the acquittal and entered a conviction on the s. 91(1) charge.

Complete case available at www.canlii.org

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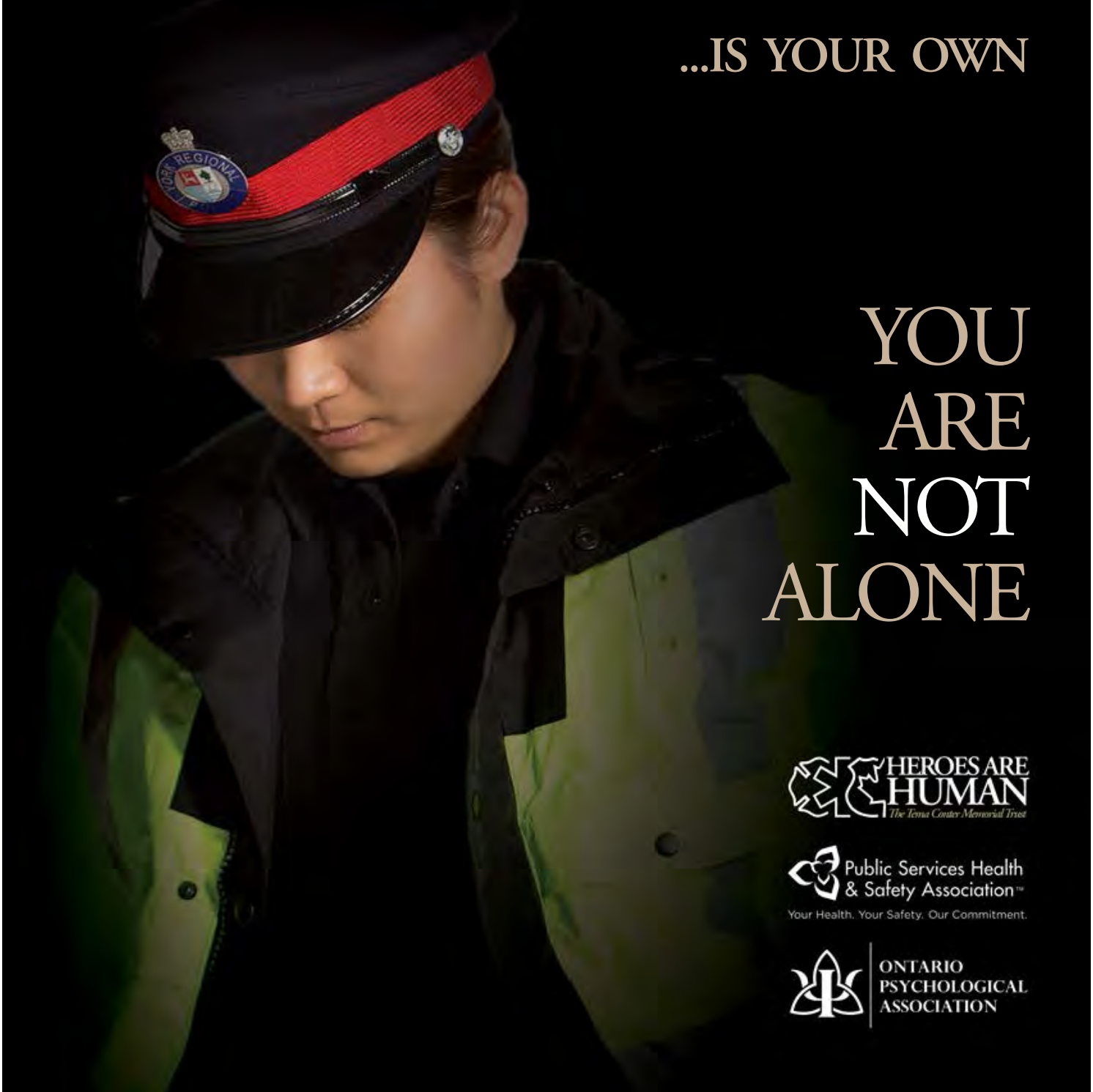

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INVENTORY SEARCH NOT JUSTIFIED: MARIHUANA EXCLUDED

R. v. Harflett, 2016 ONCA 248

The accused was arrested for driving with a Quebec driver's licence while his Ontario licence was suspended under s. 36 of Ontario's *Highway Traffic Act* (*HTA*). He was patted down and read his rights. Since the accused could not drive the vehicle and it had to be removed from the highway as it posed a safety concern, a tow truck was called. The officer decided to have the car towed to a nearby hotel with the accused riding in the tow truck with its driver. The accused could then pay his fines the following day, get his Ontario license back and resume his journey.

While waiting for the tow truck, the officer conducted an inventory search of the vehicle as he always did in such circumstances. When he opened the trunk, he smelled the odour of raw marijuana and found a large quantity of it. He immediately arrested the accused for possessing marijuana for the purpose of trafficking and re-read the right to counsel. The car was then towed to the police station and a full search was performed.

Ontario Court of Justice

The officer testified that he searches "every vehicle" for which he calls a tow truck. He will first check for exterior damage and then search inside, looking for weapons, other dangerous items and valuables. He said he was "totally responsible" for the car and searched it to protect himself, the accused and the tow truck operator. He said he was concerned about weapons that the accused might use to harm the tow truck operator and wanted to protect the operator against any allegations of stolen valuables.

The accused claimed his s. 8 *Charter* rights had been breached by the initial inventory search before it was to be towed to a hotel. In his view, the officer had no authority to conduct such a search. The judge, however, disagreed and found that the inventory search was reasonable. She stated:

> [The officer] had to remove the vehicle from Highway 401, the accused could not drive it and there was no one else to drive the vehicle. It was therefore the responsibility of [the officer]. It was reasonable to assess any pre-existing damage to the vehicle, to verify any valuables in the vehicle and whether there were any weapons or other dangerous items in the vehicle. [The officer] was going to release the accused and the vehicle to a hotel and therefore, had to verify that there was nothing dangerous in the vehicle and, prior to the tow to the hotel, the state of the vehicle and valuables.

Further, even if there was a s, 8 violation, the evidence was admissible under s. 24(2). The judge found the officer acted in good faith, any breach was technical as there is a lower expectation of privacy in his vehicle on a public roadway, and the marijuana was real evidence. The accused was convicted of possessing marihuana for the purpose of trafficking and he was sentenced to a year in jail plus 12 months of probation.

Ontario Court of Appeal

The accused argued that the trial judge erred in finding the inventory search reasonable. He suggested that the police officer had neither the statutory or the common law authority to conduct an inventory search of his vehicle. Moreover, if the search was unreasonable, the accused asserted that the trial judge erred in

BY THE BOOK:

Driving prohibited while licence suspended

Ontario's *Highway Traffic Act*

Driving prohibited while licence suspended

s. 36 A person whose driver's licence or privilege to drive a motor vehicle in Ontario has been suspended shall not drive a motor vehicle or street car in Ontario under a driver's licence or permit issued by any other jurisdiction during the suspension.

admitting the evidence under s. 24(2). In the accused's view it should have been excluded.

Inventory Search

In this case, the search of the car was warrantless and therefore presumptively unreasonable. "To justify a warrantless search, the Crown must establish, on the balance of probabilities, that (i) the search was authorized by law; (ii) the law is reasonable; and (iii) the search was carried out in a reasonable manner," said Justice Lauwers, writing the Court of Appeal's decision. Although the accused's initial detention to investigate a possible contravention of the HTA was lawful, the inventory search that followed was not authorized by law:

> [T]he power to detain an individual under the HTA does not inevitably include the power to detain or impound a vehicle, nor does it include the power to conduct an inventory search in every situation. The officer must be able to point to a specific duty or authority to justify his search of the [accused's] vehicle.
>
> The inventory search cannot be justified on the basis of officer safety or any suspicion that the [accused] was involved in criminal conduct. The officer testified that after arresting the [accused] for the first time for driving while his licence was suspended, he did not impound or seize the [accused's] car, because he was only conducting a traffic investigation, not a criminal investigation. He agreed the [accused] was polite, cooperative and non-confrontational throughout. The officer testified that there was, "nothing to hint of criminality, zero. He ... had no prior criminal record. He was not listed on any of the police records as being involved in any type of criminal activity, he was just simply a suspended driver." The officer agreed that he had no reason to believe that the vehicle contained any weapons or other dangerous items. [paras. 20-21]

"The police decision to call a tow truck to remove a vehicle does not justify an inventory search in every case."

"[T]he power to detain an individual under the HTA does not inevitably include the power to detain or impound a vehicle, nor does it include the power to conduct an inventory search in every situation. The officer must be able to point to a specific duty or authority to justify his search ..."

No statutory provision that authorized police to impound the vehicle or to search the car was identified, nor did the common law provide authority to impound it. "[T]he officer did not impound the vehicle or exercise the degree of control of the vehicle that would have made an inventory search necessary," said Justice Lauwers. "The police decision to call a tow truck to remove a vehicle does not justify an inventory search in every case." Nor was there anything in the circumstances that triggered the need for an inventory search. The officer had no public safety concerns; he was going to release the car to the accused:

> In this instance it was quite reasonable for the officer to look at the exterior of the car and to note any damage before asking the tow operator to take it to the hotel. The officer had taken at least that degree of control over the car.
>
> But the other reasons given by the officer for the inventory search do not hold up to scrutiny and pass constitutional muster. The owner was not going to be separated from the car, but was to ride with the tow operator to the hotel. There was accordingly no reason for the tow operator to access the interior of the car and the police officer had no cause to be concerned for the operator's safety. [paras. 26-27]

The officer's duty obliged him to remove the car from the highway for safety reasons, but the exigencies of the situation did not provide a reasonable basis for an inventory search. Thus, the search was unreasonable and the accused's s. 8 rights had been infringed.

s. 24(2) Charter

In considering the s. 24(2) lines of inquiry (the seriousness of the Charter-infringing state conduct, the impact on the Charter-protected interests of the accused and society's interest in adjudication on the merits), the Court of Appeal excluded the marihuana as evidence. The police misconduct was serious and favoured exclusion. "[The officer's] invariable practice of searching every car fits the description of an impermissible 'fishing expedition conducted at a random highway stop'," said Justice Lauwers:

> As an instructor of other police officers, he ought to be fully conversant with his legal authority, but the evidence shows either that he was not or that he was prepared to search regardless. His attitude was exemplified by his testimony: he resisted the notion that what he did was a "search": "I do an inventory sir, not a search". This was plainly a search. [para. 44]

The s. 8 breach was not technical, as described by the trial judge. The officer had no authority or justification to conduct any type of search inside the vehicle despite there being a lower expectation of privacy in it while on a public roadway. The impact of an unjustified search is magnified where there is a total absence of justification for it.

The accused's appeal was allowed, the evidence was excluded and an acquittal was entered.

Complete case available at www.ontariocourts.on.ca

PASSENGER IN STOPPED VEHICLE NOT NECESSARILY DETAINED

R. v. Mooiman & Zahar, 2016 SKCA 43

A police officer with a drug sniffing dog was on traffic patrol. He saw a truck approaching at a high rate of speed along a highway with a speed limit of 100 km/h. The truck's front end quickly dipped indicating sudden braking. Radar showed a speed of 98 km/h suggesting the vehicle was exceeding the speed limit before it braked and dipped. The officer pulled the vehicle over under s. 209.1 of Saskatchewan's *Traffic Safety Act* to check vehicle fitness, the driver's licence and sobriety, and the vehicle's registration.

As the officer approached the truck, he observed the accused Zahar in the driver's seat and the accused Mooiman in the front passenger seat. He noticed Mooiman had a freshly lit cigarette in his mouth and learned the two men were travelling from Saskatoon, Saskatchewan, to Richmond, British Columbia. The officer also observed that the men appeared very nervous—giggling and moving around—and that fast food wrappers were on the floor boards of the truck. These observations were striking to the officer. First, in his experience, people generally discard their cigarettes when they are stopped by the police—they do not light fresh ones—and he had been taught that cigarette smoke can be used to mask the odour of alcohol or narcotics in a vehicle. Second, while both occupants were very nervous, the passenger Mooiman had no reason to be nervous—he did not face any jeopardy. Additionally, fast-food wrappers were a common marker in the transport of narcotics by motor vehicle.

The officer queried both men through the Canadian Police Information Centre (**CPIC**) database and Police Information Portal (**PIP**) database. CPIC showed only that Mooiman had a criminal record but PIP had entries associating both Mooiman and Zahar with criminal drug activity. The officer then detained both men to investigate them for drug possession. Zahar was placed in the police vehicle while Mooiman was questioned in the truck. When Mooiman was informed by the officer that a sniffer dog would be deployed and asked whether the dog would indicate, Mooiman produced a plastic bag containing marihuana. When the officer asked, Mooiman said that Zahar knew of this marihuana. Both men were arrested for possessing a controlled substance. When the truck was searched, a duffle bag containing 1.9 lbs of packaged marihuana was located under a doghouse in the truck's box. Both men were then re-arrested for possessing marihuana for the purposes of trafficking.

BY THE BOOK:

Authority to Stop

Saskatchewan's *Traffic Safety Act*

209.1(1) A peace officer may require the person in charge of or operating a motor vehicle to stop that vehicle if the peace officer:

(a) is readily identifiable as a peace officer; and

(b) is in the lawful execution of his or her duties and responsibilities.

Saskatchewan Provincial Court

The judge found the PIP entries had tipped the balance from mere suspicion to reasonable suspicion and that is when the detention for investigatory purposes commenced. These entries indicated that Mooiman had some kind of previous involvement in the production of marihuana and in the trafficking of its resin, and Zahar had been chargeable for possession of marihuana and might have had some kind of involvement with its production. While not carrying "the weight of actual convictions", the judge found they were "significant nonetheless in that they demonstrate potential criminal involvement in higher end illicit drug activities." The judge also accepted that the officer was well experienced and trained in the area of drug transport investigations. The judge used the officer's training and experience in assessing the value of the information and observations that the officer had articulated in his testimony.

Mooiman's arrest for possessing the bag of marihuana he voluntarily handed over was lawfully made under s. 495(1)(b) of the *Criminal Code*. Since Zahar knew about it and exercised control over it by being the owner and operator of the truck, he was in constructive possession of it. The search of the truck was incident to the arrests of either Mooiman or Zahar and had not been conducted in an unreasonable manner. The evidence was admissible and each man was convicted of possessing marihuana (not exceeding three kilograms) for the purpose of trafficking. They were sentenced to a 20-month conditional sentence order.

Saskatchewan Court of Appeal

Both accused appealed their convictions arguing, in part, that the trial judge erred in assessing the legality of their detentions and arrests under s. 9 of the *Charter*. Further, they submitted that the search of the truck and seizure of the marihuana violated their rights under s. 8. In their view, the evidence should have been excluded under s. 24(2).

Passenger's Detention & Arrest

Mooiman suggested that, as a passenger in a vehicle stopped for traffic safety reasons, he had been arbitrarily detained because the officer had used this opportunity to ask him about his identification and then check him on the CPIC and PIP databases. Justice Caldwell, however, rejected this assertion. "Only the driver of a vehicle is necessarily detained by a traffic-safety stop," he said. "In the absence of some other suggestion of significant physical or psychological restraint, a passenger of a vehicle that is subject to a traffic-safety stop is simply a bystander and is not detained for the purposes of s. 9 of the Charter. ... Furthermore, it is also clear ... that the police may engage in the preliminary questioning of bystanders without giving rise to a detention under ss. 9 and 10 of the Charter." He continued:

> True, the effect of stopping a vehicle and detaining the driver may impair the passenger's ability to proceed further, but—all other things

"In the absence of some other suggestion of significant physical or psychological restraint, a passenger of a vehicle that is subject to a traffic-safety stop is simply a bystander and is not detained for the purposes of s. 9 of the Charter."

"[T]he effect of stopping a vehicle and detaining the driver may impair the passenger's ability to proceed further, but—all other things being neutral—nothing about a routine traffic-safety stop prevents a passenger of the vehicle from simply walking away."

> being neutral—nothing about a routine traffic-safety stop prevents a passenger of the vehicle from simply walking away. Similarly, absent a legal requirement under The Traffic Safety Act, the fact a passenger in a vehicle is necessarily caught up by a traffic-safety stop does not thereby legally compel or obligate the passenger to comply with the investigating police officer's requests for information or assistance. This has long been the case at common law. ...
>
> Axiomatically then, if a bystander later seeks to allege that he or she had been arbitrarily detained—and thereby compelled to answer questions or to assist a police officer—the bystander must show that he or she had been effectively deprived of his or her liberty to choose whether or not to engage in conversation with or to cooperate with the officer. This is an objective test whereby the bystander must support his or her contention—i.e., that the conduct of the police had effected a significant deprivation of liberty—by reference to the evidence before the court. [references omitted, paras. 22-23]

In this case, Mooiman had not been detained prior to the investigatory detention. The initial encounter involved preliminary questioning falling short of detention. It wasn't until Mooiman had voluntarily identified himself and the officer obtained the CPIC and PIP information linking Mooiman to criminal drug activity that the officer then proceeded to detain him for investigatory purposes.

Use of CPIC and PIP

The Court of Appeal noted that the PIP entries were not records of convictions, but indicated to the officer that both men had previous involvement with drug activity. Nevertheless, the trial judge was "entitled to make use of the CPIC and PIP entries in his assessment of the circumstances and that, in that assessment, the CPIC and PIP entries 'demonstrate potential criminal involvement in higher end illicit drug activities'. The CPIC and PIP entries were relevant to and formed part of the foundation of the constable's subjective suspicion, but, more importantly, they may be assessed objectively in that the entries may be adduced into evidence and assessed by the court. Moreover, the constable's inquiries of these databases did not amount to a search for the purposes of s. 8 of the Charter—as the [accused] freshly allege on appeal—there being no reasonable expectation of privacy in police databases."

What the PIP entries said:

SUBJECT: MOOIMAN
REG OWNER ZZZ PRODUCTION - CANNABIS
CHARGED TRAFFICK - CANNABIS RESNN 300G#U

SUBJECT: ZAHAR
General Information
ZAHAR
SHANE BELA
MALE, Born on [redacted]
SUSP CHGBLE POSSESSION - CANNABIS 30G#UNDER
OTHER ZZZPRODUCTION CANNABIS

Driver's Detention & Arrest

The driver too had been lawfully detained and arrested. Initially, he had been lawfully detained pursuant to the traffic-safety stop. This traffic detention then transformed into an investigatory detention and then an arrest once Mooiman confirmed that Zahar knew about the bag of marihuana. This provided the officer with reasonable grounds to arrest Zahar under s. 495(1)(b) as being in constructive possession of marihuana.

The Truck Search

Justice Caldwell concluded that Mooiman, as a mere passenger in the truck, did not have a reasonable expectation of privacy in it and therefore his personal rights under s. 8 of the *Charter* were not engaged by its search. Mooiman did not own the truck, was not found operating it and there was no evidence he had made personal use of it, had exercised any control over it or had regulated access to it. Since Mooiman's s. 8 rights were not engaged by the search of the truck, his s. 8 rights could not be violated by its search.

As for Zahar, he had a reasonable expectation of privacy in the truck as its owner and operator and, therefore, his s. 8 rights were engaged. The search however, was authorized as an incident to the arrest of either him or Mooiman:

> In this case, the search of Mr. Zahar's truck was rationally connected to the offence for which [the officer] had arrested both Mr. Mooiman and Mr. Zahar. Its purpose was to locate or preserve evidence relating to their possession of a controlled substance. Although additional reasonable and probable grounds were not required in the circumstances, it could be said that the search was founded upon a belief based on reasonable grounds that an offence under s. 5 (2) of the Controlled Drugs and Substances Act had been or was being committed. Nevertheless, on the facts of this matter, the search in question was undoubtedly "truly incidental" to the arrest of either Mr. Mooiman or Mr. Zahar or both of them. And, it was, for these reasons, a lawful search that did not violate Mr. Zahar's rights under s. 8 of the Charter. [para. 42]

Since there were no ss. 8 or 9 breaches, a remedy under s. 24(2) of was unavailable. The accuseds' appeals were dismissed and their convictions were upheld.

Complete case available at www.canlii.org

ENTRAPMENT APPLICATION REJECTED: POLICE ACTED ON REASONABLE SUSPICION

R. v. Ayangma, 2016 PECA 6

The police launched operation "Clean Sweep" to disrupt the illicit drug trade in Charlottetown. They utilized the services of an agent under the control of the police who made buys from various mid to upper range drug trafficking targets, the accused being one of them. There were nine confidential informants and one casual confidential informant. They provided information that the accused was heavily involved in the drug trade and was involving several other people to traffic for him. The nine confidential informants had provided information before which resulted in positive search warrants and arrests, and the police believed them to be reliable. As well, the accused had a record for drug trafficking.

The agent used Facebook and text messages to communicate with prospective sellers, including a conversation with "Sabinairo Pepper" (the accused). A Facebook conversation began after the agent sent a "friend request" too the accused:

Accused: "what's up".

Agent: "Hard at it.... listin can u help me I need play ball soft ball or hard ball don't madder".

The Accused: "Have we met".

The conversation continued with the agent offering suggestions of how the accused knew him, but the accused rejected each suggestion.

Agent: " ... you may know me threw keegan to"

Accused: "No clue buddy keighan says he knows ya but I don't".

Agent: " Can u or him point me in a way to play ball".

Accused: "Waiting for my buddy to come down from sside if you wanna wait till after supper he will prob meet you".

Agent: "Ill want a half o if he will".

Accused: "Don't think he has that much".

The agent then exchanged numerous text messages with "Keegan" (later identified as John Scott) arranging for a pick up. Surveillance officers watched Scott get into the agent's vehicle, then followed it to another location where the agent gave Scott $600 for drugs. Scott exited the agent's car and walked away to meet the accused. Scott then returned to the car and gave the agent cocaine. Three more scenarios followed over the next 10 days. During these scenarios, the accused sold cocaine to the agent. The accused was charged with one count of joint trafficking with Scott and three additional counts of trafficking.

Prince Edward Island Supreme Court

The judge convicted the accused on all four counts of trafficking. The accused then argued that he was entrapped and deserved a stay of proceedings on the charges. In his view, the agent provided an opportunity to commit a crime when the agent said, "Hard at it.... **listin can u help me I need play ball soft ball or hard ball don't madder**". The judge, however, disagreed. He found the statement "**listin can u help me I need play ball soft ball or hard ball don't madder**" was investigative language that did not constitute the presentation of an opportunity to commit a crime. "The question was essentially whether [the accused] was willing to sell drugs to the agent or not," said the judge. "I find the presentation of the opportunity did not occur until the agent stated, "**Ill want a half o if he will**".

The judge went on to conclude that when the presentation to commit a crime was made, the police had the necessary reasonable suspicion to do so. "The nature of the information provided by the informants was compelling, credible, and corroborated," said the judge. "The information named suppliers, the places in which they operated, individuals [the accused] sold to and used to sell drugs for him, the kind of drugs sold, places at which drugs were sold, cell phone numbers of individuals involved, the frequency with which [the accused] was involved, and various other pieces of information." The entrapment defence was rejected and the convictions upheld. The accused was sentenced to 30 months incarceration.

Prince Edward Island Court of Appeal

The accused appealed his convictions asserting, among other things, that the trial judge erred in rejecting his entrapment claim. In his opinion, the police did not have a reasonable suspicion that he was involved in trafficking drugs before providing him the opportunity to commit the offence and therefore they engaged in random virtue testing.

Entrapment

Justice Mitchell, speaking for the Court of Appeal, described the underlying reasons for the doctrine of entrapment this way:

> It is the belief that the administration of justice must be kept free from disrepute that compels recognition of the doctrine of entrapment. There must not be judicial condonation of unacceptable conduct by investigatory and prosecutorial agencies. The state can only go so far in investigating crime. Entrapment is a very serious allegation against the state as it means that state conduct violates our notion of fair play and decency and shows a blatant disregard for the qualities of humanness which all of us share. The onus is on the accused to show on a balance of probabilities that the conduct of the state merits a stay of proceedings. A stay will be granted only in the clearest of cases. [references omitted, para. 33]

"Reasonable and probable grounds relate to the probability of criminal activity; reasonable suspicion relates to the possibility of criminal activity. Reasonable suspicion is an intermediate standard between suspicion and reasonable and probable grounds. Reasonable and probable grounds will suffice to obtain a search warrant while a reasonable suspicion will not. It is simply a matter of degree. To determine reasonable suspicion the court must consider the constellation of objectively discernable facts."

Citing the Supreme Court of Canada judgment of *R. v. Mack*, [1988] 2 S.C.R. 903, entrapment occurs when:

(a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry;

(b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry they go beyond providing an opportunity and induce the commission of an offence.

Thus, if the police have a reasonable suspicion that a person is engaged in a criminal activity they can provide that person with an opportunity to commit the offence.

Was There Reasonable Suspicion?

There is a difference between suspicion, reasonable suspicion, and reasonable and probable grounds. Justice Mitchell stated:

> Reasonable and probable grounds relate to the probability of criminal activity; reasonable suspicion relates to the possibility of criminal activity. Reasonable suspicion is an intermediate standard between suspicion and reasonable and probable grounds. Reasonable and probable grounds will suffice to obtain a search warrant while a reasonable suspicion will not. It is simply a matter of degree. To determine reasonable suspicion the court must consider the constellation of objectively discernable facts. [para. 37]

In this case, the Court of Appeal agreed with the trial judge that the reasonable suspicion standard had been met. There was evidence providing a reasonable suspicion of the accused's participation in drug trafficking. Furthermore, even though the trial judge was correct in concluding the opening comment by the agent was investigatory, rather than an opportunity to commit a crime, this really did not matter. This was not a random virtue testing case. The police had reasonable suspicion to believe that the accused was involved in the drug trade even before the agent initiated contact with him.

The accused's appeal on the entrapment issue was dismissed.

Complete case available at www.canlii.org

Editor's note: Additional facts taken from *R. v. Ayangma*, 2015 PESC 19.

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by Patrick Lavallée and Mike Novakowski

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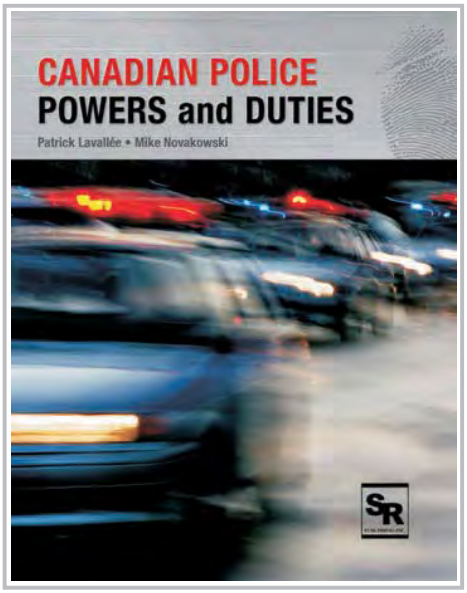

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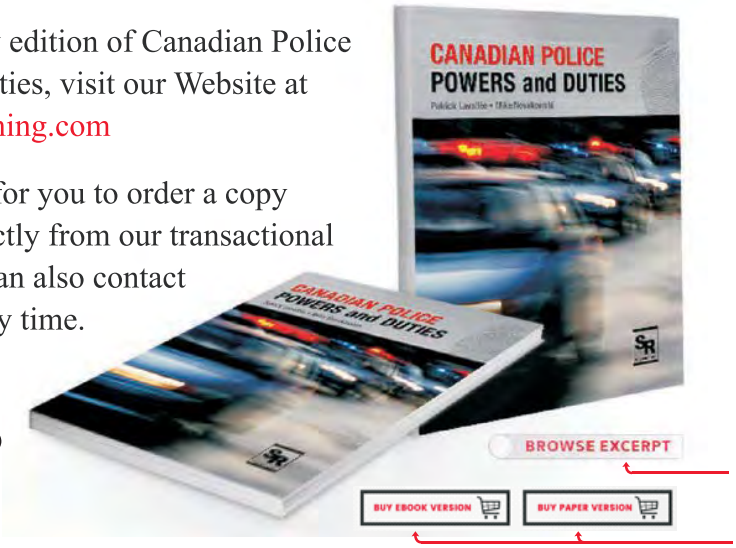

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ASKING IF SOMEONE CAN HOOK A PERSON UP WITH DRUGS IS NOT, BY ITSELF, ENTRAPMENT

R. v. Le, 2016 BCCA 155

The police received a phone number of a suspected dial-a-dope drug trafficker from a Crime Stoppers tip. The tip reported that a male person with a strong Asain accent monitored a specific cell phone number and sold drugs in Surrey, BC. Six months later an officer called the number as part of an undercover operation targeting dial-a-dope operations. The man who answered the phone had a thick Asian accent. The the officer asked "**Can you hook me up?**" When the man responded positively, the officer then asked if the man could provide him with an eight ball of cocaine. When the man said he could, the officer then asked how much it would cost and was told $200. The two agreed to meet in Surrey. The man said he would be driving a white Honda Prelude.

When they met, the officer approached the driver side of the Prelude and had a conversation with the lone occupant in the driver's seat, an Asian male. He asked the man if he had "the stuff". The man showed the officer a package of cigarettes. When the officer asked to see the drugs, the man opened the package and showed him a single rock of crack cocaine. The officer looked into the package and saw the remainder of the drugs. The man was given $200 and the officer received the cigarette package. As the Prelude left, the vehicle was stopped within minutes of leaving the scene of the drug purchase and its driver, the accused, was arrested. The accused was searched and police found $40 cash and a cell phone on him. As well, the $200 the officer used to buy the drugs (confirmed by serial numbers) was seized from the front passenger seat of the Prelude .

British Columbia Supreme Court

The accused was convicted of trafficking in cocaine. However, he brought a motion for a stay of proceedings on the basis of entrapment. He submitted that the police essentially made a cold call and did not have a reasonable suspicion prior to offering an opportunity to commit the offence. The judge, however, held that the question, "Can you hook me up?" was not providing an opportunity to commit an offence. He concluded that the police, acting on a Crime Stoppers tip and receiving a positive response to "Can you hook me up?", had reasonable suspicion. Therefore, the accused had not demonstrated that he was entrapped:

> In this case, [the officer] clearly engaged in the preliminaries of a drug transaction while arranging to meet and then meeting the accused. Whatever level of suspicion the police had in this particular investigation before the phone call being made was raised to reasonable suspicion by the positive response of this accused. Indeed, his response raised the suspicion to a level of reasonable suspicion and it allowed [the officer] to request the sale of an eight ball of cocaine, the price of which was set by the accused. The sale of drugs at an agreed meeting followed. [2014 BCSC 2207, para. 27]

British Columbia Court of Appeal

The accused suggested, among other things, that the trial judge erred in finding that he was not entrapped. The accused argued that the trial misapprehended the evidence because the officer asked "Can you hook me up with an eight ball?", and not merely "Can you hook me up?" In his view, this made a difference in his entrapment claim.

Entrapment

Justice Bennett, writing the Court of Appeal's judgment, reviewed the law of entrapment and noted the following:

- Entrapment is a defence that must be established by an accused on a balance of probabilities, only after conviction.
- Entrapment occurs when
  - the authorities provide a person with an opportunity to commit an offence without

acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry.

- although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.

- The requirement for either a reasonable suspicion that the person is engaged in illegal activity or a bona fide inquiry is to avoid the risk that the police will attract people who would not otherwise commit a crime.

- It is not a proper use of police power to "test the virtue of people on a random basis".

- When there is a bona fide investigation, the police may offer individuals they encounter in the course of that investigation the "opportunity" to commit a crime, even if they do not have reasonable suspicion that individual was engaged in criminal activity.

In this case, Justice Bennett found that it made no difference whether the officer added "with an eight ball" or "an eight ball of cocaine" after his initial request to be "hooked up". She stated:

> First, the police had reasonable suspicion when the call was answered: (i) they had a Crime Stoppers tip containing details about the phone number used, the suspected dealer's gender, ethnicity and territory of operation, (ii) aspects of the tip were confirmed when the telephone was answered by an Asian-sounding male, and (iii) there was evidence of "Swan checks" that the defence did not pursue.
>
> Second, even if there was not reasonable suspicion, this minimal conversation can only amount to part of the investigation of the tip to see if the target responded. It was not an opportunity to commit a crime. [The accused's] own expression of willingness to transact during the phone call raised a reasonable suspicion. Afterwards, a deal was struck in person. In my view, asking someone if he can "hook a person up with drugs" is not, in and of itself, entrapment.
>
> Defence counsel argued that there is a meaningful distinction between veiled statements asking if the other party is a drug dealer and more specific requests for types, quantities, or values of drugs. It was argued that the former statement is an investigatory step while the latter is an offer to commit an offence. Parsing the language of undercover drugs calls in dial-a-dope investigations in this way takes an unnecessarily narrow approach. It ignores the surrounding circumstances, but more importantly, it strays far from the core principle underlying Mack.
>
> ...
>
> Objectively speaking, innocent and otherwise law-abiding individuals would not be "manipulated" or tempted to enter the dangerous and illicit drug trade if asked by a stranger over the phone to sell him drugs. It defies common sense to suggest that asking whether an individual is willing to sell specific types, quantities, or values of illicit drugs runs the "serious unnecessary risk" that an otherwise innocent person would then go out, procure the drugs, meet with and sell them to a stranger.
>
> Third, [the officer's] phone call did not amount to entrapment given the analysis and conclusions in Swan. The call was not part of hundreds of random calls, like Swan, but fell within a bona fide investigation or inquiry, having regard to the difficulty of investigating dial-a-dope offences and not confining dial-a-dope to a known location because of the mobile nature of the crime. {paras. 91-96]

The police conduct did not amount to entrapment and the accused's appeal was dismissed.

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

"In my view, asking someone if he can "hook a person up with drugs" is not, in and of itself, entrapment."

POLICING ACROSS CANADA: FACTS & FIGURES

According to a recent report released by Statistics Canada, there were 68,777 active police officers across Canada in 2015. This represented a decrease of 29 officers from the previous year. Ontario had the most police officers at 26,205, while the Yukon had the least at 130. With a national population of 35,851,774, Canada's average cop per pop ratio was 192 police officers per 100,000 residents.

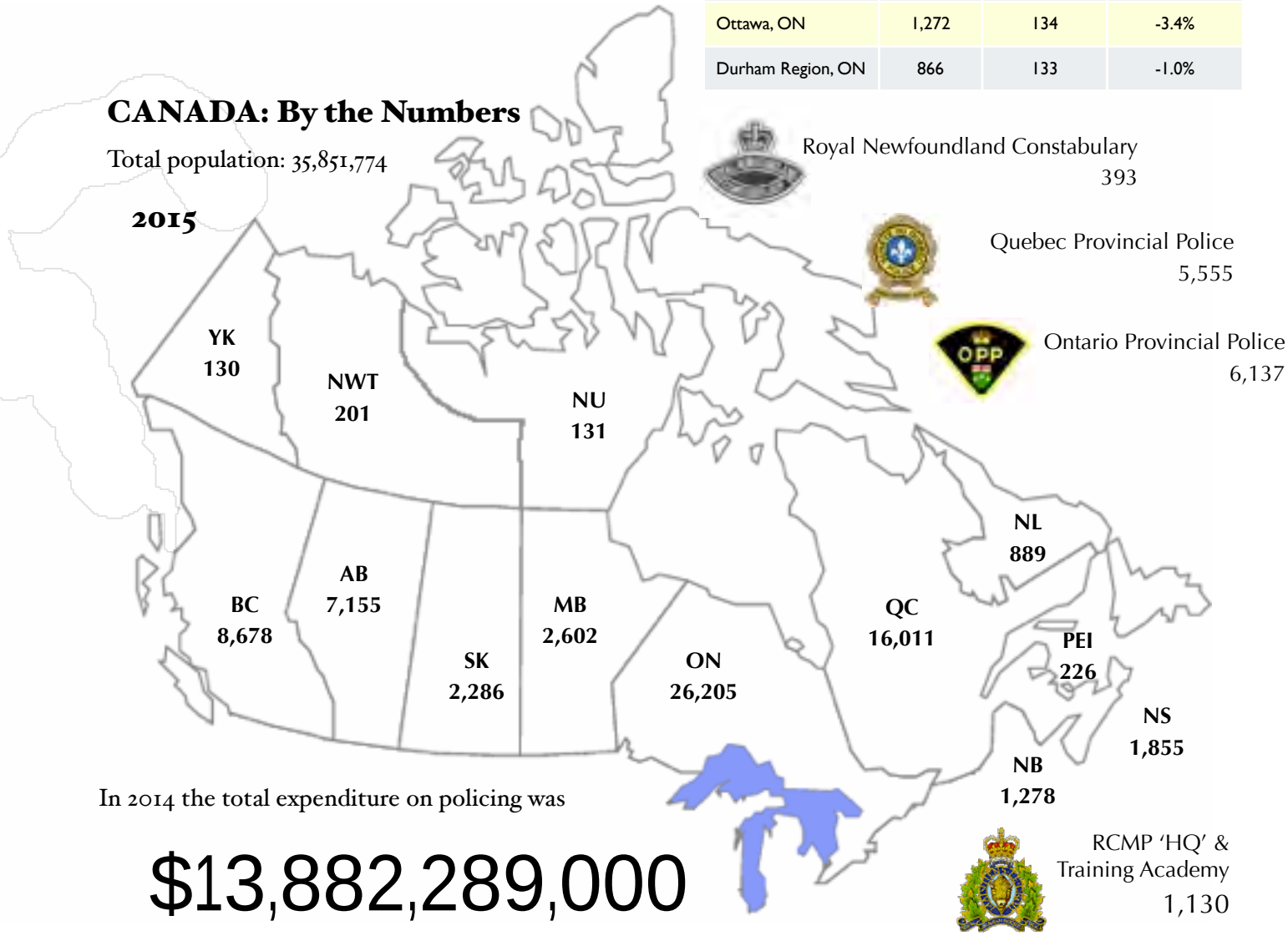
Source: Statistics Canada, Police Resources in Canada, 2015, Catalogue no: 85-225-X, March 2016

Canada's Police Officers by City - Top 10			
CMA	Officers		% Change
	Number	per 100,000	2014>2015
Toronto, ON	5,425	193	+0.4%
Montreal, QC	4,638	233	-0.9%
Calgary, AB	2,147	170	-0.7%
Peel Region, ON	1,951	144	-0.3%
Edmonton, AB	1,665	179	-2.5%
York Region, ON	1,535	137	+0.1%
Winnipeg, MB	1,422	200	-5.0%
Vancouver, BC	1,280	197	-2.9%
Ottawa, ON	1,272	134	-3.4%
Durham Region, ON	866	133	-1.0%

CANADA: By the Numbers

Total population: 35,851,774

2015



Royal Newfoundland Constabulary
393

Quebec Provincial Police
5,555

Ontario Provincial Police
6,137

RCMP 'HQ' & Training Academy
1,130

In 2014 the total expenditure on policing was

$13,882,289,000

2014 FAST FACTS

- On the snapshot day of May 15, 2015 there were 68,777 police officers in Canada. There were an additional 28,368 civilians, which represented 29% of all police personnel. There were 2.4 officers for every civilian employed.
- Saskatchewan had the highest provincial rate of police strength at 202 officers per 100,000 residents (cop to pop ratio) followed closely by Manitoba at 201 officers per 100,000. The Northwest Territories had the highest territorial cop to pop ratio at 456 officers per 100,000.
- 54.5% of police officers were 40 years of age or older.
- 17.9% of officers were over the age of 50.
- For municipal police services serving a population of 100,000 or more, Victoria B.C. had the highest police strength at 240 officers per 100,000, followed by Montreal, QC (233) and Halifax, NS (218). Richmond, BC had the lowest police strength at 97 officers per 100,000.
- For 2014/2015, 80% of officers hired were recruits. The remainder were experienced police officers.
- In May 2015 there were 14,332 female police officers in Canada. This represents 20.8% of all officers and is a +1.3% increase over 2014.
- Women represented 67.8% of civilians employed by police services.
- Police expenditures continue to rise, more than doubling since 2000.
- Per capita costs for policing in fiscal 2014/2015 translated to $391 per Canadian.
- Provincial police services in Ontario, Quebec and Newfoundland cost $2.1 billion.
- Stand alone municipal services cost $7.3 billion.
- The total operating costs for the RCMP amounted to $4.5 billion.

RETIREMENT

At the end of the 2014/2015, 11% of police officers were eligible to retire. Newfoundland had the highest proportion of officers that could retire at 23%. 48% of officers at RCMP Headquarters and the Training Academy could retire.

Top 10 Retirement Eligible Municipal Police Services

Municipal Police Service	Eligible to Retire %
St. John's, NL	33.4%
Winnipeg, MB	23.9%
Codiac Region (Moncton) NB	22.8%
Victoria, BC	21.0%
Hamilton, ON	20.6%
Montreal, QC	17.9%
Coquitlam, BC	14.6%
Kelowna, BC	11.2%
Langley Township, BC	10.1%

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, 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

RCMP Officers by Level of Policing - Canada 2015 (numbers do not include 1,130 members at HQ & Training Academy)

Level / Region	BC	AB	SK	MN	ON	QC	NB	NS	PEI	NL	YK	NWT	NU	Total
Contract	5,265	2,596	988	815	-	-	688	810	102	401	112	181	116	12,074
Federal & other policing	879	350	257	198	1,654	935	153	182	27	95	18	20	15	4,783
Total	6,144	2,946	1,245	1,013	1,654	935	841	992	129	496	130	201	131	16,857

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