



A newsletter devoted to operational police officers in Canada.



Photo: Harry De Jong

**CANADIAN POLICE AND  
PEACE OFFICERS' 39<sup>TH</sup>  
ANNUAL MEMORIAL SERVICE**

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ANNUEL DES POLICIERS ET DES  
AGENTS DE LA PAIX CANADIENS**

Le 25 septembre 2016  
Colline du Parlement  
Ottawa (Ontario)



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

inscription on Canada's Police and Peace Officers' Memorial, Ottawa

See page 24  
for  
BC's Memorial

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## Upcoming Courses

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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.

.....  
**Bullies: from the playground to the boardroom: strategies for survival.**

Jane Middleton-Moz & Mary Lee Zawadski.  
Deerfield Beach, FL: Health Communications, 2014.  
BF 637 B85 M53 2014

.....  
**Designing adaptive and personalized learning environments.**

Kinshuk.  
New York, NY: Routledge, 2016.  
LB 1031 K415 2016

.....  
**Effective succession planning: ensuring leadership continuity and building talent from within.**

William J. Rothwell.  
New York, NY: Amacom, 2016.  
HD 57.7 R689 2016

.....  
**Everyday encounters: an introduction to interpersonal communication.**

Julia Wood & Ann Schweitzer.  
Toronto, ON: Nelson Education Ltd., 2016.  
BF 637 C45 W656 2016

.....  
**Future crimes: inside the digital underground and the battle for our connected world.**

Marc Goodman.  
Toronto, ON: Anchor Canada, 2016.  
HV 6773 G65 2016

.....  
**The happiness equation: want nothing + do anything = have everything.**

Neil Pasricha.  
New York, NY: G.P. Putnam's Sons, 2016.  
BJ 1481 P38 2016

**The happiness track: how to apply the science of happiness to accelerate your success.**

Emma Seppälä.  
London: Piatkus, 2016.  
BF 637 S8 S426 2016

.....  
**Managing conflict at work: understanding and resolving conflict for productive working relationships.**

Clive Johnson & Jackie Keddy.  
London: Philadelphia : Kogan Page, 2010.  
HD 42 J643 2010

.....  
**Mastering coaching: practical insights for developing high performance .**

Max Landsberg.  
London: Profile Books, 2015.  
HF 5549.5 C53 L36 2015

.....  
**Nonviolent communication: a language of life.**

Marshall B. Rosenberg.  
Encinitas, CA : PuddleDancer Press, 2015.  
BF 637 C45 R67 2015

.....  
**The organized mind: thinking straight in the age of information overload**

Daniel J. Levitin.  
Toronto, ON: Allen Lane, 2014.  
BF 444 L49 2014

.....  
**Riding the waves of culture: understanding diversity in global business.**

Fons Trompenaars & Charles Hampden-Turner.  
New York, NY: McGraw-Hill, 2012.  
HF 5549.5 M5 T76 2012

.....  
**Talking to crazy: how to deal with the irrational and impossible people in your life.**

Mark Goulston.  
New York, NY: AMA, 2015.  
BF 637 I48 G68 2015

.....  
**What great trainers do: the ultimate guide to delivering engaging and effective learning.**

Robert Bolton & Dorothy Grover Bolton.  
New York, NY: AMA, 2016.  
HF 5549.5 T7 B5785 2016

## NO EXCEPTION TO IMPLIED LICENCE FOR IMPAIRED DRIVING CASES

**R. v. Rogers, 2016 SKCA 105**



After observing a man back into a car, a witness called police and reported a suspected impaired driver. He provided the driver's description, and the make, model and licence plate number of the car. A police officer was dispatched to the registered owner's apartment. The officer entered an unlocked exterior door to the apartment building, went to the accused's door and knocked. The accused opened the door and spoke with the officer. Both men remained on either side of the door jam. The officer formed the opinion that the accused was impaired. His speech was "very slurred". When asked whether he had been involved in an accident, the accused said that he thought someone had run into him and he offered to show the officer the damage to his vehicle. He left his apartment and walked about 20 feet to the stairway while the officer followed. The accused was "stumbling" and "staggering". He was taken to the police station where breathalyzer readings of 270 mg%, 230 mg% and 230 mg% were obtained. He was charged with impaired driving and over 80 mg%.

### Saskatchewan Provincial Court



The judge concluded, among other things, that the officer exceeded the common law implied licence to knock doctrine when he went to the apartment to see if the accused had been the driver of the car involved in the accident and to determine whether his ability to operate a motor vehicle was impaired. The judge found the officer approached the door "for the purpose of searching and obtaining evidence against the occupant." As such, the officer had exceeded his authority under the implied license doctrine and was engaged in a search of the occupant's home. The accused's s. 8 *Charter* right to be secure against unreasonable search and seizure had been breached and all of the evidence obtained by police was excluded under s. 24(2). The accused was acquitted of both charges.



### Saskatchewan Court of Queen's Bench



The Crown successfully appealed the acquittals and a new trial was ordered. An appeal judge found the officer did not exceed the implied licence doctrine. The officer did not arrest the accused in his dwelling. Rather, he merely approached the accused's home to communicate with him about the accident and the report of a possible impaired driver. "Where the sole purpose of the police officer is to ask questions of the home owner, no evidence is gathered until the occupant chooses to speak," said the appeal judge. "Investigative questioning does not exceed the bounds of the implied right to approach and knock and is not trespassory or in breach of s. 8 of the *Charter*." The accused's s. 8 rights were not breached and there was no need to consider the exclusion of evidence under s. 24(2).

### Saskatchewan Court of Appeal



The accused then appealed the order of a new trial. In his view, the conduct of the police amounted to an unreasonable search contrary to s. 8 of the *Charter* and the appeal judge erred in finding otherwise. The evidence obtained by police ought not to have been admitted and he sought the restoration of his acquittals on the charges.

### Implied Licence

Under the common law, an occupant of a dwelling house gives an implied licence (or invitation) to any



“[I]f ... a police officer knocked on the door to a residence for the purpose of securing evidence against the occupant, the officer is conducting a search within the meaning of s. 8 of the Charter. This principle applies equally to drinking and driving offences as well as to other offences where observing the person opening the door will give visual, auditory and olfactory clues about the person’s participation in the crime under investigation.”

member of the public (including a police officer) to approach the door and knock. This licence, however, extends no further than what is required to permit convenient communication with the occupant. If the police exceed this licenced purpose, such as approaching to secure evidence against the occupant, their conduct falls outside the bounds of implied licence and they are engaged in an unauthorized search, thus breaching s. 8. This does not mean, however, that the police exceed implied licence simply because they are investigating a potential criminal offence or are looking for information about an actual offence, even when they have reasonable grounds.

Justice Jackson, speaking for the Court of Appeal, recognized that the purpose for the police approach to the door, which sometimes is not easy to perceive, is critical in determining whether implied licence to knock has been exceeded:

The investigation of the crime of drinking and driving, or a similar offence, necessarily entails the potential to obtain evidence from conversing with or observing the person answering the door. Nonetheless, based on my review of the authorities, I have concluded that if a trial judge finds on all of the evidence a police officer knocked on the door to a residence for the purpose of securing evidence against the occupant, the officer is conducting a search within the meaning of s. 8 of the Charter. This principle applies equally to drinking and driving offences as well as to other offences where observing the person opening the door will give visual, auditory and olfactory clues about the person’s participation in the crime under investigation. [emphasis added, para. 29]

In this case, the officer testified that his purpose was not just to investigate but to determine whether the accused was impaired. The officer’s express purpose in knocking on the accused’s door to obtain and secure evidence as to whether the occupant, who was recently seen driving a motor vehicle, was impaired could not be ignored. This purpose exceeded the implied licence doctrine, the police conduct was unreasonable and all of the evidence that the police gathered to support the breath demands flowed from the officer’s decision to knock on the door. This evidence was inadmissible under s. 24(2), the accused’s appeal was allowed and his acquittals entered at trial were restored.

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

**Editor’s note:** BAC readings taken from *R. v. Rogers*, 2014 KQB 167.

### Excerpt from the Officer’s Testimony

**Lawyer: So your purpose in attending at Mr. Rogers’ home was to determine whether he had been the person driving, correct?**

**Officer: Yes.**

**Lawyer: And more importantly, whether his ability to operate a motor vehicle was impaired.**

**Officer: Yes.**

**Lawyer: And you would agree that the observation made of a suspected impaired driver’s appearance, demeanour, speech, and actions are critical pieces of investigation in an impaired driving investigation?**

**Officer: Yes. They are what form my grounds.**

**The Court of Appeal found the officer’s testimony supported the trial judge’s conclusion that the officer approached the apartment door for the purpose of securing evidence.**

## COULD HAVE, NOT WOULD HAVE, IS PROPER TEST IN ASSESSING SEARCH WARRANT

R. v. Loewen, 2016 BCCA 351



As part of an investigation code named *Project E-Papua*, police contacted dial-a-dope phone lines and undercover officers purchased drugs from at least two of them. Police also received information from two confidential informers that the accused was providing drugs to several street-level dealers. Based on this information, the police set up surveillance on the accused's home. Over a period of a couple of months they saw a number of individuals, including the one's selling to undercover officers, coming and going from the residence. The vast majority of these individuals stayed for less than 10 minutes, but some also came for visits substantially longer and well outside the range of time for which one might infer they were there to affect a drug transaction.

Police prepared an ITO which set out the informer information and their credibility, police surveillance observations and the information relating to the prior criminal histories of certain targets of the police investigation. Included in the ITO was information on how the police showed the informers a single photograph of targeted individuals in order to identify them. A search warrant was issued for the accused's residence and car. It was executed and police seized drugs, cash and other evidence. The accused was charged with possessing cocaine, heroin and cannabis, all for the purpose of trafficking.

### British Columbia Provincial Court



The accused argued that the ITO, which had been heavily edited to remove any information that could disclose the identity of the confidential informers, contained insufficient grounds upon which it could be granted. Thus, in the accused's view, the warrant had not been lawfully issued.



The judge found that the vast majority of the ITO contained bald, unsupported assertions, their reliability of which could not be assessed. Among many things, the judge criticized the general statement that informer A had provided information in the past resulting in drugs being seized and persons arrested as an example. There was nothing about how current the information was or its frequency, and there were no details about how much the informer was paid. The judge also criticized the identification process in showing the informers a single photograph to elicit their identification rather than using the procedures outlined by commissions such as the Sophonow Inquiry. He also highlighted the use of "boilerplate language" and "cutting and pasting" in preparing the ITO. The judge went on to conclude that the ITO did not contain "sufficient independently verifiable information on which this warrant could reasonably have been issued." The warrant was set aside. The search then, in effect, became warrantless, breached s. 8 of the *Charter* and the evidence was excluded under s. 24(2). The charges against the accused were dismissed.

### British Columbia Court of Appeal



The Crown appealed the trial judge's decision arguing he erred in setting aside the warrant. The proper test in assessing the validity of a search warrant is not for the reviewing judge to substitute their view for that of the authorizing judge. Rather, "if, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge

concludes that the authorizing judge could have granted the authorization, then [the reviewing judge] should not interfere." In the Crown's view, the trial judge conducted a *de novo* (fresh) review of the warrant (whether he would have been issued it) rather than determining whether the authorizing judge could have issued it.

Chief Justice Bauman, writing the unanimous Appeal Court judgment, agreed with the Crown. He found the trial judge did substitute his opinion for that of the authorizing judge. For example, the trial judge pondered the inference to be drawn from the fact known drug runners frequented the accused's house for very brief visits. He noted these visits were not only consistent with individuals picking up drugs to be distributed at street level, as asserted by the affiant, but also consistent with individuals delivering drugs to a drug consumer within the house or with an individual coming to see someone but they were not home. Whichever inference was to be drawn from the evidence was for the authorizing judge to make. It was not for the reviewing judge to re-weigh.

The trial judge also failed to look at the totality of the circumstances in properly assessing the informer information. "In assessing the totality of the circumstances one must look to (a) the extent to which the information predicting the criminal offence is compelling, i.e. the extent of detail provided; (b) the credibility or reliability of the source; and (c) the extent of corroboration," said Chief Justice Bauman. As for the extent of corroboration, the informers' information was corroborated by independent investigation in a number of respects.

Finally, the trial judge improperly imported trial standards, such as the use of "bad character evidence" and police "photograph identification procedures", into the search warrant review. "A search warrant is an investigative tool," said Chief

"A search warrant is an investigative tool. Its justification rests on reasonable grounds, not proof beyond a reasonable doubt."

Justice Bauman. "Its justification rests on reasonable grounds, not proof beyond a reasonable doubt." He continued:

In my view, the judge here embarked on a similarly flawed analysis by importing a trial type analysis into his consideration of the "bad character" evidence and the photo identification of various players in the matter. There is no rule precluding the inclusion of such information in an ITO so long as the prior criminal activity is relevant to the matter under investigation. The exception is for facts leading to charges that have been dismissed or judicially stayed. Nor is there a rule requiring any particular identification procedure in an ITO or the investigation upon which it is based. In any event, the identifications here were not made by witnesses unfamiliar with the subjects, who may have only caught a momentary glimpse of them. The dangers with eyewitness identification are absent here or at least greatly attenuated. [reference omitted, para. 51]

The trial judge conducted a *de novo* review of the ITO (the material founding the issuance of the warrant) and failed to assess the material in light of the totality of the circumstances. The authorizing justice could have granted the warrant. 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](http://www.courts.gov.bc.ca)

### Note-able Quote

*"Nothing in life is to be feared. It is only to be understood."* - Marie Curie

"In assessing the totality of the circumstances one must look to (a) the extent to which the information predicting the criminal offence is compelling, i.e. the extent of detail provided; (b) the credibility or reliability of the source; and (c) the extent of corroboration."



# BCLEDN

BC Law Enforcement Diversity Network

> presents a speaking engagement



# CHALLENGES

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





## WHAT IS THE BC LAW ENFORCEMENT DIVERSITY NETWORK?

The **British Columbia Law Enforcement Diversity Network** (BCLEDN) is a group of concerned and motivated members of the law enforcement community. Its goal is to champion diversity by identifying contemporary global issues. This year, on November 2, 2016, the BCLEDN is hosting "**Challenges in Modern Day Law Enforcement**" at the JIBC. They hope to see you there and encourage members from other agencies not currently represented on the committee to be a part of their team. If you are interested please contact [lstewart@jibc.ca](mailto:lstewart@jibc.ca).



**BCLEDN**

BC Law Enforcement Diversity Network

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## FENTANYL EXCLUDED: FAILURE TO s. 10(b) ON INVESTIGATIVE DETENTION WAS SERIOUS

**R. v. Daley, 2016 ONCA 564**



Two women, the accused and her passenger, went to a Money Mart. The accused went inside to pawn some jewelry while the other woman waited in the car outside. A store employee called the police as the jewelry looked like photos of stolen jewelry seen in a police flyer. When police attended, the accused was detained in the store for about 40 minutes. She was not advised of her right to counsel and, in response to a question, told police she had arrived in a car that was parked outside.

Another officer approached the passenger (Stockton), sitting in the accused's car. When Stockton reached into her purse for ID, the police officer saw a bracelet that he thought resembled some of the jewelry in the police flyer. He arrested Stockton and searched the car. In it, he found two purses, which he also searched. In one of the purses, police found a flip knife. After the accused identified it as her purse, she was arrested for possessing a prohibited

weapon. During her arrest, she was patted down and seven fentanyl patches were found in her jacket pocket. She was charged with possessing fentanyl for the purpose of trafficking.

### Ontario Superior Court of Justice



The accused submitted that her *Charter* rights under ss. 8, 9, and 10(b) had been violated and she sought the exclusion of evidence under s. 24(2). The judge found that s. 10(b) had been violated. "The police...knew that she was supposed to be cautioned and read her rights, and they did not do it," said the judge. "Their failure was patent, and there is no excuse for it." However, the judge did not conduct a s. 24(2) analysis because the s. 10(b) violation, he held, did not impugn the subsequent searches.

As for ss. 8 and 9 of the *Charter*, the judge concluded there were no breaches. He found the accused's detention was not arbitrary, except to the extent she was not advised about her right to counsel. "In the circumstances of this case, 40 minutes is not so long a detention to be arbitrary, given the pieces of jewelry, the number of them, and the quality of the flyer that they were trying to compare to," he said. As for the search, it was not conducted as an incident to the accused's detention inside the store. Rather, the police had sufficient grounds to arrest the passenger and search the purses incidental to the passenger's arrest. The accused was convicted of possessing fentanyl for the purpose of trafficking.

### Ontario Court of Appeal



The accused argued that the trial judge erred in requiring a causal connection between the s. 10(b) violation and the obtaining of evidence. As well, she alleged the judge mistakenly concluded that her ss. 8 and 9 rights had not been violated. She contended that the evidence ought to have been excluded under s. 24(2).

### s. 10(b) > s. 24(2)

The Court of Appeal agreed that the judge erred in requiring a causal connection between the s. 10(b) breach and the obtaining of the evidence. Rather, a

“In this case, there was a clear temporal and contextual connection between the violation of the [accused’s] s. 10(b) rights, the discovery of the knife in her purse, and, ultimately, the discovery of the fentanyl.”

s. 24(2) analysis is triggered by a demonstration that the evidence was “obtained in a manner” that infringed a *Charter* right. “This does not require that the violation cause the police to obtain the evidence, only that there be a nexus or connection between the two,” said the Appeal Court. “In this case, there was a clear temporal and contextual connection between the violation of the [accused’s] s. 10(b) rights, the discovery of the knife in her purse, and, ultimately, the discovery of the fentanyl.”

### s. 9 - Arbitrary Detention

As for the trial judge’s ruling that the accused’s detention was not arbitrary, there was no basis on which to make an objective assessment on the issue of whether the 40 minute detention was justified. There was no evidence regarding the number of pieces of jewelry, the police flyer was not introduced into evidence and the evidence about the activities of the police officers in the store was limited to the officers’ testimony that they spent an unspecified portion of their time in the store comparing an unspecified number of pieces of jewelry to the flyer. “In our view, the lack of explanation regarding what occurred at the store coupled with the failure of the officers to give the [accused] her s.10 (b) rights over the course of 40 minutes made the detention arbitrary,” said the Court of Appeal.

### s. 8 - Unreasonable Search

The trial judge did not err in finding that the search of the accused’s purse was reasonable as an incident to the passenger’s lawful arrest. The officer did not arrest the passenger Stockton so that he could search the accused’s car. Instead, once the police officer saw a piece of jewelry in the passenger’s purse that resembled a piece in the police flyer, he had reasonable grounds to believe she committed an offence and to make the arrest.

### What the trial judge said about the purse search:

*“[W]as it reasonable for [the officer] to search [the accused’s] purse incidental the arrest? I find that it was reasonable for him to search her purse incidental to the arrest of Ms. Stockton.*

*It was located immediately beside where Ms. Stockton was sitting, and so was within easy reach. It was open, affording easy access to her if she wanted to hide stolen property, something small, like jewelry. The purse was not then within Ms. Daley’s possession or control.*

*The search was incidental to the offence for which Ms. Stockton was arrested, he was entitled, as a matter of law, to seek additional evidence with respect to possession of stolen property, which is the offence for which Ms. Stockton was arrested, and also to look for possible weapons or tools of escape accessible to her.”*

excerpt from voir dire ruling

The accused’s purse was immediately beside the passenger and it was open. “The police officer was entitled to search it for evidence of the offence, weapons, or means of escape – i.e. for contraband that Ms. Stockton might have disposed of there,” said the Court of Appeal. “Thus, the search was connected to the reason for the arrest.”

### 24(2) - Exclusion of Evidence

Since the trial judge did not conduct a s. 24(2) analysis, the Court of Appeal did so. It found the nature of police conduct favoured exclusion. “The breach of s. 10(b) was ‘patent’ and unexplained – in an area of law that is not complex or unsettled. These were not minor or inadvertent breaches of ss. 9 and 10(b). There were no extenuating circumstances to explain or attenuate the seriousness of the officers’ conduct. Overall, the police conduct in this case demonstrated a disregard for well-established *Charter* rights.”

As for the impact of the breach on the accused’s *Charter* protected interests, it favoured exclusion as well. “The impact on the [accused’s] *Charter* rights was substantial. The arbitrary detention was not

“The conduct of the police in failing to provide the [accused] with her s. 10(b) rights over the course of 40 minutes while they conducted an investigation was serious.”

fleeing. The [accused] was detained for 40 minutes and never advised of her right to counsel. Furthermore, it is at least possible that what followed – talking to Ms. Stockton in the [accused's] car, her arrest, the search of the car and purse, the discovery of the knife, and the [accused's] own arrest – might not have occurred but for this violation.”

Finally, the truth-seeking function of the criminal trial process favoured admissibility. “Society has an interest in the prosecution of persons who possess narcotics for the purpose of trafficking. Fentanyl is a very dangerous drug. The exclusion of this reliable and objective evidence would defeat the prosecution's ability to prove the case against the [accused] and would undermine the truth-seeking function of the justice system.”

After balancing the three s. 24(2) factors, the Court of Appeal excluded the evidence. “The conduct of the police in failing to provide the [accused] with her s. 10(b) rights over the course of 40 minutes while they conducted an investigation was serious,” said the Court of Appeal. “The impact on the [accused's] Charter-protected rights was substantial. In our view, these factors outweigh” the truth-seeking function of the criminal trial process. The accused's appeal was allowed, the fentanyl was excluded and the accused's conviction was quashed.

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

**Editor's note:** Additional facts taken from Ontario Superior Court of Justice voir dire ruling.

### Note-able Quote

*“What is the difference between an obstacle and an opportunity? Our attitude toward it. Every opportunity has a difficulty, and every difficulty has an opportunity.” - J. Sidlow Baxter*



## STANDARD FIELD SOBRIETY TESTING TESTIMONY NOT EXPERT EVIDENCE

**R. v. Parada, 2016 SKCA 102**



At 12:30 am a police officer stopped the accused after observing her vehicle drive over the centre line, go over the shoulder line, and move back over the centre line of the roadway.

The officer noted the accused was having trouble extracting her driver's licence and he could smell a strong odour of alcohol. When asked if she had been drinking, the accused indicated that she had drank three beers. The officer formed the opinion the accused had alcohol in her body and, since he did not have an approved screening device with him, read a demand to the accused for her to perform sobriety tests.

The officer, certified to administer sobriety tests, had the accused perform the horizontal gaze nystagmus test, the walk-and-turn test and the one-leg stand test. After the tests were conducted, the officer formed the opinion that the accused had committed an offence under s. 253 of the *Criminal Code*. The accused was arrested, taken to the police station and breath tests were obtained resulting in readings of 150 mg% x 2. She was charged with impaired driving and driving over 80 mg%.

# BY THE BOOK:

## Alcohol/Drug Testing: *Criminal Code*



### Testing for presence of alcohol or a drug

s. 254 (2) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle ... or had the care or control of a motor vehicle ..., whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol:

- (a) to perform forthwith physical coordination tests prescribed by regulation to enable the peace officer to determine whether a demand may be made under subsection (3) or (3.1) and, if necessary, to accompany the peace officer for that purpose; and
- (b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

## Saskatchewan Provincial Court



The judge concluded that the officer's evidence concerning the physical coordination tests was not "expert testimony" and therefore the Crown was not required to follow the statutory procedures for expert evidence under s. 657.3 of the *Criminal Code*. In the judge's view, s. 254(2) provides that a "peace officer" has the power to demand an approved screening device test or physical coordination tests. If a person fails an approved screening device test, the Crown is not required to call an expert to explain how the approved

screening device works or the significance of a pass, warn, or fail reading. The judge determined that the physical coordination tests were no different. If Parliament intended the physical coordination tests to be carried out by an expert, they would have called the peace officer an expert as was done in the case of an "evaluating officer" (aka. drug recognition expert) in s. 254(3.1). The accused was convicted of driving over 80 mg%.

## Saskatchewan Court of Queen's Bench



The accused appealed his conviction arguing, among other things, that the testimony related to the standard field sobriety tests was expert opinion testimony. However, the appeal judge opined that the trial judge correctly determined that the officer's testimony about the sobriety test results was not expert evidence. The officer's evidence was used only to determine if he had reasonable grounds to believe the accused had committed an offence under s. 253 within the previous three hours and could therefore demand a breath sample under s. 254(3). The trial judge did not rely on the officer's estimations as to what the breathalyzer readings would be nor did he use his testimony to determine whether the accused was impaired. Sobriety tests under s. 254(2) is an alternative to using an approved screening device, neither of which requires qualification as an expert. The accused's appeal was dismissed.

## Saskatchewan Court of Appeal



The accused appealed his conviction again arguing, in part, that the officer's evidence about the sobriety tests was expert evidence such that it was subject to an expert evidence *voir dire* (aka. a Mohan inquiry - *R. v Mohan*, [1994] 2 SCR 9).

"Section 254(2) is clear that a "peace officer" may demand that a suspected impaired driver perform the sobriety tests. There are no special qualifications or training needed for an officer to be properly authorized by the Criminal Code to conduct an investigation under this first stage of the scheme."



# BY THE BOOK:

## Evaluation of Impaired Operation (Drugs and Alcohol) Regulations: *Criminal Code*



### Physical Coordination Tests

2 The physical coordination tests to be conducted under paragraph 254(2)(a) of the *Criminal Code* are the following standard field sobriety tests:

- (a) the horizontal gaze nystagmus test;
- (b) the walk-and-turn test; and
- (c) the one-leg stand test.

## Peace Officer Opinion Evidence

Generally, opinion evidence is inadmissible unless it falls in one of three exceptions:

- **Expert opinion evidence:** An expert performs the function of providing the judge and jury with a ready-made inference which the judge and jury are unable to draw due to the technical nature of the subject matter. This evidence is an exception to the general rule against opinion evidence because the expert witness has specialized knowledge, skill, or experience and is needed to assist the trier of fact to form a proper conclusion. Admissibility of expert evidence depends on four criteria: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; and (4) a properly qualified expert.
- **Layperson opinion evidence:** "Lay witnesses" can give opinion evidence on issues that do not require special knowledge and where it is virtually impossible to separate the facts from the inferences based on those facts. This could include such things as the identification of handwriting, persons and things, apparent age, the bodily plight or condition of a person, the emotional state of a person, the condition of things, certain questions of value, estimates of speed and distance, and whether someone was intoxicated, as it is not such an exceptional condition as would require a medical expert to diagnose it. Admissibility of layperson opinion

## How the Accused Performed

### Horizontal gaze nystagmus test

The accused scored six out of six. The officer testified that a score of four out of six would mean it is highly likely the person has a blood alcohol level greater than 0.10, and a score of six out of six would make the likelihood higher.

### Walk-and-turn test

The accused scored seven out of eight in the walk-and-turn test. A fail is a score of two out of eight. The accused made several missteps, took the wrong number of steps, and used her arms for balance.

### One-leg stand test

The accused scored four out of four in the one-leg stand test, a fail score.

### Results

The officer testified that if a person fails one test out of three there is a 65%–68% chance that person's blood alcohol level is 0.10 or more. This percentage rises to 80% if two tests out of three are failed.

evidence depends on whether: (1) the witness has personal knowledge of observed facts; (2) the witness is in a better position than the trier of fact to draw the inference; (3) the witness has the necessary experiential capacity to draw the inference; and (4) the opinion is a compendious mode of speaking (the witness could not as accurately, adequately, and with reasonable facility describe the facts he or she is testifying about).

### • **Certification by statute and/or regulations:**

For example, impaired driving provisions in the *Criminal Code* and the *Regulations* allow for a peace officer to give opinion evidence.

## Impaired Driving Scheme

In this case, the Court of Appeal ruled that the evidence of a peace officer relating to standard field sobriety tests did not constitute expert opinion evidence necessitating a *Mohan voir dire*. First, the impaired driving statutory scheme does not require that a peace officer be qualified as an expert witness. An officer is authorized to require drivers to perform physical coordination tests under s. 254(2)(a) and the results of the physical coordination tests may be used to provide reasonable grounds for arrest and a demand for a breath test under s. 253(3)

on an approved instrument. "It would be contrary to the apparent purpose ... to then require the Crown to qualify the arresting officer as an expert witness to explain how he or she utilized the directions given by Parliament to make the impaired driving investigation," said Justice Herauf speaking for the Court of Appeal. "This would effectively weaken the ability of police and prosecutors to investigate and prosecute impaired drivers." He continued:

It is important to note that there are certain limitations in the Criminal Code and the common law that are aimed at preserving a defendant's right to a fair trial. Section 254(2) only authorizes the peace officer to conduct the three tests prescribed under s. 2 of the Regulations, namely, the "horizontal gaze nystagmus" test, the "walk-and-turn" test, and the "one-leg stand" test. The restriction to these three tests is presumably designed to help ensure that the driver's Charter rights are interfered with minimally and shows that Parliament is satisfied that the science underlying the tests support their use.

[...]

Section 254(2) is clear that a "peace officer" may demand that a suspected impaired driver perform the sobriety tests. There are no special qualifications or training needed for an officer to be properly authorized by the Criminal Code to conduct an investigation under this first stage of the scheme. The regulations are specific as to what coordination tests shall be completed, and the performance by the driver may be used to enable the officer to determine whether a further demand may be made. It is not until this second stage of the scheme (under ss. 254(3) or 254(3.1)) that the officer must be a "qualified technician" or an "evaluating officer" to determine the driver's blood alcohol content or determine impairment by drug or combination of drug and alcohol. This implies that Parliament did not intend to require an officer to have any kind of special training or knowledge to perform the sobriety tests and be qualified to testify to its results. ... [references omitted, paras. 34-36]

The officer did not need to be qualified as an expert and therefore a *Mohan voir dire* was not necessary.

The accused's appeal was dismissed.

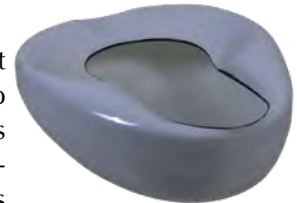
Complete case available at [www.canlii.org](http://www.canlii.org)

## GENERAL WARRANT MAY AUTHORIZE BEDPAN VIGIL

**R. v. Poirier, 2016 ONCA 582 (CanLII)**



The police received information from five confidential informers that the accused was a drug addict actively dealing in heroin, methamphetamine, and oxycodone. The information indicated that the accused stored significant quantities of drugs in plastic baggies in his rectum, only briefly removing the drugs to make a sale. On the basis of this and other information, police sought a general warrant under s. 487.01 of the *Criminal Code* that would, after police received information that the accused was in possession of a large quantity of heroin or crystal meth, authorize his detention until the drugs could be recovered from his rectum. After receiving a tip from one of their confidential sources that the accused was in possession of heroin, crystal methamphetamine, cocaine, and other substances, and that the drugs were packaged to be inserted in his rectum, the warrant was executed.



The accused was arrested at 1:32 pm and transported to the police station. He was strip searched in an open-door room, which was inadvertently recorded by a video camera. He was read the terms of the warrant and spoke to a lawyer. He was placed in a "dry cell", which had no running water and a covered sink and toilet. He was handcuffed to the bars of the cell such that he could sit or lie down on a bench next to the cell door, but only reach as low as his chest. About 21 hours later, the police placed oven mitts on his hands and secured them with duct tape. He had more freedom of movement but was still prevented him from accessing his rectal area. He remained handcuffed but was no longer chained to the bars of the cell.

The accused subsequently asked to be taken to the washroom and at 11:53 am passed two packages in only a small amount of watery stool. Each package contained 28 grams of crystal methamphetamine. He said that was all he was carrying. Without a significant bowel movement, the officers did not

# BY THE BOOK:

## General Warrant: *Criminal Code*

### Information for General Warrant



s. 487.01 (1) A provincial court judge ... may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if

- (a) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;
- (b) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and
- (c) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.

### Limitation

- (2) Nothing in subsection (1) shall be construed as to permit interference with the bodily integrity of any person.

...

believe him. He later had two more bowel movements, one containing 28 grams of heroin and the other containing heroin, cocaine, and Dilaudid pills. The last bowel movement occurred some 30 hours after his initial detention. Satisfied there were no more drugs inside the accused, his handcuffs were removed and he was moved out of the dry cell. He was told he would be charged with possessing crystal methamphetamine, heroin, cocaine and Dilaudid for the purpose of trafficking. He was then brought before a justice for the first time after spending a total of 43 hours in police detention.

## Ontario Superior Court of Justice



The accused argued that the general warrant was unlawful and that he had been subject to arbitrary detention and imprisonment under s. 9. As well, he submitted that the manner in which the bedpan vigil was carried out violated his rights under s. 8, and that his right to security of the person had been violated under s. 7. He sought the exclusion of evidence under s. 24(2).

The police said they detained the accused in the manner they did because they did not want him to be able to remove the drugs from his rectum and perhaps swallow them or otherwise destroy or conceal them. The door to the cell was left open so that officers monitoring the accused could enter quickly if needed so as to prevent the destruction of evidence, or to check on his medical condition. The judge found the accused's *Charter* rights had not been breached. The accused was convicted of possessing heroin (1.5 ounces), cocaine (7 grams), and crystal methamphetamine (2 ounces) for the purpose of trafficking and simple possession of hydromorphone (Dilaudid). He was sentenced to 10 years in prison.

## Ontario Court of Appeal



The accused contended that a general warrant could not be issued for a bedpan vigil because a bedpan vigil is not a search; it is a detention. As well, the general warrant purported to authorize non-compliance with s. 503 of the *Criminal Code* which requires that an accused person be taken before a justice "without unreasonable delay and in any event within a period of 24 hours".

He also suggested that the warrant was executed in an unreasonable manner contrary to s. 8 of the *Charter*. Further, he asserted that the detention jeopardized his right to life and security of the person under s. 7 because the monitoring of his medical condition was inadequate. He again sought the exclusion of the drugs under s. 24(2) of the *Charter*.

“[A] bedpan vigil search is a search within the meaning of s. 8 of the Charter. A general warrant issued under s. 487.01 can authorize a bedpan vigil search. The fact that detention of the individual is necessary to conduct a bedpan vigil search does not, in itself, make the warrant invalid.”

### General Warrant

Justice Weiler, authoring the Court of Appeal's unanimous judgment, found that a bedpan vigil was a search that could be authorized by a general warrant:

[A] bedpan vigil search is a search within the meaning of s. 8 of the Charter. A general warrant issued under s. 487.01 can authorize a bedpan vigil search. The fact that detention of the individual is necessary to conduct a bedpan vigil search does not, in itself, make the warrant invalid. [para. 49]

And further:

In this case, I would hold that the requirements of s. 487.01(1) were met. The issuing judge was satisfied that there were reasonable grounds to believe that the [accused] had trafficked drugs; given the issuance of the warrant and the harm to society from illicit drug trafficking, it can be inferred he was satisfied that the second requirement was also met; finally, no other provision in the Criminal Code or any other Act of Parliament provides for a warrant, authorization or order permitting a bedpan vigil search. [para. 30]

A s. 487.01 warrant “includes doing what is reasonable necessary to carry out the search, and may include detention. The length and nature of detention required must take into consideration the nature of the search to be conducted and the necessity to conduct that type of search,” said Justice Weiler. “I would hold that the fact that a bedpan vigil search takes time and involves the detention of the individual while the search is carried out does not make it any less a search.”

### What the Warrant said:

1. When one of five proven, reliable Confidential Sources referred to in this Application provides information that [the accused] is currently in possession of a large supply of Heroin and/or Crystal Methamphetamine, Officers of the Sarnia Police will locate [the accused] at the first opportunity outside of a dwelling residence and immediately place him under arrest at that time for possession for the purpose of trafficking Heroin and/or Crystal Methamphetamine.
2. [The accused] will be brought to the Sarnia Police Station. The warrant will be shown and explained to [the accused].
3. [The accused] will be given an opportunity to contact his legal counsel.
4. [The accused] will be taken to a cell where his actions will be constantly monitored by officers of the same sex.
5. [The accused] will be given the opportunity to do one of the following:
  - i) Voluntarily, in the presence of Officers of the same sex, remove the package of Heroin and/or Crystal Methamphetamine from his rectum. If [the accused] does voluntarily remove only a single package from inside of his rectum, [the accused] will still be required to provide a bowel movement which will satisfy the Officer's belief that there are no more drugs inside of his rectum. This is due to the information provided by all Sources with respect to the amounts of drugs and multiple packages that [the accused] will conceal up inside of his rectum at all times, in order to ensure that all of the drugs have been removed or vacated from inside of [the accused]'s rectum.
  - ii) Voluntarily have a bowel movement, in the presence of Officers of the same sex, significant enough to dislodge the package of Heroin and/or Crystal Methamphetamine from inside of his rectum, or enough to satisfy Officer's monitoring that no further packages exists within his rectum.
6. Should [the accused] refuse to cooperate with the provisions outlined in the terms and conditions found in Appendix “A”, then [the accused]'s detention shall continue until he has a bowel movement, significant enough to satisfy the Officer's monitoring to remove the package of Heroin and/or Crystal Methamphetamine or, to have a bowel movement significant enough to satisfy the Officer's monitoring that no packages exists within the rectum of [the accused].

**The warrant authorized police action from November 20, 2012 to December 19, 2012.**



“[A] bedpan vigil search meets the criteria for a general warrant set out in s. 487.01(1) and s. 487.01(2) and does not constitute interference with bodily integrity.”

As for whether a bedpan vigil interferes with the “bodily integrity of any person”, a limitation set out in the general warrant provisions, the Court of Appeal found it did not. A bedpan vigil is passive in nature and does not involve an invasive procedure, nor were the police attempting to collect bodily samples containing personal information relating to the accused:

[A] bedpan vigil search meets the criteria for a general warrant set out in s. 487.01(1) and s. 487.01(2) and does not constitute interference with bodily integrity. [para. 48]

### s. 503 *Criminal Code*

The Court of Appeal did, however, find the general warrant defective because it did not account for s. 503 of the *Criminal Code*. Section 503(1) requires a peace officer who arrests a person, with or without a warrant, to bring the person before a justice, where a justice is available, without unreasonable delay or in any event within 24 hours of arrest. The provisions of s. 503 are mandatory and cannot be overridden by the terms of a general warrant, which in this case purported to authorize detaining the accused indefinitely without bringing him before a justice:

Compliance with s. 503 is not simply a matter of form. Nor does it matter that the [accused] may not likely have been released by a justice of the peace while the bedpan vigil search was being conducted. If the police had complied with s. 503, the manner in which the [accused] continued to be detained would have been subject to court supervision. The [accused's] detention would have changed from being a detention pursuant to the execution of the general warrant to a court monitored detention that ensured the ongoing protection of the [accused's] Charter rights.

The valid investigative purpose that the bedpan vigil search serves is not undermined by compliance with s. 503. As the Crown recognized, it would have been open to the police to take the [accused] before a justice by

## BY THE BOOK:

### Appearance Before a Justice: *Criminal Code*

#### Taking Before Justice



s. 503(1) A peace officer who arrests a person with or without warrant ... shall cause the person to be detained in custody and, in accordance with the following provisions, to be taken before a justice to be dealt with

according to law:

- (a) (where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period, and
- (b) where a justice is not available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice as soon as possible, unless, at any time before the expiration of the time prescribed in paragraph (a) or (b) for taking the person before a justice,
- (c) the peace officer or officer in charge releases the person under any other provision of this Part, or
- (d) the peace officer or officer in charge is satisfied that the person should be released from custody, whether unconditionally under subsection (4) or otherwise conditionally or unconditionally, and so releases him.

telephone. Moreover, a justice can remand an arrested individual to prison for up to three days at the request of the prosecutor under s. 516 of the Code. “Prison” is defined in s. 2 of the Code as including a “lock-up,” and therefore the cells at the police station would appear to come within that definition. The police could have telephoned a justice of the peace and asked for the [accused] to be remanded into their custody at the police station for up to three days, or until the [accused] had expelled the drugs from his rectum, whichever was sooner. [paras. 58-59]

Since the general warrant was defective on the s. 503 basis, it did not authorize the search carried out in this case.

### Search Incident to Arrest

For a warrantless search incident to arrest to be a lawful search, the Crown must show:

1. the accused's arrest was lawful;
2. the search was for a valid objective related to the arrest such as the discovery and preservation of evidence; and
3. the search was executed in a reasonable manner.

Here, Justice Weiler found the first and second requirements were met:

- **Lawful arrest:** The police had reasonable and probable grounds to arrest the accused given the information they had received from their confidential informers that he was in possession of a large quantity of drugs.
- **Valid Objective:** The search was conducted in pursuit of valid purposes connected to the arrest, including protecting evidence from destruction at the hands of the arrestee, and discovering evidence which could be used at trial. The police had reasonable and probable grounds to believe the bedpan vigil would afford evidence of the offence for which the accused was arrested. The police had reliable information from their informers that the accused's practice was to secret the drugs he sold in his rectum and, importantly, the police had also been informed that the drugs had been packaged for insertion into his rectum. The crucial link between the location and purpose of the search incident to arrest and the grounds for the arrest was therefore present. The police must have reasonable and probable grounds to believe the bedpan vigil search will afford evidence of the offence for which the accused was arrested as well as reasonable and probable grounds to arrest.

So, even if a bedpan vigil could be conducted incident to arrest, the search in this case was not carried out in a reasonable manner. The manner in

### R. v. Poirier Timeline

Date/Time	Action
November 20	General Warrant granted
December 5	General Warrant executed
1:32 pm	Accused arrested
	Accused transported to police station and strip searched.
2:10 pm	Accused placed "dry cell". He was handcuffed to the bars in his cell.
December 6	Accused still under detention
11:21 am	Oven mitts placed over accused's hands and secured with duct tape.
11:53 am	Accused passes two packages: <ul style="list-style-type: none"> <li>• 28 grams of crystal methamphetamine</li> <li>• 28 grams of crystal methamphetamine</li> </ul>
1:32 pm	Accused passes one package: <ul style="list-style-type: none"> <li>• 28 grams of heroin</li> </ul>
8:10 pm	Accused passes one package: <ul style="list-style-type: none"> <li>• 14 grams of heroin</li> <li>• 7 packets of heroin each weighing 0.6 grams</li> <li>• 1 gram of cocaine</li> <li>• 8 Dilaudid pills each weighing 8 mg</li> <li>• two packets of cocaine each weighing 3.5 grams</li> </ul>
December 7	Accused brought before a Justice 43 hours after his arrest
Times taken from 2016 ONCA 582 & 2014 ONSC 3117.	

which the search was carried out did not have regard for the accused's personal dignity as much as possible, or for medical concerns specific to him:

- The strip search violated the accused's right to privacy. It was not conducted in a private area, but an area where one could see into the room; it was inadvertently video recorded. Further, rather than proceeding incrementally so as to ensure that the accused was not completely undressed at any one time, the accused was completely naked for a period of time.

- The bedpan vigil was carried out in an unreasonable way. The accused was handcuffed to the bars of his cell for the first 21 to 22 hours of his detention. This use of physical constraint was not proportionate to the objective, nor did it strike an appropriate balance between the need for effective law enforcement and the accused's interests in privacy and dignity. A lesser restriction (oven mitts and duct tape) proved equally effective at preventing the accused from removing or consuming the drugs, and allowed him greater freedom of movement.
- The accused was lodged in his cell in long johns and only given his track pants to wear over top after a day had gone by. He had no proper bed, and, initially, no bedding. Only after he complained of being cold, likely due to his withdrawal symptoms, was he given a blanket.
- The police knew the accused was an addict. When he began to show symptoms of withdrawal, the police made no provision for measures to ease his discomfort, such as having a doctor assess him for prescription medication or provide him with ordinary Tylenol. The police failed to minimize the accused's discomfort during his detention.
- Believing that the accused potentially had large quantities of heroin and crystal methamphetamine stored in his rectum, they had a duty to take reasonable steps to ensure that his safety and security were not compromised as a result of the nature of the search. He was not advised that if he felt unwell or wished to see a doctor he could and, when he did ask to see a doctor, no effort was made to comply with his request.

#### **s. 24(2)**

Having found ss. 7, 8 and 9 *Charter* breaches, the Court of Appeal excluded the drugs under s. 24(2) because its admission into evidence would bring the administration of justice into disrepute. The accused's appeal was allowed, his convictions were set aside and acquittals were entered on all counts.

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

#### **Note-able Quote**

*"Success is much more a matter of courage than ability."* - Joe Segal

### **EVEN IF RIGHTS BREACHED, DIGITAL PHOTOS ADMISSIBLE UNDER s. 24(2)**

**R. v. Balla, 2016 ABCA 212**



As part of an investigation into dial-a-dope drug trafficking, the police executed a search warrant under s. 11 of the *Controlled Drugs and Substances Act* (CDSA) at an apartment. The search warrant did not refer to a digital camera or images that might be retrieved from one but authorized the search for and seizure of:

***"Cocaine, weigh scales, packaging materials, score sheets, cash, electronic communication devices, and documents relating to the ownership / occupancy".***

In the accused's bedroom, police found a "score sheet", five cellular telephones, a bullet-proof vest plate, ammunition, machetes, various receipts in his name, plastic baggies, 0.2 grams of powder cocaine and a digital camera. The digital camera contained a memory card with many pictures, including photos of weapons (or imitations) and him posing in the apartment with various weapons (or



imitations) including an AK-47 looking firearm. He also posed with a handgun and there was a picture of a handgun with its serial number scratched off. An "AK-47 looking weapon" was found in the apartment and a handgun was found in the trunk of a car associated to the accused. In the bedroom belonging to another target of the investigation, police seized a significant amount of cash, a gun magazine, magic mushrooms, oxycodone and marijuana. In the common areas of the apartment police found a digital scale, marijuana, oxycodone pills and more packaging. The accused was charged with drug and weapons offences.

## Alberta Court of Queen's Bench



The judge found that a "pure" digital camera was not the same as a cellular telephone, which also has the ability to take photographs. "It appears that a person should not have an expectation of the same level of privacy in a digital camera, given that ... a digital camera does not have or retain the biographical core of personal information that they maintain on a computer or smartphone," said the judge. "The digital camera retains images, or 'documents,' nothing more. It is an electronic photo album." The judge found the language of the warrant would include the digital camera and the "documents" contained in it. The judge concluded there was no s. 8 *Charter* breach and, even if there was, he would not have excluded the photographs under s. 24(2). He noted the uncertainty in the law at the time as to whether a police officer executing a search warrant that permits the seizure and search of "electronic devices, and documents relating to the ownership/occupancy". The police believed on reasonable grounds that the search was authorized by the warrant. Plus, the officer did not have the benefit of Supreme Court of Canada jurisprudence that has since been issued. The accused was convicted on 13 counts related to drug trafficking and weapons offenses.

## Alberta Court of Appeal



The accused argued, in part, that the examination of the camera's contents by police, which occurred while they were exercising a valid search warrant, was an unreasonable search and seizure under to s. 8 of the *Charter*. In his view, the examination of the camera was not authorized by the warrant and was therefore warrantless. Further, he asserted that the evidence of the images should have been excluded under s. 24(2).

The Court of Appeal saw no need to address whether the examination of the camera was an unreasonable search. Instead, it found that even if there was a s. 8 *Charter* breach, the evidence was admissible under s. 24(2). The police were not acting in bad faith and were not negligent in their opinion that they were

"[A] police officer cannot just shrug her shoulders and walk away. The officer must decide one way or the other what her authority allows. While the police must comport themselves with integrity and must manifest the rule of law by complying with the Charter and the law generally, they have to exercise street-level judgment, often and routinely."

entitled, by operation of law under the warrant, to examine the camera and its contents. The police were entitled to believe that they were acting under s. 11 of the *CDSA*. "It should not be forgotten that 'police officers have a duty to enforce the law and investigate crimes'," said the Court of Appeal. It continued:

So a police officer cannot just shrug her shoulders and walk away. The officer must decide one way or the other what her authority allows. While the police must comport themselves with integrity and must manifest the rule of law by complying with the Charter and the law generally, they have to exercise street-level judgment, often and routinely. ...

This case is not, of course, a case where the officer had little time to reflect. But in focusing on the degree of alleged departure from warrant authority for the purposes of s 24(2) of the Charter, it is pertinent to note that the warrant here also provided the police officers effecting this search with a reasoned basis to believe that they had the authority to review the contents of the camera, howsoever mistaken. The warrant was, indeed, relied on by the police in their evidence. The warrant authorized the search for and seizure of: "Cocaine, weigh scales, packaging materials, score sheets, cash, electronic communication devices, and documents relating to the ownership / occupancy of [specified address]".

The Crown submits that the warrant provided authority to seize the camera itself. No real dispute arises on that argument based on what the police could reasonably have believed. The



Crown goes on to contend, however, that the camera content on its memory card was a “document” for the purposes of this contention. Assuming, without deciding, that a photograph in a frame depicting the [accused] inside that residence with the photo sitting in the open on a shelf in the residence, would constitute a document, it would then be arguable that such a photograph would be a document “relating to the ownership/occupancy of” the address.

As for whether the officer could infer that there was probably relevant evidence on the camera as to their investigation within the meaning of s 11 of the CDSA (quite apart from whether that evidence would have met the warrant definition as to occupancy), the reasonableness and genuineness of police beliefs based upon the grounds in evidence would be assessed on a “practical, non-technical, and common sense basis” and the totality of the circumstances by a court from the shoes of the police officer. [references omitted, para. 34-37]

The Court of Appeal went on to agree with the trial judge’s s. 24(2) conclusion and upheld the

admission of the photographs. Although the officer agreed at trial that the warrant was not “specifically for the camera”, he said that it was his understanding that the search warrant authorized the police to “look into that camera”. As the Court of Appeal noted, “there is no reason to think that the police intentionally opted to step past the legal authority they could have obtained. This was a technical mistake at worst even if related to authority.” As for the impact of the accused’s Charter-protected interests, it did not warrant exclusion. Finally, society’s interest in the adjudication of the case on its merits favoured inclusion. “Exclusion of the evidence here would contradict the truth seeking function of the administration of justice in the context of the dangerous combination of drugs and weapons, and would be the consequence of what in the old days might have been called the blunder of the policeman,” said the Court of Appeal.

The accused’s appeal was dismissed.

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

**3<sup>RD</sup> ANNUAL  
BRITISH COLUMBIA LAW ENFORCEMENT  
MEMORIAL GOLF TOURNAMENT**

**Friday, September 23, 2016**  
12:00 PM Shotgun Start  
Beach Grove Golf Club in Tsawwassen

**Followed by Dinner & Prizes**

**Texas Scramble Format (4-Person Teams)**  
Inter-Agency Competition for  
Peace Officers

Mail, email or fax your entry forms to:  
Rick Stewart  
BC Law Enforcement Memorial  
c/o Abbotsford Police Department  
2838 Justice Way, Abbotsford, BC V2T 3P5

Fax: 604-859-4812 or email: [memorial@abbypd.ca](mailto:memorial@abbypd.ca)

**Entry Fee: \$110** – includes green fee & dinner



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## BRITISH COLUMBIA LAW ENFORCEMENT MEMORIAL

*In memory of those  
who gave their lives  
in the service of  
British Columbia  
and its citizens*



**1:00 PM SUNDAY, SEPTEMBER 25, 2016**

**HOSTED BY THE VANCOUVER POLICE DEPARTMENT AND DELTA POLICE DEPARTMENT  
CEREMONY AT BROCKTON OVAL, STANLEY PARK, VANCOUVER, BC**

Law Enforcement participants to form up at HMCS Discovery at 10:30 AM

### CONTACTS:

Sergeant Major James Pearson  
778-837-1537 james.pearson@vpd.ca

Lorne Pike  
604-690-1744 lpik@deltapolice.ca

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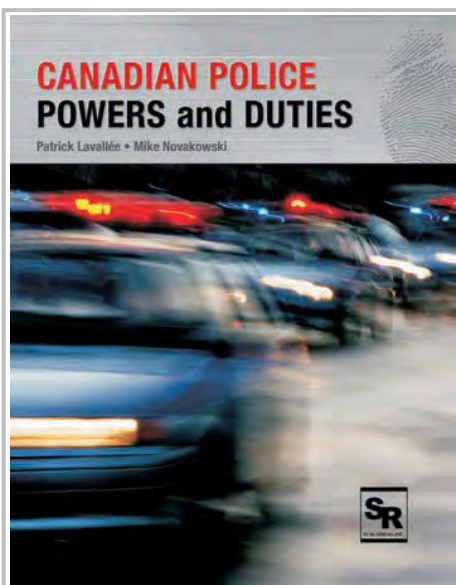
# Canadian Police Powers and Duties / 1<sup>st</sup> Edition

by Patrick Lavallée and Mike Novakowski

*Be well informed to act well*

**NEW EDITION**

**Sometimes unknown, sometimes improperly applied but often contested, powers and duties are the cornerstone of most police investigations. A good understanding of powers and duties is crucial to the work of a peace officer.**



This book aims to help those who wish to master the powers and duties of a peace officer. It will be of interest to future police officers as well as to those currently serving and to lawyers or any other person who wants to thoroughly understand the powers and duties of a peace officer. Used by several police officers who want to update their knowledge at promotion exams.

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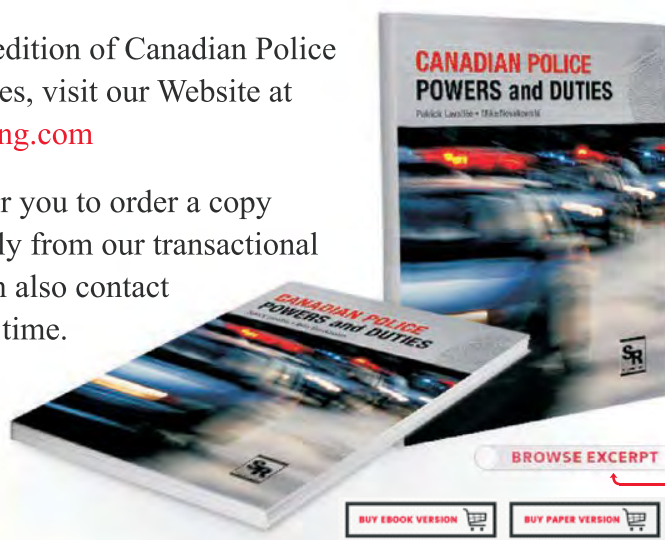


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## 2015 POLICE REPORTED CRIME



In July 2016 Statistics Canada released its *"Police-reported crime statistics in Canada, 2015"* report. Highlights of this recent collection of crime data include:

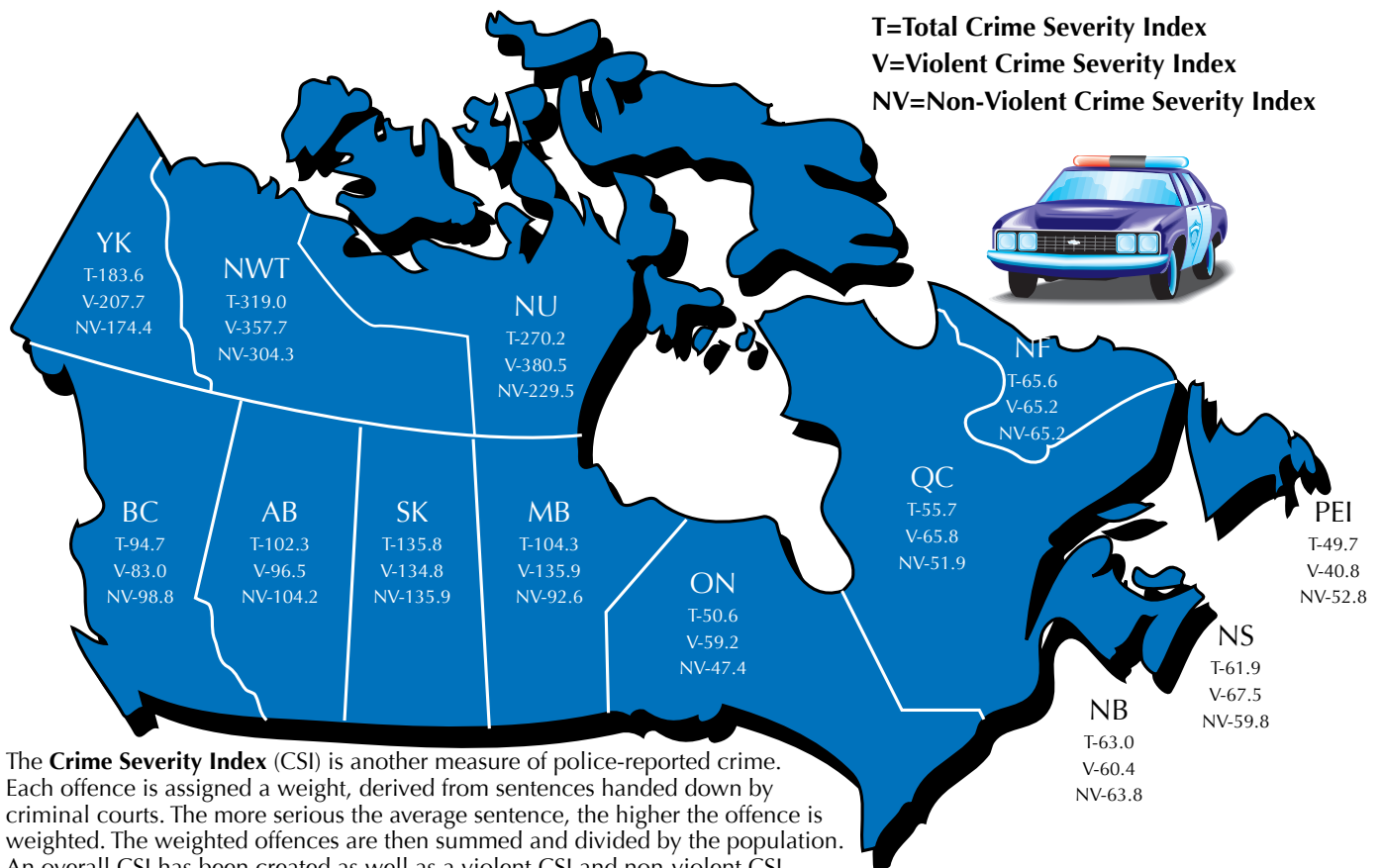
- There were **1,863,675** crimes (excluding traffic) reported to Canadian police in 2015; this represents **70,063** more crimes reported when compared to 2014.
- The total crime rate increased **+3%**. This includes a violent crime rate rise of **+2%** and a property crime rate rise of **+4%**.

Source: Statistics Canada, 2016, "Police-reported crime statistics in Canada, 2015, Catalogue no. 85-002-X, released on July 20, 2016.

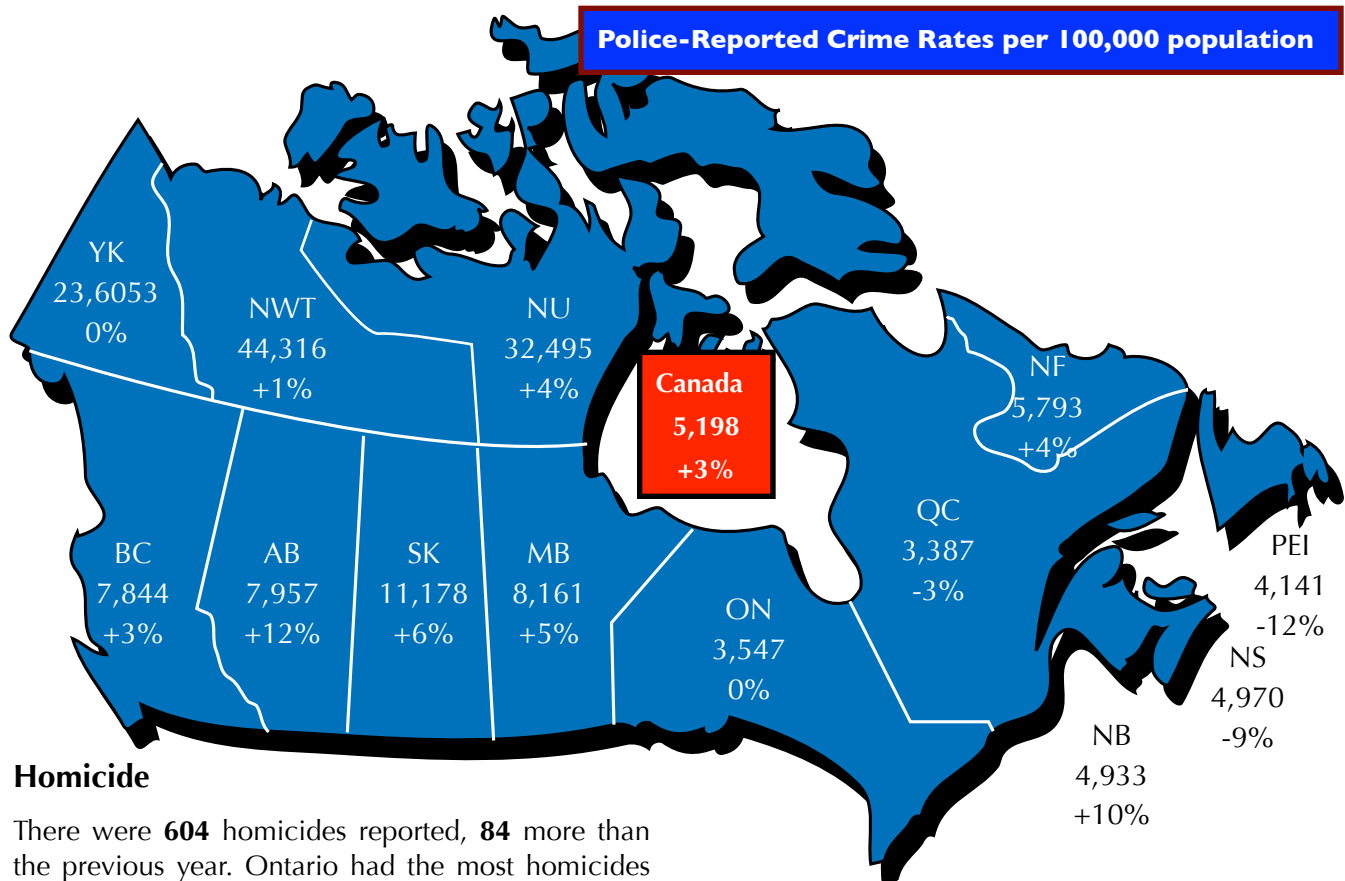
### Police-Reported Crime Severity Indexes

#### Police-Reported Impaired Driving Offences

Province	Rate	Impaired Driving Offences	Rate change 2014 to 2015
SK	575	6,519	-5%
PEI	386	264	-6%
AB	314	13,189	-9%
NS	281	2,653	-7%
NF	261	1,376	-12%
BC	249	11,652	-9%
NB	238	1,795	+5%
MB	217	2,811	0%
QC	184	15,199	0%
ON	111	15,280	0%







## Homicide

There were **604** homicides reported, **84** more than the previous year. Ontario had the most homicides at **174**, followed by Alberta (**133**), British Columbia (**95**) and Quebec (**77**). The Yukon and PEI reported one (**1**) homicide each while Nunavut reported two homicides followed by Newfoundland with three (**3**). As for provincial or territorial homicide rates, the Northwest Territories had the highest rate (**11.34** per 100,000 population) followed by Nunavut (**5.42**), Saskatchewan (**3.79**), Manitoba (**3.63**) and Alberta (**3.17**). As for Census Metropolitan Areas (CMA's), Regina, SK had the highest homicide rate at **3.30**. The Canadian homicide rate was **1.68**.

Top CMA Homicide Rates per 100,000			
CMA	Rate	CMA	Rate
Regina, SK	3.30	Windsor, ON	1.81
Saskatoon, SK	3.22	Kingston, ON	1.80
Winnipeg, MB	2.72	London, ON	1.57
Thunder Bay, ON	2.48	St. Catharines-Niagara, ON	1.56
Saint John, NF	2.36	Guelph, ON	1.53
Halifax, NS	1.91	Barrie, ON	1.41

## Canada's Top Ten Reported Crimes

Offence	Number
Theft Under \$5,000 (non-motor vehicle)	488,540
Mischief	274,829
Administration of Justice Violations	175,341
Break and Enter	159,338
Assault-level I	156,688
Disturb the Peace	104,129
Fraud (excluding identity fraud)	94,396
Theft of Motor Vehicle	78,849
Impaired Driving	72,039
Uttering Threats	62,845

## Robbery

In 2015 there were **22,080** robberies reported, resulting in a national rate of **62** robberies per 100,000 population. Manitoba had the highest robbery rate followed by Saskatchewan, Alberta and British Columbia.

Police-Reported Robberies			
Province/Territory	Rate	Robberies	Rate change 2014 to 2015
MB	127	1,642	+6%
SK	86	978	+5%
AB	81	3,404	+23%
BC	78	3,651	+7%
NWT	59	26	+30%
ON	55	7,636	-1%
YK	53	20	-24%
NU	51	19	-2%
QC	49	4,030	-1%
NF	35	186	+17%
NS	34	318	+13%
NB	20	154	+4%
PEI	11	16	-43%
<b>CANADA</b>	<b>62</b>	<b>22,080</b>	<b>+5%</b>

- Winnipeg, MB had the highest CMA rate for robbery in Canada (**178**), **+7%** higher than its 2014 rate. Quebec City, QC had the lowest rate (**15**). Thunder Bay, ON reported a jump of **42%** in its robbery rate. Saint John, NB (**+34%**), Kingston, ON (**+31%**) and Trois Rivières, QC (**+30%**) also saw high double digit rate increases.
- Six CMAs reported declines in robberies of -10% or more: Saguenay, QC, (**-30%**), Quebec City, QC (**-28%**), Greater Sudbury, ON (**-19%**), Sherbrooke, QC (**-17%**), St. Catharines-Niagara, ON (**-16%**) and Saskatoon, SK (**-10%**).



## Top Ten CMA Robbery Rates per 100,000

CMA	Rate	CMA	Rate
Winnipeg, MB	178	Toronto, ON	76
Thunder Bay, ON	149	St. John's, NL	73
Saskatoon, SK	131	Brantford, ON	60
Regina, SK	101	Halifax, NS	59
Montreal, QC	82	Ottawa, ON	58

## Break and Enter

In 2015 there were **159,338** break-ins reported to police. The national break-in rate was **444** break-ins per 100,000 people. Nunavut had the highest break-in rate (**1,633**) followed by the Northwest Territories (**1,195**).



## Police-Reported Break-ins

Province/Territory	Rate	Break-ins	Rate change 2012 to 2013
NU	1,633	603	-2%
NWT	1,195	527	+14%
SK	830	9,407	+9%
YK	802	300	+40%
MB	684	8,842	+17%
AB	656	27,517	+34%
BC	643	30,133	0%
NF	485	2,558	+1%
NB	444	3,346	+19%
QC	395	32,665	-8%
PEI	343	502	+2%
NS	340	3,202	-13%
ON	288	39,736	-1%
<b>CANADA</b>	<b>444</b>	<b>159,338</b>	<b>+4%</b>

## PART VI AUTHORIZATION NOT REQUIRED FOR HISTORICAL TEXT MESSAGES

R. v. Jones, 2016 ONCA 543



As part of their investigation into the possession and trafficking of firearms, the police obtained a production order under s. 487.012 of the *Criminal Code* directed at Telus seeking, among other things, any incoming or outgoing text messages on a particular account associated with a target. Telus provided the historical text messaging information, which included an exchange about the potential sale of a handgun between two phones. One phone was associated with the target and the other was allegedly used by the accused. Both phones, however, were listed under other names.

Relying in part on this text message exchange, police obtained a *Criminal Code* Part VI wiretap authorization for a number of phones associated with the suspects. Intercepted communications were then used to support an additional Part VI wiretap authorization. Search warrants were also granted and executed by the police. The searches resulted in marijuana trafficking and proceeds of crime charges against the accused. Firearm charges were also laid on the basis of the text messages obtained under the production order.

### Ontario Court of Justice



The accused, along with the target, challenged the production order. He contended that if the police wanted to obtain information about their text messages from service providers, they needed a Part VI wiretap authorization, not a production order. The accused submitted that his privacy interest in the text messages was self-evident while the Crown suggested he had no privacy interest in them.

The judge found the accused had no standing to argue his s. 8 *Charter* rights were breached. In her view, there was no evidence presented that the accused had either a subjective or objective reasonable expectation of privacy in the



circumstances. The judge also rejected the contention that the police required a Part VI authorization for the production of the text messages. She was of the opinion that a production order was the proper mechanism to access the cell phone records and text messages. The accused was convicted of several firearm and drug trafficking offences and he was sentenced to five years and seven months in prison, less time served.

### Ontario Court of Appeal



The accused argued, among other things, that the trial judge erred in concluding that he did not have standing to challenge the production order. He also submitted that the judge erred in upholding the use of a production order to obtain the Telus phone records.

### Standing

In this case, the Court of Appeal found the trial judge did not err in concluding that the accused had not established a reasonable expectation of privacy in the Telus records. He did not testify or lead evidence about his subjective expectation of privacy. Nor was the Telus account or phone in his name. He did not use this phone, nor was he alleged to have used it. Further, there was nothing to suggest that Telus was contractually bound to the accused to keep any of the text messages confidential.

### Production Order v. Wiretap Authorization

Although the standing issue was dispositive of the appeal, Justice MacPherson also agreed with the judge that a Part VI authorization was not needed to obtain historical text messages:

To fall under Part VI, there needs to be a prospective component to the private communications, otherwise the communications are not being intercepted. This is because the

"A Part VI authorization is not required for the search and seizure of historical text messages."

word "intercept" suggests an interference between the place of origin and the destination of the private communication. There is no such interference when obtaining historical text messages stored on a phone or a service provider's server.

... I would not describe the production of historical text messages as surveillance or an interception. It is, quite simply, a search and seizure of a historical record of text messages sent and received in the past. [references omitted, paras. 30-31]

The Court of Appeal concluded that "a Part VI authorization is not required for the search and seizure of historical text messages."

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

## **NO PRIVACY INTEREST IN SENT TEXT MESSAGES ON RECIPIENT'S PHONE**

**R. v. Marakah, 2016 ONCA 542**



Police launched an investigation into persons who had legally purchased a number of firearms over a short period of time. One of these persons, Winchester, had legally purchased 45 firearms over a six-month period. As part of the investigation, police received information from a confidential informer implicating the accused. The police obtained search warrants for four locations – three associated with Winchester and one associated with the accused. When police executed the warrants, they arrested Winchester and seized his iPhone. When police entered the accused's residence, he grabbed his Blackberry phone but a police officer knocked it out of his hand and arrested him. Both phones were forensically searched and were found to contain text messages between the accused and Winchester that clearly implicated them in gun trafficking.

## **Ontario Court of Justice**



The accused challenged the search warrant at his residence and the search of both his and Winchester's cell phones. The judge found s. 8 breaches in relation to the search of the accused's residence and his cellphone and excluded the evidence obtained from those searches under s. 24(2) of the *Charter*. As for the search of Winchester's cellphone, the judge dismissed the application. He found that the accused did not have standing to argue his s. 8 rights were breached in relation to Winchester's phone. Although he accepted that the accused had a subjective expectation of privacy in the text messages he authored and sent to Winchester, this privacy expectation was not objectively reasonable. When he sent the text messages he had no control over what would happen to them.

"I accept that the sender of a text message has a reasonable expectation of privacy in its contents after it has been sent but before it reaches its intended destination," said the judge. "This would include text messages stored in a service provider's data base. Once the message reaches its intended recipient, however, it is no longer under the control of the sender. It is under the complete control of the recipient to do with what he or she wants. In my view, there is no longer any reasonable expectation of privacy in the sender." The accused was subsequently convicted on two counts of trafficking in firearms, conspiracy to traffic in firearms, possession of a loaded restricted firearm, and possession of a firearm without a valid license. He was sentenced to nine years' imprisonment, less credit for pre-trial custody.

## **Ontario Court of Appeal**



The accused appealed his convictions alleging that the trial judge erred in concluding that he had no s. 8 *Charter* standing to challenge the search of Winchester's cell phone. In his view, his subjective expectation of privacy in the text messages was objectively reasonable even after the messages were received by Winchester. He sought their exclusion under s. 24(2).



“Like all other Charter rights, s. 8 protects people, not places. The right to challenge the legality of a search depends upon the accused establishing that his personal privacy interests are engaged.”

## Standing

Justice MacPherson, delivering the majority's decision, summarized the issue of s. 8 *Charter* standing as follows:

Section 8 of the Charter protects the right to be secure from unreasonable search and seizure. It is framed in a way that attempts to strike a balance between important societal interests and an individual's privacy interests.

Like all other Charter rights, s. 8 protects people, not places. The right to challenge the legality of a search depends upon the accused establishing that his personal privacy interests are engaged.

Section 8 does not protect all privacy interests, though. It protects only a reasonable expectation of privacy ...

Accordingly, an accused will only have standing to challenge a search or seizure when he or she has a reasonable expectation of privacy. Standing is not automatic. ...

Further, the decision as to whether an accused has a reasonable expectation of privacy must be made without reference to the conduct of the police during the impugned search. The legality or illegality of the police search is irrelevant to the determination of standing. The court must first determine the threshold question of whether the accused has a reasonable expectation of privacy. If one is found, the accused then has standing to challenge the reasonableness of the search and seizure.

It is well-established that to determine whether an accused has a reasonable expectation of privacy, courts must take a contextual approach and consider the totality of the circumstances.

This is true whether it is a personal, territorial or informational privacy interest at stake. The “totality of the circumstances” test is one of

substance, not of form. references omitted, paras. 26-32]

In this case, the majority concluded that the accused had no standing to bring a s. 8 challenge concerning the search of Winchester's cell phone. The accused had no ownership in or control over Winchester's phone and there was no obligation of confidentiality between the two. Nor did the subject matter of the communications touch on the accused's biographical core nor was it of an intimate nature:

The facts of this case demonstrate that ... the ability to control access to the information is of central importance to the assessment of the privacy claim. We are not talking about the [accused's] privacy interest in the contents of his own phone, or even the contents of a phone belonging to someone else, but which he occasionally used. We are also not dealing with deeply personal, intimate details going to the [accused's] biographical core. Here, we are talking about text messages on someone else's phone that reveal no more than what the messages contained – discussions regarding the trafficking of firearms.

This is far from being a question of whether the [accused] had “exclusive control” over the content. He had no ability to regulate access and no control over what Winchester (or anyone) did with the contents of Winchester's phone. The [accused's] request to Winchester that he delete the messages is some indication of his awareness of this fact. Further, his choice over his method of communication created a permanent record over which Winchester exercised control.

It has never been the case that privacy rights are absolute. Not everything we wish to keep confidential is protected under s. 8 of the Charter. In my view, the manner in which one elects to communicate must affect the degree of privacy protection one can reasonably expect.

“[A]n accused will only have standing to challenge a search or seizure when he or she has a reasonable expectation of privacy. Standing is not automatic.”

In this case, the application judge properly focused on the factors of control, access and lack of confidentiality. [paras. 63-66]

And further:

In most cases – but not all – ... a sender controls the content and recipient of a message. However, once the message is received, the recipient becomes the controller and the sender's privacy interest will generally disappear. [para. 78]

Since the accused lacked standing to argue a s. 8 breach, there was no need to address s. 24(2). The accused's appeal was dismissed and his convictions upheld.

## A Second View



Justice LaForme, in dissent, concluded that the accused did have a reasonable expectation of privacy to challenge the search of Winchester's phone:

We are required to consider whether people in the [accused's] situation can generally maintain a reasonable expectation of privacy in text messages sent to another person. The nature of the information that such communications might reveal and the nature of interests implicated support the [accused's] position. The absence of control does not negate a reasonable expectation of privacy and any reliance on the absence of control reintroduces the discredited risk analysis. Relevant normative considerations suggest that people should be able to maintain a reasonable expectation of privacy in text messages generally. The [accused's] position is the practically preferable option. As such, in my view, the application judge erred in concluding that the [accused] had no standing to bring a s. 8 Charter challenge in connection with the search of Winchester's cell phone. [para. 184]

In Justice LaForme's view, the search was unreasonable, it breached s. 8 and the evidence should have been excluded under s. 24(2). He would have allowed the appeal, excluded the text messages and entered acquittals on all charges.

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

**Editor's note:** The majority of the Ontario Court of Appeal in *R. v. Marakah*, 2016 ONCA 542 disagreed with the recent British Columbia Court of Appeal majority decision in *R. v. Pelucco*, 2015 BCCA 370. The majority in *Pelucco* found that an accused had standing to challenge the search and seizure of electronic messages on someone else's electronic device because a sender will ordinarily have a reasonable expectation that a text message will remain private in the hands of its recipient. As Justice MacPherson in *Pelucco* stated:

There is, in my view, a lack of empirical evidence to support a conclusion that senders of text messages have a presumptively reasonable expectation, from an objective standpoint, that their text messages will remain private in the hands of the recipient. In fact, there are many examples of behaviour in text messaging (and in other forms of communication) that suggest that senders are alive to the fact that their communications may no longer be private once sent or made. [para. 71]

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