JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

NEW & REVISED POLICING STANDARDS RELEASED

On January 18, 2021, British Columbia introduced a new Provincial Policing Standard related to Restraints while the standard related to Intermediate Weapons was updated. The chief constable, chief officer or commissioner of a police force must ensure their policies and procedures are consistent with the standards. New and reviewed standards include the following.

Restraints - 1.2.3

This new standard requires officers to only use restraints that have been approved by the Director of Police Services. A **"restraint"** is defined as ***"any mechanical device or system that when used in its ordinary and intended manner restricts the normal physical activity or range of motion of an individual in part or in whole".***

Training

Before being authorized to carry and use a restraint, the officer must successfully complete a training course and be qualified to use the restraint (1.2.3(4)) and requalified at least once every three years (1.2.3(5)). Written records must also be maintained of the restraints training and requalification courses completed by each officer (1.2.3(6). Restraints must also be maintained in good working order (1.2.3 (2)).

Storage

Restraints must be securely stored when not in use (1.2.3(3)).

Off-Duty Carry

An officer may carry their issued restraints ***"only when on assigned duty, unless otherwise authorized in writing or described in policy"*** (1.2.3(7)).

Approved Restraints

The following approved restraints are listed in Appendix A of the standard:

- Handcuffs
- Leg Restraints
- Disposable Restraint Device
- Whole Body Restraints
- Spit Hoods/Masks

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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.

The business of pandemics: the COVID-19 story.

edited by Jay Liebowitz.

Boca Raton; London; New York: CRC Press, 2021.

Available in eBook format only (JIBC login required)

A coach's guide to developing exemplary leaders: making the most of the leadership challenge and the leadership practices inventory (LPI).

James M. Kouzes, Barry Z. Posner & Elaine Biech.

San Francisco, CA: The Leadership Challenge, A Wiley Brand, 2017.

HD 30.4 K68 2017

Competencies for effective leadership: a framework for assessment, education, and research.

edited by Ralph A. Gigliotti.

United Kingdom: Emerald Publishing, 2019.

Available in eBook format only (JIBC login required)

Crisis ahead: 101 ways to prepare for and bounce back from disasters scandals and other emergencies.

Edward Segal.

Boston, MA: Nicholas Brealey Publishing, 2020.

HD 49 S44 2020

Cybersecurity for everyone.

David B. Skillicorn.

Boca Raton: CRC Press, 2021.

QA 76.9 A25 S55 2021

Decision making and problem solving: break through barriers and banish uncertainty at work.

John Adair.

London; New York, NY: Kogan Page, 2019.

HD 30.23 A43 2019

Epidemics and the modern world.

Mitchell L. Hammond.

Toronto; Buffalo; London: University of Toronto Press, 2020.

Available in eBook format only (JIBC login required)

Ethical decision-making: cases in organization and leadership.

edited by Patricia A. Mitchell

Gorham, ME : Myers Education Press, 2019

Available in eBook format only (JIBC login required)

How mediation works: resolving conflict through talk.

Angela Garcia.

Cambridge, UK; New York, NY: Cambridge University Press, 2019.

HM 1126 G36 2019

Also available in eBook format (JIBC login required)

Opening doors to diversity in leadership.

Bobby Siu.

Toronto; Buffalo; London: University of Toronto Press, 2021.

Available in eBook format only (JIBC login required)

Stereotypes: the incidence and impacts of bias.

edited by Joel T. Nadler & Elora C. Voyles.

Santa Barbara, CA; Denver, CO: Praeger, 2020.

Available in eBook format only (JIBC login required)

Strengths-based approaches to crime and substance use: from drugs and crime to desistance and recovery.

edited by David Best and Charlotte Colman.

Abingdon, Oxon ; New York, NY: Routledge, 2020.

HV 8836.5 S77 2020

What works now?: evidence-informed policy and practice.

edited by Annette Boaz, Huw Davies, Alec Fraser & Sandra Nutley.

Bristol: Policy Press, 2019.

H 97 W44 2019

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- Restorative Justice
- Project Management
- Data & Research Management

Year 4

- Aboriginal People and Policy
- Multiculturalism, Conflict and Social Justice
- Administrative and Labour Law in Canada
- Applied Research in Public Safety and Law Enforcement
- Professional Practice in Justice and Public Safety
- Crisis Intervention
- Research Project
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I JUST FEEL THIS GIANT WEIGHT AND I CARRY IT EVERYWHERE

I CAN'T UNWIND

EVEN WHEN I TAKE TIME OFF I DON'T FEEL RELAXED

I'M ON EDGE LIKE EVERYDAY I'M ON EDGE

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For more resources on better understanding mental health in the context of the experiences and pressures of first responders, as well as the broader population, visit the following link.

www.BCFirstRespondersMentalHealth.com

Handcuffs

Handcuffs are ***"restraint devices designed to secure an individual's wrists in proximity to each other. Comprised of two ring-shaped cuffs, linked together by a short chain. Each cuff has a rotating arm which engages with a ratchet that prevents it from being opened once closed around a person's wrist. Once applied, the cuff can only be removed by key."***

Approved Specifications

- May be fabricated of metal or rigid carbon fiber materials.
- Must have a double lock feature on each cuff.
- Joined by a length of chain, each end attached to a 360-degree swivel pin, no longer that four inches.

(1.2.3 Appendix A)

Training

Training in the use of handcuffs must include the following safety components:

- The officer must check each applied Restraint device for a safe level of **tightness**, in that circulation will not be dangerously restricted; and
- The **double lock mechanism** must be immediately engaged in all applications; or
- When the officer reasonably perceives that violent subject behaviour makes engaging the double lock mechanism too difficult at that time, the officer shall engage the mechanism **as soon as is practicable** after the violent behaviour subsides or the officer(s) have established sufficient control of the subject (1.2.3(4)(a)).

Leg Restraints

Leg Restraints are ***"a device used to restrict the movements of an individual's legs when exhibiting violent behavior. They can also be used on a subject's legs during transport when a greater risk of violence or escape is suspected."*** Leg Restraints are commonly referred to as leg irons.

Approved Specifications

- May be fabricated of metal, rigid carbon fiber material, or nylon strapping with affixed cam-lock or alligator clip buckles.
- Must have a double lock feature on each cuff.
- Joined by a length of chain, each end attached to a 360-degree swivel pin, no longer that 20 inches.
- May also be fabricated of a one to two inch wide single strap of nylon material, formed into a loop through a cam-lock or alligator clip buckle which is used to secure the subject's legs

1.2.3 Appendix A

Training

Training in the leg restraints must include the same safety components as handcuffs (tightness check and engagement of its double-lock mechanism) (1.2.3(4)(b)). In addition, leg restraints ***"can be used in conjunction with handcuffs and full body Restraints, but the two devices cannot be joined by any means to complete a maximal Restraint or 'hog tie'"*** (1.2.3(4) (c)).

Whole Body Restraint Devices

Whole Body Restraint Devices are ***"more complicated to apply than traditional Restraints, requiring multiple personnel, and consist of several Restraints that more greatly affect the ability of the subject to move. These Restraint devices are reserved for use on high risk, violent or self-harming subjects."***

Approved Specifications

- A shoulder harness, a binding for the ankles, and a blanket with straps that encircles and restrains the legs. The harness and the ankle strap attach to loops on the blanket with carabiners, which helps to keep subjects from moving.

- A flat board with multiple point Restraint systems and a pillow to protect the head. The board is coated for easy cleaning and the runners on the bottom elevate the board for easy access to multiple handles.

- A specially built chair on at least two wheels with soft Restraint straps intended to help control the arms, legs, and torso of violent, self-destructive subjects.

- A garment shaped like a jacket with long sleeves that surpass the tips of the wearer's fingers and cross the arms against the wearer's chest. The ends of the sleeves are ties to the back of the jacket, ensuring the arms are close to the chest with as little movement as possible. Its most typical use is restraining people who may cause harm to themselves or others.

- A belt of two to six inches wide that is secured in the back using a lockable main buckle and has two hand Restraint tethers with smaller lockable buckles that allow for one-way restricted movement and have a single handcuff on each side that is equipped with a double lock feature. All locks are released with a standard handcuff key. The Hand Restraint Waist Belt enables an escorting officer to control a subject's movement while allowing the subject enough movement to be fingerprinted, use the bathroom facilities, eat, and/or perform other required movements for transport and processing. This device comes in two sizes:
  - ➡ Standard belt fits 29 to 58-inch waists; and
  - ➡ Smaller fits 23 to 40-inch waists.

(1.2.3 Appendix A)

Training

Training in whole body restraint devices must include the same safety components as handcuffs (tightness check and engagement of its double-lock mechanism) (1.2.3(4)(a)).

Disposable Restraint Device

Disposable Restraint Devices are ***"designed to be a back-up handcuffs and a fast means of securing prisoners in a mass arrest situation. These one-time use handcuffs can be made from various materials and are disposable after one use as they must be cut from the subject's wrists using an appropriate cutting tool."***

Approved Specifications

- Made of disposable one-time use nylon braid, thin plastic fastening straps where two straps can be tethered together to form one pair of disposable restraints, and/or commercially produced plastic handcuffs that are disposed of after one use.

(1.2.3 Appendix A)

Training

Training in disposable restraint devices must include checking ***"each applied Restraint device for a safe level of tightness, in*** *that circulation will not be dangerously restricted*" and ***"at least one officer present with a subject(s) wearing a disposable restraint device must have a tool suitable for cutting and removing the device in their possession"*** (1.2.3(4)(b)).

Spit Hood/Mask

Spit hoods or masks are ***"devices intended to cover the mouth, face and sometimes the head of a restrained person in order to prevent them spitting bodily fluids at or biting others."***

Approved Specifications

- Approved models are made of a light–weight nylon mesh–type fabric and are designed to fit comfortably over the head and neck. They must allow the subject the ability to see out and officers to see the subject's face.
- Spit hoods must not restrict the subject's ability to breath while helping to restrict the expulsion of body fluids from the subject to other persons nearby.
- Certain approved models can be affixed under the arms for additional security but must never be secured around the wearer's neck.
- The design and fabrication of this device must allow bodily fluids from the nose and mouth of the subject to drain without significant pooling which could lead to asphyxiation. Models that are fabricated of non–breathable materials and allow pooling of bodily fluids within the device are not approved for use by police.

(1.2.3 Appendix A)

Training

Officers shall be trained that spit hoods or spit masks ***"must not be used on any person who is unconscious, vomiting or noticeably bleeding from the mouth or nose causing a risk of respiratory distress or asphyxiation, or in obvious need of medical attention"*** and ***"shall be immediately removed from a subject who loses consciousness or develops any [the above] difficulties."*** In addition, ***"anyone wearing a spit hood shall be kept under the constant supervision of trained personnel and their observations of the subject wearing the spit hood must be recorded in writing in five–minute intervals"*** (1.2.3(4)(b)).

Intermediate Weapons - 1.2.2

This revised standard now requires only intermediate weapons that have been approved by the Director of Police Services to be carried or used. The following approved intermediate weapons are listed in Appendix A of the standard:

- Baton (Expandable/Collapsible/Straight)
- Conducted Energy Weapon (CEW)
- Oleoresin Capsicum (OC) or Pepper Spray
- CS or Tear GasLess-Lethal Disbursement Device
- Extended Range Impact Weapons/Kinetic Energy Impact Projectile
- Pepper Ball
- Extended Range Launcher (Gas and Disbursement Device) and Launching Cup Adapter With Launching Cartridge
- Distraction Devices

Baton

- An **expandable/collapsible** baton is a cylindrical club with a cylindrical outer shaft containing telescoping inner shafts that lock into each other when expanded. One end section has a foam or similar grip surface. The last section has a weighted cap at the striking tip. The sections open with manual or centrifugal force and lock together with a friction lock or locking collars at each joint. The sections release with either a

spring-loaded button or by manually generated downward force, striking the tip on a hard surface. It is carried in a scabbard on the belt of police officers and used as a compliance tool and defensive weapon by police officers.

- A **straight baton** is a one-piece cylindrical club that is carried as a compliance tool and defensive weapon by police officers.

1.2.2 Appendix A

Approved Specifications

- Expandable/collapsible and straight batons are fabricated from metal or other rigid material and are available in lengths of between 12 to 36 inches.

1.2.2 Appendix A

CEW

- A weapon that when discharged uses a conducted electrical current in order to incapacitate a person, or to generate compliance through pain.

1.2.2 Appendix A

Approved Specifications

- Provincial Policing Standard 1.3.2 identifies approved CEW models. Currently the models identified are the TASER® X26 and TASER® X26P (1.3.2(1)).

Further specifications to approved CEW models include:

- Attach one cartridge only, have a single horizontal laser sight, fixed rear and front mechanical sights, and an ambidextrous safety switch.
- Fire two probes by expelling compressed nitrogen capsules, from a single use detachable cartridge which are attached by up to 25 feet of conductive wires. The top probe travels horizontally in line with the laser sight while the bottom probe travels downward at an eight-degree angle to the intended target.
- May also be deployed in direct contact with the intended subject, with the cartridge on or removed.

1.2.2 Appendix A

OC or Pepper Spray

- Oleoresin Capsicum (OC) Spray is an oily organic resin derived from the fruit of plants in the Capsicum genus, such as chilli peppers. When the plants are finely ground, capsicum oleoresin is formed after the extraction process of capsaicin using organic solvents such as ethanol. This agent can be delivered in many forms.

1.2.2 Appendix A

Approved Specifications

Deployment forms include:

- **Blast Dispersion Cartridge:** Delivers a cloud of micro pulverized OC powder.
- **Micro Pulverized Dust Disbursement Device/ Ferret:** Are free from the effects of fire, concussion, or fragmentation. Can be thrown, launched, or air-dropped and has a variable expulsion delay mechanism, which, when fired, drives a piston forcing the micro pulverized capsaicin dust payload through a machined discharge port. These forms are also capable of penetrating structures.
- **Aerosol Projector:** Contains a substance enclosed under pressure and able to be released as a fine spray, typically by means of a propellant gas.
- **Fog:** A spray pattern that is denser than aerosol.
- **Pepper Foam:** A uniquely formulated OC solution in which the OC is encapsulated with a surfactant, giving it a rigid jet foam dispersion.

1.2.2 Appendix A

CS or Tear Gas

- CS is the common name for orthochlorbenzalmalononitrile, a fine white powder, about the consistency of talcum powder, and it must be spread with some type of dispersing agent. CS Gas is commonly referred to as "Tear Gas".

1.2.2 Appendix A

Approved Specifications

Deployment forms include:

- **Blast Dispersion Cartridge:** Designed to deliver a cloud of micro pulverized CS "tear gas" irritant powder.
- **Micro Pulverized Dust Disbursement Device/ Ferret:** Are free from the effects of fire, concussion, or fragmentation. Can be thrown,

launched, or air-dropped and has a variable expulsion delay mechanism, which, when fired, drives a piston which forces the micro pulverized capsaicin dust payload through a machined discharge port. These forms are also capable of penetrating structures.

- **Aerosol:** A substance enclosed under pressure and able to be released as a fine spray, typically by means of a propellant gas.
- **Fog:** A spray pattern that is denser than aerosol.

1.2.2 Appendix A

Less-Lethal Disbursement Device

- Less-Lethal Disbursement Devices are most commonly used in tactical or crowd management situations and are designed with indoor/outdoor operations in mind. They are most effective when used in confined areas and close to the target area to minimize the risks to all parties through pain compliance, temporary discomfort and/or incapacitation of potentially violent or dangerous subjects. Less-Lethal Disbursement Devices can discharge small rubber or plastic pellets, irritant gasses (OS, CS), or smoke.
- Disbursement Devices can be hand thrown, launched, or OC/CS irritant and smoke Disbursement Devices can also be inserted through structural barriers using a gas injector unit.

1.2.2 Appendix A

Approved Specifications

- Approved models may have a body composed either of sheet steel with emission holes on the top and bottom capable of discharging OC/CS irritants, or smoke (available in many colours), or a rubber body containing a fuse, a separating fuse body, a black powder separation charge, a pressed black powder delay, a bursting charge of flash powder, or rubber pellets.

- Approved launchers include an attachment to 12 gauge, 37 or 40–mm launchers.

- Approved "Gas Injector Units" attach to the end of a ram bar at the front of a tactical vehicle and are designed to penetrate the surface of a structure with a steel jackhammer "needle" and inject agents, including smoke, into a structure.

1.2.2 Appendix A

Extended Range Impact Weapons/ Kinetic Energy Impact Projectile

- Extended Range Impact Weapon (ERIW): The ERIW consist of a device firing a special projectile designed to gain compliance, overcome resistance, or prevent serious injury or death.

- Kinetic Energy Impact Projectile (KEIP): Flexible or non–flexible projectiles, which are intended to gain compliance or incapacitate a subject through pain compliance, with a reduced potential for causing death or serious injury when properly used.

1.2.2 Appendix A

Approved Specifications

- Approved models include multi or single–shot launchers in 12 gauge, 37 or 40mm capable of discharging the following approved munitions:

- "RUBBER & PLASTIC BULLETS or PELLET ROUNDS" are solid spherical, or cylindrical projectiles capable of being discharged from the 12 gauge, 37 or 40mm launchers, and fired as single shots or in groups of multiple projectiles. Approved projectiles are made of rubber, plastic, PVC, or composite materials.

- "SPONGE ROUNDs" are projectiles that limit penetration of the projectile into the skin by having a tip or nose that is slightly softer. Sponge rounds are constructed with a hard foam nose or attenuated energy (collapsing on impact) projectiles with a hollow nose and are available in 37 and 40mm sizes.

- "BEAN BAG ROUNDS" also known as flexible batons, are synthetic cloth bags made of cotton and Kevlar filled with small bird shot pellets. The bags are fitted into a plastic 12 GA cartridge and expand to shape when deployed presenting a consistent aerodynamic shape.

1.2.2 Appendix A

Extended Range Launcher (Gas & Disbursement Device) & Launching Cup Adapter with Launching Cartridge

- Such launchers are also often known as "gas guns" due to their original use by police for launching tear gas projectiles. Launching cup adapters with launching cartridges allow the long–range use of smoke, OC, and CS Disbursement Devices (which would normally be thrown) to be launched from the 37mm, 40mm launchers as well as 12–gauge shotguns.

- "Disbursement Device" used in this context are all less–lethal munitions and not designed to cause death or dismemberment as in the primary function of military Disbursement Devices.

1.2.2 Appendix A

Approved Specifications

- Approved models must be 12 gauge, 37 or 40mm launching systems for less– lethal ammunition. Launching cup adapters can be added to some of these launchers and with the use of a launching cartridge, Disbursement Devices can be deployed at greater distances.

1.2.2 Appendix A

Pepper Ball

- Pepper balls are a projectile filled with irritant compounds, launched from a device like a paintball gun. They are designed to create a cloud of irritant designed to affect the eyes, nose and throat of the people who are exposed to the cloud. Pepper ball projectiles can also be inert, in that there is no irritant dispersed.

1.2.2 Appendix A

Approved Specifications

- Approved models include multi–shot launchers similar to paintball guns, capable of discharging the following approved munitions:
  - ➡ .68 calibre pellets with a semi–rigid breakable outer shell and are filled with OC resin, CS powder, PAVA resin, water, or a liquid marking dye.
  - ➡ .68 calibre window breaking pellets that are solid and not intended for use against humans.

1.2.2 Appendix A

Distraction Devices

- A Flash Bang Diversionary Device (FBDD), also known as a Noise Flash Diversionary Device (NFDD) is a less–lethal explosive device used to temporarily disorient a subject's senses.

1.2.2 Appendix A

Approved Specifications

- Approved models produce:
  - ➡ A temporarily blinding flash of light not exceeding eight million candelas for ten milliseconds; and
  - ➡ A loud "bang" causing temporary disruption of hearing, not exceeding 175 decibels at five feet.

- Approved models are available in single use or reloadable devices with single or multiple blast capability.

1.2.2 Appendix

EVIDENCE ADMITTED DESPITE EXCEEDING AUTHORITY OF IMPLIED LICENCE TO KNOCK

R. v. Babich, 2020 SKCA 139

A 7-Eleven store clerk observed the accused, who appeared to be intoxicated, get into a car and drive away with a child. The clerk smelled a strong odour of alcohol and noticed the accused was abrupt with the child. The clerk provided the licence plate number of the car. Police identified its registered owner and an associated address. A police officer went to the accused's house. Lights were on in the house but the officer did not see the car. There was, however, a garage with its doors closed.

The officer, not knowing if the suspect vehicle was in the garage, was concerned about the safety of the child if the vehicle was still being driven around. The officer knocked on the front door to the home and the accused answered it. She had a young child in her arms, and identified herself as the person who had been driving the car. The officer detected a strong odour of alcohol coming from the accused and noted that she spoke slowly and had glossy eyes. In response to questioning, the accused said she had just come from the 7-Eleven and had consumed "a couple of drinks". The officer told the accused that there were reasonable grounds to suspect she had been driving while her ability was impaired and an approved screening device (ASD) demand would be made. The accused gave the child to a nanny inside the house while the officer followed her inside to do so. Once the child was given to the nanny, the officer immediately read the ASD demand. The accused then accompanied the officer outside the house to the police car on the street. The accused refused to comply with the demand, saying she needed her lawyer present. After five minutes of conversation, the accused was arrested for refusing to provide an ASD sample, she was handcuffed, and placed in the back of the police car. She was released on an appearance notice and returned to her house. The accused was subsequently charged with refusing the ASD demand and impaired driving.

Saskatchewan Provincial Court

The accused sought the exclusion of all evidence obtained from the point police attended her home including all evidence of impairment against her, evidence of her refusal to provide a breath sample, and any other remedy the judge saw fit.

The judge ruled the accused's s. 8 *Charter* rights had been breached. Citing *R. v. Rogers*, 2016 SKCA 105, the judge found the officer was investigating a possible *Criminal Code* offence when she went to the accused's house searching for a person and a vehicle, and her sole purpose in going to the door of the residence was to engage the accused in a conversation to obtain the identity of the driver and grounds to make an ASD demand. ***"[The officer] testified in cross-examination that she told [the accused] she was investigating an impaired driving complaint and that she was watching the person to get evidence, such as her speech and actions,"*** said the judge. The officer had ***"no lawful authority to conduct a search at the entrance to the house nor to enter the house without permission."*** In the judge's view, the police exceeded the authority conferred by the implied licence to knock doctrine.

Applying s. 24(2), the trial judge excluded the evidence. First, the judge found the breach to be serious. The officer entered the accused's home without consent or invitation and followed her around. When other officers arrived, the accused was handcuffed and initially requested to go down to the police station. Second, the judge concluded that the impact of the s. 8 breach on the accused was serious. ***"It affected the accused's privacy, liberty, and human dignity,"*** said the judge. ***"She was in her own home. She did not ask the police officer in and ... the police officer's accompanying her around the home and the actions outside of the home in full public view in a residential neighbourhood are serious."*** Finally, the judge found there were other methods available to obtain the information such as by obtaining a search warrant. After considering the three lines of inquiry in the s. 24(2) analysis, the judge found admitting the evidence would undermine the long term repute of the administration of justice. The accused was found not guilty of refusing the ASD demand and driving while impaired.

Saskatchewan Court of Queen's Bench

A crown challenge to the trial judge's ruling was rejected. The appeal judge concluded that the trial judge made no error finding a s. 8 breach in applying *R. v. Rogers*. As for s. 24(2), the appeal judge upheld the trial judge's exclusion of the evidence. The trial had judge properly considered and applied s. 24(2) principles. The Crown's appeal was dismissed.

Saskatchewan Court of Appeal

The Crown sought leave to appeal (1) a reconsideration of *R. v. Rogers* and the trial judge's finding that the accused's rights under s. 8 of the *Charter* had been infringed and (2) whether the appeal judge erred by upholding the trial judge's decision to exclude the evidence. The Court of Appeal, however, only felt it necessary to resolve the appeal on the s. 24(2) issue. It rejected the need to reconsider *R. v. Rogers* while at the same time recognized it was not foreclosing the Crown from raising the issue again in a future case.

What Rogers Said

"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." - Justice Jackson in *R. v. Rogers*, 2016 SKCA 105 at para. 29.

s. 24(2) - Exclusion of Evidence

Chief Justice Richards, delivering the opinion of the Court of Appeal, first outlined a number of basic principles relevant to the s. 24(2) enquiry:

- ***"Section 24(2) of the Charter speaks to the exclusion of evidence obtained by virtue of an infringement or denial of a Charter right or freedom."***
- ***"The burden of proof under s. 24(2) – the burden of proving that the administration of justice would be brought into disrepute by the admission of the evidence – is on the party seeking the exclusion of the evidence. The applicable standard of proof is 'balance of probabilities'. However, matters beyond the primary facts such as the degree of the***

"The burden of proof under s. 24(2) – the burden of proving that the administration of justice would be brought into disrepute by the admission of the evidence – is on the party seeking the exclusion of the evidence. The applicable standard of proof is 'balance of probabilities'."

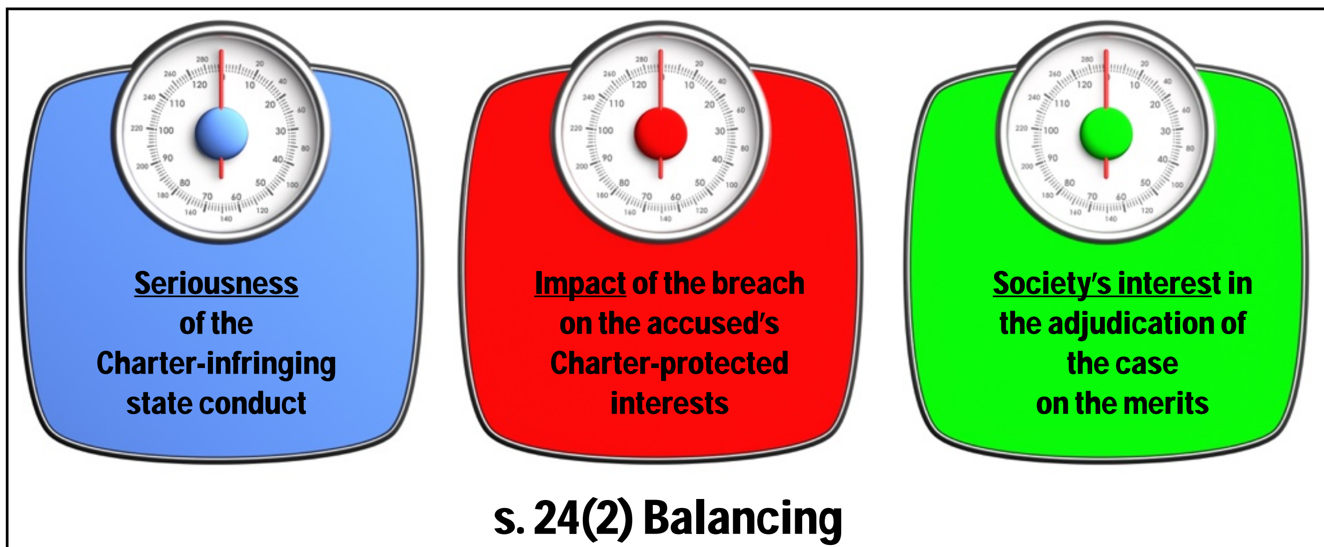
seriousness of Charter-infringing conduct are 'not susceptible' of proof in the ordinary sense but are issues of normative characterization."

- *"A judge faced with a s. 24(2) application should have regard to (a) the seriousness of the Charter-infringing state conduct, (b) the impact of the breach on the Charter-protected interests of the accused, and (c) society's interest in the adjudication of the case on the merits. The judge's role is to balance these considerations to determine whether, considering all of the circumstances, the admission of the evidence would bring the administration of justice into disrepute."*
- *"If a trial judge has considered the proper factors under s. 24(2) and has not made any error of principle or unreasonable finding, 'appellate courts should accord considerable deference to his or her ultimate determination'. Appellate courts may conduct the trial judge's s. 24(2) analysis anew if it is tainted by errors of fact or law that are relevant to the trial judge's ultimate conclusion."* [references omitted, paras. 29-32]

The Seriousness of the Breach

Chief Justice Richards concluded that the Charter-infringing conduct ***"was not nearly as serious as the trial judge believed"***:

> Even if [the Constable's] entry into [the accused's] home cannot be split away from what happened on the doorstep as clearly and completely as the Crown suggests, I nonetheless find that the trial judge erred by failing to have regard for the particular nature of the "entering the house" part of what happened on the night in question. In this regard, it is important to note that [the Constable] formed the intention to make an ASD demand while she was still on the doorstep. Indeed, after speaking to [the accused], smelling alcohol, noting the glossy eyes and slow speech, [the officer] went so far as to advise [the accused] that she would be making an ASD demand. It is reasonable to think that she proceeded in this way, i.e., delayed in making a formal demand, because [the accused] was holding a young child. When [the officer] did go into [the accused's] home, she did not enter for the purpose of conducting an investigation or gathering



evidence. Rather, she followed [the accused] into the house as [the accused] attempted to find the nanny. The Constable did this to ensure that [the accused] did not consume something that would interfere with the ASD test. When [the accused] found the nanny and transferred the child to her, [the Constable] immediately made the ASD demand. All of this could not have taken more than a very few minutes at most and the transcript suggests [the officer] conducted herself throughout in a way that was fully professional. Seen in context, therefore, there was no search or investigative dimension to [the Constable's] entry into the house. It was an entry aimed at ensuring the integrity of an ASD sample which had been referred to on the doorstep but not formally demanded. [The accused] does not suggest that there was anything improper, in and of itself, about [the Constable] acting for this purpose. She takes exception only to the fact that the Constable entered her home.

In my respectful view, even assuming for the sake of argument that the trial judge, and the appeal judge in turn, were entitled to consider the entry into [the accused's] home as part of the s. 24(2) analysis, they erred nonetheless by failing to see that entry in its full context. Not all police entries into a home are alike. Here, the trial judge appears to have taken no account of the specific reason why [the Constable] went into the house. Second, she overlooked the fact that no evidence was sought or obtained by way of the entry. Third, the trial judge paid no regard to how [the Constable] conducted herself while in the house or to the unusual circumstance presented by the presence of the child. When all of this is taken into account, it can be seen that, even if [the Constable's] entry into the house can be seen as being relevant to the seriousness of the Charter breach, it did not meaningfully elevate its seriousness.

The Crown also submits that the trial judge put a second irrelevant matter on the scale in considering the seriousness of the Charter-infringing conduct. This was the arrival of other officers on the scene, the placing of [the accused] in handcuffs at the police car and the request that she go to the police station. The trial judge found all of this "more objectionable" than [the Constable's] attendance at [the accused's] door and her entry into her home.

Once again, and with respect, this analysis involved an error in principle. The issue before the trial judge was whether evidence obtained in a manner that infringed the Charter should be excluded. As noted, the Charter breach in issue occurred on the doorstep and, perhaps arguably, when [the Constable] briefly entered [the accused's] house. [The accused] being handcuffed was entirely disconnected from any conduct said to have infringed the Charter; it cannot be seen as having amplified the seriousness of the Charter breach in issue. Handcuffing [the accused] might not have been necessary and it might have embarrassed her but it did not make the police conduct said to have breached the Charter either more or less serious. It was simply not relevant to the first line of inquiry ... . [paras. 46-49]

Here, the officer ***"was motivated to knock on [the accused's] door by a concern that an impaired driver, with a child on board, might be on the street."*** As well, the officer believed that her actions in questioning the accused on her doorstep was acceptable police procedure. Finally, following the accused into her home ***"did not materially impact the significance of the Charter breach in issue."*** These considerations reduced the need for a court to disassociate itself from the police conduct. As a result, the *Charter*-infringing conduct did not meaningfully favour excluding the evidence.

The Impact of the Breach

The Court of Appeal found the trial judge also erred in her consideration of the impact of the breach on the accused's *Charter*-protected interests. The trial judge applied concerns not relevant to the extent that the breach undermined the accused's s. 8 protected interest such as the way in which she was handcuffed, and how she was otherwise treated at the police car on the street. Chief Justice Richards, in finding the breach's impact did not significantly suggest the evidence should be excluded, commented:

> The breach that is in issue here, as per Rogers, featured [the Constable] asking [the accused] where she had come from and [the accused] responding that she had come from the 7-Eleven, and [the Constable] making observations about [the accused's] slow speech, glossy eyes and about the smell of alcohol that emanated from her. [The accused] could not have had anything but a low expectation of privacy in any of that. Just minutes before, she had been at the 7-Eleven and there had revealed to the world, so to speak, the various symptoms that suggested she was intoxicated. [The accused] had also driven in full public view and, by virtue of that, could have had little or no expectation that the fact of her driving would be private. She voluntarily opened the door when [the Constable] knocked and, on the doorstep, she voluntarily answered [the Constable's] questions and revealed the various indicia of impairment that led to the ASD demand. [The accused] did have a high expectation of privacy in relation to the interior of her home but, at the same time, [the Constable's] entry into it had no investigative, search or information-gathering purpose or consequence. [para. 58]

Society's Interest in Adjudication

The Court of Appeal accepted the Crown's submission that the trial judge substantially and incorrectly considered the idea that the police could have obtained judicial authorization to knock on the accused's door and question whoever might have opened it. ***"There is no provision in the Criminal Code that would have permitted the police to have gone forward in the way the trial judge believed they should have proceeded,"*** said Chief Justice Richard. The evidence obtained by police was reliable and important to the prosecution of the case. Society's interest in an adjudication of the case on its merits, however, did not strongly favour the admission or exclusion of the evidence one way or the other.

Admission or Exclusion?

Since the trial judge erred in her examination of all three s. 24(2) factors, her final balancing of these factors and ruling that the evidence should be excluded was also in error. Hence, the Queen's Bench judgement in deferring to or adopting the trial judge's conclusion was also an error. As such, a redo of the s. 24(2) balancing was required by the Court of Appeal. In doing so, Chief Justice Richards found the accused had not met her burden of establishing that the admission of the evidence gained by the officer on the doorstep would bring the administration of justice into disrepute. He wrote:

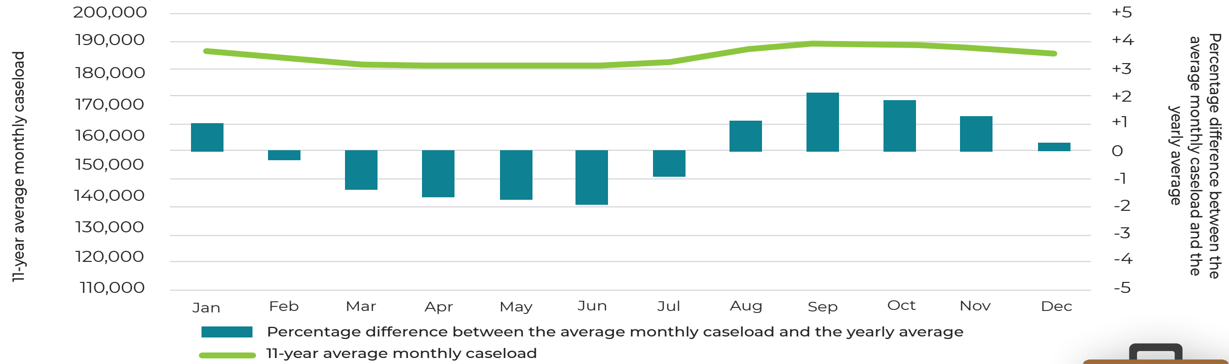
> [The Constable] was acting in exigent-type circumstances in that she had a report of an impaired driver and was concerned that the driver, with a young child as a passenger, was out on the streets. Her actions were not arbitrary. She went to [the accused's] home on the basis of information that the vehicle in question was registered to a company bearing [the accused's] name. [The Constable] knocked on the door. [The accused] voluntarily opened the door and engaged in a conversation wherein she indicated that she had just come from the 7-Eleven store and revealed signs of impairment. [The accused] herself had put all of that information into the public domain just moments before. [The Constable] believed she was acting lawfully.
>
> Having obtained information that entitled her to make a lawful ASD demand, [the Constable] advised [the accused] that she was going to make such a demand. At that point, as [the accused] looked to deal with her child, [the Constable] followed her into the house with the limited objective of ensuring that she did not consume something that would corrupt the ASD test. That entry had no investigative or evidence-gathering purpose. Once the child had been dealt with, [the Constable] immediately made the formal ASD demand. [paras. 69-70]

The Crown's appeal was allowed, the acquittal on the charge of refusing an ASD demand was set aside, and a conviction was entered. The matter was remitted to Saskatchewan Provincial Court for sentencing.

Complete case available at www.canlii.org

A MONTHLY ANALYSIS OF ADULT CRIMINAL COURT CASES IN CANADA, 2008/2009 to 2018/2019

Average monthly caseload in adult criminal court, by month, Canada, 2008/2009 to 2018/2019

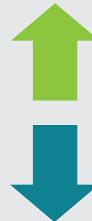


Seasonal impact on case initiation

There is little seasonal impact on most types of criminal court cases. However, seasonality does impact the initiation of cases involving disturbing the peace.

Cases involving disturbing the peace are more likely to be initiated in court in the summer months (July and August) than in the winter months (from December to March).

In a typical year...



September had the highest criminal court caseload[1] (averaging 190,456 cases over the reference period).

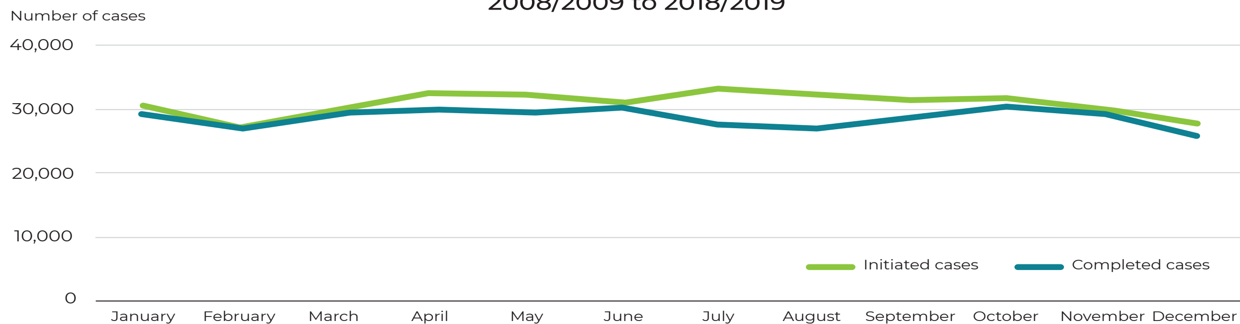
June had the lowest caseload (averaging 182,965 cases over the reference period).

Seasonal influence on court appearances

Compared with the yearly average, December (-8.3%) had the lowest number of court appearances per day.[2] This was followed by the summer months of June (-3.9%), August (-2.9%) and July (-2.5%).

In contrast, April (+4.2%) and September (+3.9%) saw the highest number of court appearances per day.

Average number of initiated and completed cases in adult criminal court, by month, Canada, 2008/2009 to 2018/2019



There are more case starts than case completions at certain times of the year. For example, in July, initiated cases were higher than the yearly average and case completions were lower.

1. "Caseload" refers to the average number of cases open on any given day in the month.

2. The number of court appearances per day has been standardized to business days in a month.

Note: Canada excluding Quebec. Data for Quebec are not available in the Integrated Criminal Court Survey Workload Time Series (ICCS WTS) Database until the 2015/2016 reference period.

Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Integrated Criminal Court Survey Workload Time Series Database, 2018/2019.

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ABILITY TO APPLY FOR WARRANT NOT TO BE CONFUSED WITH REQUIREMENT TO DO SO

R. v. Ibrahim, 2021 MBCA 12

A police sergeant received information from an informer that the accused, who the police knew was a member of a local street gang, was staying in a hotel room, which he was using as a base to distribute drugs, and was using a black car. The informer further indicated that another gang member (Libanos) was staying at the same hotel, was related to the drug investigation and was driving a Jeep Cherokee. Follow-up investigation included:

- Surveillance at the hotel observed a person matching the accused's description exiting a black car and entering into the hotel.
- Inquiries with the hotel staff revealed the accused was a registered guest and was driving a Chrysler.
- A licence plate check of the black vehicle which the accused had been driving confirmed that it was a Chrysler 300 whose registered owner was a family member of the accused with the same last name and the same address that was previously provided to the police by the accused as being his address.
- Police checks confirmed that Libanos was a registered guest at the hotel and was the registered owner of the Cherokee.

As a result, the sergeant instructed another officer to prepare search warrants for the two hotel rooms registered to the accused and Libanos. When police set up surveillance at the hotel the following evening, the Chrysler 300 was not present but the Cherokee was in the parking lot and occupied by a male in the driver's seat. A BMW, registered to a person with the same last name and address as the accused, entered the parking lot and then left, driving to a residential street.

At the same time, a Nissan Maxima driven by another gang member (Frangi) drove into the hotel parking lot and parked beside the Cherokee. The sergeant knew that Frangi had a pending charge of possession for the purpose of trafficking. He also knew the accused was on an undertaking not to have any contact with Frangi. The Nissan left the parking lot but the police did not have enough surveillance units to follow it.

While police followed the BMW, they determined that it was being driven by the accused. The BMW proceeded down the residential street and stopped for a couple of minutes. It then went further down the street toward the end of the block and stopped directly behind a parked vehicle, the Chrysler 300 that the accused had been driving the previous night. The accused exited the BMW, walked to the passenger side of the Chrysler 300 and remained there for about a minute. The police were not able to see if the door to the Chrysler 300 was opened or if the accused removed anything from it.

Aware of a growing trend, over the last three years, that individuals selling drugs would stash them in vehicles which they would then park on residential streets to avoid police detection, the sergeant believed - based on his experience and the accused's actions - that the accused had committed a drug transaction. He then ordered that the accused arrested. But before a team of officers could make it to the accused's location in time to arrest him, he got back into the BMW. He drove up the back lane of the residential street, around the block, and stopped a second time on the residential street at the other end of the block away from the Chrysler 300. The Nissan, driven by Frangi, then parked in front of the BMW and Frangi got out and entered the BMW with the accused. Believing that the drug transaction was continuing, the sergeant again ordered that the accused be arrested. Police activated their lights and sirens in an attempt to stop the BMW. But the accused fled in the BMW with the police in pursuit. At one point, Frangi exited the BMW and ran off on foot.

The accused eventually abandoned the BMW and ran from the police, but he was caught and arrested. When he was searched, police found $995 in cash and keys to the Chrysler 300. No drug-related items were located on a quick search of the BMW. Police found the Cherokee occupied by Frangi and Libanos, and both were arrested. Police returned to the Chrysler 300 parked on the residential street and searched it. The search revealed an empty prescription box in the accused's name and about one kilogram of cocaine. It was packed in several bags inside the glovebox.

Manitoba Provincial Court

The accused conceded that the police had reasonable grounds to arrest him for possessing drugs for the purpose of trafficking. He also accepted that the search of his person, as well as the BMW, was conducted incidental to his arrest. However, he argued that the search of the Chrysler 300 was not lawful as a search incident to his arrest and, therefore, an unreasonable search and seizure under s. 8 of the *Charter*.

The sergeant testified that because the accused had a significant amount of cash on him when he was arrested furthered his belief that a drug transaction had occurred. In the sergeant's view, he had reasonable grounds to believe that there was evidence in the Chrysler 300 regarding the offence of possession for the purpose of trafficking.

The judge found that the accused had a reasonable expectation of privacy in the Chrysler 300 sufficient to afford him standing to raise a s. 8 *Charter* claim. But she held the warrantless search of the Chrysler 300 was incidental to the accused's arrest. She rejected the accused's argument that the Chrysler 300 was not in his immediate surroundings at the time of the search. The judge also found that there was a reasonable prospect that drugs would be discovered in the Chrysler 300. She held that the search was not only conducted to discover evidence, but also to preserve any evidence that might have been found in the vehicle and to ensure the safety of police and others.

The accused was convicted of possessing cocaine for the purpose of trafficking, possessing proceeds of crime, failure to stop a motor vehicle while being pursued by police, breach of an undertaking and driving while suspended under Ontario's *Highway Traffic Act*.

Ontario Court of Appeal

The accused argued, in part, that the trial judge erred in her determination that the search of the Chrysler 300, which resulted in the seizure of the cocaine, did not violate his s. 8 *Charter* right. In his view, the trial judge erred in finding the Chrysler 300 was within his immediate surroundings at the time of the search. In addition, the accused submitted that the trial judge mistakenly concluded that there was an objectively reasonable prospect that a search of the Chrysler 300 would afford evidence of drug trafficking. He contended there was no reason why the police could not have simply guarded the Chrysler 300 until they were able to obtain a search warrant. The accused suggested his conviction for possessing the cocaine for the purpose of trafficking could not stand.

Search Incident to Arrest

The accused argued that the location of the Chrysler 300, being down the block from where the police attempted to arrest him and even further from the place where he was actually arrested, did not meet the requirement that the place searched was within the immediate surroundings of his arrest.

Justice Cameron, in examining whether the search was lawful and reasonable pursuant to the common law authority of search incident to arrest, first reviewed the nature and scope of this power as it has developed in the case law including the spatial and temporal requirements of this power. In this regard, the Court of Appeal concluded that ***"the***

"Delay and distance do not automatically preclude a search from being incident to arrest."

jurisprudence confirms that the spatial and temporal requirements for search incident to arrest, including the concept of immediate surroundings, are informed by the legitimate police objectives of such a search." It was also noted that ***"delay and distance do not automatically preclude a search from being incident to arrest."*** Instead, ***"the issue of immediate surroundings involves consideration of the entire constellation of the facts or the context."*** In recognizing the continuous nature of the offence, the location of the place searched and the timing of the arrest, the trial judge's finding that the Chrysler 300 was within the accused's immediate surroundings was upheld:

> Viewed cumulatively and in context, the information that the police possessed and the observations that they had made objectively support [the sergeant's] subjective belief that what police observed from the time that the accused initially parked on the residential street and approached the Chrysler 300 until the time that they activated their lights and sirens to arrest him, constituted an ongoing offence and that evidence of that offence would be found in the Chrysler 300.
>
> In my view, the effective time and place of the arrest occurred when the police pulled up behind the BMW and activated their lights and sirens — not when [the sergeant] first determined that the accused should be arrested. However, the fact that the accused was at the Chrysler 300 within minutes of his arrest and simply drove around the block where another suspected individual joined him before the attempted arrest occurred, cannot be parsed out from the continuous nature of the offence that involved the Chrysler 300. In my view, the entire crime scene encompassed the location of both the BMW and the Chrysler 300 and was, therefore, within the immediate surroundings of the accused. That is, the Chrysler 300 was spatially and temporally connected to the offence and to the accused, who it could reasonably be believed was in the course of committing a drug-related offence when the police, by activating their lights and sirens, attempted to arrest him. The purpose of the search was to discover evidence of that offence. [para. 65-66]

The Court of Appeal also concluded the trial judge did not err in holding that the police observed the accused driving the Chrysler 300 on the night before his arrest. ***"The vehicle matched the description provided in the informant information, the person who was driving the vehicle matched the description of the accused, the accused was seen at the hotel where it had been confirmed that he was staying and had listed the Chrysler 300 as his vehicle and that it was registered to someone with the same last name as his and living at the same address,"*** said Justice Cameron. ***"In any event, the identification of the accused as the driver of the Chrysler 300 on the night prior to the arrest is of relative insignificance considering that the police identified him as being at the vehicle just prior to his actual arrest. In addition, he had the keys to the Chrysler 300 on his person at the time of his arrest. In my view, that information was sufficient to connect the accused to the Chrysler 300."***

Evidence Discovery

As for whether the discovery of evidence was a valid objective of the search, Justice Cameron stated:

> The accused also argues that there was no informant information establishing that he was using the "black car" for the purpose of trafficking drugs, thereby negating the purpose

"The requirement for a valid police purpose to search does not equate to the requirement for independent reasonable and probable grounds to search. "

"The problem with the accused's argument on the facts of this case is that it conflates the ability of the police to apply for a warrant with the requirement for a warrant. Police do not require a warrant to conduct a search incidental to a lawful arrest for the valid police purpose of preserving evidence, regardless of whether they have the ability to apply for a warrant or preserve evidence pending the outcome of their application."

of the search, being for the discovery of evidence. I disagree. A consideration of the totality of the evidence, including the accused's behaviour in relation to the Chrysler 300 on the night in question, the informant information in general, the knowledge of the police regarding the use of cars by gang members to stash drugs on residential streets, and the flight of the accused while in the company of a person believed to be involved in drug trafficking, objectively established that the search to discover evidence was valid. The requirement for a valid police purpose to search does not equate to the requirement for independent reasonable and probable grounds to search. [reference omitted, para. 78]

Evidence Preservation

Since the search of the Chrysler 300 was valid to discover evidence, it was not necessary for the Court of Appeal to determine whether preservation of evidence was a further valid objective of the search. Nevertheless, the Court of Appeal considered the accused's argument that preservation of evidence was not a valid objective since the police had the ability to guard and/or tow the Chrysler 300 during the time that it would have taken for them to apply for and obtain a warrant to search the vehicle.

"The problem with the accused's argument on the facts of this case is that it conflates the ability of the police to apply for a warrant with the requirement for a warrant," said Justice Cameron, finding a warrant was not required. ***"Police do not require a warrant to conduct a search incidental to a lawful arrest for the valid police purpose of preserving evidence, regardless of whether they have the ability to apply for a warrant or preserve evidence pending the outcome of their application."***

Since there was no *Charter* breach, there was no need to conduct a s. 24(2) analysis.

The accused's appeal was dismissed.

Complete case available at www.canlii.org

DESTROYED ITEMS RESULTS IN EXCLUSION OF CRITICAL EVIDENCE

R. v. Hillier, 2021 ONCA 180

A uniformed officer approached the accused walking on the street. The officer intended to arrest the accused on a warrant for driving under suspension, but he ran away. The officer gave chase and grounded the accused in a pool of water. The accused had grabbed his waistband, refused to surrender his hands and a struggle ensued. The officer was able to control the accused, cuffing him to the rear and sitting him up. The accused was sopping wet. He told officers he had something in his sock. It turned out to be a prescription pill bottle containing drugs mixed with fentanyl.

Other officers arrived on scene and conducted a safety search. Cell phones, lighters, and cash were found on the accused's person. The accused's shoulder bag was also searched; multiple non-functional cell phones and cigarette packs were located, but no drugs. After complaining of shoulder pain, the accused was double-cuffed to take pressure off his shoulder and he was placed in the back of a police car. He was then driven to the

police station. At the station, police noticed a bulge in his mouth. This turned out to be a larger than golf ball size mass of drugs wrapped in plastic weighing 28 grams. The rear of the police car was also searched and a black pouch holding more drugs and baggies was found in the rear seat area at the footwell. Other evidence was also recovered. No photos were taken before the items were seized from the cruiser.

The drugs were turned over to an exhibit officer. He decided to destroy some of the seized items he felt were a biohazard and not significant to the investigation, such as the pouch and coins inside it, all of the drug packaging material, and a vial of suspected cannabis oil. None of these items were tested for fingerprints, nor were photos taken before the items were destroyed. The accused was charged with numerous drug offences and breach of probation.

Ontario Court of Justice

Two officers gave differing evidence about their inspection of the police car before starting their shift. One said both officers inspected the car including the footwell without the aid of a flashlight. This officer also said he examined the footwell just before the accused entered the car to ensure there was no contraband. The other officer said his practice was to crouch down to check the footwell with a flashlight as part of his daily inspection. But he made no note of doing such a check on this day. He also said, ***"as the doors open, I look in to make sure nothing is there and then ask the person to get in"***. Both testified that the accused was the first person in their police car that day. The exhibit could not provide a reason for not fingerprinting or taking photos of the evidence he destroyed and he acknowledged in hindsight it ought to have been retained.

As for the pouch, it was described differently by all three officers:

1. A black pouch similar in size to a fanny pack but unknown how it opened or was fastened;
2. A small black change purse, made of "felt-type material", with a clasp opening at the top, just large enough to hold change and a small amount of cash. It measured three inches long, by three inches tall by 3/4 inch thick.
3. Sort of brown, the size of a female clutch, eight inches in rectangular shape, but unknown how it opened. This officer inferred it was made out of cloth.

Drugs Found

On the accused:

- Pill bottle in his sock containing 5.53 grams of a heroin, fentanyl, and meth mix (along with other substances).

In the accused's mouth:

- Ball wrapped in plastic containing 28.18 grams of a heroin, fentanyl, and meth mix (along with other substances).

In the police car:

- 9.96 grams of meth;
- 1.46 grams of meth;
- 12.9 gras of oxycodone pills.

Destroyed Evidence

From the rear of the police car:

- The pouch found in the rear of the police car.
- $9.70 in coins in the pouch believed to be covered in an illicit substance.
- A vial of suspected cannabis oil.
- All of the drug packaging including a bag with multiple dime baggies inside, unused baggies from the black pouch, and multiple baggies with residue found both in the black pouch and loose in the cruiser.

Charter of Rights

s. 7 **Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.**

s. 11 **Any person charged with an offence has the right: ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.**

The accused testified in his own defence. He said he was an addict and admitted he had drugs in his sock. As for the drugs in his mouth, the accused said he was leaning forward in the police car to relieve the pressure on his injured shoulder when he found a bag, about 6-8 inches long and 3 inches high, in a puddle of water at his feet. Curious, he picked it up, unzipped it and a white ball wrapped in white plastic fell out along with other items. He then put the ball in his mouth because he didn't want to get caught with it.

The accused sought a stay of proceedings on the basis that his rights under ss. 7 and 11(d) of the *Charter* were breached because the destroyed evidence was relevant and highly probative. In his view, its loss prejudiced his right to make full answer and defence, and infringed his right to a fair trial. In the alternative to a stay, he sought the exclusion of the evidence found in the cruiser.

The judge rejected the accused's submission and convicted him of possessing drugs for the purpose of trafficking x 5 and breach of probation x 2. He was sentenced to eight years in prison.

Ontario Court of Appeal

The accused challenged his convictions, arguing the trial judge erred. The Court of Appeal agreed, concluding the police failed in their obligation to preserve the evidence and its destruction, which resulted from unacceptable negligence, impaired the accused's right to make full answer and defence protected by ss. 7 and 11(d) of the *Charter*. ***"In this case, the police did not take reasonable steps to preserve the evidence,"*** said Justice Nordheimer for the Court of Appeal. ***"To the contrary, the police purposely destroyed the evidence and did so without taking any photographs of it. The officer who destroyed the evidence said that he did so because '[he] just didn't see the significance in keeping them'. But the officer then fairly added, 'If I could do it again, I would have kept the brown purse'."*** Justice Nordheimer added:

> The fact that the officer considered the items to be a biohazard did not justify their destruction. The police routinely handle all sorts of items that could be considered biohazards, but that fact does not justify their destruction. Drugs themselves are biohazards, but they must be retained in order to prove the offences charged. Indeed, the officer acknowledged that these items could have been saved until the court proceedings concluded. [para. 30]

In this case, the trial judge did not properly analyze the significance of the items that were destroyed. Two officers could not agree on who searched the police car or how it was done, let alone who was the driver that day. And all three officers provided different descriptions of the pouch, which was the apparent source of the drugs and other items found in the back of the police car and in the accused's mouth. The accused had also been thoroughly searched at the scene before being placed in the car and was handcuffed to the rear:

"The fact that the officer considered the items to be a biohazard did not justify their destruction. The police routinely handle all sorts of items that could be considered biohazards, but that fact does not justify their destruction. Drugs themselves are biohazards, but they must be retained in order to prove the offences charged."

In these circumstances, it is problematic how an item, like this fabric pouch, could have been on the [accused's] person and yet not be found in the course of the search of the [accused]. Indeed, it is hard to see how an item, described by at least one of the officers as being like a "fanny pack", could have been missed in such a search, especially when one considers what the [accused] was wearing at the time: fitted jeans, a skin-tight shirt, a loose-fitting button-up shirt over top, and a small nylon jacket. It is also difficult to understand how the [accused] could have retrieved this item from where it was apparently so well-hidden on his person, given he was handcuffed to the rear throughout his time in the cruiser.

In order for the trial judge to properly consider the evidence on the issue of the drugs found in the rear of the cruiser, it cannot be refuted that being able to look at the fabric pouch would be of singular significance, especially in light of the differing descriptions given by the officers of the pouch. If the physical size of the pouch would lead to a conclusion that it could not realistically have been missed in a search of the [accused's] person, then that fact would have to pose a serious question whether the pouch was actually in the possession of the [accused]. It could certainly raise a reasonable doubt regarding that fact. [paras. 33-34]

Had the judge been able to see the pouch, it would have assisted in determining the likelihood that it could have been hidden on the accused, which would have assisted in evaluating his evidence about what happened.

As a remedy under s. 24(2) of the *Charter*, the Court of Appeal excluded the evidence found in the cruiser, including the ball of drugs from the accused's mouth. The convictions related to this evidence were set aside and acquittals were entered. The possession for the purpose of trafficking conviction related to the drugs found in the accused's sock at the time of his arrest was substituted with a simple possession conviction. He was to be re-sentenced on this matter. The breach of probation convictions were upheld.

Complete case available at www.ontariocourts.on.ca

ENTRY ONTO PRIVATE PROPERTY JUSTIFIABLE

R. v. Crowe, 2021 SKCA 66

At about 2:00 a.m. police received a 911 call from a house (House 195) located on First Nation land. The 911 caller requested assistance to remove people from the residence who had been drinking. Two officers responded and arrived to find the lights to the house completely off and its doors were closed. The house appeared quiet with nothing going on. But the officers saw the tail lights of a vehicle through a stand of trees about 30 metres away. They decided to investigate whether the vehicle had anything to do with the 911 call.

The officers drove down a trail - also described as a driveway - towards the vehicle. The lights to the vehicle were on and one officer saw it was running as evidenced by its exhaust. The officers pulled up behind the vehicle, which now had been turned off. The accused - the lone occupant - exited the vehicle from the driver's seat. he was staggering and was unsteady on his feet. He walked about 10 feet from the vehicle to another house (House 196) where he steadied himself against its outside balcony. As an officer approached, he detected a "very strong smell of beverage alcohol" coming from the accused's breath and found he had "very

"How [a police officers' common-law authority in responding to a 911 call] is exercised must be left in some measure to the reasonable discretion of the police officers involved, recognizing that most 911 calls are emergent. In this regard, it is important to note that emergency situations are rarely static; they are fluid and ever changing. The limit on the police officers' discretion is that their conduct must be justifiable."

slurred speech" when he spoke. And the accused had possession of the keys to the vehicle.

The officer formed the opinion that the accused was impaired by alcohol and he was arrested, handcuffed, searched and placed in the back of the police vehicle. A breathalyzer demand was given along with the right to counsel and police warning. The accused was transported to the police station, afforded the opportunity to call legal counsel and he provided breath samples. He was subsequently charged with driving while over 80mg% and having care and control of a motor vehicle while his ability to operate it was impaired by alcohol.

Saskatchewan Provincial Court

The accused alleged the police entered private property without lawful authority, and breached his s. 8 (unreasonable search or seizure) and s. 9 (arbitrary detention) *Charter* rights. He claimed the "trail" the officers had driven down was private property. He said he had been walking from the house related to the 911 call (House 195) to a neighbouring house (House 196) to ask its occupant (his uncle) for a ride home because he was too intoxicated to drive. He said he only approached his vehicle to lock it and had no intention to drive.

The judge found the accused had been detained and arrested while on private property. As for the road connecting the two houses, is was a trail used by a water truck to fill tanks on both properties. However, the police officers were responding to a 911 call, and had approached the accused's vehicle to determine whether it was connected to the call. Having the authority to investigate a 911 call in these circumstances gave the police officers lawful authority to enter the private property where the accused's vehicle was located. A new situation arose when the accused exited the vehicle, staggered and was unsteady on his feet, and spoke with slurred speech while smelling of alcohol. The officer then had reasonable grounds to arrest the accused. Neither his ss. 8 or 9 *Charter* rights were breached and he was convicted of care and control of a motor vehicle while his ability to operate it was impaired by alcohol. An acquittal was entered on the charge of driving while over 80mg%.

Saskatchewan Court of Appeal

The accused contended that the trial judge erred in her conclusions. He submitted, in part, that the police officers' conduct fell outside their statutory or common-law powers or duties when they entered onto private property, and that his ss. 8 and 9 *Charter* rights were breached through this unauthorized conduct.

Police Entry Onto Private Property

The accused argued that the police did not have authority to come onto the neighbouring private property to investigate the 911 call. In his view, the police were first required to attend House 195 to verify the nature of the 911 complaint and, until that was done, they had no authority to broaden their investigation to include persons on the adjoining property (House 196).

Relying on the Supreme Court of Canada judgement in *R. v. Godoy*, [1999] 1 SCR 311, Justice Ryan-Froslie, delivering the Court of Appeal decision, found the police were acting within the scope of their duties. The scope of a police officer's response to a 911 call will depend on a number of

"[A] police officer's authority to apprehend offenders engaged in criminal activity unrelated to a 911 call is not displaced by their duty to respond to such a call. Those two things coexist."

factors. These factors include the duty being performed, the extent to which some interference with individual liberty if necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with and the nature and extent of that liberty.

"How [a police officers' common-law authority in responding to a 911 call] is exercised must be left in some measure to the reasonable discretion of the police officers involved, recognizing that most 911 calls are emergent," said Justice Ryan-Froslie. ***"In this regard, it is important to note that emergency situations are rarely static; they are fluid and ever changing. The limit on the police officers' discretion is that their conduct must be justifiable."*** But a response to a 911 call is not necessarily limited to only locating the caller and determining their reasons for making the call.

Further, more than one police duty established by statute or the common law, with its attendant authority and powers, may be engaged at the same time. As the Court of Appeal noted, ***"a police officer's authority to apprehend offenders engaged in criminal activity unrelated to a 911 call is not displaced by their duty to respond to such a call. Those two things coexist."***

In holding that a police officer's response to a 911 call and the duties and powers engaged by that response will be informed by the circumstances they find themselves in, Justice Ryan-Froslie stated:

> In [the accused's] case, the trial judge found the police officers were justified in approaching [the accused's] vehicle to see if the occupants knew anything about the 911 call. It was approximately 2:30 in the morning; House 195, where the 911 call had emanated from, was dark; the doors were shut; and the house was quiet. The only sign of life was the tail lights of [the accused's] vehicle, visible behind a stand of trees adjacent to House 195. In my view, the trial judge did not err by finding the police officers' conduct in approaching [the accused's] vehicle was a legitimate part of their investigation into the 911 call. Further, in the circumstances as described, it was reasonable for the police officers to approach [the accused's] vehicle before knocking on the door of House 195. [para. 36]

Unreasonable Search

The accused suggested the police lacked the authority to enter onto the private property. Therefore, when they entered onto the property, arrested him and conducted a search incidental to his arrest, his s. 8 *Charter* rights were violated.

The Court of Appeal, however, disagreed. First, the accused was unable to establish a reasonable expectation of privacy respecting the property where he was located. He did not live at House 196 and it belonged to his uncle. He said he was going to the house to ask for a ride home. He was nothing more than an uninvited guest. And there was no evidence he had any right to, or interest in the property. Second, the officers' conduct in merely entering onto the driveway to approach the accused's vehicle did not constitute a search or seizure under the *Charter*.

Arbitrary Detention

The accused argued that he was detained when the officers stopped behind his vehicle to investigate. In his view, he was psychologically detained at that point. The Court of Appeal, however, rejected this claim, finding the accused had not been detained until his formal arrest:

> The police officers did not stop [the accused's] vehicle; they merely parked behind it. There is no suggestion in the evidence that [the accused's] vehicle could not be driven away.

> There was, therefore, no physical detention. The police officers' purpose in approaching [the accused's] vehicle was to inquire about the 911 call. They did not suggest they were aware of any criminal offence having been committed, and they never claimed to have effected an investigative detention ... . Further, up until the point when he was arrested, [the accused] had not identified any police conduct, direction or demand that would have caused a reasonable person in his position to conclude he or she was not free to go. Following [the accused's] arrest, the breathalyzer demand was made. [The accused] does not suggest the police officers lacked reasonable and probable grounds to make that demand. On the contrary, he freely admits he was intoxicated at the time. In the circumstances, [the accused's] s. 9 Charter rights were not breached, and the trial judge did not err in finding that he had not been arbitrarily detained. [references omitted, para. 54]

The accused's appeal was dismissed.

Complete case available at www.canlii.org

NO EXPECTATION OF PRIVACY IN CAR RENTAL INFORMATION

R. v. Telfer, 2021 MBCA 38

In the early morning hours a Jeep Cherokee pulled up beside another vehicle. A person rolled down the back driver's side window of the Jeep and fired at least 10 shots from a handgun at the other car. Two occupants were hit by gunfire. The front seat passenger was struck in the head and killed, while the driver was struck in the wrist and wounded. The Jeep then sped off.

A witness provided the Jeep's licence plate number to police. A computer query of the Jeep's plate revealed it was registered to Budget Rent A Car. Police attended at Budget and spoke with a rental agent who identified Paige Crossman as the renter of the Jeep. The accused was listed as an authorized driver on the rental contract. The accused and Crossman were regular customers of Budget and personally known to the rental agent. The rental agent provided police with their names and cell phone numbers. The manager at Budget later provided the police with the driver's licence numbers and credit card numbers that the accused and Crossman used to rent vehicles from Budget. No production order had been obtained for this information.

From the cell phone numbers, the police obtained production orders from two telecommunications companies and, through that information, were able to determine the accused's residential address. When the Jeep was returned to Budget a few days later, the police immediately seized it and obtained a search warrant to examine it. A one-page rental document for the Jeep had been left in the glovebox. It identified the renter as Crossman, showed her driver's licence number and the method of payment as a Mastercard. An authorization to intercept private communications was applied for and granted, and evidence was obtained. The accused and Crossman were charged with murder and attempted murder.

Manitoba Court of Queen's Bench

The accused challenged, in part, the sub-facial validity of the affidavit which formed the basis for the granting of the authorization to intercept. He sought the excision of the information that police received from Budget without first obtaining prior authorization. In his view, he had a reasonable expectation of privacy in the information provided by Budget. Hence, his right under s. 8 of the *Charter* had been violated and he wanted the intercept evidence excluded under s. 24(2).

The trial judge ruled that there was no reasonable expectation of privacy in the rental information given to police. The trial judge found that the accused had not established a subjective expectation of privacy. The Budget information was not excised from the affidavit and the accused's application to exclude the intercept evidence was dismissed. The accused was convicted of first degree murder and discharging a firearm with

"The purpose of section 8 of the Charter is to protect individuals' privacy interests from state intrusion. However, only reasonable expectations of privacy are protected. If there is no reasonable expectation of privacy in the subject of the state action, then there is no 'search' for the purposes of section 8 of the Charter. This means that, in assessing an alleged breach of section 8 of the Charter, the judge must first determine if the individual had a reasonable expectation of privacy in the subject of the state intrusion. If not, then section 8 is not engaged."

intent to endanger life. Crossman, however, was acquitted of all charges. While the judge found she was the driver of the Jeep at the time of the shooting, he was not convinced she intended to kill, or that she intended to help the accused to kill.

Manitoba Court of Appeal

The accused argued the trial judge erred in finding he had no reasonable expectation of privacy in the information Budget provided to police - his name, driver's licence number, credit card number and cell phone number. In his view, its acquisition constituted a search under s. 8 of the *Charter*. And, if his rights were breached, the information must be excised from the affidavit for the intercept. Since the Budget information was so critical to the trial judge's reasons for conviction and so much evidence was derived from the Budget information, he wanted a new trial.

Reasonable Expectation of Privacy

Justice Pfuetzner, for a unanimous Court of Appeal, concluded the trial judge correctly found the accused had no reasonable expectation of privacy in the information provided to police by Budget.

"The purpose of section 8 of the Charter is to protect individuals' privacy interests from state intrusion," said Justice Pfuetzner. ***"However, only reasonable expectations of privacy are protected. If there is no reasonable expectation of privacy in the subject of the state action, then there is no 'search' for the purposes of section 8 of the Charter. This means that, in assessing an alleged breach of section 8 of the Charter, the judge must first determine if the individual had a reasonable expectation of privacy in the subject of the state intrusion. If not, then section 8 is not engaged. It is only after a reasonable expectation of privacy is found to exist that the judge turns to inquire whether the search was reasonable."***

In this case, the accused was claiming informational privacy in the details provided by Budget. In assessing the accused's submission, the following framework was first considered:

- ***"A reasonable expectation of privacy is a normative question."***
- ***"The issue then becomes how to determine if a claimant has a reasonable expectation of privacy. Broadly speaking, this is a two-step process. First, the judge must determine if the claimant has a subjective expectation of privacy. If so, then the judge must assess whether that expectation of privacy is objectively reasonable. This assessment is made from the perspective of 'the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy'."***
- ***The exercise is contextual and looks at the totality of the circumstances.***

The Court of Appeal then examined the relevant factors set out by the Supreme Court of Canada in *R. v. Patrick*, 2009 SCC 17, to determine whether the accused had a reasonable expectation of privacy in the information provided by Budget:

- **Nature or subject matter of the evidence gathered by the police.** The evidence gathered by police was his name, driver's licence details,

"First, the judge must determine if the claimant has a subjective expectation of privacy. If so, then the judge must assess whether that expectation of privacy is objectively reasonable."

cell phone number and credit card number. No GPS data was obtained.

- **Did the accused have a direct interest in the subject matter?** The accused had a direct interest in the Budget information as it related to him (name, driver's licence, cell phone number and credit card number).

- **Did the accused have a subjective expectation in the information?** The trial judge found the accused had not established a subjective expectation of privacy. He did not testify at the *voir dire*. Nevertheless, the Court of Appeal proceeded as if the accused did have a subjective expectation of privacy.

- **Was the subjective expectation objectively reasonable?**

  ➡ **The place where the alleged "search" occurred.** The alleged search occurred at Budget's publicly accessible business premises. There was no intrusion on the accused's residence or personal property.

  ➡ **Was the Budget information in public view?** Although there was no evidence to indicate that the Budget information was on public display, the accused's and Crossman's activities in renting vehicles from Budget were conducted essentially in public, as they would attend in person to rent and return vehicles. Section 22 of Ontario's *Highway Traffic Act* (*HTA*) also required Budget's rental records to be accessible by the public.

  ➡ **Was the information already in the hands of third parties; If so, was it subject to an obligation of confidentiality?** While the Budget information was obtained from a third party, nothing in the rental agreement's terms and conditions, or the governing legislation, made the information subject to an obligation of confidentiality. For example, the rental agreement contemplated the disclosure of personal information in order to ***"take action regarding illegal activities or violations of terms of service"***. The Jeep was used in the commission of a homicide which would constitute both an illegal activity and a violation of the terms of the rental agreement. In addition, s. 22 of the *HTA* mandated that rental car businesses keep details of the cars they rent, as well as the identity and driver's licence particulars of the renter, available for public inspection. ***"In the circumstances of this case, I am not convinced that any of the Budget information was subject to an obligation of confidentiality,"*** said Justice Pfuetzner. ***"First, the [police] obtained the accused's name as a result of the first-hand knowledge of the rental agent. This information was also required to be disclosed to any member of the public under section 22 of the HTA, as were the particulars of the accused's driver's licence. Additionally, the one-page rental document that was left abandoned inside the vehicle directly linked at least Crossman's name to the Jeep. Next, while the accused's cell phone number and credit card number are not subject to section 22 of the HTA, Budget was entitled to disclose them to the [police] under the rental agreement in order to 'take action regarding illegal activities'."***

  ➡ **Whether the police technique was intrusive in relation to the privacy interest.** The information was obtained at Budget's public premises. There was no intrusion upon any place that the accused would consider private. Nor was a surreptitious means or intrusive technology used to obtain the information.

"The issue then becomes how to determine if a claimant has a reasonable expectation of privacy. Broadly speaking, this is a two-step process. First, the judge must determine if the claimant has a subjective expectation of privacy. If so, then the judge must assess whether that expectation of privacy is objectively reasonable."

- **Whether the use of this evidence-gathering technique was itself objectively unreasonable.** The police obtained basic information from a publicly accessible place of business. The police inquiry focussed on the vehicles that had been rented to the accused and Crossman. General access to Budget's records was not sought and this was a targeted investigation of a serious crime. ***"Driving is a highly regulated activity,"*** said Justice Pfuetzner. ***"A reasonable and informed person would have a reduced expectation of privacy in connection with the possession and operation of a vehicle."*** The evidence-gathering technique was not objectively unreasonable.

- **Whether the informational content exposed any intimate details of the accused's lifestyle or information of a biographic nature.** The Budget information was not highly personal information. ***"It contained nothing particularly sensitive or revealing [and] did not have the potential to reveal, or provide a link to, intimate details of the lifestyle and personal choices of the accused."*** A cell phone number does not tend to reveal ***"intimate details of the lifestyle and personal choices"*** of the individual and credit card numbers are accessible to anyone entitled to do a credit check on an individual. Under Manitoba's *Personal Investigations Act*, a credit report is available to ***"any police officer acting in that capacity"***.

Since the accused did not have a reasonable expectation of privacy in the Budget information, there was no s. 8 *Charter* search. The accused's appeal was dismissed.

Complete case available at www.canlii.org

REASONABLE GROUNDS LESS THEN BALANCE OF PROBABILITIES

The Director of Criminal Property and Forfeiture v. Ramdath et al, 2021 MBCA 23

Manitoba's Director of Criminal Property and Forfeiture commenced an action under Manitoba's *Criminal Property Forfeiture Act* (*CPFA*) against several defendants resulting from an investigation involving the embezzlement of millions of dollars. The Director sought an order forfeiting certain property. The Director moved for an interim preservation order under s. 7(2) of the *CPFA* to freeze funds in a GIC and TFSA in Ramdath's name until a final determination of the civil forfeiture proceeding was made.

Manitoba Court of Queen's Bench

Although the defendants opposed the interim preservation order, the judge concluded there were ***"reasonable grounds to believe"*** that the funds in the two bank accounts were proceeds of unlawful activity. The judge found the Director need not establish a ***"prima facie"*** case against the defendants, but need only satisfy the court that there are ***"reasonable grounds to believe"*** that the two bank accounts were proceeds of unlawful activity.

Manitoba Court of Appeal

The defendants argued that the motion judge erred in ordering the interim preservation of the two bank accounts. He submitted the motion judge erred in

"Standards of proof fall on a spectrum ranging from the most exacting and demanding standard to the least: 1) proof beyond a reasonable doubt; 2) proof on a balance of probabilities; 3) a prima facie case; 4) reasonable grounds to believe; and 5) reasonable suspicion."

finding that the Director had met the test set out in s. 7(2). The Director, on the other hand, asserted that the evidentiary foundation required under s. 7(2) was low and had been met.

Standard of Proof

Section 7(2) of the *CPFA* reads:

> **Unless it would clearly not be in the interests of justice, the court must make an order under subsection (1) if it is satisfied that there are reasonable grounds to believe that the property is proceeds of unlawful activity or an instrument of unlawful activity.**

Chief Justice Chartier first described the standard of proof, conceptualizing it as follows:

> A standard of proof is a test that sets out the level of certainty required to establish proof in a legal proceeding. There is a spectrum of standards of proof that arises either from legislation or from constitutional or common law. Standards of proof fall on a spectrum ranging from the most exacting and demanding standard to the least: 1) proof beyond a reasonable doubt; 2) proof on a balance of probabilities; 3) a prima facie case; 4) reasonable grounds to believe; and 5) reasonable suspicion. While there are other standards of proof (e.g., a strong prima facie case or a serious question to be tried), these are the principal ones. [para. 14]

And further:

> [W]hen judges make decisions, they must decide whether a given set of facts meets the required standard of proof or level of certainty to make the decision sought. The required standard of proof must be properly understood. It is easier to conceptualize standards of proof than it is to define them. Conceptualization identifies a process as opposed to giving a rigid and inflexible definition. A process has the advantage of being able to adapt to the purpose of the legislation and to its underlying values. [para. 17]

Balance of Probabilities

> … Often overlooked in a discussion of the "balance of probabilities" standard is the word "balance", as in a "scale". The analogy to a scale is meant to highlight that central to applying the standard is weighing competing probabilities to arrive at an outcome. Further, while there is no objective standard to measure sufficiency, the evidence must always be "sufficiently clear, convincing and cogent to satisfy the balance of probabilities test".
>
> There are several functional equivalents that have been used to describe the "balance of probabilities" standard. The standard can also be described using the question of whether something is "more likely than not". Courts have also used "more probable than not" or "preponderance of probability" and "preponderance of evidence" [references omitted, paras. 19-20]

Prima Facie Case

> The "prima facie" standard is situated on the standard of proof spectrum between "balance of probabilities" and "reasonable grounds to believe". Black's Law Dictionary defines prima facie as "on first appearance but subject to further evidence or information". The term "prima facie" is used in several different contexts and is somewhat loosely defined. The phrases "prima facie proof", "prima facie evidence" and "prima facie case" have at times been used interchangeably, contributing to the confusion around what, exactly, is the prima facie case standard of proof.

"[T]he jurisprudence shows that the 'reasonable grounds to believe' standard is higher than the 'reasonable suspicion' standard and lower than the 'balance of probabilities' standard. The central difference between 'balance of probabilities' and 'reasonable grounds to believe' is the absence of weighing probabilities in applying the 'reasonable grounds to believe' standard. The latter can exist even in the face of a competing probability."

The Supreme Court of Canada has provided helpful guidance on what constitutes a "prima facie case" standard in the context of criminal law and extradition law. It is a "case containing evidence on all essential points of a charge which, if believed by the trier of fact and unanswered, would warrant [the order sought]". [references omitted, paras. 21-22]

Reasonable Grounds to Believe

... [T]he jurisprudence shows that the "reasonable grounds to believe" standard is higher than the "reasonable suspicion" standard and lower than the "balance of probabilities" standard. The central difference between "balance of probabilities" and "reasonable grounds to believe" is the absence of weighing probabilities in applying the "reasonable grounds to believe" standard. The latter can exist even in the face of a competing probability. Moreover, the "reasonable grounds to believe" standard typically arises when dealing with preliminary pre-hearing matters, such as search and seizures or arrests and detentions, and the "balance of probabilities" standard normally applies at the final stage of a legal proceeding. [references omitted, para. 28]

Was the Standard of Proof Met?

Chief Justice Chartier was satisfied that there were reasonable grounds to believe that the funds in the two bank accounts were proceeds of unlawful activity. ***"At the section 7 interim order stage of the forfeiture proceedings, the judge is not called upon to make final determinations on the evidence,"*** he said. ***"At that stage, it is not the function of the judge to make findings of fact, to assess credibility, to prefer some evidence to other evidence or to resolve competing inferences. The director must present some evidence on each of the section 17.15 elements and the judge will review the sufficiency of the evidentiary record and decide on the 'reasonable grounds to believe' standard of proof whether the impugned property is proceeds of unlawful activity or an instrument of unlawful activity. In making that determination, the judge will decide, after considering the evidence led, whether there is some evidence capable of belief on all required elements. If there is, section 7(2) requires the judge to make the interim order unless it would clearly not be in the interests of justice to do so."***

In this case, there was some evidence that the funds in the two bank accounts were proceeds of unlawful activity. The defendant Ramdath had pled guilty to defrauding his former employer of more than $4 million. He enjoyed a lavish lifestyle beyond what his annual salary would have allowed. And there was some evidence that the stolen funds were deposited into the TFSA and GIC bank accounts. The reasonable grounds standard for the interim preservation order had been satisfied. And the defendants were unable to demonstrate the order ***"would clearly not be in the interests of justice"***.

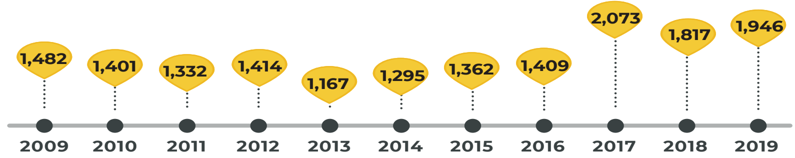
The defendants' appeal was dismissed.

Complete case available at www.canlii.org

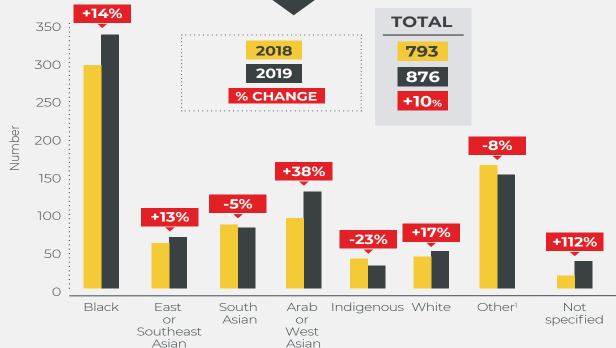
"[T]he "reasonable grounds to believe" standard is higher than the 'reasonable suspicion' standard and lower than the 'balance of probabilities' standard."

POLICE-REPORTED HATE CRIME IN CANADA, 2019

The number of police-reported hate crimes **increased 7% in 2019**. The increase was mostly due to more incidents targeting **race or ethnicity, as well as sexual orientation**.

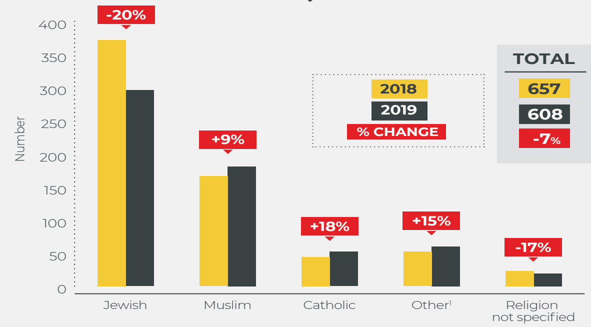


In 2019, **46%** of all police-reported hate crimes **were motivated by race or ethnicity**.



[1] Motivations based on race or ethnicity not otherwise stated and those which target more than one group.

In 2019, **32%** of hate crimes **were motivated by religion**.



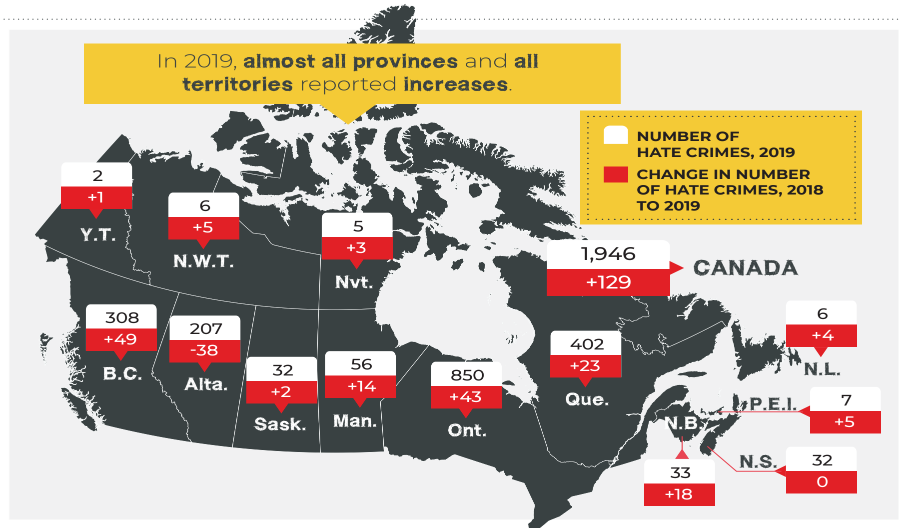
[1] Motivations based on religions not otherwise stated.

In 2019, **14%** of hate crimes **were motivated by sexual orientation**.

	2018	2019	% change
Sexual orientation	186	263	+41%
Sex or gender	54	53	-2%
Other[1]	105	99	-6%

[1] Includes mental or physical disabilities, language, age and other similar factors.

In 2019, **almost all provinces** and **all territories** reported **increases**.



The **majority** of police-reported hate crimes were **non-violent offences**.

Note: Hate crimes whose type was unknown have been excluded. Therefore, the totals for each type of hate crime shown will not add up to the overall total for 2018 and 2019.
Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Uniform Crime Reporting Survey.

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UNEXPLAINED TIME FROM CHARGE TO ARREST ATTRIBUTABLE TO CROWN DELAY

The time it takes to arrest an accused after they have been charged can be counted towards the *R. v. Jordan*, 2016 SCC 27, s. 11(b) *Charter* framework. In ***R. v. Virk, 2021 BCCA 58***, a five member panel of the BC Court of Appeal has upheld the trial judge's attribution of delay from the time a charge was laid until the accused was arrested as Crown delay for the purposes of deciding whether charges should be stayed as a result of a breach of the right to be tried within a reasonable amount of time recognized under s. 11(b).

In this case, a BC Supreme Court judge stayed sexual assault charges after it was determined that there was a net delay of 57.8 months from the time of charge to trial end, which included 140 days between the laying of the information and the arrest of the accused. The Crown had argued that the period between the charge to arrest should be deducted from the total delay because the Crown did not control when the police executed process against an accused. The Court of Appeal, however, did not agree. ***"That is not to say that the time between the laying of the information and arrest could never be deducted from total delay as a discrete event—for example, where there is evidence that the police were diligent in their efforts to serve process but unable to locate the accused, the accused was evading service, or other matters in the public interest reasonably necessitated a delay in effecting an arrest,"*** said Justice Fenlon for the unanimous Court of Appeal. ***"But that is not this case. The judge found the delay between the laying of the information and [the accused's] arrest 'was not, on the evidence, explained or justified'."***

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

EXPERT EVIDENCE or TEST FIRING NOT NECESSARY TO PROVE GUN WAS A 'FIREARM'

Just because there was no expert evidence tendered or proof a gun was test fired did not mean the Crown had not proven the object was a **"firearm"** for the purposes of the *Criminal Code*. In ***R. v. Courchene***, 2021 MBCA 24, the accused was convicted of break, enter and stealing a firearm. He and an accomplice had broken into an unoccupied home and stole three rifles, two shotguns and an airsoft pistol. The men were quickly apprehended by police and the guns were recovered. However, the guns were not examined by an expert nor were they test fired. Instead, the Crown relied on the evidence of the owner's relatives to prove the rifles and shotguns were firearms as defined in the *Criminal Code*. The owner's son-in-law ***"was familiar with firearms from serving in the military, he testified as to his personal knowledge of firing the guns historically; their storage in his father-in-law's gun case or gun safe; his cleaning and servicing of the guns to keep them in 'good working order'; and that, save for one of the rifles that was missing a bolt, the other recovered rifles and shotguns were in the same condition as when he last serviced them in the 'previous year'."***

The Manitoba Court of Appeal found the trial judge could properly draw inferences as to the condition of the guns from the evidence of the lay witness (the owner's son-in-law). ***"The inference that some of the stolen guns were 'firearm[s]' within the meaning of section 2 of the Code was reasonably open here in light of the standard of proof,"*** said Justice Mainella for the Appeal Court. ***"We note that the trial judge was careful in his reasons not to base his verdict on the damaged rifle or on the airsoft pistol (about which he heard little evidence)."***

Complete case available at www.canlii.org

CONFINEMENT DID NOT END WHEN VICTIM JUMPED FROM VEHICLE

A murder victim's desperate bid to escape from a vehicle did not end his unlawful confinement such that the constructive murder provision under the *Criminal Code* was neutered. In ***R. v. Sundram & Martin***, 2021 BCCA 53, the two accused were jointly charged with first degree murder. The Crown theorized that the murder occurred while the men were unlawfully confining the victim in a vehicle. They were rival drug traffickers. Under s. 31(5) of the *Criminal Code*, irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder if the death is caused while that person is committing or attempting to commit a number of enumerated offences, including forcible confinement. This is known as constructive murder. While the predicate offence of unlawful confinement must be linked together temporally and causally with the murder, they must be distinct and independent of one another. The trial judge convicted Suderman of second degree murder because he found a brief gap in time between the end of the victim's confinement and the commission of the murder. Just before he was shot, the victim jumped out of the vehicle he had been confined in and managed to escape. In the judge's view, this momentary gap in time between the victim's escape and being shot ended his confinement. Thus, the Crown failed to prove the victim was murdered while the accused were committing the offence of unlawful confinement.

On appeal, the trial judge was found to have erred. ***"The unlawful confinement of [the victim] did not end with his desperate act of self-preservation by jumping from the Silverado,"*** said Justice Fitch. ***"[The victim] was in no sense free to move about according to his own inclination and desire, including after he had jumped from the moving Silverado and made a run for it at the side of the road. His confinement did not, as a matter of law, end as soon as he bailed from the truck."*** Suderman's acquittal for first degree murder was set aside and a finding of guilt was entered. Martin's conviction for second degree murder was upheld since he was found not to be a party to the confinement.

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

'ACCIDENT' INCLUDES INTENTIONALLY STRIKING A PEDESTRIAN

A person who intentionally struck a pedestrian had been involved in an "accident" for the purposes of a hit and run offence under the *Criminal Code*. In ***R. v. Reid***, 2021 NLCA 13, the accused was convicted of assault with a weapon, dangerous driving causing bodily harm and failing to stop at the scene of an accident after he intentionally drove his vehicle into a pedestrian. He admitted he was the driver and did not stop at the scene, but he claimed he drove into the pedestrian intentionally and therefore it was no "accident".

The Newfoundland and Labrador Court of Appeal saw it otherwise, rejecting the accused's submission that an ***"accident"*** under the hit and run provision did not include something that arose from an intentional act. ***"We see the term 'accident' colloquially used to describe both intentional and unintentional acts,"*** said Justice Goodridge. "***Reading section 252 [now s. 320.16] in its entire context, and in the manner as directed by the Interpretation Act, leads to the conclusion that intention of the driver is not an element of 'accident'."*** And further, ***"Within the context of section 252, 'accident' contemplates any incident in which a person operates a vehicle so as to cause injury to another person or vehicle, and it includes intentional conduct on the part of the accused."***

Complete case available at www.canlii.org

"We see the term 'accident' colloquially used to describe both intentional and unintentional acts."

NATIONAL DNA DATABANK STATISTICS RELEASED

Statistics for Canada's National DNA Data Bank have been released. As at March 31, 2021 there were a total of 73,793 DNA matches.

Match Inventory Report

Criminal Investigations	Hits
Offender Hits -Crime Scene to Offender	66,539
Forensic Hits - Crime Scene to Crime Scene	7,211
Victim Hits - Matches to Victims Index	9
Humanitarian Investigations	**Hits**
Human Remains Hits - Putative Identification	25
Humanitarian Indices Hits - Investigative Lead	9
Total	73,793

Offender Hits By Case Type

Offence	Hits
Murder	4,287
Sexual Assault	6,947
Attempted Murder	1,288
Robbery (Armed)	7,258
Break and Enter	29,477
Assault	5,225
Other	12,057
Total	66,539

DNA Profiles Contained in Criminal Indices

Index	Count
Convicted Offender Index	411,999
Crime Scene Index	184,549
Victims Index	61
Total	596,609

Source: National DNA Data Bank Statistics, accessed April 17, 2021.

Alcohol Sales in Canada 2019/2020

How Health Canada defines "a drink":

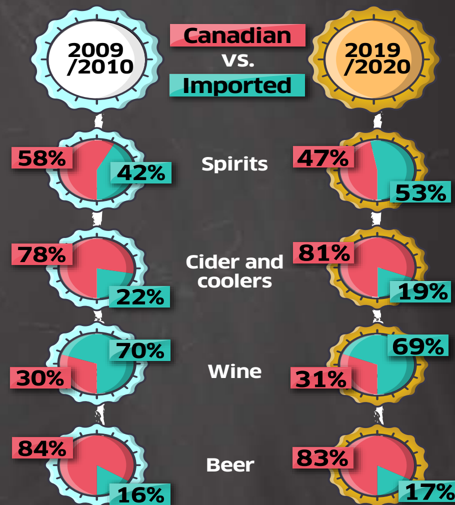
Number of standard alcoholic drinks sold per week, per person over the legal drinking age

While beer remains the drink of choice, Canadian tastes have shifted over time. Sales of cider, coolers, and gin have more than doubled in the last decade.

Gin was the spirit with the highest growth in 2019/2020.

Rum, vodka, and whisky are the top spirits throughout Canada, except in Quebec, where liqueurs are the most popular.

Demand for imported spirits has risen in recent years



Average alcohol sales in Canada were $810 per person over the legal drinking age.

Source: Control and Sale of Alcoholic Beverages in Canada 2019-2020.

Between April 1, 2019, and March 31, 2020, governments earned an average of $425 per person over the legal drinking age from the control and sale of alcoholic beverages.

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Canada

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