Pathways to Police Adoption of Body and Dash Cameras in Canada: How and Why Parliament Should Intervene

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Introduction

Over the course of the past decade, police in the United States, Britain, Australia and other nations, have embraced the use of body and dash cameras.[1] Police forces across Canada have piloted or debated policies for the use of cameras, including forces in Vancouver, Montreal, Toronto, and the RCMP.[2] Yet, prior to the summer of 2020, few police forces had adopted an on-going policy to use cameras.[3] This remains the case in early 2021, but evolving

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1. Seth Stoughton, "Police-Worn Cameras" (2018), 96 North Carolina LR 1363, noting at 1366: "By the middle of 2016, half of the seventy largest cities in the United States had begun using or committed to using BWCs [body worn cameras]", citing Rachel Lerman, "Body cameras now in half of big city police departments", *Seattle Times* (July 7, 2016); Stoughton also notes, at 1376, that "by 2013, the most recent year for which data are available, [adoption of dash camera systems] had reached 70% of agencies" in the United States. See also Privacy International, "Every Police force in the UK will soon use body worn video cameras to record us in public", privacyinternational.org (March 3, 2019), <https://privacyinternational.org/long-read/2724/every-police-force-uk-will-soon-use-body-worn-video-cameras-record-us-public>, noting that 71% of UK police force use body cameras and "every police force in the country will have them by autumn 2019." For Australia, see Emmeline Taylor, et al, "Police detainee perspectives on policy body-worn cameras", *Trends & Issues in Crime and Criminal Justice* (Australian Institute of Criminology, October 2017) at 1, noting "police BWCs were first trialled in Australia almost a decade ago, in Western Australia in 2007, and most Australian jurisdictions have trialled, or are planning to trial, BWCs with frontline police officers."
2. Amanda Pfeffer, "The Cost of Accountability: Can Canadian Police Services Afford Body Cam technology?", *CBC News* (Dec 10, 2016).
3. Justin Ling, "As Use of Bodycams Becomes Common in U.S., Most Canadian Police Forces – Including RCMP – Resistant", *National Post* (July 15, 2019). We refer in this article to body and dash cameras throughout without distinction; however, we note that different issues arise with the use

technology and the capture by video of George Floyd's death at police hands in the summer of 2020 have served as a catalyst for change in Canada.[4]

In the wake of Floyd's death, the federal government announced a commitment to spend up to $50 million a year to fund the adoption of cameras by the RCMP.[5] Forces in Ontario have recently announced $70 million in contracts for cameras and software, with two of the province's largest forces – Peel and Toronto – budgeting $10 and $34 million respectively for equipment.[6] Toronto and Calgary police have begun using bodycams.[7] Yet, the timing and nature of the uptake of camera use among other forces in Canada, including the RCMP, is unclear.[8]

The reluctance by police and government in Canada to formally adopt camera use runs contrary to the recommendations of recent police studies, copious scholarship, and repeated calls by judges. The RCMP and the Toronto Police Service produced extensive reports, in 2015 and 2016 respectively, recommending the adoption of cameras or further piloting.[9] The reports complemented the findings of a growing body of scholarship in criminology and law, noting key

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of each technology. For an overview in the American context see Stoughton, *supra* note 1, at 1371 to 1378.

4. Colin Freeze, "Despite Concerns of Skeptics, George Floyd Case has Sparked Rush to Buy Bodycam Technology for Police", *Globe and Mail* (April 23, 2021).
5. Freeze, *ibid.*; in November of 2020 Parliament committed $238.5 million in police camera funding over the next six years, to be followed by $50 million annually: Catharine Tunney, "RCMP Union Calls for Clear Guidelines on When Body Cameras Can Be Turned Off", *CBC News* (January 12, 2021).
6. Freeze, *supra* note 4.
7. Toronto Police Service, "Body-Worn Cameras", online: <http://www.torontopolice.on.ca/body-worn-cameras/>. Calgary Police Service, "Body-Worn and In-Car Cameras", online: <https://www.calgary.ca/cps/body-worn-camera.html.>
8. Freeze, *supra* note 4.
9. The RCMP produced two reports in 2015, only one of which was published. The first was published in March of 2015 and is titled "Audit of Procurement and Use of In-Car Video", <http://www.rcmp-grc.gc.ca/en/audit-procurement-and-use-car-video> [RCMP "In-Car Video"]. The second was produced in December 2015 by the RCMP's National Criminal Operations division and titled "Body Worn Video Feasibility Study: Final Report". Journalist Justin Ling (*supra* note 3) posted the March report online at: <https://www.scribd.com/document/350849795/RCMP-BMC-Final-Report#from_embed> [RCMP, "Body Worn Video"]. See also the Toronto Police Service, Strategic Planning Section, "Body-Worn Cameras: A report on the findings of the pilot project to test the value and feasibility of body-worn cameras for police officers in Toronto" (June 2016).

limitations and concerns about the technology, but affirmed a host of possible benefits and ways of mitigating many of the concerns.[10]

Courts in Canada enter the police camera debate in a virtual void of law on point. Judges have refused to recognize a right to the creation of police camera evidence under ss. 7 and 11(d) the *Charter of Rights and Freedoms*.[11] Nor does an officer's failure to use a camera constitute a search carried out in an unreasonable manner under s. 8.[12] But judges in other cases have decried the failure by police to use body or dash cameras as a means of pre-empting recurring conflicts over police evidence and possibly avoiding trials altogether.[13] Recent deliberations within the RCMP, Toronto, and other police forces across Canada suggest that the primary impediment to wider adoption is cost.[14]

This article surveys these developments to lend context for the argument that Parliament could foster greater uniformity in the adoption and use of police cameras and greater trial efficiency – without unduly interfering in local funding decisions – by legislating a requirement that police use cameras in discrete situations when practicable, including arrest and detention, vehicle stops for offences under the *Criminal Code*, and when carrying out the search of a residence.

10. See *e.g.* the Harvard Law Review Association, "Considering Police Body Cameras" (2015), 128:6 Harvard Law Review 1794 [HLRA, "Considering"]; Howard M. Wasserman, "Moral Panics and Body Cameras" (2015), 92 Washing UL Rev 831; Stoughton, *supra* note 1; Dan M. Kahan et al., "Whose Eyes Are You Going to Believe? *Scott v. Harris* and the Perils of Cognitive Illiberalism" (2009), 122 Harvard Law Review 837; Barak Ariel, William A. Farrar & Alex Sutherland, "The Effect of Police Body-Worn Cameras on Use of Force and Citizens' Complaints Against the Police: A Randomized Controlled Trial" (2015), 31 Journal of Quantitative Criminology 509 [Ariel, "Effect"]; Barak Ariel *et al.*, "Contagious Accountability: A Global Multisite Randomized Controlled Trial on the Effect of Police Body-Worn Cameras on Citizens' Complaints Against the Police" (2017), 44 Criminal Justice and Behavior 293 [Ariel, "Contagious"].
11. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11 [*Charter*].
12. Cases are canvassed in Part 2 below.
13. See Part 3 below.
14. See Pfeffer, *supra* note 2 and further discussion below.

1. Merits of Adopting Body Cameras and Impediments to Adoption

(a) Scholarship on Point

A growing body of scholarship in law and criminology lends important context to police camera use. Studies point to a host of salutary benefits: bodycams correlate with lower rates of police use of force[15] and fewer complaints about police conduct;[16] they enhance training initiatives;[17] they ameliorate perceptions of police accountability;[18] and they can render prosecutions more efficient by providing incontrovertible offence-related evidence, bypassing the need for lengthy police examinations in the course of a trial on some issues.[19]

Yet, the findings are not unanimous on all of these points. Some studies dispute that cameras significantly reduce police use of force,[20]

15. See HLRA, "Considering", *supra* note 10 at 1800; Stoughton, *supra* note 1, at 1382-1385, also noting conflicting findings at 1385-6; Tony Farrar, "Self-Awareness to Being Watched and Socially-Desirable Behavior: A Field Experiment on the Effect of Body-Worn Cameras on Police Use-of-force", National Police Foundation (March 2013), online: <www.policefoundation.org>.
16. HLRA, "Considering", *supra* note 10 at 1801; Alberto R. Gonzales and Donald Q. Cochran, "Police-Worn Body Cameras: An Antidote to the 'Ferguson Effect'?" (2017), 82:2 Missouri Law Review 299, at 309, citing Ariel "Effect" and Ariel "Contagious", *supra* note 10; see also Stoughton, *supra* note 1 at 1377; and Farrar, *supra* note 15.
17. HLRA, "Considering", *supra* note 10 at 1801; Stoughton, *supra* note 1 at 1377.
18. Gonzales and Cochran, *supra* note 16 at 311, citing Michael D. White, *Police Officer Body-Worn Cameras: Assessing the Evidence* (Washington, DC: Office of Justice Programs, Department of Justice, 2014); Stoughton, *supra* note 1 at 1379-1382; Matthew S. Crow, Jamie A. Snyder, Vaughn J. Crichlow, and John Ortiz Smykla, "Community Perceptions of Police Body-Worn Cameras: The Impact of Views on Fairness, Fear, Performance, and Privacy" (2017), 44:4 Criminal Justice and Behavior 589.
19. HLRA, "Considering", *supra* note 10 at 1803; Stoughton, *supra* note 1 at 1377.
20. David Yokum, Anita Ravishankar, and Alexander Coppock, "A Randomized Control Trial Evaluating the Effects of Police Body-Worn Cameras" (2019), 116:21 Proceedings of the National Academy of 10329, finding that "BWCs have very small and statistically insignificant effects on police use of force and civilian complaints, as well as other policing activities and judicial outcomes." See also Cynthia Lum, Megan Stoltz, Christopher S. Koper, and J. Amber Scherer, "Research on Body-Worn Cameras: What We Know, What We Need to Know" (2019), 18 Criminology & Public Policy 93, reviewing over 70 empirical studies of BWCs to date, noting at 101 that

or the number of complaints against police.[21] Even the research supporting camera use recognizes a host of concerns, including the fact that the "locus of control" over these tools (what to record and when) often remains in the hands of police, leading to inconsistent and unreliable use.[22] Many prosecutions have not been rendered significantly shorter or resulted in convictions despite what initially appeared to be clear camera evidence.[23] Recordings are often equivocal in nature due to the operation of cultural bias leading observers to draw different inferences from the same images.[24] The cost of outfitting a police force with cameras can be considerable and managing data storage onerous.[25] Police use of cameras also raises complex privacy issues by increasing the scope of state surveillance.[26]

Yet, the general tenor of the scholarship remains optimistic. Policies can be crafted to mitigate many of the concerns. Police forces could adopt rules on what should be recorded and when.[27] Officers

studies of the impact on camera use on use of force "do not reveal a definitive conclusion that BWCs can reduce officers' use of force. [...] [A]s with official complaints, reports of uses of excessive force are infrequent relative to more minor forms of force regularly used (i.e., handcuffing or restraining). Agencies also have various thresholds and accountability mechanisms for when a use-of-force report must be written, which could lead to variations in findings across sites."

21. Ariel, "Contagious" *supra* note 10, a randomized study of seven sites involving 2,000 officers, finding a "non-significant" 10.1% reduction complaints against officers; see also the summary of further studies noting "non-significant impacts of BWCs on complaints against officers" in Lum et al, *ibid*., at 99-100.
22. HLRA, "Considering", *supra* note 10 at 1805-1807.
23. See *e.g*. discussion of the failed prosecution of Ohio officers in 2014 for the death of John Crawford despite the abundance of video evidence: *ibid*., at 1804-1805.
24. *Ibid*., at 1812-1814; Wasserman, *supra* note 10 at 840 and 842; Stoughton, *supra* note 1, at 1405-1413; Kahan et al, *supra* note 10 at 840.
25. HLRA, "Considering", *supra* note 10 at 1809-1810; Gonzales and Cochran, *supra* note 16 at 318.
26. Mary D. Fan, "Privacy, Public Disclosure, Police Body Cameras: Policy Splits" (2016), 68 Alabama Law Review 395 at 442; Stephen E. Henderson, "Fourth Amendment Time Machines (And What They Might Say About Police Body Cameras)" (2016), 18 University of Pennsylvania Journal of Constitutional Law 933 at 972; Martina Kitzmueller, "Are You Recording This?: Enforcement of Police Videotaping" (2014), 47 Connecticut Law Review 167 at 170-73; Rachel Levinson-Waldman, "Hiding in Plain Sight A Fourth Amendment Framework for Analyzing Government Surveillance in Public" (2017), 66 Emory Law Journal 527 at 614; Kami Chavis Simmons, "Body-Mounted Police Cameras: A Primer on Police Accountability vs. Privacy" (2015), 58 Howard Law Journal 881 at 884.
27. Gonzales and Cochran, *supra* note 16 at 315 and 321-323; Stoughton, *supra* note 1 at 1415-1417; Jay Stanley, "Police Body-Mounted Cameras: With

could warn of potential privacy intrusions by providing notice (*e.g.*, wearing a badge or sticker advising "lapel camera in operation");[28] and rules could be crafted to address concerns about recording in intimate or sensitive settings and safe data storage.[29] Some of the costs of cameras and storage technology can be offset by a decrease in litigation, a savings in court time, and through the use of fines.[30] In any case, until police camera use becomes more pervasive and studied at greater scale, conclusions about costs and benefits remain tentative.[31]

(b) The Position of Police Forces in Canada

Over the course of the past decade, the RCMP and police forces in Vancouver, Calgary, Edmonton, Toronto, Ottawa, Montreal, and Halifax have studied or piloted the use of body or dash cameras, and some have produced extensive reports.[32] At the time of this writing,

Right Policies in Place, a Win for All", ACLU (Oct 2013), online: <https://www.aclu.org/police-body-mounted-cameras- right-policies-place-win-all>.

28. Stanley, *ibid.*; Ethan Thomas, "The Privacy Case for Body Cameras: The Need for a Privacy-Centric Approach to Body Camera Policymaking" (2017), 50 Columbia Journal Law & Social Problems 191 at 227-28; Thomas K. Bud, "The Rise and Risks of Police Body-Worn Cameras in Canada" (2016), 14:1 Surveillance & Society 117 at 120.
29. HLRA, "Considering", *supra* note 10 at 1809; see also the Privacy Commissioner of Canada, "Guidance for the use of body-worn cameras by law enforcement authorities" (Office of the Privacy Commissioner of Canada, February 2015), online: <www.priv.gc.ca/en/privacy-topics/surveillance/police-and-public-safety/gd_bwc_201502/> at 5 [Privacy Commissioner of Canada, "Guidelines"].
30. HLRA, "Considering", *supra* note 10 at 1810; Gonzales and Cochran, *supra* note 16 at 319.
31. See Lum et al, *supra* note 20 (reviewing 70 empirical studies of BWC to date); the authors note at 110 that "[a]lthough the number of BWC studies is large overall, the number available to evaluate any particular outcome is still often small, and findings are thus subject to change. As the evidence base grows, the use of more sophisticated meta-analyses of results will also provide better estimates of average effect sizes and contextual factors associated with desired and undesired outcomes."
32. Royal Canadian Mounted Police, "Audit of Procurement and Use of In-Car Video: Final Report" (March 2015), online: <http://www.rcmp-grc.gc.ca/en/audit-procurement-and-use-car-video> [RCMP, "Audit"]; National Criminal Operations, RCMP, "Body Worn Video Feasibility Study: Final Report" (December 2015), online: <www.scribd.com/document/350849795/RCMP-BMC-Final-Report#from_embed> [RCMP, "Body Worn Video"]; Toronto Police Service Strategy Management, Strategic Planning Section, "Body-Worn Cameras: a Report on the Findings of the Pilot Project to Test the Value and Feasibility of Body-Worn Cameras for Police Officers in Toronto", Toronto Police Service (June 2016), online: <www.tpsb.ca/

only two police forces have adopted a formal policy on the use of cameras.[33] A brief survey indicates that cost is a primary impediment, and no consensus has emerged among forces as to *when* to use cameras, if at all.

The three most extensive reports on camera use consist of two produced by the RCMP – one on dashcams in 2015; another on bodycams in 2015 – and a report of the Toronto Police Service on bodycams in 2016.[34] The RCMP had been using dashcams since the 1990s, recognizing them as "an important policing tool," and sought to make more pervasive use of the technology in 2013.[35] The RCMP also piloted bodycams in 2010 and 2013, with a view to formulating a national strategy for "all types of video evidence".[36] However, the dashcam report found that equipment purchased in 2013 was not used effectively due in part to a failure to appreciate "end-to-end system requirements", including data storage and management.[37] The report also cited a lack of direction as to when to record and how long to retain the recording.[38] The RCMP's bodycam report, which it

component/jdownloads/send/40-body-worn-cameras/534-toronto-police-service-bwc> [TPS, "BWCs"]; Edmonton Police Service, "Body Worn Video: Considering the Evidence: Final Report of the Edmonton Police Service Body Worn Video Pilot Project" (June 2015), online: <issuu.com/edmontonpolice/docs/bwv_final_report> [Edmonton Report]; Chief Jean-Michel Blais, "Information Report: Body-Worn Video", Halifax Board of Police Commissioners (November 16, 2017), online: <www.halifax.ca/sites/default/files/documents/city-hall/boards-committees-commissions/171120bopcInfo6.pdf> [Halifax Report]; Jamie Budd, "2020 Body Worn Camera Evaluation Report", Calgary Police Service (February 2021), online: <https://www.calgary.ca/content/dam/www/cps/documents/body-worn-cameras/BWC-evaluation-final-report.pdf> [Calgary BWC Report]; and Jamie Budd, "2020 In-Car Digital Video Evaluation Report" Calgary Police Service (February 2021), online: <https://www.calgary.ca/content/dam/www/cps/documents/body-worn-cameras/ICDV-evaluation-final-report.pdf> [Calgary DC Report]. On pilot programs in Montreal and Vancouver, see Ling, *supra* note 3; Pfeffer, *supra* note 2.

33. The Toronto Police Service, *supra* note 7. In July of 2019, the Solicitor General of British Columbia published a set of standards to guide police in the deployment and use of cameras, should a force choose to adopt them: Ministry of the Solicitor General for British Columbia, "Provincial Policing Standards" (July 1, 2019), online: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/standards/4-2-1-body-worn-cameras-equipment.pdf>.The TPS policy and BC standards are discussed further in Part 3 below.
34. RCMP, "Audit"; RCMP, "Body Worn Video"; and TPS, "BWCs", *supra* note 32.
35. RCMP, "Audit", *ibid.*
36. *Ibid.*; Ling, *supra* note 3.
37. RCMP, "Audit", *supra* note 32.

chose not to release publicly, noted challenges including cost, data management and privacy issues; but affirmed the importance of using bodycams to enhance "accountability and transparency".[39] The report recommended that one of the RCMP's 15 divisions adopt bodycams on the view that concerns could be effectively addressed "with policy guidance, training and sufficient data storage."[40] Yet the following year, the RCMP announced that it would delay "indefinitely" the use of bodycams due to technical issues, including the battery life and camera durability of the models under review.[41] The RCMP could not be certain that "the choice of technology justifies the investment at this time."[42]

The Toronto Police Service conducted a bodycam pilot in 2014 involving some 85 officers to see whether cameras improved public and officer safety, trust and perceptions of accountability, and reduced or streamlined complaints and aided with training.[43] A 95-page report published by the Service in 2016 found strong public support for bodycams, positive reception among officers wearing the cameras, and encouraging indications of the potential impact of cameras on safety, complaints, and charges (though too small a sample to draw firm conclusions on these points).[44] Among challenges noted were technical issues with the equipment and increased administrative workload.[45] More crucially, "[t]he major challenge that would be associated with any adoption of body-worn cameras by the Service is the cost."[46] The report estimated the cost of staffing, equipment, and storage to be "about $20 million in the first year of implementation, with a total 5-year estimated cost of roughly $51 million, not including costs of integrating the Service's current records management and video asset management systems with a body-worn camera system."[47] The total costs were thought to be $85 million in the first 10 years for equipment and storage, and a further $60 to 80 million for administration.[48]

38. *Ibid.*
39. *Ibid.*; Ling, *supra* note 3.
40. RCMP, "Audit", *supra* note 32; Ling, *supra* note 3.
41. Ling, *supra* note 3; Alison Crawford, "RCMP Decides Not to Outfit Officers with Body-Worn Cameras", *CBC News* (December 7, 2016).
42. Crawford, *ibid.*, citing Deputy Commissioner Kevin Brosseau.
43. TPS, "BWCs", *supra* note 32.
44. *Ibid.*, at 4-5.
45. *Ibid.*, at 2.
46. *Ibid.*, at 3.
47. *Ibid.*
48. Wendy Gillis, "Toronto Police Take Another Look at Body Worn Cameras", *Toronto Star* (June 8, 2018).

Reports of the Edmonton and Halifax police forces, in 2015 and 2017 respectively, are also worth noting.[49] Both cities commissioned reports on whether a pilot should be endeavoured. Police forces in both cities concluded that cameras would not likely solve problems considered significant in either city. They would not markedly improve public confidence or transparency given the already high public regard for police;[50] studies were equivocal as to the possible impact on the use of force;[51] a low percentage of video captured would be usable in court, with an unclear effect on prosecutions;[52] and evidence suggests that the effect on disciplinary processes are equivocal.[53] The cost for equipment, training, storage, and administration would be significant.[54] Notably, neither force chose to test these propositions through a pilot involving large numbers over a reasonable period of time.

At mid-decade, police forces across Canada drew similar conclusions about high costs and uncertain benefits, and declined to adopt cameras.[55] However, by the end of the decade, forces and governments across Canada have reconsidered. As noted above, Canada and Ontario have announced funding for camera adoption by the RCMP and other forces.[56] Police in Toronto and Calgary conducted further pilot programs with positive results and have moved ahead with formal adoption of cameras.[57] In August of 2020,

49. Edmonton Report, Halifax Report, *supra* note 32.
50. Halifax Report, *ibid.*, at 17; Edmonton Report, *ibid.*, at 8.
51. Halifax Report, *ibid.*, at 3; Edmonton Report, *ibid.*, at 8.
52. Halifax Report, *ibid.*, at 9.
53. *Ibid.*, at 7.
54. *Ibid.*, at 9; Edmonton Report, *supra* note 32 at 11.
55. Pfeffer, *supra* note 2, citing cost-related concerns by forces in Vancouver, Calgary, Edmonton, and Ottawa.
56. Freeze, *supra* note 4.
57. Notably, the Calgary Police Service, in its two reports on camera use published in 2021, found a host of benefits not touted in earlier reports by Edmonton and Halifax police, including, from body-worn cameras: support among citizens, officers, professional standards personnel, and prosecutors; a heightened perception in public trust; a decline in use of force incidents; a 50% reduction in complaint resolution time; "enhanced Crown and court outcomes such as early case resolution and reduced court time"; and a reported improvement by officers of their "professionalism and communication skills": Calgary BWC Report, *supra* note 32 at 3; see also Calgary DC Report, *supra* note 32, noting at 3 the success of dashcams in "simplifying incident review, expediting file resolution, and reducing workloads"; "[a]dvancing criminal investigations and supporting prosecution/case resolution"; [r]educing CPS liability for vehicle collision or other insurance claims"; and "[i]mproving public perceptions of CPS accountability, transparency, and overall reputation."

the Toronto Police Services Board voted to obtain cameras from Axon Canada and to equip the entire force by October 2021.[58] In early 2021, over 600 officers were using them.[59] The TPS has published a policy on when police will record; how recordings are stored and disclosed; and what measures are taken to protect privacy.[60] Similarly, in April of 2019, the Calgary Police Service provisioned patrol and traffic officers with cameras and published guidelines on their use.[61] But other forces have yet follow.

2. Judicial Perspectives on Bodycam Evidence

(a) A Constitutional Right to Police Camera Evidence?

When police are equipped with cameras but fail to use them, do they violate an accused person's *Charter* right to full disclosure of evidence protected in s. 7 of the *Charter*? A number of courts have addressed this question, with the weight of authority holding against finding such a right.[62] One case also canvassed whether the failure to record a search renders it an unreasonable search under s. 8 of the *Charter*.[63] The bulk of the cases arise from impaired driving prosecutions and, in particular, events surrounding an accused's alleged failure to provide a breath sample.

Provincial Courts were initially receptive to recognizing a *Charter* right to the creation of police camera evidence. One line held that police failure to create a recording could violate the accused's s. 7 *Charter* rights and warrant exclusion or a judicial stay of proceedings where the failure flowed from a "want of care," "unacceptable negligence", or a "pattern of indifference" by police.[64] Another line of

58. Toronto Police Service, *supra* note 7.
59. *Ibid.*
60. *Ibid.*, FAQ; details of the policy are canvased in Part 3 below.
61. Calgary Police Service, *supra* note 7; see Part 3 below for further discussion of the policy.
62. *R. v. Gormly* (2017), 50 Alta. L.R. (6th) 317, 379 C.R.R. (2d) 293, 2017 CarswellAlta 305 (Alta. Prov. Ct.); *R. v. Coombs*, 2017 CarswellAlta 306, 2017 ABPC 34, 137 W.C.B. (2d) 322 (Alta. Prov. Ct.); *R. v. Cole*, 2017 CarswellSask 349, 2017 SKPC 64, 141 W.C.B. (2d) 582 (Sask. Prov. Ct.); *R. v. Kurmoza* (2017), 9 M.V.R. (7th) 151, 376 C.R.R. (2d) 187, 2017 CarswellOnt 3475 (Ont. C.J.); *R. v. Deesasan* (2018), 35 M.V.R. (7th) 322, 2018 CarswellOnt 11476, 2018 ONSC 4180 (Ont. S.C.J.); *R. v. Khoussid*, 2018 CarswellOnt 832, 2018 ONCJ 45, 143 W.C.B. (2d) 391 (Ont. C.J.).
63. *R. v. McCoy* (2016), 336 C.C.C. (3d) 256, 28 C.R. (7th) 414, [2017] 1 W.W.R. 379 (Alta. Q.B.).
64. *Ibid.*, at para. 27 citing: *R. v. Peters*, 2014 CarswellAlta 2755 (Alta. Prov.

cases held that s. 7 *Charter* rights could be violated where the courts found explanations for not recording unreasonable.[65]

Courts in these earlier cases tended to equate the failure to record with a loss of evidence, citing the Supreme Court of Canada's ruling in *R. v. La*.[66] The court in *LA* held that lost evidence could violate disclosure requirements under s. 7 of the *Charter* if it involved "unacceptable negligence" on the part of police.[67] In *LA*, police recorded an interview with a person who would become a witness but inadvertently lost the video prior to trial. The court found a satisfactory explanation for the loss and no unacceptable negligence. However, in the camera cases, the recording did not exist and negligence or bad faith related not to the failure to *preserve* evidence, but the failure to *create* it.

R. v. McCoy,[68] a decision of the Alberta Court of Queen's Bench on a summary conviction appeal, highlights this distinction and offers what is, at present, the leading authority on s. 7 *Charter* rights and the failure to create camera evidence. The appellant was charged with refusing to provide a breath sample. The police cruiser was equipped with a functioning dashcam and the RCMP detachment had a policy in place mandating that the interaction be recorded. At trial, the appellant argued that in failing to record the interaction, police violated McCoy's section 7 and 8 *Charter* rights. In a frequently cited passage, Justice Dario distinguished the facts in *R. v. La*, and refused to follow the lower court authority on which the defence sought to rely, by holding:

> [The] . . . case law is clear that the issues for consideration (and therefore the rights invoked) where a video is already in existence is much different from the circumstance where no such evidence was ever created. As there is no obligation on the Crown to create evidence, the failure to record is not an issue of full disclosure. A failure to create evidence cannot be equated with a failure to preserve or disclose evidence for the purpose of founding a Charter violation.[69]

In this case, the officer's failure to record was not tantamount to

Ct.); *R. v. Nabrotzky*, 2014 CarswellAlta 2754 (Alta. Prov. Ct.); *R. v. Mullan*, 2013 CarswellAlta 3037 (Alta. Prov. Ct.).

65. *R. v. Stanton* (June 15, 2015), Doc. Athabasca 141460899P1 (Alta. Prov. Ct.); *R. v. Newell*, 2013 CarswellOnt 1053, [2013] O.J. No. 432, 2013 ONSC 581 (Ont. S.C.J.).
66. *R. v. La*, [1997] 2 S.C.R. 680, 116 C.C.C. (3d) 97, 8 C.R. (5th) 155 (S.C.C.).
67. *Ibid.*, at para. 20.
68. *McCoy*, *supra* note 63.
69. *Ibid.*, at para. 47. See also *R. v. Khan* (2010), 97 M.V.R. (5th) 35, 2010 CarswellOnt 4769, [2010] O.J. No. 2855 (Ont. S.C.J.), concerning the failure to create camera evidence in an impaired investigation; at para. 12,

destroying evidence or being negligent; the officer "simply refrained from taking the investigatory step of creating evidence."[70] *McCoy* should, however, be distinguished from cases finding a violation of s. 7 *Charter* rights for the failure to record where there is evidence of "deliberate avoidance".[71]

McCoy also contains a notable discussion of policy considerations against a right to police recordings under s. 7.[72] As Justice Dario notes, the Supreme Court of Canada has made clear that a failure to disclose does not in itself constitute a violation of s. 7; this requires "actual prejudice to [one's] ability to make full answer and defence".[73] To hold that a fair trial is one that requires video evidence where possible would set the bar too high in relation to the public's interest in a trial on the merits, "particularly when other evidence is available to establish the issue in question."[74] Moreover, despite the utility of video recordings in establishing evidence, in her Ladyship's view, "recordings do not usurp the truth seeking function of the courts. To suggest otherwise has far reaching implications beyond impaired driving cases, even to where no police policy exists."[75] Improvements in technology will not change this, "nor does it constitute a *Charter* violation to rely on other evidence without the recording."[76]

Courts in Alberta, Saskatchewan, and Ontario have applied this reasoning to hold no violation of s. 7 of the *Charter* arises where the equipment was ready for use, or a policy directed police to use it.[77]

MacDonnell J. held: "a failure to create evidence cannot be equated, for constitutional purposes, with a failure to preserve evidence."

70. *Ibid.*, at para. 48.
71. In *R. v. Santos* (2014), 300 C.R.R. (2d) 68, 436 Sask. R. 1, 2014 CarswellSask 29 (Sask. Q.B.), Gunn J. found an officer to have intentionally muted a microphone (in place pursuant to a policy mandating the recording) for some 49 minutes preceding the accused's arrest and that it was "done to deliberate frustrate the Crown's disclosure obligations" and violated s. 7 of the *Charter* and constituted an abuse of process. See also *R. v. Paulishyn* (2017), 49 Alta. L.R. (6th) 161, 377 C.R.R. (2d) 29, 2017 CarswellAlta 128 (Alta. Q.B.), involving similar facts, and *R. v. Khan*, *supra* note 69, at para. 15.
72. *McCoy*, *supra* note 63 at paras. 64 to 70.
73. *Ibid.*, at para. 65, citing *R v. Bjelland* at paras. 21-22; see also *R. v. O'Connor*, [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1, 44 C.R. (4th) 1 (S.C.C.) at para. 74; *R. v. Harrer*, [1995] 3 S.C.R. 562, 101 C.C.C. (3d) 193, 42 C.R. (4th) 269 (S.C.C.) at para. 45: "A fair trial must not be confused with the most advantageous trial possible from the accused's point of view".
74. *McCoy*, *supra* note 63 at para. 67.
75. *Ibid.*, at para. 68.
76. *Ibid.*, at para. 69.
77. *R. v. Gormly* (2017), 50 Alta. L.R. (6th) 317, 379 C.R.R. (2d) 293, 2017 CarswellAlta 305 (Alta. Prov. Ct.); *R. v. Coombs*, 2017 CarswellAlta 306,

Finally, the court in *McCoy* also addressed whether a failure to make use of a functioning dashcam violated s. 8 of the *Charter*. The guarantee against unreasonable search and seizure under s. 8 requires the Crown to establish that a search at issue was authorized by a reasonable law and carried out in a reasonable manner.[78] The appellant conceded that s. 254(2) of the *Criminal Code* (authorizing the breath demand) was a reasonable law,[79] but argued the failure to use the dashcam constituted a search in an unreasonable manner.[80] The direction set out in two RCMP policy manuals to make use of dashcams in impaired investigations constituted "a requirement of a reasonable search".[81] Lacking direct authority on point, the appellant sought to draw an analogy to case law in which courts had set out parameters of a search carried out in a reasonable manner, including *R. v. Golden* (strip searches in the field) and *R. v. Cornell* (police entry into a home unannounced).[82] Justice Dario rejected the analogy; "[t]hese all deal with deliberate unexplained conduct on the part of the police. By way of further differentiation, they deal with the manner of a search, not the evidentiary record of it."[83]

The court in *McCoy* offered a further rationale to "demonstrate the absurdity of the Appellant's Charter challenge".[84] In this case, the police vehicle was not positioned in a way where the dashcam would have recorded the interaction, and so "there was no point turning it on."[85] The appellant argued that to comply with the policy, police should have parked at roadside check-stops at an angle to capture interactions. For Justice Dario, the

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2017 ABPC 34, 137 W.C.B. (2d) 322 (Alta. Prov. Ct.); *R. v. Cole*, 2017 CarswellSask 349, 2017 SKPC 64, 141 W.C.B. (2d) 582 (Sask. Prov. Ct.); *R. v. Kurmoza* (2017), 9 M.V.R. (7th) 151, 376 C.R.R. (2d) 187, 2017 CarswellOnt 3475 (Ont. C.J.); *R. v. Deesasan* (2018), 35 M.V.R. (7th) 322, 2018 CarswellOnt 11476, 2018 ONSC 4180 (Ont. S.C.J.); *R. v. Khoussid*, 2018 CarswellOnt 832, 2018 ONCJ 45, 143 W.C.B. (2d) 391 (Ont. C.J.).

78. *R. v. Collins*, [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1, 56 C.R. (3d) 193 (S.C.C.) at para. 23.
79. *Criminal Code*, R.S.C. 1985, c. C-46 (the equivalent provision is now s. 320.27(1)).
80. *McCoy*, *supra* note 63 at para. 86.
81. *Ibid.*, at para. 87.
82. *R. v. Golden*, [2001] 3 S.C.R. 679, 159 C.C.C. (3d) 449, 47 C.R. (5th) 1 (S.C.C.); *R. v. Cornell*, [2010] 2 S.C.R. 142, 258 C.C.C. (3d) 429, 76 C.R. (6th) 228 (S.C.C.); the appellant also sought to rely on *Abbotsford Police Department, Re* (June 29, 2000), Doc. PH99-01 (B.C. Arb.), concerning police conduct executing a warrant in an occupied residence.
83. *McCoy*, *supra* note 63 at para. 92.
84. *Ibid.*, at para. 93.
85. *Ibid.*, at para. 93.

> impracticality of the suggestion that the officers would have to park their cruisers on an angle into a busy stretch of road and attempt to stop vehicles in the middle of traffic so that they would land within the range of the camera contrary to public or officer safety is a perfect example of how the mandatory nature of the policy cannot be an absolute, including when it is not practical, such as in the present case.[86]

The statement of a policy on using cameras does not commit the police to a standard of reasonableness for the purposes of s. 8 of the *Charter*.[87]

Justice Dario's reasoning is sound as it relates to the production of evidence. Unless there is a legislative or common-law direction requiring the use of a dashcam in the course of an investigation, then the lack of doing so is properly construed as a discretionary investigative decision. Put another way, the law has not prescribed that an accused individual is entitled to being investigated through dashcam recording, and so there is no legal entitlement to having this evidence produced and disclosed pursuant to s. 7 of the *Charter*. The use of dashcam evidence remains an investigative tool open to RCMP, and there are good reasons, as *McCoy* illustrates, for preserving an ambit of police discretion over whether and when to record.

However, leaving camera use entirely within police discretion is not without its perils. The failure to follow reasonable and well-known policy could cast doubt onto an RCMP member's credibility and reliability; it invites a trier of fact to question why policy was not followed, exposing the investigating RCMP member to possible adverse inferences. Further, due to the discretionary nature of a policy, a reasonably diligent defence counsel could make a number a disclosure requests for technical information related to the use of the dashcam and its records: *i.e.*, when was it last updated, how are the videos stored and transferred, was the RCMP member properly trained in its use, does the RCMP member have a history of using or failing to use dashcams, etc. These reasonable disclosure requests could potentially slow down the prosecutorial process and cause delay in the adjudication of the trial on its merits. If the delay is long enough, the accused's s. 11(d) *Charter* rights may be breached pursuant to *R. v. Jordan*.[88]

86. *Ibid.*
87. *Ibid.*, at para. 94.
88. *R. v. Jordan*, [2016] 1 S.C.R. 631, 335 C.C.C. (3d) 403, 29 C.R. (7th) 235 (S.C.C.).

(b) Judicial Calls for More Police Camera Evidence

McCoy may have established (for now) that failing to record does not violate a disclosure right under the *Charter* (absent evidence of intentional avoidance). But this does not mean that judges are not keen to see police make greater use of cameras. A number of recent Ontario decisions feature notable expressions of disappointment or exasperation, conveyed in *obiter*, that police are not making more frequent use of cameras in cases where they would likely have spared the court and the state significant time and expense.[89]

In *R. v. Cheema*,[90] Justice O'Donnell of the Ontario Court of Justice, concluded a 19-page ruling on an impaired driving case with a three-page section headed "The Elephant in the Room (Or More Aptly Not in the Room)".[91] Much of the trial involved challenges to the grounds for the breath sample and the right to counsel. As a visiting justice to the Saint Catherine region, his Lordship felt the need to overcome a reluctance to criticize local practices as an outsider, asserting that:

> Where I come from and, indeed, in many areas, most or all of Mr. Cheema's interactions with the officers would have been audio- and video-recorded. At a minimum there would be a video record from the point thirty seconds before the officers activated their emergency lights to stop Mr. Cheema. That video might well have resolved most or all of the issues about Mr. Cheema's driving that took up a fair portion of this trial. It might have avoided a trial entirely. Once he was pulled over, the officers' interactions with him would have been caught on an in-car video and by microphones taken from a charging dock on the cruiser's windscreen and attached to the officers' uniforms. The reading of the rights (or the failure to read the rights) to Mr. Cheema in the cruiser would not have been in issue as it would have been caught on the rearward facing in-car camera. The entire trip to the station would have been audio- and video-recorded, as would the booking process and the breath-sampling process. Quite simply, there would have been little or no

89. *R. v. Cheema*, 2016 CarswellOnt 13939, [2016] O.J. No. 4632, 2016 ONCJ 548 (Ont. C.J.); *R. v. Moore*, 2016 CarswellOnt 8702, [2016] O.J. No. 2916, 2016 ONCJ 324 (Ont. C.J.); *R. v. Weston*, 2017 CarswellOnt 10709, 2017 ONCJ 460, 141 W.C.B. (2d) 188 (Ont. C.J.); *R. v. Mendonca*, 2018 CarswellOnt 16639, 2018 ONCJ 683, 150 W.C.B. (2d) 515 (Ont. C.J.); *R. v. Hamel* (2018), 409 C.R.R. (2d) 348, 2018 CarswellOnt 6889, [2018] O.J. No. 2304 (Ont. C.J.), reversed (2019), 49 M.V.R. (7th) 65, 436 C.R.R. (2d) 133, 2019 CarswellOnt 4057 (Ont. S.C.J.), affirmed (2020), 397 C.C.C. (3d) 78, 73 M.V.R. (7th) 29, 475 C.R.R. (2d) 315 (Ont. C.A.); *R. v. Pullin*, 2019 CarswellOnt 2373, 2019 ONCJ 86, 154 W.C.B. (2d) 133 (Ont. C.J.).

90. *Cheema*, *ibid.*

91. *Ibid.*, at para. 48.

> dispute about who said what to whom. This trial was almost entirely about who said (or did not say) what to whom.[92]

Justice O'Donnell also questioned the economics of abstaining from using cameras, asking: "If the average mountain-biking enthusiast can afford to record his every manoeuvre," why should cameras not be "routinely employed" by police?[93] More crucially, the outcome of many cases:

> . . . will depend on the frailties of subjective observation, officers' notekeeping skills and the like. Bad driving and other signs of impairment or intoxication are ideally suited for objective capture on video- and audio- recordings. Failing to video- and audio-record such interactions compromises the Crown's ability to obtain convictions and as such appears like a false economy, not only for the police who invest investigative resources in cases that might fail for the lack of available evidence but for defendants and for the state, who spend a lot of money doing trials that might be either shortened or avoided entirely if such recordings were made.[94]

Cameras may well be useful in other kinds of *Charter* challenges turning on verbal and physical subtleties.[95]

Justice Harris of the Ontario Court of Justice has undertaken a campaign of sorts, peppering a number of his impaired driving decisions with provocative *obiter* decrying the failure of police to make greater use of cameras. In *R. v. Moore*,[96] his Lordship framed the case as "an argument in favour of body cameras on Police officers" on the basis that it would have "made it possible for me to determine" the more accurate of two officers offering conflicting evidence.[97] In *R. v. Weston*,[98] the officer's evidence ran contrary to that of the accused, and "[i]t would have been much simpler for me to determine the correct facts had the police officers been wearing body cameras".[99] Officers cannot be expected to record all interactions, but recording key moments "could well either shorten trials or in fact eliminate them entirely as one side or the other recognizes the futility of proceeding in the fact of such convincing evidence."[100] *R. v. Hamel* was "yet another case where an audio-video recording of events by

92. *Ibid.*, at para. 52.
93. *Ibid.*
94. *Ibid.*
95. *Ibid.*
96. *Moore*, *supra* note 89.
97. *Ibid.*, at page 11.
98. *Weston*, *supra* note 89.
99. *Ibid.*, at para. 70.
100. *Ibid.*, at para. 72.

means of a dash-cam and / or a body camera could have shortened or even eliminated the trial proceeds."[101] At issue here was the amount of time Hamel drove on the shoulder of a highway before stopping, and what the accused said and when. A recording could have settled this. "Instead, we spent a full day hearing evidence and submissions and I spent many hours preparing these reasons for judgment."[102] His Lordship added:

> . . . more than 30 per cent of the trials held in Halton Region in 2017 involved drinking / driving cases. The above comments are equally applicable to many of them. Some of these cases however took two or three days to complete in court rather than just one. It strikes me that it would be a much better allocation of resources to place cameras in police cars and on police officers thereby freeing up much of this court time and allowing us to hear cases in a more timely manner.[103]

And finally, in *R. v. Pullin*,[104] Justice Harris noted in closing:

> In this case, four days of court time were taken up by the various witnesses testifying about what exactly was said or done and when exactly those things were said or done. An audio–video recording of the events could have made all of that unnecessary and avoided the attendant costs. During the four days, a judge, court staff, a Crown counsel and police officers, amongst others, were all being paid with money provided by taxpayers. So once again I ask the Halton Regional Police Service to make better use of that money and begin using the technology that is available to us now in the twenty-first century.[105]

Other judges have shared the sentiment.[106]

However, the judges here make a crucial assumption that may prove false in many cases: that video in more cases will mean shorter or fewer trials because it will allow for quicker determination of key issues. Scholars have cautioned against overreliance on video as a direct conduit to the truth.[107] Video evidence can often be skewed or limited in ways related to camera angle (high or low, rendering the subject's body misleadingly large or small), the camera's field of vision (occluding key objects or persons), pixel density, frame rate, and so forth.[108] As Seth Stoughton notes:

101. *Hamel*, *supra* note 89.
102. *Ibid.*, at para. 143.
103. *Ibid.*, at para. 144.
104. *Pullin*, *supra* note 89.
105. *Ibid.*, at para. 91.
106. See, *e.g.* the comments of Justice Wakefield in *R. v. Mendonca*, *supra* note 89 at page 14.
107. Stoughton, *supra* note 1, at 1400-1405.
108. *Ibid.*

> Even a head-mounted camera will not provide an officer's-eye view of the situation, to say nothing of shoulder or chest-mounted cameras, and the human eye cannot see the infra-red spectrum the way some cameras can. In short, [body worn cameras] will record less, more, and differently than a human would see, all at the same time.[109]

A host of recent high-profile cases attests to the often contentious nature of audio and video evidence, and the fact that it may not shorten or avoid trials or more likely result in a conviction.[110]

The broader and more crucial question is whether a law requiring police to use cameras in specific situations – impaired driving investigations, for example – would, *on average*, result in efficiencies making up for the time and expense involved in equipping police with cameras and data management policy and capabilities. Is there evidence that, in the longer term, cameras do make a meaningful difference in prosecutorial efficiency and effectiveness for these or any other offences?

In short, not a lot. Despite there being a copious body of scholarship and many police force reports on the use of body or dash cameras, little attention has been paid to the effects of cameras on prosecutions in particular.[111] Among the scant material available is a

109. *Ibid.*, at 1405.

110. For example, in 2016, Arizona officer Philip Brailsford was captured on bodycam video shooting Daniel Shaver in a hotel hallway as Shaver crawled along the floor. A jury acquitted Brailsford of both murder and manslaughter: James Gagliano, "Daniel Shaver's Shooting by Police Officer was an Avoidable Execution", *CNN.com* (December 12, 2017). Bodycam evidence in the trial of off-duty Arizona police officer Amber Guyger for the shooting of her neighbour supported facets of both the prosecution and defence's case, prompting the prosecution to rely on other inculpatory evidence to secure a conviction: CBS News, "Bodycam Footage Played in Court Shows Moments After Cop Fatally Shot Her Neighbour", *CBSNews.com* (September 24, 2019).

111. In a recent survey of police camera studies, Lum et al, *supra* note 20 at 108, identify two recent studies with notable findings in relation to prosecutions. The first, by Catherine Owens, David Mann, & Rory Mckenna, *The Essex Body Worn Video Trial: the Impact of Body Worn Video on Criminal Justice Outcomes of Domestic Abuse Incidents* (College of Policing, October 2014), notes an increase in detections and charges for domestic assault when bodycams were used in those cases, but findings were unclear as to their impact on guilty pleas and sentences. The second study, by Weston J. Morrow, Charles M. Katz, and David E. Choate, "Assessing the Impact of Police Body-Worn Cameras on Arresting, Prosecuting, and Convicting Suspects of Intimate Partner Violence", *Police Quarterly* (June 2016) 1, found, at 1, that "[w]hen compared with posttest non-camera cases, posttest camera cases were more likely to result in an arrest, have charges filed, have cases furthered, result in a guilty plea, and result in a guilty verdict at trial." However, the sample was relatively small (252 cases) and the difference in

widely-cited 2004 report of the International Association of Chiefs of Police (IACP), prepared for the US Department of Justice, pertaining to dashcam use.[112] Surveying 147 prosecutors across the United States,[113] the authors found that "an overwhelming number (91%) have used video evidence captured from the in-car camera in court" and affirmed that "the presence of video evidence enhances their ability to obtain convictions and increases the number of guilty pleas going to trial."[114] Fifty-eight percent of prosecutors reported "a reduction in the time they actually spent in court."[115] However, "41% of the prosecutors reported an increase in their case preparation time" in cases involving video.[116] They also noted other concerns: "the camera's limitations or field of vision"; "poor quality audio and video"; challenges obtaining copies of video from police and redacting them; disclosing them to defence counsel; and establishing the "chain of custody".[117] Yet, despite these issues, 93% of prosecutors "rated the overall use of video evidence as successful or highly successful."[118] Prosecutors singled out "types of cases in which video evidence is most successful" to include: "driving under the influence, traffic violations, vehicular pursuits, assaults on officers, narcotics enforcement, domestic violence, and civil litigation against law enforcement agencies."[119]

More evidence of the impact on prosecutions of using police camera evidence would be helpful. But as technology continues to drive down the cost of buying cameras and storing data,[120] and judges continue to express frustration at the lack of camera evidence in cases

outcomes noted here was also small (a 4.4% difference in outcomes between pre- and post-test cases).

112. International Association of Chiefs of Police, *The Impact of Video Evidence on Modern Policing: Research and Best Practices from the IACP Study on In-Car Cameras* (Washington: International Association of Chiefs of Police and the US Department of Justice, 2004) We also note a more recent study, Weston J. Morrow, Charles M. Katz, and David E. Choate, "Assessing the Impact of Police Body-Worn Cameras on Arresting, Prosecuting, and Convicting Suspects of Intimate Partner Violence", *Police Quarterly* (June 2016) 1.

113. *Ibid.*, at 21, noting a "collaborate effort" with the National District Attorney's Association and the American Prosecutors Research Institute. Details of the prosecutorial survey are found at pp ii-1 to ii-5 of the Appendices of the IACP report, *ibid.*

114. *Ibid.*, at 21.

115. *Ibid.*

116. *Ibid.*

117. *Ibid.*, at 21-22.

118. *Ibid*, at 22.

119. *Ibid.*

120. Gillis, *supra* note 48.

where it may have been helpful, the case for using cameras in at least some situations remains compelling. However, camera use across Canada will likely remain stuck at an impasse as local police forces navigate difficult questions about funding and best practices. Parliament could overcome this impasse by mandating camera use in discrete situations.

3. Moving Beyond the Impasse of Politics and Economics

Before we sketch a proposal for legislation on point, we address the preliminary question of why Parliament, rather than courts, should mandate the use of cameras. The issue has proven to be contentious among US scholars.[121] The debate is shaped in part by criminal law being crafted in the United States at both the state and federal level, and the judiciary offering a unique pathway to national consistency on camera use through constitutional rulings.[122] Despite this difference in context, the debate in the United States helps to shed light on why, in Canada, Parliament is in the best position to act.

Orin Kerr has argued that legislatures are better equipped to make law on camera use, since judges seeking to regulate technology "tend to incorporate outdated assumptions of technological practice, leading to rules that make little sense in the present or future."[123] Law makers can study the surrounding issues more carefully and thoroughly than courts can.[124] Others see courts better positioned to craft rules on camera use, given their role as a "valuable counter-majoritarian force".[125] Judges are less prone to crafting rules around camera use that could "reify majoritarian preferences and insufficiently protect the privacy of certain politically unpopular minorities" by making laws allowing for "indiscriminate surveillance data collection and subsequent fishing expeditions."[126]

121. Stephen Rushin, "The Judicial Response to Mass Police Surveillance" (2011), 2 University of Illinois Journal of Law, Technology & Policy 281 at 322-326.

122. *Ibid.*, at 322: "The judiciary is the most appropriate branch to develop a national solution that would be applicable to all law enforcement–local, state, and national. By grounding the judicial remedy in the Fourth Amendment, the judiciary can ensure that every person has a reasonably consistent expectation to privacy in the aggregation and sharing of personal data across jurisdictional lines."

123. Orin S. Kerr, "The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution" (2003-2004), 102 Michigan Law Review 801 at 807 (cited in Rushin, *supra* note 121 at 322).

124. Kerr, *ibid.*

125. Rushin, *supra* note 121 at 323.

126. *Ibid.*

Both institutions have a role to play in striking an appropriate balance between state and individual interests. But courts in Canada have declined to recognize a *Charter* right to police camera evidence and have declined to entertain common law arguments requiring their use. Judges are therefore not likely to act on this front in the short term. Parliament remains the only option for effective national guidance on point.[127]

A further argument in favour of Parliament making law on camera use is to ensure uniformity in the gathering and use of evidence in the criminal law. With criminal law a matter exclusively within federal jurisdiction in Canada, disparities in the creation and use of evidence can lead to disparities in the enforcement of the law. As noted above, there are at present at least three different policies on police use of cameras: the British Columbia police camera use standards,[128] and the guidelines on use by Calgary and Toronto police.[129] We look at these in more detail in the following section, but note here that their differences can result in the production of different evidence in similar cases, resulting in different outcomes.

127. We distinguish the issue of body camera use with what happened in Canada in relation to custodial interrogations. In *R. v. Oickle*, [2000] 2 S.C.R. 3, 147 C.C.C. (3d) 321, 36 C.R. (5th) 129 (S.C.C.), Iacobucci J.'s majority opinion affirmed various benefits to courts having access to custodial interrogations captured on video. His Lordship noted, at para. 46, that "when a recording is made, it can greatly assist the trier of fact in assessing the confession"; but he declined to recognize recording as a requisite to proving voluntariness. Appellate courts would follow suit in affirming the utility of video recordings but not mandating them: *R. v. Ahmed* (2002), 170 C.C.C. (3d) 27, 7 C.R. (6th) 308, 166 O.A.C. 254 (Ont. C.A.); *R. v. Ducharme* (2004), 182 C.C.C. (3d) 243, 20 C.R. (6th) 332, [2004] 9 W.W.R. 218 (Man. C.A.), leave to appeal refused [2004] 1 S.C.R. viii, 330 N.R. 395 (note), 351 W.A.C. 158 (note) (S.C.C.). Following these decisions, Parliament took no action to legislate a requirement to record custodial interrogations. However, the practice has since become standard if not common across Canada.

    We speculate that one possible reason for this divergence from what occurred with body camera use is the greater convenience of recording custodial interrogations – which is typically done in the quiet confines of the same room in a police station, rather than in the dynamic and unpredictable conditions of a roadside investigation. The incentive to using cameras in the interrogation context may also be greater for the Crown, given that it bears the onus of proving the voluntariness of statements, and potentially increases its odds of success by relying on video demonstrating *Charter*-compliance. In any case, we point to the widespread adoption of recordings in this context as a reason that Parliament may not have seen a need to intervene – in contrast to the situation with body and dash camera use as we have outlined above.

128. "Provincial Policing Standards", *supra* note 33.

129. *Supra* note 7.

(a) Proposal for Reform

If Parliament should take the lead in this area, what general policy for body or dash-cams should it adopt? In what follows, we distinguish between two possible approaches to making law on police camera use: general versus discrete. We argue the latter is preferable.

The first approach can be found in a 2014 report of the Police Executive Research Forum (PERF) affiliated with the US Department of Justice.[130] The PERF report suggests that police be required generally to "record all encounters with the public" with officers retaining discretion not to record in a prescribed set of circumstances, including interviews with crime victims and witnesses.[131] In these cases, officers should note when and why they chose not to record or to stop recording.[132] Officers should also provide notice to persons being recorded, unless doing so endangers the safety of any person.[133]

Two US states have enacted legislation approximating these recommendations. An Illinois bill requires officers to record "at all times" when on duty and "responding to calls for service or engaged in any law enforcement-related encounter or activity".[134] Officers may cease recording upon the request of a crime victim or when impracticable, or when engaged in "community caretaking functions".[135] A New Hampshire law is closely analogous.[136]

Police in Toronto and Calgary have adopted a similar policy. Toronto police will "turn on the body-worn camera prior to arriving

130. Lindsay Miller, Jessica Toliver & Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned* (Washington, DC: Office of Community Oriented Policing Services, 2014) ["PERF Report"]. For a further a similar legislative proposal, see the ACLU, "A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement", *aclu.org* (American Civil Liberties Union, June 2018).

131. PERF Report, *ibid*., at 12 and 40-41.

132. *Ibid*., at 14 and 39-40.

133. *Ibid*., at 14 and 40.

134. 50 Ill. Comp. Stat. Ann. 706/10-20(a)(3).

135. *Ibid*., 706/10-20(4.5).

136. N.H. Rev. Stat. § 105-D:2, NH ST § 105-D:2, requiring police to record "upon arrival on scene of a call for service or when engaged in any law enforcement-related encounter or activity". Police may cease recording upon request or in exigent circumstances, but must "document the reasons". The *Act* also excludes "intimate searches", near schools, or in "locations where an individual has a reasonable expectation of privacy such as a residence, a restroom, or a locker room . . . unless the recording is being made while executing an arrest warrant, or a warrant issued by the court or . . . pursuant to a judicially-recognized exception to the warrant requirement."

at a call for service or prior to asking any sort of inquisitive question" and "turn off the body-worn camera when the call for service or investigation is complete or when the officer determines that continuous recording is no longer serving its intended purpose."[137] Calgary police "are expected to use these cameras whenever they have an interaction with the public".[138]

Law directing police to use cameras in a broad set of circumstances (all service calls; all interactions with the public) with prescribed exceptions is reasonable; but we query whether it may prove too onerous in terms of resources. Such an approach would result in significant amounts of data collection, which requiring large amounts of digital storage for the purpose of file retention. Should relevant evidence be collected, the totality of the recording must be reviewed by a state employee (administrative staff, the recording officer, or Crown prosecution services) to ensure continuity. Essentially, the costs argument against cameras is borne out more fully using this approach.

Parliament could take a less onerous and more practical approach by mandating that police use cameras in discrete situations. South Carolina passed a law in 1998 that offers a notable example. It requires police who detain and investigate persons in impaired driving investigations to audio and video record the entire interaction, from the time the police car's lights are turned on.[139] The recording must continue through "field sobriety tests"; arrest; the process of a person "being advised of his Miranda rights";[140] and the "entire breath test procedure", including interactions surrounding a person's refusal to provide a sample.[141] If the recording equipment proves inoperable, police must provide a sworn affidavit setting out "reasonable efforts to maintain the equipment in an operable condition" and stating there was no other equipment available.[142] Further permissible exceptions for recording include exigent circumstances, though recording must resume as soon as practicable.[143] Courts have dismissed charges in cases where police have failed to record and failed to provide a reasonable excuse –

137. Toronto Police Service, *supra* note 7, under the tab titled: "The Program".
138. Calgary Police Service, *supra* note 7; the policy indicates that the expectation to record is heightened where "[a]n arrest or detention is likely or happening; [t]he use of force is possible; [t]hey are having an investigative contact with the public; [a] legal demand is being made; [a] charge is being laid."
139. SC ST § 56-5-2953.
140. *Ibid.*, (A)(1)(a).
141. *Ibid.*, (A)(2).
142. *Ibid.*, (B).
143. *Ibid.*

even without the defence having to establish prejudice.[144] Mothers Against Drunk Driving has recently argued the law imposes an undue hurdle to convictions and increases the likelihood of plea agreements for less serious offences.[145]

The South Carolina law is something of an anomaly in US law. No other states have passed a similar law, and we found no other examples of laws requiring police to record interactions in relation to specific offences.[146]

The government of British Columbia has not crafted a policy that is offence-specific, but it has issued standards premised on more targeted use of cameras. The BC Solicitor General's policing standards policy prohibits the use of body-worn cameras "in a manner that requires or permits full, automatic recording of all calls or continuous recording during patrol."[147] Recording should be mandatory "as soon as it is safe and practicable to do so when attending a call or responding to an incident where there is a reasonable belief that there will be use of force, or where violent or aggressive behavior is anticipated or displayed."[148] Recording is permissible in "exigent circumstances that warrant recording an incident; and the exigent circumstances are subsequently documented in the police report."[149]

(i) Mandated Use in Three Instances

We suggest that Parliament could provide impetus and consistency in the uptake of camera use by police in ways not unduly onerous by requiring their use in three discrete instances: impaired driving investigations, arrests and detentions, and residential searches. We note qualifications and issues in each case.

First, Parliament should model a *Criminal Code* provision on the South Carolina provision discussed above for impaired driving

144. See the case law discussed in Martina Kitzmueller, "Are You Recording This?: Enforcement of Police Videotaping" (2014), 47 Conn L Rev 167, at 191.

145. Joseph Cranney, "Many Drunken Drivers Walk Free in SC Because of Strict Law, Report Says", *The Post and Courier* (August 29, 2018).

146. However, courts in eight states impose consequences for failing to comply with common law requirements when obtaining statements without recording them. See the discussion of case law in American Civil Liberties Union and Berkeley School of Law's Samuelson Law, Technology & Public Policy Clinic, *No Tape, No Testimony: How Courts Can Ensure the Responsible Use of Body Cameras* (ACLU and Berkeley Law, 2016) at 12.

147. "Provincial Policing Standards", *supra* note 33 at 2.

148. *Ibid.*

149. *Ibid.*

investigations – in one of two ways. One is to require police to begin recording an interaction from the moment they suspect a drug or alcohol related vehicle offence, or as soon thereafter as is practicable. Another way is to require police to record any field testing and demand they make at roadside for a breath/blood sample, along with any further breath test or drug recognition examination conducted at the station, or subsequent refusal.

Legislating a requirement that impaired investigations – or at least breath/blood demands and the taking of samples – be video-recorded could streamline prosecutions. As noted in recent judicial commentary, video recording evidence could resolve many triable issues and pre-empt lengthy trials.[150] In ways to be explored below, we note that law requiring police to use cameras in these and other discrete contexts would raise new issues under the *Charter* in cases where police failed to record. However, if a failure to record under new law were to constitute a *Charter* violation, s. 24(2) would provide an important tool for deciding whether the severity of the breach should warrant exclusion following the application of the *Grant* test.[151]

A second area for new law on camera use is arrest and detention. Part XVI of the *Code* pertaining to arrest should be amended requiring police to use cameras to record interactions and searches incident to any detention or arrest of more than a brief duration where practicable.[152] The challenge here is that police are often not in a position to know whether a person is detained or whether to arrest rather than merely detain; and if they do detain or arrest, how long to hold a person before releasing them. How long must a person be detained or arrested before police turn on their cameras? Moreover, situations are dynamic and, as the facts in *R. v. Suberu* illustrate, often subject to radically different interpretations (by the majority and dissenting judges in that case) as to whether a person is detained in law at all.[153] This has led to a conundrum identified by Steven Coughlan, which would also extend to any requirement that police use cameras when arresting or detaining a suspect. As Coughlan notes, one consequence of the Supreme Court's holding in *Mann*[154] and *Suberu*[155] that rights under section 10(a) and 10(b) of the *Charter*

150. See *Ibid* of the Ontario cases.

151. *R. v. Grant*, [2009] 2 S.C.R. 353, 245 C.C.C. (3d) 1, 66 C.R. (6th) 1 (S.C.C.).

152. The police power to detain for investigative purposes arises at common law (see *R. v. Mann*, [2004] 3 S.C.R. 59, 185 C.C.C. (3d) 308, 21 C.R. (6th) 1 (S.C.C.)); we suggest that Part XVI would be an appropriate place to codify a requirement to record the form of detention contemplated in *Mann*.

153. *R. v. Suberu*, [2009] 2 S.C.R. 460, 245 C.C.C. (3d) 112, 66 C.R. (6th) 127 (S.C.C.).

arise upon investigative detention is that in cases where these rights have not been discharged (possibly because the officer did not think they had detained the suspect), trial courts might be inclined to find there was no detention in law so as to avoid finding the *Charter* breach that would follow.[156] The same logic might extend to arrest in some cases. Where police fail to provide *Charter* warnings, or use cameras if required, judges might simply find a person was not arrested and merely interacting with police.

We acknowledge these challenges, but a law can still be crafted that places an onus upon the police to record arrests and detentions of more than a brief duration – or provide *a reasonable explanation for why it was not practicable to do so*. The requirements in ss. 10(a) and (b) of the *Charter* operate in a similar way. Police are not required to discharge 10(b) in all detentions (for example, when making a demand for a breath sample at roadside[157]), nor *instantly* upon investigative detention or arrest.[158] But where they do delay, police must provide a reasonable explanation.[159] A law crafted in the

154. *R. v. Mann*, *supra* note 152, holding s. 10(a) *Charter* protection arises upon investigative detention.

155. *Supra* note 153, holding at para. 37 that 10(b) *Charter* protection arises upon investigative detention.

156. Steve Coughlan, "Great Strides in Section 9 Jurisprudence" (2009), 6:75 Criminal Reports 1 at 6.

157. *R. v. Thomsen*, [1988] 1 S.C.R. 640, 40 C.C.C. (3d) 411, 63 C.R. (3d) 1 (S.C.C.), holding that police detained the accused when making a demand for a sample in an "approved screening device" at roadside; the detention triggered the right to counsel under 10(b); but the roadside demand provisions in the *Criminal Code* constitute a reasonable limit of s. 10(b) of the *Charter* under s. 1. See also *R. v. Orbanski; R. v. Elias*, [2005] 2 S.C.R. 3, 196 C.C.C. (3d) 481, 29 C.R. (6th) 205 (S.C.C.), holding that roadside detention to conduct sobriety tests and to question about alcohol consumption without consulting counsel violated s. 10(b) of the *Charter* but was a justified limit under s. 1.

158. At para. 42 of *Suberu*, *supra* note 153, McLachlin C.J. and Charron J. note that although 10(b) must be discharged "immediately" upon investigative detention, this is "[s]ubject to concerns for officer or public safety". Similarly, in relation to arrest, in *R. v. Debot*, [1989] 2 S.C.R. 1140, 52 C.C.C. (3d) 193, 73 C.R. (3d) 129 (S.C.C.) at 1146 [S.C.R.], Lamer J. (as the then was) writing for the majority, held that "immediately upon detention, the detainee does have the right to be informed of the right to retain and instruct counsel. However, the police are not obligated to suspend the search incident to arrest until the detainee has the opportunity to retain counsel."

159. The holding on s. 10(b) of the *Charter* in *R. v. Strachan*, [1988] 2 S.C.R. 980, 46 C.C.C. (3d) 479, 67 C.R. (3d) 87 (S.C.C.) at para. 34 implies a requirement for a reasonable explanation for delay; the requirement is over in *R. v. Rover* (2018), 366 C.C.C. (3d) 103, 49 C.R. (7th) 102, 143 O.R. (3d) 135 (Ont. C.A.) at para. 27; *R. v. Wu* (2017), 35 C.R. (7th) 101, 376 C.R.R.

manner we propose would avoid the need for police to record most interactions with civilians, and many if not most interactions with suspects.

Third, a provision should be added to Part XV of the *Criminal Code* ("Special Procedure and Powers") pertaining to searches with or without a warrant that would require police to use body cameras in the course of the search of a residence. We single out this situation as one in which camera evidence could be of significant value to trial judges on the basis of the volume and frequency of cases involving residential searches that prove contentious under s. 8 of the *Charter*. These are especially common in cases involving drugs, weapons, and domestic assaults.[160] In these cases, the particular details surrounding the approach to the residence, the initial contact with persons in the home, the manner of entry, the areas searched, and the circumstances surrounding the discovery or collection of evidence could be made much clearer with camera evidence.[161] Police are also often acting with foreknowledge of the search and in a position to begin recording.

However, the privacy implications of recording a residential search – especially a warrantless search – are profound. Residential searches engage a high expectation of privacy, second only to the body.[162] Yet the risk of serious violations can be mitigated. Police

(2d) 32, 2017 CarswellOnt 1650 (Ont. S.C.J.) at para. 78; *R. v. Learning* (2010), 258 C.C.C. (3d) 68, 215 C.R.R. (2d) 9, 2010 CarswellOnt 5237 (Ont. S.C.J.) at para. 75; *R. v. Soto* (2010), 209 C.R.R. (2d) 191, 2010 CarswellOnt 2377, [2010] O.J. No. 1644 (Ont. S.C.J.) at paras. 67-71; *R. v. Patterson* (2006), 206 C.C.C. (3d) 70, 364 W.A.C. 208, 221 B.C.A.C. 208 (B.C. C.A.) at para. 41.

160. See, *e.g.*, *R. v. Paterson*, [2017] 1 S.C.R. 202, 347 C.C.C. (3d) 280, 35 C.R. (7th) 229 (S.C.C.); *R. v. MacDonald*, [2014] 1 S.C.R. 37, 303 C.C.C. (3d) 113, 7 C.R. (7th) 229 (S.C.C.); *R. v. Cornell*, [2010] 2 S.C.R. 142, 258 C.C.C. (3d) 429, 76 C.R. (6th) 228 (S.C.C.); *R. v. Godoy* (1998), [1999] 1 S.C.R. 311, 131 C.C.C. (3d) 129, 21 C.R. (5th) 205 (S.C.C.).

161. For a recent case example demonstrating the use and value of camera evidence in residential searches, see: *R. v. Robertson*, 2016 CarswellBC 3883, 2016 BCSC 2474, 140 W.C.B. (2d) 119 (B.C. S.C.). In that case, the accused alleged breaches of s. 8 *Charter* rights occurred in the course of a warranted search of his residence. The accused produced video recording evidence demonstrating the entry and search of the residence by RCMP. *Charter* breaches were found on the basis of the video evidence.

162. *R. v. Feeney*, [1997] 2 S.C.R. 13, 115 C.C.C. (3d) 129, 7 C.R. (5th) 101 (S.C.C.) at paras. 38-43, reconsideration / rehearing granted [1997] 2 S.C.R. 117, 1997 CarswellBC 3179, 1997 CarswellBC 3180 (S.C.C.), canvassing early common law, including *Semayne's Case* (1604), [1558-1774] All E.R. Rep. 62, 5 Co. Rep. 91a, 77 E.R. 194 (Eng. K.B.), and noting at para. 43 that "[n]otwithstanding its prior importance, however, the legal status of the

could be required to warn any occupant they are being recorded and cease recording if asked.[163] Police could also be precluded from recording anything that may interfere with a person's sexual integrity.[164] A provision might also be crafted allowing the court, on application, to destroy police camera evidence where particularly invasive in nature.[165] Video evidence may indeed be invasive, but so too are the many photographs inside a home typically taken in a residential search. Audio and video could lend more context and detail, assisting the accused in the wake of what is unavoidably an invasive process.

Finally, a set of provisions should be added to the *Criminal Code* relating to the management and use of the data that police cameras create. We adopt the recommendations of the Privacy Commissioner of Canada published in 2015.[166] Police should be required to:

- encrypt recordings and store them on a secure server;
- restrict access to recordings, on a need to know basis;

privacy of the home was significantly increased in importance with the advent of the *Charter*." *R. v. Fearon*, [2014] 3 S.C.R. 621, 318 C.C.C. (3d) 182, 15 C.R. (7th) 221 (S.C.C.), Karakatsanis J. in dissent, at para. 134, equating home searches with strip and phone searches as engaging privacy interests that are "extremely high".

163. We credit the Office of the Privacy Commissioner of Canada's "Guidance for the Use of Body-Worn Cameras by Law Enforcement Authorities" (Ottawa: 2015) for proposing, at 5, that police wearing bodycams warn potential subjects of the fact that they are wearing cameras. The Guidance document, at 3, contemplates the use of body worn cameras "inside private dwellings", noting that it "brings up special considerations such as the higher likelihood that individuals will be recorded in highly personal situations". But aside from recommending that police have explicit authority for recording in these contexts, the document does not advance a position against using cameras in homes in principle. As the cover of the Guidance document indicates, the text is "endorsed" by the Privacy Commissioners of all provinces and territories.

164. An example of an analogous direction can be found in s. 12.1(1) of the *Canadian Security Intelligence Services Act*: "In taking measures to reduce a threat to the security of Canada, the Service shall not [...] (c) violate the sexual integrity of an individual". On the scope of conduct that may impinge upon sexual integrity, see *R. v. Jarvis*, [2019] 1 S.C.R. 488, 375 C.C.C. (3d) 324, 52 C.R. (7th) 62 (S.C.C.) (assessing the voyeurism offence in s. 162 of the *Criminal Code* as a means of protecting sexual integrity). See also Elaine Craig, *Troubling Sex: Towards a Legal Theory of Sexual Integrity* (Vancouver: UBC Press, 2012).

165. Section 162.1(1) sets out the offence of knowingly distributing "an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct".

166. *Supra* note 163.

- edit-proof video and audio; and
- implement an audit trail to provide assurance that recordings have not been modified or accessed inappropriately.[167]

Provisions on wire-taps in Part VI of the *Criminal Code* offer further guidance in this context. Analogous provisions could be crafted that draw on ss. 193 and 194, establishing the offence of unlawful use or disclosure of wiretap recordings. The annual reporting requirements in s. 195 suggest the possibility of a similar obligation on the Minister of Public Safety and Emergency Preparedness to report to Parliament annually with statistics on the nature and frequency with which body or dashcam evidence is used. Finally, the *Code* should also mandate retention limits for camera evidence and requirements for destruction.

(b) Consequences of Failing to Record Under New Law

If the *Criminal Code* were amended to require police to use body or dashcams in situations we contemplate above, the failure to record would raise issues under the *Charter*. Depending on how the provisions are worded, a law requiring police to begin recording an alcohol or drug related driving offence from the moment they suspect a person to be so involved could be construed as a condition of a reasonable search (*i.e.*, a breath demand).[168] The requirement to record would thus function in an analogous way to which the *Customs Act* requires strip searches to be conducted by officers of the same gender, where available.[169] A search in either case would cease to be "authorized by law" under the first part of the test for a reasonable search in *R. v. Collins*[170] where police fail to take this additional step (if practicable), resulting in a violation of s. 8 and possible exclusion of the fruits of the search under s. 24(2) of the *Charter*. The requirement to record a residential search would be assessed in a similar way. The failure to record where practicable or without a reasonable explanation would render the search no longer authorized by law and a violation of s. 8 *Charter* rights, shifting the focus to s. 24(2).

The failure to record on an arrest or detention of more than a brief

167. *Ibid.*, at 7.
168. Pursuant to ss. 320.27(1) and 320.28(1) of the *Criminal Code*, setting out requirements for a lawful demand at roadside of a sample in an 'approved screening device' or of a breath sample (typically) at the police station.
169. *Customs Act*, R.S.C. 1985, c. 1., s. 98(4).
170. *Supra* note 78, at para. 23.

duration and where practicable would render the arrest or detention unlawful, and contrary to s. 9 of the *Charter*. Any evidence located as a result of the arrest/detention (such as items found in the course of a search incident to arrest) would then be subject to possible exclusion under s. 24(2), and the search incident to arrest itself may also be found to be unlawful resulting in a breach of s. 8 *Charter* rights. Finally, the failure to disclose the video/audio recordings that have been created could violate disclosure requirements under s. 7, resulting in a judicial stay of proceedings under s. 24(1).[171]

Triggering a *Charter* breach for merely failing to record can seem unsettling. But s. 24(2) of the *Charter* offers courts an important safeguard to exercise discretion over the severity of breaches. In many cases, the failure to record where practicable may result from technical issues, quick decisions made in dynamic situations, good faith error, or inadvertence. Under the "police conduct" portion of the test in *R. v. Grant* for s. 24(2),[172] courts can weigh these issues together with other considerations, including patterns of police use of camera evidence, the nature of the encounter, and the availability of other evidence. Section 24(2) thus offers courts an important tool for admitting evidence in cases involving less serious breaches. Its availability suggests that a law mandating camera use in Canada in discrete situations would likely be applied by courts with different results from the cases dealing with South Carolina's law discussed above. Mere failures to record would be far less likely to result in automatic exclusions or stays of proceedings.

Conclusion

Police camera technology is a work in progress, though trends point toward better cameras and storage options at lower costs. Many questions and concerns still remain about the need for and effectiveness of police camera evidence. We know that it will not resolve every case or help avoid all trials, but we have a large enough body of evidence of camera use in the field to infer that cameras *could* help counsel resolve issues expeditiously in many cases. Judges are reluctant to mandate camera use under the *Charter*, but are eager to see them used more often in certain cases. Police across Canada are at an impasse, partly for reasons relating to funding, but partly due to a

171. *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1, 8 C.R. (4th) 277 (S.C.C.), on general disclosure requirements under ss. 7 and 11(d) of the *Charter*; *R. v. La*, *supra* note 66, affirming the remedy of a judicial stay of proceedings under s. 24(1) of the *Charter* for lost evidence due to "unacceptable negligence".

172. Grant, *supra* note 151.

lack of consensus as to when and where to use cameras. Parliament is in the best position to lend guidance and consistency in camera use by making law on point. Funding and privacy concerns may remain, but cameras will eventually be cheap enough to render police uptake even likelier. Federal law mandating greater consistency in this area would also lead to greater conformity of camera use with the rule of law.