JUSTICE INSTITUTE of BRITISH COLUMBIA

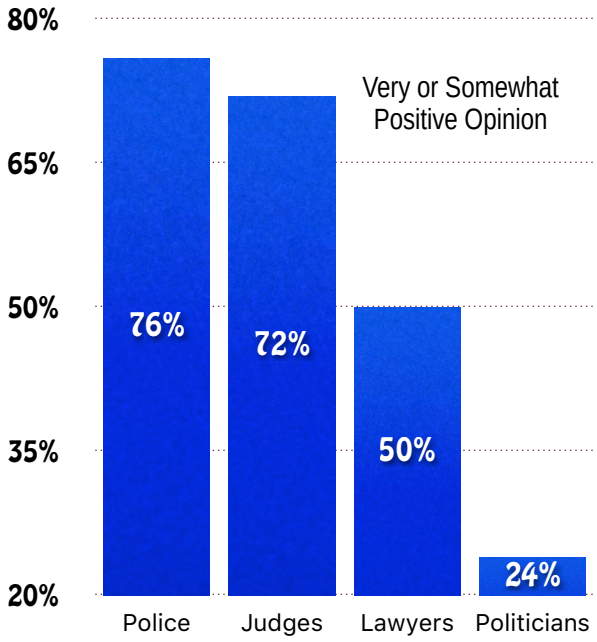
IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

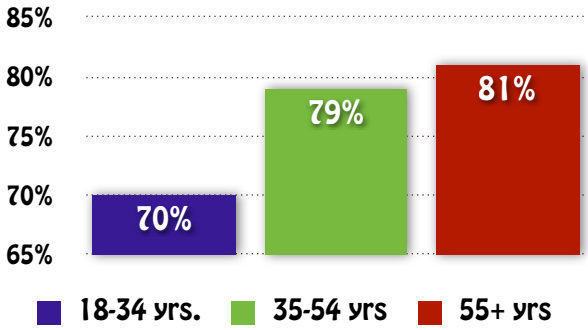
POLICE MOST RESPECTED JUSTICE PROFESSION

Once again, police officers are more respected by Canadians than judges, lawyers and lawmakers. In a recently released Canada wide Insights West poll, police officers earned highest ratings among Canadians of all other justice professions surveyed. The survey, which asked Canadians about 27 occupations, saw police officers attain a 76% positive opinion of their profession followed by judges (72%), lawyers (50%) and politicians (law makers) at 24%.



Fast Facts

- More women (81%) held a higher view of police than men (72%).
- The older the person, the more positive their opinion of the police.



- The opinion of the police varied depending on which province the rater resided.

Province/Region	Very or Somewhat positive opinion	Change from 2016
BC	81%	+1%
Alberta	80%	-3%
Manitoba/Saskatchewan	78%	-2%
Ontario	82%	+10%
Quebec	64%	-6%
Atlantic	69%	-8%

- Middle income earners respected the police the most.

Household income	Very or Somewhat positive opinion
less than $50,000	73%
$50,000 > $100,000	78%
more than $100,000	77%

Continued on page 4

Highlights In This Issue

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Note-able Quote

"Enthusiasm ... the sustaining power of all great action.'

Samuel Smiles

JUSTICE INSTITUTE of BRITISH COLUMBIA | LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

The Justice Institute of British Columbia Library is an excellent resource for learning. Here is a list of its recent acquisitions which may be of interest to police.

Bringing out the best in people: how to apply the astonishing power of positive reinforcement.
Aubrey C. Daniels.
New York, NY: McGraw-Hill Education, 2016.
HF 5549.5 M63 D36 2016

Dealing with difficult people.
Roy Lilley.
London; Philadelphia, PA: Kogan Page, 2016.
HF 5548.8 L493 2016

Empathy.
Boston, MA: Harvard Business Review Press, 2017.
BF 575 E55 E45 2017

Happiness.
Boston, MA: Harvard Business Review Press, 2017.
BF 575 H27 H362 2017

Hidden lives: true stories from people who live with mental illness.
Edited by Lenore Rowntree and Andrew Bowden.
Victoria, BC: Brindle & Glass, 2017.
RC 464 A1 H54 2017

The leadership challenge: how to make extraordinary things happen in organizations.
James M. Kouzes, Barry Z. Posner.
Hoboken, NJ: John Wiley & Sons, Inc., 2017.
HD 57.7 K68 2017

The leadership gap: what gets between you and your greatness.
Lolly Daskal.
New York, NY: Portfolio, 2017.
HD 57.7 D394 2017

Managing transitions: making the most of change.
William Bridges, PhD, with Susan Bridges.
Boston, MA: Da Capo Lifelong Books, A Member of the Perseus Books Group, 2016.
HD 58.8 B75 2016

Mastering the instructional design process: a systematic approach.
William J. Rothwell, G.M. (Bud) Benscoter, Marsha King, Stephen B. King.
Hoboken, NJ: Wiley, 2016.
HF 5549.5 T7 R659 2016

Mindfulness.
Boston, MA: Harvard Business Review Press, 2017.
BF 637 M56 M56 2017

Promoting intercultural communication competencies in higher education.
Edited by Grisel María García-Pérez, Costanza Rojas-Primus.
Hershey, PA: IGI Global, Information Science Reference (an imprint of IGI Global), 2017.
LB 2331 P764 2017

Resilience.
Boston, MA: Harvard Business Review Press, 2017.
BF 698.35 R47 R462 2017

The rules of work: a definitive code for personal success.
Richard Templar.
New York, NY: Pearson, 2015.
HF 5386 T34 2015

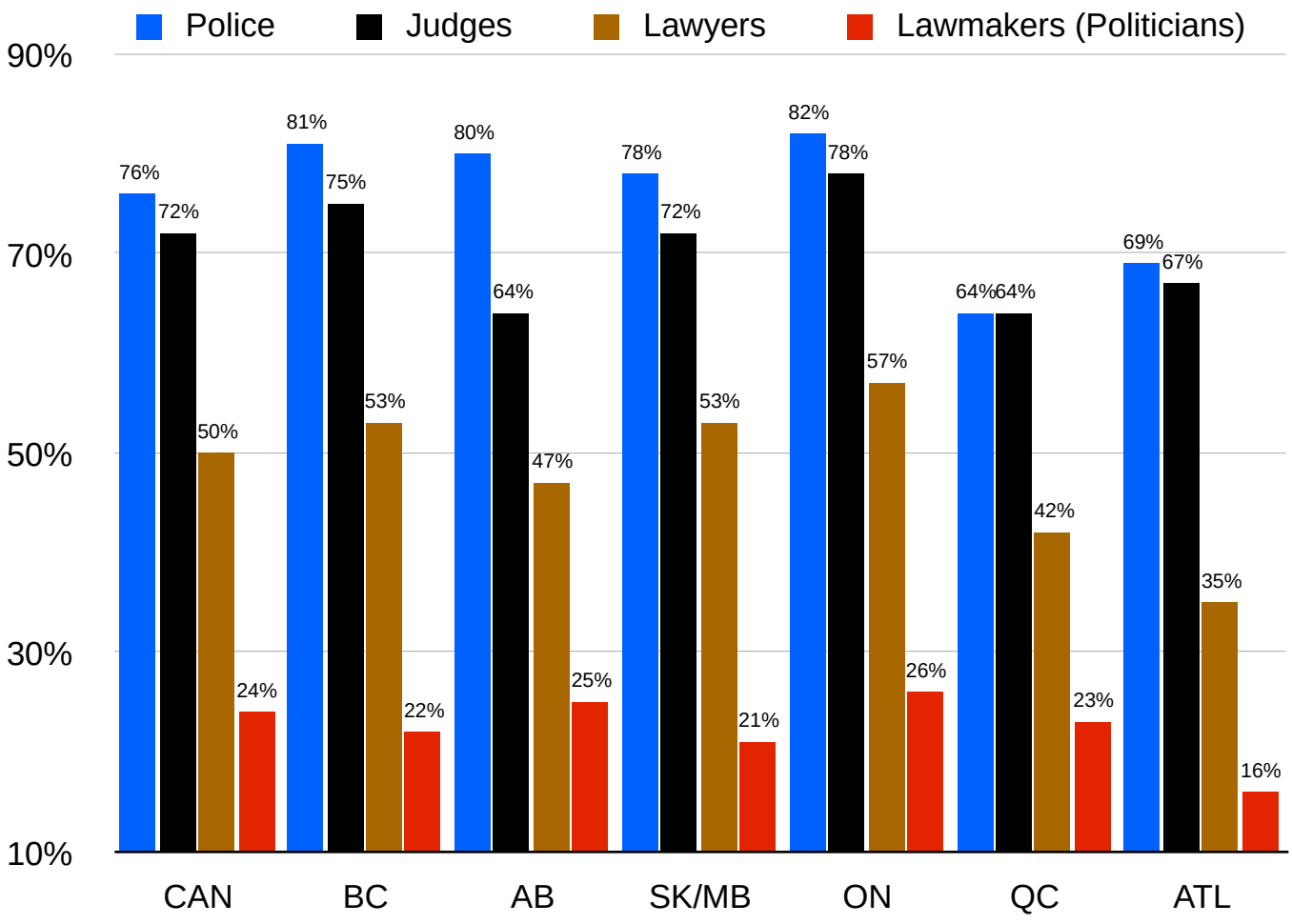
Theory U: leading from the future as it emerges : the social technology of presencing.
C. Otto Scharmer.
San Francisco, CA: Berrett-Koehler Publishers, Inc., a BK Business Book, 2016.
HD 58.8 S337 2016

Unsettling Canada: a national wake-up call.
Arthur Manuel and Grand Chief Ronald M. Derrickson; with a foreword by Naomi Klein.
Toronto, ON: Between the Lines, 2015.
E 78 C2 M337 2015

Very or Somewhat Positive Opinions of Justice System Professions							
Province/Region	CAN	BC	AB	SK/MB	ON	QC	ATL
Police Officer	76%	81%	80%	78%	82%	64%	69%
Judge	72%	75%	64%	72%	78%	64%	67%
Lawyer	50%	53%	47%	53%	57%	42%	35%
Lawmaker	24%	22%	25%	21%	26%	23%	16%

Justice System Professions

Very or Somewhat Positive Opinions Comparison Graph



ALL PROFESSIONS SURVEYED

Profession	Very or Somewhat positive opinion	Very or Somewhat negative opinion	Not sure
Nurses	91%	5%	3%
Doctors	89%	8%	3%
Farmers	88%	7%	4%
Scientists	88%	7%	5%
Architects	87%	6%	8%
Veterinarians	87%	7%	5%
Engineers	85%	10%	6%
Teachers	85%	11%	3%
Accountants	80%	12%	7%
Dentists	80%	16%	4%
Police Officers	76%	21%	3%
Auto Mechanics	73%	21%	5%
Military Officers	73%	22%	5%
Psychiatrists	73%	20%	6%
Judges	72%	22%	6%
Athletes	71%	23%	6%
Actors/Artists	68%	25%	6%
Journalists	62%	33%	4%
Priests/Ministers	59%	35%	7%
Building Contractors	54%	39%	6%
Lawyers	50%	46%	4%
Realtors/Real Estate Agents	50%	45%	6%
Bankers	49%	45%	5%
Business Executives	47%	46%	6%
Pollsters	34%	48%	18%
Car Salespeople	28%	66%	6%
Politicians	24%	72%	4%

Source: Insights West. Survey of Canadians on Professions. June 15, 2017. https://insightswest.com/wp-content/uploads/2017/06/Professions2017_Tables.pdf

SEARCH OF ASSAULT SUSPECT's BAG RELATED TO ARREST

R. v. Aviles, 2017 ONCA 629

Police responded to a report of an assault occurring at a Mac's Milk convenience store. The victim told police he knew one of the assailants by name. The other two assailants were a dark skin man wearing baggy hip-hop style clothing and a woman. The victim said he had lost a shoe during the assault and police found it in a nearby alley. While he was talking with the police, the victim pointed through the convenience store window at three people approaching, a woman and two men. He identified them as his attackers. One of the men was the individual the victim had identified by name. The other man was the accused. He was wearing a black pea coat, black jogging pants, brown boots and a black baseball cap.

The accused was arrested for assault and handcuffed. During the arrest, a grey single-strap shoulder bag dropped from his shoulder. He was escorted to the police car, given his right to counsel and caution, and searched incident to arrest. Two cell phones and a wallet with $160 in cash was found on his person. Police also picked up the accused's shoulder bag and searched it quickly for a weapon for officer safety reasons. Inside the bag, police located a leather box containing a digital scale and several types of narcotics. The accused was re-arrested for possessing narcotics for the purpose of trafficking, re-advised of his right to counsel and cautioned. A further search of the bag revealed a large knife inside its top flap as well as three cellphones. At the police station, the accused was again searched and a bag of cocaine was found in a pocket of his pea coat. The accused was charged with possessing controlled substances for the purpose of trafficking and carrying a concealed weapon. He was not charged with assault as the victim did not want to pursue the matter.

Ontario Superior Court of Justice

The judge found, in part, that the accused had been lawfully arrested for assault. The police had satisfied both the subjective and objective components of reasonable and probable grounds for arrest. First, the officer had received a report of an assault directly from the alleged victim. Second, the officer had obtained some corroboration that the assault had occurred from finding the victim's shoe in the alley where he said he had lost it during the assault. Third, the victim expressly identified the three people approaching the convenience store as the the perpetrators. Finally, the three people matched in significant detail the description that the victim had initially given: two men and a woman; one man named and known to the victim; the second man (the accused) with dark skin. In the judge's view, "a reasonable person placed in the position of [the arresting officer] would conclude that there were indeed reasonable and probable grounds for the arrest." Since the arrest was lawful, there was no s. 9 *Charter* breach.

As for the searches, the judge found they were all incident to the lawful arrest and re-arrest of the accused. The initial search for the purpose of officer safety and the detection of a possible weapon, in the context of an assault arrest, was objectively reasonable in the circumstances. There was therefore no s. 8 *Charter* violations. The accused was convicted of possessing cocaine, Oxycodone, marihuana and heroin for the purpose of trafficking along with carrying a concealed weapon. He was sentenced to 21 months in prison (less three months for time served and his restrictive bail conditions), two years probation, a 10 year weapons prohibition, a DNA order and forfeiture of the cellphones, scale, $160 and knife seized on his arrest.

Ontario Court of Appeal

The accused argued, among other things, that the police did not have reasonable and probable grounds to arrest him for assault and that the judge erred in finding that

the police had grounds to search the shoulder bag incident to his arrest for assault. As a result, he submitted that the police breached his ss. 8 and 9 *Charter* rights and the evidence should be excluded under s. 24(2).

Reasonable Grounds For Arrest

The accused argued that the police had the necessary objective grounds to arrest the person named by the victim. But they had nothing more than a suspicion to believe he was the second man involved in the assault. He submitted that he was not wearing baggy hip hop clothing as described by the victim and the named assailant could have been walking with a different person by the time he showed up after the assault at the convenience store.

The Court of Appeal, however, disagreed. Although the arresting officer testified that a pea coat would not be considered baggy hip hop style clothing, the police "were entitled to rely on the victim's identification of the [accused] as one of his assailants from only a short time before." Further, the group of people identified by the victim as his assailants matched in significant respects the description he had already given. There was no arbitrary detention under s. 9.

Search Incident to Arrest

The accused contended that the initial search of his shoulder bag was not a lawful search incident to arrest. He suggested there was no objectively reasonable basis to search the bag on officer safety grounds. There was no suggestion that a weapon had been used in the assault and no basis to believe there would be one in the bag. Also, there was no danger to police because all three alleged attackers were handcuffed.

The Court of Appeal rejected this submission too. Here, the accused was under arrest and there was no option for him to leave or take the bag away. Because of the arrest, the police had the power to search incident to it for officer or public safety, preserving evidence, or discovering evidence relevant to the offence for which the accused was arrested. And since the police would be taking the bag to the station, the officer was concerned for safety and believed the bag should be checked for a loaded firearm. This concern was informed by the accused's arrest for a violent offence even though there was no report of a weapon as part of the assault. Furthermore, the fact all arrestees were handcuffed did not eliminate an objectively reasonable concern of danger to the police from a loaded firearm in the shoulder bag. As Justice Feldman noted, "the trial judge made no error in his conclusion that the officer had both a subjective and objectively reasonable basis to conduct a search of the bag incident to the [accused's] arrest in all the circumstances of this case." There was no s. 8 breach against unreasonable search and seizure and therefore no need to conduct an admissibility analysis under s. 24(2).

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's Note: Additional facts taken from *R. v. Aviles*, 2016 ONSC 34.

VEHICLE SEARCH REMAINED INCIDENT TO ARREST AFTER ITS MOVE TO POLICE STATION

R. v. Dunkley, 2017 ONCA 600

The police were surveilling a suspected cocaine dealer's residence when they saw the accused, a slim black male about six feet tall with a dark jacket, park a silver Honda Accord on the street at about 9:05 pm near the residence. The Honda's license plate was registered to a female at an out of town address. An officer recalled receiving information earlier that month from the handler of a confidential informer that the male driver of a silver Honda Accord with the same license plate number was a high-level cocaine supplier in town. The informer had described the male as thin, black, in his thirties and from out of town. The informer was believed to be reliable and the information was first-hand.

"[T]he police are not required to corroborate the very criminality of the information given by the informant through their independent investigation, and it is not necessary to confirm each detail in a tip. The police must only be satisfied that the possibility of innocent coincidence is removed based on the conformity of the events actually observed to the pattern anticipated by the tip."

This information was shared with the other members of the surveillance team and, at about 9:33 pm, the police saw the suspected cocaine dealer showing the accused out of the house. When the accused drove away from the house, officers formed the belief that he was the suspect described by the informer and that they had grounds to arrest him for possessing cocaine for the purpose of trafficking. As he drove to a nearby McDonald's drive-through, he was stopped and arrested at 9:47 pm.

The accused was patted down incident to his arrest and his car was also searched. Six cellphones were recovered from the accused's pants pockets and the centre console of his vehicle. As well, $1,200 cash was found in a backpack in the back seat of the car along with a handwritten list of names and phone numbers and a large, empty Ziplock bag. The accused's car was moved to the police station where a more extensive search was conducted. The police regarded this further search as a continuation of the roadside search incident to arrest. Several plastic panels that concealed "natural voids" within the vehicle were removed. Behind the plastic panel on the rear driver's side arm rest, police found about $440,000 USD and a loaded handgun wrapped in saran wrap. Behind the rear passenger-side panel, approximately 5.5 kilograms of cocaine was found, packaged in various quantities.

Ontario Superior Court of Justice

The accused argued that his arrest was unlawful and that the evidence found when police conducted their searches incident to arrest should be excluded. The judge, however, held that the arrest was lawful and admitted the evidence. The judge found the police had the requisite grounds to justify an arrest under s. 495(1)(a) of the *Criminal Code*. First, the house being watched was the residence of a suspected cocaine dealer. Second, the accused entered the residence and left with the suspected cocaine dealer about half an hour later. And finally, the accused's appearance and vehicle completely matched the information provided by the confidential informer. The judge found this was not an innocent coincidence and the accused's presence at the address corroborated the informer's tip.

As for the searches of the accused and his vehicle, the judge concluded they were proper as an incident to his valid arrest. The purpose of these searches was to discover and preserve evidence with respect to possession for the purpose of trafficking. The delay involved in moving the vehicle to the police station did not preclude the subsequent search from being one properly conducted as an incident to arrest. The accused was convicted of several offences including possessing cocaine for the purpose of trafficking and firearms-related offences.

BY THE BOOK:

Criminal Code

Arrest Without Warrant

s. 495 (1) A peace officer may arrest without warrant (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence; ...

"The tip was compelling: it contained sufficient detail to ensure that it was based on more than a mere rumour or gossip. The tip was credible. The tip was corroborated: the surveillance team independently observed a vehicle completely matching the description given by the informant arrive at the very residence they were staking out for drug trafficking."

Ontario Court of Appeal

The accused appealed his convictions submitting, among other things, that the trial judge erred in finding that his arrest was based on reasonable and probable grounds. Moreover, he contended the evidence seized incident to his invalid arrest should be excluded under s. 24(2) of the *Charter*.

The Arrest

Since the arresting officer had no personal dealings with the informer, the accused suggested there was no evidence capable of providing an objectively reasonable basis that the arresting officers could rely on the handler's statement about the informer's reliability. Further, the accused argued that the trial judge should not have ruled out an innocent coincidence and that the police were required to confirm the accuracy of the tip through independent investigation before acting on it.

The Court of Appeal, however, found the trial judge properly determined whether the police had the necessary reasonable grounds to arrest arising from the informer's tip. "The tip was compelling: it contained sufficient detail to ensure that it was based on more than a mere rumour or gossip," said the Court of Appeal. "The tip was credible. The tip was corroborated: the surveillance team independently observed a vehicle completely matching the description given by the informant arrive at the very residence they were staking out for drug trafficking." The Court of Appeal continued:

> [T]he police are not required to corroborate the very criminality of the information given by the informant through their independent investigation, and it is not necessary to confirm each detail in a tip. The police must only be satisfied that the possibility of innocent coincidence is removed based on the conformity of the events actually observed to the pattern anticipated by the tip. [references omitted, para. 15]

In this case, the trial judge correctly found that the possibility of innocent coincidence was removed:

> He correctly held that the attendance of a man fitting the description provided by the informant, in the same car identified by the informant and at the house of a known cocaine supplier, was clear corroboration of the tip that rendered it sufficiently reliable to be acted upon, despite the absence of evidence from the informant's handler. The supplier let the [accused] into his house and escorted him back to his car. The high degree of suspicion attached to these non-criminal acts was sufficient to remove the possibility of innocent coincidence. [para. 16]

The arrest was lawful, there was no s. 8 *Charter* violation and it was therefore unnecessary to conduct a s. 24(2) analysis. The accused' appeal was dismissed and his convictions were upheld.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

"Leadership: The art of getting someone else to do something you want done because he wants to do it."

Dwight D. Eisenhower

2016 POLICE REPORTED CRIME

In July 2017 Statistics Canada released its *"Police-reported crime statistics in Canada, 2016"* report. Highlights of this recent collection of crime data include:

- There were **1,895,546** crimes (excluding traffic offences) reported to Canadian police in 2016; this represents **27,713** more crimes reported when compared to 2015.
- The total crime rate did not change even though the violent crime rate dropped **-1%** and other Criminal Code offences rose **+4%**.

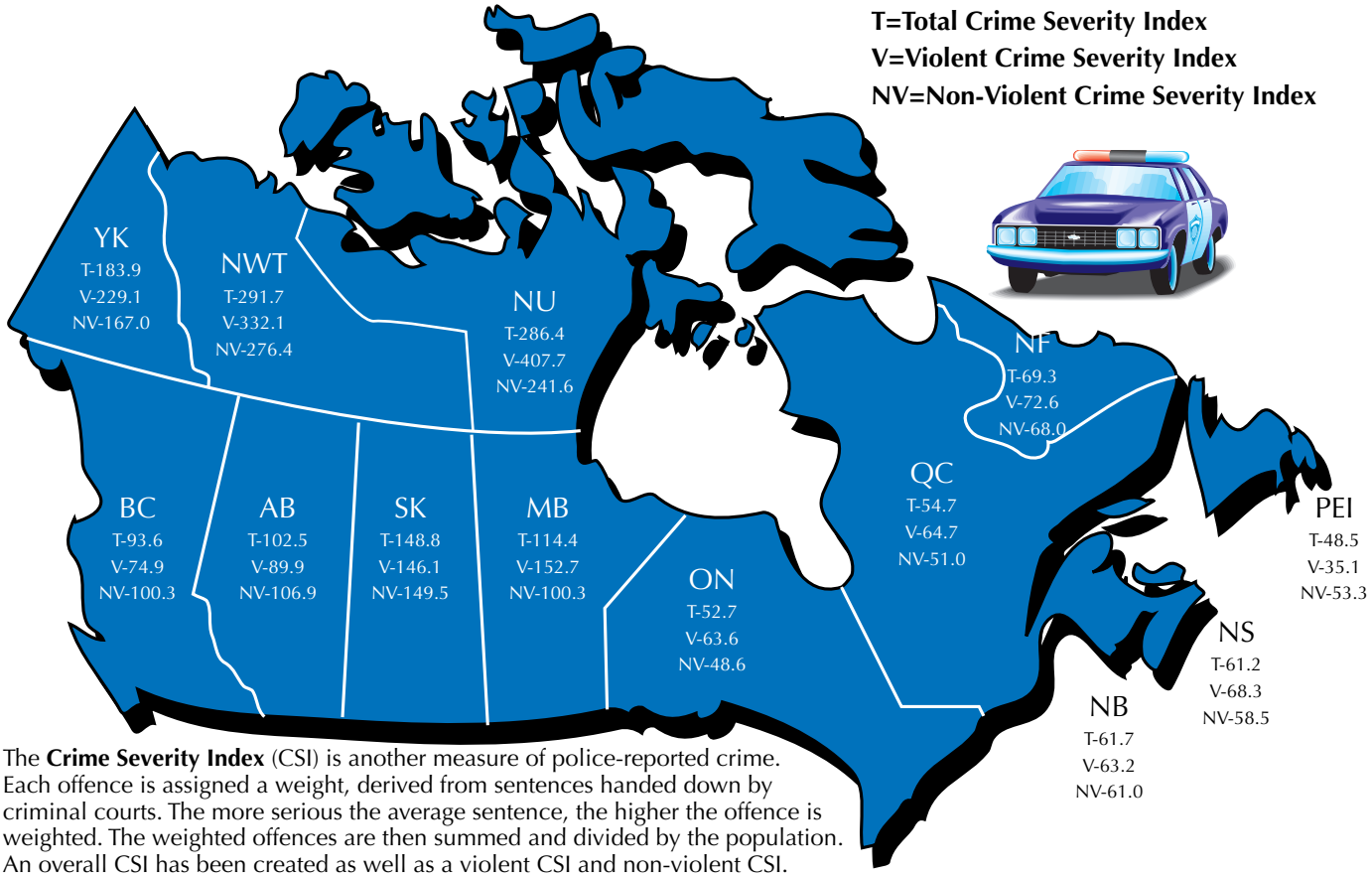
Source: Statistics Canada, 2017, "Police-reported crime statistics in Canada, 2016, Catalogue no. 85-002-X,released on July 24, 2017.

Police-Reported Impaired Driving Offences

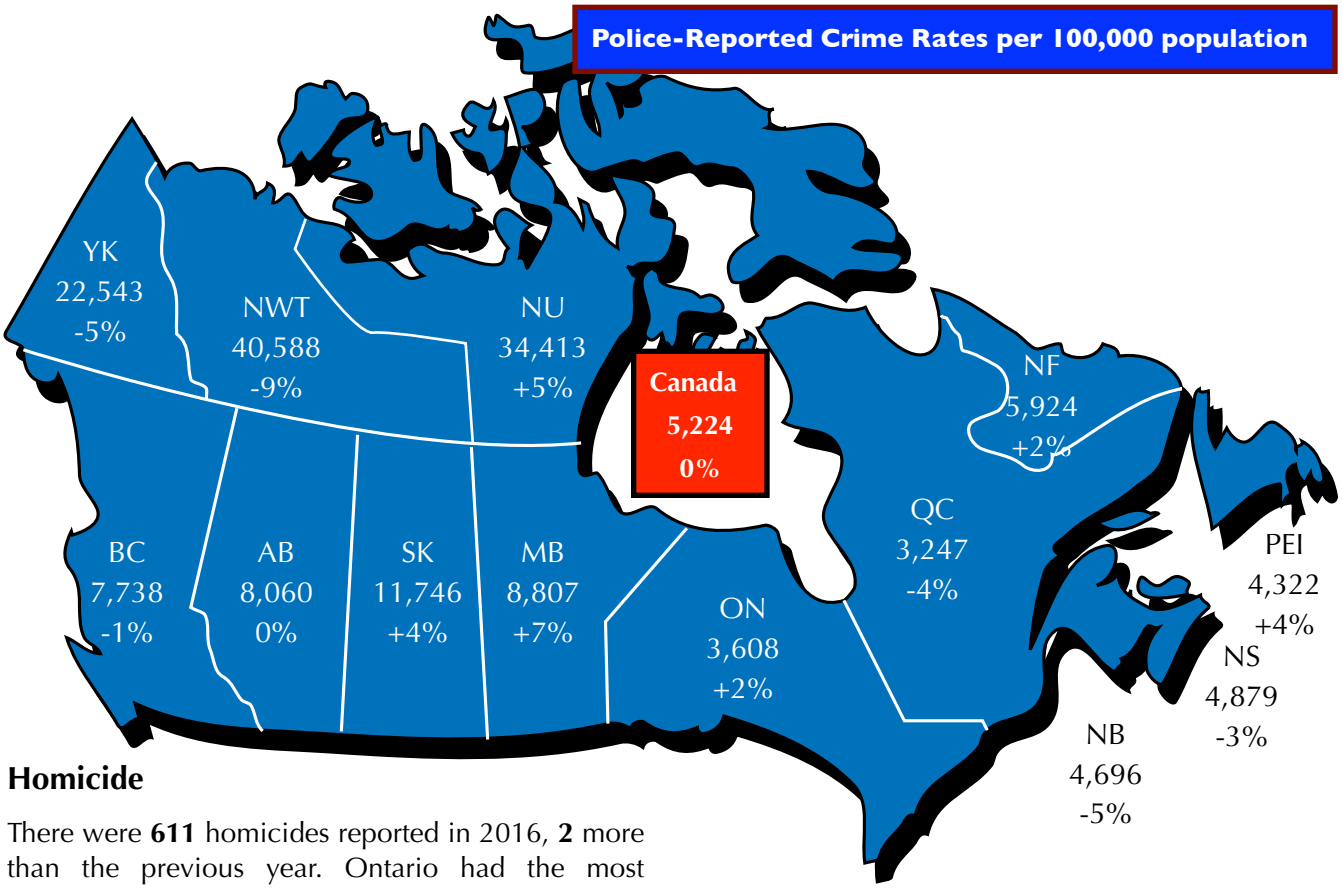
Province	Rate	Impaired Driving Offences	Rate change 2015 to 2016
SK	554	6,377	-4%
PEI	488	328	+24%
AB	287	12,191	-8%
NS	263	2,501	-7%
NF	260	1,376	0%
MB	257	3,391	+19%
BC	241	11,451	-3%
NB	221	1,676	-7%
QC	180	15,025	-2%
ON	106	14,765	-5%

Police-Reported Crime Severity Indexes

T=Total Crime Severity Index
V=Violent Crime Severity Index
NV=Non-Violent Crime Severity Index



The **Crime Severity Index** (CSI) is another measure of police-reported crime. Each offence is assigned a weight, derived from sentences handed down by criminal courts. The more serious the average sentence, the higher the offence is weighted. The weighted offences are then summed and divided by the population. An overall CSI has been created as well as a violent CSI and non-violent CSI.



Homicide

There were **611** homicides reported in 2016, **2** more than the previous year. Ontario had the most homicides at **206**, followed by Alberta (**116**), British Columbia (**87**) and Quebec (**67**). PEI reported no homicides while Nunavut reported only one (1), followed by the Northwest Territories with three (3) and the Yukon with four (4). As for provincial or territorial homicide rates, the Yukon had the highest rate (**10.67** per 100,000 population) followed by Northwest Territories (**6.75**), Saskatchewan (**4.69**), Manitoba (**3.19**) and Alberta (**2.73**). As for Census Metropolitan Areas (CMA's), Thunder Bay, ON had the highest homicide rate at **6.64**. The Canadian homicide rate was **1.68**.

Top 10 CMA Homicide Rates per 100,000

CMA	Rate	CMA	Rate
Thunder Bay, ON	6.64	Halifax, NS	2.82
Edmonton, AB	3.39	Brantford, ON	2.73
Regina, SK	3.23	Kelowna, BC	2.54
Abbotsford-Mission, BC	3.22	Ottawa, ON	2.37
Saskatoon, SK	3.12	Saint John, NB	2.35

Canada's Top Ten Reported Crimes

Offence	Number
Theft Under $5,000 (non-motor vehicle)	487,176
Mischief	274,816
Administration of Justice Violations	179,271
Break and Enter	159,630
Assault-level 1	157,046
Disturb the Peace	103,892
Fraud (excluding identity fraud)	94,425
Theft of Motor Vehicle	78,800
Impaired Driving (alcohol)	69,115
Uttering Threats	62,815

Robbery

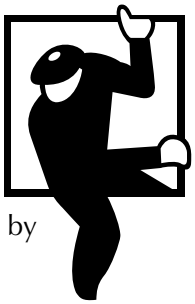
In 2016 there were **22,149** robberies reported, resulting in a national rate of **62** robberies per 100,000 population. Manitoba had the highest robbery rate followed by Saskatchewan, Alberta and Northwest Territories.

Police-Reported Robberies			
Province/ Territory	Rate	Robberies	Rate change 2015 to 2016
MB	156	2,059	+21%
SK	86	988	-1%
AB	71	3,038	-13%
NWT	70	31	+14%
BC	62	2,956	-20%
YK	61	23	+4%
ON	59	8,255	+7%
QC	45	3,707	-9%
NF	42	23	+19%
NB	30	226	+47%
NS	29	272	-16%
NU	27	10	-48%
PEI	12	18	+11%
CANADA	**60**	**21,806**	**-3%**

- Winnipeg, MB had the highest CMA rate for robbery in Canada (**229**), **+27%** higher than its 2015 rate. Trois-Rivieres, QC had the lowest rate (**12**). Moncton, NB reported a jump of **62%** in its robbery rate. Saint John, NB (**+48%**), Gatineau, QC (**+44%**), Barrie, ON (**+28%**) and Winnipeg, MB (**+27%**) also saw high double digit rate increases.
- Six CMAs reported declines in robberies of -25% or more: Trois-Rivieres, QC, (**-66%**), Abbotsford-Mission, BC (**-36%**) and Kelowna, BC (**-28%**).

Top Ten CMA Robbery Rates per 100,000			
CMA	Rate	CMA	Rate
Winnipeg, MB	229	St. John's, NL	87
Thunder Bay, ON	118	Toronto, ON	83
Regina, SK	118	Vancouver, BC	78
Saskatoon, SK	116	Montreal, QC	73
Edmonton, AB	103	Hamilton, ON	70

Break and Enter



In 2016 there were **159,119** break-ins reported to police. The national break-in rate was **439** break-ins per 100,000 people. Nunavut had the highest break-in rate (**1,766**) followed by the Northwest Territories (**1,014**).

Police-Reported Break-ins			
Province/ Territory	Rate	Break-ins	Rate change 2015 to 2016
NU	1,766	655	+6%
NWT	1,014	451	-15%
SK	887	10,206	+7%
MB	728	9,592	+6%
YK	672	252	-16%
AB	658	27,989	-1%
BC	628	29,841	-2%
NF	510	2,702	+5%
NB	430	3,254	-3%
QC	372	30,952	-3%
NS	307	2,917	-10%
ON	286	39,929	-1%
PEI	256	380	-25%
CANADA	**439**	**159,119**	**-2%**

NATURE OF DRUGS CAN BE INFERRED FROM CIRCUMSTANCES

R. v. Douglas, 2017 ONCA 609

Over a period of two days, the police surveilled a motel room and observed numerous brief comings and goings to and from the room and an adjacent room. These visits included known drug users. The police obtained a search warrant and breached the door of the motel room. Inside they found three men, including the accused, lying on top of two beds. Police found cocaine and cash on the two other men. These drugs were sent for testing and were confirmed by certificates of analysis. One of the other men also had a key to the motel room. No drugs were found on the accused but two bundles of cash, secured by elastics, were in his pockets. Police also located $440 in a rear pocket and $210 in a front pants pocket were located.

Police also found three baggies of suspected crack cocaine (21.7 grams) under a cup on a table adjacent to the bed where the accused was lying; two bags of suspected cocaine or crack cocaine (86.6 grams) under one of the beds in the room and one bag of suspected crack cocaine (1.2 grams) in a small bag in plain view on another table in the room. None of these drugs were sent for testing. Other items found in the room included a scale with a white powder residue on it and several phones.

Ontario Superior Court of Justice

The judge made a finding that the untested drugs were cocaine, based on the totality of the circumstantial evidence, even though there was no certificate of analysis. The judge also concluded that the accused was in possession of the untested drugs found in the room. The accused was convicted of possessing cocaine for the purpose of trafficking and possessing proceeds of crime. He was sentenced to two years' less a day imprisonment, minus 24 days' credit for pre-sentence custody, and three years' probation.

Ontario Court of Appeal

The accused argued the trial judge erred in relying on the police officer's lay opinion evidence to establish that the untested substances in the room were cocaine. In his view, there were differences in the colour, texture and packaging of the untested substances in the room as compared to the tested substances found on the two other occupants of the room. As well, the police officer who testified the substances were cocaine was not a chemist and was not in a position to positively confirm their character. The accused, also submitted that, even if the other substances were cocaine, the Crown failed to prove he was in possession of those substances and the proceeds of crime.

Nature of Substances

Although the Court of Appeal noted that it would be rare for a trial judge to find that a substance was a particular narcotic without a certificate of analysis, it was open to the trial judge in this case to do so based on the totality of the circumstantial evidence:

> [S]amples of the substances found on the two other occupants of the motel room were confirmed to be cocaine by certificates of analysis. A police officer who had participated in more than 100 undercover cocaine purchases testified that the non-tested substances smelled like cocaine and had the appearance, texture(s) and colours for cocaine and were packaged as cocaine often is, in ziplock bags. Based on the whole of the

> evidence, including the surveillance evidence that placed the [accused] in the motel room for more than a fleeting period; the evidence of the comings and goings to the room; the presence of what appeared to be drugs and drug-related paraphernalia throughout the room; the experienced police officer's lay opinion concerning the nature of the balance of the substances in the room; and the cash in each of the occupant's pockets; it was open to the trial judge to conclude, as he did, that the occupants of the room, including the [accused], were part of a drug-dealing enterprise and that the substance they were dealing was cocaine. [para. 12]

Possession

The same evidence found by the Court of Appeal to support the trial judge's conclusion that the untested drugs were cocaine was sufficient to also find that the accused was in possession of the untested substances found in the motel room.

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

TEAR GAS DEPLOYMENT NOT A DISCRETE CHARTER 'SEARCH'

R. v. Rutledge, 2017 ONCA 635

The police, relying in part on information from a confidential informer, obtained two telewarrants to search a remote farmhouse for firearms, ammunition, controlled substances and related paraphernalia. One warrant was issued under the *Criminal Code* and the other under the *Controlled Drugs and Substances Act*. Some of the many people who were believed to occupy or have access to the farmhouse had histories of violence. It was believed that drugs were trafficked at or from the farmhouse, and weapons and firearms, including a semi-automatic rifle, were present and available for use by its occupants.

The officer in charge of the investigation determined that an undetected approach to the farmhouse to execute the warrants was safest, including flushing out any occupants to avoid a shootout or armed standoff. Police broke a window on the ground floor of the farmhouse, tossed a tear gas canister onto the floor of a room adjacent to the broken window and rammed down the front door. The canister dispensed gas but it was not incendiary. The accused was the only occupant of the farmhouse and quickly left it as the tear gas spread. He coughed and was teary-eyed, but required no medical intervention or assistance, and was promptly arrested. The police found large quantities of marijuana, three ounces of cocaine, indicia of trafficking in both cocaine and marijuana, three restricted or prohibited handguns and ammunition for the three guns. The accused had over 20 long guns, rifles and shotguns stored in or near to an unlocked gun cabinet, along with boxes of ammunition stored in an unlocked tidy case. One long gun was found in the kitchen. The accused was charged with several drug and weapons offences.

Ontario Superior Court of Justice

Before his trial on the weapons and ammunition offences, the accused pled guilty to possessing cocaine and marihuana for the purpose of trafficking. At the accused's trial for the weapons offences, the judge, among other things, found the use of tear gas in the circumstances was not unjustified. She found the search was not executed in an unreasonable manner. The judge stated:

> In this case, the police reasonably believed that in executing the warrant they could be faced with an array of weapons, including handguns and an AK - an automatic or semiautomatic weapon. The home was two stories, plus a basement, and multiple persons might have been encountered. There was no risk, as there might be in a city, that persons leaving the home would pose a risk to the public, since

"Every investigatory technique used by police does not amount to a 'search' within or for the purposes of s. 8 of the Charter. It is only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals that police conduct amounts to a 'search'."

> there were no other homes anywhere nearby and it was night-time. On the facts here, it is not for the court to second-guess the police discretion respecting the operational approach taken. The extraordinary measure of using tear gas to flush out the inhabitants of this isolated home was, in this case, not unjustified. [para. 109, *R. v. Rutledge*, 2015 ONSC 1675]

The accused was convicted of firearms and ammunition offences, sentenced to 12-months in prison, placed on two years probation, given a 10-year firearm prohibition, and ordered to forfeit many of the guns, provide a DNA sample and pay a $600 victim surcharge.

Ontario Court of Appeal

The accused argued that the use of tear gas was, on its own, a discrete "search" under the *Charter*. This required prior judicial authorization which the police did not receive. In his view, this "search" was unreasonable and breached s. 8 of the *Charter*. Furthermore, he submitted that the use of tear gas rendered the manner of the search conducted under the telewarrants unreasonable, another s. 8 violation.

Tear Gas as a "Search"

The Court of Appeal rejected the accused's tear gas "search" argument. First, the accused did not advance this argument at trial. Second, "the use of tear gas in these circumstances does not fall within the plain or any extended meaning of 'search' within s. 8 of the Charter," said the Court of Appeal. It continued:

> Every investigatory technique used by police does not amount to a "search" within or for the purposes of s. 8 of the Charter. It is only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals that police conduct amounts to a "search". It is not only the type of police conduct that determines whether a search has occurred, but also the purpose of that conduct that is controlling. A search is about looking for things to be used as or to obtain evidence of a crime.
>
> To be certain, s. 8 protects personal privacy. It guarantees the right of persons not to have their bodies touched or otherwise explored for the purpose of disclosing objects, matters or information that they wish to conceal. State actions that interfere unreasonably with a person's bodily integrity for such a purpose breach a person's right to privacy. But not every state action does this.
>
> In this case, the use of tear gas was not for the purpose of obtaining personal information about the [accused] which he sought to shelter from state discovery and use. The purpose of using tear gas was to flush out the occupants of the premises so that confrontation would be avoided. Section 8 interests were not implicated by what occurred. [references omitted, paras. 19-20]

The Court of Appeal also rejected the accused's submission that the investigative decision or plan to use tear gas should have been disclosed in the ITO. "This submission comes perilously close to micromanagement of police choices about equipment and the manner of execution that are to be avoided or better considered as part of the inquiry into whether the search was conducted in a reasonable manner," said the Court of Appeal. "We also note that the statutory form used for an ITO, Form 1, makes no reference to the manner of execution."

"The purpose of using tear gas was to flush out the occupants of the premises so that confrontation would be avoided."

"In this case, the use of tear gas was not for the purpose of obtaining personal information about the [accused] which he sought to shelter from state discovery and use. The purpose of using tear gas was to flush out the occupants of the premises so that confrontation would be avoided. Section 8 interests were not implicated by what occurred."

Unreasonable Search?

The trial judge did not err in finding that the search was executed in a reasonable manner. The Court of Appeal stated:

> In reaching our conclusion, we have in mind that police decisions about the manner in which a search will be carried out fall to be adjudged by what was or should reasonably have been known to them at the time the search was conducted, not through the lens of how things turned out to be. Hindsight is not our measuring stick.
>
> We also recognize that police are entitled to some latitude on how they decide to enter premises under a warrant. Omniscience is not a prerequisite for a search to be conducted in a reasonable manner. In an assessment of the manner in which a search has been executed, a reviewing court balances the rights of suspects, on the one hand, with the requirements of safe and effective law enforcement, on the other. The trial judge did this. This is no place for the Monday morning quarterback. [paras. 25-26]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's Note: Additional facts taken from *R. v. Rutledge*, 2015 ONSC 1675 and *R. v. Rutledge*, 2015 ONSC 6625.

DEMONSTRATING REASONABLE GROUNDS NOT THE SAME AS PROOF TO CONVICT

Parsaei v. Toronto (Police Services Board), 2017 ONCA 512

The plaintiff, along with two other women, was charged criminally in connection with harassing and threatening letters, and hostile and harassing phone calls. A police detective assigned to investigate the threats charged the plaintiff with threatening death and intimidation. At her criminal trial, the plaintiff was acquitted but was required to enter into a peace bond. In acquitting her of the charges, the trial judge stated:

> I am not for a moment saying the two women are innocent. In Scotland they have three verdicts, guilty, not guilty and not proven. To me this is a case of just not proven. I am deeply suspicious but I am simply not convinced beyond a reasonable doubt, so on these charges they are acquitted.

The plaintiff then launched a civil action against the police for wrongful arrest and negligent investigation.

Ontario Superior Court of Justice

The police sought and were granted summary judgment. The motion judge found there was no genuine issue for trial because the absence of reasonable and probable grounds is an essential element of the civil torts of wrongful arrest and negligent investigation. Based on the evidence, the motion judge ruled that the detective had reasonable and probable grounds to believe that the plaintiff had committed the offences with which she was charged.

Ontario Court of Appeal

The plaintiff appealed the granting of summary judgment arguing, in part, that the motion

"Demonstrating reasonable and probable grounds in support of an arrest and the laying of charges is not the same thing as the Crown having to prove the factual and mental elements of an offence necessary to establish guilt beyond a reasonable doubt."

judge erred in finding that the police had reasonable and probable grounds to lay the charges in the first place. The Court of Appeal, however, rejected the plaintiff's appeal:

> There was ample evidence to support the motion judge's finding that the police had reasonable and probable grounds to arrest the [plaintiff] and to lay the charges. That evidence included (i) the exhaustive affidavit of [the detective] setting out in detail the particulars of the investigation and the documentation obtained, together with a lengthy summary of the facts supporting his belief that reasonable and probable grounds existed; (ii) the transcripts of the preliminary hearing and the trial; (iii) the information that [the detective] had consulted two Crown attorneys prior to laying the charges and had been advised that there was ample evidence to support his doing so; and (iv) the reasons of [the trial judge in acquitting the [plaintiff]. [para. 12]

The Court of Appeal found the trial judge's reasons in acquitting the plaintiff even supported the existence of reasonable and probable grounds:

> "Mere suspicion" is not enough to constitute reasonable and probable grounds, but [the plaintiff's lawyer] concedes that "reasonable suspicion" has been found to do so. We read [the trial judge's] analogy with the Scottish situation and his "deeply suspicious" comment as signalling that he was of the view that the basis for the Crown's case went well beyond mere suspicion, although it was insufficient to establish guilt beyond a reasonable doubt. [para. 14]

As well, a court must be careful to not conflate the issues pertaining to criminal responsibility and those pertaining to the civil liability of police:

> Demonstrating reasonable and probable grounds in support of an arrest and the laying of charges is not the same thing as the Crown having to prove the factual and mental elements of an offence necessary to establish guilt beyond a reasonable doubt. [para. 16]

The plaintiff's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

MOTOR VEHICLE DETENTION MORPHED INTO UNLAWFUL CRIMINAL INVESTIGATIVE DETENTION

R. v. Mhlongo, 2017 ONCA 562

A police officer parked his cruiser in an alleyway close to a "crack house". He noticed a black Honda (a rental vehicle) drive by him at a slow rate of speed. He also saw that the front passenger, the accused, was not wearing a seat belt. The officer pulled in behind the Honda. He followed it and conducted a computer search. He learned that it had unauthorized licence plates attached to it, contrary to Ontario's *Highway Traffic Act* (*HTA*). The officer pulled the car over into a parking lot to investigate the licence plate infraction and called for backup.

As the officer approached the car, the accused got out of it but was ordered back in. He complied. The officer requested ownership papers and the driver's licence. He also asked the passengers for their identification. The driver provided his driver's licence. The accused provided a photo health card, and the ownership and insurance documents from the glove compartment. The backseat passenger orally gave a name, which subsequently was discovered to be false. The officer confirmed the plates did not belong on the vehicle and arrested the driver.

The accused and the other passenger were asked to get out of the vehicle while it was searched. They

stood outside the car together and waited. Computer checks of the passengers on the CPIC and Niche RMS database systems, were conducted. These databases are available only to police and contain not only records of criminal convictions, but can also include information about outstanding warrants, court orders, charges, police contacts and investigations relating to individuals and locations. Once the police learned the accused had a criminal record, they determined the other passenger was in breach of a recognizance because he was prohibited from being in the company of anyone with a criminal record. This other passenger suddenly fled but was quickly caught and arrested.

Even though he had no specific crime in mind at the time other than thinking something else might be going on besides the *HTA* offence, the officer ordered one of the backup officers to detain the accused. But before he could be detained, the accused walked towards a parked white car and made a downward motion with his hand, as if he were throwing something on the ground under the white car. The accused then approached the driver's door of this vehicle and asked its driver for a cigarette. The accused was detained for further investigation and handcuffed. The item thrown under the white car was retrieved by the backup officer. It was a bag containing approximately 23.5 grams of cocaine. A smaller bag of 0.45 grams of cocaine was found in the area where the accused and the other passenger had been standing. The accused was then arrested and patted down. Police found an iPhone, a Blackberry and $420 in cash on him. He was then advised of his right to counsel.

Stop > Arrest Timeline	
07:15 pm	Vehicle stop.
07:25 pm	Driver arrested.
07:48 pm	CPIC & Niche searches complete.
	Shortly after rear passenger flees and is caught and arrested.
	Officer decides accused should be detained. Before accused could be detained, he walked towards a parked vehicle and made a downward motion as if to throw something under the car.
07:57 pm	Accused physically detained & handcuffed.
	Bag containing 23.5 grams of cocaine found under the car and a bag containing 0.45 grams of cocaine found where both passengers had been standing.
07:58 pm	Accused arrested.
08:00 pm	Accused advised of right to counsel.

Ontario Superior Court of Justice

The investigating officer testified he returned to his cruiser to conduct the data system checks on the accused and the other passenger after the driver's arrest. He conceded that he was conducting a criminal investigation of the accused at that time. He also admitted he had no grounds and acknowledged he did not then have any specific crime in mind when he ordered the accused detained. He also conceded that, if the accused was in fact detained in those circumstances, it would not have been lawful.

The judge found a breach of s. 8 (unlawful search and seizure) and a breach of s. 10(b) (the right to counsel). The judge concluded that the investigator's request for the accused's identification for purposes of a general criminal investigation, rather than simply for valid *HTA* investigation purposes, constituted an unreasonable search and seizure. The request for identification in the circumstances of the accused's detention pursuant to the traffic stop amounted to a warrantless seizure without reasonable cause. As for the right to counsel, the judge found the three minute delay in providing s. 10(b) rights after the accused was physically detained was only a brief violation.

The judge rejected the notion of a s. 9 breach because the police had a valid reason to stop the vehicle and conduct an *HTA* investigation. The police were allowed to take control of the driver and passengers for this purpose. The request for identification and checking it on the police computer did not prolong or alter the nature of the *HTA* detention. When the accused was physically detained some nine minutes later, it was justified in light of the information the police then had.

Despite the ss. 8 and 10(b) breaches, the judge refused to exclude the evidence under s. 24(2). The s. 8 violation was relatively a low-threshold breach. Even though the officer did not ask the accused for his identification because of the seat belt issue, had he done so it would have been lawful and he could have issued a ticket for it. And the s. 10(b) breach was relatively brief. The police had not acted in bad faith and the admission of the evidence would not bring the administration of justice into disrepute. The accused was convicted of possessing cocaine for the purpose of trafficking.

Ontario Court of Appeal

The accused appealed his conviction on the basis that the trial judge erred in not excluding the cocaine and cash as evidence based on *Charter* violations.

Arbitrary Detention?

The Crown conceded that the accused was detained when he was told to get back into the vehicle immediately after the traffic stop, and he complied. Defence counsel, on the other hand, conceded that the officer had a valid reason to stop the vehicle and detain the driver and passengers during the investigation of the *HTA* offence.

The Court of Appeal found the detention of the accused, although initially lawful for purposes of the *HTA* investigation, became unlawful the moment the driver was arrested, the *HTA* investigation was concluded and the criminal investigation of the accused began.

In this case, the trial judge erred in finding that the accused's detention for criminal investigative purposes did not commence until he was physically detained by the backup officer just prior to his arrest. Rather, the investigating officer intended to undertake a criminal investigation of the accused at the time of the driver's arrest by conducting database checks:

> [T]he HTA investigation with respect to the unauthorized plates – the basis for the traffic stop – was completed, at least from the perspective of the [accused's] involvement, once [the driver] was arrested. The trial judge accepted that [the investigating officer] pulled the vehicle over to investigate the unauthorized plates and that he did not ask the [accused] for identification on account of the seat belt issue. [The investigating officer] acknowledged that he was satisfied as to the [accused's] identification by the time of the driver's arrest, having looked at his photo on the produced health card. A police database check was not needed for that purpose. [para. 38]

The Court of Appeal also found there were no grounds to detain the accused, either at the time of the *HTA* stop, or at the time of conducting the police checks following the driver's arrest and termination of the *HTA* investigation. Furthermore, it could not be said that the request for identification did not prolong or alter the nature of the accused's detention. He was not in exactly the same position he would have been if only the driver had been questioned:

> Had it not been for the request for identification, neither the [accused] nor [the other passenger] would have remained in detention following [the driver's] arrest and the termination of the HTA investigation; there would have been no CPIC or Niche search of their names; it would not have been discovered that the [accused] had a criminal record, that the back-seat passenger was [identified], and that [he] was in breach of a recognizance by being in the company of the [accused]. The entire scenario evolving from the knowledge the police obtained through the flight and arrest of [the other passenger] to the discarding of the

> drugs by, and the arrest of, the [accused], would not have occurred.
>
> I am satisfied in the circumstances of this case, therefore, that the [accused's] detention turned from lawful to arbitrary (and therefore unlawful) once [the driver] was arrested, the HTA investigation was completed from the [accused's] perspective, and the subsequent investigation of the [accused] for criminal act purposes commenced. His right not to be detained unlawfully, pursuant to s. 9 of the Charter, was violated. [paras. 43-44]

This unlawful detention continued until the accused was subsequently detained after the backup officer witnessed him throw cocaine under the white vehicle.

Right to Counsel

Since the trial judge erred in determining when the accused was detained for criminal investigative purposes, the s. 10(b) analysis was reconsidered. The nature of the accused's detention was transformed from a detention for valid *HTA* investigation purposes to a detention for criminal investigative purposes at the time of, or very shortly after, the driver's arrest. The accused's detention for criminal investigative purposes did not begin only when the accused was physically detained after he threw the object under the white car. So, rather than there being only a relatively brief three minute delay in providing s. 10(b) rights as the trial judge found, the delay between detention and s. 10(b) rights was actually more than 30 minutes.

Admissibility

In light of the trial judge's errors, the Court of Appeal revisited the s. 24(2) analysis. Here, the accused was held unlawfully in investigative detention (s. 9 breach) for more than half an hour without being provided his right to counsel (s. 10(b) breach). These were quite serious. The s. 8 breach, while less serious on the seriousness spectrum when viewed in isolation, "provided the entree to the serious ss. 9 and 10(b) violations that followed".

The seriousness of the three *Charter* breaches favoured exclusion as did their impact on the accused's *Charter* protected interests. And while society's interest in adjudication of the case on its merits, favoured inclusion, on balance, the Court of Appeal excluded the evidence because "the serious s. 9 breach and the lengthy s. 10(b) breach" would bring the administration of justice into disrepute.

The accused's appeal was allowed, his conviction was set aside and an acquittal was entered.

Complete case available at www.ontariocourts.on.ca

ARBITRARY VEHICLE STOP LEADS TO EXCLUSION OF DRUGS, GUNS & CASH

R. v. Gonzales, 2017 ONCA 543

As a result of an investigation into a spate of residential daytime break-ins, plainclothes officers patrolled the area in unmarked vehicles. They were on the lookout for those whose conduct raised their suspicions. However, there were no descriptions of any suspects or vehicle thought to be involved. One early afternoon a detective noticed a brand new van being driven along a street in a residential area with both completed and unfinished homes. Two younger men of "Latino descent" were in the van. They appeared "suspicious." The van was coming from an area with no access and following a route with no apparent purpose or destination. The detective waived them through an intersection and the van pulled into the driveway of a home at 31 Hislop Dr. in Markham, Ontario. It entered the garage and the garage door closed. The detective watched the home for about an hour, but he left after observing no one enter or leave the house. He also learned the van was rented by a person with a Toronto address and it was overdue for return to the rental company.

Five days later the detective returned to the same area to continue his patrol and surveillance. He saw the same van he had seen earlier. It had two

men in it and both looked towards the detective as they drove slowly through an intersection. The detective followed. The van drove by the address the detective had seen the van park at five days earlier. But it parked down the street four or five houses away. The detective pulled in behind the van, intending to make a traffic stop and pursue the investigation of the break-ins. The van then moved away from its parking spot, turned onto another street and was pulled over.

As the officer approached the van he could see through the side windows that it was full of large, sealed closed cardboard boxes. At the driver's door of the van, the detective displayed his badge and ID. When the accused opened his driver's door window, the officer smelled the odour of fresh marihuana coming from inside the van. The accused asked why he had been stopped. The officer told the accused that he wanted to ensure he was a licensed driver entitled to operate the van. The accused handed over the documents requested. The officer returned to his police vehicle to verify them. Believing the occupants of the van were in possession of marijuana, the detective called for backup to assist with the arrest. When backup arrived, the detective approached the van and told the accused he was under arrest for possessing marihuana. He was advised of his right to counsel, searched incident to arrest, handcuffed and put in the rear of a police cruiser for transport to the police station. Back at the station, the accused was strip searched.

When one of the cardboard boxes inside the van was searched, police found two sealed, large black industrial plastic bags containing several clear freezer-type Ziploc bags with marihuana. The detective put the contents back inside the van and had it towed back to the police station to await a search warrant so a more extensive search of the van and its contents could be completed. After obtaining a telewarrant for the van, 252 lbs. of packaged marijuana was found. Police also located $105,000 in Canadian currency in a garbage bag between the van's front seats. Another search warrant was obtained for 31 Hislop Dr. When that warrant was executed, police found another 185 lbs. of marijuana along with a large quantity of freezer-style Ziploc bags, vacuum sealing equipment, empty cardboard boxes and $27,000 in cash. They also seized debt lists, cellphones, a money counter, a firearm and several rounds of ammunition. The accused was charged with seven firearm and ammunition offences and two offences of possessing marihuana for the purpose of trafficking.

Ontario Superior Court of Justice

The judge found this was a lawful "dual purpose" stop under the authority of s. 216(1) of Ontario's *Highway Traffic Act (HTA)*. Even though the detective was primarily motivated by his investigation of the residential break-ins in the area, the *HTA* justified the stop. He found the stop was not a pretext and rejected any suggestion of an investigative detention. As for the warrantless arrest, the judge found it was lawful under s. 495(1)(b) of the *Criminal Code*. The search of the single box was incidental to arrest. The accused's strip search too was upheld since there were ample grounds for the arrest.

The judge, however, found a single breach of s. 10(b) of the *Charter* because the police failed to advise the accused of his right to counsel until 18 minutes after his arrest. But all the marijuana, cash and related paraphernalia found during the searches of the accused, the van and the house was ruled admissible as evidence. The s. 10(b) breach was neither wilful nor reckless, the impact on the accused's Charter-protected rights was non-existent and the evidence was extremely reliable and

BY THE BOOK:

Criminal Code

Arrest Without Warrant

s. 495 (1) A peace officer may arrest without warrant ... (b) a person whom he finds committing a criminal offence; ...

crucial to the Crown's case. The accused was convicted on three firearms counts and one count of possessing marijuana for the purpose of trafficking. He was sentenced to five years' imprisonment.

Ontario Court of Appeal

The accused appealed his convictions contending, among other things, that he had been arbitrarily detained, unlawfully arrested, and searched unreasonably, including his vehicle and his post-arrest strip search. As a consequence, he claimed the evidence gathered against him ought to have been excluded under s. 24(2).

Arbitrary Detention?

The accused argued that he was arbitrarily detained because the stop was a pretext and was not authorized by law. In his view, the stop could not be justified under s. 216(1) of the *HTA* because the detective's singular purpose in stopping his van was to further the criminal investigation of the break-ins. The detective had no intention, much less a basis, to investigate any highway traffic or highway safety issues. The Crown, on the other hand, asserted that the stop was not arbitrary. In its view, the police had the authority to investigatively detain the accused based on a reasonable suspicion he was involved in the residential break-ins in the area. As well, the Crown suggested the police could rely on the *HTA* because they needed to confirm that the occupants were in lawful possession of the vehicle, and lawfully licensed and insured to operate it.

Justice Watt, speaking for the Court of Appeal, concluded the stop of the van was not justified under the *HTA*. Although s. 216(1) authorizes a police officer to stop vehicles for highway regulation and safety purposes, even at random, the detective testified his only purpose in stopping the van was to pursue his investigation of the residential break-ins, not for traffic regulation. "The record reveals no basis upon which to reject [the detective's] testimony that his purpose in stopping the van was to pursue his investigation of the residential break-ins, his raison d'être for being in the area in the first place," said Justice Watt. "This he planned to do by looking into the interior of the van for any indicia associated with break-ins: contraband, gloves, tools of the trade and such. Not only did [the detective] identify his purpose as other than traffic regulation or vehicular safety, but he denied that the latter was the or even a purpose for the stop." Thus, the trial judge's ruling that the real motivation for this stop was s. 216(1) was wrong. And since s. 216(1) afforded no basis for detention, it was not a dual purpose stop.

As for the common law power of investigative detention, it did not justify the stop either. There was no constellation of objectively discernible facts that provided the detective with a reasonable suspicion that the occupants of the van were criminally implicated in the residential break-in activity under investigation:

> [The detective] had no information to link the van or its occupants to the daytime residential break-ins he was investigating. The officer knew about the number of break-ins and the time and manner of entry. But neither the police, nor [the detective], had a description of any individuals or vehicles that might have been involved in or associated with these activities. [The detective] had seen the same van in the same area twice in five days. Each time, there was a driver and a passenger. However, on the first occasion, what happened satisfied [the detective] that there was no connection between the van and the break-ins. The occupants had access to 31 Hislop. They entered the house. [The detective] did not see them leave. He thought that one of the men may have lived there. Scarcely the stuff of articulable cause or reasonably grounded suspicion.
>
> Similarly, nothing that happened [five days later] could ground a reasonable suspicion. The same vehicle. Two young men. A look from the [accused] to [the detective] as the [accused] drove through the intersection. Nothing more. [paras. 77-78]

"The Criminal Code requires that an arresting officer subjectively have reasonable grounds on which to base an arrest. But more is required. In addition, the grounds must be justifiable from an objective point of view. To say the same thing in another way, a reasonable person in the position of the officer must be able to conclude that there were indeed reasonable grounds for the arrest. On the other hand, nothing more than reasonable grounds need be shown. Not a prima facie case. And not proof beyond a reasonable doubt."

Arrest and Search Incident to Arrest

The accused submitted that his arrest for possessing marijuana was based solely on the detective's evidence that he smelled raw marijuana when the window on the driver's side of the van was lowered. The accused argued that smell alone does not constitute a reasonably-grounded belief that he committed an indictable offence. Thus, his arrest was unlawful and arbitrary. In the absence of a lawful arrest, the search of the single sealed box and its contents was also lawful.

The Crown, on the other hand, suggested the arrest and search were both lawful. In the Crown's opinion, an experienced police officer can rely on the smell of marijuana as a basis upon which to justify an arrest without warrant. Finally, the Crown asserted that the search of the single box in the van was undertaken to discover evidence of the offence on which the accused had been arrested.

Justice Watt noted that reasonable grounds for arrest has both subjective and objective elements:

> The Criminal Code requires that an arresting officer subjectively have reasonable grounds on which to base an arrest. But more is required. In addition, the grounds must be justifiable from an objective point of view. To say the same thing in another way, a reasonable person in the position of the officer must be able to conclude that there were indeed reasonable grounds for the arrest. On the other hand, nothing more than reasonable grounds need be shown. Not a prima facie case. And not proof beyond a reasonable doubt. [para. 95]

"No bright line rule prohibits the presence of the smell of marijuana as the source of reasonable grounds for an arrest."

As for the odour of marihuana, "no bright line rule prohibits the presence of the smell of marijuana as the source of reasonable grounds for an arrest," said Justice Watt. "However, what is dispositive are the circumstances under which the olfactory observation was made. Sometimes, police officers can convince a trial judge that their training and experience is sufficient to yield a reliable opinion of present possession. As with any item of evidence, it is for the trial judge to determine the value and effect of the evidence." Putting the unlawful detention aside, the detective had the necessary reasonably grounded belief that the accused was presently committing the offence of possessing marihuana:

> [T]he evidence here described the odour as that of raw or fresh marijuana, an observation that spoke to an offence that was then ongoing. The officer was experienced in drug investigations. He had participated in dismantling grow ops, something that could support an inference that he would be familiar with the smell of vegetative marijuana. And his observations were made in connection with a van filled with large sealed boxes. [para. 107]

As for the search of the single sealed box, it was incident to arrest:

> The single carton search took place immediately following the arrest. It involved the vehicle driven by the [accused], the vehicle from which the odour of fresh or raw marijuana emanated. The box examined was immediately behind the driver's seat, the position occupied

"[T]he inquiry into the unreasonableness of a strip search is not co-extensive with the basis for the arrest to which it is said to be incident. As with all searches incident to arrest, a strip search must be for a purpose related to the arrest. But reasonable and probable grounds beyond those that justify the arrest are required to render the strip search reasonable. And where the purpose of the strip search is to discover or prevent the destruction of evidence, the mere possibility that evidence might be found falls short of what is required."

> by the [accused] on arrest. There was a reasonable prospect that search of the sealed box would reveal the source of the odour, thus evidence of the offence for which the [accused] was arrested. The search was minimally intrusive, the officer choosing to await issuance of a warrant to examine the several remaining identical boxes. [para. 109]

Strip Search

Unlike the trial judge, the Court of Appeal found the accused's strip search to be unreasonable. Just because there were ample grounds to justify the his arrest does not mean the strip search was warranted:

> [T]he inquiry into the unreasonableness of a strip search is not co-extensive with the basis for the arrest to which it is said to be incident. As with all searches incident to arrest, a strip search must be for a purpose related to the arrest. But reasonable and probable grounds beyond those that justify the arrest are required to render the strip search reasonable. And where the purpose of the strip search is to discover or prevent the destruction of evidence, the mere possibility that evidence might be found falls short of what is required. [para. 142]

And further:

> Assuming the arrest of the [accused] was lawful, the evidence adduced simply cannot support a conclusion that would sustain the strip search as lawful. In combination, the circumstances do not establish more than, if even, a mere possibility that the [accused] was concealing evidence that a strip search would locate. Recall the contents of the single box searched immediately upon arrest. An industrial-sized garbage bag. Large vacuum-sealed Ziploc bags, each containing what appeared to be bulk marijuana. Not apparently capable of secretion. [para. 144]

Since the strip search was unlawful it was therefore unreasonable.

Admissibility of the Evidence

Unlike the trial judge, the Court of Appeal excluded all of the evidence. Not only was there a failure to provide the informational component of s. 10(b) immediately upon arrest, the traffic stop and subsequent detention violated s. 9 of the *Charter*. This arbitrary detention then set off a cascade of events that led to the accused's arrest, the search of the van and the search of the house. Justice Watt stated:

> In my respectful view, a proper analysis under s. 24(2) requires exclusion of the products of the searches of the [accused], the van and the house at 31 Hislop. In combination, the seriousness of the police misconduct and the strong negative impact of the breaches on the [accused's] Charter-protected interests constitute an unanswerable case for exclusion. Doubtless, society has a significant interest in a trial on the merits. The evidence that is the subject of the complaints about unconstitutional conduct is reliable and crucial to proof for the case for the Crown. But society's immediate interest in an adjudication of the merits of this particular case must give way to the more important long-term interests served by its exclusion in this case.
>
> This case involves serious police misconduct. [The detective] had no grounds to believe that

the occupants of the van had anything to do with the daytime residential break-ins he was investigating. He had seen the same van with two occupants enter a garage on the street five days earlier. He concluded then that there was no connection of the van or its occupants to the break-ins. The officer was not there doing traffic enforcement and had no traffic-related reason to pull the vehicle over. The officer knew or should have known that he had no basis to signal the vehicle to stop and to detain its occupants.

[The detective] was an experienced police officer. He was not faced with a situation in which the law was uncertain or had recently changed. The controlling legal principles were well-established. Little, if anything, can be offered in mitigation.

A final point on the seriousness of the Charter infringing state conduct. Evidence emerged from the officers at trial that this stop was part of a larger pattern of pulling over "suspicious" persons and asking them what they were doing in the neighbourhood. That the misconduct was part of a pattern of abuse tends to support exclusion of the evidence.

The serious negative impact of the Charter breaches on the [accused's] Charter-protected interests also favours exclusion. The arbitrary detention negated the [accused's] personal liberty, his right to be left alone. The detention led directly to the basis for an arrest, which led to the search incident to arrest which revealed marijuana and furnished the grounds to apply for a warrant to search the vehicle and later the house where the incriminating evidence was found. In other words, there was a strong causal connection between the initial arbitrary detention and the discovery of the incriminating evidence that constituted the entirety of the case for the Crown. And we should not forget the subsequent strip search, for which there was no basis, which offends the principles laid down in Golden about a decade earlier. [paras. 167-171]

The accused's appeal was allowed, his convictions were set aside and acquittals were entered.

Complete case available at www.ontariocourts.on.ca

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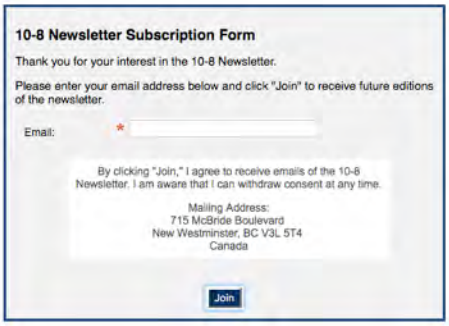

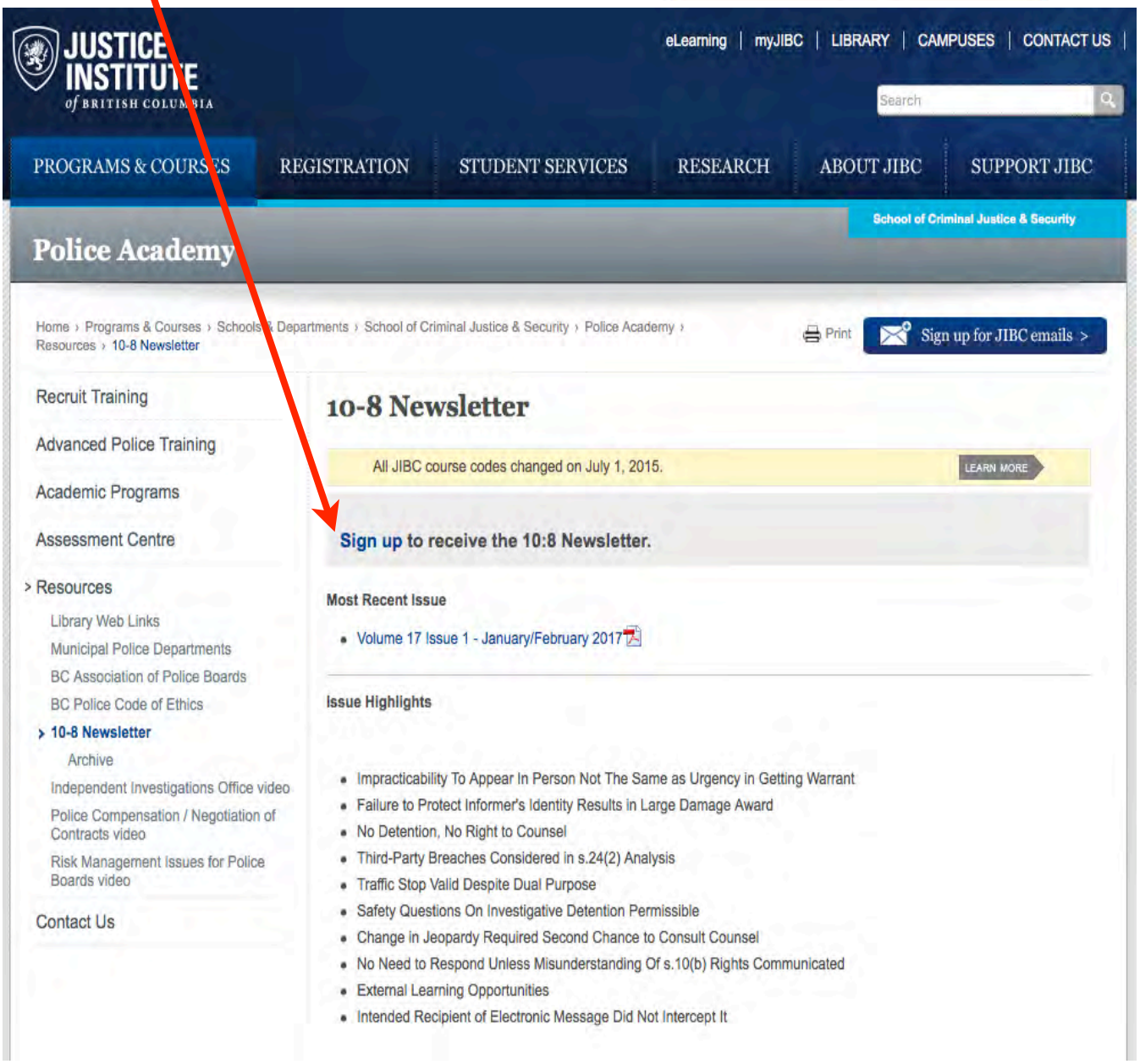

Canadian Police and Peace Officers' 40th Annual Memorial Service

September 24, 2017
Parliament Hill
Ottawa, Ontario

Le 24 septembre 2017
Colline du Parlement
Ottawa (Ontario)

Le 40e service commémoratif annuel des policiers et agents de la paix canadiens

www.thememorial.ca

2017 British Columbia Law Enforcement Memorial

Sunday, September 24, 2017 at 1:00 pm
Ceremony at the BC Legislature in Victoria, BC

Law Enforcement participants to form up in the 700 block of Wharf Street at 12:00 pm.

For complete events information, visit our website at http://www.bclem.ca
or
For details specific to your agency, contact your Ceremonial Sergeant Major

BC LAW ENFORCEMENT MEMORIAL

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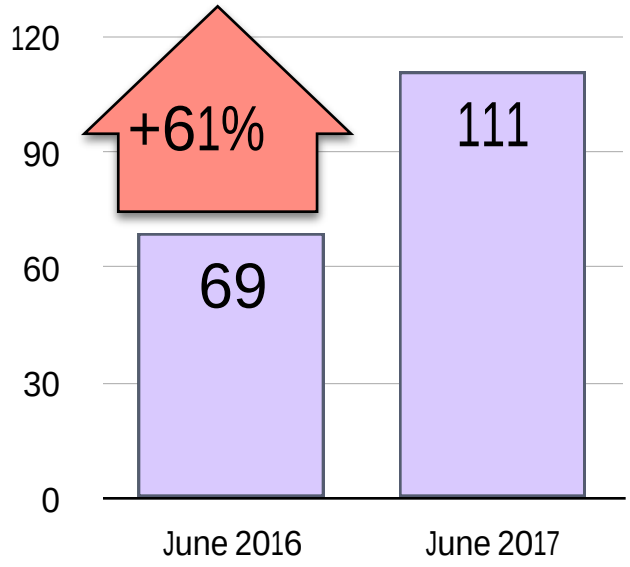
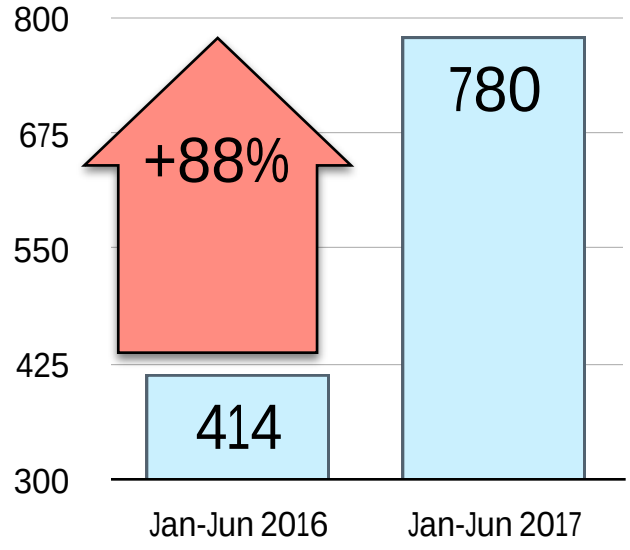
ILLICT DRUG OVERDOSE DEATHS ON THE RISE 4.0

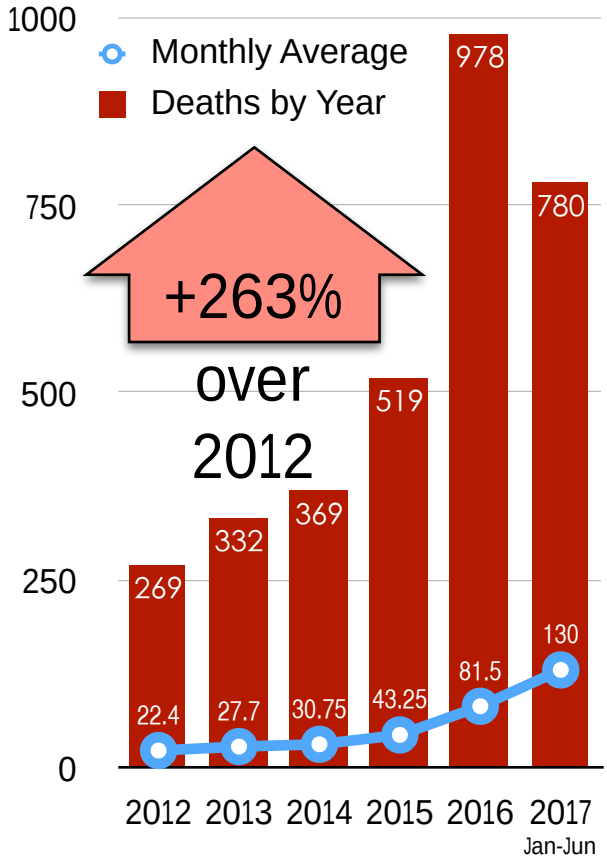
The Office of BC's Chief Coroner has released statistics for illicit drug overdose deaths in the province from **January 1, 2017 to June 30, 2017**. In June there were 111 suspected drug overdose deaths. This represents a 61% increase over the number of deaths occurring in June 2016. This amounts to about seven (7) people dying every two days of the month (or 3.7 people per day).

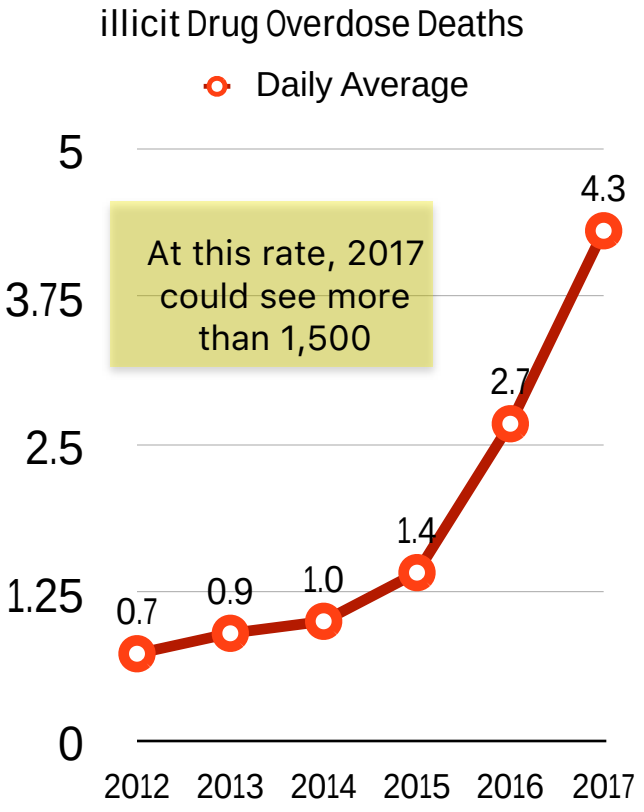


From January 1 to June 30, 2017 there were a total of **780** illicit drug overdose deaths. This is a **88%** increase over the same period last year.



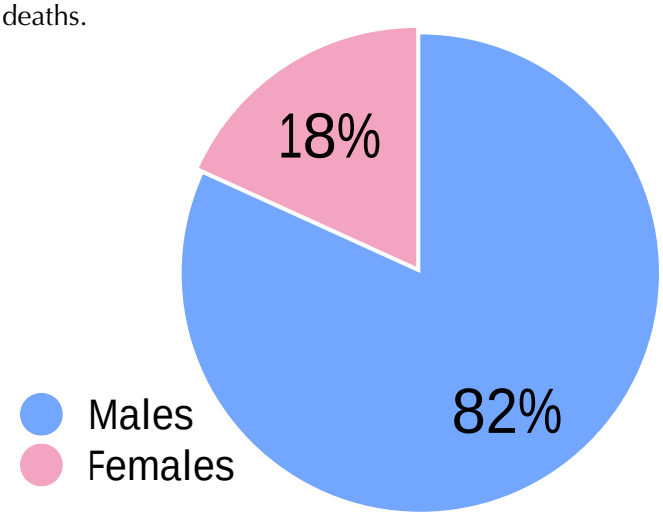
Last year, there were **978** overdose deaths, more than an **88%** increase over the same period in 2015 and a **263%** over 2012. Moreover, the report attributes fentanyl laced drugs as accounting for the increase in deaths. In December 2016 alone, there were **159** deaths. This was the highest recorded number of deaths occurring in a single month in BC and was more than double the monthly average of illicit drug overdose deaths since 2015.

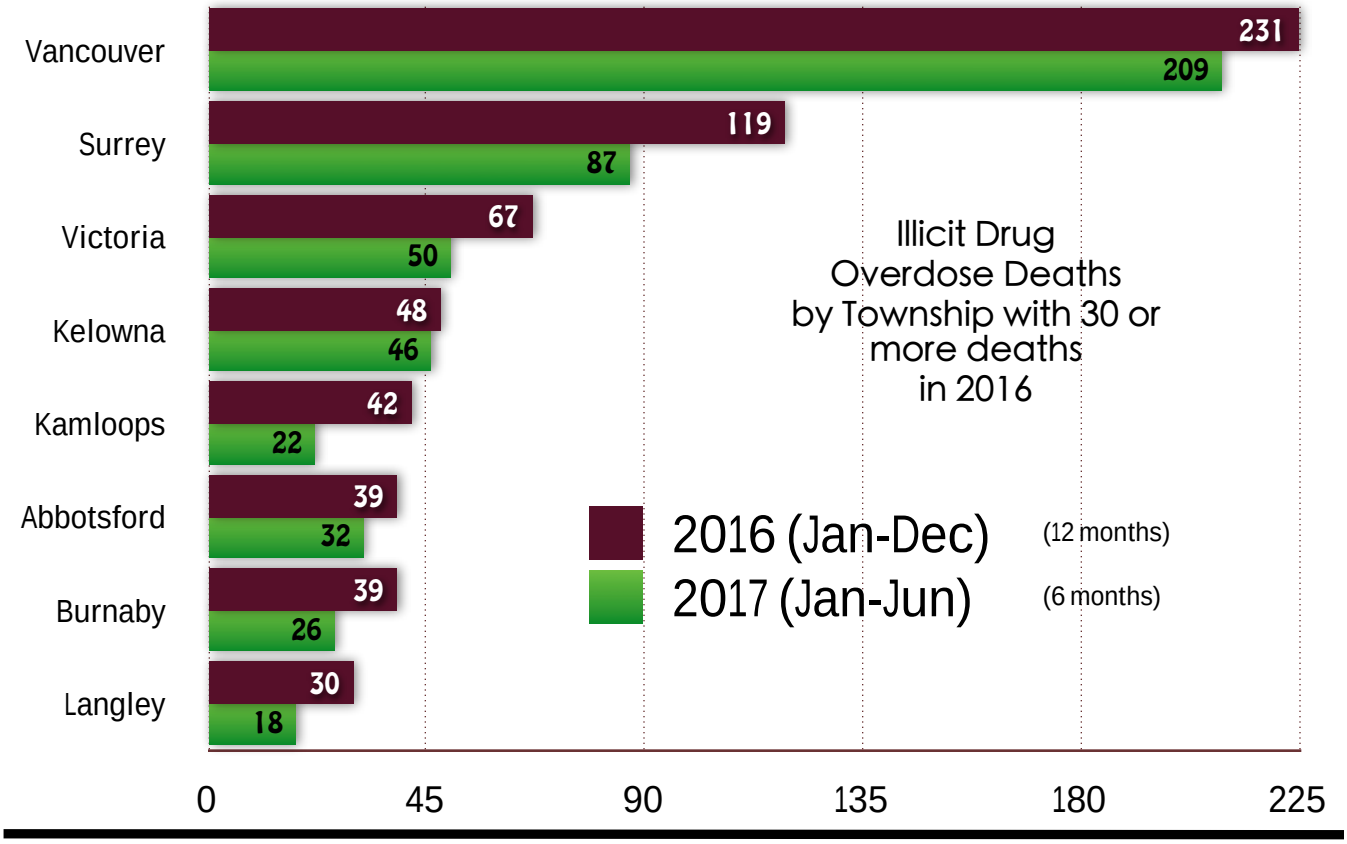




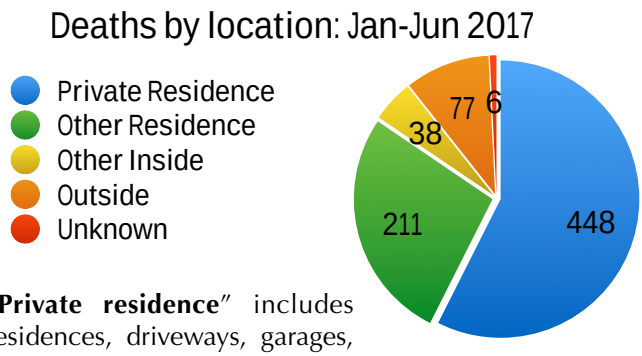
People aged 30-39 have been the hardest hit so far in 2017 with **238** illicit drug overdose deaths followed by 40-49 year-olds at **177** deaths and 50-59 year-olds at **156** deaths. Vancouver had the most deaths at **209** followed by Surrey (**87**), Victoria (**50**), Kelowna (**46**) and Abbotsford (**32**).

Males continue to die at almost a **5:1** ratio compared to females. From January to June 2017, **638** males have died while there were **142** female deaths.





The data indicates that most illicit drug overdose deaths (**89.4%**) occurred inside while **9.9%** occurred outside. For four (4) deaths, the location was unknown.



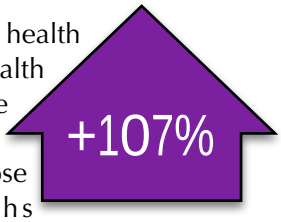
"**Private residence**" includes residences, driveways, garages, trailer homes.

"**Other residence**" includes hotels, motels, rooming houses, shelters, etc.

"**Other inside**" includes facilities, occupational sites, public buildings and businesses.

"**Outside**" includes vehicles, streets, sidewalks, parks, wooded areas, campgrounds and parking lots.

DEATHS SINCE PUBLIC HEALTH EMERGENCY



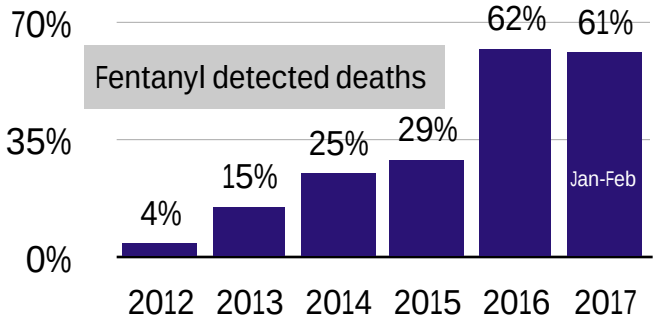
In April 2016, BC's provincial health officer declared a public health emergency in response to the rise in drug overdoses and deaths. The number of overdose deaths in the 15 months preceding the declaration (Jan 2015-Mar 2016) totaled **742**. The number of deaths in the 15 months following the declaration (April 2016-Jun 2017) totaled **1,535**. This is an increase of **107%**.

TYPES OF DRUGS

The top four detected drugs relevant to illicit drug overdose deaths from 2015 and 2016 were cocaine, which was detected in **48.6%** of deaths, fentanyl (**45.9%**), heroin (**35.9%**) and methamphetamine/amphetamine (**30.0%**).

From January to May 2017, fentanyl was detected in **78%** (525) of illicit drug overdose deaths. This is a **109%** increase in which fentanyl was detected in deaths occurring during the same period in 2016 where fentanyl was detected in 251 deaths.

Many police departments are trying to message to various segments of the population in different ways. Above is one such messaging example provided by the Abbotsford Police Department as is the example on p. 29 (Source Abbotsford Police).



According to Vancouver Coastal Health, drugs users at Insite - a supervised injection site - checked their drugs more than 1,000 times from July 2016 to March 2017. Overall, **79%** of the drugs checked were positive for fentanyl, including **83%** of heroin samples, **82%** of crystal meth and **40%** of cocaine.

Sources:

-Illicit Drug Overdose Deaths in BC - January 1, 2017 to April 30, 2017.

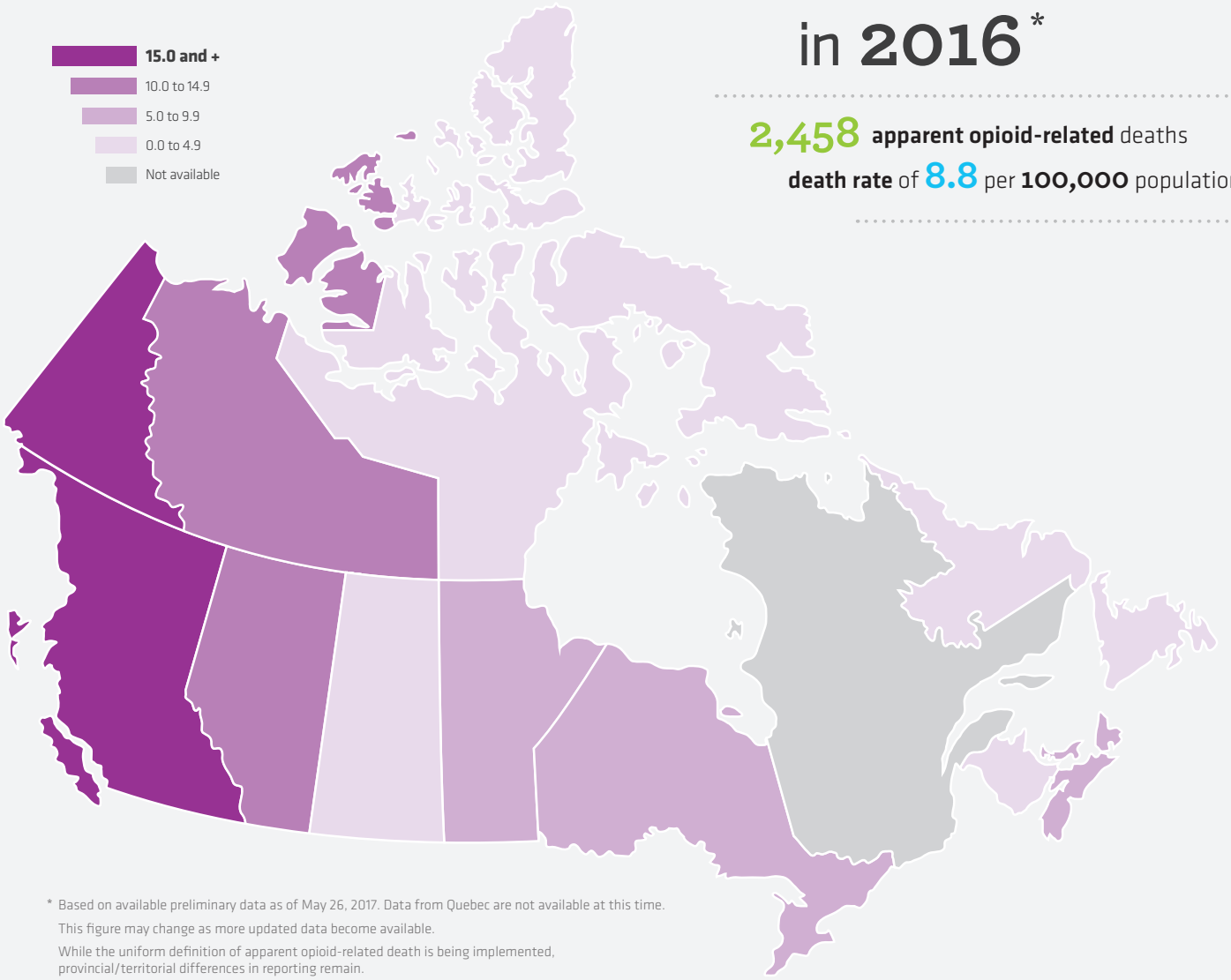
-Fentanyl Detected Illicit Drug Overdose Deaths - January 1, 2012 to February 28, 2017.

Ministry of Justice, Office of the Chief Coroner. April 19, 2017.

U.S. DRUG CRISIS

According to the CDC (Centers for Disease Control and Prevention) the United States is in the midst of an opioid overdose epidemic. Opioids (including prescription opioids and heroin) killed more than **33,000** people across the U.S. in 2015. The National Center for Health Statistics also reported that 52,404 deaths involved drug poisoning of which 84% were unintentional.

APPARENT **OPIOID**-RELATED **DEATHS** in **CANADA**



in 2016 *

2,458 **apparent opioid-related** deaths

death rate of **8.8** per **100,000** population

* Based on available preliminary data as of May 26, 2017. Data from Quebec are not available at this time.
This figure may change as more updated data become available.
While the uniform definition of apparent opioid-related death is being implemented, provincial/territorial differences in reporting remain.

OPIOID-RELATED DEATHS CAN BE PREVENTED

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TRUNK SEARCH AS AN INCIDENT TO INVESTIGATIVE DETENTION LAWFUL

R. v. Lee, 2017 ONCA 654

The police received a 911 call stating that an Asian male was observed in his car in a parking lot near a liquor store with what the 911 caller believed was a gun. A vehicle description was also provided. Two patrol officers were dispatched to the call at 8:23 pm. The officers also received a message on their onboard computer. Emergency 911 gun calls are designated with the highest priority and the officers were only seconds away.

The officers checked the liquor store parking lot at 8:24 pm but there was no vehicle matching the description provided in the 911 call. They then drove along a nearby street and saw a vehicle matching the description, including licence plate number, pulled over with its engine running. The lone occupant occupying the driver's seat was the accused. He was Asian and wearing a brown hat. The officers approached him, ordered him to show his hands, opened the car door and removed him from the vehicle. The officer told the accused he was under investigative detention for the 911 gun call. The accused said , "No! No!" in response to the word "gun." He was patted down for weapons

but none were found. A search of the interior of the vehicle's cabin also did not reveal a gun. Police then opened the trunk by pushing the trunk release button. They saw a duffle bag in the trunk. An officer lifted the bag and found it heavy. He unzipped it, thinking there could be guns inside, but instead found 23 kilograms of cocaine. No gun was recovered.

The accused was arrested for possessing a controlled substance for the purpose of trafficking at 8:39 pm and advised of his right to counsel. The following day the police obtained a warrant to search the accused's vehicle and seize the duffle bag and cocaine.

COMPUTER MESSAGE SENT TO OFFICERS

WL2 SCARBOROUGH WIND-MOBILE
ADDRESS AVAILABLE BY THE LIQUOR STORE IN A WHITE VEH -BKND714
COMP SAYS HE SAW A LARGE BAG
IT WAS IN THE TRUNK OPEN
COMP BELIEVES HE SAW A GUN - 1M/ A.SIAN-30-40'S

…

COMP SAYS HE JUST DROVE BY A CAR AND BELIEVES HE SAW A GUN
THINKS THIS MALE IS DEALING DRUGS
COMP IS IN A CAR AND DROVE BY THE SUSP VEH-ITS DARK INSIDE THE CAR AND BELIEVES HE SAW IT IN THE MALE'S POCKET

…

SAYS THE MALE WAS BY HIMSELF AND IN THE DRIVER'S SEAT
VEH COMES BACK AS RENTAL CAR
TRIED TO FIND OUT HOW HE SAW THE GUN IN THE DARK DRIVING BY-
CHANGES HIS MIND
BELIEVES HE SAW IT

…

MALE ALSO HAS A BRN HAT ON
COMP COULD NOT EXPLAIN/CLARIFY EXACTLY WHERE THE GUN MAY BE

Ontario Superior Court of Justice

The accused sought the exclusion of the cocaine from evidence at trial under s. 24(2) of the *Charter*. The judge ruled that the 911 call was not unreliable simply because it was ambiguous as to where exactly the suspect was storing a gun – in his car or in his pocket. She found the other details provided by the caller, and the fact that the officers found a vehicle matching the caller's description in the vicinity of the identified location, made the caller a "reasonably reliable source of information". On the basis of the information in the 911 call, the officers reasonably believed the accused was probably the person the caller had seen. They reasonably inferred there could have been a gun in his car. And since the gun was not on the accused's person or in the car's cabin, the judge accepted the officers' evidence that the gun was likely in the trunk.

The judge found the police were justified in searching the trunk under s. 117.02(1) of the *Criminal Code* (warrantless weapons search) even though the officers all testified that they did not believe they had grounds to obtain a warrant to arrest the accused at the time of their search. Furthermore, the judge held the search was also authorized under the common law power to search incidental to an investigative detention.

The judge did, however, find a s. 10(b) breach when the police did not inform the accused of his right to counsel immediately upon detaining him for investigative purposes. But the 90 second delay in doing so was minimal, there was no bad faith, and the police did not elicit any statements from the accused. Moreover, there was no connection between the s. 10(b) breach and locating the drugs, and trial fairness would not be compromised. Therefore, the judge did not exclude the cocaine.

And, even if there was a s. 8 breach, the judge would not have excluded the evidence anyways. The accused was convicted of possessing cocaine for the purpose of trafficking.

BY THE BOOK:

Criminal Code

Warrantless Weapons Search

s. 117.02 (1) Where a peace officer believes on reasonable grounds

(a) that a weapon, an imitation firearm, a prohibited device, any ammunition, any prohibited ammunition or an explosive substance was used in the commission of an offence, or

(b) that an offence is being committed, or has been committed, under any provision of this Act that involves, or the subject-matter of which is, a firearm, an imitation firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance,

and evidence of the offence is likely to be found on a person, in a vehicle or in any place or premises other than a dwelling-house, the peace officer may, where the conditions for obtaining a warrant exist but, by reason of exigent circumstances, it would not be practicable to obtain a warrant, search, without warrant, the person, vehicle, place or premises, and seize any thing by means of or in relation to which that peace officer believes on reasonable grounds the offence is being committed or has been committed

Ontario Court of Appeal

The accused argued that the search of the vehicle was unreasonable under s. 8 of the *Charter*. In his view, the search of the trunk was neither authorized under s. 117.02(1) of the *Criminal Code* or the common law. He also contended that the evidence ought to have been excluded under s. 24(2).

s. 117.02 Criminal Code

In describing the authority to search under s. 117.02(1) Justice Weiler, writing the Court of Appeal's majority judgement, stated:

"[T]he police officer is entitled to search the individual detained for a weapon where the officer has a reasonable belief that his safety 'or the safety of others…is at risk'. ... The decision to search cannot be premised on hunches, mere intuition, or a vague or non-existent concern for safety, rather, the officer, 'is required to act on reasonable and specific inferences drawn from the known facts of the situation'. The search must also be confined in scope to an intrusion reasonably designed to locate weapons."

> Section 117.02(1) authorizes the police to search a vehicle without a warrant where certain preconditions are met. This section applies where a police officer believes on reasonable grounds that a weapon was used in the commission of an offence and evidence of the offence is likely to be found in a vehicle, and where the conditions for obtaining a warrant exist but because of exigent circumstances it would not be practicable to obtain a warrant. [para. 16]

Unlike the trial judge, however, the Court of Appeal concluded that the search of the trunk was not authorized by s. 117.02(1) because the police did not believe they had grounds to obtain a warrant to arrest the accused at the time they did their search. This was dispositive of the issue.

Search Incidental to Detention

The accused raised several points challenging the reasonableness of the search under the common law. He submitted that there was no confirmatory evidence from the pat-down search or the search of the car's cabin that a weapon existed. He also claimed that, once these searches were completed, there was no reasonable basis remaining for a belief that the accused had immediate access to a firearm. Nor were there any specifically articulated safety concerns. Furthermore, he argued that the trial judge failed to consider the exculpatory statements he uttered and the police not questioning him prior to the search.

Before determining whether the search in this case was justified under the common law power of search incident to detention, the Court of Appeal outlined this authority as follows:

> First, a police officer must have reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary.
>
> Second, the police officer is entitled to search the individual detained for a weapon where the officer has a reasonable belief that his safety "or the safety of others…is at risk". ... The decision to search cannot be premised on hunches, mere intuition, or a vague or non-existent concern for safety, rather, the officer, "is required to act on reasonable and specific inferences drawn from the known facts of the situation". The search must also be confined in scope to an intrusion reasonably designed to locate weapons.
>
> Third, the search must be conducted in a reasonable manner.
>
> Fourth, the investigative detention should be brief and the individual detained is not obliged to answer questions. Questions during the detention may, depending on the circumstances, amount to a search and seizure of information. [references omitted, paras. 30-33]

As for the search power's scope, it is not limited to only a pat down of the detained persons. Searches of vehicles may be authorized in appropriate circumstances provided the police believe that the search is necessary for their own safety of the safety of the public. Such belief must be objectively reasonable.

In this case, the majority found the investigative detention lawful. The police had a reasonable suspicion the accused was connected to a crime. "Based on the 911 call, '[the officers] were discharging their common law duty to preserve the

"[T]he police had reasonable grounds to believe that their safety and the safety of the public was engaged and they were entitled to conduct a protective pat-down search of the [accused]. In the particular circumstances ... they were also entitled to search the cabin of the car."

peace, prevent crime, and protect life and property'," said Justice Weiler. "As a result of confirmation of the specific information in the call, description of the car, licence plate, and description of the individual driving it, the police had reasonable grounds to suspect that the [accused] was connected to a particular crime, possession of an illegal weapon, a gun, and his investigative detention was necessary." The detention was also brief.

Trunk Search

As for the search of the trunk, it was reasonably necessary to ensure the safety of the police and the public. "[T]he police had reasonable grounds to believe that their safety and the safety of the public was engaged and they were entitled to conduct a protective pat-down search of the [accused]," said Justice Weiler. "In the particular circumstances ... they were also entitled to search the cabin of the car." She continued:

> [T]he caller specifically asserted he believed he saw a gun in the possession of the person sitting in the driver's seat of the car, he saw a large bag in the open trunk, and he suspected the person in the car was dealing drugs in a public area. The officers were responding to a 911 call and [one of the officer's] testified that, as a police officer, he was concerned for public safety after reading the computer printout of the 911 call. The urgency and importance associated with a 911 gun call and its implications for public safety, cannot be ignored. In responding to the 911 call, the officers' concern was for the safety of the public as well as their own safety. [para. 55]

And further:

> At the time of the 911 call, the caller specifically stated the trunk of the car was open and there was a large bag inside. Although the caller indicated he thought the person in the driver's seat had a gun in his pocket, he also indicated he could not explain or clarify exactly where the gun might be. When the officers approached the vehicle, the trunk was closed. The trial judge found the officers reasonably believed the person driving the car was probably the person who had closed the trunk. ...
>
> ...
>
> In holding that the officers' belief was reasonable and that the inference they drew was a reasonable one, the trial judge was assessing their evidence objectively; she did not base her decision solely on the sincerity of the police officers' subjective belief as asserted by the [accused]. Once the police had searched the [accused's] person and the car's cabin, it was not an unreasonable inference that the gun might be in the trunk. [paras. 57-58]

Furthermore, "the nature of the search, a search of the trunk of the [accused's] car, was not demeaning to his dignity, integrity or individual autonomy."

Absence of an Immediate Threat

The police testified that the accused posed no threat while he was detained but that a member of the public was "probably going to be … affected by it down the road" if he had a gun in the trunk and was allowed to drive away without his trunk having been searched. So, even though the police believed

"Although actual harm might only occur in the future, a present danger of harm existed that had not been dispelled. The only way the police could complete their duty to protect the public from the risk of harm was to search the trunk."

"[T]his decision must not be read as condoning an unlimited search of a car for police or public safety purposes whenever there is an investigative detention. The jurisprudence makes it clear that it is the totality of the circumstances that must be considered in every case. It is a very factually-driven analysis."

the immediate threat to public and police safety was over once the driver and body of the car had been searched, it was apparent that an immediate concern for the safety of the public remained. "This concern was reasonable because had the police not searched the trunk of the car, and had the [accused] been allowed to leave, he would still have had access to any firearm in the trunk simply by pressing a lever and re-opening the trunk," said the majority. "Although actual harm might only occur in the future, a present danger of harm existed that had not been dispelled. The only way the police could complete their duty to protect the public from the risk of harm was to search the trunk."

Exculpatory Statements

Justice Weiler concluded that the trial judge did note the accused's exculpatory statements in response to being informed he was under investigation because of a 911 gun call, but the police were not obliged to act on these assurances.

Lack of Questioning

As for the police not questioning the accused before searching, Justice Weiler found the police were not required to do so. "Given the circumstances and the fact the detainee is under no obligation to respond to questions, the police were under no duty to question him," she said.

Word of Caution

The majority also cautioned the police this way:

> Importantly, this decision must not be read as condoning an unlimited search of a car for police or public safety purposes whenever there is an investigative detention. The jurisprudence makes it clear that it is the totality of the circumstances that must be considered in every case. It is a very factually-driven analysis. [para. 65]

Admissibility

Even if there was a *Charter* breach, the majority would nonetheless uphold the trial judge's decision to admit the evidence.

A Different View

Justice Pardu, concurring with the majority that evidence obtained from the search was admissible under s. 24(2), would have found the search in this case was not authorized by law and therefore breached the accused's s. 8 *Charter* right to be secure from unreasonable search and seizure. First, she agreed that the police did not meet the requirements of s. 117.02(1) of the *Criminal Code*. Second, she found that "police powers of search incident to investigative detention should not be expanded beyond what is necessary to deal with immediate safety concerns." In this case, she concluded that the trunk search under the common law as an incident to the accused's investigative detention did not meet the parameters established in *R. v. Mann*. Justice Pardu stated, in part:

> Once no weapon was found on the [accused's] person or inside the cabin of his vehicle within his accessible reach, no further immediate safety hazard existed; the [accused] had no immediate access to his trunk and had no means to immediately retrieve anything from the trunk or from the luggage in the trunk that could pose such as hazard. [para. 101]

The accused's appeal was dismissed and his conviction was upheld.

Complete case available at www.ontariocourts.on.ca

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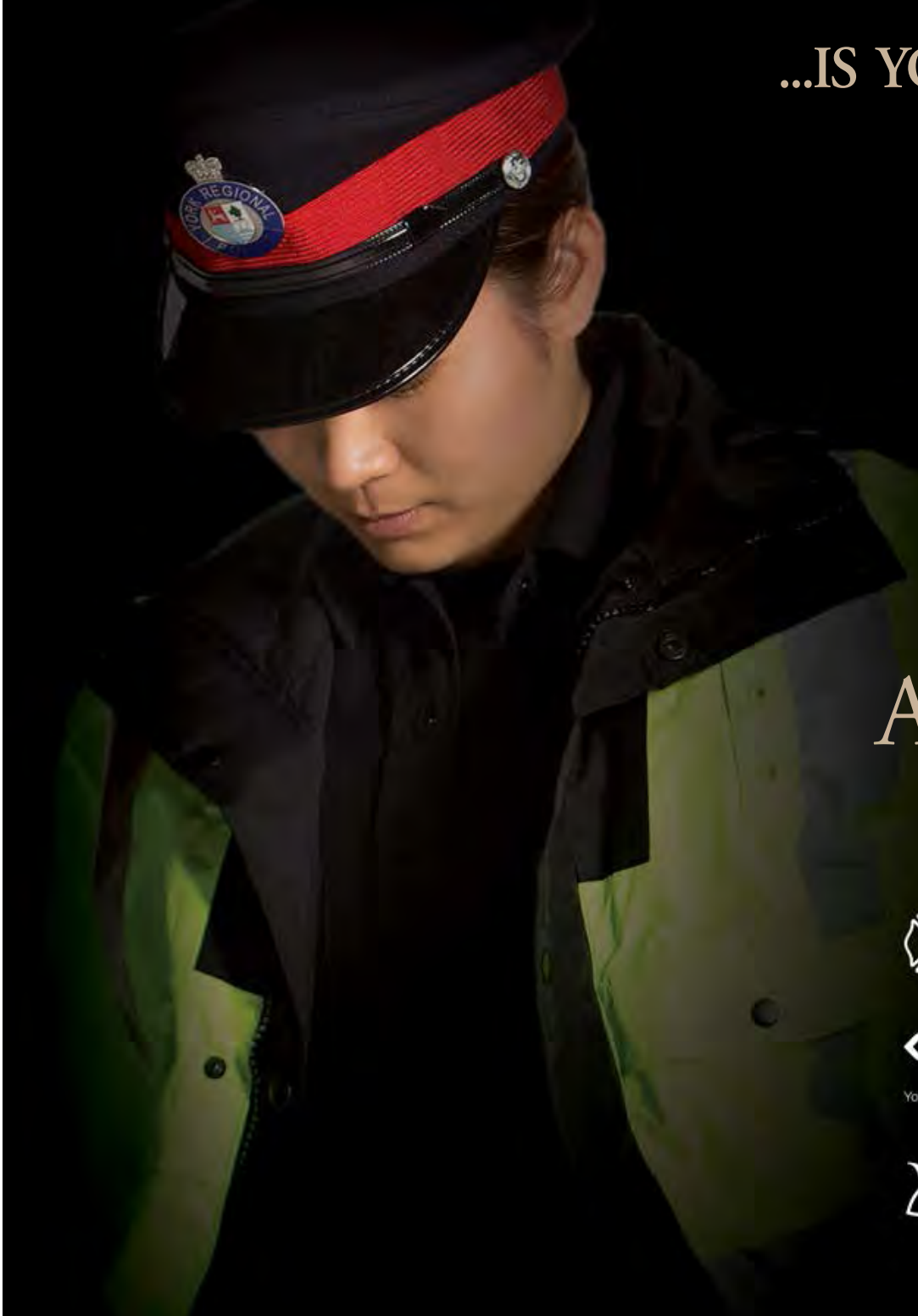

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