JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

IN MEMORIAM

On April 11, 2018 Victoria Police Department Constable Ian Jordan passed away. Constable Jordan was involved in an on-duty motor vehicle accident in 1987, which resulted in injuries that left him in a coma until his death.

In the early morning hours of September 22, 1987 Constable Jordan was responding to a potential break and enter in progress. As other police members responded to the scene, Constable Jordan's vehicle collided with another police car at an intersection.

Constable Jordan was 35-years-old at the time of the incident. He is survived by his wife and son, who was 16-months old at the time of the collision.

The collision resulted in a change of procedure in traffic light control as well as the formation of the Victoria Police Department's Critical Incident Stress Management (CISM) team.

Source: www.VicPD.ca

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

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

CANADIAN POLICE & PEACE OFFICER MEMORIAL SERVICE

Sunday, September 30, 2018
Parliament Hill, Ottawa, Ontario

Highlights In This Issue

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Upcoming Courses

Advanced Police Training

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

JIBC Police Academy

See Course List here.

NATIONAL POLICE WEEK

MAY 13-19, 2018

Note-able Quote

"Character is like a tree and reputation like a shadow. The shadow is what we think of it; the tree is the real thing."

Abraham Lincoln

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.

The book of no: 365 ways to say it, mean it, and stop people-pleasing forever.
Susan Newman, PhD with Cristina Schreil.
Nashville: Turner Publishing Company, 2017.
BF 575 A85 N49 2017

Creating courses for adults: design for learning.
Ralf St. Clair.
San Francisco: Jossey-Bass, 2015.
LC 5215 S743 2015

Debating hate crime: language, legislatures, and the law in Canada.
Allyson M. Lunny.
Vancouver; Toronto: UBCPress, 2017.
KE 8905 L86 2017

The heart of coaching: using transformational coaching to create a high-performance coaching culture.
Thomas G. Crane with Lerissa Patrick.
San Diego: FTA Press, 2017.
HF 5549.5 C53 C69 2017

K9 aggression control: teaching the out.
Stephen A. Mackenzie.
Edmonton: Brush Education Inc., 2017.
SF 431 M34 2017

Leadership vertigo: why even the best leaders go off course and how they can get back on track.
S. Max Brown and Tanveer Naseer.
United States: Familius, 2014.
HD 57.7 B769 2014

Mapping geographies of violence.
Heather A. Kitchin Dahringer & James J. Brittain, editors.
Halifax; Winnipeg: Fernwood Publishing, 2017.
HM 1116 M37 2017

Misbehavior in organizations: a dynamic approach.
Yoav Vardi and Ely Weitz.
New York; London: Routledge, Taylor & Francis Group, 2016.
HD 58.7 V367 2016

The power of people skills: how to eliminate 90% of your HR problems and dramatically increase team and company performance.
Trevor Throness.
Wayne: Career Press, 2017.
HF 5549 T47 2017

Qualitative research: a guide to design and implementation.
Sharan B. Merriam & Elizabeth J. Tisdell.
San Francisco: Jossey-Bass: A Wiley Brand, 2016.
LB 1028 M396 2016

Social work and human services best practice.
Kathy Ellem, Wing Hong Chui & Jill Wilson, editors.
Annandale: The Federation Press, 2017.
HV 3176 S63 2017

Teaching naked techniques: a practical guide to designing better classes.
José Antonio Bowen & C. Edward Watson.
San Francisco: Jossey-Bass, 2017.
LB 2806.15 B66 2017

Transforming adults through coaching.
James P. Pappas & Jerry Jerman, editors.
San Francisco: Jossey-Bass, 2015.
BF 637 P36 T73 2015

Understanding violence and abuse: an anti-oppressive practice perspective.
Heather Fraser & Kate Seymour.
Black Point; Winnipeg: Fernwood Publishing, 2017.
HM 1116 F73 2017

CAPE 2018

C.A.P.E.
Canadian Association of Police Educators

A.C.I.F.P.
Association canadienne des intervenants en formation policiere

Canadian Association of Police Educators

PRACADEMICS:

Bridging the Gap Between Academia & Police Training

June 25-29, 2018

www.cape-educators.ca

Pacific Region Training Centre
Chilliwack, British Columbia

More info on p. 45

SUPREME COURT MORE DIVIDED ON CASES

In its report, ***"Supreme Court of Canada - Statistics 2007 to 2017"***, the 2017 workload of Canada's highest Court was outlined. In 2017 the Supreme Court heard 66 appeals. This is three more appeals than it heard in 2016. The most appeals heard annually in the last 10 years was in 2008 when 82 cases were brought before the Court. The lowest number of appeals heard in a single year during the last decade was 65 in 2010.

Case Life Span

The time it takes for the Court to render a judgment from the date it hears a case was 4.6 months, down two months from 2016. The shortest time within the last 10 years for the Court to announce its decision after hearing arguments was 4.1 months (2014) while the longest time was 7.7 months (2010). Overall it took 15.8 months in 2017, on average, for the Court to render an opinion from the time an application for leave to hear a case was filed. This is down from the previous year's statistics when it took 16.8 months.

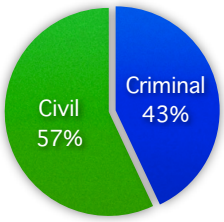
Applications for Leave

In 2017 there were 492 applications for leave, meaning a party sought permission to appeal the decision of a lower court. This represents 106 fewer applications for leave than in 2016. Ontario was the source of most applications for leave at 158 cases. This was followed by Quebec (97), the Federal Court of Appeal (67), British Columbia (65), Alberta (56), Manitoba (17), Saskatchewan (12), Newfoundland and Labrador (7), New Brunswick (6), Nova Scotia (6), and Prince Edward Island (1). No applications for leave came from the Northwest Territories, the Yukon or Nunavut. Of the 492 leave applications, 48 or 10% were granted while 41 were pending. Of all applications for leave, 26% were criminal and 74% were civil.

Appeals Heard

Of the 66 appeals heard in 2017, Quebec had the most of any province at 15. This was followed by Ontario (13), British Columbia (12), Alberta (12), the Federal Court of Appeal (6), Saskatchewan (3) Newfoundland and Labrador (3), New Brunswick (1), and the Yukon (1). No appeals originated from Nova Scotia, Manitoba, the Northwest Territories, Prince Edward Island or Nunavut.

Of the appeals heard in 2017, 57% were civil while the remaining 43% were criminal. Eighteen percent (11%) of the criminal cases dealt with *Charter* issues.

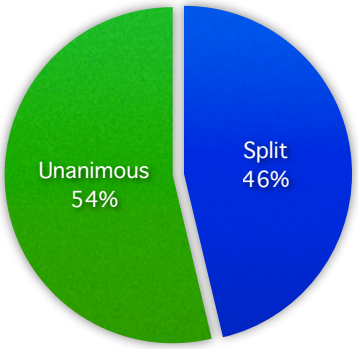


Seventeen (17) of the appeals heard in 2017 were as of right. This source of appeal includes cases where there was a dissent on a point of law in a provincial court of appeal. The remaining 49 cases had leave to appeal granted. This source of appeal requires permission from the Supreme Court to hear it.

Appeal Judgments

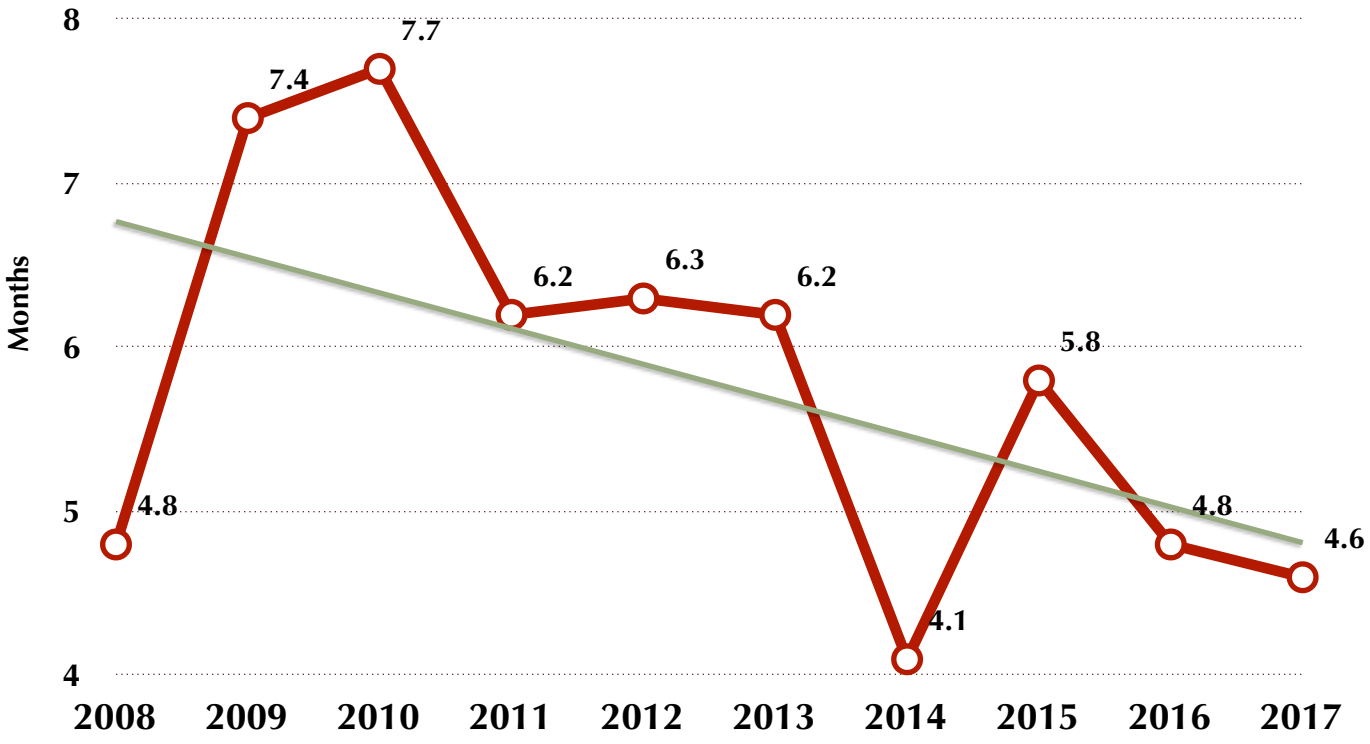
There were 67 appeal judgments released in 2017, up from 57 the previous year. Nineteen (19) decisions were delivered from the bench while the remaining 48 were delivered after being reserved. Eighteen (18) appeals were allowed while 25 were dismissed. Twenty three (23) decisions were on reserve as at December 31, 2017.

In terms of unanimity, the judges of the Supreme Court all agreed in only 54% of its cases. This is down significantly from the Court's 79% agreement in 2014. For the remaining 46% of its judgments released in 2017 the Court was split. This is the lowest percentage of unanimity in the last 10 years.

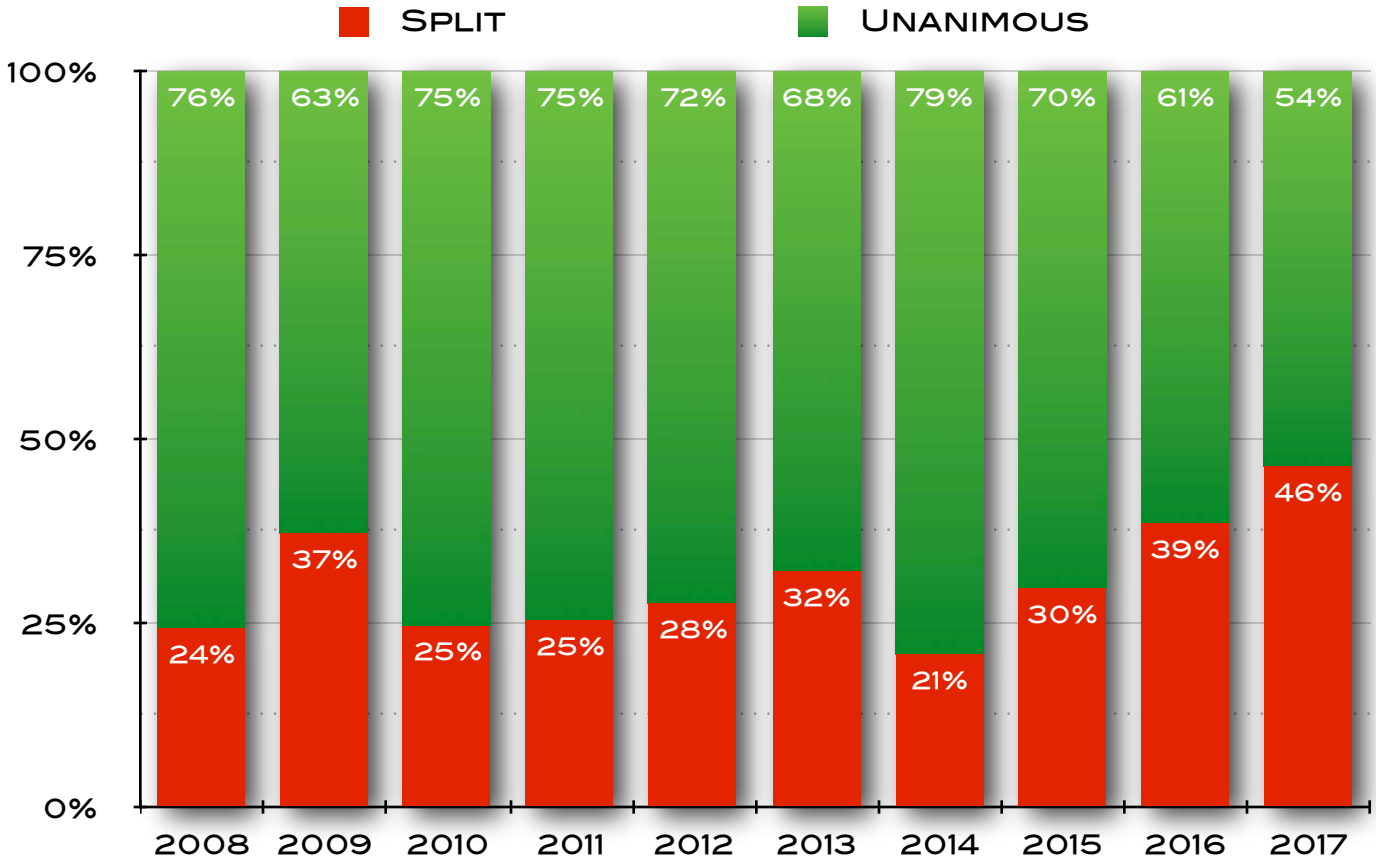


Source: www.scc-csc.gc.ca

Average Time Lapses (in months) between SCC hearing and judgment



SUPREME COURT OF CANADA DECISIONS: SPLIT v. UNANIMOUS



DRIVING OFFENCES LEAD TO VEHICLE FORFEITURE

R. v. Cameron, 2018 QCCA 301

Police attempted to stop the accused for driving with defective lights on the trailer he was towing with his truck. When police activated their flashing lights and siren, the accused began to drive dangerously for about 25 kilometers with police in hot pursuit. He reached speeds of more than 160km/h and drove past a stop sign without braking. At one point, the trailer unlatched from the truck and stopped in the middle of the road. The accused made several manoeuvres to outdistance police and even drove at them with his truck, twice ramming a police car. He eluded police after abandoning his truck and running into the woods, despite the use of a police dog. He was later found and arrested.

Court of Quebec

The accused pled guilty to dangerous driving, mischief to a police vehicle and possessing a stolen trailer. The Crown sought the forfeiture of his 2013 GMC Sierra truck as offence-related property under s. 490.1 of the *Criminal Code*. But the accused argued the forfeiture of his truck would be disproportionate. He submitted that he lived in the countryside with no public transportation, he needed his truck for work, and that he was still making installment payments on it. As well, he claimed he had medical problems that required his attendance at doctor appointments. He also admitted that he had access to his father's truck and his mother was available to help him get groceries and go to his medical appointments.

Under s. 490.1 a court must order as forfeit offence-related property where an accused is convicted of an indictable offence. However, under s. 490.41(3), a court has jurisdiction not to order property forfeited if the impact of the forfeiture would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the person convicted of the offence. The onus is on the accused to show, by a preponderance of evidence, that the forfeiture of the vehicle would be disproportionate.

The judge concluded that the accused's vehicle should be forfeited. Although forfeiture could be disadvantageous to the accused, his truck was not essential to him. He could use his father's vehicle and had transportation from his mother and a friend when necessary. Moreover, the judge considered that the accused deliberately operated his truck in a dangerous and reckless manner in order to escape from police without considering the lives and security of others.

Quebec Court of Appeal

The accused challenged the forfeiture of his truck. In his view, the forfeiture judge overemphasized the seriousness of the offences in his finding that forfeiture was not disproportionate in the circumstances. He also suggested the judge erred in not finding that he needed his truck for work and in not considering his criminal record. But the Court of Appeal found no such error, noting the law was well settled in this area:

> ... The proportionality of the forfeiture order is limited to three factors: the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the person convicted of the offence.
>
> Here, the offences are very serious and their commission was accompanied by many aggravating factors. The judge was aware that the use of the truck was important for the [accused] to earn a living, a fact she did not fail to consider. She was equally aware of alternative means of transport readily available to him in that regard. Finally, it is difficult to understand how consideration of his criminal record could be of assistance to the [accused] since it reveals drug and other vehicle-related offences. [reference omitted, paras. 5-6]

The accused's appeal was dismissed.

Complete case available at www.canlii.org

NO NEED FOR OFFICER TO ASK WHETHER ARRESTEE WISHED TO CALL A LAWYER

R. v. Knoblauch, 2018 SKCA 15

While on patrol, a police officer stopped the accused for a possible seatbelt violation at 9:20 pm. The officer noted the accused had a mouthful of sunflower seeds and an odour of alcohol emanating from the vehicle. The accused also admitted to having consumed "a couple" of drinks (two or three beer). He also had a staggered walk, and glassy and droopy eyes. As a result, the officer made an approved screening device (ASD) demand and the accused failed. He was arrested for impaired driving, advised of his section 10(b) *Charter* right to counsel and asked if he understood. The accused said, "Yep, yes". But the officer never asked him if he wanted to speak to a lawyer. At 9:32 pm, the officer made a breath demand and provided a police warning to him, which the accused indicated that he understood. After attending to other duties at the scene, the officer transported the accused back to the detachment where he provided two breath samples well over the legal limit. He was charged with impaired driving and over 80 mg%.

Saskatchewan Provincial Court

Relying on the officer's testimony and the patrol car video, the judge found that the officer never asked the accused if he wanted to call a lawyer. Nevertheless, the judge held that the accused had been properly informed of his right to counsel under s. 10(b) of the *Charter*. He was informed that legal advice was immediately available, including free legal advice through a toll-free number. The judge concluded that the accused understood his right to counsel and did not assert it. There was no s. 10(b) *Charter* breach and the certificate of analysis was admitted as evidence. The accused was convicted of driving a motor vehicle while over 80 mg%.

Saskatchewan Court of Queen's Bench

The appeal judge found the accused's s. 10(b) right had been violated. In his view, a police officer is obligated to inquire with a detainee about whether they want to exercise their right to counsel. ***"The prospect of the implementational duty being triggered obliges the state authority to ascertain the detainee's wishes about retaining counsel,"*** said the appeal judge. ***"The requirement of immediacy obliges the state authority to do so in as timely a way as possible."*** The best way for police to ascertain whether a detainee wants to invoke their right to counsel is for a police officer to ask a detainee the question, "Do you want to speak to a lawyer?" The certificate of analysis was excluded and, without the certificate, there was no evidence of the accused's blood alcohol level. He was acquitted on the charge.

Saskatchewan Court of Appeal

The Crown appealed arguing, in part, that the appeal judge erred in concluding that a police officer complying with the informational component of s. 10(b) of the *Charter* has a duty to ask a detainee whether they want to consult with a lawyer.

Justice Ryan-Froslie, writing the Court of Appeal judgment, found no such duty existed. She noted that s. 10(b) imposes three duties on police officers when arresting or detaining an individual:

1. **The police must inform a detainee, without delay, of their right to retain and instruct counsel including the existence and the availability of Legal Aid and duty counsel;**

INFORMATIONAL DUTY

2. **If a detainee has indicated a desire for counsel, the police must provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances);**

IMPLEMENTATIONAL DUTY

3. **The police must refrain from questioning or otherwise attempting to elicit evidence from a detainee until they have had a reasonable opportunity to consult and retain counsel (except in urgent and dangerous circumstances).**

IMPLEMENTATIONAL DUTY

The second and third duties are not triggered unless and until a detainee indicates a desire to exercise their right to counsel.

In this case, Justice Ryan-Froslie found the appeal judge erred in imposing a duty on the police to ask the accused whether he wished to exercise his right to counsel for the following reasons:

- The purpose or wording of s. 10(b) does not mandate an officer to ascertain whether a detainee wishes to exercise their right to counsel. Rather, a police officer's obligation is to impart knowledge of the right.
- Following the fulfillment of the informational duty, a police officer has no further obligation unless and until the detainee asserts the right to counsel.
- Several courts, including the Supreme Court of Canada, have consistently found the failure of the police to not ask a detainee if they wished to call a lawyer did not breach s. 10(b).

The Court of Appeal concluded that a police officer does not have a duty under s. 10(b) to ascertain whether a detainee wishes to invoke their right to counsel. Thus s. 10(b) is not breached by a police officer who, after properly informing the detainee of their to counsel, fails to ask whether the detainee wishes to consult with a lawyer. The appeal judge erred in concluding a detainee must unequivocally waive their right to counsel before the police can elicit evidence from them. While the accused's silence did not amount to a waiver of his s. 10(b) right to counsel it also did not equate to an assertion of that right. In this case, the officer properly fulfilled his informational duty by informing the accused of his right to counsel and no further duties were imposed on the officer unless and until the accused invoked that right. Since he did not invoke it, the accused's s. 10(b) rights were not infringed. Since there was no *Charter* breach, s. 24(2) was not engaged.

The Crown's appeal was allowed, the accused's acquittal was set aside and his conviction was restored.

Complete case available at www.canlii.org

Another Knoblauch Note-able Quote

"Police services provide their officers with caution cards, which are used by the officers to inform detainees of their s. 10(b) Charter right. Some such cards include a question as to whether the detainee wishes to consult counsel; others do not ... In my view, there is no magic to the incantation of the words on such cards. What is important is not the words used but, rather, whether, in the circumstances as a whole, a detainee has been properly informed of his or her right to counsel." [references omitted, paras. 28-29]

EMERGENCY PREPAREDNESS WEEK
MAY 6-12, 2018

FAILURE TO FOLLOW ASD MANUAL NOT NECESSARILY FATAL TO REASONABLE SUSPICION

R. v. Jennings, 2018 ONCA 260

After following a vehicle and observing it straying significantly out of its lane, a police officer pulled it over. The officer detected an odour of alcohol on the accused's breath and asked him if he had been consuming alcohol. After receiving an affirmative response, the officer concluded that he had a reasonable suspicion the accused had alcohol in his body. A demand for a breath sample into an approved screening device (ASD) was made and the accused registered a "fail". He was arrested and taken to a police detachment where he provided two breath samples into a breathalyzer, both significantly exceeding 80 mg%.

Ontario Court of Justice

The judge concluded that the officer did not have reasonable and probable grounds to believe the accused had committed the offence of over 80 mg% from the results of the roadside test with the ASD. Although the officer had the requisite subjective belief, the judge found the officer's belief that the accused had committed the offence was not objectively reasonable because the officer failed to follow three procedures set out in the police manual for using the ASD. The officer did not (1) perform a self-test of the ASD at the beginning of his shift, (2) record the particulars of the ASD calibration check in his notebook or (3) perform a second self-test after the accused provided his breath sample.

Since the officer did not follow these procedures, he could not have reasonably believed that the ASD was in proper working order and therefore could not use the results of the roadside test as a reason to believe the accused's blood alcohol level was over 80 mg%. Thus, the breath sample demand and taking of the subsequent breath samples at the police station amounted to an unreasonable search or seizure under s. 8 of the *Charter*. The judge excluded the breath samples as evidence under s. 24(2) and the accused was acquitted.

Ontario Superior Court of Justice

The Crown challenged the trial judge's decision but an appeal court judge upheld the ruling. In the appeal judge's view, there was no error in finding that the officer's subjective belief in the "fail" result was not objectively unreasonable. The trial judge's decision to exclude the evidence under s. 24(2) was also upheld and the Crown's appeal was dismissed.

Ontario Court of Appeal

The Crown again appealed arguing there was no s. 8 *Charter* violation in the taking of the accused's breath samples at the police station. In the Crown's view, the breath samples ought not to have been excluded as evidence under s. 24(2).

Justice Miller, speaking for the Court of Appeal, outlined the two-stage investigatory process set out in s. 254 of the *Criminal Code*:

> … Initially, an officer with a reasonable suspicion that a driver has alcohol in his or her body is authorized by s. 254(2) of the Criminal Code to demand the driver provide a breath

"The determination of whether there are reasonable and probable grounds to demand a breath sample under s. 254(3) of the Criminal Code has a subjective and an objective component: (i) the officer must have an honest belief that the suspect committed an offence, and (ii) there must be reasonable grounds for that belief."

> sample into an ASD. This is a preliminary screen only, and registering a fail on the ASD cannot be used as evidence that the driver was impaired or that his or her blood/alcohol level was over the legal limit. But an ASD failure – either alone or in combination with an officer's other observations – may provide the officer with reasonable and probable grounds to conclude that an impaired driving offence has been committed. If the officer forms reasonable and probable grounds for an arrest, the officer is authorized to arrest the driver and demand breath samples on an approved instrument pursuant to s. 254(3).
>
> The determination of whether there are reasonable and probable grounds to demand a breath sample under s. 254(3) of the Criminal Code has a subjective and an objective component: (i) the officer must have an honest belief that the suspect committed an offence, and (ii) there must be reasonable grounds for that belief. [references omitted, paras. 9-10]

In this case, Justice Miller noted that there was no dispute that the officer had a subjective belief that the accused had been driving while over 80 mg%. As for whether the officer's belief was objectively reasonable, he considered the officer's non-compliance with the ASD manual was considered:

> Failure to follow policy or practice manual directions does not automatically render reliance on test results unreasonable. What matters is whether the officer had a reasonable belief that the device was calibrated properly and in good working order, and whether the test was properly administered. A failure to follow a practice manual direction can serve as some evidence undermining the reasonableness of an officer's belief. But the fact that an officer failed to follow a practice manual direction is not itself dispositive. Not every failure to follow a direction is necessarily fatal to reasonableness of belief. Not all practice manual directions will bear equally, or perhaps at all, on the reasonableness of an officer's belief that the ASD is properly functioning. It is necessary to take the further step and determine how or whether each of the specific failures identified undermine the reasonableness of the officer's belief that the ASD was functioning properly. [references omitted, para. 17]

Justice Miller then went on to address each deficiency identified by the trial judge:

1. **Not performing a self-test of the ASD at the beginning of his shift.** Although the officer did not perform a self-test of the ASD at the beginning of his shift, he did perform a self-test at roadside and immediately before administering the test. For the purposes of ensuring proper functioning of the ASD at the time a test is administered, there was no evidence that there was any advantage to performing the self-test at the beginning of the shift rather than at roadside. ***"The beginning of the shift requirement appears simply to be a matter of operational efficiency – of avoiding the inconvenience of finding oneself in the field with malfunctioning equipment,"*** said Justice Miller. ***"The failure to follow the directive in this particular respect could not have had any bearing on the officer's belief that the ASD was functioning when the test was administered."***

2. **Not recording the calibration particulars of the ASD in his notebook.** The officer said that he checked the calibration and accuracy of the device (which must be verified) at the time of the stop but did not record the details in his notebook as required. Recording calibration results is an administrative matter but a failure to record does not automatically negate the officer's testimony that he performed the necessary checks. Moreover, the officer testified that the ASD had a fail-safe feature that would not allow it to be operated at all if it was not properly calibrated.

3. **Not performing a second self-test immediately after the accused provided a breath sample.** ***"This is a matter of best practices, to confirm that the ASD remains in working order, and would provide some evidence that the ASD was properly functioning at the time of the test,"*** said Justice Miller. ***"But absent something happening to the ASD in the brief period after the first self-test, the constable would have no reason to believe that the ASD was no longer in proper working order. The failure to perform the second self-test does not negate the objective reasonableness of the constable's subjective belief that it was in working order when the test was administered."***

In this case, the Court of Appeal found it was reasonable for the officer to believe the ASD was functioning properly and could rely on the accuracy of the results. The officer's subjective belief that the accused had been driving over 80 mg% was objectively reasonable based on the following evidence (facts) and:

- The officer observed the accused's vehicle swaying into the wrong lane;
- The officer detected alcohol on the accused's' breath;
- The accused admitted to having consumed alcohol;
- The officer followed the procedures for use of the ASD (except for those noted above);
- The results of the self-test and the calibration check indicated the device was working; and
- The accused's breath sample registered over 80 mg%.

Since there was no s. 8 *Charter* breach it was unnecessary to consider the admissibility of the breath test results. However, even if there was a breach, the evidence ought not to have been excluded. First, the officer subjectively believed the ASD reading was accurate, took steps to ensure that it was and acted in good faith. Second, the impact of a breach would be minimal. And finally, the breath samples were reliable evidence. All three factors would favour the admission of the evidence.

The Crown's appeal was allowed, the accused was convicted of over 80 mg%, and the matter was remitted to the trial judge for sentencing.

Complete case available at www.ontariocourts.on.ca

Sidebar: s. 24(2) Guidance

Another interesting issue in R. v. Jennings, 2018 ONCA 260 was which of two approaches courts should take on the s. 24(2) Charter analysis in breath sample cases. One approach considers only the impact of the administration of the breath sample procedure, which is itself minimally intrusive. The other approach considers not only the breath sample procedure, but also the the impact of the procedures faced by an accused such as the initial detention, arrest, transport to the police station and detention at the police station.

In this case, the trial judge viewed not only the immediate impact of providing a breath sample but the overall impact of the breach, including his detention in the back of the police car, transportation to the police station for breath-testing and his subsequent detention at the police station. In so doing, the trial judge concluded the impact of the breach on the accused was serious. The Ontario Court of Appeal, however, found this to be an error. Breath sample procedures are minimally intrusive and "to find otherwise would be to create a categorial rule that s. 8 breaches in breath sample cases automatically favour the exclusion of evidence ... since drivers in these cases are almost invariably arrested and taken to the police station to provide further breath samples." The trial judge was mistaken in not finding the impact of the breach minimal which favoured admission of the evidence.

"Failure to follow policy or practice manual directions does not automatically render reliance on test results unreasonable. What matters is whether the officer had a reasonable belief that the device was calibrated properly and in good working order, and whether the test was properly administered."

INVENTORY SEARCH OF LAWFULLY IMPOUNDED VEHICLE UPHELD

R. v. Cuff, 2018 ONCA 276

While conducting speed enforcement, a police officer saw a vehicle being driven well in excess of the speed limit. The officer pursued the vehicle and it came to a stop in a parking lot of a multi-unit apartment complex. When the officer parked behind the accused, the accused got out of his car and approached the police car. Through his open driver's door window, the officer asked the accused for his licence, insurance and registration. After one or two seconds, the accused fled and the officer took up chase on foot.

A backup officer responded to the area and saw a man he believed was the driver running through a field. The officer yelled out to the man that he was a police officer. He told the man to stop because he was being arrested for failing to identify himself. The man looked back and continued to run. When the officer caught up to the man (the accused), he was arrested for failing to identify himself under s. 33(3) of Ontario's *Highway Traffic Act*. The accused was handcuffed, identified and advised of his right to counsel. He was searched and found to have $731.40 cash in his pocket. A computer check revealed the accused was on probation for possession for the purpose of trafficking and possession of a loaded prohibited firearm. The probation order required him to keep the peace and be of good behavior. He was also arrested for breaching probation and was transported to the police station.

The vehicle had been left locked and the accused did not have the keys in his possession. The police looked for the keys, but could not find them. The vehicle was towed to the contract police impound yard where an inventory search was conducted. On the backseat of the car, the police found a yellow plastic shopping bag. This bag contained the

BY THE BOOK:

Highway Traffic Act (Ontario)

Abandoned or unplated vehicles

s. 221(1) A police officer or an officer appointed for carrying out the provisions of this Act who discovers a vehicle apparently abandoned on or near a highway or a motor vehicle or trailer without proper number plates may take the vehicle into the custody of the law and may cause it to be taken to and stored in a suitable place.

accused's Ontario Health Card with his photo, his temporary driver's licence and a sandwich style bag with numerous smaller baggies containing crack cocaine totally 72.2 grams in weight. The search was stopped, the vehicle was resealed and a search warrant was obtained. As a result of the warrant, the drugs and packaging were recovered.

Ontario Superior Court of Justice

The judge found the accused did not establish that he had a reasonable expectation of privacy in the vehicle therefore he had no standing to assert a s. 8 *Charter* claim respecting its search. And, even if he did have a privacy interest, the judge found the initial search of the vehicle was a lawful inventory search. First, the vehicle was lawfully impounded under s. 221 of Ontario's *Highway Traffic Act* (*HTA*) as it was as it had been *"apparently abandoned on or near a highway."* Second, as the police were entitled under s. 221 to seize the vehicle, they were entitled to conduct an inventory search. The fact that the officers suspected they might find drugs or weapons in the car did not change the legitimacy of the inventory search. The judge found the towing and inventory search of the vehicle was authorized by law. The judge also found it unnecessary to determine whether the accused had been arbitrarily detained because any s. 9 *Charter* breach would have had no impact on the admissibility of the evidence located within the lawfully seized vehicle.

The cocaine and cash were admissible as evidence and the accused was convicted of possessing cocaine for the purpose of trafficking and breach of probation. He was sentenced to 30 months in custody, prohibited from firearms for life, ordered to provide a DNA sample, given a victim surcharge fine, and the money and drug packaging seized were forfeited.

Ontario Court of Appeal

The accused argued, among other things, that the trial judge erred in concluding that the vehicle was lawfully seized. In his view, s. 221(1) of the *HTA* did not apply because the vehicle was not *"apparently abandoned"* within the meaning of the statutory provision. Thus, the police were not entitled to conduct an inventory search of the vehicle and in doing so breached his s. 8 *Charter* rights. As well, the accused contended that the police were really searching the vehicle for a purpose unrelated to inventorying its contents; they were looking for drugs. Finally, the accused argued that the trial judge erred in not addressing his s. 9 *Charter* submission.

Impoundment

As for the impoundment of the vehicle, the trial judge made no mistake in finding it lawful. First, ***"s. 221(1) of the HTA allows for the seizure of vehicles apparently abandoned 'near a highway'."*** Second, the specific facts of this case, including the accused's flight, could be fairly construed as ***"apparent abandonment"*** under s. 221(1) and support the seizure of the vehicle:

(i) the vehicle was not registered in the [accused's] name;

(ii) the [accused] was unable to produce documentation for the vehicle;

(iii) the vehicle was left on private property, parked behind an apartment building;

(iv) the police on scene had no reason to associate the [accused] with the apartment building and,

"Having properly seized the vehicle, the police were under an obligation to keep the vehicle and its contents safe. To fulfill this responsibility, the police had to conduct an inventory search of the vehicle."

in fact, they believed that he did not live in Brantford;

(v) the [accused] had run from the vehicle after being signalled by the police to stop the vehicle; and

(vi) the keys to the vehicle could not be found. [reference omitted, para. 22]

The accused was not simply running away from a vehicle left parked on private property. Rather, he ***"attempted to distance himself from a vehicle he had been driving by parking it on private property,"*** said the Court of Appeal. ***"The police were unable to link the vehicle the [accused] had been driving to the location where he had left it. And … the police did not believe that they could leave the vehicle the [accused] had been driving on the private property where he had left it."*** The trial judge made no error in concluding that the vehicle had been *"apparently abandoned"* and it was open to the police to seize it under s. 221(1).

Inventory Search

As for the inventory search, the Court of Appeal upheld the trial judge's findings. ***"Having properly seized the vehicle, the police were under an obligation to keep the vehicle and its contents safe,"*** said the Appeal Court. ***"To fulfill this responsibility, the police had to conduct an inventory search of the vehicle."*** Moreover, the trial judge concluded that the primary purpose for the search was to inventory the vehicle's contents:

> The fact that the police may have suspected that they would find drugs while searching the vehicle did not alter their authority to conduct an inventory search. Once they found the drugs, the police acted responsibly, ceased their search, resealed the car and obtained a search warrant. [reference omitted, para. 27]

Detention

The Court of Appeal agreed with the accused that the trial judge erred by failing to rule on his s. 9 *Charter* argument. However, it found there was no s. 9 breach. The accused's arrest was lawful and entirely justified:

> Following the [accused's] arrest [for failing to identify himself], the police were involved in a serious investigation into who he was, where he lived, and who owned the vehicle he seemed so anxious to flee from. The police searched the area for about forty minutes after the [accused's] apprehension to determine if he had discarded anything. Although the s. 33(3) offence was not continuing, this did not mean that the arrest under this provision had come to an end. [The officer] was clear that he was uncertain who owned the vehicle and was concerned that it may have been stolen. Among other things, one of the reasons to detain under s. 149 of the [*Provincial Offences Act*] is to prevent the commission of another offence. In this environment of uncertainty, while the investigation was continuing, it was open to the police to detain the [accused] as they did.
>
> Computer checks were appropriately done. Within about thirty minutes of the [accused's] apprehension, his breach of probation had been discovered. Against the factual backdrop of this case, it was open to the police to arrest the [accused] on a s. 553 offence for the same reasons that justified the ongoing detention under s. 149 of the POA. These same facts also provide the rationale for detaining the [accused] under s. 497(1.1). Releasing the [accused] in these circumstances could have led to the continued breach of his probation or the commission of another offence. [paras. 36-37]

Since there were no s. 8 or 9 *Charter* breaches, there was no need to address 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. Cuff*, 2015 ONSC 6324.

Sidebar: Reasonable Expectation of Privacy

The onus is on an accused to establish standing to raise a s. 8 Charter challenge. In R. v. Cuff, 2018 ONCA 276the trial judge concluded that the accused did not have a reasonable expectation of privacy in the vehicle and therefore no standing to argue his s. 8 rights were breached.

The trial judge found it could be inferred that the accused had a subjective expectation of privacy in the vehicle. He may have locked the doors prior to fleeing and the vehicle had been parked at an apartment building where his brother resided (even though none of the officers at the scene of the arrest knew this). However, the trial judge held this subjective expectation was not objectively reasonable in the circumstances. While the accused was in possession of and was present in the vehicle while driving it, he had deliberately removed himself from the vehicle when he fled and did not regain possession of it when he and the officers returned to the scene. Nor could he have regained possession. The doors had been locked and the keys had been lost or discarded. As well, the accused did not own the vehicle and there was no suggestion he had a historical connection to it. Further, there was no evidence that the accused occupied the vehicle with the owner's consent and, therefore, no evidence to suggest he had any right to admit or exclude anyone from the vehicle.

The Ontario Court of Appeal upheld the trial judge's ruling in finding that the accused had not met his onus in establishing a reasonable expectation of privacy in the vehicle.

INVESTIGATIVE DETENTION AUTHORIZED USE OF FORCE

Turton v. Hanson, 2018 ABCA 84

Two police officers attended a casino in response to a complaint about three patrons refusing to leave. When the officers arrived, a security guard advised them that the casino suspected that the plaintiff and his friends had damaged a video lottery terminal (VLT). The officers observed the plaintiff, who was agitated and intoxicated, shouting and acting aggressively towards a security guard. The two police officers approached the plaintiff and one officer placed his hand on the plaintiff's chest to separate him from a security guard. The police officers advised him that they were there to investigate whether the plaintiff or one of his friends had broken a VLT and that he was unable to leave until they were done. The plaintiff expressed an intention to leave the casino loudly and clearly, using profanity.

The plaintiff extended his left arm and raised his open hand in the air not far from where a police officer was standing. The officer grabbed the plaintiff's left arm and brought it down without releasing his grip. Within seconds, the plaintiff's right hand formed a fist and he raised it to his waist. An officer grabbed the plaintiff's right arm and pulled him forward. A struggle ensued and the men ended up against the wall and then on the floor, with the plaintiff kicking. The officers told the plaintiff to stop resisting and to cooperate. The plaintiff stated that he was not resisting.

One of the officers threatened to use a Taser and the plaintiff pleaded with him not to do so. At some point, the plaintiff sustained injuries to his mouth. Finally, the plaintiff advised that he was done resisting. He was handcuffed and placed on a chair while the officers reviewed the surveillance video. The video showed that the plaintiff was not involved with any property damage. EMS attended and the plaintiff was taken to the hospital for stitches. He was charged with assaulting a police officer and resisting arrest, but those charges were later dropped.

Alberta Court of Queen's Bench

The plaintiff sued police, seeking damages for assault, battery, false arrest, false imprisonment, malicious prosecution and breach of his s. 9 *Charter* rights. He argued the two police officers were not authorized to detain him in the manner they did by using physical force against him when they responded to the complaint at the casino. The plaintiff conceded that the police had a reasonable suspicion that he was connected to a possible crime (mischief) and, if force was authorized, the level used against him was not excessive. However, he argued that the officers were not authorized to use any force at all.

Most of what happened between the plaintiff and the officers was captured on the casino's surveillance cameras. The judge found the officers' conduct constituted assault and battery. However, he ruled the officers were authorized to use force against the plaintiff under their common law power of investigative detention. He held that the officers' interference with the plaintiff's liberty was necessary in the performance of their duties. The officers were unaware of exactly what had happened when they entered the scene and almost immediately observed the plaintiff engaged in a loud argument with casino security personnel.

The officers attempted to defuse the situation and to fulfill their duty to investigate by detaining the closest man in the group whom security identified (the plaintiff). The judge also accepted that if the officers allowed the plaintiff to leave, they may not have had access to him for questioning later without knowing his identity or his relationship to the other suspects. Having found the investigative detention necessary in the circumstances, including the use of force, the plaintiff's claims were dismissed.

Alberta Court of Appeal

The plaintiff appealed the trial judge's decision dismissing his claims against the police. The plaintiff challenged the trial judge's findings, submitting that it was unnecessary for police to detain him and to use force against him in the context of a suspected offence related to mischief of property.

"Investigative detention is a fact-specific inquiry, and the bounds of the police's ability to detain and the scope of that detention will vary depending on the circumstances."

Investigative Detention

The Court of Appeal first acknowledged that the Supreme Court of Canada case of *R. v. Mann*, 2004 SCC 52 governed the investigative detention analysis. ***"In Mann, the Supreme Court of Canada created a contextual framework for the courts to use to assess on a case-by-case basis the bounds of the limited police power to intrude upon individual liberty,"*** said the Appeal Court. ***"Investigative detention is a fact-specific inquiry, and the bounds of the police's ability to detain and the scope of that detention will vary depending on the circumstances. The analysis of what is necessary under the Mann test cannot be determined in a vacuum or by ignoring the context."*** The Court of Appeal noted the plaintiff was asking it to re-weigh the evidence and find that the detention and application of force were unnecessary because the police were investigating a minor mischief to property offence.

In this case, the investigative detention involved a quick chain of events leading up to the scuffle. When the officers arrived at the scene, the situation was fluid and escalated quickly. The Court of Appeal concluded that the plaintiff had not demonstrated any error with the trial judge's statement of the law, his understanding of the evidence, or his application of the law to the facts. There was ample evidence to support the trial judge's conclusion that the detention and force were necessary, most of which related to the plaintiff's own conduct. The Appeal Court stated:

> Based on the trial judge's assessment of the evidence, and in particular, his understanding of the evolving nature of the circumstances, the [plaintiff's] drunk and aggressive nature, and

the officers' reasonable belief that the [plaintiff] would attempt to flee before they had an opportunity to investigate, the trial judge was satisfied that force was necessary in these circumstances.

In coming to this conclusion, the trial judge considered and rejected the alternative avenues that the officers could have taken instead of applying force, such as asking the [plaintiff] further questions or waiting for him to make good on his threat to leave. He found that none of these options were reasonable in the circumstances.

In the end, the trial judge concluded that the detention was brief, the officers told the [plaintiff] the reason for the detention, and it was reasonably necessary for the officers to use force in these circumstances to prevent the [plaintiff] from leaving the premises. [paras. 23-25]

The plaintiff's appeal was dismissed.

Complete case available at www.canlii.org

REASONABLE GROUNDS TO ARREST CALLS FOR COMMON SENSE

R. v. Canary, 2018 ONCA 304

While conducting surveillance in an unrelated investigation, a highly experienced drug investigator saw two men in a parking lot moving cylindrical bins from the trunk of one vehicle to another. The officer had seen these types of bins in the past while investigating other clandestine chemical drug labs. In those cases, the bins contained Class A precursors under the *Controlled Drugs and Substances Act* (CDSA). The officer positioned himself so that he could take a closer look. He was able to see that the labels on the bins were torn. He then watched as both men entered the vehicle into which the bins had been placed. While the men were in the vehicle, the licence plates of both vehicles were checked on CPIC. The checks returned clear.

When the accused emerged from the passenger's side of the vehicle, he was holding a brick shaped object in a translucent plastic bag. Based on the officer's past experience, including undercover drug deals he had been personally involved in, he believed that the bag contained cash. When he got closer, the officer was able to see a $20 bill through the translucent bag. After 15-20 minutes of observation, the officer formed the belief that the men were trafficking in drugs.

Both men were arrested for possession for the purpose of trafficking and a search incident to arrest followed. Four bins and a box were found in the back of the vehicle in which the cash exchange had occurred. Large plastic bags were used to line the inside of the bins and box. They were full of pills and Zip ties were used to close the bags. Although the officer did not recognize the pills and was not certain of their contents, he nonetheless believed they were a prohibited chemical substance under the *CDSA*. It was later discovered that the pills – 220,000 of them – weighed over one hundred kilograms in total. The translucent plastic bag in the accused's hand at the time of arrest contained $14,000 in $20 bills.

The officer decided only to seize the pills and cash at the time of arrest, and submit them for analysis to determine their contents. The men were released after being told that the pills would be analyzed and, if they contained a controlled substance, the men would be summonsed to court. If the pills turned out to be an inert substance, the men were told that their property would be returned. The police bagged and tagged the evidence and then returned to their initial unrelated investigation. A sample of the pills were subsequently analyzed as steroids. He was charged with possessing cocaine for the purpose of trafficking and possessing proceeds of crime.

Ontario Superior Court of Justice

The accused sought to have the pills and money excluded as evidence. He submitted that the officer had insufficient grounds to arrest him. Further, even if the officer initially had the necessary grounds for arrest, he argued that, as the investigation continued, the grounds for arrest evaporated and the property seized should have been returned to him. The judge, however, rejected the accused's contention. In his view, the experienced drug enforcement officer's conclusion that the accused was involved in a drug transaction was reasonable. Choosing to release the accused because the pills were not recognized was nothing more than a reasonable exercise of discretion, which did not alter the nature of the arrest. The judge ruled the arrest was based on reasonable grounds and that the search incident to arrest was lawful. And, even if he was wrong in not finding a *Charter* breach, the judge would have admitted the evidence under s. 24(2) anyways. The accused was convicted of possessing a controlled substance for the purposes of trafficking and possessing proceeds of crime.

Ontario Court of Appeal

The accused appealed his convictions. Among other things, the accused maintained that his *Charter* rights under ss. 8 and 9 were breached because his arrest was unlawful and the search incident to arrest was unreasonable. Further, even if the arrest and search were lawful, he maintained that the police were required to return the items seized when they decided to unconditionally release him from the scene.

The Arrest

Justice Fairburn, speaking for a unanimous Court of Appeal, found the police did have sufficient grounds to justify the accused's arrest and therefore the search incident to arrest was also lawful. The Appeal Court described the police power of arrest this way:

> Where a peace officer believes on reasonable grounds that a person has committed an indictable offence, the officer may make a warrantless arrest: s. 495(1)(a) of the Criminal Code. There is both a subjective and objective component to the reasonable grounds inquiry. To fulfill the subjective requirement, the officer

"To fulfill the objective requirement, the officer's belief must be objectively reasonable in the circumstances known to the officer at the time of arrest."

must hold an honest belief that the person committed an offence. The officer "must subjectively believe that there are reasonable grounds to make the arrest". To fulfill the objective requirement, the officer's belief must be objectively reasonable in the circumstances known to the officer at the time of arrest. The objective inquiry asks whether "a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest".

When considering whether an officer's subjective belief is objectively reasonable, the court looks at the objectively discernible facts through the eyes of a reasonable person with the same knowledge, training and experience as the officer. Determining whether sufficient grounds exist to justify an exercise of police powers is not a "scientific or metaphysical exercise", but one that calls for the application of "[c]ommon sense, flexibility, and practical everyday experience."

The reasonable grounds standard does not require the establishment of a prima facie case or proof beyond a reasonable doubt. The test is met where, based on all of the circumstances known to the officer, "credibly-based probability" replaces suspicion. [references omitted, paras. 21-23]

Justice Fairburn then considered whether the trial judge erred in determining whether the officer had the requisite reasonable grounds to justify the arrest. In concluding that the officer's subjective belief that he was witnessing a drug transaction was objectively reasonable in the totality of the circumstances, Justice Fairburn stated:

> The trial judge properly took into account [the officer's] over 15 years investigating drugs and his work as an undercover drug officer. It was through the lens of that experience that [the officer's] observations had to be considered, including:
>
> (i) two vehicles parked in a remote part of a parking lot;
> (ii) no markers on the vehicles that might suggest that they were connected to a legitimate business;
> (iii) bins of a kind that he had previously seen in clandestine chemical drug labs containing Class A CDSA precursors, being moved from one trunk to another;
> (iv) labels ripped off of the bins, causing [the officer] to believe that the bins were not involved in what he described as a "legitimate" transaction;
> (v) a man emerging from a vehicle carrying a brick-like package in a plastic bag, looking similar to cash the officer himself had packaged for undercover drug deals in the past; and
> (vi) a noticeable $20 bill showing through the plastic bag.
>
> [The officer] testified that these observations were consistent with other high-level drug transactions he had witnessed in the past. Indeed, he testified that he had never seen a transaction like this one that did not constitute a drug transaction. [paras. 25-26]

The accused also attempted to undermine the officer's reasonable grounds by highlighting innocent explanations or exculpatory interpretations for the factors the officer relied upon to establish reasonable grounds for the arrest. For example, he noted:

"When considering whether an officer's subjective belief is objectively reasonable, the court looks at the objectively discernible facts through the eyes of a reasonable person with the same knowledge, training and experience as the officer."

"Facts known to an officer at the time of arrest should not be considered within individual silos. The question is not whether each fact, standing alone, supports or undermines the grounds for an arrest. The question is whether the facts as a whole, seen through the eyes of a reasonable person who has the same knowledge, training and experience as the arresting officer, make the arrest objectively reasonable."

- Legitimate trunk-to-trunk transactions can take place, as can cash transactions;
- The officer acknowledged that, from his previous exposure to the bins, he had found them to contain only Class A precursors and not actual prohibited substances;
- The CPIC check on the vehicles did not turn up anything of concern;
- The transaction took place in broad daylight; and
- The men demonstrated no surveillance-conscious behaviour.

But the Court of Appeal rejected this submission. ***"This argument disregards the correct approach to considering the objective reasonableness of the arresting officer's subjective belief,"*** said Justice Fairburn. ***"Facts known to an officer at the time of arrest should not be considered within individual silos. The question is not whether each fact, standing alone, supports or undermines the grounds for an arrest. The question is whether the facts as a whole, seen through the eyes of a reasonable person who has the same knowledge, training and experience as the arresting officer, make the arrest objectively reasonable."***

The Search

Since the initial arrest was lawful, the Court of Appeal found the search incident to arrest was also lawful:

> A search incident to arrest rests on three components: (a) the arrest is lawful; (b) the search is truly incidental to the arrest, in the sense that it is connected to the arrest, either as a means by which to discover and preserve evidence connected to the arrest, protect safety, or protect against escape; and (c) the search is conducted reasonably.
>
> I have already determined that the arrest was lawful. I also find that the search was truly incidental to arrest and conducted reasonably. Taking the money from the [accused's] hand and searching for the content of the bins was clearly connected to the purpose of the arrest. The arrest arose from these very items having been observed. There is no suggestion that the searches were done unreasonably. It follows, therefore, that a lawful search took place, incident to the lawful arrest. [references omitted, paras. 33-34]

"Abandoned" Arrest

The accused also contended that, even if the initial arrest was lawful, the grounds for arrest disappeared when the police were unable to identify the pills as controlled substances. He asserted that the police were then required to return the seized items once the arrest was effectively *"abandoned"*. This submission was also rejected. Even though the officer did not recognize the pills, he nevertheless continued to believe they contained a controlled substance. Thus, the officer continued to believe he had witnessed a drug deal:

> …[I]t seems like an eminently reasonable conclusion that an experienced drug officer looking at 220,000 pills in plastic bags tied

"A search incident to arrest rests on three components: (a) the arrest is lawful; (b) the search is truly incidental to the arrest, in the sense that it is connected to the arrest, either as a means by which to discover and preserve evidence connected to the arrest, protect safety, or protect against escape; and (c) the search is conducted reasonably."

> with zip ties, placed in the type of bins that the officer knew to be associated with clandestine chemical drug labs, passed in a trunk-to-trunk transaction, would maintain his belief that the pills contained a controlled substance. This belief takes on an added layer of reasonableness when one considers that the men involved had just exchanged a brick of cash contained in a plastic bag. [para. 37]

The accused argued that the officer's continued belief was not reasonable because only a limited search incident to arrest was conducted (his cellphone was not seized) and he was released from the scene without conditions (as opposed to release under s. 497(1) of the *Criminal Code*). But this submission was dismissed. The Court of Appeal found the manner in which the police exercised their discretion at the scene did not require the return of the property that was seized incident to arrest:

> This argument seems to come down to a suggestion that the failure of the police to exercise their discretion at maximum tilt should serve to cast doubt on the reasonable grounds for an arrest. This is problematic reasoning. The police have broad discretion to exercise their powers in a manner commensurate with the circumstances at work. Discretionary decisions that serve to minimize intrusions into privacy, and maximize liberty interests, should be encouraged, not discouraged. I agree with the trial judge that the fact that [the officer] chose not to seize the [accused's] phone, or conduct a more thorough search incident to arrest, merely demonstrates a responsible discretionary call on the officer's part. It is not prima facie evidence that he did not continue to maintain his grounds for arrest.
>
> In addition, the decision to release the [accused] from the scene was a responsible one. [The officer] told the [accused] that if the analysis showed that the drugs contained controlled substances, the officer intended to summons the [accused] to court. The fact that the officer did not issue an appearance notice or immediately move to have the [accused] summonsed to court (both options under s. 497(1) of the Criminal Code), did not undermine the grounds for arrest.
>
> The key fact is that, at the time that the pills and money were lawfully seized, the [accused] was under lawful arrest. In these circumstances, it was open to the police to release the [accused], yet continue their investigation. The police were under no obligation to give the lawfully seized items back while the investigation continued. It would be undesirable to construct a rule that would require the police to commit to a greater intrusion into Charter interests, only to justify seizures that were lawfully made in the first instance. Accordingly, it is open to the police to release someone in the field, all the while maintaining a belief that the person committed an offence and that the items lawfully seized should be held. [paras. 39-41]

The accused's appeal was dismissed and his convictions were upheld.

Complete case available at www.ontariocourts.on.ca

A Note on 5.2s

In the *R. v. Canary* case, 31 days following the arrest and just over two weeks after the certificates of analysis were received, a report to a justice was filed under s. 489.1 of the *Criminal Code*. The accused argued the failure by the police to file a s. 489.1 report to a justice as soon as practicable constituted a s. 8 *Charter* breach. Because this issue was raised for the first time on appeal and there was an insufficient factual record to determine the matter, the Court of Appeal declined to address this submission. However, it made the following comments concerning the filing of report to a justice:

> Where the police wish to keep something seized during the execution of their duties, s. 489.1(1)(b)(ii) of the Criminal Code requires that they make a report to a justice "as soon as is practicable". A report filed under s. 489.1(1)(b)(ii) allows the seized items to be dealt with in accordance with s. 490(1), which grants a justice the power to order the things seized detained or returned. The balance of s. 490 contains numerous provisions governing the continued detention, use, and return of seized property.

> Section 489.1(1) applies to seizures made both with and without prior judicial authorization. The provision fulfills an important purpose, providing the gateway to s. 490 of the Criminal Code. Section 489.1 should not be conceptualized as a meaningless exercise in paperwork. Filing the initial report under s. 489.1(1) is the act that places the property within the purview of judicial oversight. It provides for a measure of police accountability when dealing with property seized pursuant to an exercise of police powers. This provides an important measure of protection to the party who is lawfully entitled to the property, but also provides a measure of protection to the police who become the custodians responsible for the property seized. Allowing for this type of oversight is particularly important in the wake of warrantless seizures, ones where no prior authorization has been given, meaning the seizures are beyond the knowledge of the judicial system. [references omitted, paras. 44-45]

In so far as what constitutes ***"as soon as practicable"***, the Appeal Court stated:

> There is an inherent flexibility built into the assessment of whether the police acted "as soon as is practicable". Determining whether this requirement has been met is a necessarily fact-specific inquiry and one that should only be answered after a careful review of all of the evidence, including any explanations for why the report was filed when it was. [reference omitted, para. 47]

"Section 489.1(1) applies to seizures made both with and without prior judicial authorization."

NATIONAL
ROAD SAFETY
WEEK
MAY 15-21, 2018

TRESPASS NOT TANTAMOUNT TO PRIVACY BREACH

R. v. Le, 2018 ONCA 56

At about 10:40 pm three police officers were patrolling a townhouse complex plagued by a very high level of violent crime, most of which was associated with gangs, guns and drugs. The officers spoke with two security guards responsible for overall security at the housing complex and general crime prevention in the area. The officers were looking for two people wanted by the police and known to be involved in violent crimes in the housing complex area. The security guards indicated that one of the men hung around an area of the complex behind townhouse #84. The security guards described that area as a "problem area" associated with drugs and other criminal activities.

After speaking to the security guards, the police decided to walk through the townhouse complex to the area that the guards had identified. The officers walked along a paved footpath that travelled through the complex. The footpath stopped at a walkway that led into the backyard at #84. The backyard was surrounded by a waist-high wooden fence with an opening where the walkway was located. There was no gate. The officers saw five young men they did not recognize, including the accused, sitting in the backyard simply talking. They were not doing anything wrong. Police walked through the fence opening into the backyard. Neither officer asked permission to enter the backyard or said anything to the young men before entering. But no one objected to their presence either. Police cordially addressed the group and learned the accused did not live at the townhouse. However, they also learned that one of the men, who produced identification, lived in the townhouse with his mother.

When an officer saw one of the men on the couch put his hands behind his back he told the man to keep his hands in front of him. As police were identifying the men, the accused responded that he did not have any identification on him. The accused

looked nervous to the officer. He had a bag slung over his shoulder sitting on his hip and appeared to be **"blading"** his body. Concerned that the accused might have a weapon, the officer asked, **"What's in the bag?"** The accused immediately bolted from the backyard and the officers gave chase. The accused was tackled and a fight ensued. During the fight the police became aware the accused had a pistol in his bag and was trying to reach for it. The fight intensified and the accused was subdued. A search at the scene of the arrest and at the police station yielded a fully-loaded, .45 calibre semi-automatic Ruger pistol, 13 grams of cocaine, and considerable cash. The accused was charged with 10 criminal offences including firearm and drug-related crimes.

Ontario Superior Court of Justice

The judge found the police were entitled to enter the backyard and speak to the men under the common law *"implied licence"* doctrine. The judge also held the accused was a *"mere transient guest"* and did not have a reasonable expectation of privacy in the backyard. Although the accused was physically present in the backyard, he had no possession or control of any kind over the backyard and no means to regulate access to the property. Nor was there any evidence of his historical use of, or connection with, the property. The judge also ruled that the accused was not detained until the officer asked him what he had in the bag slung over his shoulder. At this point, he became the target of a focussed investigation. This detention, however, was lawful. The officer had reasonable grounds to suspect that the accused was armed and the investigative detention was justified. But the accused fled before he could be physically detained.

The judge went on to decide that, had there been *Charter* breaches, the evidence would nevertheless be admissible under s. 24(2). He concluded that all three s. 24(2) factors - the seriousness of the Charter-infringing state conduct, the impact on the Charter-protected interests of the accused and society's interest in adjudication on the merits - favoured admission of the evidence. The accused was convicted of several firearm and drug-related offences and sentenced to five years in prison.

Ontario Court of Appeal

The accused argued that police breached his ss. 8 and 9 *Charter* rights. In his view, the police unlawfully entered the backyard of the townhouse and in doing so breached his right to be free from unreasonable search. As well, he claimed he was arbitrarily detained when police walked into the backyard and questioned him and the other young men. He contended that the ss. 8 and 9 breaches, together or individually, warranted the exclusion of the evidence seized from him.

s. 8 Charter (Search & Seizure)

Justice Doherty, speaking for the majority, questioned the trial judge's finding that the police were authorized to enter the backyard under the implied licence doctrine. Without deciding the matter, he nevertheless assumed that the police entry was unlawful and they were trespassers in the backyard. This unlawful entry, however, did not necessarily amount to a s. 8 *Charter* violation unless the entry also interfered with the accused's reasonable expectation of privacy. The majority described the interplay between the right to privacy and s. 8 this way:

> Section 8 of the Charter protects an individual's reasonable expectation of privacy from unreasonable state intrusion. State conduct that infringes on an individual's reasonable expectation of privacy will be treated as a search for the purposes of s. 8.
>
> In considering a reasonable expectation of privacy claim, the court begins by identifying the subject matter of the claim. It then asks first, did the claimant have a subjective expectation of privacy in the subject matter, and second, if so, was that expectation objectively reasonable? The second of these two inquiries is almost inevitably the determinative consideration. [references omitted, paras. 32-33]

And further:

> A reasonable expectation of privacy does not exist in the air or in the abstract. One has or does not have a reasonable expectation of privacy in respect of a specified subject matter in specified circumstances.
>
> The subject matter of a privacy claim may be the person of the claimant, a place, information, or a combination of the three. The factors that will be relevant to the determination of whether a reasonable expectation of privacy exists and the weight to be assigned to any particular factor will depend in large measure on the subject matter of the privacy claim. For example, if the privacy claim is informational, the potential capacity of the information to reveal core biographical data relating to the claimant will be crucial in assessing the privacy claim. However, if the subject matter of the privacy claim is a place, control over that place will play a central role in assessing the validity of a reasonable expectation of privacy claim. If the privacy claim has both a territorial and informational component, then all of the relevant factors will be considered. [references omitted, paras. 35-36]

In this case, the accused did not advance an informational privacy claim in respect to what he was doing or saying in the backyard. Rather, he contended only a territorial privacy claim. He argued that he had a reasonable expectation of privacy with respect to the physical space of the backyard.

Justice Doherty concluded the trial judge correctly applied the law with respect to any territorial privacy interest the accused may have had in the backyard. Property law concepts do not determine privacy interest. Here, there was no evidence that the accused had any control over the property, had used it in the past, had any relationship with the owner or occupant that would establish some special access, or had any ability to regulate access to the property. Nor was there any evidence that the accused, as an invited guest, had the *de facto* power to control who can access or stay on a property. ***"The right to be left alone, when exercised in relation to real property, must, in my view, include some ability, either as a matter of law, or in the circumstances as they existed, to control who can access and/or stay on the property,"*** said Justice Doherty. ***"One cannot realistically talk about a reasonable expectation of privacy in respect of real property without talking about an ability to control, in some way, those who can enter upon, or remain on, the property."***

In this case, the accused's physical presence in the backyard, although relevant to the reasonable expectation of privacy inquiry, did not support a finding that he had some kind of control over who could access or remain on the property. Since the accused did not have a reasonable expectation of privacy in the backyard, the police entry into it did not infringe his s. 8 *Charter* rights.

s. 9 of the Charter (Arbitrary Detention)

The accused argued that he was arbitrarily detained, in the psychological sense, from the moment the police entered the backyard. The majority agreed that the accused was detained when he was asked about the contents of his bag. Psychological detention was described as follows:

> The test for psychological detention is an objective one. The court must determine whether a reasonable person, in the [accused's] circumstances, would conclude that he or she was not free to go and had to comply with the police direction. Although the test is objective, the [accused's] perception that he was in fact free to leave and was not being detained by the police when they entered the backyard must be an important consideration in determining how the encounter between the officer and the [accused] would be reasonably perceived. The [accused's] perception is particularly significant as he is no stranger to street-level encounters with the police. [reference omitted, para. 63]

But the majority found this psychological detention to be lawful. ***"The [accused's] movements simultaneously aroused the suspicions of two police officers who, based on their training and***

experience, connected the [accused's] movements to the possession of a weapon," said Justice Doherty. ***"There was a basis upon which [the officer] could reasonably suspect that the [accused] was armed. That suspicion justified an investigative detention."***

As for the police trespass in the backyard, the majority ruled it did not vitiate the legality of the accused's detention:

> … I do not think that the status of the officers as trespassers would affect the lawfulness of the [accused's] detention. Section 9 is intended to protect individuals from unlawful state intrusion upon the liberty of the individual. On the trial judge's finding, there was no intrusion upon the [accused's] liberty until [the officer] asked him what was in the bag. Even if the police were trespassers on the Dixon property, that trespass had no impact on any facet of the [accused's] liberty. His liberty was limited only after [the officer] had reasonable grounds to suspect that the [accused] was armed and committing a criminal offence.
>
> One might well come to a different conclusion as to the lawfulness and, hence, arbitrariness of the detention if the police had unlawfully entered the property for the purposes of detaining the [accused] and the other young men in the backyard. The situation may also have been different if the [accused] could demonstrate that the improper entry into the backyard by the police somehow interfered with his personal rights or individual liberty.
>
> On the trial judge's findings, the police did not enter the property intending to detain anyone. Nor did their entry in any way infringe upon any of the [accused's] rights.
>
> In my view, in the circumstances of this case, the lawfulness of the police entry into the backyard had no impact on either the determination of the point in time at which the [accused] was detained, or the arbitrariness of that detention. There was no breach of the [accused's] s. 9 right, even if the police were trespassing. [paras. 72-75]

s. 24(2) of the Charter

Even if the accused's rights under ss. 8 or 9 of the *Charter* were breached, the majority would have admitted the evidence anyway. First, any Charter-infringing state conduct was technical, inadvertent, and made in good faith. Second, the impact of any breach on the accused's Charter-protected liberty interest was momentary and minimal. Finally, society's interest in an adjudication on the merits favoured admission as the evidence was highly reliable and the crimes were very serious.

A Different View

Justice Lauwers, in dissent, disagreed with the majority's analysis and would have excluded the evidence. First, the police entry into the backyard of the townhouse exceeded the bounds of the implied licence doctrine and was therefore unlawful. Second, the accused, as an invited guest at his friend's home, did have a reasonable expectation of privacy in the backyard and therefore standing to challenge the police conduct. Third, from this unlawful entry flowed an arbitrary detention, the flight, the arrest, the search and the finding of the evidence. In Justice Lauwers' view, the accused was psychologically detained by the police when they suddenly and without seeking permission barged into the backyard of the townhouse property.

"When police enter a property as trespassers, they act outside the bounds of their lawful authority," said Lauwers. ***"The detention of the [accused] occasioned by the police while they were acting outside their lawful authority was, on its face, an arbitrary detention. It was not authorized by law because the police were not entitled to exercise any of their investigative powers, including the common law power to detain for investigative purposes, while they were trespassers on the property. What I see here, to be blunt, is casually intimidating and oppressive police misconduct."*** He would have then excluded the evidence - the gun, the drugs and the money – under s. 24(2). Although the evidence was reliable, important to the Crown's case and society had a significant

interest in the prosecution of firearm and drug offences, the Charter-infringing state conduct was serious. The police, on information about possible criminality that was at best speculative, unlawfully entered onto private property, someone's home, as trespassers. Second, the impact of the breach on the accused's Charter-protected interests was significant. His liberty interest was unlawfully suspended and the breach provided the police with incriminating evidence that they would not have otherwise discovered.

In concluding the admission of the evidence would bring the administration of justice into disrepute, Justice Lauwers commented:

> Perhaps the officers were emboldened by the sense they were doing the right thing in trying to root out criminality in the community. They seem to have assumed the young men in the backyard were up to no good and decided to confront them suddenly. I doubt that the police would have brazenly entered a private backyard and demanded to know what its occupants were up to in a more affluent and less racialized community. The occupant of a residence might tolerate sudden police intrusion into private space if there were an emergency or the police were in hot pursuit of a suspect or fugitive, however shocking they might find it. There is no such pretext in this case. [para. 163]

Complete case available at www.ontariocourts.on.ca

Editor's Note: *R. v. Le*, 2018 ONCA 56 case is under appeal to the Supreme Court of Canada as of right. It is scheduled to be heard October 12, 2018.

NATIONAL PEACE OFFICERS' MEMORIAL DAY SERVICE

Tuesday, May 15, 2018
U.S. Capitol
Washington, D.C.

CANADIAN POLICE & PEACE OFFICER MEMORIAL SERVICE

Sunday, September 30, 2018
Parliament Hill
Ottawa, Ontario

WHAT IS BLADING?

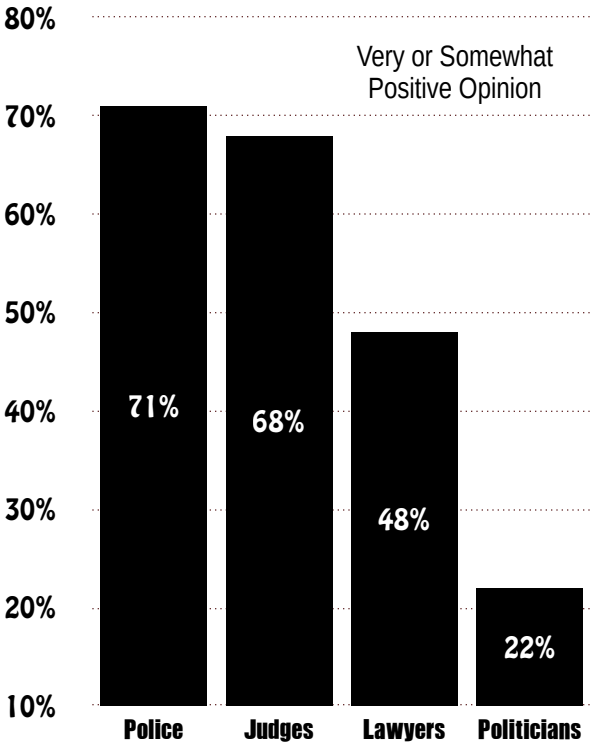
In *R. v. Le*, 2018 ONCA 56, Justice Doherty described ***"blading"*** as ***"a term used by the police to describe a body movement whereby a person attempts to position himself so that an officer cannot see an object sitting on the person's hip. The police are trained to associate this manoeuver with possession of a firearm."***

Blading is one of several movements that police officers have been trained in that may signal possession of a firearm (see for example R. v. Peterkin, 2015 ONCA 8 at para. 28). Other cases describe blading as:

- ***"A person blades his body when he turns sideways to his counterpart. A person may blade his body to protect a firearm held on one side."*** - R. v. Fountain, 2015 ONCA 354 at footnote 1.
- ***"In police jargon, 'blading' is a synonym for hiding or obscuring something."*** - R. v. Amofa, 2011 ONCA 368 at para. 9.
- ***"The police officer observed suspicious behaviour ('blading', a police term for an attempt to conceal a weapon) ..."*** - R. v. Grant, 2007 ONCA 26 at para. 3.

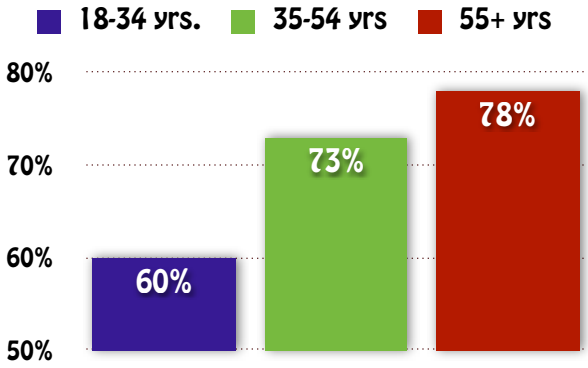
COPS STILL ON TOP AS RESPECTED JUSTICE PROFESSION

Police officers are more respected by Canadians than judges, lawyers or lawmakers. In a recently released Canada wide Insights West poll, police officers were viewed more positively among Canadians than other justice professions. The survey, which asked Canadians about 28 occupations, saw police officers attain a 71% positive opinion of their professions followed by judges (68%), lawyers (48%) and politicians (law makers) at 22%.



Fast Facts

- People had the highest opinion of firefighters at 92 % followed by nurses (91%). Farmers (88%), doctors (87%) and teachers (86%) rounded out the top five professions.
- Politicians ranked the lowest at 22% followed by car salespeople (26%) and pollsters (42%).
- More women (73%) held a higher view of police than men (69%). Both of these percentages are down from the 2017 survey where 81% of women held a positive view while 72% of men did so.
- The older the person, the more likely they were to hold a positive opinion of the police.



- Opinions of the police varied across Canada. Quebec had the lowest opinion while Atlantic Canada had the highest.

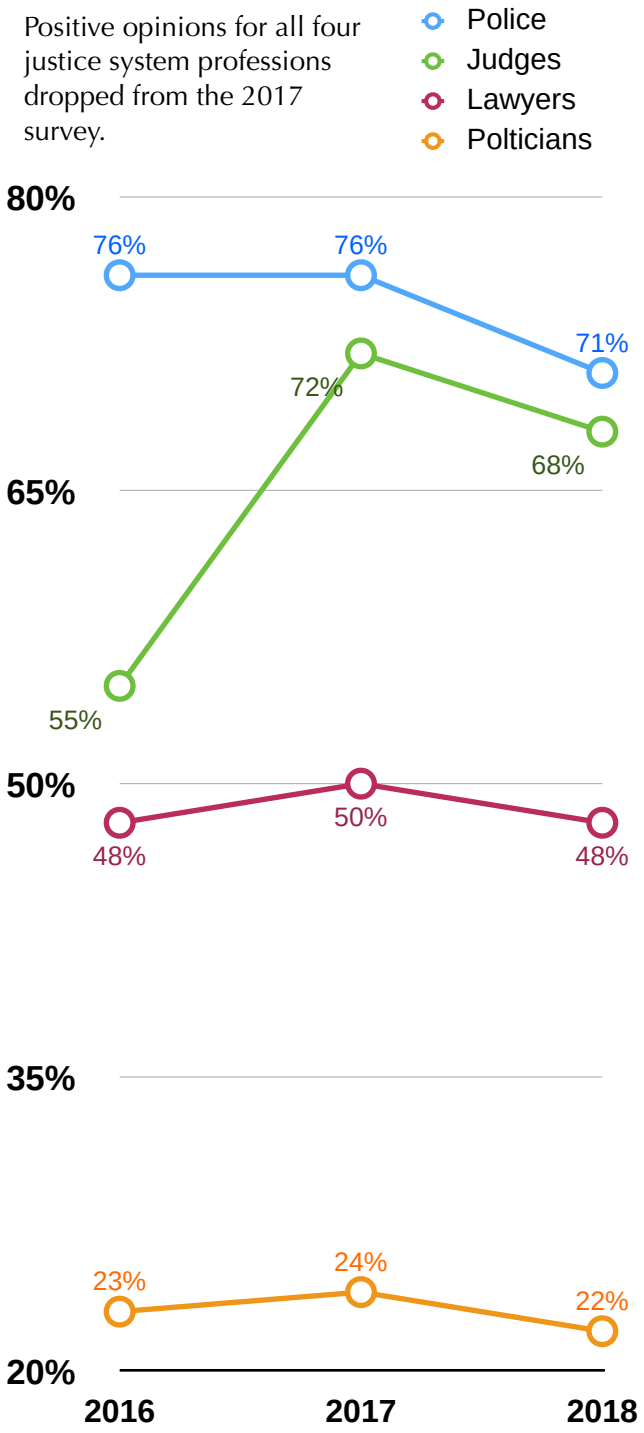
Province/Region	Very or Somewhat positive opinion
BC	79%
Alberta	77%
Saskatchewan/Manitoba	65%
Ontario	71%
Quebec	60%
Atlantic	82%

- People who voted Conservative in the 2015 federal election were more likely than people voting NDP or Liberal to have a positive opinion of the police.

Vote in 2015 Election	Very or Somewhat positive opinion
Conservative	82%
NDP	71%
Liberal	69%

Profession	Very or Somewhat Positive Opinion
Firefighters	92%
Nurses	91%
Farmers	88%
Doctors	87%
Teachers	86%
Scientists	84%
Engineers	82%
Veterinarians	82%
Architects	81%
Dentists	78%
Accountants	75%
Military Officers	74%
Police Officers	71%
Psychiatrists	71%
Athletes	70%
Journalists	70%
Judges	68%
Auto Mechanics	62%
Actors/Artists	61%
Building Contractors	56%
Priest/Ministers	52%
Bankers	51%
Lawyers	48%
Business Executives	47%
Realtors/Real Estate Agents	47%
Pollsters	42%
Car Salespeople	26%
Politicians	22%

Positive opinions for all four justice system professions dropped from the 2017 survey.



The Ask: *"All things considered, do you have a positive or negative opinion of each of the following professions?"*

Source: Insights West, "Firefighters and Nurses Top List of Canada's Respected Professionals". March 15, 2018.

RGB TO BE APPLIED IN PRACTICAL, NON-TECHNICAL & COMMON SENSE WAY

R. v. Manlove, 2018 BCCA 37

At 1:00 am a man stole some bicycles from the second floor balcony of a building and moved them to the backyard of another property, which was also known as a "drug house". At 5:00 am a blue car arrived at the property where the stolen bicycles were being kept in the back yard. Two masked men brandishing guns jumped out of the car and started yelling about the bikes. One of men was carrying an assault rifle with a silencer. The masked men moved into the backyard where one of them shot the bike thief in the leg. About three weeks after the shooting, the police interviewed a witness who had been in the front yard when the blue car arrived. The witness said he saw the gunmen jump out of the car. They pointed their guns at him, shouted "where are the bikes", and went into the backyard. The witness told police he thought the shooter was the accused. Based largely on this identification, the police sought and obtained a warrant to search the accused's home. The police subsequently found a number of weapons during the search. The accused was charged with aggravated assault, discharging a firearm with intent, and several firearms offences.

British Columbia Provincial Court

The accused challenged the validity of the search warrant, arguing that the ITO did not accurately capture the "flavour" of the witness' identification evidence. In the accused's view, there was no credibly based information identifying him as the person with the assault rifle. Therefore, he submitted there were insufficient grounds to issue the search warrant.

The judge agreed. In applying the reasonable grounds standard, the judge found that the summary report prepared by the officer taking the statement from the witness did not adequately describe the equivocal nature of those statements. The judge found that it was improper for the affiant to not verify the reliability of the information

contained in the summary provided. The witness' possible recognition of the accused failed to satisfy the reasonable grounds test and therefore there were insufficient grounds to issue the warrant. ***"In my view, the statement given to the police by [the witness, ultimately concluding with the following phrase, 'So that's what made me kind of think that maybe it was him,' suggests to me that perhaps [the witness] recognized [the accused], but does not provide reasonable grounds with amplification for the warrant to have been issued,"*** said the judge. ***"In the totality of the circumstances, in my view, there was not sufficient evidence, on oath, to enable me to find reasonable grounds to issue the warrant."***

The judge found that the police breached the accused's s. 8 *Charter* rights because of this material non-disclosure that misled the JJP who issued the warrant. The judge nonetheless admitted the evidence obtained during the search under s. 24(2). He found the exclusion of the evidence would have a greater negative effect on the repute of justice than its admission. The accused was ultimately acquitted of aggravated assault and discharging a firearm with intent because the judge concluded the Crown had failed to prove the identity of the shooter. But the accused was convicted of possessing a firearm while prohibited, possessing a loaded firearm, possessing a prohibited weapon (brass knuckles) and possessing a prohibited device (silencer).

British Columbia Court of Appeal

The accused appealed his convictions arguing that the trial judge erred in admitting the weapons seized from his

"[The judge] applied a standard of proof far more demanding than the appropriate standard of reasonable probability, which is less demanding than proof on a balance of probabilities or proof beyond a reasonable doubt."

residence under s. 24(2) of the *Charter* after he found the evidence was obtained as a result of a s. 8 breach. The accused sought an order setting aside the convictions.

The Crown, on the other hand, submitted that the trial judge should not have found a s. 8 breach. The Crown argued that the witness' identification evidence along with other circumstantial evidence in the ITO constituted sufficient factual grounds to support the issuance of the search warrant. And, even if there was a violation, the Crown contended there was no error in admitting the evidence under s. 24(2).

The Reasonable Grounds Standard

Justice Garson, speaking for a unanimous Court of Appeal, found the trial judge erred in concluding that the appropriate standard of proof necessary to obtain a search warrant was not satisfied in this case. Justice Garson opined that the trial judge applied the wrong legal standard:

> For the following reasons, I have reached the conclusion that the judge took an overly literal and narrow approach to [the witness'] interview. He applied a standard of proof far more demanding than the appropriate standard of reasonable probability, which is less demanding than proof on a balance of probabilities or proof beyond a reasonable doubt. … In my view, even if the ITO exaggerated the certainty of [the witness'] identification of [the accused], the record before the JJP, as amplified on review, supports the issuance of the warrant. [reference omitted, para. 31]

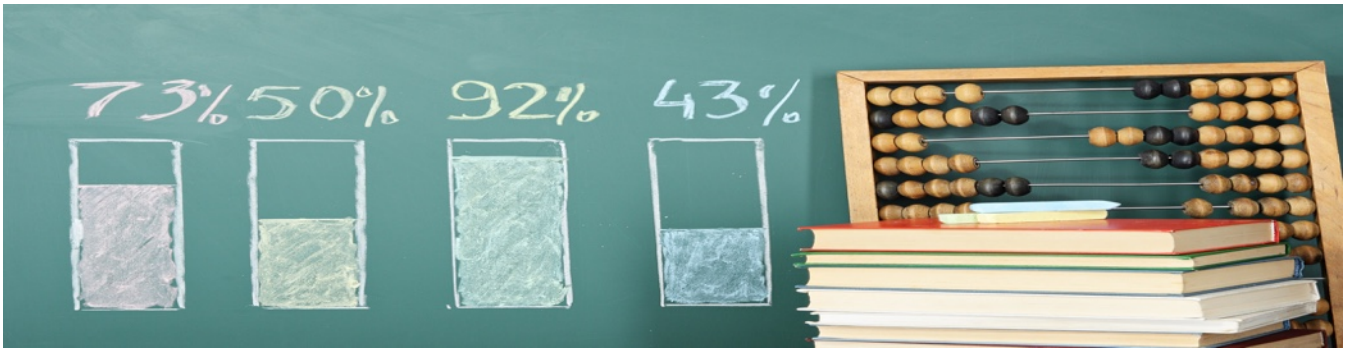
The judge erred by isolating and taking literally one phrase ("So that's what made me kind of think that maybe it was him") from the balance of the witness' interview as conveying uncertainty. He did not consider the full context of the interview. However, when examined in the totality of the interview, the witness gave reasonably strong identification evidence. The judge also failed to consider the totality of the other evidence in the ITO, particularly where it supported the identification evidence in the witness' statement:

> As amplified on review, the information the police had was more than sufficient to conclude there was a reasonable probability that [the accused] was the man with the assault rifle. In evaluating the probability of the existence of facts and inferences, the judge failed to apply the correct legal standard in a practical, non-technical and common sense way. Although he identified the correct legal test, he misapplied it. This was an error of law. He took a far too literal approach to his application of the standard of reasonable probability. Specifically, the judge took one part of a lengthy statement in isolation and failed to consider it in the context of the entire statement and the other information revealed in the ITO. It would be unreasonable to conclude that the police had insufficient information at that stage of their investigation to support a reasonable probability that the shooter was [the accused]. In my view, it would have been illogical for the police to reach any other conclusion as to the identity of the man with the assault rifle once they were in possession of the information in the ITO. [para. 35]

The Court of Appeal concluded the trial judge erred in finding a s. 8 *Charter* breach. The evidence was admissible and the accused's appeal against convictions was dismissed.

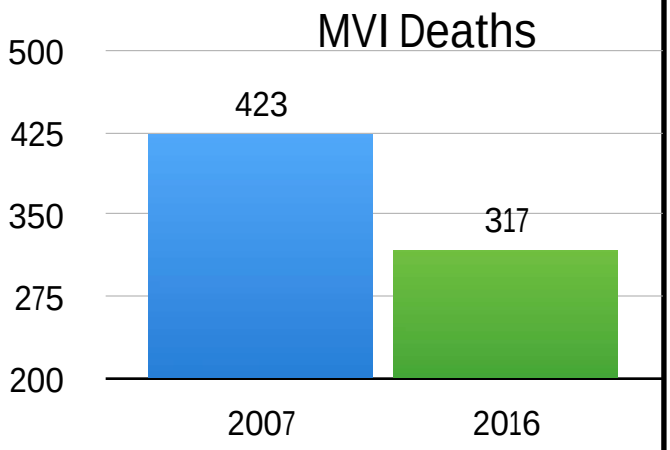
Complete case available at www.courts.gov.bc.ca

"In evaluating the probability of the existence of facts and inferences, the judge failed to apply the correct legal standard in a practical, non-technical and common sense way."



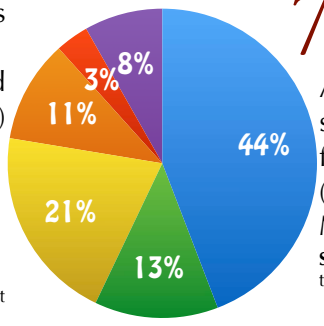
FACTS - FIGURES - FOOTNOTES

-25.1% The total percentage by which motor vehicle incident deaths decreased in British Columbia between 2007 and 2016. This represented an average -2.9% decrease year over year.



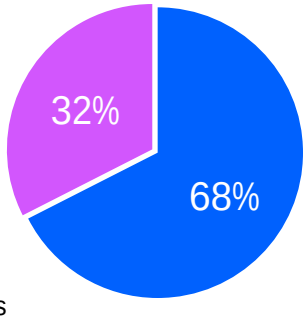
Source: BC Coroners Service, "Motor Vehicle Incident Deaths 2007-2016", released on February 15, 2018.

Drivers ... were more likely to be killed in a motor vehicle incident than any other role. In 2016, 140 drivers died. This was followed by 65 pedestrians, 41 passengers, 34 motorcycle or moped riders, 11 cyclists and eight (8) commercial drivers.



Source: BC Coroners Service, "Motor Vehicle Incident Deaths 2007-2016", released on February 15, 2018.

Males ... are more likely to be killed than females in motor vehicle incidents. In 2016, 214 males died compared to 103 females. This is a ratio of more than 2:1.



Source: BC Coroners Service, "Motor Vehicle Incident Deaths 2007-2016", released on February 15, 2018.

87% ... of Canadians agreed that the outcome of a case in the justice system depended heavily on **how good a person's lawyer was**. Residents in Atlantic Canada agreed the most (99%), followed by Alberta (90%), Ontario (89%), British Columbia (86%), Quebec (81%) and Saskatchewan/ Manitoba (70%). Only 6% of Canadians disagreed that the outcome of a case depended on how good a lawyer was while 7% were not sure.

Source: Insights West for National Observer, Survey of Canadians on the Justice System, February 18, 2018.

71% ... of Canadians agreed that the criminal justice system is **too soft** on offenders. Residents of Atlantic Canada agreed the most that the system was too soft on offenders at 83%, followed by Alberta (75%), BC (70%), Quebec (70%), Ontario (67%) and Saskatchewan/ Manitoba (67%).

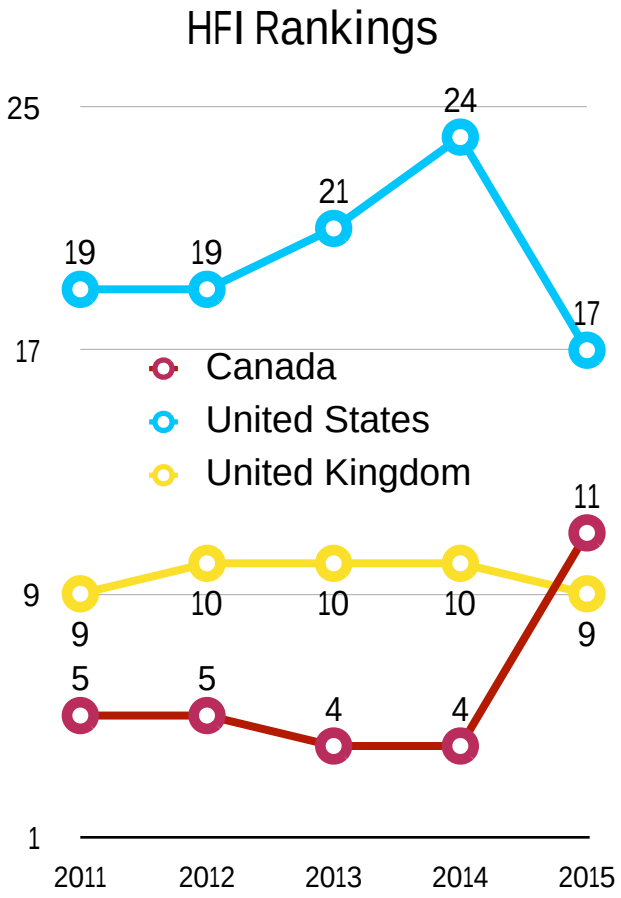
Source: Insights West for National Observer, Survey of Canadians on the Justice System, February 18, 2018.

Eleventh

Canada's world ranking in **"The Human Freedom Index 2017."** The Human Freedom Index (HFI) is a global measurement of personal and economic freedom among 159 countries. It captures the degree to which people enjoy major personal freedoms (PF) such as civil liberties - freedom of speech, religion, association and assembly - and economic freedom (EF) such as freedom to trade or use sound money. The index uses 79 distinct indicators to rank the countries.

SELECT COUNTRY RANKINGS			
HFI Ranking	Country	PF Ranking	EF Ranking
1	Switzerland	6	4
2	Hong Kong	26	1
3	New Zealand	9	3
4	Ireland	13	5
5	Australia	11	9
7	Norway	1	25
9	United Kingdom	16	6
11	Canada	14	11
17	United States	24	11
27	Japan	23	29
33	France	31	52
68	South Africa	60	95
73	Mexico	82	76
102	India	103	95
126	Russia	134	100
130	China	136	112
158	Venezuela	127	159
159	Syria	159	153

Although Canada ranked 11th on the 2017 HFI, it should be noted that it has slipped seven spots since the last measurements were used. Canada is no longer ranked as one of the 10 freest countries. This drop in the rankings for Canada compares to the United States climbing seven spots and the United Kingdom moving up one.



"44 percent of the world's population lives in the bottom quartile of countries that have low levels of freedom." (p. 25)

Source: The Cato Institute, the Fraser Institute, and the Friedrich Naumann Foundation for Freedom, 2017, "The Human Freedom Index 2017: A Global Measurement of Personal, Civil, and Economic Freedom".

Alcohol

... is Canada's drug of choice. According to the Canadian Tobacco, Alcohol and Drugs Survey (CTADS), which was undertaken in 2015 but posted in March 2017, 77% of Canadians consumed alcohol in the past year. Young adults (20-24) had riskier patterns of alcohol consumption compared to youth (15-19) and adults older than 25.

Cannabis

... is Canada's most popular illicit drug. The CTADS reports past-year cannabis use was 12%. The median age for initiating cannabis use was 17 years of age for both males and females.

Tobacco

Cigarette smoking was at the lowest rate of use ever recorded. In 2015 the prevalence of cigarette smoking was 13%, down from 15% in 2013.

13%

... of Canadians aged 15 years and older reported having ever tried an e-cigarette. This is up from 9% as reported in 2013.

British Columbia

... was the province with the highest rate of past year and lifetime use of cannabis. More than half (51.3%) of British Columbians reported having used cannabis in their lifetime while 17.3% reported past year use. Nova Scotia was a close second with 51.2% reporting lifetime use while 14.4% reported past year use. On the other hand, British Columbia had the lowest cigarette smoking rate at 10.2% while Newfoundland had the highest smoking rate at 18.5%.

DRUG USE BY AGE

Drug	15-19 Youth	20-24 Young Adult	25+ Adult
Alcohol - past year use	59%	83%	78%
Illicit Drugs* - past year use	21%	31%	10%
Illicit Drugs (excludes cannabis) - past year use	5%	9%	1%
Cannabis - past year use	21%	30%	10%
Current Cigarette Smoking	10%	18%	13%
Tobacco Use** - past 30 day use	13%	24%	15%
e-Cigarettes - ever tried	26%	30%	11%

* Illicit drugs surveyed were (1) cannabis, (2) cocaine or crack, (3) ecstasy, (4) speed or methamphetamines, (5) hallucinogens, or (6) heroin.

** Tobacco use includes the use of a number of tobacco products including cigarettes, cigars, little cigars or cigarillos, smokeless tobacco, water-pipe and pipes.

Females

... smoke less, drink less and consume illicit drugs less often than their male counterparts. For example, 65.2% of females reported never having smoked a cigarette compared to 54.2% of men. As for current smoking, 10.4% of females smoke compared to 15.6% of males. As for cannabis, 37.2% of females reported using during their lifetime (52.1% for males). Past-year use of cannabis for women was 9.7% compared to 14.9% for males. Past-year use of alcohol was 72.7% for females (81.3% for males). Lifetime use of alcohol amongst females was 87.7% compared to 94.2% for males. Overall use of alcohol for the Canadian population was 90.7%.

Source: Canadian Tobacco, Alcohol and Drugs Survey (CTADS): 2015 Survey, corrections posted March 2017.

B... was the highest letter grade received by a province in the MacDonald-Laurier Institute's **"Report Card on the Criminal Justice System #2"** released in March 2018. The report card measured a number of strengths and weaknesses of the criminal justice system in each province and territory. Metrics used included headings of public safety, support for victims, costs and resources, fairness, and access and efficiency.

Several of the individual metrics used to grade the provinces and territories were related directly to the police. These metrics included the following:

- Police effectiveness at enforcing the law;
- Police effectiveness at ensuring safety;
- Perception of police supplying information;
- Perception of police being approachable;
- Police per 100,000 population;
- Perception of police being fair;
- Confidence in police; and
- Police responding properly.

Source: MacDonald-Laurier Institute, "Report Card on the Criminal Justice System #2", March 2018.

2017 CRIMINAL JUSTICE REPORT CARD

Province/ Territory	2017 Rank	2017 Grade	2016 Rank	2016 Grade
PEI	1	B	1	B+
NB	2	B	3	B
NF	3	B	2	B
ON	4	B	7	C+
NS	5	B	5	B
QC	6	B	4	B
AB	7	B	6	C+
NU	8	C+	10	C+
SK	9	C+	9	C+
BC	10	C+	8	C+
MB	11	C	12	C
NWT	12	C	11	C
YT	13	C	13	C

SELECT INDIVIDUAL METRIC LETTER GRADE GRID BY PROVINCE

METRIC	BC	AB	SK	MB	ON	QC	NF	NS	NB	PEI
Police effective at enforcing the law	C	C+	D	D	B+	A+	C+	C+	B+	B+
Police effective at ensuring safety	C	C+	D	F	B+	A	B+	C+	B+	A
Police supplying information	D	C+	D	D	C+	B+	A	C+	B+	A
Police being approachable	C	C	C+	D	C+	D	A	B	B+	A+
Number of police per 100,000 population	C+	B+	D	C	C+	C	B+	C	B+	A+
Confidence in police	D	B	B+	C+	C+	D	A+	C+	B+	C
Perception of police being fair	D	C	C	D	C+	B+	B+	C+	A	A+
Criminal Code incidents per police officer	B+	B+	A	B+	D	D	C+	C	C	C+
Police responding promptly	C+	C+	D	F	B+	A	C+	B	B+	A

100% The proportion of opioid users in the Downtown Eastside of Vancouver who tested positive for fentanyl in 2017. This was up from just 45% five months earlier. This 2017 five-month study examined the presence of fentanyl in people residing in marginal housing in the Downtown Eastside. People enrolled in opioid addiction treatment programs were also tested and more than half of them tested positive for fentanyl, indicating they sometimes seek out other more potent drugs. The study was funded by the Canadian Institutes of Health Research and BC Mental Health and Substances Use Services.

Source: "Fentanyl overwhelms opioid drug market in Vancouver's Downtown Eastside", February 1, 2018.

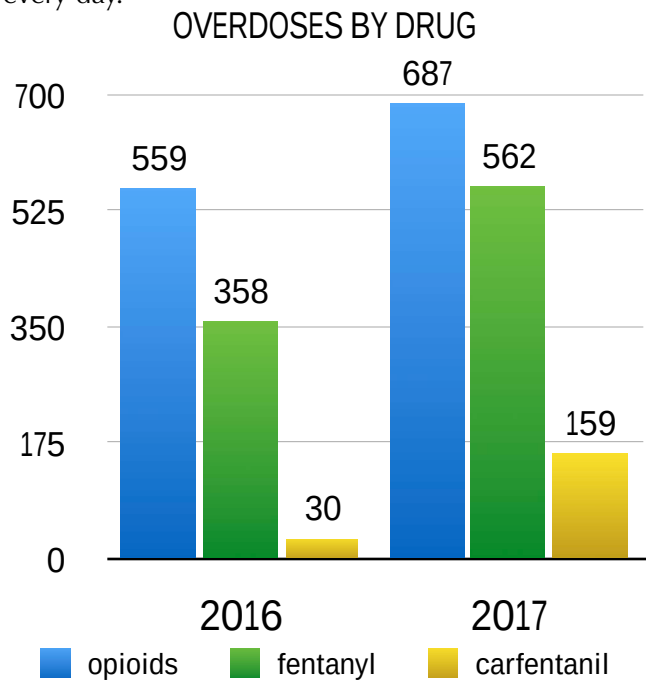
175,464 The number of visits to Insite from January 1 to December 31, 2017. Insite is North America's first legalized supervised drug injection site. Other user statistics include:

- **7,301** individual users;
- An average of **537** visits per day to the needle exchange service;
- An average of 415 injection room visits per day;
- **2,151** overdose interventions;
- **3,708** clinical treatment interventions (such as wound care, pregnancy tests);
- Substances reportedly used:
  - heroin (64% of instances);
  - methamphetamine (25% of instances); and
  - cocaine (6% of instances).
- **28%** of participants were women;
- **18%** of participants were Indigenous;
- For the fiscal year 2017/18 **443** clients accessed Onsite, the adjoining detox treatment facility, with an average stay of **11** days; and
- More than **3.6 million** clients have injected illicit drugs under supervision by nurses at Insite since 2003. There have been **48,798** clinical treatment visits and **6,440** overdose interventions without any deaths.

Source: "Insite User Statistics", January 1 - December 31, 2017.

430% The percentage increase of **Alberta** accidental poisoning (overdose) deaths related to carfentanil, a sub category of fentanyl. In 2017 there were **159** deaths related to carfentanil, up from **30** in 2016. As well, deaths related to fentanyl reached **562** in 2017, up from **358** in 2016.

The most up-to-date data shows that **687** people died in Alberta from an apparent accidental opioid overdose in 2017. This is almost two people dying every day.



- From January 1 - December 31, 2017, **81%** of deaths occurred in large urban areas such as Calgary, Edmonton, Red Deer, Lethbridge, Medicine, Grande Prairie and Fort McMurray.
- **80%** of accidental overdose deaths related to fentanyl were among males. **54%** of accidental overdose deaths related to an opioid other than fentanyl were among males.

Source: Alberta Health. "Opioids and Substances of Misuse: Alberta Report, 2017 Q4", March 2, 2018.

In the first 6 weeks of 2018, **74** individuals have died from a fentanyl overdose, up **32%** from **56** during the same period in 2017.

Source: Alberta Health. "Opioids and Substances of Misuse: Alberta Q1 Interim Report 2018", April 5, 2018.

2015 Lexus

... GX 460 4 door AWD SUV was the top vehicle stolen in Canada in 2017 according to the Insurance Bureau of Canada. Their annual list of the **Top 10 Stolen Vehicles** in Canada is based on actual insurance claims data collected from nearly all automobile insurance companies in Canada.

Canada's Top 10 Stolen Vehicles - 2017	
Rank	Vehicle
1	**2015 LEXUS GX460 4DR AWD SUV**
2	**2007 FORD F350 SD 4WD PU**
3	**2006 FORD F350 SD 4WD PU**
4	**2005 FORD F350 SD 4WD PU**
5	**2001 FORD F350 SD 4WD PU**
6	**2003 FORD F350 SD 4WD PU**
7	**2004 FORD F350 SD 4WD PU**
8	**2016 TOYOTA 4RUNNER 4DR 4WD SUV**
9	**2002 FORD F350 SD 4WD PU**
10	**2006 FORD F250 SD 4WD PU**

Source: Insurance Bureau of Canada, "Top 10 Stolen Vehicles", accessed on April 11, 2018.

$13 Million

The estimated 2017 dollar loss of Online Purchase Scams in Canada, so says the Better Business Bureau (BBB). In February 2018, the BBB released its list of the **Top 10 Scams of 2017**. According to its press release, *"scammers bilked Canadians of over 95 million dollars in 2017 and, once again, it's believed that only 5% of those victimized actually come forward to report losses. Taking that into account, the actual losses quickly balloon to the range of $2 billion dollars."*

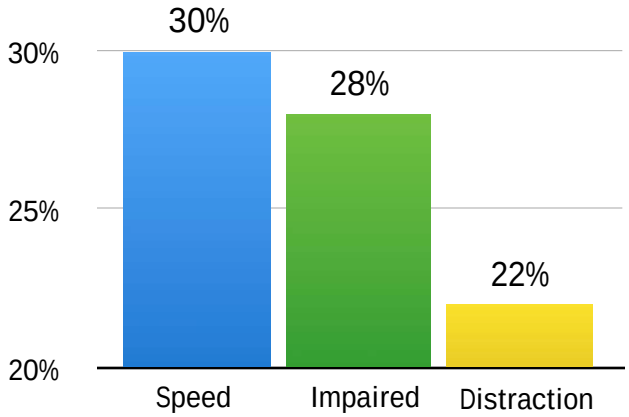
Canada's Top 10 Scams - 2017	
Rank	Vehicle
1	**Online Purchase Scam**
2	**Wire Fraud / Spearphishing**
3	**Romance Scam**
4	**Employment Scam**
5	**Cryptocurrency Scam**
6	**Income Tax Scam**
7	**Miracle Weight-loss Scam**
8	**Advance Fee Loans**
9	**Shady Contractors**
10	**Fake Invoices**

Source: Better Business Bureau of Canada, "Top 10 Scams", accessed on April 11, 2018.

Speed

...was the top contributing factor in British Columbia's 2016 fatal crashes. This was followed by impairment and distraction.

Top Contributing Factors in Fatal Crashes - 2016



Source: ICBC, "Quick Statistics", updated December 2017, 2018.

NO PRIVACY INTEREST IN MESSAGES SENT TO POLICE USING THIRD PARTY's PHONE

R. v. Beairsto, 2018 ABCA 118

The police arrested a man named Ahmed (also known as "Ricardo") during a drug investigation. In the course of Amhed's arrest, the police seized a Blackberry cell phone from the driver's side door of his vehicle. The cell phone did not require a password, was not otherwise locked, and was open to a Blackberry messenger chat between the phone's user and an individual named "Dobes Red Rum," later determined to be the accused. A text conversation indicative of drug trafficking was captured and downloaded by police and retained as evidence. In an effort to download the messages, a police officer added a police Blackberry number to the text conversations. The police number that had been added as a third party then received a text message from "Dobes" asking "who's that?"

The police officer portrayed himself as an associate of Ahmed who was involved in the drug trade. In further conversation with "Dobes" using the police Blackberry, the officer pretended to be "a buddy" of Amhed named "Hunter". Because the police retained Ahmed's Blackberry, they were able to confirm that "Dobes" had attempted to discover "who is Hunter?" by sending a text to Ahmed's Blackberry. The officer then used Ahmed's cell phone to confirm the relationship. Thereafter, "Hunter" (an undercover police officer designated a public officer for the purpose of ss. 25.1-25.4 of the *Criminal Code*), impersonated Ahmed and engaged in an exchange of text messages with "Dobes" using both Ahmed's Blackberry and his police cell phone over a five day period.

The Electronic Exchange

Time	Sender	Message
7:00 am	Dobes	"Who's that?"
10:20 am	Police Officer	"I am a buddy of Ricardo"
10:25 am	Dobes	"Oh. Whats. Up bro"
10:27 am	Police Officer	"Not. Much wanted da recipe that's all"
		"Who are u?"
10:28 am	Dobes	"I'm. His. Pal. From Van. What recipe. Bro?"
10:29 am	Police Officer	"The. Coke and soda one"

The accused ultimately shipped a kilogram of cocaine from Vancouver to a police intercept address in Edmonton. Arrangements through text exchanges were then made to send $40,000 by UPS in payment for the cocaine. A controlled delivery of a weighted parcel (with no money) was made to the accused at his Vancouver address. He took delivery of the UPS package after producing a BC driver's license to confirm his identity. He was arrested for drug trafficking and, on being searched incidental to arrest, was found to possess three Blackberry cell phones, one of which had the same number to which "Hunter" was texting messages to "Dobes" to order the cocaine. A search warrant was also executed on his residence and police recovered residency documents, 1.5 kilograms of cocaine, scales, seven cellphones, a money counter and $8,185 is cash. He was charged with cocaine trafficking.

Alberta Court of Queen's Bench

The accused conceded that the initial search of Ahmed's Blackberry was a lawful search incident to Ahmed's arrest. However, he sought to exclude the text messages he sent to police after Ahmed's arrest based on alleged breaches of ss. 7 and 8 of the

"The totality of the circumstances, inclusive of the following, will determine whether s. 8 Charter protection will be engaged. The claimant must establish (a) a direct interest in the subject matter of the search, (b) a subjective expectation of privacy in that subject matter, and (c) that the subjective expectation of privacy was objectively reasonable. If the latter factor is not made out, standing to argue that the search was unreasonable will be rejected."

Charter arising from the use of the cell phones by police. The judge concluded that, in the particular circumstances of this case, the accused did not have a reasonable expectation of privacy with respect to the text messages he sent after Ahmed's arrest. Furthermore, the police use of the phones to engage in the text exchanges with the accused, without obtaining a Part VI authorization under the *Criminal Code*, did not amount to a *Charter* breach. Nor did the failure of police to obtain a general warrant. Finally, even if the judge was wrong in finding no *Charter* breaches, he would not have excluded the evidence under s. 24(2). The accused was convicted of cocaine trafficking and sentenced to five and a half years in prison less time served.

Alberta Court of Appeal

The accused argued that the trial judge erred in finding that the he did not have a reasonable expectation of privacy respecting the text messages he sent to Ahmed. As well, he asserted that the police intercepted his private communications when they used Ahmed's phone to exchange text messages with him, which required prior judicial authorization.

Reasonable Expectation of Privacy

In determining whether an accused has a basis for standing to challenge the search of another person's cell phone and the electronic discussion therein, a Court must assess whether the accused had a subjective expectation of privacy in the electronic discussion and whether that expectation was objectively reasonable. Lack of control over a cell phone is no longer dispositive of whether a person maintains a reasonable expectation of privacy. Relying on *R. v. Marakah*, 2017 SCC 59, the Court of Appeal noted that text messages sent and received can, in some cases, attract a reasonable expectation of privacy. ***"The totality of the circumstances, inclusive of the following, will determine whether s. 8 Charter protection will be engaged,"*** stated the Appeal Court. ***"The claimant must establish (a) a direct interest in the subject matter of the search, (b) a subjective expectation of privacy in that subject matter, and (c) that the subjective expectation of privacy was objectively reasonable. If the latter factor is not made out, standing to argue that the search was unreasonable will be rejected."***

In describing the objective analysis, the Court of Appeal stated:

> Objective reasonableness of an expectation of privacy will be determined, inter alia, on the basis of (a) the place where the search occurred (the subject matter of the search is the electronic conversation itself, not its components. The place may be a real physical place or a metaphorical chat room) (b) Whether the electronic conversation reveals details of the claimant's lifestyle or information of a biographic nature (c) whether the claimant, at the material time, exercised control over the conversational information.

"Objective reasonableness of an expectation of privacy will be determined, inter alia, on the basis of (a) the place where the search occurred (the subject matter of the search is the electronic conversation itself, not its components. The place may be a real physical place or a metaphorical chat room) (b) Whether the electronic conversation reveals details of the claimant's lifestyle or information of a biographic nature (c) whether the claimant, at the material time, exercised control over the conversational information."

> Critical to a consideration of the latter factor, loss of control does not inevitably follow from possession of the conversational information by another person nor by a third party's ability to access that information or disclose it. Put another way, exclusive control is not a condition precedent to establish a reasonable expectation of privacy, safe from state scrutiny. One may now confidently assert that binding precedent has now rejected the proposition that the sending of an electronic message constitutes a complete relinquishment of control over who may view the contents thereby extinguishing all expectation of privacy. [para. 13-14]

However, in this case, the Court of Appeal was unwilling to recognize the accused's asserted expectation of privacy as "reasonable":

> There is a complete absence of evidence, testimony or otherwise, that the [accused] expected Ahmed to keep their messages private. Unlike the facts in *Marakah* where on numerous occasions the accused had asked his accomplice to delete their text messages from his phone, thereby supporting a subjective expectation of privacy in the contents of the accomplice's phone which was also objectively reasonable, the factual matrix in the case at bar lends no such support. [para. 27]

Nor was there any evidence to support a subjective expectation of privacy in relation to copies of sent text messages located on Ahmed's cell phone. The accused chose not to testify on the *vior dire*. He bore the burden of establishing a reasonable expectation of privacy, which he failed to do.

Interception

Under s. 183 of the *Criminal Code*, an interception is defined as to include *"listen to, record or acquire a communication or acquire the substance, meaning or purport thereof."* However, the Court of Appeal found that the deception of an individual as to the identity of their interlocutor through the use of electronic communications, does not amount to an interception:

> ... Simply put, as I see it, deception does not amount to an interception.
>
> In my view, it is important to distinguish between the disclosure of found private communications and the interception of same. Where an investigation involves a basic deception as to whom the [accused] is communicating with, absent intrusive technologies amounting to an "interference" between the recipient and the sender, no interception is made out. In R. v. Mills, 2017 NLCA 12 the Newfoundland Court of Appeal held that where there is direct communication between two parties, deception as to the identity of the recipient does not alter the nature of the communication or transform the "receipt by the intended recipient into an interception" ... . I respectfully agree. [para. 25]

The accused's appeal against conviction was dismissed.

Complete case available at www.canlii.org

Editor's Note: Additional facts taken from *R. v. Beairsto*, 2016 ABQB 216 and *R v. Beairsto*, 2017 ABCA 225.

"Simply put, as I see it, deception does not amount to an interception. In my view, it is important to distinguish between the disclosure of found private communications and the interception of same."

POLICING ACROSS CANADA: FACTS & FIGURES

According to a recent report released by Statistics Canada, there were 69,027 active police officers across Canada in 2017. This represented an increase of 168 officers from the previous year. Ontario had the most police officers at 25,981, while Nunavut had the least at 134. With a national population of 36,708,083, Canada's average cop per pop ratio was 188 police officers per 100,000 residents.

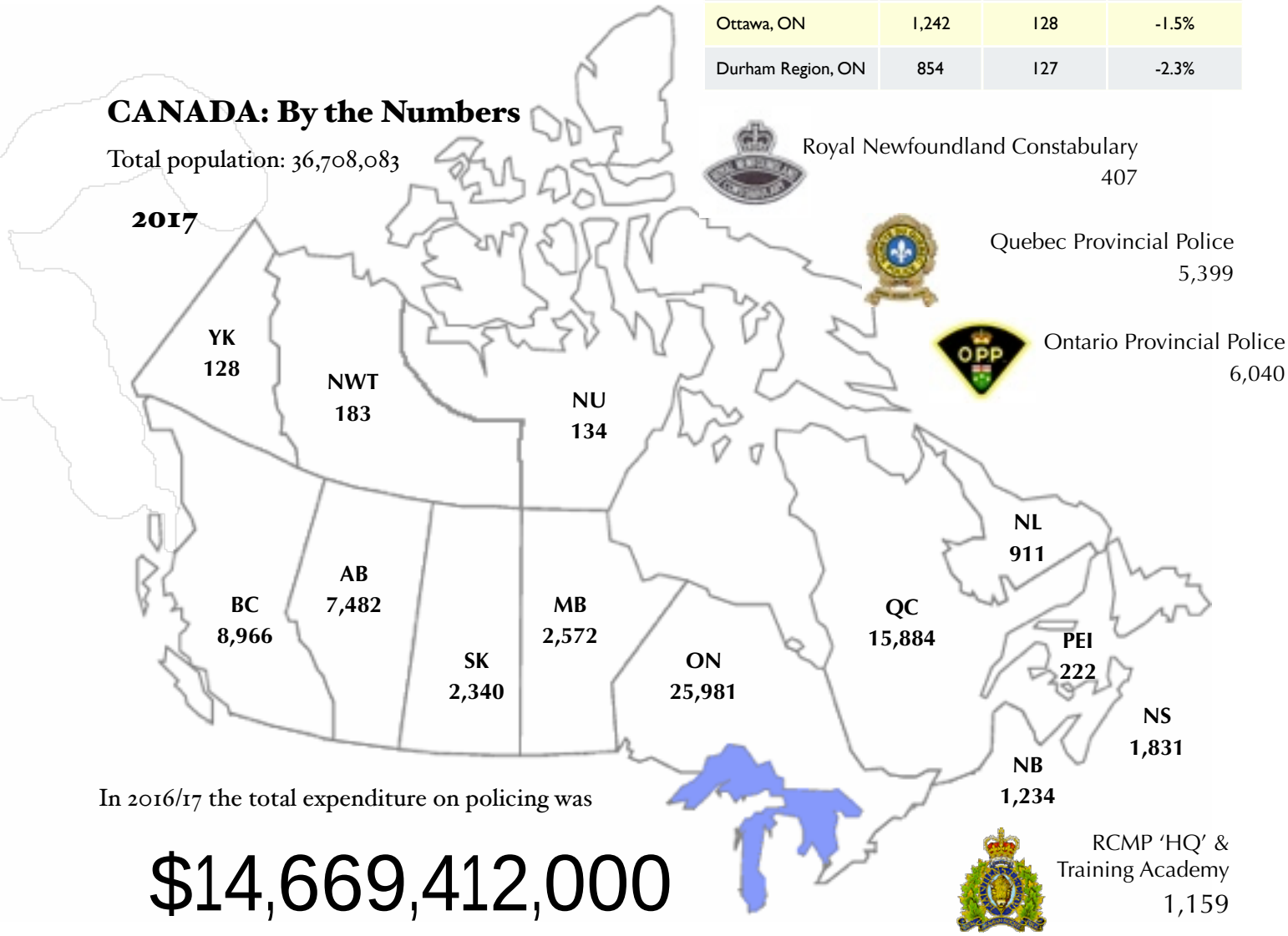
Source: Statistics Canada, Police Resources in Canada, 2017, Catalogue no: 85-225-X, March 28 2018

Canada's Police Officers by City - Top 10			
CMA	Officers		% Change
	Number	per 100,000	2016>2017
Toronto, ON	5,190	180	-4.9%
Montreal, QC	4,596	228	-0.9%
Calgary, AB	2,215	168	-0.4%
Peel Region, ON	1,973	140	-2.0%
Edmonton, AB	1,775	183	-0.2%
York Region, ON	1,586	137	-2.4%
Winnipeg, MB	1,409	192	-2.6%
Vancouver, BC	1,313	196	0.0%
Ottawa, ON	1,242	128	-1.5%
Durham Region, ON	854	127	-2.3%

CANADA: By the Numbers

Total population: 36,708,083

2017



Royal Newfoundland Constabulary
407

Quebec Provincial Police
5,399

Ontario Provincial Police
6,040

RCMP 'HQ' & Training Academy
1,159

In 2016/17 the total expenditure on policing was

$14,669,412,000

2017 FAST FACTS

- On the snapshot day of May 15, 2017 there were 69,027 police officers in Canada. There were an additional 29,049 civilians, which represented 30% of all police personnel. There were 2.4 officers for every civilian employed.
- Saskatchewan had the highest provincial rate of police strength at 201 officers per 100,000 residents (cop to pop ratio) followed closely by Manitoba and Nova Scotia both at 192 officers per 100,000. The Northwest Territories had the highest territorial cop to pop ratio at 411 officers per 100,000.
- 56% of police officers were 40 years of age or older.
- 66% of OPP officers were over the age of 40.
- For municipal police services serving a population of 100,000 or more, Victoria BC had the highest police strength at 233 officers per 100,000, followed by Montreal, QC (228) and Halifax, NS (223). Richmond, BC had the lowest police strength at 98 officers per 100,000.
- For 2016/2017, 86% of officers hired were recruits. The remainder were experienced police officers.
- Police expenditures continue to rise, more than doubling since 2000.
- Per capita costs for policing in fiscal 2016/2017 translated to $315 per Canadian.
- Provincial police services in Ontario, Quebec and Newfoundland cost $2.2 billion.
- Stand alone municipal services cost $7.7 billion.
- The total operating costs for the RCMP amounted to $4.8 billion.

RETIREMENT

At the end of the 2016/2017, 10% of police officers were eligible to retire. Manitoba had the highest proportion of officers that could retire at 19%. This was followed by Newfoundland and Labrador (17%) and the Yukon (16%). Forty one percent (41%) of officers at RCMP Headquarters and the Training Academy could retire.

Top 10 Retirement Eligible Municipal Police Services

Municipal Police Service	Eligible to Retire %
Winnipeg, MB	25.8%
St. John's, NL	24%
Codiac Region (Moncton) NB	21.8%
Victoria, BC	21.4%
Hamilton, ON	19.0%
Montreal, QC	16.3%
Levis, QC	13.1%
Kelowna, BC	12.4%
Guelph, ON	10.9%

GENDER

There were 14,752 female officers on May 15, 2017 accounting for 21% of all officers, or roughly 1 in 5. This is up 197 more female officers from the previous year. The Royal Newfoundland Constabulary reported the highest proportion of female officers at 28%. The Ontario Provincial Police and the Sûreté du Québec each reported 22% of their officers as female while the RCMP and municipal stand-alone police services (excluding First Nations), each reported 21% of officers as female. The First Nation self-administered services accounted for 16% of female officers.

Senior officers, such as chiefs, deputy chiefs, superintendents, inspectors and other equivalent ranks, were 15% female. Non-commissioned officers, such as sergeants, were 19% female. Constables were 23% female.

City	% Fem
Longueuil, QC	34.7
Montreal, QC	32.1
Kelowna, BC	31.8
Laval, QC	30.0
St. John's, NL	28.7
Quebéc, QC	27.2
Terrebonne, QC	27.2
Coquitlam, BC	26.4
Victoria, BC	25.4
Vancouver, BC	25.3

RCMP

The RCMP is Canada's largest police organization. It is divided into 15 Divisions with Headquarters in Ottawa. Each division is managed by a commanding officer and is designated alphabetically.

RCMP DIVISIONS	
Division	Area
Depot	Regina, SK (Training Academy)
National	National Capital Region
B	Newfoundland & Labrador
C	Quebec
D	Manitoba
E	British Columbia
F	Saskatchewan
G	Northwest Territories
H	Nova Scotia
J	New Brunswick
K	Alberta
L	Prince Edward Island
M	Yukon Territory
O	Ontario
V	Nunavut Territory

RCMP On-Strength Establishment
as of January 1, 2018

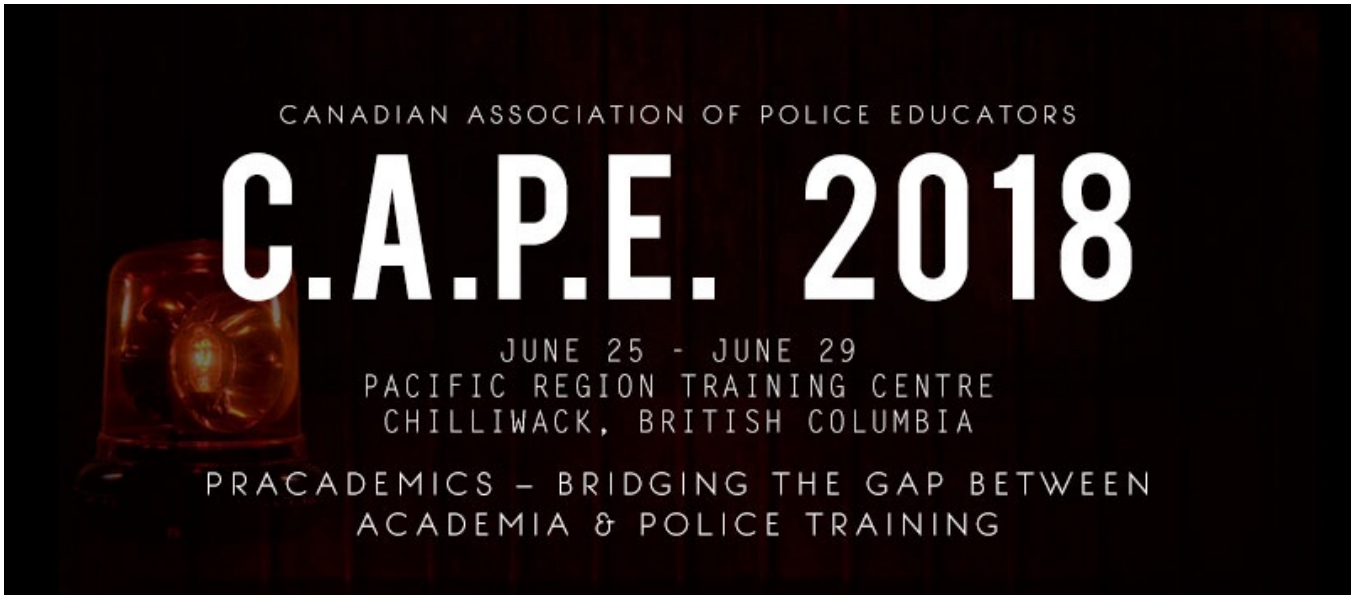
Rank	# of positions
Commissioner	1
Deputy Commissioners	5
Assistant Commissioners	31
Chief Superintendents	59
Superintendents	189
Inspectors	333
Corps Sergeant Major	1
Sergeants Major	7
Staff Sergeants Major	14
Staff Sergeants	835
Sergeants	1,956
Corporals	3,543
Constables	11,691
Special Constables	114
Civilian Members	3,709
Public Service Employees	7,083
Total	**29,571**

Source: www.rcmp-grc.gc.ca/about-ausujet/organi-eng.htm

RCMP Officers by Type of Policing - Canada 2017 (numbers do not include 1,159 members at HQ & Training Academy)

Level / Region	BC	AB	SK	MN	ON	QC	NB	NS	PEI	NL	YK	NWT	NU	Total
Contract	5,529	2,669	1,024	819	-	-	659	795	97	409	111	163	123	12,398
Federal & Other	870	430	247	176	1,652	882	135	151	27	95	17	20	11	4,713
Total	6,399	3,099	1,271	995	1,652	882	794	946	124	504	128	183	134	17,111

Source: Statistics Canada, Police Resources in Canada, 2017, Catalogue no: 85-225-X, March 28 2018



Canadian Association of Police Educators

The Canadian Association of Police Educators (CAPE) promotes excellence in law enforcement training and education through the guidance of innovative research, program development, knowledge transfer, network facilitation, and collaborative training initiatives. The objectives of CAPE include:

- **Providing** advice and input regarding national and regional law enforcement training and education trends/needs.
- **Advocating** and promoting the commitment to training.
- **Advising** on training specific policy.
- **Liaising** between operational training academies and academic institutions.
- **Guiding** and undertaking law enforcement training and education research.
- **Coordinating** knowledge transfer initiatives.

Presentation topics at the 2018 CAPE Conference include:

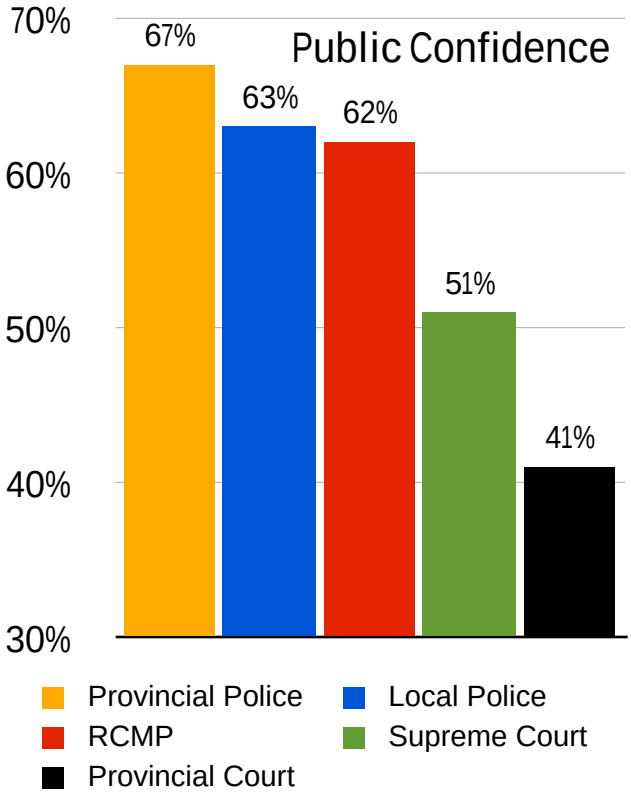
- ✓ Police Research in Canada
- ✓ Professionalization of Policing
- ✓ Applying rResearch on Targeted Violence to the Practice of Threat Management in Communities: A US Perspective
- ✓ Problem Based Learning for Policing
- ✓ Practical Applications of Police Use of Force Research
- ✓ Evidence Based Policing
- ✓ Simulators and Bridging the Gap Between Research and Police Training

This conference also provides an opportunity to network and exchange ideas.

cape-educators.ca

JUSTICE SYSTEM CONFIDENCE: POLICE TAKE TOP SPOTS

According to a recent Angus Reid Institute research poll, more people had confidence in the police than in the court system. When people were asked how much confidence they had in the various elements of the Canadian justice system, the provincial police forces in Ontario and Quebec were at the top (67%), followed by their local police (municipal or RCMP detachment) (63%), the RCMP (62%), the Supreme Court of Canada (51%) and finally provincial criminal courts (41%).



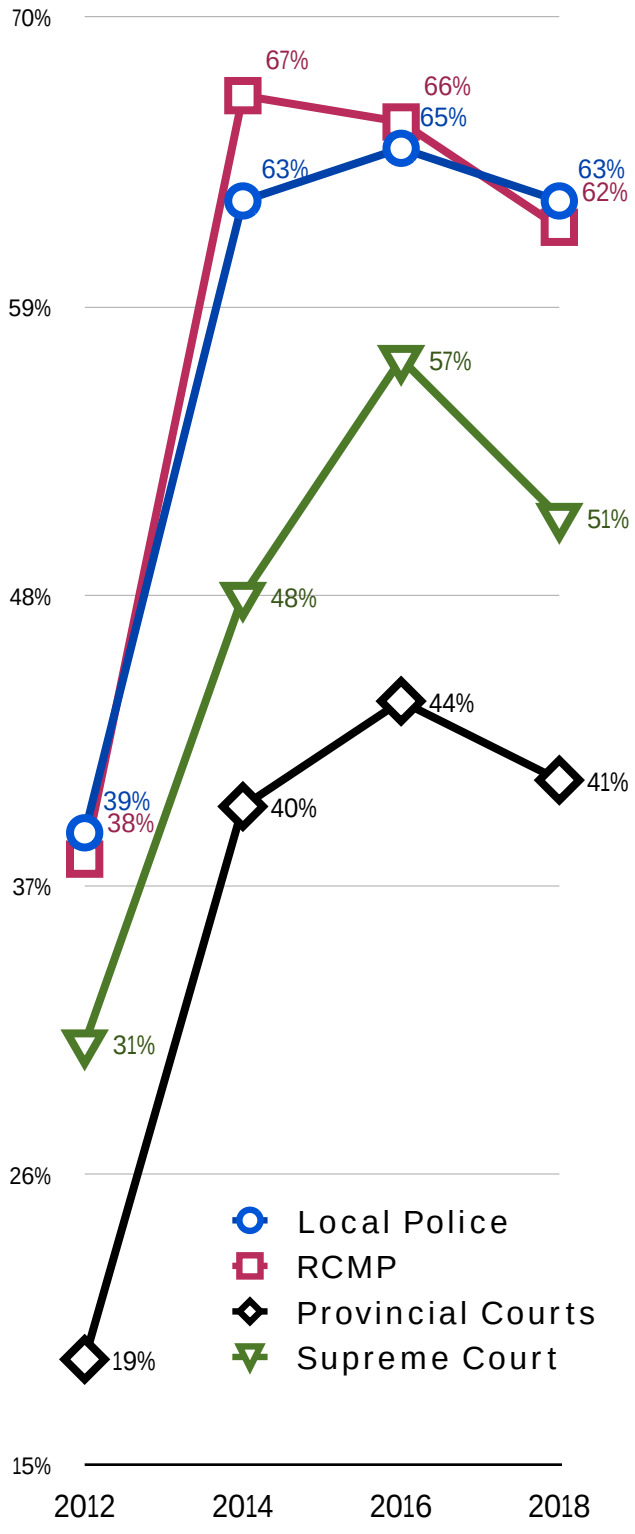
Confidence varied across the regions with Atlantic Canada having the lowest confidence in the RCMP (55%) and local police (47%) while British Columbia had the least confidence in its provincial criminal courts (28%). Manitobans had the least confidence in the Supreme Court of Canada (35%).

Quebec had the highest confidence in the RCMP (68%) while Saskatchewan had the most confidence in their local municipal or RCMP detachment (67%). Quebec also had the highest confidence in its provincial criminal courts and the Supreme Court of Canada.

How much confidence do you have in each of these elements of the criminal justice system?

Region	Provincial Police (ON & QC only)	Local police (municipal or RCMP detachment)	RCMP	Supreme Court of Canada	Provincial criminal courts
BC	-	62%	56%	43%	28%
AB	-	63%	67%	41%	36%
SK	-	67%	61%	39%	38%
MB	-	57%	60%	35%	33%
ON	60%	64%	60%	56%	44%
QC	68%	66%	68%	59%	50%
ATL	-	47%	55%	45%	29%
Total	67%	63%	62%	51%	41%

Overall, confidence in the criminal justice system has declined slightly over the 2016 survey results but has improved significantly since the 2012 survey.



OTHER FAST FACTS

- People identifying as visible minorities were **less likely** to have confidence in the police, whether the RCMP, provincial or local police.
- **42%** of Canadians reported an **increase in crime** where they lived in the last five years while **7%** said crime decreased during that time period. The remaining people saw no change (39%) or were unsure (12%).
- **13%** of Canadians reported they have been **a victim of crime** within the past two years that was reported to the police. Those reporting being victimized were highest in Saskatchewan (19%) and lowest in Quebec (7%).
- **60%** of Canadians agreed that the **criminal courts do a good job** in determining whether or not an accused person is guilty. This was highest in Ontario and Quebec (each at 62%) and lowest in Atlantic Canada (49%).
- Only **37%** of Canadians agreed **the justice system treats everyone fairly**. This was highest in Quebec (50%) and lowest in Saskatchewan (22%).
- **46%** of Canadians agreed that **judges do a good job handing out punishments** and sentences to people who commit crimes. This was lowest in British Columbia (34%) and highest in Quebec (52%).
- **37%** of Canadians believed the primary purpose of prison is to **protect the public** from dangerous criminals. **33%** of people believed the primary purpose of prison was to **punish law breakers**, followed by **rehabilitating criminals** so they can re-enter society (**14%**) and to **discourage others from committing crimes** (**13%**).
- **62%** of Canadians though the justice system was **too soft** in dealing with law breakers while only **4%** felt the system was **too harsh** with criminals. Only 25% thought the system struck the right balance while the remaining 9% couldn't say.

Source: Angus Reid Institute, "Confidence in the justice system: Visible minorities have less faith in courts than other Canadians", February 20, 2018.

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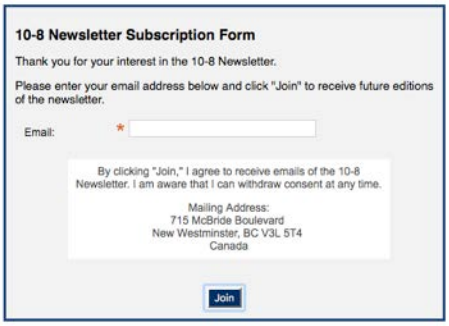
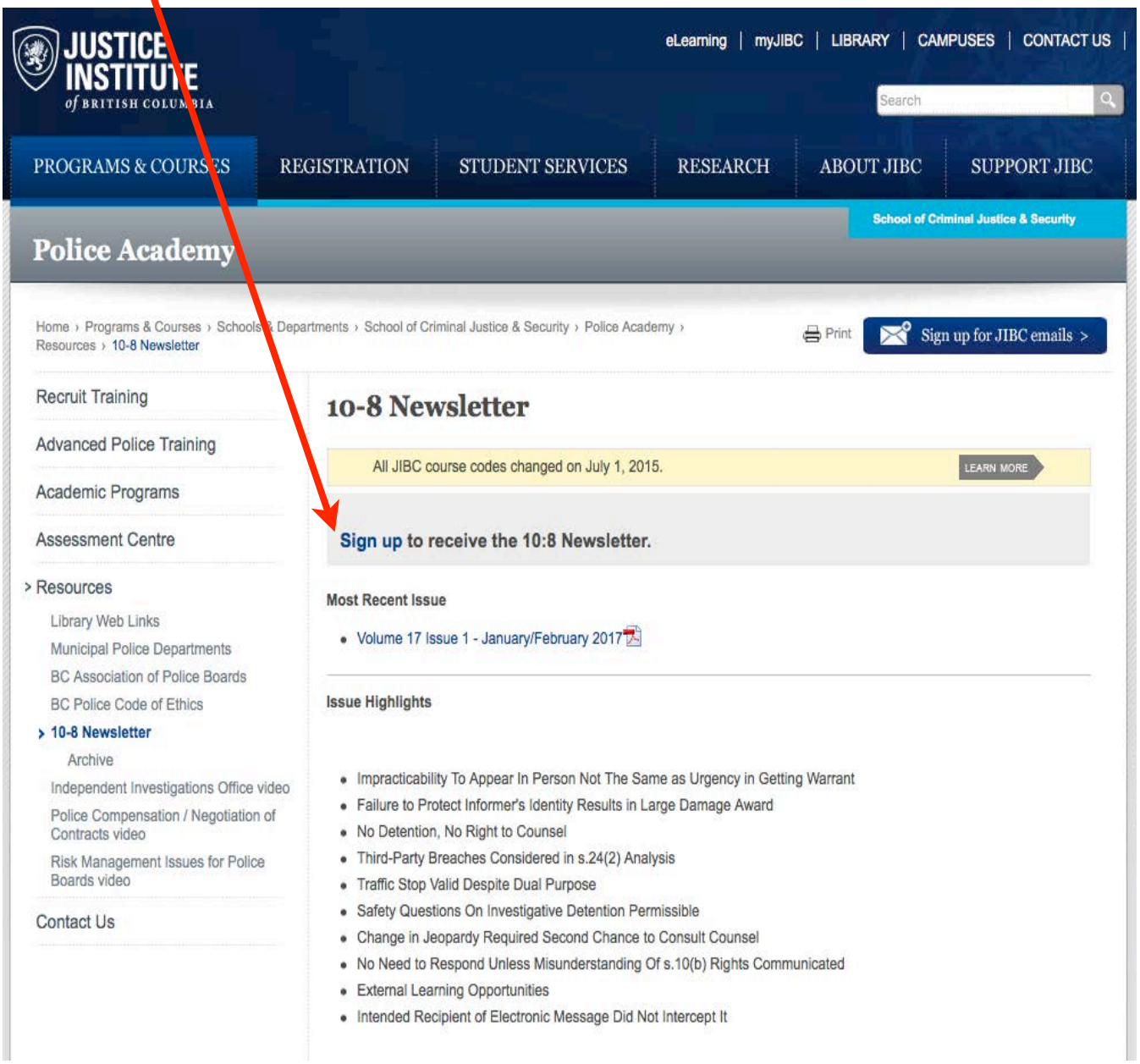
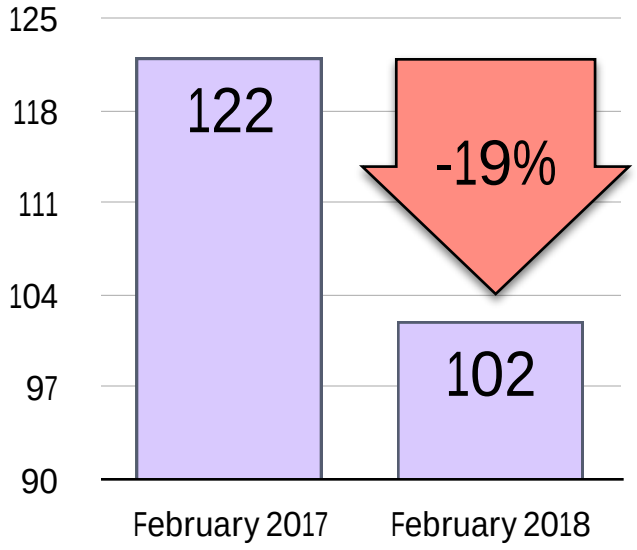


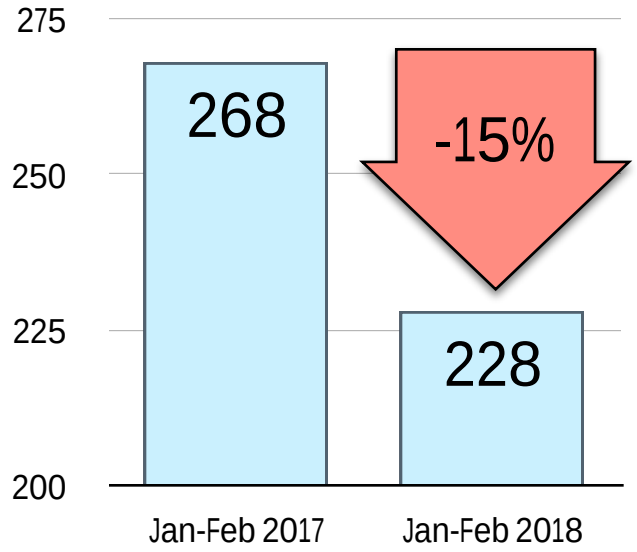


ILLICT DRUG OVERDOSE DEATHS IN 2018

The Office of BC's Chief Coroner has released statistics for illicit drug overdose deaths in the province from **January 1, 2008 to February 28, 2018**. In February there were 102 suspected drug overdose deaths. This represents a 19% decrease over the number of deaths occurring in February 2017. This amounts to about seven (7) people dying every two (2) days of the month.



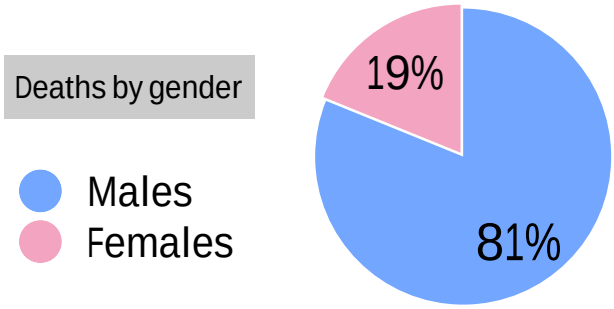
There were a total of **228** illicit drug overdose deaths in January and February 2018. This is a **-15%** decrease over the same period last year.

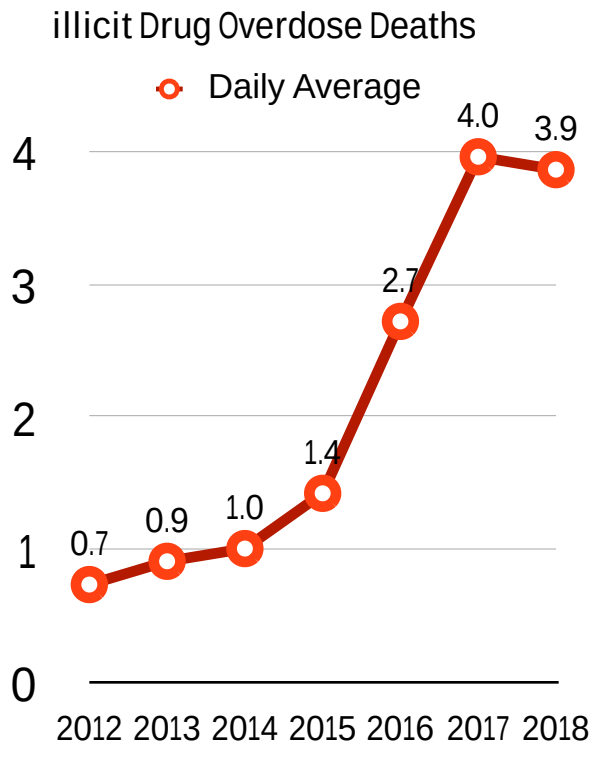


The **1,446** overdose deaths last year amounted to more than a **334%** over 2013. Moreover, the report attributes fentanyl laced drugs as accounting for the increase in deaths.

People aged 30-39 were the hardest hit so far in 2018 with **60** illicit drug overdose deaths followed by 19-29 year-olds at 52 deaths. People aged 40-49 year-olds and 50-59 year-olds had 47 deaths each.. Vancouver had the most deaths at **52** followed by Surrey (**36**), Victoria (**20**), Kamloops (**9**), Kelowna (**9**) and Prince George (**9**).

Males continue to die at almost a **5:1** ratio compared to females. In 2018, **185** males have died while there were **43** female deaths.





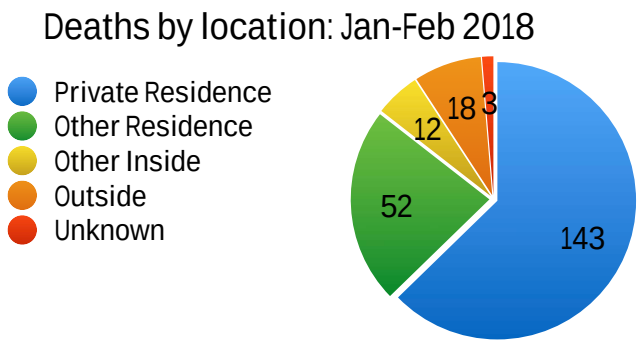
The 2018 data indicates that most illicit drug overdose deaths (**91%**) occurred inside while **9%** occurred outside. For three (3) deaths, the location was unknown.

"**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.



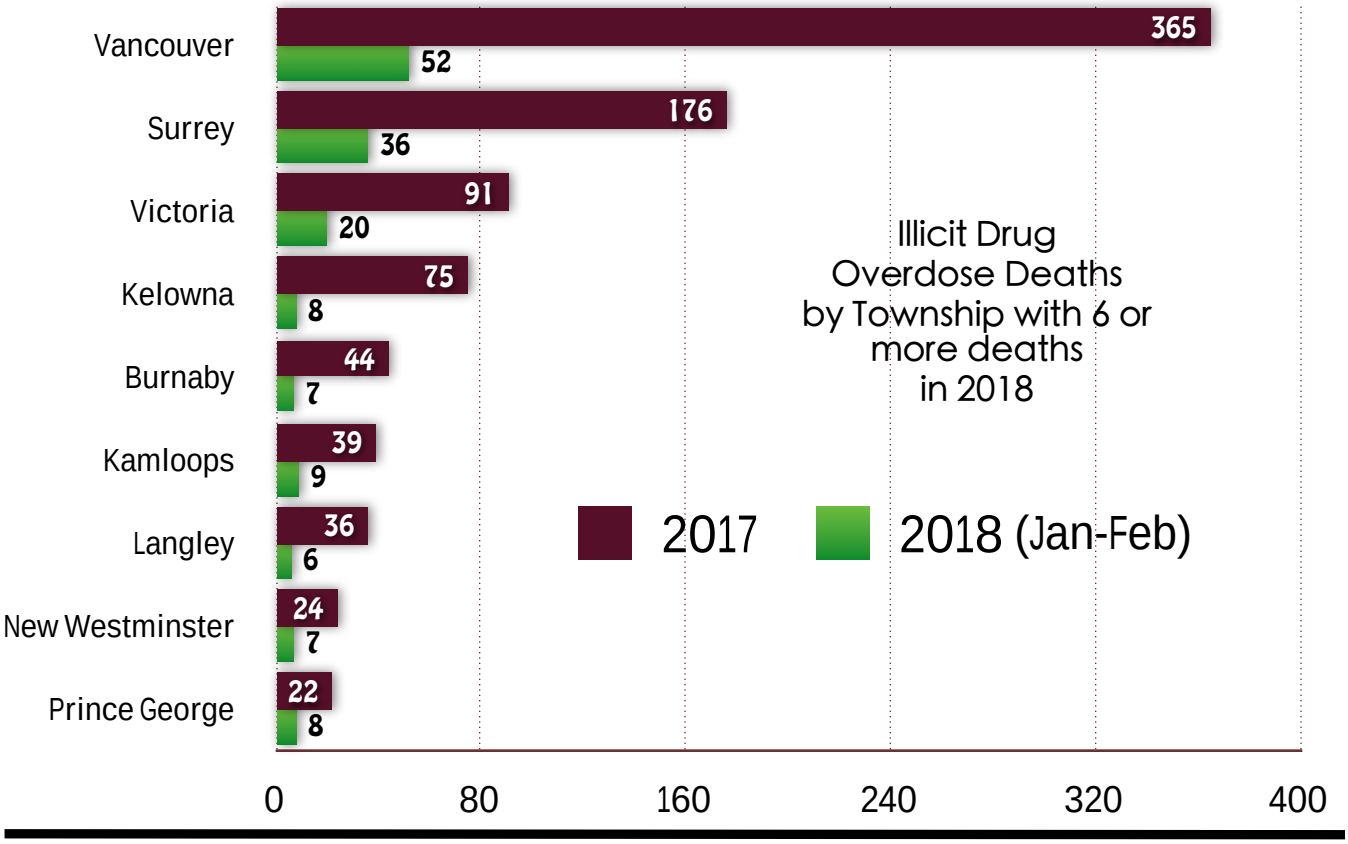
DEATHS SINCE PUBLIC HEALTH EMERGENCY

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 21 months preceding the declaration (May 2014-Mar 2016) totaled **992**. The number of deaths in the 23 months following the declaration (April 2016-Feb 2018) totaled **2,445**. This is an increase of **146%**.

TYPES OF DRUGS

The top four detected drugs relevant to illicit drug overdose deaths from 2016 and 2017 were fentanyl, which was detected in **71.0%** of deaths, cocaine (**48.7%**), methamphetamine/amphetamine (**33.0%**), and heroin (**28.5%**).

Source:
-Illicit Drug Overdose Deaths in BC - January 1, 2008 to February 28, 2018.
Ministry of Justice, Office of the Chief Coroner. April 5, 2018.



OPIOID awareness in Canada

Opioids are typically pain medications, mostly available by prescription. Some of the most commonly known opioids are fentanyl, OxyContin, morphine and codeine.

3 in 10 Canadians aged 18 and over reported using some form of opioid in the past 5 years.

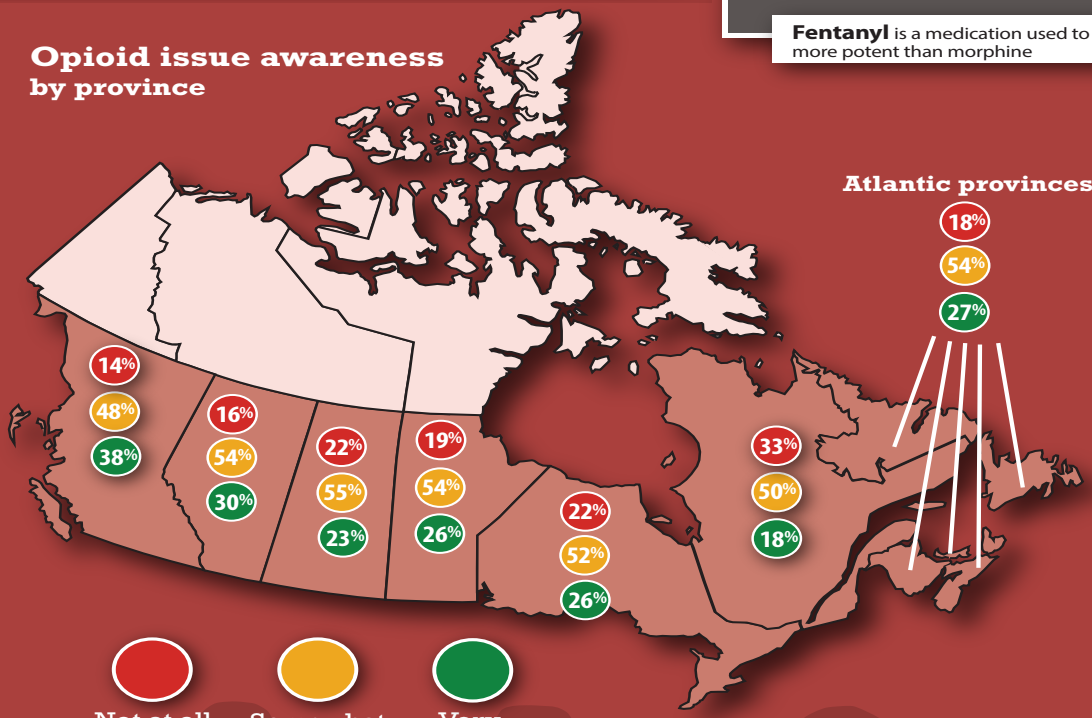
Of those, more than **1 in 4** have left-over opioids being stored in the home.

Did you know?

Drugs obtained illegally or on the street have the potential to contain **fentanyl.**

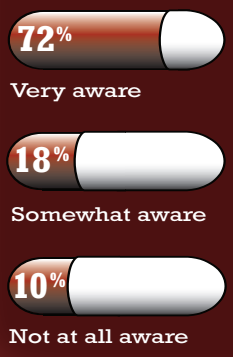
Fentanyl is a medication used to relieve pain that is about 100 times more potent than morphine

Opioid issue awareness by province



Level of awareness

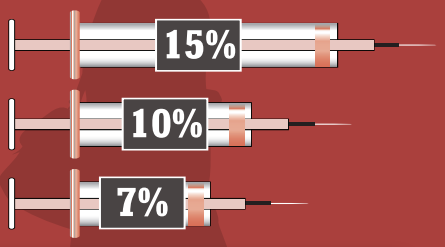
Adverse effects of mixing opioids with other medication



I would recognize the signs of an opioid overdose

28%	51%	22%
Agree	Disagree	Neither agree or disagree

Percentage of Canadians who agreed they would know how to:



Naloxone is a life-saving medication that can stop or reverse an opioid overdose, however, the results are temporary

For further information on opioids, please visit the following website:

www.canada.ca/opioids

Source: Survey on Opioid Awareness, 2017

ISBN: 978-0-660-24451-8
Catalogue number: 11-627-M

BC CROWN COUNSEL UPDATES ITS CHARGE ASSESSMENT GUIDELINES

The BC Prosecution Service updated its 2009 charge assessment guidelines on March 1, 2018. The new guideline caution Crown Counsel *"against becoming too closely connected to the police or doing anything else to hamper their ability to conduct objective charge assessments."*

Charging Standard

The charge assessment standard involves a two-part test:

1. whether there is a substantial likelihood of conviction.

EVIDENTIARY TEST

2. whether the public interest requires a prosecution.

PUBLIC INTEREST TEST

Evidentiary Test

The evidentiary test is whether there is ***a substantial likelihood of conviction***:

> The reference to "likelihood" requires, at a minimum, that a conviction according to law is more likely than an acquittal. In this context, "substantial" refers not only to the probability of conviction but also to the objective strength or solidity of the evidence. A substantial likelihood of conviction exists if Crown Counsel is satisfied there is a strong and solid case of substance to present to the court.
>
> In determining whether this test is satisfied, Crown Counsel must consider the following factors:
>
> - what material evidence is likely to be admissible and available at a trial
> - the objective reliability of the admissible evidence
> - whether there are viable defences, or other legal or constitutional impediments to the prosecution, that remove any substantial likelihood of a conviction.
>
> In assessing the evidence, Crown Counsel should assume that the trial will unfold before an impartial and unbiased judge or jury acting in accordance with the law, and should not usurp the role of the judge or jury by substituting their own subjective view of the ultimate weight or credibility of evidence for those of the judge or jury. [p. 2]

Public Interest Test

If the Crown is satisfied that the evidentiary test is met, then the Crown must determine whether the public interest requires a prosecution. Justice does not require that every provable offence be tried and the policy reserves prosecution for those cases requiring the full force of the criminal justice system. If, on the other hand, there are reasonable alternatives available, they should be pursued.

In assessing public interest, the policy requires Crown Counsel to consider and weigh a number of factors relevant to any particular case.

Public Interest Factors that Weigh in Favour of Prosecution

- the seriousness of the allegations;
- the likelihood of significant sentence upon conviction the seriousness of the harm caused to a victim;
- the use, or threatened use, of a weapon;
- the relative vulnerability of the victim;
- the alleged offender's history of relevant previous convictions or previous allegations that resulted in alternative measures;
- the alleged offender's position of authority or trust in relation to the victim evidence of premeditation;
- evidence that the offence was motivated by bias, prejudice, or hate based on colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, mental or physical disability, or any other similar factor;

- a significant difference between the actual or mental ages of the alleged offender and the victim
- that the alleged offender was under an order of the court at the time of the offence;
- the presence of reasonable grounds for believing the offence is likely to be continued or repeated;
- the offence occurs frequently in the location where it was committed;
- the offence is one that affects the integrity, safety, or security of the justice system or its participants ;
- the offence is a terrorism offence; and/or
- the offence was committed for the benefit of, at the direction of, or in association with a criminal organization.

Public Interest Factors that Weigh Against Prosecution

- a conviction is likely to result in an insignificant penalty;
- the public interest has been or can be served without a prosecution by the BC Prosecution Service, including through alternative measures, administrative or civil processes, or a prosecution by another prosecuting authority;
- the offence was committed as a result of a genuine mistake or misunderstanding of fact the loss or harm was the result of a single incident and was minor in nature;
- the alleged offender's lack of history of relevant previous convictions or recent previous allegations that resulted in alternative measures;
- the offence is of a trivial or technical nature; and/or
- the law giving rise to the offence is obsolete or obscure.

Public Interest Factors that May Weigh Either in Favour of or Against a Prosecution

- the youth, age, intelligence, physical health, mental health, or other personal circumstances of a witness or victim;
- the personal circumstances of the accused;
- the alleged offender's degree of culpability in relation to other parties;
- the length and expense of a prosecution when considered in relation to the social benefit to be gained by it;
- the time which has elapsed since the offence was committed; and/or
- the need to maintain public confidence in the administration of justice.

Exceptional Evidentiary Test

In some cases, described as **exceptional circumstances**, the relevant public interest factors may weigh so heavily in favour of a prosecution that it will be necessary to resort to a lower charge assessment standard of ***a reasonable prospect of conviction*** in order to maintain public confidence in the administration of criminal justice. Thus, a charge may still be approved even though the usual evidentiary test of a substantial likelihood of conviction is not met:

> A reasonable prospect of conviction requires more than just "some evidence" on each essential element of an alleged offence but it does not require that a conviction be more likely than an acquittal. The term "reasonable" means based on reason; rational; objective, as opposed to subjective. "Prospect" is forward-looking. It involves the expectation of a potential outcome, informed by previous experience and common sense. A "reasonable prospect of conviction" exists if experienced Crown Counsel, informed of all the relevant facts, is satisfied there is a rational and realistic basis for obtaining a conviction according to law. [p. 5]

In determining whether the reasonable prospect of conviction test is satisfied the following factors must be considered:

- what material evidence is arguably admissible and available at a trial;
- the objective reliability of the admissible evidence; and
- whether the evidence is overborne by any incontrovertible defence.

Source: British Columbia Prosecution Service, Crown Counsel Policy Manual, Charge Assessment Guidelines, CHA 1, March 1, 2018

GROUNDS NOT TO BE DISSECTED & ISOLATED TO MINIMIZE THEIR SIGNIFICANCE

R. v. Duong, 2018 SKCA 25

A police officer, in company a drug sniffing dog, was parked at the side of the TransCanada Highway. He clocked the accused's vehicle on radar travelling 116 km/h in a 110 km/h zone. The officer pulled onto the highway and followed the accused's vehicle for three to five kilometers, querying its licence plate on the police computer. Although the vehicle was driven in a normal manner, the police computer generated three hits: (1) a conviction for cultivation; (2) a conditional discharge for an offence of which the officer was unaware; and (3) the vehicle was linked to a prohibited driver. Because of the third hit, the officer decided to pull the vehicle over and check the driver's status.

The officer went to the passenger side of the vehicle. The officer noted that the accused, who was the sole occupant of the vehicle, appeared to be very nervous. His hand was trembling, he fumbled with the power switch of the passenger side window and his face was sweaty. When asked for his driver's licence and registration, the accused opened the centre console to retrieve the documents. The officer observed a billfold of cash wrapped by an elastic band in the console. On the outside was a $50 bill, but the officer did not know whether the denominations of the currency underneath were $50 bills. He thought there might be $100 bills.

The officer returned to his vehicle and conducted computer checks. He learned:

- the accused had a driver's licence and was not a prohibited driver;
- the vehicle was registered;
- the accused had been convicted of marihuana cultivation in 2007; and
- the accused had been arrested but not charged in relation to a marihuana trafficking investigation in 2009.

Sidebar: Officer's Training & Experience

The officer was an experienced and trained drug investigator. He:

- Was a 15 year police member;
- Worked six years in general duty policing in an area with a lot of marihuana use and where he was involved in 75–100 drug investigations.
- Spent five years with Integrated Border Enforcement, focusing on people transporting anything illegally across the border from the USA into Canada and where he was involved in 20–30 drug investigations.
- Spent last three-and-a-half years in traffic services where he had assisted other units with their drug investigations and done his own drug investigations. He estimated that he had been involved in a total of 130–140 drug investigations where at least a third of them dealt with travelling criminals.
- He described his experience with detecting travelling criminals as significantly more than probably most people in Canada.
- At the date he stopped the accused, the officer had been an instructor at the RCMP Pipeline training course (designed to enhance an investigator's ability to detect the presence of travelling criminals) for two years, having taken the course previous to that.
- The officer's dog was trained to detect the scent of drugs, including the scent of marihuana, and had been used in 30–40 drug investigations.

The officer decided to detain the accused. He got out of his police car and returned to the accused's vehicle. He then smelled cologne for the first time, which the officer believed was a masking agent to hide the smell of drugs. The accused was detained, given his rights to counsel and provided the standard police warning. After the accused was placed in the police car, the officer's drug sniffing dog was deployed around the Acura and indicated an odour of a drug by sitting near the rear of the vehicle. The accused was then arrested for possessing a controlled substance and given his rights and warnings again. The officer then searched the vehicle and found 50 lbs of marihuana in the trunk. It was vacuum-sealed in half-pound bags.

Saskatchewan Court of Queen's Bench

The officer testified that the accused's hand trembling was indicative of someone more nervous than the average person who was pulled over. He also stated that drivers were not usually nervous to the point where they would break out in a sweat. As for the wad of bills, the officer believed, based on his training and experience, that it was most commonly related to criminal activity, and the transportation or carrying of contraband. The accused's cultivation of marihuana in 2007 and his association to another investigation for marihuana trafficking were also significant to the officer. Based on these considerations, the officer said he decided to detain the accused for a drug investigation and use the drug sniffing dog.

The accused challenged the lawfulness of the initial traffic stop and his subsequent detention. He argued the stop was a random drug investigation. In his view, the officer did not have the necessary reasonable suspicion to detain him nor the reasonable suspicion required to conduct a warrantless search by using the drug detection dog.

The judge concluded that the initial traffic stop was lawful as was the accused's detention and the use of the drug dog. First, the officer followed the accused's car because he had clocked it speeding at 116 km/h and stopped it because it was connected to a prohibited driver. The initial stop was conducted because the car might be associated with a prohibited driver and for no other reason. The judge found the traffic stop was not a random stop for drugs. Second, the accused's continued detention was based on a reasonable suspicion. The accused appeared unusually nervous (trembling hands, fumbling with the window and facial sweat), there was a wad of cash wrapped in an elastic band in the car console, and the officer was aware of the accused's previous criminal record for marihuana cultivation and his subsequent arrest but no charge of trafficking in drugs.

The judge was satisfied that the officer's subjective belief the accused might be involved in a drug-related offence was objectively substantiated. Finally, this reasonable suspicion also justified the deployment of the dog. And once the dog indicated the presence of drugs, the officer had reasonable grounds to arrest the accused and the search of the vehicle was incidental to that valid arrest. There were no breaches of the accused's ss. 8 or 9 *Charter* rights and the evidence was admissible. He was convicted of possessing marihuana for the purpose of trafficking.

Saskatchewan Court of Appeal

The accused challenged his conviction arguing, in part, that the trial judge erred by improperly determining that the reasonable suspicion standard was met. In his view, the trial judge failed to consider the totality of the circumstances by mentioning only inculpatory factors and not considering exculpatory or neutral ones. As well, he submitted that the trial judge erred in concluding that the inculpatory factors met the legal standard of reasonable suspicion.

Reasonable Suspicion

The accused contended that the trial judge did not consider the absence of several factors indicative of drug involvement in deciding whether the reasonable suspicion standard was met. Justice Ottenbreit, however, concluded the trial judge did not err in applying the reasonable suspicion standard. He did not fail to look at the totality of the factors. In his view, the trial judge was not required to take into consideration that absence of several other factors (see sidebar, p. 57). Justice Ottenbreit described the reasonable suspicion totality test as follows:

> The reasonable suspicion standard derives its rigour from the requirement that it be based on objectively discernible facts, which can then be subjected to independent judicial scrutiny. However, consideration by a trial judge of the absence of certain inculpatory factors changes the focus from facts an officer actually observed, which obviously formed part of his thought process, to facts the officer did not observe. This is the wrong approach. [references omitted, para. 30]

And further:

> … the totality principle … does not require the trial judge to consider factors missing from the constellation of factors presented by the evidence. The absence of evidence of certain factors that could have been present to support reasonable suspicion is neither exculpatory nor neutral and does not attenuate the cogency of the factors that do exist, such as they are. That said, it may be that there is such a paucity of observable factors that a reasonable suspicion is not objectively raised. However, that is different than considering the absence of certain factors in the analysis.
>
> In short, the totality of circumstances test requires the trial judge focus on what the observations of the officer actually were and the factors that were actually present to assess whether those factors looked at, in totality, support the possibility of criminal behaviour and rise to the level of reasonable suspicion. This means analyzing the totality of all observable, discernible, inculpatory, exculpatory, neutral and equivocal factors. [references omitted, paras. 36-37]

The Court of Appeal concluded the trial judge correctly applied the totality of circumstances test.

Was Reasonable Suspicion Satisfied?

In an effort to undermine the strength of the factors the officer relied upon for his reasonable suspicion, the accused sought to challenge the reliability of the officer's observations by inviting the Court of Appeal to minimize or discount those factors. He sought to isolate individual factors and dissect the officer's observations to reduce their impact and significance.

But the Court of Appeal ruled that the trial judge did not err in determining that the constellation of inculpatory factors relied upon by the officer to detain the accused and deploy a sniffing dog met the legal standard of reasonable suspicion. ***"Reasonable suspicion is a relatively low threshold,"*** said Justice Ottenbreit. ***"The reasonable suspicion test … must be assessed against the existing evidence and looked at as a whole to determine if the threshold has been crossed."***

Sidebar: Absent Factors

The factors the accused argued were not present but should have been considered by the trial judge:

- No scent of marihuana;
- There was no indicia of a quick turnaround trip;
- The vehicle was registered in Alberta, which according to the officer was not a "source" province;
- The presence of masking agents;
- The vehicle was properly registered in the accused's name and was not a "third party vehicle";
- There was no inconsistent or incredible story arising from the dialogue between the officer and the accused;
- There was no evidence of multiple cell phones;
- There was no inexplicable pulling to the side of the road or adverse driving (such as a "nosedive") nor was the vehicle travelling way below the speed limit;
- There was no evidence of suspicious posture/actions of the accused when he was driving;
- There was no evidence of any fast food, energy/power drinks or coffee; and
- The vehicle did not have a "slept in" or disheveled look.

The accused's level of nervousness, the wad of cash and the accused's record of a drug conviction and involvement in a further drug investigation, through the officer's lens of training and experience, were objectively discernible factors that were verifiable.

"Although few in number, they are cogent and in total amount to more than a generalized suspicion," said Justice Ottenbreit. ***"Taking into account the totality of the circumstances and the threshold of the test … I am satisfied that on this constellation of factors there was a reasonable possibility that [the accused] was connected to a drug-related offence. Put another way, the constellation of factors was capable of supporting a logical inference of drug-related criminal behaviour by [the accused]."***

The trial judge did not err in finding reasonable suspicion and the accused's appeal was dismissed.

Complete case available at www.canlii.org

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