JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

"Many people stopped by a police officer will feel compelled to remain and answer questions, regardless of the circumstances. … Informing a person that their participation is voluntary may not be sufficient on its own and additional steps may need to be taken to ensure the person does not feel compelled to cooperate."

Foreword

BC Provincial Policing Standards

BCPPS 6.2 Police Stops

BC RELEASES STANDARDS ON POLICE STOPS

British Columbia's Director of Police Services has released new Provincial Policing Standards promoting unbiased policing. The Foreword to the Standards states the Director has implemented them, which take effect **January 15, 2020**, to address the police practice of "street checks" and the over representation of Indigenous persons and racial minorities amongst those street checked.

"The term police stops is intended to refer to any interaction between a police officer and a person that is more than a casual conversation and which impedes the person's movement," states the foreword. *"A stop may include a request or demand for identifying information depending on the circumstances. … Officers are not permitted to request or demand, collect, or record a person's identifying information without a justifiable reason."*

The Standards will *"also require police agencies to provide written direction to police officers regarding interactions that may result in a request for a person to voluntarily provide identifying information. The officer must reasonably believe there is a public safety purpose or objective they are attempting to address, and the officer must explain the reason to the person. It is also the responsibility of the officer to take steps to ensure that the person understands their right to not answer questions and to walk away."*

This is a work in progress and further Standards are yet to be completed. Section 6.2.1 **Promotion of Unbiased Policing - Police Stops** is available here.

Highlights In This Issue

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Advanced Police Training at the Justice Institute of BC

Looking to refresh or develop your current skills? The JIBC's Advanced Training Program provides in-depth development opportunities for law enforcement officers. Some of our courses involve training in traditional and online investigations; patrol operations, as well as surveillance techniques and developing leadership skills. Sworn municipal officers, RCMP, peace officers, and other law enforcement officers (by approval) are encouraged to register.

Upcoming Courses for 2019

- ☑ **Standard Field Sobriety Training** @ New West Campus: November 18-21
- ☑ **Major Crimes Investigations** @ New West Campus: November 18-22
- ☑ **Field Trainers** @ New West Campus: November 19-20
- ☑ **Field Trainers** @ New West Campus: November 21-22
- ☑ **Intoximeter Training** @ New West Campus: November 25-29
- ☑ **Standard Field Sobriety Training** @ New West Campus: December 9-12

Advanced Police Training Contact Information

advancedpolicetraining@jibc.ca

604-528-5761

2019 Course Calendar here

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.

Bring your brain to work: using cognitive science to get a job, do it well, and advance your career.

Art Markman.

Boston, MA: Harvard Business Review Press, 2019.

HF 5381 M268 2019

Helping people change: coaching with compassion for lifelong learning and growth.

Richard E. Boyatzis (PhD), Melvin Smith (PhD), & Ellen Van Oosten (PhD).

Boston, MA: Harvard Business Review Press, 2019.

BF 637 P36 B69 2019

The identity trade: selling privacy and reputation online.

Nora A. Draper.

New York, NY: New York University Press, 2019.

HD 9696.8 U62 D73 2019

Inquiry and research: a relational approach in the classroom.

Michelle Reale.

Chicago, IL: ALA Editions, 2019.

ZA 3075 R43 2019

A mindfulness-based stress reduction workbook.

Bob Stahl, PhD, Elisha Goldstein, PhD; foreword by Jon Kabat-Zinn, PhD; afterword by Saki Santorelli, EdD.

Oakland, CA: New Harbinger Publications, Inc., 2019.

RA 785 S73 2019

Nobody's victim: fighting psychos, stalkers, pervs, and trolls.

Carrie Goldberg with Jeannine Amber.

New York, NY: Plume, 2019.

HQ 1237 G63 2019

Overcoming everyday racism: building resilience and wellbeing in the face of discrimination and microaggressions.

Susan Cousins with Cheryl Hill.

London: Jessica Kingsley Publishers, 2019.

E 184 A1 C68 2019

Risk assessment: tools, techniques, and their applications.

Lee T. Ostrom & Cheryl A. Wilhelmsen.

Hoboken, NJ : John Wiley & Sons, Inc., 2019.

HM 1101 O88 2019

The rules of security: staying safe in a risky world.

Paul Martin.

Oxford: Oxford University Press, 2019.

HV 7431 M37 2019

See what you made me do: power, control and domestic abuse.

Jess Hill.

Carlton, VIC: Black Inc., 2019.

HV 6626.23 A8 H55 2019

Talking to strangers: what we should know about the people we don't know.

Malcolm Gladwell.

New York, NY: Little, Brown and Company, 2019.

HM 1106 G58 2019

Trauma-sensitive mindfulness : practices for safe and transformative healing.

David A. Treleaven; foreword by Willoughby Britton.

New York, NY: W.W Norton & Company, 2018.

RC 531 T74 2018

Treating addiction: a guide for professionals.

William R. Miller, Alyssa A. Forcehimes, & Allen Zweben.

New York, NY: The Guilford Press, 2019.

RC 564 M546 2019

Wellbeing at work: how to design, implement and evaluate an effective strategy.

Ian Hesketh & Cary Cooper.

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

HF 5548.85 C657 2019

SHARE IT. DON'T WEAR IT.

IT'S TIME TO SPEAK UP ABOUT MENTAL HEALTH.

AMBULANCE PARAMEDICS OF BRITISH COLUMBIA | BC EMERGENCY HEALTH SERVICES | BC MUNICIPAL CHIEFS OF POLICE | BRITISH COLUMBIA POLICE ASSOCIATION | BRITISH COLUMBIA PROFESSIONAL FIRE FIGHTERS ASSOCIATION | CANADA BORDER SERVICES AGENCY | FIRE CHIEFS' ASSOCIATION OF BC | FIRST NATIONS EMERGENCY SERVICES SOCIETY OF BRITISH COLUMBIA | GREATER VANCOUVER FIRE CHIEFS ASSOCIATION | PROVINCE OF BC | ROYAL CANADIAN MOUNTED POLICE | TRANSIT POLICE | VOLUNTEER FIREFIGHTERS ASSOCIATION OF BC | WORKSAFEBC

BCFirstRespondersMentalHealth.com

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

www.BCFirstRespondersMentalHealth.com

POLICING ACROSS CANADA: FACTS & FIGURES

According to a recent report released by Statistics Canada, there were **68,562** active police officers across Canada in 2018. This represented a decrease of **-463** officers from the previous year. Ontario had the most police officers at **25,327**, while the Yukon had the least at **132**. With a national population of **37,058,856**, Canada's average cop per pop ratio was **185** police officers per 100,000 residents.

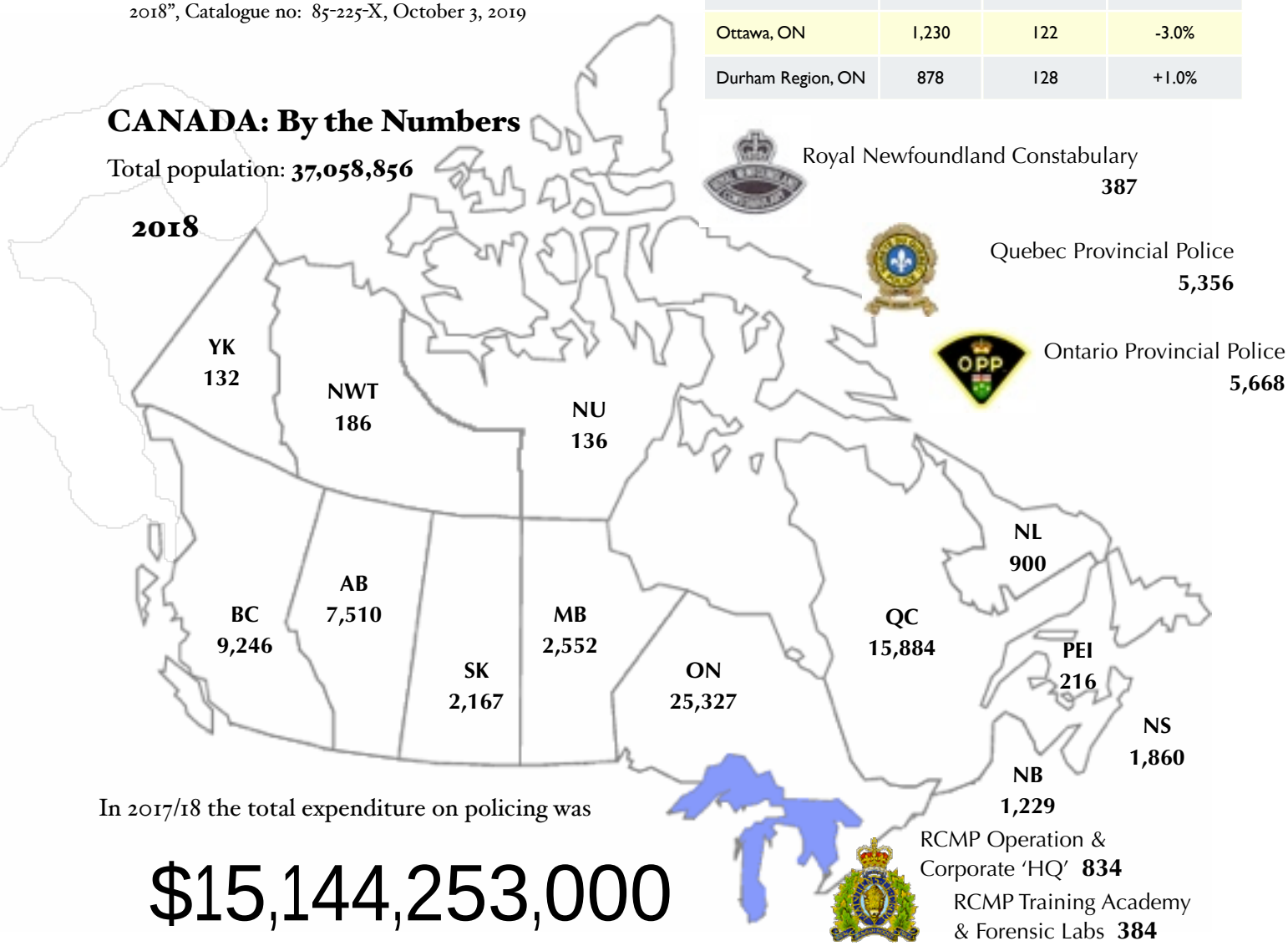
Source: Statistics Canada, "Police Resources in Canada, 2018", Catalogue no: 85-225-X, October 3, 2019

Canada's Police Officers by City - Top 10			
CMA	Officers		% Change
	Number	per 100,000	2017>2018
Toronto, ON	4,923	167	-8.0%
Montreal, QC	4,532	223	-3.0%
Calgary, AB	2,006	153	-11.0%
Peel Region, ON	2,004	143	0.0%
Edmonton, AB	1,882	187	+4.0%
York Region, ON	1,505	131	-6.0%
Winnipeg, MB	1,383	184	-3.0%
Vancouver, BC	1,341	198	+1.0%
Ottawa, ON	1,230	122	-3.0%
Durham Region, ON	878	128	+1.0%

CANADA: By the Numbers

Total population: **37,058,856**

2018



Royal Newfoundland Constabulary **387**

Quebec Provincial Police **5,356**

Ontario Provincial Police **5,668**

In 2017/18 the total expenditure on policing was

$15,144,253,000

RCMP Operation & Corporate 'HQ' **834**

RCMP Training Academy & Forensic Labs **384**

2018 FAST FACTS

- On the snapshot day of May 15, 2018 there were **68,562** police officers in Canada. There were an additional **26,851** civilians, **2,539** special constables and **1,660** recruits. There were **2.2** officers for every civilian employed.
- Nova Scotia had the highest provincial rate of police strength at **194** officers per 100,000 residents (cop to pop ratio) followed closely by Manitoba and Quebec both at **189** officers per 100,000. The Northwest Territories had the highest territorial cop to pop ratio at **416** officers per 100,000.
- **55%** of police officers were **40** years of age or older.
- **62%** of OPP officers were over the age of **40**.
- Officers over the age of **50** accounted for **18%** of officers compared to **15%** in 2012.
- For municipal police services serving a population of 100,000 or more, Montreal, QC had the highest police strength at **223** officers per 100,000. This was followed by Victoria, BC (**215**) and Halifax, NS (**210**). Richelieu-Saint-Laurent, QC had the lowest police strength at **100** officers per 100,000.
- In 2017/2018 the average salary for a police officer was **$99,298**. The average salary reported by the OPP was **$102,821** while the RCMP reported an average salary of **$99,082**. Municipal police services serving a population of 100,000 residents or more reported an average salary of **$101,112** while small or medium municipal police services was **$99,931**.
- Of the officers hired, **61%** were experienced police officers while **39%** were recruits.
- BC had the highest net gain of police officers in 2017/2018 at **+247** followed by Alberta (**+220**), Quebec (**+101**) and Saskatchewan (**+44**). Ontario had the highest net loss at **-175** officers followed by New Brunswick (**-42**), Prince Edward Island (**-10**) and Manitoba (**-5**).
- Ontario spent the most money on policing (**$5.720B**) followed by Quebec (**$2.810B**), BC (**$1.869B**) and Alberta (**$1.726B**). RCMP HQ, Training Academy and forensic labs cost **$1.618B**.

Top 10 CMA Retirement Eligible Municipal Police Services

Municipal Police Service	Eligible to Retire %
St. John's, NL	20%
Codiac Region (Moncton) NB	20%
Montreal, QC	17%
Halifax Regional, NS	16%
Delta, BC	13%
Levis, QC	13%
Chatham-Kent, ON	12%
Guelph, ON	10%
Kelowna, BC	10%
Langley Township, BC	10%
Vancouver, BC	10%

RETIREMENT

At the end of the 2017/2018, **11%** of police officers were eligible to retire. Nova Scotia and the Yukon had the highest proportion of officers that could retire at **18%**. This was followed by Prince Edward Island (**17%**), and both Newfoundland and Labrador, and New Brunswick at **16%**. Forty percent (**40%**) of officers at RCMP Headquarters, the Training Academy and forensic labs could retire.

RCMP Officers by Type of Policing - Canada 2018 (numbers do not include members at HQ & Training Academy)														
Level / Region	BC	AB	SK	MN	ON	QC	NB	NS	PEI	NL	YK	NWT	NU	Total
Contract	5,855	2,795	1,091	867	-	-	689	856	98	439	118	168	122	13,098
Federal & Other	819	425	-	128	1,709	912	117	125	22	74	14	18	14	4,377
Total	6,674	3,220	1,091	995	1,709	912	806	981	120	513	132	186	136	17,475

GENDER

There were **14,943** female officers on May 15, 2018 accounting for **22%** of all officers, or about 1 in 5. This was up +**196** female officers from 2017. The Royal Newfoundland Constabulary reported the highest proportion of female officers at **29%**. The RCMP, Ontario Provincial Police and the municipal police services each reported **22%** of their officers as female while First Nation self-administered services accounted for **14%** 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
Montreal, QC	33
St. John's, NL	29
Coquitlam, BC	28
Terrebonne, QC	28
Kelowna, BC	27
Quebéc, QC	27
Langley Township, BC	26
Regina, SK	25
Roussillon, QC	25
Vancouver, BC	25
Victoria, BC	25

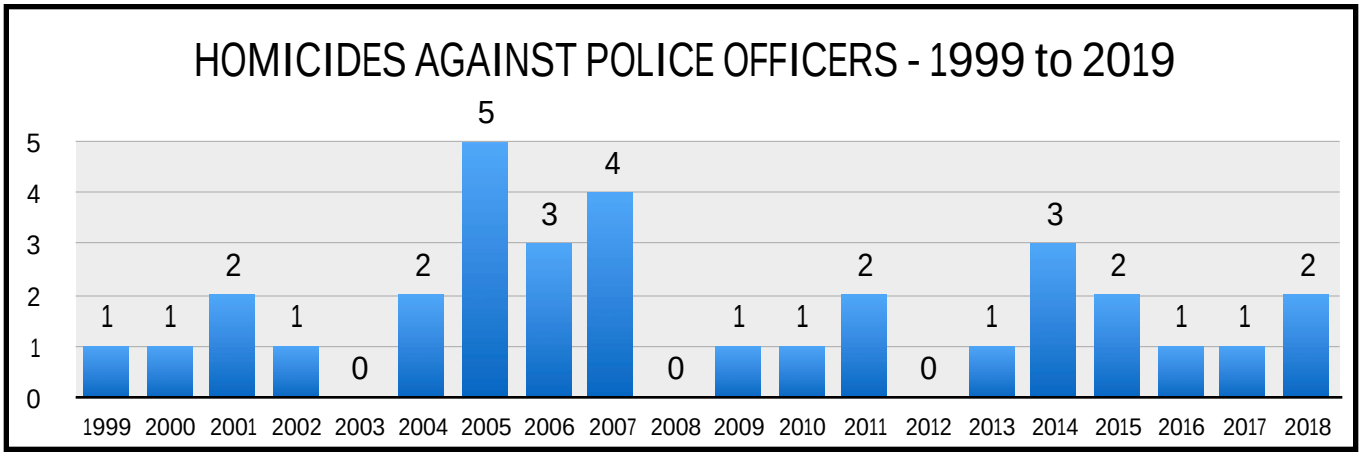
HOMICIDES OF POLICE OFFICERS

There were a total of **148** homicides of police officers from 1961 to 2018. That represents an average of five (5) homicides every two (2) years. Ontario lost the most officers (**48**) followed by Quebec (**43**) and the Prairies (**30**). Atlantic Canada lost **13** officers during this same time period followed by BC (**11**) and the Territories (**3**).

ASSAULTS AGAINST PEACE OFFICERS

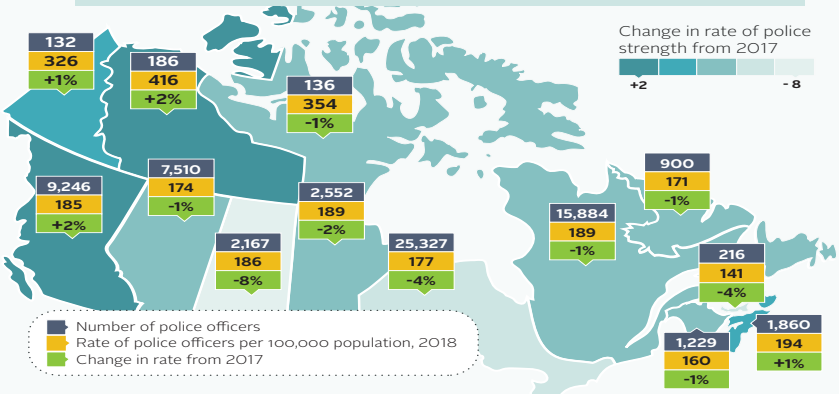
According to Statistics Canada there were **11,627** assaults against peace officers in 2018. This is from **10,965** from 2017, an increase of **662** assaults. This increase represents a **+5%** change over 2017.

Of the **11,627** assault against peace officer offences reported in 2018 only **45** were concluded as unfounded. In 2017 there were **11,024** reports with **59** unfounded occurrences. Of the assaults against peace officers, **678** were reportedly committed by youth in 2018, down from **701** reported in 2017. (Source: Statistics Canada, 2019, "Police-reported crime statistics in Canada, 2018, Catalogue no. 85-002-X,released on July 22, 2019.)



POLICE PERSONNEL AND EXPENDITURES IN CANADA, 2018

As of May 15, 2018, there were **68,562 police officers** in Canada, **463 fewer than in 2017.** This represents a rate of police strength of **185 officers per 100,000** population, and marks a decline of 2% from the previous year.[1]

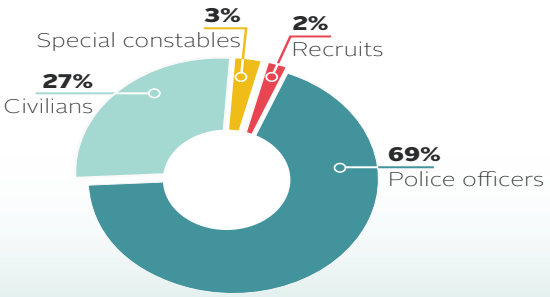


Police services across Canada in 2018

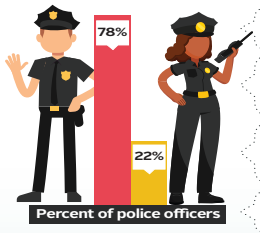
- 36 First Nations self-administered police services
- 141 Municipal stand-alone police services
- 3 Royal Newfoundland Constabulary (RNC) detachments
- 180 Ontario Provincial Police (OPP) detachments
- 87 Sûreté du Québec (SQ) detachments
- 675 Royal Canadian Mounted Police (RCMP) detachments

ACROSS CANADA, POLICE SERVICES RECEIVED 12.8 MILLION CALLS FOR SERVICE

Police personnel



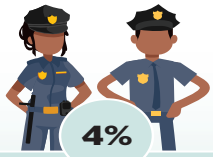
Women in policing



- There were **196 more female** police officers than in 2017
- **15%** of commissioned officers and **19%** of non-commissioned officers are female
- Women accounted for **71%** of civilian positions in police services
- **36%** of special constables and **24%** of recruits are female

8%

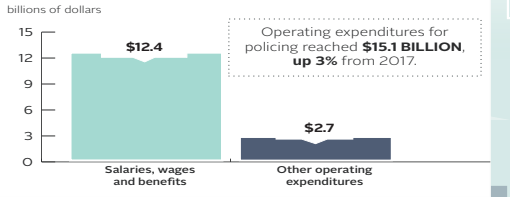
of all police officers in Canada self-identified as belonging to a **visible minority** group



4%

of police officers self-identified as **Indigenous**

Police operating expenditures



Operating expenditures for policing reached **$15.1 BILLION**, **up 3%** from 2017.

The average police officer salary in 2018 was just over **$99,000**.

Police operating and capital expenditures

Police services across Canada spent **$380.0 million** on **Information Technology** (IT) operations and **$284.2 million** on **police equipment**

- Radios: **$193.0 million**
- Software, applications and computer systems: **$146.7 million**
- Other telecommunication devices: **$85.4 million**
- Computers and hardware: **$77.7 million**

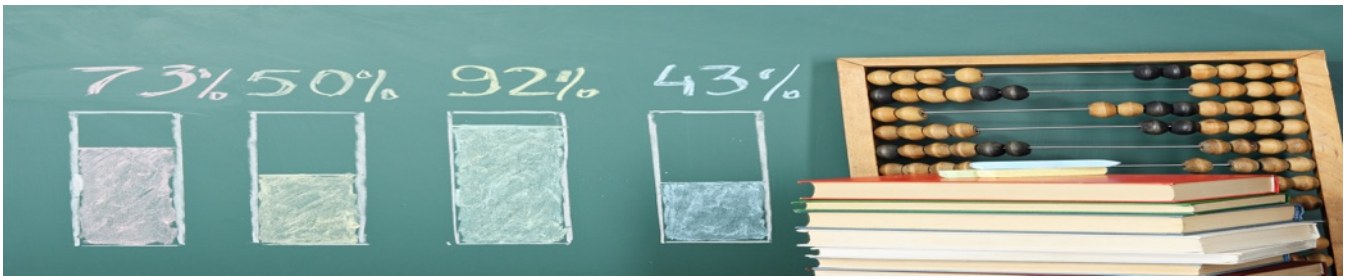
Catalogue number: 11-627-M **ISBN number:** 978-0-660-2193-6

1 Canada includes personnel from the Royal Canadian Mounted Police operation and corporate headquarters, training academy depot division and forensic labs. This is not represented on the map.

Note: data on police personnel, women in policing, visible minority, Indigenous people are based on a "snapshot date" of May 15, 2018, while the other data on this infographic represent the calendar year ending December 31, 2017 (or March 31, 2018 as some police services operate on a fiscal year basis). Percentages may not add up due to rounding.

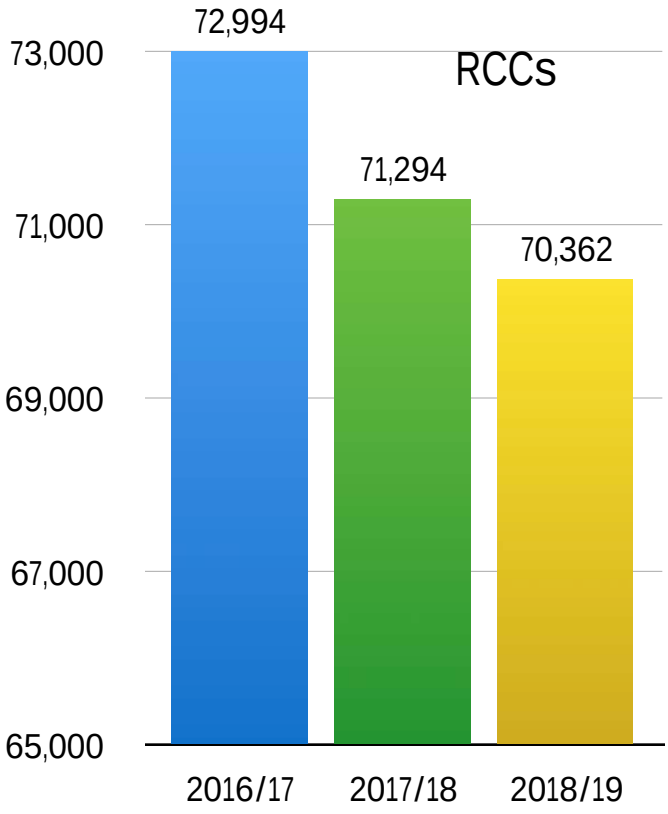
Definitions for the different police personnel and police services used in this infographic, can be found in the Juristat article

Source: Statistics Canada, Canadian Centre for Justice Statistics, Police Administration Survey, 2018
"Police resources in Canada, 2018 ". Juristat. Statistics Canada Catalogue no. 85-002-X



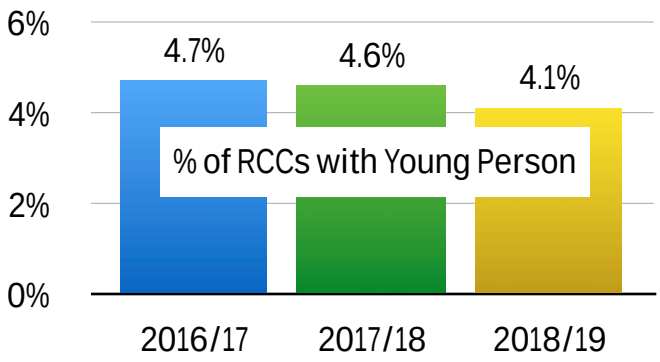
BC PROSECUTION SERVICE ~ANNUAL REPORT~

70,362 The number of Reports to Crown Counsel (RCCs) received by the BC Prosecution Service from investigative agencies in fiscal 2018/19. These RCCs represented a total of **73,412** accused persons. This was the third year in a row for which there was a decline in the number of RCCs received.

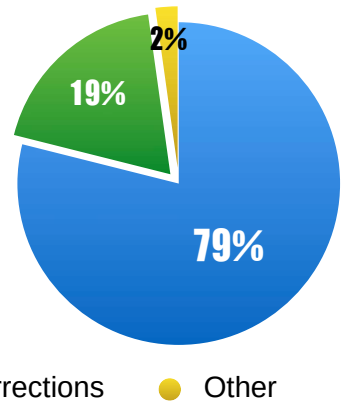


Source: BC Prosecution Service, "Annual Report - 2018/19", accessed October 11, 2019.

Young Persons . . . as a percentage of overall accused named in an RCC submitted to the BC Prosecution Service has declined over the last three years.

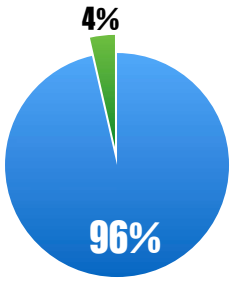


Police ... were the investigative agency most likely to submit an RCC to the BC Prosecution Service. In fiscal 2017/18, police agencies submitted **55,528** RCCs. This was followed by BC Corrections (**13,279**) and other investigative agencies such as wildlife conservation or financial regulators (**1,555**).



4.1%

The percentage of accused persons that were young persons (ages 12-17). In fiscal 2018/19, the BC Prosecution Service approved to court **59,565** accused persons. This consisted of **57,427** adults and **2,138** young persons.

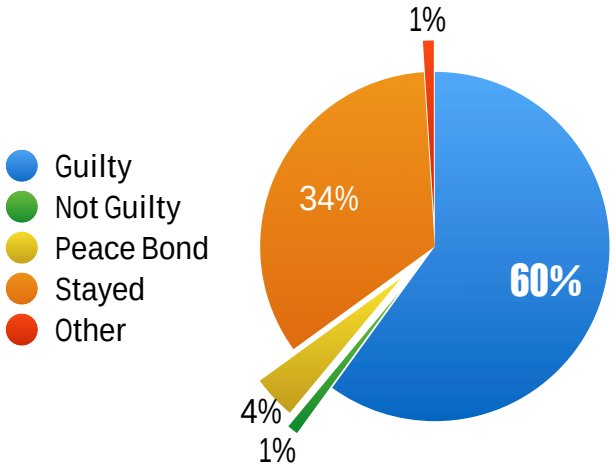


85%

... was the BC Prosecution Services overall charge approval rate for RCCs submitted by investigative agencies. Data extracted from the **69,734** people named in RCCs for which their was a final charge assessment decision made in fiscal 2018/19 resulted in an **85%** charge approval rate. **13%** resulted in no charges and **2%** were referred to alternative measures.

60%

The percentage of prosecutions resulting in a conviction by way of a guilty plea or guilty verdict at trial. Of the **59,821** prosecutions concluded in 2018/19, **60%** had a guilty finding, **1%** were not guilty, **4%** entered into a recognizance to keep the peace, **34%** had their charges stayed, and **1%** were concluded otherwise, such as a finding of unfit to stand trial or not criminally responsible due to a mental disorder.

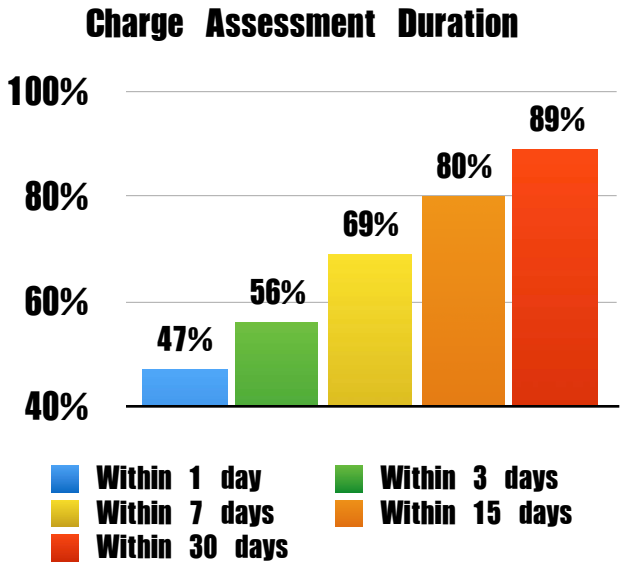


Unreasonable Delay

... was the most common reason why a prosecution was concluded with a Judicial Stay of Proceedings. In fiscal 2018/19 there was a total of **14** prosecutions judicially stayed for a variety of legal reasons. Of those, **9** were stayed because of delay, up from **8** in fiscal 2016/17 and 2017/2018. About half of stays of proceedings directed by the BC Prosecution Service resulted in other consequences for the accused including referrals to alternative measures, a peace bond or a plea on another file.

Within 3 Days

The time it takes for BC Crown Counsel to undertake a charge assessment in most cases. From the date an RCC is received until Crown Counsel makes a charge decision, **56%** of cases take three days or less. **69%** of decisions are made within 7 days, **80%** within 15 days and **89%** within 30 days.



93 days

The median number of days (net of bench warrant days) it takes for a file to conclude from the time an information was sworn or filed (a charge laid) to the date that all charges on the file have a final disposition.

CROWN MUST PROVE REPLICA GUN NOT A FIREARM

R. v. Eyre, 2019 BCCA 333

The accused was arrested by police on outstanding arrest warrants. In conducting a search incidental to arrest, a police officer found an Umarex PX4 Storm pellet pistol tucked into the accused's waistband. Police also located about two grams of methamphetamine in a pants pocket. Police seized the handgun and methamphetamine. Upon a closer examination of the pellet pistol, the officer noted it looked like a real Beretta PX4 handgun. At the time of this arrest, the accused was prohibited from possessing any firearms, weapons or prohibited devices, which included a replica firearm. One of the prohibition orders imposed was a lifetime ban. Among other things, the accused was charged with possessing a prohibited device (a replica handgun) while prohibited from doing so and possessing methamphetamine.

British Columbia Supreme Court

A weapons expert provided a written opinion as to whether the device seized was appropriately described as a **"replica"** of an actual handgun. The expert's report referenced the RCMP **"Firearms Reference Table"** which included excerpts related to the Beretta PX4 Storm semi-automatic handgun and the Beretta PX4 Storm CO2 powered handgun manufactured by Umarex. The report described how the expert physically examined the pellet gun but the expert did not test fire it. The expert stated that ***"this pellet gun is classified as exempt from being a firearm in Canada due to the muzzle velocity of the pellets"***, but the expert did not say whether the pellet gun was or was not a firearm as defined in s. 2 of the *Criminal Code*.

The accused agreed that the pellet gun closely resembled a Beretta PX4 Storm. He testified that, prior to being arrested, he had shot at some tin cans and the pellets penetrated the cans. He said that the pellets could possibly break someone's skin and thereby injure them. He also said the pellet gun's muzzle velocity was 380 feet/second but did not provide the manufacturer's specifications.

The judge concluded that the pellet gun was not capable of causing serious bodily injury or death, and therefore was a replica firearm. In his view, there was no evidence the pistol was a **"firearm"** even though there was a warning stamped on it that read: **"Misuse or careless use may cause serious injury or death."** The accused was convicted of possessing a prohibited device—a "replica handgun"—while prohibited from doing so and for possessing methamphetamine.

British Columbia Court of Appeal

The accused appealed his conviction for possessing a replica firearm arguing, in part, that the Crown failed to prove the pellet gun was a *"replica firearm"* as defined in s. 84(1) of the *Criminal Code*. He submitted that the pellet pistol was a *"firearm"* as defined in the s. 2.

BY THE BOOK:

s. 2 *Criminal Code*

"firearm" means a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm.

s. 84(1) *Criminal Code*

"replica firearm" means any device that is designed or intended to exactly resemble, or to resemble with near precision, a firearm, and that itself is not a firearm, but does not include any such device that is designed or intended to exactly resemble, or to resemble with near precision, an antique firearm.

Replica Firearm

In this case, the Crown was required to prove that (1) the pellet gun resembled with near precision an actual firearm and (2) the pellet gun was not itself an actual firearm.

"To prove a particular pellet gun is a firearm the Crown will often tender evidence from an expert who test-fired that gun to establish that it has a muzzle velocity sufficient to cause serious bodily injury or death," said Justice Frankel, speaking for the Court of Appeal. ***"It is open to the Crown to prove a pellet gun is not capable of causing serious bodily injury or death other than by tendering opinion evidence from an expert who test-fired that gun."*** However, in this case, the Crown sought to prove the pellet gun was not capable of causing serious bodily injury or death by means of an expert's report based on information from the Firearm Reference Table (FIR). The expert did not opine on the pellet gun's actual muzzle velocity or on its capability to cause harm:

> [The expert's] statement with respect to the pellet gun being "classified exempt from being a firearm … due to the muzzle velocity of the pellets" is no more than a statement that the gun is "deemed" not to be a firearm for certain purposes by reasons of s. 84(3)(d). ... [A] pellet gun exempted under s. 84(3)(d) can still be a firearm for other purposes. Indeed, the FTR excerpt for the Umarex pellet gun supports the view that the pellet gun seized from [the accused] is a firearm as defined in s. 2. [para. 35]

Since the expert's report was silent about the pellet gun's capability to cause harm, the trial judge's finding that it was a replica firearm (and not an actual firearm) was unreasonable. The apparent incongruous result in this case of an acquittal—since the accused was prohibited from possessing both firearms and replica firearms—turned ***"on how the Crown chose to word the charge and the evidence it tendered in support of that charge."***

The accused's appeal was allowed, his conviction was set aside and a new trial was ordered.

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

PROVING A PELLET GUN IS A FIREARM

The focus on whether a pellet gun meets the definition of a "firearm" depends on it **nature** (as a barrelled object) and its **capability** (to cause serious bodily injury or death), not the intent of its possessor nor the use made of it. Some barrelled objects are deemed not to be firearms if the shot, bullet or other projectile does not exceed a muzzle velocity of 152.4 m/s (500 ft/s). However, this velocity threshold deeming a barreled object as non-firearms is only in relation to specific offences concerning the strict licensing regime of the *Firearms Act* and *Criminal Code* (eg. unauthorized possession, trafficking, importing/exporting, failing to report or false reporting of lost, found, or destroyed firearms). Other offences such as carrying a concealed weapon (s. 90), careless handling (s. 86), and possession for a dangerous purpose (s. 88) are not subject to the 152.4 m/s threshold.

R. v. Dunn, 2013 ONCA 539 aff'd 2014 SCC 69 the Ontario Court of Appeal described three different categories (or groups) of barrelled objects

1. **Group One**: Barrelled objects shooting a projectile with a velocity of less than 214 ft./s. (or 246 ft./s., using the V50 standard) are not firearms because they are not capable of serious injury or death; these objects will only be considered weapons, and thus fall within a prohibition such as the concealed weapon prohibition in s. 90, if they meet paras. (a) or (b) in the definition of "weapon".

2. **Group Two**: Barrelled objects shooting a projectile with a velocity of more than 214 ft./s. (or 246 ft./s., using the V50 standard) are firearms, because they are capable of causing serious injury or death, whether or not they also meet paras. (a) or (b) in the definition of "weapon"; these weapons will fall within a prohibition such as that found in s. 90. Nevertheless, they will not be subject to the stricter licensing regime in the Criminal Code and the Firearms Act if they fall within one of the exemptions in s. 84(3), for example, if the velocity of the projectile does not exceed 500 f./s.

3. **Group Three**: Barrelled objects shooting a projectile with a velocity of more than 500 f./s. These objects fall within the definition of firearm for all purposes of the Criminal Code and the Firearms Act and must be licensed accordingly. Some airguns and most powder-fired bullet-shooting guns will fall within this regime. At a minimum, ... Group Three objects do not need to meet the paras. (a) or (b) definition of weapon to be deemed to be weapons. [paras. 44-46]

INVENTORY SEARCH LAWFUL: EVIDENCE ADMITTED

R. v. Knott, 2019 MBCA 97

The accused, who was wanted on outstanding warrants, and another man were observed by an off-duty police officer in a restaurant. The off-duty officer called on-duty officers who attended and arrested the accused. A bag on the seat beside the accused was searched incident to arrest. In the bag, police found a loaded handgun, a large amount of methamphetamine, marihuana, cash, drug paraphernalia and the accused's identification cards. The police had prior information connecting the accused with a white Ford F150. A similar truck was in the restaurant's parking lot and keys to the truck were with the accused when he was arrested. The truck's licence plate belonged to a rental company but none of the expected rental vehicle identification features were noted on the truck. The police seized and searched the truck before it was towed to a secure compound.

Manitoba Provincial Court

The police said the truck was seized for further investigation and searched before being towed to ensure there were no other weapons, determine ownership and inventory its contents. More drugs, firearms, and identification of the accused were found in the truck, which were later seized pursuant to a search warrant.

The judge ruled the seizure and search of the truck did not violate s. 8 of the *Charter*. In the judge's view, police had authority under Manitoba's *Highway Traffic Act* to seize the vehicle and inventory its contents. The seized items found inside the truck were admitted and the accused was convicted of numerous firearm and drug offences along with three counts of possessing firearms while prohibited. He was sentenced to 11 years' incarceration.

WHAT POLICE FOUND

According to a Winnipeg Police media release at the time of this event, police seized the following items:

- $9814.50 Canadian currency
- 0.39 grams of an unknown substance
- 2 magazines - 1 loaded with Luger 9mm ammunition
- 56.4 grams Marijuana
- 63.38 grams of powder cocaine
- 79.3 grams of Methamphetamine
- A black "bear claw" shredding tool
- A box of shotgun shells
- A hatchet
- A Sturm Ruger, Mini 30, "Ranch Rifle" with a magazine loaded with three rounds of ammunition
- An SKS style semi-automatic rifle
- Gun Holster
- Loaded 9mm Sawed-off Semi-Automatic Rifle
- Rifle ammunition
- Score Sheets
- Smith and Wesson Model 659 handgun
- Two "banana clip" style high capacity magazines, one loaded with ten to twelve rounds of ammunition.
- Two Cell Phones
- Weigh digital scale
- Winchester Air Pistol

Manitoba Court of Appeal

The accused argued, among other things, that the trial judge erred in failing to find a s. 8 *Charter* breach and in not excluding the seized items from the truck as evidence under s. 24(2).

Justice Spivak, speaking for the unanimous Court of Appeal, found the trial judge did not err in concluding that the accused's s. 8 rights were not violated:

> The trial judge held that the police had authority pursuant to The Highway Traffic Act, CCSM c H60 (the Act), to seize and search the truck. Section 242 of the Act permits detention of a vehicle when an officer has reason to believe that an offence contrary to the Act or the Criminal Code has been committed in

"Having assumed legal custody of the truck, the police were justified in inventorying its contents."

> relation to the vehicle. The evidence of the police at trial was that the truck needed to be seized for further investigation, given the firearms and drugs found in the bag in the accused's possession, and to ascertain the lawful owner of the vehicle. We agree with the trial judge that it would have been unreasonable for the police to leave the truck, associated with the accused who was in possession of a handgun and drugs, in a public parking lot. Having assumed legal custody of the truck, the police were justified in inventorying its contents. [references omitted, para. 7]

The accused's appeal against conviction was dismissed.

Complete case available at www.canlii.org

REASONABLE SUSPICION MORE THAN SINCERELY HELD SUBJECTIVE BELIEF

R. v. Sahouli, 2019 PECA 14

Police began a drug trafficking investigation, code named "Project Lurid". It started with informer tips. The drug trafficking operation was fairly high level and involved moving drugs between Montreal and the Maritimes. During the investigation the police obtained *Criminal Code* judicial authorizations, including tracking warrants (s. 492.1), data number recorders (s. 492.2), general warrants (487.01) and a wiretap authorization. When police raided an apartment where the accused was present, they seized, among other things, $44,840 in cash, marihuana, ammunition, numerous cell phones, a money counter, and zip lock bags. As a result of the investigation, The accused was charged with conspiracy to traffic in a controlled substance. Others were charged as well.

Prince Edward Island Supreme Court

The accused sought to excise all evidence obtained from two data number recorder warrants because, he argued, the requisite reasonable suspicion on which they could issue was not met. Further, he submitted that once the information from the data number recorder warrants was excised from the wiretap authorization, it too should not have been granted.

The judge dismissed the applications to exclude the evidence from the two data number recorder warrants. In assessing the reasonable suspicion standard, the judge referred to dictionary definitions that included **"reasonable"** as meaning ***"not irrational or absurd"*** and the word "suspicion" as meaning ***"1) imagination of something that is possibly likely, 2) a faint belief that something is the case, 3) a notion, 4) an inkling, 5) a hint, 6) an intuitive feeling."*** He also described the reasonable suspicion standard ***"as a hunch, even a hunch based on experience".***

The judge also found that the information in the ITO was credible, compelling and corroborated. He described this as, in part, a ***"hindsight based test."*** The informers were credible (the information was 100% accurate), the information was compelling (the police found the drugs as expected) and the information was corroborated (every police source or informer agreed the accused and others were trafficking in marihuana). The accused was convicted and he was sentenced to two years in prison.

"Reasonable grounds to suspect means reasonable suspicion. Reasonable suspicion is not the same thing as reasonable grounds to believe. Both concepts must be grounded in objective facts and stand up to independent scrutiny. However reasonable suspicion is a lower standard as it engages reasonable possibility rather than probability."

Prince Edward Island Court of Appeal

The accused contended, among other things, that the trial judge erred in his application of the "reasonable suspicion" standard. He suggested that the judge also used hindsight reasoning in finding the ITO established reasonable suspicion.

Reasonable suspicion

Justice Mitchell, authoring the opinion for the Court of Appeal, first noted that ***"a justice may issue a warrant authorizing a peace officer to obtain transmission data, commonly called data number recorder, where a justice is satisfied on information on oath that there are reasonable grounds to suspect that the transmission data will assist in the investigation of an offence."***

In Justice Mitchell's view, the trial judge clearly misunderstood the application of the reasonable suspicion test. ***"Reasonable grounds to suspect means reasonable suspicion,"*** said Justice Mitchell. ***"Reasonable suspicion is not the same thing as reasonable grounds to believe. Both concepts must be grounded in objective facts and stand up to independent scrutiny. However reasonable suspicion is a lower standard as it engages reasonable possibility rather than probability."***

The trial judge incorrectly interpreted reasonable suspicion. ***"The law is quite clear that reasonable suspicion is not simply a suspicion nor is it a hunch, a notion or a feeling,"*** said Justice Mitchell. ***"It means … 'something more than a mere suspicion and something less than a belief based on reasonable and probable grounds.' A sincerely held subjective belief is not sufficient. A reasonable suspicion must be supported by factual elements which can be adduced in evidence and permit an independent judicial assessment."***

Hindsight Reasoning Not Part Of Analysis

In determining whether the information in an ITO is credible, compelling and/or corroborated, an after-the-fact analysis is not appropriate. ***"The fruits of a search can never be used, ex poste facto, to justify the search,"*** said Justice Mitchell. ***"The grounds for the search must exist before the search is carried out, and in this case, the reasonable suspicion must exist prior to the data number recorder warrant being issued. The trial judge's focus ought to have been on whether the reasonable suspicion existed before the search was carried out, not afterwards."***

The accused's appeal was allowed and the matter was sent back to Prince Edward Island Supreme Court for a new trial. At the new trial, a judge can rule on whether the information obtained from the two data number recorders should be excised from the wiretap authorization and whether the evidence obtained from the wiretap authorization is admissible.

Complete case available at www.canlii.org

Editor's Note: Additional details taken from *R. v. Sahouli*, 2018 PECA 8

Ex Post Facto (Latin): after the fact; done, made, or formulated after the fact.

"The law is quite clear that reasonable suspicion is not simply a suspicion nor is it a hunch, a notion or a feeling. It means … 'something more than a mere suspicion and something less than a belief based on reasonable and probable grounds.' A sincerely held subjective belief is not sufficient. A reasonable suspicion must be supported by factual elements which can be adduced in evidence and permit an independent judicial assessment."

REASONABLE SUSPICION STANDARD SATISFIED: NO ENTRAPMENT

R. v. Li, 2019 BCCA 344

Police received an anonymous Crime Stoppers tip involving a phone number that the tipster alleged belonged to a dial-a-dope operation. The tipster also stated that the operation involved the sale of cocaine from a tan Honda Odyssey minivan and the vehicle's licence plate number was provided. The officer taking the tip recorded the information on a document. Police database queries related to the phone number were negative. A check of the licence plate number showed it was registered to an Odyssey minivan. A PRIME (Police Records and Information Management Environment) query revealed that the registered owner of the licence plate had an extensive history of suspected drug trafficking through dial-a-dope operations, including several recent reports. Motor vehicle records also revealed that the registered owner had five other vehicles registered in his name. When police placed a call to the phone number it rang twice, then disconnected. The officer recorded on the document that he had a reasonable suspicion that the phone number was a dial-a-dope drug line.

Police subsequently selected the phone number for an attempted undercover drug purchase. An officer called the phone number. It was answered by a man. The officer asked how the man was doing, and he responded that he was "good". The man then asked who was calling, and the officer said it was "J" or "Jen". The man said "Okay". He did not ask any follow up questions, so the officer stated that she wanted "half of soft", a street term for half a gram of powder cocaine. The man said that he could meet her, and they arranged to meet at a supermarket. About half an hour later, they met in the parking lot, and negotiated a purchase of 0.75 grams of powder cocaine for $80. Over the following months, the police made an additional 21 drug purchase transactions as part of their investigation. The accused was involved in 16 of these transactions.

British Columbia Provincial Court

The accused pled guilty to one count of trafficking in cocaine. However, he argued that he was entrapped and that the proceedings should be stayed. The judge agreed and found that when the officer made her initial phone call, the police did not have a reasonable suspicion that the accused was a drug trafficker or that the phone number was affiliated to a dial-a-dope operation. ***"Nothing in the original tip was corroborated or linked by external police investigation,"*** said the judge. ***"While the police may have had a mere suspicion, this is not sufficient. The police did not corroborate the original tip either connecting [the accused] personally with the vehicle or telephone number in the Crime Stopper tip, or connecting the phone number and vehicle or registered owner of that vehicle. The tip contained no other information to corroborate such as names, descriptions, or accents."***

Further, ***"the police did not achieve an objectively reasonable suspicion through investigative steps after calling the phone number and giving the opportunity to commit the offence,"*** said the judge. When the officer called the phone number, she engaged the accused in a criminal transaction for cocaine without taking investigative steps or gaining additional information.***"[The officer's] request for a half of soft was not an investigative step at an opportunity to traffic. It was a request for a particular type and amount of drugs. She engaged in transactional language that only required [the accused] to say yes for the offence to be complete. She offered him an opportunity to traffic by offer without reasonable suspicion."*** As a consequence, a stay of proceedings was entered.

British Columbia Court of Appeal

The Crown challenged the trial judge's ruling on entrapment. The Court of Appeal first reviewed the concept of entrapment. It noted that entrapment can occur in the following ways:

"In summary, the judge erred in requiring specific corroboration of all elements of the tip. Such corroboration was unnecessary. Rather, what was required was that the police had sufficient information to harbour a reasonable suspicion that they were calling a phone number attached to a drug trafficking operation."

1. the authorities provide an opportunity to a person to commit an offence:

    - without a reasonable suspicion the person is already engaged in the particular criminal activity; or
    - the police undertake a *bona fide* investigation directed at an area where it is reasonably suspected that criminal activity is occurring.

2. having a reasonable suspicion, they go beyond providing an opportunity and induce the commission of an offence.

Reasonable Suspicion

In this case, Justice Grobermen, speaking for the Court of Appeal, concluded that the trial judge failed to consider the tip as a whole rather than separating the information into parts. There was no need for the tip to identify the accused personally by name nor were the police required to establish, independently of the tip itself, that the telephone number belonged to a dial-a-dope operation. Rather, it was only necessary that the police establish a reasonable suspicion that the number called was one dedicated to drug trafficking through a dial-a-dope operation given the details of the Crime Stoppers tip and the preliminary information uncovered in police investigations:

> While the Crime Stoppers tip was from an anonymous informant of unknown reliability, aspects of the tip enhanced its credibility. The tip referred to a vehicle that the police were able to connect to a person who appears to have been involved in several dial-a-dope operations. The police were entitled, in the circumstances, to attach considerable weight to the tip. [para. 18]

> In summary, the judge erred in requiring specific corroboration of all elements of the tip. Such corroboration was unnecessary. Rather, what was required was that the police had sufficient information to harbour a reasonable suspicion that they were calling a phone number attached to a drug trafficking operation. [para. 24]

The police officers also operated as a team, rather than as separate individuals, and the officer making the telephone call was entitled to take action based on the advice of her colleagues.

The Appeal Court noted that ***"the reasonable suspicion standard is not an onerous one."*** It is something more than a mere suspicion but less than reasonable and probable grounds. In some cases, the standard has not been met where the police have acted on anonymous tips of indeterminate credibility and no attempt had been made to investigate. In other cases, ***"very limited confirmatory evidence has been held to be sufficient to transform an anonymous tip (or a tip of uncertain credibility) into 'reasonable suspicion'."*** In this case, the Court of Appeal concluded that the reasonable suspicion standard had been satisfied:

> [S]ome details of the tip were confirmed: the correspondence between the licence plate number and the Honda Odyssey, and the apparent involvement of the vehicle's owner with dial-a-dope operations. Those elements of confirmation were sufficient to give the police reasonable suspicion that the number they called was associated with a dial-a-dope operation. [para. 32]

Thus, the police had a reasonable suspicion before providing the accused with the opportunity to sell cocaine to an undercover officer.

Bona Fide (Latin): "good faith"; refers to a quality of genuineness.

A Bona Fide Investigation?

The police were also involved in a *bone fide* investigation in which they could approach a person and attempt to purchase drugs. Here, the police were undertaking a *bona fide* investigation where it was reasonably suspected that criminal activity was occurring. In this case, ***"the police had information that was sufficient to label the telephone number 'suspicious',"*** said Justice Groberman. ***"The limited inquiries made by [the police officer] can properly be characterized as investigative in nature. The actual transaction to purchase the drug occurred later, and only after negotiations at the [supermarket]."***

The Crown's appeal was allowed, the stay of proceedings lifted, and the matter was remitted back to the trial court for sentencing.

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

FURTIVE & FIDGETY MOVEMENTS PROVIDE CIRCUMSTANTIAL EVIDENCE SUPPORTING POSSESSION

R. v. Hebrada-Walters, 2019 MBCA 102

Two police officers conducted a traffic stop on a vehicle in which the accused was in the back seat. As the officers approached the vehicle, they observed the accused fidgeting with his hands on the left side of his body and glancing down to his left side. Despite the officers' warnings to keep his hands up and on the back of the seat in front of him, he continued to drop his left hand towards his waist. Concerned for officer safety, one of the officers pulled the accused from the back seat of the vehicle. As the officer looked back into the vehicle, he saw a handgun on the seat of the vehicle where the accused had been seated. The gun was a 45 calibre Glock handgun. The slide portion of the gun was on the seat and the handle was up, positioned against the back of the seat. A front seat passenger was also found in possession of a handgun. The accused was charged with numerous firearm offences including possessing a loaded restricted firearm, unauthorized possession of a firearm in a motor vehicle, possessing a firearm knowing the serial number had been removed and possessing a firearm while prohibited from doing so.

Manitoba Court of Queen's Bench

The judge found the evidence that the accused was in possession of the 45 calibre Glock handgun ***"clear and overwhelming."*** He stated:

> The testimony of [the officer] setting out [the accused's] furtive glances and fidgeting conduct are consistent with [the officer's] opinion that [the accused] was attempting to access or conceal something while he was being instructed to show his hands. When [the accused] was removed from the vehicle as a result of his failure to comply with the officer's request, the Glock handgun was then plainly seen in the immediate area of where he had been sitting in the vehicle. No other article of any type was present on the seat of the car.
>
> I agree with the Crown's argument that the Glock firearm was in the direct possession of [the accused] and that the essential elements of possession as required by s. 4(3) of the Code, including knowledge, custody and control are established by the evidence beyond a reasonable doubt. [paras. 33-34, 2018 MBQB 6]

The judge rejected the accused's argument that there was a reasonable doubt because no police officer actually saw the Glock in the accused's hands. In doing so, the judge concluded that ***"there [was] no reasonable inference other than guilt on the basis of the evidence here, and the Crown's evidence meets the standard of proof beyond a reasonable doubt."*** The accused was convicted and globally sentenced to six years in prison.

Manitoba Court of Appeal

The accused submitted that the trial judge erred in convicting him because there was no direct evidence of possession and the circumstantial evidence was equally consistent with innocence as it was with guilt.

Justice Pfuetzner, delivering the Appeal Court's opinion, disagreed with the accused. In his view, the trial judge did not err in drawing the inferences he did in finding the standard of proof beyond a reasonable doubt had been met. He also agreed ***"with the trial judge's assessment that the evidence was overwhelming, that there was no reasonable inference other than guilt and that the elements of possession were established beyond a reasonable doubt."***

The accused's appeal against conviction was dismissed.

Complete case available at www.canlii.org

Editor's Note: Additional details taken from *R. v. Hebrada-Walters et al.*, 2018 MBQB 6.

NO COMMON LAW POWER TO ARREST TARGET OF BREACH OF THE PEACE

Fleming v. Ontario, 2019 SCC 45

During a longstanding land dispute between the Crown and the First Nation of Six Nations of the Grand River, Six Nations protestors occupied a piece of land. In the course of the protest, some protesters hung Indigenous flags along the street running in front of the occupied property. The Crown subsequently purchased the piece of land and permitted the protesters to continue to occupy the property. Other groups in the community organized counter-protests against the occupation. Violent clashes between the sides arose. On numerous occasions, the O.P.P. were called in to deal with the violence sometimes using police lines and buffer zones to allow the two groups to demonstrate peacefully near one another.

One day, a counter-protest group held a "flag rally" to protest the land's occupation, the flying of Indigenous flags along the street, and the O.P.P.'s actions. The plan for the flag rally was to march down the street and raise a Canadian flag across the street from the occupied land's front entrance. The O.P.P. were aware of the flag rally and developed an operational plan to ensure public safety while allowing all groups to express themselves peacefully. Protesters would be kept apart and no flag rally participants would be permitted to enter the occupied land. Police informed the organizers of the flag rally that they would not be allowed on occupied land but no police line or buffer zone was put in place on the day of the rally.

On the day of the rally, the plaintiff began walking down the street towards the place where the rally was to be held. He was carrying a Canadian flag on a 40" to 42" wooden pole. As the plaintiff walked on the shoulder of the road, police drove past him. Police turned around and headed towards the plaintiff with the intention of placing themselves between him and the entrance to the occupied land. The plaintiff saw the approaching police vehicles and, to avoid them, moved off the shoulder, down into a grassy ditch, up the opposite side and over a low fence onto the occupied land. Officers exited their vehicles and began yelling various commands at the plaintiff, including "stop" and "return to the shoulder". He did not realize that the officers were speaking to him because he believed he was not doing anything wrong.

The protesters on the occupied land, about 100 meters away, reacted to the plaintiff stepping onto the property. Eight to 10 of them began moving towards the plaintiff's location, some walking and some jogging. None of the protesters were carrying weapons, none uttered any threats and the plaintiff did not say anything to the protesters. With the protesters still 10 to 20 feet away, an officer approached the plaintiff, told him that he was under arrest, took him by the arm and led him back across the fence, off the occupied property. Police

ordered the plaintiff to drop his flag but he refused. The officers then forced him to the ground, took his flag and handcuffed him. He was placed in a transport van, moved to a jail cell and released about 2.5 hours after his arrest. He was charged with obstructing a peace officer by resisting arrest but the charge was withdrawn by Crown some 19 months after it was laid.

Ontario Superior Court of Justice

The plaintiff sued the province of Ontario and seven OPP officers involved in his arrest. He said his left arm was yanked behind his back as he was being handcuffed, causing him severe pain and a lasting injury. He claimed general damages for assault and battery, wrongful arrest, and false imprisonment, as well as aggravated or punitive damages, and damages for breaches to his ss. 2(b), 7, 9, and 15 *Charter* rights.

The trial judge found in the plaintiff's favour. She held that the police had intended to prevent the plaintiff from walking down the street with a Canadian flag and that he was arrested without legal authority. The plaintiff had broken no law prior to his arrest and the police had no power to arrest him to prevent an apprehended breach of the peace. There was no violence or harm to anyone, nor was any breach imminent or substantial. She also found that the officers' concern over the plaintiff's safety had been based not on the actual events of the day, but rather on a generalized concern rooted in past violence. There were less invasive options that could have defused the situation, such as setting up a buffer zone between the plaintiff and the protesters.

The judge concluded that the torts of false arrest, unlawful imprisonment and battery had been made out. She also found the plaintiff's rights under ss. 2(b), 7 and 9 had been violated when the police had unlawfully arrested him and prevented him from attending a political demonstration, but no s. 15 breach had been established. The plaintiff was awarded general damages, special damages, tort damages and *Charter* damages. The defendants were also ordered to pay costs in the amount of $151,000.

DAMAGES AWARDED BY SUPERIOR COURT

- ✓ $80,000 in general damages
- ✓ $10,000 in damages for false arrest, wrongful imprisonment and breach of right to pass
- ✓ $12,986.97 in special damages
- ✓ $5,000 in damages for a s. 2(b) Charter breach.
- ✓ No aggravated or punitive damages.

Total: $107,986.97

Source: Fleming v. Ontario, 2018 ONCA 160

Ontario Court of Appeal

A majority allowed the defendants' appeal, concluding that the police had the authority at common law to arrest the plaintiff for an anticipated breach of the peace. Amongst other things, the majority found the police had been acting in the execution of their duty to keep the peace and protect the public. The protesters rushing towards the plaintiff posed a real risk to his safety, which threatened a breach of the peace. The police were therefore justified in taking action to prevent harm to the plaintiff and a likely breach of the peace. While other options may have been available, there was no need to resort to them if the situation could be easily addressed by removing the plaintiff from the property, especially since alternative measures could have inflamed tensions. The majority set aside the trial judge's award of damages and ordered a new trial on the issue of excessive force.

Justice Huscroft, in dissent, found there was no basis to interfere with the trial judge's conclusion that the officers had not been justified in arresting the plaintiff. In his view, the plaintiff's arrest had not been a valid first resort, even in the face of potential illegal violence, the risk of which was neither imminent nor substantial. The police power

"[A]n act can be considered a breach of the peace only if it involves some level of violence and a risk of harm. It is only in the face of such a serious danger that the state's ability to lawfully interfere with individual liberty comes into play. Behaviour that is merely disruptive, annoying or unruly is not a breach of the peace."

to arrest someone for an apprehended breach of the peace is exceptional, and exercising it was not justified in this case. Justice Huscroft would have dismissed the defendants' appeal.

Supreme Court of Canada

The plaintiff appealed the ordering of a new trial. In his view, his arrest was not lawful because he had committed no crime, broken no law, was not about to commit any offence, harm anyone or breach the peace. And a unanimous seven member panel of the Supreme Court of Canada agreed.

The Central Issue

Justice Côté, delivering the unanimous Supreme Court decision, framed the main issue in determining whether the police acted lawfully in arresting the plaintiff this way:

> [W]hether, and in what circumstances, the police have a common law power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace. Does the common law permit police officers to arrest individuals who have not committed any offence, who are not about to commit any offence, who have not already breached the peace and who are not about to breach the peace themselves? [para. 36]

Justice Côté also made clear that this case was not about a power to arrest a person for the purpose of preventing that person from breaching the peace. Instead, this case addressed the power to ***"target individuals who are not suspected of being about to break any law or to initiate any violence themselves."*** In other words, this was not about the power to arrest someone who was personally about to breach the peace but about arresting someone whose conduct may provoke others to breach the peace, believing their removal from the area would defuse the situation, avert the apprehended violence and even protect that person.

Lawful Authority?

The defendants cited no statutory authority to justify the plaintiff's arrest. However, in some cases the common law can proscribe police powers and thereby justify an arrest. Here, the Supreme Court defined the police power as ***"a power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace. In targeting someone who is acting lawfully, this proposed power is aimed at individuals who have not committed, and are not about to commit, either an indictable offence or a breach of the peace."***

Breach of the Peace

In defining the term "breach of the peace", the Supreme Court noted that "***violence lies at the core of this concept." "An act can be considered a breach of the peace only if it involves some level of violence and a risk of harm,"*** said Justice Côté. ***"It is only in the face of such a serious danger that the state's ability to lawfully interfere with individual liberty comes into play. Behaviour that is merely disruptive, annoying or unruly is not a breach of the peace."***

Although Justice Côté did not find it necessary to determine whether a power to arrest a person to prevent that person from breaching the peace exists, he seriously questioned whether a common law power of this nature would still be necessary in Canada today.

Ancillary Powers Doctrine

In determining whether police actions ancillary to the fulfillment of recognized police duties that interfere with individual liberty are permitted at common law as reasonably necessary, courts use a two stage test:

- **The Police Duty:** Does the police action at issue fall within the general scope of a statutory or common law police duty?
- **Reasonably Necessary:** Does the action involve a justifiable exercise of police powers associated with that duty? Or, in other words, was the police action reasonably necessary for the fulfillment of the duty? This analysis includes weighing the following factors:
  - the importance of the performance of the duty to the public good.
  - the necessity of the interference with individual liberty for the performance of the duty.
  - the extent of the interference with individual liberty.

Justice Côté found the police action in this case did fall within the general scope of a statutory or common law police duty:

> [T]he purported police power falls within the general scope of the duties of preserving the peace, preventing crime, and protecting life and property.
>
> ... ...
>
> Preventing breaches of the peace, which entail violence and a risk of harm, is plainly related to these duties. [paras. 69-71]

As for whether the action involved a justifiable exercise of police powers associated with the police duty, Justice Côté explained there were three reasons why it would be more difficult to justify this police power as reasonably necessary compared to other common law powers:

- **its impact on law-abiding individuals:** This power would expressly be exercised against someone who is not suspected of any criminal wrongdoing or even of threatening to breach the peace.
- **its preventative nature:** This power would enable the police to act to prevent breaches of the peace before they arise. Courts must be very cautious about authorizing these arrests merely because an unlawful or disruptive act could occur in the future. Vague or overly permissive standards in such situations would sanction profound intrusions on liberty with little societal benefit. As a general rule, it will be more difficult for the state to justify invasive police powers that are preventative in nature than those that are exercised in responding to or investigating a past or ongoing crime.
- **it would be evasive of review:** Since this power of arrest would generally not result in the laying of charges, the affected individuals would often have no forum to challenge the legality of the arrest outside of a costly civil suit. Judicial oversight of the exercise of such a police power would therefore be rare.

Ultimately, Justice Côté determined that the power to arrest someone acting lawfully in order to prevent an apprehended breach of the peace did not meet the reasonably necessary test for the fulfillment of the relevant police duties. Although there was no doubt that preserving the peace and protecting people from violence are important, utilizing the drastic power of arrest where there were less invasive measures available that would be effective in preventing the breach rendered the arrest not reasonably necessary. If an individual fails to comply with less intrusive measures taken by a police officer to avert a breach of the peace, then the power of arrest found in s. 495(1) of the

"As a general rule, it will be more difficult for the state to justify invasive police powers that are preventative in nature than those that are exercised in responding to or investigating a past or ongoing crime."

Criminal Code for the offence of obstructing a peace officer, assaulting the officer, or omitting to assist the officer in preserving the peace after having reasonable notice of a requirement to do so may arise.

> The [defendants'] purported power of arrest would result in serious interference with individual liberty. As a result, such an arrest cannot be justified under the ancillary powers doctrine. There is already a statutory power of arrest that can be exercised should an individual resist or obstruct an officer taking other, less intrusive measures. It is not reasonably necessary to recognize another common law power of arrest in such circumstances. Therefore, to be clear, the only available powers to arrest someone in order to prevent an apprehended breach of the peace initiated by other persons are the ones that are expressly provided for in the Criminal Code. In my view, these statutory powers are sufficient, and any additional common law power of arrest would be unnecessary. [para. 95]

Hence, the plaintiff's arrest was unlawful. ***"Because there is no common law power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace, the officers in this case did not have lawful authority to arrest [the plaintiff],"*** said Justice Côté. ***"The [defendants] have not ... cited or relied on any statutory power to arrest [the plaintiff]. They do not claim that the arrest was authorized pursuant to s. 129, s. 270, s. 495(1)(a) or any other provision of the Criminal Code. They rely entirely on a common law power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace by other persons — a power that I have found to be non-existent."***

Excessive Force

As for the use of force used to arrest the plaintiff, Justice Côté stated:

> [Section 25(1) of the Criminal Code] authorizes police officers to use "as much force as is necessary" in the execution of their duties. It affords them a defence to a claim of battery, provided that the section's requirements are satisfied. The provision will not shield officers from liability if the force they used is found to be excessive.
>
> However, police officers cannot rely on s. 25(1) to justify the use of force if they had no legal authority — either under legislation or at common law — for their actions.
>
> Because the [defendants] were not authorized at common law to arrest [the plaintiff], no amount of force would have been justified for the purpose of accomplishing that task. They were not doing what they were "required or authorized to do" within the meaning of s. 25(1). [references omitted, paras. 116-118]

As a result, there was no new trial required on whether or not police used excessive force. The police were liable for battery for their use of force in making the unlawful arrest.

The plaintiff's appeal was allowed, the order for a new trial was set aside, and the trial judge's verdict was restored. Additional costs for the appeal of $48,000 were also awarded.

Complete case available at www.scc-csc.gc.ca

BY THE BOOK:

s. 25(1) *Criminal Code*

Protection of persons acting under authority

s. 25 (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(a) as a private person,

(b) as a peace officer or public officer,

(c) in aid of a peace officer or public officer, or

(d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

REASONABLE GROUNDS FOR ARREST LOWER THAN BALANCE OF PROBABILITIES

R. v. Glendinning, 2019 BCCA 365

At about 8:40 p.m. a plainclothes officer of a police drug section was surveilling a downtown area known for its high levels of street-level drug use. It was on the edge of a "red zone"—an area in which drug trafficking was common. The officer noticed a female drug user walking along the street. The officer had surveilled the woman before and saw her purchase drugs two years earlier in the same area. The officer saw the woman walk to a nearby dog park and look at vehicles as they approached. About five minutes later, a black Dodge pickup truck occupied by its driver and a passenger stopped by the woman. She ran up to the passenger side, remained there for about 10 seconds, and then walked away. The truck then left. The officer believed the occupants of the truck had just sold the woman drugs. The officer noted the truck's licence plate number and alerted other officers about his observations, and requested assistance.

Another drug section officer saw the truck again at 9:07 p.m. and followed it. There were two occupants. The truck came to a stop in front of a man in his 20s who was waiting on a corner. There was no bus or taxi stand nearby. The young man got into the rear passenger side of the truck. The truck then moved slowly around a cul-de-sac and then stopped. The young man got out of the truck and walked away from it. Police decided they had enough grounds to arrest both occupants for trafficking in drugs. They boxed in the truck. The driver of the truck (the accused) was recognized as the same individual who had been driving at the time of the meet with the female drug user. He appeared panicky and was fidgeting with his arms. Both the accused and his passenger were arrested.

The accused was searched and found in possession of 14 pieces of individually packaged crack cocaine weighing 10.59 grams in total and 22 pieces of an individually packaged heroin/fentanyl mix weighing 7.51 grams in total. The accused, along with his passenger, was charged with possessing controlled substances for the purpose of trafficking.

BY THE BOOK:

s. 495(1)(a) *Criminal Code*

Arrest without warrant by peace officer

s. 495 (1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence ...

British Columbia Supreme Court

The judge concluded that the police had the requisite reasonable grounds to arrest the accused, both subjectively and objectively. ***"The Crown is not required to establish that it was more likely than not that an indictable offence was about to or had occurred,"*** said the judge. ***"Rather, the Crown must establish a reasonable belief or probability on the totality of the circumstances."*** The two independent interactions the police had observed, when viewed in their totality along with the officers' experience, were sufficient to provide reasonable grounds of dial-a-dope drug transactions. The female was known to an officer as a drug user and addict, she was in an area where she had previously met with a drug supplier and the interaction had lasted only 10 seconds. Plus there was the slow movement of the truck in the cul-de-sac and a brief meeting with a man waiting on the street. The judge stated:

> ...[B]oth sets of interactions within approximately 30 minutes of each other had many consistencies with the officers' knowledge and descriptions of dial-a-dope transactions, including the presence of a waiting purchaser on the side of the road, the short interaction time, the open door, and the

Defence Position On Missing

Dial-a-Dope Factors

Factors the defence emphasized that are often present in dial-a-dope operations but which were not present in this case:

- The truck used by the accused was not a rental;
- The individuals operating the Truck were not known to the police;
- The truck was not known to police;
- The driver did not engage in any typical behaviours of a dial-a-dope seller to detect police surveillance, referred to as a "heat check";
- There was no hand-to-hand exchange observed nor any related activity such as reaching in a pocket, or putting things away in a pocket or purse;
- There was no cellphone use observed;
- There was no tip, this investigation occurred simply as a result of observations during a patrol; and
- One of the transactions took place in an area that was not known to these officers as a drug "hot spot".

> occasional entry into the vehicle by the purchaser for a short duration, a vehicle ride that does not change the location of the purchaser substantially, and the parting of the purchaser and the seller in different directions. With respect to the first interaction, its location was also consistent with known dial-a-dope drug transactions generally, and for that drug purchaser in particular.

And even though innocent explanations might have been available for the two transactions, none was satisfactory from a common sense perspective. Furthermore, it was not necessary for the officers to rule out such possible innocent explanations. There was no s. 9 *Charter* breach (arbitrary detention) nor was the search that followed as an incident to arrest unreasonable (s. 8). The evidence was admissible and the accused was convicted of possessing controlled substances for the purpose of trafficking.

British Columbia Court of Appeal

The accused argued that the police did not have the necessary reasonable grounds for belief required for an arrest under s. 495(1) of the *Criminal Code*. In his view, the trial judge applied the wrong test in finding the arrest lawful. Thus, he submitted that his rights not to be arbitrarily detained or imprisoned, and to be secure against unreasonable search or seizure were violated.

Reasonable Grounds for Arrest

Justice Newbury, speaking for the Court of Appeal, upheld the trial judge's ruling. In finding that the police met the reasonable grounds standard, she outlined a number of considerations in determining whether the threshold for arrest was satisfied:

- "There can be no doubt about the importance of ensuring that Canadians are not deprived of their rights under ss. 8 and 9 of the *Charter*, and that judicial scrutiny of police conduct in acting without warrants must be meaningful."
- "What is meant by 'reasonable grounds' in [the arrest] context, and in other contexts in the Code, is in my view quite clear. The phrase 'reasonable grounds' is regarded as the equivalent to 'reasonable and probable grounds,' the phrase used in the predecessors to s. 495(1) in the Code prior to 1988."
- "Although the word 'probable' or 'probably' appears in some of the foregoing authorities, I do not read them as contravening the notion that the s. 495(1) standard is lower than the 'balance of probabilities' standard in civil law."

"[T]he law is clear: the Crown need not demonstrate that the belief of the police (that an indictable offence had occurred) was correct on a balance of probabilities. Rather, the arresting officer must have subjectively believed an offence had occurred and that belief must have been objectively reasonable from the viewpoint (or through the "lens") of a person with the officer's experience and training."

"[I]t is also well-established that 'reasonable grounds' imports a test or standard that is lower than the standard of civil proof, or proof 'on the balance of probabilities'."

- "[I]t is also well-established that 'reasonable grounds' imports a test or standard that is lower than the standard of civil proof, or proof 'on the balance of probabilities'."
- "[T]he law is clear: the Crown need not demonstrate that the belief of the police (that an indictable offence had occurred) was correct on a balance of probabilities. Rather, the arresting officer must have subjectively believed an offence had occurred and that belief must have been objectively reasonable from the viewpoint (or through the 'lens') of a person with the officer's experience and training."
- "In the context of s. 495(1), which is applied not at the end of a trial but in various situations in the 'real world' in which peace officers find themselves, it would be impractical to require proof on a 'balancing' of probabilities by police officers. The evidence available to them is obviously limited; they are not finders of fact; and their decisions must often be made quickly."
- "[T]he officer must have grounds that tend to support his or her subjective belief — i.e., that make the belief more likely or more "probable" than it would otherwise be — and that those grounds must be objectively defensible, such that the line between 'mere suspicion' and 'reasonable belief' is crossed. The officer must be able to explain what objective factors, when considered through the 'lens' of his or her experience and training, led to the belief.

Here, the trial judge did not err in describing the "reasonable grounds" standard and applying it. Even though the accused pointed out (1) the absence of factors common in dial-a-dope operations, (2) the absence of any observed hand-to-hand exchanges of drugs and (3) the two year span from when the officer last interacted with the known female drug user, Justice Newbury recognized that ***"the police officer had to make his decision based on what he did observe, not on what he did not see."***

"In my view the conduct observed by the officers was highly suspicious and it was not unreasonable for the police officers here to form the opinion that a drug transaction had occurred and that the driver of the truck was trafficking in drugs on the day in question'" said Justice Newbury. ***"While it is true that police must not take a cynical or highly suspicious approach to what they see, neither should they be naïve or overly cautious in enforcing the laws of the land. Their belief must be reached based on the totality of the circumstances, again including their particular expertise and experience in drug investigations."***

The accused's appeal was dismissed.

Complete case available at www.canlii.org

LACK OF CREDIBILITY NOT OVERCOME BY TIP's DETAIL OR CORROBORATION

R. v. Pavlik, 2019 SKCA 107

At 8:39 p.m. a police officer belonging to an Integrated Street Enforcement Team received information from a confidential informer that the accused would be arriving at a named bar in about 20 minutes. The informer said the accused would be driving a red car belonging to his girlfriend, Ms. Werminsky, who would be with him. The two would be in possession of multiple ounces of methamphetamine and would be selling it. The officer passed this information off to a sergeant and told him that the accused was "arrestable". The sergeant asked no questions about the informer or their prior involvement with police.

The sergeant queried the vehicle and learned the description and licence plate number of the red

vehicle was registered to Ms. Werminsky. At 8:52 p.m., the sergeant passed on the details of the tip to other officers who drove to the bar, arriving shortly before 9:00 p.m. Upon their arrival, police saw a red car, matching the description provided, near the building. Before the police could cover all the exits to the bar, the red vehicle went mobile. Police confirmed that the licence plate number but the accused was not in it. He was seen walking in the parking lot near an entrance to the bar.

Police stopped the red car and confirmed Ms. Werminsky was driving it. She was arrested for possessing a controlled substance for the purpose of trafficking. The accused was also arrested for the same offence. He was searched and so was the car, which had been towed to the police station. In the car, police discovered a loaded, sawed-off, 12-gauge shotgun (a prohibited weapon) in the trunk. The accused subsequently gave a warned statement to the police in which he admitted to possessing the shotgun and denied the female had any knowledge of it because he didn't want her to get in trouble.

Saskatchewan Provincial Court

The accused argued the police had lacked the necessary grounds to arrest him. He contended that police corroboration of the details of the tip did not lend enough credibility to the allegations of criminal conduct to support his warrantless arrest. In his view, his s. 9 *Charter* rights were breached and the search of the vehicle was unreasonable and violated s. 8. He also contended that his warned statement was not voluntary. He sought to exclude the shotgun and the warned statement on the grounds that his arrest and the search of the vehicle were unlawful.

The judge concluded that the accused's arrest was lawful under s. 495(1)(a) of the *Criminal Code*. Since there was little evidence about the credibility of the informer, including their motivation or reliability, the judge held the informer's credibility was weak and only slightly better than that of an anonymous tipster. However, he found the tip was precise and detailed enough, in terms of time, location and people involved, to support the arrest. In the judge's view, the level of detail ruled out mere coincidence, indicating it had been provided by someone with personal knowledge of the accused's activities and whereabouts. Moreover, the police had corroborated most of the information in the tip and all of the "neutral" information. The female named by the informer owned a red car and she and the car had been seen in the bar's parking lot within the time period set out in the tip.

As for the search of the car, the judge concluded that the accused did not have a reasonable expectation of privacy in Ms. Werminsky's car. Thus, the accused's s. 8 rights had not been engaged by its search. The accused's warned statement was also found to be voluntary. The shotgun and the warned statement were admitted and the accused was convicted of several firearm related offences.

Saskatchewan Court of Appeal

The accused alleged the trial judge erred by concluding that the police had, in the totality of the circumstances, reasonable grounds to believe he had committed or was about to commit the indictable offence under the *Controlled Drugs and Substances Act* of possessing methamphetamine—a controlled substance—for the purpose of trafficking and was therefore "arrestable" without warrant under s. 495(1)(a). He argued the police breached s. 9 of the *Charter* by arresting him and that the sawed-off shotgun and the warned statement he made to the police ought to have been excluded under s. 24(2).

Reasonable Grounds to Arrest

Justice Caldwell first described s. 495(1)(a) of the *Criminal Code* as follows

> Put in broad terms, when the lawfulness of a warrantless arrest under s. 495(1)(a) is challenged, the application of the standard of "reasonable grounds to believe" involves the court's objective assessment of whether the

"Put in broad terms, when the lawfulness of a warrantless arrest under s. 495(1)(a) is challenged, the application of the standard of 'reasonable grounds to believe' involves the court's objective assessment of whether the police subjectively believed the individual arrested had committed or was about to commit an indictable offence and whether the observations and circumstances articulated by the police are rationally capable of supporting that belief."

> police subjectively believed the individual arrested had committed or was about to commit an indictable offence and whether the observations and circumstances articulated by the police are rationally capable of supporting that belief. ....
>
> Therefore, a reviewing court must critically evaluate the grounds for arrest that have been advanced by the Crown but, as noted, the required degree of probability of such criminal conduct having occurred or occurring is not high—it is lower than a prima facie case for conviction. [references omitted, paras. 20-21]

In assessing reasonable grounds for arrest based on an informer's tip, a reviewing court must consider the totality of the circumstances including (1) whether the information predicting the commission of a criminal offence was compelling, (2) whether the informer was credible and (3) whether the information was corroborated by police investigation prior to making the decision to arrest.

In this case, the police officer who received the informer's tip, assessed the informer's credibility, and advised on-the-ground police officers that the accused was "arrestable" did not testify at trial. Hence, there was no information about the informer, their reliability, or their history with the police.

As for the weakness of the informer's credibility, it could not be sufficiently compensated by the compelling nature of the tip and its corroboration by police. Although the trial judge found the tip to be compelling—to a degree—it was ***"just barely better than a 'bald conclusory statement',"*** said Justice Caldwell. ***"There was no evidence as to: (i) how the tipster had acquired the information; (ii) whether [the accused] had prior convictions for drug-related offences; (iii) whether Ms. Werminsky (the other participant in the anticipated offence) had convictions for drug-related offences; and (iv) whether the police had knowledge that [the accused] and [the female] were reputed to be drug users and traffickers."*** Justice Caldwell continued:

> The tipster advised where [the accused] would be in 20 minutes (which, as noted, the police knew to be a site for drug deals), with whom he would be, what type vehicle he would be in, to whom the vehicle would belong, who would be driving it, and the illegal activity in which they would be participating, including the general amount of methamphetamine they would have in their possession. This information had enough detail to allow for a conclusion that the tip was more than gossip or rumour but, because [the accused] and Ms. Werminsky had no reputation with the police, it is not much more than a "bald assertion" that they were dealing drugs... . The information contained in the tip suggests the tipster was familiar with [the accused] and his personal affairs, which lends to the persuasiveness of the tip. However, the tip lacks certain details, and the details it does provide are not more than what someone might be able to say even having no familiarity with the alleged criminal activity of [the accused]. [references omitted, para. 33]

As to the level of corroboration or verification of the tip, it was weak. ***"Even though there is no general requirement that they do so, the police were unable to corroborate any criminal activity, or any activity that, although not illegal, could be viewed as reasonably anticipatory to illegal activity on the part of [the accused] or***

Ms. Werminsky," said Justice Caldwell. ***"This gap in the corroborative evidence when taken alongside the lack of specificity of the criminal activity alleged in the tip, and the lack of any background or reputational knowledge linking [the accused] or Ms. Werminsky to the type of criminal activity anticipated by the tip (or any previous criminality, for that matter), barely moves the needle off mere speculation that [the accused] was about to commit a drug-related indictable offence."***

The Court of Appeal found the ***"the best that could be said is that the police had objectively reasonable grounds to suspect that either [the accused] or Ms. Werminsky were about to commit the indictable offence of trafficking in a scheduled substance. However, because the police had not observed any activity from which they could have drawn an inference that a drug-related indictable offence was about to occur or was occurring, they did not have an objectively reasonable basis to believe that [the accused] was about to commit a drug-related indictable offence."*** Justice Caldwell stated:

> In my assessment, the overall corroborative effect of the police observations was not meaningful in the context of the tip in question. Moreover, it failed to overcome the absence of evidence as to the tipster's credibility, the lack of detail and specificity as to the criminality alleged in the tip, and the lack of background knowledge on the part of the police linking the suspects to the alleged criminality. ... [para. 39]

Although he found the arresting officers honestly held a subjective belief that they had sufficient grounds to arrest the accused, Justice Caldwell was unable to conclude objective reasonable grounds existed. ***"Given that they had received a tip with some compelling details, and had corroborated most of the neutral circumstances it predicted, the on-the-ground officers had grounds to subjectively believe that [the accused] had or was about to commit an indictable offence and was, therefore, subject to being arrested under s. 495(1)(a) of the Criminal Code,"*** he said. ***"[However], the absence of evidence as to the credibility of the tipster or as to what had supported [the officer receiving the tip's] assessment that [the accused] was "arrestable" critically undermined the Crown's ability to prove that it was in fact objectively reasonable in the circumstances for the police to have arrested [the accused] without a warrant."*** The accused's arrest was unlawful and therefore it was arbitrary and breached s. 9.

Admissibility of Evidence?

The Court of Appeal excluded the shotgun and the accused's warned statement under s. 24(2) of the *Charter*. Although the conduct of the police was on the lower side of the scale of seriousness, its seriousness nevertheless favoured exclusion. As for the impact of the *Charter* breach of the accused, he was arbitrarily deprived of his liberty when arrested and then his person was searched. His detention was not fleeting. The police also obtained a warned statement from him during his unlawful detention where he admitted to possessing the shotgun. This warned statement was tainted by his arbitrary detention. And without his statement, there was no evidence linking him to Ms. Werminsky, her vehicle or the shotgun. The impact of the s. 9 breach favoured the exclusion of the shotgun and the statement. As for society's interest of a trial on its merits, the reliability of the shotgun as evidence favoured its inclusion. The statement, however, was given in circumstances where the accused did not want Ms. Werminsky to get into trouble, which called into question its reliability. Thus, this weighed against its admission.

Without the excluded evidence, the Crown's case against the accused was not provable. The accused's appeal was allowed, his convictions were set aside and acquittals were entered.

Complete case available at www.canlii.org

Note-able Quote

"If you are working on something that you really care about, you don't have to be pushed. The vision pulls you."
~Steve Jobs~

COURT ORDERED SEARCH PROVISION DID NOT AUTHORIZE SEARCH AGAINST CO-RESIDENT

R. v. Arnault, 2019 SKCA 109

The accused, a high-risk offender, resided with another man, also a high-risk offender. Both men were bound by recognizance orders prohibiting them from purchasing and consuming alcohol and drugs, prohibiting the possession of weapons, and each was subject to an 11:00 p.m. curfew. The co-tenant also had a search clause, which was not a condition of the accused's recognizance. The co-tenant's search clause read as follows:

> That you shall upon demand of a peace officer, submit to a cursory search of your person, residence, and motor vehicle for possession of alcohol, drugs or weapons for the purpose of checking compliance of your conditions.

One evening, five police officers belonging to the Guns and Gangs unit knocked on the door of the men's residence. An officer spoke to both men near the back door. She told the accused's co-tenant that police would be enforcing the cursory search condition in his recognizance. The accused objected to the police right to enter vis-à-vis him and emphasized the absence of a search clause in his recognizance.

The police asserted their right to undertake a cursory search and proceeded into the house. Police found two visitors sitting on a mattress watching television and saw a spoon with residue on it, consistent with drugs. A bladed weapon was also seen in an open closet and alcohol was observed on the kitchen table, which one of the visitors claimed had been brought into the home to share with the accused. There were also needles readily observable throughout the residence as the search progressed through the house.

About five minutes after the officers entered the residence, one of them pulled back a cushion from a black leather sofa in the living room of the house and discovered a sawed-off shotgun. All of the occupants were arrested, including the accused who was believed to also be in violation of many conditions of his recognizance. He was provided with his *Charter* rights and warnings and was told that he was being arrested for the possessing the firearm and a drug investigation. A more thorough warrantless search of the residence was then conducted by police under the authority of the accused's recognizance. More weapons, drugs and drug paraphernalia were discovered. The accused was subsequently charged with the *Criminal Code* offences of carelessly storing a firearm (s. 86(1)), possessing a firearm without a license (s. 92(1)), possessing a prohibited firearm with ammunition (s. 95(1)(b)), possessing a weapon for a purpose dangerous to public peace (s. 88), possessing a firearm contrary to a court order (s. 117.01(1)) and breach of recognizance (s. 811). He was also charged with possessing methamphetamine for the purpose of trafficking under the *Controlled Drugs and Substances Act* (s. 5(2)).

Saskatchewan Provincial Court

The accused argued that the warrantless search was unlawful and that his rights under s. 8 of the *Charter* had been violated. He also sought exclusion of the evidence under s. 24(2). The Crown, on the other hand, argued the evidence leading to the accused's arrest was either found in plain view or was obtained pursuant to the cursory search clause in the order. Finally, the Crown contended that the search was non-intrusive and executed within the confines of what was permitted.

The judge found the accused not only had a reasonable expectation of privacy in the shared dwelling, but that the warrantless search was also unreasonable. Even though the accused was a tenant – and not the owner of the home – it was his home for s. 8 *Charter* purposes and he had a high expectation of privacy in it. As for his reasonable expectation of privacy in the home, it was not

Assessing whether an individual's s. 8 rights have been violated involves two fundamental determinations: whether a search or seizure has taken place and, if so, whether the search or seizure was reasonable.

diminished by the search clause contained in his co-tenant's recognizance. The judge found the accused had ***"asserted his right to privacy"*** but he was ignored. Thus, his s. 8 *Charter* right was breached.

The judge then went on to exclude the evidence under s. 24(2). First, the police conduct was a serious breach of the accused's s. 8 *Charter* right. He had expressly told police that he did not consent to the search. ***"Simply assuming that [his co-habitant's] search clause trumped the accused's reasonable expectation of privacy in his home, was a serious violation of section 8 of the Charter,"*** said the judge. Second, the impact of the breach on the accused's privacy rights was substantial. A person has a high expectation of privacy in their home. Finally, the reliability of the firearms and drugs and the negative impact of guns and drugs on society was not sufficient enough to tip the scale in favour of admitting the evidence. After balancing the relevant factors, the judge concluded the admission of the evidence would bring the administration of justice into disrepute.

The judge also commented on whether the search conducted by police was "cursory" in nature. He examined the length of the total search (an hour-and-a-half) and the manner in which it was conducted. ***"In this case, couch cushions were pulled back. Mattresses were lifted up,"*** said the judge. ***"The contents of an opaque plastic chest of drawers were examined and some things ... removed. Cupboard doors were opened. The ledge behind the stove was examined as was a pile of garbage in the back door. A cellphone was seized from the top of a kitchen table."*** In the judge's view, the search exceeded what would be considered cursory - ***"a walkthrough to quickly observe what may be in plain view"*** - and therefore was not authorized by law. Since the evidence was excluded, the accused was acquitted of all charges.

Saskatchewan Court of Appeal

The Crown submitted that the search of the accused's home did not breach his s. 8 *Charter* rights. In its view, the police had the lawful authority for the warrantless search of the residence during each stage of the police search - initial entry, cursory search of the premises pursuant to the co-tenant's recognizance and search incident to arrest. And, even if the search breached s. 8, the Crown argued the trial judge erred in excluding the evidence under s. 24(2).

Unreasonable Search?

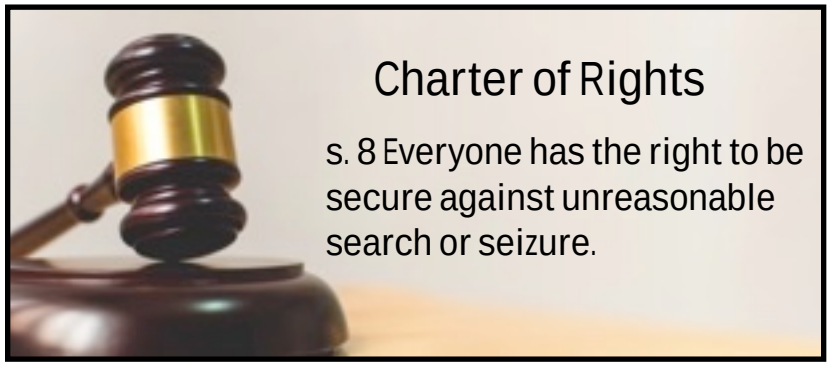
The Crown suggested that the police were legally authorized to initially enter the shared residence without a warrant based on a consent search condition in the recognizance of one of its residents. Moreover, the law was not challenged as being unreasonable and entry into the residence was conducted in a reasonable manner.

Justice Schwann, delivering the Court of Appeal decision, first identified considerations relevant to the s. 8 *Charter* inquiry:

- Section 8 of the *Charter* provides that everyone has the right to be free from unreasonable search and seizure.

- Assessing whether an individual's s. 8 rights have been violated involves two fundamental determinations: whether a search or seizure has taken place and, if so, whether the search or seizure was reasonable.

- The s. 8 analysis involves an examination of the point at which "the public's interest in being left alone by government must give way to the government's interest in intruding on the



individual's privacy in order to advance its goals".

- Although s. 8 protects people not places, courts have been sensitive to an individual's expectation of privacy in their own home.

- Section 8 is only engaged if the claimant first establishes that they have a reasonable expectation of privacy in the place or with the item searched or seized.

- If s. 8 is engaged, the court must then turn to the question of whether the search or seizure was reasonable.

- A warrantless search or seizure is presumptively unreasonable, and the Crown bears the burden of rebutting this presumption. This presumption relieves the applicant from the burden of establishing that the search was unreasonable. That said, a party seeking to justify a warrantless search bears the onus of rebutting the presumption by establishing the following:

  (a) the search was authorized by law;

  (b) the law itself is reasonable, and

  (c) the manner in which the search was carried out was reasonable.

In this case, the trial judge did not err in determining that the accused had a reasonable expectation of privacy in the shared residence, which was his own home.

Consent Search?

"An individual may consent to a warrantless search," said Justice Schwann. ***"For the consent to be valid, it must be fully informed, which means the person in question must be provided with 'sufficient available information to make the preference meaningful'. Valid consent must also be given voluntarily. This aspect of consent has been interpreted to mean that the person must have had a real choice in providing the purported consent."***

Justice Schwann did not question whether the search was authorized by law as against the accused's co-tenant but found the search condition contained in the co-tenant's recognizance did not provide lawful authority for the police to enter and undertake a cursory search as against the accused, who happened to share the residence. Although search conditions in recognizances have been recognized as a form of voluntary consent for a police search, the accused's co-resident could not provide consent on behalf of the accused such that the consent search clause contained in the co-tenant's recognizance operated as a waiver of the accused's constitutional right to be free from unreasonable search and seizure.

The Court of Appeal recognized that the law with respect to third party consent in relation to a joint residence was not clearly settled. Nevertheless, several provincial appellate courts have concluded that a resident has the right to permit police entry into common areas of a home without the consent of all other residents. Citing the Supreme Court of Canada decision *R. v. Reeves*, 2018 SCC 56, Justice Schwann stated:

> Reasoning by analogy, if I had to decide whether a search condition for one person can be relied upon as authority to effect a search against another person who happens to reside in the same home, I would conclude, broadly speaking, that the police may not rely on such authority. This question would, of course, need

> to be determined against the backdrop of the particular facts of the case at hand. [para. 74]

Hence, the Court of Appeal found the police could not rely on the co-tenant's third party consent to enter and search the home as a source of authority as against the accused.

In this case, Justice Schwann found the trial judge assessed co-tenant consent when he found the accused's reasonable expectation of privacy in the shared dwelling was not diminished or attenuated by the search clause contained in his co-resident's recognizance. And, ***"even if ... a resident has the right to permit the police to enter the common areas of a shared home, ... seizure of the items from [this] residence cannot be justified under the plain view doctrine,"*** said Justice Schwann. ***"I say this because the trial judge made no finding of fact to that effect; if anything, the evidence would suggest otherwise. Furthermore, the plain view doctrine confers a seizure power not a search power, which ... does not permit an exploratory search to find other evidence."***

Admissibility of the Evidence?

The trial judge did not err in excluding the evidence. He correctly identified the three branches of the s. 24(2) analysis - (1) the seriousness of the breach; (2) the impact of the breach on the accused's protected interest; and (3) society's interest in adjudication of the case on its merits. He was alive to the relevant legal principles and made no error in principle or unreasonable finding of fact that would justify an appeal court intervening with the deference he was owed in his decision to exclude the evidence.

The Crown appeal was dismissed.

Complete case available at www.canlii.org

Note-able Quote

"Don't let yesterday take up too much of today."
~Will Rogers~

EXTERNAL LEARNING OPPORTUNITIES

OSGOODE
OSGOODE HALL LAW SCHOOL
PROFESSIONAL DEVELOPMENT

December 6, 2019

Forensic Science in Criminal Cases: New Developments, Good Evidence?
In Person and Webcast
Click here

February 7, 2020

17th National Symposium on Search and Seizure Law in Canada
In Person and Webcast
Click here

February 27, 2020

Courtroom Testimony: A Practical Skills Workshop for Police and Other Law Enforcement Professionals
In Person and Webcast
Click here

March 2-3, 2020

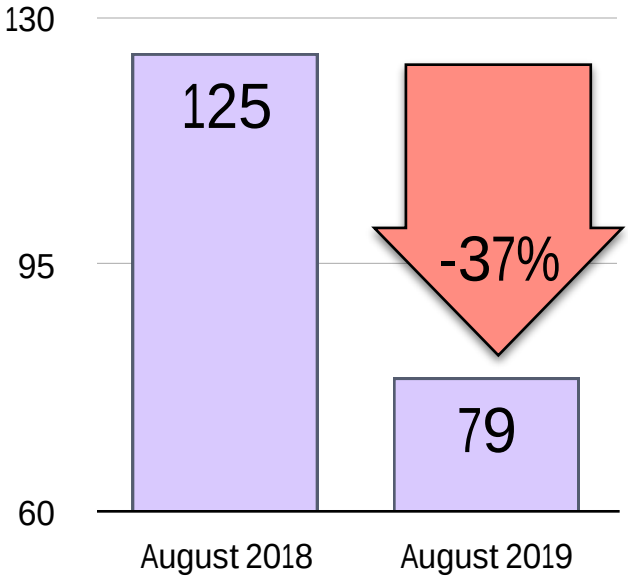
13th Annual Intensive Course on Drafting and Reviewing Search Warrants
In Person and Webcast
Click here

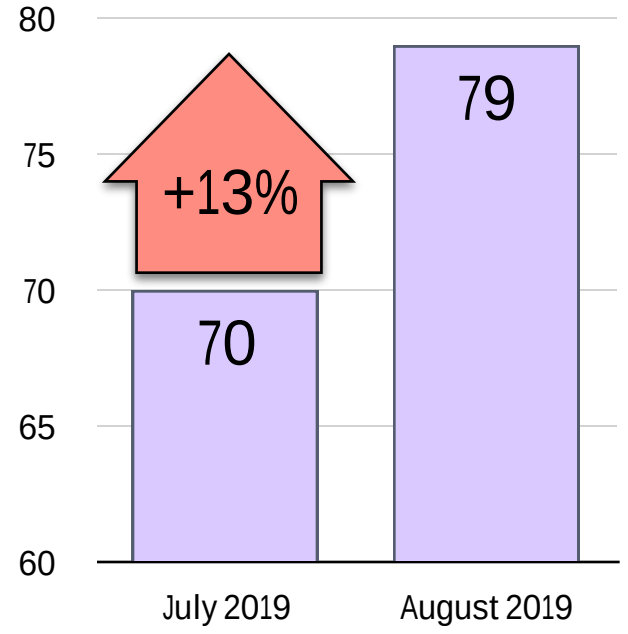
April 3, 2020

13th National Symposium on Tech Crime and E-Evidence
In Person and Webcast
Click here

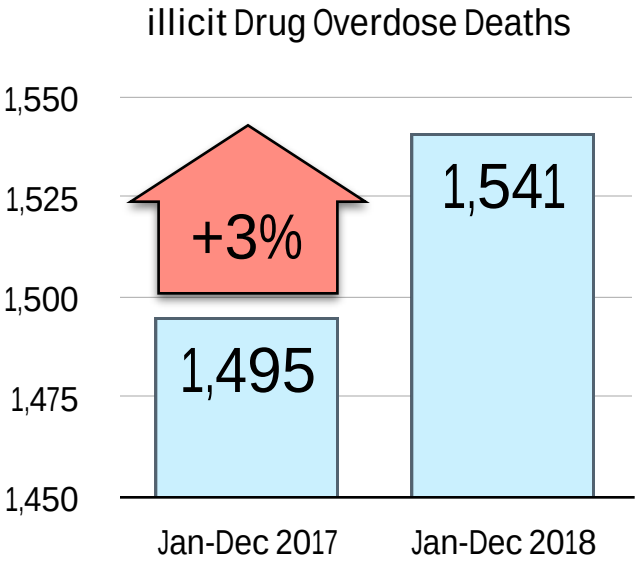
ILLICT DRUG OVERDOSE DEATHS IN 2019

The Office of BC's Chief Coroner has released statistics for illicit drug toxicity deaths (formerly known as illicit drug overdose deaths) in the province from **January 1, 2009 to August 31, 2019**. In August 2019 there were 79 suspected drug toxicity deaths. This represents a **-37%** decrease over the number of deaths occurring in August 2018 and a **-13%** decrease over July 2019.





In 2018, there were a total of **1,541** suspected drug overdose deaths. This was an increase of 46 deaths over the 2017 numbers (**1,495**).



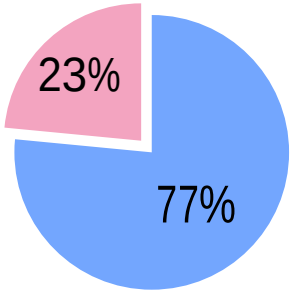
Overall, the 2018 statistics amount to about **four (4) people dying every day of the year.**

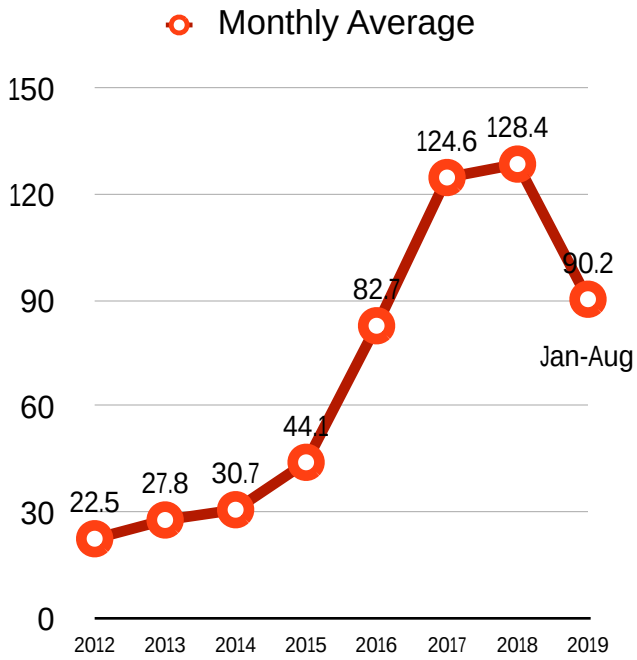
The **1,541** toxicity deaths last year amounted to more than a **360%** increase over 2013. The report also attributed fentanyl laced drugs as accounting for the increase in deaths.

People aged 30-39 were the hardest hit so far in 2019 with **184** illicit drug toxicity deaths followed by 40-49 year-olds (**154**) and 50-59 years-old (**152**). People aged 19-29 had **123** deaths. Vancouver had the most deaths at **182** followed by Surrey (**86**), Victoria (**35**), Abbotsford (**33**), Kamloops (**24**), Burnaby (**22**), and Prince George (**20**).

Deaths by gender

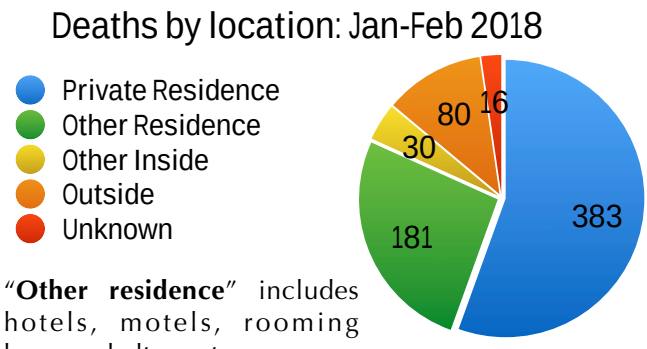
Males continue to die at almost a **3:1** ratio compared to females. In 2019 (Jan-Aug), **528** males had died while there were **162** female deaths.





The 2019 data indicates that most illicit drug toxicity deaths (**86%**) occurred inside while **12%** occurred outside. For **16** deaths, the location was unknown.

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



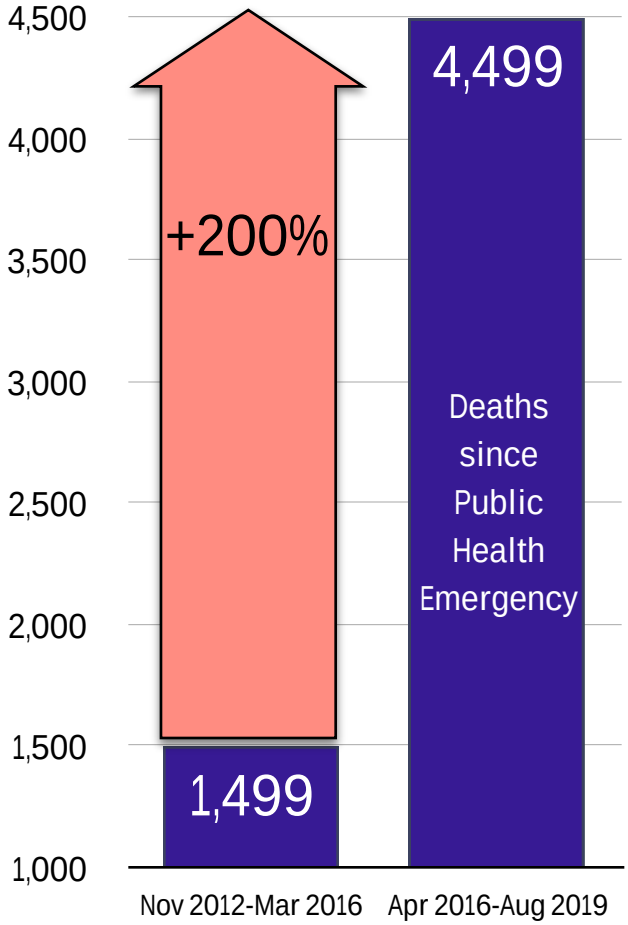
"**Other residence**" includes hotels, motels, rooming houses, shelters, etc.

"**Other inside**" includes correctional facility, police cell, medical facility, occupational site, or public building.

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

DEATHS SINCE PUBLIC HEALTH EMERGENCY

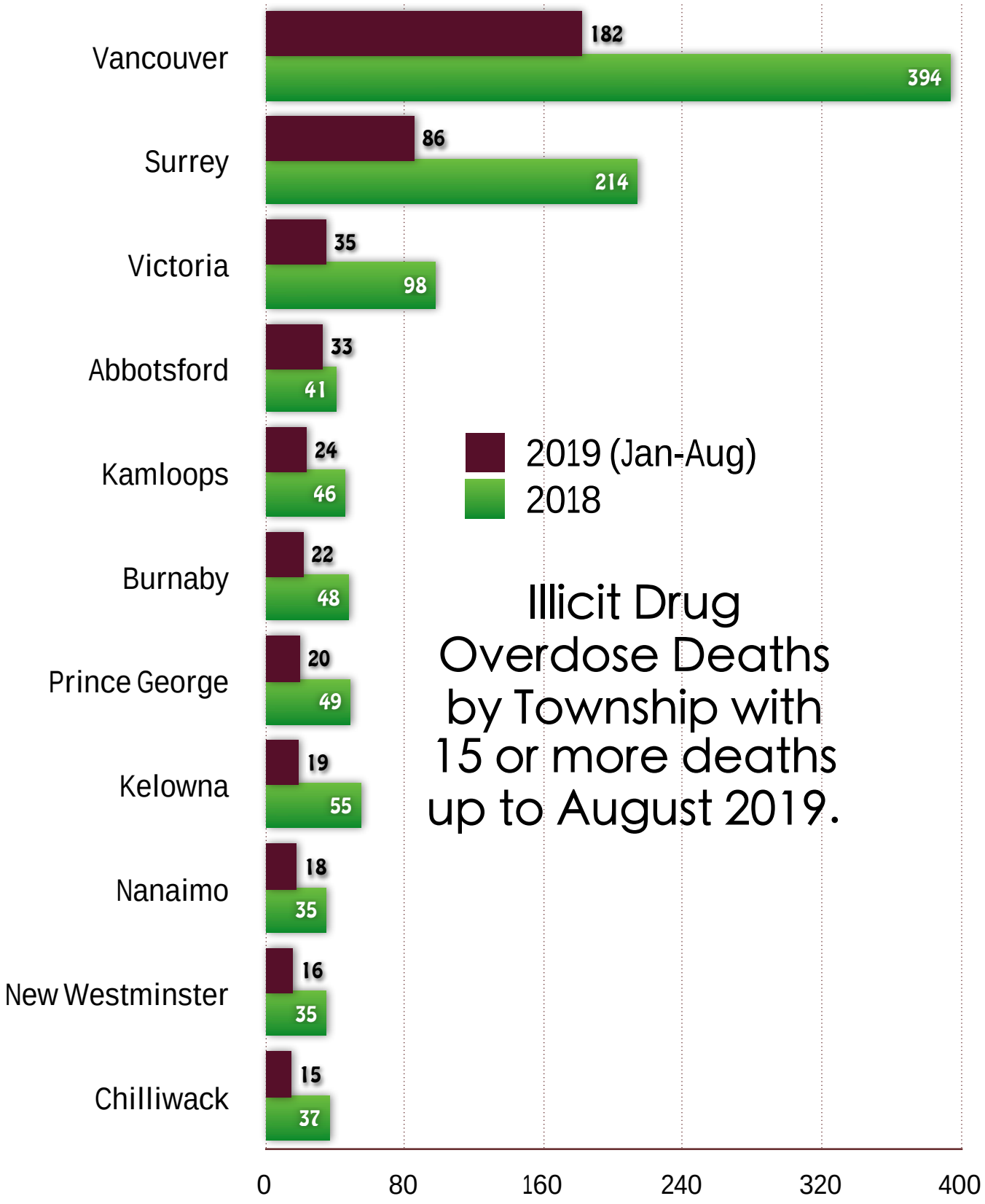
In April 2016, BC's provincial health officer declared a public health emergency in response to the rise in drug overdoses and deaths. The number of overdose deaths in the **41** months preceding the declaration (Nov 2012-Mar 2016) totaled **1,499**. The number of deaths in the **41** months following the declaration (Apr 2016-Aug 2019) totaled **4,499**. This is an increase of **3,000** deaths or **200%**.



Source: Illicit Drug Toxicity Deaths in BC - January 1, 2009 to June August, 2019. Ministry of Public Safety and Solicitor General, Coroners Service. October 16, 2019.

TYPES OF DRUGS

The top five detected drugs relevant to illicit drug overdose deaths from 2016 - 2018 were fentanyl and its analogues, which was detected in **81.8%** of deaths, cocaine (**50.0%**), methamphetamine/amphetamine (**32.1%**), ethyl alcohol (**27.1%**), and heroin (**17.0%**).


Vancouver
182
394
Surrey
86
214
Victoria
35
98
Abbotsford
33
41
Kamloops
24
46
Burnaby
22
48
Prince George
20
49
Kelowna
19
55
Nanaimo
18
35
New Westminster
16
35
Chilliwack
15
37
2019 (Jan-Aug)
2018
Illicit Drug Overdose Deaths by Township with 15 or more deaths up to August 2019.
0
80
160
240
320
400

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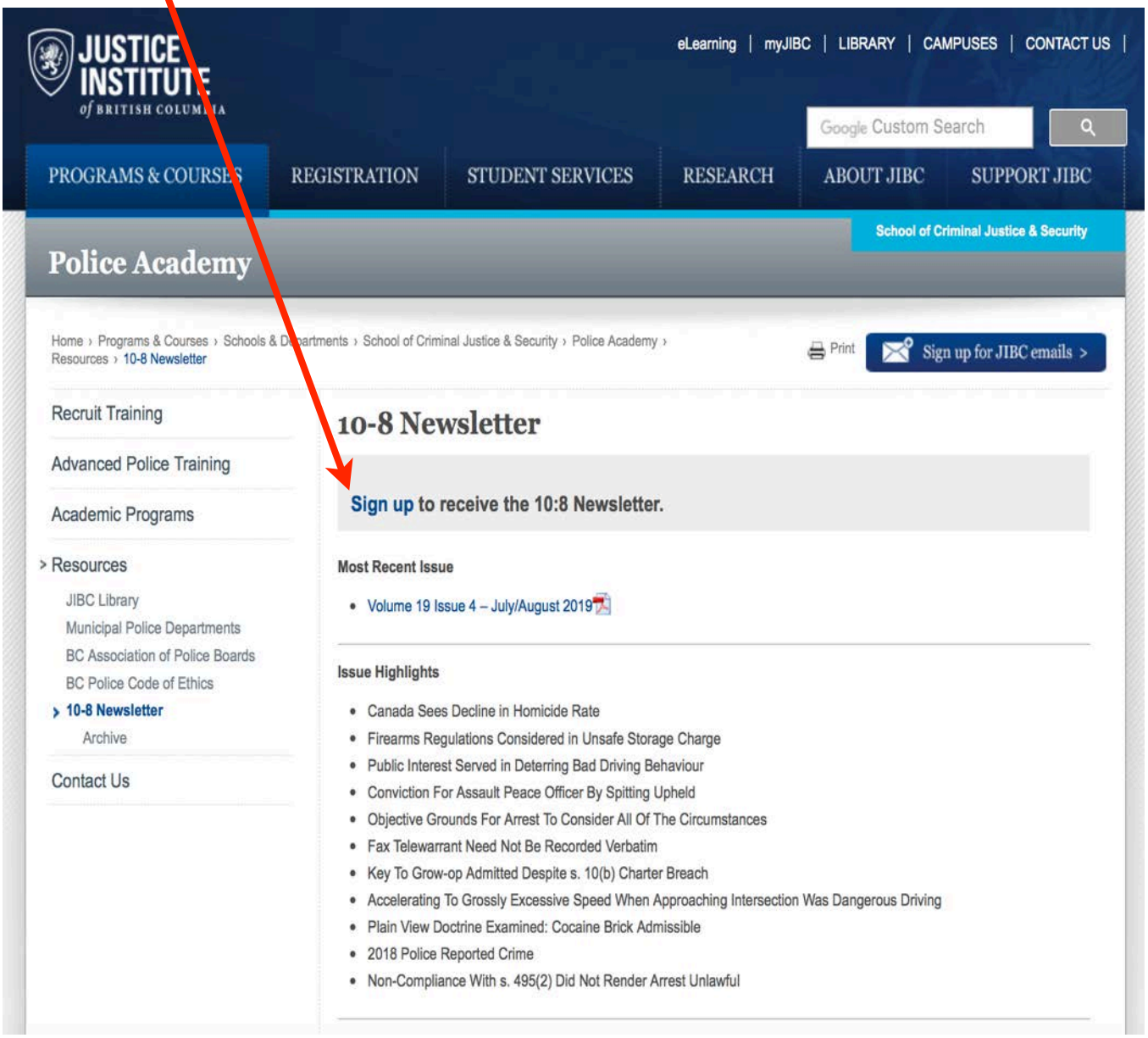

The World Day of Remembrance for Road Traffic Victims
November 17, 2019

ROAD TRAFFIC INJURIES: **THE FACTS**

ROAD TRAFFIC INJURIES ARE THE **8th** LEADING CAUSE OF DEATH

1.35 MILLION
ROAD TRAFFIC DEATHS EVERY YEAR

1ST CAUSE OF DEATH AMONG CHILDREN AGED 5-14 AND AMONG YOUNG ADULTS AGED 15-29

LOW-INCOME COUNTRIES
1% OF THE WORLD'S VEHICLES BUT **13%** OF ALL DEATHS

HIGH-INCOME COUNTRIES
40% OF THE WORLD'S VEHICLES BUT **7%** OF ALL DEATHS

54% OF DEATHS ARE PEDESTRIANS, CYCLISTS AND MOTORCYCLISTS

3% **28%** **23%**

EVERY 24 SECONDS SOMEONE DIES ON THE ROAD

DECADE OF ACTION FOR ROAD SAFETY 2011-2020

#RoadSafety

World Health Organization

source: WHO Global status report on road safety 2018
www.who.int/violence_injury_prevention/road_safety_status/2018/en/

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To register for any of the following courses, click on the course code below or contact the JIBC Registration Office at 604.528.5590 or 1.877.528.5591 (toll free). You can check Ways to Register for other registration methods and for assistance from the registration office. View the full 2019 Course Calendar online for a full list of upcoming Investigation & Enforcement Skills courses in 2019.

UPCOMING ONLINE COURSES

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Introduction to Administrative Law (INVE-1002)

February 19-April 1, 2020

Introduction to Administrative Law (INVE-1002)

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November 6-8, 2019

Introduction to Investigative File Management (INVE-1003)

November 18, 2019

Tactical Communications (INVE 1012)

November 19-22, 2019

Conducting Internal Investigations (INVE 1011)

November 25-29, 2019

Introduction to Investigative Skills and Processes (INVE 1003)

December 9-11, 2019

Introduction to Criminal Law (INVE 1001)

January 6-7, 2020

Intro Criminal Justice System (INVE 1000)

February 3-5, 2020

Introduction to Criminal Law (INVE 1001)

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