JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

IN MEMORIAM

On November 19, 2020, 52-year-old Ontario Provincial Police (OPP) Constable Marc Hovingh was killed in a shooting that also left a civilian dead in the tight-knit community of Manitoulin Island. Along with another member, Constable Hovingh attended a property after its owner reported the presence of an unwanted man. Soon after arriving, a man was located inside a trailer. There was an exchange of gunfire between Constable Hovingh and the man, resulting in both men being struck. They were transported to hospital where both succumbed to their injuries.

A well-respected officer, Constable Hovingh was also known as a devoted family man. He leaves behind his wife and four children. He was highly regarded in the community where he coached minor hockey throughout his career and was active in the Mindemoya local Missionary Church where he was involved with the Sunday school program for the last 20 years.

Constable Hovingh was talented in woodworking and carpentry. He built his family home and was planning to build “tiny” homes in his retirement. He was not only handy on land, but also was an avid sailor and enjoyed taking people out on his boat. Constable Hovingh served with the OPP for 28 years.

~ Constable Marc Hovingh~

"We are grateful and forever indebted to you for your service."

OPP Commissioner Thomas Carrique
November 28, 2020

Source: https://www.opp.ca/news/#/viewnews/5fb72042036bd and https://www.siu.on.ca/en/news_template.php?nrid=6153.

Highlights In This Issue

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Season's Greetings

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.

Academic literacy in the social sciences.
Judy Eaton & David N. Morris.
Toronto; Vancouver: Canadian Scholars, 2019.
H 62 E27 2019

All you have to do is ask: how to master the most important skill for success.
Wayne Baker.
New York, NY: Currency, 2020.
HD 30.3 B365 2020

American epidemic: reporting from the front lines of the opioid crisis.
edited by John McMillian; wtih a foreword by Leslie Jamison.
New York, NY: The New Press, 2019.
RC 568 O45 A435 2019

The blindspots between us: how to overcome unconscious cognitive bias and build better relationships.
Gleb Tsipursky, PhD.
Oakland, CA: New Harbinger Publications, Inc., 2020.
BF 447 T78 2020

Crisis communication strategies: how to prepare in advance, respond effectively and recover in full.
Amanda Coleman.
London; New York, NY : Kogan Page, 2020.
HD 49.3 C65 2020

Ethics for the public service professional.
Aric W. Dutelle & Randy S. Taylor.
Boca Raton, FL: CRC Press, 2018.
JL 111 E84 D88 2018

How we learn: why brains learn better than any machine ... for now.
Stanislas Dehaene.
New York, NY: Viking, 2020.
BF 318 D44 2020

Life's great question: discover how you contribute to the world.
Tom Rath.
San Francisco, CA: Silicon Guild Books, 2020.
BF 481 R38 2020

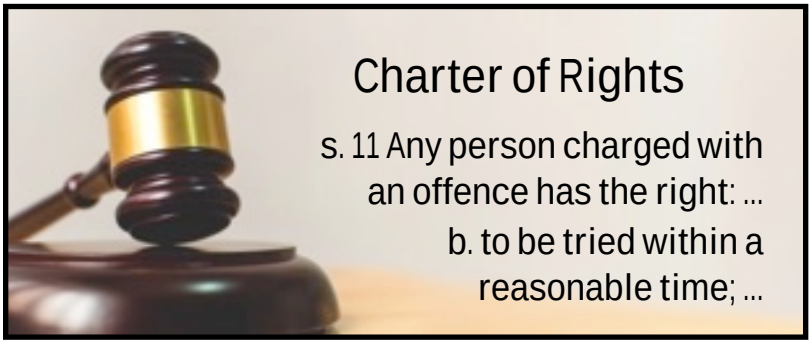
Optimal outcomes: free yourself from conflict at work, at home, and in life.
Jennifer Goldman-Wetzler, PhD.
New York, NY: Harper Business, an imprint of HarperCollinsPublishers, 2020.
HM 1126 G64 2020

Overdose: heartbreak and hope in Canada's opioid crisis.
Benjamin Perrin.
Toronto, ON: Viking, an imprint of Penguin Canada, a division of Penguin Random House Canada Limited, 2020.
RC 568 O45 P47 2020

Resilience at work: practical tools for career success .
Kathryn Jackson.
Abingdon, Oxon; New York, NY: Routledge, 2019.
BF 698.35 R47 J33 2019

The resilient practitioner: burnout and compassion fatigue prevention and self-care strategies for the helping professions.
Thomas M. Skovholt & Michelle Trotter-Mathison.
London; New York, NY: Routledge, Taylor & Francis Group, 2016.
RC 451.4 M44 S57 2016

What's your problem?: to solve your toughest problems, change the problems you solve.
Thomas Wedell-Wedellsborg.
Boston, MA: Harvard Business Review Press, 2020.
HD 30.29 W434 2020



ALBERTA JORDAN APPLICATIONS

In 2016, the Supreme Court of Canada established a new framework for applying s. 11(b) of the *Charter* - the right to be tried within a reasonable time - *R. v. Jordan*, 2016 SCC 27. A majority of the Supreme Court created a presumptive ceiling on the time it should take to bring an accused person to trial:

- **18** months for cases going to trial in the provincial court; and
- **30** months for cases going to trial in the superior court.

In October 2016, Alberta's Justice and Solicitor General started tracking defence applications to dismiss cases based on the *Jordan* timelines.

Between October 25, 2016 and September 30, 2020, there were **289** *Jordan* applications filed in Albert courts.

Source: Jordan Applications

Of the 289 applications, they were disposed of in the following manner:

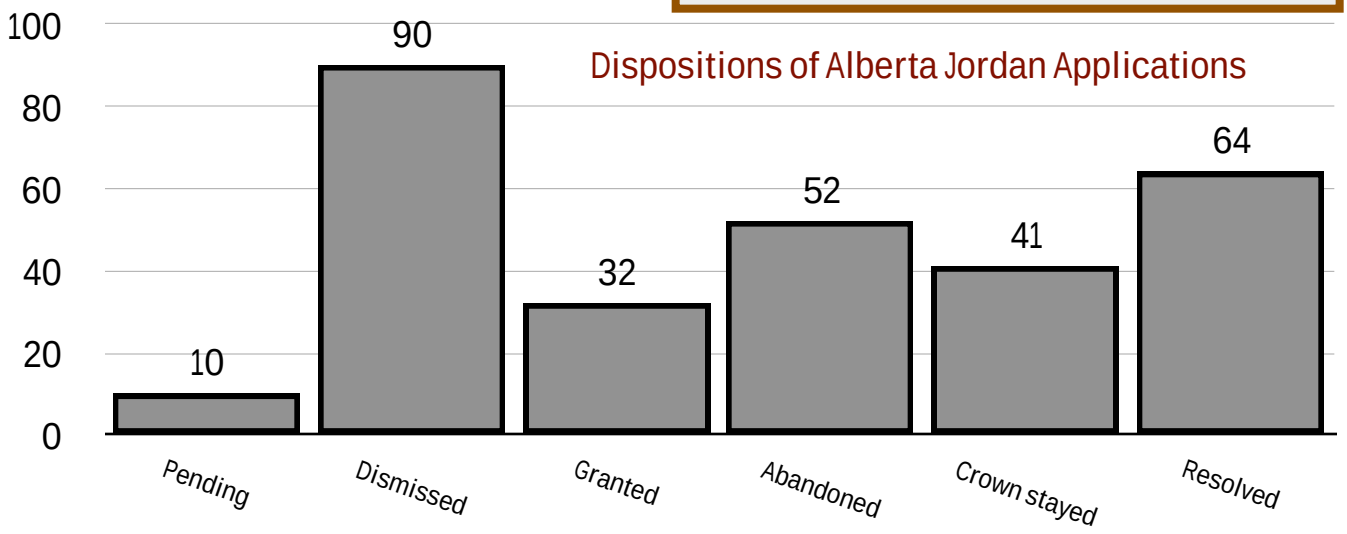
- **10** pending;
- **90** dismissed by the Court;
- **32** granted (one being a possible appeal by Crown);
- **52** abandoned by defence
- **41** proactively stayed by the Crown (on the basis that they would not have survived a *Jordan* application); and
- **64** were resolved (unrelated to *Jordan*).

LEGALLY SPEAKING:

"· **Once the presumptive ceiling is exceeded**, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the case's complexity, the delay is reasonable.

· **Below the presumptive ceiling**, in clear cases, the defence may show that the delay is unreasonable. To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (2) the case took markedly longer than it reasonably should have."

Justices Moldaver, Karakatsanis and Brown in *R. v. Jordan*, 2016 SCC 27 at para. 105.



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

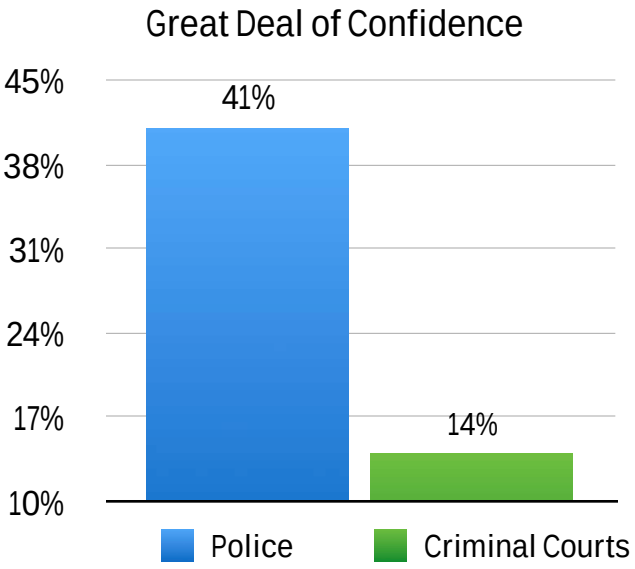
BCFirstRespondersMentalHealth.com

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

COPS TOP COURTS IN CANADIAN CONFIDENCE

In a recent Statistics Canada report - "Public Perceptions of the Police in Canada's Provinces, 2019" - it was revealed that Canadians have far more confidence in the police than they do in the Canadian criminal courts. While **41%** of Canadians said they had a great deal of confidence in the police, only **14%** said they had a great deal of confidence in the criminal courts.



The survey also reported how well Canadians felt the criminal courts were doing in specific performance measures.

Canadian Criminal Courts				
Performance Measure	Good job	Average job	Poor job	Don't know
Providing justice quickly	10%	30%	31%	28%
Helping victims	14%	32%	21%	33%
Determining guilt	19%	35%	12%	34%
Ensuring a fair trial for the accused	26%	32%	8%	33%

Confidence in Police

Overall, 90% of Canadians living in the provinces said they had confidence in the police. Only 7% said they did not have very much confidence while 2% reported having no confidence at all. Residents of PEI had the highest level of confidence in the police (**97%**) while Manitoba had the least (**87%**).

CONFIDENCE IN POLICE BY PROVINCE			
Province	Total	Great deal	Some
PEI	97%	59%	38%
NL	93%	49%	44%
QC	92%	43%	49%
NB	92%	45%	47%
SK	91%	46%	45%
AB	90%	41%	49%
NS	90%	41%	49%
BC	89%	39%	50%
ON	89%	40%	49%
MB	87%	34%	53%
Canada	90%	41%	49%

Other highlights of the report include:

- Persons with a disability were less likely than people without a disability to report a great deal of confidence in the police.
- Confidence in the police was highest among seniors.
- Confidence in the police was lower among Indigenous people.
- Visible minorities reported less confidence in the police than non-visible minorities.

CONFIDENCE IN POLICE BY CMA	
CMA	Some or a Great Deal of Confidence
Abbotsford-Mission, BC	98%
Trois-Rivières, QC	97%
Saguenay, QC	95%
Québec, QC	94%
Gatineau, QC	94%
London, ON	93%
Regina, SK	93%
Calgary, AB	93%
St. Catharines–Niagara, ON	92%
Kitchener–Cambridge–Waterloo, ON	92%
St. John's, NL	91%
Moncton, NB	91%
Montréal, QC	91%
Hamilton, ON	91%
Windsor, ON	91%
Saskatoon, SK	91%
Halifax, NS	90%
Sherbrooke, QC	90%
Victoria, BC	90%
Ottawa, ON	89%
Toronto, ON	88%
Winnipeg, MB	88%
Edmonton, AB	88%
Kelowna, BC	87%
Vancouver, BC	87%
Greater Sudbury, ON	84%
All CMAs	90%

Confidence by CMA

Confidence in the police was generally high among Census Metropolitan Areas (CMAs). *"A CMA is formed by one or more adjacent municipalities centred on a population centre (known as the core). A CMA must have a total population of at least 100,000, of which 50,000 or more must live in its core."*

Police Performance

The report also examined the perception of police performance across six measures:

- Enforcing the laws;
- Promptly responding to calls;
- Being approachable and easy to talk to;
- Supplying information to the public on ways to prevent crime;
- Ensuring the safety of the citizens in the area; and
- Treating people fairly.

Police Performance Measures				
Performance Measure	Good job	Average job	Poor job	Don't know
Enforcing the laws	46%	33%	5%	15%
Promptly responding to calls	40%	26%	7%	27%
Being approachable and easy to talk to	49%	24%	6%	20%
Supplying information to the public on ways to prevent crime	37%	31%	10%	22%
Ensuring the safety of the citizens in the area	44%	33%	6%	17%
Treating people fairly	42%	26%	8%	24%

REASONABLE GROUNDS VIEWED CUMULATIVELY, CONTEXTUALLY & COMMONSENSICALLY

R. v. Coutu, 2020 MBCA 106

A convenience store was robbed by a man armed with a machete. The robber took a small amount of money and fled on foot with an accomplice who was believed to be a female wearing a black jacket. The police arrived at the store within minutes of the robbery. Officers obtained a description of the suspects from the store owners and hastily viewed a surveillance video. The man was described as about 30-years-old; 5′ 10″; and medium build, with a lighter skin tone. He was wearing black Nike shoes with a white swoosh, dark clothing, and a black winter jacket with a hood and a small logo over the left breast. His face was covered and he was wearing gloves, carrying a knife and had a laptop bag.

About 10 minutes after the robbery, police used a dog to track the suspects from the store. The dog led the officers to a discarded laptop bag, and then to a residence a further street away. Police arrived at the residence about 30 minutes after the robbery had occurred. The dog handler believed the suspects had entered the residence through a side door but, due to the passage of time, he could not say for certain if they were still inside. The police dog picked up a track leaving the rear door of the residence and a fresh bicycle track was seen in the snow leaving the front yard of the residence.

Police then saw two individuals come into the back yard of the residence after exiting a vehicle that had just pulled up in the back lane. One of these individuals was believed to be a female and was wearing a grey jacket while the other was the accused. The accused had the same stature as the male robbery suspect and was wearing black Nike shoes with a white swoosh, dark clothing and a black winter jacket with a hood. His face was difficult to see and he was carrying a backpack. An officer yelled, **"Police, show me your hands."** The accused began to walk backwards and tried to *"gingerly"* remove his backpack. The officer thought the accused was "*potentially going to start running away"*. Based on the officer's experience, this behaviour "heightened" a belief that the accused was the male suspect. The officer then arrested the accused and the backpack was searched incidental to the arrest. In the backpack, police found a loaded sawed-off rifle, two throwing stars and an air pistol with a silencer. The other individual with the accused turned out to be a man, not a woman.

Once the accused had been arrested, the police reviewed the video surveillance at the store. With the opportunity and time now to scrutinize the ***"very fine details"*** and subtleties of the surveillance video and carefully watch the robbery from multiple camera angles, the police were able to quickly clear the accused of the robbery even though his appearance, clothing and footwear were similar to the male suspect's. Nevertheless, the accused was charged with multiple firearms and weapons offences.

Manitoba Court of Queen's Bench (?)

The judge found the accused's arrest unlawful. In his view, the arresting officer's grounds were ***"far short of being objectively reasonable."*** The description of the male suspect and the accused did not exactly ***"match."*** As well, the stature of the accused and the male suspect was ***"common"*** and the person with the accused was a male wearing a grey jacket as opposed to a female wearing a black jacket. In the judge's opinion, the officer, ***"at best"***, had a reasonable suspicion that could have allowed for an investigative detention.

Since the accused's arrest was illegal, the warrantless search of his backpack was unreasonable under s. 8 of the *Charter*. However, the judge nevertheless admitted the evidence under s. 24(2) because excluding it would bring the administration of justice into disrepute. The accused was convicted of possessing a loaded prohibited firearm, carrying a concealed weapon (the air pistol with a silencer), possessing a

prohibited weapon (the throwing stars) and five counts of possessing weapons contrary to a prohibition order. He was sentenced to five and half years in prison less six months for the deliberate disregard shown by the police when they breached his *Charter* rights. The sentence was further reduced by 1.5 months for pre-trial custody.

Manitoba Court of Appeal

The Crown argued, among other things, that the trial judge erred in finding the accused's arrest unlawful. Thus, his sentence should not have been reduced because of the state misconduct (*Charter* breaches).

Legality of an Arrest

A warrantless arrest under s. 495(1)(a) of the *Criminal Code* requires the arresting officer subjectively believe they have reasonable grounds on which to base the arrest and those grounds must be objectively justifiable to a reasonable person placed in the position of the officer. In discussing reasonable grounds for arrest, Justice Mainella, for the unanimous Court of Appeal, noted the following:

- ***"In assessing the totality of the circumstances of an arrest, it is important to bear in mind 'that the police are often required to make split-second decisions in fluid and potentially dangerous situations' based on the available information which may be imperfect, evolving or even turn out to be wrong."***
- ***"The point at which credibly-based probability replaces suspicion is often unclear and debatable. While police officers must evaluate discrepancies and uncertainties in information before acting upon it, the mere existence of discrepancies or uncertainties is not fatal to there being reasonable grounds to arrest. A belief can be objectively reasonable even if it turns out to be wrong."***

BY THE BOOK:

Criminal Code

Arrest without warrant

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

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

In this case, ***"there were language barriers with the store owners, there was no time to do anything more than briefly look at the surveillance video and the male suspect was armed."*** In finding the trial judge erred in concluding that the arresting officer's grounds to arrest were not objectively reasonable, the Court of Appeal concluded:

> The judge misapplied the totality-of-the-circumstances test by failing to consider all of the relevant circumstances known to the arresting officer. When confronted by the police, the accused reacted in a way suggesting he was about to flee. The arresting officer relied on this fact in his decision-making, as he was entitled to do. Flight or other suspicious behaviour is a factor a police officer can rely upon to support other grounds to arrest where the indicia of it occurs before the decision to arrest is made.
>
> We are satisfied that the totality of the circumstances provided reasonable grounds to

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> arrest the accused. The dog-track evidence put the accused in the pool of potential suspects. While it is true that the accused's stature was not suspicious, it did not exclude him from being the male suspect because the two were similar in height and build. The timing here was not too long to make the male suspect's description stale, but long enough to allow him to have done more than simply run into the residence in question. The differences between the black-hooded winter jackets worn by the male suspect and the accused were trivial. Both the accused and the male suspect were wearing dark clothing. Importantly, the accused's footwear appeared, at a distance, identical to that described to be worn by the male suspect. The arresting officer explained that his experience was that, while it is not uncommon for robbery suspects to change their clothing after a robbery to evade capture, they "don't often change their footwear". Finally, the accused's suspicious behaviour when confronted by the police supported the other grounds.
>
> The cumulative effect of these circumstances, viewed contextually, commonsensically, and in light of the arresting officer's experience and training, established that the arresting officer objectively had reasonable grounds to arrest the accused. [references omitted, paras. 22-24]

Since the arrest was lawful, the search of the backpack incidental to the arrest was reasonable.

"The cumulative effect of these circumstances, viewed contextually, commonsensically, and in light of the arresting officer's experience and training, established that the arresting officer objectively had reasonable grounds to arrest the accused."

Sentence Reduction

Absent a *Charter* breach, it was an error for the trial judge to reduce the accused's sentence for that reason. And there was no other state misconduct that would otherwise justify a sentence reduction. "***While the police did make a mistaken identity, they treated the accused professionally, fairly and acted diligently to exclude him from the robbery,"*** said Justice Mainella. ***"There was no misconduct relevant to the circumstances of the offence or the offender which could be used as a mitigating factor on sentence."***

The Court of Appeal did, however, find the accused's sentence related to his breaching of the prohibition orders should have been consecutive to the possession of a loaded prohibited firearm conviction:

> Prohibition orders are designed to protect the public by reducing the misuse of weapons. Parliament has recognised the severity of contravening a prohibition order by setting the maximum term of imprisonment at 10 years. Accordingly, there must be "serious consequences" for a person subject to a prohibition order who chooses to violate it. Sentencing courts should not treat contravening a prohibition order in a manner like failing to attend court or to comply with a condition of judicial interim release or probation; it is not a run-of-the-mill breach offence. [references omitted, para. 34]

The accused's sentence was varied. It was increased to a total of six years' imprisonment less pre-trial custody credit.

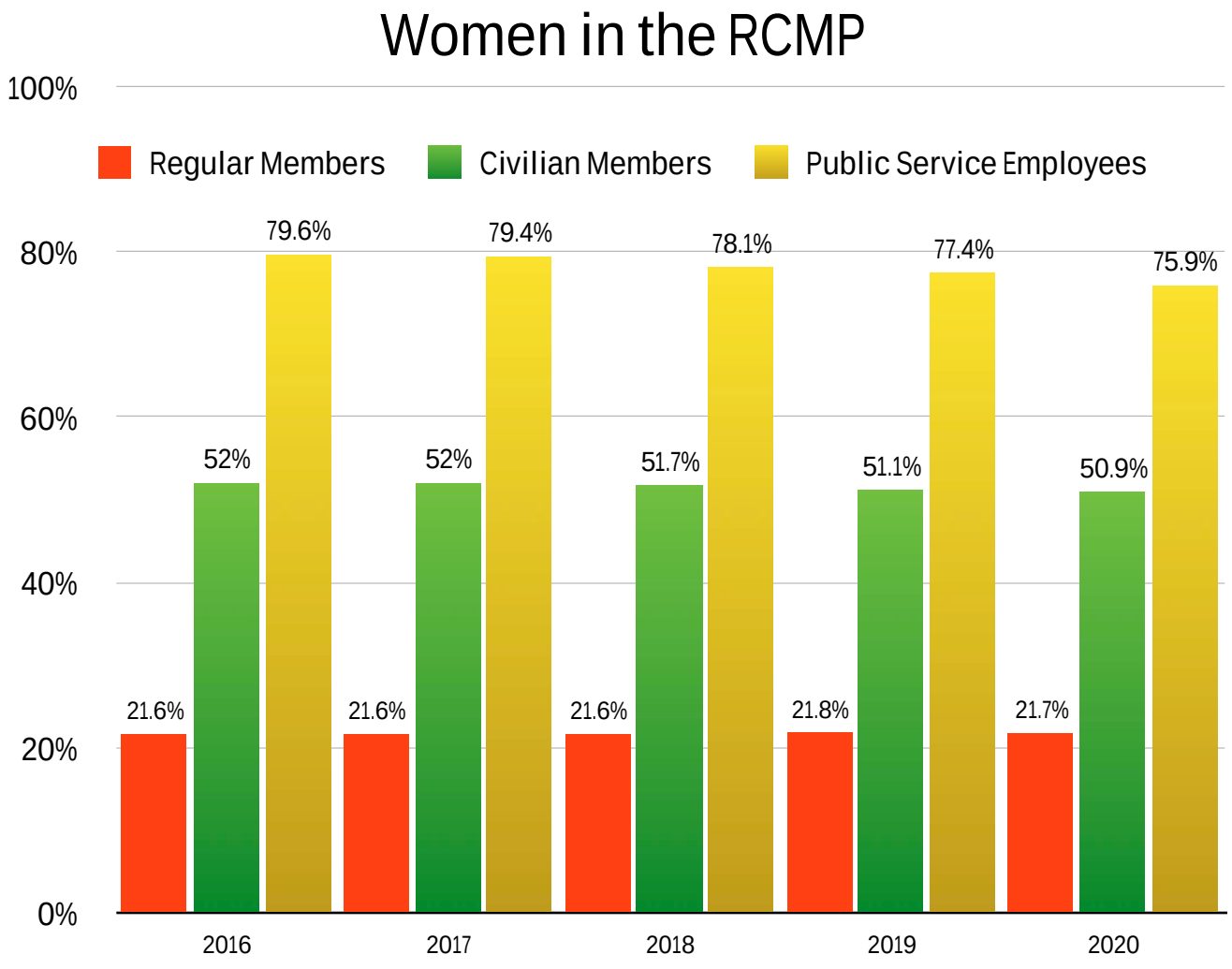
Complete case available at www.canlii.org

RCMP RELEASE EMPLOYEE DIVERSITY STATISTICS

The RCMP has released statistics showing the current representation rates for all categories of employees as at April 1, 2020. The percentage of women comprising regular members has remained stable over the last five years, from a low of **21.6%** in 2016, 2017, and 2018 to a high of **21.8%** in 2019. More than half of the civilian members and more than three-quarters of its public service employees were women.

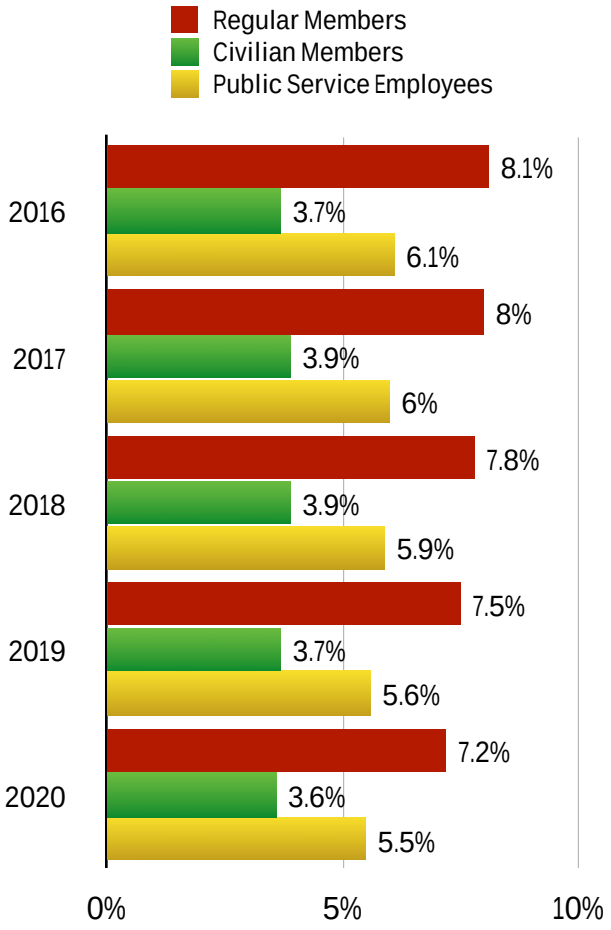
Women in the Ranks (%)			
Special Constable	5.2%	Superintendent	25.4%
Constable	23.1%	Chief Superintendent	22.8%
Corporal	21.1%	Assistant Commissioner	26.9%
Sergeant	19.2%	Deputy Commissioner	16.7%
Staff Sergeant	11.0%	Commissioner	100%
Inspector	24.3%	All Ranks	21.8%

Source:https://www.rcmp-grc.gc.ca/transparenc/police-info-policieres/employ/2020-eng.htm



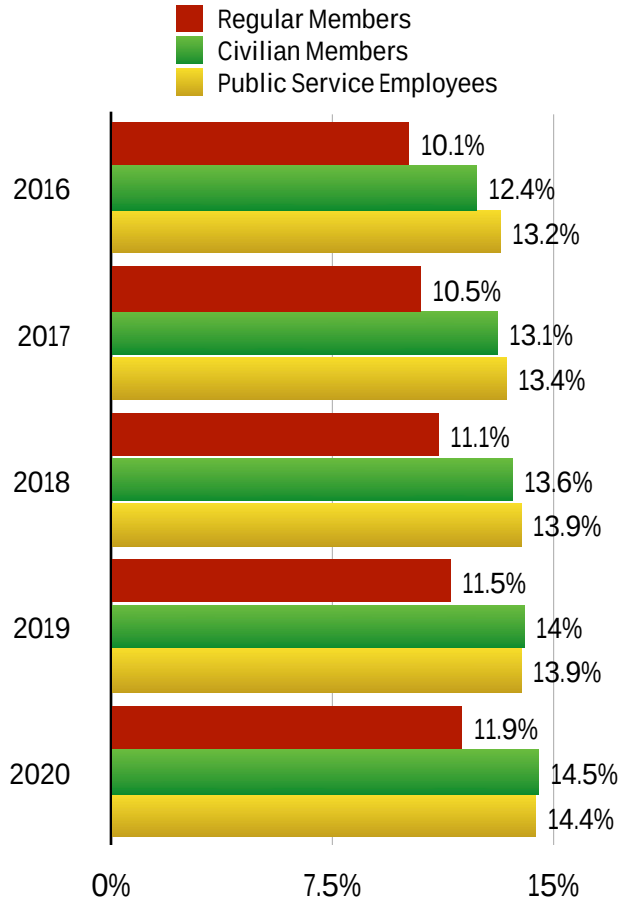
The RCMP also surveyed their workforce to determine the number of individuals who self-identified as a member of a visible minority, Indigenous peoples, and persons with a disability. Employees could choose to identify with more than one group or not to identify at all.

Indigenous Peoples (as a percentage)



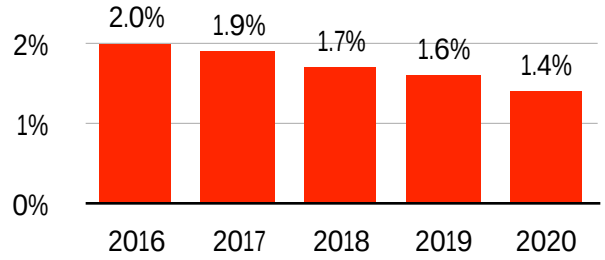
Indigenous Peoples in the Ranks (%)			
Special Constable	9.5%	Superintendent	7.4%
Constable	6.3%	Chief Superintendent	3.5%
Corporal	8.7%	Assistant Commissioner	3.8%
Sergeant	8.9%	Deputy Commissioner	0%
Staff Sergeant	9.7%	Commissioner	0%
Inspector	9.5%	All Ranks	7.2%

Visible Minorities (as a percentage)



Visible Minorities in the Ranks (%)			
Special Constable	1.7%	Superintendent	12.7%
Constable	12.5%	Chief Superintendent	7.0%
Corporal	10.3%	Assistant Commissioner	3.8%
Sergeant	11.4%	Deputy Commissioner	0%
Staff Sergeant	11.0%	Commissioner	0%
Inspector	17.5%	All Ranks	11.9%

Regular Members with Disabilities



POLICING ACROSS CANADA: FACTS & FIGURES

According to a recent report released by Statistics Canada, there were **68,718** active police officers across Canada in 2019. This represented an increase of **+186** officers from the previous year. Ontario had the most police officers at **25,340**, while the Yukon had the least at **131**. With a national population of **37,589,262**, Canada's average cop per pop ratio was **183** police officers per 100,000 residents.

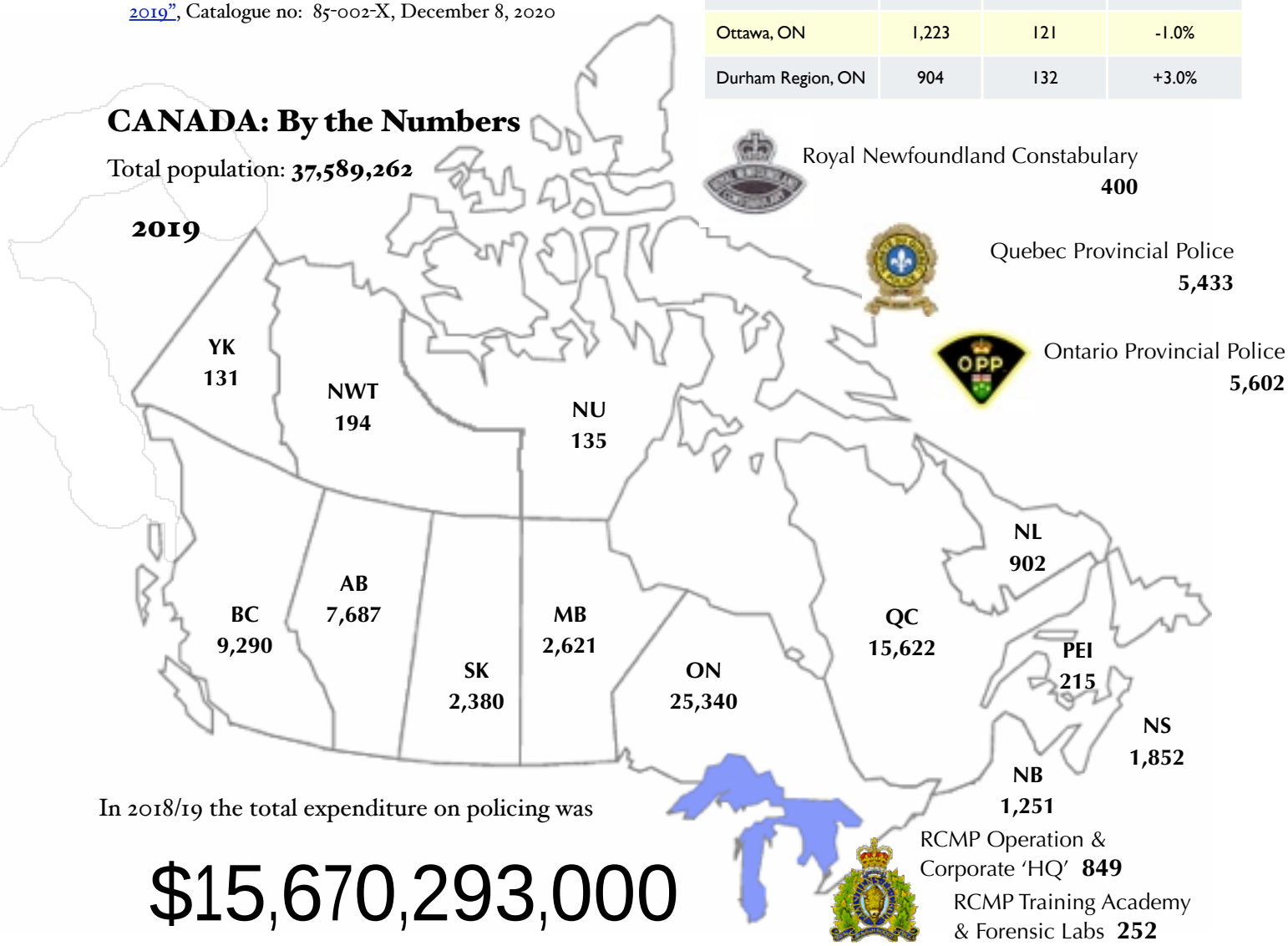
Source: Statistics Canada, "Police Resources in Canada, 2019", Catalogue no: 85-002-X, December 8, 2020

Canada's Police Officers by City - Top 10			
CMA	Officers		% Change
	Number	per 100,000	2018>2019
Toronto, ON	4,790	162	-3.0%
Montreal, QC	4,295	212	-5.0%
Calgary, AB	2,123	162	+6.0%
Peel Region, ON	2,002	144	+1.0%
Edmonton, AB	1,885	188	0.0%
York Region, ON	1,543	134	+3.0%
Winnipeg, MB	1,405	186	+2.0%
Vancouver, BC	1,330	196	-1.0%
Ottawa, ON	1,223	121	-1.0%
Durham Region, ON	904	132	+3.0%

CANADA: By the Numbers

Total population: **37,589,262**

2019



Royal Newfoundland Constabulary **400**

Quebec Provincial Police **5,433**

Ontario Provincial Police **5,602**

In 2018/19 the total expenditure on policing was

$15,670,293,000

RCMP Operation & Corporate 'HQ' **849**

RCMP Training Academy & Forensic Labs **252**

2019 FAST FACTS

- On the snapshot day of May 15, 2019 there were **68,718** police officers in Canada. There were an additional **26,878** civilians, **2,621** special constables and **2,200** recruits.
- Saskatchewan had the highest provincial rate of police strength at **203** officers per 100,000 residents (cop to pop ratio) followed closely by Nova Scotia and Manitoba both at **191** officers per 100,000. The Northwest Territories had the highest territorial cop to pop ratio at **433** officers per 100,000.
- Police responded to **13.5 million** calls for service in 2018/2019. This is up **+6.0%** over the previous year (2017/2018). Municipal police services handled **67%** of the calls for service, follow by the RCMP (**22%**), provincial police (**11%**) and First Nations police services (**1%**). First Nations police, however, responded to a higher ratio of calls (**90,228** calls per 100,000 population) followed by municipal police services (**38,871** calls per 100,000), the OPP (**37,689**), the RCMP (**36,308**), the Royal Newfoundland Constabulary (**25,697**) and the Sûreté du Québec (**20,206**).

Calls For Service per 100,000 Population		
Police Service	2017/2018	2018/2019
First Nations	85,780	90,228
Municipal	36,813	38,371
OPP	36,031	37,689
RCMP	33,744	36,308
RNC	16,929	25,697
SQ	19,605	20,206

- **55%** of officers were **40** years of age or older.
- Overall, the proportion of police officers aged 50 and older has grown. Officers **50** years of age or older accounted for **18%** of officers.
- For municipal police services serving a population of 100,000 or more, Victoria, BC had the highest police strength at **214** officers per 100,000. This was followed by Montreal, QC (**212**) and Halifax, NS (**209**). Richelieu-Saint-Laurent, QC had the lowest police strength at **102** officers per 100,000.

Retirement Eligible Police Officers by Province/Territory	
Province/Territory	Eligible to Retire %
YK	18%
NB	17%
PEI	17%
NL	15%
NS	15%
QU	13%
BC	12%
NWT	12%
NU	10%
SK	9%
MB	9%
ON	8%
AB	6%
Provincial/Territory	10%
RCMP Operation & Corporate HQ, Depot and Forensic Labs	41%
Canada	11%

RETIREMENT

At the end of the 2018/2019, **11%** of police officers were eligible to retire. The Yukon had the highest proportion of officers that could retire at **18%**. This was followed by both New Brunswick and Prince Edward Island (**17%**), and both Newfoundland and Nova Scotia at **15%**. Forty-one percent (**41%**) of officers at RCMP Headquarters, the Training Academy and forensic labs could retire.

RCMP Officers by Type of Policing - Canada 2019 (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	5,972	2,877	1,171	913	-	-	703	846	96	427	120	175	121	13,421
Federal & Other	765	401	130	129	1,749	886	115	121	22	75	11	19	14	4,437
Total	6,737	3,278	1,301	1,042	1,749	886	818	967	118	502	131	194	135	17,858

- There were approximately **236,690** training hours devoted to the enforcement of new cannabis laws. This included **143,740** hours dedicated to SFST (Standardized Field Sobriety Testing), **18,830** hours of SFST refresher course, and **74,120** hours of DRE (Drug Recognition Expert) training. In 2018/2019, a total of **4,725** police officers successfully completed the SFST course, **3,439** officer completed the SFST refresher course and **1,002** officers were DRE certified.

Hirings		
Province/Territory	Experienced	Recruit
YK	-	-
NB	97%	3%
PEI	100%	-
NL	59%	41%
NS	100%	-
QU	45%	55%
BC	79%	21%
NWT	100%	-
NU	100%	-
SK	91%	9%
MB	79%	21%
ON	24%	76%
AB	67%	33%
Canada	50%	50%

- **4%** of police officers identified as Indigenous.
- Of the officers hired, **50%** were experienced police officers and **50%** were recruits.
- Ontario had the highest net gain of police officers in 2018/2019 (hirings less departures) at **+138** followed by BC (**+119**), Alberta (**+111**) and Quebec (**+106**). Nova Scotia had the highest net loss at **-11** officers followed by PEI (**-6**), Nunavut (**-3**), and New Brunswick and the Yukon (**-2**).

GENDER

There were **15,268** female officers on May 15, 2019 accounting for **22%** of all officers, or about 1 in 5. This was up +**325** female officers from 2017/2018.

Senior officers, such as chiefs, deputy chiefs, superintendents, inspectors and other equivalent ranks, were **18.9%** female. Non-commissioned officers, such as sergeants, were **20.0%** female. Constables were **23.3%** female.

Of the municipal police services serving a population of 100,000 or more, Longueuil had the highest percentage of female officers at **35%**, followed by Montreal (**33%**) and St. John's (**30%**).

RANKS

Most police officers were of constable rank (**68%**) followed by non-commissioned officers (**27%**) and commissioned officers (**5%**).

Of the non-commissioned ranks, **21%** were corporals, **64%** sergeants, **13%** staff-sergeants and the remaining **2%** were other ranks.

Of the commissioned ranks, **31%** were inspectors, **31%** senior constables, **10%** superintendents, **8%** commissioned lieutenants and **20%** other commissioned officers.

SEALING, SEIZING & TOWING VEHICLE FROM PROPERTY LAWFUL

R. v. Iraheta, 2020 ONCA 766

The police obtained a warrant to search a dwelling for marijuana and drug paraphernalia after receiving information from a confidential informer. While conducting surveillance of the premises, police saw a person matching the accused's description leave the property in a vehicle. After stopping the vehicle and identifying the accused as its driver, the police detained and subsequently arrested him. The same day, the police executed the search warrant at the accused's premises. Upon entering the unit from both its front and rear, the police discovered that there were two separate units with a family unrelated to the accused residing in the front unit. After realizing that the accused resided in the rear unit, the police vacated the front unit and proceeded to search the rear unit.

While searching the accused's residence, the police discovered several prohibited firearms, ammunition, controlled substances, drug paraphernalia, and documents. The police also saw a Ford Fusion in the accused's backyard. They observed a safe through its window. The police sealed the doors to the vehicle and arranged for it to be towed to the police garage. The following day, the police executed an additional warrant to search the vehicle, where they discovered weapons, ammunition, drugs, and counterfeit money.

The accused was charged with several firearm related offences, possessing a controlled substance for the purpose of trafficking, and possessing counterfeit money.

Ontario Superior Court of Justice

Among other things, the accused challenged the sufficiency of the information to obtain the search warrants for his residence and his vehicle. He alleged that his rights under s. 8 of the *Charter* had been breached. The judge, however, rejected the accused's submissions. First, the police did not need another search warrant once they realized the residential premises was divided into two units. The police searched the address for which the warrant was authorized and where the target of the investigation allegedly resided. Second, the warrant was issued on the basis of reasonable grounds. The confidential informer's information was compelling, credible and corroborated. Finally, the seizure of he vehicle was lawful. The police sealed its doors and towed it to the police garage. The warrant to search it was based on reasonable grounds.

The accused was convicted of possessing a loaded prohibited firearm and possessing a prohibited firearm. He was sentenced to 96 months in prison less 44 months for pre-sentence custody.

Ontario Court of Appeal

The accused argued the search warrant for his residence was facially invalid because it did not particularize the specific unit to be searched in the multi-unit premises. He also contended that the information to obtain the search warrant was insufficient because it was not sufficiently corroborated and the police improperly exceeded the scope of the search warrant by sealing, seizing and towing the vehicle from the property. In his view, the searches of his home and his vehicle were serious s. 8 *Charter* breaches and the evidence ought to have been excluded under s. 24(2) of the *Charter*. He wanted his convictions set aside and acquittals entered.

The Search of the Unit

The Court of Appeal rejected the accused's assertion that, once the police learned the search warrant did not accurately describe his particular unit, they should have stopped their search and obtained further judicial authorization to search it unless there were exigent circumstances. ***"The question of whether a search warrant adequately describes a location to be searched depends on the***

particular circumstances of the case," said the Court of Appeal. It continued:

> In the particular circumstances of this case, it was not necessary for the police to stop their search in order to obtain another search warrant. The search warrant adequately described the location to be searched: it correctly stated that the search was for the dwelling unit located at 1 Cobbler Crescent, which is where the [accused] lived. There is no dispute that at the time of the search, the [accused] resided with his co-accused girlfriend and her two young children in the rear unit of 1 Cobbler Crescent. That another family lived in the front unit of the same address, a fact unknown to the police when they applied for the warrant, does not, by itself, render the warrant's description inadequate.
>
> As the application judge found, there was no indication from the outside that the house was divided into multiple units: 1 Cobbler Crescent is a small, one-storey detached house; there were no separate unit numbers; there was one mailbox, one doorbell, and one utility meter. Surveillance would not have assisted the police in discerning that there were two units. As there was no indication from the outside of the dwelling house that it contained two units, various comings and goings would not have alerted the police to the existence of two units.
>
> The police had clear boundaries to search the [accused's] unit and did not have to look past the warrant:. They searched the precise location of the target specified in the search warrant, namely, the dwelling unit located at 1 Cobbler Crescent, which is where the [accused] resided. They conducted the search in a reasonable manner. They only searched the rear unit. Upon entering the front unit occupied by the other tenant, the police realized their mistake and left the front unit. [reference omitted, paras. 15-17]

Sufficiency of the ITO

Although he conceded the information from the informer was compelling, the accused suggested the police required a higher level of corroboration because the search warrant was based on the information of an untested, first-time confidential informer. He also argued that the accused's criminal record could not be used to corroborate the informer's information. But the Court of Appeal disagreed, finding the application judge made no error in determining that the ITO was sufficient and the search warrant was validly issued.

"It is well established that each Debot factor [whether the information is compelling, credible and corroborated] does not form a separate test but that it is the totality of the circumstances that must meet the standard of reasonableness," said the Appeal Court. ***"Weaknesses in one area may be compensated, to some extent, by the strengths in the other two Debot factors."*** And further:

> ... As the application judge found, the detailed information provided by the confidential informant was particularly compelling. She did not err in referencing the [accused's] criminal record to corroborate the confidential informant's knowledge of the [accused] and to bolster the informant's credibility. The application judge did not rely solely on the [accused's] past involvement in criminal activities but was satisfied on all the

"The seizure of the vehicle was authorized under both s. 489(1)(c) of the Criminal Code and s. 11(8) of the CDSA. Under s. 489(1)(c) of the Criminal Code, the police were entitled to seize any thing that they believed on reasonable grounds would afford evidence in respect of an offence. Furthermore, the provisions of s. 11(8) of the CDSA ... permits the seizure of 'any thing that the peace officer believes on reasonable grounds has been obtained by or used in the commission of an offence or that will afford evidence in respect of an offence'."

> circumstances that she outlined in detail that there were reasonable and probable grounds to believe there would be evidence of a criminal offence in 1 Cobbler Crescent. ... [para. 24]

The Vehicle Seizure

The accused's suggestion that the warrantless seizure of his vehicle from the backyard was without lawful authority was also rejected:

> ... The seizure of the vehicle was authorized under both s. 489(1)(c) of the Criminal Code and s. 11(8) of the CDSA. Under s. 489(1)(c) of the Criminal Code, the police were entitled to seize any thing that they believed on reasonable grounds would afford evidence in respect of an offence. Furthermore, the provisions of s. 11(8) of the CDSA do not limit the police to the things mentioned in the warrant. Notably, "in addition to the things mentioned in the warrant", s. 11(8) permits the seizure of "any thing that the peace officer believes on reasonable grounds has been obtained by or used in the commission of an offence or that will afford evidence in respect of an offence."
>
> Here, the evidence of the firearms, ammunition, controlled substances, and drug paraphernalia, as well as the presence of the safe in plain view in the [accused's] Ford Fusion vehicle, informed the police's belief on reasonable grounds that the vehicle would "afford evidence in respect of an offence." In our view, in light of the evidence of firearms and drugs in the [accused's] residence, it was both reasonable and necessary for the police to secure and tow the Ford Fusion vehicle that likely contained similar items away from the house and property, where children were present, to the police garage for safe-keeping until a warrant could be obtained for its search. [paras. 29-30]

Since there were no *Charter* breaches, it was unnecessary to consider s. 24(2).

Complete case available at www.ontariocourts.on.ca

NO DETENTION WHILE VISITING REMANDED PRISONER: s. 10(b) NOT REQUIRED

R. v. Saretzky, 2020 ABCA 421

Within a five day period, three murders occurred in a small community. One involved the killing of a 27-year-old man and his 2-year-old daughter, while the other involved the death of a 67-year-old woman. The police believed the killings were related. Following the deaths of the man and his daughter, the accused became a suspect. During interactions with the accused, the police properly *Chartered* and cautioned him. The accused eventually offered a confession to killing the man and his daughter. This confession followed consultation with counsel.

While the accused was being held in a remand centre on the murder charges, a police officer visited him. However, when the accused was advised by a corrections officer that the officer was there to speak with him, the accused declined the meeting. Two months later the officer again returned to the remand centre for another unscheduled meeting. This time, the accused agreed to speak to the officer. The meeting took place in the barber shop of the remand centre. The officer and the accused were the only two people in the room and the door, which could only be opened from the outside, was closed.

The officer told the accused he was not under arrest, was not being forced to be there, and was free to go. The officer explained that the door was locked, but if the accused wanted to go he just had to let the officer know. The officer also told the accused he was still under investigation for the killing of the 67-year-old woman. He also advised the accused that anything he said could be used as evidence in court. The accused said he understood.

During the meeting, the accused acknowledged killing the woman. He was again told he could leave but nevertheless went on to describe her

"Section 10(b) informs the detainee of the right to retain and instruct counsel without delay and offers an opportunity to exercise that right. ... Importantly, that right is only triggered on arrest or detention"

killing in detail. The accused was also then charged with a third count of murder for the death of the woman.

Alberta Court of Queen's Bench

The police officer said he did not provide a s. 10(b) *Charter* advisement because the accused was not detained. The judge found the accused was not detained at anytime during the meeting when he confessed to the killing and therefore a s. 10(b) warning was not required. The accused believed he had a choice whether to speak to the police or not, and the officer made it absolutely clear that he could leave whenever he wanted to. Furthermore, the judge found the accused's confession was freely and voluntarily made. The accused was convicted of three-counts of first-degree murder and sentenced to life in prison without eligibility for parole until serving 75 years.

Alberta Court of Appeal

The accused argued that he had been detained during the meeting when he confessed to killing the 67-year-old woman and therefore the police officer was required to advise him of his s. 10(b) *Charter* right to counsel. The Crown, on the other hand, submitted that the accused was not detained.

Psychological Detention

"The Charter requires that upon arrest or detention (physical or psychological) the police must advise the detainee of his/her s. 10 rights," said Justice Martin speaking for the Court of Appeal. ***"Section 10(b) informs the detainee of the right to retain and instruct counsel without delay and offers an opportunity to exercise that right. ... Importantly, that right is only triggered on arrest or detention. ... Generally, a person is detained when he or she submits or acquiesces to any form of compulsory restraint (physical or psychological), exerted by the police, reasonably believing they have no choice to do otherwise."***

In this case, Justice Martin noted the issue was whether the accused was psychologically detained:

> [Psychological detention] will occur when the individual remains in response to a legal obligation to comply with a restrictive direction or demand made by police. Psychological detention may also be found to exist absent legal compulsion where the conduct of the police would cause a reasonable person in the subject's position to conclude that they were not free to leave but had to cooperate with the police. The cases speak in terms of feeling unable to leave, obliged to comply, and unable to decline to cooperate. The emphasis is on acquiescing to a loss of liberty reasonably believing there is no choice to do otherwise. It is the perceived loss of choice which creates a psychological detention.
>
> The onus is on the [accused] to show that the circumstances they were facing amounted to detention. "The test is an objective one and the failure of the applicant to testify as to his or her perceptions of the encounter is not fatal to the application". [references omitted, paras. 32-33]

Justice Martin then identified relevant facts of particular significance in this case:

- The accused declined the invitation to meet with the same officer two months earlier.
- At the outset of the meeting the accused was told, and indicated he understood, that he did not have to stay and talk, that he was free to leave at anytime, and that he was still a suspect in the killing of the 67-year-old woman and that anything he said about that offence could be used as evidence.

"The triggering words in s. 10 of the Charter are restricted to: 'Everyone has the right on arrest or detention...', and not: 'Everyone has the right on arrest or detention, or on being suspected of having committed a crime...'."

- Having been given that advice, the accused elected to stay and talk. Then, immediately after admitting to the killing, but before providing any details of the killing, he was told again that he could leave the room whenever he wished and need not stay if he did not want to. He elected to stay and provide a full account of the killing.

"Put simply, the [accused] had the choice to attend the meeting, the choice to end the meeting at anytime and the choice to answer the questions or decline to do so," said Justice Martin. Nor did focussed questioning necessarily trigger a detention. ***"In my opinion, focussed questioning, like focussed suspicion, '...in and of itself, does not turn the encounter into a detention. What matters is how the police ... interacted with the subject.' In other words, mere focussed questioning that does not arouse the feeling that the choice to walk away is lost, does not create a detention."*** (references omitted).

Nor would an analysis of the circumstances of the encounter, nature of the police conduct, or characteristics of the accused change the result:

- **Circumstances of the encounter:** The accused would know (1) he could have declined the meeting (as he did so two months earlier), (2) he was still as suspect in the woman's murder and (3) he did not have to talk to the police officer. He was also told repeatedly and acknowledged that he understood he cold end the meeting and leave at anytime he wished. ***"I disagree that by virtue of being a suspect, the officer was legally obliged to remind the [accused] of his s. 10(b) rights,"*** said Justice Martin. ***"That may have been the prudent course but it is not the law. The triggering words in s. 10 of the Charter are restricted to: 'Everyone has the right on arrest or detention...', and not: 'Everyone has the right on arrest or detention, or on being suspected of having committed a crime...'."***

- **Nature of Police Conduct:** The officer was polite and respectful throughout, and told the accused that he did not have to stay and talk and could leave at anytime. But, even though the door was locked and the accused's liberty and movements were strictly controlled, his freedom to choose to meet and talk with the officer was not lost or impaired. ***"In the unique circumstances of this case, the [accused's] refusal to meet with the officer when invited to do so only two months before, and the repeated advice that he need not stay or talk but could return to his cell if and when he wished, overcame any suggestion that his being an inmate denied him the freedom of choice to leave the interview room and return to his cell."***

- **Characteristics of the accused:** There was no evidence to support the accused's claim that he was an unsophisticated and broken man at the time of the interview.

The accused was not detained and therefore he was not entitled to be reminded of his s. 10(b) rights. And, even if the accused's s. 10(b) rights were triggered, the accused's confession would not have been excluded under s. 24(2).

Complete case available at www.canlii.org

Note-able Quote

"I learned that courage was not the absence of fear, but the triumph over it. The brave man is not he who does not feel afraid, but he who conquers that fear."

~Nelson Mandela~

RACIAL PROFILING CLAIM REJECTED: NO EVIDENCE ACCUSED TARGETED BECAUSE OF SKIN COLOUR

R. v. Davis, 2020 ONCA 748

During the course of an unrelated investigation into shoplifting, the accused was observed making what appeared to be a drug transaction with another individual. He was then arrested for trafficking drugs after police observed what they believed was a second drug transaction at a different location. The accused had just returned to his vehicle and entered its driver's side when the police moved in for the arrest. An officer approached from the passenger side of the vehicle and saw the accused put something down his waistband. He described it as a ***"plastic, clear bag like a ziplock bag."*** After the accused was arrested, he was placed on the sidewalk beside the car. He was handcuffed behind his back. An officer searched the accused and found a clear plastic sandwich bag containing an ounce of crack cocaine in a pouch on his waistband. In the accused's front pockets, police found two large bundles of cash and a cell phone. The accused was then told he was also under arrest for possession for the purpose of trafficking. He was read his s. 10(b) *Charter* right to counsel and was cautioned.

Police searched the accused's car and found a scale, identification, a car rental agreement, various receipts and a small amount of marihuana. The accused was transported to the police station where a strip search was authorized by a supervisor. He was subsequently charged with possessing cocaine for the purpose of trafficking, trafficking in cocaine and possessing property (money) obtained by crime.

Ontario Court of Justice

Among other submissions, the accused argued he was racially profiled and that the police had no reasonable grounds for his arrest, thus violating s. 9 of the *Charter*. In addition, he contended that the strip searches of his underwear at the scene of the arrest and then later at the police station were unreasonable and breached s. 8 of the *Charter* .

The judge found the officer had reasonable grounds to arrest the accused, both subjectively and objectively. Furthermore, the judge rejected the accused's suggestion that the police engaged in racialized thinking. The judge found there was no evidence that the accused was targeted because of his skin colour. As for the search at the scene of the arrest, the judge found it was nothing more invasive than searching the accused's waistband area and finding a plastic bag with drugs. ***"I also find that [the accused's] actions in secreting contraband down his pants when first confronted by the police was sufficiently exigent to warrant [the officer] searching his waistband to retrieve the baggie,"*** said the judge. ***"Even if [the accused] was handcuffed upon arrest it is verging on absurd to suggest that the police had to leave the drugs in his waistband until they arrived at the police station. I would not do so. There is no evidence that the search of his waistband at the roadside involved anything more than [the officer] reaching into the waistband portion of the underwear and pulling out the drugs. No clothes were removed. By all accounts it was a very brief single action. There was no aspect of violation of [the accused's] personal privacy in the search. The roadside search did not lead to a Charter violation."***

The strip search at the police station, which was authorized by a supervisor, followed the fact the accused had tried to hide contraband in his underwear. The strip search was required to rule out whether there was anything more in his underwear. This strip search was conducted in less then three minutes, occurred in a private room and was conducted by officers of the same gender. It was nothing more invasive than a visual inspection of the accused's genitals and anal areas, and there was no evidence of any real physical contact. But other than a video showing the accused and two officers going into and out of the room for the search, no real record was made of it. This minor deviation from search protocol by not keeping a

record of the manner in which the strip search was conducted, however, was insufficient upon which to find a *Charter* breach.

The accused was convicted of trafficking cocaine, possessing cocaine for the purpose of trafficking and possessing proceeds of crime. He was sentenced to 20 months' imprisonment.

Ontario Court of Appeal

The accused again argued, in part, that the trial judge erred in finding that the police had reasonable grounds to arrest him and in concluding that he was not searched unreasonably.

Reasonable Grounds for Arrest

The Court of Appeal found the trial judge did not err in finding the officer had the necessary subjective grounds for arresting the accused and that those grounds were objectively reasonable:

> The police observed two people they had under surveillance stand outside the door on the driver's side of the [accused's] car at a shopping plaza, after which they walked back to their car with something in hand. The police arrested them and found a crack pipe and 3.3 grams of crack cocaine, but no money. We agree with the Crown that the grounds for arresting the [accused] were enhanced when the police observed a similar event when the [accused] was parked at another plaza – a person walked up to his car door and reached into it before walking away quickly. Although a hand-to-hand transfer was not observed, [the officer], who has considerable experience in drug-related investigations, thought that these were exchanges of drugs for money and his view was objectively reasonable. There was ample basis for arresting the [accused] after not one but two transactions consistent with drug trafficking were observed.

The accused accepted that if the grounds for arrest were sufficient then the question of racial profiling did not arise.

The Roadside Search

The search incident to arrest that occurred at the scene of the arrest involved an officer reaching into the accused's waistband and pulling out a bag of contraband. As the trial judge held, the search involved nothing more than an officer ***"reaching into the waistband portion of the underwear and pulling out the drugs."*** No clothes were removed at the scene of the arrest. The grounds for doing this arose from the fact that the accused had been seen placing that bag into his underwear just prior to his arrest. The trial judge did not err in holding that this search was incident to arrest. The recovery of the contraband at the scene of the arrest did not breach s. 8 of the *Charter*.

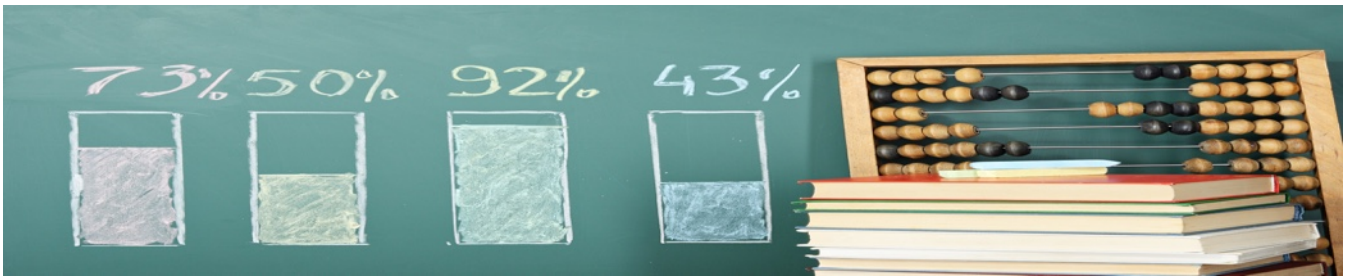
The Strip Search

The strip search conducted at the police station was also reasonable in the circumstances. The accused had already been seen placing contraband in his underwear and it had been recovered from the search incident to arrest. The Court of Appeal saw no error in the trial judge's conclusion that the strip search was reasonable in the circumstances. As for the manner in which the search was conducted, it was not more invasive than necessary. ***"The trial judge found that the search was conducted in under three minutes, by officers of the same gender, in a private room, and that there was no evidence of anything more than a visual inspection of the [accused's] genitals and anal areas,"*** said the Court of Appeal. Furthermore, the trial judge found that the search was conducted in accordance with the guidelines set out by the Supreme Court of Canada in *R. v. Golden*, 2001 SCC 83 except for making a record of the manner in which the search was conducted. Nevertheless, the trial judge found that this was a ***"minor deviation from the Golden guidelines, insufficient to found a Charter breach."***

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

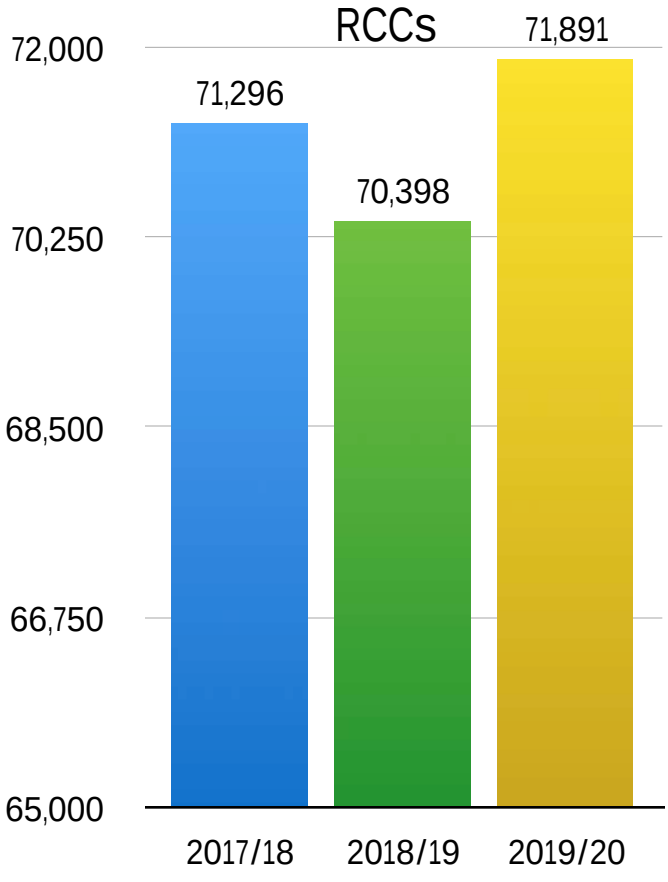
Editor's Note: Additional details taken from *R. v. Davis*, 2019 ONCJ 254.



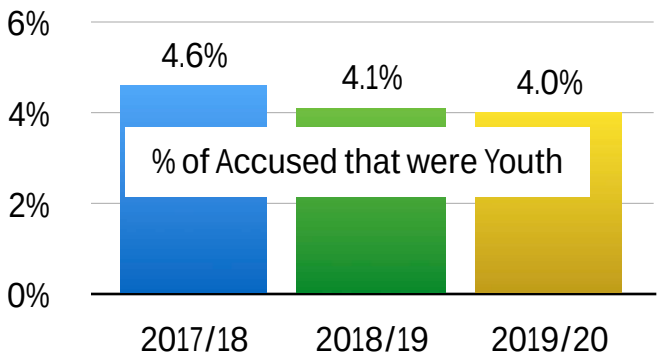
BC PROSECUTION SERVICE ~ANNUAL REPORT~

71,891 The number of Reports to Crown Counsel (RCCs) received by the BC Prosecution Service from investigative agencies in fiscal 2019/20. These RCCs represented a total of **75,169** accused persons. This was an increase of **2.1%** over last year.

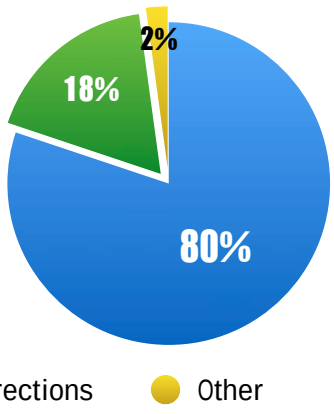
Source: BC Prosecution Service, "Annual Report - 2019/20", accessed December 11, 2020.



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.

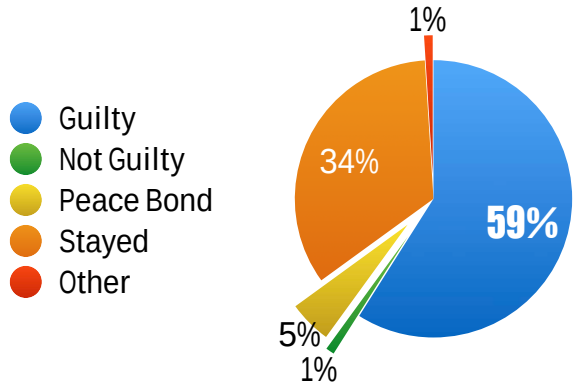


Police ... were the investigative agency most likely to submit an RCC to the BC Prosecution Service. In fiscal 2019/20, police agencies submitted **57,609** RCCs. This was followed by BC Corrections (**12,726**) and other investigative agencies such as wildlife conservation or financial regulators (**1,556**).



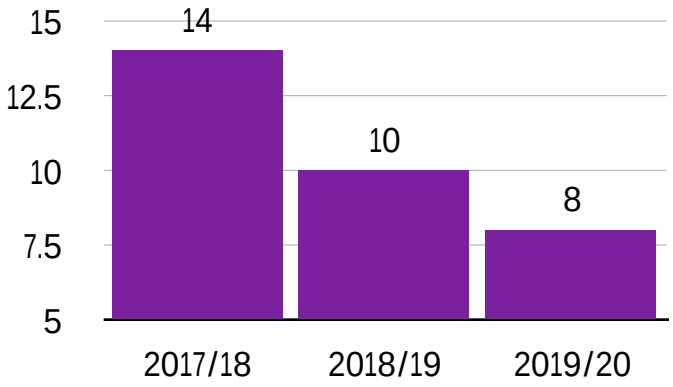
84% ... was the BC Prosecution Services overall charge approval rate for RCCs submitted by investigative agencies. Of the **75,169** people named in RCCs for which their was a final charge assessment decision made in fiscal 2019/209, **59,688** were charged, an **84%** charge approval rate. Of the remaining accused, **14%** were not charged and **2%** were referred to alternative measures.

59% The percentage of prosecutions resulting in a conviction by way of a guilty plea or guilty verdict at trial. Of the **56,268** prosecutions concluded in 2019/20, **59%** had a guilty finding, **1%** were not guilty, **5%** entered into a peace bond, **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.



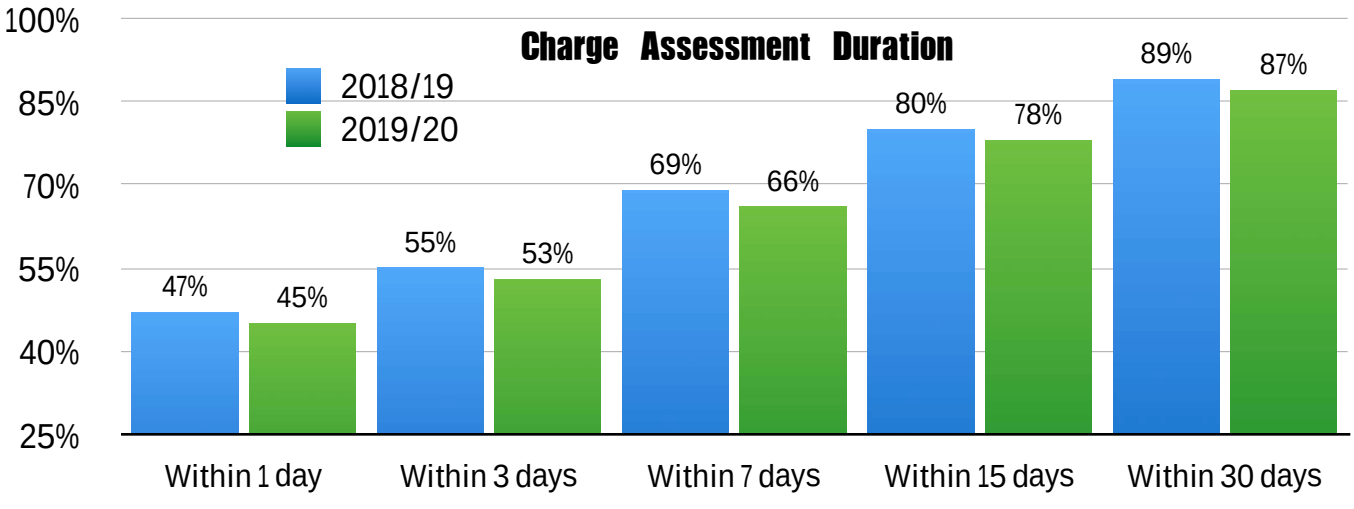
Unreasonable Delay

... was the most common reason why a prosecution was concluded with a Judicial Stay of Proceedings. In fiscal 2019/20 there was a total of **8** prosecutions judicially stayed for a variety of legal reasons. This is down from previous years.



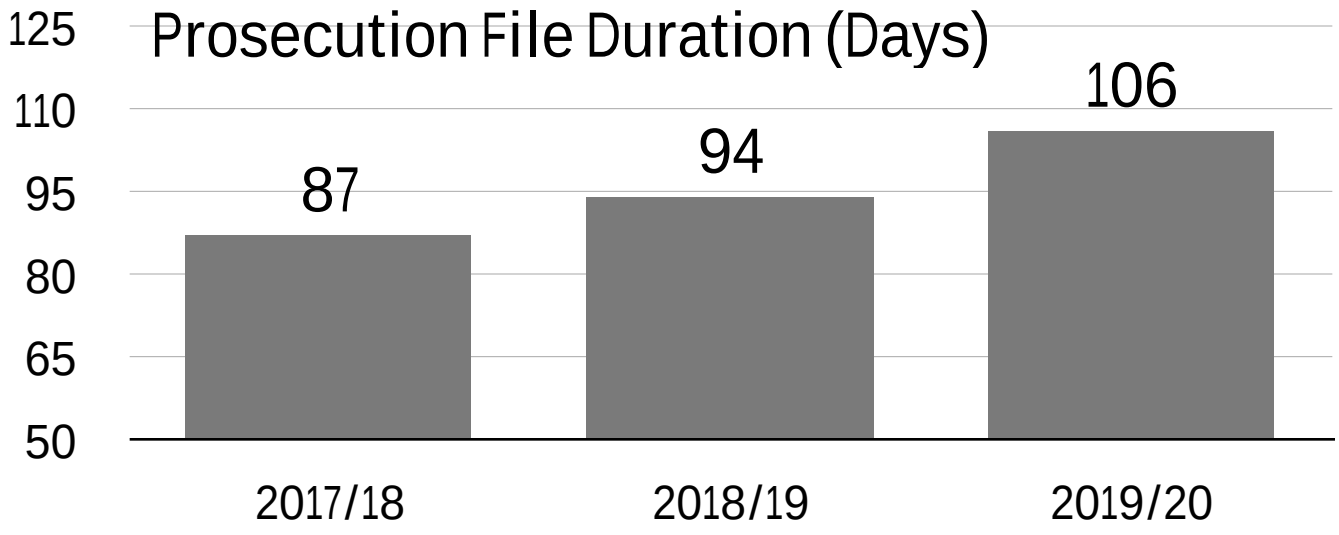
Within 3 Days

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, **53%** of cases take three days or less. **66%** of decisions are made within 7 days, **78%** within 15 days and **87%** within 30 days. The percentage of files approved within these charge assessment durations are down from last year in all categories.



106 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 and there are no future scheduled appearances. This is an increase over the last two years.



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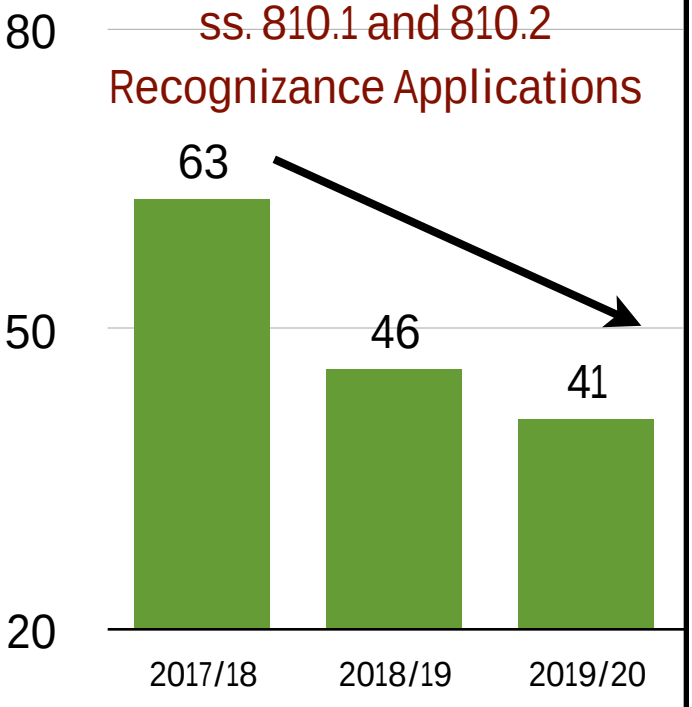
The number of s. 810.1 and s. 810.2 *Criminal Code* applications filed in court. This is a decrease over the previous two years.



The report describes ss. 810.1 and 810.2 of teh *Criminal Code* as follows:

Section 810.1 of the Criminal Code allows for an Information to be laid before a provincial court judge for the purpose of having the defendant enter into a recognizance including conditions that he or she not engage in activity that involves contact with persons under 16 years of age and prohibiting him or her from attending certain places where persons under 16 years of age are likely to be present. The judge makes the order where satisfied on evidence that there are reasonable grounds to fear that the defendant will commit certain sexual offences against children under 16 years of age.

Section 810.2 of the Criminal Code allows anyone, with the consent of the Attorney General, to lay an Information before a provincial court judge for the purpose of having the defendant enter into a recognizance where there are reasonable grounds to fear that the defendant may commit a "serious personal injury offence" as defined in the Criminal Code. Conditions may be imposed, such as a weapons prohibition, to secure the good conduct of the defendant.

POLICE DID NOT CREATE EXIGENT CIRCUMSTANCES BY DECISIONS THEY MADE

R. v. Hobeika, 2020 ONCA 750

After receiving information from a confidential informer that the accused Hobeika was selling various drugs out of his car and the condominium (Liberty Village) where he lived, the police obtained search warrants for his condominium and his vehicle. The police set up surveillance hoping to execute both warrants when he was in the condominium. Armed with information that the vehicle owned by the accused was registered to a unit at a different condominium in Etobicoke, officers went there and located the accused's vehicle in its parking lot. An officer checked the directory inside the front door of the Etobicoke condominium building and learned the accused was listed as the occupant of one of its units. The lead investigator, who had considerable experience in drug investigations, concluded the accused may be operating his drug business out of both condominiums. Police then decided to prepare an Information to Obtain (ITO) a warrant for the Etobicoke condominium as well.

While waiting outside of the Etobicoke condominium, the police received information that a person living there had been previously charged about two years earlier with drug trafficking. This person had been released on bail with the accused as his surety and was required to live at the accused's unit. The lead investigator decided that, if the accused left the Etobicoke condominium and went to his car, the vehicle would be stopped and the search warrant for the car executed.

The police saw the accused and another person leave the Etobicoke condominium and go to the vehicle. When the accused entered the vehicle, the lead investigator ordered the vehicle blocked and instructed officers to execute the search warrant for the vehicle. Police could smell marihuana in the car and saw a significant quantity of marihuana in the pocket of the front door. The officers also found drugs in the possession of the vehicle's passenger. The accused was arrested for possessing marihuana and he was advised of his right to counsel. He wanted to exercise his right to counsel and named a specific lawyer he wanted to speak with. The vehicle stop and arrest, which was loud and public, occurred in plain view of the condominium's entrance. The accused had a cell phone and at least three individuals exited the condominium while the stop and arrest were taking place. They were seen using their cell phones and one of them immediately went back into the building.

Although the police did not yet have a search warrant for the Etobicoke condominium unit, the lead investigator decided the police would enter the building and make a warrantless entry of the accused's unit. In his view, there were reasonable grounds to believe there was evidence of narcotics trafficking in the unit and there was a real risk evidence would be destroyed if he did not act immediately to enter. Using a key fob seized from the accused on arrest, the police entered the common area of the condominium building and proceeded to the accused's unit. Officers could hear someone inside the unit. The lead investigator knocked on the door to the unit, identified himself as a police officer, and said he was there to perform a bail compliance check. Steps could be heard in the unit moving away from the door. Police broke the door open with a battering ram, entered the unit, spread out, and conducted a quick visual examination of the premises to locate any persons inside. During this clearing search for safety purposes, an officer saw chunks of cocaine powder and a number of Ziplock baggies. The accused Sanchez, who was sitting at a table beside a jar containing psilocybin, was arrested and advised of his right to counsel. The police **"froze"** the scene to await the arrival of the search warrant. The observations made during the warrantless entry were included in the ITO for the Etobicoke condominium.

When the lead investigator arrived back at the police station some six hours after Hobeika's arrest, he tried to contact his named lawyer but learned the lawyer had been suspended from practice. Hobeika was offered duty counsel. He accepted the offer and spoke with them.

As a result of searching both condominium units, the police located a substantial quantity of various drugs and cash. Subsequent police investigation led to the seizure of funds from the accused Hobeika's bank accounts and other locations. In total, the police seized about $400,000 in cash and bank drafts. Hobeika was charged with four counts of possessing controlled substances for the purpose of trafficking, three counts of possessing proceeds of crime (money) and one count of money laundering. Sanchez was charged with four counts of possessing controlled substances for the purpose of trafficking.

Ontario Superior Court of Justice

Among other rulings, the judge concluded the police could only rely on s. 11(7) of the *Controlled Drugs and Substances Act* (*CDSA*) if they had the necessary reasonable grounds to enter the condominium and the necessary urgency to do so without a warrant. As for the necessary reasonable grounds, the judge found the police could not rely on information gained when standing outside of the unit's door. But even without that information, the police had probable cause to enter Hobeika's unit when they entered the common area of the condominium. These grounds included:

- Information from a reliable confidential informer;
- Hobeika was connected to the condominium: he was designated as an occupant in the building registry; his licence and car ownership showed the condominium as his residence; he possessed the key fob for the front entry to the condominium; and his vehicle having been parked in the parking lot beside the condominium;
- When he was arrested immediately after leaving the condominium he was in possession of drugs. More drugs were found in the car, and in the possession of the passenger. It could be inferred Hobeika and his passenger had just left Hobeika's unit; and
- A third party living at the condominium building had been charged with drug trafficking about two years earlier and under the terms of his bail, was required to live in the accused's unit.

As for urgency, the judge held the location and nature of the stopping of the accused's vehicle and his arrest made it reasonably probable the arrest could quickly come to the attention of a person or persons in the condominium unit or with quick access to it. Those persons could destroy evidence in the unit before the police could obtain and execute a search warrant.

The judge concluded the requisite urgency was established before the police entered the building . Therefore, the judge did not need to decide whether the police could rely on the additional information obtained while standing at Hobeika's door. The judge also rejected the suggestion that the police created the very exigent circumstances they were relying on to justify the warrantless entry by making the decision to execute the search warrant on the vehicle and arrest Hobeika in plain view of the entrance to the condominium building. In the judge's view, the police had no intention of searching Hobeika's vehicle in front of the condominium. The police were merely maintaining surveillance, waiting for the anticipated warrant for Hobeika's unit and wanted to execute it while he was in it. But Hobeika happened to leave his unit and enter the vehicle.

The judge also ruled that Hobeika's s. 10(b) right to counsel had not been breached as a result of the delay in accessing counsel. ***"While there is some evidence of delay in facilitating the exercise by Mr. Hobeika of his right to counsel, [Hobeika] has failed to lead sufficient evidence to persuade me that this delay was unreasonable in the circumstances,"*** said the judge.

Hobeika and Sanchez were convicted on all counts. Hobeika was sentenced to 8½ years imprisonment less pre-sentence custody. Sanchez was sentenced to 4½ years' imprisonment less pre-sentence custody. The judge also ordered the forfeiture of all cash found in Hobeika's possession and his Etobicoke condominium as ***"offence-related property"***.

Ontario Court of Appeal

It was argued that the police did not have the necessary reasonable grounds to enter Hobeika's condominium building and his unit. In addition, it was contended the police failed to show the requisite urgent circumstances justifying the warrantless entry of the condominium and the subsequent entry and search of the unit. In Hobeika's view, there was no evidence the police knew someone was inside his unit or had immediate access to it. Further, it was suggested that whatever urgency existed was created by the tactical decisions made by police and could not be relied upon to make out the urgency required to justify a warrantless exigent circumstances entry.

The Crown, on the other hand, contended that the entry and safety search, although warrantless, was authorized under s. 11(7) of the *CDSA*. Not only did the police have the necessary reasonable grounds for the entry, exigent circumstances existed so that a warrant was not required.

s. 11(7) CDSA

Section 11(7) of the *CDSA* reads:

> A police officer may exercise any of the powers described in subsection (1), (5) or (6) without a warrant if the conditions for obtaining a warrant exist, but by reasons of exigent circumstances it would be impracticable to obtain one.

Justice Doherty, authoring the Court of Appeal's opinion, noted that s. 11(7) has two prerequisites: (1) the probable cause requirement and (2) the urgency requirement. ***"First, 'the conditions for obtaining a warrant' must exist at the time the warrantless entry and search are conducted,"*** he said. ***"Second, it must be impracticable to obtain a warrant 'by reasons of exigent circumstances'."*** He continued:

> The first requirement, sometimes referred to as the probable cause requirement, is determined by asking whether the police had adequate grounds to obtain a warrant to search the location they entered without a warrant. That assessment is made based on the facts the police knew or reasonably should have known when the entry was made. [references omitted, para. 36]

The first requirement, sometimes referred to as the probable cause requirement, is determined by asking whether the police had adequate grounds to obtain a warrant to search the location they entered without a warrant. That assessment is made based on the facts the police knew or reasonably should have known when the entry was made."

Although Justice Doherty noted the police made two entries (one into the common area of the condominium and the second into the Hobeika's unit), he opined it would be artificial to draw a distinction between the two for the purpose of determining whether the police had the necessary probable cause to enter. Thus, the probable cause requirement had to be made out at the time the police entered the condominium common area without relying on any information gained while standing outside Hobeika's door.

Probable Cause Requirement

The Court of Appeal found the trial judge did not err in holding that the probable cause (reasonable grounds) requirement of s. 11(7) to enter the accused's unit at the time the police entered the condominium building had been met.

Urgency Requirement

In *R. v. Patterson*, 2017 SCC 15, the Supreme Court of Canada explained the meaning of exigent circumstances for the purposes of s. 11(7):

> So understood, then, "impracticable" within the meaning of s. 11(7) contemplates that the exigent nature of the circumstances are such

"The police cannot circumvent the warrant requirement by devising and implementing a strategy which creates an imminent danger evidence will be destroyed, and then rely on that imminent danger as justification for acting without a warrant. If the police strategy creates the supposed urgency, the circumstances are not 'exigent', but are anticipated, if not planned for, by the police."

> that taking time to obtain a warrant would seriously undermine the objective of police action – whether it be preserving evidence, officer safety or public safety.
>
> In sum, I conclude that, in order for a warrantless entry to satisfy s. 11(7), the Crown must show that the entry was compelled by urgency, calling for immediate police action to preserve evidence, officer safety or public safety. Further, this urgency must be shown to have been such that taking the time to obtain a warrant would pose serious risk to those imperatives.

Justice Doherty found the s. 11(7) urgency requirement had also been met. When the lead investigator decided to enter the building and proceed to the unit to make a warrantless entry, he reasonably believed the circumstances called for immediate action to preserve evidence in the unit, and reasonably believed waiting for a warrant would put the preservation of that evidence at serious risk.

As for whether the police ***"knew"*** someone was in Hobeika's unit or had immediate access to it, *"knowledge"* was not the standard. ***"Section 11(7) of the CDSA did not require that the police have actual knowledge someone was in, or could readily access the unit,"*** said Justice Doherty. ***"Instead, it required the police have reasonable grounds to believe there was an imminent risk that evidence in the unit would be destroyed before the police could obtain and execute a warrant. The evidence accepted by the trial judge included evidence a person released on bail for drug trafficking was required to live in Hobeika's unit as a term of his bail. While it is true the bail order was about two years old, the officers had no reason to believe it was not still in effect. That evidence provided a basis for the trial judge's finding of an imminent risk that evidence in the unit could be destroyed."***

As well, even assuming the police could not rely on what they heard through the door, the Court of Appeal upheld the trial judge's finding that the urgency requirement under s. 11(7) was satisfied when the police decided to enter the building. ***"The voices at the doorway served to confirm the urgency and also provided justification for the forced entry into the unit,"*** said Justice Doherty.

Police Created Urgency?

The Court of Appeal agreed that exigent circumstances would not justify a warrantless entry if those circumstances were the consequence of a pre-planned police operation. ***"The police cannot circumvent the warrant requirement by devising and implementing a strategy which creates an imminent danger evidence will be destroyed, and then rely on that imminent danger as justification for acting without a warrant,"*** said Justice Doherty" ***"If the police strategy creates the supposed urgency, the circumstances are not 'exigent', but are anticipated, if not planned for, by the police."***

The existence of a causal link between the circumstances said to create the need to act without a warrant and a police operational decision does not necessarily result in a finding the police effectively created the urgency. Moreover, the existence of reasonable alternative operational decisions does not mean the police created the urgency flowing from the decision they did make:

> A causative link between the circumstances creating the urgency relied on to act without a

"Often, police action will result in the urgency relied on to act without a warrant. The question is not whether there is some causative link between police action and the urgency, but rather whether that police action reflects a pre-existing plan, which included the creation of the circumstances said to justify acting without a warrant."

> warrant and a police action is a step towards showing the police created the urgency. In many cases, however, it will be a small step. Often, police action will result in the urgency relied on to act without a warrant. The question is not whether there is some causative link between police action and the urgency, but rather whether that police action reflects a pre-existing plan, which included the creation of the circumstances said to justify acting without a warrant.
>
> Evidence the police could have proceeded in a different manner may also have evidentiary value when assessing whether the alleged exigent circumstances were created by the police. The availability of a different strategy does not, however, mean that the police created the alleged urgency. The question is not could the police reasonably have done something else, but whether the police operational plan would, in its implementation, create the very circumstances said to justify acting without a warrant. [paras. 54-55]

The Court of Appeal upheld the trial judge's ruling that the police did not engage in a pre-planned operation that would create circumstances in which the police could act without a warrant. The police intended to obtain a search warrant and execute the warrant while Hobeika was in the condominium. This changed, however, when Hobeika left the condominium before the warrant was obtained. The police reacted by choosing to execute the warrant on the vehicle, detain and subsequently arrest Hobeika. This was not planned in advance. ***"From the police perspective, their strategy changed in reaction to a new situation, albeit one the officer in charge had contemplated as a possibility while awaiting the warrant,"*** said Justice Doherty. ***"The change in circumstances, and not any pre-existing police plan, generated the exigent circumstances relied on for the warrantless entry."***

s. 10(b) Right to Counsel

On appeal, the Crown conceded that the trial judge erred in finding there was no s. 10(b) *Charter* breach. And the Court of Appeal agreed that the concession was fully supported by the case law. ***"There is no evidence to support a finding that the delay in providing access to counsel was reasonable in the circumstances,"*** said Justice Doherty. ***"Hobeika's right to counsel under s. 10(b) was breached when he was held for over four hours before the police took steps to put him in touch with counsel."***

s. 24(2) Charter

Despite the s. 10(b) breach, no evidence was excluded under s. 24(2). Just because an accused demonstrates a breach of s. 10(b), they are not

"Evidence the police could have proceeded in a different manner may also have evidentiary value when assessing whether the alleged exigent circumstances were created by the police. The availability of a different strategy does not, however, mean that the police created the alleged urgency. The question is not could the police reasonably have done something else, but whether the police operational plan would, in its implementation, create the very circumstances said to justify acting without a warrant."

"Section 24(2) does not create an automatic rule of exclusion applicable to evidence obtained in a manner that infringed a constitutional right. Instead, s. 24(2) requires the accused to establish 'having regard to all the circumstances the admission of it [the evidence] in the proceeding would bring the administration of justice into disrepute'."

always entitled to a remedy under s. 24(2). ***"Section 24(2) does not create an automatic rule of exclusion applicable to evidence obtained in a manner that infringed a constitutional right,"*** said the Appeal Court. ***"Instead, s. 24(2) requires the accused to establish 'having regard to all the circumstances the admission of it [the evidence] in the proceeding would bring the administration of justice into disrepute'."*** In deciding whether any evidence ought to have been excluded, the Court of Appeal made the following comments about s. 24(2):

- ***"The failure to comply with s. 10(b) for over four hours reflects a troubling police indifference to Hobeika's s. 10(b) rights. There can be no suggestion of any good faith by the police. There can be no suggestion the police were operating in an area of constitutional uncertainty. There are no circumstances that might ameliorate, to some degree, the failure to comply with s. 10(b). This was a clear violation of a long-established and well-understood constitutional obligation."***
- ***"A serious breach of a long-established and well-understood constitutional right can lead to exclusion of evidence, even where the breach is not systemic in nature, or part of a pattern of police misconduct."***
- ***"Exclusion is not, however, automatic. Section 24(2) requires, in all cases, an approach which balances the competing relevant factors, with a view to maintaining the long-term repute of the administration of justice. The court must assess the seriousness of the police misconduct, the impact on the [accused's] Charter-protected interest, and society's interest in an adjudication on the merits."***

In deciding not to exclude the evidence, Justice Doherty concluded:

> On the evidence adduced at trial, the breach of Hobeika's s. 10(b) rights cannot be characterized as the product of an improper police protocol, or a systemic failure by the police involved in this investigation to meet their constitutional obligations. On the evidence, the breach was a situation-specific, isolated failure, albeit a serious one, by the officers who had custody of Hobeika during the relevant time period.
>
> [...]
>
> I come down on the side of admissibility. To exclude the evidence obtained in the searches of the condominiums and Hobeika's vehicle strikes me as using s. 24(2) more to punish the offending police officers than to vindicate the long-term repute of the criminal justice process. [Hobeika] has not established the admission of the evidence obtained in the searches would, in all the circumstances, bring the administration of justice into disrepute. [paras. 88, 89]

Both accused had their appeals dismissed.

Complete case available at www.ontariocourts.on.ca

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SEARCHES OF ELECTRONIC DEVICES AT THE BORDER REVISITED

R. v. Canfield; R. v. Townsend, 2020 ABCA 383

R. v. Canfield

After arriving at the Edmonton International Airport on a flight from Cuba, Canfield (a Canadian citizen) was referred by a CBSA Border Services Officer (BSO) for secondary screening because he was travelling alone, travelled regularly to Cuba by himself, and had an overly friendly demeanour. He had referred to "women and Cuba and the beach", which the BSO viewed as an indicator of sex tourism for women and children. At secondary, the BSO noted Canfield was breathing heavily, sweating profusely, had cotton dry mouth, and his hands were shivering and shaking. Condoms, lubricants and a penis ring were found in his luggage. The BSO formed the belief that Canfield had child pornography on his phone and asked him if there was any. Canfield first said, ***"I'm not sure"*** but later said, ***"Yes"***. When asked to show the BSO an image, Canfield did so. The BSO then conducted a more detailed search of the phone and found more images of child pornography. Canfield was arrested, provided his rights and cautioned. The matter was referred to a Child Exploitation Unit for further investigation. A search warrant was subsequently obtained and 130 images and 17 videos of child pornography were found.

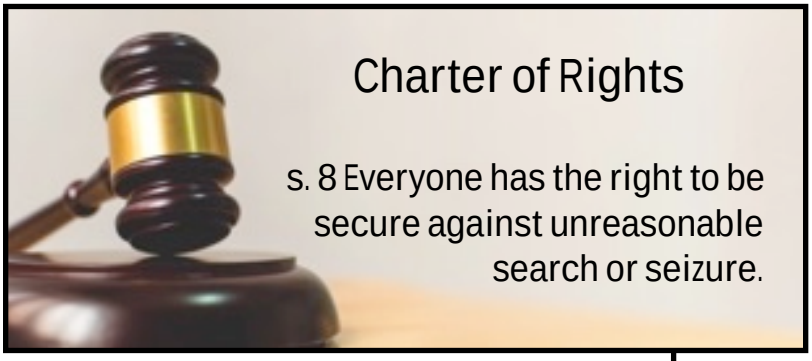
R. v. Townsend

After arriving at the Edmonton International Airport on a flight from Seattle, Townsend (a Canadian citizen) was referred for secondary screening because the BSO considered his three bags, five-month travel pattern and lack of employment were unusual. His demeanour also changed and he stopped making eye contact during initial questioning. At the secondary inspection area, Townsend's luggage was examined. He appeared agitated and was found in possession of 12 electronic devices. One of Townsend's cell phones was searched and legal pornographic images were found. Townsend had a laptop computer but was reluctant to provide its password. When a BSO insisted on the password for the laptop, Townsend provided it. The laptop was searched and images of child pornography were found. Townsend was then arrested, but he fainted and was taken to the hospital. The matter was also referred to a Child Exploitation Unit for further investigation. A subsequent forensic search of Townsend's various devices revealed 4,422 images and 53 videos of child pornography.

Alberta Court of Queen's Bench

The judge found the searches of the electronic devices were authorized under s. 99(1)(a) of the *Customs Act*, which he held was valid and constitutional. This provision permits the routine examination of any ***"goods"***. The search of personal electronic devices, such as laptop computers and cell phones, fell within the definition of ***"goods"*** for the purposes of s. 99(1)(a) and, as such, a search of these devices could be routinely undertaken without any individualized grounds. The judge refused to revisit the three categories of border searches recognized by the Supreme Court of Canada in *R. v. Simmons*, [1998] 2 SCR 495: (1) routine questioning which every traveller undergoes at a port of entry, sometimes accompanied by a search of baggage and perhaps a pat or frisk of outer clothing; (2) a strip or skin search conducted in a private room after a secondary examination; and (3) a body cavity search. In his view, the searches of the electronic devices fell within the first category of routine searches and therefore did not engage s. 8 of the *Charter*.

In addition, the judge concluded that neither Canfield nor Townsend were detained during secondary screening, thus ss. 10(a) and 10(b) were not triggered.



Since the searches of the personal electronic devices fell within the routine category of border searches, there were no ss. 7, 8, 10(a) or 10(b) breaches of the *Charter*. The evidence of the photographs and videos retrieved from the personal electronic devices was admissible and the two men were each convicted of possessing child pornography.

Alberta Court of Appeal

Both Canfield and Townsend submitted, among other things, that the trial judge erred by not reconsidering *Simmons*. They also argued that the judge erred by finding that s. 99(1)(a) was not unconstitutional by permitting unlimited searches of electronic devices. In their view, ss. 7, 8 and 10 of the *Charter* were violated. Furthermore, both accused contended that the evidence from the searches of their electronic devices ought to have been excluded under s. 24(2).

Search of Electronic Devices

Canfield and Townsend suggested that s. 99(1)(a) was unconstitutional and breached s. 8 of the *Charter* because it imposed no restrictions on the ability to search their personal electronic devices. In their opinion, people have a reasonable expectation of privacy with respect to their personal electronic devices even when crossing the border and the routine category of border search recognized in *Simmons* ought to have been revisited because it did not distinguish between the search of such devices and the search of other goods.

Section 99(1)(a) of the *Customs Act* provides:

> An officer may (a) at any time up to the time of release, examine any goods that have been imported and open or cause to be opened any package or container of imported goods and take samples of imported goods in reasonable amounts.

The Court described this provision as follows:

> [Section 99(1)(a) of the *Customs Act*] permits a customs officer to "examine any goods that have been imported and open or cause to be opened any package or container of imported goods". The legislation provides no limits on the examination of any imported goods conducted under this section, beyond presumably that the search be conducted for a valid customs purpose. Computers and cell phones, including the electronic documents which they contain, have been treated in the jurisprudence as "goods" that can be searched at the border pursuant to s. 99(1)(a) as part of a routine search without raising any Charter implications, on the basis that they fall within the first category of routine search outlined in Simmons. [references omitted, para. 69]

The word *"goods"* is defined in s. 2(1) of the *Customs Act* and includes *"conveyances, animals and any document in any form"*. In the border context, *"goods"* has been interpreted to include documents in electronic form on personal electronic devices, such as cell phones and personal computers. The Court of Appeal agreed, stating that ***"the electronic documents, photos or videos on an electronic device fall within the broad definition of 'goods' in s. 2 of the Customs Act, which includes 'any document in any form'."***

"[I]n our view the threshold for the search of electronic devices may be something less than the reasonable grounds to suspect required for a strip search under the Customs Act. ... Whether the appropriate threshold is reasonable suspicion, or something less than that having regard to the unique nature of the border, will have to be decided by Parliament and fleshed out in other cases."

Border Search Categories

In *Simmons*, the Supreme Court of Canada outlined three distinct types of border searches:

1. *"[T]he routine of questioning which every traveller undergoes at a port of entry, accompanied in some cases by a search of baggage and perhaps a pat or frisk of outer clothing. No stigma is attached to being one of the thousands of travellers who are daily routinely checked in that manner upon entry to Canada and no constitutional issues are raised. It would be absurd to suggest that a person in such circumstances is detained in a constitutional sense and therefore entitled to be advised of his or her right to counsel."* This category - routine searches - do not engage constitutional issues. And "goods" may be searched under s. 99(1)(a).

2. *"[T]he strip or skin search, conducted in a private room, after a secondary examination and with the permission of a customs officer in authority."*

3. *"[T]he body cavity search, in which customs officers have recourse to medical doctors, to X-rays, to emetics, and to other highly invasive means."*

Considering these three discrete categories of border searches, the Court of Appeal found it necessary to revisit them insofar as they applied to searches of personal electronic devices because ***"there have been significant developments in the technology of personal electronic devices and the way they are used by Canadians since Simmons was decided in 1988"*** and ***"the law with respect to searches of personal electronic devices in the domestic setting has, likewise, changed significantly in the same period."***

Moreover, these categories of border search recognized by *Simmons* related primarily to physical or bodily integrity and did not address informational privacy. ***"Computers and cell phones, including the electronic documents which they contain, have been treated in the jurisprudence as 'goods' that can be searched at the border pursuant to s. 99(1)(a) as part of a routine search without raising any Charter implications, on the basis that they fall within the first category of routine search outlined in Simmons,"*** said the Court of Appeal. But, as the Court of Appeal concluded, s. 99(1)(a) did violate s. 8 of the *Charter* because the provision did not impose limits on when and how searches of personal electronic devices could be conducted at the border. In its view, the contents of electronic devices should be treated differently at the border from other receptacles.

The Court of Appeal ruled that a search of an electronic device at the border required a threshold requirement. Although it noted that ***"the threshold for the search of electronic devices may be something less than the reasonable grounds to suspect required for a strip search under the Customs Act,"*** the Appeal Court ***"[declined] to set a threshold requirement for the search of electronic devices at this time."***

"Whether the appropriate threshold is reasonable suspicion, or something less than that having regard to the unique nature of the border, will have to be decided by Parliament and fleshed out in other cases," it continued. ***"However, to the extent that s. 99(1)(a) permits the unlimited search of personal electronic devices without any threshold requirement at all, it violates the protection against unreasonable search in s 8 of the Charter."*** And, even if a threshold was to be

established it would not apply to all searches of personal electronic devices:

> Although an unlimited and suspicion-less search of the contents of a personal electronic device would breach the Charter, we recognize that some of the information commonly stored on cell phones and other devices must be made available to border agents as part of the routine screening of passengers. For example, and without setting out an exhaustive list, we note that receipts and other information relating to the value of imported goods, as well as travel related documents, are an essential part of routine screening. The review of such items on a personal electronic device during a routine screening would not constitute an unreasonable search under s 8. [para. 79]

Having found s. 99(1)(a) breached s. 8 to the extent that it authorized unlimited searches of the contents of personal electronic devices, it also ruled that the provision could not be saved as a reasonable limit under s. 1. Thus, the definition of *"goods"* in s. 2 was of no force or effect insofar as the definition included the contents of personal electronic devices for the purposes of s. 99(1)(a). This declaration of invalidity, however, was suspended for one year given the serious problems posed by child pornography and other border protection goals. During this period of suspension, Parliament would have an opportunity to craft a solution to address and balance the various competing interests.

In sum, the Court of Appeal ruled that the searches of the cell phones and personal computers in this case were unreasonable and infringed s. 8.

Right to Counsel

Not every traveller who crosses the border is detained for *Charter* purposes. For example, ***"routine questioning by customs officials at the border or routine luggage searches conducted on a random basis do not constitute detention for the purposes of s 10"*** but a person forced to submit to a strip search is detained. In the case of a search of a traveller's personal electronic device, the traveller will not be detained every time. ***"Some searches of personal electronic devices may fall under the rubric of 'routine questioning' and not a more intrusive invasion of privacy,"*** said the Court of Appeal. ***"An obvious example would be receipts for imported goods and travel-related documents, stored in electronic format. A search for such items at the border would be considered routine. A wholesale search of a traveller's correspondence or photos would not."*** The Appeal Court continued:

> In our view, the line from routine questioning to more intrusive search is crossed when the BSO develops "some sufficiently strong particularized suspicion", sufficient to permit a broader search of the traveller's electronic device, beyond what is required for routine screening. [para. 130]

In Canfield's case, he was not detained when he ***"was subject to the normal screening process when he was referred to secondary screening, when his luggage was searched, and when he was asked whether he might have any child pornography on his phone."*** However, he was detained and should have been advised of his right to counsel when he ***"became the subject of a particularized suspicion and was subjected to a more intrusive search of his personal electronic device, in an interaction with significant legal consequences."*** At this point, the screening moved beyond routine after Canfield answered "yes" to the question about his possession of child pornography and showed the BSO an image that constituted child pornography. The BSO had decided to conduct a more thorough search of the images on the phone.

"Some searches of personal electronic devices may fall under the rubric of 'routine questioning' and not a more intrusive invasion of privacy. An obvious example would be receipts for imported goods and travel-related documents, stored in electronic format. A search for such items at the border would be considered routine. A wholesale search of a traveller's correspondence or photos would not."

"If and when a traveller is detained, however, his rights to counsel and to remain silent are engaged. If he is compelled by statute to answer questions at that point, the admission of those compelled statements may well violate the principle against self-incrimination."

In Townsend's case, his referral to secondary screening and the search of his luggage was a part of routine questioning. But when the BSO asked Townsend for the password to his laptop so a more thorough search could be conducted, he was detained and should have been advised of his s. 10 rights. At this point, Townsend was the subject of *"particularized suspicion"*.

s. 7 Charter

The principle against self-incrimination is a principle of fundamental justice under s. 7 of the *Charter*. Since a traveller is compelled to answer questions truthfully under s. 11 of the *Customs Act* and failing to do so can result in a prosecution, Canfield and Townsend suggested any statements they made to the BSOs engaged the principle against self-incrimination enshrined in s. 7. Canfield suggested his right against self-incrimination was violated when he responded to the question of whether he had child pornography on his cell phone and when he showed the BSO the suspected image on it. Townsend contended his right was breached when he provided his password to unlock his computer.

"If and when a traveller is detained ... his rights to counsel and to remain silent are engaged," said the Court of Appeal. ***"If he is compelled by statute to answer questions at that point, the admission of those compelled statements may well violate the principle against self-incrimination."*** The Appeal Court added:

> It is well established that routine questioning at the border is not a sufficiently intrusive state action to amount to a detention, even when there is a statutory duty to answer those questions. Absent detention, there is no constitutional right to counsel and no constitutional right to remain silent at the border. ... We agree ... that routine questioning and routine searches at the border do not engage a traveller's s. 7 rights. [references omitted, para. 146]
>
> ... [T]here can be a point where, what began as routine questioning and a routine search of belongings, becomes sufficiently intrusive that it qualifies as a detention that engages Charter rights. Absent detention, there is no right to counsel and no right to remain silent. Neither the existence of a statutory duty to answer the questions posed, nor the criminal penalties attendant on failing to do so honestly, gives rise to constitutional rights as long as the interaction remains part of routine questioning by Customs officials. The values animating the protection against self-incrimination are not implicated when a traveller is compelled to answer routine questions. The answers to such questions can, accordingly, be received in subsequent proceedings without violating the principle against self-incrimination. [references omitted, para. 149]

Canfield was subject to routine questioning and was not detained when he admitted he had child pornography on his electronic device in response to the question posed by the BSO. Since his admission that he had child pornography was made in the course of routine questioning prior to his detention, the use of this admission in his criminal trial did not offend s. 7. However, when he was asked to pull up an image of child pornography on his cell phone he was detained. This was the start of a more intrusive inquiry, beyond routine questioning, and Canfield's right to counsel and right to silence were engaged. Any statements he made after he was detained would be protected by the principle against self-incrimination and their admission in criminal proceedings would breach his rights under s 7.

Townsend was detained at the point when the BSO demanded his password so that she could conduct

a more thorough search of his laptop computer. At this point, Townsend's s. 7 rights were triggered and any statements he made after this point would be subject to the right against self-incrimination.

s. 24(2) Charter

Despite a finding that the searches of the electronic devices violated Canfield's and Townsend's rights under s. 8, and their ss. 7, 10(a), and 10(b) rights were infringed, the evidence was not excluded under s. 24(2). While the impact on Canfield's and Townsend's *Charter* protected interests under ss. 7, 8, and 10 were serious, the BSOs acted in good faith in searching the devices and the evidence uncovered was real and reliable evidence of a serious offence that was crucial to the Crown's case.

The appeals were dismissed and the convictions were upheld.

Complete case available at www.canlii.org

POLICE TURNED THEIR MINDS TO SPECIFIC CIRCUMSTANCES: NO s.10(b) BREACH IN DELAYING ACCESS TO COUNSEL

R. v. Leonard, 2020 ONCA 802

Police suspected that the accused supplied cocaine to a street-level trafficker. The officers prepared a high-risk takedown of the accused because a confidential informer said he possessed a long firearm. At 10:35 pm, officers arrested him at gunpoint during a traffic stop. On a search incident to arrest, police found 56 grams of cocaine in his shorts and two mobile phones in his vehicle but no gun. When advised of his rights, the accused immediately expressed a desire to speak with a lawyer.

The accused was transported to the police station. At about 10:55 pm, an officer left a voicemail for the accused's counsel of choice. When it was learned this lawyer was unavailable, the accused asked to speak to a different lawyer of choice. At 10:59 pm, the officer called this lawyer and left a voicemail. The accused then asked to speak to duty counsel. At 11:16 pm, a voicemail message was left for duty counsel requesting a call back. Meanwhile, police decided to apply for a search warrant to be executed at the accused's residence. As a result, police would not permit the accused access to counsel for the time being. When duty counsel called back at 11:38 pm, the lawyer was told he could not speak to the accused because of an outstanding warrant.

A search warrant application was prepared and faxed to a justice of the peace at 00:54 am. From 01:59 am to 02:05 am, officers questioned the accused in the cellblock to determine whether the police would discover a firearm at the residence when they executed the search warrant and if anyone else was expected to be in the home. Officers also asked about the presence of marijuana and other drug paraphernalia at the house. At 03:00 am a justice of the peace authorized a search warrant. At 03:10 am police called duty counsel again and left a voicemail. Duty counsel called back and the accused spoke with a lawyer at 03:21 am. The total delay in the accused speaking to counsel was about 3.5 hours.

Ontario Superior Court of Justice

The Crown conceded that the police breached the accused's s. 10(b) rights by questioning him in the cellblock and chose not to adduce into evidence his statements or the results of the search at his residence. But the judge ruled that the delay in not permitting the accused to speak to counsel was not a further s. 10(b) breach. In delaying access, the police responded to the specific circumstances of the case.

The judge refused to exclude the cocaine found on the accused at the time of his arrest under s. 24(2). The s. 10(b) breach resulting from the questioning in the cellblock ***"fell within the mid-range of seriousness, had little or no impact on [the accused's] Charter-protected interests, and that society's interest in an adjudication on the merits favoured the admission of this reliable and non-***

"[The officer] referred to a 'common practice' of police delaying access to counsel when preparing search warrants for arrested persons' homes. However, that statement has to be considered in the context of other evidence that demonstrated that the police had turned their minds to the specific concern about a long firearm being in [the accused's] residence."

conscriptive evidence." The accused was convicted of trafficking in a controlled substance and possessing a controlled substance for the purposes of trafficking.

Ontario Court of Appeal

The accused contended that the trial judge erred in finding the deliberate delay of not facilitating his access to counsel was justified in the circumstances. He suggested that the trial judge failed to consider an officer's testimony that it was ***"common practice"*** for police to delay access to counsel when preparing search warrants for arrested persons' homes. He also asserted the trial judge erred in finding that no s. 10(b) breach occurred in delaying his access because police had turned their minds to the specific circumstances at hand.

Deliberate Delay

The Court of Appeal found the trial judge correctly determined whether the deliberate delay of facilitating access to counsel was justified in the circumstances.

> [T]he trial judge was alive to the concern that any delay in granting access to counsel must be reasonable. Indeed, he specifically referenced that the delay must be reasonable when he articulated the test to determine whether the deliberate delay of facilitating access to counsel was justified. He then conducted a detailed review of the circumstances of this case and found a demonstrated and justified basis for the police's actions based on concerns for officer safety due to credible information about an outstanding firearm. Implicit in his reasoning was a finding that the police acted reasonably. [para. 12]

As for whether the trial judge erred in finding no s. 10(b) breach occurred because police had turned their minds to the specific circumstances, the Court of Appeal stated:

> [The officer] referred to a "common practice" of police delaying access to counsel when preparing search warrants for arrested persons' homes. However, that statement has to be considered in the context of other evidence that demonstrated that the police had turned their minds to the specific concern about a long firearm being in [the accused's] residence. That evidence included: the fact that the police engaged in a high-risk takedown because they were concerned about the firearm; the discussions that took place among the officers about delaying [the accused's] contact with counsel because of concerns about the firearm; the interview in the cellblock included questions about the firearm; and [the officer's] testimony that his primary motivation in delaying contact between [the accused] and counsel was public and police safety. [para. 13]

In this case, there was evidence that police turned their mind to the specific circumstances of this case before deciding that the accused would be denied access to counsel for several hours while a search warrant was sought and obtained.

The trial judge did not err in concluding that the delay in providing the accused access to duty counsel was not a s.10(b) violation. It was therefore unnecessary to undertake a new s. 24(2) analysis.

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

SEARCH OF BAG INCIDENT TO ARREST JUSTIFIED FOR SAEFTY

R. v. Cain, 2020 NSCA 84

After responding to an alarm at a residence, police arrived and found the patio door had been smashed in. Police cleared the premises and found no-one inside. The method of entry and other circumstances reminded an officer of another break and enter on the same street that occurred six or seven months prior. When dispatch was contacted, police were advised that the accused had been arrested and charged in the earlier break in and was bound by a recognizance to house arrest. The homeowner later found a considerable amount of jewelry was missing, along with a pillow case which had been removed from a pillow on a bed. A radio transmission was broadcast naming the accused as a suspect in the recent break and enter, mentioned the location where the break in occurred and reported that jewelry had been stolen, without providing specifics of the stolen items.

Officers attended at the accused's residence and knocked on its door. When no-one answered, police set up surveillance at the back of the residence. A short time later the accused appeared. He was walking down a path and was clutching a pillow case. He was arrested for breaching his recognizance. He became argumentative, uncooperative and refused to let the pillow case go. Police obtained the pillow case from the accused and he was handcuffed and searched. In his pockets, police found a cell phone, lighter, several gold rings, a bracelet and three cards, including one with the home-owners name on it. The pillow case was also searched and it was found to contain loose jewelry and jewelry boxes. The accused was then arrested for the break and enter.

Nova Scotia Supreme Court

The officer who searched the accused said he did so as an incident to arrest but he was not asked for any further explanation. The officer who searched the pillow case also said he did so as an incident to arrest.

The accused suggested the search of his person as incident to arrest was not lawful because his arrest for breach of recognizance was invalid. In his view, the police failed to check and see if there was an exception to his recognizance which would have excused his absence from his home. Moreover, the accused suggested that even if his arrest was lawful, the mere assertion by the officer that he searched the accused "***incident to arrest***", without further elaboration, was not sufficient to justify the search. As for the search of the pillow case, he argued it had been removed from his grasp and he had been handcuffed. Thus, he was unable to compromise officer safety.

The judge found the accused had been lawfully detained and searched. The accused had been detained when investigators' formulated reasonable grounds to believe he was in breach of his recognizance. The police had the necessary subjective belief that the accused was arrestable for breaching his recognizance, and these grounds were objectively reasonable. Further, ***"while in some circumstances, an officer may choose to do so, it was not necessary that these officers, who all knew that [the accused] had some exceptions to his house arrest conditions, actually review the Recognizance first, then investigate as to whether he had indeed been off of the premises for one of the reasons specified in the Recognizance, prior to arresting him."*** There was no s. 9 *Charter* breach.

As for the searches, the judge noted that ***"the police have the ability at common law to conduct a search of an accused incident to a lawful arrest and to seize anything in his possession, if done for the purposes of ensuring the safety of the police and the accused, to prevent his escape, or to provide evidence against him. There is no need for the existence of reasonable and probable grounds to believe that the accused is in possession of weapons or evidence as a prerequisite to such a search, provided that the search is not done abusively or done with constraints that are disproportionate to the contextual circumstances."***

The search of the accused was consistent with the legitimate objective of a safety search incident to arrest:

> In this case, the stated reason for the search was "incident to arrest". This response is broad enough to encompass the three legitimate possible objectives of such a search. At no time did the accused, through his counsel, ask either peace officer to "fine tune" the response, or explain whether it was one, two, or all three of these objectives which were in play.
>
> In this case, the officer's response was that the search was done "incident to arrest" – the response is consistent with three legitimate possible objectives to which such a search could aspire. At no time did counsel elicit any information from the police officer which was inconsistent either objectively, or in the mind of the police officer, with one or more of these objectives.
>
> [...]
>
> For example, one legitimate reason for the search would be protection of the police officers or the accused. The officers were attempting to arrest the accused for breach of Recognizance. He was also known to be a suspect in a break and enter that had only just occurred. He also is known to be on a Recognizance as a result of one that occurred six to seven months earlier. These include crimes of violence – it is certainly reasonable for the police to determine whether he has a weapon on his person. [paras. 56-59, 2019 NSSC 398]

The pillow case search was also reasonable:

> What about the bag then? Recall, the accused argues that once he was handcuffed and the bag was being held by [the officer], no issue of police safety remained at that point. Hence, there was no need to search it.
>
> With respect, I disagree. He was arrested while clutching it. It was in plain view. He would not let it go without a struggle and it interfered with police attempts to handcuff him.
>
> Having taken the bag, the police clearly cannot give it back to [the accused] after he is handcuffed - he is being arrested. What are they to do with it? They must maintain possession of it. What if it contains a loaded weapon which could injure [the officer] or one of his colleagues if mishandled? Clearly they had to know what was inside of it. [paras. 60-62, 2019 NSSC 398]

The judge also found the searches were conducted in an appropriate manner. The warrantless searches were reasonable under the circumstances and did not breach s. 8 of the *Charter*. And, even if the accused's *Charter* rights had been breached, the judge would have admitted the evidence under s. 24(2). The accused was convicted of break and enter and possessing stolen property.

Nova Scotia Court of Appeal

The accused submitted, among other things, that the trial judge erred in applying the law. He argued the trial judge erred in concluding his arrest and detention were lawful, and the searches were not valid as an incident to arrest. But Justice Beaton, speaking for the Court of Appeal, disagreed:

> The burden was on the Crown to establish the warrantless search was reasonable and justified in the circumstances. [The accused] was initially arrested for breaching his Recognizance, and the judge was satisfied the arrest and the search of [the accused] incidental to arrest were lawful. The record reflects the judge's correct application of the law regarding both the arrest and the search incidental to arrest. [para. 10]

The Court of Appeal also dismissed the accused's motion to introduce fresh evidence in the form of a transcript of the police radio transmissions exchanged among the various police officers involved in the events leading to his arrest.

The trial judge committed no errors in reaching his conclusions and convicting the accused. The accused's appeal was dismissed.

Complete case available at www.canlii.org

Editor's Note: Additional details taken from *R. v. Cain*, 2019 NSSC 398.

Public Safety in Western Canada				
In the past three years Crime has ...	increased	Stayed the same	Decreased	Not sure
British Columbia	42%	46%	6%	7%
Alberta	48%	37%	6%	9%
Saskatchewan	41%	51%	5%	4%
Manitoba	54%	32%	7%	6%

MANITOBANS MORE LIKELY TO FEEL CRIME HAS RISEN IN THEIR COMMUNITY

In a recent online study conducted in November 2020 by the Research Co., residents of Manitoba were more likely to feel that crime has risen in their community than other residents of western Canada.

British Columbia

People living on Vancouver Island were more likely to feel crime increased compared to those in other areas of the province.

BC - Feel crime has increased	
Metro Vancouver	39%
Fraser Valley	49%
Vancouver Island	50%
Northern BC	44%
Southern BC	44%
BC - All	42%

Alberta

People living outside the Calgary or Edmonton Census Metropolitan Areas were more likely to feel crime increased.

Alberta - Feel crime has increased	
Calgary CMA	41%
Edmonton CMA	43%
Rest of Alberta	57%
Alberta - All	48%

Saskatchewan

People living in the Saskatoon CMA were more likely to feel crime increased compared to those in the Regina CMA or other areas of the province.

Saskatchewan - Feel crime has increased	
Regina CMA	36%
Saskatoon CMA	47%
Rest of Saskatchewan	38%
Saskatchewan - All	41%

Manitoba

People living outside the Winnipeg CMA were more likely to feel crime increased compared to those living in it.

Manitoba - Feel crime has increased	
Winnipeg CMA	51%
Rest of Manitoba	57%
Manitoba - All	54%

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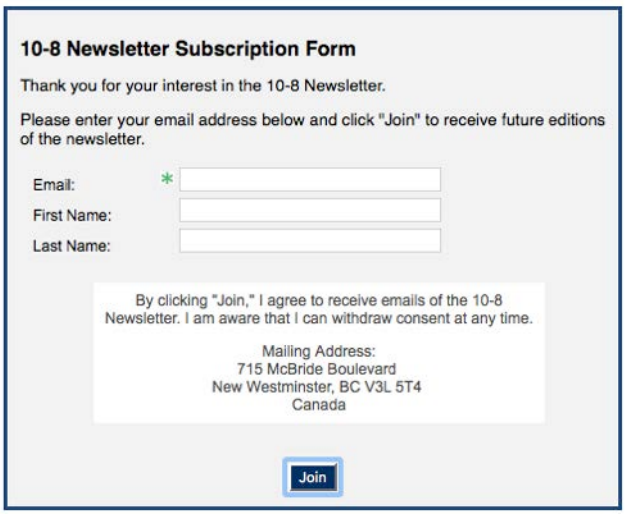

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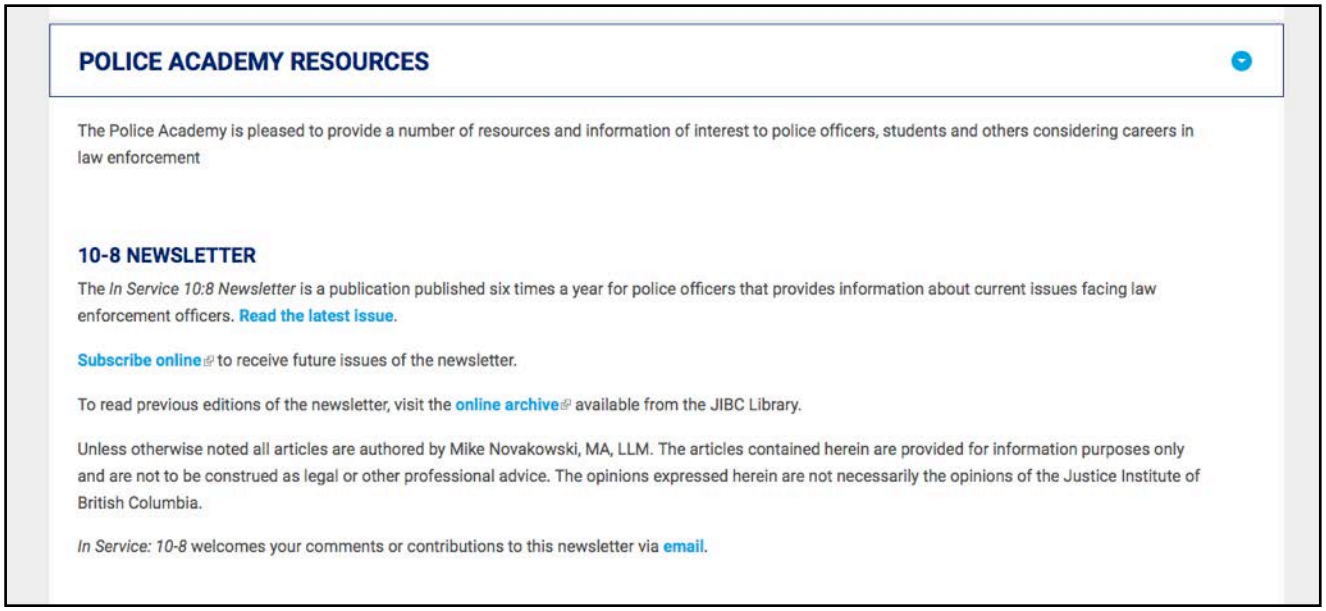

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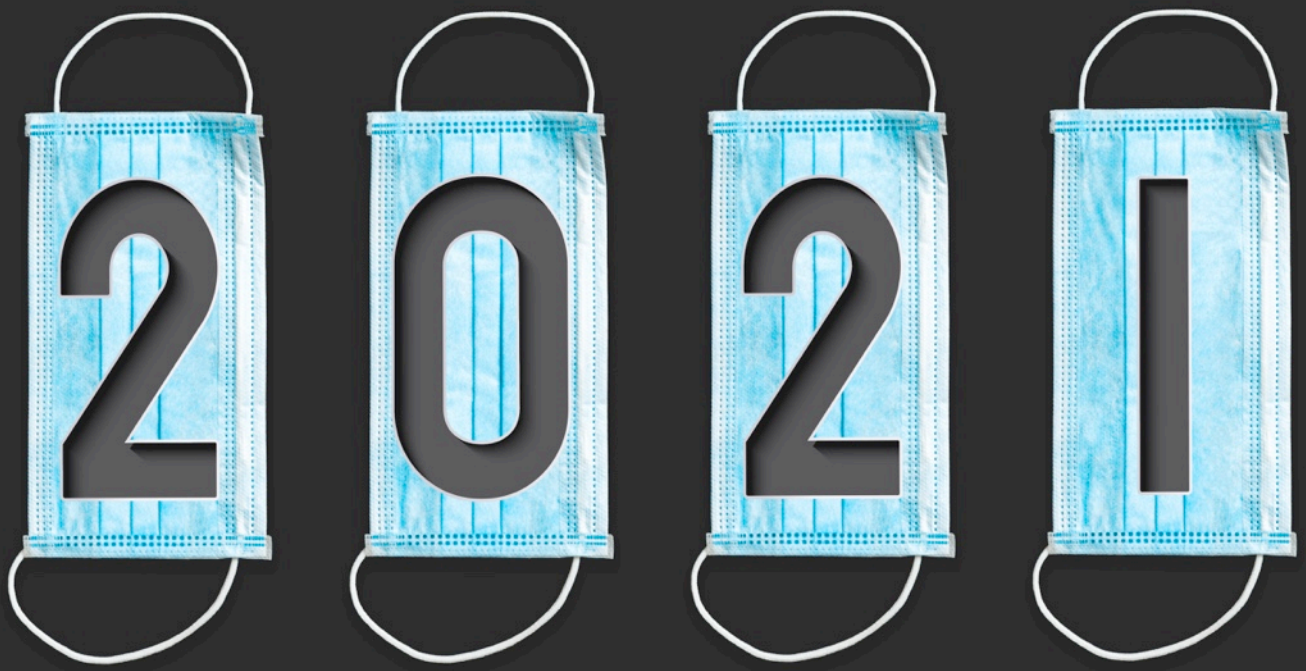

HAPPY NEW YEAR