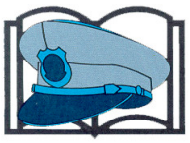
JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION



CHARTER OF RIGHTS & FREEDOMS TURNING 40

The Canadian Charter of Rights and Freedoms became law on **April 17, 1982**. That was 40 years ago! Since then the courts, in applying and interpreting the *Charter*, have tried to inform government and its actors (including the police) where exactly the boundaries of an individual's rights and the countervailing societal interest in effective law enforcement intersect. This is no easy task. Equally, if not more difficult, is applying the law to real life, particularly in novel situations. This is the job of the police. It is their duty to take constitutional principles (such as privacy), sometimes in the abstract, and apply them to daily reality, often in a moments notice with little time for reflection, second opinion or timeouts. The call an officer makes is the one many people will live with for the rest of their lives. Training and education are key! That is one reason why **In-Service: 10-8** is now entering its **21st year of publication**. We salute all our readers and thank them for all they do in maintaining law and order in this great nation we call Canada!

Highlights In This Issue

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Unless otherwise noted all articles are authored by Mike Novakowski, MA, LLM. The articles contained herein are provided for information purposes only and are not to be construed as legal or other professional advice. The opinions expressed herein are not necessarily the opinions of the Justice Institute of British Columbia. "In Service: 10-8" welcomes your comments or contributions to this newsletter.

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Be the one making a difference and keeping communities safe. If you want to gain the applied skills to be a sought-after graduate pursuing a rewarding career in law enforcement and public safety, then this program is for you.

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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.

10 steps to successful coaching.
Sophie Oberstein.
Alexandria, VA: ATD Press, 2020.
HF 5549.5 C53 O24 2020
Also available in eBook format (JIBC login required)

The burnout epidemic: the rise of chronic stress and how we can fix it.
Jennifer Moss.
Boston, MA: Harvard Business Review Press, 2021.
RA 785 M69 2021

The Charter of Rights and Freedoms.
Hon. Robert J. Sharpe (distinguished jurist in residence, Faculty of Law, University of Toronto), Kent Roach
(Faculty of Law, University of Toronto).
Toronto, ON: Irwin Law, 2021.
KE 4381.5 S53 2021

Coaching online: a practical guide.
Kate Anthony & DeeAnna Merz Nagel.
Abingdon, Oxon; New York, NY: Routledge, 2022.
HD 30.4 A626 2022

Control the narrative: the executive's guide to building, pivoting and repairing your reputation.
Lida Citroën.
London ; New York, NY: Kogan Page, 2021.
HF 5415.1255 C4848 2021

Crisis management: resilience and change.
Sarah Kovoor-Misrar,
University of Colorado at Denver.
Los Angeles, CA: SAGE, 2020.
HD 49 K69 2020

Cybersecurity in Canada: a guide to best practices, planning and management.
Imran Ahmad.
Toronto, ON: LexisNexis Canada, 2021.
HV 6773 A36 2021

Developing mental toughness: strategies to improve performance, resilience and wellbeing in individuals and organizations.
Doug Strycharczyk, Peter Clough & John Perry.
London; New York, NY: Kogan Page, 2021.
BF 481 C57 2021

Enhancing learning through formative assessment and feedback.
Alastair Irons & Sam Elkington.
Abingdon, Oxon; New York, NY: Routledge, Taylor & Francis Group, 2022.
LB 2368 I75 2022

Evidence-based training methods: a guide for training professionals.
Ruth Colvin Clark.
Alexandria, VA: ATD Press, 2020.
HF 5549.5 T7 C58 2020
Also available in eBook format (JIBC login required)

Falsehood and fallacy: how to think, read, and write in the twenty-first century.
Bethany Kilcrease.
Toronto,ON; Buffalo, NY; London: University of Toronto Press, 2021.
BF 441 K55 2021

Handbook of posttraumatic stress: psychosocial, cultural, and biological perspectives.
edited by Rosemary Ricciardelli.
New York, NY: Routledge, Taylor & Francis Group, 2022.
RC 552 P67 H348 2022

HBR's 10 must reads on building a great culture.

Boston, MA: Harvard Business Review Press, 2020.

HD 58.7 H42 2020

HBR's 10 must reads on building a great culture.

Boston, MA: Harvard Business Review Press, 2020.

HD 58.7 H42 2020

HBR's 10 must reads on diversity.

Boston, MA: Harvard Business Review Press, 2019.

HF 5549.5 M5 H459 2019

HBR's 10 must reads on women and leadership.

Boston, MA: Harvard Business Review Press, 2019.

HD 6053 H36 2019

How ten global cities take on homelessness: innovations that work.

Linda Gibbs, Jay Bainbridge, Muzzy Rosenblatt, & Tamiru Mammo.

Oakland, CA: University of California Press, 2021.

HV 4493 G43 2021

Instant anger management: quick and simple CBT strategies to defuse anger on the spot.

Aaron Karmin.

Oakland, CA: New Harbinger Publications, Inc., 2021.

BF 575 A5 K367 2021

The leader's guide to unconscious bias: how to reframe bias, cultivate connection, and create high-performing teams.

Pamela Fuller & Mark Murphy; with Anne Chow.

New York, NY: Simon & Schuster, 2020.

HD 57.7 F855 2020

Learning technologies and user interaction: diversifying implementation in curriculum, instruction, and professional development.

edited by Kay K. Seo & Scott Gibbons.

New York, NY: Routledge, 2022.

LB 1028.3 L43 2022

Treating PTSD in first responders: a guide for serving those who serve.

Richard A. Bryant.

Washington, DC: American Psychological Association, 2021.

RC 552 P67 B793 2021

The security risk assessment handbook: a complete guide for performing security risk assessments.

Douglas J. Landoll.

Boca Raton. LA: CRC Press, 2021.

HF 5548.37 L358 2021

What inclusive instructors do: principles and practices for excellence in college teaching.

Tracie Marcella Addy, Derek Dube, Khadijah A. Mitchell & Mallory SoRelle.

Sterling, VA: Stylus Publishing, LLC., 2021.

LB 2331 A34 2021

Also available in eBook format (JIBC login required)

Workplace learning: how to build a culture of continuous employee development.

Nigel Paine.

London: KoganPage, 2021.

HF 5549.5 T7 P35 2021

World drug report.

United Nations Office on Drugs and Crime.

Geneva: United Nations.

HV 5801 W73

Also available on the internet.

JUSTICE INSTITUTE of BRITISH COLUMBIA

SCHOOL OF CRIMINAL JUSTICE & SECURITY

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Each program provides an advanced theoretical and practical framework for the study of intelligence and its application in a wide variety of contexts.

WHAT WILL I LEARN?

The graduate certificates in Intelligence Analysis and Tactical Criminal Analysis are 15-credit programs delivered entirely online. Consisting of five courses (three credits each), these programs are designed to provide the specialized, theoretical foundation and applied skills to function successfully as an analyst. This is accomplished through a rigorous curriculum that includes three core courses that expose students to the fundamental and advanced concepts and analytic techniques in analysis.

Graduates will possess the skills to critically scrutinize unstructured and often ambiguous data within a variety of competitive, security and criminal contexts such as finance and banking, crime and organized crime, national security, safety and terrorism.

CAREER FLEXIBILITY

Graduates will be prepared to work in varying industries that employ analysts. Examples of potential roles include:

- intelligence analyst
- anti-money laundering specialist
- fraud investigator
- financial analyst
- military analyst
- investigator
- compliance officer
- senior analyst
- crime analyst
- intelligence officer
- compliance investigator
- military police officer
- law enforcement officer
- government analyst

GRADUATE CERTIFICATES IN: CYBERCRIME ANALYSIS, INTELLIGENCE ANALYSIS, OR TACTICAL CRIMINAL ANALYSIS

CURRICULUM AT A GLANCE

The graduate certificates in Cybercrime Analysis, Intelligence Analysis, or Tactical Criminal Analysis consist of three foundational courses and two specialized courses.

FOUNDATIONAL COURSES INCLUDE:

- Intelligence Theories and Applications (INTL-5100)
- Intelligence Communications (INTL-5800)
- Advanced Analytical Techniques (INTL-5200)

CYBERCRIME ANALYSIS SPECIALIZED COURSES INCLUDE:

- Applied Cybercrime Analysis (INTL-5900)
- Open Source Intelligence (OSINT) Investigation and Analysis (INTL-5910)

INTELLIGENCE ANALYSIS SPECIALIZED COURSES INCLUDE:

- Competitive Intelligence (INTL-5400)
- Analyzing Financial Crimes (INTL-5260)

TACTICAL CRIMINAL ANALYSIS SPECIALIZED COURSES INCLUDE:

- Tactical Criminal Intelligence (INTL-5760)
- Analytical Methodologies for Tactical Criminal Intelligence (INTL-5370)

Graduates are able to continue their education towards a Masters of Science in Intelligence Analysis through Mercyhurst University.

HOW TO APPLY?

There are entrance requirements for admission into this program. For details of these requirements, and application deadlines, please visit our website at www.jibc.ca/intelligence

FOR MORE INFORMATION:

jibc.ca/intelligence
graduatestudies@jibc.ca

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JUSTICE INSTITUTE of BRITISH COLUMBIA

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Justice Institute of British Columbia (JIBC) is Canada's leading public safety educator with a mission to develop dynamic justice and public safety professionals through its exceptional applied education, training and research.

22-013

FEDERAL CROWN FILES DOWN FROM PREVIOUS YEAR

The Public Prosecution Service of Canada (PPSC) released its 2020/21 Annual Report. This report provides information about the PPSC's work including statistics on its files, the number of accused persons and the outcome of cases.

Opened & Carried Over Files Down

In 2020/21, the PPSC opened **31,411** files, down **-4.4%** from 2019/20 and **-30.5%** from 2012/2013.

In 2020/21, the PPSC carried over **26,805** files, down **-2.2%** from 2019/20 and **-12.2%** from 2012/2013.

Total files worked on in 202/2021 totalled 58,216, down **-3.4%** from 2019/2020 and **-23.2%** from 2012/2013.

NEW, CARRIED OVER & TOTAL FILES*

Year	Files Opened	Files Carried Over	Total Files
2012/2013	45,208	30,540	75,748
2013/2014	44,070 ▼	30,913 ▲	74,983 ▼
2014/2015	45,300 ▲	29,527 ▼	74,827 ▼
2015/2016	41,661 ▼	30,877 ▲	72,538 ▼
2016/2017	38,863 ▼	31,165 ▲	70,028 ▼
2017/2018	36,873 ▼	29,025 ▼	65,898 ▼
2018/2019	33,850 ▼	30,353 ▲	64,203 ▼
2019/2020	32,839 ▼	27,413 ▼	60,252 ▼
2020/2021	31,411 ▼	26,805 ▼	58,216 ▼

*Other totals taken from previous annual reports.

Top 10 Federal Statutes

The PPSC regularly prosecutes 36 federal statutes. The following table outlines the top 10 statutes prosecuted based on the number of charges:

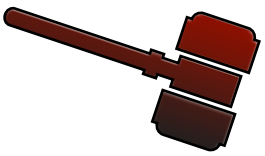
Statute	Number of Charges
Criminal Code	95,905
Controlled Drugs & Substances Act	84,844
Cannabis Act	5,000
Fisheries Act	4,248
Immigration & Refugee Protection Act	1,370
Customs Act	900
Income Tax Act	755
Employment Insurance Act	542
Excise Tax Act	357
Excise Act, 2001	354

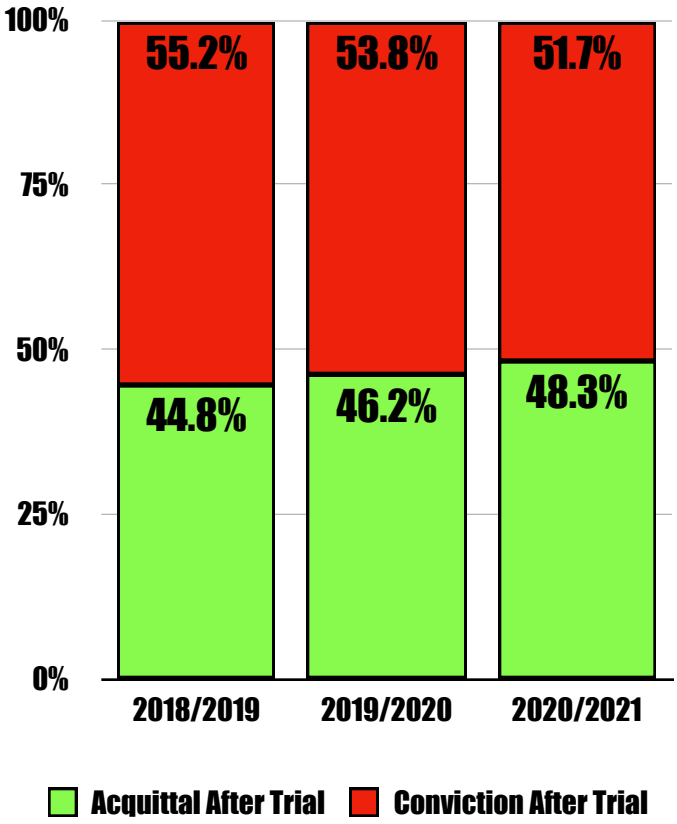
Charging Outcomes

Most PPSC charges were withdrawn or stayed by Crown (**75%**). The second largest category of charges were disposed of by way of guilty plea (**22%**).

After Trial Convictions Drop

The percentage of charges in 2020/2021 resulting in a conviction <u>after trial</u> dropped **-3.5%** since 2018/2019.





DISPOSITION BY CHARGE*

Year	Acquittal After Trial	Conviction After Trial	Guilty Plea**	SOP*** (Judicial)	Charge Withdrawn/ SOP (Crown)	Other****	Total
2018/2019	1,577	1,947	23,208	109	43,571	108	70,520
2019/2020	1,439	1,673	17,833	118	35,519	137	56,719
2020/2021	696	744	11,346	115	39,436	42	52,379

*Other totals taken from previous annual reports.
**Some guilty pleas and findings of guilt that resulted in discharges are not reflected in these numbers
***SOP = Stay of Proceedings.
****Other category includes discharge at preliminary hearing and mistrial.

Decision To Prosecute Test

In its annual report, the PPSC described its file assessment for charge approval — or the **"decision to prosecute test"** — as comprising two considerations:

1. Is there a reasonable prospect of conviction? and
2. Is it in the public interest?

Reasonable Prospect of Conviction?

The PPSC's Decision to Prosecute guideline describes a **"reasonable prospect of conviction"** as follows:

> A reasonable prospect of conviction requires that there be more than a bare prima facie case, or in other words, it requires more than evidence that is capable of making out each of the necessary elements of the alleged offence against an accused.

Quarantine Act Charges

As of March 31, 2021, the PPSC had instituted charges in **50** files under Canada's *Quarantine Act*. This includes **59** accused persons and **65** charges.

QUARANTINE ACT CHARGES			
Region	**Files**	**Accused**	**Charges**
Alberta	5	5	5
British Columbia	14	17	21
Manitoba	16	21	21
Ontario	6	7	7
Quebec	1	1	1
Atlantic	3	3	3
Yukon	1	1	2
National Capital Region	4	4	5
Total	**50**	**59**	**65**

Files By Region

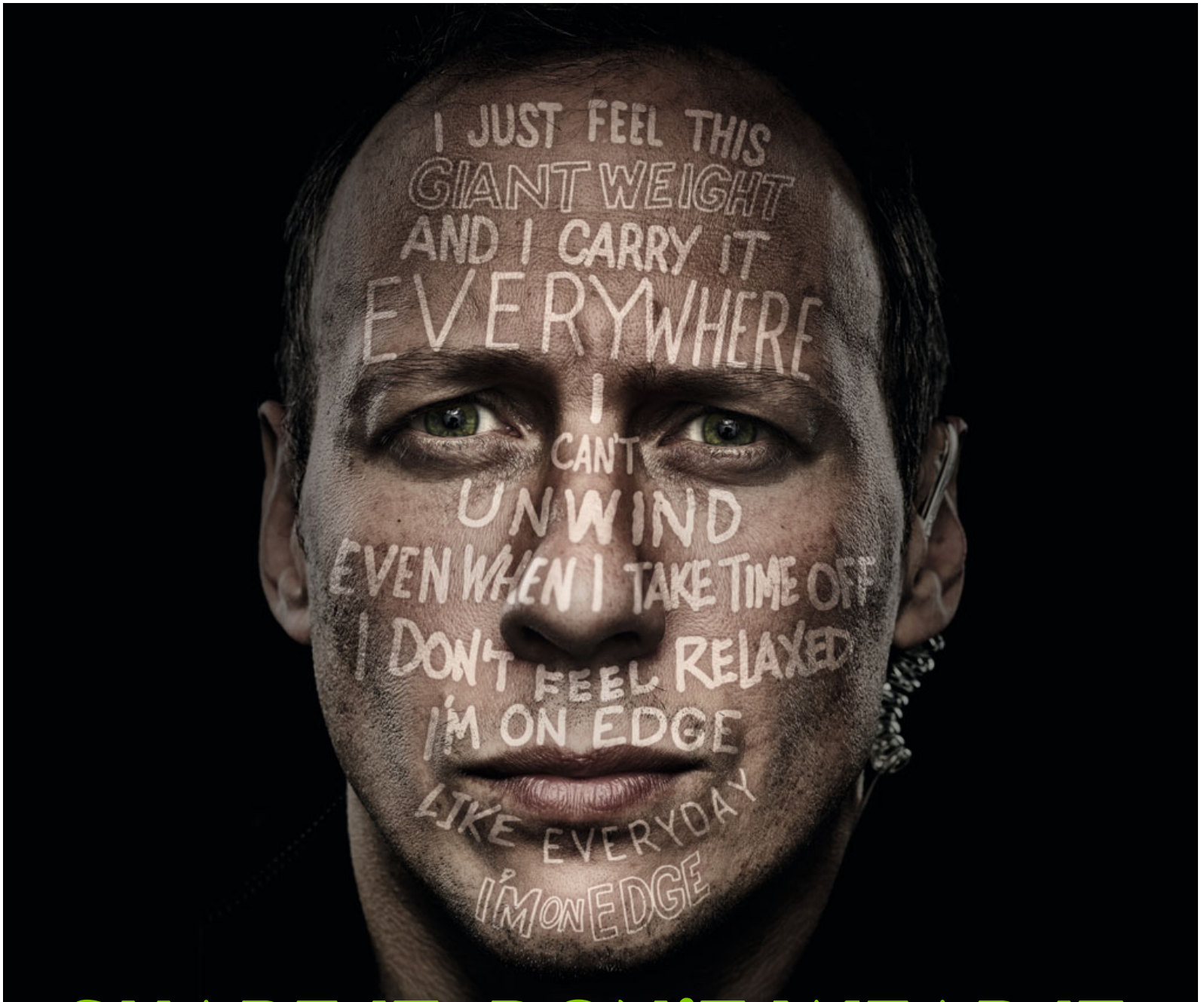
Ontario had the most PPSC files (**17,663**) followed by Alberta (**8,268**), the National Capital Region (**6,826**) and British Columbia (**6,291**).

PPSC FILES BY REGION	
Ontario	17,663
Alberta	8,268
National Capital Region	6,826
British Columbia	6,291
Northwest Territories	3,916
Atlantic	3,477
Saskatchewan	3,315
Nunavut	3,165
Manitoba	2,319
Yukon	1,884
Quebec*	961
Headquarters	132
Total	**58,217**

*In Quebec, the PPSC only prosecutes drug offences if they were investigated by the RCMP.

International Day for the Elimination of Racial Discrimination

March 21



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

IRP & ADP STATISTICS RELEASED

B.C.'s Ministry of Public Safety and Solicitor General (RoadSafetyBC) released statistics on Administrative Alcohol and Drug Related Driving Prohibitions in the province for 2021.

BC's ALCOHOL DRIVING PROHIBITIONS

	Immediate Roadside Prohibitions						Administrative Driving Prohibitions				
	Warn			90 Days			90 Days				Total IRP & ADP
YEAR	3 day IRP	7 day IRP	30 day IRP	FAIL	REFUSE	Total IRP	OLD (FAIL)	NEW	REFUSE	Total ADP	
2011	7,874	154	7	13,190	1,446	22,671	1,900		520	2,420	25,091
2012	5,391	222	12	6,784	1,161	13,570	3,576		696	4,272	17,842
2013	6,066	309	30	11,577	1,414	19,396	1,021		340	1,361	20,757
2014	5,702	368	26	11,240	1,470	18,806	1,049		352	1,401	20,207
2015	4,670	351	32	9,288	1,863	16,204	1,127		481	1,608	17,812
2016	4,588	334	33	8,864	1,830	15,649	1,127		464	1,591	17,240
2017	4,243	259	19	8,388	1,715	14,624	1,067		419	1,486	16,110
2018	4,736	292	23	9,207	1,710	15,968	1,021		377	1,398	17,366
2019	5,034	315	26	9,124	1,681	16,180	485	469	348	1,302	17,482
2020	3,663	274	26	7,589	1,530	13,082	-	965 (see below)	429	1,394	14,476
2021	3,359	228	26	7,297	1,522	12,432	1	1,051 (see below)	444	1,496	13,928

Source: Alcohol Driving Prohibitions [accessed February 17, 2022]

Administrative Driving Prohibitions Reporting

Year	Alcohol Breath	Alcohol Blood	Drug Blood	Alcohol/Drug Combined	DRE	Total
2021	678	92	34	3	244	1,051
2020	777	49	22	2	115	965

TWO POLICE DEPARTMENTS AMONG BRITISH COLUMBIA's TOP EMPLOYERS

The **Delta Police Department** and the **Saanich Police Department** were both recognized as two of British Columbia's Top Employers for **2022**. Employers were evaluated by the editors of Canada's Top 100 Employers using the following eight criteria:

1. **Physical Workplace;**
2. **Work Atmosphere & Social;**
3. **Health, Financial & Family Benefits;**
4. **Vacation & Time Off;**
5. **Employee Communications;**
6. **Performance Management;**
7. **Training & Skills Development; and**
8. **Community Involvement.**

Employers were compared to other organizations in their field to determine which offers the most progressive and forward-thinking programs.

Delta Police Department

According to the editors, reasons the Delta Police Department was selected as one of BC's Top Employers include:

- "Delta Police Department established the Covid Mental Health Working Group, who created a unique space where employees could safely gather and enjoy conversation, coffee or a meal - the unique space was created with the purchase of a large outdoor tent that was set up on the patio area."

- "Delta Police Department employees can access a generous mental health practitioner benefit as part of their health benefits plan, to $5,400 annually."

- "Delta Police Department helps employees prepare for the future with retirement planning assistance and a defined benefit pension plan."

Saanich Police Department

Reasons the Saanich Police Department was selected include:

- "Saanich Police Department supports a number of local and national charitable initiatives each year and encourages employees to get involved with up to 14 paid days off to volunteer annually."

- "Saanich Police Department maintains maternity and parental leave top-up policies for parents-to-be, offering the majority of new mothers up to 80 per cent of salary for up to 32 weeks, and parental top-up for fathers and adoptive parents to 80 per cent of salary for up to 15 weeks."

- "Additionally, the department provides academic scholarships to parents with college-aged children, to $1,000 per child per year."

Other BC Top Employers include:

- BC Hydro
- BC Pension Corporation
- BC Ferries
- BCIT
- British Columbia Liquor Distribution Branch
- Capilano University
- College of Physicians and Surgeons of British Columbia, The
- Coquitlam, City of
- Douglas College
- Fraser Health Authority
- ICBC
- Kwantlen Polytechnic University
- Law Society of British Columbia, The
- North Vancouver, Corporation of the District of
- Simon Fraser University
- TransLink (SCBCTA)
- UBC
- University of Northern British Columbia
- UFV
- University of Victoria
- Vancouver, City of
- WorkSafeBC

NATIONAL DNA DATA BANK

The National DNA Data Bank (NDDB) was created by an Act of Parliament which came into force in 2000. The NDDB maintains several indices including the Convicted Offenders Index (COI), the Crime Scene Index (CSI) and the Victims Index (VI).

As at December 31, 2021 there were **422,067** DNA profiles contained in the COI. The NDDB receives 400 to 500 convicted offender samples per week. There were also **193,053** DNA profiles contained in the CSI.

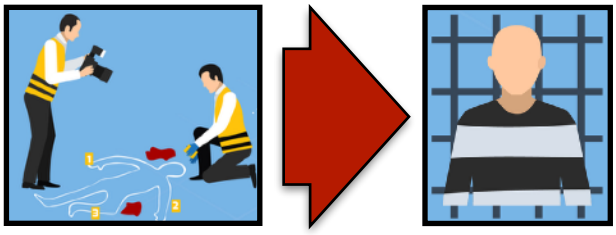
Index	Total DNA Profiles
Convicted Offender (COI)	422,067
Crime Scene (CSI)	193,053
Victims Index (VI)	75
Total DNA Profiles	615,195

Comparisons

Assistance is sometimes provided to criminal investigation through offender and forensic hits:

Offender Hits

- **CSI > COI**: Comparing DNA profiles found at Crime Scenes (CSI Index) to the DNA profiles of Convicted Offenders (COI Index). This can help identify a suspect and is known as an **"offender hit"**. This process can assist in eliminating a suspect if no match is made.



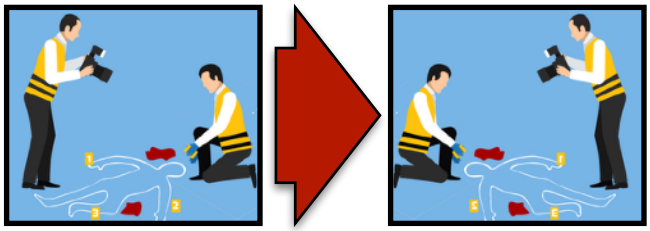
There were **70,426** offender hits (CSI > COI), related to the following case types:

Offence	Total Offender Hits
Murder	4,603
Sexual Assault	7,271
Attempted Murder	1,365
Armed Robbery	7,651
Break & Enter	30,779
Assault	5,614
Other	13,143
Total	70,426

Convicted Offender Biological Samples Received	
Blood	98.6%
Buccal	1.3%
Hair	0.1%

Forensic Hits

- **CSI > CSI**: Comparing DNA profiles found at different Crime Scenes (CSI Index to CSI Index). This can help identify links between crime scenes and is known as a **"forensic hit"**. This process can assist in determining whether a serial offender is involved in a number of crimes.



As at December 31, 2021 there were **7,695** forensic hits (CSI > CSI).

Source: National DNA Data Bank Statistics [accessed February 17, 2022]

WITNESS PROTECTION BY THE NUMBERS: UPDATED

Canada's **Witness Protection Program Act** (*WPPA*) established a federal program for the protection of individuals (witnesses) who have provided information or assistance to the police or the courts.

Witnesses

A witness is defined in s. 2 of the *WPPA* as:

(a) a person who has given or has agreed to give information or evidence, or participates or has agreed to participate in a matter, relating to an inquiry or the investigation or prosecution of an offence and who may require protection because of risk to the security of the person arising in relation to the inquiry, investigation or prosecution,

(b) a person who has assisted or has agreed to assist a federal security, defence or safety organization and who may require protection because of a risk to his or her security arising in relation to the assistance, or

(c) a person who, because of their relationship to or association with a person referred to in paragraph (a) or (b), may also require protection for the reasons referred to in that paragraph.

A witness could include a victim, compromised informant, police agent, or an independent witness who received a threat.

Factors to Consider

Section 7 of the *WPPA* outlines the factors to be considered in determining whether a witness should be admitted to the **Witness Protection Program** (WPP). These factors include:

- The nature of the risk to the security of the witness;
- The danger to the community if the witness is admitted to the WPP;
- The nature of the inquiry, investigation or prosecution involving the witness — or the nature of the assistance given or agreed to be given by the witness to a federal security, defence or safety organization — and the importance of the witness in the matter;
- The value of the witness's participation or of the information, evidence or assistance given or agreed to be given by the witness;
- The likelihood of the witness being able to adjust to the WPP, having regard to the witness's maturity, judgment and other personal characteristics and the family relationships of the witness;
- The cost of maintaining the witness in the WPP;
- Alternate methods of protecting the witness without admitting the witness to the WPP; and
- Such other factors as the RCMP Commissioner deems relevant.

Protection

Section 2 of the *WPPA* defines protection as including:

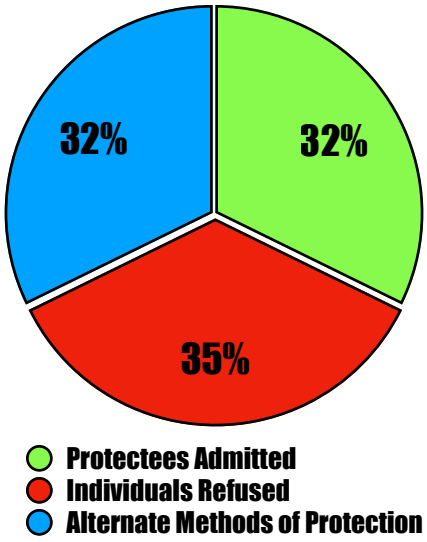
- relocation,
- accommodation,
- change of identity, or
- counselling and financial support for the above purposes or any other purposes in order to

ensure the security of a person or to facilitate the person's re-establishment or becoming self-sufficient.

Termination

There are two ways a witness — also known as a **protectee** once admitted to the WPP — can be terminated. The protectee can request termination, or the RCMP Commissioner can terminate the protection if there is evidence that there has been (1) a material misrepresentation or a failure to disclose information relevant to the admission of the protectee to the WPP or (2) a deliberate and material contravention of the obligations of the protectee under the protection agreement.

Individuals Assessed for WPP



WITNESS PROTECTION PROGRAM STATISTICS

Fiscal Year*	2020/2021	2019-2020	2018-2019	2017-2018	2016-2017
Cases assessed for admission	19	38	37	49	64
•From RCMP	17	35	34	38	u/k
•From Other Police Agencies	2	0	3	10	u/k
•From International	0	3	0	1	u/k
Individuals - admitted	10	12	7	15	14
Individuals - refusal	11	19	21	42	42
Alternate methods of protection	10	21	9	29	23
Terminations from WPP	14	6	6	15	15
•Voluntary terminations	14	6	5	11	12
•In voluntary terminations	0	0	1	4	3
Civil litigation cases against WPP	2	0	0	1	0
WPP Total Expenditure	$11,636,116	$16,017,504	$13,560,223	$12,541,987	$11,602,988

Fiscal year runs from April 1 to March 31 of the following year.
Source: Annual reports on the federal Witness Protection Program [accessed February 18, 2022]

STRIP SEARCH JUSTIFIED: 'SOME EVIDENCE SUGGESTING THE POSSIBILITY OF CONCEALMENT'

R. v. Ali, 2022 SCC 1

Police received information from two confidential informers about two men trafficking crack cocaine from a van and an apartment complex. Police conducted surveillance and corroborated the tips, making observations consistent with drug trafficking. A search warrant was obtained for the apartment. When the search warrant was executed, police found three people, including the accused, inside the apartment. The accused did not immediately comply with the arresting officer's commands. He was wearing baggy pants pulled partly down showing athletic (basketball) shorts worn underneath, and he was seen reaching towards his nether region, or back of his pants, during the arrest.

The accused was arrested and cautioned. His pants were removed and its pockets were searched. A small amount of marijuana, a ringing cell phone and cash were found in the accused's pants pocket. More money was found in the pockets of his athletic shorts, which were not removed from his person. No cocaine was located but a small scale was found on a table in front of the accused.

The accused was transported to the police station. The arresting officer told the lead investigator about his observations of the accused reaching around the back of his pants. The lead investigator then phoned the staff sergeant at the jail, explained the circumstances of the arrest, and requested the accused be strip searched. A strip search was conducted in a private restroom and police found three white baggies containing cocaine, weighing 65 grams in total, in his **"butt crack area"**. The accused was subsequently charged with several offences including possessing cocaine for the purpose of trafficking.

Nether Region - genitals or buttocks
Merriam-Webster online dictionary

Alberta Provincial Court

The lead investigator testified he did not himself personally observe the accused reaching towards his nether region but had received information from the arresting officer about the accused making adjustments to the area near his buttocks. The lead investigator said the accused had very little time to hide anything when the police first entered the residence but, based on his actions, it was believed he had concealed or was always concealing drugs on his person. **"His clear adjustments kind of on his back end towards ... his buttocks area lead me to believe that he may be concealing evidence in that area,"** said the lead investigator. He was concerned with the accused's safety, stating cocaine could be ingested anally through the body which could lead to an overdose or death.

The judge recognized that the police must have both a subjective and an objective basis for a strip search. He found there were objective reasons for the police to believe that evidence could be found by way of a strip search given the totality of circumstances, including the facts outlined in the search warrant as well as the accused's actions upon arrest. The accused was convicted of possessing cocaine for the purpose of trafficking.

Alberta Court of Appeal

The accused conceded there were reasonable and probable grounds to arrest and search him, but argued there were insufficient reasonable and probable grounds to justify the strip search. In his view, the trial judge improperly used inadmissible hearsay — the information that the accused was reaching towards his buttocks — in deciding whether the police objectively had reasonable grounds for the strip search. Further, he submitted that the wrong test

was applied in justifying the strip search because the higher threshold required to establish the reasonable and probable grounds necessary for a strip search was not considered.

"Hearsay"?

The accused suggested that the observation of him touching his buttocks was **"hearsay"** because the lead investigator was relying upon what the arresting officer told him. And the arresting officer never testified about this observation. Therefore, the accused asserted this information could not be used to justify the strip search.

The majority of the Court of Appeal found this information was not hearsay because it was not being admitted as evidence to prove the truth of its contents. Rather, this information was merely being used as part of the grounds for conducting the strip search. Police officers are entitled to rely on sufficiently credible information provided by another officer and the trial judge was permitted to consider it when deciding whether there were reasonable and probable grounds to conduct the strip search.

Strip Search Justification

The Supreme Court of Canada, in *R. v. Golden*, 2001 SCC 83, determined that a strip search could be conducted incidental to a lawful arrest for the purpose of discovering weapons in the arrestee's possession or evidence related to the reason for the arrest provided the police could establish reasonable and probable grounds justifying the strip search beyond the reasonable and probable grounds justifying the arrest. In describing the test in *Golden* for reasonable and probable grounds justifying a strip search, the majority of the Court of Appeal stated:

> [R]easonable and probable grounds justifying the arrest, or justifying an ordinary search incidental to that arrest, are not sufficient. The test of "reasonable and probable grounds" does not require proof on a balance of probabilities. Rather, that standard requires a factually based likelihood that there are grounds for the strip search, rising above mere suspicion, but not necessarily demonstrating grounds on a balance of probabilities. Reasonable and probable grounds exist where, for reasons above mere suspicion, it is not unlikely that evidence will be found during the search. [2020 ABCA 344, reference omitted, para. 19]

The majority found the trial judge did not err in determining the strip search of the accused, incident to his lawful arrest, complied with the principles governing strip searches as set out in *Golden*. In addition, the information received by the investigating officer from the arresting officer was not hearsay because it was not being adduced for its truth. The trial judge's decision that the police had the necessary reasonable and probable grounds to justify the strip search was upheld. The overall context of the investigation, the execution of the search warrant and the observed movements of the accused justified it. The strip search was lawful and the accused's appeal was dismissed.

Justice Veldhuis, in dissent, found the trial judge did not turn her mind to the proper test for a strip search — whether the police had reasonable and probable grounds for concluding that the strip search was necessary in the particular circumstances of the arrest. Since the accused had already served his sentence, Justice Veldhuis declined to conduct a s. 24(2) analysis. She would have allowed the accused's appeal and entered an acquittal.

Supreme Court of Canada

Justice Moldaver, speaking for a four member majority of the Supreme Court, rejected the accused's further appeal that the strip search was unlawful as an incident to arrest. ***"Where a strip search is conducted as an incident to a person's***

"Where a strip search is conducted as an incident to a person's lawful arrest, there must be reasonable and probable grounds justifying the strip search, in addition to reasonable and probable grounds justifying the arrest. These grounds are met for the strip search where there is some evidence suggesting the possibility of concealment of weapons or other evidence related to the reason for the arrest."

lawful arrest, there must be reasonable and probable grounds justifying the strip search, in addition to reasonable and probable grounds justifying the arrest," said Justice Moldaver. ***"These grounds are met for the strip search where there is some evidence suggesting the possibility of concealment of weapons or other evidence related to the reason for the arrest."*** He continued:

> [W]e are satisfied that there were reasonable and probable grounds justifying the strip search: the police had confidential source information that their target was in possession of a large quantity of cocaine and that he kept most of his drugs on his person; [the accused] was found next to a table with drugs, other than cocaine, and with items consistent with drug trafficking, including a scale, money, and a ringing cell phone; [the accused's] pants were partially down as he was being arrested; and one of the officers reported seeing [the accused] reaching towards the back of his pants. Viewed in its totality, this was clearly some evidence suggesting the possibility that [the accused] had concealed drugs, particularly cocaine, in and around the area of his buttocks. [para. 4]

Hearsay

Tthe investigating officer's reliance on the arresting officer's information that the accused was reaching towards the back of his pants was not improper. The accused conceded this information was not inadmissible hearsay because it was not tendered for the truth of its contents. The investigating officer could reasonably rely on the information as a factor in deciding whether he had reasonable and probable grounds to request the strip search. Unfortunately for the accused, his trial lawyer made a tactical choice to not cross-examine either officer about this information which undermined his argument it was unreasonable for the lead investigator to rely on it.

A Different View

Justice Côté, in dissent, found the Crown failed to discharge its burden of establishing the high threshold to justify a warrantless strip search. She concluded the accused's s. 8 *Charter* rights had been breached but would have admitted the evidence under s. 24(2). In her view, excluding the evidence would bring the administration of justice into disrepute.

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

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

Editor's note: Additional details taken from *R. v. Ali*, 2020 ABCA 344.

What is a strip search?

"Strip search" = "the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments."

R. v. Golden, 2001 SCC 83

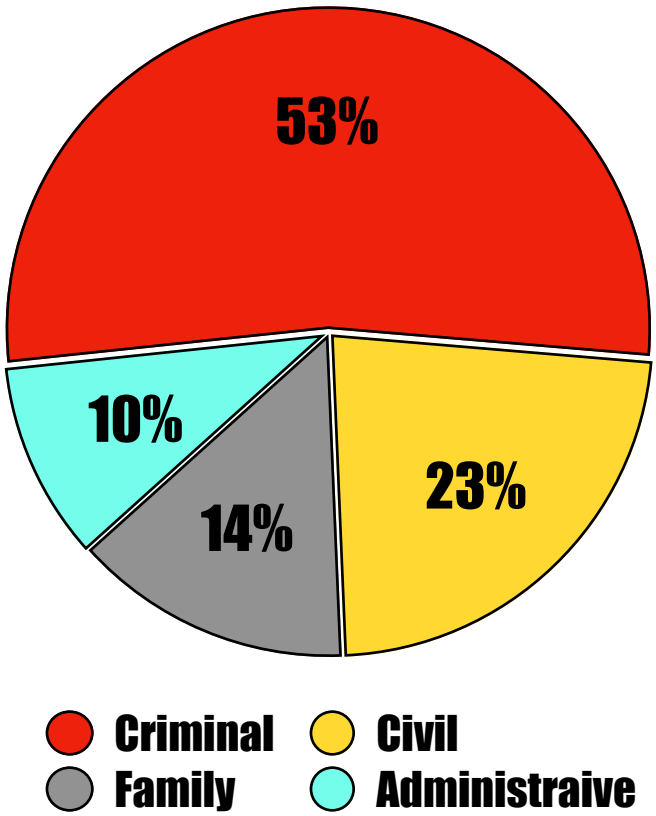
MANITOBA COURT OF APPEAL RELEASES ITS FIRST ANNUAL REPORT

On November 16, 2021 the Manitoba Court of Appeal issued its first-ever Annual Report. This report was for the 2019/20 fiscal year. During this time, the Manitoba Court of Appeal was comprised of 13 judges, including five supernumerary judges. Five judges were male (Mr.) and eight were female (Madam).

The Court of Appeal usually sits in panels of three judges, which constitute a quorum, but occasionally, on matters of great importance, will sit with a panel of five judges.

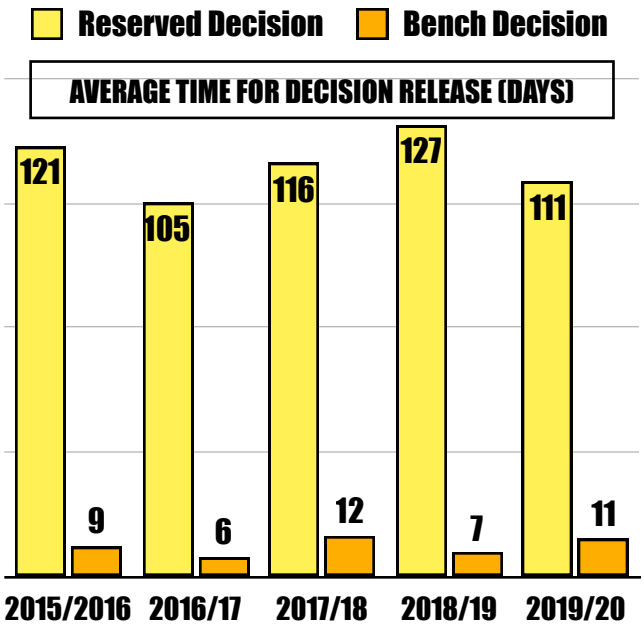
Most Appeals Were Criminal

In 2019/20 more than half of appeals related to criminal law matters. The remaining appeals related to civil, family and administrative law.



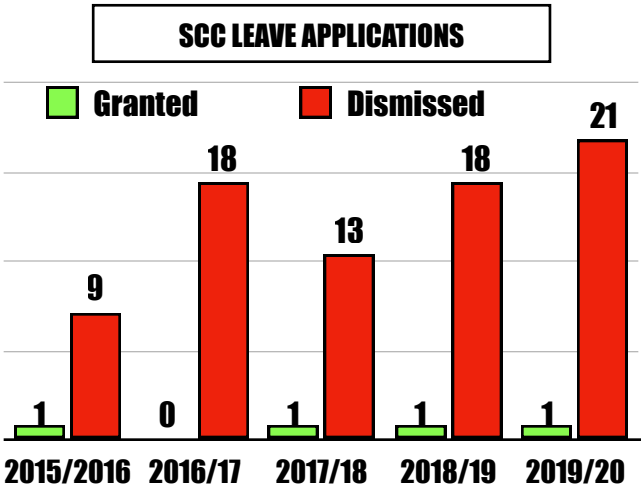
How Long To Decide?

In 2019/20 it took, on average, **111** days for the Court of Appeal to render a reserved judgement. This was down from **127** days in 2018/19. Judgements rendered from the bench took, on average, **11** days. This was down from seven days the previous year.



Leave to Appeal to Supreme Court of Canada

In 2019/20, there were 22 leave applications of Manitoba Court of Appeal decisions to the Supreme Court of Canada. Twenty of these applications were dismissed (95%) while only one was granted.



FANNY PACK SEARCH LAWFUL INCIDENT TO INVESTIGATIVE DETENTION

R. v. McKenzie, 2022 MBCA 3

At about 10:45 p.m. on a winter evening two police officers stood outside their police car talking to the occupants of a parked car in a back lane of a residential neighbourhood. The officers saw the accused jogging through a nearby back yard. The accused was clenching the left side of his body with his elbow. Thinking the accused might be injured, one of the officers called out to him and asked, **"Are you okay?"** When the accused made eye contact by looking directly at the officer, the officer recognized the accused from police intelligence reports as a long-time member of a street gang (the Indian Posse) who was known to carry a weapon. The officer had never met the accused but had seen his photo on many occasions.

The accused appeared startled or frightened at seeing the police and immediately increased his pace to a full out sprint. Both officers believed that the manner in which the accused was holding his left side was an effort to conceal something. One of the officers decided to detain the accused for an investigative purpose related to a weapons offence. The officer had extensive training and experience with weapons offences including the manner in which people carry them. He believed the accused's mannerism was an attempt to conceal a weapon between his left arm and his body.

The officer yelled at the accused to stop, but he did not comply and a short foot pursuit ensued. During the chase, the accused's jacket was open and the officer observed a fanny pack. The officer caught the accused, pinning him against the wall of a house. He observed that the zipper to the fanny pack was about 75% unzipped (open). He lifted the flap on the fanny pack to fully open it, shined his flashlight and immediately observed a handgun. The accused was handcuffed and arrested for possessing the firearm. The second officer then arrived in the police car shortly after. When the accused's jacket was searched, police found 37 gms. of fentanyl, 46 gms. of methamphetamine and other items indicative of drug trafficking. The firearm turned out to be loaded and stolen.

Manitoba Court of Queen's Bench

The officer testified that when he saw the fanny pack it occurred to him that the accused was probably running a load of drugs and the fanny pack likely contained either drugs or a weapon. The judge concluded that the investigative detention was lawful and therefore not arbitrary:

> Reduced to its core facts, [the officer] observed a member of the Indian Posse known to carry weapons, running through a residential yard late at night holding his body in a manner consistent with his carrying a weapon. Upon seeing the officers, [the accused] fled and refused to stop when told to do so.
>
> This constellation of factors includes objective facts, along with [the officer's] knowledge gained in his training. Most in and of themselves could be neutral or capable of other interpretations, but in combination I am satisfied they establish reasonable grounds to suspect [the accused] was involved in an ongoing weapons offence and Beattie was entitled to detain him for investigative purposes. I am also satisfied that [the officer] believed he had grounds to detain [the accused]. [paras. 34-35, 2021 MBQB 54]

As for the search of the fanny pack, the judge found it was reasonably necessary to eliminate an

"The common law power of investigative detention is not limited to 'a specific known criminal act' but extends to recent or ongoing criminal activity that is reasonably suspected."

imminent threat to the officer's safety. The officer did not conduct a safety search as a pretext, ruse or subterfuge to look for evidence. And, even if the officer's purpose was also to look for drugs, it would not negate his authority to look for a weapon as part of a lawful safety search. The judge also rejected the accused's contention that it was unreasonable to look inside the fanny pack because a pat-down of it would suffice to determine if there was a weapon inside it.

Finally, even if the accused's *Charter* rights were breached, the judge would have admitted the evidence under s. 24(2) anyways. The accused was convicted of possessing a controlled substance for the purpose of trafficking, possessing a restricted firearm with ammunition, and possessing a firearm while prohibited.

Manitoba Court of Appeal

The accused argued the trial judge erred in her application of the law relating to ss. 8, 9 and 24(2) of the *Charter*. He submitted that his detention was arbitrary under s. 9 and the search of his fanny pack unreasonable under s. 8. As a result, he suggested, the evidence ought to have been excluded under s. 24(2).

The Investigative Detention

Justice Mainella, speaking for the Court of Appeal, identified the following points respecting investigative detention:

- "A police officer may detain an individual for investigative purposes 'where they have **reasonable grounds to suspect** that the individual is connected to particular criminal activity and that such a detention is reasonably necessary in the circumstances'."
- "An investigative detention affords police the ability to take **reasonable measures** to investigate an offence."
- "The common law power of investigative detention is not limited to 'a specific known criminal act' but extends to recent or ongoing criminal activity that is **reasonably suspected**."
- "The objective of the reasonable suspicion standard for a lawful investigative detention is for meaningful judicial review of what the police knew at the time of their decision making so that society's interest in the detection and punishment of crime can be balanced with maintaining individual rights and freedoms."
- "The standard of reasonable grounds to suspect is both '**an objective and subjective standard**'. While a reasonable suspicion must be grounded in objective facts that stand up to independent scrutiny, it is a lower standard on the spectrum of standards of proof than reasonable grounds to believe as 'it engages the reasonable possibility, rather than probability, of crime'."
- "Reasonable suspicion is assessed by the court examining the **totality of the circumstances** known to the police at the time of the detention. This is a broad contextual inquiry that is 'fact-based, flexible, and grounded in **common sense** and **practical, everyday**

"[I]f the sum of the objectively discernable facts support the conclusion of possible recent or ongoing criminal behaviour by the individual to be detained, then the standard of reasonable suspicion is met even if there is a reasonable innocent alternative in the circumstances."

experience' to ascertain whether the constellation of factors rise above the level of a generalized suspicion or hunch."

- "Because the reasonable suspicion standard is invariably fact-driven, there is little in the way of guidance as to when the threshold will be met. However, what is not disputed is that, if the sum of the objectively discernable facts support the conclusion of **possible recent or ongoing criminal behaviour** by the individual to be detained, then the standard of reasonable suspicion is met even if there is a reasonable innocent alternative in the circumstances. There is **no duty on police to undertake further investigation to seek out exculpatory factors or to rule out possible innocent explanations**. The nature of the judicial inquiry does not require a court to choose between competing inferences or assess which was the most likely possibility at the time."
- "While the courts have an important duty to protect the rights and freedoms of everyone, they must be mindful in an after-the-fact assessment of the reality that **police often have to make quick decisions in dynamic, unpredictable and dangerous situations based on imperfect, evolving or even wrong information**."
- "[A]n investigative detention is not a 'de facto arrest'. **Police powers governing investigative detentions and arrests are different**. An investigative detention is intended to generally be 'a brief and limited suspension of a citizen's right to go about his or her business freely'."
- "An investigative detention that is carried out in conformity with common law police powers and in an otherwise reasonable manner is not an arbitrary detention for the purposes of section 9 of the *Charter*."

Reputational Awareness?

The Court of Appeal rejected the accused's assertion that the officer's knowledge of his criminal reputation was undermined because it did not arise from personal contact:

> There is no merit in the accused's submission that the trial judge should have had a reliability concern as to [the officer] recognizing the accused and knowing his criminal reputation, due to the fact that the source of knowledge was reading police intelligence reports as opposed to having had recent personal contact. This argument is nothing more than a request for this Court to retry the case and substitute its view of the evidence.
>
> We are also not persuaded that the trial judge misconstrued the facts as to what [the officer] said he learned about the accused from police records such as intelligence reports and arrest photos. The complaints raised by the accused are different interpretations of [the officer's] evidence in relation to his knowledge of the accused based on police records than what the trial judge found. That is not a reason to interfere with her findings of fact. The trial judge made no readily obvious error that goes to the substance of material parts of the evidence rather than to detail. What is indisputable according to [the officer's] evidence is that, despite never having had previous personal contact with the accused, he was very familiar with him and his reputation as a long-standing gang member with a propensity to carry weapons.
>
> In short, the accused has not persuaded us that the trial judge made a palpable and overriding error as to the evidentiary foundation on which her decision regarding the investigative detention was based. In our view, her reasons are thorough and her findings are reasonably supported by the record. (References omitted, paras. 23-25]

Reasonable Suspicion?

Justice Mainella concluded the totality of the circumstances provided the necessary reasonable suspicion for the investigative detention. In his opinion, the accused was asking the Appeal Court ***"to deconstruct the circumstances, using a 'divide and conquer approach that finds each factor individually equivocal'"***, which is not the proper approach to the reasonable suspicion analysis:

"[T]he standard of reasonable suspicion is met even if there is a reasonable innocent alternative in the circumstances. There is no duty on police to undertake further investigation to seek out exculpatory factors or to rule out possible innocent explanations."

> The trial judge was correct that there was a constellation of objective facts that gave rise to a reasonable suspicion to detain the accused for a weapons offence investigation, namely, the accused was holding his body in a manner consistent with his carrying a weapon, while running, in the absence of any reasonable explanation; upon seeing the police, he attempted to flee; and he had a criminal reputation and a propensity to carry weapons. In assessing the possibilities from the sum of these factors, the trial judge correctly considered the circumstances through the lens of [the officer's] extensive training and experience, but did not do so uncritically. [reference omitted, para. 27]

Reasonably Necessary?

The detention was also reasonably necessary and conducted in a reasonable manner:

> … Weapons offences are a serious threat to the peace, therefore there was significant importance in [the officer] taking immediate action in terms of the public good as well as a necessity for him to interfere with the accused's liberty. In terms of the extent of the interference with the accused's liberty, the duration of the investigative detention was brief, lasting about ten seconds (after the foot chase ended). The nature of the detention, with some limited use of force to pin the accused outside against a house, was appropriate given the inquiry related to a possible weapons offence, the accused was known to carry weapons, and the accused had knowingly attempted to evade police inquires by running. Nothing about [the officer's] behaviour was abusive, let alone unprofessional. [reference omitted, para. 29]

The accused's s. 9 *Charter* right against arbitrary detention was not violated.

Search Incident to Detention

The Court of Appeal recognized that the police have a warrantless search power at common law incident to a lawful investigative detention:

- "A police officer may conduct a protective pat-down search for weapons incident to an investigative detention where the officer has reasonable grounds to believe that his or her safety or that of others is at risk."
- "This search power is more circumscribed than the common law search power that police have incident to a lawful arrest."
- "A protective search incident to an investigative detention **does not arise as a matter of course**. The court must be satisfied that the officer's decision to search was 'reasonably necessary in light of the totality of the circumstances'."
- "Such searches 'must be grounded in objectively discernible facts to prevent 'fishing expeditions' on the basis of irrelevant or discriminatory factors'."
- "A protective search '**cannot be justified on the basis of a vague or non-existent concern for safety**, nor can the search be premised upon **hunches or mere intuition**'."
- "The conduct of the protective search 'must also be **confined in scope to an intrusion reasonably designed to locate weapons**' and must be otherwise reasonably conducted."
- "[A] protective search incident to a lawful investigative detention that is carried out in conformity with common law police powers and otherwise in a reasonable manner is not an unreasonable search or seizure for the purposes of section 8 of the Charter."

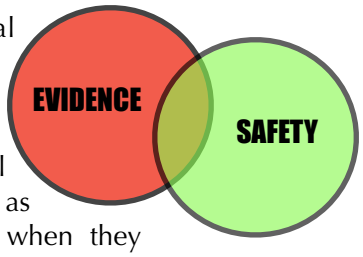
"A protective search incident to an investigative detention does not arise as a matter of course. The court must be satisfied that the officer's decision to search was 'reasonably necessary in light of the totality of the circumstances'."

Fanny Pack Search?

The search of the fanny pack complied with the common law. The trial judge properly found there was a safety reason to search the fanny pack. Justice Mainella wrote:

> … Here, the trial judge made no error in concluding that [the officer] had reasonable grounds to believe there was an imminent threat to his safety that made it reasonably necessary to conduct a protective search of the accused's fanny pack. Protecting life and property is an important police duty that necessitates some interference with individual liberty. The situation presented to [the officer] was volatile and uncertain. [The officer] had cause to have concern for his personal safety given the accused's unusual mannerisms suggested he may be carrying a weapon. [The officer] was by himself in a dark area as [the cover officer] had not yet arrived. Although the accused was cooperating, he had just recently attempted to evade the police. [The officer] knew that the accused was a gang member with a propensity to carry weapons. Finally, the extent of the infringement (opening the remaining 25% of the fanny pack to shine a flashlight in) was focused entirely on a protective function.
>
> In our view, the trial judge was correct that the search of the fanny pack was reasonably necessary to eliminate an imminent threat to [the officer's] safety. [references omitted, paras. 47-48]

Dual Purpose?



The Court of Appeal agreed with the trial judge that if the officer had another otherwise unlawful reason in mind (such as an evidential search) when they conducted the safety search, as long as the search met the requirements of a lawful safety search it would nevertheless be reasonable. In this case, although the officer was clear that he thought the fanny pack may contain drugs or weapons, the reason he decided to look inside it was **"to ensure [his] safety."**

Pat-Down v. Opening Fanny Pack

The Court of Appeal rejected the accused's submission that the police must follow ***"a rigid sequence of a pat-down search first, before a bag or pocket may be opened or otherwise searched"*** in order for a safety search to be reasonable.

"Searches to eliminate any imminent threat to the officer or third parties can take many forms depending on the circumstances and are not limited to pat-down searches," said Justice Mainella. ***"It strikes us as incorrect and entirely artificial to say that legally [the officer] was limited in his split second decision, where there was a real threat to his safety, to use his sense of touch on the outside of the fanny pack as opposed to completely opening the already partially open zipper and using his eyesight when he was careful to conduct a minimally intrusive search that was limited in its scope to locate weapons."***

"Searches to eliminate any imminent threat to the officer or third parties can take many forms depending on the circumstances and are not limited to pat-down searches."

The search of the accused's fanny pack was conducted in conformity with the officer's common law police powers and was reasonable in the circumstances. There was no s. 8 *Charter* breach.

s. 24(2) Charter

Since there were no ss. 8 or 9 *Charter* breaches, there was no reason to consider s. 24(2).

The accused's appeal was dismissed.

Complete case available at www.canlii.org

Editor's note: Additional facts taken from *R. v. Mckenzie*, 2021 MBQB 54.

ASKING 'U GOOD FOR POWDER' NOT ENTRAPMENT

R. v. Zakos, 2022 ONCA 121

A police officer received an anonymous tip that "Thomas Zakos", going by "TJ", was a cocaine and marijuana dealer conducting drug deals at a gas station using a cell phone. A cell phon number was provided to police. After receiving the tip, the officer checked RMS and MTO records and found a person named "Thomas Zakos" who had no criminal record. The officer texted the target cell phone number and engaged in the following conversation:

Officer:	This tj?
Target:	Who is this
Officer:	Scot, got your number from my cousin. You still around the college?
Target:	Who's your cousin
Target:	Yes still close but I moved
Officer:	Jay said he got off you at the gas station a while back. **U good for powder?**
Target:	How much were you looking for
Officer:	**How much for a b?**
Officer:	Scot, got your number from my cousin. You still around the college?
Target:	230
Target:	Real nice
Officer:	That's good man... Good stuff tho?
Target:	It's real nice. haven't had a complaint all year haha
Officer:	When can u meet?
Target:	Let me text me roommate he can meet you I'm out of town.
Officer:	Ok let me know. how long u think he'll be?
Target:	An hour, I think.
Officer:	you want me to message you or your roommate
Target:	[provided phone number]

The officer then arranged to purchase cocaine on three occasions over two days. Twice cocaine was purchased from a contact of the accused and once from the accused himself when police attended the door of his residence, purchasing a "half ball" of cocaine for $130. Police then obtained and executed a search warrant at the residence and the accused was arrested. Police found 33 gms. of cocaine on a desk in the basement of the residence. The accused was charged with several drug offences.

Ontario Superior Court of Justice

The accused was convicted of three counts of trafficking in cocaine and possessing proceeds of crime. However, he was acquitted on a charge of possessing the 33 gms. of cocaine for the purpose of trafficking because the area where those drugs were found was accessible to all and there were no personal identifiers nearby linking it to the accused.

"Entrapment recognizes that the state may not engage in conduct that violates the notions of decency and fair play as the ends do not justify the means utilized. The administration of justice would be brought into disrepute if the state were permitted to punish someone whom the state itself caused to transgress."

The accused then sought a stay of proceedings on the basis that he had been entrapped. He claimed he was provided the opportunity to traffic cocaine when the officer asked, **"U good for powder?",** but had not yet formed a reasonable suspicion that he was engaged in criminal activity or that the phone line was being used to traffic cocaine.

The judge found the accused had not been entrapped. The officer did not provide an opportunity to commit a crime when he asked, **"U good for powder"**. Instead, the opportunity to commit a crime came when the officer asked, **"How much for a b?"** By that time, however, the officer had the necessary reasonable suspicion that the phone line was being used as a means to traffic drugs and that officer was engaged in a *bona fide* inquiry.

Ontario Court of Appeal

The accused argued the trial judge erred in his application of the law of entrapment. He claimed that the officer provided him the opportunity to traffic cocaine when he asked, **"U good for powder?"** without having a reasonable suspicion that he was trafficking cocaine. In his view, a stay of proceedings ought to have been ordered. The Crown, on the other hand, submitted that asking the question, **"U good for powder?"**, was merely an open-ended, exploratory question about whether the accused was a drug dealer. An opportunity to commit cocaine trafficking was not provided until the officer asked, **"How much for a b?"** By that time, the Crown suggested, the officer had a reasonable suspicion the accused was involved in cocaine trafficking.

Entrapment

Justice Thorburn, delivering the opinion for the unanimous Court of Appeal, reviewed the law of entrapment. In doing so, she made the following comments:

- "Entrapment is the 'conception and planning of an offence by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer'."
- "Entrapment is not a defence. It is an application of the doctrine of abuse of process for which the remedy is to stay the proceedings."
- "Entrapment recognizes that the state may not engage in conduct that violates the notions of decency and fair play as the ends do not justify the means utilized. The administration of justice would be brought into disrepute if the state were permitted to punish someone whom the state itself caused to transgress."
- "The entrapment framework balances the need to protect privacy interests and personal freedom from state intrusion against the state's legitimate interests in investigating and prosecuting crime."
- "Because the state is not permitted to engage in abusive police conduct, where police are involved in the commission of an offence, entrapment is made out and a stay of proceedings will be entered."
- "A finding of entrapment is reserved for the 'clearest of cases' of intolerable state conduct."
- "There are two alternative branches of entrapment, either of which may lead to a finding of entrapment justifying a stay of proceedings:

"The 'reasonable suspicion standard requires only the possibility, rather than the probability, of criminal activity'. The suspicion must be 'focused, precise, reasonable, and based in 'objective facts that stand up to independent scrutiny'."

i. **Where police offer an individual the opportunity to commit an offence without acting on a reasonable suspicion that the individual is already engaged in that type of criminal activity or pursuant to a bona fide inquiry**; or

ii. Where, although acting with reasonable suspicion or pursuant to a bona fide inquiry, police go beyond providing an opportunity to commit an offence and induce a person to commit an offence.

In this case, only the first branch of entrapment was at issue because the accused was not induced to commit an offence.

Reasonable Suspicion

Under the first branch of the entrapment doctrine, a **reasonable suspicion** is a prerequisite to providing an opportunity to commit a crime:

> Entrapment under the first branch is made out when police provide the accused with an opportunity to commit an offence, without first having a reasonable suspicion that either "(1) a specific person is engaged in criminal activity; (2) people are carrying out criminal activity at a specific location, sometimes referred to as a bona fide inquiry". A bona fide inquiry is not a separate and freestanding way to entrap an individual, but describes the reasonable suspicion standard in a location.
>
> In the context of a dial-a-dope operation, police must have a reasonable suspicion that the person answering the phone is already engaged in drug trafficking before providing an opportunity to traffic drugs. The factors supporting reasonable suspicion may relate to the individual, the telephone number, or both.
>
> When police receive a tip, a police officer may develop reasonable suspicion before contacting the target, or in the course of a conversation with the target.
>
> If the police have not formed a reasonable suspicion before making the call, they must form a reasonable suspicion in the course of the call before providing an opportunity to commit a crime. [references omitted, paras. 31-35

As for what constitutes a **reasonable suspicion**, Justice Thorburn wrote:

> Reasonable suspicion requires a "constellation of objectively discernible facts" giving the officer "reasonable cause to suspect" that a certain kind of offence is being committed by a particular person in a particular place.
>
> The "reasonable suspicion standard requires only the possibility, rather than the probability, of criminal activity". The suspicion must be "focused, precise, reasonable, and based in 'objective facts that stand up to independent scrutiny'".
>
> Reasonable suspicion is not an "unduly onerous" standard.
>
> …
>
> The primary purpose of the reasonable suspicion standard is to permit meaningful judicial review of police conduct.
>
> In assessing whether a case for reasonable suspicion has been made out, the analysis of objective reasonableness should be conducted through the lens of a reasonable person "standing in the shoes of the police officer". An

"When police receive a tip, a police officer may develop reasonable suspicion before contacting the target, or in the course of a conversation with the target."

"In assessing whether a case for reasonable suspicion has been made out, the analysis of objective reasonableness should be conducted through the lens of a reasonable person 'standing in the shoes of the police officer'. An officer's training or experience can make otherwise equivocal information probative of criminal activity."

officer's training or experience can make otherwise equivocal information probative of criminal activity.

However, hunches grounded in an officer's experience are not sufficient, and deference is not owed to a police officer's view of the circumstances based on their training or experience. Reasonable suspicion remains an objective standard that must withstand judicial scrutiny.

A bare tip from an unknown source that someone is dealing drugs from a phone number is therefore insufficient to create reasonable suspicion. However, a reasonable suspicion may develop if this information is supplemented by the discovery of other facts in the course of a post-tip investigation.

Corroboration of the tip must suggest that it is "reliable in its assertion of illegality", not just in its identification of a particular person. The target's responsiveness to details in the tip, and to slang used in drug trafficking, along with other factors, may reinforce the reliability of the tip. [references omitted, paras. 36-44]

Questions: Exploratory v. Opportunity

The Court of Appeal addressed the difference between exploratory investigative questions — making requests of a target such as asking them whether they sell drugs — and questions that provide a target with an opportunity to commit an offence. The former being permissible when asked without a reasonable suspicion while the latter is not. ***"Entrapment is not made out if the opportunity to commit an offence is made after police have a reasonable suspicion that the target is engaged in specific criminal activity or that specific criminal activity is taking place at a specific location,"*** said Justice Thorburn. She continued:

> In sum, the feature that distinguishes exploratory statements from those that create an opportunity to commit an offence seems to be the making of an offer to purchase, such that all the target must do is accept the terms. A court must examine all the circumstances, including the language used in the communication with the target, in determining whether police formed a reasonable suspicion before providing an opportunity.
>
> The words used, the meaning of the words used, and the context of the words in the conversation up to the point the question or statement at issue is made, are all factors to be considered in determining whether there was an offer to purchase. The police officer's language to the target must be an offer that, if accepted, would constitute an offence. [references omitted, para. 49-50]

And further:

> In deciding whether a question is merely exploratory or constitutes an opportunity to commit an offence, one must look at the words used, the meaning of the words, and the context of the conversation up to the point the question or statement at issue is made. [para. 55]

In this case, when the officer asked **"U good for powder?"**, the officer did not have a reasonable

"Entrapment is not made out if the opportunity to commit an offence is made after police have a reasonable suspicion that the target is engaged in specific criminal activity or that specific criminal activity is taking place at a specific location."

suspicion that the target was selling cocaine. But he was merely asking an **exploratory question**:

> This was not an opportunity to traffic cocaine. There was (i) no offer on the part of [the officer] to buy cocaine, and (ii) no terms of an offer discussed. As such, the terms of the deal had not been narrowed to the point where the [accused] could commit an offence by responding affirmatively to what [the officer] requested. At most, he was asking whether the [accused] had cocaine to sell. … [T]he question amounted to whether the [accused] was a drug dealer. As such, this question did not provide the [accused] the opportunity to traffic cocaine.
>
> Once the [accused] answered, "How much were you looking for", [the officer] had sufficient information to generate a reasonable suspicion that the [accused] trafficked cocaine. He had (i) received the tip that a person who went by the name TJ sold cocaine and marijuana near Durham College and used an 8098 telephone number, (ii) some information in the tip had been verified including the [accused's] location near Durham College, (iii) the [accused] did not deny that he was TJ, suggest the caller had the wrong number or redirect the call and instead, continued to converse with [the officer], and (iv) the [accused] responded positively to [the officer's] use of language particular to the drug subculture: "U good for powder?" by asking "How much were you looking for".
>
> Having connected the tip to the person on the phone, the aspect of the tip that asserted illegality was corroborated by the [accused's] understanding of drug trafficking slang and willingness to engage in it. Taken together, these factors grounded a reasonable possibility that the [accused] was involved in drug trafficking. [references omitted, paras. 63-65]

When the officer asked the target the further question, **"How much for a b?"** an opportunity to commit the offence of trafficking cocaine was provided. At this point, the specific offer to purchase the drugs amounted to an opportunity to commit the crime. But, by the time this question was asked, the officer had a reasonable suspicion that the accused was involved in cocaine trafficking.

The accused was not entrapped and his appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

CHARTER BREACHES RESULT IN EXCLUSION OF EVIDENCE FROM RECTAL SEARCH

R. v. Mohamed, 2022 ONCA 117

At about 11:30 p.m., patrol officers responded to a call about a sexual assault by "two intoxicated Somalian males" inside unit 10 of a residential building. When police arrived at the building, officers saw the accused, a black man, in the lobby of the building. As one of the police officers "ran or rushed" towards the building, the accused came out and started to walk away. An officer asked to speak him. The accused stopped and spoke to police. When asked which apartment he was coming from, the accused said unit 10.

The accused was arrested for sexual assault and break and enter, and read the police caution and s. 10(b) *Charter* rights (to counsel). The accused was searched as an incident to arrest and was found in possession of a four inch knife and two grams of marijuana. At this point, the accused was told he would be charged with possessing marihuana and possessing a knife for an unlawful purpose.

The other officer noticed the accused was exhibiting indicators of intoxication. He led the accused to the police cruiser, and reviewed the reasons for arrest, his right to counsel and the caution. The accused replied, **"I want a lawyer. I don't want to talk to you no more"**. The accused was checked on CPIC and it was learned that two weeks earlier he had been found in possession of three grams of marijuana, had admitted to hiding drugs between his buttocks, and, in 2014, had been convicted of trafficking in crack cocaine. During transport to the police station, the accused had been been very talkative

and was rambling. On approach to the police station, the officer asked the accused whether he was hiding any contraband on his person, such as weapons or drugs. The officer then informed the accused that he would be searched more thoroughly in the cellblock and encouraged the accused to be honest and let him know if any drugs, weapons or contraband had been missed during the roadside pat-down. In response, the accused went silent for a minute, from which the officer inferred the accused was hiding something on his person.

At the police station, authorization for a strip search was obtained from the cellblock sergeant. During a rectal search, the police discovered a package containing 20 grams of crack cocaine which was packaged in a manner consistent with trafficking. The accused was charged with possessing marihuana, possessing crack cocaine for the purpose of trafficking and possessing a knife for a purpose dangerous to the public peace.

Ontario Court of Justice

The officer who questioned the accused after he asserted a desire to speak to a lawyer about whether he was hiding any contraband, such as weapons or drugs on his person, testified that he did this with everyone **"as a matter of practice"**. He also said he had several reasons for believing that the accused was secreting drugs on his body, but **"the single biggest indicator"** was the accused's change in behaviour and silence when he was asked whether he was hiding drugs on his person.

The judge found the accused had not been detained when the police first made contact with him at the apartment building in response to the sexual assault call. The judge held the accused's arrest was lawful and both the initial search at the scene and the strip search at the police station were reasonable as searches incident to arrest. Since the detention, arrest and searches were lawful, no ss. 7, 8, 9 or 10(b) *Charter* breaches were found and the accused's application for the exclusion of the evidence was dismissed. The accused was convicted on all three charges.

Ontario Court of Appeal

The Crown, on appeal, conceded that the police had breached the accused's *Charter* rights when he was asked about whether he had drugs on his person and, at the station, when his silence in response to this question was used as a ground to justify the strip search.

Justice MacPherson, speaking for the Court of Appeal, found the Crown's concession of the *Charter* breach meant the police had infringed two rights: ss. 8 and 10(b). Although the accused had been immediately advised of his right to counsel, he told police, **"I want a lawyer. I don't want to talk to you no more."** This was a clear request to consult with a lawyer. But rather than ceasing conversation with the accused, the officer continued to speak to him, including asking him if he was hiding any weapons or drugs on his person. The officer then used the accused's silence in response to the questioning as **"the single biggest indicator"** to justify the strip search at the police station which resulted in the 20 gms. of crack cocaine being found.

Admissibility

In applying the three factor test for evidence admissibility under s. 24(2) of the *Charter* — (1) the seriousness of the *Charter*-infringing state conduct, (2) the impact of the breach on the Charter-protected interests of the accused and (3) society's interest in the adjudication of the case on its merits — the Court of Appeal excluded the evidence. Although the third factor (society's interest in an adjudication of the case on the merits) favoured admission of the evidence, the other two factors favoured exclusion. The police ***"conduct amounted to a serious violation of two Charter rights"*** and the impact of the police misconduct on the accused's *Charter*-protected interests was far from peripheral.

The accused's appeal was allowed, the evidence was excluded and acquittals were entered.

Complete case available at www.ontariocourts.onc.ca

"It was not required, in order to obtain the search warrant, that the presence of drugs in the residence be established to a certainty. It was only required that there be reasonable grounds to believe that drugs would be found."

SEARCH WARRANT DOES NOT REQUIRE PRESENCE OF DRUGS TO A CERTAINTY

R. v. Shedden, 2022 ONCA 25

Two confidential informers provided police with information that the accused and another person were dealing large quantity of drugs, specifically cocaine. When surveillance was established on both individuals. Over a three day period police observed 14 interactions involving the accused that were consistent with drug transactions. In between many of these transactions, the police saw the accused return to a specific residence on at least nine occasions for brief periods of time. However, all of the transactions consistent with drug trafficking occurred either in the accused's automobile or in close proximity to it.

Based on this information, the police obtained a search warrant which included a search of the residence he had been seen returning to. When the police executed the search warrant at the residence, they found cocaine, oxycontin, methamphetamine, marijuana and a quantity of cash. The accused was charged with drug offences based solely on the results of the search warrant.

Ontario Court of Justice

The accused challenged the search warrant arguing there was no evidence that the drugs would be found at the residence. In his view, neither confidential informer had mentioned the residence in their information and police surveillance observations were insufficient to provide the requisite reasonable and probable grounds there might be drugs in it. Rather, he contended, at best, the police surveillance observations raised only a suspicion drugs were at the residence.

The accused called his mother who testified that she lived at the residence. He contended that the police ought to have known this fact, or at least to have discovered it, and have included it in the Information to Obtain (ITO) the search warrant. He suggested this information would have cast a different light on the reason why he might visit the residence. Although the Crown erroneously suggested that the test for the granting of a search warrant was reasonable grounds to suspect, not reasonable grounds to believe, the judge rejected the accused's challenge to the search warrant and upheld it. The accused was convicted of various drug offences.

Ontario Court of Appeal

The accused argued, in part, that the trial judge applied the wrong standard when assessing the sufficiency of the search warrant. The Court of Appeal, however, upheld the validity of the search warrant even if the trial judge had applied the wrong test for the search warrant's issuance. In making its own independent determination regarding the search warrant, the Court of Appeal stated:

> The record in this case amply sustains the conclusion that the search warrant was validly granted with respect to the residence. It was not required, in order to obtain the search warrant, that the presence of drugs in the residence be established to a certainty. It was only required that there be reasonable grounds to believe that drugs would be found. The available information provided those grounds based on reasonable inferences that could be drawn from the observed conduct of the [accused]. That conduct included what the police believed

> were 14 drug transactions committed over three days during which the [accused] made at least nine visits to the residence. It was an entirely reasonable inference to be drawn, from those facts, that the [accused] was using the residence as his "stash" house. The reasonableness of that inference is not avoided, or precluded, by adding the knowledge that the [accused's] mother resided in the residence. [para. 10]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.onc.ca

FACTS UNDERLYING CHARGES NOT RESULTING IN CONVICTIONS USEABLE IN ITO

R. v. Ribble, 2021 ONCA 897

The police obtained a search warrant to search the accused's residence. The ITO included information that the accused and his co-accused used his co-accused's workplace — a salon — to traffic drugs but there was no specific information that the accused used his own residence to traffic drugs. There was also information in the ITO about prior charges against the accused involving drugs and firearms found in his car, his former residence and the salon. However, these charges were dropped, stayed or resulted in acquittals. And charges resulting in convictions had no connection to the accused's residence. When the search warrant was executed, police found a handgun, ammunition, cash, cocaine, meth, GHB, marijuana, hydromorphone pills, and a mixture of heroin, fentanyl and caffeine. The accused was charged with numerous drug, weapons and proceeds of crime offences.

Ontario Court of Justice

The accused challenged the validity of the search of his home under s. 8 of the *Charter*. He submitted that the ITO did not provide the requisite reasonable and probable grounds to justify a search warrant for his residence. The judge found that the ITO, together with the record on review, supported the search warrant's issuance. The accused's s. 8 *Charter* application was dismissed and he was convicted of various drug and firearm related offences. He was sentenced to a nine-year global sentence.

Ontario Court of Appeal

The accused asserted that were no reasonable and probable grounds to believe there would be evidence at his residence when the warrant was granted. He submitted that the police should not have included in the ITO facts related to prior charges that were withdrawn, stayed or resulted in acquittals. In addition, he argued the trial judge failed to distinguish between charges on which the accused was convicted and charges which were withdrawn, stayed or resulted in acquittals when referring to his **"criminal history"**.

Using Facts Underlying Charges Not Resulting In A Conviction

The Court of Appeal disagreed that the police could never include **facts** underlying charges that did not result in a conviction. ***"The facts underlying charges which do not result in convictions, in some circumstances, may be validly considered as a basis for search warrants, though in other cases will be 'irrelevant and improper',"*** said the Court of Appeal. Furthermore:

> **"The facts underlying charges which do not result in convictions, in some circumstances, may be validly considered as a basis for search warrants, though in other cases will be 'irrelevant and improper'."**

In this case … there was no attempt to conceal the fact that certain prior charges against the [accused] had been withdrawn, stayed or resulted in acquittals. Further, the underlying facts of these charges, to the extent that it formed part of the ITO, were corroborative of other evidence arising from police operations and observations relied upon by the trial judge in reaching her finding … .

For example, in April 2018, a police operation observed a car being loaded with furniture and other items from the salon. The car was later seen at the [accused's] residence.

The trial judge also drew inferences from other evidence in the record. For example, with respect to the evidence of the co-accused's eviction from the salon where drugs were known to be stored and sold, the trial judge inferred that a new location from which to store and sell drugs needed to be found. [references omitted, paras. 10-12]

"Criminal History"

The Court of Appeal said it ***"would have been preferable for the trial judge not to conflate prior charges against the accused leading to convictions with those resulting in charges withdrawn, stayed or leading to acquittals in her reference to the [accused's] 'criminal history'"***. However, there was no error in the trial judge's ultimate determination that the warrant was justified based on the totality of the evidence.

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

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: Additional facts taken from *R. v. Ribble*, 2019 ONCJ 640.

Photo source: Hamilton Police

HANDGUN ADMITTED EVEN THOUGH ARREST UNLAWFUL

R. v. Nicholls, 2022 ONCA 133

The police received information from two confidential informers that the accused supplied drugs to a third party who was a drug dealer. The police conducted surveillance for several hours and subsequently arrested the accused, believing he was in possession of drugs. When the police searched the accused incident to his arrest, they did not find any drugs but located a partially loaded, concealed firearm in his computer bag. He was charged with several firearm offences.

Ontario Superior Court of Justice

The accused conceded he was in possession of the firearm but argued the police did not have reasonable and probable grounds to arrest him. The judge agreed. Even though the arresting officer **subjectively** believed he had the necessary grounds to arrest the accused, the judge concluded the police did not **objectively** have reasonable and probable grounds to make it. The police had some grounds to believe a criminal offence had taken place but those grounds fell just short of the necessary objective standard.

The information from the informers was neither overly credible nor compelling and was subject to limited corroboration. ***"The limited surveillance of and confirmed association between the [accused] and the third party did not sufficiently elaborate the grounds held by the police to believe the [accused] possessed C.D.S.A. substances that evening,"*** said the judge ***"More specifically, the circumstances known to the police at the time, coupled with the inferences they were entitled to draw based on their training and experience, were not enough to allow [the arresting officer] to form the necessary grounds to arrest the [accused] for possession of C.D.S.A. substances."*** As a result, the arrest was arbitrary under s. 9 of the *Charter* and the resultant search incident to arrest was unreasonable under s. 8. Despite the breaches, the judge nevertheless admitted the evidence of the handgun under s. 24(2). The accused was convicted and sentenced to 3½ years.

Ontario Court of Appeal

The accused argued that the trial judge properly found the arrest and search to be unlawful, but was wrong not to exclude the evidence. The Crown, on the other hand, suggested the arrest and search were lawful, and therefore the admissibility of thee evidence was not an issue. The Court of Appeal concluded the trial judge did not err in finding that the police lacked the necessary reasonable and probable grounds to arrest the accused. The trial judge applied the correct legal principles and deference was owed to his fact-finding.

s. 24(2) Charter

Despite the *Charter* violations, the Court of Appeal agreed that the evidence was nevertheless admissible under s. 24(2). The trial judge had followed the proper three part analysis for exclusion. First, the **seriousness of police conduct** fell at the lower end of the spectrum. Deference was owed to the trial judge's finding that the grounds for arrest were close to meeting the reasonable and probable grounds standard. This factor provided some, but not strong support for exclusion. Second, the trial judge properly held the **impact of the breach on the Charter-protected interests** of the accused was serious. Although this favoured exclusion of the evidence, the final factor — **society's interest in an adjudication of the case on its merits** — favoured admission of the evidence. The handgun was reliable evidence and important to the prosecution of a serious criminal charge.

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

DRUGS, HANDGUN, MAGAZINE & AMMUNITION ADMITTED DESPITE ILLEGAL ARREST

R. v. St. Clair, 2021 ONCA 895

In the early morning hours, an officer approached the accused's parked vehicle to speak with him. A tow truck driver had told police the accused had been driving recklessly. The officer smelled fresh marijuana coming from either the accused or from inside of the car. Other indicia of marijuana possession and use was observed inside the car, including grinders and loose marijuana flakes. The officer formed the opinion that the accused unlawfully possessed marijuana and arrested him. At the time of the arrest, marijuana possession was illegal in Canada, subject to an exemption for medical use as provided by the *Access to Cannabis for Medical Purposes Regulations (Regulations)*.

The accused told the officer that he had a licence for medical marijuana and produced a plastic card issued by MedReleaf bearing his name, date of birth, and patient identification number. The card also indicated the name of the accused's physician, the prescription expiry date, and authorized the consumption of 3 gms. of marijuana per day. The officer, however, believed the card was fake because (1) it looked old, faded, and dirty; (2) it looked similar to other cards he had seen that falsely asserted the bearer was legally entitled to possess marijuana; (3) the circumstances looked consistent with someone using marijuana recreationally rather than medicinally; and (4) the accused did not produce the type of documentation the officer expected, such as a government issued licence bearing the accused's photo, a prescription from a physician, or product packaging referencing a prescription. The officer did not take any further steps to determine whether and under what conditions the accused was authorized to possess marijuana.

The accused was patted-down. A plastic bag containing marijuana and a marijuana grinder was found in his pockets. He was handcuffed and placed in the police car. A search of the vehicle did not produce any marijuana product packaging or copy of a physician's prescription for marijuana use. But when the car was searched by the officer's partner, an after-market compartment containing a loaded semi-automatic handgun with an overcapacity magazine was found. The accused was arrested for unlawful possession of a handgun, oversized magazine, and ammunition. He was transported to the police station and strip-searched. A plastic bag containing packages of crack and powder cocaine was found between his buttocks. He was charged with several weapons and drug offences.

Ontario Superior Court of Justice

The officer testified he knew marijuana could be legally possessed for medical use but stated that he had not read the *Regulations* nor had he been briefed on them. Nor had he received any training on how to identify fake cards purporting to authorize marijuana possession. The Crown conceded that the accused was legally entitled to possess marijuana sourced from MedReleaf for medical purposes and the card that was produced was issued by MedReleaf, which was licenced to distribute marijuana for medical purposes in Canada.

The accused argued the officer lacked the necessary reasonable and probable grounds for his arrest after being presented with the MedReleaf card. This, he submitted, rendered the arrest unlawful under s. 9 and the searches incident to arrest unreasonable under s. 8. He wanted the handgun, ammunition, magazine, marijuana, and cocaine excluded from evidence

The judge ruled the officer subjectively believed the accused had committed the offence of unlawful possession of marijuana and his belief did not become objectively unreasonable after the MedReleaf card was produced. The officer considered the accused's assertion that he was authorized to possess marijuana but reasonably rejected it on the basis that he believed the card to be fake. In the judge's view, the officer was not

"An officer is entitled to rely on conclusions based on a reasonable belief that certain facts exist even if that belief turns out to be mistaken."

required to take any further steps to find evidence that might support the accused's claim. Furthermore, the officer would have been entitled to search the car and the accused's person even if he had believed the accused's card was genuine because producing the card would not have excluded the possibility that the accused possessed more marijuana than he was legally authorized to possess. Finally, even if the accused's arrest was unlawful, the judge would have admitted the handgun, ammunition, magazine, and drugs into evidence under s. 24(2).

Ontario Court of Appeal

The accused submitted that the trial judge erred in (1) holding the arrest did not become unlawful after he produced the medical marijuana licence and (2) admitting the drug and firearm evidence.

Arrest

Under s. 495(1) of the *Criminal Code*, a peace officer may arrest without warrant if they have reasonable grounds to believe a person has committed an indictable offence. ***"For the arrest to be lawful, the officer must subjectively believe there are grounds for arrest, and those grounds must be 'justifiable from an objective point of view',"*** said Justice Miller for the Court of Appeal. ***"The officer's belief will be objectively reasonable if a reasonable person, with the officer's knowledge, experience and training, assessing the totality of the circumstances known to the officer at the time of the arrest, could have concluded that there were grounds to arrest the [accused]."***

Unlike the trial judge, Justice Miller concluded the officer's mistaken belief that the accused unlawfully possessed marijuana was not objectively reasonable in light of the accused's exculpatory explanation and production of the MedReleaf card:

> [The officer] was ultimately wrong in concluding that the MedReleaf Card was inauthentic, and wrong in concluding that the [accused] was not licenced to possess marijuana sourced from MedReleaf. [The officer's] mistaken conclusions did not necessarily render his belief objectively unreasonable. An officer is entitled to rely on conclusions based on a reasonable belief that certain facts exist even if that belief turns out to be mistaken.
>
> He was also under no obligation to accept or investigate every exculpatory explanation offered by the [accused], but he was obliged to consider all information before him, including the degree to which the MedReleaf card supported the [accused's] explanation, unless he had "good reason" to believe it to be unreliable.
>
> … [T]he reasons given by [the officer] for concluding that the [accused] was unlawfully in possession of marijuana do not hold up to scrutiny. He admitted on cross-examination that what he believed to be indicia of recreational marijuana use – the presence of multiple grinders, flakes of marijuana on the console of the car, Blackwoods cigars – were equally

"For the arrest to be lawful, the officer must subjectively believe there are grounds for arrest, and those grounds must be 'justifiable from an objective point of view'. The officer's belief will be objectively reasonable if a reasonable person, with the officer's knowledge, experience and training, assessing the totality of the circumstances known to the officer at the time of the arrest, could have concluded that there were grounds to arrest the [accused]."

> consistent with use for medical purposes. Similarly, his reasons for concluding the MedReleaf card was "fake" – that it was old, dirty, did not have a user photo, and was similar to other fake licences in an unspecified respect – are not just incorrect, but unjustifiable. There was no explanation as to how the officer thought the physical condition of the card – old, dirty – could bear on its authenticity. Neither does the officer's evidence that this card appeared similar to other fake cards he had seen provide good reason to believe the card was not what it purported to be. None of the specific indicia of inauthenticity that he had observed in his experience applied to this card: it was not issued by an American dispensary nor by one of the Toronto dispensaries known by [the officer] to be operating illegally. [The officer's] belief that this card otherwise appeared similar to fake cards he had previously seen (based on criteria he did not articulate) presupposed that those comparators were in fact fake. But given [the officer's] ignorance of the content of the Regulations – and specifically the forms of documentation they contemplated – his prior judgments about the authenticity of cards he had seen did not offer a secure baseline for comparison and could not be safely relied on.
>
> [[The officer's] final reason for believing the card to be fake was his expectation that a licenced user of marijuana would be given a government issued licence with, in his words, a government logo and photograph. This was based on an incorrect assumption about the operation of the Regulations. In reality, the Regulations did not make any provision for a formal license to be carried by the user, as, for example, the Firearms Licences Regulations, SOR/98-199 make provision for a formal license to be possessed by a person possessing a firearm. [the officer] applied an irrelevant criterion in assessing the authenticity of the MedReleaf card. [references omitted, paras. 26-29]

The officer's mistaken belief about the state of the law was not reasonable. First, this was not an error of law nor ***"an error arising out of competing interpretations of common law powers, or of the intricacies of applying law to novel situations."*** ***"The officer was uninformed of how the Regulations functioned, and in the place of that knowledge, proceeded on the basis of what he assumed the law might be, based on what the Ontario legislature and Canadian Parliament had enacted in regulating other matters,"*** said Justice Miller. ***"Given the multiplicity of means that governments use to implement regulatory schemes, it was not objectively reasonable for the officer to proceed on the basis of assumptions about how the scheme might work."*** Since the accused's arrest was unlawful, his right to be free from arbitrary detention under s. 9 of the *Charter* was infringed.

Vehicle Search

The search incidental to the accused's unlawful arrest was unreasonable. Furthermore, the search could not be justified to determine whether the accused possessed more marijuana than he claimed to be entitled to possess. ***"Such a search may have been justified if there were some reason to suspect that the [accused] had more than the prescribed quantity in his possession,"*** said the Court of Appeal. ***"Here, there was no reason to suspect there was more marijuana to be found. Were the Crown's argument accepted, it would authorize a search of any vehicles, premises, and the person of everyone asserting an authorization to possess controlled substances in limited quantities. Such a proposition has no support in the law."***

Both the search of the vehicle and the search of the accused consequent to his arrest breached s. 8 of the *Charter*.

s. 24(2) Charter

Although the Court of Appeal found ss. 8 and 9 *Charter* breaches, it too, like the trial judge, would have admitted the evidence using the three-part s. 24(2) inquiry: (1) the seriousness of the *Charter*-infringing police conduct; (2) the impact on the accused's *Charter*-protected; and (3) society's interest in the adjudication of the case on its merits.

- **The seriousness of the Charter-infringing police conduct**: Although ***"the officers acted***

honestly and without bad faith", they did not act in good faith. There was both an institutional failing (the lack of training provided by the police service on the *Regulations*) and an individual failing (a police officer using his best guess). Nevertheless, the police conduct lied at the less serious end of the fault spectrum. ***"The regulations governing the use of marijuana were not static but continually in flux during this period,"*** said Justice Miller. ***"[The officer's] Charter breach was not deliberate, and [the officer] applied what he genuinely believed the law would require based on his experience as a police officer. To a degree, his expectation of what the law would require – that the user would be provided with packaging and a prescription similar in nature to what a user of pharmaceutical drugs would be given - was correct. In this overall context, the breach is less serious."***

- **The impact on the accused's Charter-protected interests**: ***"The low expectation of privacy the [accused] had in the motor vehicle, coupled with the unlikelihood that the [accused] could have demonstrated his authorization to possess the marijuana bears on the impact of the subsequent strip search on the [accused's] Charter rights,"*** said Justice Miller. ***"Typically strip searches imply a serious infringement of privacy and personal dignity… But given that the [accused] would likely have been arrested in any event and subjected appropriately to a strip search after the discovery of the firearm and ammunition, the seriousness of this violation is significantly attenuated."*** The Court of Appeal noted there may well have been grounds to arrest the accused even though he had a valid client card because the presentation of the MedReleaf card by itself would likely not have been accepted as sufficient without the product packaging. The *Regulations* at the time established labelling requirements to be attached to the container of the marijuana products provided to the client. This included a label stating, among other things, the name, telephone number, and email address of the producer.

- **Society's interest in the adjudication of the case on its merits:** This factor favoured admission of the evidence. The cocaine, ammunition, magazine and handgun were highly reliable evidence and important to the prosecution of very serious offences such that its exclusion would terminate the Crown's case.

Considering all of the factors, the evidence was admissible and the accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

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SCHOOL OF CRIMINAL JUSTICE & SECURITY

JUSTICE & PUBLIC SAFETY DIVISION

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- Skills required to effectively work within a law enforcement agency.

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- Graduates of JIBC's two-year Law Enforcement Studies Diploma (LESD) or applicants a diploma or associate degree in a related field can begin in the third year of the Bachelor of Law Enforcement Studies program.
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- animal cruelty officer
- border services agency official
- fraud investigator
- by-law enforcement officer
- regulatory enforcement officer
- gaming investigator
- correctional officer
- deputy sheriff
- intelligence services officer
- probation officer

BACHELOR OF LAW ENFORCEMENT STUDIES (BLES)

CURRICULUM AT A GLANCE

Courses in years one and two are offered through the Law Enforcement Studies Diploma. Years three and four build on these courses to complete the degree. Students can pursue their third and fourth year studies full-time or part-time to complete the final 60 credits.

Year 3

- Criminal & Deviant Behaviour
- Comparative Criminal Justice
- Leadership in a Law Enforcement Environment
- Search & Seizure Law in Canada
- Organizational Behaviour
- Investigations & Forensic Evidence
- Restorative Justice
- Project Management
- Data & Research Management

Year 4

- Aboriginal People and Policy
- Multiculturalism, Conflict and Social Justice
- Administrative and Labour Law in Canada
- Applied Research in Public Safety and Law Enforcement
- Professional Practice in Justice and Public Safety
- Crisis Intervention
- Research Project
- Governance and Accountability in Law Enforcement
- Terrorism and Society
- Organized Crime and Society

PROGRAM FORMAT

Students can pursue their studies full-time at the New Westminster campus or online. The full-time on-campus format consists of 60 credits completed over two years with courses over the fall and winter semesters (five courses per semester). The online format consists of 60 credits that must be completed within five years with the flexibility to take courses in the fall, winter and spring-summer semesters.

HOW TO APPLY?

Credit for the first two years of BLES will be granted to students who meet the program's admission requirements. For details on admission requirements and application deadlines please visit our website at jibc.ca/bles.

FOR MORE INFORMATION:

jibc.ca/bles

bles@jibc.ca
604-528-5778

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New Westminster, BC V3L 5T4
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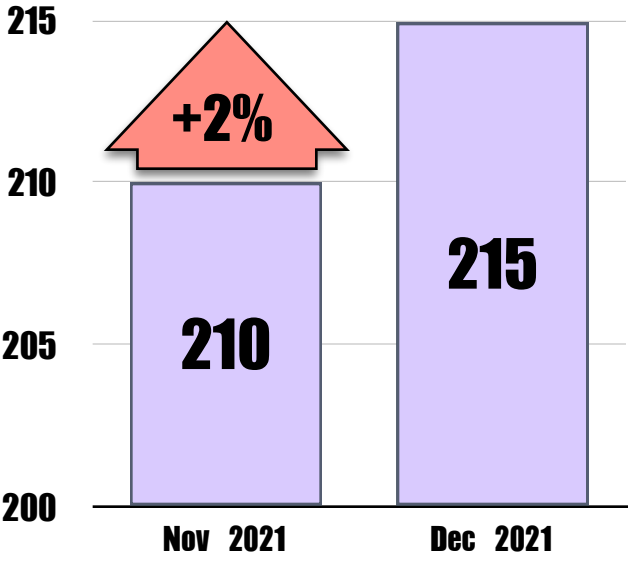
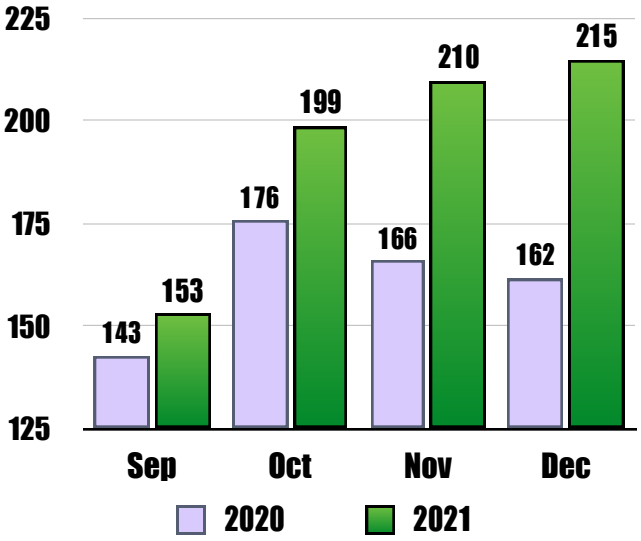
22-084

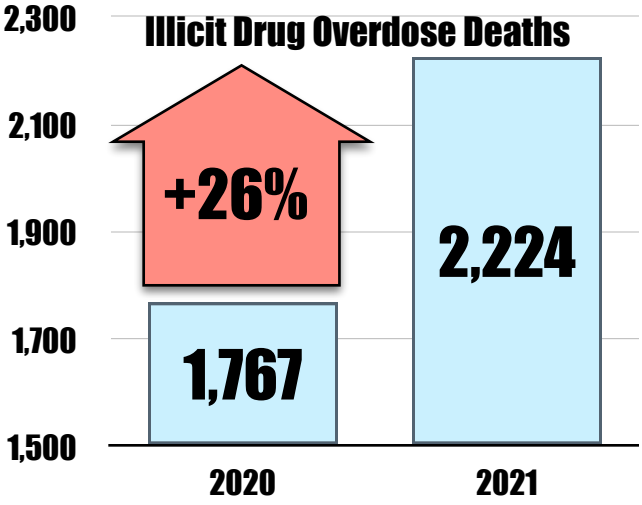
2022 BC ILLICIT DRUG TOXICITY DEATHS CRUSH PREVIOUS YEAR

The Office of BC's Chief Coroner has released statistics for illicit drug toxicity deaths (formerly known as illicit drug overdose deaths) in the province from **January 1, 2011 to December 31, 2021**. In December 2021 there were **215** suspected drug toxicity deaths, the highest single month total ever recorded. This represents a **+2%** increase over the number of deaths occurring in November 2021 (**210**).





In 2021, there has been a total of **2,224** suspected drug overdose deaths from January to December. This represents an increase of **457** deaths over the 2020 numbers(**1,767**).

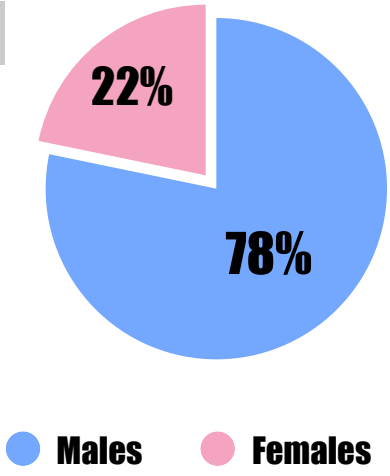


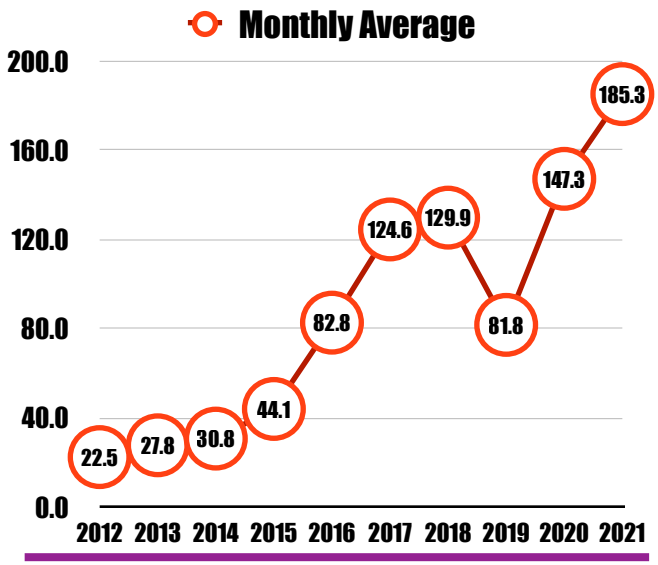
People aged 50-59 were the hardest hit in 2021 with **554** illicit drug toxicity deaths, followed by 30-39 year-olds (**539**) and 40-49 year-olds (**485**). There were **325** deaths among people aged 19-29, **262** deaths among 60-69 year-olds while those under 19 years had **29** deaths. People aged 70-79 had **30** deaths. Vancouver had the most deaths at **524** followed by Surrey (**281**), Victoria (**126**), Abbotsford (**86**), Burnaby (**78**), Kamloops (**77**) and Kelowna (**73**).

Overall, the 2021 statistics amount to about **7 people dying every day of the year.**

Deaths by Sex

Males continue to die at about a **4:1** ratio compared to females. In 2021, **1,740** males had died while there were **484** female deaths.





The 2021 data indicated that most illicit drug toxicity deaths (**83%**) occurred inside while **15%** occurred outside. For **34** deaths, the location was unknown.

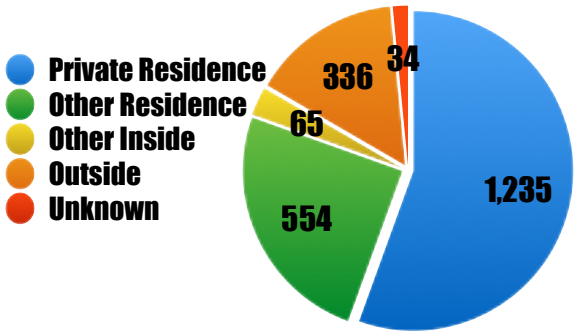
"**Private residence**" includes residences, driveways, garages, trailer homes.

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

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

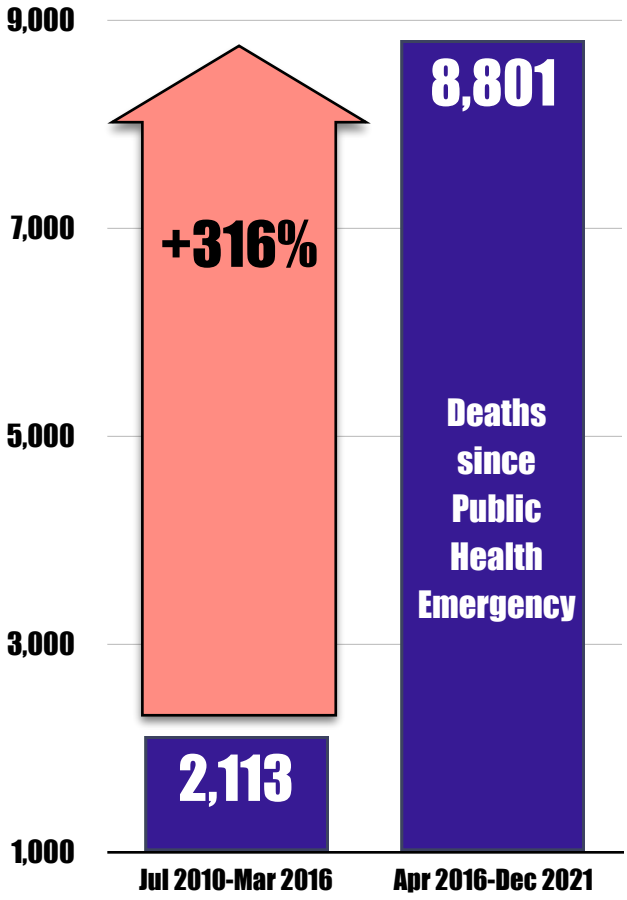
"**Outside**" includes vehicles, streets, sidewalks, parks, wooded areas, campgrounds and parking lots.

Deaths by location: Jan-Oct 2021



DEATHS SINCE PUBLIC HEALTH EMERGENCY

In April 2016, BC's provincial health officer declared a public health emergency in response to the rise in drug overdoses and deaths. The number of overdose deaths in the **69** months preceding the declaration (Jul 2010* — Mar 2016) totalled **2,063**. The number of deaths in the **69** months following the declaration (Apr 2016 — Dec 2021) totalled **8,801**. This is an increase of **316%**.

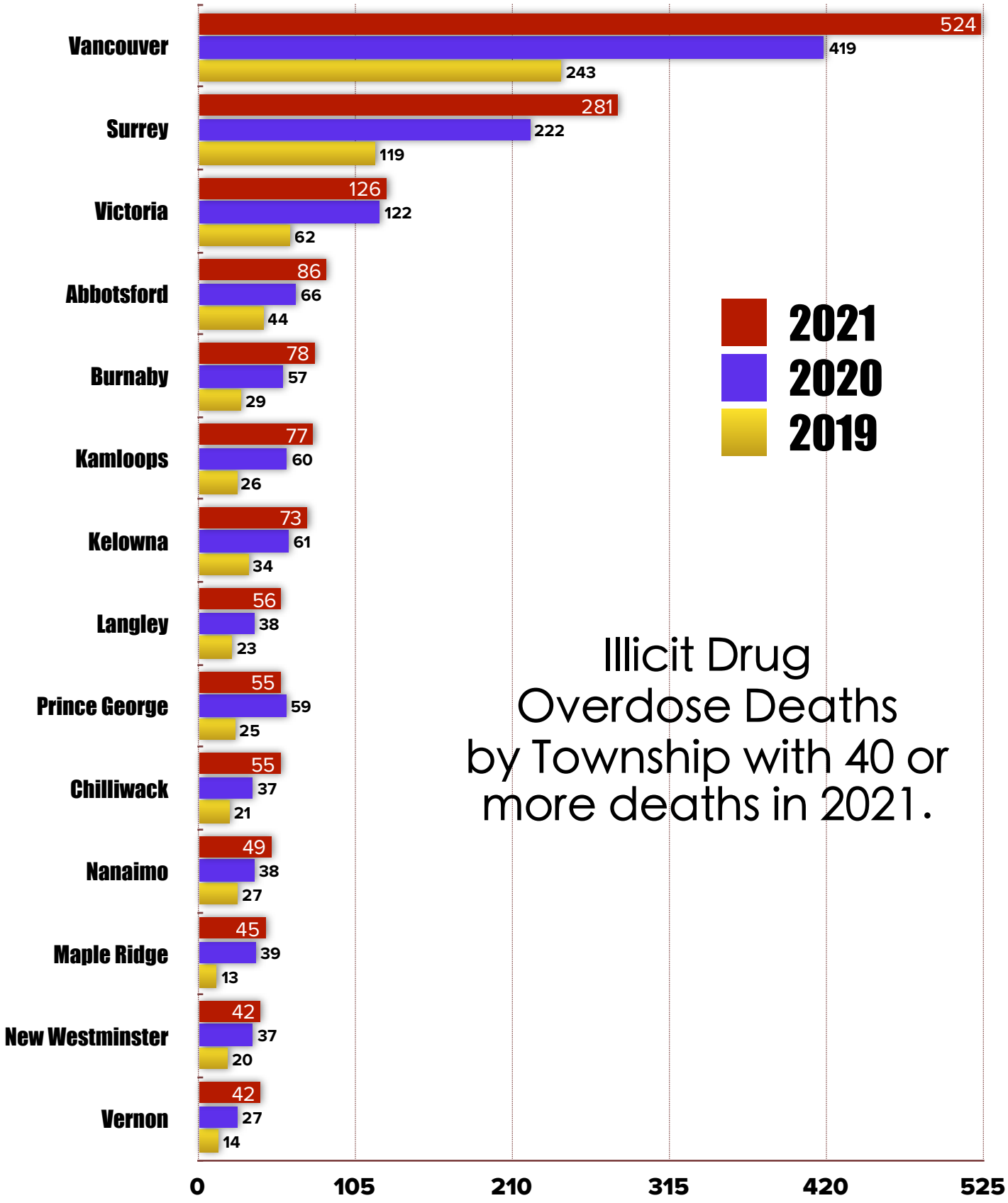


Source: Illicit Drug Toxicity Deaths in BC - January 1, 2011 to December 31, 2021. Ministry of Public Safety and Solicitor General, Coroners Service. February 9, 2022.

* July - December 2010 stats taken from Illicit Drug Toxicity Deaths in BC January 1, 2017 – October 31, 2016 November 14, 2016 draft.

TYPES OF DRUGS

The top five detected drugs relevant to illicit drug overdose deaths from 2018 - 2021 were illicit fentanyl and its analogues, which was detected in **86.7%** of deaths, cocaine (**48.0%**), methamphetamine/amphetamine (**39.7%**), ethyl alcohol (**28.0%**) and benzodiazepines (**7.9%**). Other opioids (**29.1**), such as heroin, codeine, oxycodone, morphine and methadone, and other stimulants (**2.8%**) were also detected.


Vancouver
524
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Surrey
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222
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Victoria
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122
62
Abbotsford
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Burnaby
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Kamloops
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Kelowna
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61
34
Langley
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38
23
Prince George
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59
25
Chilliwack
55
37
21
Nanaimo
49
38
27
Maple Ridge
45
39
13
New Westminster
42
37
20
Vernon
42
27
14
2021
2020
2019
Illicit Drug Overdose Deaths by Township with 40 or more deaths in 2021.
0
105
210
315
420
525

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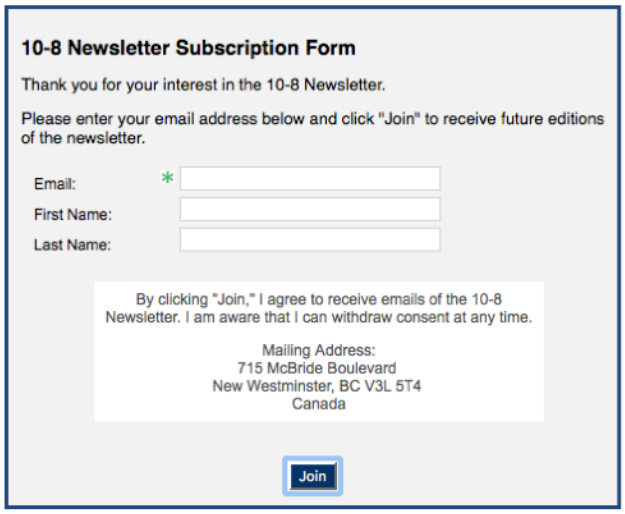

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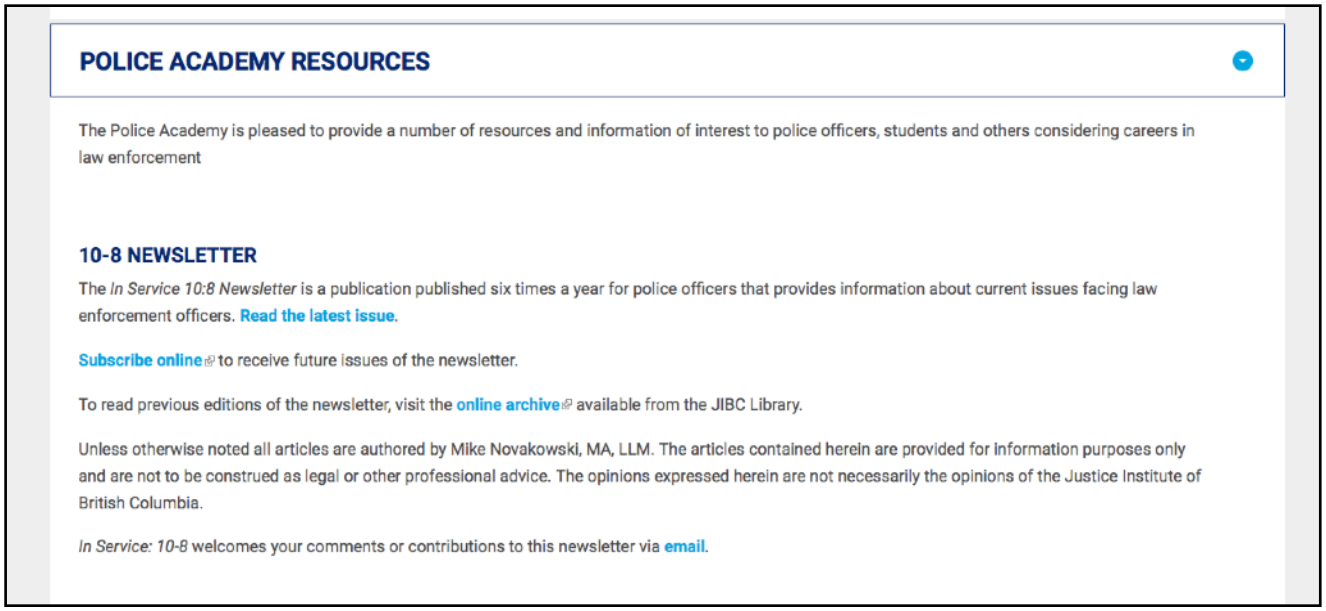

POLICE ACADEMY RESOURCES

The Police Academy is pleased to provide a number of resources and information of interest to police officers, students and others considering careers in law enforcement

10-8 NEWSLETTER

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