JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

IN MEMORIAM

On July 2, 2021, 55-year-old Toronto Police Service Constable Jeffrey Northrup was killed while responding to a call in the very early hours.

Constable Northrup and his partner were conducting an investigation in response to a call in an underground parking lot. During the course of this event, Constable Northrup was struck by a vehicle in what is believed to be an intentional, deliberate act. He was attended to by other first responders, rushed to hospital and pronounced dead shortly after. A male suspect has been charged with first degree murder.

Constable Northrup proudly served the Toronto Police Service for 31 and a half years. He started his career with Court Services, was assigned to 11 Division when he became a police officer in 1999, and had been a member of 52 Division since 2008. He was also a proud member of the Chief's Ceremonial Unit.

Constable Northrup is survived by his wife, three children and his mother.

~ Constable Jeffrey Northrup ~

"[A] man who dedicated his life to the things that matter most – his community and his family."

Toronto Police Service Chief James Ramer

Highlights In This Issue

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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.

Big data surveillance and security intelligence: the Canadian case.

edited by David Lyon & David Murakami Wood.

Vancouver, BC; Toronto, ON: UBC Press, 2021.

JL 86 I58 B54 2021

Also available in eBook format (JIBC login required)

The Canadian justice system: an overview.

Paul Atkinson & Daniel Atkinson.

Markham, ON: LexisNexis Butterworths, 2020.

KE 444 A85 2020

Creating effective teams: a guide for members and leaders.

Susan A. Wheelan, Maria Åkerlund & Christian Jacobsson.

Thousand Oaks, CA: SAGE Publications, Inc, 2021.

HD 66 W485 2021

Effective interviewing and interrogation techniques.

Nathan J. Gordon & William L. Fleisher.

London; San Diego, CA: Academic Press, an imprint of Elsevier, 2019.

HV 8073 G64 2019

Effective treatments for PTSD: practice guidelines from the International Society for Traumatic Stress Studies.

edited by David Forbes, Jonathan I. Bisson, Candice M. Monson & Lucy Berliner.

New York, NY: The Guilford Press, 2020.

RC 552 P67 E35 2020

Also available in eBook format (JIBC login required)

Mastering facilitation: a guide for assisting teams and achieving great outcomes.

Morgan L. Jones.

Boca Raton, FL: Routledge, 2021.

HM 751 J66 2021

Mistakes were made (but not by me): why we justify foolish beliefs, bad decisions, and hurtful acts.

Carol Tavris & Elliot Aronson.

Boston, MA: Mariner Books, Houghton Mifflin Harcourt, 2020.

BF 337 C63 T38 2020

Neuroscience for organizational change: an evidence-based practical guide to managing change.

Hilary Scarlett.

New York, NY: Kogan Page Ltd, 2019.

HD 58.8 S294 2019

Stop avoiding stuff: 25 microskills to face your fears & do it anyway.

Matthew S. Boone, Jennifer Gregg, & Lisa W. Coyne.

Oakland, CA: New Harbinger Publications, 2020.

BF 575 F2 B66 2020

Sudden death: intervention skills for the emergency services.

edited by Tricia Scott.

Cham: Springer, 2020.

RB 150 S84 S84 2020

Also available in eBook format (JIBC login required)

Violence against children in the criminal justice system: global perspectives on prevention.

edited by Wendy O'Brien and Cédric Foussard.

New York, NY: Routledge, 2020.

Available in eBook format only (JIBC login required)

What's wrong with leadership?: improving leadership research and practice

edited by Ronald E. Riggio.

New York, NY: Routledge, 2019.

HD 57.7 W456 2019

Also available in eBook format (JIBC login required)

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SCHOOL OF CRIMINAL JUSTICE & SECURITY

JUSTICE & PUBLIC SAFETY DIVISION

BACHELOR OF LAW ENFORCEMENT STUDIES (BLES)

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Today's law enforcement and public safety environment is complex. Employees in public and private organizations are increasingly being called upon to perform inspections, investigations, security supervision, enforcement and regulatory compliance functions. The Bachelor of Law Enforcement Studies (BLES) provides expanded opportunities in the study of law enforcement and public safety and will position you to be a sought-after candidate in a highly competitive recruiting environment. Our education program will prepare you for success by developing your leadership skills, and enhancing your interpersonal communications, critical thinking and ethical decision making.

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- An in-depth knowledge of the Canadian criminal justice system.
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WHO SHOULD TAKE THIS PROGRAM

- 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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CAREER FLEXIBILITY

The program will provide you with the in-depth knowledge, expanded skills and competencies to seek employment in a wide range of law enforcement, public safety, regulatory, and compliance fields offering you more career flexibility and professional development. Examples of potential roles include:

- police officer
- conservation officer
- 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)

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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.

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- 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.

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Justice Institute of British Columbia (JIBC) is Canada's leading public safety educator recognized nationally and internationally for innovative education in justice, public safety and social services.

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"The principle of judicial immunity is not a perk for judges. Rather it is an essential element of the independence of the judiciary. An independent judiciary is the right of every Canadian and constitutes a fundamental pillar of the rule of law in a free and democratic society."

JUDGE ENJOYS ABSOLUTE IMMUNITY FROM CIVIL LIABILITY WHILE ACTING IN OFFICIAL CAPACITY

Taha v. Clements, 2021 PECA 5

The plaintiff commenced civil actions against a bank and its lawyer. In his action against the bank he sought general damages in the amount of $100 million and punitive and exemplary damages in the amount of $246 billion. He also claimed an additional $1 million in general, punitive and exemplary damages in his action against the bank's lawyer. When the matters came before the Chief Justice of the Supreme Court of Prince Edward Island, she dismissed the actions on the basis that they were frivolous, vexatious or otherwise an abuse of process. The plaintiff then sued the Chief Justice who dismissed his claim seeking punitive and exemplary damages in the amount of $1 million.

Prince Edward Island Supreme Court

The claim against the Chief Justice was dismissed in its entirety as being frivolous, vexatious and/or an abuse of process. The motions judge found no reasonable cause of action was disclosed anywhere in the entire statement of claim and, on its face, the plaintiff's claim was without merit or substance. Further, dissatisfaction with a judicial decision taken in good faith did not constitute grounds for an action against the decision-making judge and, therefore, the proceeding was an abuse of process.

Prince Edward Island Court of Appeal

The plaintiff challenged the dismissal of his claim. But the lower court's ruling was upheld because (1) the Chief Justice was immune from civil suit and (2) the plaintiff's action was "frivolous and vexatious" and "entirely devoid of merit".

Judicial Immunity

"The immunity of judges from civil liability for acts done in the performance of their judicial functions is an ancient and well-established principle of law inherited from the English Common law," said Justice Mitchell for the Court of Appeal. He continued:

> The principle of judicial immunity is not a perk for judges. Rather it is an essential element of the independence of the judiciary. An independent judiciary is the right of every Canadian and constitutes a fundamental pillar of the rule of law in a free and democratic society.
>
> A judge must be, and must be seen to be, free to decide honestly and impartially on the basis of the law without external pressure or influence and without fear of reprisal of litigation by those who might feel wronged by their decision.
>
> Should a litigant feel that a judge has erred in law, a litigant is free to appeal the decision to a higher court. Should the litigant feel the Supreme Court judge engaged in inappropriate conduct or comments, the litigant may file a complaint with the Canadian Judicial Council. A litigant cannot, however, sue a judge as superior court judges have absolute immunity from civil liability for acts done in their capacity as judges. Provincial Court judges

have the same immunity by virtue of s.11(2) of the Provincial Court Act, R.S.P.E.I. 1988, Cap. P-25. [references omitted, paras. 9-11]

Frivolous & Vexatious

In agreeing that the action was frivolous and vexatious, and entirely devoid of merit, Justice Mitchell stated:

> The focus of the proceeding is acknowledgment and correction of a perceived government shortcoming as opposed to any rights recognized by law. There are no stated legal or evidentiary grounds upon which to entertain or allow the appeal. There is nothing in the [plaintiff's] notice of appeal or submissions that points to any legal error made by the Rule 2.1 motions judge. Hence, the matter is frivolous. The claim contains entirely unfounded and unwarranted inappropriate and scandalous allegations and aspersions regarding the person of the defendant judge. There is nothing on the face of the proceeding or in the appeal record to support [the plaintiff'] various bare allegations of bad faith made outside the defendant judge's jurisdiction. Hence the matter is vexatious. In these circumstances, it was appropriate for the motions judge to find, as he did, that the proceeding was frivolous, vexatious, and an abuse of process. [para. 12]

The plaintiff's appeal was dismissed.

Complete case available at www.canlii.org

Editor's Note: Additional facts taken from *Taha v. Clements*, 2019 PESC 23

"A judge must be, and must be seen to be, free to decide honestly and impartially on the basis of the law without external pressure or influence and without fear of reprisal of litigation by those who might feel wronged by their decision."

MATCHING DESCRIPTION TO POLICE BULLETIN JUSTIFIED DETENTION

R. v. Linklater, 2021 MBCA 65

At about 3:34 a.m., paramedics responded to a neighbour's 911 call about a fire at a residence. On arrival, firefighters found heavy smoke inside but no active fire. A man's body was also found slumped in a chair. There was blood on the body, the floor and the chair. No one else was in the residence.

An autopsy determined that the victim died prior to the fire as a result of significant blood loss due to his injuries, which included 33 sharp-force wounds to his face, back and arms (slashes or stabs caused by a knife). As part of their investigation, police located surveillance videos of the victim prior to his death from various locations. These videos showed the victim with a man and a woman at a hotel approximately two to three hours prior to the 911 call. The surveillance videos also showed these same two individuals in the vicinity of the victim's residence after the 911 call.

In an effort to identify the people in the surveillance videos, the police issued three bulletins. The bulletins included a brief description of the man and the woman and photographs taken from the surveillance videos. One of the bulletins also included a video clip from taken the surveillance videos.

A few days later, two police officers who had seen the bulletins and attended shift briefings where the bulletins were discussed, recognized the accused walking down the street with the woman. They were immediately detained as persons of interest for a "murder investigation". They were provided with their s. 10(b) *Charter* rights and given the police caution. The accused was placed in the back of a police car and back-up was requested to assist with the woman.

While the accused was detained, the police obtained his name, date of birth and address. A supervisor attended and contacted the homicide supervisor who instructed the officers to arrest the accused and his female companion. The arrest for second degree murder occurred 25-minutes after the initial detention. Using the address the accused provided, the police obtained a search warrant for his residence where they discovered and seized evidence, including a plaid shirt and a baseball cap. The accused, along with the woman, were jointly charged with second degree murder.

Manitoba Court of Queen's Bench

Among other things, the accused argued that his address, the plaid shirt and the baseball cap were obtained in violation of his ss. 8, 9, 10(a) and 10(b) *Charter* rights. He contended the police obtained his address during an unlawful detention and in response to questions asked before he had the opportunity to speak to a lawyer. He then submitted that the search warrant would not have issued without his address and, without the search warrant, the seizure of the plaid shirt and baseball cap were unlawful.

The judge concluded that the accused's detention and arrest were lawful and therefore did not breach s. 9 (arbitrary detention). He also found no breaches of s. 8 (search or seizure), nor of s. 10(a) (to be informed promptly of the reason for arrest or detention) or s. 10(b) (right to counsel).The accused was subsequently convicted by a jury of second degree murder and sentenced to life imprisonment with a 12-year period of parole ineligibility. His co-accused, on the other hand, was acquitted.

Manitoba Court of Appeal

The accused argued, in part, that the trial judge improperly applied the law to the facts in finding that his detention and arrest were not arbitrary and, therefore, compliant with s. 9 of the *Charter*. He submitted that the police did not have the necessary grounds to detain or arrest him, and it was unlawful for the police to detain him with the intention of ascertaining his identity.

Investigative Detention

Justice leMaistre, delivering the opinion of the Court of Appeal, noted Supreme Court of Canada jurisprudence holding that the police have the power to **"detain an individual for investigative purposes where, in the totality of circumstances, there are reasonable grounds to suspect a clear nexus between the individual and a recent or still unfolding crime."** In upholding the trial judge's finding that the police acted lawfully, she stated:

> ... The trial judge carefully reviewed the information known to the officers when they recognized the accused from the bulletins and briefings, as well as their personal observations and reasons for detaining him. He also considered whether the officers' suspicions that the accused was one of the individuals sought in connection with the murder investigation were objectively reasonable. The trial judge concluded that the officers had "more than a reasonable suspicion that [the accused and the woman] matched the information which had been given to them in the bulletins and at police briefings" and that "their detention of them was fully justified."
>
> In my view, the detention prior to the accused's arrest was justified in the context of an investigation into a recent murder and the accused's resemblance to a person of interest in the investigation. The police were investigating a serious offence. The bulletins and briefings were clear that the police were attempting to identify the male and female who were with the victim in the surveillance videos and that they were "persons of interest in relation to the murder". Anyone with information about the

"[T]he detention prior to the accused's arrest was justified in the context of an investigation into a recent murder and the accused's resemblance to a person of interest in the investigation."

> "persons of interest" was to notify the homicide unit.
>
> As a result of the bulletins and briefings, two police officers recognized these "persons of interest" as they were walking down the street. The officers detained them on site for a relatively short duration until they determined that there were grounds for an arrest. This is how police investigations are done. There was nothing unusual let alone inappropriate or unjustified with the detention and arrest. There is no merit to the accused's argument that the police did not have the necessary grounds to detain or arrest him.
>
> The accused's address used by police in their information to obtain the search warrant was provided by the accused after he was lawfully detained, but before he was arrested. In this scenario, I fail to see the relevance of the lawfulness of the arrest to the admissibility of the items seized pursuant to the search warrant. [paras. 26-29]

Since the detention was lawful, there was no need to conduct a s. 24(2) *Charter* analysis.

The accused's appeal against his conviction was dismissed.

Complete case available at www.canlii.org

'HOLDING' CELL PHONE NOT LIMITED TO USING ONE'S HANDS

R. v. Rajani, 2021 BCCA 292

A police officer saw the accused looking down while driving. The officer approached the car and saw a cell phone connected to a cord face-up in the accused's lap. The officer could see a glassy surface but could not say whether the cell phone was lit. The officer issued the accused a violation ticket for using an electronic device while driving, contrary to s. 214.2(1) of BC's *Motor Vehicle Act* (*MVA*).

British Columbia Provincial Court

The accused disputed the ticket before a Judicial Justice. The accused agreed he had been looking down when the officer first saw him, but testified that the cell phone was wedged between his right thigh and the car seat, facing up.

The Judicial Justice upheld the ticket. In his view, the precise location of the cell phone made no difference since the phone was a potential distraction and was in use because it was being charged.

British Columbia Supreme Court

The accused argued the Judicial Justice erred in his ruling. The Crown conceded that the Judicial Justice's interpretation of the *MVA* was in error when he found it prohibited (1) the touch-free charging of a cell phone in a vehicle and (2) the presence of an electronic device anywhere in a vehicle because it could possibly be distracting. In this case, however, the accused was **"holding"** the phone in a position in which it could be used. In the appeal judge's view, the phone was being supported in a way that permitted its use and she rejected the accused's suggestion that "holding" was restricted to an action done with one's hands. Regardless of whether the accused had the cell phone on his lap or wedged between his thigh and the seat, with the screen facing up, he was holding it in a position in which it could be used.

"To interpret 'holding' as being restricted to an action done with one's hands is not in harmony with the scheme of the distracted driving provisions of the MVA," said the appeal judge. ***"Such an interpretation would allow drivers to operate their vehicles with electronic devices in their laps, between their thighs, tucked under their arms or chins, or supported by other parts of their bodies."*** The curative proviso in s. 686(1)(b)(iii) of the *Criminal Code* was applied and the accused's conviction was upheld.

"'Holding' in s. 214.1(a) means physically grasping, carrying, or supporting an electronic device with any part of one's body in a position in which the device may be used."

British Columbia Court of Appeal

The accused contended that the prohibition in s. 214.2(1) of the *MVA* did not apply to a cell phone wedged between a driver's leg and the seat when the screen was not illuminated. In his view, the "ordinary meaning" of the words "use" and "hold", as well as the description of the bill when it was introduced in the Legislature, did not render his conduct unlawful.

"Holding"

Section 214.2(1) of the *MVA* prohibits using an electric device while driving. "Use" includes "holding the device in a position in which it may be used". Justice Fenlon, writing the Court of Appeal decision, concluded "holding" was not restricted to using one's hands:

> "Holding" in s. 214.1(a) means physically grasping, carrying, or supporting an electronic device with any part of one's body in a position in which the device may be used. [para. 15]

In coming to this conclusion, Justice Fenton noted **(1)** ***"the definition of 'electronic device' in s. 214.1 includes a large number of devices, not only handheld devices but also global positioning systems and televisions"***; **(2)** a ***"broad interpretation of 'holding' best aligns with the Legislature's object of preventing death and injuries associated with distracted driving because it captures more potentially distracting conduct than the narrow interpretation urged by the [accused]"***; and **(3)** a ***"broader interpretation accords with the ordinary grammatical meaning of 'hold.'"*** (The Oxford English, Merriam-Webster and Cambridge dictionaries were cited).

In this case, the accused was holding the phone by physically supporting it with a part of his body in a position in which it could be used. The curative proviso applied and the accused's appeal was dismissed.

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

BY THE BOOK:

BC's Motor Vehicle Act

Definitions

214.1 In this Part:

"electronic device" means

(a) a hand-held cellular telephone or another hand-held electronic device that includes a telephone function,

(b) a hand-held electronic device that is capable of transmitting or receiving electronic mail or other text-based messages, or

(c) a prescribed class or type of electronic device;

"use", in relation to an electronic device, means one or more of the following actions:

(a) holding the device in a position in which it may be used;

(b) operating one or more of the device's functions;

(c) communicating orally by means of the device with another person or another device;

(d) taking another action that is set out in the regulations by means of, with or in relation to an electronic device.

Prohibition against use of electronic device while driving

s. 214.2 (1) A person must not use an electronic device while driving or operating a motor vehicle on a highway.

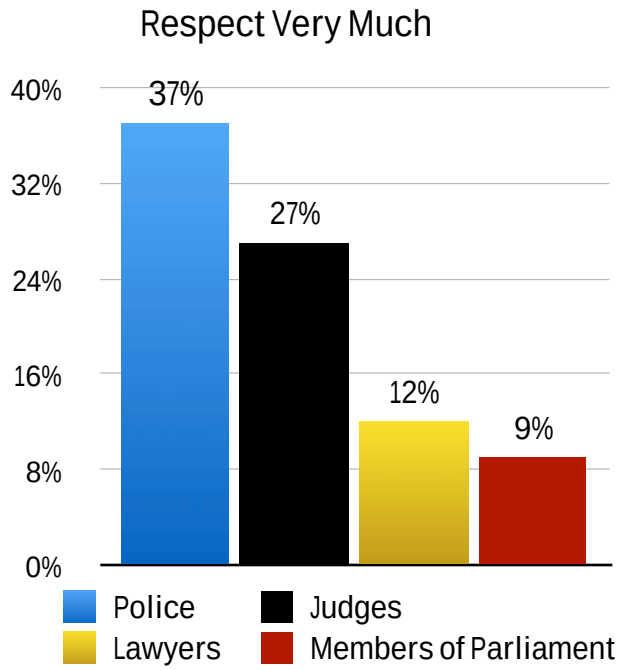
(2) Without limiting subsection (1), a person must not communicate by means of an electronic device with another person or another device by electronic mail or other text-based message.

"To interpret 'holding' as being restricted to an action done with one's hands is not in harmony with the scheme of the distracted driving provisions of the MVA. Such an interpretation would allow drivers to operate their vehicles with electronic devices in their laps, between their thighs, tucked under their arms or chins, or supported by other parts of their bodies."

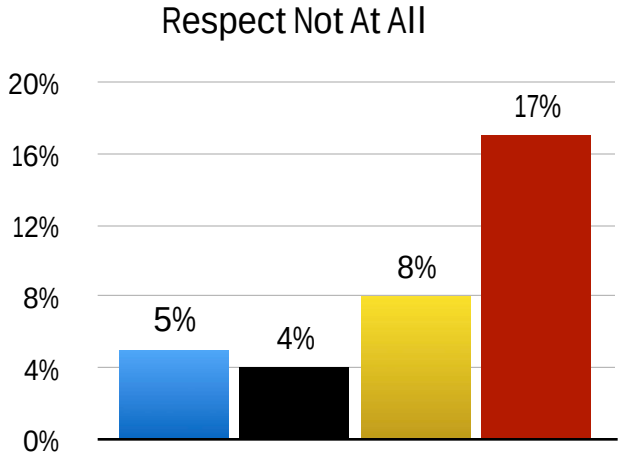
R. v. Rajani, 2020 BCSC 779 at para. 27, appeal dismissed 2021 BCCA 292.

COPS TOP JUDGES, LAWYERS & LAWMAKERS FOR RESPECT

In a recent Maru Public Opinion survey — "Canada's Most Respected Occupations 2021" — it was revealed that Canadians have more respect for the police than they do for judges, lawyers or lawmakers (elected Members of Parliament). While **37%** of the Canadian public said they respected the police very much, only **27%** said they had such respect for judges followed by lawyers at **12%** and elected Members of Parliament at **9%**.

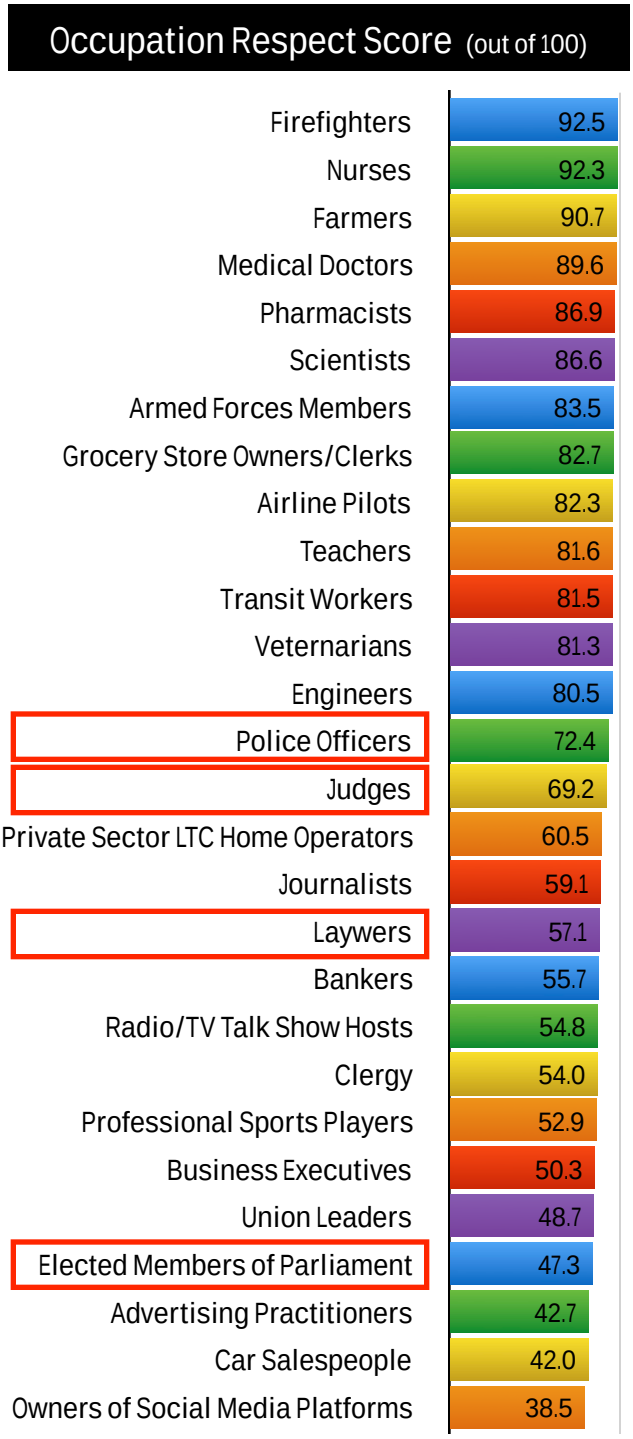


The survey also reported the percentage of respondents who did not respect these occupations at all.



Most Respected Occupations

Of the 28 occupations identified in the survey, Firefighters were found to be the most respected occupation with a weighted Respect Score of **92.5** while Owners of Social Media Platforms were respected the least (**38.5**).



CANADIAN POLICE & PEACE OFFICER MEMORIAL SERVICE

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BC IIO NOTIFICATIONS UP FROM THE PREVIOUS YEAR

In its Annual Report 2020-2021, the IIO described itself as follows:

> The IIO is a civilian-led oversight law enforcement agency which was created in 2012. It is headed by the Chief Civilian Director (CCD) who, per the Police Act, is not permitted to have ever been a police officer. The IIO is mandated to conduct investigations into incidents involving death or serious harm that may have been the result of the actions or inactions of a police officer, whether on- or off-duty.
>
> The IIO's jurisdiction extends to all police officers operating in B.C. This includes 11 municipal agencies, the Royal Mounted Canadian Police (RCMP), the South Coast BC Transportation Authority Police Service (Metro Vancouver Transit Police), and the Stl'atl'imx Tribal Police Service. In addition, officers appointed as special provincial constables and municipal constables are also subject to oversight by the IIO. The IIO does not have jurisdiction over correctional officers in municipal, provincial, or federal correctional facilities, or civilian jail guards.
>
> ... An IIO investigation occurs whenever it is determined that there has been serious harm or death; no allegations of wrongdoing on the part of the involved officers is required. All investigations are completed in as transparent a manner as practicable under the circumstances, while respecting the integrity of the investigation and the privacy interests of those involved. The IIO conducts all investigations to a criminal law standard.

According to its Annual Report, the IIO received **339** incident notifications that potentially involved serious harm or death arising from the action or inaction of police for the fiscal period from April 1, 2020 to March 31, 2021. Of these 339 notifications, **106** were categorized as advice files while **232** were investigated. During the 2020-2021 fiscal year, **104** cases were concluded: **53** cases were closed with a public report and **44** cases were concluded with a media release. Eight (**8**) cases were referred to Crown Counsel while **52** cases remained under active investigation.

Of the 232 investigations opened:

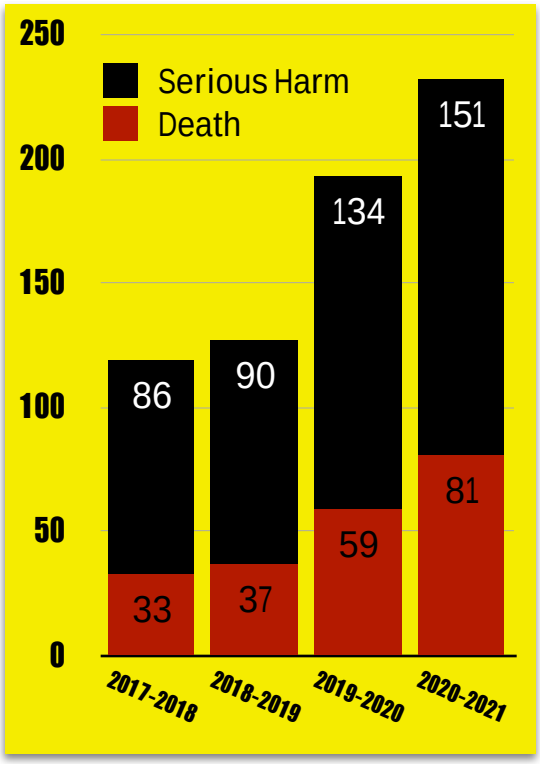
- **169** originated from an RCMP detachment, **61** from a municipal police agency, two (**2**) from the Metro Vancouver Transit Police and one (**1**) involved a Health Authority Special Constable.
- **172** notifications to the IIO occurred within 24 hours of the incident taking place. Of these notifications, **32** were made within one hour of the incident. The remaining **60** notifications occurred after 24 hours.

AFFECTED PERSONS

Individuals who died or suffered serious injuries as a result of an interaction with BC police.

Age Range	0-9	10-14	15-19	20-24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65-69	70-74	75-79	80-84	85-89	90-94	95-100	Total
Male	0	0	5	13	25	29	32	23	15	21	12	8	6	2	2	0	0	0	0	193
Female	1	0	4	4	4	9	4	6	1	3	0	2	0	2	1	0	0	0	1	42
Total	1	0	9	17	29	38	36	29	16	24	12	10	6	4	3	0	0	0	1	235

FILES BY CLASSIFICATION			
Classification	Death	Serious Harm	Total
CEW (Conducted Energy Weapon)	0	3	3
Firearm	3	3	6
Medical	10	4	14
MVI (Motor Vehicle Incident)	5	13	18
PSD (Police Service Dog)	0	16	16
Self-Inflicted	46	30	76
Use of Force	2	61	63
Other	15	21	36
Total	81	151	232



"Serious harm" is defined "as injury that may result in death, may cause serious disfigurement, or may cause substantial loss or impairment of mobility of the body as a whole or of the function of any limb or organ."

The **"medical"** classification "includes instances where the primary reason for the death or serious harm of the affected person is attributed to a health condition confirmed by a medical professional during the course of an IIO investigation."

The **"other"** classification "involve circumstances that are not well-aligned with the broader classification groups identified or may include elements that fit under multiple categories."

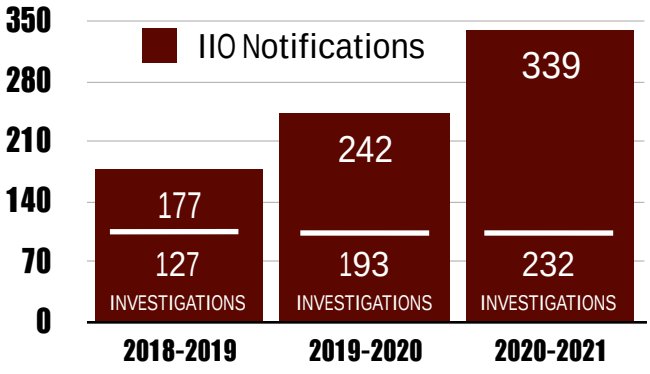
The **"self-inflicted"** classification includes serious harm or death that "occur as a result of some action on the part of the affected person. For example, an individual who sustains a serious injury when they fell while running from police would be classified as self-inflicted." In this report, "the IIO has eliminated the in-custody category because being in custody is not a mechanism of harm, although serious harm and death may occur there." The IIO has decided that "these files are more appropriately classified by the condition which caused or contributed to the serious harm or death, such as medical, use of force, etc."

Crown Counsel Referrals

Of the eight (**8**) cases referred to Crown Counsel in fiscal 2020-2021, charges were approved in only one (**1**) case, no charges were approved in two (**2**) cases and the remaining five (**5**) cases were pending charge assessment.

IIO Notifications

Notifications to the IIO were up **40%** over the previous fiscal year, but investigations rose only **20%**.



IIO STATS

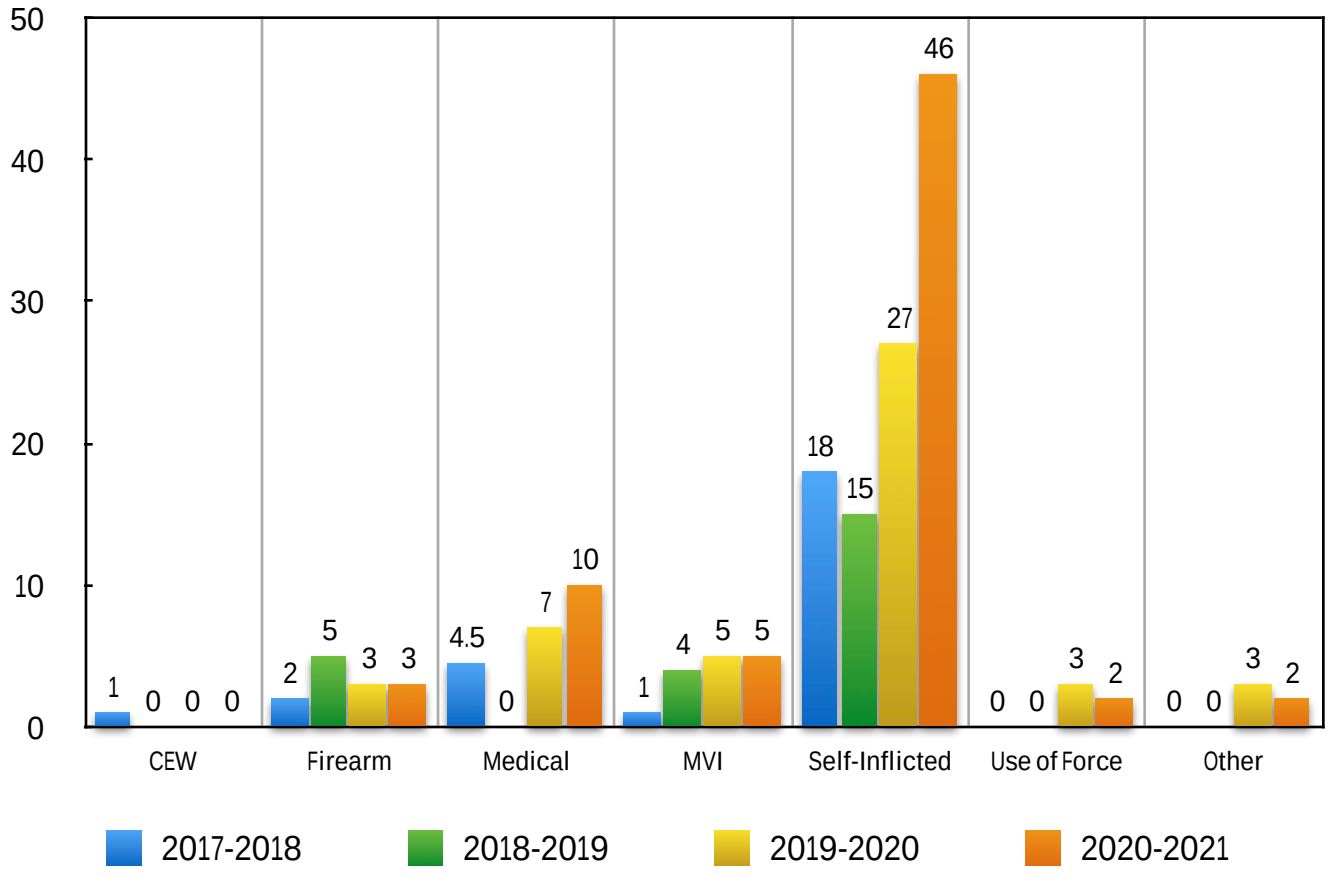
POLICE FORCE	Investigations By Agency
Abbotsford	9
Central Saanich	1
Delta	4
New Westminster	2
Oak Bay	2
Saanich	1
Vancouver	32
Victoria	8
West Vancouver	2
Municipal Total	61
RCMP	169
Metro Vancouver Transit Police	2
Health Authority	1
Total*	233

Includes one investigation into a Nova Scotia wrongful conviction matter.

INVESTIGATIONS BY RCMP DETACHMENT

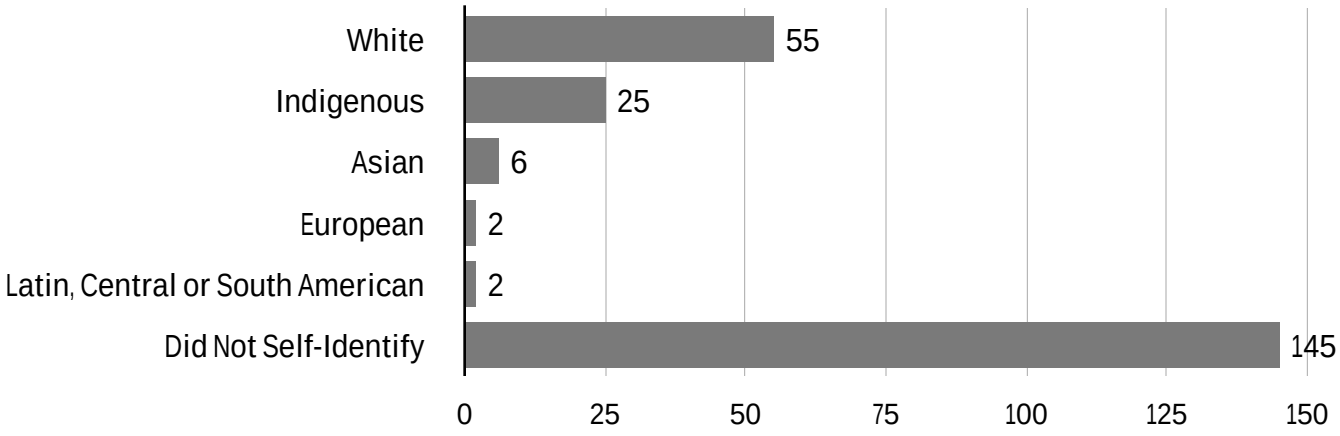
100 Mile House	2	Nanaimo	6
Anahim Lake	2	Nelson	1
Bella Coola	1	North Cowichan/Duncan	6
Burnaby	3	North Okanagan/Vernon	10
Burns Lake	3	North Vancouver	7
Campbell River	1	Oceanside	1
Castlegar	2	Penticton	3
Chase	2	Port Alberni	2
Chemanius	1	Port Mann Freeway Patrol	1
Chetwynd	1	Powell River	1
Chilliwack	8	Prince George	7
Clearwater	1	Prince Reupert	6
Comox Valley	2	Princeton	1
Coquitlam	1	Richmond	4
Cranbrook	1	Ridge Meadows	5
Creston	1	Salmon Arm	1
Dawson Creek	1	Shawnigan Lake	1
Forst St. John	1	Sicamous	1
Grand Forks	1	Sidney/North Saanich	1
Kamloops	10	Smithers	1
Kelowna	5	Sooke	1
Kitimat	1	Squamish	3
Ladysmith	2	Surrey	15
Lake Country	3	Terrace	2
Langley	4	Tofino	3
Limis/Nass Valley	1	Tsay Keh Dene	1
Lytton	2	Vanderhoof	2
Masset	2	West Kelowna	1
Merritt	3	West Shore	1
Midway	1	Whistler	1
Mission	1	Williams Lake	3
		TOTAL	169

IIO DEATH FILE CLASSIFICATIONS



Ethnicity - Affected Persons

In fiscal 2020-2021, the IIO began collecting ethnicity data of affected persons. This information was provided on a voluntary basis.



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

2020 POLICE REPORTED CRIME

In July 2021, Statistics Canada released its *"Police-reported crime statistics in Canada, 2020"* report. Highlights of this recent collection of crime data include:

- There were **2,014,779** crimes (excluding traffic) reported to Canadian police in 2020; this represents a decrease of **195,015** crimes reported when compared to 2019.
- The total crime rate decreased **-10%**. This includes a violent crime rate decrease of **-2%** and a property crime rate decrease of **-13%**.

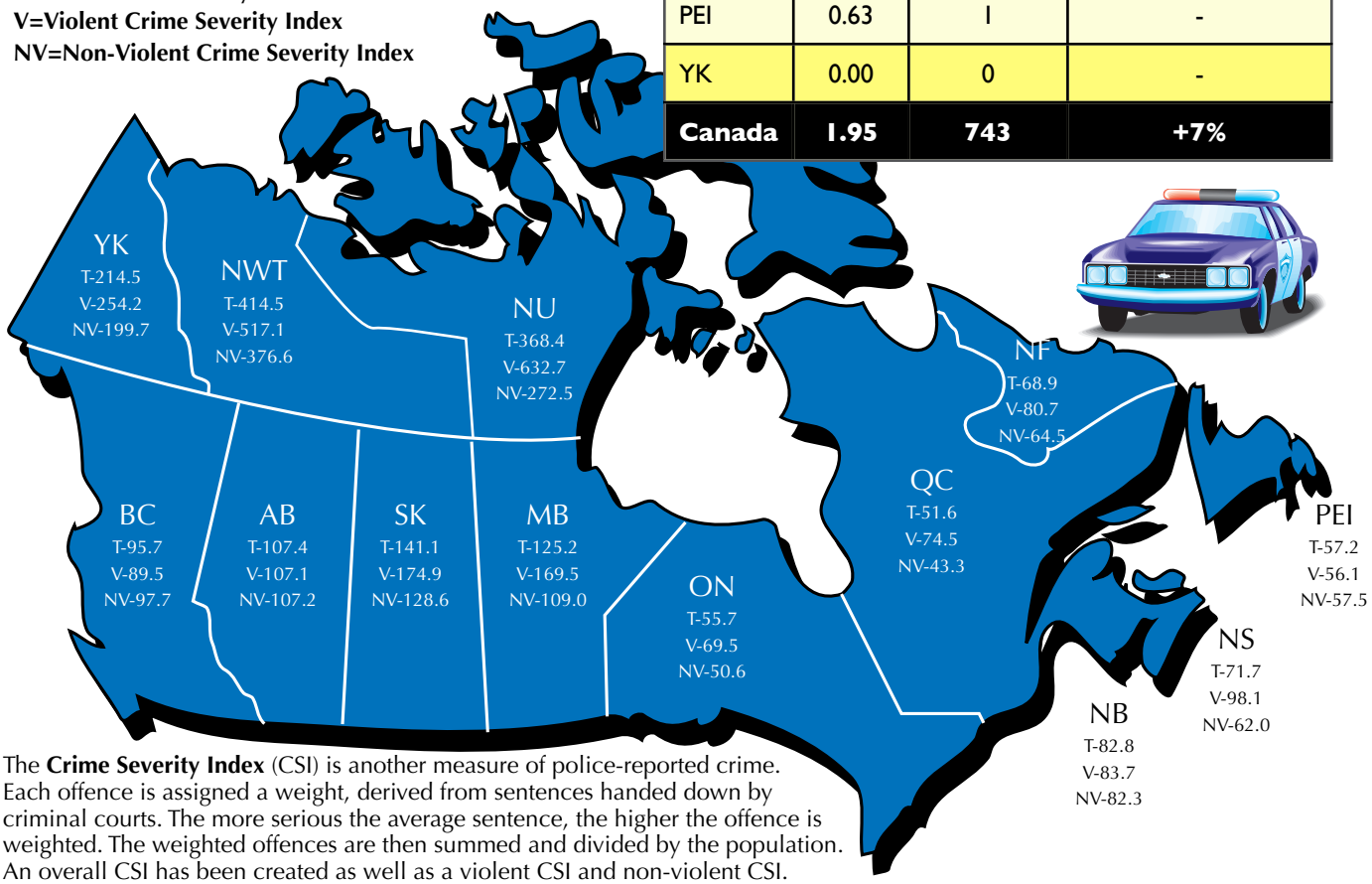
Source: Statistics Canada, 2021, "Police-reported crime statistics in Canada, 2020, Catalogue no. 85-002-X, released on July 27, 2021.

Police-Reported Homicide Offences

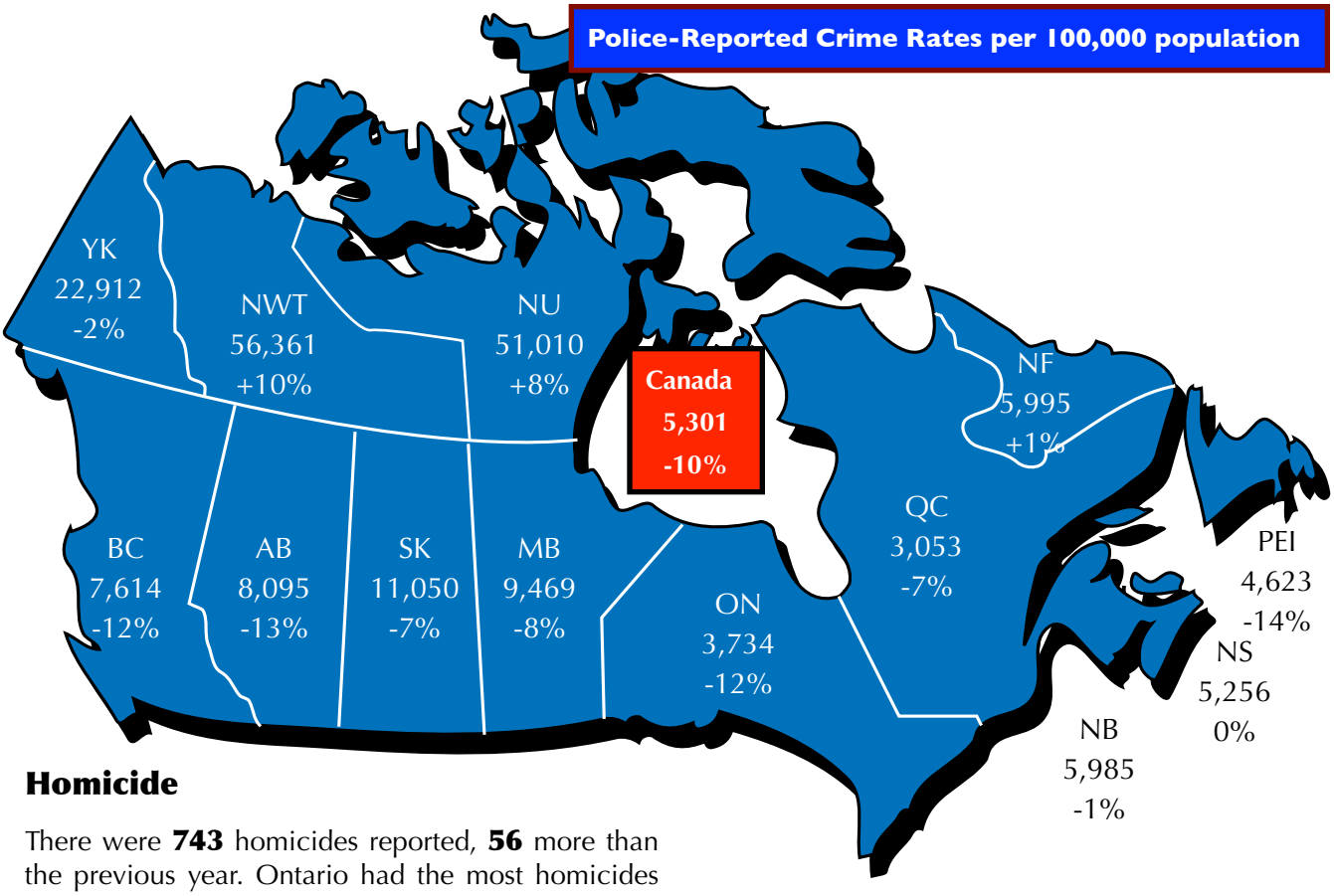
Province	Rate	Homicides	Rate change (2019 to 2020)
NWT	13.29	6	-
NU	7.62	3	-
SK	5.09	60	+9%
MB	4.50	62	-14%
NS	3.57	35	+478%
AB	3.14	139	+37%
BC	1.90	98	+8%
NB	1.79	14	-18%
ON	1.59	234	-9%
QC	1.01	87	+12%
NF	0.77	4	-
PEI	0.63	1	-
YK	0.00	0	-
Canada	**1.95**	**743**	**+7%**

Police-Reported Crime Severity Indexes

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



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



Homicide

There were **743** homicides reported, **56** more than the previous year. Ontario had the most homicides at **234**, followed by Alberta (**139**), British Columbia (**98**) and Quebec (**87**). Nova Scotia had **35** homicides, including **22** deaths resulting form a mass shooting. As for provincial homicide rates, Saskatchewan had the highest rate (**5.09** per 100,000 population) followed by Manitoba (**4.50**), Nova Scotia (**3.57**), and Alberta (**3.14**). As for Census Metropolitan Areas (CMA's), Thunder Bay, ON had the highest homicide rate at **6.35**. The Canadian homicide rate was **1.95**.

Top CMA Homicide Rates per 100,000

CMA	Rate	CMA	Rate
Thunder Bay, ON	6.35	Greater Sudbury, ON	2.96
Winnipeg, MB	4.93	Brantford, ON	2.62
Regina, SK	4.54	Calgary, AB	2.53
Saskatoon, SK	4.10	Hamilton, ON	2.32
Edmonton, AB	3.19	Peterborough, ON	2.32

Canada's Top Ten Reported Crimes

Offence	Number
Theft of $5,000 or less (non-motor vehicle)	343,521
Mischief	297,185
Administration of Justice Violations	201,462
Assault-level 1	177,580
Fraud	138,011
Break and Enter	137,516
Disturb the Peace	107,258
Shoplifting Under $5,000	90,904
Uttering Threats	84,171
Theft of Motor Vehicle	78,155

Robbery

In 2020 there were **19,268** robberies reported, resulting in a national rate of **51** robberies per 100,000 population. Manitoba had the highest robbery rate followed by Saskatchewan and the Northwest Territories.

Police-Reported Robberies

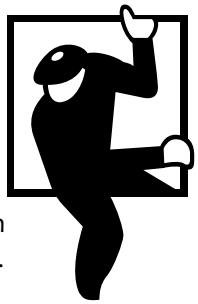
Province/ Territory	Rate	Robberies	Rate change 2019 to 2020
MB	162	2,240	-17%
SK	80	946	-16%
NWT	75	34	-6%
AB	66	2,926	-21%
ON	48	7,117	-21%
BC	52	2,674	-8%
NF	24	127	-23%
QC	32	2,761	-20%
YK	55	23	+3%
NU	28	11	-28%
NS	27	267	+11%
NB	17	134	-21%
PEI	5	8	-67%
CANADA	**51**	**19,268**	**-18%**

- Winnipeg, MB had the highest CMA rate for robbery in Canada (**228**), down **-18%** from 2019 rate. Saguenay, QC & Quebec City, QC both had the lowest rate (**12**). Peterborough, ON reported a jump of **45%** in its robbery rate. Guelph, ON (**+36%**), Kingston, ON (**+33%**), and Saint John, NB (**+31%**) also saw high double digit increases.
- Five CMAs reported declines of robbery of more than 30%: Belleville, ON (**-49%**) Saguenay, QC, (**-46%**), Moncton, NB (**-41%**), Quebec City, QC (**-36%**), Barrie, ON (**-36%**), and Ottawa, ON (**-31%**).

Top Ten CMA Robbery Rates per 100,000

CMA	Rate	CMA	Rate
Winnipeg, MB	228	Calgary, AB	66
Thunder Bay, ON	107	Brantford, ON	65
Regina, SK	107	Windsor, ON	62
Saskatoon, SK	96	Vancouver, BC	62
Edmonton, AB	86	Toronto, ON	60

Break and Enter



In 2020 there were **137,516** break-ins reported to police. The national break-in rate was **362** break-ins per 100,000 people. The Northwest Territories had the highest break-in rate (**819**) followed by Nunavut (**765**).

Police-Reported Break-ins

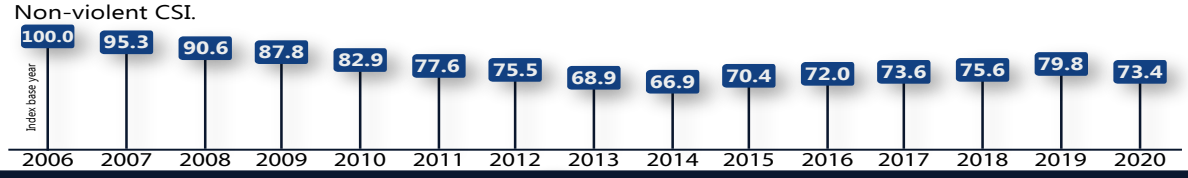
Province/ Territory	Rate	Break-ins	Rate change 2019 to 2020
NU	765	301	-33%
NWT	819	370	-22%
SK	729	8,592	-15%
MB	625	8,627	-23%
AB	663	29,316	-13%
BC	480	24,704	-15%
YK	478	201	-24%
NB	399	3,115	-16%
NF	291	1,521	-24%
ON	267	39,382	-14%
QC	218	18,674	-21%
NS	243	2,375	-11%
PEI	212	338	-29%
CANADA	**362**	**137,516**	**-16%**

POLICE-REPORTED CRIME IN CANADA, 2020

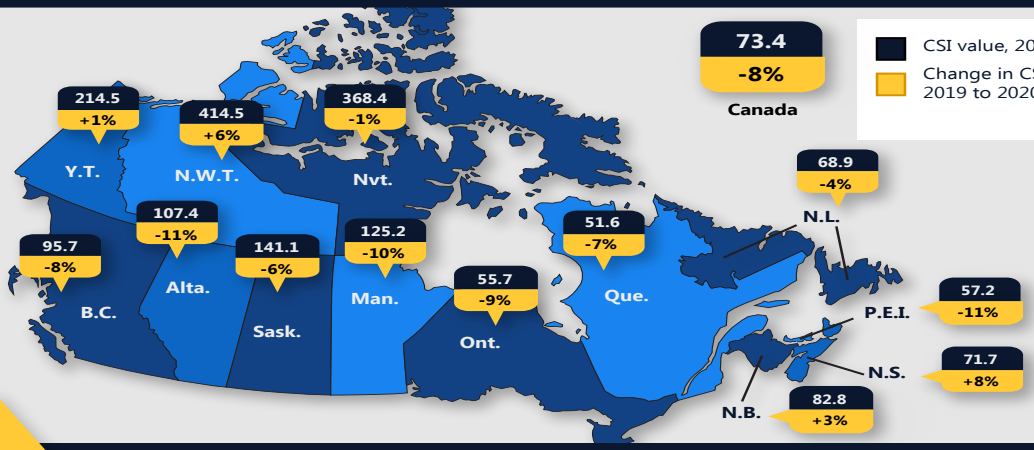
CRIMES AFFECTING THE CHANGE IN CSI BECAUSE OF THEIR VOLUME AND SEVERITY

TYPE OF OFFENCE	RATE
BREAKING AND ENTERING	-16%
THEFT UNDER $5,000	-20%
ROBBERY	-18%
SHOPLIFTING UNDER $5,000	-36%
ADMINISTRATION OF JUSTICE VIOLATIONS	-17%
SEXUAL ASSAULT (LEVEL1)	-9%

THE CRIME SEVERITY INDEX (CSI)[1] was 8% lower than in 2019, the first decrease after 5 years of increases. In the first year of the pandemic, the Violent CSI decreased 4%, while the Non-violent CSI decreased 10%. This was the largest year-over-year change recorded for the Non-violent CSI.



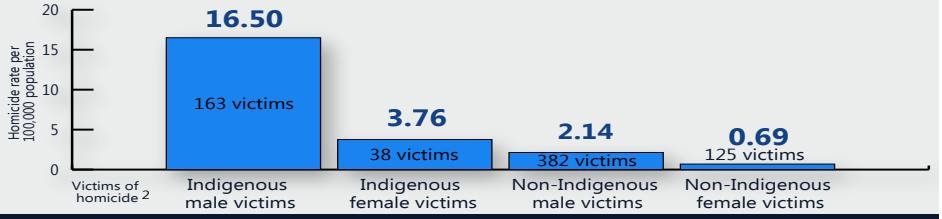
IN 2020, MOST PROVINCES AND ONE TERRITORY REPORTED DECREASES IN THEIR CSI.



2,669 HATE CRIME INCIDENTS

The number of police-reported hate crimes increased **37%** to **2,669 incidents**. Hate crimes targeting the Black population, East or Southeast Asian population, Indigenous population, and South Asian population accounted for most of the national change.

743 VICTIMS OF HOMICIDE IN CANADA, **56** MORE THAN IN 2019.



The rate of police reported opioid offences (excluding heroin) increased **34%** in 2020. Of all specific drug offences reported in 2020, opioid offences were the only ones to have increased from the previous year.

The rate of total fraud[3] **remained stable** for the first time in 9 years; however, rates of identity theft **(+52%)** and identity fraud **(+12%)** increased.

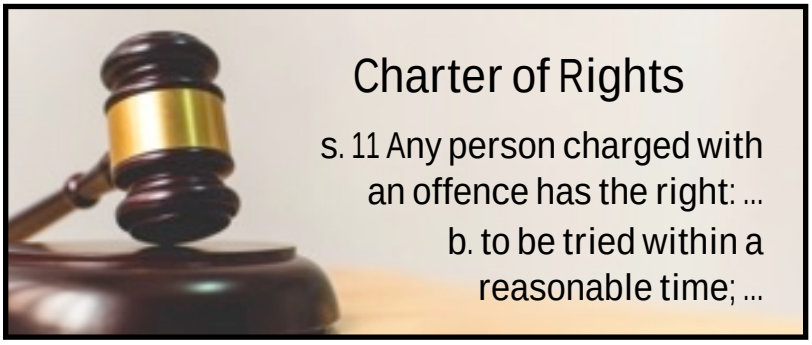
5 LARGEST INCREASES AND DECREASES IN CSI AMONG CENSUS METROPOLITAN AREAS

Top 5 increases by CMA	Change in CSI, 2019 to 2020	Top 5 decreases by CMA
Peterborough	+14%	-20% Regina
Greater Sudbury	+7%	-17% Calgary
Kingston	+4%	-16% Ottawa
Victoria	+3%	-16% Barrie
Halifax	+2%	-15% Toronto

1. While the crime rate measures the volume of crime, the Crime Severity Index (CSI) measures both the volume and severity of crime. To determine severity, all crimes are assigned a weight based on actual sentences handed down by courts in all provinces and territories. More serious crimes are assigned higher weights, while less serious crimes are assigned lower weights. As a result, more serious offences have a greater impact on changes in the index.
2. Total homicide victims excludes persons where the Indigenous identity or gender identity was reported as unknown by police (5% of victims in 2020). Rates are calculated per 100,000 Indigenous population by sex, and per 100,000 non-Indigenous population by sex.
3. Total fraud includes general fraud, identity theft and identity fraud.

Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Uniform Crime Reporting Survey. "Police-reported crime statistics in Canada, 2020." *Juristat*. Statistics Canada Catalogue no. 85-002-X.

Catalogue number: 11-627-M | ISBN: 978-0-660-39073-4



ALBERTA JORDAN APPLICATIONS

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

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

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

Between October 25, 2016 and March 31, 2021, there were **332** *Jordan* applications filed in Alberta courts.

Source: Jordan Applications

Of the **332** applications, they were disposed of in the following manner:

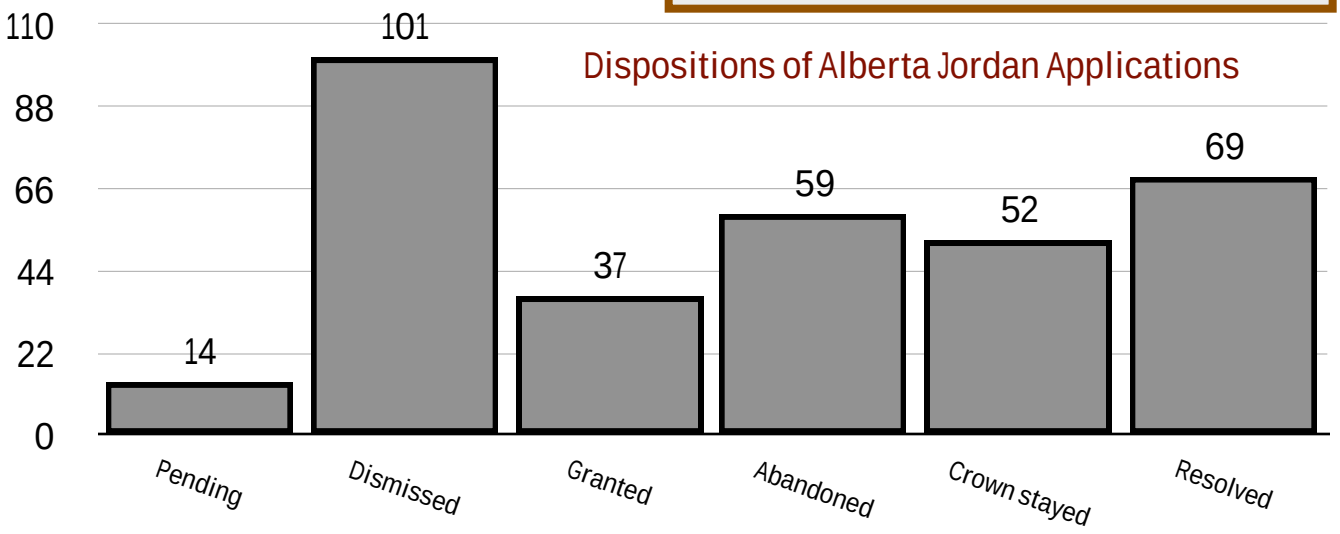
- **14** pending;
- **101** dismissed by the Court;
- **37** granted (two being appealed by Crown);
- **59** abandoned by defence
- **52** proactively stayed by the Crown (on the basis that they would not have survived a *Jordan* application); and
- **69** were resolved (unrelated to *Jordan*).

LEGALLY SPEAKING:

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

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

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



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 June 30, 2021 there were **415,450** DNA profiles contained in the COI. The NDDB receives 400 to 500 convicted offender samples per week. There was also **187,499** DNA profiles contained in the CSI.

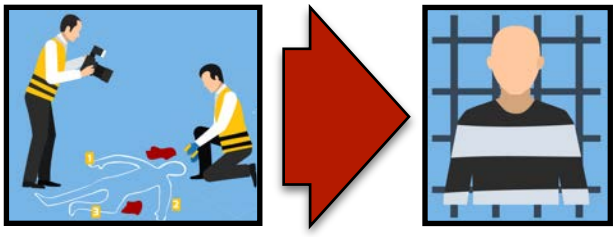
Index	Total DNA Profiles
Convicted Offender (COI)	415,450
Crime Scene (CSI)	187,499
Victims Index (VI)	63
Total DNA Profiles	603,012

Comparisons

Assistance is sometimes provided to criminal investigation through the following comparisons:

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.



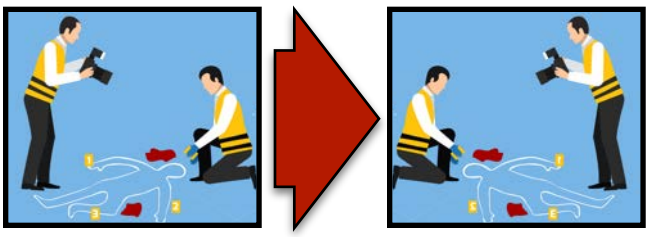
As of June 30, 2021 there were **67,765** offender hits (CSI > COI). As of March 31, 2021 offender hits related to the following case types:

Offence	Total Offender Hits
Murder	4,287
Sexual Assault	6,947
Attempted Murder	1,288
Armed Robbery	7,258
Break & Enter	29,477
Assault	5,225
Other	12,057
Total	66,539

Convicted Offender Biological Samples Received	
Blood	98.60%
Buccal	1.30%
Hair	0.10%

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 June 30, 2021 there were **7,362** forensic hits (CSI > CSI).

Source: National DNA Data Bank Statistics [accessed August 11, 2021]

SUCCESS RATE OF APPEALS RISES IN BC's HIGHEST COURT

According to the BC Court of Appeal's 2020 Annual Report, the success rate for challenges to a lower court ruling was the highest in the last five years. Of the 110 criminal appeal dispositions in 2020, 49 were allowed. This represented a 45% success rate. That means 45% of the time a lower court judge got it wrong or, in the language of the courts, erred. Remember, an appellant, whether Crown or the accused, must prove that the decision made by the lower court was incorrect because the judge made a mistake in understanding the facts (error of fact) or in applying the law (error in law). An appeal is not a new trial.

Criminal Court Dispositions					
Year	2016	2017	2018	2019	2020
Appeals Allowed	32	42	30	50	49
Percent (%) Allowed	22%	34%	27%	32%	45%
Appeals Dismissed	114	82	83	104	61
Percent (%) Dismissed	78%	66%	73%	68%	55%
Total	146	124	113	154	110

There are no witnesses testifying during an appeal nor is there a jury. In addition, even if the judge erred, it must also be proven that the mistake significantly affected the outcome of the case.

- In 2020 there were a total of **129** criminal appeals filed. This was down **41%** from 2019.
- Usually an appeal is heard by a panel of three (**3**) judges, but sometimes more will sit. In 2020 there was only one criminal appeal heard by a panel of five (**5**) judges.

Criminal Appeals Filed					
Year	2016	2017	2018	2019	2020
Appeals Filed	209	246	258	219	129
Sentence	85	97	107	90	49
Conviction	82	95	118	92	56
Summary Conviction	11	11	10	11	12
Acquittal & Other	31	43	23	26	12

Reasons an accused may appeal a sentence include (1) it is excessive (too harsh), (2) it is illegal (not authorized by statute), or (3) the sentencing judge erred in applying one of more principles of sentencing (ignored or overemphasized them) and this error impacted the sentence. Reasons an accused may appeal a conviction include (1) the verdict was unreasonable or couldn't be supported by the evidence, (2) the judge made an error of law, or (3) there was a miscarriage of justice.

The success rate for civil appeals had a similar fate. A slightly higher percentage (**46%**) were successful in 2020.

Civil Court Dispositions					
Year	2016	2017	2018	2019	2020
Appeals Allowed	117	112	104	97	87
Percent (%) Allowed	41%	40%	40%	42%	46%
Appeals Dismissed	169	168	155	134	102
Percent (%) Dismissed	59%	60%	60%	58%	54%
Total	286	280	259	231	189

PRODUCTION ORDER ITO NEED NOT ESTABLISH ITS EXECUTION WILL AFFORD EVIDENCE AGAINST ACCUSED

The Ontario Court of Appeal has held that the issuance of a production order does not require reasonable grounds to believe that its execution could provide evidence against a particular accused. In **R. v. Mawick, 2021 ONCA 177** the accused argued that an Information to Obtain (ITO) used to obtain a production order for a money service business ("Cash House") did not establish a basis to believe it could provide any evidence that he had committed a fraud. Therefore, the warrant should not have been issued. In rejecting this ground of appeal, Justice Rouleau, for a unanimous Court of Appeal, found the affiant to the ITO need not satisfy the issuing justice that there are reasonable grounds to believe that the record holder has documents that will afford evidence against the accused:

- ***"Production orders are presumed valid and properly issued. When the validity of the order is confirmed by a reviewing judge, that ruling is entitled to deference on appeal."*** [references omitted, para. 36]
- ***"In order to issue a production order under s. 487.014(2) of the Criminal Code, the judge or justice making the production order against a person must be satisfied that there are reasonable grounds to believe: (a) an offence has been or will be committed, and (b) the document or data is in the person's possession or control and will afford evidence respecting the commission of the offence."*** [para. 7]
- ***"Section 487.014(2)(b) only requires the affiant to show reasonable grounds to believe that a production order will afford evidence "respecting the commission of an offence". ... Put simply, there was no requirement to establish that the Cash House production order would afford evidence against the [accused] directly."*** [references omitted, para. 40]

Complete case available at www.ontariocourts.on.ca

BY THE BOOK:

s. 487.014 Criminal Code

General production order

s. 487.014 (1) Subject to sections 487.015 to 487.018, on ex parte application made by a peace officer or public officer, a justice or judge may order a person to produce a document that is a copy of a document that is in their possession or control when they receive the order, or to prepare and produce a document containing data that is in their possession or control at that time.

Conditions for making order

(2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to believe that

(a) an offence has been or will be committed under this or any other Act of Parliament; and

(b) the document or data is in the person's possession or control and will afford evidence respecting the commission of the offence.

Form

(3) The order is to be in Form 5.005.

Limitation

(4) A person who is under investigation for the offence referred to in subsection (2) may not be made subject to an order.

"Section 487.014(2)(b) only requires the affiant to show reasonable grounds to believe that a production order will afford evidence 'respecting the commission of an offence'."

EVIDENCE OF PRIOR UNCHARGED CRIMINAL ACTIVITY OK IN ITO

The British Columbia Court of Appeal says police can use prior uncharged criminal activity in an ITO to establish reasonable grounds for a search warrant. In **R. v. Le, 2021 BCCA 52**, police in BC used the accused's dated criminal record for possessing a narcotic and possessing drugs for the purposes of trafficking in an ITO to obtain a search warrant. The ITO also included information connecting the accused to more recent large, outdoor illicit marihuana grow operations in Ontario where police saw him on two properties where marihuana was being cultivated. He had also purchased an industrial water pump that was installed at one of the grow operations.

At trial in BC Provincial Court, the judge found the accused's drug related convictions were relevant but dated, and it was unclear whether the circumstances related to those offences bore any similarity to the current case. As for including the information about the Ontario investigation in which the accused was a person of interest, the trial judge noted there was divergent case law on the issue that needed to be reconciled.

Prior Uncharged Criminal Activity

Justice Groberman, speaking for the Court of Appeal, found earlier BC cases (*R. v. Loewen*, 2016 BCCA 351; *R v. Della Penna*, 2012 BCCA 3; and *R. v. Hutchings*, (1996) 111 C.C.C. (3d) 215 (BCCA), leave to appeal ref'd, [1997] S.C.C.A. No. 21) ***"stand for the proposition that reference to prior suspected criminal activity is appropriately included in an ITO, as long as the prior activity was of a type that is relevant to the investigation, and as long as the prior suspected activity did not result in charges that were dismissed."*** He continued:

> Subsequent authority also appears to confirm that the approach taken in Loewen is the correct one. In R. v. Li, 2020 SCC 12, the issue was entrapment. The question for the Court was whether the police had "reasonable suspicion" that a specific phone number was being used in a dial-a-dope operation before they called the number and arranged to purchase drugs. The anonymous tip provided to the police referred to a specific vehicle that was allegedly used in the operation. The police determined that the vehicle belonged to an individual "with an extensive and recent history of suspected dial-a-dope drug dealings", though he had not been charged. The Court found that evidence to be important in supporting a reasonable suspicion.
>
> In terms of the weight to be given to the evidence of suspected criminal activity, it is important to recognize that the judicial justice of the peace was obliged to consider all of the information in the ITO together, not to reach separate conclusions as to the cogency of each piece of relevant evidence. ... [para. 82-8]

Insufficient Investigation

The trial judge also suggested that additional investigation was necessary before the information in the ITO could be considered. In deciding whether a warrant could be quashed because an investigation was insufficiently thorough, Justice Groberman stated:

> It is important, for both the issuing justice and the reviewing judge to recognize that it is for the investigating authorities to decide how to conduct their investigations and how deeply to

"[R]eference to prior suspected criminal activity is appropriately included in an ITO, as long as the prior activity was of a type that is relevant to the investigation, and as long as the prior suspected activity did not result in charges that were dismissed."

"The requirement that an ITO include all information that 'ought to be known', then, does not go so far as to impose on the police a legal obligation to conduct a 'thorough' or 'diligent' investigation, as desirable as such an investigation may be."

delve into particular questions. The mere fact that further inquiries could have been conducted will not mean that a search warrant cannot issue. ...

I would make two observations that, in minor respects, may be seen as qualifications to the general proposition that investigations that might have been undertaken, but were not, are not to be considered in assessing whether a search warrant should have issued.

First, perfunctory investigations will typically fail to provide a sufficient factual foundation to establish a credibly-based probability that a search will uncover evidence of a crime. A justice of the peace examining an ITO is entitled to consider the significance of evidentiary gaps in it. Where obvious inquiries have not been undertaken, the credibility of any suspicion will be impacted, and may well be undermined. Where the ITO does not provide evidence sufficient to meet the "credibly-based probability" threshold, no search warrant can issue.

Second, an ITO will be found to be misleading where investigators have failed to disclose information that was known or ought to have been known to them. ...

The requirement that an ITO include all information that "ought to be known", then, does not go so far as to impose on the police a legal obligation to conduct a "thorough" or "diligent" investigation, as desirable as such an investigation may be.

> While [*R. v. Morelli*, 2010 SCC 8] does ... speak of "police diligence" when applying for search warrants, it is referring to diligence in preparing the affidavit material, and not diligence in the underlying investigations.
>
> The question for the judge in this case, therefore, was not whether the police investigation was sufficiently thorough, but rather whether the nature and result of the investigations were adequately described in the ITO, and whether the investigations gave rise to a credibly-based probability that an illegal marihuana production operation was taking place on the property. [references omitted, paras. 47-53]

A subsequent appeal to the Supreme Court of Canada was dismissed on July 15, 2021.

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

"It is important, for both the issuing justice and the reviewing judge to recognize that it is for the investigating authorities to decide how to conduct their investigations and how deeply to delve into particular questions. The mere fact that further inquiries could have been conducted will not mean that a search warrant cannot issue."

ASSAULT PO FORMS UNLAWFUL ACT FOR UNLAWFULLY CAUSING BODILY HARM

R. v. Eddison, 2021 BCCA 168

Two uniformed officers working night shift sat in their unmarked police car at about 1:35 a.m. They were parked in an entertainment area. The accused, who was siting on a nearby bench, mouthed words and gestured at police. He then unsteadily walked towards the police car and spoke to the passenger officer. He appeared to be frustrated and angry, and smelled of a strong odour of alcohol. He asked the officer for a for a cigarette. The officer driving the police car moved it a short distance to get away from the accused, but he followed and continued to ask the passenger officer for a cigarette. Although the officer told the accused he did not have a cigarette, the accused repeated his demand and said, ***"Give me the fucking cigarette or else I'll fucking kill you".*** The passenger officer got out of the police car to arrest the accused for uttering a threat. The accused backed away and took a fighting stance, telling the officer, ***"Watch out, or I will fuck you up."***

The officer told the accused he was under arrest. The accused replied, ***"No, I'm fucking not"***. The officer moved forward about two meters and took hold of the accused's right arm. The accused grabbed the officer and pushed him back towards the police car. The officer regained some control and swept the accused's leg, taking him to the ground. During the takedown, the other officer, who had also got out of the police car to assist, suffered a serious injury to her leg. She felt a bone protruding from her skin and her foot appeared to be bent backwards. She had suffered an open fracture to her left tibia and fibula The accused was charged with uttering a threat and assaulting a police officer in the execution of his duty with respect to the arresting officer, and aggravated assault, assaulting a police officer causing bodily harm, aggravated assault of a police officer, and unlawfully causing bodily harm with respect to the injured officer.

BY THE BOOK:

s. 269 *Criminal Code*

Unlawfully causing bodily harm

Every one who unlawfully causes bodily harm to any person is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

s. 2 Definitions

"**bodily harm** means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature".

British Columbia Provincial Court

The accused was convicted of both charges related to the arresting officer. He was acquitted, however, of the charges related to the officer suffering the fracture to her leg. The trial judge had difficulty determining how the officer actually sustained her injury. He said the officer's injury could have occurred in two plausible ways: (1) she was intentionally kicked by the accused, or (2) the accused fell backwards onto her while resisting arrest and assaulting the arresting officer. Because he could not resolve what caused the injury, the judge found the Crown had failed to meet its burden in proving any of the charges involving the injured officer beyond a reasonable doubt.

British Columbia Court Appeal

The Crown argued, among other things, that the trial judge erred in acquitting the accused in relation to the unlawfully causing bodily harm charge. In the Crown's view, although it could not prove the accused intended

"Under s. 269 of the Code, it is an offence to unlawfully cause bodily harm to any person. The elements of the offence are not controversial. The Crown must prove the following elements beyond a reasonable doubt: that the accused committed an underlying unlawful act; the objective foreseeability of non-trivial bodily harm; and that bodily harm resulted from the unlawful act. The mental element of the offence thus has two components: objective foreseeability of non-trivial bodily harm; and the mental element required for the underlying offence or unlawful act."

and did in fact kick the officer, either of the two plausible versions of events accepted by the trial judge were sufficient to prove the unlawfully causing bodily harm offence.

Unlawful Cause Bodily Harm

Justice Butler, delivering the decision of the Court of Appeal, noted the elements of s. 269 of the *Criminal Code*:

> Under s. 269 of the Code, it is an offence to unlawfully cause bodily harm to any person. The elements of the offence are not controversial. The Crown must prove the following elements beyond a reasonable doubt: that the accused committed an underlying unlawful act; the objective foreseeability of non-trivial bodily harm; and that bodily harm resulted from the unlawful act. The mental element of the offence thus has two components: objective foreseeability of non-trivial bodily harm; and the mental element required for the underlying offence or unlawful act. [reference omitted, para. 38]

The Crown suggested that the accused was engaged in an unlawful act — assaulting the arresting officer — and bodily harm resulted. Justice Butler agreed. Either of the two scenarios described by the trial judge — an intentional kick or falling backwards while resisting arrest — were sufficient to support the first element of s. 269 (the unlawful act).

As for the mental element, an inability to prove the necessary intent for assault was not fatal to proving the intent for the distinct charge of unlawfully causing bodily harm. In this case, the mental element required for the underlying unlawful act — assaulting the arresting officer — had been proven. And, the defence had conceded that, if the accused was guilty of resisting arrest, it was reasonably foreseeable that some harm could occur. In light of this concession, the Crown had proven that harm was reasonably foreseeable. It was not necessary for the Crown to establish the specific harm caused — the leg fracture — was foreseeable.

"[The accused] threatened [an officer], resisted arrest and fought against the lawful attempt to take him into custody," said Justice Butler. ***"[The accused's] unlawful actions were a cause of the injury to [the other officer], whether he directly kicked her or she was injured when he fell backwards into her and the police car door. While he may not have foreseen the precise consequences of his conduct, it was objectively foreseeable that his altercation with [the arresting officer] could lead to an injury to him or to [the other officer] if she provided assistance."***

The Crown's appeal was allowed, the accused's acquittal on the unlawfully cause bodily harm charge was set aside, a conviction was entered, and the matter was remitted to the trial court for sentencing.

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

'MOTOR ASSISTED CYCLE': MOTOR MUST BE CAPABLE OF SUPPLEMENTING HUMAN PROPULSION

R. v. Ghadban, 2021 BCCA 69

A police officer observed the accused riding a Motorino XMr scooter on a public road. His young son was also on the scooter. The officer stopped the accused and asked him to produce his driver's licence and proof of insurance, but the accused was unable to do so. He was not licenced to drive a motor vehicle and the scooter he was riding was not insured. The accused was issued violation tickets for driving without a driver's licence (s. 24(1)) and driving without insurance (s. 24(3)) under BC's *Motor Vehicle Act* (*MVA*).

British Columbia Provincial Court

The accused disputed his violation tickets. Photographs of the scooter and an owner's manual, which included operating instructions and specifications, were entered as exhibits. The scooter, which had a 500-watt electric direct drive motor in its rear wheel, resembled a motorcycle — handlebars, wheels, seat, suspension, frame and instrumentation — but it also had pedals attached to it. The pedals drove a chain connected to the rear wheel and could be removed without interfering with the ordinary operation of the scooter. The accused testified he had never used the pedals because he did not want to pedal the weight of the scooter, which he estimated at 300 lbs. He said the motor could not be used while pedaling and, if a rider chose to pedal the scooter, the motor was always off. He also said the scooter was incapable of exceeding 32 km/h.

The Judicial Justice found the vehicle operated by the accused was not a **"motor assisted cycle"** as defined by s. 1 of the *MVA* and, therefore, was not excluded from the definition of a **"motor vehicle"**. The Judicial Justice addressed both the propulsion aspect of the scooter (its electric propulsion did not assist human propulsion) as well as its wheel size (it was too small). In his view, the Motorino XMr was an electric scooter capable of being pedaled rather than a cycle assisted by electric propulsion. Since the scooter primarily relied on electric propulsion it was not a motor assisted cycle within the meaning of the *Motor Assisted Cycle Regulation*. As a motor vehicle, its operation required a valid driver's license and insurance. Since the accused did not have a valid driver's license, and the vehicle was not insured, the accused was convicted of the offences alleged in the violation ticket.

British Columbia Supreme Court

The accused argued the Judicial Justice erred in convicting him of the offences charged. The appeal judge, however, agreed with the trial judge's conclusion that a Motorino XMr did not comply with the intent of the legislation, which was for a motor assisted cycle to supplement or assist the human power required to pedal the vehicle. The accused's appeal was dismissed and his convictions upheld.

British Columbia Court of Appeal

The accused argued, in part, that the appeal judge erred in upholding the judicial justice's interpretation that a motor assisted cycle be primarily powered by human power, with electric power limited to a supplementary role.

"Motor Vehicle" or "Motor Assisted Cycle"?

Under BC's *MVA*, a person requires a valid driver's licence and insurance to operate a motor vehicle, but not to operate a motor assisted cycle. Both a motor vehicle and a motor assisted cycle are defined in s. 1 of the *MVA*.

"motor vehicle" means a vehicle, not run on rails, that is designed to be self-propelled or propelled by electric power obtained from overhead trolley wires, but does not include mobile equipment or a motor assisted cycle.

"motor assisted cycle" means a device

(a) to which pedals or hand cranks are attached that will allow for the cycle to be propelled by human power,

(b) on which a person may ride,

(c) to which is attached a motor of a prescribed type that has an output not exceeding the prescribed output, and

(d) that meets the other criteria prescribed under section 182.1 (3).

In addition, the *Motor Assisted Cycle Regulation* contains a number of requirements for motor assisted cycles. For example, a motor assisted cycle must have an electric motor that does not exceed 500 watts and is not capable of propelling the cycle at a speed greater than 2 km/h on level ground, and its wheels must be 350 mm or more in diameter. Furthermore, it must be equipped with a motor shut-off:

s. 3 (1) A motor assisted cycle must be equipped with a mechanism, separate from the accelerator controller, that

(a) allows the driver to turn the motors on and off from a normal seated position while operating the motor assisted cycle, or

(b) prevents the motors from turning on or engaging before the motor assisted cycle attains a speed of 3 km/hr.

(2) The motors of a motor assisted cycle must turn off or disengage if

(a) the operator stops pedaling,

(b) an accelerator controller is released, or

(c) a brake is applied.

Justice Groberman, speaking for a two-member majority, concluded that the proper interpretation of s. 3(2) in the *Regulation* meant that the motor of the motor assisted cycle must turn off or disengage in each of the three situations described, and not just in at least one of the situations:

> It appears to me that s. 3(2) is a safety provision, designed to ensure that the motor is not providing motive force when the rider does something that shows that motive force is not required. Thus, the motor ought to disengage in each of the three situations. There would be no rationale for a regulation that required the motor to disengage in only one of the three situations. [para. 28]

In this case, the accused could not stop the motor by ceasing to pedal it because the motor would not operate while it was being pedaled and would already be off when pedaling stops. But his scooter would turn off or disengage in the other two situations. When the throttle control was released the motor was turned off, and when the brakes were applied the motor stopped providing force to the wheel and was no longer powering it.

Jusice Groberman also found ***"it is important to recognize that s. 3(2) does not require a rider to be pedaling in order to start or engage the motor; rather, it says that if a person is pedaling, and stops, the motor must stop or disengage. There is, then, no prohibition on running the electric motor without pedaling at the same time."*** Thus, riders are not prohibited from using the electric motor when the cycle is not being pedaled.

The legislation does not require that a motor assisted cycle be primarily propelled by human power. Rather, it must be designed to be primarily propelled by human power, with electric power supplementing or assisting. In other words, the cycle must be designed in such a way that human power is the primary force intended to be used to power it and the electric motor is a secondary source of power, to assist the rider in cycling, not to be an alternative to it. Justice Groberman stated:

> In my view, "motor assisted cycle" should not, without good reason, be interpreted to include a device where the motor can be used only as an alternative to human power, or a device where the use of human power is impractical.

"[A] device cannot be a motor assisted cycle unless it is designed so that the motor is capable of being used to supplement human propulsion."

> ... The Motor Vehicle Act and Motor Assisted Cycle Regulation deliberately chose to use the words "motor assisted", and the concept should be interpreted in a way that is, as far as possible, harmonious with the words chosen.
>
> The regulation includes a provision in s. 3(2)(a) that specifically requires that the motor stop or disengage when the rider stops pedaling. In my view, that is telling. The drafter clearly contemplated a device that allowed the motor to be engaged while the rider was pedaling. That interpretation is consonant with the use of the term "motor assisted cycle". As I see it, a device cannot be a motor assisted cycle unless it is designed so that the motor is capable of being used to supplement human propulsion.
>
> In saying this, I do not suggest that a motor assisted cycle cannot have the motor operating without the rider pedaling. It is quite consistent with the idea of "motor assisted cycling" that the rider can, at times, stop pedaling and rest, re-engaging the motor using the accelerator controller. It is also completely consistent with the language of the regulation. What is not consistent with the concept of a "motor assisted cycle" or with the regulation is an electric scooter where the motor is never used to assist human-powered cycling, but is used exclusively as an alternative to it. [paras. 47-50]

And further:

> I do not suggest that a motor assisted cycle must be incapable of being operated when the rider is not pedaling. I say only that the design must contemplate human power being a primary means of propulsion, and must allow for a person to pedal at the same time as the motor is providing assistance. [para. 53]

In this case, the accused's scooter was not a "motor assisted cycle" for two reasons:

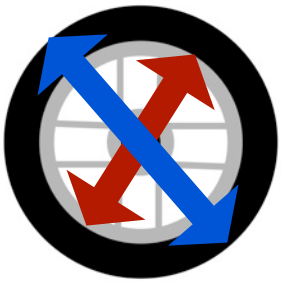
1. **"[T]he scooter is too heavy to be practical as a human-powered device. It is designed to be used as a motor-scooter, not a pedal powered cycle. That does not comply with the clear intention of the legislation."**

2. **"[T]he evidence shows that the motor cannot operate at any time when the rider is pedaling. The motor is only an alternative to human-powered cycling, not an assistance to it."**

The appeal judge did not err in finding the accused's scooter was not a motor assisted cycle. The accused's appeal was dismissed and his convictions were affirmed.

A Different View

Justice Saunders disagreed with the majority. In her view, the accused's scooter-like device met the first four requirements of the definition of a motor assisted cycle. It had pedals attached, it allowed for propulsion by human power, it was a device on which a person could ride, and it had a motor attached of the type prescribed in the *Regulation*. She also found the scooter complied with s. 3 of the *Regulation*, including disengagement of the motor.



The only issue which required further exploration was the wheel size. However, the term **"wheel"** was not defined. If the "wheel" was measured from **rim edge to rim edge** it was likely too small, but if it was measured from **tire edge to tire edge** it was likely large enough. Since the wheel size was not properly addressed at trial, Justice Saunders would allow the appeal, set aside the convictions and remit the charges back to Provincial Court for a fresh determination on the matter.

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

9/11: A SOMBER REMINDER OF THE ULTIMATE SACRIFICE

According to the Officer Down Memorial Page, the terrorist attacks on September 11, 2001 caused more law enforcement line of duty deaths than any other single incident in U.S. history. One officer, who had tried to gain control from the hijackers, was killed when United Flight 93 crashed in Shanksville, Pennsylvania. Another 71 officers were killed when the two World Trade Center buildings collapsed in New York City. And, as of August 27, 2021 the Memorial Page identified more than 300 officers who died from a 9/11 related illness.

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- **Corporal Harvey Snook, III**

Cayuga County Sheriff's Office, NY

- **Undersheriff Stephen B. McLoud**

City University of New York Department of Public Safety, NY

- **Deputy Chief John P. McKee**

Connecticut State Police, CT

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- **Trooper First Class Walter Greene, Jr.**

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Montclair State University Police Department, NJ

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- Police Officer Peter Martino
- Police Officer Paul J. McCabe
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- Lieutenant Michael P. Shea

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- Staff Sergeant Bryan U. McCoy
- Trooper Robert Emmet Nagle

New Rochelle Police Department, NY

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- Police Officer Kathleen O'Connor-Funigiello

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- Fire Marshal Ronald P. Bucca

New York City Police Department, NY

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- **Detective Philip T. Perry**
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- **Detective Joseph L. Pidoto**
- **Sergeant Louis R. Pioli**
- **Captain Peter L. Pischera**
- **Police Officer Francis Thomas Pitone**
- **Police Officer Frank J. Pizzo**
- **Police Officer Nancy A. Puca**
- **Lieutenant Christopher M. Pupo**
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- **Detective Joseph Edward Seabrook**
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- **Sergeant Harold John Smith**
- **Captain Scott V. Stelmok**
- **Detective Christopher Strucker**
- **Police Officer Ramon Suarez**
- **Sergeant Barbara J. Sullivan**
- **Police Officer Robert S. Summers**
- **Detective Traci L. Tack-Czajkowski**
- **Police Officer Paul Talty**
- **Police Officer Richard E. Taylor**
- **Sergeant Edward Doyle "Ned" Thompson**
- **Detective Sally A. Thompson**
- **Detective William B. Titus, Jr.**
- **Police Officer Martin Tom**
- **Police Officer Reginald Umpthery, Sr.**
- **Police Officer Santos Valentin, Jr.**
- **Detective Harry Valentin**
- **Police Officer Manuel Vargas, Jr.**
- **Detective Dennis J. Vickery**
- **Police Officer John F. Vierling, Jr.**
- **Detective Joseph Vincent Vigiano**
- **Police Officer Perry T. Villani**
- **Police Officer Matthew S. von Seydewitz**
- **Sergeant Michael B. Wagner**
- **Police Officer William T. Walsh**

- Lieutenant William H. Wanser, III
- Detective Thomas P. Ward
- Police Officer Walter Edward Weaver
- Detective Thomas Francis Weiner, Jr.
- Police Officer Ronald Evan Weintraub
- Detective Richard H. Wentz
- Detective Jennifer A. Williams
- Police Officer Wade Jason Williams
- Detective Robert W. Williamson
- Inspector Richard Daniel Winter
- Police Officer Kenneth W. Wolf
- Police Officer George Mon Cheng Wong
- Detective John T. Young
- Detective James Zadroga
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New York State Environmental Conservation Police, NY

- Conservation Officer Stephen Lawrence Raymond

New York State Office of Court Administration, NY

- Senior Court Officer Thomas Jurgens
- Captain William Thompson
- Senior Court Officer Mitchel Scott Wallace

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- Bureau Chief Charles Mills

New York State Office of Tax Enforcement - Revenue Crimes Bureau, NY

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- Director of Public Safety Fred V. Morrone
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- Police Officer James Nelson
- Police Officer Alfonse Niedermeyer
- Sergeant Vincent Joseph Oliva
- Police Officer Pavlos D. Pallas
- Police Officer James Parham
- Police Officer Dominick Pezzulo
- Police Officer Bruce Reynolds
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- Chief James Romito
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- Police Officer Walwyn Stuart
- Police Officer Michael Edmund Teel
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- Detective Stephen John Mullen
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- Special Agent Dennis Patrick McCarthy
- Special Agent Edward Joseph Smith
- Special Agent Robert T. Williams
- Special Agent Thomas Michael Wischerth

United States Department of Justice - Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Government

- Special Agent William C. Sheldon

United States Department of Justice - Federal Bureau of Investigation, U.S. Government

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- Special Agent Steven A. Carr
- Special Agent William Robert Craig
- Supervisory Special Agent Brian Lawrence Crews
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- Special Agent Leonard Hatton
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- Special Agent Paul H. Wilson
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- Refuge Manager Richard Jerry Guadagno

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- Master Special Officer Craig J. Miller

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- Police Officer Anthony Maggiore
- Lieutenant Roy D. McLaughlin

CUMULATIVE EFFECT, INCLUDING MARIHUANA SMELL, JUSTIFIED ARREST

R. v. Smeltzer, 2021 ONCA 472

In 2015, experienced drug investigators were conducting surveillance in an area known for drug activity. They saw the driver of a vehicle, unrelated to their current drug trafficking investigation, behave in a suspicious manner. The driver first parked in a lot in front of an apartment building, which was one in cluster of apartment buildings. He appeared to be looking around and texting. The driver then circled around one of the buildings, exited the parking lot, and parked on a nearby public road which bordered the parking lot. The accused then approached this vehicle on foot from the direction of the parking lot of the apartment complex.

The accused entered the vehicle. The vehicle then drove a short distance down the road, turned around, and then returned to the parking lot. This time it came to a stop near the front of a different apartment. This area was a more "secluded spot" than the "exposed" parking area in front of the building where the vehicle had first parked. Once the vehicle stopped, officers observed the accused passing something to the driver. Approximately 30 seconds later, the accused exited the vehicle and the vehicle left.

As the accused was about to enter one of the apartment buildings, an officer, by ruse, induced the accused to approach him. As the accused got close, the officer began to smell the strong odour of marijuana "coming from the area of [the accused's] person and the backpack". The accused was arrested and a search of his backpack incidental to arrest revealed about 259 grams of marihuana wrapped in plastic and a "large bundle of cash". Upon a search of the accused's person, three cellphones were located.

Ontario Court of Justice

The judge found the police did not breach the accused's ss. 8 (unreasonable search) or 9 (arbitrary detention) *Charter* rights. The judge accepted the experienced arresting officer's evidence that marijuana has a **"strong pungent"** odour and that he could smell it even though it was wrapped in plastic and concealed inside a backpack. The smell of marihuana, along with the cumulative observations, provided reasonable grounds for arresting the accused and searching him. The accused was convicted of possessing marijuana for the purpose of trafficking.

Ontario Court of Appeal

The accused contended that the trial judge erred in finding that the arresting officer had the requisite reasonable grounds to arrest and search him. First, he submitted that the trial judge did not consider the the arresting officer's reliance on the low-income, high-crime nature of the area, which was offered as supporting his grounds for arrest, was class-based discrimination that contaminated the officer's subjective grounds. Second, the accused suggested that the officer's grounds for arrest were not objectively reasonable because the observed conduct of the parties was neutral and therefore an unreliable indicator of drug trafficking activity. Finally, he argued that the arresting officer's evidence that he had smelled marijuana coming from the accused and his backpack should not have been accepted.

The Court of Appeal rejected the accused's assertions, and concluded that the trial judge was entitled to find that the arresting officer had subjective grounds to believe there was a credibly-based probability that the accused had engaged in drug trafficking, and that this belief was objectively reasonable.

Nature of the Neighbourhood

The Court of Appeal opined that the arresting officer's consideration of high-crime character of the area was problematic. ***"We agree that one's mere presence in a high-crime area is not an objective indicium that one is involved in criminal activity,"*** said the Court of Appeal. ***"As such, the arresting officer should not have considered this factor in determining his grounds for arrest. However, as indicated, based on the remaining grounds the arresting officer considered, his conclusion that he had reasonable and probable grounds to arrest the [accused] was objectively reasonable."*** It continued:

> We do not accept that the arresting officer's reliance on the fact that the apparent transaction occurred on the Proudfoot Lane apartment complex constituted discrimination based on "perceived class", thereby contaminating and undermining the arresting officer's subjective grounds. The arresting officer found relevance in his knowledge that the Proudfoot Lane apartment complex was a high-crime area, not that it was a low-income area. He mentioned the low rents in the buildings when explaining why it is common for the apartments to be used as drug "stash houses". We see no indication that he relied on the alleged poverty of the neighbourhood as an indicium of criminal activity.
>
> Had the arresting officer done so, or had he expressed suspicion of criminal activity because the area was low-income, closer consideration of the [accused's] submission on this point may have been warranted. That submission, by analogy to this court's racial-profiling decision in R. v. Dudhi, 2019 ONCA 665,... is that reliance on discriminatory stereotypes about poverty and crime should be treated as tainting, and therefore undermining, an officer's subjective grounds for interfering with the liberty of a suspect. In the circumstances of this appeal, however, we need not address this matter. [paras. 24-25]

Neutral Behaviours

The Court of Appeal found the trial judge was entitled to accept the testimony of the experienced drug officers in believing that the series of events, viewed cumulatively, was consistent with a drug trafficking transaction. The relevant series of events included:

- The conduct of the driver upon arrival;
- The pickup of the accused on a public road rather than out front of the building he came from;
- The otherwise pointless movement of the vehicle to a secluded area after the pickup;
- The apparent hand-off of something within the vehicle from the accused, who was carrying a backpack; and
- The short duration of the meeting.

These cumulative behaviours, coupled with the smell of marijuana coming from the accused immediately after departing the vehicle, provided the necessary reasonable grounds for the arrest and search.

Odour of Marijuana

The trial judge did not err in accepting the arresting officer's testimony that he had smelled marijuana coming from the accused and his backpack before he made the arrest. The trial judge considered and rejected the accused's challenge that it was implausible for the arresting officer to smell wrapped marijuana inside a backpack. And the trial judge was not "obliged to demonstrate in his reasons that he had considered that smell evidence can be highly subjective and suspect." There was not a case-specific reason to doubt the officer's smell evidence. Nor did the trial judge engage in circular reasoning. When the trial judge said the arresting officer must have smelled marijuana or else he could not have arrested the accused, he was simply rejecting the suggestion that the arresting officer had not smelled the marijuana until he had already arrested and detained the accused. Rather, when the arresting officer called the accused over, he secured the grounds for the accused's arrest – the smell – before arresting him.

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

FAIRNESS REQUIRES SUED OFFICER TO CHALLENGE ADVERSE FINDINGS IN CRIMINAL TRIAL

Klassen v. British Columbia (Minister of Public Safety and Solicitor General), 2021 BCCA 294

The plaintiffs (husband and wife) were charged with assaulting a police officer who had attended their residence in response to a dropped 911 call. The officer alleged he witnessed the wife lunge at and push her husband. When the officer arrested the wife, she assaulted the officer and her husband threatened him. The wife denied lunging at and pushing her husband.

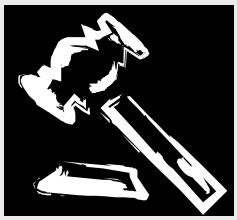
At their criminal trial in British Columbia Provincial Court, the judge found it was not probable that the wife assaulted her husband and he rejected the officer's evidence on this point. The officer therefore did not have the necessary grounds to arrest the wife and exceeded his authority in the melee that followed. Thus, the officer was not in the lawful execution of his duty when he attempted the arrest. Furthermore, the husband was justified in aiding his wife. The plaintiffs were acquitted of assaulting a peace officer. An appeal by the Crown from the verdict of acquittal was dismissed in the British Columbia Supreme Court.

British Columbia Supreme Court

The plaintiffs then sued the Province of British Columbia and the officer alleging they were both unlawfully arrested. They sought damages for the torts of assault, battery and false imprisonment. They also claimed that police intentionally inflicted emotional distress on them during and after their arrest by holding them overnight in cells, forwarding charges to the Crown for approval, and lying at trial. They sought damages for breach of their *Charter* rights, and wanted aggravated and punitive damages.

LEGALLY SPEAKING:

Issue Estoppel



"Issue estoppel is concerned not with whether the cause of action in two proceedings is the same, but with whether an issue to be decided in proving the current action is the same as an issue decided in a previous proceeding. The causes of action may be (and typically are) different. Issue estoppel in Canada has historically applied to both civil and criminal law." - R. v. Mahalingan, 2008 SCC 63 at para. 16.

The defendants plead the officer had reasonable grounds to believe the wife had committed an assault and the husband had obstructed the officer in his duties. Thus, as was asserted at the criminal trial, it was claimed the officer had the grounds for an arrest and was justified in arresting the plaintiffs without a warrant. The defendants denied the use of excessive force and submitted, under s. 21 of the *Police Act*, the officer was immune from personal liability because he was acting in the performance of his duty and in the exercise of his powers as a provincial constable.

The plaintiffs sought the paragraphs in the defendants' response to the lawsuit, claiming the arrest was lawful, be struck. In the plaintiffs' view, since the arrest had already been found unlawful in the criminal trial, the doctrines of issue estoppel and abuse of process prevented the defendants from claiming this defence in the civil proceeding.

Even assuming that issue estoppel applied, the chambers judge exercised his discretion in not applying it and dismissed the plaintiffs' application out of fairness to the officer. He noted that the plaintiffs had a number of protections in the criminal proceedings that they no longer would have in the civil proceeding. For example, in the criminal proceeding the plaintiffs had the right to remain silent, which the husband did exercise. But in the civil proceeding, the officer would have discovery rights and the husband could be forced to testify.

British Columbia Court of Appeal

The plaintiffs argued that the chambers judge erred in not applying the correct legal test for the exercise of discretion related to both issue estoppel and abuse of process, and when exercising his discretion he used speculative concerns and conjecture.

Issue Estoppel?

Issue estoppel precludes an unsuccessful party from relitigating in the courts what has already been decided. In this case, since the arrest was already found to be unlawful in the criminal proceeding, the plaintiffs suggested the defendants were precluded from arguing its lawfulness in the civil proceeding.

To establish **issue estoppel**, three preconditions must be met:

1. **the same question has been decided;**
2. **the judicial decision which is said to create the estoppel was final; and,**
3. **the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.**

Even if these three requirements of issue estoppel have been met, the court retains the discretion to refuse to apply it if doing so would be unfair or work an injustice.

Although the judge declined to decide whether the three preconditions of issue estoppel were met and moved directly to exercising his discretion, Justice Griffin, delivering the Court of Appeal's decision, found the third precondition had not been satisfied:

> Indeed, in my view the [plaintiffs] clearly failed to establish the third element of issue estoppel, namely mutuality of interests ... .
>
> [The officer] was not a party to the criminal proceeding; he was a witness. The Crown did not represent his personal interests in that proceeding and did not stand in his place. [The officer] may well have disagreed with the Crown's approach to the calling of evidence, cross-examination of witnesses, and submissions. However, he was powerless to affect those things due to the independent role of the Crown prosecutor. [The officer] had no right to call witnesses or make submissions on his own behalf at the criminal trial.
>
> The law is well-established that the prosecutorial role of Crown counsel is a distinct, independent role. The Crown prosecutor does not represent the government as a whole, government employees or agents at large, victims, or the police. The Crown prosecutor must act solely in the public interest. It would be improper for a Crown prosecutor to advance the personal interests of a police officer in a proceeding. For these reasons, the third element of issue estoppel, a mutuality of interests, does not exist between the Crown prosecutor and other government actors in other roles, such as the police. [references omitted, paras. 29-31]

And further:

> The separation of the Crown prosecutorial role and the police investigational role are essential to prevent miscarriages of justice. If Crown prosecutors had to consider the risk of civil liability due to reputational harm to police officers, it would undermine and conflict with their duties to protect the integrity of the process and the rights of the accused. For these reasons, prosecutors are not accountable to the police, whose interests are adverse to the accused.
>
> [The officer] is therefore independent of the Crown prosecutor in the criminal trial. So too is the Minister, who is named in the civil lawsuit as vicariously liable under the Police Act for the damages allegedly caused by the actions of the police. Issue estoppel does not apply to these parties in this circumstance. [references omitted, paras. 34-35]

Fairness?

Because issue estoppel did not arise, it was unnecessary to determine whether the chambers judge properly exercised his discretion in not applying it on the basis of it being unfair to the officer. Nevertheless, the Court of Appeal did comment on the issue. Although finality to litigation is a compelling consideration, it is not solely determinative:

> A number of procedural, evidentiary, and Charter safeguards exist to protect the rights of the accused in criminal proceedings, in furtherance of the principle of innocence until proven guilty beyond a reasonable doubt. Because of the procedural protections afforded to an accused in criminal proceedings, and because the case was not being advanced against him, [the officer] may not have had the opportunity to "put his best foot forward" in the criminal proceeding on issues relevant to the civil proceeding against him personally.
>
> Further, the burden in the civil proceeding shifts and falls on the [plaintiffs] to prove their claim on a balance of probabilities. The [defendants] are entitled to discovery and have the right to subpoena the [plaintiffs] to testify. A judge in the civil proceeding will be required to weigh all the evidence on the civil standard of proof, a balance of probabilities, and could well come to a different conclusion about the facts of what happened during the altercation.
>
> The [plaintiffs] submit that it is pure conjecture that the evidence obtained on discovery, or from [the husband], who did not testify in the criminal trial, would make any difference to the outcome. I do not find that submission helpful. It is always conjecture as to how the evidence at trial will unfold, as the witnesses are subject to cross-examination. The facts of what happened during the incident were witnessed by three people, and [the officer] has never had the opportunity to test the evidence of the [plaintiffs], and, if it turns out to be the case, to point out inconsistencies in the evidence of [the husband] and [the wife]. In my view it would be procedurally unfair to deny him the opportunity to defend himself by testing their evidence.
>
> The [plaintiffs] submit that allowing the [defendants] to contest the lawfulness of the arrest would violate fundamental principles of justice underlying the community's sense of fair play and decency. I disagree. A reasonable member of the public, properly informed, would not be offended by allowing [the officer] the opportunity to defend the allegations against him given the prospect of civil liability. Allowing the [defendants] to defend the civil claim would not undermine the fair administration of justice. Indeed, the opposite is true: it would offend the community's sense of fair play and decency to not allow [the officer] an opportunity to defend himself. [paras. 40-43]

Justice Griffin, citing the dissent in *Ontario (Attorney General) v. Clark*, 2021 SCC 18, reasoned that ***"a police officer witness tainted with adverse findings in a criminal trial has the right to challenge those findings in a subsequent civil lawsuit brought against the officer, and, indeed, that fairness dictates that the officer be able to do so. Further, it is open to the trial court in the civil lawsuit to make findings that are exculpatory of the police officer, contrary to the adverse findings in the criminal case."***

> On my reading of the judge's reasons, he quickly and succinctly homed in on the heart of this case: the unfairness of not allowing [the officer] to challenge the allegations regarding his conduct despite the fact he now faces significant jeopardy for civil liability and in light of the fact that his interests were not represented and he had no right to challenge the findings made at the criminal trial. I agree with the judge that it would be "fundamentally unfair" not to allow [the officer] to defend himself in the civil trial, given that the very restrictions he faced in defending his actions at the criminal trial were designed to protect the interests of the [plaintiffs] as accused persons. [para. 48]

The doctrine of issue estoppel did not apply in this case nor was it an abuse of process to allow the police to defend all aspects of the claims against them. The plaintiffs' appeal was dismissed.

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

IMMEDIATE ROADSIDE PROHIBITION SCHEME CAN SUSPEND CHARTER s. 10(b)

R.B. v. British Columbia (Superintendent of Motor Vehicles), 2021 BCCA 262

Police officers responded to a report of an alleged stalking, threats and use of a firearm incident. A suspect vehicle description was provided along with a partial licence plate number. Police spotted a vehicle matching the description and stopped it at 6:36 p.m. The driver was arrested for the stalking allegations and he was handcuffed. After checking the driver's identification, it was determined he was not the suspect police were looking for. However, an officer smelled a strong odour of liquor on the driver's breath and requested an approved screening device (ASD) be brought to the stop.

Within one minute, another officer arrived with an ASD. This officer approached the driver who was standing outside of his vehicle still in handcuffs. He had been asking to speak to his lawyer. The officer smelled liquor on the driver's breath and, in response to police questioning, the driver admitted to consuming three beers and said his last drink was at 6:20 p.m. The officer demanded a breath sample but the driver refused to provide one and continued to ask to speak to his lawyer. He also requested that the police allow him an opportunity to provide a blood sample.

Police explained the consequences of refusing to blow into the ASD (the seizure of his driver's licence and service of a notice of driving prohibition). He was also advised that (1) his right to counsel under the *Charter* was suspended for the purpose of obtaining the breath sample, (2) he was lawfully required to provide a sample, and (3) his request to go to the police station for an "evidentiary blood test" was not an option. The driver maintained his refusal and he was issued a 90–day immediate roadside prohibition (IRP) at 6:43 p.m.

Superintendent of Motor Vehicles

The driver challenged the IRP before a delegate of the Superintendent of Motor Vehicles. He submitted that (1) he did not refuse or fail to comply with the demand and (2) he had a reasonable excuse for not complying. He said he had repeatedly asked to speak to a lawyer after being arrested for the stalking allegations. And, since the police failed in their obligation to facilitate access to legal counsel , they could not lawfully obtain a sample from him. The Adjudicator determined that the driver refused to comply with the demand and, although his requests to speak to his lawyer were denied, his right to counsel was suspended at the time of the breath demand. The police did not breach the driver's right to counsel when they denied him access to a lawyer and, therefore, he did not have a reasonable excuse to refuse the ASD demand. The IRP was confirmed.

British Columbia Supreme Court

The driver (now petitioner) sought judicial review of the Adjudicator's decision. He wanted the IRP revoked because he had a reasonable excuse for not complying with the ASD demand. He contended that when the demand for a breath sample was made, he was under arrest and in handcuffs on matters unrelated to the demand for a breath sample. This arrest triggered his rights under s. 10(b) of the *Charter* which could not be suspended for the purpose of obtaining a breath sample. And because he invoked his right to counsel under s. 10(b), he had a reasonable excuse for not complying with the ASD demand.

After reviewing the statutory framework for IRPs, the judge concluded, among other things, that the IRP scheme can suspend (or limit) the right to counsel. The judge also found it was reasonable for the Adjudicator to hold that the driver's s. 10(b) right had been suspended. Moreover, the petitioner's s. 10(b) rights had been minimally impaired and he had no reasonable excuse for not complying with the ASD demand. The IRP was again upheld.

British Columbia Court of Appeal

The petitioner asserted that the judge erred in not finding the adjudicator's s. 10(b) *Charter* analysis unreasonable. He argued that he was not stopped by police for the purposes of roadside screening and therefore the limit on his s. 10(b) right did not apply. He maintained that not having access to a lawyer excused his non-compliance with the breath demand. In other words, the petitioner relied on a deprivation of his right to counsel as his excuse for not blowing into the ASD.

Right to Counsel

Justice DeWitt-Van Oosten, authoring the unanimous Court of Appeal opinion, ruled it was reasonable for the Adjudicator to find that the petitioner's s. 10(b) right was not breached when he was not permitted to contact counsel before being required to provide the breath sample into the ASD at roadside:

> Here, the Adjudicator found that within one minute of the start of their interaction with [the petitioner], the police shifted their investigation from the Stalking Allegations to drinking and driving. After discovering that [the petitioner] was not the individual they were looking for, the police effectively abandoned that investigation and took no further related steps. Instead, they immediately turned their attention to the odour of alcohol on [the petitioner's] breath, continued to detain him for that purpose, and made an ASD demand that the Adjudicator found met the requirements of s. 320.27 of the Code.
>
> I am of the view that in these circumstances, the s. 10(b) limit upheld in [Gregory v. British Columbia (Superintendent of Motor Vehicles), 2018 BCCA 7] did apply. Gregory affirmed that the police are not obliged for the purposes of an ASD demand within the context of the IRP regime to comply with the informational and implementation duties mandated by the right to counsel. They are not constitutionally required to facilitate access to legal counsel before obtaining a breath sample or before recording a refusal to comply with an ASD demand.
>
> Gregory was binding on the Adjudicator and the judge. At law, [the petitioner] was not entitled to access a lawyer in relation to the demand that he provide a sample of his breath into an ASD. As such, the police were not obliged to wait until he did so before obtaining a sample. Moreover, in my view, it mattered not that prior to the ASD demand the police had arrested [the petitioner] for Code offences unrelated to drinking and driving. [paras. 66-69]

And further:

> … In my view, once [the Adjudicator] concluded that the breath demand met the requirements of s. 320.27 of the Code and was a valid ASD demand, the s. 10(b) enquiry in relation to that demand was complete. As a matter of law, [the petitioner] did not have the right to access a lawyer before blowing into the ASD or refusing to do so. It was not necessary to engage in an individualized assessment of whether the s. 10(b) limit upheld in Gregory was justified in [the petitioner's] circumstances. [para. 77]

Since s. 10(b) was not operative for purposes of an ASD demand, the police refusal to facilitate the petitioner's access to legal counsel could not, by itself, constitute a reasonable excuse for refusing to comply with a valid demand. The Adjudicator had reasonably determined that a deprivation of the right to counsel did not provide the petitioner with a reasonable excuse for non-compliance with the ASD demand. The petitioner's appeal was dismissed.

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

"At law, [the petitioner] was not entitled to access a lawyer in relation to the demand that he provide a sample of his breath into an ASD. As such, the police were not obliged to wait until he did so before obtaining a sample."

CHILDHOOD MALTREATMENT

and the link with victimization in adulthood:

Findings from the 2019 General Social Survey

Measuring childhood maltreatment

- There is a clear link between adverse childhood experiences and negative outcomes in adulthood, including being a victim of violence.
- The 2019 General Social Survey on Victimization measured four types of childhood maltreatment: physical abuse, sexual abuse, witnessing violence in the home, and harsh parenting (e.g., emotional abuse, neglect).
- These types of childhood maltreatment were each associated with a higher risk of victimization in adulthood, even when controlling for other factors.

Harsh parenting was the most common form of childhood maltreatment, experienced by **6 in 10** Canadians **before** age **15**.

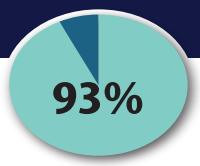
All types of childhood maltreatment were linked to higher rates of violent victimization in adulthood.

Link between childhood maltreatment and adult victimization was more pronounced for women.

In 2019, **women and men** who were physically or sexually abused during childhood recorded **higher** violent victimization rates as **adults**, compared with those who were not.

Women who **were abused** as children were victimized at a rate **4 times higher** than those who **were not abused** as children. For **men**, the rate was **twice as high** among those who were abused as children.

Most childhood abuse goes unreported.



More than **9 in 10 (93%)** people who experienced childhood physical or sexual abuse said that it was **not reported** to police, child protective services, or another agency.

For more information, see the *Juristat* article "Criminal victimization in Canada, 2019."

Source: Statistics Canada, General Social Survey, 2019.

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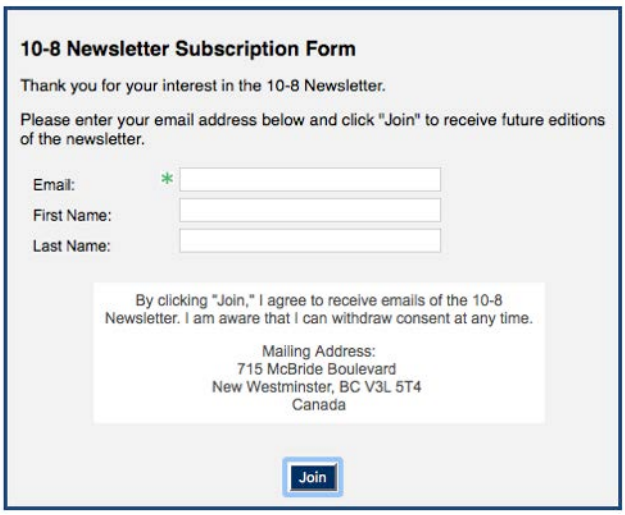

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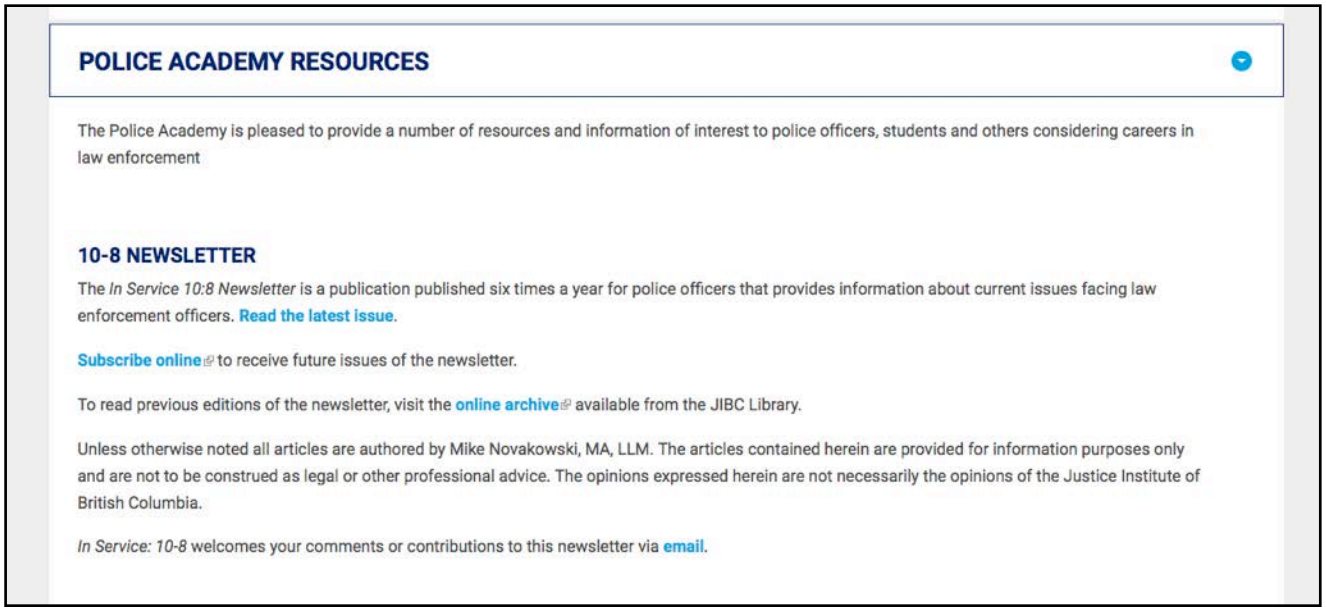

POLICE ACADEMY RESOURCES

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

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The *In Service 10:8 Newsletter* is a publication published six times a year for police officers that provides information about current issues facing law enforcement officers. **Read the latest issue.**

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