AN EXAMINATION OF THE IMPACT OF COURT RULINGS ON POLICE INVESTIGATION TIME AND RESOURCES

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The Crime Reduction Research Program

The Crime Reduction Research Program (CRRP) is the joint-research model in British Columbia between academics, the provincial government, and police agencies operated by the Office of Crime Reduction – Gang Outreach. The CRRP is supported and informed by a Crime Reduction Research Working Group which includes representation from the Ministry of Public Safety Solicitor General (represented by Community Safety and Crime Prevention Branch and Police Services Branch), the Combined Forces Special Enforcement Unit of British Columbia and the Royal Canadian Mounted Police "E" Division.

The CRRP focuses on investing in research that can be applied to support policing operations and informing evidence-based decisions on policies and programs related to public safety in British Columbia. Each year, the CRRP reviews submissions of research proposals in support of this mandate. The CRRP Working Group supports successful proposals by working with researchers to refine the study design as necessary, provide or acquire necessary data for projects, and advise on the validity of data interpretation and the practicality of recommendations.

The CRRP operates a $1M annual funding allocation in the form of grants that are dedicated to support university-led research at Canadian institutions. This project was supported through the 2017/18 CRRP funding allotment.

Executive Summary

In 2005, a report published by Malm et al. documented the rising demands for police services from the RCMP in British Columbia since the 1980s. The authors examined whether the amount of work necessary to respond to calls for police services increased or decreased over that period of time. The results demonstrated that not only had the number of police calls for service increased significantly over the past 30 years, but the complexity of the investigations increased, the amount of police time and resources required to respond and investigate calls for service increased, and there were a growing number of steps that police investigators had to undertake in order to clear cases and to comply with disclosure and other judicial requirements that have resulted in additional resource burdens on the police. With more recent court rulings and legislation, such as *R. v. Jordan*, there is a question of how much more additional time RCMP officers in British Columbia must now spend to successfully conduct investigations and complete submissions to Crown Counsel within the timeframes that were established in the *R. v. Jordan* decision.

This purpose of this study was to assess the effect of recent Canadian court rulings on police investigation time and the number of steps that investigators must complete to conclude an investigation and prepare a submission to Crown Counsel. Specifically, using homicides, sexual assault, and drug offences, the authors examined police data from 2000 to 2018 and interviewed subject matter experts from across British Columbia to understand the evolution in the number of steps and time it now takes to properly investigate and prepare a submission to Crown Counsel as compared to a decade ago. To set the context for this discussion, the literature review provides a summary of some of the historical and more recent caselaw decisions that are likely to have influenced police investigation practices and timelines. Following the literature review, the authors provide an empirical data analysis of trends in homicide, sexual assault, and drug offences over the past decade.

Homicide

While participants acknowledged that the number of homicide investigations fluctuated and depended on the jurisdiction under consideration, most participants felt that the number of homicides that they investigated remained about the same compared to ten years ago. When asked to comment on the complexity of homicide investigations currently compared to ten years ago, all participants reported that investigations were much more complex. Participants indicated that this increased complexity was not based on a change in the level of sophistication among offenders or incidents but was a result of the introduction of new technologies. Related to the complexity of homicide investigations, participants were divided on the issue of whether the number of steps required to complete an investigation have increased or stayed the same compared to ten years ago. Those participants who reported an increase in the number of steps required to complete an investigation pointed to changes based on case law and the nature of electronic evidence, specifically the pervasive use of mobile phones and CCTV. It was interesting to note that some participants suggested that the actual number of steps had not increased, but that there are additional avenues of evidence collection. All participants felt that the amount of time it took to complete a homicide investigation today compared to ten years ago has increased, even for those

investigations where the suspect is immediately known to police. When participants were asked to identify what were the main drivers of a homicide investigation timeline, the most common responses were: the amount of evidence collected, such as statements, digital and video evidence, and forensic evidence; the amount of time it takes to write warrants and affidavits; disclosure requirements and completing a disclosure package for Crown Counsel; lab analysis and receiving reports from the labs; and the number of simultaneous investigations that require attention.

While participants understood the reasons for the decisions made by the judges and most participants did not disagree with the decisions, it was in the implementation of the decisions that frustrated participants. For example, it was felt that the *R. v. Jordan* decision created an arbitrary presumptive ceiling that did not adequately consider how much time a modern homicide investigation took. Moreover, from the perspective of participants, there was simply not enough manpower and resources to complete investigations within the timelines set out by *R. v. Jordan*. This lack of resources was also found in crime labs that were often dealing with substantial backlogs of cases requiring analysis due to the lack of sufficient staffing and resources. Compounding all of this was the rapid speed of technological advancements, such as larger hard drives, encryption software, and third-party applications, and the ability of law enforcement and the legal system to respond to technological advancement appropriately and in a timely manner.

R. v. Stinchcombe and the subsequent judicial decisions related to disclosure has increased exponentially the amount of work associated just to the disclosure process. All participants spoke of the human, technological, and financial resources allocated to support and complete a disclosure package. In effect, participants concluded when monumental judicial decisions are taken, such as *R. v. Jordan* and *R. v. Stinchcombe*, the government must respond by funding more police, more Crown Counsel, and more courtrooms. In addition, the RCMP lab must be better resourced. Adequately resourcing investigations and Crown Counsel will contribute to investigations achieving the requirements of case law, maintaining the repute of the criminal justice system, and maintaining public safety.

Homicide investigations were described by participants as having five broad stages. The first stage was the investigation of the immediate scene where the victim was located. This stage typically included securing the perimeter of the scene, requesting any additional resources that might be required based on the specific circumstances of the crime scene, determining the command structure for the investigation, contacting the coroner for body removal and autopsy, and processing the scene for evidence, such as blood, fingerprints, weapons, and taking pictures as required. The second stage was the investigation away from the immediate scene where the victim was located, including taking statements from witnesses or neighbors, canvassing the surrounding area for any additional evidence, locating and securing any video evidence, such as closed-circuit television or dash-mounted video camera footage, logging exhibits, notifying and potentially interviewing the next of kin, and eventually, attending the autopsy. The third stage was described as the follow-up investigation, which typically occurred over the weeks, months, or years after the homicide. This stage included creating an investigative strategy and possibly revising it as new information was discovered, setting up file coordinators for the collection of evidence and materials related to the case, including records, disclosure materials, lab reports, interview recordings and

transcriptions, as well as carrying out any additional steps in the investigation, such as additional neighborhood inquiries, identifying and interviewing witnesses or suspects, obtaining search warrants, and possibly planning and carrying out undercover or wiretap operations. Step four in the investigation occurred when a suspect was identified and needed to be arrested. When necessary, this step could include significant preparation, surveillance, undercover operations, and coordination with emergency response teams, particularly for dangerous suspects. Finally, the fifth and final steps was described as the court step, where police provided the final disclosure package to the Crown prosecutor and assisted in the trial process, including providing testimony, as requested.

The technological advancements that have had the greatest effect on homicide investigations, according to participants, have been mobile phones, video surveillance, and DNA. The challenge is that it can be extremely time consuming to get judicial authorization to access the device and to extract and analyse all the information contained on the device or stored in the cloud. Participants spoke of the immense workload involved in collecting, processing, analysing, storing, and disclosing digital evidence. Still, all participants stated that there were enormous investigative benefits of analysing mobile phone, video, and other digital evidence. Most, but not all, participants felt that technology served to confirm what the investigators already knew, rather than providing new information. Digital evidence was seen as providing strong support for the timeline that investigators attempted to establish for different aspects of an investigation, such as when the homicide occurred, the location of the suspect over time, tracking the movement and communication of a suspect, supporting and corroborating witness statements, and assisting with suspect identification. Participants liked digital and forensic evidence because it was viewed as unbiased evidence.

Sexual Assault

Nearly all sexual assault investigator participants agreed that the number of sexual assaults reported to police had increased over the past ten years. Some participants reported changes in the types of sexual assault files. Generally, this concerned an increasing proportion of technology-facilitated sexual assault offences. Despite the increased presence of technology as a factor in these investigations, the nature of sexual assault offences themselves were not seen as any more complex than they were one decade ago. Rather, all sexual assault investigator participants identified that the investigation of these offences had become more complex because of technology and court rulings that added to their administrative workload and lengthened their investigations. Many participants now dealt with digital evidence that complicated their investigations in terms of how they legally and physically accessed and analyzed the information.

Most participants felt that the number of steps involved in a sexual assault investigation had increased over the past ten years, primarily due to the caselaw requirements around documenting and disclosing evidence, and the increased amount of technology they were working with. The length of time for a sexual assault investigation had reportedly increased substantially. One of the

main reasons for the increased length of investigations was the time it took to prepare for disclosure, while another major cause was the delays in exhibits processing by labs.

Overall, whereas sexual assault investigations previously could be completed by police within a matter of days or weeks, it was not unusual for these investigations to now take anywhere from three to six months, with the more complex files taking more than one year before police could submit the disclosure package to Crown Counsel for charge approval. Once received by Crown Counsel, it could be another three to six months before Crown Counsel reviewed the file and approved charges. Many participants specifically commented that they felt these delays resulted in threats to public safety and were a detriment to victims receiving justice.

The standard steps involved in a sexual assault investigation varied depending on several factors, such as the nature of the sexual assault and the relationship between the accused and victim. All sexual assault investigations began with taking a statement from either the victim or the individual that disclosed the incident. Once the crime scene was determined, priority was placed on obtaining perishable evidence (e.g., video footage) and the victim underwent a sexual assault/forensic nurse examination to collect any biological evidence. Another interview was then conducted with the victim to supplement information obtained from the first interview. The interview process took about one week, longer if the victim is a child or youth. Interviews then needed to be transcribed and disclosed. Upon determining the various sources of evidence and information, decisions were made about whether warrants and production orders were required to collect certain evidence, such as digital evidence. If biological evidence was sent to a laboratory for analysis, it can take several weeks to receive a preliminary report and sometimes longer for the final report. In the case of a sexual assault that involves two individuals, the report to Crown Counsel could be prepared in two to three months. However, if the case involved complex digital evidence, the investigation could take several months and, as a result, it could take between six months to one year to prepare the report to Crown Counsel. When asked about the main factors that influenced the length or complexity of an investigation, the two common contributors were technology and changes to case law during an investigation. Other factors included the complexity of the case, how cooperative victims and witnesses were, and lab delays in processing biological evidence.

The major case law affecting sexual assault investigations were identified as *R. v. Jordan* and *R. v. Marakah*. All participants strongly felt that the *R. v. Jordan* decision substantially negatively impacted police investigations. One of the major consequences of the *R. v. Jordan* decision was the delay of charge approval, which completely shifted the investigative timeline. Many participants suggested that the shift in investigative timelines and the delay of charge approval until months after the offence occurred posed threats to public safety. The decision in the *R. v. Marakah* case was also of great concern to many of the participants, who felt that this decision was being interpreted too broadly and inconsistently. Participants had varying interpretations of what *R. v. Marakah* meant in terms of collecting evidence from digital devices. While they always applied for a search warrant for the suspect's phone, participants felt that the ruling had left unclear guidelines for when a warrant was needed when a victim willingly presented their phone as evidence. Several participants also identified that the need for investigators to physically seize the mobile device from a victim to search the device and download the content was a consequence of the *R. v. Marakah* case

that could put the victim in a vulnerable position, or which resulted in their being unwilling to participate in the investigation. Most participants had spent their career policing under the *R. v. Stinchcombe* decision and so they tended not to identify any changes to their investigations as a direct result of this ruling, noting that investigations were always led from the outset with the *R. v. Stinchcombe* decision in mind.

All sexual assault investigator participants stated that closed circuit TV (CCTV) footage, mobile phones, social media, and DNA have both facilitated and complicated investigations. While these types of evidence have value in terms of corroborating information from interviews, the overall investigative process takes longer because of the time it took to approve warrants or production orders. If the digital evidence belonged to the accused, there was an additional administrative burden associated with section 490 orders that enabled the police to hold onto the accused's property for longer than 90 days. With respect to DNA evidence, while technological advances have allowed for older DNA samples to be tested and for analyses to be conducted with even smaller samples, DNA evidence can take between three to six months to analyze. Overall, sexual assault investigators reported that it was rare for technology to open new avenues of investigation. Instead, digital evidence tended to confirm what investigators already knew. All participants acknowledged the benefits of technology and digital evidence in contributing to a stronger case that increased the probability of charge approval. The frustrations with technology and digital evidence were directed at the time and resources it took to locate, catalogue, and prepare the evidence for Crown Counsel.

Drug Offences

All drug investigator agreed that the complexity of CDSA investigations had increased, the number of steps required had increased, and the amount of time it takes to conduct a CDSA investigation had increased. This aside, participants noted that the number of investigations being conducted has decreased because of strained resources despite the clear perception from participants that the number of drug importation and trafficking offences in British Columbian communities have increased substantially. Participants suggested CDSA investigations were unlike other Criminal Code offence investigations because they were intelligence-led and not in response to a call for service with a clear victim. In CDSA investigations, participants suggested that there were three broad investigative stages: Profile Development, Tactical Investigation, and Preparation for Crown.

Participants indicated that the requirements of disclosure set out by *R. v. Stinchcombe* and other related judicial decisions, while important for ensuring procedural justice and the protection of an accused's *Charter* rights, had not adapted to the enormous volumes of information and digital evidence that had become available because of innovations in technology. Participants noted that the need to disclose everything, including information that was not relevant to the investigation created a resource drain for both the police and the (PPSC). A second critical theme that emerged was public safety concerns resulting from the changes in protocol precipitated by tighter, arbitrary timelines as established in *R. v. Jordan*. Participants unanimously condemned the catch-and-release practice now common in CDSA investigations, pointing out that many of these offenders were not recreational drug users, but serious criminals, and that releasing them into the community

immediately following arrest, without any means of monitoring their behaviour posed a grave and continuing threat to public safety. Participants understood that the intent of the presumptive ceiling set in *R. v. Jordan* was to prevent cases from languishing, and investigators agreed with that intent in principle. However, they bemoaned the fact that provisions originally targeted toward Crown Counsel fell to the police, who similarly were not provided with the necessary resources to comply with *R. v. Jordan*. Finally, participants broadly noted that the case law related to privacy had a tremendous effect on CDSA investigations, and that there were a number of cases presently making their way through the courts that were very likely going to make things even more difficult for the police. Of course, no participant was opposed to the principle of privacy and the requirement of investigators to ensure that they respected the privacy of everyone associated to a CDSA investigation. However, for participants, the issue was one where the courts, in their reasoning, did not demonstrate an appreciation for the world in which the police operated.

When asked to describe the steps of a CDSA investigation, participants denoted three broad stages: profile development, tactical investigation, and preparation for Crown Counsel. It was noted that the steps involved in CDSA investigations were fundamentally unlike other investigations, such as sexual assault and homicide, because there was no index offence to which the police were called for response. Broadly stated, the first stage of a CDSA investigation includes the police receiving intelligence information from a confidential source, through a tip, or because of another ongoing investigation. All participants noted that it was imperative that the information received be vetted for a reliability assessment and for corroboration. In Stage Two, the file coordinator would begin gathering all the necessary disclosure information and the affiant would start the process of writing the necessary privacy related authorizations, production orders, and warrants. All participants noted that, given the increasing expectations of privacy, the burden of these authorizations increased year over year. Several participants noted that, in recent years, investigators did not do anything without first obtaining an authorization, order, or warrant. The overall goal of this stage of the investigation was to establish the elements of the offence culminating in takedown day, preferably with the target being arrested in possession of the illicit substances being trafficked. After takedown day, all the exhibits gathered were sent to the necessary labs. The Report to Crown Counsel was written and disclosure efforts intensified and continued for numerous months to ensure that when the information from the various labs returned, the file was ready to go to Crown Counsel along with the initial disclosure. Participants suggested that prior to the transmission of the RTCC to Crown Counsel, the entire file often needed to go through various internal reviews, including to the CI or source handling unit for vetting, and, depending on the level and nature of the investigation, sometimes to RCMP 'E' Division for vetting, deconfliction, and oversight/assistance with the file from subject matter experts in OISP or LAST.

Participants were also asked about the role of technology in CDSA investigations. In effect, participants suggested that technological evolution in tracker technology, drones, DNA technology, and the proliferation of CCTV had proven particularly helpful in CDSA investigations. Some argued that technology has proven to be the biggest hindrance to present-day CDSA investigations noting that the criminal element has, through the adoption of evolved technology, successfully managed to evade charges. Several participants further noted that the police resources available to dedicate to technology were not keeping up with the seemingly endless resources available to the people under

investigation in CDSA files. Moreover, evolving technology resulted in ever-increasing volumes of information and data in each investigation, all of which was subjected to disclosure. As a result, the strain on time and resources to collect, vet, digitize, and disclose all of the information was the primary driver responsible for the increased length of time required to complete a CDSA investigation and successfully receive crown approval for charges.

It is recommended that investigative units work with their internal, regional, or RCMP 'E' Division analysts routinely to understand their local crime trends to better predict the number of investigations their teams might be tasked with. This information should be used to plan for the development of the necessary number of investigative teams, the size of each team, what the most effective and efficient mix of sworn and civilian members is, and what roles are required. This also requires consideration of retention of members, promotion of members out of the unit, and initial and ongoing training to ensure that all team members have the necessary knowledge and skills to be most effective and efficient in their roles.

Related to this point, police agencies should undertake an assessment to determine which responsibilities require a sworn member and which roles can and should be assigned to civilian members. Moreover, connected to the evaluation of specific crime trends, police agencies should constantly be assessing the degree to which they are up-to-date on the latest technology and have either in-house experts or outside experts that can assist them in not only adopting technology to make their investigations more effective and efficient, but to also ensure that the police have the ability to understand how targets and suspects use technology, the ability to access the technology of these people in a timely fashion, and to incorporate this data and evidence in their investigations while complying with case law and their Charter obligations. There is also an immediate need to increase the number of crime labs throughout Canada. The current lack of resources in crime labs has had the effect that there were often substantial backlogs of cases requiring analysis.

Background

In 2005, a report published by Malm et al. documented the rising demands for police services from the RCMP in British Columbia since the 1980s. The authors examined whether the amount of work necessary to respond to calls for police services increased or decreased over that period of time. The results demonstrated that not only had the number of police calls for service increased significantly over the past 30 years, but the complexity of the investigations increased, the amount of police time and resources required to respond and investigate calls for service increased, and there were a growing number of steps that police investigators had to undertake in order to clear cases and to comply with disclosure and other judicial requirements that have resulted in additional resource burdens on the police. With more recent court rulings and legislation, such as *R. v. Jordan*, there is a question of how much more additional time RCMP officers in British Columbia must now spend to successfully conduct investigations and complete submissions to Crown Counsel within the timeframes that were established in the *R. v. Jordan* decision.

This purpose of this study was to assess the effect of recent Canadian court rulings on police investigation time and the number of steps that investigators have to complete to conclude an investigation and prepare a submission to Crown Counsel. Specifically, using homicides, sexual assault, and drug offences, the authors examined police data from 2000 to 2018 and interviewed subject matter experts from across British Columbia to understand the evolution in the number of steps and time it now takes to properly investigate and prepare a submission to Crown Counsel as compared to a decade ago.

To set the context for this discussion, the literature review provides a summary of some of the historical and more recent caselaw decisions that are likely to have influenced police investigation practices and timelines. Following the literature review, the authors provide an empirical data analysis of trends in homicide, sexual assault, and drug offences over the past decade. The empirical data is followed by a qualitative discussion about homicide, sexual assault, and drug offence investigations using the interview data collected from subject matter experts who were asked to discuss whether and how various court rulings and subsequent legislation had increased the steps and time it took investigators to conclude an investigation. Within this discussion, the interview participants were also asked about the effects of technology on police time investigations. While the report does not provide firm recommendations, the implications of these findings for police investigations are discussed.

Literature Review of Important Judicial Decisions for Canadian Law Enforcement

With its origin in the English common law tradition, the Canadian criminal justice system relies on precedent-setting case law to interpret and apply the law. Decisions about the interpretation and application of the *Criminal Code of Canada* and the *Canadian Charter of Rights and Freedoms* define what criminal justice looks like in Canada, leading Morton and Knopff (2002) to state that "[m]ost of the important questions arising under the *Charter* have been settled by judges exercising policymaking discretion, not by its text" (p. 40). Since the enactment of the *Canadian Charter of*

Rights and Freedoms in 1982, Canadian courts have made decisions about the application of the rights afforded to Canadian citizens by this doctrine. Case law decisions have shaped legislation, informed policy, and dictated practice related to the way law enforcement carry out their mandate and enforce the law in their attempt to balance the rights and freedoms of individuals with the need to maintain and ensure public safety.

Given this, it is not unexpected that the courts in Canada have had a significant effect in shaping how law enforcement does its work, as police and other agents of public safety are required to respond to new obligations, expectations, and requirements as set out by the courts. However, as pointed out by the Council of Canadian Academies (2014), the courts do not need to consider the effects of their decisions on policing generally or investigations specifically. Instead, judicial decisions are designed to maintain and protect the rights and freedom of all Canadians, including those accused or suspected of committing an offence. As a result, the expenditure of police resources, in terms of human, technological, financial, and time resources is, in part, dictated by case law rulings that decree the way law enforcement officers must carry out their duties throughout Canada.

In principle, a common law legal system is designed to respond to changes in society. As technology enhances and increases the complexity of Canadian society there has also been an increase in the complexity of crime and investigative techniques. The courts must respond to social changes by determining how to interpret and apply the *Criminal Code* and *Charter* in the face of this ever-changing context. As a result, initial *Charter* decisions must be re-considered in the face of both technological change and shifts in societal norms and expectations.

Since the introduction of the *Charter of Rights and Freedoms*, specific and individual case law decisions have substantially changed the landscape of law enforcement. This section of the report explores a list of landmark case law decisions that have significantly affected the practice and operation of law enforcement in Canada. To develop this list, legal literature and case law rulings were reviewed, and to ensure the majority of critical case law decisions related to law enforcement were included, citation frequency was used as a crude estimate of each ruling's effect on law enforcement and the Canadian criminal justice system.

In ***Hunter et al. v. Southam, Inc., [1984] 2 S.C.R. 145***, the Supreme Court of Canada made its first ruling on Section 8 of the *Charter* that guarantees the right to protection against unreasonable search and seizure. The premises of the Edmonton Journal, a division of the corporation Southam, Inc., were searched based on the authorization of the Director of Investigation and Research of the Combines Investigation Branch. The authorization was broad, allowing investigators to inspect anything on the premises and "elsewhere in Canada". At issue was whether s. 10 of the *Combines Investigation Act* that permitted such authorization was consistent with the *Charter*; the Supreme Court ruled that it was not. A warrant acts as an alternative to permission to enter and search any place where a reasonable expectation of privacy exists. Failure to obtain a warrant constitutes a breach of Section 8 of the *Charter*. This decision, which upheld that searches without a warrant are, by their nature, unreasonable, increased the circumstances wherein law enforcement is required to obtain a search warrant. The requirement for police to obtain a warrant in any situation that does not constitute exigent circumstances has been consistently upheld over the past three decades,

including in ***R. v. Paterson, [2017] 1 S.C.R. 202*** where evidence obtained by police without warrant was excluded. In this case, Langley RCMP officers entered Paterson's home without a warrant following his agreement to hand over some cannabis in his possession. Once inside Paterson's home, the officers spotted drugs, firearms, and related paraphernalia. Paterson was then arrested, and the subsequent warrantless search uncovered additional drugs and weapons, all of which were ruled to be inadmissible by the Supreme Court. Other rulings will be discussed in this section that have made interpretations about what circumstances carry a reasonable expectation of privacy and subsequently require a warrant.

In ***R. v. Therens, [1985] 1 S.C.R. 613***, where, following a motor vehicle accident, officers asked the accused to provide a breathalyzer sample at the police detachment, the Supreme Court ruled on *Charter* Section 10 that provides Canadians with the right to be informed of the reasons for one's arrest or detention and to be provided access to counsel. The court extended this right by clarifying that a motorist requested to provide a breathalyzer sample had been detained and, therefore, had a right to access to counsel, signaling that the rights of the individual were to be at the forefront of the criminal justice system proceedings, regardless of the implications for evidence gathering or the outcome of a criminal investigation (Rosenberg, 2009). The definition of detention and the issue of access to counsel has since continued to be refined and arguably expanded through other judicial decisions. In ***R. v. Taylor, [2014] 2 S.C.R. 495***, the Supreme Court ruled that law enforcement must facilitate access to counsel as soon as is practicable after an accident, medical treatment, or hospitalization. The accused in this instance had been arrested for impaired driving causing bodily harm after losing control of his vehicle and injuring three of his four passengers. Immediately upon arrest, Taylor requested to speak with his lawyer. Instead, he was taken to hospital for further examination, including multiple blood draws, and was not given the opportunity to contact his lawyer during this time. The Supreme Court determined that police cannot pursue obtaining evidence until access to counsel is facilitated or waived. As it encoded the right of Canadian citizens to counsel, the ruling in ***R. v. Taylor, [2014] 2 S.C.R. 495*** also increased the onus placed on law enforcement to carry this out in practice.

R. v. Collins, [1987] 1 S.C.R. 265 provided an initial framework for the exclusion of evidence obtained via a *Charter* violation. The accused, Ruby Collins, had been under surveillance at a motel. Hours later, officers observed Collins seated in a pub with some associates. Suspecting that she may be in possession of heroin and might swallow the evidence, an officer grabbed Collins by the throat and pushed her to the floor. At that time, a balloon full of heroin was found in her hand. In its ruling, the courts outlined that three elements were to be considered when deciding whether evidence would be excluded: (1) whether the admission would affect the fairness of the trial; (2) the seriousness of the *Charter* violation; (3) and the effect of the admission on the administration of justice. This ruling underscored the seriousness of *Charter* violations, as Morton and Knopff (2000) suggested that the Supreme Court created a low threshold resulting in the frequent exclusion of evidence. The relevance of this ruling is apparent in its citation frequency, having been cited over 4,200 times on the online legal literature database CanLII.

The court tendency toward exclusion of evidence was later mitigated by the introduction of a new approach in ***R. v. Grant, [2009] 2 S.C.R 353***. A uniformed officer approached Grant, blocking his

path as he was walking on a sidewalk and appeared 'nervous' after spotting an unmarked police vehicle. Two more officers became involved, standing directly behind Grant. When asked if he 'had anything he shouldn't have', Grant admitted to some cannabis and a firearm, and was arrested and searched. The appellant argued that officers, by blocking his path, had unlawfully detained him and failed to advise him of his right to speak with an attorney. At trial, Grant was convicted of five firearms offences and no breach of his ss. 8, 9, and 10(b) *Charter* rights was found. The trial judge found that the officers' questioning of Grant did not constitute a search and that Grant had not been detained – or, if he had, he waived his right by cooperating. The Supreme Court disagreed with regard to ss. 9 and 10(b); a reasonable person in Grant's position would feel that police had detained him or her, and that, given that the officers admitted to lacking reasonable suspicion, the detention was arbitrary. Grant should have been informed of his section 10(b) right to counsel. The evidence in question – Grant's firearm – had been obtained as a direct result of these violations.

Three criteria were considered in determining exclusion of evidence under section 24(2), differing from the original three laid out in ***R. v. Collins, [1987] 1 S.C.R. 265***: (1) the seriousness of the *Charter*-infringing state conduct; (2) the effect of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits. In particular, ***R. v. Grant, [2009] 2 S.C.R 353*** deviated from ***R. v. Collins, [1987] 1 S.C.R. 265*** in stating that discoverability – whether the evidence would have been discovered regardless – was no longer determinative of admissibility. Although the *Charter* breaches did have a significant effect on the rights of the accused, the officers' behaviour was neither egregious nor in bad faith and the evidence was highly reliable. As such, the firearm was admitted under section 24(2). At the conclusion of the judicial process, four of the five convictions were upheld by the Supreme Court, and a new trial was ordered on the weapons trafficking charge, for reasons unrelated to the *Charter* breaches. ***R. v. Grant, [2009] 2 S.C.R 353*** acknowledged that ***R. v. Collins, [1987] 1 S.C.R. 265*** leaned too much toward the rights of the individual. While the continued effect of ***R. v. Collins, [1987] 1 S.C.R. 265*** was lessened by the ***R. v. Grant, [2009] 2 S.C.R 353*** framework, the police are still required to avoid a *Charter* breach at all cost.

Exhibits seized with judicial authorization can be excluded as a result of subsequent police behaviour. In the case of ***R. v. Gill, [2021] BCSC 377***, the accused and the victim were involved in a motor vehicle accident in the spring of 2011. The altercation escalated, the victim was shot and killed, and Gill was subsequently charged with second-degree murder. Investigators in this case violated the accused's section 8 *Charter* rights in two main ways: the over-seizure of evidence and the failure to apply for continued detention orders to retain the evidence, as required by sections 490(2) and (3) of the *Criminal Code*. During a warranted search of the accused's residence, officers discovered nine cell phones and were uncertain which one belonged to the accused. Little or no attempt was made to establish who the owners of the phones were, and instead all of the cell phones found in the residence were seized, along with security camera footage. The Court ruled that officers did not have reasonable grounds to indiscriminately seize all phones nor were there grounds to seize the video surveillance system. Additionally, throughout the course of the investigation, officers from the Integrated Homicide Investigation Team (IHIT) failed to apply for judicial authorization to continue to hold this evidence. During testimony, the investigating officer admitted that no detention applications were sought in this case, as well as numerous other files

that officer was involved in. Despite legal advice to the contrary from both Crown Counsel and RCMP Counsel, IHIT's policy with regard to detention orders was one of non-compliance from 2007 to 2014. Given this widespread policy, and the fact that no detention applications were made in this case even after 2014, this over-holding amounted to a breach of the accused's *Charter* rights. As such, the evidence taken from the accused's residence was excluded. While the Court did not find the over-seizure alone warranted the exclusion of the resulting evidence, when combined with IHIT's long-term, willful disregard of legislative requirements, the behaviour was found to be sufficiently egregious to bring the administration of justice into disrepute.

R. v. Brydges, [1990] 1 S.C.R. 190 considered the right to counsel afforded to Canadian citizens under *Charter* Section 10(b). Brydges was arrested in Manitoba for a homicide offence that occurred in Alberta. The police officers involved were from Edmonton. At the start of the interrogation, Brydges was asked if he wanted to contact a lawyer, to which the accused stated that he did not know a lawyer, could not afford one, and asked whether Manitoba had a Legal Aid service. Though the officer responded in the affirmative, the interrogation continued and Brydges made several statements later used to convict him. Failing to provide the accused with information and access to Legal Aid was found to be a breach of his section 10(b) right. The ruling outlined that police are required to provide information about the availability of Legal Aid and facilitate access, if requested. This decision also outlined that, while it is possible to implicitly waive one's 10(b) right to access counsel, the standard for doing so is very high: the accused must carefully consider his or her options and be aware of the consequences of choosing to waive the right to counsel. Department of Justice (2015) commentary on ***R. v. Brydges, [1990] 1 S.C.R. 190*** outlined its implications for impaired driving cases, which often occur outside regular working hours, and the extent to which this issue has been litigated in the courts.

Several subsequent Supreme Court decisions further clarified the role of police in such situations. The first, ***R. v. Bartle, [1994] 3 S.C.R. 173***, involved an accused who failed a roadside breathalyzer test. Upon arrest, the constable on scene advised the appellant of his right to retain and instruct counsel, including free Legal Aid counsel. However, this incident occurred at 1:00am on a Saturday morning, and the officer made no mention of a 24-hour, toll-free legal aid phone number, nor did he ask if Bartle wished to speak to a lawyer at the time of arrest. During his testimony, the accused stated that he believed he would only be able to speak with counsel when one became available during normal business hours. The Supreme Court ruled that an accused is entitled to be advised not only of the existence of free legal counsel, but also how to access it. In this instance, failing to provide Bartle with the toll-free number was a violation of his section 10(b) rights.

Similarly, in ***R. v. Propser, [1994] 3 S.C.R. 236***, following a vehicle and foot chase, the accused was arrested and charged with having care and control of a motor vehicle while having a blood alcohol level above the legal limit and impaired driving. Prosper was advised of his right to counsel and was provided with a list of phone numbers for Legal Aid lawyers. The accused was unable to contact counsel, as all Legal Aid lawyers in the area had recently decided to stop taking calls outside business hours except for existing clients. As a result, no duty counsel system was in place at the time of these events. The arresting officer provided Prosper with a phone book and the opportunity to attempt to contact other counsel. Not long after, the accused agreed to a breathalyzer test. The

Court found that, in such situations, police are obligated to delay gathering additional evidence from an accused who has asserted his or her right to counsel until the accused has had a reasonable opportunity to contact counsel. If the detainee chooses to waive this right, police are required to inform him or her of this obligation. ***R. v. Hebert, [1990] 2 S.C.R. 151*** considered whether a confession provided to an undercover officer constituted a breach of an individual's right to silence under *Charter* Section 7, or the right to refuse to answer questions. The accused had been arrested in connection with a robbery and informed police, following a consultation with legal counsel, that he did not wish to make a statement. Herbert was subsequently placed in a jail cell with an undercover officer who engaged him in conversation. Based on the accused's statements to the officer, Herbert was convicted. The Supreme Court's decision held that an undercover officer may not actively elicit a confession, indicating that incriminating statements made to an undercover officer are allowable so long as the officer does not actively question or probe. This ruling extended the right to silence to the detention stage of an investigation. Further case law has reiterated the requirement for police to be passive. For example, in ***R. v. Singh, [2007] S.C.R. 405***, the accused repeatedly stated that he did not wish to make a statement to investigating officers, but the interrogation continued resulting in Singh making several incriminating statements. The courts found that repeated questioning of a suspect or the accused after they have asserted their right to silence is permissible, but that this does not extend to the point where it restricts an individual's free will in exercising their right to remain silent. Taken together, the case law surrounding Section 7 limits police to being passive recipients of information imparted by a suspect.

Three fundamental cases in the early 1990s and the legislative changes that resulted significantly affected the methods, techniques, and strategies by which police could obtain evidence as part of an investigation. In the face of increased technological capacity for surveillance and monitoring, the courts were required to interpret and apply an individual's *Charter* Section 8 rights to this constantly changing context. In doing so, the courts applied the tests developed in ***R. v. Edwards, [1996] 1 S.C.R. 128*** and ***R. v. Plant, [1993] 3 S.C.R. 281*** that considered a range of factors to determine the limits to the concept of a reasonable expectation of privacy. In ***R. v. Edwards, [1996] 1 S.C.R. 128***, the accused was suspected of trafficking drugs and hiding crack cocaine in his girlfriend's apartment, where Edwards was not a resident. Officers attended the apartment of Edwards' girlfriend and failed to inform her of her right to refuse entry to police who did not have a warrant, and of her right to counsel. As a result of the officers' statements, some of which were untrue or misleading, the officers were allowed into the apartment and conducted a search. The Supreme Court ruled that Edwards had no reasonable expectation of privacy in a residence that was not his own, and that the expectation of privacy was not a valid basis upon which to contest the admissibility of the evidence found in the apartment. As such, the evidence in question was not excluded, and Edwards' conviction was upheld. In ***R. v. Plant, [1993] 3 S.C.R. 281***, officers were directed to a potential marijuana grow operation by an anonymous tip, and used a terminal connected to the local electrical utility to find that electrical consumption was far higher than in similar residences. Police entered the property to conduct a perimeter search and observed additional signs of a grow-op, including covered basement windows and a covered vent. Based on this information, a search warrant was obtained. Although the perimeter search was deemed unreasonable by the Supreme Court, as there were no exigent circumstances to justify a

warrantless search and did constitute a violation of the accused's section 8 *Charter* right, the search of computerized records did not violate section 8 of the *Charter*.

R. v. Pipping, [2020] BCCA 104 dealt with residents' expectations of privacy in common areas of an apartment building. During the course of an undercover operation, police sought to identify which unit of a four-story apartment complex the appellant resided in. The entrance to the building required key access and the property management company would not provide police with Pipping's unit number without a warrant. The building had no video surveillance. Police obtained a general warrant to search common areas and were able to observe Pipping entering Unit #407. Based on this, a search warrant for the accused's apartment was carried out and its contents led to Pipping's conviction on several drug-related charges. The Court of Appeal found that the appellant did have a reasonable privacy interest in the hallway outside of his unit because, given the building's security features, it was reasonable for occupants to assume the public was not permitted to enter without an invitation. The search of common areas was determined to be covert, and police erred by failing to give notice of the covert search. Given this, the warrant was deemed invalid, and the accused's section 8 *Charter* rights were violated.

In ***R. v. Duarte, [1990] 1 S.C.R. 30****,* the Supreme Court found that recording a conversation of a suspect without their consent constituted a breach of an individual's *Charter* Section 8 rights. In this case, police had rented an apartment for an informant working with an undercover officer and equipped the unit with audio-visual recording equipment. Of note, the informer and officer consented to the recording, but the accused was unaware at the time that they were being recorded. This resulted in an amendment of the *Criminal Code* to include section 184.2, whereby law enforcement was required to seek judicial authorization prior to recording conversations in situations where only one party consented to the recording (known as "one party consent"). In ***R. v. Wong, [1990] 3 S.C.R. 36***, Toronto police used video surveillance in a hotel room in connection with a gambling investigation with the permission of hotel management, but without a warrant. Police had established prior to the surveillance that a warrant would be unlikely to be granted based on the available evidence at the time but proceeded regardless. The Supreme Court found that the installation of cameras for video surveillance without consent also constituted a Section 8 *Charter* breach. The *Criminal Code* was subsequently amended to include general warrant requirements in section 487.01.

In ***R. v. Wise, [1992] 1 S.C.R. 527***, the accused was a suspect in a homicide investigation. As police had found little evidence in Wise's home or vehicle, they installed an electronic tracking device in his vehicle. This surveillance led to an arrest for mischief. The courts contended that a measure of privacy was owed to citizens as they moved around publicly, and that electronic tracking of movements without prior authorization constituted a *Charter* breach. This ruling led to the inclusion of a tracking warrant provision in the *Criminal Code* under section 492.1. As the capacity of law enforcement to utilize technology to obtain evidence increased, so too did the burden on police to justify the use of these kinds of methods. The pre-emptive requirement to obtain warrants for each of these circumstances has increased, rather than decreased the resource expenditure to obtain evidence in investigations.

Perhaps the case that has had the most direct effect on law enforcement in the pre-***R. v. Jordan*** era is ***R. v. Stinchcombe, [1991] 3 S.C.R. 326***. This ruling substantially increased the disclosure burden placed upon Crown Counsel and consequently on the police. The accused was a lawyer charged with theft, fraud, and breach of trust for allegedly appropriating property held in trust for a client. The defence argued that, despite the formal relationship of client and lawyer, Stinchcombe had been made a business partner and his behaviour had been appropriate for that position. During a preliminary hearing, a Crown Counsel witness, who was a former secretary of Stinchcombe's, gave evidence favourable to the defence. She also gave a similarly favourable account to an RCMP officer at a subsequent time. Crown Counsel elected not to call this witness during trial and did not disclose the contents of the statements. The Supreme Court's unanimous decision ruled that the Crown Counsel has a duty to disclose to the defence any and all evidence that could potentially be relevant to the case to enable the accused's right to make full answer and raise a fulsome defense as guaranteed under *Charter* Section 7. The definition of what is to be considered relevant evidence was left open for debate in subsequent rulings, which has continued to expand over time.

For example, in ***R. v. McNeil, [2009] 1 S.C.R. 66***, a drug trafficking case in which the arresting officer had himself committed drug-related offences for which he was later charged, it was determined that some records of police misconduct may be relevant in accessing the testimony or evidence presented by the officer depending on the specifics of the investigation. In ***R. v. McKay, 2015 BCSC 1510***, the B.C. Supreme Court found that source handling notes, source debriefing reports, and dissemination reports related to information provided by confidential informers were subject to disclosure, despite the fact that they would likely require substantial vetting to guarantee confidentiality. In this case, where McKay had been charged with cocaine trafficking in a "dial-a-dope" operation, the search warrant had been based on information provided by confidential informants. The effect of ***R. v. Stinchcombe, [1991] 3 S.C.R. 326*** on law enforcement cannot be overstated, having fundamentally changed the capture and disclosure of investigative actions. In British Columbia, any specialized investigation subject to major case management is required to have a file coordinator responsible for investigation data management and disclosure. In large RCMP detachments and municipal departments across British Columbia, administrative disclosure clerk and electronic file administrator positions have been created to handle the volume of data generated by investigations that is subject to the disclosure rules established in ***R. v. Stinchcombe, [1991] 3 S.C.R. 326***. As identified by Hon. Rosenberg (2009), "disclosure obligations… delay and frustrate access to justice within a reasonable time". As will be discussed, the ***R. v. Stinchcombe, [1991] 3 S.C.R. 326*** disclosure requirements, when combined with the ***R. v. Jordan, [2016] 1 S.C.R. 631*** ruling on right to trial within a reasonable time have resulted in law enforcement investing substantial resources to meet the guidelines and requirements outlined by the courts.

R. v. Feeney, [1997] 2 S.C.R. 13 considered whether warrantless entry to a residence constituted a breach of Section 8 of the *Charter of Rights and Freedoms*. Feeney was awoken in his trailer by investigating officers, who entered the trailer after their knocks went unanswered. He was arrested once officers spotted blood on his clothing. Although promptly informed of his right to counsel, there was no phone in Feeney's trailer, and he did not consult with legal counsel until almost 48 hours after his arrest. Within that timeframe, the accused made several incriminating statements to police and evidence had been taken from his person and home. The court ruled that the existing

common law violated Section 8, and, excepting exigent circumstances, warrantless arrests within a private dwelling were unlawful. The legislative response amended the *Criminal Code* to include section 529, known as the "Feeney warrant", to be used in circumstances where an individual is subject to an arrest warrant and there are reasonable grounds to believe the individual is inside a dwelling place. This warrant, implemented to satisfy the expectation of privacy within such a dwelling place, extended the circumstances under which law enforcement must seek and obtain a warrant.

In 2020, there was a ruling concerned with the standard required for breaching conditions, including those relating to curfew and appearing at the front door when police attend. In ***R. v. Zora, [2020] S.C.C. 14***, the accused had been charged with several counts of possession for the purposes of trafficking. Zora was granted bail with 12 conditions, among them a 'curfew condition' that required him to remain in his residence, except during the day if accompanied by an approved supervisor, and the condition that he appear at the door of his residence within five minutes of a peace officer's attendance. On two separate occasions, police attended his residence in the evening, but the accused failed to present himself at the door. As a result, he was charged under section 145(3) of the *Criminal Code* with two counts of breaching curfew conditions and two counts of breaching his condition to present himself at the door. At trial, Zora was acquitted of the former chargers but convicted of the latter. Subsequent appeals were dismissed. At issue was whether section 145(3) of the Code requires a subjective or objective *mens rea*. In other words, whether the court should consider the accused's specific intentions at the time of the offence or if the accused's behaviour is sufficiently different from that of a reasonable person. Zora's conviction was dismissed, and a new trial was ordered. Although the BC Court of Appeal applied an objective standard, the Supreme Court of Canada disagreed; the Court determined that Parliament intended to apply a standard of subjective fault.

Preliminary analysis of the most-cited rulings on CanLII suggest that the late 80s to early 2000s were heavily represented among the top 300 rulings, with 69% occurring between 1987-2002. This lends support to the effect of the *Charter* on the criminal justice system. Having established standards and tests for the initial interpretation and application of the *Charter of Rights and Freedoms* in the late 1980s and 1990s, rulings in the subsequent decades have focused heavily on the circumstances in which these tests apply. As suggested by Malm et al. (2004), the courts have also begun to rule on *Charter* issues in relation to technology.

With respect to search warrants and technology, in ***R. v. Jones, 2011 ONCA 632***, the Court of Appeal for Ontario decided that a computer search with warrant must be related to what was sought in the warrant based on reasonable and probable grounds. In this case, the accused was suspected of fraud, and a warrant for his computer had been obtained for that purpose. While conducting this search, analysts discovered images of child pornography. Crown Counsel advised police that they could expand their search to include further evidence of child pornography and claimed that the existing warrant was broad enough to cover this expanded investigation. The courts disagreed, noting that search warrants fundamentally limit the type of evidence that can be searched for, not what can be searched. If a police officer, as part of their investigation, should happen upon evidence unrelated to what was being sought for, it is allowable under the plain view doctrine codified in

Criminal Code section 489(2). However, to continue searching for additional evidence related to the new offence requires that a subsequent search warrant must be applied for and granted. Given the potential for copious amounts of information to be stored on computers and electronic devices, and the potential for evidence of multiple offences to co-exist, the effect of this ruling may be a requirement for police to obtain repeated search warrants for the same device.

Three court rulings, all concerning child pornography offences, considered the expectation of privacy as it relates to electronic data. In ***R. v. Cole, [2012] S.C.C. 53***, there was the introduction of an expectation of privacy, although diminished, for work-issued computers where personal use is permitted. Cole was employed as a high school teacher and, during routine maintenance of his work-issued laptop, a technician discovered nude photos of a female student. Following the discovery, the school principal seized the laptop and ordered the technician to copy the evidence and temporary internet files to CDs. The laptop and the CDs were handed over to police who then conducted their own warrantless search. AS a result of this case, the courts ruled that, in these types of circumstances, warrants are required. ***R. v. Cole, [2012] S.C.C. 53*** also established four lines of inquiry guiding the reasonableness of an accused's expectation of privacy: (1) the subject matter of the search; (2) whether the accused had a direct interest in the subject matter; (3) whether a subjective expectation of privacy exists; and (4) whether the subjective expectation of privacy is objectively reasonable.

In ***R. v. Ward, 2012 ONCA 660***, the owner of a German website provided police with evidence that child pornography was being shared on his platform, and police used this information to request the names and addresses of site subscribers from the relevant internet service provider (ISP). Identifying information was voluntarily provided and used to obtain a search warrant. The courts concluded that the accused did not have a reasonable expectation of privacy in this particular situation. However, the courts went on to say there may be circumstances in which an individual does have an expectation of privacy over personal information disclosed to a third party, such as an internet service provider.

Six years later, ***R. v. Reeves, [2018] S.C.C 56*** affirmed an accused's right to privacy with regard to the contents of a shared electronic device. Reeves had been arrested for a domestic assault on his common-law spouse in 2011. Within a year of the arrest, Reeves' partner contacted the accused's parole officer to report that she had discovered child pornography on their shared laptop. Officers attended the home and seized the laptop with her consent, but without a search warrant. Following the lines of inquiry set out in ***R. v. Cole, [2012] S.C.C. 53***, the Supreme Court determined that Reeves did indeed have a reasonable expectation of privacy. Regardless of the joint ownership of the laptop and his spouse's consent, the warrantless seizure and search of the device constituted an infringement of the accused's *Charter* rights. Taken together, these rulings made it clear that *Charter* Section 8 rights apply to an individual's electronic data and served to increase the onus on police to obtain warrants for electronic information.

In ***R. v. Tse, [2012] S.C.C. 16***, which concerned warrantless surveillance of communications between an alleged kidnapping victim and his daughter, the Supreme Court found that the existing *Criminal Code* provisions allowing wiretapping in emergency situations were unconstitutional as they lacked accountability. The subsequent Bill C-55 added section 196.1 of the *Criminal Code*

requiring that law enforcement notify any individuals whose private communications were intercepted in emergency circumstances within 90 days and restricted the emergency authorization of wiretaps to offences listed under Section 183 of the *Criminal Code*. This amendment simultaneously increased the burden on police to undertake administrative measures related to emergency wiretaps and restricted the circumstances in which they may be used.

In 2013, there were additional restrictions placed on the police by the courts in relation to technology. In ***R. v. Telus Communications Company, [2013] S.C.C. 16***, the issue in question was whether a general warrant was sufficient to obtain electronic copies of text messages between two Telus subscribers. It was held that the content of text messages necessitated private communications that are not obtainable under a general warrant. The court afforded text messages the same protection as phone conversations, which necessitate a Part VI application if the police wish to intercept or collect the data. In ***R. v. Vu, [2013] 3 S.C.R. 657***, the courts considered whether computers could be searched as part of a search warrant. The accused was being investigated for theft of electricity for which the police obtained a search warrant. This warrant did not specifically authorize searching the accused's computers, only "computer generated notes". Warrants allow for law enforcement to reasonably search containers and storage areas, and the issue in question was whether a computer could be considered a container or storage receptacle. The ruling found that computers and similar devices are significantly different from storage areas, and that prior authorization is required to search a computer. While not fundamentally increasing the burden upon police, this ruling reinforced that electronic devices are unique, and the data therein is subject to privacy protections.

Two rulings had a significant effect on how and on whom police use undercover operations. In ***R. v. Fliss, [2002] 1 S.C.R. 515***, the accused had been charged and convicted at trial of first-degree murder, which was reduced to second-degree murder on appeal. This was because the original 1st degree charge was the result of Fliss committing the homicide during the commission of another offence, sexual assault. However, there was some ambiguity regarding the sexual assault, such as the forensic evidence found no male DNA at the scene or on the victim. Police engaged in an undercover operation in which officers entangled the accused in a fictional criminal organization. Eventually, Fliss confessed to the officers, believing the organization had a terminally ill contact who would take the fall for the offence. The confession was surreptitiously recorded and the undercover officer in attendance promptly reviewed and corrected the transcript of the recording. However, at trial, the judge determined the judicial authorization for this recording should not have been provided, due to insufficiency of evidence, and both the recording and the resulting transcript were deemed inadmissible. At issue was the evidence presented by the undercover officer at trial. Because the officer had none of his own notes taken during Fliss' confession, he was permitted to use his corrected transcript to refresh his memory. His testimony, at times, was a near-verbatim reading of the excluded transcript. The Supreme Court ruled that the officer was entitled to refresh his memory using excluded evidence, unanimously dismissing the accused's appeal. Of note, there was a minority opinion that argued that the evidence should not be excluded due to the s. 686(1)(b)(iii) proviso of the *Criminal Code*, whereas the majority decided it should not be excluded due to a s. 24(2) analysis.

Over one decade later, ***R. v. Hart, [2014] S.C.C. 52*** fundamentally changed police use of the Mr. Big operation investigative technique. The accused was suspected of killing his twin three-year-old daughters, but police lacked evidence to secure an arrest. Two years following the deaths, undercover officers began to establish a relationship with the accused and involve him in a fictitious criminal organization with the goal of eliciting a confession. This technique is known as a Mr. Big operation (Lutes, 2020). Hart became closely involved with this organization, committing several simulated offences, accepting payments and trips, and quickly began to regard the undercover officers as his brothers. Within a few months of the operation, the accused confessed to the murder of his daughters, and even re-enacted the murder on location in front of an undercover officer. ***R. v. Hart, [2014] S.C.C. 52*** established that any confession generated from a Mr. Big operation should be presumed to be inadmissible due to its misleading nature. The decision ensured that evidence obtained through a Mr. Big operation could only be admitted upon Crown Counsel proving, on the balance of probabilities, that the value of the confession outweighed its prejudicial effect. Judge Karakatsanis alone disagreed with this approach to Mr. Big operations arguing that the technique violated an accused's autonomy, made for unreliable confessions, and raised concerns about abusive state conduct.

With the decision outlining that the technique had been used over 350 times prior to 2008, the ruling had significant implications for law enforcement. This case outlined the need for corroborative evidence to suggest the reliability of the confession. As the resource-intensive Mr. Big operation is often used as a measure of last resort in complex or historical criminal cases, the presence of additional evidence is often a rarity (Moore, Copeland, & Schuller, 2009). Additionally, as noted by Hart's lawyer, ***R. v. Hart, [2014] S.C.C. 52*** increased the obligation on police to document their actions to ensure that they are consistently meeting the requirements outlined in the ruling (Dias, 2014). However, confessions made to undercover police officers still remain somewhat in a "legal vacuum" with regard to an accused's Charter rights, and it is unclear to what extent ***R. v. Hart, [2014] S.C.C. 52*** applies to other undercover operations (Lutes, 2020).

Soon after, ***R. v. Kelly, [2017] ONCA 621*** sought to provide a framework for determining whether the Hart test was applicable for similar undercover operations. In this case, the accused was convicted of the first-degree murder of his common-law spouse following a variation of a Mr. Big undercover operation in which a police officer assumed the role of a private investigator for an insurance company attempting to settle Kelly's common-law spouse's life insurance policies. The Ontario Court of Appeal ruled that because the officer did not befriend the accused or make him vulnerable to pressure as a friend, Kelly's confessions were admissible and did not violate Kelly's *Charter* rights.

The definitive judgment on entrapment came only a few years after the *Charter* came into force. ***R. v. Mack, [1988] 2 S.C.R. 903*** concerned an accused who had been approached by a persistent police informant over the course of several months to sell drugs. Mack had a previous addiction and, among other tactics, the informant, at one point, threatened him. The Supreme Court of Canada allowed the accused's appeal due to entrapment. ***R. v. Mack, [1988] 2 S.C.R. 903*** established that entrapment occurs when "(a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal

activity or pursuant to a *bona fide* inquiry, and, (b) although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and induce the commission of an offence" (p. 964). In ***R. v. Barnes, [1991] 1 S.C.R. 449***, the court clarified that an exception exists where officers are investigating a precise location for which there is reasonable suspicion of criminal activity. In such an instance, it is fair for police to provide any individual related to that location with the opportunity to commit an offence. Barnes had been arrested as a result of the Vancouver Police Department's "buy and bust" operation in the Granville Mall, an area known to be the site of regular drug trafficking. The accused argued that he had been subjected to random virtue testing, having been approached without any reasonable suspicion that Barnes himself was engaged in criminal activity. The Court ruled that police conduct was justified, as there was reasonable suspicion that drugs were being sold at the Granville Mall, and the accused was approached during the course of a *bona fide* inquiry.

These principles were upheld in two recent decisions. In ***R. v. Swan, [2009] BCCA 142***, a police constable called a number that had been provided to her as a possible dial-a-dope number, asked if the caller was working at the time, and directly requested "40 up", street jargon for $40 worth of cocaine. The constable and Swan met at a pre-arranged location, made the exchange, and the appellant was arrested and charged. The Court of Appeal overturned Swan's conviction and entered a stay of proceedings. It was determined that cold calling phone numbers based on nothing more than mere suspicion and providing the target with an opportunity to commit an offence does constitute entrapment. A phone number being provided to police as a potential drug operation alone does not amount to a reasonable suspicion. Similarly, ***R. v. Ahmad, [2020] S.C.C. 11*** ruled that the police cannot offer an individual who answers the phone an opportunity to commit an offence without reasonable suspicion of criminal activity for either the individual or the phone number. Of note, an unverified tip does not meet this standard. However, reasonable suspicion can be formed during the course of a conversation with a suspect. In this case, police had received unsubstantiated tips regarding dial-a-dope operations, resulting in the eventual arrest of Ahmad and his co-accused, Williams. The officer who called Ahmad had a conversation to him prior to requesting drugs, noting that the accused responded in the affirmative to a suspected alias and clearly understood drug subculture jargon. Conversely, Williams was not subject to similar discussion before being provided an opportunity to sell drugs. The Court ruled that, as police had taken the time to establish reasonable suspicion during the phone call with Ahmad, he was not entrapped. On the other hand, Williams was entrapped as no such attempt was made before the police invitation to traffic drugs.

Returning to Section 8 violations with technology and third-party data, in its judgement in ***R. v. Spencer, [2014] 2 S.C.R 212***, the accused had been identified as a suspect because of the police's use of a peer-to-peer file sharing program, LimeWire. This program allowed all users to obtain each other's IP addresses and see their shared folders. An officer identified an IP address in his jurisdiction and found child pornography in that user's shared folder. From there, subscriber information was voluntarily provided by the ISP. The Supreme Court ruled that the police did not have lawful authority to obtain subscriber information, regardless of a company's willingness to provide it. While the courts left room for future discussion about what would constitute lawful authority to obtain information, such as exigent circumstances, the courts made it clear that there were circumstances wherein a person had a reasonable expectation of privacy over their subscriber

information, and that such circumstances would require a warrant to be lawful. The Supreme Court in ***R. v. Spencer, [2014] 2 S.C.R 212*** intentionally deviated from the findings of the Ontario Court of Appeal in ***R. v. Ward, 2012 ONCA 660***. Whereas the Court of Appeal based their decision on two main considerations: 1) that an ISP has an interest in helping law enforcement address offences committed on its services, and 2) the serious nature of the offence in question, the Supreme Court in ***R. v. Spencer, [2014] 2 S.C.R 212*** argued that these considerations do not outweigh section 7(3)(c.1)(ii) of the Personal Information Protection and Electronic Documents Act (PIPEDA). PIPEDA only allows disclosure of personal information to a government institution with "lawful authority". No such authority existed in this instance and the officer's inquiry effectively amounted to a warrantless search. This ruling further entrenched the privacy rights of Canadian citizens, but also increased the circumstances whereby law enforcement would be required to obtain a warrant.

R. v. Fearon, [2014] 3 S.C.R. 621 clarified that law enforcement were not justified in searching cell phones related to every arrest. The accused had been arrested for his suspected involvement in an armed robbery. During a pat-down search incident to arrest, officers discovered a mobile phone, the contents of which allowed them to find the handgun used during the offence. While allowing searches in the specific circumstances of the case, wherein the arrest was lawful and there is an objectively valid reason to search, such as to protect the public or preserve evidence, the police may be permitted to search a mobile phone. While this ruling still permitted law enforcement to take action where justified, the onus was placed on law enforcement to provide that these criteria have been met. This required police officers to increase their documentation around the decision-making process related to requests to search a cell or mobile phone. In ***R. v. McNeill, [2020] ONCA 313***, the Ontario Court of Appeal dismissed the argument that a second warrant would be required to examine a seized cell phone belonging to an individual who was not the direct target of the investigation. The two co-accused had been convicted of multiple counts of possession for the purpose of trafficking. Although McNeill was not the target of the original police investigation, she was present when police executed a search warrant at a garage where McNeill and others were found, and her cell phone was seized. The warrant explicitly allowed for the seizure and examination of electronic devices from the location. On appeal, McNeill claimed that a second warrant should have been obtained to examine her phone, as it was her co-accused who was under investigation and only his section 8 rights had been considered by the justice who authorized the search. Regardless of the fact that McNeill herself was not originally under police scrutiny, there were reasonable and probable grounds to believe that evidence found in the garage would be directly relevant to the drug trafficking investigation.

A substantial ruling with respect to *Charter* Section 8 was ***R. v. Marakah, [2017] 2 S.C.R. 608***, where the Supreme Court ruled that text messages obtained from the phone of the recipient of the message may carry a reasonable expectation of privacy, and that, although there are circumstances that could justify a warrantless search, the circumstances in ***R. v. Marakah, [2017] 2 S.C.R. 608*** constituted a breach of Section 8 rights. In this case, police had obtained warrants to search the home of the accused and his accomplice, during which they seized two cell phones that contained incriminating text messages. However, the warrant to search Marakah's residence was later deemed invalid, largely due to its overreach. The application judge found the list of items to be searched for and seized to be "virtually limitless". Separate to this, the accused argued that he had a

reasonable expectation of privacy with regard to the personal communications recovered from his accomplice's phone. The majority of the Court agreed that this expectation was reasonable and that Marakah had standing under section 8. As the search of the accomplice's phone was warrantless and not a valid search incident to arrest, the evidence was excluded under section 24(2). In dissent, Judge Moldaver and Judge Côté argued Marakah lacked standing to challenge the search, as the accused had no control whatsoever over the mobile phone of his accomplice and thus had no reasonable expectation of privacy. Additionally, they suggested that granting standing in these circumstances has the undesirable consequence of providing a reasonable expectation of privacy to sexual predators or abusive partners in any threatening, explicit, or otherwise unlawful communications sent to their victims. This ruling presented a number of challenges for law enforcement and, by deciding that it was the conversation rather than the device that involved privacy rights, the ruling further increased the onus on law enforcement to obtain search warrants. Various commentaries noted that ***R. v. Marakah, [2017] 2 S.C.R. 608*** began to address the privacy debate about digital communications but left much still to be determined by the courts (Novac, 2018). Further, this ruling created the potential for evidence to be challenged in circumstances where a recipient was willing to provide the contents of their phone to police. This shift places the onus entirely on the police to justify obtaining digital written communications in situations where both parties do not explicitly provide consent. Given the implication for cases related to offences where individuals are victimized via digital communication, and the room for debate in the application of the four-part Cole test described above, it is likely that future case law decisions will clarify the ways in which this decision should be interpreted. As it stands, the requirements upon police with respect to seizing digital communication evidence have been significantly increased by this ruling.

The cumulative effect of case law decisions regarding privacy associated to technology and digital communications over the years has been to substantially increase the resource requirements for law enforcement to obtain evidence. While Bill C-13, the *Protecting Canadians from Online Crime Act*, changed the threshold required for computer data, transmission data, and tracking data from reasonable grounds to reasonable grounds for suspicion, which has made this data more readily available to law enforcement when needed, the increasing relevance of electronic evidence and the expanded scope in which law enforcement are required to complete warrants to obtain this evidence have negatively affected law enforcement resource expenditures. This is apparent in research from the Department of Justice (2019) that concluded that, despite a decrease in the overall number of cases in adult criminal courts, the median time required to complete those cases had increased by 14%, from 125 in 2006/2007 to 141 days in 2016/2017. As expected, this varies significantly according to the nature of the offence. In 2016/2017, the median time to completion for drug possession offences was 113 days, whereas other drug offences had a median time of 285 days. Sexual assault and homicide had median completion times of 319 and 498 days, respectively (Statistics Canada, 2021c).

The increased obligations on law enforcement as a result of case law and judicial decisions since the 1990's is what makes the Supreme Court ruling in ***R. v. Jordan, [2016] 1 S.C.R. 631*** so important. ***R. v. Jordan, [2016] 1 S.C.R. 631*** effectively overturned previous case law and precedent related to *Charter* Section 11(b) that guaranteed an accused the right to trial within a reasonable time. The

previous framework for evaluating trial delays developed in ***R. v. Askov, [1990] 2 S.C.R. 1199*** and clarified in ***R. v. Morin, [1992] 1 S.C.R. 771*** allowed for consideration of the context when evaluating the unreasonableness of delay. In ***R. v. Askov, [1990] 2 S.C.R. 1199***, which concerned a group of accused charged with conspiracy to commit extortion and whose trials were postponed by two years, the courts established that the following factors were to be considered in determining the unreasonableness of a delay: (1) length of delay; (2) explanation for delay, including actions of Crown Counsel, accused, institutional resources, and others; (3) waiver of delay by the accused; and (4) prejudice to the accused. A guideline of six to eight months between committal and trial was established as the limit for a reasonable delay. Soon after that ruling, in ***R. v. Morin, [1992] 1 S.C.R. 771***, a case of impaired driving in which an institutional delay postponed trial by 12 months, a guideline of eight to ten months was suggested for provincial courts. However, in ***R. v. Jordan, [2016] 1 S.C.R. 631***, the Court argued that the *Morin* doctrine was too confusing, complex, and unpredictable, and allowed for too many after-the-fact rationalizations as opposed to encouraging preventative measures. The majority decision in ***R. v. Jordan, [2016] 1 S.C.R. 631*** set a presumptive ceiling for unreasonable delay at 18 months for provincial criminal court cases and 30 months for superior court cases. In setting these thresholds, the Court was influenced by the guidelines set out in ***R. v. Morin, [1992] 1 S.C.R. 771*** of 14 and 18 months for institutional delay in provincial and superior court cases, respectively. These guidelines were combined with additional factors that can increase delay, such as case complexity, to arrive at the presumptive ceiling. In instances where the time to trial exceeded this presumptive delay, the delay was automatically presumed to be unreasonable and the burden then lay with the Crown Counsel to establish exceptional circumstances. In the event that this burden could not be met, the charges against the accused were to be stayed.

In the case of ***R. v. Jordan, [2016] 1 S.C.R. 631***, Jordan was involved in a dial-a-dope operation in Langley and Surrey, British Columbia. The police obtained a search warrant and seized heroin, cocaine, and crack cocaine from Jordan's residence. Jordan was subsequently arrested and charged with possession for the purpose of trafficking. In total, from the time Jordan was charged until he was convicted, nearly 50 months had passed. While the trial judge determined that the delay was not unreasonable, the Supreme Court of Canada determined that the delay was unreasonable and set aside Jordan's conviction. While all justices deplored the existing culture of complacency and agreed that Jordan's section 11(b) right had clearly been violated, the presumptive ceiling set out in ***R. v. Jordan, [2016] 1 S.C.R. 631*** was far from unanimous. Reasonableness, the dissent argued, cannot be captured by an arbitrary numerical ceiling, and by defining it as such, an accused's section 11(b) right was diminished. Depending on the circumstances, a delay below the presumptive ceiling could still be unreasonable. However, in such a situation, the burden would fall to the accused to prove both that the delay was unreasonable and also that the defence took meaningful steps to expedite the proceedings. In many instances, the numerical ceiling prescribed by ***R. v. Jordan, [2016] 1 S.C.R. 631*** would, by itself, do little to address delays. In effect, 18 and 30 months are significantly beyond the median case completion times shown by Statistics Canada (2021c). Yet, for more complex cases, these limits may still be too low. Regardless, the issue of whether an accused has been tried within a reasonable time is highly case-specific. To this end, the

dissent elaborated upon the guidelines set out in ***R. v. Morin, [1992] 1 S.C.R. 771*** as an alternative to the presumptive ceiling.

The Supreme Court signaled the extent to which it was serious about treating criminal justice system delay by re-affirming its application of the Jordan framework in ***R. v. Cody, [2017] 1 S.C.R. 659***. In this case, the accused was arrested and charged as a result of a larger trafficking investigation; however, due to a combination of the actions of the Crown Counsel, the accused, and institutional delays, the trial was not scheduled to begin until five years after the date of the charge. Using the guidelines set out in ***R. v. Jordan, [2016] 1 S.C.R. 631***, the delay in ***R. v. Cody, [2017] 1 S.C.R. 659*** was found to be unreasonable. Similarly, this limit was upheld in ***R. v. Thanabalasingham, [2020] S.C.C. 18***, in which the accused had been charged with the second-degree murder of his spouse. In this case, the institutional delay of 43 months was found to be unreasonable as it was beyond the 30-month presumptive ceiling established in ***R. v. Jordan, [2016] 1 S.C.R. 631***.

In British Columbia, the B.C. Supreme Court issued a subsequent criminal practice direction for complex criminal cases in 2017 that outlined the expectation that the majority of criminal cases must be completed upon an even more stringent timeline, noting that "the practice direction speaks more generally of the Court's expectation of how [complex] cases will be managed as they progress toward trial" (p. 3). Previous case law had increased the circumstances in which legal applications were required during an investigation; however, when combined with the ***R. v. Stinchcombe, [1991] 3 S.C.R. 326*** requirements for disclosure, ***R. v. Jordan, [2016] 1 S.C.R. 631*** placed a significant burden upon law enforcement and Crown Counsel to operate within extremely tight deadlines. In files that require forensic analysis, including DNA, drug analysis, digital forensics, such as mobile phones and video footage, or firearm testing, the current laboratory result timeframes make meeting the ***R. v. Jordan, [2016] 1 S.C.R. 631*** requirements extremely difficult. The effects of ***R. v. Jordan, [2016] 1 S.C.R. 631*** are yet to be felt in its entirety, but preliminary analysis suggests both the frequency of Section 11(b) applications and the percentage of those that are granted have increased since ***R. v. Jordan, [2016] 1 S.C.R. 631*** (Patrick, 2017). It has also been suggested that ***R. v. Jordan, [2016] 1 S.C.R. 631*** may result in cases proceeding by direct indictment (Carenza, 2018).

The general purpose of this report is to outline some of the effects of ***R. v. Jordan, [2016] 1 S.C.R. 631*** and other judicial decisions on police investigative resources. Acknowledging that the timeframe of criminal proceedings has lengthened in recent decades, the Supreme Court of Canada attempted to address these challenges. However, by simply imposing a timeframe, the onus now lies with law enforcement and the Crown Counsel to find ways to both meet the demands of criminal proceedings and the new timeframe in which these must occur.

Consequences of Judicial Decisions and the Changing Nature of Policing

The above review outlined some of the more significant and recent case law decisions that have affected law enforcement since the implementation of the *Canadian Charter of Rights and Freedoms*. When considered in the aggregate, the compounding effect of case law decisions over time has exponentially increased the workload and resource expenditure required for law enforcement to

carry out their mandate (Griffiths et al., 2015; Jones et al., 2014; Malm et al., 2005). While there has been commentary on the absence of police research in Canada in recent decades (Griffiths, 2014; Huey, 2016), some research has documented increasing challenges associated with policing, including workload and costing, with reference to the unintended outcomes of judicial case law decisions. A Public Safety Canada qualitative study titled, "Improving Police Efficiency" (Griffiths et al., 2015) interviewed practitioners in the criminal justice system and identified case law as a primary contributor to increased workload, including the need for the development of policies to respond to case law decisions. This study identified that case law has affected various areas of policing, including disclosure, case management, lengthy trials, witness management, preliminary hearings, search warrants, and video statements.

Researchers with the Collaborative Centre for Justice and Safety at the University of Regina found that a majority of practitioners interviewed indicated that case law decisions frequently resulted in an increased workload (Jones et al., 2014). This research specifically pointed to the workload increases as a result of disclosure requirements with respect to videos and transcription. The authors concluded that the effect of "case law has raised significant challenges for police and Crown Counsel with respect to their daily operations within the legally prescribed frameworks" (Jones et al., 2014, p. 7).

A 2014 study titled, "Economics of Policing" (ICURS, 2015) updated previous research work on policing costing (Malm et al., 2004). Both of these studies depicted the typical flow chart of an investigation for various offence types, with the 2014 version containing an increased number of steps relative to its 2005 counterpart. The 2005 study specifically discussed the role that the evolving legal context plays in increasing the workload for law enforcement, detailing the increased investigative procedural volume over time (Malm, 2005).

In addition to explicit case law rulings, other factors that play out in the courts also have an effect on police investigations. One study found that cases with DNA evidence were much more likely to reach the courts in Australia, and that cases with DNA also influenced a jury's likelihood of conviction (Briody, 2004). Briody (2004)'s research identified that the inclusion of fingerprint evidence and confessions at trial also significantly increased the likelihood of conviction. This has put additional pressure on police to ensure that this type of evidence is included at trial. Other research has pointed to the potential of a "CSI effect" on juries, wherein popular culture and media have shaped jury expectations (Faguy, 2005). The CSI effect suggests that juries expect certain types of evidence to be introduced at trial and, in the absence of this type of evidence, such as CCTV, fingerprints, or DNA, juries are less likely to convict. While the existence of a CSI effect has been contested in some of the research literature (Shelton, 2008), the implications of DNA evidence for investigations are significant given the time required to locate, collect, and process this form of evidence.

One of the most well-researched areas of police investigation in Canada is the homicide investigation. Previous studies have considered factors that influence homicide clearance rates and time to clearance, factors affecting homicide investigations, and the relevance of resources to solving homicides, as well as differentiating between gang and non-gang homicides (Armstrong, Plecas, & Cohen, 2012; Keel, Jarvis, & Muirhead, 2009; Pastia, Davies, & Wu, 2017). This research

has pointed to the resource-intensive nature of homicide investigations, and the need for these investigations to rely upon advanced and time-consuming investigative techniques. While the number of homicides has decreased in recent decades, the clearance rates for homicide investigations have also decreased. As outlined above, homicide rates in Canada peaked in the mid-1970s, hovering at close to or above three per 100,000, and declined slowly from there. Since 1997, with only one exception, Canadian homicide rates remained steadily below two per 100,000 (Statistics Canada, 2021a). Homicide clearance rates were highest in the 1960s, with 90% of offences cleared by arrest or otherwise. However, clearance rates began to decline in the 1970s as homicides increased. In the last twenty years, clearance rates stayed between 70% to 80% (Statistics Canada, 2021b). Research has identified that the longer a homicide investigation takes, the less likely it is that the case will be cleared (Pastia et al., 2017). Armstrong et al. (2012) pointed to the fundamental differences between gang and non-gang homicides, suggesting that gang homicides required a more significant resource investment and had a much lower clearance rate. Gang homicides also typically leave police with less evidence to work with, including fewer cooperative witnesses, necessitating more complex, resource-intensive strategies. Taken collectively, this body of research suggests that homicide investigations are increasingly challenging, with many investigations relying on advanced investigative strategies.

In light of the aforementioned absence of empirical research, Statistics Canada conducted a Police Administration Survey for 2019, with the goal of collecting information to help understand what drives the cost of policing in Canada. Total operating expenses were higher in 2019 compared to the previous year by 1%, after accounting for inflation (Conor, Carrière, Amey, Marcellus, & Sauvé, 2020). Salaries, wages, and benefits, for both sworn and civilian members, made up the largest proportion of police operating expenditures (81 per cent), increasing by 3% from 2018. Non-salary operating costs increased as well and was primarily driven by expenses relating to information technology operations and services (Conor et al., 2020).

While this survey has assisted in empirically quantifying and evaluating various factors and their effect on policing, it is clear from the research literature that the very nature of the common law tradition requires that law enforcement expend significant resources, including time and financial resources, dedicated to training and knowledge transfer to stay abreast of changes and developments in case law. Understanding and applying the law has become increasingly nuanced and cumbersome, as indicated by the prevalence of Legal Applications Support Teams within various RCMP jurisdictions. Legal Applications Support Teams, the first of which was implemented in 2003, are composed of officers dedicated to assisting law enforcement in completing legal applications during their investigations, and the proliferation of these teams across the country reflects the increasing complexity in understanding and applying the law.

This understanding of the effect of the *Charter* on police investigations is not new. An early-1990s study of the implementation of case law noted that, "since the *Charter*'s adoption, the police have been forced to modify their practices more often, faster, and with less warning" (Moore, 1992, p. 570). While this process has affected investigational processes for a range of offences, including impaired and drug investigations (Whitling, 1997), it also occurs in the courtroom. In her research exploring judicial oversight of policing, Daly (2011) commented on Canada's shift from a judicial

tendency towards the inclusion of evidence to a post-*Charter* environment where judges applied logical frameworks to reach a conclusion about whether evidence obtained by the police through a potential *Charter* breach ought to be admitted at trial. This shift has had a trickle-down effect for law enforcement, wherein police must proactively consider the degree to which their investigative actions will be challenged in court and whether their evidence will be admitted at trial.

While the effects of significant case law rulings, including ***R. v. Jordan, [2016] 1 S.C.R. 631***, have yet to been fully realized or studied, it is expected that the influence of case law upon law enforcement will only continue to compound over time. The common law tradition upon which Canada's criminal justice system is based means that all aspects of criminal justice must respond to new legal interpretations clarified in case law. The outcome of a single case law decision can be substantial, and when considered cumulatively, the effects of judicial decisions and case law has the potential to substantially influence how the police investigate crimes, the resources required for a police agency to be effective and efficient, and the ability of Crown Counsel to prosecute successfully those accused of committing an offence. From the above review, it is apparent that the nature of law enforcement, and the allocation of its resources, have shifted substantially over the past decade in response to the changing judicial landscape.

Project Methodology

This purpose of this study was to assess the effect of recent Canadian court rulings on police homicide, sexual assault, and drug offences investigation time, the number of steps that investigators had to complete to conclude an investigation and prepare a submission to Crown Counsel, and the complexity associated with completing each of the aforementioned types of investigations. The objectives of this study were achieved using a combination of quantitative and qualitative research methods and data collection. The methodologies used for this research project included semi-structured interviews with homicide, sexual assault, and drug offence investigators and secondary data collection and analysis.

With the assistance of RCMP 'E' Division Operations Strategy Branch, homicide, sexual assault, and drug offence investigators from across British Columbia were identified and approached to participate in interviews to discuss the effects of case law and technology on the amount of time, resources, investigative steps, and complexities of investigations and to compare these elements to one decade ago. The interviews involved a step-by-step presentation of how offences move from the initial call for service through to the report submission to Crown Counsel. Moreover, interview participants discussed the technological changes that have occurred in investigations over the past 10 years that have either increased or decreased the amount of time members spend on each of the three main offence types under study in this project. In total, interviews were conducted with 11 homicide investigators, 12 sexual assault investigators, and 10 Controlled Drugs and Substances Act (CDSA) investigators from across British Columbia.

Offence data were taken from Statistics Canada, including counts of offences, cleared cases, and the total number of persons charged for the years 2000 to 2018, inclusive. The offences included were homicide (including both total homicides and disaggregated into first- and second-degree murder,

manslaughter, and infanticide), all three levels of sexual assault, and possession, trafficking, importation and exportation, and production offences for a variety of drug types, specifically cannabis, cocaine, heroin, methamphetamine, methylenedioxyamphetamine (ecstasy), opioids other than heroin ('other opioids'), and drugs other than those listed previously ('other drugs'). Violations were based on Uniform Crime Reporting (UCR) Survey codes and included all police-reported criminal incidents. The number of cleared cases refers to the number of incidents that were resolved either by charge or by other means. To be cleared otherwise, an accused must have been identified and sufficient evidence must exist for a charge, but the charge did not proceed due to the accused's death, diversion from the criminal justice system, or for some other reason. Data were collected for British Columbia as a whole, as well as the cities of Burnaby, Surrey, Prince George, Nanaimo, and Kelowna individually.

Burnaby was the only region that did not have both a municipal and rural policing jurisdiction. For the remaining cities, crime data from both jursidictions were combined. As a result, while crime rate data for British Columbia and Burnaby were taken directly from Statistics Canada, rates for Surrey, Prince George, Nanaimo, and Kelowna were manually calculated. For each offence, crime rates per 100,000 were calculated by dividing the number of offences by population and multiplying the result by 100,000. The change in crime rates from the beginning to the end of the time period was calculated by subtracting the 2000 rate from the 2018 rate and dividing the result by the 2000 rate. Population estimates were drawn from BC Statistics that measures the population of the province, as well as each policing jurisdiction each year. Estimates are regularly revised retroactively as a result of methodological improvements or other updates. Given this, the most recent population estimates available were selected to be used in the present analysis. And, similar to the procedure outlined above, populations of both rural and municipal policing jurisdictions in a region were combined to create a total population for a jurisdiction.

Finally, Statistics Canada does not provide offence counts for all years for all offence types. In particular, drug-related offences, especially methamphetamine, ecstasy, or non-heroin opioids, were inconsistently presented for the first half of the time period but were made available for all jurisdictions from 2011 onwards. As such, only for those years that had data available were included in the analyses for change over time.

The ethics of the research project was reviewed by the University Human Research Ethics Board prior to any data being collected. Participation in the interviews was voluntary and those willing to participate were provided with an information sheet prior to the interview that included a detailed overview of the purpose of the interview. Immediately before the interviews, all participants were provided again with the information sheet and asked for their verbal consent to participate in the study. Interviews were not recorded using video or audio recording devices, were conducted over Zoom, and all information provided by participants was anonymized prior to analysis.

Results and Discussion

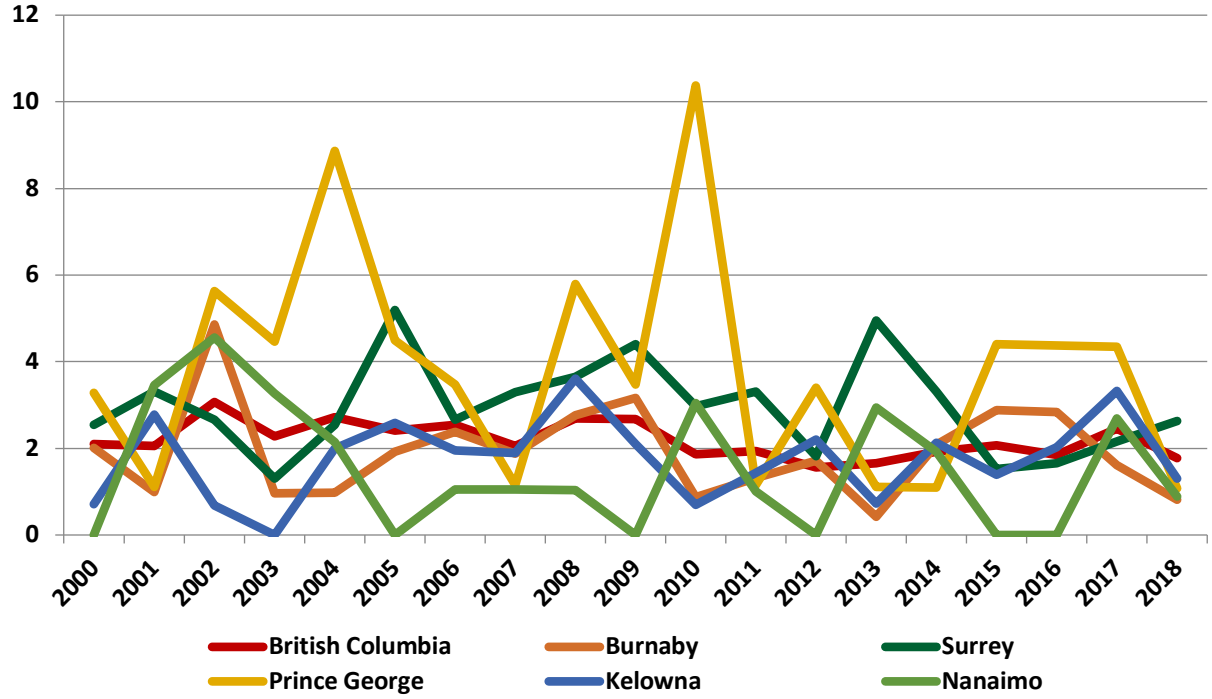
Crime rates for homicide, sexual assault, and drug-related offences between the years 2000 and 2018, inclusive, are presented below, both for the province as a whole and for the municipalities of

Burnaby, Surrey, Prince George, Kelowna, and Nanaimo. All homicide offences combined are presented as well as disaggregated rates for first- and-second-degree murder, manslaughter, and infanticide. Possession, trafficking, importation and exportation, and production offences are shown for all substance types combined. Disaggregated rates for each drug type are provided in Appendices A to D.

Homicide Offences

Rates of homicide offences (see Figure 1) in the province remained, for the most part, relatively stable between 2000 and 2018. After a peak of 3.07 per 100,000 in 2002, rates steadily decreased with two exceptions in 2008 and 2009 – hitting a low of 1.56 in 2012. From then, although rates increased slightly, they remained below 2 per 100,000 for all but two years (2015 and 2017). From 2000 to 2018, homicide rates in the province decreased by 15%; in the five cities, homicide rates decreased by over 50% with the exception of Surrey (increased by 3.7%) and Kelowna (increased by 83.1%). For most years, the homicide rates of most of the five cities approximately mirrored that of British Columbia as a whole, fluctuating at a rate of between one and four per 100,000. This was especially true for Burnaby, whose homicide rate mirrored that of British Columbia's quite closely. The exceptions to this trend were found in Prince George, Kelowna, and Nanaimo. Kelowna and Nanaimo rarely exceeded the homicide rate of British Columbia. More often than not, their rates were slightly lower, and, in some years, no homicides were recorded. More specifically, in 2003, there were no homicides in Kelowna, and in 2000, 2005, 2009, 2012, 2015, and 2016, there were no homicides in Nanaimo. Conversely, Prince George almost always exceeded the homicide rate of British Columbia, with notable spikes of 8.86 and 10.38 per 100,000 in 2004 and 2010, respectively. This sharp fluctuation can be partially attributed to a relatively low population. Prince George saw between one and nine homicides each year; however, due to its population and the rarity of the offence, a single homicide can have a notable effect on the city's homicide rate. This explanation may also explain the large increase in Kelowna between 2000 and 2018 as this jurisdiction had a very small homicide rate of 0.71 in 2000 and a rate of 1.30 in 2018.

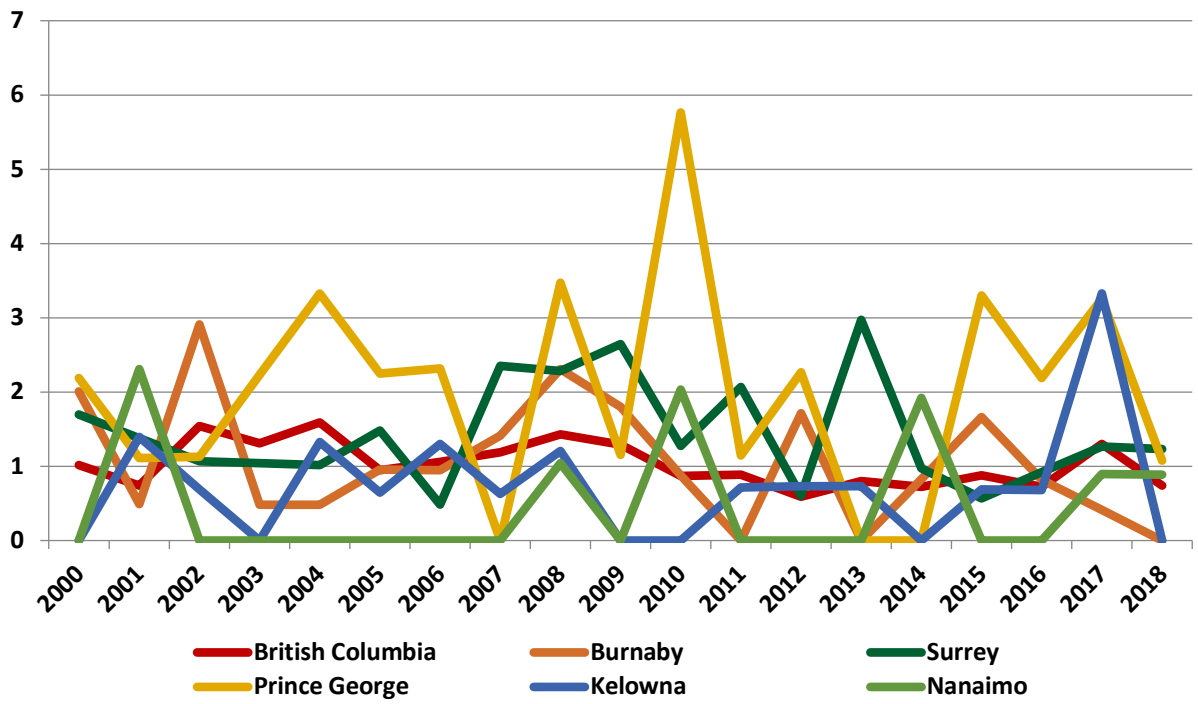
FIGURE 1: HOMICIDE - RATE PER 100,000



The vast majority of homicide offences were classified as either first- or second-degree murders (see Figures 2 and 3, respectively). In B.C., rates of first-degree murder remained close to one per 100,000, with a high of 1.59 per 100,000 in 2004 and a low of 0.59 in 2012. Between 2000 and 2018, the Province's first-degree murder rate decreased by 27.5%. Within the five jurisdictions, first-degree murder rates largely hovered between 0 to three per 100,000, and in all but Kelowna, which saw an increase of 139% in its first-degree murder rate by 2017[1], rates decreased between 27% and 80% over the time period. In Prince George, rates regularly exceeded three per 100,000, reaching a peak of 5.8 per 100,000 in 2010 and smaller peaks of just above three per 100,000 in 2004, 2008, 2015, and 2017. Kelowna similarly saw a spike of 3.3 per 100,000 in 2017. However, neither of these spikes amounted to more than five first-degree homicides in one year for either municipality. With occasional exceptions, Surrey and Burnaby typically followed the pattern of B.C., whereas Nanaimo recorded zero first-degree murders for 13 out of the 19 years analysed.

[1] In Kelowna, 2000 rates were compared to those of 2017, as there were no 1st degree murder homicides in 2018.

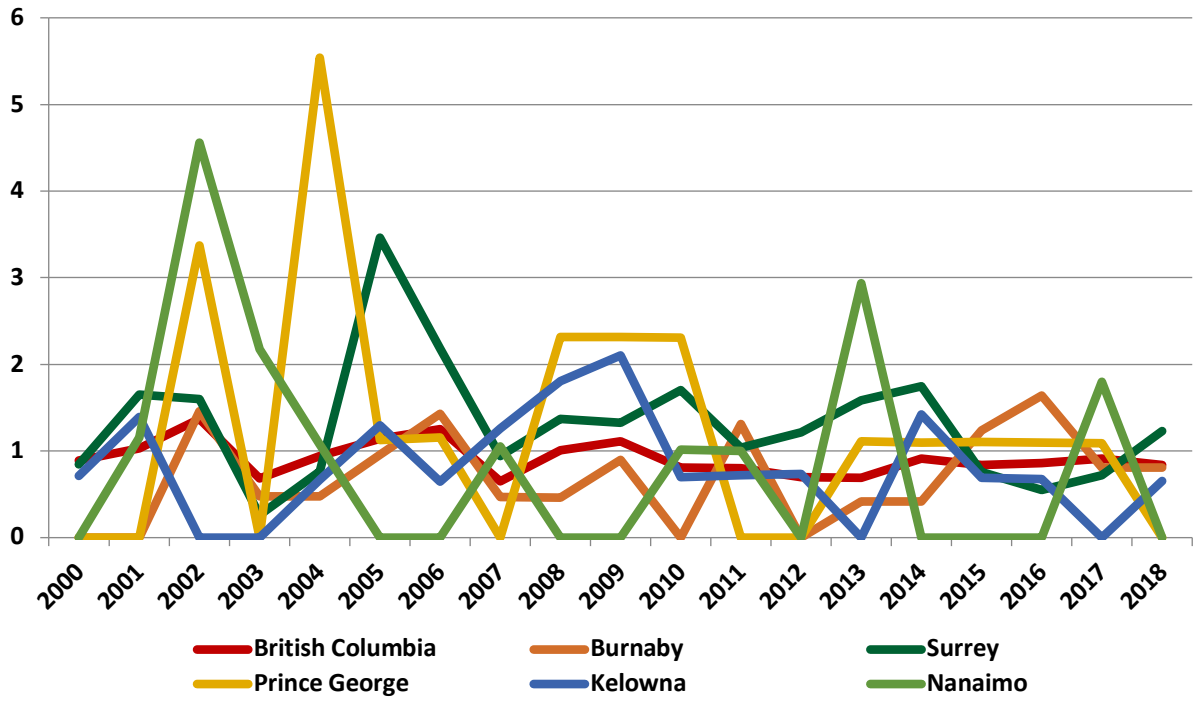
FIGURE 2: MURDER, 1ST DEGREE - RATE PER 100,000



Second-degree murders in B.C. remained fairly stable, staying quite close to one per 100,000, and decreased by only 5.6% from 2000 to 2018. Between 2002 and 2005, Prince George, Nanaimo, and Surrey recorded their highest rates of second-degree murder, ranging between 3.5 to 5.5 per 100,000. Despite some fluctuation, all municipalities' rates remained below three per 100,000 for the remainder of the time period. Burnaby's rate only exceeded one per 100,000 five times, with its highest in 2016 at 1.64 per 100,000, largely following the pattern of the province. With only one or two exceptions, respectively, Kelowna and Surrey's second-degree murder rate stayed below two per 100,000. With the exception of Surrey, no municipality had more than five second-degree murder incidents in one year. Excluding years with no second-degree offences, Burnaby and Prince George saw a decrease in their rates of 44.5% and 67.8%, respectively, between the first and last

years of the time period under study, while Kelowna decreased by 8.2%. Surrey and Nanaimo saw increases of roughly 50%.

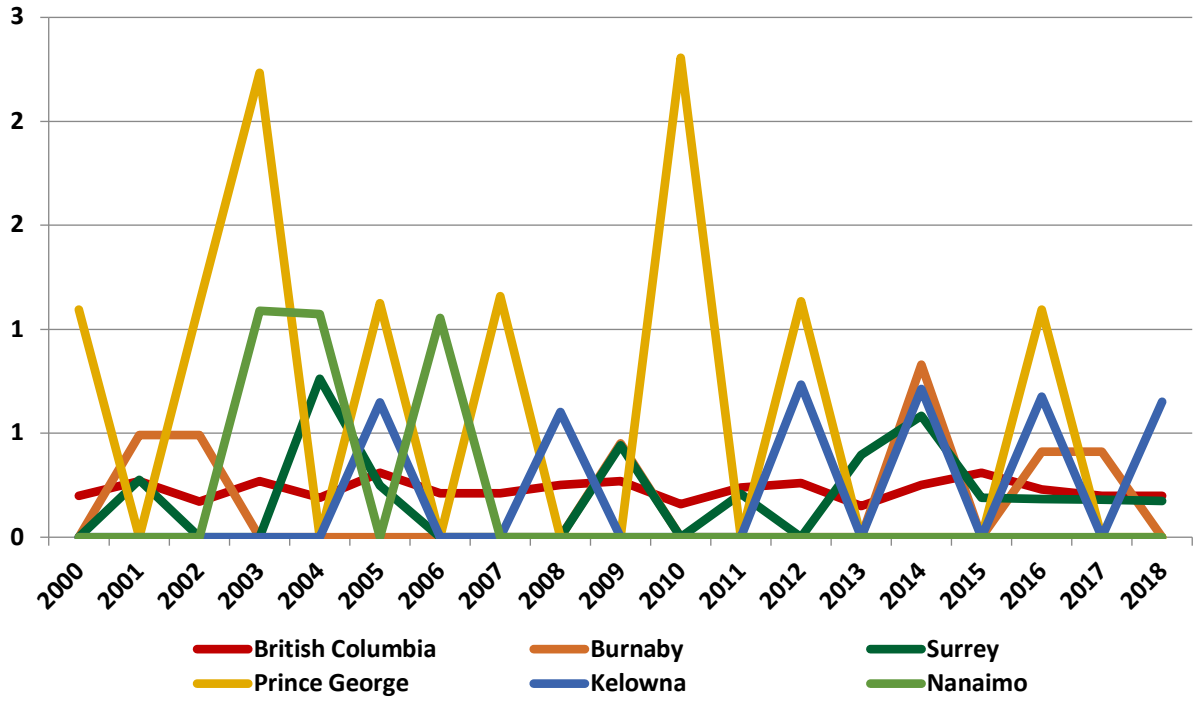
FIGURE 3: MURDER, 2ND DEGREE - RATE PER 100,000



Rates of manslaughter were significantly lower than those of murder (see Figure 4), with many jurisdictions reporting multiple years without any manslaughter offences at all. In fact, all but Surrey recorded more years with no manslaughter offences within the time period under study. In the province overall, rates of manslaughter typically deviated little from 0.20 per 100,000, which was the rate in both 2000 and 2018. Due to the rarity of the offence and smaller population sizes, some cities appeared to fluctuate somewhat in their manslaughter offence rates. This was the case in Prince George, which had a high of two manslaughters in 2003 and 2010, and one or zero manslaughter offences in the remaining years. Burnaby had two manslaughter offences in 2014, one in 2001, 2002, 2009, 2016, and 2017; otherwise, the city recorded no manslaughter offences. Nanaimo and Kelowna also appear to vary quite a bit, but the peaks in the graph below are simply the years in which the municipalities recorded one manslaughter offence; there were zero offences otherwise. Although Surrey reported the fewest number of years without a single manslaughter of

all of the jurisdictions included in this study, there were never more than three offences in one year (2004 and 2014), and rates were almost always below 0.50 per 100,000.

FIGURE 4: MANSLAUGHTER - RATE PER 100,000

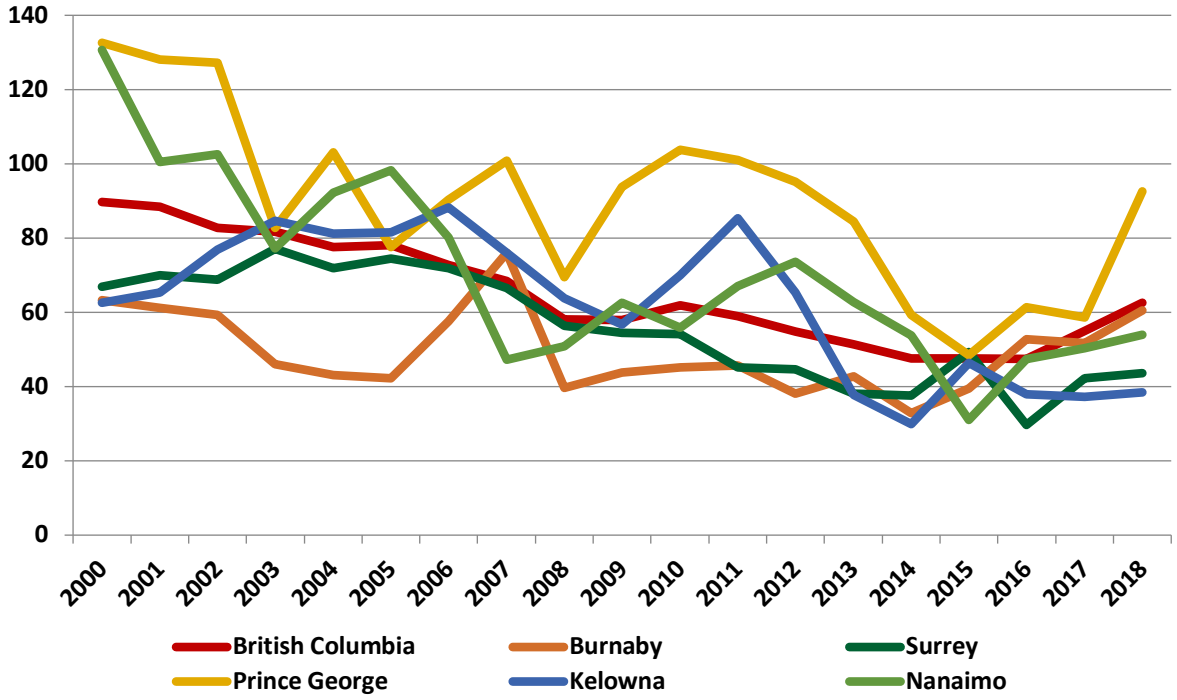


Finally, a total of four infanticide offences occurred in B.C. during this time period, with one each in 2001, 2003, 2006, and 2010. None of the recorded offences took place in one of the five cities; all reported zero infanticides between 2000 and 2018.

Sex Offences

The most common sex offence, sexual assault level one, decreased in the province and in each jurisdiction included in this study during the time period under study, despite a small spike in 2017 and 2018 (see Figure 5). In British Columbia, rates peaked in 2000 at 89.72 per 100,000, almost halved by 2016 (47.46 per 100,000), before rising slightly in the following years. Between 2000 and 2018, rates of level one sex assault dropped by 30%; a trend that was also evident in all cities but Burnaby, which had a decrease of only 4.3% and Nanaimo, which had a decrease of 58.7%. The trajectories of Prince George, Surrey, and Nanaimo were largely similar, although Prince George had a large spike in 2018 (rising from 58.64 to 92.52 per 100,000). Kelowna, whose sexual assault rate was highest between 2003 and 2006, and again in 2011 – reaching highs of over 80 per 100,000 – also saw fewer sexual assault offences in 2018 compared to 2000. Burnaby, which consistently had the lowest sexual assault rates (hovering at around 40 to 60 per 100,000), fluctuated throughout the time period, but did not show a clear upward or downward trend.

FIGURE 5: SEXUAL ASSAULT, LEVEL 1 - RATE PER 100,000



Rates of sexual assault causing bodily harm (see Figure 6) and aggravated sexual assault (see Figure 7) largely remained quite low. Again, the data used in this report was based on police calls for service that were classified as founded. Only rarely did these offences climb above three or two per 100,000, respectively. Level two sexual assault in British Columbia followed the downward trend of level one sexual assault, with its peak of 1.71 per 100,000 at the very beginning of the time period; by 2018, level two sexual assault had decreased by 53%. The primary exception to this downward trend was Prince George where level two sexual assault rates reached a high of 9.97 per 100,000 in 2004, and, for several other years, hovered at around four or more per 100,000. Only Burnaby and Nanaimo had rates higher than three per 100,000, reaching peaks of 3.45 and 4.20 per 100,000, respectively. Rates of aggravated sexual assault were varied throughout the time period, although, in the province as a whole, rates decreased by 74.1% from 2000 to 2018. Counts of level three sexual assault were almost always in the low single digits. The one exception occurred in 2010, when British Columbia's rate hit its highest point of 1.10 per 100,000, or a total of 49 sexual assaults. This sharp increase in offences was driven predominantly by the City of Surrey, which accounted for half of those offences (25, or a rate of 5.31 per 100,000). While the reason for this increase was not explored, it is possible that changes in training, oversight, and quality control may have contributed to these increases, rather than an actual increase in the number of offences themselves.

Although higher rates of aggravated sexual assault were found in both Prince George and Kelowna, neither municipality recorded more than three or five aggravated sexual assaults per year in total. However, given the relative rarity of level two and three sexual assaults, several regions reported zero offences in multiple years, including Prince George, Surrey, and Nanaimo for level two sexual assaults. In fact, all cities reported at least one year, and often more than one year, with no recorded aggravated sexual assaults. For instance, Nanaimo recorded zero level three sexual assaults for nine different years between 2000 and 2018.

FIGURE 6: SEXUAL ASSAULT, LEVEL 2, WEAPON OR BODILY HARM - RATE PER 100,000

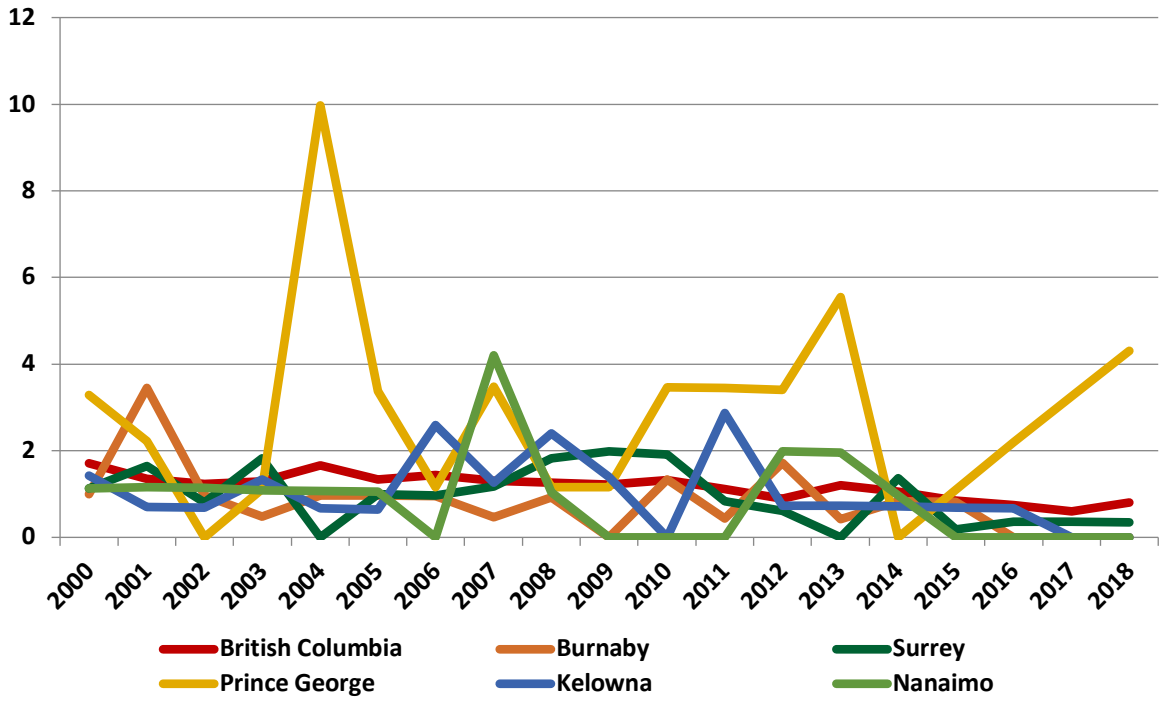
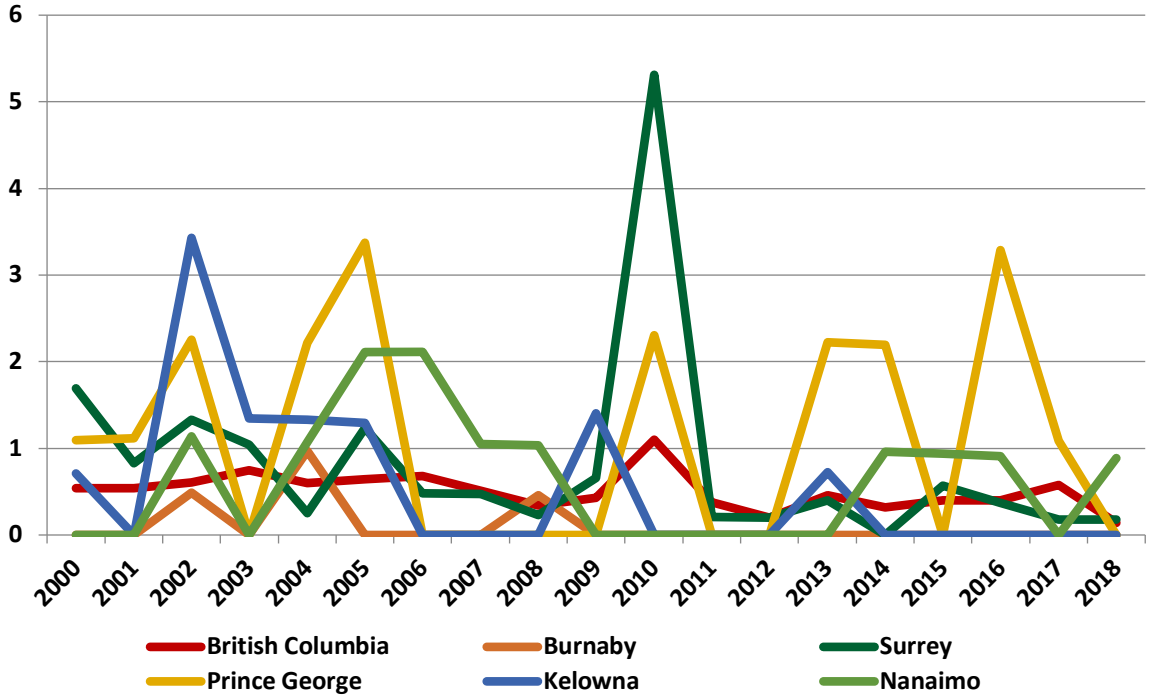


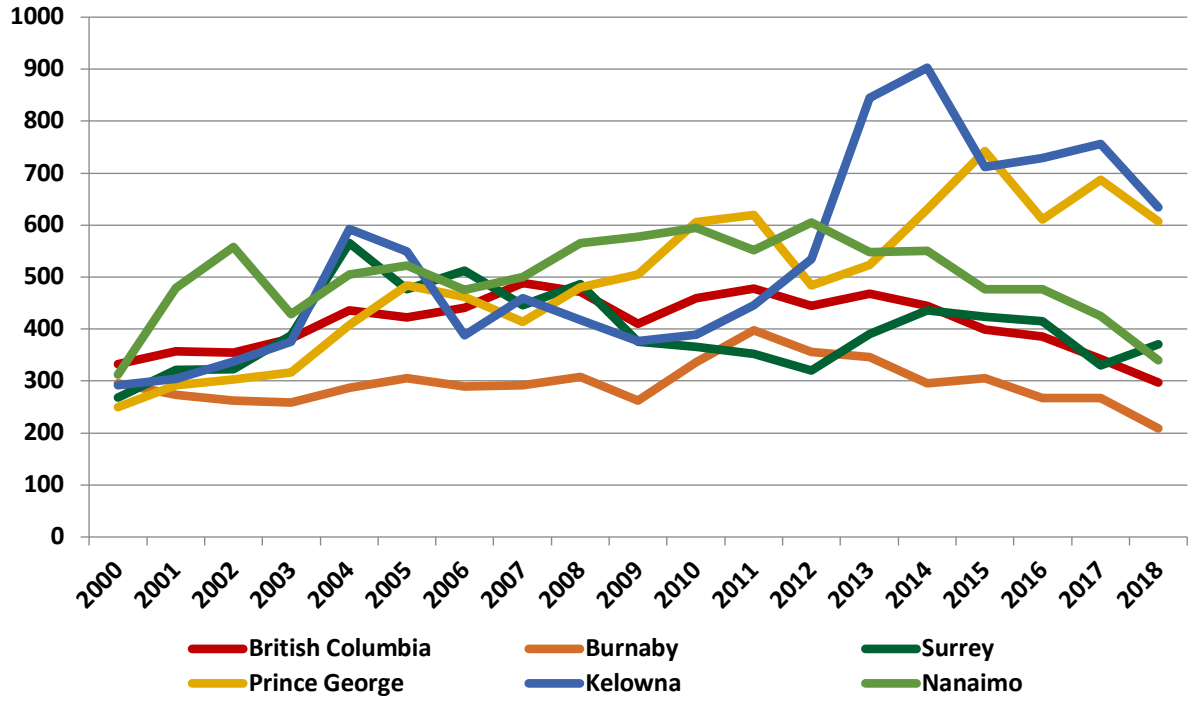
FIGURE 7: SEXUAL ASSAULT, LEVEL 3, AGGRAVATED - RATE PER 100,000



Drug Offences

With respect to drug offences, as expected, by far the most common drug-related offence was simple possession (see Figure 8). Of these offences, the most frequent offence was cannabis possession prior to legalization on October 17, 2018. Possession rates for all drugs combined varied, typically fluctuating between 200 and 600 per 100,000. In British Columbia, rates were highest between 2004 and 2014, reaching their highest level of 488.58 per 100,000 in 2007. Prior to and after this ten-year period, drug possession rates were consistently below 400 per 100,000 for the province. Overall, drug possession offences in British Columbia declined by 10.6% between 2000 and 2018. Surrey and Nanaimo followed similar patterns, both showing steady decreases over the last four years examined in this report; however, their rates in 2018 were 38.4% and 8.8% higher than in 2000, respectively. Burnaby, whose drug possession rates were routinely lower than other municipalities, showed a late peak in 2011 (397.60 per 100,000). However, from this peak, rates fell, reaching their lowest point in 2018 (208.87 per 100,000), which was also 29.2% lower than Burnaby's 2000 offence rate. In contrast, possession rates in Prince George and Kelowna did not peak until 2014 and 2015, respectively, dwarfing rates recorded in other jurisdictions. Between 2000 and 2018, rates increased by 142.9% and 117.1%, respectively, in Prince George and Kelowna.

FIGURE 8: DRUG POSSESSION - RATE PER 100,000

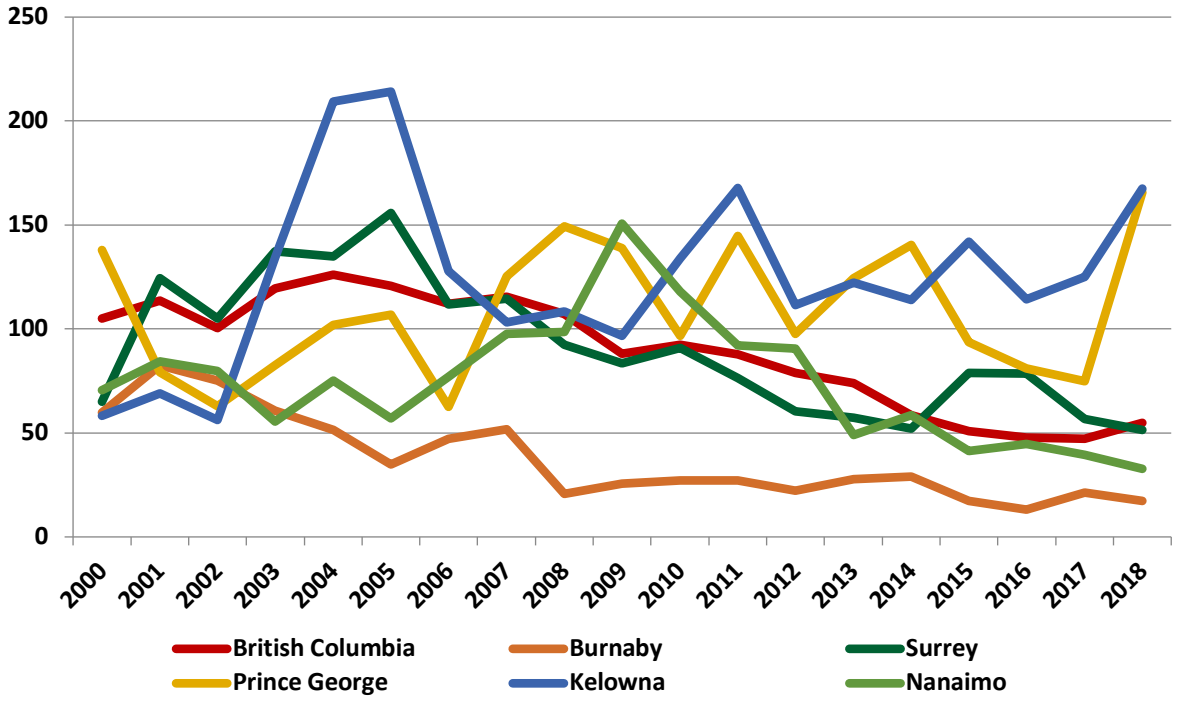


The evident trend for all drug types combined obscures individual patterns (see Appendix A for disaggregated rates). For instance, rates of cannabis possession consistently decreased in all included jurisdictions from 2012 onwards, reaching their lowest rates at the tail end of the time period. This finding was most likely the result of the impending move to legalize cannabis. Similarly, cocaine possession, though far less common than cannabis, showed an increase up to the year 2008 followed by a steady decrease in the following years. On the other hand, heroin, methamphetamine, other drugs, and other opioid possession offence rates rose substantially throughout the time period under examination. Altogether, these varying patterns account for the relative consistency seen in British Columbia, Burnaby, Surrey, and Nanaimo drug possession rates. On the other hand, the rise in possession rates in Prince George and Kelowna could largely be attributed to increases in heroin and methamphetamine possession, and, to a lesser extent, relatively high rates of cocaine possession.

As with drug possession, drug trafficking offence rates varied considerably across the time period and jurisdictions examined (see Figure 9). Provincial trafficking rates were highest early on, particularly between 2003 and 2005 (119 to 126 per 100,000), and slowly decreased from there. Offence rates dipped to around 90 or below in 2009, and, in the last five years reviewed, stayed below 60 per 100,000; from 2000 to 2018, they dropped by 47.7%. Trafficking offences in Surrey followed a similar pattern, as did Burnaby, with a much lower rate; rates were 20.8% and 71.1% lower in Surrey and Burnaby, respectively, in 2018 compared to 2000. However, the decline in the latter half of the time period in British Columbia overall did not apply to all municipalities. Kelowna,

whose highest trafficking rates were in 2004 and 2005 (209.45 and 214.16 per 100,000, respectively) demonstrated a slight resurgence from 2011 onwards, occasionally approaching or surpassing rates of 150 per 100,000. Throughout this time period, Kelowna's trafficking rate rose by 187.7%. On the other hand, Prince George started high at 138.07 per 100,000, declined, and then surpassed that rate several times from 2008 to 2018; overall, its rate increased by 20%. Yet another trend was found in Nanaimo where trafficking offence rates peaked between 2007 and 2012, rather than the beginning of the time period, but did decline considerably towards the end; the trafficking rate was 53.5% lower in 2018 than in 2000.

FIGURE 9: DRUG TRAFFICKING - RATE PER 100,000



Rates of drug importation and exportation offences were, for the most part, fairly inconsistent across the various jurisdictions (see Figure 10). In British Columbia, rates climbed to their highest point in 2002 (16.26 per 100,000) and declined from there. From 2009 until 2018, importation/exportation offence rates stayed at five per 100,000 or below; offence rates declined by 49.4% between 2000 and 2018. Likewise, Surrey's highest rate was also reached in 2002 (18.41 per 100,000) and was followed by a subsequent decrease, despite some fluctuations. Overall, Surrey saw a decrease of 39.5% throughout the time period. Though rates were comparatively low in Nanaimo, a similar pattern of decline was evident; import/export offence rates were 74% lower in 2018 than in 2000. In contrast, both Burnaby and Kelowna had low rates of production offences, fairly consistently throughout the time period, but both saw an overall decrease of 73.4% and 8.2%, respectively. Drug importation and exportation rates in Prince George were, by far, the lowest of all

included jurisdictions. More specifically, in 16 out of the 19 recorded years, there were zero production offences in Prince George, and in the remaining three years, Prince George had only one drug production offence in total.

In all five included municipalities and the province as a whole, production of all drugs was highest early on and declined steadily by the end of the time period under study (see Figure 11). By 2018, production offences decreased consistently from 2000 by around 95% in the province and all five cities. In British Columbia, production offences began at 98.24 in 2000 and subsequently dwindled, reaching a low of 4.98 per 100,000 in 2018. Despite a later peak in Prince George of 102.61 per 100,000 in 2010, and smaller peaks in Surrey and Kelowna, the general trend held for all cities. By 2018, drug production offences were at below five per 100,000 in all municipalities, with the exception of Prince George, which had a rate only slightly higher at 8.61 per 100,000. This sharp decline can be largely attributed to a significant decrease in rates of cannabis production offences (see Appendix D). Production of other drugs accounted for only a fraction of all of production offences and remained relatively stable throughout the time period.

FIGURE 10: DRUG IMPORTATION AND EXPORTATION - RATE PER 100,000

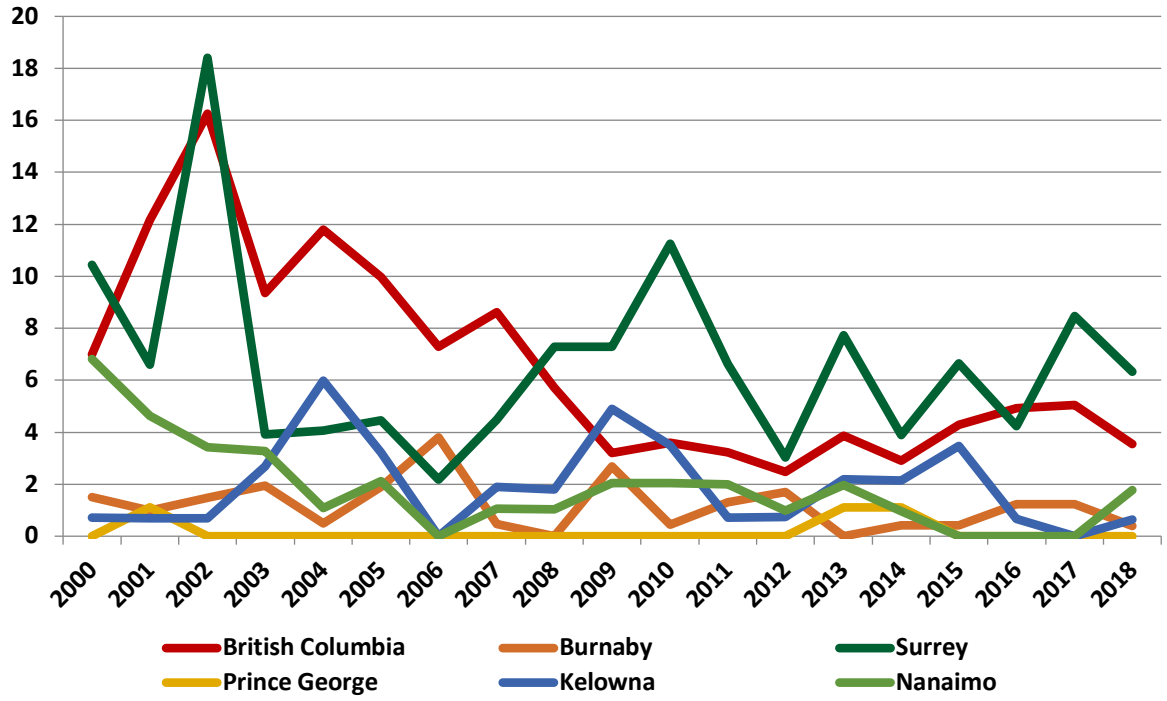
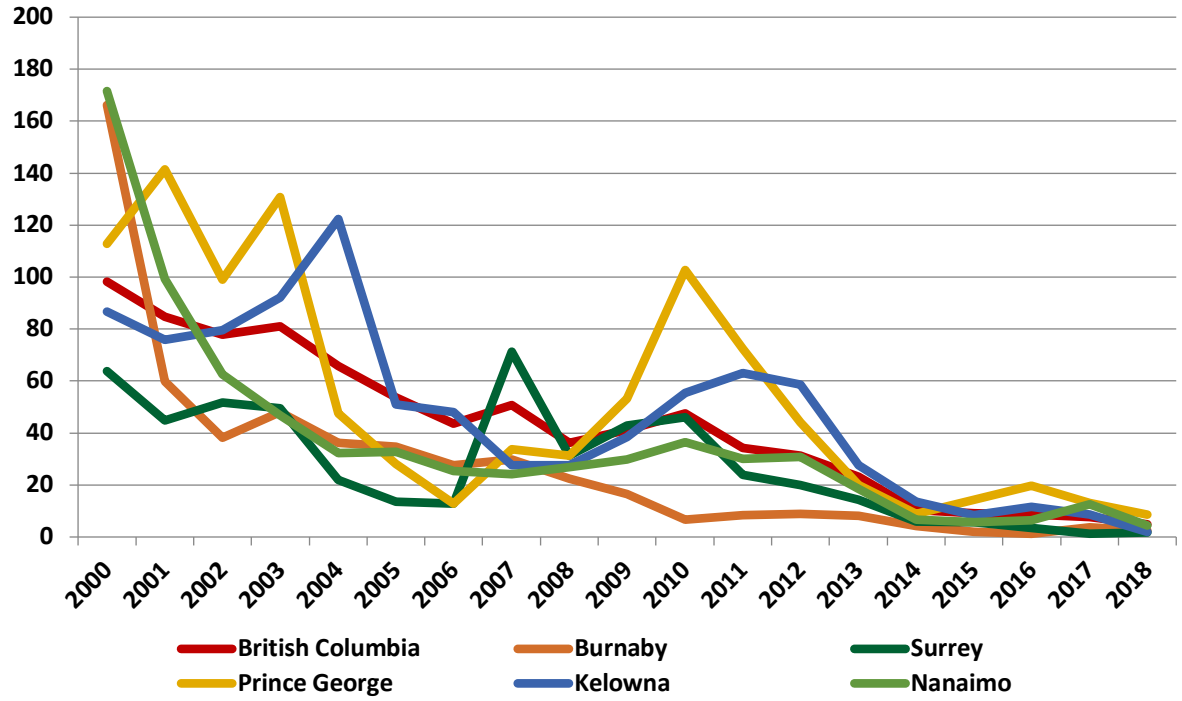


FIGURE 11: DRUG PRODUCTION - RATE PER 100,000



Interviews with Homicide Investigators

General Information

As outlined in the methodology section, in total, 11 homicide detectives agreed to participate in an interview. These investigators came from IHIT, RCMP detachments, and municipal police departments. In terms of their years of experience, participants had a range of four to 19 years investigating homicides. While participants acknowledged that the number of homicide investigations fluctuated and depended on the jurisdiction under consideration, most participants felt that the number of homicides that they investigated remained about the same compared to ten years ago. However, as expected given the different jurisdictions that participated in this study, there were a few investigators that reported that there had either been an increase or a decrease over the past ten years. Again, depending on jurisdiction, the number of homicides ranged from about three to five per year to about 50 per year. This higher number reflected the number of homicides that the Integrated Homicide Investigation Teams would investigate.

When asked to comment on the complexity of homicide investigations currently compared to ten years ago, all participants reported that investigations were much more complex. Participants indicated that this increased complexity was not based on a change in the level of sophistication among offenders or incidents but was a result of the introduction of new technologies, including mobile phones, the primary and third party applications on mobile phones, offshore computer

servers, closed-circuit television (CCTV), video surveillance, doorbell cameras, dash cameras, encryption technology, and other electronics, case law related to warrants, disclosure rules, timelines, privacy matters, and the demands of Crown Counsel. In addition, internal police policies and a desire among homicide investigators to do their investigations more effectively and efficiently have increased the complexity of homicide investigations. Each of these issues will be addressed in greater detail below.

Related to the complexity of homicide investigations, participants were divided on the issue of whether the number of steps required to complete an investigation have increased or stayed the same compared to ten years ago. Those participants who reported an increase in the number of steps required to complete an investigation pointed to changes based on case law and the nature of electronic evidence, specifically the pervasive use of mobile phones and CCTV. It was interesting to note that some participants suggested that the actual number of steps had not increased, but that there are additional avenues of evidence collection. For example, many participants mentioned that they still engaged in traditional canvassing practices that involved engaging in face-to-face interviews with people. However, because of the widespread adoption of CCTV technology among the public, video canvassing is an additional avenue that investigators undertake as part of the traditional canvassing step. The introduction of dash cams, doorbell cameras, and HD CCTV from businesses and residences has, for example, increased the number of steps or avenues for evidence collection for some investigators, in that they need to write additional warrants to cell phones, take additional measures to ensure that they are respecting people's reasonable expectation of privacy, and follow the additional steps of storing, watching, analysing, and disclosing all this evidence. Some investigators indicated that these additional tasks should be viewed as new steps that needed to be routinely completed compared to ten years ago, while other participants felt that these additional tasks should be thought of as just additional avenues of evidence collection in a modern homicide investigation.

Regardless, all participants felt that the amount of time it took to complete a homicide investigation today compared to ten years ago has increased, even for those investigations where the suspect is immediately known to police. The main drivers of this increase in time were, as mentioned above, the use of technology by suspects, CCTV use by businesses and the public, the use of technology by investigators in processing, reviewing and analysing evidence, case law that has directly affected investigations, police resourcing issues, the time it takes to receive results from crime labs, and the requirements of internal police policies. When participants were asked to identify what were the main drivers of a homicide investigation timeline, the most common responses were: the amount of evidence collected, such as statements, digital and video evidence, and forensic evidence; the amount of time it takes to write warrants and affidavits; disclosure requirements and completing a disclosure package for Crown Counsel; lab analysis and receiving reports from the labs; and the number of simultaneous investigations that require attention.

There was a general concern among participants that, in addition to the psychological, emotional, and interpersonal trauma related to investigating homicides, the increase in the complexity of homicide investigations, the amount of time it takes to complete an investigation, the internal police organizational and community pressure to successfully investigate and conclude a homicide, and

staffing issues results in burnout among investigators. Several participants suggested that the lack of sufficient human resources in all units, teams, and departments involved with homicide investigations, in addition to the increased downloading of responsibilities to the police due to case law, has the real potential to result in burnout, mental health issues, self-medicating measures, people not wanting to join homicide units, or people leaving or asking to transfer to other duties resulting in positions being not filled or filled with inexperienced members. Again, understanding that the needs vary by jurisdiction, it was generally felt that more human resources would allow for some tasks to be completed more quickly, such as the logging and analysis of evidence. It was interesting to note that participants believed that some of these tasks, including but not limited to digital forensics, could be civilianized, which would free up sworn members to spend more time on other aspects of the investigation. In effect, participants reported that being a homicide investigator involved long hours, balancing multiple files, and being constantly available. Many participants spoke about giving out their business card to victims, witnesses, or others related to an investigation and feeling obligated to answering their phones when that number is called. Participants also spoke of the pressure to get some justice for the families and friends of victims in as short a time frame as possible. Not being able to provide answers or closure to family members was reported as being an additional pressure felt by homicide investigators.

As will be discussed below, there was also the belief that legislation was not keeping up with the needs of the police and that current legislation and case law had swung too much in favour of Defence Counsel and the accused, which further contributed to investigator burnout. One of the phrases that was repeated by several participants was that rather than the accused being on trial, it was how the investigation was undertaken and completed that was on trial. To further complicate matters, participants noted that human resourcing and funding has not increased commiserate with the increase in the steps required to complete a homicide investigation and the complexity associated with homicide investigations. In effect, participants felt that more trained investigators and more civilian support staff would change the workload and potentially speed up the amount of time it took to complete an investigation to the satisfaction of Crown Counsel.

Impact of Case Law on Homicide Investigations

Participants were asked about many different case law or judicial decisions that may affect homicide investigations. While the literature review above discusses many important decisions, this section will focus on five judicial decisions that participants felt had the greatest effect on contemporary homicide investigations, as well as some comments about a number of other decisions that participants reported influenced their processes and procedures when investigating a homicide.

R. v. Stinchcombe

The homicide investigators in this study did not feel that the decision in *R. v. Stinchcombe* was bad case law. Instead, they felt that this ruling, and other rulings related to disclosure, actually contributed to homicide investigators being more thorough and diligent during their investigations, led to better investigations, and held the police more accountable. However, all participants acknowledged that *R. v. Stinchcombe* and other subsequent decisions that have affected disclosure rules and practices have substantially increased the amount of time and resources needed to complete a disclosure package related to a homicide investigation, even for those cases that investigators classified as simple, routine, or clear-cut investigations. A clear outcome of the judicial decisions on disclosure rules was that the police could not have any evidence or information related to an investigation without releasing it to Crown Counsel. In effect, the consensus among the homicide investigators who participated in this study was not that they had to disclose or what they needed to disclose, but the time and resources it took to complete a disclosure package. As the disclosure rules have been in place for many years, participants reported that disclosure, as a principle, had not changed how homicide investigators did their work over the past decade. It was a practice they were very familiar and comfortable with and recognized it as an important aspect of completing an investigation. However, when they expressed frustration with disclosure rules, again, it was related to the amount of time and resources that it took when trying to get Crown Counsel to approve charges following disclosure.

When asked to compare disclosure packages today to ten years ago, participants stated that what had changed was the amount and type of information that needed to be disclosed. Many participants stated that, in all homicide investigations, there were hundreds of pieces of evidence and information that needed to be vetted by support staff to ensure that the information was accurate and that police were not disclosing inappropriate information, such as witness addresses or privileged conversations. Again, the use of technology, such as mobile phones, CCTV video, and social media were seen as the greatest contributors to the increased amount of information that needed to be processed, analysed, and disclosed, and the amount of time it took to put the final disclosure package together for Crown Counsel. While electronic disclosure packages are becoming more common, and, at the time of the writing of this report, an MOU was pending to make all disclosure packages electronic, again, investigators mentioned that requiring the electronic disclosure package to be searchable has become a time-consuming responsibility for the police. Moreover, participants reported that it was common for disclosure packages to be tens of thousands of pages long, particularly when involving any kind of disclosure of electronic data, which was related to the amount of time and effort needed to complete the disclosure package. The software that the police used to access information on computers or phone, for example, could produce tens of thousands of pages of data; all of which needed to be vetted for accuracy and probative evidence. To try to address the amount of information that needed to be disclosed and the amount of time it took to complete a disclosure package, participants spoke of adding resources, including full-time civilian support staff, dedicated exclusively to addressing the needs of disclosure. While the inclusion of additional resources has occurred, participants suggested that more is needed. Again, participants did not feel that the demands around disclosure were

unreasonable, just that it took a tremendous amount of resources and time to complete within a short timeline. However, there were aspects of disclosure that participants felt had gone too far. For example, some participants spoke about the necessity to disclosure text messages or emails between investigators on the same case, which they viewed as an overreach and something that only served to hinder investigations. In response, investigators no longer discuss their cases with other investigators through email or text. Another challenge posed by *R. v. Stinchcombe* mentioned by participants was that, due to disclosure and how Defence Counsel used the inclusion and exclusion of information in disclosure packages, investigators felt that they were obligated to investigate any tip, even if they knew that piece of information would not lead anywhere. This was required because in court, investigators will be questioned about things they did not do or investigate by Defence Counsel. As such, investigators were concerned that one of the outcomes of *R. v. Stinchcombe* was that the police needed to investigate things that were irrelevant to the case. It was a common feeling among participants that it was the investigation that was on trial in court rather than the accused and that *R. v. Stinchcombe* contributed greatly to this situation. Still, participants spoke about how *R. v. Stinchcombe* has been around for years, so homicide teams, units, and investigators had adapted over time to disclosure requirements, had become good at anticipating the amount of time and resources needed to complete the disclosure package, and had built their teams with file coordinators already in place to deal with disclosure requirements at the onset of a homicide investigation.

In effect, participants viewed disclosure as a necessary evil but also as an important constitutional right and step in the court process. It is a process that takes a lot of time and resources, contributed to the amount of time it took to close an investigation, and was a substantial burden on investigators, but was also viewed as important to maintain trust and confidence in the prosecution of homicide offences, contributed to holding investigators accountable and transparent, and was a necessary element to allow for Defence Counsel to put on a frank and fair defence for the accused. It was also interesting to note that participants felt that the case law that derived from *R. v. Stinchcombe* was appropriate and well-intentioned and contributed to improved investigations.

R. v. Jordan

When asked which court decision has had the largest effect on homicide investigation, the consensus among participants was *R. v. Jordan*. It was felt that this decision did not necessarily affect the complexity of a homicide investigation, or the number of steps investigators routinely took when investigating a homicide. Instead, *R. v. Jordan's* impact was felt in the timeline of investigations because once the *R. v. Jordan* presumptive ceiling begins, there is typically no stopping it. Only through a stay of proceedings or the start of a trial does the clock stop. Moreover, investigators and Crown Counsel want to move a case forward to the charge approval stage as quickly as possible, which is necessary to potentially detain a suspect until trial, because of concerns for public safety and caseloads. Given this, there is pressure on investigators to complete their initial disclosure packages to Crown Counsel as quickly as possible, so that the information can be sworn and an arrest and detention until trial, when necessary for public safety, can occur. However, as soon as the information is sworn, the *R. v. Jordan* presumptive ceiling begins. As homicide investigations can be extremely complicated, and due to the amount of time it takes for

crime labs to produce reports on forensic evidence, and the amount of time that it takes to complete a disclosure package, participants felt that *R. v. Jordan* placed an arbitrary time burden on the police and increased the risk to the public due to the delay in arrest and detention of potential suspects.

Nearly all participants indicated that prior to *R. v. Jordan*, homicide investigators would provide sufficient information to Crown Counsel to lay a charge, which would either place the accused in remand or allow them to stay in the community under a range of court-mandated orders, such as prohibitions against possessing weapons, having no contact with witnesses or victims, curfews, or house arrest, while the police completed their investigation. However, as a result of the *R. v. Jordan* decision, investigators were now required to complete most, if not all, aspects of their investigation prior to Crown Counsel approving charges and the suspect being arrested to prevent the *R. v. Jordan* presumptive ceiling from beginning. As many homicide investigations could take more than one year to complete, it is possible that over this period of time, the suspect remained in the community under no court-mandated conditions, which participants felt increased the risk to victims, witnesses, or public safety. Again, to avoid starting the *R. v. Jordan* presumptive ceiling and to increase the probability of a conviction, participants reported that Crown Counsel typically would not provide charge approval on a case unless they felt that there was a high probability of conviction. While this may be a logical decision, the practical outcome of this is that investigators were required to have completed and submitted a substantial portion of their disclosure package, including interview transcripts, forensic analysis, and lab reports before Crown Counsel would provide charge approval.

It should be noted that most participants reported that they were not aware of a suspect in a homicide who committed another homicide while investigators were working on their previous homicide because the suspect had not yet been charged because of *R. v. Jordan*. Still, participants felt that this was only a matter of time before a tragedy occurred. Participants believed that once a suspect has been charged, their chances of reoffending was reduced, either because the offender was in remand until trial or because of court-mandated conditions; however, when they were not charged, the risks to victims, witnesses and the public increased. In effect, while the risk to the public of a subsequent homicide was mainly theoretical, all participants agreed that a repeat homicide was not only possible but was eventually going to happen, especially when the suspect was connected to a gang-related homicide. The general feeling was that there was always a risk to the public in not arresting a homicide suspect as soon as possible, but, due to *R. v. Jordan*, homicide suspects remained in the community without any court-mandated conditions for an extended amount of time, to ensure that the police and Crown Counsel comply with the *R. v. Jordan* presumptive ceiling. Moreover, extending the amount of time that a suspect can remain in the community could increase risk associated with suspects threatening witnesses, victims, the victim's family, or tampering with or destroying evidence, especially in gang-related homicides. It was interesting to note that some participants mentioned that the families of victims were suffering as a result of the time delay in approving charges and arresting a suspect. Some participants spoke of cases in which investigators were in a position to make an arrest but could not get charge approval because of concerns related to the *R. v. Jordan* presumptive ceiling. In this way, some participants felt that, in addition to a risk to public safety, victim's families were losing out on the justice component by not having suspects arrested for an extended amount of time.

In terms of the expectation from Crown Counsel on how long it should take for investigators to provide an initial disclosure package, based on the responses from participants, the amount of time varied. It was reported that there is no standard policy requiring an initial disclosure package to be submitted within a certain amount of time, but that this varied by jurisdiction and was somewhat dependant on the relationship between the police and their Crown Counsel. Still, the amount of time expected by Crown Counsel for an initial disclosure package ranged from three to four weeks to several months prior to the second court appearance by the accused. Of course, participants did suggest that the circumstances of the case also played an important role. Participants indicated that the timeframe also depended on decisions by the judge or requests from Defence Counsel, which investigators had no input on. Again, participants felt that this timeline placed a substantial burden on investigators requiring a lot of work to be completed in a short period of time, including the previously discussed challenges with disclosure packages. Participants were concerned that this timeframe could result in investigators making mistakes, not pursuing certain avenues of investigation because it would take too long, or Crown Counsel using the *R. v. Jordan* presumptive ceiling as a reason for not approving charges.

Additional concerns related to the *R. v. Jordan* decision that affected the timeline of homicide investigations were that the resources were not available to meet the time limitations set by *R. v. Jordan* and the presumptive ceiling set by this court decision. Many participants suggested that the decision in *R. v. Jordan* was targeted at the court system and was an attempt to decrease the delay before the start of a trial, protecting an important constitutional right to a trial within a reasonable amount of time. However, participants felt that the time pressures related of *R. v. Jordan* were simply offloaded to the police. Moreover, while it is not the responsibility of judges to consider the effect of their decisions on police resources, *R. v. Jordan* substantially increased the workload burden on investigators who were not in a position to receive the additional necessary resources to comply with the *R. v. Jordan* requirements. In effect, participants argued that the criminal justice system was not set up in a way to meet the presumptive ceiling set out in *R. v. Jordan* without additional resources. Simply put, from the perspective of participants, there were insufficient resources in terms of homicide investigators, sworn and civilian support staff, labs and lab technicians, Crown Counsels, and court rooms.

In terms of the presumptive ceiling set out in *R. v. Jordan*, participants indicated that the amount of time it took to complete an investigation relied on so many distinct factors, that it did not seem practical to establish a particular timeframe for all investigations. Some participants referred to the timeframes established in *R. v. Jordan* as arbitrary and not evidence-based. As outlined above, there was previous case law establishing that disclosure needed to be completed with 18 or 30 months, which formed the basis of the *R. v. Jordan* timeframe. However, participants pointed out that every province and jurisdictions within each province had different levels of resources, capacities, and abilities to abide by these timelines. So, while Crown Counsel and homicide investigators worked extremely hard to ensure that they operated within that timeframe, participants reported being very satisfied with the *Charter's* statement of a reasonable amount of time before the start of a trial. Participants felt that this wording allowed for some flexibility, which was since removed as a result of *R. v. Jordan*. In this way, many participants agreed that trials should occur within a reasonable amount of time, but that *R. v. Jordan* was a very narrow interpretation and implementation of this

standard. While not the experience of all participants, several homicide investigators reported that they have heard of cases being thrown out of court because of a violation of the *R. v. Jordan* presumptive ceiling. Again, while there are a few ways to stop the clock, there was a general sense of frustration among investigators that they could spend a considerable amount of time and resources on a homicide investigation and have it thrown out of court because of a violation of what, in their minds, was a somewhat arbitrarily established timeframe.

One area where all participants indicated *R. v. Jordan* had a significant effect was related to the detention of evidence seized during an investigation. Participants argued that without charge approval, investigators needed to justify why they were keeping certain pieces of evidence over an extended period of time. In effect, investigators had to complete an application to the judge, known as a 490 order, to hold onto evidence belonging to someone who has not been charged with an offence. In addition to not wanting to disclose to a suspect that certain evidence exists, for example on a mobile phone, the requirement to submit a 490 order could result in weeks of work writing the necessary affidavits to keep evidence. As mentioned above, and to be discussed in greater detail below, there can be many steps required in an investigation that are out of the hands of the investigator, such as the analysis of forensic evidence, cell phone data processing, and CCTV processing, that can take enough time to require investigators to complete multiple 490 orders for the same piece of evidence. Participants indicated that to be compliant with the law, an application to extend the seizure of exhibits would usually begin within 3 weeks of seizing the evidence to receive a 90-day extension. They would then begin working on the next 490 order application to have the extension apply for 12 months. This process begins so early because of how involved and detailed the process was. There was also the concern that the person writing the 490 application was not able to be involved in other aspects of the investigation because of how much time and effort was required to complete the application.

Of note, most participants indicated that they were successful in receiving the requested 490 order extension; however, participants indicated that this was not a 'rubber stamp'. Some participants indicated that some judges were reluctant to grant extensions and thus required investigators to return exhibits to their owner. The process required that the investigator articulate to a judge why the exhibit was still required and why the investigation remained ongoing after 12 months. Participants indicated that judges asked a lot more questions than in the past about why the exhibit needed to remain in police custody. Moreover, and perhaps directly related to the implications of R. v. Jordan, investigators needed to examine exhibits much more quickly to understand what relevant evidence the exhibit contained to determine if the exhibit could be returned to the owner or whether the police needed to retain the exhibit and write a 490 application.

Participants did see some benefit to the 490 application process. Primarily, the benefit was that police were not arbitrarily holding onto items or holding items for longer than required. Still, participants felt that the system was burdensome and antiquated. Several participants recommended that a clearer and more structured definition of what items should be considered depriving someone of 'real' property when an exhibit is seized. In other words, participants understood the need to return a mobile phone as quickly as possible but were challenged to understand the need to return a bloodied t-shirt, for example. Participants tended to understand

that s. 5.2 and 490 of the *Criminal Code* of Canada were put in place to ensure that police were not keeping property from people that they should not. However, given the work associated with a 490 application, several participants indicated that the first detention order should be for one year as opposed to 90 days. After one year, participants felt that it was reasonable for investigators to appear before a provincial court judge to extend the order for another year. Again, the primary reason for recommending this process was some of the technology issues related to how long it took to process evidence on mobile devices and the length of time it took to get reports from labs.

Another issue related to the timeframe set in *R. v. Jordan* reported by participants was that the RCMP labs used to analyse evidence and provide reports to investigators takes a very long time to return results. This concern was for a wide range of analyses, such as those from forensics, DNA, autopsy, and firearms. Of note, this was not due to the amount of time it took to undertake the specific analyses or the people doing the analyses, but because of the large backlog of cases. From the experience of participants, the effects of this were that charge approval was delayed or investigators used non-RCMP labs, including those in the United States. While this often resulted in receiving reports in a much timelier fashion, there was an increased cost associated with using outside labs.

Similar to *R. v. Stinchcombe*, some participants saw one positive influence in terms of the presumptive ceiling established by *R. v. Jordan*. It was felt that the *R. v. Jordan* presumptive ceiling kept investigators on task. Given that suspects remained in the community, rather than in custody or under court-mandated conditions, it was believed that investigators felt a sense of urgency to complete their investigations to move to the charge approval stage as quickly as possible with the related concern that rushing the process might lead to a critical mistake or a missed investigative avenue. In addition, to avoid the potential of having too many homicide files on one's caseload, the timelines set out in *R. v. Jordan* reduced whatever level of complacency might have crept into homicide investigations. In other words, it was possible for a lack of urgency to appear in some cases for some investigators in the past because the suspect was already remanded or had court-ordered conditions imposed on them while in the community awaiting the police to complete their investigation. However, with suspects in the community prior to being arrested, police were much more motivated to conclude their investigations, which is one of the objectives of the *R. v. Jordan* decision. In addition, some participants simply felt that getting the case to and through the court system in a timely manner was good for victims, the friends and families of victims, the community, and the criminal justice system. To the degree that *R. v. Jordan* contributed to this, it was seen by some participants as a positive.

R. v. Grant

For the most part, participants explained that *R. v. Grant* played a minor role in how investigators carried out their duties to comply with case law and the *Charter*, but that it was not a major contributor to the amount of time, the number of steps, or the complexity of completing homicide investigations. Participants commented that ensuring that everything they did complied with the law and the *Charter* was always a concern in a homicide investigation and that homicide investigators were typically extremely knowledgeable about case law and how the *Charter* effected

how they conducted investigations. Their main concern was when case law changed and how that change might affect in progress investigations. It was interesting to note that participants were concerned that, while a minor breach or violation might not be enough to have a homicide case thrown out of court, a series of breaches in an investigation could have that effect. Therefore, investigators were very careful during an investigation and ensured that they were up to date on case law and erred on the side of caution, if they were unsure, for example, if they should seek a warrant for a piece of evidence. In effect, participants acknowledged that they would seek the advice of Crown Counsel or the Department of Justice on a wide variety of issues that might arise during an investigation to ensure that their process and procedures were '*Charter* proof', or safe from challenges of *Charter* violations Defence Counsel might make during trial.

Participants explained that, due to the seriousness of homicide investigations, the need to maintain public safety, and that investigators maintained the repute of the administration of justice, they were very aware of s. 24(2) of the *Charter* as it relates to the exclusion of evidence obtained or collected in a way that infringes on the rights or freedoms of the accused. Participants reported that there have been instances where investigations have engaged in a minor breach during their interaction with suspects, the collection of evidence, or the chain of evidence, as examples, but the evidence was so important, and a homicide is such a serious offence that the judge agreed that throwing the evidence out would be egregious and place the administration of justice in disrepute. Given this, as mentioned above, participants were very aware of s. 24(2) and the implications of *R. v. Grant* but stated that this ruling did not come up very often in homicide investigations for the reasons already discussed above. Instead, participants stated that they simply felt the constant pressure that evidence would be excluded if the police did something egregiously wrong at any stage of a homicide investigation. Again, while many participants felt that they had more leeway if a minor breach occurred, compared to investigations for less serious offences, the one area where there was the largest degree of concern was with custodial interviews. Breaches of a person's *Charter* rights during a custodial interview or confession were not likely to be overlooked by judges and could result in a homicide case being thrown out of court.

Some participants spoke about the benefit of judicial decisions, such as *R. v. Grant*, being that bad faith actors or those who used to be a little more liberal in their behaviour during investigations could no longer engage in the types of strategies or tactics that they had become accustomed to because the evidence collected through these methods would be excluded. Participants indicated that files were being completed more diligently and 'by the book' because of decisions like *R. v. Grant* and not wanting to rely on s. 24(2) to allow evidence in a trial that might have been collected in a way that included a minor breach of the *Charter*. It also contributed to participants thinking more carefully about people's rights to privacy and the expectation of privacy. A few participants did report that one of the negative aspects of *R. v. Grant* was that some investigators felt it was necessary to get warrants for everything as a precaution against a claim of a *Charter* violation. This approach added to the cost and time of an investigation and was seen by some as an added aggravation when conducting a homicide investigation.

R. v. Fliss

Participants indicated that *R. v. Fliss* was important because it allowed investigators to rely on transcribed audio recording at trial to refresh their memory when testifying. Moreover, these transcriptions can be submitted at evidence at trial. In the *R. v. Fliss* decision, the judge stated that "there is no doubt that he did the right thing in obtaining an authorization, in having the recording transcribed and in verifying immediately the accuracy of the transcript of a conversation to which he was a party, while it was still fresh in his mind. This was indeed prudent since the tape could have been lost or could have deteriorated before trial". However, all participants reported that the requirement that the transcription and the review of the transcription happen immediately was a substantial burden on investigators and other resources. Participants indicated that the largest issue was getting transcripts done in a reasonable amount of time. Of note, participants indicated that technology had improved over the previous years, which made it much easier to send audio files, have a trained person transcribe the interaction, and have the investigator review the transcription. In effect, participants stated that this process took much longer in the past because of the inability to send the audio files electronically and the quality of the audio recordings.

All participants estimated that there was a 1:6 or a 1:8 ratio associated with transcription; meaning that one minute of conversation took six to eight minutes to transcribe. While this might not seem like an unreasonable time ratio, it is necessary to keep in mind that there might be transcriptions needed of conversations between, for example, an investigator and a suspect in a police station or an interaction between a prisoner and their cellmate who is an undercover police officer. These conversations could last more than 10 hours; all of which needs to be transcribed in a very short period of time. Moreover, one homicide investigation might involve dozens of conversations collected through wiretaps or undercover operations; all of which need to be transcribed in a timely manner. Again, it is important to keep in mind that all interactions are audio recorded, and it all needed to be transcribed.

What is interesting was that participants indicated that their transcripts had not been successfully challenged in court, primarily because the court wanted to accept the best evidence available, and the process established because of *R. v. Fliss* allows for this. In fact, some participants wished that Crown Counsel would use this kind of evidence more often. So, while the overall quality of the audio recording affected the amount of time it took to transcribe a recording, and it is now a requirement to "*Fliss*" all audio recordings that will be used as evidence in court, advances in technology have contributed to reducing the amount of time it takes investigators to accomplish this task.

Still, participants indicated that there are instances where they have needed to obtain additional resources and to pay for overtime to ensure that transcriptions were completed in accordance with *R. v. Fliss*. Depending on how many people are working on transcribing the audio recordings and ensuring that the transcription is accurate, this process could add weeks and months to the amount of time it takes to complete an investigation and forward all the necessary initial disclosure information to Crown Counsel for charge approval. For undercover operations, some participants indicated that the requirements due to *R. v. Fliss* has been a massive undertaking for police. Participants indicated that, with undercover scenarios, they used to only transcribe evidentiary portions of the audio recording; however, as a result of *R. v. Fliss*, everything was now transcribed.

One participant provided the example of an investigation that used a wiretap. In this case, to prepare for disclosure, five investigators spent six weeks transcribing the audio recording that resulted from the wiretap.

Still, other than the cost and time associated with transcribing all audio recordings in a very short period of time, participants did not report any other challenges or problems with how the *R. v. Fliss* decision has affected homicide investigations. In effect, many participants felt that *R. v. Fliss* simply reinforced best practice. Moreover, while the *R. v. Fliss* requirements can be logistically difficult, the decision was considered positively because it allowed investigators to record scenarios and use the transcript as their notes at trial. It used technology advantageously for investigators as they could go through the transcript and confirm if it was correct or not, adopt the transcript as their notes, and have the transcript admitted as evidence.

R. v. Hart

Participants indicated that the *R. v.* Hart decision made investigators think more carefully about what a 'vulnerable' person meant and what type of target police were using Mr. Big scenarios on. Participants reported that *R. v. Hart* affected the type of approach used with a suspect based on their background and potential vulnerabilities. *R. v. Hart* contributed to participants looking more deeply into a suspect's background to identify, for example, a mental health issue could make them not suitable for a Mr. Big scenario because of *R. v. Hart*. As a result, participants indicated that they take additional steps at the front end of the process to ensure that a target is suitable in accordance with *R. v. Hart*. In effect, there is a much more nuanced consideration of a target's lifestyle, how they might perceive or respond to threats, how they react to power imbalances, a target's level of sophistication, and their vulnerability. While these things were considered to varying degrees in the past, according to participants, the decision in *R. v. Hart* defined these considerations more clearly and placed them at the forefront of any decision to undertake a Mr. Big scenario.

Participants also indicated that it changed, to some degree, the type of Mr. Big scenarios they used. In other words, when they might have used a more violent interaction with a suspect, they might now consider engaging the suspect in a conversation about money laundering, for example. Moreover, participants indicated that, as a result of *R. v. Hart*, it took more time to come up with scenarios and covers, investigators had to be more careful in their decision to undertake a Mr. Big operation, they needed to take more notes, and more clearly articulate why the decision to undertake a Mr. Big operation was taken. In effect, *R. v. Hart* changed the selection of which homicide investigations would use Mr. Big operations based on an assessment of the vulnerability of the person subjected to the operation.

More specifically, it was a common comment that *R. v. Hart* resulted in investigators pursuing other strategies prior to deciding on a Mr. Big-type strategy, whereas prior to *R. v. Hart*, this type of strategy would have been implemented much earlier in the process. Of note, this was not seen as a negative, just a strategic change because of *R. v. Hart*. Given this, much more thinking, discussion, and planning occurred prior to activating a Mr. Big scenario, and, as a result, scenarios tended to be longer, much more involved, and needed much more documentation.

Many participants indicated that they were in favour of the *R. v. Hart* decision because it set the parameters or boundaries for the use of Mr. Big strategies during undercover operations. This judicial decision made it that the determination to start a major crime undercover investigation that included a Mr. Big approach was not taken lightly but was reserved for very specific files when other investigative avenues had either failed or were inappropriate. Participants stated that it was the facts of the case and what evidence was missing was what determined whether an undercover operation that included a Mr. Big strategy was appropriate and whether the approach would likely provide the necessary evidence, and further, that there was an additional vetting process within the department that was used to determine whether the suspect was appropriate for this process because of *R. v. Hart.*

However, participants were also cognisant of the fact that the *R. v. Hart* decision increased the amount of work for investigators related to disclosure, court preparation, and transcription. It was also felt that *R. v. Hart* had a negative effect on resources with the result that fewer Mr. Big operations were undertaken. Participants also stressed that suspects were not tricked by the police as often as the suspect thought they were but that undercover operations were more probative than people give it credit for. So, there was balance between the benefits of an undercover operation and the resources and time requirements to undertake an operation.

While some participants indicated that *R. v. Hart* turned Mr. Big operations into a strategy of last resort, others thought that *R. v. Hart* simply made investigators think about what they were doing and why they selected to go down this investigative route. For many, there were no major drawbacks to the *R. v. Hart* decision and required the police to investigate further and potentially pursue other investigative avenues prior to undertaking a risky and expensive strategy, such as a Mr. Big operation, which was not viewed necessarily as a negative.

R. v. Marakah

According to participants, the effect of *R. v. Marakah* on homicide investigations was related to the increased number of warrants that investigators needed to write. Participants reported that if they had any concerns around the issue of someone's expectation of privacy, especially as it related to information on devices, such as a mobile phone, they were required to get a warrant. Given the amount of time and resources required to write a warrant, participants felt that *R. v. Marakah* increased the time it took to complete and investigation and added steps and complexity to investigations. Not only did it take an additional time to write warrants, but participants mentioned that so many warrants were being written that Justices of the Peace now have to review and decide on dozens of warrants every day. Participants indicated that they routinely wanted to examine 10 or more devices as part of a homicide investigation and that *R. v. Marakah* resulted in investigators requiring judicial authorizations for each device, which takes a lot of time and resources, not only from the police, but from the courts as well.

A common comment from participants was that the legal system has a difficult time keeping up with technology and technological advancements. As such, at times, ruling can occur that may not apply well or might reflect a misunderstand of how technology is used. *R. v. Marakah* was often cited by participants as an example of this, in that it was viewed as extending the notion of privacy

in a way that does not align with how individuals use and think of their technology. While the *R. v. Marakah* ruling was not viewed by participants as fundamentally hindering investigations, it was seen as increasing the timeframe of an investigation by many months because of the need to write so many warrants and the effect of this on completing a disclosure package for Crown Counsel.

Again, participants did not feel that *R. v. Marakah* changed what investigators searched for or examined, and, prior to *R. v. Marakah*, they still would have sought a warrant to examine, for example, text messages sent by the suspect; however, because of *R. v. Marakah*, investigators additionally sought warrants to view, for example, the mobile phone of the victim, a witness, or someone who came forward to the police, even when the individual voluntarily handed over their device and provided consent for investigators to examine the device. Of note, these warrants can be 80 to 100 pages to receive judicial authorization for one device. It is important to keep in mind that affiants can write an omnibus warrant. Still, as an example, one participant stated that there was typically the need for many judicial authorizations at the beginning of a homicide investigation and that this used to take an affiant one week to write all the warrants. As a result of *R. v. Marakah*, this participant indicated that it took a month or more to write all the warrants.

Another challenged based on *R. v. Marakah* was related to the willingness of individuals to come forward and provide their devices for police. Prior to *R. v.* Marakah, investigators might simply take pictures of the information on the device and return the device in a few hours to the owner; however, because the owner cannot simply consent to having their device examined due to the potential of text-based conversations between the owner of the device and a third party that did not consent to the search, the process after *R. v. Marakah* requires the police to seize the device, write a warrant, receive judicial authorization, download all the data, transcribe the information, analyse it, and include the information in a disclosure package; all of which might mean that the owner was deprived of their device for days or weeks. Moreover, the affiant may not be able to write the warrant immediately because they are working on warrants for more perishable evidence, which can also delay the process. Given how dependent so many people are on their mobile devices, knowing that one might be without it for weeks while the police examine it may result in fewer people coming forward with probative information on their devices for fear of being without their phone for an extended period of time.

It should be noted that not all participants felt that requiring investigators to write warrants for all devices was necessarily a negative thing. Some participants argued that *R. v. Marakah* contributed to '*Charter* proofing' that aspect of an investigation and provided a clear process for examining a device lawfully. In effect, some participants felt that *R. v. Marakah* was good jurisprudence in that it kept an individual's privacy rights in the mind of investigators at all times during an investigation. Still, several participants felt that *R. v. Marakah*'s extension of third-party expectation of privacy went too far, overwhelmingly benefited the suspect rather than the victim, and did not contribute to public safety. In effect, it was seen by some participants as more of a hinderance to investigations than a benefit to society. It was also felt that *R. v. Marakah* was very unclear regarding determining whether there was an expectation of privacy, which not only led to confusion, but the need to err on the side of caution, which extended the time and increased the resources needed to complete an investigation and avoid running afoul of this decision.

Cumulative Effects of Case Law on Homicide Investigations

While participants understood the reasons for the decisions made by the judges in the cases discussed above and most participants did not disagree with the decision, it was in the implementation of the decision that frustrated participants. For example, while all participants felt that it was important for investigations to be completed as quickly as possible and recognized that the accused had a right to a trial within a reasonable amount of time, it was felt that the *R. v. Jordan* decision created an arbitrary presumptive ceiling that did not adequately consider how much time a modern homicide investigation took. In complex investigations, there was a vast amount of information and evidence that needed to be analysed and considered, and *R. v. Jordan* created a process where Crown Counsel, in most circumstances, will not charge a suspect until the entire investigative process was complete out of concern that the trial would not be completed within the presumptive ceiling. This placed a substantial burden on investigators and potentially increased the risk to victims, witnesses, and the public. Moreover, from the perspective of participants, there was simply not enough manpower and resources to complete investigations within the timelines set out by *R. v. Jordan*. This lack of resources was also found in crime labs that were often dealing with substantial backlogs of cases requiring analysis due to the lack of sufficient staffing and resources. Compounding all of this was the rapid speed of technological advancements, such as larger hard drives, encryption software, and third-party applications, and the ability of law enforcement and the legal system to respond to technological advancement appropriately and in a timely manner.

It is also important to keep in mind that all of this evidence and information ultimately needed to be disclosed to Crown Counsel and Defence Counsel, leading to concern by participants that investigations could fail because of disclosure issues. As the amount of information and evidence in each homicide investigation increases, there is a greater chance that something will not be disclosed. Moreover, *R. v. Stinchcombe* and the subsequent judicial decisions related to disclosure has increased exponentially the amount of work associated just to the disclosure process. All participants spoke of the human, technological, and financial resources allocated to support and complete a disclosure package. In effect, participants concluded when monumental judicial decisions are taken, such as *R. v. Jordan* and *R. v. Stinchcombe*, the government must respond by funding more police, more Crown Counsel, and more courtrooms. In addition, the RCMP lab must be better resourced. Adequately resourcing investigations and Crown Counsel will contribute to investigations achieving the requirements of case law, maintaining the repute of the criminal justice system, and maintaining public safety.

Typical Steps in a Homicide Investigation

Homicide investigators were asked about their personal experiences with different stages of a homicide investigation. Specifically, they were asked about the average time required for each stage of an investigation, whether this amount of time has changed over the past 10 years, and what, specifically, had caused the change in the time required for each stage. The five stages were presented to investigators first, allowing the respondents to organize their thoughts before responding. The first stage was at the immediate scene where the victim was located. Typical steps at this stage were identified as securing the perimeter, requesting additional required resources

based on the specific circumstances of the crime scene, determining the command structure for the ensuing investigation, contacting the coroner and waiting for the coroner to remove the body for autopsy, and processing the immediate scene for evidence, such as blood, fingerprints, weapons, and so on. The second stage was the initial investigation away from the immediate scene where the victim was located, including collecting witness statements, canvassing the surrounding area for additional evidence, locating and collecting closed-circuit television footage or dashcam footage, collecting and logging exhibits, notifying the next of kin, and attending the autopsy. The third stage was the follow up investigation, which typically occurred over the weeks, months, and potentially years after the start of the investigation. This included creating and potentially revising the investigative strategy, setting up file coordinators for the collection and storage of evidence and materials, including records, disclosure materials, analysis, and interview recordings or transcriptions, identifying and securing any additional resources required for the investigation, carrying out additional steps in the investigation, such as neighborhood inquiries, identifying and talking to additional witnesses or suspects, obtaining search warrants, and potentially developing and carrying out undercover or wiretap operations. Step four in the investigation occurred when the suspect had been identified and the investigators needed to develop a plan to arrest the suspect. In some cases, this was a very straight-forward step, but in cases where the suspect was considered dangerous, it could include significant planning, surveillance, undercover operations, and assistance from emergency response teams. The fifth and final step was described as the court step, where the police provided their final disclosure package to Crown Counsel and assisted in the trial process, including providing testimony.

One thing that was immediately made clear by nearly all participants was that there was no such thing as a typical or average homicide investigation. While some homicides might be concluded very quickly, with an arrest of a suspect occurring in just a few days, others might take months or years before a suspect was identified and arrested. Participants emphasized that every homicide investigation could be very different than the last one, with different circumstances and unique challenges. For example, factors like the weapon or method used in the homicide, the location or state of the victim when discovered, the weather, or how long the victim has been deceased could all play a significant role in the investigation. Further, many participants pointed out that one homicide might be motivated by domestic violence, another by gangs or drugs, and another might have a completely unknown motive. The investigators stressed that the paths of these investigations, and consequently the steps required, were often different based on these factors, issues, or circumstances.

That being said, many participants agreed that there were three different general categories of homicides. First were the so-called “smoking-gun” homicides, where it was often very clear to the investigators who the main suspect(s) was almost immediately. In these types of cases, it was not uncommon for the main suspect to be at the scene of the homicide and sometimes the suspect was immediately cooperating with the investigators. This was common for homicides related to domestic violence or homicides related to a crime of passion, such as a fight between two people that ended in one person dying. The second type of homicide identified by investigators were related to organized crime and gangs. Most participants stated that these were some of the most difficult homicides to investigate for a variety of reasons, including the methods used to commit the

offence and because these homicides typically included uncooperative witnesses. Finally, the third type of homicide identified by most investigators were those where investigators had no idea who committed the offence or why it was committed, often referred to as "whodunnit" cases by investigators. These types of cases, where investigators were not able to identify a motive or a suspect within the first 48 to 72 hours, were identified by respondents as both very rare and very challenging, with some going unsolved for years, and many unsolved cases still under investigation. Interestingly, there seemed to be significant differences in the distribution of the three main types of homicide cases based on the jurisdiction that the participant worked in. For example, homicide investigators working in a more rural area stated that they typically had a suspect immediately identified in approximately 90% of their cases, as their caseload of homicides was most commonly characterized by domestic violence homicides or those involving a dispute between two individuals. However, participants from larger urban centres more commonly reported that approximately 65% of their homicide investigations were related to gang violence, where, although investigators might have an idea of which rival gang was likely responsible for the violence, they had no immediate suspect.

Stage 1: Initial On-Scene Investigation

The first step of any homicide investigation is the initial on-scene examination, which typically occurs in and around the area where the victim is found. All of the participants discussed the same initial steps for a homicide investigation; a search of the immediate area to ensure the safety of investigators, securing a perimeter to preserve and locate potential evidence, and, if the body was not found in a public space, determining the owner of the residence or location where the victim was found. These initial steps of securing the immediate scene could be carried out by general duty officers, depending on how and when the victim was located. However, once homicide investigators arrived on scene, which was typically reported as occurring within an hour, they took over control of the scene and investigation. The initial on-scene investigation, which can include determining any additional resources that might be required, calling out any additional officers needed to secure the area, and ensuring that all of the perishable evidence is either collected or preserved, would typically be completed within the first few hours. However, more than one investigator mentioned that the location of the victim can make this step more complicated and time consuming. For example, a victim found in a lake would require a boat, a dive team, and other additional resources that might take more time to arrive on-scene. Another example was a body found several kilometers into the forest, which could require a helicopter or all-terrain vehicles to access the location and the body.

Another important step identified by investigators was the determination of a command structure, such as establishing the lead investigator, assigning a dedicated file coordinator, establishing the crime scene manager, and so on. All of the interview participants explained that the command structure was determined well before the homicide investigation began. This was important as it allowed for all of the necessary roles to be in place and ready to act when the team was notified of a homicide. In most jurisdictions, the command structure for multiple teams is already determined, with the number of teams in a jurisdiction based on the population size in the jurisdiction. In effect, each homicide team worked independently on a rotation as a new investigation began. This allowed

for each team to know in advance what their role would be for the next homicide investigation, and which team was on-call during a given period should another homicide occur.

Once the investigation of the initial scene around the victim was completed, the coroner service would remove the body for autopsy. Most of the interview participants stated that this would typically occur quite quickly after locating the victim, sometimes in as little as a few hours. However, in more complicated circumstances, it could take as long as a few days before the body was removed for autopsy. Depending on the circumstances of where the victim was located, part of the initial investigation and body removal could require a warrant from a judge. While participants stated that this process was rarely problematic, a few investigators stated that the writing of the warrant and appearing in front of a judge to discuss the relevant details regarding the crime scene could be cumbersome and time consuming. That being said, no investigator stated that obtaining this initial warrant at the start of the investigation was excessively time consuming or problematic, and, in fact, no investigator reported ever having their application for this warrant being denied by a judge.

According to the participants, one of the most time-consuming steps during this initial stage of the investigation was the collection and processing of evidence at the scene, such as blood, fingerprints, physical evidence, weapons, and taking photographs and measurements. All participants stated that this step varied greatly in the amount of time it took depending on any number of key factors. For example, one investigator mentioned the difficulty of carrying out an investigation of a victim found in a remote wooded location, and another mentioned the challenges of finding a victim in a river or body of water. Further, the circumstances and method of the homicide had a significant effect on the initial stages of the investigation as well. For example, a scene where two individuals got into a fight and one individual fell, struck their head, and died could be much less time consuming than a scene where a body was found outdoors, and the investigators have no initial idea of the circumstances related to how the individual died. Still, most investigators gave a range of between one to two days at the low end to as much as three weeks for a very difficult or complicated scene to complete their processing of the immediate scene around the victim. Still, participants stated that, most of the time, the initial at-scene investigation was completed within one week. However, as one investigator pointed out, there were always rare cases that could take much more time, such as the Robert Pickton investigation, which took multiple teams of investigators several months to complete the initial processing of the crime scene.

In terms of changes over time, these first steps of a homicide investigation were identified by participants as being relatively stable over the past 10 years. All participants stated that very little has changed, either for better or worse, in terms of how long this initial stage took investigators or the number and type of steps taken at this stage of the investigation. Moreover, none of the participants identified any challenges or issues with case law or recent judicial decisions that have made this stage of a homicide investigation more challenging. There appeared to be consensus regarding the typical timelines during this stage, with all participants stating that the at-scene investigation was typically completed within the first week of being notified of a homicide and arriving on scene.

Stage 2: Initial Canvassing of Surrounding Area

The second step of a homicide investigation as identified by participants involved canvassing the area near the victim. This step typically included identifying and talking to witnesses and surviving victims, locating and securing any video evidence, such as closed-circuit television, security camera, doorbell, or dash-camera footage, searching for any potential evidence away from the immediate scene, logging all exhibits, notifying and interviewing the victim's next of kin, and attending the autopsy. Participants stated that the range and scope of this initial canvassing varied depending on the location of the homicide. For example, for a homicide that occurred in a dense urban area, investigators might canvas the area within a radius of several blocks, while a homicide that occurred in a rural area, the radius might be several kilometers. In some circumstances, where a potential suspect had already been arrested, this step could include interviews with the suspect, as well as court appearances in the event that there was enough evidence to lay charges. Finally, this step could include determining a media strategy, including creating a media release and/or interviews with the media, which were most often conducted through a media liaison officer.

The time required to canvas the surrounding area to identify and interview potential witnesses and to locate and secure possible video evidence can also vary greatly. For example, the time required to canvas a dense urban area would be significantly greater than a very rural area with few homes. As one participant identified, the canvassing process for a victim found in a densely populated area could take one or more weeks, while the canvassing process for a victim found several kilometers out in the woods would likely take much less time. Further, that same investigator stated that the canvassing process could take much longer in a 'whodunnit' investigation, where there was no immediate suspect identified. Under these circumstances, the participant explained that police would need to cast a much wider net, collecting as much information as possible. While much of the information and evidence might not be relevant, participants suggested that it was sometimes difficult to tell what evidence would be important later on in the investigation at this early stage. Given that the circumstances for each homicide could vary greatly, it was not surprising that the estimation of the time required during this step also varied greatly. Estimates ranged from a few days for less complicated or broad canvassing to upwards of one month under more complicated circumstances. Still, the majority of participants seemed to agree that the initial canvassing and collection of witness statements and video evidence typically took about one week. Further, it is important to note that this step in the investigation was usually carried out at the same time as the on-scene investigation.

Participants stated that, although the initial canvassing of the surrounding area has remained relatively similar and consistent in terms of how long the process took, there have been significant changes in the amount of video surveillance and electronic devices investigators routinely collect compared to 10 years ago. The frequency of home video surveillance, doorbell cameras, and dash cameras in motor vehicles has increased substantially over the past several years. Further, there has been a substantial increase in the number of people with smart phones capable of taking videos, the proliferation of CCTV cameras and home and business video surveillance cameras. As a result, investigators need to identify where there might be video surveillance, collect the information, log

it, analyse it, and disclose it. This has resulted in in a substantial increase in time and necessary resources for the police.

Stage 3: Investigation

The third stage of a homicide investigation occurs after the collection of evidence at the initial scene and canvassing of the neighborhood is complete. Unlike the first two steps in the investigation, where timelines were identified as being somewhat predictable with very little change in the past 10 years, participants all agreed that this step has seen significant changes over the past 10 years. Further, many participants had more difficulty trying to estimate how long this step would take for an average homicide case, given the complex nature of most homicide investigations. Similar to previous stages in the investigation, many investigators provided estimates for average timelines for this step based on the different types of homicide mentioned above. While estimates varied somewhat between participants, the ranges were somewhat similar. Specifically, the more straightforward "smoking-gun" homicides, where a suspect was identified within the first 24 to 48 hours, could potentially take as little as a few months to complete the investigation, while more complex "whodunnit" or gang-related homicides could take two to three years or longer to complete the investigation.

The variance in timelines was often based on the specific elements of the investigation; the requirement for DNA analysis, firearm analysis, or toxicology reports, the requirement for undercover, surveillance, or Mr. Big operations, the process of obtaining permissions for wiretaps and analyzing that information, and the volume of electronic devices or data requiring analysis and/or de-encryption. The challenges identified by investigators as having a direct effect on timelines could be broken down into three main categories; (1) technical or forensic reports, (2) the growing complexity of homicide investigations, including complexity brought about by recent legal decisions, such as the *R. v. Fliss* or *R. v. Jordan* decisions, and (3) the growing complexity, frequency, and volume of electronic data and video surveillance. Finally, many investigators mentioned that gang-related homicides often took much longer due to the frequently uncooperative nature of witnesses or the lack of witnesses, as well as the lack of a murder weapon in many cases.

Many participants discussed the challenges related to getting toxicology reports or DNA reports back in a timely manner as a major reason for longer investigation timelines, with most participants stating that getting these types of forensic reports back took, on average, between 9 and 12 months. To address this long wait time, a few participants mentioned using private forensic labs in the United States and Canada rather than the RCMP forensic labs as a possible solution for this issue. Participants mentioned that they could often get results within a few weeks or months from private labs, albeit at an increased cost. For example, one participant mentioned using the Vancouver Police Department (VPD) lab for firearms analysis because investigators could typically get results back within 30 days. Similarly, another participant mentioned using the British Columbia Institute of Technology (BCIT) for DNA analysis, where the turnaround for results was often within 24 hours compared to waiting 6 to 12 months for the RCMP forensic lab. It is important to note that participants who mentioned the long wait for results from the RCMP forensic labs felt it was due to inadequate staffing in those labs rather than related to any issues with the lab technicians. In fact,

many participants commented that there was a need for at least one RCMP forensic lab in every province.

The second key driver of the increase in investigation times was identified as the growing complexity of homicide investigations over the past decade, including the effect of several judicial decisions. For example, as discussed above, participants mentioned the impact of the *R. v. Fliss* decision requiring investigators to fully transcribe conversations or recorded materials gathered during undercover or electronic surveillance operations promptly after being collected. Investigators discussed how the transcription of these materials could take a substantial amount of time and resources that cost a lot of money in overtime and could sometimes cause investigative delays. Other participants mentioned the increased requirements around getting judicial approval for any undercover or electronic surveillance operations as a contributor to longer investigation timelines, as the process for filing for these types of warrants took a substantial amount of time. The *R. v. Jordan* decision was another case frequently discussed as a primary reason for the increase in investigation time over the past decade. Again, due to the limited time available between the approval of formal charges and the completion of the trial after the *R. v. Jordan* decision, many interview participants felt that Crown Counsel were requiring a complete or near-complete investigation and initial disclosure package prior to approving charges in many circumstances. Further, investigators felt that Crown Counsel demanded a far more substantial initial disclosure package to approve charges than in the past, thereby increasing the workload for investigators and consequently increasing timelines.

The third key driver identified as the main cause for increased timelines seen over the past decade was the analysis and disclosure of information contained on electronic devices or video surveillance. Specifically, the analysis and disclosure of this type of electronic data has become more complicated and time consuming, largely due to the increased volume of information stored on modern devices. For example, the iPhone 4S was released in 2011 with 8 Gigabytes (GB) of storage, and optionally, up to 64 GB of storage. The iPhone 12, released in 2020, had 64 GB of data, and optionally, up to 256 GB of data. This represents between a four-fold and eight-fold increase in data volume over the past 10 years on an average cellular device. This same type of data storage increase has been seen on other electronic devices, such as desktop or laptop computers. This increase in data volume presents unique challenges to investigators; however, particularly when it comes to disclosure to Crown Counsel. Specifically, the data on these devices needs to be analyzed and reported to Crown Counsel as part of the disclosure package, where a single high-volume electronic device can consist of thousands or even tens of thousands of pages of disclosure. Similarly, as mentioned above, the popularity of home surveillance systems, doorbell cameras, dash-mounted video cameras in motor vehicles, and other forms of video have increased the amount of data analysis and disclosure required for video evidence.

Stage 4: Suspect Arrest

The next stage, identified as the formal arrest and charging of the suspect, could occur at different points during the investigation, depending on the circumstances of the homicide. Many participants delineated that for the so-called “smoking-gun” homicides, where the suspect was identified very

quickly, the arrest process typically occurred within the first few days after the start of the homicide investigation, with charges following soon thereafter. The delay of a few days before charging the suspect allowed investigators to collect evidence, interview the suspect and any witnesses, and confirm the events surrounding the homicide. However, for the gang-related or "whodunnit" type of homicides, the arrest process can be far more complicated and will often occur months or even years after the start of the investigation. As one participant explained, a gang-related homicide often took investigators one or more years before they had enough evidence to forward the file to Crown Counsel. After the decision to charge has been made by Crown Counsel, the investigators will often sit down to develop a plan to safely arrest the suspect. Depending on the history of the suspect, such as a history of violent offences or gun possession, this plan could involve undercover operations, Emergency Response Teams, or planning and coordination with police in another jurisdiction. These types of situations can vary greatly in how long they take to carry out, particularly if police were conducting surveillance on a suspect that required judicial warrants. Most participants explained that the arrest process for more difficult cases often took between one and three months, with the most significant challenge being getting charge approval. Once Crown Counsel granted charge approval, the time to plan and execute a safe arrest of the suspect could take as little as a few hours, or up to two or three weeks with more dangerous suspects or complicated circumstances.

While participants stated that the arrest process has remained static in terms of the amount of time it took compared to 10 years ago, many participants felt that the *R. v. Jordan* decision had a significant effect on how quickly Crown Counsel provided charge approval. While this issue was discussed above, many participants did voice concern over the potential for homicide offenders to be in the community longer than necessary due to Crown Counsel not approving charges as quickly as they had in the past, particularly at a much earlier stage of the investigation process. Participants often felt that this was directly related to the *R. v. Jordan* decision and the need for Crown Counsel to have a complete disclosure package before approving charges. When asked specifically about the potential risk to the public, one participant stated that the responsibility fell on the police to find and allocate the necessary resources to monitor and surveil suspects prior to charge approval. However, given the costs associated with surveillance and other police operations, suspects were not typically watched 24-hours per day, which resulted in an element of risk to the public that the suspect might reoffend while under investigation and prior to charges being approved.

Stage 5: Final Disclosure and Court Process

The last step in a homicide investigation was identified as the creation of a final disclosure package for Crown Counsel and presenting information in court, when necessary. For a variety of reasons, participants stated that it was difficult to estimate an exact amount of time that this process took. First, as participants repeatedly stated during their interviews, every homicide investigation had different circumstances, challenges, and timelines. Second, investigators found it very difficult to estimate how long the disclosure process took as the collection of information necessary for disclosure began at the first moments of the investigation and continued throughout the investigation, even after charges had been approved. As mentioned above, evidence and file coordinators are identified at the onset of the investigation and continuously work towards the

final disclosure package right from the moment that a homicide has been identified. Given the nature of how the information for disclosure is collected throughout the investigation, it was very difficult to give an estimate on how long it takes to complete the disclosure package for an 'average' homicide investigation. However, with those caveats in place, a few participants provided some rough estimates. One participant mentioned that a gang-related homicide could take a single full-time person dealing with disclosure the entirety of a three-year investigation, while a more straightforward "smoking-gun" homicide might require about 1½ to two months of full-time work. Another investigator gave a very similar estimate, stating that an average two-year investigation might require around 2,000 hours (or approximately 50 weeks) of full-time work for a file coordinator. Similarly, another investigator stated that a straight-forward "smoking-gun" homicide could be done within the first two months, and posited that a more complicated homicide, such as a gang-related murder, could take years to complete.

When discussing whether the timeline for completing disclosure has changed over the past 10 years, there seemed to be some mixed responses. Most participants felt that things had not changed significantly regarding the time required to complete disclosure to Crown Counsel, while a minority of participants felt that the amount of time it took to complete the disclosure package had increased substantially. Interestingly, those who stated that the time to complete disclosure had increased over the past 10 years reported that this increase was most likely due to a human resourcing issue rather than the result of any specific judicial decision or legal requirement changes. These investigators pointed to challenges with overworked homicide investigators and support staff, the effects that this had on investigator burnout and wellness, the aforementioned challenges of receiving lab results in a timely fashion, and the need to collect and disclose evidence that did not exist in the past, such as cellular phone data or video footage, along with the rapid increase in the actual volume of data investigators routinely collected during a homicide investigation. Finally, one participant mentioned that they often collected electronic data that they might not be able to use right away but might be able to access in the future after additional advancements in technology occurred. Specifically, the participant mentioned that they often collected things like encrypted cellular phones or computers that the police were unable to access due to encryption in the hopes that they might be able to bypass or 'crack' the encryption in the future.

The Role of Technology in Homicide Investigations

The technological advancements that have had the greatest effect on homicide investigations, according to participants, have been mobile phones, video surveillance, and DNA. More specifically, not only do mobile phones contain private communications, but investigators can frequently access banking information, which websites have been visited, emails, texting, social media data, and a wide range of other information, such as usernames and passwords. As discussed above, the challenge is that it can be extremely time consuming to get judicial authorization to access the device and to extract and analyse all the information contained on the device or stored in the cloud. In terms of video surveillance, participants reported that the proliferation of home security video, business CCTV, dashboard cameras and doorbell cameras, and the number of people with cell

phones that can record high quality videos has contributed massively to homicide investigations. In addition to the challenges mentioned above, participants pointed out the need to have the capacity to download, store, view, analyse, and disclose all the video evidence that police currently collect. Finally, with reference to DNA, in addition to requiring smaller amounts of viable DNA for analysis, participants indicated that genealogy sites, such as 23andme.com and ancestry.com, have provided new investigative avenues for investigators. Moreover, drone technology and 3D imaging of crime scenes were also mentioned as newer technological advancements that have enhanced homicide investigations.

While there were additional challenges associated with technology that will be discussed in greater detail below, all participants stated that there were enormous investigative benefits of analysing mobile phone, video, and other digital evidence. For example, participants felt that reviewing hundreds of hours of video assisted investigators in piecing together behaviours, actions, and events that took place before and after the offence occurred. This information could assist in establishing a motive, confirming or challenging an alibi, and tracking the movements of suspects. Participants indicated that video evidence could be very powerful in court and can serve to limit the arguments of Defence Counsel. Again, most participants indicated that collecting, analysing, storing, and reviewing video evidence was challenging and extremely time consuming but was also very valuable for an investigation. Related to external sources of video evidence, participants did mention that having the technology to audio or video record statements at the scene or in their vehicles was a benefit.

To address the volume of digital evidence, some participants spoke of the development of forensic video units or establishing technology units or departments that focus on tasks, such as downloading information from mobile devices and computers. Of note, participants felt that the investment in human and financial resources to these types of units was critical and worthwhile in a modern police department or detachment. Many participants indicated that there was no better way to verify an investigative strategy than with digital evidence, such as the information from GPS trackers, mobile phones, or video surveillance cameras. It was interesting to note that the main benefit associated with technology was that it confirmed a suspect or established what the investigators already believed, rather than providing new avenues of investigation.

In effect, most, but not all, participants felt that technology served to confirm what the investigators already knew, rather than providing new information. While that does happen at times, this was reported as being much less common than having the digital or forensic evidence confirm pre-existing suspicions. In effect, digital evidence was seen as providing strong support for the timeline that investigators attempted to establish for different aspects of an investigation, such as when the homicide occurred, the location of the suspect over time, tracking the movement and communication of a suspect, supporting and corroborating witness statements, and assisting with suspect identification. Participants liked digital and forensic evidence because it was viewed as unbiased evidence. There are often concerns with eyewitness testimony or statements made by witnesses during a trial in terms of their veracity and accuracy. Given this, participants felt that digital evidence was much more reliable in court and much more powerful than other forms of evidence at trial.

Moreover, while the use of digital evidence was seen mainly as confirming or reinforcing what investigators already suspected, several investigators did provide examples where digital evidence provided new information. Obviously, it was very helpful to have, for example, video of the offence occurring but, in many homicides, investigators do not have a suspect immediately identified and, in these cases, participants felt that digital and forensic evidence was very helpful in providing possible suspects, eliminating other potential suspects, and establishing a timeline or a partial timeline for the offence.

Of course, there are a number of challenges associated with digital and forensic evidence; some of which are related to resources and others related to case law. Participants spoke of the immense workload involved in collecting, processing, analysing, storing, and disclosing digital evidence. Part of this was because of the variety of different systems in use by the public and, at times, the owner's lack of knowledge about how to use and download video from their system. As mentioned above, forensic labs took a long time to produce reports, wait times have been increasing, and there is a learning curve involved in getting Crown Counsel and the legal system comfortable with new tests and new forms of technology.

Mobile phones contain a lot more information than in the past. Participants stated that a phone could contain tens of thousands of pages of information of which only a small proportion might support an investigation. Complicating the process is that phones and hard drives commonly have encryption software installed, some require biometrics to unlock, some applications have built-in end-to-end encryption, and these applications and devices are constantly being updated with new security features. In addition, there are a plethora of third-party security software installed on devices that can thwart most brute force attacks commonly used by police and are highly resistant to other approaches used to breach digital devices and download data. For the RCMP participants, if they cannot unlock the device at the detachment, they must send it to the RCMP Lab in Ottawa that can result in months before any information from the device is provided to the investigators. In effect, the sheer volume of information, the time and resources required to unlock, download, and analyse the information, and the need to disclose everything contained on the device has substantially increased the amount of time, the number of steps, and the complexity in dealing with digital and forensic evidence. As such, *R. v. Jordan*, *R. v. Stinchcombe*, and *R. v. Marakah* were frequently cited as challenges associated with digital and forensic evidence. Still, participants felt that the evidence from digital devices frequently made the difference between a conviction and not getting a conviction.

Finally, it was interesting to note that participants reported that there were no steps that they routinely took when investigating a homicide that rarely or never produced anything of value, but they continued to do so because Crown Counsel required it, case law required it, or Crown Counsel requested it because not doing so might open an avenue of questioning from Defence Counsel. Participants indicated that they work in partnership with Crown Counsel and that most of Crown Counsel's requests were reasonable and appropriate. An interesting way that this was described by one participant was that Crown Counsel have certain things on their checklist that need to be accomplished and completed when building a prosecution but, to comply with the requirements of case law, there might be 20 different tasks that investigators have to do to complete just one of the

points on the checklist and each of these tasks take time and resources. Again, judicial decisions, such as *R. v. Stinchcombe*, have resulted in some Crown Counsel asking for all video evidence or witness statements, for example, to be transcribed and vetted, even when the investigators have determined that the information is not relevant. Some participants also spoke about the s. 5.2 and 490 applications as taking a lot of time and, as mentioned above, it would be beneficial if it was easier to interpret the requirements and to not have to do a three-month extension and a one-year extension. Others mentioned the *R. v. McNeil* decision requiring investigators to complete a Member Conduct Disclosure Form that speaks to the integrity of those involved in the investigation. Some participants reported that they were required to complete the form for every investigation, which took time and required the file coordinator in charge of disclosure to send emails to every police officer to complete the form. In effect, participants reported that advances in technology served both a positive and negative role in homicide investigations, and that technology touched many aspects of an investigation in ways that increased the amount of time, the number of steps, and the complexity of homicide investigations.

Interviews with Sexual Assault Investigators

General Information

Interviews were conducted with 12 investigators from nine municipal police and RCMP jurisdictions across the four policing districts in British Columbia. All investigators had significant experience in policing, with most holding a Sergeant or Staff Sergeant position. Participants reflected on whether sexual assault investigations had increased, decreased, or stayed about the same over the last decade in terms of the number of files, the complexity of the investigations, the number of investigative steps, and the amount of time the investigations took. Nearly all participants agreed that the number of sexual assaults reported to police had increased over the past ten years, but generally felt that this reflected changes in awareness about, understanding of, and reduced tolerance for sexual misconduct rather than an increase in the actual number of sexual assaults occurring. They identified factors including the #MeToo movement, the 2017 Globe and Mail report into unfounded sexual assault files, better education among the public, and increased reporting options as contributors to the increased rates. Some participants also commented on changes within the types of sexual assault files. Most commonly, technology was identified as a factor in an increasing proportion of their files. This included offences committed using technology, such as online grooming, sexual exploitation, sexual harassment, and child pornography; however, as will be discussed in more depth below, technology also played an increasingly important role in the investigation of sexual assault files.

Despite the increased presence of technology as a factor in these investigations, the nature of sexual assault offences themselves were not seen as any more complex than they were one decade ago. Rather, all participants identified that the investigation of these offences had become more complex because of technology and court rulings that added to their administrative workload. They felt that

there was a higher burden now in proving a case. As will be discussed in more depth below, participants identified that various court rulings resulted in more complex investigations requiring more advanced skill sets related to documenting and disclosing evidence. Similarly, while the more 'traditional' evidence, such as verbal statements and biological evidence, in sexual assault files were still present, many participants were now dealing with digital evidence, such as cellphones, computers, and videos, that complicated their investigations in terms of how they legally and physically accessed and analyzed data. Although not a common investigation for many of the participants, those who were dealing primarily with the online exploitation of children described this as an extremely complex investigation given the transnational elements involved and the need for different types of legal documents required to pursue their investigations. However, more commonly, participants identified that the main issues with technology included the sheer amount of technological evidence they needed to sort through and manage, the increasing complexity of that evidence, such as accessing locked cellphones, and the lack of clarity on or constantly evolving caselaw on how technological evidence should be accessed and managed (see *R. v. Marakah*).

Although not commonly raised by participants, several mentioned that sexual assault investigations were more complex with growing awareness about trauma-informed practices. For example, it was common for statements to change as a victim or witness of a crime recalled more of their traumatic memories. For some investigators, this led to issues where Crown Counsel was not willing to approve charges due to the inconsistencies in their statements. Several participants also explained that consent-based sexual assaults were difficult to get charge approval for, as these were often nuanced, and charge approval would often come down to the quality of the statements. With advances in research on interviewing techniques and strategies, such as stepwise or phased interviewing, combined with court rulings in this area like ensuring statements were made voluntarily without inducement, interviewing was seen as a more complex process than in the past, requiring greater investigative experience to do well and appropriately.

Most participants felt that the number of steps involved in a sexual assault investigation had also increased over the past ten years, primarily due to the caselaw requirements around documenting and disclosing evidence, and the increased amount of technology. For example, investigators might have to analyze video footage and cellphone data, in addition to biological evidence and verbal statements. One participant explained that, whereas video canvassing was not a routine component of sexual assault investigations in the past, it had now become much more standard. The number of statements that investigators might need to take had also increased in many cases. One participant explained that they were seeing more non-police disclosures of sexual assault over social media, while several others observed that disclosure in child victim cases would typically happen first to a parent or other authority figure/relation to the victim, requiring investigators to obtain statements from each of these 'witnesses', each of which would typically need to be transcribed in a timely fashion. Requests from Crown Counsel to refute different possible versions of the offence were also adding to the steps police were required to take in an investigation. One participant gave the example that if a sexual assault happened at a party where 50 people were in attendance, police would primarily focus on interviewing those who were potential immediate witnesses, whereas Crown Counsel may direct police to interview all 50 people who had attended in the event that one individual might have conflicting evidence that would raise doubt about the suspect's guilt.

The administrative steps required as part of an investigation had increased slightly over the past 10 years, mainly as there were more instances now where police needed to apply for a warrant. For example, whereas in the past, an investigator may have been able to directly contact an internet service provider (ISP) to obtain the identity of an internet protocol (IP) address, due to recent caselaw (e.g., *R. v. Vu*), investigators now needed to apply for a production order. A second example, which will be discussed in more detail below in relation to *R. v. Marakah*, was that, in the past, investigators could take photos of threatening statements texted to a victim. However, because of *R. v. Marakah*, as discussed in the homicide section of this report, investigators stated that they needed to first obtain a search warrant and then download the content from the victim's cellphone. Overall, investigators agreed that there was an increased number of steps they had to follow in sexual assault investigations to get charge approval compared to 10 years ago. However, as will be discussed in relation to the *R. v. Jordan* case, in many instances, participants reported that, while the number of steps had increased only slightly, the main change over the past 10 years was the order that the investigative steps occurred in. As discussed above, in reference to homicide investigations, in the past, investigators conducted much of the investigation following the arrest of a plausible suspect; however, now the entirety of the investigation occurs prior to the suspect's arrest, thus delaying charges by anywhere from three to six months, or even longer (12 to 24 months) in more complex files.

Relatedly, the length of time for a sexual assault investigation had reportedly increased substantially. As an example, one participant suggested that a file that would have taken them a half day to complete 15 years ago would now take two investigators several weeks to work through. One of the main reasons for the increased length of investigations was the time it took to prepare for disclosure. One participant explained that electronic submissions took more time to complete, and that most of their time was spent documenting and organizing files, and ensuring it was formatted in line with their Crown Counsel's preferences.

Another major cause of this longer timeline were the delays in exhibit processing by labs. Depending on the type of exhibit (e.g., biological, digital, transcription), delays could be anywhere from a few weeks to over one year. This would significantly delay the police investigation because, post-*R. v. Jordan*, charge approval generally would not happen until the evidence was processed by the labs and included in the disclosure package. Similarly, several participants noted that, in the past, Crown Counsel used to accept summaries of statements that were given, but now they typically did not review a file until the fully transcribed statements were included. As transcription can take a substantial amount of time, depending on the number of statements taken and whether they could be transcribed in house or not, this could delay Crown Counsel's review of a file for several months.

Participants felt that the longer investigations resulted in threats to public safety because, while they could potentially issue some conditions to a person of interest in a case, these typically expired after three months, yet the investigation may take months longer. This situation had the potential of leaving the person of interest at large in the community without any conditions constraining their behaviours or whereabouts. Consequently, participants were turning more often to private labs for analysis, as they may be able to receive a report within a matter of weeks. However, using outside

labs increases the financial costs of investigations. Further, when it came to biological evidence and samples, one participant reported that they were only able to use private labs if they had a known suspect. Otherwise, they would need to wait for the police labs to accept their application for analysis, after which they could submit their evidence, and then wait, potentially several more months, for the lab report.

Overall, whereas sexual assault investigations previously could be completed by police within a matter of days or weeks, it was not unusual for these investigations to now take anywhere from three to six months, with the more complex files taking more than one year before police could submit the disclosure package to Crown Counsel for charge approval. Once received by Crown Counsel, several participants observed that it could still be another three to six months before Crown Counsel reviewed the file and approved charges. Many participants specifically commented that they felt these delays resulted in an increased threat to public safety and were a detriment to victims receiving justice, particularly when, even after submitting a full disclosure package, Crown Counsel would not move forward with charge approval.

Impact of Case Law on Sexual Assault Investigations

Participants were asked about seven specific court cases identified by the researchers as the most likely to have impacted their investigations. In the area of sexual assault, the participants identified that *R. v. Stinchcombe, R. v. Jordan, R. v. Grant, R. v. Marakah,* and *R. v. Edwards* were very or somewhat relevant whereas *R. v. Fliss* and *R. v. Hart* were not. As such, *R. v. Fliss* and *R. v. Hart* will not be discussed in this section on sexual assault investigations.

R. v. Stinchcombe

Most participants had spent their career policing under the *R. v. Stinchcombe* decision and so they tended not to identify any changes to their investigations as a direct result of this ruling, noting that investigations were always led from the outset with the *R. v. Stinchcombe* decision in mind. However, several participants observed that as *R. v. Stinchcombe* continued to be raised and debated in court, ongoing decisions that cited this case continued to evolve and contribute to changes in terms of police practices with respect to full disclosure. For example, one participant described that with subsequent decisions that built upon *R. v. Stinchcombe*, there were increased administrative pressures placed on police to organize, hyperlink, and provide text-searchable digital documents. Participants also explained that they were transitioning to a new electronic ledger, meaning that going forward, all disclosure to Crown Counsel would occur electronically. While they felt that this was a good thing, as it would mean consistent practices across the province, they felt that there was a substantial learning curve given the complexities of disclosure practices resulting from decisions like *R. v. Stinchcombe*. One participant explained that a consequence of *R. v. Stinchcombe* was mandated training around documentation and disclosure, which they observed to be a positive outcome overall, but that with new technologies and the shift to the electronic ledger, there appeared to be a need for ongoing training and greater offloading of this work to sworn and civilian support staff.

There were inconsistent practices when it came to disclosure. Some participants reported that they disclosed everything to Crown Counsel, holding nothing back. They believed that *R. v. Stinchcombe* and its subsequent interpretations required them to disclose everything collected during an investigation, regardless of whether it was deemed relevant to the charges they were recommending. Participants pointed out that Crown Counsel would ask them for things that the police felt were completely irrelevant to the charge, but if Defence Counsel asked to see this information and the materials had not been disclosed, this could raise issues in court. As examples, participants mentioned transcriptions being done of irrelevant statements, analysis of DNA to prove negatives, and providing irrelevant video footage. While some materials may be held back in larger more complex cases as Crown Counsel could only handle so much data at any given time, for the smaller files, participants felt it was best practice simply to forward everything they collected, whether it was directly relevant to the charge or not.

Other participants indicated that they only sent what they believed to be directly relevant, documenting the remaining evidence as available for inspection (AFI). If later requested by the Crown or Defence Counsel, at that point, investigators would fully document and disclose that additional information. As an example, if police collected thousands of pages of text-related conversations, they disclosed the relevant content and documented the remaining pages as AFI. This allowed investigators to better manage their workload and avoid overwhelming their Crown Counsel. However, some Crown Counsel preferred for investigators to disclose everything at once. In other words, disclosure practices appeared to come down to a combination of police and Crown Counsel preferences.

R. v. Jordan

All participants strongly felt that the *R. v. Jordan* decision substantially negatively affected police investigations. One of the major consequences of the *R. v. Jordan* decision was the delay of charge approval. As outlined above, before *R. v. Jordan*, police received a file, identified and arrested a suspect, and forwarded recommended charges to Crown Counsel, usually within a few days or weeks for a 'typical' sexual assault file. They continued to gather, analyze, and document evidence following charge approval, and provided Crown Counsel with updated disclosure documents as additional evidence was discovered and reports came back from the labs. For example, as DNA reports or transcribed statements were returned to them, investigators disclosed this to Crown Counsel as additional inculpatory or exculpatory evidence. This enabled police to protect public safety, at least somewhat, as having charges laid at an earlier point either enabled the accused to be held in remand or to be released with court mandated conditions pending trial. Prior to *R. v. Jordan*, police operated under a partial disclosure practice, where they informed Crown Counsel about the evidence they had collected and were in the process of analyzing and updated the disclosure as reports were returned to them. Following the *R. v. Jordan* decision, the investigative timeline completely shifted. Participants explained that Crown Counsel would not review a sexual assault file for charge approval until all the available evidence had been collected, analyzed, and disclosed to them, meaning that police were required to transition to a full disclosure model. This resulted in a practice where it might be months or years before a suspect was charged with a sexual assault offence.

One of the reasons given for how *R. v. Jordan* has had such as negative effect on police investigations of any file, including sexual assault, was that the timelines were not realistic given the delays outside of the control of investigators in processing evidence. While police observed that they could collect and transcribe statements within a few weeks to months, often it could take six months to more than one year to receive lab reports related to digital forensics, such as analyses of cellular phones or computers, or biological evidence, such as DNA analysis. As Crown Counsel would not review the report until these components were disclosed, in some sexual assault files, it was typical for charges not to be approved until six months or more after the offence occurred. Several participants also explained that even once they submitted a full disclosure package with recommended charges, it could still be another two to three months before Crown Counsel had an opportunity to review the package and decide on charge approval.

Many participants suggested that the shift in investigative timelines and the delay of charge approval until months after the offence occurred posed threats to public safety. In practice, police delayed the arrest of a suspect and the laying of an information to avoid triggering the *R. v. Jordan* presumptive ceiling. This sometimes put investigators in a situation where they were not able to move forward with their investigation until they arrested the suspect and were able to collect their statement, but they wanted to refrain from making the arrest as it would initiate the *R. v. Jordan* presumptive ceiling. In some cases, where there was a clear threat to public safety, they made the arrest and started the *R. v. Jordan* clock, but observed that this then put pressure on Crown Counsel to be ready to receive the file and approve charges in a short timeframe, which was not always possible given the delays in receiving lab reports. One participant suggested that this might shut down certain investigative avenues for them. As an example, if a suspect was arrested and an information laid, investigators may not be able to collect and analyze evidence from an encrypted device in time to meet Crown Counsel's timelines for charge approval, and so investigators may bypass the collection of certain evidence if it was felt that it was not feasible to get the evidence analyzed in time. Other participants suggested that, if needed, they could potentially submit evidence to a private lab and pay to have it prioritized. However, in the current funding model for police, this was not necessarily always feasible, possible, or best practice.

Police could arrest and release someone without laying an information, and could issue some police-imposed conditions, such as a no go or no contact order, if needed for public safety. However, these typically expired within three months and before Crown Counsel would be able to review the file and approve charges, leaving a gap in supervision that participants felt could pose a risk to public safety. A few participants were also concerned that the practice of police issuing conditions outside of the courts was an abuse of process and, moving forward, there would likely be legal arguments raised by Defence Counsel about the ethics of delaying charges and using police conditions to constrain a person's behaviour in the interim.

Participants also felt that while the implications of *R. v. Jordan* were primarily being offloaded onto the police, victims were also bearing the brunt of this decision, as it would be months before they knew whether the suspect in their file would have a charge laid against them. During this time, the conditions that police may have issued to the accused would expire, potentially placing the victim of the offence at further risk. In some cases, participants felt that sexual assault files were being risk

assessed by Crown Counsel and charge approval was not happening as Crown Counsel did not assess the case as likely to receive a conviction. While some cases would be plea bargained, many others allegedly resulted in charges not being approved, which participants felt let the victim down. Overall, several participants stated that victims were not well served by the *R. v. Jordan* decision.

Related to this point, several participants commented that *R. v. Jordan* negatively affected police morale. They explained that police were in this profession to serve and protect the public, and that they worked hard to put together what they felt were strong cases against suspects. When charges were delayed and ultimately not approved, this wore investigators down psychologically and had the potential to result in officers selectively pursuing particular kinds of investigations that they felt were most likely to receive charge approval, rather than serving all victims equally. Participants expressed that it was incumbent on supervisors to support frontline officers and to ensure that they were putting their best disclosure package forward, regardless of the potential outcome of Crown Counsel's decision. Still, participants observed that police were getting burned out through this practice, especially given that when charges were not approved, it was typically left to the investigators, who had developed rapport and a connection to the victims, to explain why a victim's case would not be going forward to the charge stage.

Participants recognized why the *R. v. Jordan* decision had been made and agreed that there were issues with criminal justice system delays that were unfair to those who were being charged with a crime. Still, they felt that whereas most of these delays were not being caused by the police, the subsequent offloading of the *R. v. Jordan* decision had been placed on the police. While participants did not necessarily offer solutions to this issue, they suggested that the problem stemmed from the backlog in the courts themselves, and that more resources were needed in the criminal justice system and with recruiting, training, and retaining additional support staff to facilitate the more efficient processing of cases.

R. v. Grant; R. v. Edwards

The cases of *R. v. Grant*, which concerned the admissibility of evidence collected in violation of the *Charter*, and *R. v. Edwards,* which considered when a suspect had a reasonable expectation of privacy, were not generally identified by participants as having a specific effect on the amount of time or the complexity of sexual assault investigations. Participants explained that they were careful to collect evidence in line with the courts' expectations. Unless it was clear to them that evidence could be obtained without a warrant, they tended to err on the side of caution and apply for a warrant or seek advice from Legal Services about whether a warrant may be necessary. If there was any possibility that a suspect may have an expectation of privacy, such as in a shared residence, they applied for a search warrant. Other than the application for a warrant, it was not felt that these court decisions increased the amount of time it took to complete an investigation. The area of most concern was evidence collected from cellphones, which will be discussed in more depth in the context of *R. v. Marakah*. Overall, the practices stemming from *R. v. Grant* and *R. v. Edwards* were viewed positively, as participants felt that this made them better at their job as they were careful to follow the law and to not intentionally violate a person's *Charter* rights and risk the investigation being viewed as putting the administration of justice in disrepute at trial.

R. v. Marakah

In contrast to *R. v. Grant* and *R. v. Edwards,* the decision in the *R. v. Marakah* case was of great concern to many sexual assault investigator participants who felt that this decision was being interpreted too broadly and inconsistently. Overall, it seemed as though participants had varying interpretations of what *R. v. Marakah* meant for collecting evidence from digital devices. While they always applied for a search warrant for the suspect's phone, participants felt that the ruling had left unclear guidelines for when a warrant was needed when a victim willingly presented their phone as evidence. In terms of sexual assault cases, *R. v. Marakah* was a concern in the context of threatening messages that were digitally sent by a suspect to a victim or in cases of 'sexploitation' of a minor. Some participants felt that it was safest to obtain a search warrant even if the victim willingly presented their phone as evidence of the threatening or exploitative messages. Others felt that, in this context, given the nature of the threatening tone, there was not a reasonable expectation of privacy, as the victim was not a willing accomplice to this offence. One participant explained that digital messages should be interpreted in the same manner as a letter – if the suspect wrote a threat into a letter that was mailed to a victim, they gave up their expectation of privacy as they no longer had control over the contents of that communication. Similarly, this participant explained that going online was not anonymous and that there was a presumption that the device one was accessing the internet with could be individually identified via the IP address. However, this was not the way that most participants reported *R. v. Marakah* being interpreted by their agency or by their Crown Counsel. Participants felt that there was often a requirement for investigators to obtain a search warrant even when a victim willingly provided the digital evidence on their device.

Several participants also raised the issue of the need for investigators to physically seize the mobile device from a victim to search the device and download the content because of *R. v. Marakah*. In the past, officers typically took screen shots of the phone content provided by the victim, but this was no longer considered sufficient. While some participants had access to software to download phones while in the field, many did not, and these officers needed to send the phone to a lab for possibly weeks or months to have the content downloaded. Even if the software was available on site, many participants reported that, to ensure that they were complying with the law, they applied for a search warrant that, depending on the experience level of the officer writing the affidavit, could delay the seizure of evidence for several days. Several participants also indicated that being without their cellphone during this time could put some victims in a vulnerable position. Moreover, many victims were unwilling to be without their phone for an indefinite amount of time, and some participants indicated that a victim may consequently change their mind about cooperating with the investigation. Investigators had to make a decision about whether it was worth it to put the victim through this process. A workaround solution that some participants explained was to download the content of the phone on site and return the phone to the victim, then apply for a warrant to examine and analyze the content of the phone. However, one participant cautioned that this may raise issues related to the *R. v. Grant* decision that could result in the evidence being excluded due to the proper procedures not being followed. Still, participants felt as though this approach minimized the negative effect on the victim while still following the *R. v. Marakah* guidelines in principle. Overall, the participants felt that the *R. v. Marakah* decision was vague and

unclear requiring further clarification around expectations of privacy for suspects when communicating digitally with victims.

From the perspective of sexual assault investigators, the caselaw most significantly affecting sexual assault investigations were *R. v. Jordan* and *R. v. Marakah*. When asked whether there were any other cases that had substantially changed how sexual assault investigations proceeded or had contributed to the complexity or the amount of time it took to complete a sexual assault investigation, there were no other commonly identified cases. One participant raised *Jane Doe v. Metro Toronto Commissioners of Police* (1998), which concerned the police's failure to notify the public about a serial rapist. To maintain the integrity of the investigation, the police did not make a public notification and subsequently another person was victimized. This participant explained that while serial sexual assault cases were rare, when they did occur, there was always now a conversation with senior management about whether, when, and what to release to the public. A different participant raised *R. v. Oickle* (2000) regarding psychological detention during an interview and whether offering inducements would be considered a form of psychological detention. This participant explained that it was now a regular part of their practice to spend hours preparing to engage in an interview or obtain a statement so that they could obtain a statement fairly and without any inducements being offered. A third participant raised *R. v. Sanghera* (SCBC 2019) that established a four-part test for assessing the credibility of an accused's testimony; however, this case did not seem to have a direct effect at this stage on sexual assault investigations. One participant mentioned *R. v. Vu* and *R. v. Zora*. Whereas in the past investigators were able to request information from internet service providers, *R. v. Vu* (2013 SCC) resulted in the requirement to obtain a production order to obtain the identity of a person associated to an IP address. Depending on the skillset and experience of the affiant, this could result in an investigative delay of several weeks. The *R. v. Zora* decision was interpreted by this participant as follows: when an offender breached bail conditions, charges would not be supported unless the investigators were able to prove that the accused intended to violate their conditions. The result of this ruling and interpretation was that many investigators no longer laid these types of administrative charges unless it was connected to a new offence. While these cases were raised in the various interviews conducted with the sexual assault investigators who participated in this research, none of these cases was raised by more than one participant and so their respective impacts on sexual assault investigations are not clearly defined.

Cumulative Effects of Case Law on Sexual Assault Investigations

When asked to speak about the cumulative effects of caselaw on sexual assault investigations, participants primarily returned to the *R. v. Jordan* decision as having the largest effect on their work. Participants understood that caselaw would continue to evolve their practices and they were prepared to adapt as needed. However, they saw *R. v. Jordan* as having direct consequences on the police when, from their perspective, the court system was where the decision should have had the most impact. As previously discussed, the concerns with *R. v. Jordan* centred around what the participants saw as a risk to public safety with the delaying of arrest and charges until they could

submit a full disclosure package that could take months to complete. Investigations that previously could be completed in a matter of shifts now reportedly took several months to complete in their entirety because of the added administrative requirements with documenting, transcribing, and hyperlinking evidence, the ever-increasing amount and forms of digital evidence investigators collected, and the more sophisticated analyses that labs were able to conduct with biological and digital forms of evidence. Participants reported that the added administrative burdens translated into the need to hire more support staff both for police (e.g., transcription staff, lab analysts, file coordinators) as well as for Crown Counsel (e.g., paralegals). Generally, they felt that the incoming MOU with the electronic ledger was a positive step forwards towards having more consistent practices in disclosure across the province, but participants also recognized that this would be a difficult transition for both police and Crown Counsel as they navigated through this massive shift.

Overall, participants understood the underlying rationale for the *R. v. Jordan* decision. However, there were concerns that the decision weighed the rights of the accused more heavily over the rights of victims and society. In particular, when there is a risk to public safety, the timelines and procedures for disclosure may result in further harm. Further, they felt that the workaround solutions currently in place, such as delaying of charge approval until full disclosure had been submitted, were not solving the issue and would likely lead to more *Charter* violation applications in the future as the accused may be under investigation for many months before knowing whether charges are laid against them. Similar to the homicide investigators, the other concern was that the courts did not appear to consider the complexities associated with a sexual assault investigation and the lack of police resources. Some participants commented that rather than having set timelines for disclosure that apply to all cases, the timelines should depend on the nature and complexity of the case. The consequence of the *R. v. Jordan* decision was that additional burdens were placed on police without recognizing that police were not solely responsible for the concerns raised by the *R. v. Jordan* case. While all participants commented that additional resources would be helpful, this would not lead to the desired outcomes of the *R. v. Jordan* case if additional Crown Counsel were not hired, or courtroom availability was not increased so that cases could be heard in a timelier manner.

While participants felt that *R. v. Jordan* had a negative effect on police workload, they also understood that Crown Counsel was likewise overburdened and struggling to manage their caseload effectively within the timelines set by *R. v. Jordan*. Participants were asked whether any of the cases they submitted had been dismissed as a result of not meeting the *R. v. Jordan* timelines, and none of the participants recalled a sexual assault file where this had occurred. However, many of the participants felt that getting charge approval from Crown Counsel was difficult, not only given the length of time before the file would go to Crown Counsel for review, but also due to Crown Counsel 'risk assessing' the submitted files and selecting only those that they felt they could successfully prosecute within the *R. v. Jordan* timeframe. From the perspective of participants, this usually meant that the more 'nuanced' cases, such as those concerning a consent issue, were not approved for charges. Participants felt that Crown Counsel was under pressure to resolve as many files as possible outside of the courtroom to reduce court delays and they understood the need for this but were frustrated when files they worked on to the point of full disclosure were not approved for charges by Crown Counsel. There was a growing concern that the *R. v. Jordan* decision was

driving a wedge between Crown Counsel and the police and that the police took the blame for all the criminal justice system failures when the failure was not solely within the police's control. As mentioned above with the homicide investigators, there was a concern that it would only be a matter of time before there was a tragedy simply because investigators had no way of managing an offender in the community because Crown Counsel refused to lay a charge in fear of *R. v. Jordan*'s presumptive ceiling.

Typical Steps in a Sexual Assault Investigation

Participants were each asked to lay out the typical steps undertaken during a sexual assault investigation. As expected, the standard steps involved in a sexual assault investigation varied depending on several factors, such as the nature of the sexual assault, whether a suspect has been identified, the number of victims, the age of the victim, the relationship between the accused and victim, and the geographical location of the incident. In general, there are three main stages for investigators: (1) securing the immediate scene; (2) conducting their investigation; (3) and preparing for disclosure.

Participants reported that all sexual assault investigations begin with taking a statement from either the victim or the individual who received the disclosure of the incident. The focus of this statement is to determine whether a crime scene needs to be located and secured, and to attend to the safety needs of the victim. This information then directs the subsequent steps in the investigation. Once the crime scene is determined, priority is placed on obtaining perishable evidence (e.g., video footage) and if the offence recently occurred, the victim undergoes a sexual assault/forensic nurse examination to collect any biological evidence. Another interview is then conducted with the victim to supplement the information obtained from the first interview. This process is consistent with a trauma-informed approach and memory principles recognizing that traumatic events may affect how information is encoded and recalled. The first stage of a sexual assault investigation is, therefore, focused primarily on collecting and preserving perishable evidence.

The next stage of the investigation occurs over a lengthier timeframe where the investigator(s) will attempt to corroborate the victim's account. This stage can occur over several months and it may include interviewing witnesses, conducting secondary interviews with the victim, canvassing for additional evidence, writing affidavits for search warrants or production orders, applying for Section 490 extensions, and waiting for the analytical reports to come back from the exhibits submitted for analysis. Upon determining the various sources of evidence and information, decisions are made about whether warrants and production orders are required to collect certain evidence, such as digital evidence or medical records. Many participants reported that the victim and witness interviews typically take about one week, but this time period is lengthened if the victim is a child or a youth as interviews need to proceed more cautiously. For example, if the victim is a child, a specially trained interviewer may need to be brought into the investigation to take the statement. Statements then need to be transcribed, which may be done in house if the resources are available. Participants reported that it could take several weeks to months for a statement to be

transcribed, after which they need to review it for accuracy and, at times, redact personal information. Similarly, if biological evidence is sent to a laboratory for analysis, it can take several weeks to receive a preliminary report and sometimes longer for the final report. During this second stage, the investigator may arrest and interview the suspect, collecting any available biological evidence, and then release the suspect on conditions, such as a no contact order. Generally, investigators will avoid swearing an information at this stage to avoid the presumptive ceiling related to *R. v. Jordan*.

As the investigator receives the various reports and transcriptions, they work on completing their disclosure package and preparing their Report to Crown Counsel, which is the third main stage of their investigation. Under the recently introduced MOU between police and Crown Counsel, there is a standard format for cataloguing evidence. There has been an increase in the amount of time it takes to log all the evidence, not only due to this new format, but also because there is a considerable volume of digital evidence. For example, interviews must be transcribed, and images need to be formatted in a manner that can be viewed by Crown Counsel. In the case of a sexual assault that concerns the issue of whether there was consent between two individuals, it was commonly noted that the Report to Crown Counsel could be prepared in two to three months. However, if the case involved complex digital evidence, the investigation could take several months and, as a result, it could take between six months to one year to prepare the Report to Crown Counsel.

Once the Report to Crown Counsel is submitted, participants explained that it could be several months before Crown Counsel reviewed their disclosure package. Once the disclosure package was reviewed, Crown Counsel may approve charges and an information will be laid against the accused, starting the presumptive ceiling of *R. v. Jordan*. However, Crown Counsel may also request that the investigator complete further investigative steps, such as conducting additional interviews, or that they prepare information that was initially held back from disclosure as available for inspection.

When asked about the main factors that influenced the length or complexity of an investigation, the two most common contributors were technology and changes to case law during an investigation. Other factors included the complexity of the case, how cooperative victims and witnesses were, and lab delays in processing biological evidence. Generally, files that were statement-driven (e.g., a consent case) could be completed by the investigator within a few weeks or months, depending on the need for and ability to transcribe statements. However, the addition of any other available evidence, whether digital, biological, or historical records, extended the timeline of the investigation, often by months.

Most participants indicated that all the steps involved in an investigation were necessary to ensure a strong case that increased the likelihood of charge approval and success at trial. However, there were a couple of issues noted by some participants. The first involved the formatting of digital evidence, noting that some Crown Counsel had preferences for the format of digital evidence. Part of this appeared to stem from the fact that the technology that Crown Counsel had access to was not compatible with the technology of the evidence. While investigators understood this issue, it resulted in considerable time and resources on their part to comply with this type of request. The second issue was that, at times, Crown Counsel requested additional evidence to corroborate or

refute other information. Although this may result in further delays in charge approval, participants understood that, at times, this strategy was an attempt by Crown Counsel to proactively address any potential issues that might be raised by Defence Counsel at trial.

The Role of Technology in Sexual Assault Investigations

When asked about how technological innovations and changes influenced sexual assault investigations, all participants stated that CCTV footage, mobile phones, social media, and DNA have both facilitated and complicated investigations. For example, it was now common practice for investigators to canvass for any video footage from CCTV and dash cam videos, particularly if the incident occurred in a public space. This evidence is made a priority as it is considered perishable because some video footage may only be stored on the recording device for up to 48 hours. Similarly, it is routine practice to access mobile phones to determine if there was communication between the accused and victim, such as text messages or photos. While these types of evidence have value for corroborating information from interviews, the overall investigative process takes longer because of the time it takes to approve warrants or production orders. When the digital evidence must be acquired from a public or private company, there is the additional obstacle of getting compliance from the company. Some companies encrypt their data making it inaccessible, and data may be difficult to access because it is housed outside Canadian jurisdiction. If the digital evidence belongs to the accused, there is an additional administrative burden associated with section 490 orders. For example, as discussed in the homicide section, if the accused's mobile phone is seized, police have 90 days to detain the property. A request must be put in and approved to detain the device for an additional year, which is commonly required because technological advances to mobile devices makes it much more difficult to access the device and it takes more time to unlock the device, download the data, and analyse the information. As mentioned above in reference to homicide investigations, many sexual assault investigators reported that section 490 extension requests are put in soon after seizing the device because court back logs typically result in a six-week wait for these requests to be heard. In general, the sheer volume of digital evidence has resulted in more time and resources required to catalogue evidence and determine what evidence to put forward and what evidence is deemed available for inspection.

With respect to DNA evidence, many participants commented that technological advances have allowed for older DNA samples to be tested and for analyses to be conducted with even smaller samples. However, time lags in having biological evidence tested have contributed to investigations taking longer to complete. It was commonly reported that DNA evidence in sexual assault cases can take between three to six months to analyse, although specific cases can be prioritized when necessary, such as those that pose an immediate or serious threat to public safety. As noted above, some participants stated that they used private labs in the hopes of speeding up analyses and reports, but that this needed to be balanced against various factors, such as resources and costs. Moreover, some participants reported that police labs will not accept evidence if it was first sent to a private lab.

The consensus among participants was that technological advances and digital evidence corroborated evidence obtained through traditional methods, such as statements. Of note, given the amount of time and resources needed to collect and analyse digital evidence, it is instructive that sexual assault investigators reported that it was rare for technology to open new avenues of investigation. Instead, digital evidence tended to confirm what investigators already knew. Given the use of mobile devices and technology, individuals inevitably leave a large digital footprint that has resulted in changes to investigations. Therefore, the typical approach used by sexual assault investigators was to prioritize the collection of digital evidence. All participants acknowledged the benefits of technology and digital evidence in contributing to a stronger case that increased the probability of charge approval. The frustrations with technology and digital evidence were directed at the time and resources it took to locate, catalogue, and prepare the evidence for Crown Counsel. In addition, some members commented that the law did not keep up with advances in technology and that it would be helpful if the courts provided clearer guidelines for processing digital evidence and recognized the administrative burden of accessing this type of evidence.

Interviews with Drug Offence Investigators

General Information

In total, 10 qualitative interviews were conducted with participants working Controlled Drugs and Substances Act (CDSA) investigations from units across all four RCMP Districts in British Columbia, as well as one municipal police department. When asked whether, compared to ten years ago, the number of CDSA investigations has increased, decreased, or stayed the same, participants suggested that the number of offences occurring in the community had increased exponentially, but the number of active investigations per team and, therefore, the capacity to investigate those offences has decreased significantly. It was suggested that this decrease in the number of investigative files was simply the result of capacity. While the number of police officers assigned to drug units had remained the same, their ability to work multiple files at once had dissipated with several participants noting that an entire drug team of 7-10 officers could only reasonably work one or two files at a time given the resource drain related to disclosure and the length of time it took to complete a file. There was some dichotomy in the types of files being investigated with detachment level drug units indicating that they would only take on the lower-level targets for CDSA investigations intended to disrupt rather than waiting for the higher-level 'big fish' given the limited availability of resources. It was further noted that, at this level, capacity had reduced significantly with larger detachment level drug units having worked 20 files per year one decade ago, and only being able to take on perhaps three or four files per year currently because of limited capacity. Concomitantly, officers working at the joint task force level noted that their units were only concerned with the higher-level targets and expressed concern that lower-level targets at the provincial level were going by the wayside. These participants also noted that, even in investigating those high-level targets, there was significant reluctance to take on any kind of conspiracy files with

multiple accused given the limited resources for disclosure combined with the resource constraints of the Public Prosecution Service of Canada (PPSC) in prosecuting files with more than one target.

When asked whether, compared to 10 years ago, the number of steps required to complete a CDSA investigation had increased, decreased, or stayed the same, all ten participants resoundingly noted that the number of steps required to complete a CDSA investigation had increased. Broadly, participants noted two main reasons for this: the increased expectations of privacy in Canada and the evolution of technology. When asked to comment on whether the complexity of the steps required to complete a CDSA investigation had increased, all participants agreed that the complexity of steps had increased. When asked how the steps had changed in terms of the step itself, the complexity in completing the step, or how long the step took, all participants responded that there had been a significant increase in the overall amount of time and resources required to complete a CDSA investigation. The specific drivers of this will be discussed in greater detail below.

Impact of Case Law on CDSA Investigations

R. v. Stinchcombe

Many of the participants noted that the decision in *R. v. Stinchcombe* was old enough that investigators had spent most or all of their careers working under the requirements stemming from this decision. At the same time, they noted that the ramifications were ongoing, that the law around disclosure continued to evolve, perpetually expanding the scope and degree of information that the police were required to disclose. The list of what is "disclosable" was perceived as growing longer each year, now including things, such as radio chatter, emails, text messages, and electronic group chats between police officers, even when the subject of the conversation was not directly related to the investigation. Some participants noted that even personal cellular phones were not off limits from disclosure requests from Defense Counsel. As a result, the span and depth of *R. v. Stinchcombe* continued to effect CDSA operations in a myriad of ways. Much like the homicide and sexual assault investigators, CDSA participants unanimously argued that disclosure requirements, more than any other area of case law, adversely effected the length of time and resources required to conduct CDSA investigations.

Participants consistently iterated that the sheer weight of disclosure requirements, in terms of the volume of information, affected all facets of police operations. Perhaps the most obvious example was related to data management. As discussed above, although police agencies were increasingly moving toward digital disclosure, some data sources, most notably patrol officer case notes, are not digitized. This combination of digital and paper sources was viewed as extremely cumbersome. Moreover, just because information was digitized did not mean it was standardized or centralized. Participants commented that information had to be extracted from a number of different databases, including the physical Records Management System (RMS), the hard drives on officers' computers, other hard copy information, as well as third party information and data. Moreover, all of this information is being collected in different formats, adding yet another level of complication. As a result, this had enormously complicated the disclosure process, including the amount of time it took

and the resources required to complete a disclosure package to the satisfaction of Crown Counsel. Even after the data collection has been completed, all of the accumulated information must be transcribed. This was another enormous task; large or complex investigations generated immense amounts of information, and the requirement to transcribe all of this data weighed differently across various jurisdictions. While some of the larger agencies have established dedicated disclosure units, most others do not have this type of support. Thus, while the totality of disclosure requirements are daunting even for the largest police agencies, data management and transcription in smaller agencies can be prohibitive, in terms of resource expenditure. Participants noted that, for larger agencies, the time and financial resources needed limited the number of substantial investigations or "big cases" that the agency could initiate at any given time. Smaller agencies, on the other hand, were reported to be compelled to exclusively pursue smaller, more routine cases given the time and resources they had available and the requirements to comply with *R. v. Stinchcombe* and other pieces of case law. Clearly, there are public safety implications that flow from the extra resources mandated by *R. v. Stinchcombe* and related disclosure case law.

Participants related how disclosure considerations affected a wide range of operational decisions. For example, concerns about the need, or even potential need, for information sharing could have the effect of stopping an investigation in the planning (profile development) stage. Participants mentioned being leery of sharing information with other agencies for fear that its disclosure in some other context might jeopardize or compromise their investigation. Some participants spoke of instances where they avoided even taking information, knowing that the need to disclose that information could jeopardize their case. One participant revealed that the very mention of one case during the investigation of another case led to the judge disallowing certain information in the original case. Another participant recounted how knowing that an investigator was starting a file based on someone else's information could serve to filter out or severely delay what investigations were possible or even started because it is very difficult for an investigator to trust information collected by anyone other than themselves. In some instances, officers could try to get the same information from another source, which was time-consuming and very challenging. Participants indicated that investigations were regularly stopped because officers were unable to proceed if their case sourcing was not well established and defendable.

A closely related difficulty posed by disclosure rules was related interjurisdictional issues. In one particular example, a participant shared their experience with a problem that they routinely encountered in cases involving province A and B. Because of the way the law has been interpreted and acted upon, province B would not share information on major crime or drug files with province A. In part, this stemmed from differences in expectations for laying charges: in province A, Crown Counsel is required to lay charges, while in province B, they are not. Moreover, province B argued that the disclosure rules in province A were too expansive and were, therefore, unwilling to share information. Again, these sorts of clashes can have notable effects in cases, such as those involving large drug conspiracies, which are, by their nature, cross-jurisdictional.

One specific area of practice that was often mentioned by participants was confidential informants. There are other cases, most notably *R. v. McKay*, that highlight this issue, which will be discussed in greater detail below. But several participants spoke of *R. v. McKay* as a subset of *R. v. Stinchcombe*.

In contrast to the other types of crimes addressed in this report, CDSA cases make very heavy use of confidential informants (CIs). Because of the central role CIs may play in a case, and the need to protect CI identities, they are typically vetted through specialized Human Source Handling Units. Federal Crown Counsel are also involved in the process of vetting the CIs information. The CI handler's notebooks also require special vetting. Given the ubiquitous nature of social media and the amount of information about a person that is available through an open-source analysis of social media, this vetting has become increasingly more difficult. The cumulative effect of all of this vetting was the addition of considerable time and resources to many CDSA investigations.

While *R. v. Stinchcombe* and related cases have established a more constrained context, the way that some agencies have chosen to address that context has been equally problematic. Participants suggested that there was a difference between what was needed and what police agencies and Crown Counsel think was needed. In terms of the former, one participant compared the expansion of police procedure to painting a barn, with each requirement representing another coat of paint, and proffered that it had gotten worse over the years. Others were more inclined to express concerns that Crown Counsel was too critical and too often erred on the side of caution. There was also a perception that differences in Crown Counsel requirements within and across different provinces was pronounced. In effect, participants suggested that *R. v. Stinchcombe* presented a number of challenges, but they similarly contended that these were perhaps compounded by inappropriate institutional responses.

In addition to the challenges presented by evolving disclosure requirements, some participants also identified positive aspects wrought by disclosure. For example, the knowledge that all communications were disclosable induced officers to maintain a higher level of professionalism. As well, several participants offered that the increased attention brought to really thinking about evidence was a welcome development. For example, investigators were more cognizant of whether information could identify a CI and put them at risk. The disclosure rules resulted in officers thinking more about whether they were collecting information in a way that made sense, complied with the law, and would be accepted by Crown Counsel and at trial. Still, a recurrent theme expressed was frustration that all cases were treated the same, and that no allowances were made to account for case-specific vagaries or exigencies. Participants felt that Crown Counsel had become frozen by fears of disclosure, and that the straightjacketing of cases was deleterious for public safety.

R. v. Jordan

Participants were not unified in their responses to whether the *R. v. Jordan* decision had affected the number or complexity of steps required in a typical investigation, or the length of time it took to complete these steps. A minority of participants argued that *R. v. Jordan* had not extended the overall timeframe for investigations as much as it had shifted the timeframe. Specifically, the entire investigation process had become front-end loaded. As discussed above, prior to *R. v. Jordan*, accused suspects were arrested and charged. The police would then build the court case while the accused was either remanded to custody or released with a series court-mandated conditions intended to deter further offending. Following *R. v. Jordan*, after the police arrest a suspect, they are

forced to release the suspect back into the community without any conditions, while investigators build the case for charging the accused. As stated, some participants viewed this change in procedure as a reshuffling of time. But for a majority of participants, the effects of *R. v. Jordan* had a pronounced effect on the length of time required to conduct investigations in that all aspects of the investigation took longer.

Many participants commented on the increased time and difficulty required to satisfy the requirements to successfully obtain charge approval. Some participants suggested that Crown Counsel had become more gun shy, knowing that the *R. v. Jordan* presumptive ceiling would start as soon as charges were laid. As a result, Crown Counsel wanted all aspects of the case concluded before they proceeded to charge a suspect. Some participants recounted that their cases had ground to a halt because they were waiting for lab results. These participants also noted backups and wait times for lab results had increased. More generally, participants expressed a widespread belief that the *R. v. Jordan* decision had not sufficiently taken into account how the stricter timeframes would affect the entire criminal justice system. Although many participants felt that the *R. v. Jordan* decision was primarily directed at Crown Counsel, its effects were felt across the entire system, but primarily by police. For example, the need for extra resources to ensure that investigations complied with the *R. v. Jordan* timeframe was not considered. Several participants expressed sympathy for Crown Counsel recognizing that they were also often understaffed and overworked. But, more to the point, the practical ramifications of the *R. v. Jordan* decision had been off-loaded to the police. The lack of necessary resources across the criminal justice system had produced a number of bottlenecks, often outside of the control of the police, that slowed down investigations. And the effect of front-loading investigations was felt even after charges were laid. Because suspects were released without conditions, the police had to expend considerable time and resources tracking down the suspect months or years after their original arrest.

It is important also to consider the interactive influence of *R. v. Jordan* and *R. v. Stinchcombe*. Again, in creating largely artificial deadlines, *R. v. Jordan* did not account for the challenges already wrought by onerous disclosure provisions. Everything has to be completed before the police expect Crown Counsel approval to lay charges, such as the collection of all of the evidence, including the information on electronic devices, such as cellphones, viewing all available video footage, and the transcription and vetting of all that information. Returning to a theme first raised in the answers related to *R. v. Stinchcombe,* participants explicitly commented that the combination of this case with *R. v. Jordan* had had a noticeable chilling effect on the ability of the police to engage in larger scale drug investigations. One participant provided some valuable context: "We may want to go after six people, but we will only go after three, to make it more manageable. Because investigations are lengthier, we are able to turn over fewer files per year."

One area in which there was universal agreement was concern over how *R. v. Jordan* affected public safety. Fears about the catch-and-release protocol that is now standard in CDSA cases were expressed by every participant. Simply put, immediately releasing offenders back into the community with no formal way of controlling or even monitoring them represented a serious risk to public safety, in part because many suspects were repeat offenders who consistently demonstrated a complete disregard for public safety. Participants maintained that given that public

health epidemic currently in British Columbia around drug use, those involved in the drug trade should be regarded as serious threats. Participants further pointed out that these individuals' actions were not limited only to drugs. These suspects were allegedly commonly involved in the full gamut of dangerous crimes, including weapons offenses and murders. Some participants further expressed frustration that CDSA crimes were not always taken as seriously as other types of crimes by Crown Counsel. Finally, one participant suggested that *R. v. Jordan* effectually undermined one of the principal bases for the decision. Although the point of the *R. v. Jordan* decision was to ensure that the accused's right to a speedy trial was not violated, *R. v. Jordan* has actually had the opposite effect by delaying the charge approval timeline.

Concerns about threats to safety extended beyond the public to include some offenders as well. Two participants indicated that an actual, if largely unconsidered, by-product of the front-end loaded, catch-and-release approach utilized by the police to meet the requirements of *R. v. Jordan* was that a suspect's life could be put in danger. During the initial "door-kick" or arrest of the suspect, the police routinely seize evidence of the crime, including cash and drugs. The suspect would then be released without charge pending the outcome of the investigation. But, in many cases, these suspects were relatively low in the drug trade hierarchy, and they now owed that missing cash and/or product to someone higher up in the criminal hierarchy. In effect, the suspect could find themselves in real and potentially mortal danger. These unaddressed concerns about individual and public safety have had a discernable negative effect on police morale. Unsolicited, several participants talked about these concerns as affronts to the basic ethical and moral principles of policing.

Despite the challenges and misgivings identified by participants, a few did note some positive elements flowing from *R. v. Jordan*. For example, it was argued that the new requirements forced investigators to be more organized. Another proffered that the police were increasingly much more specific or 'surgical' in their investigations. Having the necessary evidence organized, vetted, and ready for Crown Counsel was also viewed as an improvement that resulted from *R. v. Jordan*. But even these insights were offset by complaints over a perceived lack of consideration about the effects of *R. v. Jordan* foisted on police. These same participants expressed dismay that procedural changes were not accompanied by resources; nor was there any period of transition. They spoke of needing to train officers on the changes and to accumulate institutional knowledge about how to comply with *R. v. Jordan* while still successfully completing thorough investigations.

R. v. Grant

Most participants had very little to say about the effects of the *R. v. Grant* decision. A common refrain was that investigators had to follow the *Charter* and *R. v. Grant* was part of doing so. Much of this sentiment seems to reflect the unique nature of many CDSA investigations. For example, homicide and sexual assault investigations involved crimes for which the police response was necessarily reactive. As a result, these kinds of investigations were much more fluid, especially in their earliest stages. In contrast, CDSA investigations tended to be more controlled in that strategic proactive planning was central to most of these cases. In this way, *Charter* infringements could generally be avoided. Nonetheless, a few participants indicated that *Charter* considerations did add

steps or slow things down, but that these considerations did not have a tremendously negative effect on the timeframe, complexity, or steps associated with a CDSA investigation. For example, while it may pose a challenge to remove an officer from the road for six to eight hours to obtain a judicial authorization, obtaining this authorization to be compliant with *R. v. Grant* was necessary and the police could plan for this requirement. Moreover, there were specific areas where *Charter* considerations had continued to grow that extended the amount of time it took to complete an investigation. For example, participants indicated that there had been circumstances previously where the police could search a vehicle without a warrant; however, because of *R. v. Grant*, judicial authorization was now required that required an investigator to write the authorization and for a judge or justice of the peace to grant it. While not viewed as a terrible burden, participants did acknowledge that this additional step resulted in investigations taking longer.

R. v. Feeney

For the CDSA investigators who participated in this study, the requirements posed by *R. v. Feeney* were not identified as a particular issue. Perhaps owing to their proactive nature, CDSA investigations do not typically involve warrantless entry. As will be made clear below, the bigger challenges for CDSA investigations involved the need to get warrants for almost everything, and the complexity and difficulties involved in getting various types of warrants.

R. v. Fliss

Although two participants indicated that *R. v. Fliss* caused an increase in the time it took to complete an investigation, other participants highlighted this piece of case law because of how it has greatly complicated investigational logistics and resource management. Because of the deadlines imposed by the way in which *R. v. Fliss* has been interpreted and applied, the transcription of audio recordings must be completed and vetted for accuracy very quickly. Moreover, this task cannot be completed by any clerk. Instead, it must be handled by specifically appointed units. Given the required process and the amount of time it takes to complete the transcription, there is a financial cost to the organization in the form of paying overtime to ensure that the transcription process complies with how *R. v. Fliss* is being applied. In addition, simply getting the device to transcription services in a timely manner can be challenging.

R. v. Hart

There was little doubt among participants that the requirements of *R. v. Hart* resulted in investigations taking significantly longer to complete. It was estimated by some participants that *R. v. Hart* resulted in a time increase of 30% to 40%. As discussed above with homicide investigations, much of this increase was attributed to the need to better scrutinize the level of sophistication or vulnerability of the target and the need to transcribe all of the interactions and conversations involving the suspect that were audio or video recorded. However, participants were unanimous in suggesting that Mr. Big scenarios played only a very minor role in CDSA investigations. In some respects, this reluctance to employ these techniques reflected a greater appreciation and awareness of the potential dangers of using certain types of individuals, such as those who might be cognitively compromised. This awareness was cited as a positive aspect of *R. v. Hart.* Rather than

risk a case on the intricacies of a Mr. Big operation, participants were more likely to try to gather the information in other ways. However, as a result, the requirements of *R. v. Hart* indirectly increased the length of time for investigations. Participants spent even more time scouring open-source materials, increasing surveillance efforts, and even employing undercover officers. But again, in terms of direct impacts, *R. v. Hart*-type scenarios were comparatively rare for CDSA investigations.

R. v. Marakah

For most of the CDSA investigator participants, *R. v. Marakah* was a critical case. *R. v. Marakah* did not necessarily result in a notable change in how the police thought about their investigations, in that they have always been focused on obtaining evidence lawfully. However, the complexity of technology, particularly mobile phones, had greatly amplified the effect of *R. v. Marakah*. For many people, mobile phones have become more than merely a tool; they are extensions of people themselves. Given this, in terms of an investigation, mobile phones are informational gold mines as they include locations, mapping, texts, videos, email, contact, and social media information. As a result of *R. v. Marakah* and related case law, the police must now assume the primacy of privacy. This has significant implications for CDSA investigations.

At the most fundamental level, the process of obtaining warrants to intercept private communications (Part 6 applications) is incredibly onerous. The amount of time required to write and compile these documents is staggering. One participant related that their first Part 6 application was 600 pages long and took them two months to write. Another said that they had work on one application for their entire shift for eight straight days. Following the completion of the application, further delays can arise from the need to have the application reviewed by a senior member. The review process is extremely time consuming. Finally, the application has to be submitted to Crown Counsel who conduct their own review of the application and possibly ask for changes.

The extra resources required by *R. v. Marakah* do not end once the application has been approved. Several participants raised the challenges of monitoring communications. In some respects, their comments reflected the distinct nature of CDSA investigations. Specifically, many in the drug trade are on their phones all the time. In response, people are required to be in the monitoring room 24/7. In short, this procedure was very labour intensive. The extensive use of mobile phones also had *R. v. Stinchcombe*-related implications, as all of these conversations needed to be transcribed.

The challenges of the requirements resulting from *R. v. Marakah* have been significantly exacerbated by technological innovations, especially encryption software and applications. The higher the level of encryption, the longer it takes for technicians to unlock and gain access to the information on the mobile phone. Of great concern is the fact that the police are increasingly finding that they are unable to get into locked phones. Moreover, some decryption cannot be defeated no matter how much time is allocated to the task. Once again, the unique nature of drug enterprises is a factor here. Drug dealers and suppliers rely almost exclusively on encrypted devices.

In addition to the cases addressed above, there were a number of other cases mentioned by participants as having a noteworthy effect on CDSA investigations. Several of these cases were related to considerations of privacy, while others represented continuing extensions of established case law.

R. v. Edwards

As reflected in *R. v. Edwards,* one area of the law rapidly expanding is that of third-party privacy. Case law in this area was viewed as challenging to investigations because it was constantly intersecting with other case law requirements, such as *R. v. Hart, R. v. Grant,* and Section 5.2 issues. For some participants, extending the reach of privacy expectations to third parties resulted in this issue becoming a key consideration for investigators. It was felt that *R. v. Edwards* resulted in the expectation of privacy going so far in favour of a suspect that investigators were afraid to collect any evidence without prior judicial approval. In effect, as a consequence of *R. v. Edwards*, participants assumed that the expectation of privacy holds at all times and in all circumstances. The result of this was investigators writing more warrants and writing increasingly long and complex warrants. In practice, warrants that used to be seven or eight pages were now closer to 80 pages. And, these applications had to be reviewed both by senior officers and Crown Counsel, all of which increased the length of time and resources required to complete investigations.

Another challenge posed by the continuing evolution of privacy law was trying to keep police officers apprised of, and trained to respond to, unfolding developments and the constantly moving goalposts of case law. In a practical sense, participants indicated that it was not only hard for them to keep up with all the new requirements resulting from the constantly evolving case law but challenging understand the judge's language to comply with their requirements. Participants indicated that it often took some time and guidance from Crown Counsel to figure out what new case law meant and what was required for the police to comply with it. There was the concern that, in the most unfortunate circumstances, investigators only fully understand how to apply case law once they have Crown Counsel not approve charges, have their evidence challenged at trial, or have some aspect of their investigation thrown out in court. Not surprisingly, then, several participants expressed a need for greater training and communication as it pertained to new case law.

R. v. Pipping

Another important case for CDSA investigations involving the expectation of privacy was *R. v. Pipping*. Similar to *R. v. Edwards*, *R. v. Pipping* had the effect of expanding expectations of privacy, specifically to surveillance of buildings and hallways. This decision had an enormous effect on police investigations. Prior to *R. v. Pipping*, investigators could simply arrange for building and/or camera access through building or strata managers. But, because of *R. v. Pipping*, there is no longer clarity in terms of which circumstances this process will suffice. In light of privacy concerns generally, managers are increasingly more reluctant to help the police in the absence of a warrant. As with *R. v. Edwards*, the consequence has been additional and more complex warrant applications. Participants offered numerous anecdotes to outline the challenges of *R. v. Pipping*. For example, some drug dealers have multiple residences. Therefore, it may be unclear which residence served as a storage facility for illicit narcotics. As such, investigators must complete warrant applications

for all residences, with the additional challenges of providing search justifications for each location. It was noted that just this aspect of the investigation could take weeks and, during that time delay, the subject has the opportunity to move the drugs.

A related difficulty for the police is the increased security measures in many apartment buildings and condominium complexes. These additional measures sometimes make it hard for the police to even gather the evidence necessary to obtain a production order. Again, more time is added on to the investigations. It is also worth noting that there are very recent cases, such as *R. v. Kim* and *R. v. Latimer* that are further expanding the reach of *R. v. Pipping* to potentially include, for example, back alleys or sidewalks. Many participants expressed concern that these judicial decisions effectually add greater time delays to investigations.

R. v. Duarte; R. v. Wong

As set out in the *R. v. Duarte* and *R. v. Wong* decisions, general video warrants and attendant Part 6 applications are inextricably linked to considerations of privacy. Participants unanimously argued that these cases have resulted in very strict restrictions, and that Part 6 applications have increasingly become more complex and difficult, and thus take much longer that they would have previously. Meeting the necessary thresholds established by these decisions can be very daunting. According to several participants, these applications took months in non-emergency situations. And, as with several other of the cases examined, *R. v. Duarte* and *R. v. Wong* have broadened the scope of circumstances in which Part 6 applications are necessary. Participants provided numerous examples, but due to concerns about operational integrity, those cannot be discussed in this report. In some circumstances, investigators explained how they chose less effective or efficient alternatives so as not to run afoul of the edicts flowing from these cases.

R. v. McKay

Because of the pivotal role that a confidential informant can play in many CDSA investigations, *R. v. McKay* featured prominently in discussions with many of the participants. Simply stated, *R. v. McKay* affected investigation timelines because it added to the complexity of disclosure. Unlike other materials that are prepared for disclosure, investigators could not simply turn over their notes and briefing reports regarding CIs, as the information contained within those documents is incredibly sensitive. As a result, participants indicated that investigators had to be exceedingly careful about how to proceed with CIs. Depending on the amount of information, the procedures developed for proper vetting increased the total time and expense of investigations proportionately.

A second implication of *R. v. McKay* disclosure rules involved the issue of CI risk and safety, the protection of which could directly affect the way an investigation proceeded or whether an investigation proceeded at all. For example, as a result of the overarching considerations that the safety of a CI was paramount and that the police would never sacrifice an individual's safety over an investigation, investigators cannot start a new file with a single source of information where that information has been provided by a CI for fears that this would identify the CI. Instead, the police must expend more time and resources essentially trying to develop the same information. If the police are unable to do so, the case is typically dropped. This same concern related to sole-source CI

data could occur at any time during the investigation. If the information would identify the CI, the investigation quickly grinds to a halt.

Cumulative Effects of Case Law on CDSA Investigations

Participants indicated that the requirements of disclosure set out by *R. v. Stinchcombe* and other related judicial decisions, while important for ensuring procedural justice and the protection of an accused's *Charter* rights, had not adapted to the enormous volumes of information and digital evidence that had become available because of innovations in technology. Participants noted that the need to disclose everything, including information that was not relevant to the investigation created a resource drain for both the police and the (PPSC). Logistical challenges related to the need to transcribe all audio and video recordings, format images so they can be viewed by Crown Counsel, and transmit or share large amounts of data with PPSC, and then the necessary time delay for Crown Counsel to review all the data were perceived as bogging down investigations and the criminal justice system. All participants felt that the outcome of all these additional steps and time was negatively affecting the effectiveness and efficiency of CDSA investigations in British Columbia.

A second critical theme that emerged was public safety concerns resulting from the changes in protocol precipitated by tighter, arbitrary timelines as established in *R. v. Jordan*. Participants unanimously condemned the catch-and-release practice now common in CDSA investigations, pointing out that many of these offenders were not recreational drug users, but serious criminals, and that releasing them into the community immediately following arrest, without any means of monitoring their behaviour posed a grave and continuing threat to public safety. Participants understood that the intent of the presumptive ceiling set in *R. v. Jordan* was to prevent cases from languishing, and investigators agreed with that intent in principle. They expressed empathy for Crown Counsel, who they acknowledged had not been provided with adequate additional resources with which to meet the requirements of *R. v. Jordan*. However, they bemoaned the fact that provisions originally targeted toward Crown Counsel fell to the police, who similarly were not provided with the necessary resources to comply with *R. v. Jordan*. As a result, the strategy of releasing suspects until the investigation could be completed developed as a way to comply with the presumptive ceiling of *R. v. Jordan*, which endangered the public. Participants voiced frustration that the courts did not appear to consider the systemic effects of their decisions or established timeframes that were evidence-based and in the best interest of public safety.

Finally, participants broadly noted that the case law related to privacy had a tremendous effect on CDSA investigations, and that there were a number of cases presently making their way through the courts that were very likely going to make things even more difficult for the police. Of course, no participant was opposed to the principle of privacy and the requirement of investigators to ensure that they respected the privacy of everyone associated to a CDSA investigation. However, for participants, the issue was one where the courts, in their reasoning, did not demonstrate an appreciation for the world in which the police operated. Participants felt that many of the requirements imposed by the courts were unnecessary, added more steps to CDSA investigations, and greatly complicated the existing steps. As a result, CDSA investigations now took appreciably

longer to conduct, to the point where many police agencies were not able to take on as many investigations as they previously did, despite the fact that the need for such investigations was increasing.

Typical Steps in a CDSA Investigation

When asked to describe the steps of a CDSA investigation, participants denoted three broad stages: profile development, tactical investigation, and preparation for Crown Counsel. It was noted that the steps involved in CDSA investigations were fundamentally unlike other investigations, such as sexual assault and homicide, because there was no index offence to which the police were called for response. CDSA investigations are intelligence-led and thus, there were many additional steps and levels of decision-making required in the first stage that often did not exist in other *Criminal Code* investigations. Moreover, the fluid nature of the investigation combined with the available resources played a substantial role in whether and which steps in the investigation were undertaken at the next stage. As such, it was frequently iterated that every CDSA investigation was somewhat different, and every drug unit was different in its priorities, capacities, and available resources.

Stage 1: Profile Development

Broadly stated, the first stage of a CDSA investigation includes the police receiving intelligence information from a confidential source, through a tip, or because of another ongoing investigation. All participants noted that it was imperative that the information received be vetted for a reliability assessment and for corroboration. Participants noted that information from a CI must also be obtainable from some other source so as not to compromise the CI. This was critical because disclosure requirements would render it impossible for police to identify the primary information from which the file was created unless that same information was available beyond the CI. If the information could not be corroborated in other ways, the file would sit in abeyance until further information became available. If the intelligence information was vetted and could be corroborated beyond the CI, a complete profile development would occur, which included gathering information from relevant databases, partner agencies, open-sources, and a complete workup would be conducted by a criminal intelligence analyst, including threat assessment and deconfliction. At that point, the team would then triage the files to determine which file was worthy of surveillance. Participants noted that because of capacity related concerns, many files would not move past this point onto the next step. If a determination was made to conduct surveillance, some short and long-term goals would be established and observations from undercover (UC) agents and CIs would be sought. After an initial period of surveillance, a determination would be made as to whether enough information had been gathered to consider the investigation viable and, in consultation with management, a decision about ongoing resources would be made. If the file was going to move to the next stage of investigation, short and long-term objectives would be established and the necessary Major Case Management (MCM) roles, which always includes an Affiant, but may also include a Field Investigator, Exhibit Manager, and Disclosure Team, would be established.

Stage 2: Tactical Investigation

In Stage Two, the file coordinator would begin gathering all the necessary disclosure information and the affiant would start the process of writing the necessary privacy related authorizations, production orders, and warrants. All participants noted that, given the increasing expectations of privacy, the burden of these authorizations increased year over year. Several participants noted that, in recent years, investigators did not do anything without first obtaining an authorization, order, or warrant. While the administrative side of the investigation was pursuing legal sanctions, the surveillance teams would continue their efforts and CI handling/reporting also continued. Technological aids considered necessary for the operations, such as trackers, cellular phone data from service providers, and CCTV, were also utilized in nearly every investigation. The overall goal of this stage of the investigation was to establish the elements of the offence culminating in takedown day, preferably with the target being arrested in possession of the illicit substances being trafficked. When files became large or complex, the assistance and support of the Office of Investigative Standards and Practices (OISP) and/or the Legal Application Support Team (LAST) were sought from RCMP 'E' Division. Depending on the complexity of the investigation and available resources, Part 6 authorizations were also utilized. Participants noted that because of the time and resources required to conduct Part 6 projects, very few files were taken to this level. However, when they were, numerous additional resources were required to establish a wire room, handle transcription in a timely fashion, and manage disclosure obligations. Stage Two generally ended with takedown day at which point the target was arrested in the first instance while committing an offence, but subsequently released without charge so as not initiate the presumptive ceiling related to *R. v. Jordan*. As discussed above, many participants noted that the developments in case law that have resulted in the police's inability to arrest, fingerprint pursuant to arrest under the *Criminal Evidence Act*, and thereby seek court-imposed conditions, presented a serious threat to public safety. The threat was expressed by participants as the target being unlikely to face criminal charges for a minimum of 12 months that resulted in the significant likelihood that the accused would go right back to trafficking illicit substances. Participants noted that this resulted in a continued flow of often deadly narcotics in British Columbian communities and the inability to impose conditions was perceived to severely handicap police in their ongoing prevention and intervention efforts. Secondly, the act of arresting the target and taking commercial quantities of narcotics, cash, and weapons, but then subsequently releasing the target without charges was perceived as potentially posing a safety threat to the target. Some participants noted that this safety threat to the target actually represented a threat to the safety of the broader community because of the brazen nature of drug-related violence in communities across British Columbia.

It is important to note that participants indicated that it was extremely rare for a situation to arise that resulted in Stage Two ending in the absence of a takedown day. The reason provided for this was because, by virtue of the evidence collected throughout this stage of the investigation, including surveillance, undercover operations, and CI information combined with the resources dedicated to the file, the investigation just continued until the target could be intercepted in such a manner that there would be sufficient evidence for the laying of a charge. Participants could only think of a few instances where a file was closed in Stage Two and noted that, in these cases, the decision to close the file on a specific individual was often the result of a deconfliction effort because there was

overlap with another, more serious police investigation and the requirement to disclose would become problematic, possibly threatening the integrity of other investigations. Participants noted that, in other circumstances, files had sometimes been closed to avoid disclosing investigative tactics.

Stage 3: Preparation for Crown Counsel

As noted previously, Stage Two was generally described as ending with takedown day or the point at which the affiant believed the investigation resulted in enough evidence to prove the elements of the CDSA offence. After takedown day, all the exhibits gathered were sent to the necessary labs (FIS, Digital, Forensics, DNA, Health Canada). The Report to Crown Counsel was written and disclosure efforts intensified and continued for numerous months to ensure that when the information from the various labs returned, the file was ready to go to Crown Counsel along with the initial disclosure. Participants suggested that prior to the transmission of the RTCC to Crown Counsel, the entire file often needed to go through various internal reviews, including to the CI or source handling unit for vetting, and, depending on the level and nature of the investigation, sometimes to RCMP 'E' Division for vetting, deconfliction, and oversight/assistance with the file from subject matter experts in OISP or LAST.

Some participants suggested that the number of steps in Stage One had not increased over the past 10 years, but the amount of time it took to complete the various steps, particularly the time required to conduct effective surveillance, had increased exponentially. Participants noted that this time delay was the result of the privacy authorizations required to effectively conduct surveillance, as well as the need for the surveillance team to repeatedly observe the same activity as a foundation for the increased expectation of prima facie evidence for the warrant application. For example, it was important to record the same hand-to-hand drug dealing activity seven times instead of the previously required three times as best evidence. One participant noted that the initial steps prior to surveillance did not take any longer, but that fewer cases moved forward in the process and suggested that perhaps only 10% to 15% of files were taken past Stage One. Other participants noted that the types of files they were working on in the past took approximately one year from the time the information was received to the time it went to court. However, currently, charges were not frequently laid within one year. All participants noted that the requirements of disclosure because of *R. v. Stinchcombe* and other related cases increased the complexity and time required at every stage of a CDSA investigation and noted that the enormous disclosure requirements after takedown prior to the Report to Crown Counsel were cumbersome and that sometimes, despite best efforts, charges were not laid. Some participants suggested that teams were working the CDSA files for up to one year post-takedown before they could move onto the next investigation, which severely limited their overall capacity to take on files.

When asked about the primary drivers of the timeline in CDSA investigations, participants consistently iterated that the increased availability of information in the information gathering stages along with higher expectations of evidence gathering, including increased expectations of surveillance, and the expectation to obtain authorizations, production orders, and warrants was extending the timeline in Stages One and Two of the investigation. Then, in Stage Three, delays in

receiving analysis back from the various exhibit labs combined with the time and resource constraints to collect, vet, digitize, and disclose all of the information that also had to be included in the narrative for the Report to Crown Counsel, were responsible for the increased amount of time it took to conduct a CDSA investigation.

The Role of Technology in CDSA Investigations

Several participants suggested that the greatest challenge to police CDSA investigations that resulted from technological innovation was the sheer volume of data amassed during an investigation, and the subsequent need to collect and distribute all that information to meet disclosure requirements. Police investigators noted that the funding model in policing did not support a heavily administrative and file management intensive side to CDSA investigations. However, it was these kinds of resources that were critical and required because of judicial decisions, such as *R. v. Stinchcombe* and *R. v. Jordan*.

Participants suggested that technological improvements had inherently increased the sheer volume of information available on mobile phones concomitantly increasing the expectation of privacy. As such, participants noted that, in every instance, warrants were required to access the information on a mobile phone. Beyond the increased expectation of privacy, the innovation of mobile and workstation operating systems and third-party end-to-end encryption applications and other popular applications, such as *WhatsApp* and *Signal,* have rendered the information police traditionally obtained from service providers through production orders or warrants for text messages obsolete. Technological advancements in hardware have also resulted in increased sophistication causing issues with investigators gaining access to the data stored on electronic devices, with some participants suggesting that these challenges have required investigators to pivot away from relying on the ability to obtain information from mobile phones as supporting evidence. Moreover, the savvier targets have started to use cellphone companies whose servers are located overseas or in third world countries as their service providers. This renders police, even with a production order or warrant, unable to obtain information related to the cellular calls or data from the originating cellular service providers.

Tracker technology has evolved in recent years, with increased options for the transmission of information from the tracker to police organizations through Bluetooth and USB technology. The ability to transmit information in these ways was viewed as a huge improvement as this was often a problem in the past. Participants noted that the tracking devices have gotten smaller over time, and the devices themselves were easier to install. Moreover, participants noted that the ability to receive real-time information from the tracker meant that police were able to improve their interdiction strategies, particularly in relation to the transportation of illicit drugs. Tracker devices were also thought to improve safety in tactical takedowns because the police were able to predict exactly when the individual would be arriving at the location designated for the arrest. That said, participants also noted that despite improvements in tracker technology, the evolution of vehicles had, in many instances, made trackers somewhat harder to install. The TESLA vehicle was offered as an example because the traditional installation of trackers relied on the installing police officer to

understand the wiring and vehicle engine. Issues of liability arise if the trackers have not been properly installed, so participants suggested that, while the tracking devices had improved, there were increased challenges associated with installing them. Some officers suggested that the evolution of the audio probe installed in a vehicle with the tracker (only in the case of a Part 6) offered the added benefit of both knowing where the person of interest was going, whom they were with, and what they were saying. As such, the development of concordant technologies used in concert with the trackers was viewed as a successful approach. Some participants noted that, while the tracker technology available to police had improved, it had also become less expensive and more readily available to the public. This fact could sometimes present situations where the subject of surveillance in CDSA investigations was found to be using tracker technology to track the movements of dial-a-dopers within the drug line. As such, in some cases, the evolution of tracker technology had proven fruitful for both the police and the targets they investigated.

When asked about innovation in technology related to DNA evidence, participants noted that DNA was not frequently used in CDSA investigations for two reasons. The first was that DNA analysis in Canada was prioritized for use in offences against persons cases, such as sexual assault and homicide. The second reason it was not often used was attributed to resources. DNA analysis remains expensive, and the lab prioritizes analysis based on the severity of the offence. Given this, wait times for results from the lab could be very long. At the Joint Force Operations level, which is when two RCMP detachments, an RCMP detachment and a municipal police department, or an RCMP detachment and a federal section of the RCMP work together on a project, it was noted that DNA had been used, but that in those cases, authorization was sought to send the exhibits to RCMP approved private labs that were able to complete the analyses and provide a written report in a few weeks. In sum, overall, advancements in DNA technology had little effect on CDSA investigative timelines, steps, or complexity generally because it was so seldom used, but the advancements that exist and the capacity to outsource lab analysis to private labs for expedient results had proven fruitful when necessary.

Many participants noted that the proliferation of CCTV, both private and public, served as a useful investigative tool. Officers described the increased requirements for production orders and warrants because of case law in recent years but reported that one decade ago, the information available through video surveillance did not really exist. Therefore, participants indicated that the availability of CCTV has significantly altered the strategies used when conducting CDSA investigations. It was frequently noted that CCTV was particularly helpful when attempting to corroborate other information. Moreover, the advancements in private video capabilities resulted in private citizens posting videos online to social media, thereby creating open-source information that could be particularly useful to police. While more organized criminal groups have used CCTV in the past, today many citizens' residences are equipped with doorbell cameras that have proven to be useful in police investigating CDSA files, particularly in relation to determining routes of travel. That said, it was noted by several participants that the sheer volume of information available to the police can become cumbersome and very daunting with the requirement to document the recorded activities of several hours of video when perhaps only 20 seconds was relevant to the investigation.

Several participants noted that the proliferation of CCTV had the negative effect of persons of interest to the police often having their own cameras located both in and outside of their residences rendering police covert surveillance efforts difficult. Participants reported that they must always be alert and the level of professionalism expected must remain high because it was likely that their actions were being audio and video recorded by targets or the public. A few participants stated that recent files presented concerns related to countersurveillance where the subject of surveillance recorded observations of police in the community. As such, participants specified that the presence of video cameras, particularly from private residents, was sometimes a double-edged sword. Finally, some participants indicated that residents who recorded criminal activity related to the drug trade on their private CCTV systems were frequently reluctant to provide those recordings to police for fear of being caught up in a trial and their identity becoming known to drug or gang-involved individuals.

When asked about the effect of the proliferation of the dark web on CDSA investigations, none of the participants suggested that police had successfully developed any capacity to use the dark web to enhance investigative strategies. Participants noted that while they recognized the threats posed by the dark web, including that firearms were being sold, policing, in general, lacked investigators with the technological understanding or skills to offer a presence on the dark web. Concerns were also expressed about the challenges posed by the emergence of crypto-currency and its perceived connection to illicit goods. In sum, participants were aware of their capacity and resource challenges that limited any significant ability to utilize the dark web either as an investigative strategy or for meaningful operations.

In terms of other technological developments that had proven useful in CDSA investigations, like the homicide investigator participants, several participants noted that developments in drone technology have proven fruitful for CDSA investigations. With respect to improving the capacity of CDSA investigations, several police officers noted that the predilection of drug traffickers to post to social media, particularly Facebook, that identified their whereabouts and who they are with, had proven very useful for intelligence-gathering and surveillance efforts. Other participants reported that an area of technology that required continuous improvement was pinging cellphones and suggested that the complete reliance on cellular service providers without any ability to encourage them to act faster often hindered CDSA investigations.

Some participants suggested that, overall, technology was the biggest hindrance to present-day CDSA investigations noting that the criminal element had, through the adoption of current and emerging technology, successfully managed to evade charges. Several participants indicated that the police resources available dedicated to technology were simply not keeping up with the resources available to the people under investigation in CDSA files. Police officers suggested that the proliferation of readily available and inexpensive counter surveillance technology that could be used to sweep for wiretap devices had become problematic presenting challenges to longstanding investigative techniques. Another easily adopted technique used by subjects of surveillance was to drive around with a signal jammer in the vehicle preventing transmission of information to surveillance teams.

Recommendations

Given that this report focussed on the effects of judicial decisions on homicide, sexual assault, and CDSA investigations, it will not include any recommendations related to the judicial process of rendering decisions or the making of case law. Instead, as the police are required to comply with case law, there are several things that police agencies should consider, bearing in mind current case law and the ramifications of these decisions on the amount of time, steps, and complexity of investigations. Therefore, these recommendations focus on the need for additional resources or the restructuring of current resources.

It was commonly reported that there were insufficient investigators in several jurisdictions to deal with the volume of investigations. The implications of this were prioritizing which investigations to undertake, being forced to end investigations early to devote more resources to other active investigations, or allowing investigations to drag on over an extended period of time while other cases were being more 'actively' investigated. Therefore, it is recommended that investigative units work with their internal, regional, or RCMP 'E' Division analysts routinely to understand their local crime trends to better predict the number of investigations their teams might be tasked with. This information should be used to plan for the development of the necessary number of investigative teams, the size of each team, what the most effective and efficient mix of sworn and civilian members is, and what roles are required. This also requires consideration of retention of members, promotion of members out of the unit, and initial and ongoing training to ensure that all team members have the necessary knowledge and skills to be most effective and efficient in their roles.

Related to this point, police agencies should undertake an assessment to determine which responsibilities require a sworn member and which roles can and should be assigned to civilian members. Moreover, connected to the evaluation of specific crime trends, police agencies should constantly be assessing the degree to which they are up-to-date on the latest technology and have either in-house experts or outside experts that can assist them not only in adopting technology to make their investigations more effective and efficient, but also to ensure that the police have the ability to understand how targets and suspects use technology, the ability to access the technology of these people in a timely fashion, and to incorporate this data and evidence in their investigations while complying with case law and their *Charter* obligations.

Given that general forensics, autopsies, DNA analysis, firearm forensics, drug testing, and video and audio recordings are going to remain critical aspects of criminal investigations, and that technology is going to continue to evolve, there is an immediate need to increase the number of crime labs throughout Canada. Owing to the current lack of resources in crime labs, there were often substantial backlogs of cases requiring analysis. This was not primarily due to the amount of time it took to complete an analysis and report, but, from the perspective of participants, this occurred because of the lack of sufficient staffing and resources. Compounding all of this was the rapid speed of technological advancements, such as larger hard drives, encryption software, and third-party applications, and the ability of law enforcement and the legal system to respond to technological advancements appropriately and in a timely manner. Given this, it is recommended that additional labs be developed in each province and that staffing levels be based on an evaluation of the

requirements for the labs to analyse material and produce reports in line with the requirements of case law.

Recognizing that the *R. v. Jordan* decision placed time limits on the processing of cases, it would be worthwhile for police to have discussions with Crown Counsel about how to approach investigations and the preparation of evidence for disclosure, if they have not already done so. Although the new MOU between police and Crown Counsel on the issue of electronic disclosure is a good starting point, the focus of this agreement is on the cataloguing of evidence. Many participants commented that the presumptive ceiling in the *R. v. Jordan* court decision was arbitrary and did not take into consideration the complexity of an investigation or the delays associated with processing the various forms of evidence. Recognizing that these time limits are in effect, police and Crown Counsel should consider coming to an agreement about how to ensure cases are processed effectively and efficiently. For example, perhaps a threshold could be set for the quantity and quality of evidence so that Crown Counsel can review a file and decide about charge approval, even if all of the evidence has not been catalogued. This is an important consideration in cases where the accused will be in the community without conditions or supervision for an extended period of time and, therefore, may pose a risk to public safety. A proactive approach whereby police and Crown Counsel collaborate should ensure the balancing of accused and victims' rights and facilitate the administration of justice.

Research Limitations and Future Research

While there were no significant research limitations related to the focus and purpose of this study, future research could include obtaining the views of judges and Crown Counsel on the effects of the judicial decisions discussed in this report. Attention could be placed on the interpretation and application of these decisions and how these decisions affected the decision-making process of Crown Counsel, their workload, and their procedures. It would also be interesting to determine the effect of these judicial decisions on the working relationships between police and Crown Counsel and the criminal justice system more broadly. Future research could also consider examining whether and how judicial decisions, like *R. v. Jordan,* have affected the police-Crown Counsel relationship.

Moreover, research should also evaluate the effects of *R. v. Jordan* on charge approval. It is possible that *R. v. Jordan* has had the unintended positive consequence of increasing charge approval as the files would theoretically now be stronger given that full disclosure packages were being provided in the first instance. Alternatively, it is possible that the pressure to resolve cases outside the court and to meet the *R. v. Jordan* timelines for charges have resulted in more cases having charges not approved or stayed. The participants in the current study suggested the latter; however, a more in-depth examination of these trends would be useful. Finally, future research could address the psychological impact of decisions like *R. v. Jordan* on those working in the criminal justice system, as consistent themes raised by participants in the current study concerned officer morale, cynicism, and burnout as unintended consequences of these judicial decision.

Conclusion

The current study reviewed the effects of court decisions, such as *R. v. Jordan*, on police investigations of homicides, sexual assaults, and controlled drugs and substances offences. While criminal investigators are not in a position to provide advice to judges when making their decisions and it would appear that it is not a requirement of judges to consider the effects that their decisions might have on police resourcing, it is evident that 20 or more years of case law has substantially changed the way police must investigate crime. While the participants in this study felt that many of these decisions contributed to better investigations, they also recognized that these decisions contributed to an increase in the number of steps certain investigations, the complexity of investigations, and, most critically, the amount of time it took to complete an investigation.

In effect, when monumental judicial decisions are taken, such as *R. v. Jordan* and *R. v. Stinchcombe*, the government must respond by funding more police, more Crown Counsel, and more courtrooms. In addition, the RCMP lab must be better resourced and additional labs must be established in each province. Adequately resourcing investigations and Crown Counsel will contribute to investigations achieving the requirements of case law, maintaining the repute of the criminal justice system, and maintaining public safety.

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Appendix A: Drug Possession – Disaggregated by Drug Type

FIGURE 5: CANNABIS POSSESSION - RATE PER 100,000

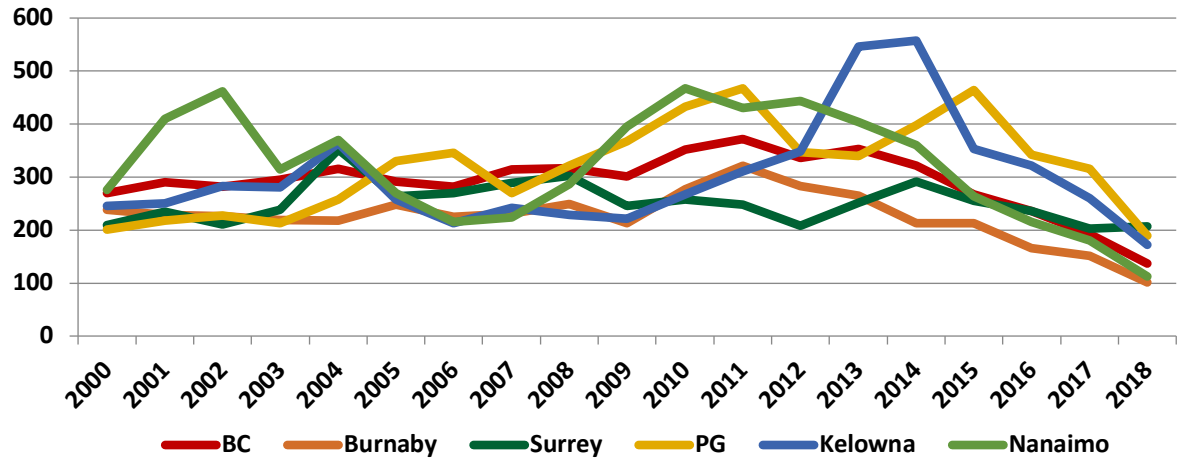


FIGURE 6: COCAINE POSSESSION - RATE PER 100,000

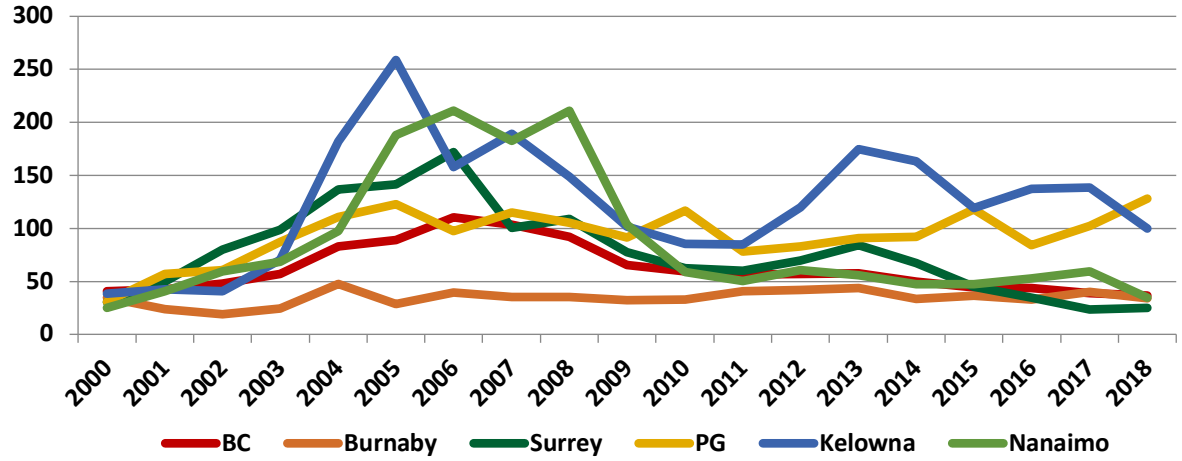


FIGURE 7: HEROIN POSSESSION - RATE PER 100,000

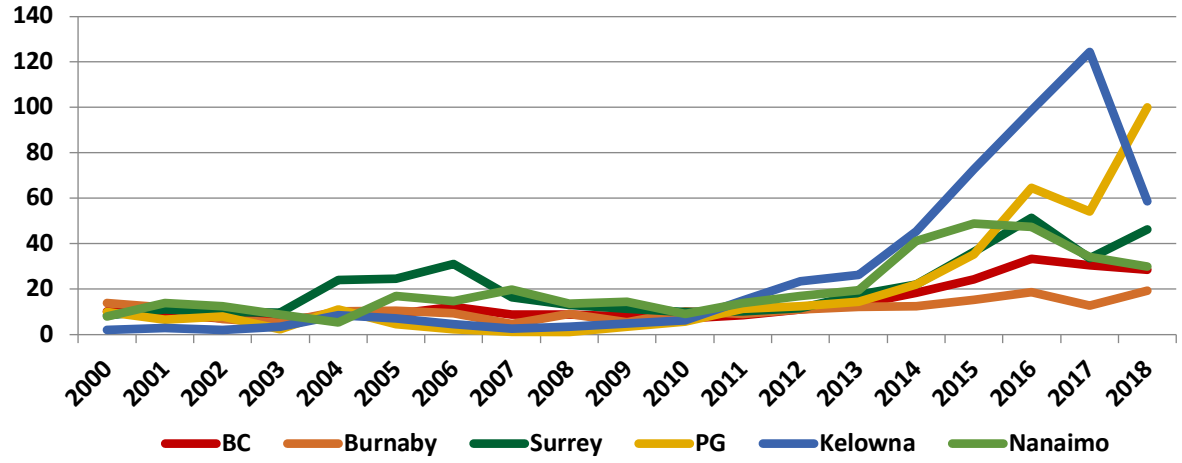


FIGURE 8: METHAMPHETAMINE POSSESSION - RATE PER 100,000

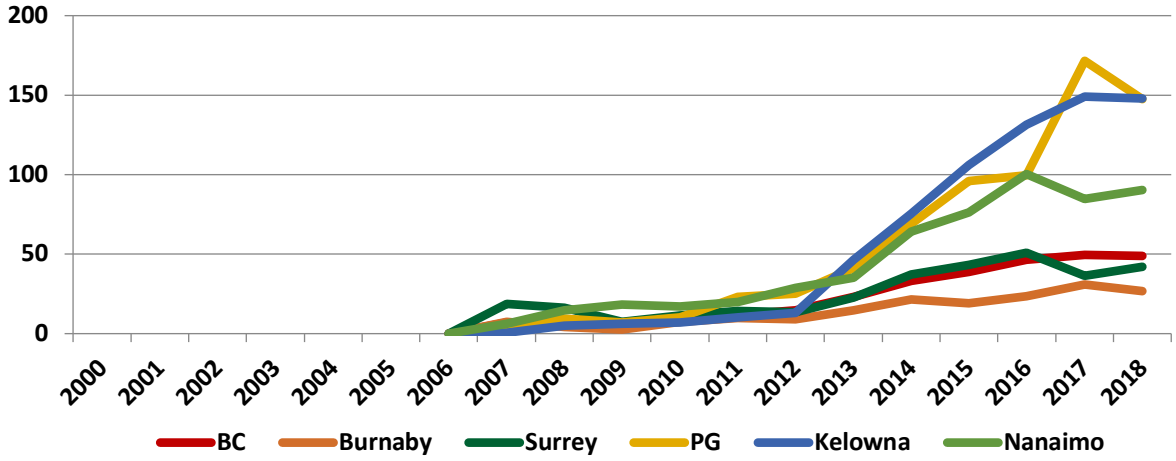


FIGURE 9: ECSTASY POSSESSION - RATE PER 100,000

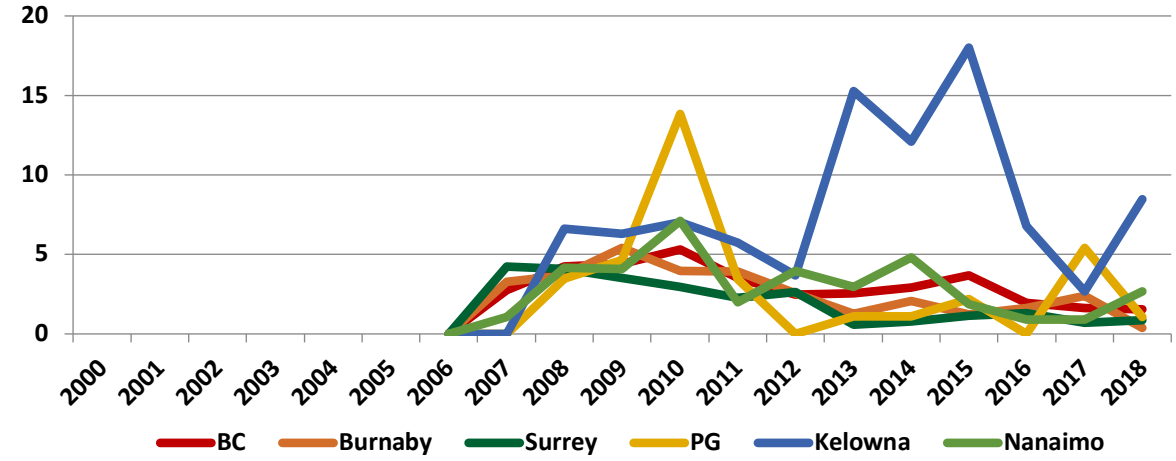


FIGURE 10: OTHER DRUGS POSSESSION - RATE PER 100,000

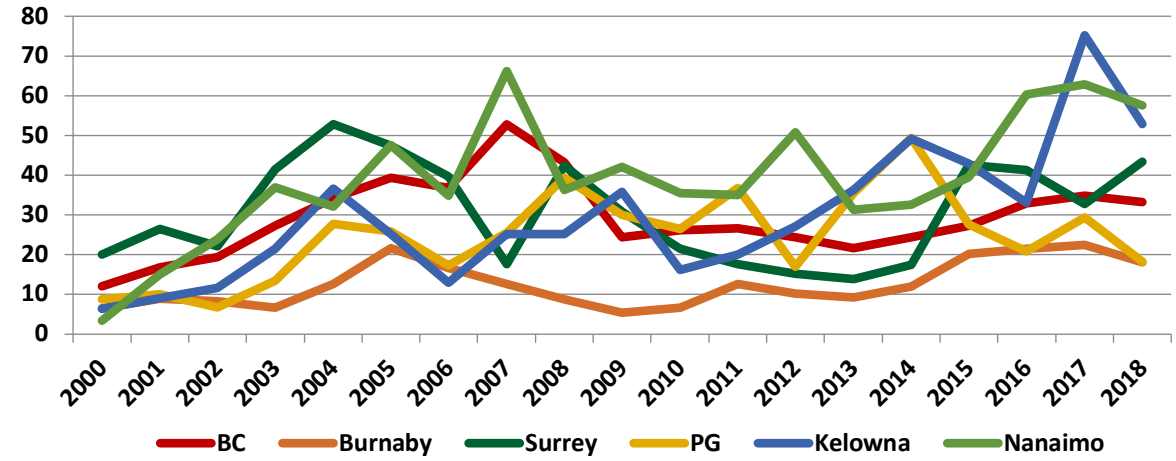
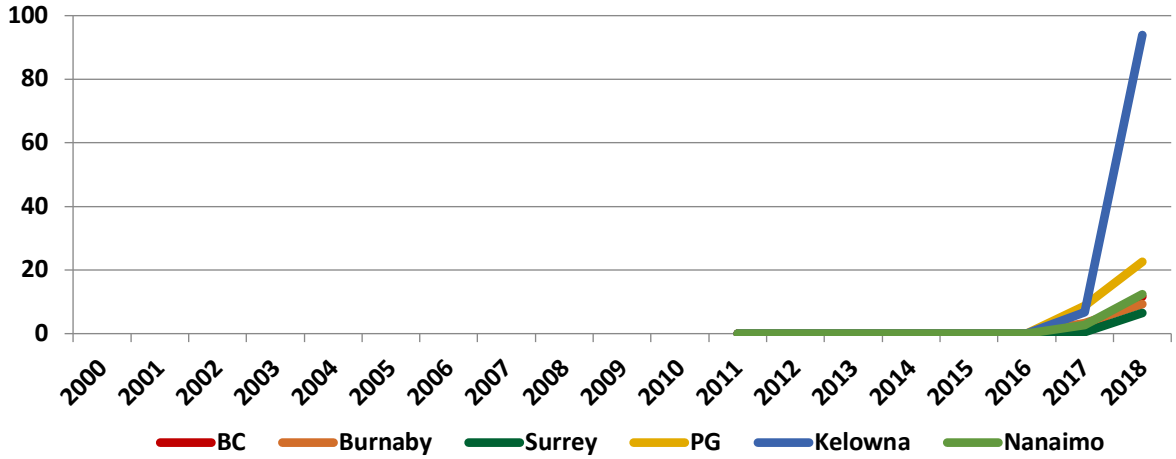


FIGURE 11: OTHER OPIOIDS POSSESSION - RATE PER 100,000



Appendix B: Drug Trafficking – Disaggregated by Drug Type

FIGURE 12: CANNABIS TRAFFICKING - RATE PER 100,000

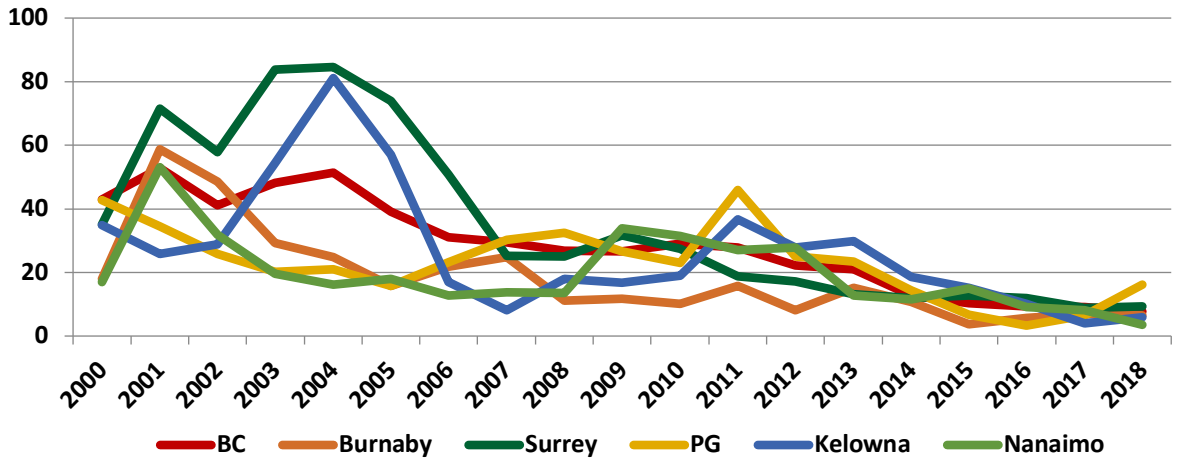


FIGURE 13: COCAINE TRAFFICKING - RATE PER 100,000

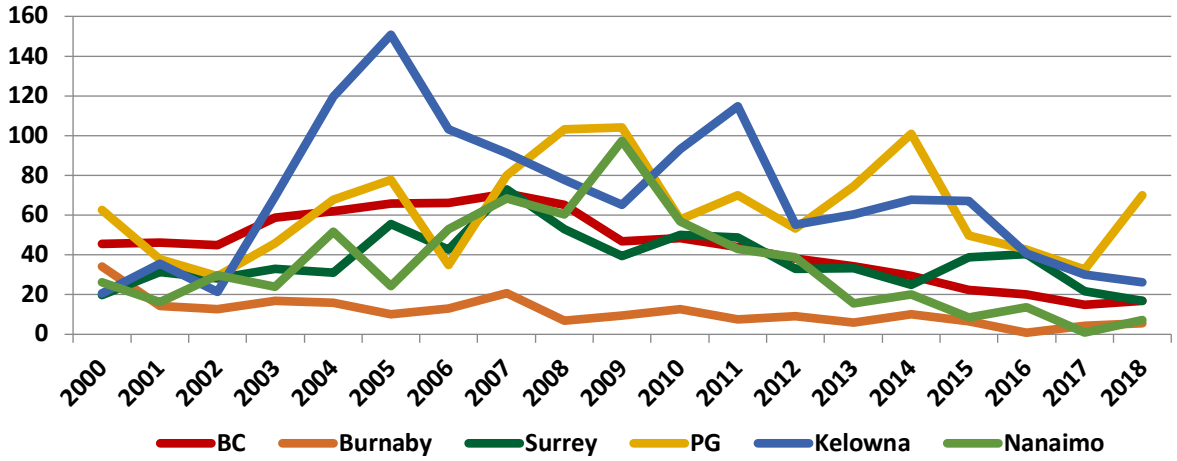


FIGURE 14: HEROIN TRAFFICKING - RATE PER 100,000

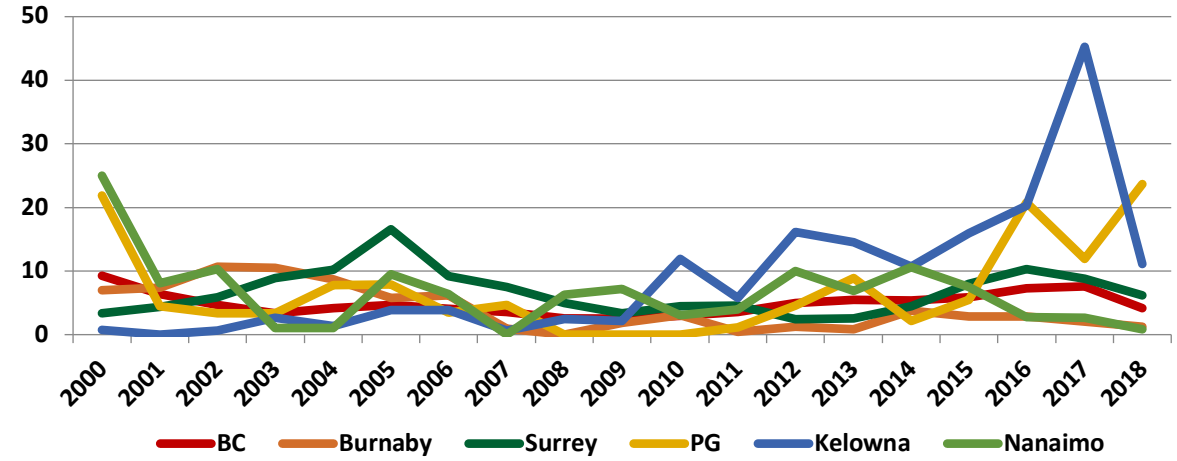


FIGURE 15: METHAMPHETAMINE TRAFFICKING - RATE PER 100,000

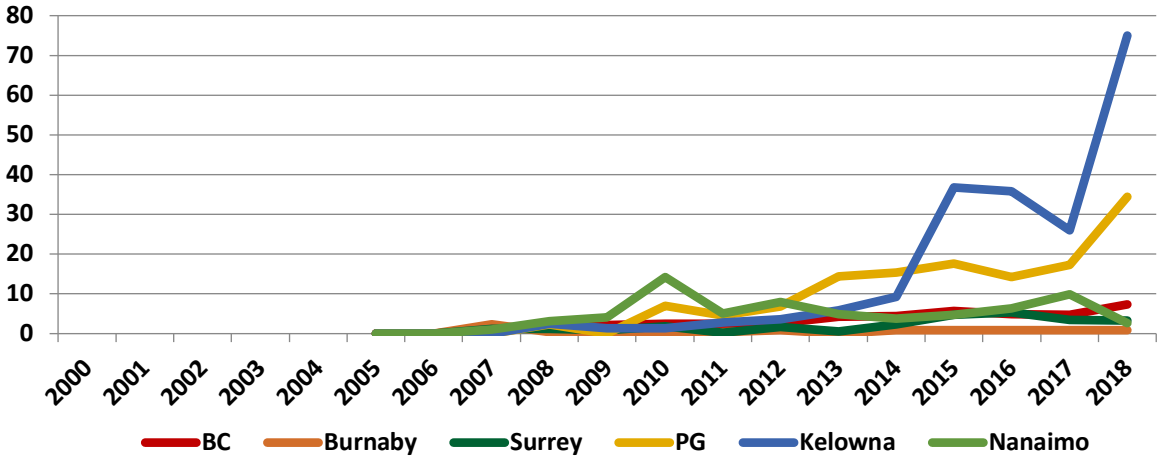


FIGURE 16: ECSTASY TRAFFICKING - RATE PER 100,000

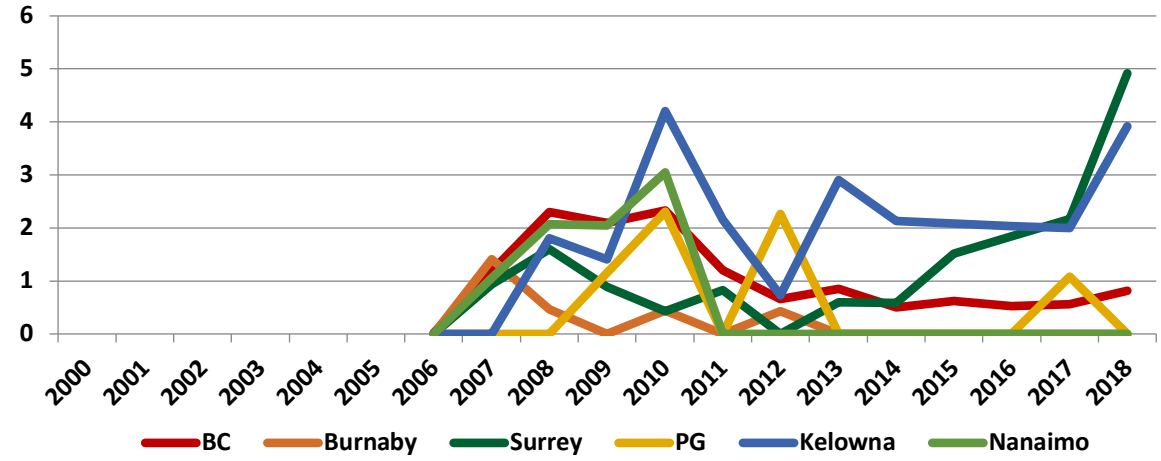


FIGURE 17: OTHER DRUGS TRAFFICKING - RATE PER 100,000

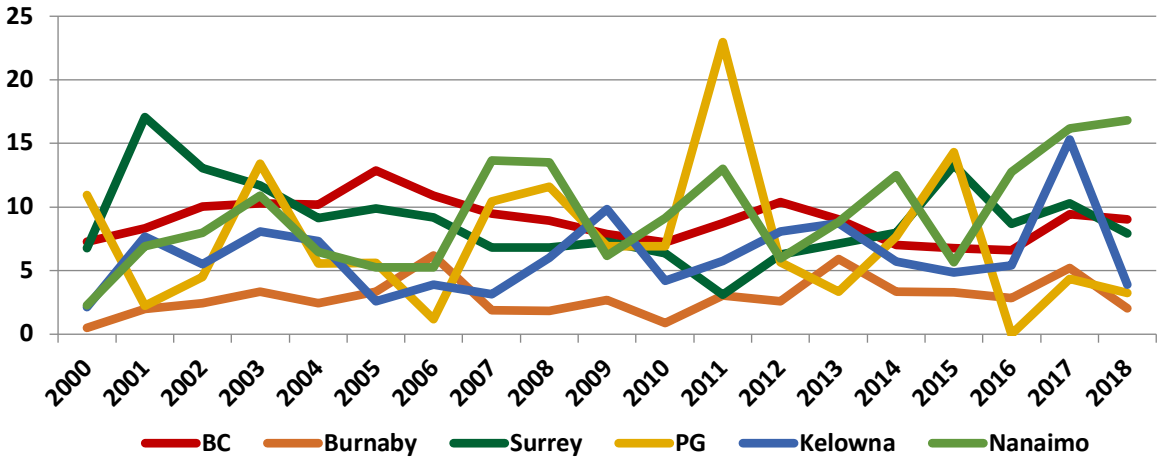
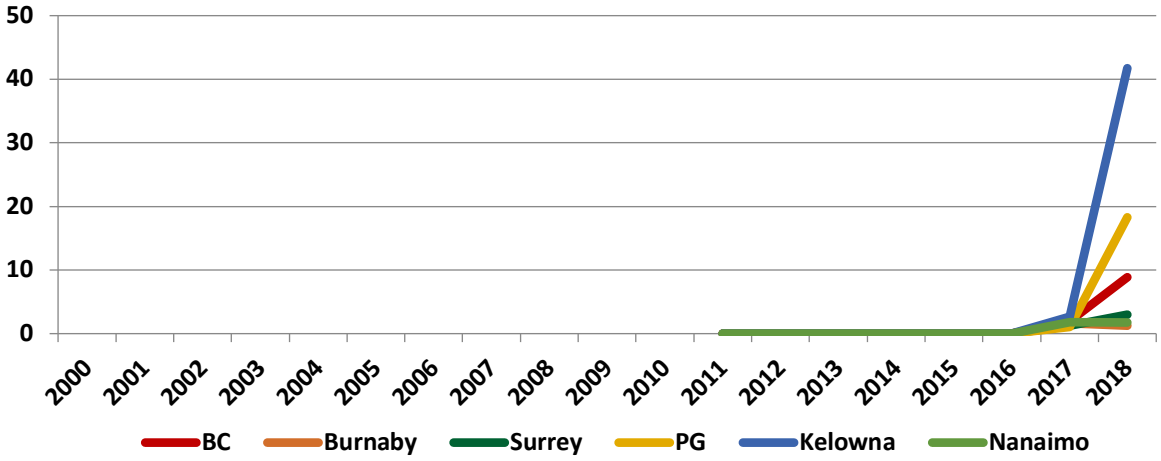


FIGURE 18: OTHER OPIOIDS TRAFFICKING - RATE PER 100,000



Appendix C: Importation/Exportation – Disaggregated by Drug Type

FIGURE 19: CANNABIS IMPORTATION/EXPORTATION - RATE PER 100,000

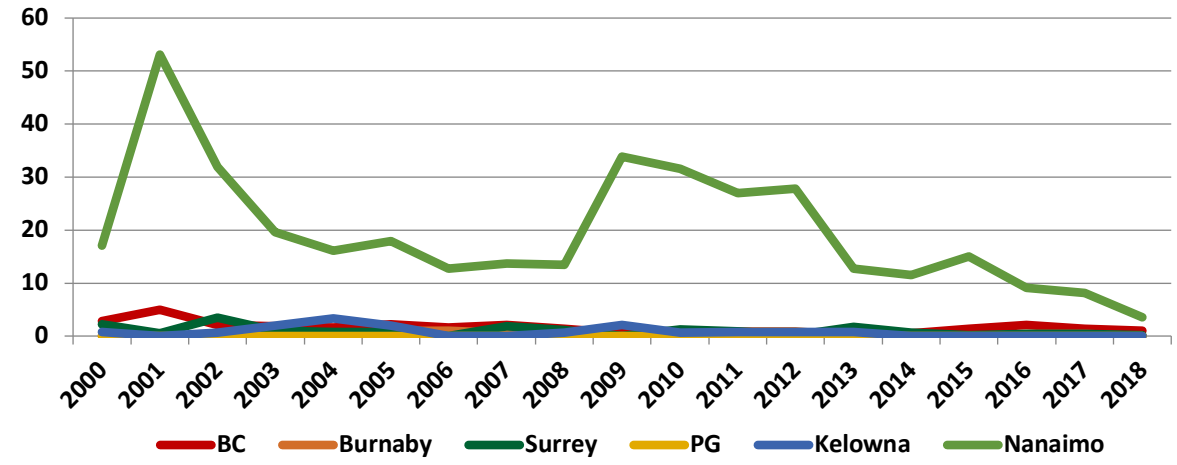


FIGURE 20: COCAINE IMPORTATION/EXPORTATION - RATE PER 100,000

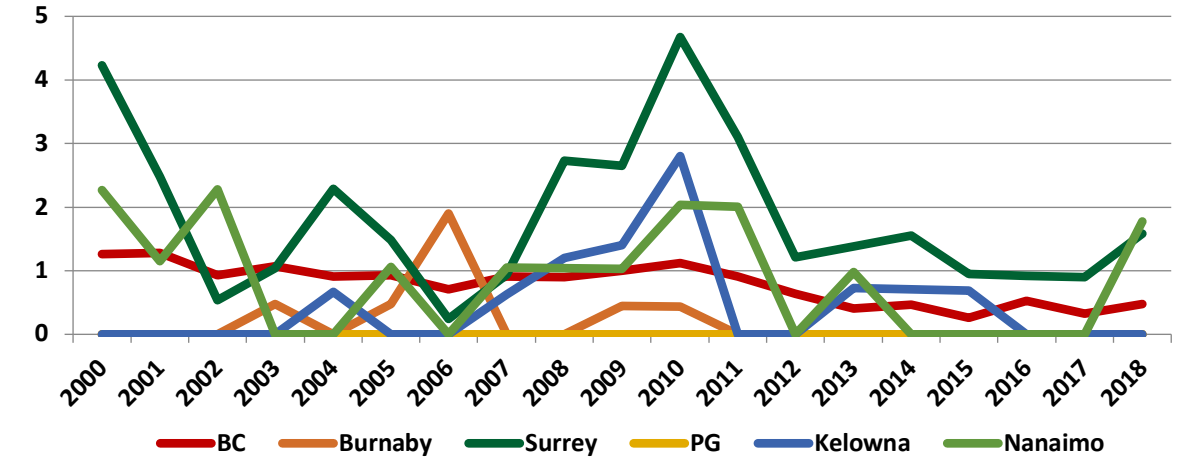


FIGURE 21: HEROIN IMPORTATION/EXPORTATION - RATE PER 100,000

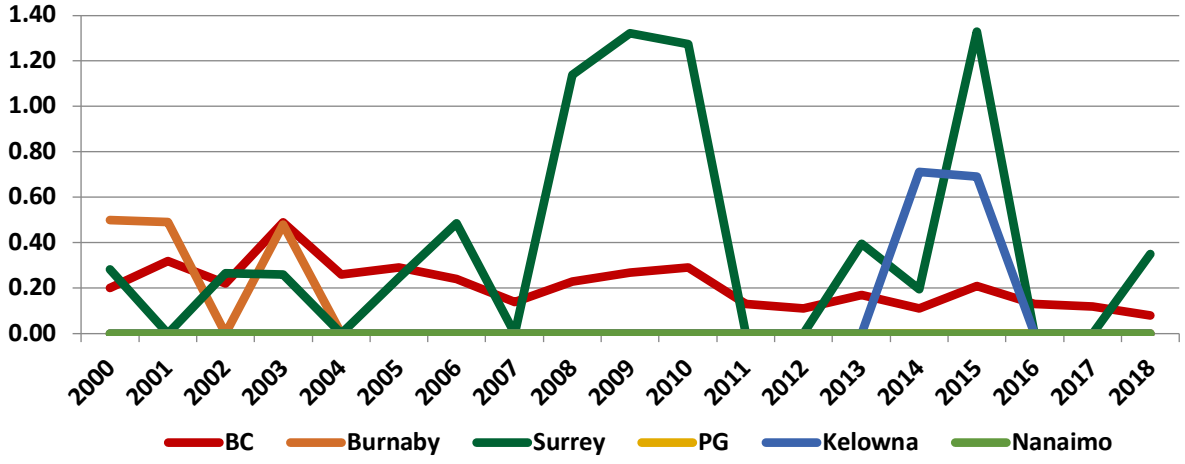


FIGURE 22: METHAMPHETAMINE IMPORTATION/EXPORTATION - RATE PER 100,000

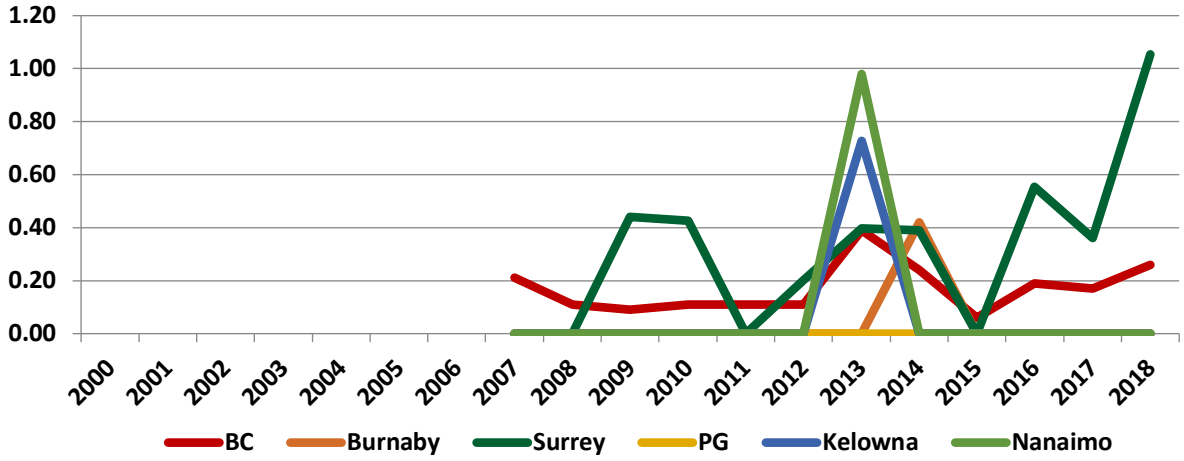


FIGURE 23: ECSTASY IMPORTATION/EXPORTATION - RATE PER 100,000

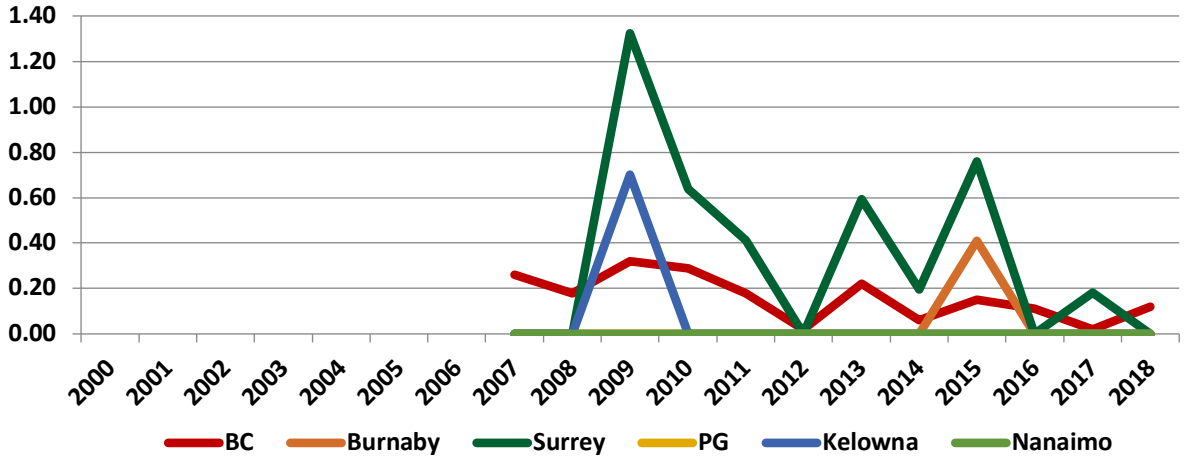


FIGURE 24: OTHER DRUGS IMPORTATION/EXPORTATION - RATE PER 100,000

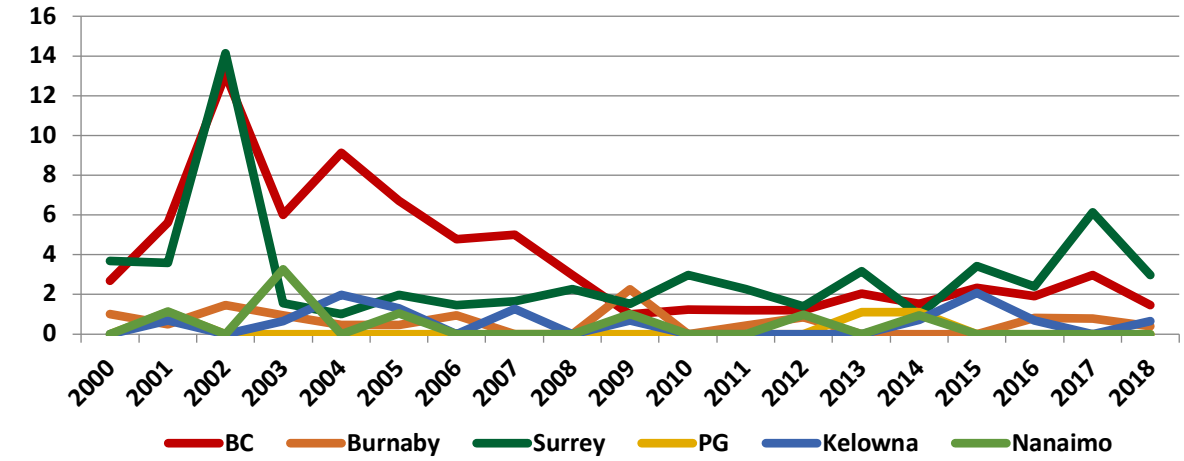
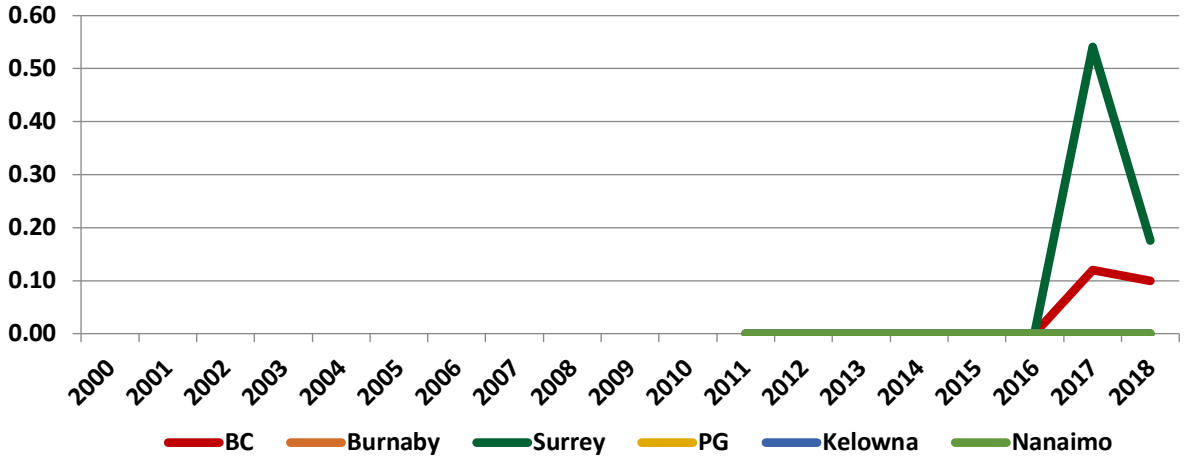


FIGURE 25: OTHER OPIOIDS IMPORTATION/EXPORTATION - RATE PER 100,000



Appendix D: Production – Disaggregated by Drug Type

FIGURE 26: CANNABIS PRODUCTION - RATE PER 100,000

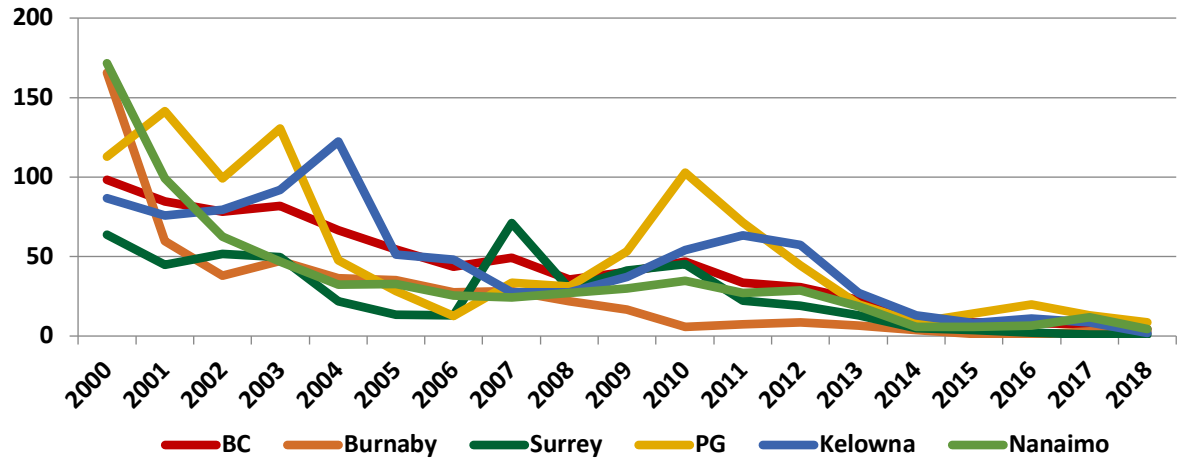


FIGURE 27: COCAINE PRODUCTION - RATE PER 100,000

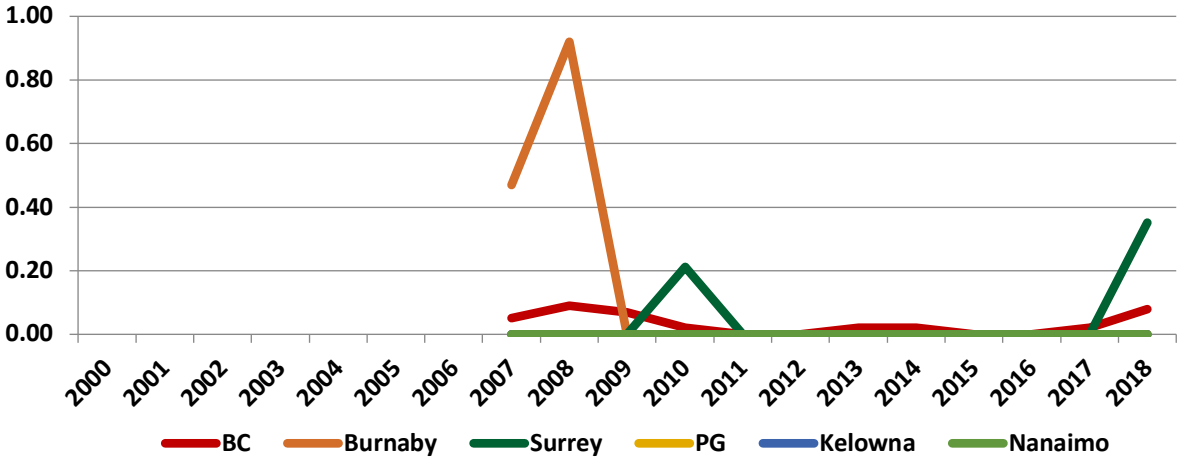


FIGURE 28: HEROIN PRODUCTION - RATE PER 100,000

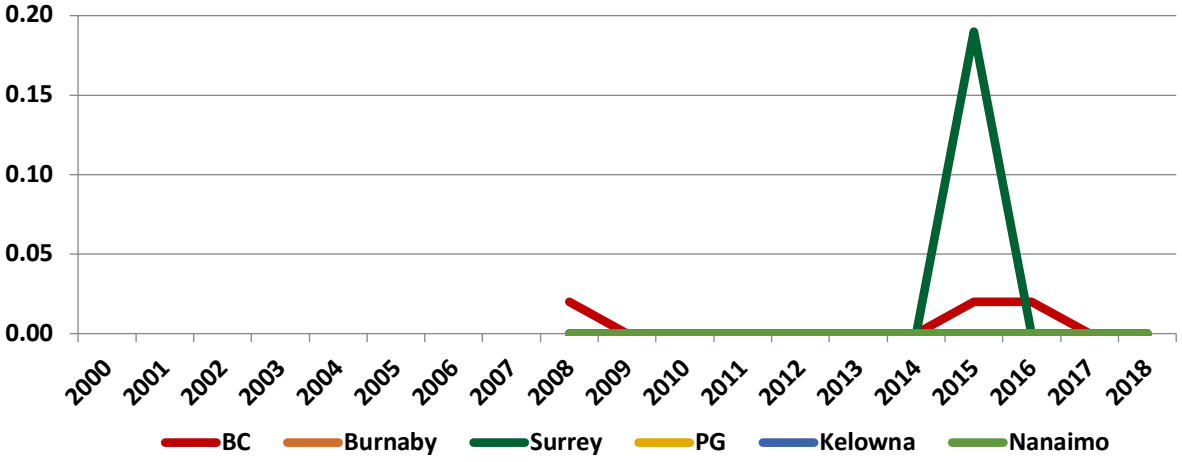


FIGURE 29: METHAMPHETAMINE

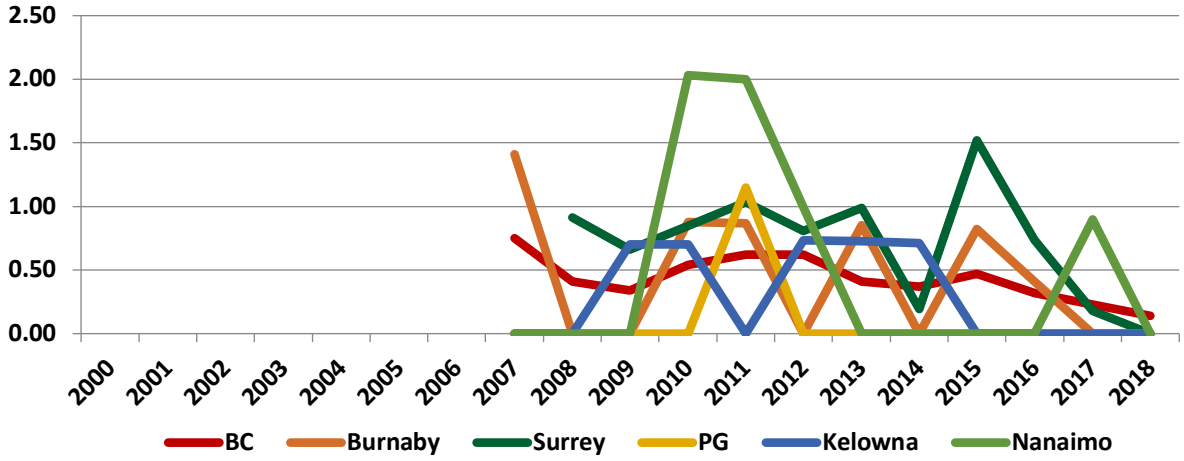


FIGURE 30: ECSTASY PRODUCTION - RATE PER 100,000

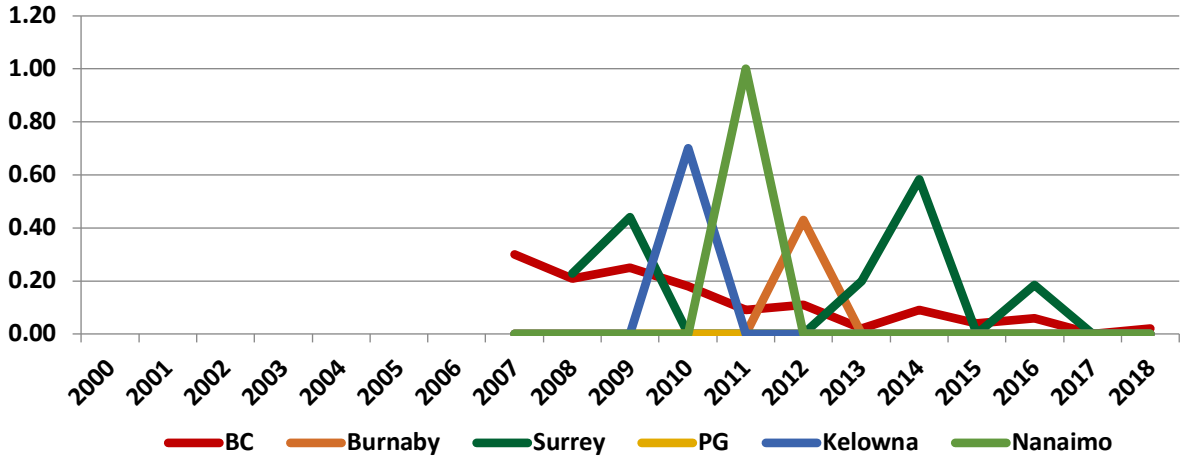


FIGURE 31: OTHER DRUGS PRODUCTION - RATE PER 100,000

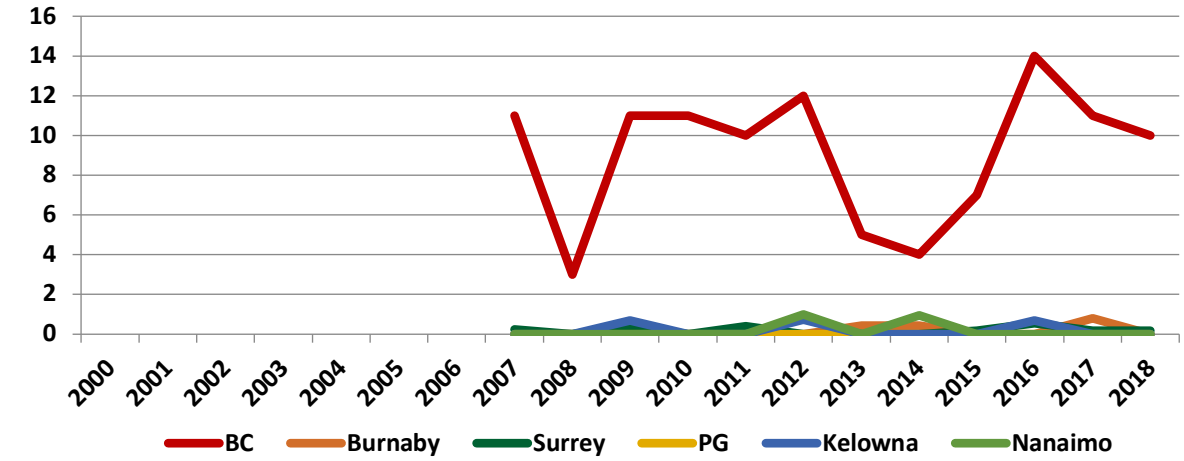
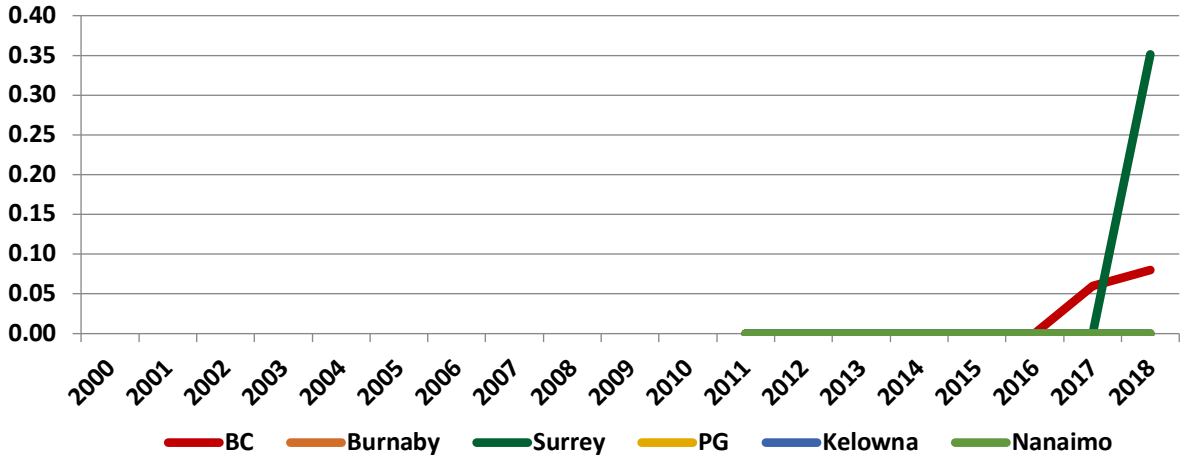


FIGURE 32: OTHER OPIOIDS PRODUCTION - RATE PER 100,000



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Population Data BC Stats, Ministry of Jobs, Trade and Technology, Province of British Columbia. Last updated February 2018.

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