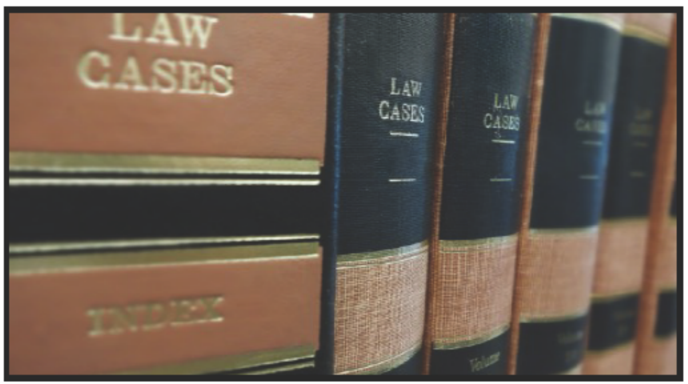
IN SERVICE: 10-8

A PEER READ PUBLICATION

IN SERVICE:10-8 IS OUT OF SERVICE: 10-7 — A FINAL THOUGHT —

By Mike Novakowski



After 21 years of writing **"In Service:10-8"** it now comes time to say goodbye (unless or until it gets a revival). Budget constraints. Need I say more!

I did, however, want to leave you — my law enforcement colleagues — with some thoughts about legal training in in policing. Having served as a police officer for more than 30 years, I understand what it is like to be standing on the doorstep of a home and having to decide whether to force entry or not. I have felt the tension with my sense of duty pulling me through the door yet my understanding of the *Charter* pushing me back. I didn't have a lot of time to review case law, seek legal counsel or speak with my colleagues before making my decision. I had to make a call and live with the outcome.

I also recall at one time calling a prosecutor about a case in which I testified. I wanted to know the outcome of the trial and whether there was anything I could have done better. The prosecutor, surprisingly, told me it shouldn't matter. As he put it, I was a disinterested witness who should not be attentive to the outcome. I told him I did have a vested interest in keeping my community safe and doing my job to the best of my knowledge and abilities. I could only think that if I had incorrectly applied the law, or failed to conform with proper procedure, I would continue to do so unless I was aware of any shortcomings. To this day, I encourage officers to follow-up with their cases and assess whether they need to change or improve for the future. Or, if they got it right, stay the course. **We must be careful what we practice, we might get good at it!**

I have been honoured to serve **10-8's** readers by, I hope, providing one small way to learn and digest the various nuggets of legal information arising from case law and thereby help the front-line officer with their on-the-street decision making. After all, not only can we learn from our own experience, but also from the experience of others as recounted and recorded in the case law.

Continued
Page 4

"[The witness] told this Tribunal that there is a magazine called 10-8 ... He testified that while this is not required reading, it is available to all police officers to access and keep themselves current on legal issues. It is significant to note that he told this tribunal that it is a publication that ... is intended to keep operational police officers updated on current case law."

BC Police Act Public Hearing - Submissions of Public Hearing Counsel - OPCC File: 2016-11766

Highlights In This Issue

Legal Issues In Policing Podcast	3
What's New For Police In The Library	33
Graduate Certificates In: Cybercrime Analysis, Intelligence Analysis, or Tactical Criminal Analysis.	35
Canada's Highest Court More Divided Than Previous Year	41
Mistake Of Law Renders Arrest Unlawful	46
s. 487/487.1 Search Warrants Executed By Day, Exceptionally By Night	50
Common Law Permits Modified Search of Home Incidental To Arrest	53
Evidence Admitted Despite Illegal Drug Dog Sniff	61
Undermining Legal Advice Breached s. 10(b) Charter: Statement Excluded	65
Plain View Drugs Justifies Arrest	69
Force Justified During Investigative Detention: Handgun Admitted	70
2022 BC Illicit Toxicity Deaths	85

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Legal Issues in Policing (LIIP) is the podcast blending the demands of the book with the rulings from the bench through the lens of the badge. Police Officers with a solid understanding of the law and their legal powers are more confident, competent and effective. Each and every episode will examine a legal issue in policing by reviewing current Canadian criminal case law from coast to coast to coast.

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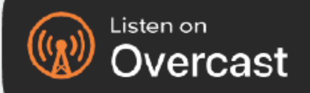

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> **"Just as ignorance of the law is no excuse for those who break the law, this same ignorance cannot be an excuse for those who enforce the law."**
> **R. v. Ouellette, 2012 ONCJ 528**

As of today, there are more than **2,200** active subscribers to the newsletter. And I know the reach of the newsletter goes beyond the subscriber list. I have been told it is forwarded on and posted internally on departmental websites. I know people read the newsletter because they care. They care about their communities and they care about their actions.

In 2017, a needs assessment of **Municipal Police Training In British Columbia** was conducted by the Municipal Chiefs of Police. The report's authors noted the following:

> **[M]ost municipal departments do not have a ready resource to provide updates on the law. A number of departments rely on [In Service: 10-8].** [p. 32]
>
> **The challenge posed by our changing law has yet to be addressed in the municipal policing world. The only source for changes to the law for most of the municipal police departments is [In Service: 10-8].** [p. 59]

This response has affirmed the newsletter's mission: a source of information devoted to keeping operational police officers case law current.

Anyone who has spent any time on the road knows just how difficult policing can be. Your uniforms may be different, but you all do the same job. That job entails making tough, sometimes life altering decisions, literally in a heartbeat. Do nothing? Detain or arrest? Search or don't search? Force entry or not? Shoot, don't shoot? These can be challenging decisions to make without the benefit of full argument and case law research on the matters you must decide. Add to this the reality that you will sometimes deal with people who can escalate from cooperative to assaultive in a nanosecond. This reality cannot be forgotten nor ignored.

Unlike some professions, where tough decisions can be debated, deliberated and even discarded, and then given a do-over, many of your decisions, not so much. The media, the public, oversight bodies and courts have days, weeks, and years to pick apart your decisions. You will often not have the luxury of waiting and synthesizing all of the information available to you. Many of your on-the-spot decisions must be made without the time needed for careful reflection.

Lately I have been pondering the amount of critical examination police officers are receiving these days. There is no doubt that police departments and individual officers are subject to intense scrutiny. The very nature of police work lends itself to complaints, lawsuits, media attention and courtroom critique of police investigations. This, in turn, leads me to police **legal training**. Although police officers do not "practice" law as that word has been used by the bar — providing legal services — perhaps no other profession actually "practices" or applies the law more often than policing. You apply and enforce it daily, in real time. It's where the rubber meets the road. No refresh, rewind or reset buttons. But you must be careful; **practice doesn't make perfect, it makes permanent.**

Without a solid understanding of the scope of police legal authority, officers can find themselves unknowingly exceeding their powers. A failure to appreciate and correctly apply the law can lead to serious consequences, including criminal and civil sanctions against officers, disciplinary action and the exclusion of evidence. Criminals — those factually guilty — can walk free and officers become frustrated by the process. In addition, failing to utilize the full breadth of police authority can often inhibit effective police investigation. Knowledge of case law is fundamental for all police officers. Without knowing what the courts have deemed as

acceptable police action, police decisions often become an uneducated guessing game. Police officers will do more than they have to or less than they are supposed to.

The Scrutiny

By now, there should be no doubt that policing is a highly scrutinized profession. Just turn on your local news. But this is to be expected and should be welcomed given the authority police officers wield in society. An officer's abuse of power or participation in illegal conduct will reflect poorly not only on them, but their home agency and the police profession as a whole. This will undermine public trust and delegitimize policing, making your job much more difficult.

Knowing the level of scrutiny you are under compels you to **prepare**, **train**, and **educate** yourself so when the light is shone your way there is **no there there**. When the day ends, and all the facts are known, there will be no substance or veracity to the criticism you may face.

In Canada, the police are subject to multiple layers of oversight, investigation and accountability. In BC, this includes the **Independent Investigations Office — IIO** (responsible for investigating incidents of on-and-off-duty police involved serious harm or death), the **Office of the Police Complaints Commissioner — OPCC** (responsible for overseeing and monitoring complaints concerning municipal police officers), **BC Police Services** (responsible for drafting and crafting standards, and conducting audits), **police boards** (responsible for studying and reporting on matters of local policing and crime prevention), **WorkSafeBC** (responsible for preventing workplace injury, illness or death), the **BC Coroners Office** (responsible for holding an inquest if a deceased was in the care or control of a peace officer) and the **BC Human Rights Tribunal — BCHRT** (responsible for accepting, screening, mediating, and adjudicating human rights complaints). RCMP officers are subject to

oversight by the **Civilian Review and Complaints Commission — CRCC** (responsible for public complaints concerning RCMP officers). In Ontario, the **Office of the Independent Review Director — OIPRD —** is a civilian oversight body that receives and manages all public complaints about municipal, regional and provincial police. Other provinces have their own oversight bodies.

The opportunity for accountability has never been so high because of the public visibility of police performance. Many encounters with police are recorded — e.g. security cameras, cellphone cameras, body cameras, and dashboard cameras. Any way you slice it, such intense examination and oversight can be very stressful on a police officer — wether or not there has been any impropriety.

Legal Training

Police action, the lawfulness of exercised authority, and legal training has never before been the subject of so much examination and criticism. Several reports and cases over the years have commented on the (in)adequacy of police legal training, criticized it and made recommendations.

In its 1994 report — **Closing the Gap: Policing and the Community** — the Commission for Inquiry recommended that **"the Law Enforcement Branch ... designate a source of legal information for police to use on a regular basis."**

"[The officer] did not understand her constitutional obligations. Despite being a police officer for 21 years, and despite serving 11 of those 21 years between the release of Suberu and her arrest of [the accused], she mistakenly believed that she need only inform [the accused] of his right to counsel as soon as it was practicable. She held a similar misconception about her implementational duties. And, even by her own misguided standards, she knew she would have some explaining to do about the delay between the arrest at 9:19 p.m. and the time at which she informed [the accused] of his rights at 9:28 p.m. It is utterly unacceptable that an officer with her level of experience, whom the public can reasonably expect to detain and arrest suspects with some regularity, does not know of her obligation to immediately inform a suspect of their rights. It is equally unacceptable that she does not know of her obligation to implement the suspect's rights at the first reasonably available opportunity.

... In my view, [the officer's] long-term failure to understand the obligations placed upon her by section 10(b) of the Charter places her conduct closer to the 'brazen disregard' end of the spectrum of seriousness. ...

Unfortunately, the breaches in this case does not stand in isolation. Police in this jurisdiction have, with some frequency, demonstrated an ignorance of the immediacy requirement. As a jurist, it is difficult to discern the pervasiveness of this misunderstanding across the police force. I would note, however, a number of decisions locally in which that misunderstanding has been identified. ... Similar observations have been made in other jurisdictions in the province The persistent appearance of this type of 'immediacy' breach in our jurisdiction and others in the province makes the breach more serious, in my opinion."

R. v. Foreman, 2022 ONCJ 214, references omitted, emphasis added, paras. 94-96

Training

Knowledge, competencies
professional development
teaching of vocational or prac
practical skills provides the b
- On-the-job training tak
- Off-the-job training aw

In its **Annual Report 1997-1998**, the Commission for Public Complaints Against the RCMP stated:

> **RCMP officers need to keep up to date on developments in criminal law, especially those that affect the use of police powers, acceptable methods of evidence gathering, and the right of accused persons. ... This shortcoming is not confined to junior officers of the Force; some supervisors have given unsound advice to police under their command because they failed to consider all relevant provisions of a law.**

In 2001, Dr. Radford, in his report — **Evaluation of the Training Provided by the Police Academy at the Justice Institute of British Columbia** — noted **"that more than 70% of the police officers interviewed made spontaneous reference to the need for regular and useful legal updates."**

In 2009, the Traffic Injury Research Foundation in its **National Survey of Crown and Defence Counsel on Impaired Driving** found the following:

> **More than half of prosecutors (58%) and defence counsel (56%) report that Charter issues are always or often a reason for acquittal... The Charter issues most frequently raised include: officers not having reasonable and probable grounds (RPG) for arrest, section 8 pertaining to search and seizure, section 9 involving the right not to be arbitrarily detained, and section 10(b) which is the right to retain and instruct counsel without delay.** [pgs. 70-71]

In ***R. v. Kelly*, 2010 NBCA 89** — a search warrant case — the New Brunswick Court of Appeal was critical of police in their lack of adherence to *Charter* standards:

> **[P]olice officers are not above the law and Canadians rightly expect and assume they will discharge their professional responsibilities with punctilious respect for the law. After all, the official motto of the RCMP is "maintiens le droit", not "the end justifies the mean".** [para. 1]

In 2010, the **BC Police Services Division** conducted a *Police Act* audit of a municipal police department (PSSG10-008). It found that **"a formal process does not exist to facilitate proactive review of all policies or to ensure that policies are regularly amended in response to legislative or case law developments."** It was recommended that the department **"create a policy review schedule to ensure that ... legislative reform and case law development are reviewed at least annually [including] a) arrest, detention and criminal investigation; and b) search and seizure."**

In its 2012 report — **Policing the Right to Protest: G20 Systemic Review Report** — Ontario's Office of the Independent Police Review Director stated:

> **Many police officers ignored the basic rights citizens have under the Canadian Charter of Rights and Freedoms and, by stopping and searching people arbitrarily, they overstepped their authority.** [p. vii]
>
> **Overall, the training provided regarding police powers to stop and search people and the rights of citizens when they are stopped by police was insufficient.** [p. 84]
>
> **[T]here was carelessness in terms of police officers' understanding of whether they were entitled to search people's backpacks or there was a disregard for people's rights during the week of G20.** [p. 90]
>
> **In their attempts to prevent unlawful activity, many police officers ignored the basic rights citizens have under the Charter and overstepped their authority when they stopped and searched them arbitrarily and without reasonable grounds in law.** [p. 92]

The Director made many recommendations including the following:

> **"Absent a law to the contrary, individuals are free to do as they please. By contrast, the police (and more broadly, the state) may act only to the extent that they are empowered to do so by law."**
> **R. v. Mann, 2004 SCC 52**

> **Officers should be provided with refresher training in the legal parameters of their authorities to stop and search protesters and the legal authorities to detain and arrest.** [p. 92]

In 2016, the CRCC noted in its interim report — **Chair-Initiated Complaint and Public Interest Investigation into the RCMP's Response to the 2013 Flood in High River, Alberta** — that **"RCMP supervisors failed to provide sufficient guidance to members in relation to the seizure of firearms and the scope of the members' authorities to search homes. The RCMP also failed to provide adequate supervision with respect to the duty of members pursuant to paragraph 489.1(1)(a) of the Criminal Code to report to a justice to show that they had reasonable grounds to undertake warrantless searches and seizures."** Findings made by the commission, and which the RCMP Commissioner agreed, included:

- **RCMP members were not authorized by the *Criminal Code* to seize secured firearms.**
- **RCMP supervisors failed to provide sufficient guidance to members involved in the seizure of firearms.**
- **In several cases the searches exceeded their authorized scope by expanding from a search for people or pets to a search for firearms or contraband.**
- **RCMP supervisors failed to provide sufficient guidance to members in relation to the scope of their authorities to search buildings.**
- **RCMP members failed to report to a justice to show that they had reasonable grounds to undertake warrantless seizures pursuant to paragraph 489.1(1)(a) of the *Criminal Code*.**
- **The RCMP failed to provide adequate supervision with respect to the duties of members pursuant to paragraph 489.1(1)(a) of the *Criminal Code*.**

In 2017, the CCRC noted in its final report — **Chair-person Initiated Complaint and Public Interest Investigation regarding Policing in Northern British Columbia** — that the RCMP National Headquarters and the RCMP in British Columbia considered stripping a subject down to their underwear would not amount to a strip search, which was not consistent with the Supreme Court of Canada's definition of a strip search in ***R. v. Golden*, 2001 SCC 83.** The Commission recommended the RCMP update its policy manual.

In its 2018 systemic review — **Broken Trust** — Ontario's Office of the Independent Police Review Director reported:

> **There were repeated failures to understand the legal rights of witnesses or suspects. This, of course, had the potential of undermining the admissibility of evidence in court proceedings.** [p. 158]

In its 2019 report — **Breaking the Golden Rule: A review of Strip Searches in Ontario** — Ontario's Office of the Independent Police Review Director commented:

> **The number and nature of unlawful strip searches conducted in this province tell us that a number of officers do not understand their legal obligations pertaining to strip searches, likely due in part to deficiencies in training, or have forgotten or ignored what they learned, likely due in part to a failure to refresh or reinforce their training in a timely and effective way.** [p. 133]
>
> **It was obvious that existing training is insufficient to ensure that officers comply with the law. ... Training on strip searches cannot be confined to front-line officers. Updated training for senior officers, especially those who authorize strip searches, is key to ensuring that only lawful strip searches occur.** [p. 139]

In 2019, the Honourable Michael H. Tulloch, in his **Report of the Independent Street Checks Review** noted:

> **Through a number of meetings with both frontline and more senior officers, it became apparent to me that many police officers are not confident in their knowledge and understanding of the lawful authorities granted to them or the proper scope of their police powers.** [p. 161]

In assessing police training, he had this to say:

> **From my perspective, training needs to be reinforced to be effective. There should be more refresher training generally on topics such as arrests, search and seizure, lawful authorities and community interactions. Police training in general must happen on a regular, periodic basis. ...** [p. 171]

In 2019, the **Halifax, Nova Scotia: Street Checks Report**, written for the Nova Scotia Human Rights Commission, recommended that police "**develop additional training modules that will improve officer adherence to the principles of procedural justice and ensure respect for civil rights during all civilian encounters.**"

In 2019, the results of a public hearing (**OPCC File PH18-02**) under BC's *Police Act* into the conduct of police officers engaged in an investigative detention was released. The adjudicator (retired Supreme Court Judge) wrote, **"some members have, as a matter of routine, ignored the need to have a reasonable belief that upon detention there is an actual concern for officer safety before conducting any search."** The adjudicator recommended that the Chief of Police remind his members **"of the state of the law in respect to 'pat-down' searches for officer safety."**

In ***R. v. Landry*, 2020 NBCA 72** — a s. 10(b) *Charter* case — the New Brunswick Court of Appeal found the police breached Mr. Landry's right to counsel on two occasions: (1) preventing him from accessing counsel at the scene of the arrest as a matter of usual practice **"despite the Supreme Court of Canada's explicit and well-known instructions ... dating back more than thirty-three years"**; and (2) reading him a *Prosper* warning, something the officer always did, whether or not an arrestee waived their right to counsel. In evaluating the admissibility of evidence under s. 24(2), the Court of Appeal had this to say about the officer's conduct:

> **[T]he police officer testified he acted in accordance with his usual practice, but there is no evidence he engaged in conduct he believed was required by law. I cannot conceive that the RCMP, with all its resources and means of communicating with its members, would not have alerted its members about how they should conduct themselves, especially in light of the fact that the expected conduct was established by Canada's highest court more than thirty years ago.** [para. 56]

In 2020, the CCRC for the RCMP concluded in its final report — **Review of the RCMP's Policies and Procedures Regarding Strip Searches:**

> **It has been nearly two decades since the Supreme Court of Canada outlawed the routine use of strip searches by police and provided a roadmap on how to conduct a lawful search. Despite the highly prescriptive ruling that has been incorporated into the RCMP's operational policy, the Commission's review revealed widespread non-compliance with policy and relevant jurisprudence.**

Just last month (April 2022), a Special Committee on Reforming the Police Act released a report — **Transforming Policing and Community Safety in British Columbia.** Committee members **"noted that there is not much ongoing police training, except for tactical training, and suggested that there should be training when new laws are introduced or updated to ensure officers are aware of the changes and understand why they are being made. They noted that ongoing professional development and training would help to increase trust in policing."**

Effective July 30, 2023, BC Provincial Policing **Standard 6.1.1 — Promoting Unbiased Policing** will come into effect. Part of this standard will require a Chief Constable, Chief Officer or Commissioner to ensure that:

Written procedures are examined annually to ensure consistency with legislative amendments and applicable case law related to right to equal treatment, protection and benefit under the law, including the Canadian Charter of Rights and Freedoms and the obligations of police, related to:

(a) informing persons of the reason for their arrest or detention;

(b) informing a detained or arrested person of their right to counsel and providing that person with access to the same;

(c) detaining a person;

(d) obtaining confessions and admissions from a person; and

(e) gathering of evidence, including search and seizure.

It will take some energy on police agencies to stay case law current. This might seem like an easy task but its not. Ensuring consistency with legislative amendments and applicable case law will take a determined effort.

The Jeopardy

As noted, failing to appreciate and correctly apply the law can lead to serious consequences, including discipline, criminal charges and lawsuits, let alone public condemnation for police decisions.

For example, in ***Vancouver (City) v. Ward*, 2010 SCC 27** the Supreme Court of Canada recognized that s. 24(1) of the *Charter* included a remedy of constitutional damages for a breach of a person's *Charter* rights, distinct from an action in tort law. In holding that awarding damages for *Charter* violations may serve to deter future breaches by the police, a unanimous Supreme Court (9:0) stated:

> **Deterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution. … [D]eterrence as an object of Charter damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the Charter in the future.** [para. 29]

The Court went on to uphold a $5,000 damage award for an unreasonable strip search, which was found to be serious police misconduct. In doing so, it commented on the expectation of the police in understanding the law:

> **<u>[W]ithout asking officers to be conversant with the details of court rulings, it is not too much to expect that police would be familiar with the settled law</u> that routine strip searches are inappropriate where the individual is being held for a short time in police cells, is not mingling with the general prison population, and where the police have no legitimate concerns that the individual is concealing weapons that could be used to harm themselves or others.** [emphasis added, para. 65]

In a 2021 Notice of Discipline Authority's Decision under BC's *Police Act* (**OPCC File 2020-18195**), a Discipline Authority (retired Provincial Court Judge) commented that several police officers had **"a common belief that a 'search incidental to arrest' was authorized as a matter of course anytime there had been a lawful arrest."** After reviewing the facts of the internal investigation, the Discipline Authority concluded,**"the search exceeded the limits the courts have imposed on the common law right to conduct a search incidental to arrest and that there were no valid grounds for the search of this vehicle."**

Earlier this year (2022), the Reasons for a Discipline Proceeding Decision (**OPCC File 2020-17317**) was released. It examined the conduct of police officers involved in the arrest of an Indigenous man and his granddaughter. In finding the officers simply decided, on insufficient grounds, to hastily arrest as the next step in their investigation, the Discipline Authority (retired Provincial Court Judge) noted:

> **An arrest … is not, and should never be, a perfunctory action taken by police. The essence of an arrest is the deprivation of a citizen's freedom by force. Clearly it is easier for police to deal with anyone suspected of a crime if under arrest and handcuffed. However, it is not the law that any suspicion of criminal activity provides officers with the authority to summarily end a person's freedom through an arrest.**

> **The arrest process should never be routine or take place by rote to accommodate an evolving investigation. … [O]fficers are required to assess the totality of the circumstances that they encounter, assess those circumstances having regard to their training, and only move to an arrest if articulable reasonable and probable grounds for arrest have been established.** [para. 183]

In ***R. v. Doucette,* 2012 PESC 26** a police officer detained a man for investigation by pushing him against a police car and forcing him into its back seat where he was held for eight to ten minutes. A PEI Provincial Court judge **convicted the officer of assault and unlawful confinement**. The judge found the officer lacked the lawful authority to detain the man and confine him in the back seat of the police car. Therefore, s. 25(1) of the *Criminal Code* provided no protection. This guilty finding was upheld by PEI's Supreme Court. The superior court judge agreed the detention was not only unlawful, but any officer safety concern was a ruse. **"The police have a duty to investigate, but that does not empower them to trample on the individual liberties in so doing,"** said the superior court judge. **"Police do not enjoy a general power to detain individuals for the purpose of ferreting out possible criminal activity. Police must not conduct an investigative detention in order to determine whether a person is up to no good."**

In ***Elmardy v. Toronto Police Services Board et al.*, 2015 ONSC 2952**, the plaintiff — a black man — sued the Police Services Board and a named individual officer for battery, unlawful arrest, and various *Charter* violations — ss. 8, 9, 10(a) and 10(b). The trial judge found the officer **"took the law into his own hands and administered some street justice"** when he unlawfully detained the plaintiff, punched him twice in the face, emptied his pockets and left him lying in the cold for 20 to 25 minutes while handcuffed. Section 25(1) of the *Criminal Code* did not apply because the officer was acting unlawfully and outside the proper scope of executing his duties. Although the trial judge dismissed a racial profiling claim, the judge awarded the plaintiff general damages of $9,000 — $5,000 for battery and $4,000 for s. 8, 9 and 10 *Charter* breaches — and punitive damages of $18,000. Costs for the action were also awarded to the plaintiff in the amount of $60,000.

On appeal by the plaintiff, an Ontario Divisional Court comprised of three judges concluded the police were involved in racial profiling, thus also breaching s. 15 of the *Charter* (**2017 ONCA 2074**). **"The only reasonable inference to be drawn from the fact that both officers, without any reasonable basis, suspected the [plaintiff] of criminal behaviour is that their views of the [plaintiff] were coloured by the fact that he was black and by their unconscious or conscious beliefs that black men have a propensity for criminal behaviour,"** said the Divisional Court. **"This is the essence of racial profiling."** Although the award of $5,000 for battery remained unchanged, the Divisional Court increased the damages arising from the constitutional violations from $4,000 to $50,000 and punitive damages from $18,000 to $25,000. An additional $20,141 in appeal costs was awarded.

These are but a few examples of the types of sanctions officers and police departments or police boards might face.

The Expectation

It is axiomatic to say that police training is important. The Supreme Court of Canada has commented on the importance of police knowing the law:

> **In Canada, every person has the right to expect that the authorities will comply with the Charter.** [*R. v. Harrer*, [1995] 3 SCR 562 at para. 50]

> **The Charter requires that agents of the state act in accordance with the rule of law.** [*R. v. Caslake*, [1998] 1 SCR 51 at para. 27]

> **While police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to know what the law is.** [*R. v. Grant*, 2009 SCC 32 at para. 133]

"The only thing black and white about this job is the car."
Officer Pete Malloy, Adam-12

> **In a free and democratic society, police officers may interfere with the exercise of individual freedoms only to the extent provided for by law. Every person can therefore legitimately expect that police officers who deal with him or her will comply with the law in force.** [*Kosoian v. Société de transport de Montréal*, 2019 SCC 59 at para. 6]

> **Canadians rightly expect the police to follow the law, which requires the police to know the law.** [*R. v. Tim*, 2022 SCC 12 at para. 30]

Provincial appellate courts have echoed these sentiments:

> **The Charter reflects the principle underlying criminal justice in Canada: when it comes to criminal proceedings and the imposition of the state's coercive powers, it is obligatory that the police follow procedures mandated by law and not impose rules of their own making that are directed to concerns that are irrelevant to the case at hand.** [*R. v. Flintoff*, 1998 CanLII 632 (ON CA) at para. 33]

> **Police officers are expected to know and follow duties imposed on them by the Criminal Code.** [*R. v. Bohn*, 2000 BCCA 239 at para. 43]

> **It is a truism that the police have a duty to know the law and to follow it.** [*R. v. Schedel*, 2003 BCCA 364 at para. 77]

Key to knowing and understanding the law (and thereby following it) is **training**. In ***R. v. Clayton*, 2007 SCC 32** — a detention and search case — Justice Abella for the majority stated, **"there is no doubt that police training is important,"** while Justice Binnie in a concurring opinion said, **"police training is critical to the successful utilization of their common law powers of detention and search."** In ***R. v. Grant*, 2009 SCC 32** — another detention and search case — the Supreme Court noted that **"clear guidance on the rules governing such encounters is, or ought to be, an important part of police training."**

In ***R. v. G.T.D.*, 2018 SCC 7,** a majority of Canada's highest court agreed with an Alberta Court of Appeal dissenting justice's opinion that the police service failed in its obligation (1) to consider whether their practices had kept pace with developments in *Charter* jurisprudence and (2) in training their officers. In this case, the standard *Charter* caution included asking a single, concluding question. This question elicited a potentially incriminating statement from a detainee despite s. 10(b) police duties made well-known over two decades before obliging the police to "hold off" questioning after a person asserted a desire to speak with a lawyer. The officer's reasonable reliance on his training was not enough to save the evidence obtained from exclusion.

"The arresting officer's good faith does not significantly mitigate the seriousness of a *Charter* breach if his good faith misunderstanding of the law was a result of [the department's] training or policy that did not properly educate the officer about his obligations under the Charter," said the Alberta Court of Appeal dissenter. **"Instead, such an institutional or systemic Charter breach is more serious than an isolated incident."** The accused's incriminating statement made in response to the question asked, which followed the police caution, was excluded. The accused's conviction for sexual assault was vacated and a new trial was ordered.

In ***Kosoian v. Société de transport de Montréal*, 2019 SCC 59** — a civil case — a full Supreme Court (9:0) held, **"the expectations that exist for police officers remain high. Where there is uncertainty about the law in force, it is incumbent on them to make the inquiries that are reasonable in the circumstances, for example by suspending their activities in order to consult with a prosecutor or by rereading the relevant provisions and the available documentation."** The Supreme Court concluded that not only did the police agency at the centre of this case have an obligation to ensure that the training it provided would be appropriate and reflect the law, there was an **"obligation of police officers to acquire**

> **"It is disturbing that it appears a number of officers from one of Canada's largest municipal police services are unaware of their search powers."**
> **R. v. Bacchus, 2012 ONSC 5082**

knowledge of the law and to keep that knowledge up to date."

But just how long do the police have to comply with changing legal precedent? It all depends. In ***R. v. Brydges*, [1990] 1 S.C.R. 190** the Supreme Court found that s. 10(b) of the *Charter* required the police to advise a detainee of the existence and availability of legal aid and duty counsel yet provided a 30-day transitional period to give the police time to take the steps necessary to implement its decision. In ***R. v. Reddy*, 2010 BCCA 11**, the BC Court of Appeal found 11 months was ample time for police officers to bring their investigative-detention practices into conformity with the dictates of ***R. v. Mann,* 2004 SCC 52.** Thus, when the officer unlawfully detained Mr. Reddy and subsequently found two loaded handguns, the officer was not acting in good faith because **"he either knew, or ought to have known, that he did not have the power (a) to detain someone for investigation on a bare suspicion that that person might be in breach of a condition of a probation order, or (b) to conduct a search incidental to an investigative detention that is unconnected to any safety concerns."** The two handguns were excluded as evidence and Mr. Reddy's convictions were overturned.

In ***R. v. Crevier*, [2010] O.J. No. 5889**, a police sergeant failed to provide a s. 10(b) *Charter* advisement upon detaining the accused. In assessing the serious of misconduct, the judge said this:

> **... I am particularly troubled that a sergeant ..., an officer with 30 years experience, an officer who is in charge of guiding and supporting other officers and providing advice to constables, an officer who works in general uniform patrol on the streets ..., is not aware that an accused's right to counsel are engaged on detention. This is particularly troubling given that the officer said he was unaware of the need to advise detained individuals of right to counsel.**
>
> **This comes 15 months after the Supreme Court of Canada has clearly decided the issue. ...**
>
> **If this was one month later, if this was two months later, I would not be as troubled, but this is 15 months later and shows, in my view, a lack of systematic education of officers in positions such as [the sergeant]. In this case the sergeant said he had no training on this aspect of the law since these important decisions. ...** [emphasis added, paras. 43-45]

However, courts have been reluctant to provide any sort of bright line rule about how much time it should take for the police to implement changes in the law. In one case — ***R. v. Kokesch*, [1990] 3 SCR 3,** — the Supreme Court of Canada acknowledged this issue but declined to address it. Justice Sopinka noted, **"the question of the length of time after a judgment that ought to be permitted to pass before knowledge of its content is attributed to the police for the purposes of assessing good faith is an interesting one,"** but rejected **"imposing upon the police a burden of instant interpretation of court decisions"** because the issue did not arise on the facts of the case.

Nevertheless, at the risk of breaching *Charter* rights and relying on s. 24(2) to possibly save evidence from exclusion, it would benefit all in minimizing any delay in implementing changing *Charter* jurisprudence. But again, this takes effort.

The Challenge

My point in stating all of the forgoing is not to depress, but impress. Impress upon all law enforcement officers the importance of knowing, studying, and understanding the law. This requires a career long learning process. However, this will be no easy task. Even judges have been found to be in error by appellate courts when applying the law. And these decisions are made from the comfort of a courtroom or office with opportunity

for time outs (adjournments), reflection, and oral and written argument, luxuries an officer cannot afford.

One only need to look at the Supreme Court of Canada itself. According to its most recent statistics for **2021**, the court could not agree in their judgments in more than 50% of the cases, a trend that has been consistent over the last four years. In fact, the Court rendered a split decision in **54%** of its 2021 cases. When I stop and think of these statistics I cannot overlook the fact that the justices take, on average, 4.2 months to render an opinion from the time they hear the matter. Moreover, they have up to nine people to draft a decision and a host of law clerks to help them craft it.

You, on the other hand, may only have a moments notice to make a decision by yourself. Yet you will be held to a very high standard. Although the courts, they claim, will not hold you to perfection, it does seem, at times, that the standard to which you will be held is impossibly high.

For example, in this issue, the case of ***R. v. Stairs*, 2022 SCC 12** is highlighted. Briefly, the police conducted a warrantless entry of a home following a 9-1-1 report of a male striking a female. When the officers located the suspect in a basement laundry room and arrested him for assault, they conducted a visual clearing search — a protective sweep — of an adjacent living room area. They noticed methamphetamine in plain view and Mr. Stairs was charged accordingly. At trial, the judge found the police acted properly, having searched the living room as an incident to arrest under the common law. There were no *Charter* violations. Mr. Stairs was sentenced to 26 months in jail following convictions for PPT methamphetamine, assault and breach of probation.

On appeal to Ontario's top court, a two judge majority agreed with the trial judge, but a dissenting judge found the police committed a serious *Charter* breach. The dissenting judge said **"the officers knew, or ought to have known, that they were not entitled to conduct a search without judicial authorization, especially within the private residence of an individual."** He continued:

> **[The officers] had to know that they were treading on dangerous ground by deciding to wander through another portion of the residence to look around, and yet that is what the one officer chose to do, and for no legally permissible reason. In my view, that is serious misconduct by the officer. It is difficult to accept that the officer acted in good faith when he proceeded to conduct a search, within a private residence, in violation of the well-established principles regarding such searches and the equally well-established high degree of privacy that exists in any person's private residence.** [*R. v. Stairs*, 2020 ONCA 678, emphasis added, at para. 99]

How is it even possible the police knew, or ought to have known, they were acting unlawfully, when they were in fact acting lawfully — at least according to the majority, the opinion that actually matters? Canadians courts do not require unanimity for a decision to be considered binding. At best, the majority's decision should have been acknowledged by the dissent in assessing good faith. After all, up until this point three judges found police action lawful.

Then, on appeal to the Supreme Court of Canada, a five judge majority agreed the police acted lawfully even after the Court itself modified the law on search incident to arrest inside a home. **That's good (or lucky) police work when an officer fortuitously complied with a legal framework that didn't even exist at the time they acted!** Ironically, a three member dissent, like the lone dissenting judge at the Ontario Court of Appeal, concluded the police breached the *Charter*. They too would have placed the police misconduct at the higher end of the seriousness spectrum, excluded the methamphetamine evidence, and entered an acquittal on the PPT charge.

> **"I find that the officer's lack of basic knowledge about the [approved screening] device combined with his ignorance of the law regarding its use resulted in a serious breach that requires exclusion of the evidence, notwithstanding its reliable nature. Public confidence in the administration of justice is undermined if officers do not know the law and use of devices that serve as a basis for arrest."**
> **R. v. Costa, 2010 ONCJ 171**

Justice Côté provided a third opinion. Although he agreed the police infringed s. 8, he acknowledged the predicament police officers may find themselves in when acting in a dynamic situation. **"Disagreement among the members of this Court and those of the Court of Appeal on the proper standard for and permissible scope of post-arrest residential safety searches illustrates the legal grey area in which police were operating,"** he said. **"If a dozen distinguished jurists cannot agree on the applicable law, how can we expect these officers to have understood and properly applied it on the fly?"** Adding the numbers accordingly, of the 13 judges to touch this case eight found the police acted lawfully while five did not. **Just how well-established were these "well-established principles"** such that the police knew or ought to have known they were acting unlawfully? More than 60% of the judges addressing the matter found the police acted lawfully!

Similarly, in ***R. v. Paterson***, 2017 SCC 15, a five member majority of the Supreme Court found the s. 8 *Charter*-infringing conduct by police in entering an apartment without a warrant serious enough to justify excluding evidence, including cocaine, methamphetamine, ecstasy, marihuana, oxycodone, four loaded handguns, more than $30,000 cash and a bulletproof vest. The majority held the police were **"not operating in unknown legal territory … in light of the well-established legal principles governing the authority of police to enter a residence without a warrant".** Mr. Paterson's nine convictions for drugs and weapons offences were overturned and acquittals were entered.

Justice Moldaver, speaking for himself and another judge, agreed with the majority that the police acted contrary to s. 8 but found they acted in **good faith**. He opined, in assessing the good faith of the police, that the decisions of the lower courts, who are apparently well versed in settled law, failed themselves to apply the law properly. In this case, a trial judge and three BC Court of Appeal judges found the police acted lawfully. Justice Moldaver noted that the police made a mistake — the same mistake the four judge's below had made. Court hierarchy aside, six judges in total found the police entry and search complied with *Charter* standards while five didn't. **Again, just how well defined was this "legal territory" and these "well-established legal principles"?**

In ***R. v. Omar*, 2018 ONCA 975** — an investigative detention case — a two member majority of the Ontario Court of Appeal, in rejecting a trial judge's finding of good faith, held **"the police should have known that they were exceeding their powers in detaining"** Mr. Omar because, following an earlier Supreme Court decision with similar facts (***R. v. Grant*, 2009 SCC 32**), **"it should have been apparent to a properly trained and legally informed police officer that the [accused] was detained without lawful justification."** The majority found, **"*Grant* gave the officers everything they needed to make a reasoned assessment"** and **"notice that as the law of detention was clarified, they were expected to act accordingly."** The majority excluded the handgun and cocaine found on Mr. Omar and acquittals were entered.

A dissenting judge took a different approach. In his view, *Grant* did not bring practical, on-the-street clarity of when a psychological detention occurs to which police officers could look in order to guide their actions. **"Although [Grant's] after-the-fact, 13-factor 'contextual' analysis to determine whether a person is detained psychologically constitutes an established legal standard, it hardly offers certain, real-time guidance to police officers about where the line**

demarking a psychological detention begins," said Justice Brown. Not surprisingly, when Crown appealed to the Supreme Court it too was split (4:3). In allowing the Crown's appeal and restoring Mr. Omar's convictions, four judges agreed substantially with Justice Brown's reasoning, while three judges would have upheld his acquittals. **Once again, just how well defined was the legal framework for detention when the courts were split on the clarity earlier precedent offered?**

Finally, one need not go any further than the drug sniffing dog cases to see how difficult it can be for judges, let alone officers, to apply the law to the facts. In ***R. v. Kang-Brown, 2008 SCC 18***, the Supreme Court of Canada for the first time looked at whether the use of a drug sniffing dog was a *Charter* **"search"**, the standard required to utilize one, and whether the standard was met in this case. A drug-sniffing dog hit on Mr. Kang-Brown's bag at a bus terminal resulting in his arrest. When his bag was manually searched incident to arrest, police found 17 ounces of cocaine. A small amount of heroin was also located in his pocket.

Nine judges heard the case and all agreed that the use of a drug dog — at a bus terminal — to sniff a person's bag was a **"search"** for constitutional purposes. Thus, when the police used the drug sniffing dog, s. 8 of the *Charter* was triggered. Unanimity! A police dog sniff of a bag in which a person has a reasonable expectation of privacy is a "search".

Next, the Supreme Court had to decide what the standard would be for the police to deploy the dog and yet comply with the *Charter*. This is where things got interesting. Four judges said **reasonable and probable grounds** was the standard but it had not been reached. For some observers this made little sense. If the police needed reasonable and probable grounds to believe contraband was present in the bag to use a sniffer dog, the dog's use would be superfluous and unnecessary. Instead of using the dog, the police could get a search warrant, or arrest the accused and search the bag incidental to the arrest. The confirmatory evidence from the dog deployment wouldn't be required for police to manually search the bag. Since the standard of reasonable and probable grounds had not been met, the four judges would exclude the evidence and thereby acquit Mr. Kang-Brown.

Four other judges concluded that the requisite standard for the sniff was individualized

"[U]nfamiliarity with the law, or a misunderstanding of the law, cannot be equated with good faith. While the law of detention and the police powers ancillary to it can be sometimes complex and subtle, officers are expected to know the law and apply it correctly. They did not do that here and what resulted were a constellation of Charter breaches that had a domino effect."
R. v. Moulton, 2015 ONSC 1047

> **"Good faith cannot be claimed if the Charter breach arises from a police officer's negligence, unreasonable error, ignorance as to the scope of their authority, or ignorance of Charter standards."**
> **R. v. Tim, 2022 SCC 12**

reasonable suspicion. This lower standard sufficed because dog sniffs are targeted, reliable and minimally intrusive. A specially trained dog sniffs the outside of the bag only for select drugs. But two of these four judges held the police did not meet the reasonable suspicion standard. Since the sniff search was conducted without reasonable suspicion, the dog hit provided no valid grounds for arrest. These two judges would have excluded the evidence and set aside Mr. Kang-Brown's conviction. The other two judges found the police did have a reasonable suspicion drugs would be discovered, thus using the police dog to sniff (search) the bag was justified. Since there was no *Charter* breach with the sniff, the dog hit provided the necessary grounds for arrest and the search of Mr. Kang-Brown's bag incident to arrest was lawful. Hence, there was no reason to consider exclusion under s. 24(2). The evidence was admissible and Mr. Kang-Brown's conviction was valid.

The ninth judge suggested, rather than the police needing a reasonable suspicion related to a particular individual to justify a sniff search of their bag, it may be enough for the police to have a reasonable suspicion related to a particular area (i.e. the bus terminal). This he would call a **"generalized suspicion"**. However, it was unnecessary to use the lower generalized suspicion standard because the police met the higher individualized suspicion standard anyway. Thus the search did not infringe s. 8. This ninth judge would admit the evidence.

Despite four separate opinions being authored by the Supreme Court judges, at the end of the day, Mr. Kang-Brown's conviction for possessing a controlled substance for the purpose of trafficking was set aside. But, doing the math, it became clear that getting to this outcome required some mental gymnastics even though all nine judges agreed the sniff was a search. The four judges requiring reasonable and probable grounds and the two judges requiring reasonable suspicion, but finding it had not been reached, would exclude the evidence. This meant a total of six judges would toss the drugs. Without the drugs there would be no basis for a conviction. The other three judges finding reasonable suspicion had been satisfied — the controlling standard — concluded no *Charter* breaches occurred and therefore the evidence should be admitted. (See decision grid below).

Decision Grid: R. v. Kang-Brown, 2008 SCC 18

Judge/ Question	LeBel	Fish	Abella	Charron	Binnie	McLachlin	Deschamps	Rothstein	Bastarache
s. 8 search?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Standard required?	RPG	RPG	RPG	RPG	RS	RS	RS	RS	RS (maybe GS)
Standard met?	No	No	No	No	No	No	Yes	Yes	Yes
Charter breach?	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No
Evidence excluded	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No

RPG = Reasonable and Probable Grounds | RS = Reasonable Suspicion | GS = Generalized Suspicion

Other cases involving drug sniffing police dogs, like ***R. v. Chehill*, 2013 SCC 49** and ***R. v. MacKenzie*, 2013 SCC 50**, underscore the challenge in applying legal standards to the facts on the ground. ***Chehill*** — the sniff of a passenger's luggage at an airport — and ***MacKenzie*** — the sniff of a vehicle stopped by police for a traffic infraction — also tackled the reasonable suspicion standard used to justify the deployment of a drug sniffing dog. A full Supreme Court — all nine justices — sat on these companion cases. And, although the Supreme Court had, half a decade earlier, made the rules in ***Kang-Brown***, it unanimously (9:0) concluded reasonable suspicion had been met in one case yet was divided (5:4) in the other.

In ***Chehill***, all nine judges concluded the totality of the circumstances known to police — including the specific characteristics of the accused, the contextual factors, and the offence suspected — were sufficient to reach the threshold of reasonable suspicion. Mr. Chehill was travelling alone, on an overnight one-way flight from Vancouver to Halifax on a less expensive airline, which drug couriers apparently prefer. He was also the last passenger to purchase a ticket for this flight, paid for his ticket with cash, and only checked one piece of luggage. Officers testified that this constellation of factors had been noted in their training, seen by them before in other investigations, and knew it was common to drug couriers. The positive indication by the dog, in combination with the reasonable suspicion that led to its use, then raised the reasonable suspicion standard to the level of reasonable grounds for arrest. The police were then entitled to physically search Mr. Chehill's luggage incident to the arrest. The search was reasonable.

In ***MacKenzie***, the Supreme Court was split by a 5:4 margin on the application of the reasonable suspicion standard to the facts of the case, even though they heard the same oral arguments, and had access to the same factums and lower court decisions. Five judges found the combination of factors cited by the investigating officer — erratic driving, extreme nervousness, physical signs consistent with marihuana use, and travel on a known drug pipeline — along with his training and experience provided reasonable suspicion that Mr. MacKenzie was involved in a drug-related offence. This justified the detention and the deployment of a drug sniffing dog. After the dog's hit, in combination with the totality of the circumstances proceeding it, the police had reasonable grounds to arrest and search Mr. MacKenzie's vehicle incidental to it.

Four judges, disagreed with this analysis. They concluded, **"when viewed collectively, the factors do not support a finding that the police had objective grounds for reasonable suspicion when they conducted the warrantless dog-sniff search of the [accused's] vehicle."** In their view, the search violated Mr. MacKenzie's s. 8 *Charter* rights and the officer's *Charter*-infringing conduct was categorized as serious and deliberate, even though they recognized that the law on dog sniffs was in **"a state of flux"** at the time of the traffic stop (2006). They would have excluded the evidence.

One thing is clear, reasonableness is in the eye of the beholder. What may be reasonable to one judge may not be reasonable to another. The same applies to cops.

Many examples of split decisions found at the appellate court level show that even judges, steeped in the law and acting, presumably, with the utmost of good faith, can have differing opinions on the legal issues. How is it that a body such as the Supreme Court can make the rules but so often disagree on their application to a particular set of facts? If even the "experts" can't agree, for example, on whether the reasonable grounds standard had been met to conduct an investigative detention or arrest, or to deploy a drug sniffing dog, how easy can it be for a police officer to get it right all of the time? And when a court is split on whether the police acted lawfully, how is it that a dissenting judge can say the police knew or ought to have known the law when the majority of their colleagues did not? How can some judges hearing a case find no misconduct by police yet other judges hearing the same case find misconduct, and serious misconduct at that?

Of course, foundational to examining police decision making is the concept that an officer's actions must be viewed from the officer's point of view without the benefit of hindsight. It is far too

> **"The state of the police officer's knowledge of the right breached is relevant to the seriousness of a violation. An officer, who violates a Charter right while knowing better, commits a flagrant breach. For those officers who do not know of the relevant right, the reason they do not know can properly influence where on the good faith/bad faith continuum the Charter breach might fall."**
> **R. v. Adler, 2020 ONCA 246**

easy for judges, or anyone else for that matter, to muse on how a police officer could have handled a situation better from the comfort of a courtroom or their chambers. But is some cases that is exactly what happens. And, of course, those reviewing your actions have knowledge of the "ending" to your event. Something you don't have as you're going through it. They can consider your conduct through the rear view mirror while you look through the windshield, dealing the with chaos ahead and without knowing what's lurking around the corner. Many people tend to judge an officer's actions through this type of Monday morning quarterbacking, a practice the Supreme Court rejected in *R. v. Cornell,* 2020 SCC 31.

Some courts recognize the difficulty a police officer will find themselves in when making a decision. For example, in ***Allen v. Alberta (Law Enforcement Review Board)*, 2013 ABCA 187** — a police discipline case — Alberta's top court overturned a finding made by a Presiding Officer of unlawful or unnecessary exercise of authority. In holding that a *Charter* breach was not *ipso facto* — by the very fact or act — a disciplinary offence, the Court of Appeal stated:

> **[S]ome element of common sense is required in assessing the conduct of police officers. ... The "parameters set by prevailing court decisions" tend to be somewhat abstract and theoretical. They are generally set in hindsight in the context of a known factual situation. How those abstract "parameters" apply to particular situations encountered by police officers is not always obvious, even to judges. The very word "parameters" implies that there is a range of examples, with some lack of clarity at the margins.**
>
> **One must also be sensitive to the fact that police officers often have to make quick decisions without the ability to resort to legal advice or legal research. A police officer in an alley behind a hotel, dealing with a defiant suspect, cannot be expected to hold a hearing, or sit down and do a careful analysis of the case law after consulting his law reports. It is not helpful to say that just because, with hindsight and after the careful argument of counsel, a court or tribunal is able to determine that there was a Charter breach based on "parameters set by prevailing court decisions", that the arresting officer has engaged in disciplinary misconduct.**
> [references omitted, paras. 35-36]

Police officers cannot sit on the sidelines. They have duty to act. They run towards the danger, not away from it. But they are not superhuman. They bleed too.

Good Faith

This brings me to good faith and the determination of the **"seriousness of Charter-infringing police conduct"**, one of the three lines of inquiry considered in the s. 24(2) analysis. The impact of the breaches on the accused's *Charter*-protected interests and society's interest in the adjudication of the case on its merits are the other two factors.

Under s. 24(2), a court is required to exclude evidence obtained in a manner that infringed the *Charter* if its admission would bring the administration of justice into disrepute. As a majority of the BC Court of Appeal stated in ***R. v. Reilly*, 2020 BCCA 369 aff'd 2021 SCC 38**, **"this constitutional requirement serves to keep police conduct within the reasonable boundaries expected in our free and democratic society and**

preserves the public respect for the administration of justice.” In ***Reilly***, the police, while investigating two armed robberies, committed three s. 8 *Charter* breaches by unlawfully: (1) entering Mr. Reilly’s home through an insecure patio door, (2) entering his bedroom to arrest him, and (3) conducting a clearing search of the home following the arrest. All of these searches were done without a warrant. The majority excluded the evidence, quashed six robbery and firearm related convictions, and ordered a new trial. In finding the police misconduct fell at the very serious end of the culpability scale, the majority found the seriousness of the *Charter*-infringing conduct was aggravated by the failure of the police to turn their minds to obtaining a *Feeney* warrant:

> **The violations were flagrant. Since 1997 when the Supreme Court of Canada released its decision in Feeney, police officers have required what has come to be known as a “Feeney warrant” in order to enter a dwelling-house to make an arrest.** [para. 126]
>
> **In summary, the relevant law regarding warrantless entries into a residence has been clear for over 20 years. The police knew, or ought to have known, that they could not enter a residence without a warrant to effect an arrest (absent exigent circumstances, which did not exist here). To do so constituted a serious violation of the [accused’s] s. 8 Charter rights … .**
>
> **It is disturbing the police did not discuss the well-known requirement of a Feeney warrant at their pre-arrest meeting. It is obviously more disturbing that they entered the [accused’s] residence to effect a warrantless arrest in violation of Feeney as codified in the Criminal Code. Nor is it reassuring that as the judge noted, [the officer] testified, “he would not do anything differently under similar circumstances” … The nature and circumstances of the Charter violations place them at the serious end of the spectrum and pull towards exclusion of the evidence.** [paras. 133-134]

Good faith can attenuate the serious of a *Charter* violation and reduce the need for the court to dissociate itself from police conduct by excluding the evidence obtained from the breach. Courts are more willing to find that police officers acted reasonably and in good faith where there was some legal basis for them to believe their conduct did not violate the law. For example, sometimes the police will act in accord with the state of the law at the time evidence was obtained, but the purported authority for police action may subsequently be declared constitutionally invalid. When a police officer has acted in accord with legal authority not yet found unconstitutional, the officer’s reasonably held belief will not be retroactively undermined. Other times, the state of the law may be uncertain at the time of the breach and it would be unreasonable to demand prescience on the part of the police as to how the law will be settled. Yet still, in other cases, the police will turn their mind to settled law and do their best to apply it. But they make a mistake.

So, for a *Charter* breach to have been committed in good faith, a police officer must, at the time the breach occurred, have honestly and reasonably believed they were acting lawfully. On the other hand, bad faith entails the police action to be knowingly or intentionally wrong. The absence of bad faith, however, does not equate to good faith, nor does the absence of good faith equate to bad faith. Rather, good and bad faith are polar opposites and fall at either end of a spectrum. Depending on the particular mental state of the officer, their actions will fall somewhere along this spectrum with good and bad faith forming its endpoints.

The Supreme Court noted in ***R. v. Tim*, 2022 SCC 12**, **“good faith cannot be claimed if the *Charter* breach arises from a police officer’s negligence, unreasonable error, ignorance as to the scope of their authority, or ignorance of *Charter* standards.”** And, as stated in ***R. v. Washington*, 2007 BCCA 540**, **“an inquiry into good faith examines not only the police officer’s <u>subjective</u> belief that they were acting with the scope of their authority, but it also questions whether this belief was <u>objectively</u> reasonable.”**

In ***R. v. Harflett*, 2016 ONCA 248** a police officer conducted an inventory search of a vehicle and found a large quantity of drugs in the trunk. But the Ontario Court of Appeal concluded the search was unreasonable. The vehicle was to be released at the scene and towed to a hotel with Mr. Hartflett

"It is in the nature of police officers to be suspicious, indeed, a suspicious nature is one of the positive attributes of a competent police officer. But the Constitution stands between suspicion and the citizen."
R. v. Martin (1995), 97 CCC (3d) 241 (BCCA)

riding with the tow operator. The officer did not impound or otherwise exercise the degree of control of the car that would make an inventory search necessary. Rather, the officer testified he searches **"every vehicle"** for which he calls a tow truck. Mr. Hartlett's lawyer pointed to two other cases where the same officer was found to have abused his search powers leading to the exclusion of evidence. In finding the police misconduct was serious, the Ontario Court of Appeal stated:

> **... [The officer] testified that he always searches cars that he stops. He was an instructor in "pipeline techniques" and taught police officers and others the skills to "recognize indicia of the criminal element in traffic enforcement" during "traffic stops". ... In his testimony [the officer] agreed that he is "really good at finding ways to search motor vehicles", adding, however, that he does so "lawfully".**
>
> **I do not doubt that [the officer] believes that he is doing the right thing, and to that extent shows good faith. But, ... [the officer's] invariable practice of searching every car fits the description of an impermissible "fishing expedition conducted at a random highway stop". As an instructor of other police officers, he ought to be fully conversant with his legal authority, but the evidence shows either that he was not or that he was prepared to search regardless. His attitude was exemplified by his testimony: he resisted the notion that what he did was a "search": "I do an inventory sir, not a search". This was plainly a search.** [paras. 43-44]

Perhaps, not surprisingly, determining whether or not a police officer acted in good faith can, in some cases, be as difficult as determining whether the officer complied with the law. For example, in ***R. v. Le*, 2019 SCC 34** — a detention and search case — five Supreme Court judges heard the case. In addition to Mr. Le as the appellant and the Crown as the respondent, there were 13 intervening parties. All five Supreme Court judges found Mr. Le had been the subject of an arbitrary detention — a s. 9 *Charter* breach. However, when deciding whether the fully loaded handgun, crack cocaine, and considerable amount of cash found in Mr. Le's possession should be admitted or excluded as evidence under s. 24(2), the Court was split (3:2) on whether the police acted in good faith.

The majority — three judges — concluded the police did not act in good faith and their misconduct was serious. They found the circumstances of the detention **"did not take the police into uncharted legal waters or otherwise raise a novel issue about the constitutionality of their actions. Indeed, the authority of police to detain individuals is governed by settled jurisprudence from this Court."** In their view, describing the misconduct as technical or inadvertent, and made in good faith would be **"manifestly indefensible"**. The majority excluded the evidence, set aside Mr. Le's 10 convictions for firearm and drug-related offences, and entered acquittals.

On the other hand, the minority — two judges — concluded the police misconduct fell at the low end of the spectrum of seriousness and any breach was technical and inadvertent. The minority found the police **"mistake was understandable. After all, a practised trial judge with years of experience in criminal law matters considered the police entry to be lawful. In my view, it would be both unfair and unreasonable to hold the police to a higher standard of legal acumen than we hold experienced trial judges. It can scarcely be contended, as a matter of principle or policy, that placing such a burden on the police is necessary to ensure the long-term integrity of the justice system and the public's confidence in it."** The minority would have dismissed Mr. Le's appeal and upheld his convictions.

These two opinions are mutually exclusive. On one view, the police misconduct was described as technical or inadvertent, and an understandable mistake while in the other view it was **"manifestly indefensible"** to describe it as such.

One thing is clear, ignorance of the law is hardly consistent with good faith. And an honest and sincere belief that is not reasonably held, perhaps not bad faith, will not constitute good faith.

As an example, in ***R. v. Roberts*, 2012 ONCA 225**, a police officer, believing he had reasonable grounds to do so, arrested Mr. Roberts and searched him incidental to arrest, finding cocaine, marihuana and cash. Mr. Roberts was convicted at trial for possessing cocaine, PPT cocaine, and possessing marihuana. On appeal, Ontario's top court found the officer, despite having an honest belief that he had reasonable grounds, objectively did not. This resulted in Mr. Robert's rights being infringed under s. 9 of the *Charter* — arbitrary detention. The Ontario Court of Appeal then had to decide whether to nevertheless admit the evidence. The Court did not agree with the Crown's good faith assessment of the officer's conduct. Even accepting that the officer honestly believed he had grounds to arrest, the officer **"did not turn his mind to the possibility of exercising police powers short of actual arrest."** In this case, the Court of Appeal concluded that the officer routinely saw arrest as the best tool to investigate crime because if, after further investigation, it turned out there were no grounds to arrest, the person would be released. In the officer's view, there was no harm in a brief arrest. The officer's cavalier attitude towards arrest and his failure to consider a less intrusive means of investigation rendered the *Charter*-infringing conduct serious.

In ***R. v. Balendra*, 2019 ONCA 68**, a police officer searched a USB key found in Mr. Balendra's pocket following his arrest for possessing a stolen van and careless driving. The USB was searched without a warrant, purportedly as an incident to arrest. Multiple credit card numbers and a driver's licence template were found on the USB. This evidence led to convictions for possessing fraudulent and forged credit cards, and possessing identity information with intent to commit fraud. He was sentenced to four years in prison. When Mr. Balendra challenged his convictions, the Ontario Court of Appeal, in part, found the officer was not looking for evidence on the USB related to the stolen van charge or careless driving, but rather for evidence of impersonation or fraud. This took the search outside the framework for a lawful search incident to arrest and breached s. 8 of the *Charter*.

Although the officer testified that he genuinely believed he could search the USB key to find evidence of impersonation, impersonation was not the reason for arrest. **"The search thus infringed the clear legal rule established [by the Supreme Court of Canada] in Caslake, which holds that where a search incident to arrest is conducted to find evidence, it must be for evidence of the offence for which the person was arrested,"** said the unanimous Court of Appeal. **"The fact that the search infringed a clear legal standard renders the breach more serious than it might otherwise have been. ... Even where a breach is not deliberate, it may still be reckless, and therefore serious, if the police show insufficient regard for Charter rights. ... [The officer] searched the USB key to find evidence of impersonation, 15 years after Caslake made it clear that he could not have done so without a warrant. The search thus fell squarely outside the scope of a valid search incident to arrest. In these circumstances, [the officer's] belief that the search was Charter-compliant was unreasonable. It follows that the breach was serious."**

This again leads me to training. An officer's understanding of the law and the training they have received is often considered by a judge assessing where to place the seriousness of the *Charter* breach on the good faith and bad faith continuum. As the Ontario Court of Appeal in ***R. v. Adler*, 2020 ONCA 246** put it:

> **The state of the police officer's knowledge of the right breached is relevant to the seriousness of a violation. An officer, who violates a Charter right while knowing better, commits a flagrant breach. For those officers who do not know of the relevant right, the reason they do not know can properly influence where on the good faith/bad faith continuum the Charter breach might fall. Ignorance may result, for example, from disinterest or an absence of care on the part of the individual officer, or**

"Clear boundaries cannot sit silently in the libraries of lawyers and judges. Police forces have a responsibility to regularly update their knowledge of these boundaries. In the absence of continuing education about their investigative powers, police cannot be heard to claim a reasonable misapprehension of the law."
R. v. Sawicki, [1999] Y.J. No. 55 (YTC)

> **systemic training deficiencies within the police service.** [emphasis added, para. 27]

The Court of Appeal went on to exclude the evidence used to convict Mr. Adler of possessing and making child pornography, and sexual assault. Acquittals were entered on all charges. Multiple *Charter* breaches had been found: (1) failing to provide Mr. Adler with his rights to counsel in a timely way; (2) strip searching him without reasonable and probable grounds; (3) conducting a bedpan vigil without judicial authorization; (4) providing misleading information at a bail hearing; (5) conducting a warrantless entry to his apartment; (6) conducting an unlawful search under an invalid telewarrant; and (7) unlawfully searching his devices without proper judicial authorization. **"The Charter breaches set out above are breaches of well-settled Charter principles,"** said the Court of Appeal. **"They do not involve grey areas in the law nor do they involve new and novel situations. Rather, they demonstrate a reckless disregard by the police of fundamental constitutional rights of which any police officer ought to be well aware."**

Perhaps Justice Stuart in ***R. v. Sawicki*, [1999] Y.J. No. 55 (YTC)** — a drug trafficking case involving an unlawful warrantless perimeter search of a dwelling — put the importance of police training and knowledge of the law in the good faith analysis most compellingly:

> **The potential of s. 8 to prevent unreasonable searches depends principally upon two things: clear boundaries, marking out what is and is not an unreasonable search, and significant consequences for failing to respect these boundaries. Clear boundaries cannot sit silently in the libraries of lawyers and judges. Police forces have a responsibility to regularly update their knowledge of these boundaries. In the absence of continuing education about their investigative powers, police cannot be heard to claim a reasonable misapprehension of the law.** [emphasis added, para. 10]
>
> **The police are presumed to know the law delineating the exercise of their powers. The integrity and effectiveness of the judicial process depends upon the police understanding and acting within the law. A failure to do so can severely compromise the prosecution of a case and bring the entire administration of justice into disrepute. Public respect for the law suffers when cases are resolved, not on the merits, but on procedural and technical issues. Conversely, prosecutions that survive illegal police conduct can also engender disrespect for the process and add costly court time. Nothing is gained, and much can be lost, when police fail to understand and act in accord with the legal regime governing their powers.**
>
> **The good faith of police officers is a key factor in assessing the seriousness of a s. 8 violation. Measuring the good faith of police depends significantly on their honest, reasonable basis for belief in understanding the law. An honest but mistaken belief that is not sustained by reasonable efforts to appreciate the law precludes any claim to good faith. Good faith requires taking reasonable efforts to understand and be current in their knowledge of the law.**
>
> **Evidence of good faith emanates from what police forces do to provide continuing education and from what the specific officer has done. Regular upgrading courses within the police**

> **"This is again going to bring into sharp focus the fact that our police officers don't have continued Charter education as a mandatory part of their job. Like they are taught on a yearly basis to brush up on their skills on how to kill people, they are not brushing up on their skills on a yearly basis about developments in the law. So if you think any police officer is going to read this or care about this within the next 10 years you are diluting yourself."**
> **Canadian Criminal Defence Lawyer — podcast discussing SCC decisions *R. v. Marakah*, *R. v. Jones***

> **department and supervision by lawyers or specialists within the force are essential measures in establishing good faith. The officer involved in the case must take full advantage of the services a police force provides to advance the basis of his/her knowledge of the law. ...** [emphasis added, references omitted, paras. 55-57]

Justice Stuart excluded the marihuana plants that were seized since no evidence had been led to establish what either the local police force or the officers had done to keep abreast of the law.

And who should be blamed when things go wrong? Who's fault is it when officers are undertrained and underperform as a result? These above quoted passages of Justice Stuart seem quite simply to say that the police agency has an obligation to educate its officers while the officer has the corresponding responsibility to learn. It's a symbiotic relationship.

The point made by Supreme Court Justice Côté in ***Kosoian v. Société de transport de Montréal*, 2019 SCC 59** bears repeating. Once a police service provides training in the law, police officers have the corollary obligation to acquire knowledge of the law and to keep that knowledge up to date. **"Police officers are obliged to have an adequate knowledge and understanding of criminal and penal law, of the offences they are called upon to prevent and repress and of the rights and freedoms protected by the Charters,"** he said. **"They also have an obligation to know the scope of their powers and the manner in which these powers are to be exercised."**

Add to all of this: **Why you do what you do is critical to the legality of your actions.** Let me explain by way of example. In ***R. v. Caslake*, [1998] 1 SCR 51**, the accused was arrested for possessing marihuana, and his vehicle was towed by police and later searched without a warrant. Police found $1,400 and some cocaine. The officer testified that the only (or sole) reason he searched the vehicle was to comply with an RCMP policy requiring that the contents of an impounded car be inventoried. A majority (4:3) of the Supreme Court found the warrantless search was unreasonable because it was not authorized by law. A lawful search must meet both its subjective and objective requirements. Subjectively, the authority offered by the officer for the search — its purpose and justification — was RCMP policy, not the common law power of search incidental to an arrest. Had the officer said he was searching as an incident to arrest for evidence related to drug arrest it would have been lawful. But he didn't. The majority stated:

> **This Court cannot characterize a search as being incidental to an arrest when the officer is actually acting for purposes unrelated to the arrest. That is the reason for the subjective element of the test. The objective element ensures that the police officer's belief that he or she has a legitimate reason to search is reasonable in the circumstances.** [para. 21]

> **Naturally, the police cannot rely on the fact that, objectively, a legitimate purpose for the search existed when that is not the purpose for which they searched. The Charter requires that agents of the state act in accordance with the rule of law. This means that they must not only objectively search within the permissible scope, but that they must turn their mind to this scope before searching. The subjective part of the test forces the police officer to satisfy him or herself that there is a valid purpose for the search incident to arrest before the search is carried out.** [emphasis added, para. 27]

> **The fact that this search was not, <u>in the mind of the searching party</u>, consistent with the proper purposes of search incident to arrest means that it falls outside the scope of this power. As a result, the search cannot be said to have been authorized by the common law rule permitting search incident to arrest.** [emphasis added, para. 29]

The officer's purported policy search could not be justified based on the fact that he would have had objective grounds if he had conducted a search incident to arrest. Despite finding a *Charter* breach, the ***Caslake*** court admitted the evidence and upheld the convictions because, in part, the officer had the necessary objective grounds for the search but just didn't know it.

Interestingly, a dozen years later in ***R. v. Nolet,* 2010 SCC 24**, an officer used the same rationale — creating an inventory pursuant to RCMP policy — for searching the cab of a semi-truck following the arrest of its occupants for possessing proceeds of crime. The Supreme Court (9:0) found the search unreasonable and therefore a s. 8 *Charter* breach because it was conducted incidental to RCMP administrative procedures rather than to the arrest of the two accused, as had been previously discussed in ***Caslake***. But the Court again acknowledged that the police would have been **"within their rights"** to have conducted the search incident to arrest although that was not the reason offered.

In ***R. v. Dhillon*, 2012 BCCA 254** a police officer testified he was relying on consent to search the trunk of a car where he found an AK-47 rifle. He said he did not have grounds to detain, arrest or get a search warrant. The trial judge ruled the legal requirements for consent had not been met. However, the judge found Mr. Dhillon had been lawfully detained for an investigation and the search of the trunk was lawfully conducted for officer safety reasons. The AK-47 was admitted as evidence and Mr. Dhillon was convicted of four firearm offences. In effect, the trial judge disregarded the basis offered by the officer for the search (consent) and substituted a lawful basis for the officer's actions (search incident to investigative detention). Same outcome — searching the trunk and finding a gun — but for a different reason.

But when Mr. Dhillon challenged the trial judge's ruling, the BC Court of Appeal tossed the firearm as evidence, overturned the convictions, and entered acquittals on all charges. As the Appeal Court noted, **"it is not sufficient that the police may have had a legal basis to exercise certain powers if they did not in fact exercise those powers … The question for the court is the lawfulness of the actual police conduct, not the potential basis for the exercise of police power."** It begs the question, had the officer claimed to detain for investigation and searched for safety, would the trial judge's ruling have been upheld?

In ***R. v. Peekeekoot*, 2017 SKQB 27**, the police detained the accused after responding to a knifepoint robbery of a cellphone. Mr. Peekeekoot was handcuffed and patted down. A two foot long machete was found inside his pants. He was subsequently ruled out of the robbery, but charged with carrying a concealed weapon. At trial the officer testified he frisked for officer safety — to ensure there were no weapons, knives or needles on Mr. Peekeekoot. The officer also, on cross-examination, said that he searches anyone he is going to place in a police vehicle or anyone put in handcuffs on the basis of officer safety. The judge concluded the investigative detention was not arbitrary but the pat down was an unreasonable search because **"the officer did not testify as to any grounds he had for concerns for his safety. Rather, this is something he effects <u>every time</u> he engages in an investigatory detention."** The Crown tried to save the officer's actions by stating the obvious — <u>robbery with knife</u> equals <u>a safety concern</u> — but the judge rejected this because the officer did not say it himself:

> **In argument, the Crown sought to connect the report of a robbery at knife point with a concern over officer safety. That, of course, makes sense. But, despite having the opportunity to make that connection, that does not accord with the officer's testimony. Rather, he completes a search every time he is involved in an investigatory detention.**
>
> **On the facts of the case before me, there was no reasonable basis given for suspecting officer safety was in issue in this particular case. The officer did not testify as to this.** [paras. 33-34]

Patrol Sergeant: "So what does your S.W.A.T. book say about a situation like this?"
Lt. Dan "Hondo" Harrelson: "I'm writing that chapter now."
S.W.A.T. (1975) TV Series, Episode "Omega One"

The judge found the *Charter* breach to be serious — **"the officer completes a search in each and every case where he detains someone for an investigatory purpose"** — and excluded the machete as evidence. **If it's obvious, you still have to connect the dots.** And you can't rely on the Crown to fill in the blanks for you:

> **[T]he Crown cannot resort to grounds that might have existed for stopping the [accused] that were not relied upon by the officer at the time.** [*R. v. Coles*, 2003 PESCAD 3 at para. 12]

> **[T]the subjective component of the relevant legal standards plays an important role in ensuring that the police act for legitimate purposes and turn their minds to the legal authority they possess.** [*R. v. Dudhi*, 2019 ONCA 665 at para. 64]

> **The court's task is to examine the evidence of the actual reasons for the search — and not whether reasonable suspicion could have justified the search.** [*R. v. Stairs*, 2022 SCC 11 at para. 128]

A police officer may arrest a suspect and pat them down, only to discover a gun tucked in the waistband. If a judge ruled the arrest was unlawful for want of reasonable grounds, the search would be unreasonable as an incident to arrest. The Crown cannot rescue the legality of the officer's conduct on the basis that the officer could have done things differently: detained for investigation on the lower reasonable suspicion standard and conducted a safety frisk. Same result — the discovery of the gun — but for a different reason (detention v. arrest). Because your purported authority to act was based on an arrest, it cannot later be saved on the potential basis of some other authority not exercised at the time. In ***R. v. Whitaker*, 2008 BCCA 174**, the BC Court of Appeal made this clear:

> **The Crown argued, in brief, that even if the police did not have reasonable grounds to arrest Mr. Whitaker, his detention was not arbitrary because he could have been detained under the common law power of investigative detention recognized in R. v. Mann ... The difficulty with this argument is that the police did not invoke the common law power of investigative detention; they invoked the statutory power of arrest, with its more extensive power of incidental search of the person. When the police have wrongfully arrested someone, their actions cannot be defended on the basis that they could have detained this person on some other basis. In deciding whether the police infringed Charter rights, they are to be judged on what they did, not what they could have done.** [emphasis added, para. 65]

In ***R. v. Stevenson*, 2014 ONCA 842**, the Crown argued that if Mr. Stevenson's arrest for first degree murder was unlawful it was not arbitrary in the circumstances because the police had grounds to detain him for investigative purposes at the time of his arrest. The Ontario Court of Appeal rejected this argument. **"Whatever lawful police power, apart from the arrest power, the police may have had to detain the [accused], they did not purport to exercise any such power,"** said the Court of Appeal. **"The police arrested the [accused]. The police conduct at and after the gunpoint encounter with the [accused], is only consistent with a full arrest. The arbitrariness of the [accused's] detention must be determined having regard to the police power actually exercised and not by reference to some other police power which may have been, but was not, exercised. ... The arrest cannot be converted to an investigative detention for the purposes of determining the constitutionality of the police conduct."** Since the accused's arrest was unlawful his detention was arbitrary.

What these cases signal, and others like it, is that you must have in your mind the correct legal basis for your action at the time you take it. You must establish that you subjectively **turned your mind** to whether you were properly exercising your powers. If you do not, in fact, address your

mind to the power you are exercising and the legitimate purposes or objectives that animate the power, you could be found to be acting unlawfully even though "objectively" your action could otherwise be justified. It is not enough to later justify your action on some other basis you had not considered at the time and argue the evidence you found would ineluctably have been discovered. Although **"objectively"**, a reasonable officer may have acted lawfully had they been thinking a certain way, if you weren't thinking that same way at the time you acted your conduct may be found to be unlawful. **I cannot fathom how you would properly turn your mind to something which you do not know or understand.** Yet another reason to understand and know the law.

All of this emphasis on training and education reminds me of a keynote address made by the Honourable Associate Justice William W. Bedsworth, a judge of the California Fourth District Court of Appeal, at the grand opening of the Golden West College's Criminal Justice Training Centre. Here is an excerpt:

> **Law enforcement changes hourly, folks. It is no easier to keep up with the changes in law enforcement than it is to keep up with changes in medicine or physics or biology or ballistics or pharmacology. All of which, by the way, are things the modern police officer must know a lot about — must learn and relearn constantly.**
>
> **...**
>
> **Every day, every time a cop picks up a paper or watches the news, she learns about something else she will have to know about probably before her next shift. The amount of education and reeducation our police must assimilate every day is staggering. It requires literally, and I emphasize, I mean this literally, not figuratively, it requires literally more daily re-education than a doctor or lawyer ever needs to do his or her job, and when a peace officer applies that reeducation, he or she has to be a psychologist, a pharmacologist, a teacher, a counselor, a lawyer, an EMT, and a bad-ass superhero, probably all during one shift.**

Categories of Cops

At risk of oversimplification, and perhaps stereotyping, I have come to categorize cops into four categories. As you read this, ask yourself, **"In which category do I belong?"**:

1. Cops who **FOLLOW THE RULES**. In order to follow the rules, an officer will need to know and understand them. As demonstrated, this is no easy task at all. It requires persistent study and learning. This is not to say that a police officer cannot unknowingly follow the law, as the officer did in ***R. v. Stairs***. Remember, the officer complied with rules that had not yet been articulated by the Supreme Court. Sometimes police get lucky and unwittingly get it right. But that's a chance best avoided through education and training. At the end of the day, an officer who follows the rules commits no *Charter* breach. Without a *Charter* infringement, there is no need to evaluate the seriousness of police misconduct under s. 24(2).

2. Cops who **MISAPPLY THE RULES**. Sometimes police officers will know the rules, but inadvertently misapply them to the facts of a case. They make a mistake. As judges have demonstrated, even those of the Supreme Court of Canada (who ultimately have the final say on what the rules are), it can be challenging to apply them to the particular facts of a case. Often, officers who do their best to properly apply the law will be found to be acting in good faith (or at least not in bad faith). They make an understandable mistake. Or perhaps they are operating in unknown legal territory or a constitutional grey area and make a reasoned decision, which a court may later determine to be unconstitutional. Misapplication of the rules by police will undoubtedly occur just as judges err in law, even those of appellate courts. **"Not every Charter breach should be characterized as ignorance of the law,"** said Justice Fairburn in

RULES

WHICH CATEGORY APPLIES TO YOU?

Follow the Rules	Misapply the Rules
Ignorant of the Rules	Ignore the Rules

***R. v. Wegner*, 2017 ONSC 1791**. **"Police can know the law, but simply miscalculate its application in a particular situation."** Training and learning by on-the-job experience will often avoid a repeat occurrence.

3. Cops who are **IGNORANT OF THE RULES**. These officers do not know the rules, either through a lack of training or an unwillingness to learn. Or perhaps the officer is willfully blind — **dumb on purpose**. Of course, an officer who does not know the rules cannot properly apply them. This can, in some circumstances, be viewed as a major departure from *Charter* standards where the police should or ought to have known that their conduct was not *Charter* compliant. Although an officer falling within this category will not necessarily be acting in bad faith, an absence of bad faith does not equate to a positive finding of good faith. Other times, an officer will be found completely ignorant of the scope of their authority that the breach they committed will be clear and flagrant, thus pulling the misconduct towards the bad faith pole of the spectrum. This factor can, and often does, strongly push (or pull) the evidence towards exclusion. This makes sense. If evidence was routinely admitted when officers were ignorant of their authority, this could incentivize them to remain ignorant. Why know the law? I get better results if I don't know it. The case law is littered with officers who don't seem to care about doing it right. Sometimes officers who are undertrained (ignorant) overestimate their authorities and step outside the lines. Proper training and education can assist these officers in realizing their lack of knowledge and understanding of it.

4. Cops who **IGNORE THE RULES**. This category describes those officers who know the rules but choose not to follow them. Their misconduct is described as deliberate, wilful, flagrant, or blatant, and will often be labelled as serious *Charter*-infringing conduct. This will be the case where the police knew that their conduct was not *Charter*-compliant. An officer who knows what they are doing is wrong, but chooses to do it anyways epitomizes bad faith. These are the cops that deliberately deviant from the law and abuse their power. These are the bad actors. The police profession has no place for this type of thinking. This misconduct is also contrary to an Ontario police officer's solemn oath to **"uphold the Constitution of Canada"** or BC's Police Code of Ethics duty to the public **"to protect lives and property, preserve peace and good order, prevent crime, detect and apprehend offenders and enforce the law, while at the same time**

protecting the rights and freedoms of all persons as guaranteed in our Charter of Rights and Freedoms."

As Supreme Court Chief Justice McLachlin said in ***R. v. Harrison*, 2009 SCC 34**, **"we expect police to adhere to higher standards than alleged criminals."** In that case, the police misconduct was found to be serious. The officer stopped and searched Mr. Harrison's vehicle without any reasonable grounds. It was concluded that the officer's determination to turn up incriminating evidence blinded him to the constitutional requirements for searching. Moreover, the officer provided misleading testimony in court. The trial judge held the officer knowingly violated Mr. Harrison's *Charter* rights and then offered explanations in court that appeared to be "contrived", "def[ied] credibility" and were "extremely difficult to accept as valid." Despite a conviction at trial (the drugs were admitted under s. 24(2)), which was upheld by the Ontario Court of Appeal, the Supreme Court **excluded the 77 lbs. of cocaine** found by police, overturned Mr. Harrison's conviction for cocaine trafficking, and acquitted him.

Moving Forward

Police training does not, of course, establish the constitutional standards by which you may act. The law does. As explained, police officers are expected to know the law and to abide by *Charter* standards. Responsible police officers will take care to learn what is required of them under *Charter* jurisprudence and will diligently act to conform their conduct to the rules. Sometimes, however, there will be no legal precedent to guide the police as to whether a particular investigative technique or act will infringe the *Charter*. Just because there is no legal rule or authority that prohibits your action doesn't mean you can't, or won't, be sanctioned for it. Remember, you may act only to the extent that you are empowered to do so by law.

Furthermore, it is not uncommon for an appeal court, including the Supreme Court, to assume, without deciding, that the police infringed a *Charter* right and then move directly to a s. 24(2) enquiry. Under this framework, the evidence will be admissible since exclusion requires a finding of an actual breach, not an assumed one. This approach, however, does little to guide officers in applying the law because the legitimacy of the underlying police conduct that led to the assumed violation remains unknown. It's as if the adjudication process is short circuited and an important step in addressing the means to the end is sidestepped. It may be appropriate for the courts to let the evidence in at the end of the day, but the police want to know (at least I did) whether the impugned conduct was permissible or not. Without clear guidance and a declaration that a particular investigative technique is constitutional, police have no way of knowing for future cases whether or not their conduct will be *Charter* compliant.

Despite these shortcomings, police officers must make reasoned decisions by turning their mind to the action they are about to take rather than running roughshod or demonstrating a cavalier attitude towards *Charter* rights. This won't be easy. Your job involves assessing competing and conflicting interests — individual rights and liberties against society's interest in effective law enforcement. Your challenge will be to enforce the laws within the area where the boundaries on personal freedoms and the public interest intersect. You must weigh your two obligations to the public — to protect and to respect. Protecting the public by investigating crime, enforcing the law, and apprehending offenders while at the same time respecting individual rights. Your duty to protect may oblige you to take coercive action (such as detention, arrest, search, force) while your duty to respect obliges your action to not be arbitrary, unreasonable or without justification. If you do not act with a justifiable legal basis, or a legitimate purpose or aim, interference with a person's liberty, security or privacy will result in a *Charter* violation with its attendant consequences.

Although you are not expected to be a lawyer, you should have a good understanding of the legal frameworks related to your police powers. Remember too, just because you have a duty to do something — like investigate crime — doesn't

mean you are empowered to take any and all action to perform the duty. Your powers are not unbridled or unlimited. By understanding the framework related to a power, you can "turn your mind" to the legal requirements and do your best to apply the rules to the facts as you find them. Not only will a working knowledge of the law provide confidence, increasing your legal acumen and understanding with proper training can lead to your performance meeting the level of what the courts expect of you. This can result in you following the rules or, if you misapply the rules, may demonstrate to a court that you were acting in good faith. You tried to get it right. Although your good faith will not cleanse a *Charter* breach, it could rescue evidence obtained in a manner that breached a right from exclusion. This will then further society's interest in a case being decided on its merits.

I once heard a podcaster — a criminal defence lawyer — say the following:

> "You can get a warrant really quickly. You can get a warrant over the phone, a telewarrant. This isn't the sort of process that takes a long time. It can be done rather quickly."

Obviously, this lawyer had never obtained a warrant before. He was an armchair quarterback. In my world, drafting an ITO for a telewarrant or an in-person appearance takes the same amount of time if the officer wants to take care to conform with the requirements of the law. Any time savings comes in not having to drive (or walk) to the justice for signature. The driving (or walking), however, is often not which takes the most time. It is the ITO preparation. Being careful to make full, fair, and frank disclosure of the material facts without overwhelming the justice with irrelevant details. And, of course, the justice themselves still needs to read the ITO. This takes the same amount of time whether the ITO arrives via fax or via physical transport. Reading and evaluating the written word takes the same care.

Recently, an Ontario Court of Appeal judge in *R. v. Bakal*, 2021 ONCA 584 noted the ridiculousness of this podcaster's notion.

> [A] telewarrant is not free for the asking. To be sure, a telewarrant application carries the same degree of solemnity as an application that would be determined after being dropped at a courthouse in the light of day. While s. 487.1 provides for more flexibility in terms of how an application for a warrant is placed before a justice, it does not alleviate the normal demands placed upon an affiant in relation to preparing that application. Nor does it relieve the application justice from taking the time necessary to properly consider the application to determine whether the requested authorization should be granted. [emphasis added, para. 31]

This example highlights the incongruence with what some critics say (in theory) and what officer's know and understand (in reality).

Police officers also need to prepare themselves for defence arguments. Read case law! Seek out training! Discuss the issues with your peers! If you have time to think before acting, then think. Not every decision you make will require exigent or instantaneous action. By understanding the requirements of the law, officers can often discharge the Crown's onus (e.g. presumptive warrant requirement), defend their actions from allegations of illegality, and/or counter claims of *male fide* intent.

For example, the police in *R. v. Morris,* 2013 ONCA 223 stopped a Honda Civic for two reasons: (1) to verify the driver's documentation and (2) a CPIC check of the licence produced cautions, related to the registered owner, of "armed and dangerous", "violent" and "domestic violence". An officer had run the licence plate because Honda Civics were a commonly stolen car and it was late at night. When the officers approached the vehicle, they smelled a strong marihuana odour and arrested Mr. Morris for possessing it — an offence at the time. In the course of a field search incident to arrest, police found a hidden compartment containing marihuana, crack cocaine, and a loaded handgun. Police said they would not have stopped the car but for the "caution". They also testified that they understood the constraints placed upon them when conducting a "dual purpose" stop. If the driver's documents were in order they would have let him go on his way; the officers did not

intend to search the car before stopping it. The trial judge believed the police and rejected the contention that the stop was a ruse or pretext to search the car. Mr. Morris was convicted of several firearm related offences and sentenced to 50 months incarceration.

An appeal to Ontario's top court was rejected. "[The trial judge] concluded that the officers had a valid HTA-related reason for stopping the car, that their intention was to check the driver's licence, ownership and insurance documentation, and that at the time they stopped the car they did not intend to search it or do anything beyond what was permitted by the HTA," said the Court of Appeal. "The trial judge further found that this remained their intention until the point at which they detected the odour of fresh marijuana emanating from the car. That, she found, was sufficient to give rise to reasonable and probable grounds to arrest [Mr. Morris] and search him and the vehicle as an incident of the arrest." Had the officers not testified to their understanding of the law and the limitations it imposed upon them, this decision may well have turned out quite differently.

I too would suggest using the language the courts use. For example, if you have reasonable grounds (suspicion or belief) say so. That should pretty much put the subjective component of reasonable grounds to rest. Why have a judge try to figure out the import of your evidence and whether or not you had the requisite subjective suspicion or belief? Why make your evidence ambiguous? Lawyers live for ambiguity. When ambiguity is created there will be more argument. When you get the subjective test out of the way, you can then focus on articulating and explaining your grounds, the objective factors leading you to conclude the way you did, for acting (e.g. detaining, arresting, searching, seizing, using force, etc.).

Of course, you must often make your decisions with equanimity — the steadiness of mind under stress. Peace under pressure. Remaining calm in the chaos is a sign of a professional. But it's easier said than done. You must also be tactical, protecting yourself and others. You must consider threats, time, distance, weapons of opportunity. You will encounter those who are high on drugs or alcohol, or experiencing a mental health crisis — people with unhealthy neurological processing. You thought you would receive cooperation through communication or even low levels of force such as wrist locks or joint manipulation, but instead a physical battle ensues. Pain compliance becomes pain defiance. Add to this, it seems, a default bias by some that any police use of force is often illegitimate. They posit the notions that de-escalation through communication is always an achievable act or the police have complete control over their environment. Both of these may be nice in theory, but have no basis in reality.

Recently, I was reminded of four main pillars needed for any police department to operate well: **(1) policy, (2) training, (3) supervision and (4) discipline when necessary.**

When an officer makes a mistake, most often there was inadequate policy in place, appropriate training wasn't provided, or there was a lack of quality supervision to guide the officers. And for those officers who strayed or went off-side and needed assistance or corrective action, they may not have received it. I have focussed this article on one of the four pillars mentioned above and only on one aspect of training — **legal training.**

Conclusion

There is no doubt police officers work in a fishbowl. Their actions will be placed under a microscope. Knowing this, police officers can prepare themselves for the inevitable — rigorous judicial scrutiny, professional accountability, media exposure — crime stories lead the nightly news — and public attention. The police profession has a great opportunity for always improving.

Training is more than just telling someone to do something. Police officers have to understand the rules in order to follow them. There is no doubt that some officers have tarnished the badge through their conduct — some deliberate, some accidental. But we can lean in, learn and strive to do better.

After all, you are the one that must account for your actions. As can be seen, the Crown can't provide your grounds for acting — even if it might be obvious to all — nor can a judge fill in the legal gaps for you. As equally important to objective factors, which are a necessary component to justify police conduct, is your mindset. This is the required subjective component. But before you can turn your mind to a legal authority you must have one in mind. This requires knowledge, thought and focus. Where the attention goes the energy flows! Individually and collectively we must develop a growth mindset. Train the brain! But that takes effort!

To all my readers, the fact that you take the time and energy to read this publication, learn from it, and apply your knowledge shows the high level of dedication and calibre of people working in law enforcement. I commend you all! This is one of the most challenging careers that many see as a calling. I hope I have helped equip you in some small way in your pursuit of legal knowledge. Until we meet again, I would like to leave you with the words of Theodore Roosevelt:

"It is not the critic who counts; not the [person] who points out how the strong [person] stumbles, or where the doer of deeds could have done them better. The credit belongs to the [person] who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends [themselves] in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if [they fail], at least [fail] while daring greatly, so that [their] place shall never be with those cold and timid souls who neither know victory nor defeat."

CONTACT MIKE:

If you would like to contact me you can email me at legalissuesinpolicing@gmail.com.
Check out my podcast at "Legal Issues in Policing" or www.liip.ca!

WHAT'S NEW FOR POLICE IN THE LIBRARY

The Justice Institute of British Columbia Library is an excellent resource for learning. Here is a list of its recent acquisitions which may be of interest to police.

5 types of people who can ruin your life: identifying and dealing with narcissists, sociopaths, and other high-conflict personalities.

Bill Eddy.

New York, NY: TarcherPerigee, 2018.

BF 637 I48 E328 2018

Alcohol and drugs in the Canadian workplace: an employer's guide to the law, prevention and management of substance abuse.

Norm Keith.

Toronto, ON: LexisNexis Canada Inc., 2020.

HF 5549.5 A4 K43 2020

Appreciative inquiry in higher education: a transformative force.

Jeanie Cockell & Joan McArthur-Blair.

Victoria, BC: FriesenPress, 2020

LC 1100 C63 2020

Beyond collaboration overload: how to work smarter, get ahead, and restore your well-being. Rob Cross.

Boston, MA: Harvard Business Review Press, 2021.

HF 5548.85 C76 2021

Cities and homelessness: essays and case studies on practices, innovations and challenges.

edited by Joaquin Jay Gonzalez III & Mickey P. McGee.

Jefferson, NC: McFarland & Company, 2021.

Available in eBook format only.

Designing and delivering effective online instruction: how to engage adult learners.

Linda Dale Bloomberg.

New York, NY: Teachers College Press, 2021.

LB 1044.87 B56 2021

Also available in eBook format.

Discussions in dispute resolution: the foundational articles.

edited by Art Hinshaw, Andrea Kupfer Schneider, & Sarah Rudolph Cole.

New York, NY: Oxford University Press, 2021.

KF 9084 H56 2021

Dying and death in Canada.

Herbert C. Northcott & Donna M. Wilson.

Toronto; Buffalo; London: University of Toronto Press, 2022.

BF 789 D4 N67 2022

Also available in eBook format.

Essentials for blended learning: a standards-based guide.

Jared Stein & Charles R. Graham.

New York, NY Routledge, Taylor & Francis Group, 2020.

LB 1028.5 S715 2020

Essentials of managing stress during times of pandemic: a primer.

Brian Luke Seaward.

Burlington, MA: Jones & Bartlett Learning, 2022.

Available in eBook format only.

Experiential education and training for employment in justice occupations.

Peter Charles Kratcoski, Peter Christopher Kratcoski.

Cham, CH : Springer Nature, 2021.

Available in eBook format only.

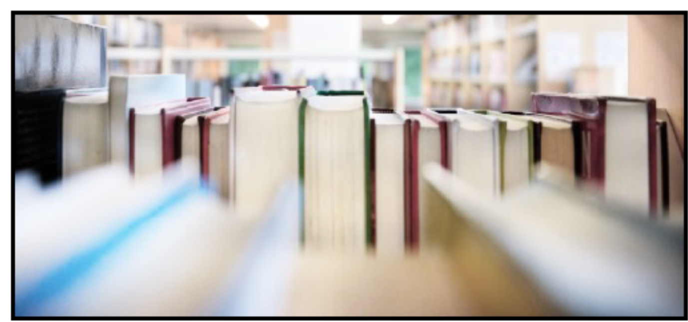
Facilitating group learning: strategies for success with diverse learners.

George Lakey; foreword by Mark Leier.

Oakland : PM Press, 2020.

LC 5225 L42 L35 2020

Also available in eBook format (JIBC login required)



Humanity over comfort: how you confront systemic racism head on.

Sharone Brinkley-Parker, Tracey L. Durant, Kendra V. Johnson, Kandice Taylor, Johari Toe & Lisa Williams.

Thousand Oaks, CA: Corwin, 2022.

Available in eBook format only.

Humble inquiry: the gentle art of asking instead of telling.

Edgar H. Schein & Peter A. Schein.

Oakland, CA: Berrett-Koehler Publishers, Inc., 2021.

BF 637 C45 S352 2021

Also available in eBook or Audiobook format.

Improving performance through learning: a practical guide to designing high performance learning journeys.

Robert O. Brinkerhoff, Anne M. Apking & Edward W. Boon; foreword by Thiagi.

Bolton, ON: Amazon.ca, 2019.

HF 5549.5 T7 B657 2019

Mediating high conflict disputes: a breakthrough approach with tips and tools and the New Ways for Mediation® method.

Bill Eddy & Michael Lomax.

Scottsdale, AZ: Unhooked Books, 2021.

HM 1126 E33 2021

Presentation Zen: simple ideas on presentation design and delivery.

Garr Reynolds.

Berkeley, CA: New Riders, 2020.

HF 5718.22 R49 2020

Responsible leadership.

edited by Nicola M. Pless & Thomas Maak.

Abingdon, Oxfordshire; New York, NY: Routledge, 2022.

HD 57.7 R465 2022

Risk: why we fear the things we shouldn't - and put ourselves in greater danger.

Dan Gardner.

Toronto, ON: McClelland & Stewart, 2009.

HM 1101 G37 2009

Simple truths of leadership: 52 ways to be a servant leader and build trust.

Ken Blanchard & Randy Conley.

Oakland, CA: Berrett-Koehler Publishers, 2022.

Available in eBook format only.

Violence against women: what everyone needs to know®.

Jacqui True.

New York, NY: Oxford University Press, 2021.

HV 6250.4 W65 T784 2021

Also available in eBook format.

Volunteer administration: professional practice.

editors, Keith Seel & Jennifer R. Bennett.

Toronto, ON: LexisNexis Canada, 2021.

HN 49 V64 V65 2021

What's your formula?: combine learning elements for impactful training.

Brian Washburn.

Alexandria, VA: ATD Press, 2021.

Available in eBook format only.

Working with conflict 2: skills and strategies for action.

Simon Fisher, Vesna Matovic & Bridget Walker; edited by Dylan Mathews.

London: Zed Books, 2020.

HM 1126 W67 2020

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

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

CAREER FLEXIBILITY

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

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

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

CURRICULUM AT A GLANCE

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

FOUNDATIONAL COURSES INCLUDE:

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

CYBERCRIME ANALYSIS SPECIALIZED COURSES INCLUDE:

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

INTELLIGENCE ANALYSIS SPECIALIZED COURSES INCLUDE:

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

TACTICAL CRIMINAL ANALYSIS SPECIALIZED COURSES INCLUDE:

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

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

HOW TO APPLY?

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

FOR MORE INFORMATION:

jibc.ca/intelligence

graduatestudies@jibc.ca

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

198 KM/H: TOP 2021 SPEED RECORDED ON BC INTERSECTION CAMERA

British Columbia has released statistics for its intersection safety cameras that are located at 140 high-risk intersections throughout the province. One hundred and five (**105**) cameras monitor for red light violations while **35** monitor for both red light and speed violations.

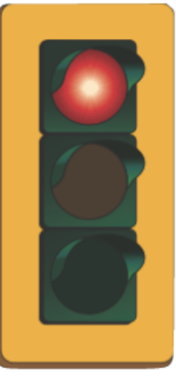
The cameras operate 24 hours a day, seven days a week.

In 2021, from January to December, there were **66,657** red light tickets issued and **46,700** speeding tickets issued. During the same period in 2020, there were **64,379** red light tickets issued and **72,546** speeding tickets issued.

Source: ntersect on safety v o at on t cket stat st cs

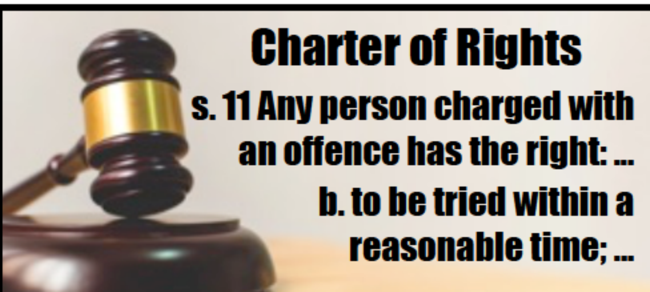
INTERSECTION CAMERA TICKETS

	2021			
Term	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec
Red Light Tickets	13,242	16,486	19,600	17,329
Speeding Tickets	10,252	14,284	13,631	8,533
Highest Speed	181 km/h 60 zone	198 km/h 80 zone	162 km/h 60 zone	142 km/h 50 zone



BC INTERSECTION SAFETY CAMERA PROGRAM

Year	2019	2020	2021
Red Light Tickets	83,358	64,379	66,657
Paid	73,490 (88%)	61,070 (95%)	61,547 (92%)
Disputed	3,775 (5%)	3,278 (5%)	2,681 (4%)
Speeding Tickets	9,721	72,546	46,700
Paid	4,101 (42%)	49,640 (68%)	47,057 (101%)
Disputed	525 (5%)	5,143 (7%)	2,718 (6%)
Total Tickets	93,079	136,925	113,357
Net Revenue Paid	$11,355,265	$17,697,761	$17,518,533
	Source: ntersect on Safety Camera Program Annua Report 2019	Source: ntersect on Safety Camera Program Annua Report 2020	Source: ntersect on Safety Camera Program Annua Report 2021



ALBERTA JORDAN APPLICATIONS

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

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

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

Between October 25, 2016 and March 31, 2022, there were **391** *Jordan* applications filed in Alberta courts.

Of the **391** applications, they were disposed of in the following manner:

- **20** pending;
- **115** dismissed by the Court;
- **40** granted (3 are being appealed by Crown);
- **59** abandoned by defence
- **65** proactively stayed by the Crown (on the basis that they would not have survived a *Jordan* application); and
- **92** were resolved (unrelated to *Jordan*).

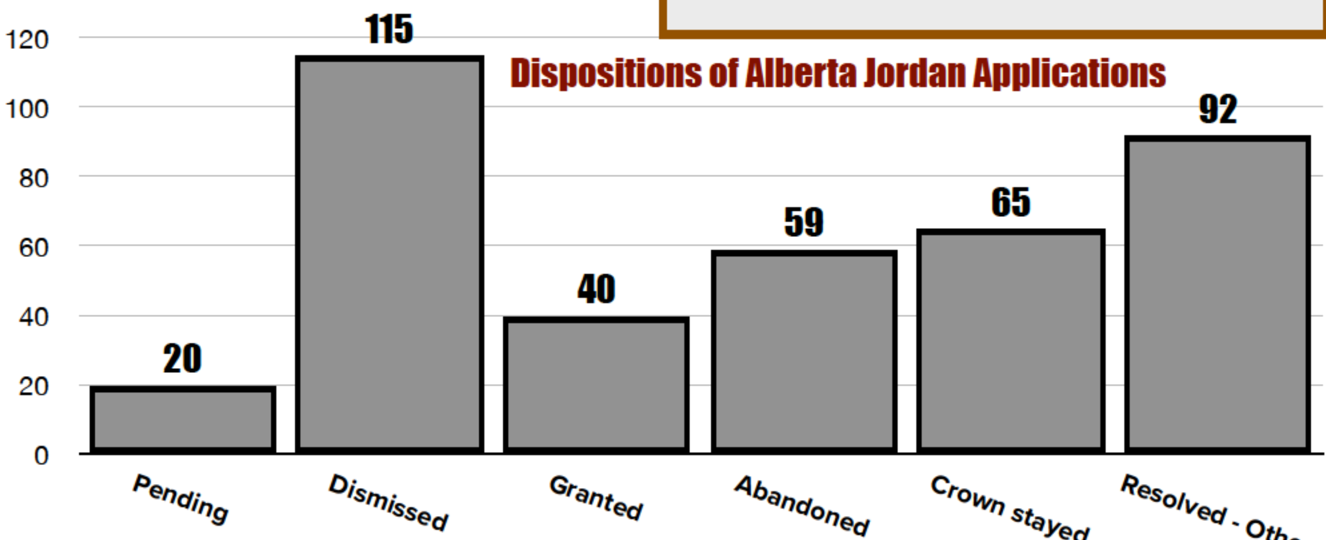
LEGALLY SPEAKING:

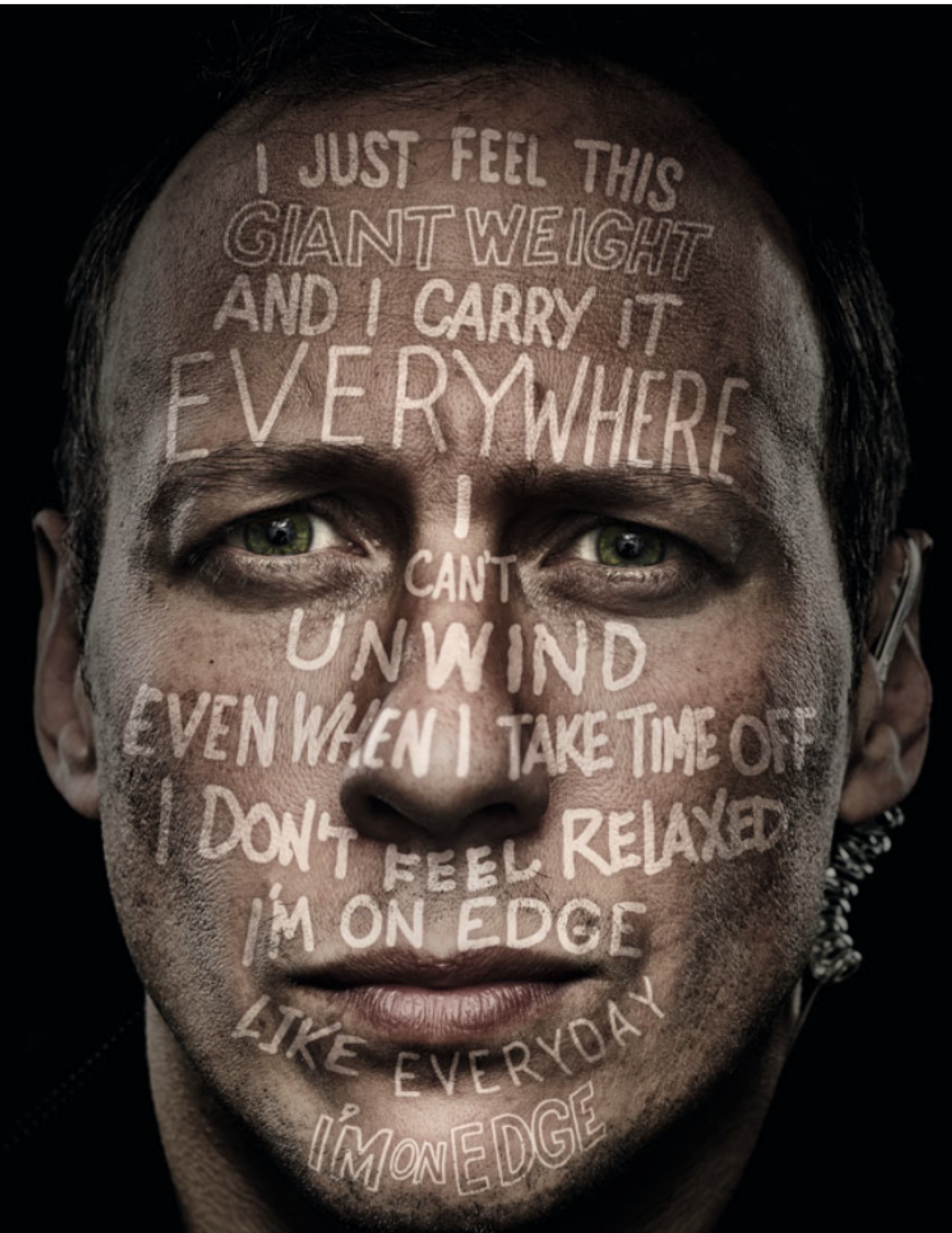
- "**Once the presumptive ceiling is exceeded**, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2)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

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

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

Source: Jordan Applications





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BCFirstRespondersMentalHealth.com

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

www.BCFirstRespondersMentalHealth.com

IRP & ADP STATISTICS RELEASED

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

BC's ALCOHOL DRIVING PROHIBITIONS

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

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

Administrative Driving Prohibitions Reporting

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

CANADA's HIGHEST COURT MORE DIVIDED THAN PREVIOUS YEAR

In its report, **"2021 Year in Review"**, last years' workload of Canada's top Court was highlighted. In 2021 the Supreme Court heard **58** appeals. This was up **41%** from the **41** appeals it heard in 2020 which were the lowest number of appeals heard in a single year during the last decade. The most appeals heard annually in the last 10 years was in 2014 when **80** cases were brought before the Court.

Case Life Span

The time it took for the Court to render a judgment from the date it heard a case in 2021 was **4.2** months, down from **5.4** months in 2020 and **5.3** months in 2019. The shortest time within the last 10 years for the Court to announce its decision after hearing argument was **4.1** months (2014) while the longest time was **6.3** months (2012). Overall it took **15.2** months in 2021, on average, for the Court to render an opinion from the time an application for leave to hear a case was filed. This is down from the previous year (2020) when it took **17.4** months.

Applications for Leave

In 2021 there were **473** applications for leave submitted to the court, meaning a party sought permission to appeal the decision of a lower court. There were 430 applications for leave that were referred for decision. Quebec was the source of most applications for leave referred for decision at **117** cases. This was followed by Ontario (**107**), B.C. (**52**), Alberta (**51**), the Federal Court of Appeal (**45**), Saskatchewan (**28**), Manitoba (**7**), Nova Scotia (**7**), New Brunswick (**7**), Newfoundland and Labrador (**5**), the Yukon (**2**), Prince Edward Island (**1**), and Nunavut (**1**). No applications for leave came from the Northwest Territories. Of the known outcomes for leave applications, only **34** or **8%** were granted. Of all applications for leave, **32%** were criminal law while **22%** were private law and **46%** public law.

Appeals Heard

Of the **58** appeals heard in 2021, Ontario had the most of any province at **13**. This was followed by B.C. with **12**, Quebec (**10**), Alberta (**9**), Saskatchewan (**4**), Manitoba (**3**), the Federal Court of Appeal (**3**), Newfoundland and Labrador (**2**), and New Brunswick and Prince Edward Island each with one (**1**) each. None of the appeals heard originated from Nunavut, Nova Scotia, the Northwest Territories, or the Yukon.

Of the appeals heard in 2021, **32** (or **55%**) were criminal. **Fourteen** (**24%)** of cases were public law and **12** (**21%)** were private law.

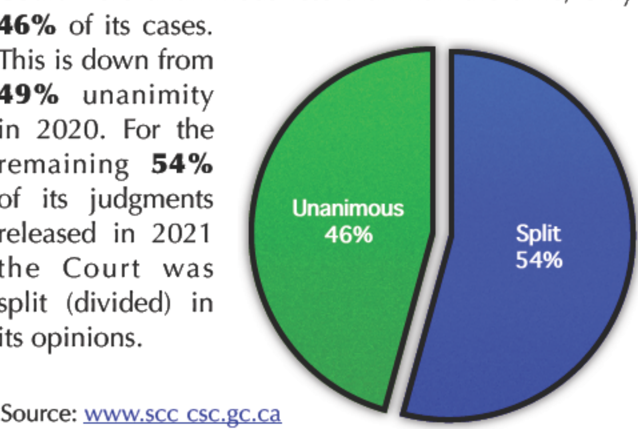
Public 24%
Private 21%
Criminal 55%

Twenty-one (**21**) appeals heard in 2021 were as of right. This source of appeal does not require the Court's permission and includes cases where there was a dissent on a point of law in a provincial court of appeal. Alberta had the most appeals as of right (**7**), followed by B.C. (**4**), Ontario (**3**), Quebec (**2**), Saskatchewan (**2**), Newfoundland and Labrador (**2**), and Nova Scotia with one (**1**).

Appeals Decided

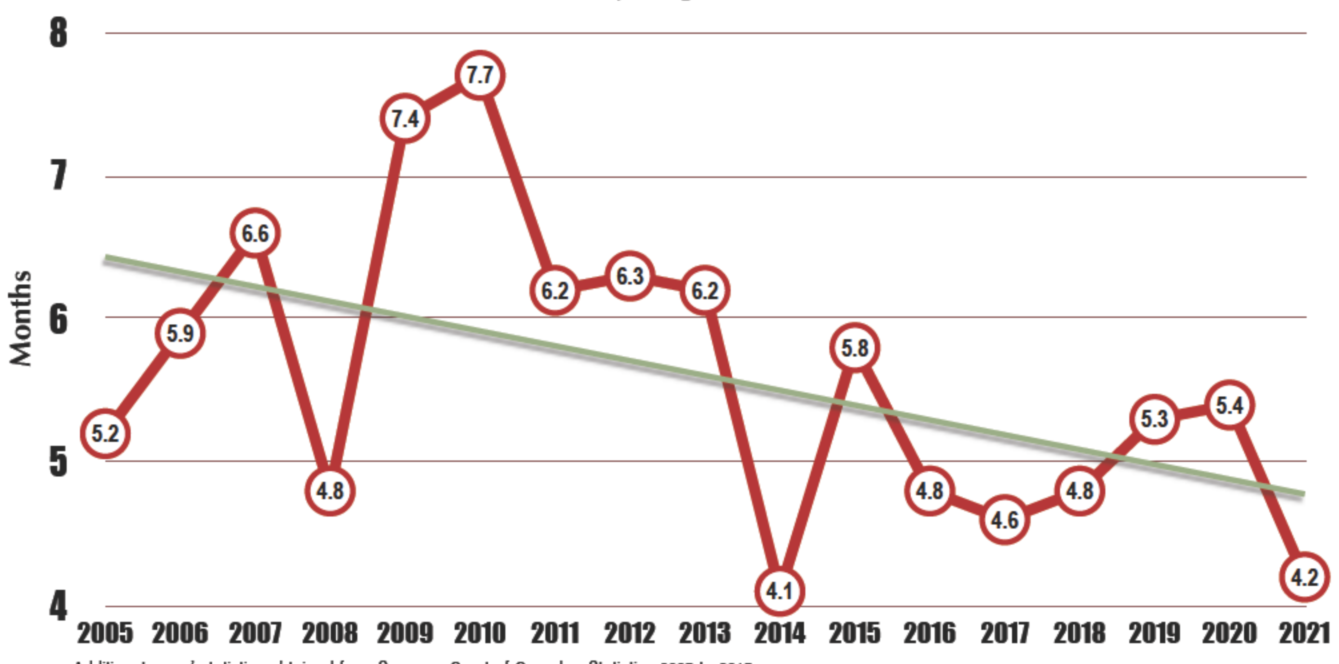
There were **59** appeal judgments released in 2021, up from **45** the previous year. Twenty-two (**22**) decisions were delivered from the bench while the remaining **37** were reserved with written reasons to follow. Twenty-two (**22**) appeals were allowed while **37** were dismissed. Seventeen (**17**) appeal decisions were on reserve as at December 31, 2021.

In terms of agreement, the judges of the Supreme Court were unanimous less than half the time; only **46%** of its cases. This is down from **49%** unanimity in 2020. For the remaining **54%** of its judgments released in 2021 the Court was split (divided) in its opinions.



Source: www.scc csc.gc.ca

Average Time Lapses (in months) between SCC hearing and judgment



Split | Unanimous

Year	Split	Unanimous
2005	27%	73%
2006	20%	80%
2007	38%	62%
2008	24%	76%
2009	37%	63%
2010	25%	75%
2011	25%	75%
2012	28%	72%
2013	32%	68%
2014	21%	79%
2015	30%	70%
2016	39%	61%
2017	46%	54%
2018	52%	48%
2019	58%	42%
2020	51%	49%
2021	54%	46%

Additional years' statistics obtained from Supreme Court of Canada - Statistics 2005 to 2015.

CANADIAN POLICE & PEACE OFFICER MEMORIAL SERVICE

Sunday, September 25, 2022

They are our heroes.
We shall not forget them.

BC LAW ENFORCEMENT MEMORIAL SERVICE

Sunday, September 25, 2022

SUCCESS RATE OF APPEALS DROPS IN BC's HIGHEST COURT

According to the BC Court of Appeal's 2021 Annual Report, the dismissal rate for challenges to a lower court ruling dropped from the previous year. Of the 108 criminal appeal dispositions in 2021, 70 were dismissed. This represented a **65%** dismissal rate. That means **35%** of the time a lower court judge got it wrong or, in the language of the courts, erred. Remember, an appellant, whether Crown or the accused, must prove that the decision made by the lower court was incorrect because the judge made a mistake in understanding the facts (error of fact) or in applying the law (error in law). An appeal is not a new trial.

Criminal Court Dispositions					
Year	2017	2018	2019	2020	2021
Appeals Allowed	42	30	50	49	38
Percent (%) Allowed	34%	27%	32%	45%	35%
Appeals Dismissed	82	83	104	61	70
Percent (%) Dismissed	66%	73%	68%	55%	65%
Total	124	113	154	110	108

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

- In 2021 there were a total of **171** criminal appeals filed. This was up **33%** from 2020.
- Usually an appeal is heard by a panel of three (**3**) judges, but sometimes more will sit.

Criminal Appeals Filed					
Year	2017	2018	2019	2020	2021
Appeals Filed	246	258	219	129	171
Sentence	97	107	90	49	69
Conviction	95	118	92	56	71
Summary Conviction	11	10	11	12	7
Acquittal & Other	43	23	26	12	24

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

The success rate for civil appeals was higher than that of criminal appeals. A higher percentage (**44%**) were successful in 2021.

Civil Court Dispositions					
Year	2017	2018	2019	2020	2021
Appeals Allowed	112	104	97	87	114
Percent (%) Allowed	40%	40%	42%	46%	44%
Appeals Dismissed	168	155	134	102	147
Percent (%) Dismissed	60%	60%	58%	54%	56%
Total	280	259	231	189	261

MISTAKE OF LAW RENDERS ARREST UNLAWFUL

R. v. Tim, 2022 SCC 12

The car the accused was operating collided with a road sign but he kept driving. A passerby called 9-1-1 to report the hit-and-run collision. Fire, medical and police services responded to the call. A police officer found the accused standing on the roadside about a kilometre from the collision speaking with a firefighter. The vehicle had become disabled and stopped. The accused confirmed he was the driver and was cooperative with police. The officer asked the accused for his driver's licence, vehicle registration and proof of insurance. When the accused returned to his vehicle and opened the driver-side door to retrieve his documents, the police officer saw him try to hide a small zip-lock bag containing a single yellow pill by swiping it to the ground. The officer identified the pill as **gabapentin**, which he had seen trafficked before with other street drugs such as fentanyl and methamphetamine.

The officer immediately arrested the accused for possessing a controlled substance, handcuffed him and searched his person. During the pat-down, police found live ammunition for a .22 calibre rifle and a .45 calibre handgun, five fentanyl pills, two hydromorphone pills, two alprazolam pills, another gabapentin pill, three cell phones, and $480 cash.

While the accused was patted-down, another officer searched his car finding a folded serrated knife, a canister of bear spray, four fentanyl pills and two alprazolam pills. As the accused was escorted to a police vehicle, the arresting officer noticed the accused walking strangely. He was limping and shaking his leg as if he had something down his pants. The officer then saw .22 calibre ammunition fall from accused's pant leg. The officer patted the accused down again by touching the outside of his pants in the groin area. The officer felt a metal object that became dislodged and fell from the accused's pants. It was a double-barrelled firearm loaded with a live round in each barrel.

The accused was then arrested for possessing the prohibited firearm and was taken to the police station where he was strip searched down to his underwear. His waistband was searched to see if anything else was hidden, but no further contraband or weapons were found. At the time of his arrest the accused was under a firearms prohibition and an undertaking not to be in possession of drugs.

The accused was charged with several *Criminal Code* and *Controlled Drugs and Substances Act* (*CDSA*) offences including possessing a loaded firearm, carrying a concealed weapon, possessing a weapon while prohibited, breach of undertaking, and possessing fentanyl.

Alberta Court of Queen's Bench

The evidence established that the arresting officer was mistaken. While fentanyl, hydromorphone and alprazolam are all *CDSA* controlled substances, gabapentin is not. It is a prescription painkiller and anti-seizure medication. Although the officer correctly identified the yellow pill as gabapentin, the officer erroneously believed it was a controlled substance under the *CDSA*.

The accused argued that his *Charter* rights under s. 8 — search or seizure — and s. 9 — arbitrary detention — were breached and the evidence, including the pistol, ammunition and fentanyl, ought to be excluded under s. 24(2).

The trial judge found the warrantless arrest to be lawful. Not only did the officer have a subjective belief that gabapentin was a controlled substance, this belief was objectively reasonable because the officer had seen gabapentin trafficked with other street drugs before and had seen the accused try to hide the pill. Since the arrest was lawful, the searches incidental to it — the two pat-downs, the vehicle search and the strip search were

reasonable. There were no ss. 8 or 9 *Charter* breaches and the evidence was admissible. The accused then pled guilty to the charges. He was sentenced to 3 1/2 years in prison.

Alberta Court of Appeal

The accused appealed his conviction submitting the trial judge erred in failing to find *Charter* breaches and by not excluding the evidence. But a two member majority upheld the trial judge's ruling. In the majority's view, the officer had the necessary subjective belief to make an arrest for possessing a controlled substance and the belief was also objectively reasonable in the circumstances. The majority stated:

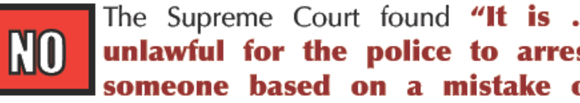
> [The officer] knew the drug in question was Gabapentin, and he had seen it trafficked in conjunction with illicit street drugs before. He did not know that it was not a controlled substance — this is an error of law. On reasonable and probable grounds, he believed in the existence of a state of facts and law which, if it did exist, would have the legal result that the person being arrested … committed a criminal offence, that being in possession of a controlled substance. [*R. v. Tim*, 2020 ABCA 469, para. 37]

The majority concluded there were no *Charter* breaches, the evidence was therefore admissible. The accused's convictions were upheld.

Supreme Court of Canada

The accused again appealed, this time to a a seven member panel of the Supreme Court of Canada. In assessing the merits of the accused's appeal, the Supreme Court examined the facts of the case in six discrete events — two arrests and four searches. The first arrest occurred when the officer recognized the yellow pill that was swept away as gabapentin and arrested the accused for possessing it. This led to the first search incident to arrest when the accused was promptly patted down and more drugs, ammunition, cash and cell phones were found. The second search occurred when police looked through the accused's vehicle and found more drugs, the knife and bear spray. The third search occurred when the accused was frisked a second time at the police car after .22 calibre ammunition fell from his pant leg. This led to the dislodging of the pistol. This prompted a second arrest for possessing the firearm. Finally, a fourth search occurred in the form of a strip search at the police station when the accused was stripped to his underwear.

Was the first drug arrest lawful?



The Supreme Court found **"It is … unlawful for the police to arrest someone based on a mistake of law."** The court defined a mistake of law as when **"when the officer knows the facts and erroneously concludes that they amount to an offence, when, as a matter of law, they do not."** The officer correctly identified the pill as gabapentin but erred in concluding its possession was illegal. This is different from a mistake of fact, for example, where an officer reasonably misidentifies a substance as an illegal drug which later turns out not to be. Justice Jamal, speaking for the six member majority stated:

> Allowing the police to arrest someone based on what they believe the law is — rather than based on what the law actually is — would dramatically expand police powers at the expense of civil liberties. This would leave people at the mercy of what particular police officers happen to understand the law to be and would create disincentives for the police to know the law. Canadians rightly expect the police to follow the law, which requires the police to know the law. [para. 30]

"Canadians rightly expect the police to follow the law, which requires the police to know the law."

> **"Allowing the police to arrest someone based on what they believe the law is — rather than based on what the law actually is — would dramatically expand police powers at the expense of civil liberties. This would leave people at the mercy of what particular police officers happen to understand the law to be and would create disincentives for the police to know the law."**

Since the initial arrest was unlawful the resulting detention was arbitrary and breached s. 9 of the *Charter*.

Was the first pat-down lawful?

NO One of the pre-requisites for a valid search incident to arrest is that the person searched must be lawfully arrested. Since the arrest for possessing the gabapentin was unlawful, the pat-down conducted as an incident to the arrest was unreasonable under s. 8.

Was the vehicle search lawful?

NO Just as the pat-down faltered on the basis that the arrest was unlawful, the vehicle search met the same fate. The vehicle search conducted as an incident to the unlawful arrest was unreasonable under s. 8.

Was the second pat-down lawful?

YES The Supreme Court found it to be **"a lawful search incident to investigative detention relating to the traffic collision investigation."** The police were responding to a collision in which the driver failed to remain at the scene of an accident, offences under both Alberta's *Traffic Safety Act* and, in certain circumstances, the *Criminal Code*.

Thus, apart from the erroneous drug investigation, the accused was **"lawfully detained as part of a traffic collision investigation"**. The officer came to where the damaged car had stopped and approached the accused because he was suspected of fleeing the scene of a collision with a roadside sign.

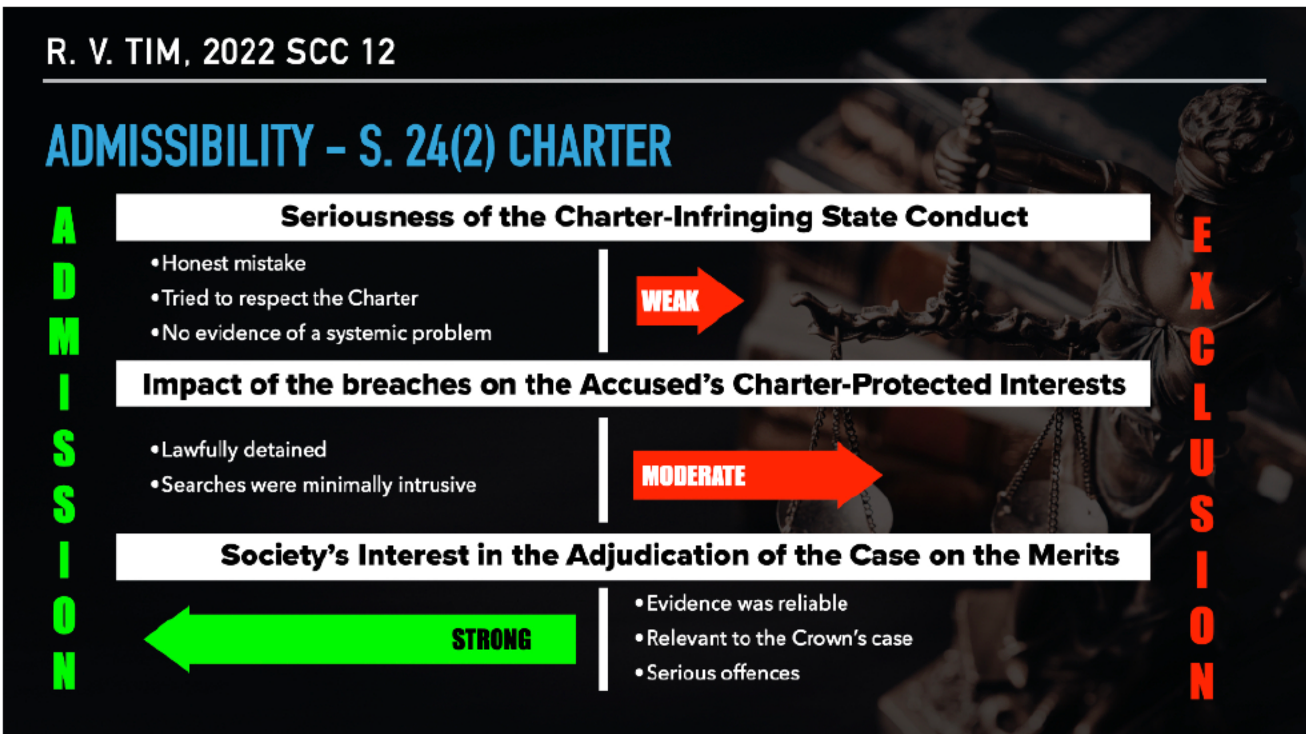
Incidental to a lawful investigative detention, the police may search the detainee as long as they have reasonable grounds to believe that their safety or the safety of others was at risk. Here, the officer not only had the necessary subjective concern about safety, his belief was objectively reasonable as well:

> The officer had just found bullets on the [accused] during a pat-down search, and then he saw more bullets falling from his pants. The [accused] was 'limping and shaking his leg', as if he had 'something concealed in his pants'. The obvious 'something' was a gun. [para. 62]
>
> When there are concealed bullets, there may be a concealed gun. The further pat-down search of the [accused's] person, in which the officer dislodged a loaded handgun by merely touching the outside of the [accused's] pants, was also conducted reasonably. [para. 64]

Since the accused was lawfully detained for the traffic collision investigation and the officer had the necessary grounds for a safety search, the second pat-down conducted as an incident to an investigative detention was NOT unreasonable under s. 8 of the *Charter*. It was a lawful search.

Was the firearm arrest lawful?

YES The Supreme Court found **"the [accused] was lawfully arrested for the weapons offences after the ammunition and the handgun fell from his pants."**



Was the strip search lawful?

YES The Supreme Court reasoned that "**the strip search at the police station was incident to this weapons arrest, because it was for the purpose of discovering concealed weapons or evidence related to the offence for which the [accused] was lawfully arrested.**" The strip search was minimally intrusive, conducted reasonably and limited to the waistband of the accused's underwear which he wore throughout the search.

Admissibility?

Using the three lines of inquiry relevant to the s. 24(2) analysis — the seriousness of the *Charter*-infringing state conduct, the impact of the breaches on the accused's *Charter*-protected interests, and society's interest in the adjudication of the case on its merits — the majority admitted the evidence.

- **Seriousness of the *Charter*-infringing state conduct:** The *Charter* breaches were at the less serious end of the scale. The officer made an honest mistake. The breaches were inadvertent and not deliberate. The officer tried to respect the *Charter* and there was no evidence of wilful blindness or a flagrant disregard for *Charter* rights. Further, there was no evidence of a systemic problem or lack of training that contributed to the officer's honest mistake. Hence, the seriousness of the *Charter*-infringing state conduct weakly favoured exclusion.

- **Impact of the breaches on the accused's *Charter*-protected interests:** The unlawful arrest and first two searches had a moderate impact on the accused's *Charter*-protected interests. Although unlawfully arrested, the accused was detained lawfully for the traffic collision investigation. Moreover, the first pat-down and vehicle search were minimally intrusive. The pat-down was a relatively non-intrusive procedure and there is a reduced expectation of privacy in a vehicle.

- **Society's interest in the adjudication of the case on its merits:** The majority found the evidence to be reliable and relevant to the

"Section 488 of the Criminal Code establishes that search warrants will ordinarily be executed by day and only exceptionally by night."

prosecution of these serious offences. The *Charter* breaches led to the discovery of a loaded gun, ammunition and fentanyl, a drug that has been described as **"public enemy number one"**.

A Different View

Justice Brown wrote a short dissenting opinion. Although he agreed with the majority's ss. 8 and 9 *Charter* analysis, he would have excluded the evidence under s. 24(2) and acquitted the accused on all charges.

Complete case available at www.scc-csc.ca

Editor's Note: Additional details taken from *R. v. Tim*, 2020 ABCA 469 and related appeal documents.

s. 487/487.1 SEARCH WARRANTS EXECUTED BY DAY, EXCEPTIONALLY BY NIGHT

R. v. Carstairs, 2022 BCCA 69

The police received a report of the theft of a $4,000 necklace from a jewelry store. The complainant said an unknown male was shopping for a gold chain, tried it on, and then ran out the door of the store with it. A CCTV video and picture captured from it was disseminated to local officers. An officer subsequently identified the male, a person who was associated with the accused. A couple of months later the accused was advertising a gold necklace for $2,000 on Facebook Market Place under his full name. The necklace depicted on the website was recognized by the police officer investigating the theft and by employees of the jewelry store as the necklace that was stolen. The accused was also advertising the necklace with the same pictures from Facebook on Kijiji. An undercover officer made an offer on the Kijiji account but received no response from the account holder.

The accused was on a recognizance for unrelated charges with a condition that he reside at a specific motel room and obey a curfew from 9 p.m. to 6 a.m. each day and wear an electronic monitoring device. Another officer, who subsequently became an ITO affiant, attended the motel to conduct a curfew check at 4 a.m. While speaking to the accused, the officer noted he was wearing a gold necklace identical to the necklace the accused was advertising for sale. The officer believed the necklace was the one stolen from the jewelry store. Later that day, the police confirmed the necklace was still advertised for sale.

The following day, a *Criminal Code* search warrant application was prepared and faxed to the Justice Centre at 1:48 a.m. The officer sought a night time search for the following reasons:

- The investigation was time sensitive in nature. The necklace was being sold on two separate sites. There was a risk that the necklace could be sold at any time. The longer a search was delayed, the greater chance the necklace and any other evidence might be lost;
- Timing a night search with the accused's' curfew check would guarantee his presence inside the motel unit; and
- When officers had conducted the curfew check at 4 a.m. the accused was fully dressed and appeared to be awake and fully functional.

A signed search warrant was faxed back to police at 2:28 am authorizing entry into the hotel room between 2:30 a.m. and 6 a.m. Although no one was continuously watching the motel room overnight, the police attended the motel room at 3:15 a.m. to execute the search warrant. The accused answered the door wearing the stolen gold necklace/chain. He was arrested for

possessing stolen property and taken to a police car. His girlfriend was also present in the room.

The motel room, consisting of a main living area with a bed and a separate bathroom, was then searched for the (1) gold chain, (2) identification papers and documents bearing the unit and motel address, and (3) electronic devices, including computers or smartphones used to place advertisements on Facebook and Kijiji. The police located a wallet containing a bank card in the accused's name, a laptop with the login screen on and in the name of "Matt", income tax and employment insurance forms in the accused's name, an air gun that resembled a semi-automatic firearm and $950 Canadian currency. Several baggies of drugs, including fentanyl, methamphetamine and cocaine were found in a small silver safe. Other drugs and drug related evidence, along with a stolen drone, was also found in the motel room. The accused was charged with possessing fentanyl and methamphetamine for the purpose of trafficking, possessing cocaine, and possessing stolen property.

British Columbia Provincial Court

The judge found the judicial justice authorizing the search warrant was entitled to find there were reasonable grounds for its nighttime execution in compliance with s. 488 of the *Criminal Code*. ***"The necklace had in recent days been put up for sale on two websites and was apparently still listed for sale,"*** said the judge. ***"It was an easily moveable piece and indeed had been worn by the accused during the early morning curfew check … Given the circumstances as set out in the Information, the Judicial Justice was entitled to find reasonable grounds to authorise the warrant and to provide for execution of the warrant by night. … Once reasonable grounds for authorising a night warrant are established and those reasonable grounds are included in the Information, the test is met. All that remains is to ensure that the warrant authorizes execution by night. Unlike s. 185 of the Code, s. 488 does not require the Informant to establish that other investigative procedures have been tried and failed, or otherwise to establish the investigative necessity element required of an affiant in a wiretap application."***

Since the search warrant was properly granted, there was no s. 8 *Charter* breach resulting from its nighttime execution. The evidence was admitted and the accused was convicted on two counts of possessing a controlled substances for the purposes of trafficking, possessing a controlled substance and possessing stolen property.

British Columbia Court of Appeal

The accused argued the trial judge erred by finding the nighttime search was justified. In his view, the evidence ought to have been excluded under s. 24(2)

Nighttime Searches

Section 488 of the *Criminal Code* states:

> **"A warrant issued under section 487 or 487.1 shall be executed by day, unless**
> **(a) the justice is satisfied that there are reasonable grounds for it to be executed by night;**
> **(b) the reasonable grounds are included in the information; and**
> **(c) the warrant authorizes that it be executed by night."**

"Day" is defined in the Criminal Code as **"the period between six o'clock in the forenoon and nine o'clock in the afternoon of the same day"** — (6 a.m. to 9 p.m.).

Justice Willcock, speaking for the unanimous Court of Appeal, examined other cases involving nighttime searches and concluded that a request for a nighttime search requires the authorizing justice to engage in a balancing process and consider several factors, including the gravity of the substance of the investigation, the likely occupancy of the residence and degree of disruption to privacy the search may cause, the nature of the items that may be found in a search, and the needs of the

"The nature of the offence under investigation, possession of stolen goods, did not weigh significantly in favour of an urgent search. The fact the necklace was easily moveable cannot have tipped the scale in favour of a very intrusive search."

investigation. ***"Section 488 of the Criminal Code establishes that search warrants will ordinarily be executed by day and only exceptionally by night,"*** said Justice Willcock. This requires a "common sense" approach in assessing what objective foundation exists for authoring such a search using a "reasonable grounds" test. Although the authorizing justice considered the online sale of the necklace, the accused's presence at the time the warrant was executed and the portable nature of the necklace to justify an urgent search, the nature of the offence was not considered.

Justice Willcock found the warrant invalid in this case as there was an insufficient basis to justify the nighttime search:

- The gravity of the substance of the investigation did not call for an urgent search. A nighttime search is more likely to be considered reasonable where there is a heightened concern for public safety, even where there is a relatively small risk the evidence sought will be lost or disposed of.
- It was known that the residence was likely to be occupied. A significant factor weighing in favour of executing a warrant at night is when no one is expected to be present in a residence at the time of search (known to be unoccupied).
- The item sought was unlikely to pose a danger to the public.
- The necklace was unlikely to be disposed of except by sale. The accused was also being monitored and was barred from leaving the motel at night. The fact the object of the search is easily transported is not generally considered to be material. Most evidence is portable and would be easily moved or destroyed. More would be needed than simply saying the items searched for may be easily moved or destroyed.
- The needs of the investigation could be served by a search in the morning.

In agreeing with the accused that there were insufficient grounds to authorize a nighttime search of his residence (motel room), Justice Willcock stated:

> … [U]rgency was not dictated by any apparent threat to the public. The nature of the offence under investigation, possession of stolen goods, did not weigh significantly in favour of an urgent search. The fact the necklace was easily moveable cannot have tipped the scale in favour of a very intrusive search.
>
> The fact this residence was known to be occupied was not a factor favouring a nighttime search. No weight could be placed upon the fact [the accused] had previously been awake in the middle of the night. [The affiant] did not claim to be familiar enough with [the accused's] circumstances to say whether he would be awake or alone at the time of the execution of the warrant. He knew only that he would be home. …
>
> The only apparently relevant factor in the ITO was the fact there was an ongoing attempt to sell the necklace. However, the evidence was that the necklace had been listed for sale online for days. The warrant was not sought during the day on December 9, 2018, after [the accused] was seen wearing the necklace at 4:00 a.m. There is no evidence of a significant risk it would be sold in the interval between the execution of the search at 4:00 am and the end of [the accused's] curfew at 6:00 am on the morning of December 10, 2018, which is also the time that marks the beginning of the "day" under s. 2 of the Code. [paras. 41-43]

The Appeal Court suggested the ***"obvious and only reasonable approach was for the officer to obtain the warrant and greet the [accused] at his [motel] door in the morning"***.

Admissibility?

The Court of Appeal applied the three s. 24(2) *Charter* factors — seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused and society's interest in adjudication of the case on its merits — in assessing the admissibility of the evidence:

- **Seriousness of the Charter-Infringing State Conduct:** This was not a serious breach. There was no clear violation of well-established rules governing police conduct. There was some evidence the search was time-sensitive. Nor was there any material inaccuracy or omission in the ITO. The officers were expressly permitted by the warrant to execute the search at night and believed they were acting on legal authority.

- **Impact of the Breach on the Charter-Protected Interests of the Accused:** Other than the breach flowing directly from the nighttime search, there was no evidence the search was aggravated by police conduct during the search. For example, there was no evidentiary foundation for the argument that the treatment of the accused's girlfriend, present in the motel room at the time of the search, exacerbated the impact of the *Charter* breach.

- **Society's Interest in Adjudication of the Case on its Merits:** The evidence was reliable and critical to the Crown's case. The crimes included three drug offences, one of which was for possessing fentanyl for the purposes of trafficking. Trafficking of fentanyl is a serious offence that puts the public at risk. This factor weighed in favour of admitting the evidence.

The first two factors did not strongly favour the exclusion of the evidence, while the third factor favoured admission. On balance, the exclusion of the evidence, rather than its admission, would bring the administration of justice into disrepute.

The accused's appeal was dismissed.

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

Editor's Note: Additional details taken from *R. v. Carstairs*, 2020 BCPC 300.

COMMON LAW PERMITS MODIFIED SEARCH OF HOME INCIDENTAL TO ARREST

R. v. Stairs, 2022 SCC 11

A citizen called 9-1-1 about 15 minutes after he claimed he saw the male driver of another vehicle hitting a "turtling" female passenger in a "flurry of strikes". The caller described the make, model and colour of the car, and provided a licence plate number of either **"BEWN 480"** or **"BEWN 483"**. He also described the driver as a white male, between the ages of 25 to 35, with a buzz cut or shaved head. Police located a suspect vehicle parked in the driveway of a residential home, close to where the 9-1-1 caller had made his observations. The vehicle provided matched the make and model but bore licence plate **"BEWN 840"**. The attending officers believed this was the correct vehicle. The vehicle was registered to the accused's father but a plate query indicated the accused was known to drive it. The accused had cautions for escape risk, violence, family violence and he was listed as a high-risk offender.

The police repeatedly knocked at the front door of the residence and announced their presence, but no one answered. Concerned for the safety of the female passenger, three officers entered the home without a warrant through an unlocked side door while loudly announcing "police". On the main level, no lights were on, but the officers could see light and heard music coming from the basement.

One of the officers looked down the basement steps and saw a man run by, from the right to the left side of the basement. Police continued to announce their presence and instructed all those present in the basement to come upstairs with their "hands up". Eventually, a woman came up the steps from the right side of the basement with her hands up. She had fresh injuries to her face including marks and swelling to her forehead and eyes, cuts on her cheek, and scratches. One of the officers remained with the woman while two officers descended into the basement. At the bottom of the stairs a living room was to the right and a laundry room was to the left. The accused came out of laundry room, complied with police commands and was arrested.

One of the officers then conducted a visual clearing search — a protective sweep — of the living room area which contained a coffee table, couch, TV and cabinets. The officer was not looking for evidence, but rather was clearing the room for safety reasons. During his visual sweep of the living room, the officer walked behind the couch and saw a transparent plastic container sitting out in the open on the floor. He saw what looked like glass shards inside the container, which he believed to be methamphetamine. He also saw a plastic Ziploc bag next to the coffee table containing what he believed was more methamphetamine. Police secured the residence and prepared a warrant to conduct a more thorough search for evidence related to the drug offence. The accused was ultimately charged with possessing methamphetamine for the purpose of trafficking, assault and failing to comply with a probation order.

Ontario Superior Court of Justice

The judge concluded that the police entered the home because they were legitimately concerned with the safety of the female. Police entry was justified under the common law ancillary powers doctrine. The accused's arrest in the home was lawful. The safety sweep was also lawful as a search incident to arrest. The police had a "valid objective," to make sure that "no one else was there and that there were no other hazards." The woman and the accused had both come from the living room and the officers could not fully see into this area. The methamphetamine was sitting out in the open (plain view) when the officer did a brief sweep of the room for safety purposes and could be seized. The accused was convicted of assault, breach of probation, and possessing methamphetamine for the purpose of trafficking. He was sentenced to 26 months in jail (less 20 months pre-trial custody).

Ontario Court of Appeal

The accused appealed his conviction for possessing methamphetamine for the purpose of trafficking. He argued, among other things, that the police conducted an unlawful search of the basement living room after his arrest. In his view, the drugs ought to have been excluded under s. 24(2) of the *Charter*.

A majority of the Appeal Court rejected the accused's suggestion that the police needed reasonable grounds to believe that officer safety was at stake and that a search was necessary to address this specific concern before searching the basement living area. The search of the living room area was incident to lawful arrest. The purpose of the search was based on legitimate safety concerns. The police searched the living room to ensure no one else was present and there were no other hazards:

> [T]the police were able to articulate why they had safety concerns. That articulation made sense. They had descended into a basement where they had never been before, in a house they had never been in before. While the 9-1-1 caller said that there were two people in the car that he observed, that did not mean there were only two people in the home. Nor did it mean that there were no other safety concerns hiding around corners.
>
> In particular, the police could not see behind the sofa from the doorway to the living room. It was not unreasonable to take a quick visual scan of the room in the circumstances. They

"The baseline common law standard for search incident to arrest requires that the individual searched has been lawfully arrested, that the search is truly incidental to the arrest in the sense that it is for a valid law enforcement purpose connected to the arrest, and that the search is conducted reasonably."

> had a person in handcuffs and needed to ascend the stairs, which were located right beside the living room, to safely get him out of the residence, all while the female remained on the first floor. …. [*R. v. Stairs*, 2020 ONCA 678, paras. 67-68]

It was objectively reasonable for the police to take a quick visual scan of the basement living room area. Since the drugs were in plain view, the police could seize them. The accused's appeal was dismissed.

Justice Nordheimer, in a dissenting opinion, was not convinced the warrantless "safety search" of the basement living area was reasonable. The police did not have the necessary reasonable grounds to believe that there was an imminent threat to public or police safety. There wasn't even a reasonable suspicion that there would be weapons, hazards or other people in the living room that would pose a threat. A vague safety concern was not sufficient. In Justice Nordheimmer's view, the search breached s. 8 of the *Charter* and the evidence should be excluded under s. 24(2). He would have allowed the appeal, set aside the accused's drug conviction and entered an acquittal.

Supreme Court of Canada

The accused appealed his conviction, again arguing that the search incident to arrest which led to the discovery of the methamphetamine was unreasonable. He opined that the common law standard for search incident to arrest needed modification for searches conducted in a home — a place where a person enjoys a high privacy expectation. He submitted that a police search for safety purposes required reasonable grounds to believe, or at least suspect, that there was an imminent threat to public or police safety. Since the police did not meet this standard, the search by police of the basement living room breached s. 8 of the *Charter*. As a result, the methamphetamine seized by the police should have been excluded and an acquittal entered on the charge of possessing a controlled substance for the purpose of trafficking.

Search Incident to Arrest

Generally, a search incident to arrest will be lawful where the arrest is lawful, the search is conducted incidental to the arrest and the search is conducted in a reasonable manner. ***"The baseline common law standard for search incident to arrest requires that the individual searched has been lawfully arrested, that the search is truly incidental to the arrest in the sense that it is for a valid law enforcement purpose connected to the arrest, and that the search is conducted reasonably,"*** said Justices Moldaver and Jamal for a five member majority. And further:

> The common law standard for search incident to arrest is well established. … [I]t requires that (1) the individual searched has been lawfully arrested; (2) the search is truly incidental to the arrest in the sense that it is for a valid law enforcement purpose connected to the arrest; and (3) the search is conducted reasonably.
>
> Under the second step, valid law enforcement purposes for search incident to arrest include (a) police and public safety; (b) preventing the destruction of evidence; and (c) discovering evidence that may be used at trial.

"[V]alid law enforcement purposes for search incident to arrest include (a) police and public safety; (b) preventing the destruction of evidence; and (c) discovering evidence that may be used at trial."

> The police's law enforcement purpose must be subjectively connected to the arrest, and the officer's belief that the purpose will be served by the search must be objectively reasonable. To meet this standard, the police do not need reasonable and probable grounds for the search. Instead, they only require "some reasonable basis" to do what they did. This is a much lower standard than reasonable and probable grounds. [references omitted, paras. 35-37]
>
> [T]he common law standard permits a search of the person arrested and the surrounding area of the arrest when (1) the arrest is lawful; (2) the search is incidental to the arrest, such that there is some reasonable basis for the search connected to the arrest and the search is for a valid law enforcement purpose, including safety, evidence preservation, or evidence discovery; and (3) the nature and extent of the search are reasonable. [para. 57]

In some cases, however, where the particular privacy interests are elevated the general (or baseline) framework for search incident to arrest will require modification to ensure compliance with the *Charter*. For example, the power to search incident to arrest has been eliminated for the seizure of an arrestee's bodily samples (e.g. hair, teeth impressions and buccal swabs) and ***"modified in other situations presenting a heightened privacy interest in the subject matter of the search, such as strip searches, penile swabs, and cell phone searches"***.

Searches Incident to Arrest - Home

The majority noted that in-home arrests can be risky. They are **"often volatile and dynamic"**. Besides the arrestee, there may be others in the home including potential victims needing assistance or aggressors posing a safety risk. With this in mind, the majority agreed that the standard for search incident to arrest in a home, with the attendant heightened privacy interests, required modification making it stricter than the baseline common law standard but not so high as requiring the police to have a reasonable belief in imminent harm:

> Balancing the demands of effective law enforcement and a person's right to privacy in their home, we conclude that the common law standard for a search of a home incident to arrest must be modified, depending on whether the area searched is within or outside the physical control of the arrested person. Where the area searched is within the arrested person's physical control, the common law standard continues to apply. However, where the area is outside their physical control, but it is still sufficiently proximate to the arrest, a search of a home incident to arrest for safety purposes will be valid only if:
>
> - the police have reason to suspect that there is a safety risk to the police, the accused, or the public which would be addressed by a search; and
> - the search is conducted in a reasonable manner, tailored to the heightened privacy interests in a home. [para. 8]

The majority further explained:

> To pass constitutional muster, the common law standard for search incident to arrest must be modified in two ways that make the standard stricter where the police search areas of the home outside the arrested person's physical control:
>
> - the police must have reason to suspect that there is a safety risk to the police, the accused, or the public which would be addressed by a search; and
> - the search must be conducted in a reasonable manner, tailored to the heightened privacy interests in a home. [para. 56]

"When the police make an arrest, under the existing common law standard, they may conduct a pat-down search and examine the area within the physical control of the person arrested."

Surrounding Area - In Home Arrest

In establishing this framework, two subcategories within the surrounding area of an arrest were recognized:

1. the area **within the physical control** of the person arrested at the time of arrest; and
2. areas **outside the physical control** of that person, but which are part of the surrounding area because they are sufficiently proximate to the arrest.

Whether a particular area falls within the **"surrounding area"** of the arrest depends on ***"whether an area is sufficiently proximate to the arrest"***. This requires a link between the location and purpose of the search and the grounds for the arrest, and involves a contextual and case-specific inquiry. ***"The inquiry is highly contextual; the determination must be made using a purposive approach to ensure that the police can adequately respond to the wide variety of factual situations that may arise,"*** said Justices Jamal and Moldaver. ***"Depending on the circumstances, the surrounding area may be wider or narrower."***

Noting that the more extensive the search the greater the potential for violating privacy, the majority went further to identify different standards for each of the two subcategories.

Area Within The Arrestee's Physical Control

The majority did not define the area **within** the arrestee's physical control. It is suffice to infer that the living room area was outside the accused's physical control at the time of his arrest because the majority did not apply this "within the physical control standard" to the basement living room area even though he was seen run from it into the laundry room. When searching the area within the arrestee's immediate physical control, the majority found the general framework (or baseline standard) for searches incident to arrest applies:

> When the police make an arrest, under the existing common law standard, they may conduct a pat-down search and examine the area within the physical control of the person arrested. [para. 61]

Area Outside the Arrestee's Physical Control

When the police want to search the surrounding area of the arrest **outside** the arrestee's immediate physical control, a different standard applies:

> [W]hen the police go outside the zone of physical control, the standard must be raised to recognize that the police have entered a home without a warrant. In these circumstances, it is not enough to satisfy the existing common law standard, which requires some reasonable basis for the search. Rather, the police must meet a higher standard: they must have reason to suspect that the search will address a valid safety purpose. [para. 61]

This reasonable suspicion standard was further elaborated as follows:

> When the police search incident to arrest in a home for safety purposes, they must have reason to suspect that a search of areas outside the physical control of the arrested person will further the objective of police and public safety, including the safety of the accused. This modified standard, which is stricter than the basic common law standard, respects the privacy interests in the home while allowing the police to effectively fulfil their law-enforcement responsibilities.
>
> Like the common law test, the purpose of the search must be subjectively connected to the

> **"When the police search incident to arrest in a home for safety purposes, they must have reason to suspect that a search of areas outside the physical control of the arrested person will further the objective of police and public safety, including the safety of the accused."**

arrest, and the officer's belief that the purpose will be served by the search must be objectively reasonable. However, the objective requirement is stricter. To meet this stricter standard, the Crown must establish "objective facts [that] rise to the level of reasonable suspicion, such that a reasonable person, standing in the shoes of the police officer, would have held a reasonable suspicion".

Reasonable suspicion is a higher standard than the common law standard for search incident to arrest. … [T]the search incident to arrest power arises from the fact of the lawful arrest. All that is required is "some reasonable basis" for doing what the police did based on the arrest. The common law standard is less stringent than the reasonable suspicion standard because it permits searches based on generalized concerns arising from the arrest, while the reasonable suspicion standard does not.

By contrast, to establish reasonable suspicion, the police require a constellation of objectively discernible facts assessed against the totality of the circumstances giving rise to the suspicion of the risk. This assessment must be "fact-based, flexible, and grounded in common sense and practical, everyday experience". In addition, the police must have reason to suspect that the search will address the risk. However, reasonable suspicion is a lower standard than reasonable and probable grounds because it is based on a possibility rather than a probability.

Whether the circumstances of a particular case give rise to reasonable suspicion must be assessed based on the totality of the circumstances. Relevant considerations include (a) the need for a search; (b) the nature of the apprehended risk; (c) the potential consequences of not taking protective measures; (d) the availability of alternative measures; and (e) the likelihood that the contemplated risk actually exists. [references omitted, paras. 65-69]

To justify entry, however, the reasonable suspicion standard need not reach the higher bar of a reasonable belief in imminent harm.

Nature and Extent of the Search

The majority found the power to search incidental to arrest must be limited in scope given the elevated expectation of privacy found in a home:

> The police must carefully tailor their searches incident to arrest in a home to ensure that they respect the heightened privacy interests implicated. The search incident to arrest power does not permit the police to engage in windfall searches. The police are highly constrained when they go beyond the area within the physical control of the arrested person.
>
> The search incident to arrest power only permits police to search the surrounding area of the arrest. … [T]he key consideration is the link between the location and purpose of the search and the grounds for the arrest.
>
> In addition, *the nature of the search must be tailored to its specific purpose, the circumstances of the arrest, and the nature of the offence*. As a general rule, the police cannot use the search incident to arrest power to justify searching every nook and cranny of the house. A search incident to arrest remains an exception to the general rule that a warrant is required to justify intrusion into the home. The search should be no more intrusive than is necessary to resolve the police's reasonable suspicion.

> Further, it would be *good practice for the police to take detailed notes after searching a home incident to arrest*. They should keep track of the places searched, the extent of the search, the time of the search, its purpose, and its duration. In some instances, insufficient notes may lead a trial judge to make adverse findings impacting the reasonableness of the search. [emphasis added, references omitted, paras. 78-81]

In summarizing the framework for the search of a home incident to arrest for safety purposes, the majority stated the following requirements:

> **(1) The arrest was lawful.**
>
> **(2) The search was incident to the arrest. The search will be incident to arrest when the following considerations are met:**
>
> **(a) Where the area searched is within the arrested person's physical control at the time of the arrest, the common law standard must be satisfied.**
>
> **(b) Where the area searched is outside the arrested person's physical control at the time of the arrest — but the area is sufficiently proximate to the arrest — the police must have reason to suspect that the search will further the objective of police and public safety, including the safety of the accused.**
>
> **(3) Where the area searched is outside the arrested person's physical control at the time of the arrest — but the area is sufficiently proximate to the arrest — the nature and the extent of the search must be tailored to the purpose of the search and the heightened privacy interests in a home. [para. 82]**

The Search was Lawful

In this case, the police had the necessary reasonable suspicion (subjectively held/objectively reasonable) that there was a safety risk in the basement living room and their concerns would be addressed by a quick scan of it to ensure that no one else was present and there were no weapons or hazards. The dynamic of the arrest (volatile and rapidly changing) and the nature of the offence (domestic assault) figured prominently in the reasonable suspicion analysis. And the quick visual scan was the least intrusive manner of search possible in the circumstances. No items were moved nor were any doors or cupboards opened. ***"The police had reason to suspect that there was a safety risk which would be addressed through a cursory visual clearing search,"*** said the majority. ***"Moreover, the search was tailored to its purpose — it was targeted, brief, and constrained."***

A Word of Caution — Investigation Related Purposes

The majority noted the decision in this case related solely to safety searches and did not extend to searches incident to arrest for investigation-related purposes such as evidence preservation or evidence discovery. Whether or not the reasonable suspicion standard applies to investigative purposes was left unresolved as the Supreme Court put this issue off for another day.

The majority concluded that the search of the living room incident to arrest did not violate the accused's' s. 8 *Charter* right against unreasonable search and seizure. The accused's appeal was dismissed.

A Different View

Three Supreme Court justices concluded the search of the basement living room and the methamphetamine seizures breached s. 8. Justice Karakatsanis, speaking for the minority, agreed that the common law set too low a standard for searches incident to arrest inside a home but a reasonable belief standard would be too high. She disagreed with the majority's distinction between areas within or outside an arrestee's physical control, suggesting it was unnecessary and complicated the search incident to arrest framework.

In balancing the privacy interests in a home and law enforcement interests, she would have

R. V. STAIRS, 2022 SCC 11

SEARCH INCIDENT TO ARREST

General Framework

1. Lawful arrest
2. Valid objective
   - ✓ Safety (police and/or public)
   - ✓ Evidence (preserve and/or discover)
3. Reasonably conducted

Application

- Arrestee + surrounding area

Modified Framework

PENILE SWAB

+ reasonable grounds to believe that a penile swab will afford evidence of the offence for which the accused was arrested.

STRIP SEARCH

+ some evidence suggesting the possibility that the person arrested has concealed weapons or evidence related to the reason for arrest.

CELL PHONE

+ the nature and the extent of the search must be incidental to the particular arrest for the particular offence.
+ may only search for the purpose of discovering evidence when the investigation would be stymied or significantly hampered absent the ability to promptly search the cell phone incident to arrest.
+ detailed notes of what was examined.

Warrant Required

Bodily Substances

E.g.:

- Hair samples
- Teeth impressions
- Buccal swabs

HOME SAFETY SEARCHES

Within arrestee's physical control

General framework applies

Outside arrestee's physical control

+ reasonable grounds to suspect there is a safety risk (police, arrestee, public) which would be addressed by a search.

required a ***"reasonable suspicion of an imminent threat to police or public safety."***

In her view, the searching officer provided no reasonable suspicion that anybody's safety was at risk following the accused's arrest. He had been handcuffed and the victim was upstairs with an officer. And there was no sign of weapons or other people inside the residence. In Justice Karakatsanis' opinion, the search and seizures were unreasonable and the evidence should be excluded under s. 24(2). She would have entered an acquittal on the drug charge.

Yet Another Opinion

Justice Côté authored his own opinion. He agreed with Justice Karakatsanis on both the reasonable suspicion standard for searches incidental to arrest inside a home and with her application of this standard to the facts of this case. He too found the search and seizures in this case infringed the accused's s. 8 rights. However, he would have admitted the evidence under s. 24(2). He also offered this advice:

> The modifications to the law my colleagues outline will require police to respect individual privacy rights within a home, by refraining from warrantless searches unless they reasonably suspect a search is necessary to address a safety risk. Where no such risk exists which meets the requisite threshold, the arrestee's s. 8 privacy interests should generally prevail. In other words, police should secure the home and obtain a search warrant, which is not a particularly onerous task. [para. 173]

Justice Côté, like the majority, would dismiss the appeal and affirm the conviction but for different reasons.

Complete case available at www.scc-csc.ca

Editor's Note: Additional details taken from *R. v. Stairs*, 2020 ONCA 678 and associated appeal documents.

EVIDENCE ADMITTED DESPITE ILLEGAL DRUG DOG SNIFF

R. v. Zacharias, 2022 ABCA

The accused was pulled over on Highway 1 in Banff by an officer for having illegally tinted windows and a burnt-out fog light on his truck contrary to Alberta's *Traffic Safety Act*. The officer saw a large suitcase in the cab of the truck and a tonneau cover on the box. Over the course of their interaction, the accused told the officer he was heading to Calgary from Kelowna to visit his sister for a couple of days. The officer asked the accused if he was a member of law enforcement because the truck had a **"back the blue"** decal on one of its windows. The accused said the decal was on the truck when he bought it. The accused said his wallet had been stolen and he provided his passport for identification. After searching the accused's name in police databases, the officer believed he developed a reasonable suspicion that the accused may be in possession of controlled substances. The officer was a 14-year member with significant experience, training and education in the interception and detection of travelling criminals on highways, including being a certified National Pipeline instructor who had taught over 15 courses. He based his suspicion of illegal drug activity on the following:

- The accused was stopped on Highway 1, a known corridor for transporting drugs.
- The accused was travelling to visit his sister for a couple of days but he had a large suitcase in the cab of the truck which seemed inconsistent with a short visit. The suitcase was in the cab of the truck, not in the box behind the truck, which suggested that the back was full.
- The accused seemed extremely nervous when he handed over his passport. People who are pulled over for a traffic stop are nervous but their nervousness diminishes over time.
- The **"back the blue"** decal sticker was suspicious because such messages of support for police were commonly used by drug traffickers.
- The police databases query contained an entry revealing that three years earlier the accused was the subject of a complaint that he was involved in the distribution of large amounts of cannabis and cocaine. The identity and reliability of this complainant were unknown.

The officer called for back-up and a sniffer dog. The accused was detained for investigation, patted down for officer safety, and placed in the back of a police vehicle. The sniffer dog was brought to the scene, deployed on the exterior of the truck and confirmed the presence of controlled substances. The accused was arrested for possessing a controlled substance and his truck was manually searched incident to arrest. Numerous large bags full of marijuana, edibles (126 THC-infused pastries), cannabis resin (700 grams of cannabis oil in a jar), cell phones, a score sheet and $12,600 in cash (under the rear bench seat) were found. In total, 101.5 lbs. of cannabis was located. The accused was re-arrested for trafficking, handcuffed and transported to the police station where he was stripped to one layer of clothing and placed in a telephone room to speak with a lawyer. He was subsequently released about six hours after being detained. Charges included possessing marihuana for the purpose of trafficking, possessing cannabis resin and possessing proceeds of crime.

Alberta Court of Queen's Bench

The accused challenged the officer's reasonable suspicion to detain him for a drug investigation and for calling the drug sniffing dog. As a result, he argued that his ss. 8 and 9 *Charter* rights were breached. The judge agreed that the officer's suspicion was unreasonable. The officer lacked the necessary reasonable grounds to suspect illegal drug activity and therefore the accused had been arbitrarily detained. As for the search using the drug sniffing dog, it was unreasonable for lack of the requisite suspicion. The judge accepted that the officer sincerely believed he had reasonable grounds to suspect that the accused was involved in illegal drug activity but the officer's observations and the information available to him did not constitute objectively reasonable grounds for suspicion. Although the totality of information and observations were assessed as a whole, the judge found most of them were weak indicators of drug activity and applied broadly to innocent people:

- The accused's nervousness was a common reaction to being pulled over. Although it was described as extreme, it might have been because the accused did not have his driver's licence with him. In any event, it diminished over time.
- There was an innocent explanation for the accused keeping his luggage in the cab, not the box in the back; it was cold and he did not want it to freeze.
- The officer had no information about where the pro-police decal came from or whether it was on the vehicle when the accused acquired it.
- The route on which the accused was stopped was also used by law abiding citizens; this was not a significant indicator of unlawful activity.
- The information acquired from the police database search was a very weak indicator of unlawful drug activity because it was dated and its source and reliability were unknown.

The judge, however, admitted the evidence under s. 24(2). In the judge's view the breach was not serious, the accused had a lower expectation of privacy in the vehicle, and the evidence was highly reliable and important to the Crown's case. The administration of justice would be brought into disrepute by the exclusion of such a significant quantity of controlled substances. The accused was convicted of possessing cannabis for the purpose of trafficking and sentenced to 14 months incarceration.

Alberta Court of Appeal

The accused alleged the trial judge erred in her s. 24(2) analysis by, in part, failing to consider all of the circumstances relevant in assessing the seriousness of the *Charter*-infringing conduct. He suggested the trial judge failed to consider all of the s. 8 *Charter* breaches committed by the police, such as the roadside pat-down, the search of the truck, and the strip search at the police station, and their effects on his *Charter*-protected interests. Although she found a s. 9 breach regarding the initial investigative detention, the judge did not refer to it in her s. 24(2) analysis. Nor did she consider that the accused was placed in the back of a police vehicle, arrested on the basis of the unlawful sniffer dog search, re-arrested on the results of an unlawful search incident to arrest, handcuffed, and detained for six hours at the police station.

The majority, Justices Wakeling and Crighton, first noted that the accused had only initially claimed *Charter* breaches related to his investigative detention and the sniffer dog search because the necessary reasonable suspicion was lacking. The Appeal Court could not now consider other conduct that might be contrary to the *Charter* when it was not argued at trial and where no findings were made. ***"The [accused] decided what police conduct he would challenge and the Crown, and indeed the trial judge, responded to the evidence led in relation thereto,"*** said the majority. ***"It would be unfair for an appellate court to make findings of fact on new breach arguments that were never argued or admitted at trial to undermine the trial judge's section 24(2) analysis."*** And further:

> We decline to consider [the accused's] arguments regarding the additional breaches

> that were neither included in his Charter notice nor argued at trial. The onus is his to identify the breaches the trial judge is required to adjudicate. To ask this Court to assess different and additional arguments now is to change the entirety of the trial and the case the Crown was asked to meet. [para. 10]

Nevertheless, the majority did not agree that the accused was subjected to a strip search at the police station when he was asked to remove a layer of clothing. He was not required to strip naked. A strip search is a visual inspection of a person's undergarments or genitals, which did not occur in this case.

The majority did agree, however, that the trial judge did not expressly include the s. 9 *Charter* breach relative to the accused's investigative detention in the second stage of her s. 24(2) admissibility analysis — the impact of the *Charter* breaches. But her failure to do so did not affect the result:

> The Charter protected interests relative to section 8 and section 9 of the Charter are the right not to be unreasonably detained, the expectation of privacy and the right to be free from an unreasonable search and seizure by the state. The trial judge found there was nothing untoward about [the officer's] decision to stop [the accused], to engage him in discussion, or to take any steps necessary to assess the driver and to assure traffic safety. The impugned detention was required to facilitate deployment of the sniffer dog. … Here, the investigative detention was necessary to facilitate deployment of the sniffer dog relative to a vehicle in which [the accused's] expectation of privacy is low. The impugned investigative detention was also brief and accompanied by the right to counsel which [the accused] refused. All of this, along with the factors identified by the trial judge, support her conclusion that the section 8 and 9 Charter breaches she found had only minimal impact on [the accused's] Charter protected rights. [para. 7]

The trial judge did not err in admitting the evidence, the accused's appeal was dismissed, and his conviction was upheld.

A Second Opinion

Justice Khullar, in dissent, disagreed with the majority that the evidence should have been admitted. She was willing to entertain the additional ss. 8 and 9 *Charter* breaches not considered by the trial judge. In her view, in addition to the sniffer dog search of the vehicle, the pat down search of the accused's person, and the search of the interior of the truck, including the duffel bags, were also s. 8 breaches. Moreover, s. 9 breaches included the initial detention without reasonable grounds, the arrests, and the continuation of the s. 9 breaches by placing the accused in the police vehicle, handcuffing him, and transporting him to the police station where he was detained for several hours.

In her final analysis, Justice Khullar would have excluded the evidence. Although the breaches were not very serious (not made in bad faith, deliberate, systemic or negligent) and the evidence seized was reliable and integral to the Crown's case which favoured inclusion of the evidence, the s. 8 breaches had more than a trivial impact on the accused's *Charter*-protected interests while the s. 9 breaches had a significant impact. On balance, Justice Khullar held, ***"admitting the drug evidence in these circumstances would undermine the reputation of the criminal justice system in the eyes of a reasonable person informed of all the relevant circumstances."*** She would have set aside the accused's conviction and entered an acquittal.

Complete case available at www.canlii.org

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2022 British Columbia Law Enforcement Memorial

Sunday, September 25, 2022 at 1:00 pm
Ceremony at the BC Legislature
in Victoria, BC

Law Enforcement participants to form up in the 800 block of Government Street at 12:00 pm.

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UNDERMINING LEGAL ADVICE BREACHED s. 10(b) CHARTER: STATEMENT EXCLUDED

R. v. Dussault, 2022 SCC 16

After arresting the accused for murder and arson, the police informed him of his s. 10(b) *Charter* rights. The accused indicated that he wished to speak to a lawyer and he was transported to the police station, arriving at 2:36 p.m. He was presented with a list of local defence lawyers and chose one at random. He was placed in a telephone room and told to wait for a call. The phone rang and the accused spoke to his chosen lawyer for about nine minutes. The lawyer explained the charges and the accused's right to remain silent. The lawyer believed the accused was not processing or understanding his advice and offered to come to the station to meet in person. The accused agreed. The lawyer asked the accused to pass the phone to an officer, which he did.

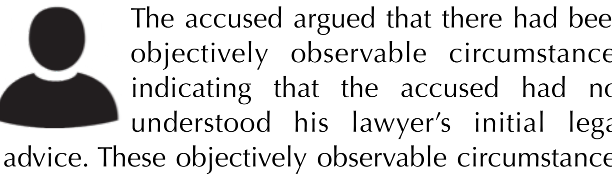
The lawyer spoke to a detective for about three minutes, telling him that he was coming to the police station and asking that the investigation be suspended. The detective replied, ***"[n]o problem"*** or ***"no trouble"***. The lawyer then spoke to the accused, confirming he would be coming to the station to meet with him. The lawyer told the accused he would be placed in a cell and told him not to speak with anyone. The accused believed his lawyer would be coming to the police station to meet him.

At 3:20 p.m., officers involved in the investigation decided that the lawyer would not be permitted to meet with the accused. The detective called the lawyer and told him there was no point in coming to the police station. The detective explained that the accused had exercised his right to counsel during the telephone conversation and the accused himself had not expressed a desire to meet with his lawyer. A Crown prosecutor was contacted and confirmed that the accused was not entitled to meet with his lawyer at the police station.

At 4:15 p.m. the lawyer arrived at the police station but was not permitted to meet with the accused. At 6:30 p.m., the lawyer departed the station but left a handwritten note for the detective indicating he had only partially instructed the accused on his rights during the earlier phone call and wanted to meet with the accused to complete the advice before he was interrogated. He said he would be available after 7:45 p.m. and asked the detective to contact him as soon as possible.

The investigators decided not to permit further consultation between the accused and his lawyer before proceeding with questioning. Meanwhile, when he asked three times whether his lawyer had arrived at the station, the police declined to tell the accused that his lawyer was at the station or that his lawyer had asked to speak with him. At 8:52 p.m. the accused was taken for an interview. He continued to express his expectation that his lawyer would come to the station and he was reluctant to proceed with the interview. The interviewer persisted despite the accused's repeated assertions that he did not wish to say anything further and that he wanted the interview to stop. The accused subsequently provided an incriminating statement.

Superior Court of Quebec



The accused argued that there had been objectively observable circumstances indicating that the accused had not understood his lawyer's initial legal advice. These objectively observable circumstances were:

(1) the lawyer's handwritten note; and

(2) the accused's assertion that his lawyer had said he was coming to meet with him.

In his view, these circumstances obliged the police to provide him with a second opportunity to consult his lawyer.

The judge concluded that the accused had exercised his right to counsel by the end of the telephone call with his lawyer. In the judge's opinion, the lawyer had adequately explained the

> **"Detainees do not have a right to obtain, and police do not have a duty to facilitate, the continuous assistance of counsel."**

right to silence, the accused understood this, and the accused did not mention to police that he did not understand his rights.

The judge found the police could reasonably presume that the accused had exercised his right to counsel and thereby had discharged the implementation duties imposed upon them under s. 10(b) of the *Charter*. Accordingly, the police were not obligated to provide a second opportunity for the accused to consult counsel and the incriminating statement was not obtained unconstitutionally. The accused pled guilty to the arson charge and was convicted by a jury of second-degree murder.

Quebec Court of Appeal

The accused appealed the murder conviction on the basis that the trial judge erred in not excluding his incriminating statement. In the Court of Appeal's unanimous opinion, the accused's telephone call with his lawyer did not constitute a complete consultation for the purposes of s. 10(b). The police **"were fully aware that [the accused] and his counsel expected the consultation to continue"**. The police had deliberately and concertedly attempted to frustrate the effective exercise of the right to counsel and therefore were not entitled to presume that the right to counsel was exhausted at the end of the phone conversation. Denying the accused the opportunity to continue his consultation with counsel breached s. 10(b). The accused's incriminating statement was excluded under s. 24(2) of the *Charter* and a new trial was ordered.

Supreme Court of Canada

The Crown challenged the Court of Appeal's decision arguing the police did provide the accused with a reasonable opportunity to consult counsel. But a unanimous Supreme Court disagreed, holding the police failed in their duty. Rather than deciding whether or not the police were entitled to presume that the phone conversation constituted a "complete" consultation in its own right, the Supreme Court found that there were **"objectively observable"** indicators that the police conduct undermined the legal advice that was provided during the first consultation such that a second opportunity to consult counsel was required.

A Second Consultation

The Supreme Court again explained s. 10(b) and the duties it imposes on police:

> Section 10(b) of the Charter provides that everyone has the right on arrest or detention "to retain and instruct counsel without delay and to be informed of that right". Stated at its broadest, the purpose of the right to counsel "is to provide a detainee with an opportunity to obtain legal advice relevant to his legal situation".
>
> Section 10(b) places corresponding obligations on the state. Police must inform detainees of the right to counsel (the informational duty) and must provide detainees who invoke this right with a reasonable opportunity to exercise it (the

> **"Section 10(b) places corresponding obligations on the state. Police must inform detainees of the right to counsel (the informational duty) and must provide detainees who invoke this right with a reasonable opportunity to exercise it (the implementational duty). Failure to comply with either duty results in a breach of s. 10(b)."**

"Once a detainee has consulted with counsel, the police are entitled to begin eliciting evidence and are only exceptionally obligated to provide a further opportunity to receive legal advice."

> implementational duty). Failure to comply with either duty results in a breach of s. 10(b).
>
> Police can typically discharge their implementational duty by facilitating "a single consultation at the time of detention or shortly thereafter". In this context, the consultation is meant to ensure that "the detainee's decision to cooperate with the investigation or decline to do so is free and informed". A few minutes on the phone with a lawyer may suffice, even for very serious charges.
>
> … Detainees do not have a right to obtain, and police do not have a duty to facilitate, the continuous assistance of counsel. Although other jurisdictions recognize a right to have counsel present throughout a police interview, that is not the law in Canada. Canadian courts and legislatures have taken a different approach to reconciling the personal rights of detainees with the public interest in effective law enforcement.
>
> Once a detainee has consulted with counsel, the police are entitled to begin eliciting evidence and are only exceptionally obligated to provide a further opportunity to receive legal advice. … [references omitted, paras. 30-34]

In *R. v. Sinclair*, 2010 SCC 35, the Supreme Court recognized three categories of objectively observable changed circumstances that can renew a detainee's right to consult counsel:

1. **new procedures involving the detainee;**
2. **a change in the jeopardy facing the detainee; or**
3. **reason to believe that the first information provided was deficient.** The renewed right to counsel under this category includes situations where the police "undermine" the legal advice that the detainee has received.

Undermining Legal Advice

The type of police conduct that could **"undermine"** the legal advice a detainee has received cannot be defined too broadly so as to include efforts by police to convince a detainee to act contrary to their lawyer's advice, such as stopping their questioning of a detainee who said ***"my lawyer told me not to talk"***. Instead, ***"police can undermine legal advice by undermining confidence in the lawyer who provided that advice."*** The Supreme Court stated:

> A detainee's confidence in counsel anchors the solicitor-client relationship and allows for the effective provision of legal advice. When the police undermine a detainee's confidence in counsel, the legal advice that counsel has already provided — even if it was perfectly correct at the time it was given — may become … "distort[ed] or nullif[ied]". [references omitted, para. 39]

This would require the **"police to provide a new opportunity to consult with counsel in order to counteract these effects."**

But **"undermining"** counsel is not limited to the intentional belittling of defence counsel such as expressly calling into question their competence or trustworthiness. Police conduct can unintentionally undermine the legal advice provided to a detainee. ***"The focus remains on the effects of the police conduct,"*** said Justice Moldaver. ***"Where the police conduct has the effect of undermining the legal advice given to a detainee, and where it is objectively observable that this has occurred, the right to a second consultation arises. There is no need to prove that the police conduct was intended to have this effect. … To focus on whether the police intended to bring about a change in circumstance would be to shift the inquiry away from the necessity for reconsultation***

and toward the fault of the police. … The duty to facilitate reconsultation is not imposed on police as a punishment for ill-intentioned conduct."

Again, undermining police conduct is not limited to the **"belittling"** of defence counsel. Conduct other than the express belittlement of defence counsel may have the effect of distorting or nullifying the legal advice received. ***"The focus remains on the objectively observable effects of the police conduct, rather than on the conduct itself,"*** said Justice Moldaver. He continued:

> Simply put, the purpose of s. 10(b) is to provide the detainee with an opportunity to obtain legal advice relevant to their legal situation. … [T]he legal advice is intended to ensure that "the detainee's decision to cooperate with the investigation or decline to do so is free and informed". The legal advice received by a detainee can fulfill this function only if the detainee regards it as legally correct and trustworthy. The purpose of s. 10(b) will be frustrated by police conduct that causes the detainee to doubt the legal correctness of the advice they have received or the trustworthiness of the lawyer who provided it. Police conduct of this sort is properly said to "undermine" the legal advice that the detainee has received. If there are objectively observable indicators that the legal advice provided to a detainee has been undermined, the right to a second consultation arises. By contrast, the right to reconsult will not be triggered by legitimate police tactics that persuade a detainee to cooperate without undermining the advice that they have received. … [P]olice tactics such as "revealing (actual or fake) evidence to the detainee in order to demonstrate or exaggerate the strength of the case against him" do not trigger the right to a second consultation with counsel. [references omitted, para. 45]

In this case, the police undermined the legal advice that the accused's lawyer had provided him during their telephone conversation and triggered the police duty to provide the accused with a second opportunity to consult counsel, which they failed to do.

The police led the accused to believe that an in-person consultation with his lawyer would occur. But the detective's conduct was misleading. When the lawyer said he was coming to the police station to meet the accused and asked that the investigation be suspended, the detective said it would be no problem or no trouble. Relying on these words, the lawyer told the accused he was coming to meet him. This had the effect of causing the accused to believe an in-person meeting would be taking place.

The police led the accused to believe that his lawyer had failed to come to the police station for their in-person consultation. When the accused asked whether his lawyer had arrived, the officer said he wasn't at the front of the station. This response suggested that the lawyer had not arrived at all.

These two separate objectively observable acts undermined the legal advice provided. First, the content of the lawyer's advice was undermined. ***"[The lawyer] advised [the accused] that he was coming to the police station to meet with him in person; that, in the interim, [the accused] would be placed in his cell; and that he — [the accused] — should not speak to anyone,"*** said Justice Moldaver. ***"In refusing to permit [the lawyer] to meet with [the accused], the police effectively falsified an important premise of [the lawyer's] advice — i.e. that [the accused] would be placed in a cell until [the lawyer] arrived."***

Second, during the interrogation, the accused repeatedly expressed his expectation that his lawyer would attend and his concern that he had not shown up. These statements were ***"objectively observable indicators that the legal advice given to [the accused] had been undermined."***

The Supreme Court also agreed that the right to counsel is ***"a 'lifeline' through which detained persons obtain legal advice and 'the sense that they are not entirely at the mercy of the police while detained'." "In this case, the conduct of the police had the effect of undermining and distorting the advice that [the accused] had received."*** Justice

Moldaver said, ***"the police ought to have offered him a second opportunity to re-establish his 'lifeline', but they did not. In failing to do so, they breached his s. 10(b) rights."***

The accused's incriminating statements were excluded under s. 24(2) and the Crown's appeal was dismissed.

Complete case available at www.scc-csc.ca

PLAIN VIEW DRUGS JUSTIFIES ARREST

R. v. Morin, 2022 SKCA 46

Police conducted a traffic stop of an unregistered vehicle. When officers approached the vehicle, the driver exited it and was followed on foot. Two other individuals were still inside the vehicle. The accused, the front seat passenger, exited the vehicle and identified himself without being asked to do so. The backseat passenger did the same. The vehicles windows had been rolled down and its doors left open. While standing beside the vehicle, an officer observed a clear plastic bag in the open centre console between the front seats. The bag contained what he believed was methamphetamine.

The accused and the backseat passenger were arrested for possessing a controlled substance for the purpose of trafficking. In searches incidental to their arrests, the police discovered about $2,000 in bundles of cash and a cellphone on the accused, as well as a scale and three bags of cocaine, on the backseat passenger. The accused's cellphone was later searched and found to contain messages indicative of drug trafficking. The police seized 10.7 grams of cocaine and 3.7 grams of methamphetamine from the centre console of the vehicle. No drugs were found on the accused and he claimed he had recently visited a casino where he had won the cash. The accused was charged with possessing methamphetamine and cocaine, each for the purpose of trafficking.

Saskatchewan Provincial Court

The accused alleged, among other things, that the police breached his ss. 8 and 9 *Charter* rights and he wanted the evidence discovered in the searches excluded under s. 24(2). The judge found the passenger side front and rear doors were both open, the front passenger window was down. The officer could see into the centre console, which was ajar about six inches. The officer saw a clear baggie tied in a knot sticking out from the centre console and a small Ziploc clear baggie next to it with what appeared to be methamphetamine. On this basis, all of the occupants were then arrested for drug possession. The judge found the accused's arrest and searches were lawful. The accused's *Charter* application was dismissed and he was convicted of possessing methamphetamine and cocaine, each for the purpose of trafficking. He was sentenced to 22 months incarceration followed by three years of probation.

Saskatchewan Court of Appeal

The accused asserted, in part, that the trial judge erred by failing to find violations of ss. 8 and 9 of the *Charter* in the circumstances of his arrest. But the Court of Appeal concluded the trial judge did not err in finding that the arrest and searches were lawful.

Plain View

Since the methamphetamine and cocaine were in plain view in the vehicle, the police had reasonable grounds to arrest the accused. The search for and seizure of the evidence did not violate s. 8. The console was open, the drugs were in clear plastic bags and the trial judge found they were in plain view. ***"The judge's plain-view finding is thoroughly supported by the testimony of the officer who saw the baggie of methamphetamine in the centre console of the vehicle as well as by the dashboard-camera footage from the police cruiser, which is the only evidence relevant to the finding,"*** said Justice Caldwell, speaking for the unanimous Court

of Appeal. ***"Although [the accused] attempted to establish through the dash-cam video that the officer had entered the vehicle before he saw the drugs, the officer maintained that the drugs had been in plain view and that he had directed other officers to arrest [the accused] after seeing the drugs from the exterior of the vehicle, not after leaning into the vehicle and finding them."***

The trial judge did not misapprehend the evidence nor was his finding that the drugs were in plain view clearly wrong. The trial judge's conclusion that the police had reasonable grounds to arrest the accused was not an error and the search incidental thereto was lawful. There were no ss. 8 or 9 of the *Charter* breaches and, therefore, no reason to conduct a s. 24(2) analysis.

The accused's appeal was dismissed.

Complete case available at www.canlii.org

FORCE JUSTIFIED DURING INVESTIGATIVE DETENTION: HANDGUN ADMITTED

R. v. Noor, 2022 ONCA 338

The police received a 9-1-1 call about a man with a gun at a gas station. The caller said he was approached by the man (a stranger), who asked for a cigarette. After the caller gave the man a cigarette, the man "flashed" a gun that was in his waistband under his jacket and said "peace". While driving away, the caller saw the man knocking on the window of the gas station. The caller provided a description of the man: male, black, about six feet tall, slim build, in his late 20s, wearing light blue pants and a hoodie that was yellow, blue, and had a little bit of red with the hood down (described as "more like a sweater type"). Two officers attended the gas station and were told by its attendant that the man came to the window and asked him to call a taxi. When the attendant refused, the man walked east, away from the gas station. The attendant described the suspect as male, black, with a gold earring in each ear, possibly having a gold tooth or teeth, wearing an orange hoodie.

The two officers began a search for the suspect by driving in the area. At a plaza located about 350 metres from the gas station, the officers noticed the accused. He appeared similar in description to the suspect and was standing among a group of six to eight men outside of a restaurant. The accused was a young, black man, about six feet tall, with a slim build, short hair, a goatee and facial hair along his jawline. He did not have gold teeth but had gold hoop earrings in his ears. He was wearing light coloured pants, an orange sweatshirt, and a red, orange and black jacket. The jacket had no hood but had large and distinctive white number 8s on the sleeves and back.

As the officers approached the group on foot, the accused appeared startled and quickly moved away from the other men and tried to evade the officers. One of the officers told the accused, "hold on, man", and he reached for the accused's arm to restrain and detain him for investigation. The accused tried to leave and a violent struggle ensued. He was taken to the ground but resisted. He had his arms under his body and appeared to be trying to reach into his jacket with his right arm. The officer was concerned that the accused was reaching for a firearm. With the assistance of other officers, the accused was controlled and handcuffed. When he was rolled onto his side, his jacket fell open revealing the grip of a handgun in an inside jacket pocket. It was a restricted firearm — a Para USA 1911 Elite Commander 45 caliber semi-automatic handgun with an obliterated serial number. There were six rounds in the magazine and another round in the chamber. The accused was not the holder of a firearms acquisition certificate, license, or firearms registration certificate. He was charged with several firearms offences.

Ontario Court of Justice

The detaining officer conceded that there were no grounds to arrest the accused until after he was subdued and the gun was discovered. The accused

Gun Seized
Source: Toronto Police

Loaded magazine
Source: Toronto Police

alleged that he was arrested and/or detained without sufficient grounds — contrary to s. 9 of the *Charter* and the search and seizure of the handgun was unreasonable — contrary to s. 8 of the *Charter*. In his view, the evidence ought to have been excluded under s. 24(2).

The judge held the accused had been lawfully detained. She found the officer ***"had objectively reasonable grounds to suspect that [the accused was the man who had flashed the gun at the gas station."*** She also found the accused had been lawfully searched incident to the lawful detention.

He was convicted on two gun-related charges: (1) possessing a loaded restricted firearm without an authorization, licence or registration certificate; and, (2) possessing a firearm, knowing the serial number had been removed. He was sentenced to a total of 467 days in jail, followed by two years of probation.

Ontario Court of Appeal

The accused argued that the trial judge erred in finding there was no violations of his rights under ss. 8 and 9 of the *Charter* and maintained the gun ought to have been excluded from evidence under s. 24(2). He

"It is important to bear in mind that reasonable suspicion, the standard that applies to the investigative detention that was underway, is a lower standard than reasonable and probable grounds and can be based on information that is 'different in quantity and content than that required to establish probable cause' and 'less reliable'."

suggested that the police officers' notes disclosed that they had arrested him, rather than just detained him for investigative purposes. Thus, the trial judge erred in characterizing the interaction as an investigative detention instead of an arrest. In addition, the accused submitted that the officers did not have reasonable grounds for an arrest because there were substantial differences between the description of the suspect flashing the gun and his own appearance. And, even if the interaction was merely an investigative detention, the police lacked the required reasonable suspicion.

Investigative Detention

The officer was detaining the accused for an investigation, not arresting him, when the handgun was discovered. The trial judge accepted the officer's evidence that his intention at the time he approached the accused was to conduct an investigative detention. He used the word **"arrest"**, as opposed to detain, in his police notes because the notes were made after the event, when the accused was actually under arrest.

As well, when the accused was detained, the police officer had the necessary reasonable suspicion that the accused was the man who flashed the gun. ***"It is important to bear in mind that reasonable suspicion, the standard that applies to the investigative detention that was underway, is a lower standard than reasonable and probable grounds and can be based on information that is 'different in quantity and content than that required to establish probable cause' and 'less reliable',"*** said the Court of Appeal. ***"The reasonable suspicion standard demands less because "[s]uspicion' is an expectation that the targeted individual is possibly engaged in some criminal activity", and such suspicion will be 'reasonable' where it is supported by objectively articulable grounds."*** The Appeal Court continued:

> [The officer] had sufficient objectively articulable grounds at the time [the accused] was detained to support his subjective belief that [the accused] could possibly be the suspect. [The accused] was in the vicinity of the event that led to the 911 call, shortly after that event. He fit the general description of the suspect's gender, race, age, height, and build, being a male, black, in his late twenties, six feet tall, with a slim build. There were also material similarities between what [the accused] was wearing, and what the suspect was described to be wearing. Like the suspect, he was wearing light blue pants and gold earrings in each ear. Like the suspect, he was wearing multi-coloured clothing on his upper body that included the colours orange and red. In those objectively articulable circumstances, the trial judge was entitled to find that [the officer's] belief that there was a possibility that [the accused] could be the suspect was reasonable.
>
> To be sure, (1) the clothing on [the accused's] upper body did not include some of the colours described by one of the witnesses, namely blue and yellow; (2) no witness described a crest on the suspect's clothing, but [the accused's] jacket had crests of the number 8 on the back and arms of his coat; (3) [the accused's] orange sweater was not a hoodie; and (4) [the accused] had facial hair, a feature the witnesses to the incident did not include in their description. But even if these differences would have prevented a "reasonable grounds" conclusion sufficient to support an immediate arrest, something we need not decide in this appeal, they are not the type of differences that required the complete elimination of [the

accused] as a reasonably possible suspect. These discrepancies could well have been attributable to honest error by the witnesses, or to an understandable inability or failure to note available details in the circumstances. The witnesses were describing a brief, unexpected event that occurred at night between strangers. Based on timing, location, physical description, and the impressive similarities that did exist, it is understandable that [the officer] approached [the accused] for investigation, notwithstanding these differences.

It is also worth noting that [the officer] did not require reasonable suspicion to approach and attempt to speak to [the accused]. When [the officer] began to approach, [the accused] projected a startled look and he quickly attempted to walk away. Although [the accused] was legally entitled at this point to walk away, his reaction could only have reasonably reinforced [the officer's] suspicion prior to the detention. [paras. 10-12]

Search & Seizure

The Court of Appeal upheld the trial judge's search and seizure ruling:

> … No search occurred before the handgun was seized. On the evidence the trial judge accepted, the handgun came into plain view incidentally, during the struggle. No issue can be taken with the correctness of the trial judge's finding that the officers were acting legally when that struggle occurred. As we have explained, [the officer] had grounds to detain [the accused] for investigative purposes. He was therefore entitled to attempt to restrain [the accused] by the arm as [the accused] attempted to avoid detention. When [the accused] began to struggle in response, [the officers] were entitled to use reasonable force to detain [the accused]. Once [the accused] appeared to be reaching for something, possibly a weapon, the officers were entitled to overcome his resistance for officer safety. They and the officers who were assisting them were in the process of restraining [the accused] when the handgun was observed. Once the firearm was observed, it is obvious that the officers had reasonable and probable grounds to arrest [the accused] for possession of the firearm and to seize the firearm incidental to that arrest. In the circumstances, the seizure of the handgun was lawful, and based on reasonable grounds. [para. 15]

And the police did not conduct the seizure unreasonably. ***"[T]he force used, including compliance strikes that were administered to prevent [the accused] from succeeding in reaching for what the officers believed could be a weapon, was reasonable,"*** said the Court of Appeal.

The accused's appeal was dismissed.

Complete case available at www.ontario.courts.on.ca

Editor's Note: Additional details taken from *R. v. Noor*, 2021 ONCA 469

National Day of Remembrance for Victims of Terrorism

June 23, 2022

TRAINING & EXPERIENCE NOT TO OVERWHELM REASONABLE GROUNDS ANALYSIS

R. v. Santos, 2022 SKCA 50

A Saskatchewan police officer stopped the accused driving eastbound on the Trans-Canada Highway to check his licence and registration under Saskatchewan's *Traffic Safety Act*. The officer made several observations and obtained other information and, in light of his training and experience, formed the belief that the accused was in possession of cannabis for the purpose of distribution, contrary to s. 9(2) of *Canada's Cannabis Act*. This observations and information included:

- **The Honda CRV was a rental vehicle.**

> **Officer lens:** People often drive rental vehicles for a degree of anonymity. When a licence plate is queried, the police won't know the driver's identity.

- **The accused volunteered he was driving a rental because his own car was in the shop.**

> **Officer lens:** In 2,500 vehicle stops, the officer said he "never really had anyone volunteer to [him] why they were in a particular car". He didn't ask about it and thought the accused was trying to justify being in a rental car.

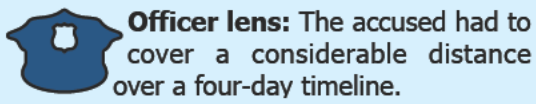
- **When asked for the rental agreement, the accused appeared to be flustered and had difficulty locating it.**

> **Officer lens:** The accused appeared to be panicking when asked for a simple rental agreement and was staring at the officer through the vehicle mirrors while the officer waited for backup.

- **The accused said he was travelling from Calgary to Winnipeg.**

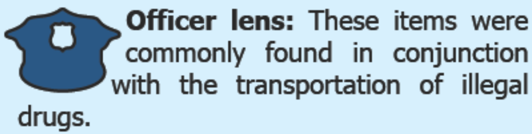
> **Officer lens:** Calgary was a source point for drugs while Winnipeg was a destination point for drugs. The officer had seen many previous seizures on the Trans-Canada highway.

- **The rental agreement stated the accused had rented the vehicle the day before in Calgary and it was due back in three days.**



> **Officer lens:** The accused had to cover a considerable distance over a four-day timeline.

- **The officer saw a Red Bull energy drink in the cup holder, and there was fast food trash on the floor behind the passenger seat.**

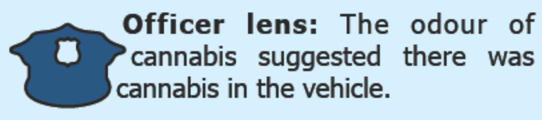


> **Officer lens:** These items were commonly found in conjunction with the transportation of illegal drugs.

- **The cargo compartment of the vehicle was covered with a factory-installed cover.**

> **Officer lens:** The accused was trying to hide something in the back of the vehicle from plain sight. The officer had previously been involved in similar large cannabis seizures where the cannabis had been concealed in the back of a vehicle.

- **The officer recognized the odour of fresh (i.e., raw, unsmoked) cannabis coming from the vehicle.**



> **Officer lens:** The odour of cannabis suggested there was cannabis in the vehicle.

- **A database query indicated 15 entries involving the accused. One entry by ALERT**

(Alberta Law Enforcement Response Team), which investigates serious crimes such as drug trafficking and money laundering, stated the accused had video surveillance set up outside his residence in Lethbridge, had reportedly purchased a $60,000 car the previous summer by paying cash for it and, on several occasions, his neighbours had complained of people mistakenly coming to their houses asking for drugs. The entry ended with the following words: "This information lends credence to the possibility that [the accused] is involved in drug trafficking".

The officer told the accused that he believed there was a large amount of marihuana in his vehicle, arrested the accused, handcuffed him and searches incidental to arrest were conducted. The accused had $1,881 in his pocket, and there was a garbage bag in the covered luggage area of the vehicle with a 1.065-kilogram brick of packaged cocaine inside it. A baggie containing 7 grams of marijuana was also located in the centre console between the driver's and passenger's seats.

Saskatchewan Provincial Court

The accused contended that his arrest was unlawful (s. 9 *Charter* breach), the search of the vehicle unreasonable (s. 8 *Charter* breach), and the package of cocaine found hidden in the luggage compartment should be excluded under s. 24(2). In his view, at the time of arrest, the officer did not have reasonable grounds to believe that he had committed or was committing the offence of possessing cannabis for the purpose of distribution. Although the smell of raw cannabis coming from his vehicle supported an inference that he had cannabis in it, the odour did not support an objectively reasonable belief that he possessed it for the purpose of distributing it. After all, under the *Cannabis Act*, a person may lawfully possess up to 30 grams of dried cannabis and odour alone says nothing about the quantity in possession. Moreover, the ALERT information did not implicate the accused in drug trafficking. Finally, all of the other factors relied upon by the officer to support the

belief that the accused possessed cannabis for the purpose of distribution were entirely innocuous. Even considered cumulatively, these factors did not amount to reasonable grounds for the accused's arrest.

Despite the accused's arguments, the judge found the officer's subjective belief that he was probably transporting enough cannabis to meet the criteria for illegal distribution under s. 9(1)(a)(i) of the *Cannabis Act* was objectively reasonable. The initial traffic stop was lawful and the questions the officer asked all fell within the scope of the authority provided by Saskatchewan's *Traffic Safety Act*. Moreover, the judge held the officer honestly believed the accused possessed cannabis for the purpose of distributing it (<u>subjective grounds</u>) and had relied on his training and experience in forming that belief. And the grounds offered by the officer were <u>objectively</u> capable of supporting his belief. Although the individual factors for which there could be an innocent explanation individually didn't mean much, when taken together, through the officer's training and experience, reasonably led the officer to believe the accused was transporting marihuana illegally for distribution.

"The smell of fresh marihuana gave him grounds that there was marihuana in the car, and the rest gave him grounds that it could reasonably be an

"Where a lawful arrest has been made, the common law authorizes police officers to search the person arrested and 'seize anything in their possession or the surrounding area of the arrest to guarantee the safety of the police and the arrested person, prevent the person's escape, or provide evidence against them'."

illegal amount being transported," said the judge. ***"From the officer's position and training, I find that the grounds are objectively reasonable for the officer -- officer's belief, looking at all factors leading to his belief. As such, the arrest was based on reasonable and probable grounds, being both subjectively and objectively, and the rest was lawful."*** There were no *Charter* violations and thus no s. 24(2) analysis was required. The cocaine was admitted into evidence and the accused was convicted of possessing it for the purpose of trafficking. He was sentenced to four years in prison.

Saskatchewan Court of Appeal

The accused submitted that the trial judge erred in determining that his rights under ss. 8 and 9 of the *Charter* had not been violated. He asserted, in part, that the trial judge overemphasized the officer's subjective interpretation of the circumstances and used his specialized training and experience as a **"trump card"** in the reasonable grounds analysis. It was wrong, he contended, to solely rely on the officer's subjective interpretation of events to draw inferences of criminality that a reasonable observer viewing those same events would not draw.

Arrest & Search

Justice Kalmakoff, writing a unanimous Appeal Court judgment, described the common law power to search as an incident to arrest:

> Section 8 of the Charter protects against unreasonable search and seizure. In order to comply with s. 8, a search conducted by state actors must be authorized by law, the law itself must be reasonable, and the search must be carried out in a reasonable manner. Section 9 protects against arbitrary detention. Detention that is unlawful is arbitrary.
>
> Where a lawful arrest has been made, the common law authorizes police officers to search the person arrested and "seize anything in their possession or the surrounding area of the arrest to guarantee the safety of the police and the arrested person, prevent the person's escape, or provide evidence against them". An unlawful arrest violates s. 9 of the Charter. A search conducted incidental to an unlawful arrest is not authorized by law and, therefore, violates s. 8. [references omitted, paras. 15-16]

Was the Arrest Lawful?

Section 495(1)(a) of the *Criminal Code* allows an officer to arrest a person without a warrant who ***"has committed an indictable offence or who, on reasonable grounds, [the officer] believes has committed or is about to commit an indictable offence"***. The basis for the arrest that the officer relied upon was the indictable offence under s. 9(2)(a)(i) of the *Cannabis Act* for a person 18 years or older to distribute cannabis that weighs more than 30 grams. **"<u>Distribute</u>"** is defined in the Cannabis Act as including ***"administering, giving, transferring, transporting, sending, delivering, providing or otherwise making available in any manner, whether directly or indirectly, and offering to distribute"***. Thus, the officer could only lawfully arrest without a warrant if he had reasonable grounds to believe that the accused was transporting cannabis that weighed more than 30 grams.

"[T]he totality of the circumstances known to the officer at the time of the arrest, as seen from the perspective of a reasonable person with comparable knowledge, training and experience as the arresting officer, must be capable of supporting the belief that grounds for the arrest exist."

Reasonable Grounds

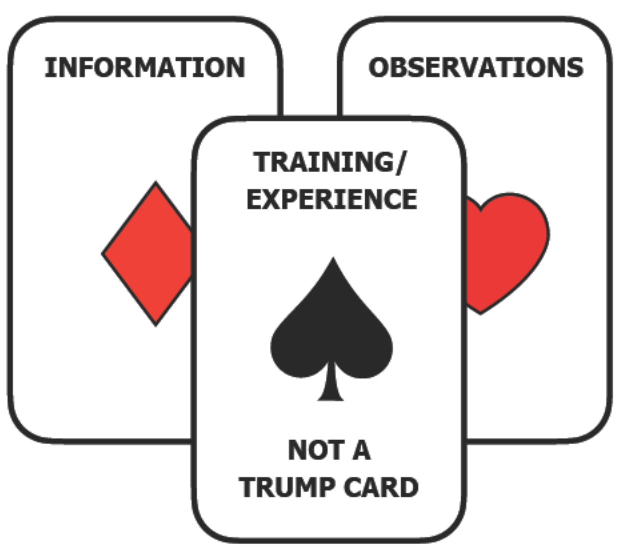
In determining whether the officer had the requisite reasonable grounds to believe that the accused had more than 30 grams of cannabis in the vehicle, as he testified to, Justice Kalmakoff noted the following governing principles:

- *"The threshold for a warrantless arrest under s. 495(1)(a) has a subjective component and an objective component. The subjective component requires that the arresting officer honestly believe the individual being arrested has committed (or is about to commit) an indictable offence. The objective component requires that the officer's belief be objectively reasonable in the circumstances. That is to say, the totality of the circumstances known to the officer at the time of the arrest, as seen from the perspective of a reasonable person with comparable knowledge, training and experience as the arresting officer, must be capable of supporting the belief that grounds for the arrest exist."*
- *"The governing test, while easy to recite, is sometimes difficult to apply. This is not surprising, given the wide variety of circumstances in which police may purport to exercise statutory or common-law powers on the basis of reasonable grounds to believe."*
- *"The current language in the Criminal Code, 'reasonable grounds', has the same meaning as the former 'reasonable and probable grounds'. It signifies the point at which credibly based probability replaces suspicion."*
- *"Reasonable grounds to believe is a higher standard than reasonable suspicion. Whereas reasonable suspicion engages the possibility of crime, reasonable grounds to believe engages the probability of crime. It is important that the two standards not be conflated."*
- *"The reasonable grounds to believe standard does not necessitate that the circumstances known to the arresting officer be sufficient to prove the commission of an indictable offence beyond a reasonable doubt, or on a balance of probabilities, or to establish a prima facie case for conviction. It does, however, require a strong connection between the accused and the offence under investigation."*
- *"While an arrest based on a mistake of law is unlawful, the concept of "reasonable grounds to believe" relates to the facts. This means an arresting officer's belief as to the existence of the facts necessary to support an arrest does not need to be correct in order to be reasonable. A factual belief can be reasonable even if it is mistaken or later proven to be wrong. It is not necessary that the inference drawn by the officer be the only possible inference that can be drawn from the available information. Nor does it have to be the most compelling inference. Reasonable belief is not automatically negated simply because other plausible innocent explanations may arise from the same observations and information. The question for a reviewing court is whether the belief held by the by the arresting officer was a reasonable one to have held at the time of the arrest, based on the circumstances known to the officer at that time. For this standard to be met, the court must be able to conclude that the factors articulated by the officer who made the arrest were reliable and objectively capable of supporting their belief that the offence in question had been committed."*
- *"In determining whether the reasonable grounds to believe standard has been met, the reviewing court must examine the information*

> **"There is no checklist with a certain number of indicia that must be met before reasonable grounds to believe will be established, and no single identifiable factor that marks the point at which reasonable suspicion crosses the threshold to become reasonable grounds to believe."**

that was available to the arresting officer cumulatively, and not in a piecemeal fashion."

- *"Deciding whether reasonable grounds to believe exist is a qualitative, not quantitative, exercise. There is no checklist with a certain number of indicia that must be met before reasonable grounds to believe will be established, and no single identifiable factor that marks the point at which reasonable suspicion crosses the threshold to become reasonable grounds to believe. It is the totality of the circumstances that is important."*
- *"The arresting officer must consider all of the incriminating and exonerating information that the totality of the circumstances permits. They can only disregard information which they have reason to believe may be unreliable. Judicial scrutiny of the "totality of the circumstances" must bear in mind that police officers are often required to make split-second decisions in fluid and potentially dangerous situations, based on available information which may be imperfect, evolving, or inaccurate.*
- *"Context is also crucial when considering the totality of the circumstances confronting the arresting officer. In that respect, the reputation of a suspect may be germane in assessing whether there were reasonable grounds, if that reputation is related to the reason for the arrest, and the police knowledge is based on reliable evidence."*
- *"The approach to the question of reasonable grounds must be flexible and grounded in common sense and practical everyday experience. The 'reasonable person' in the requisite analysis is one armed with the knowledge, training, and experience of the investigating officer."*



- *"While the training and experience of the arresting officer are undoubtedly relevant considerations, they do not form a trump card. Nor does the fact that the officer has certain training and experience remove the need for an objective and critical analysis by a reviewing court. The question is not simply whether this officer, on the basis of their training and experience, believed what they believed, but rather whether it would be reasonable for an officer with the same training and experience to have formed that belief."* [references omitted, paras. 26, 27, 29]

In this case, the Court of Appeal found the trial judge let the officer's training and experience overwhelm the reasonable grounds analysis:

> **"While the training and experience of the arresting officer are undoubtedly relevant considerations, they do not form a trump card."**

"Courts must be careful not to allow the fact that an officer has certain experience and training to function as a thread that automatically sews a patchwork of exclusively innocuous circumstances into a quilt of reasonable grounds to believe a person has committed an offence."

> … Although he began his analysis by referring to the relevant legal principles, he fell into error by failing to conduct any critical examination of [the officer's] subjective assessment of the evidence. In effect, the trial judge reasoned as though [the officer's] training and experience alone were enough to remove the need for a thorough assessment of the reasonableness of his subjective belief. If the trial judge had conducted that critical analysis, in my view, he would have concluded that, while [the officer] had reasonable grounds to suspect that that [the accused] was committing the offence for which he was ultimately arrested, the evidence fell short of providing an objective basis to believe he was committing that offence. To put that another way, the factors on which [the officer] relied to form his belief fell short of providing an objectively reasonable basis to conclude that there was a probability, as opposed to merely a possibility, that [the accused] possessed cannabis for the purpose of distribution.
>
> … [D]etermining the point at which reasonable suspicion crosses the threshold to reasonable grounds to believe is a qualitative, not quantitative, exercise. There is no bright line between the two and no definitive checklist of factors that can be consulted to distinguish one from the other. That said, reasonable grounds to believe is clearly a higher standard than reasonable suspicion and, where it is met, it entitles the police to exercise more intrusive powers than may be exercised on the basis of a reasonable suspicion. Accordingly, while the gap between the two standards may not be wide, it must remain one that is distinguishable. [paras. 31-32]

Justice Kalmakoff then analyzed the factors proffered by the officer in support of his reasonable belief. ***"Courts must be careful not to allow the fact that an officer has certain experience and training to function as a thread that automatically sews a patchwork of exclusively innocuous circumstances into a quilt of reasonable grounds to believe a person has committed an offence,"*** he said. He determined that almost all of the factors were, individually, exclusively innocuous and, although when taken together met the reasonable suspicion standard, did not provide the necessary reasonable grounds upon which to base an arrest:

> In this case, almost all of the factors [the officer] cited as supporting his belief that [the accused] possessed cannabis for the purpose of distribution were, on their own, completely innocuous. These innocuous observations included the fact that [the accused] was driving a rented vehicle, the fact that he was travelling from Calgary to Winnipeg along the Trans-Canada highway, and the fact that he had an energy drink in the cup holder, fast-food wrappers on the floor, and a factory-installed luggage cover in place. [The officer] said these were things that, in his experience, were commonly found in conjunction with the transportation of illegal drugs. But they are also, in my view, so commonplace with travelers who are doing nothing illegal that they contribute little to the base of a reasonable belief in criminal activity.
>
> Several of the other factors that [the officer] identified as being significant were also completely innocuous when examined individually, including the fact that Mr. Santos volunteered the reason he was driving a rented vehicle without being asked. While [the officer] seemed to place a fair bit of emphasis on this, it is hard to see [the accused's] explanation as being anything other than entirely innocuous from the standpoint of a reasonable observer. After all, [the accused] was driving a vehicle that was not his own and he had just been stopped by a police officer who asked to see the vehicle's registration. It is not difficult to envision how even a completely law-abiding person in that situation may feel a need to explain why their own name does not appear

on the registration certificate. Nothing about [the accused's] response, in my view, could reasonably be taken as suspicious.

Also significant, in [the officer's] mind, were the fact that the rental term only allowed [the accused] four days to make the trip from Calgary to Winnipeg and back and the fact that [the accused] seemed flustered and had trouble finding the rental agreement in the vehicle. In my view, however, even considering the distance [the accused] had to cover, a four-day timeline to make the trip, using the most direct route between the two cities, would not strike a reasonable observer as remarkable, let alone suspicious. Nor, in my view, would a reasonable person find anything suspicious about the fact that a person driving a rental car had difficulty locating the rental agreement, or that the inability to quickly locate the rental agreement would cause them to become flustered when they had been asked to do so by a police officer who has stopped them on the highway.

[…]

In this case, even the potentially incriminating aspects of the observations on which [the officer] had relied added little to the exclusively innocuous factors. The odour of cannabis from [the accused's] vehicle was undoubtedly an important observation, but its importance must be considered in the light of the fact that, under the Cannabis Act, he was lawfully entitled to possess cannabis as long as he did not have more than 30 grams of it, intend to distribute it to an organization, or know that it was "illicit". In that respect, the odour that [the officer] detected, at least on his testimony, said absolutely nothing about quantity, purpose, or knowledge. There may be circumstances where a court could find that the strength or quality of such an odour was reasonably indicative of quantity—but that was not the case here. Likewise, the fact that [the accused] appeared to be nervous and watched [the officer] intently during the encounter could be taken in a number of ways but, at most, added little more than a suspicion. …

The ALERT entry also required closer examination. Notably, it did not suggest that [the accused] had ever been convicted, charged, or even arrested for any drug-related offences. It mentioned that [the accused] had, on one occasion, reported that he had been the victim of a car theft. It said he had, at some point, paid cash for a car. It mentioned that his neighbours had complained about people mistakenly coming to their houses asking to purchase drugs but, although the inference was open to be drawn, it did not say that any of the prospective drug purchasers had identified [the accused] as the person they were hoping to meet for that purpose. Finally, the ALERT entry contained an opinion that the information in the entry lent credence to the "possibility" that [the accused] was involved in drug trafficking. … [I]nformation gained from police databases is relevant and properly considered in determining whether police have reasonable grounds to suspect – or believe – that someone is involved in particular criminal activity. But that information must be examined to consider the degree to which it connects the suspect to the crime in question. Key factors here include the recency of the information, the similarity to the offence under investigation, proximity in time, specificity, and the quality of the source. In this case, none of the information in the ALERT entry was particularly specific or compelling. None of it drew anything more than a tenuous link between [the accused] and drug trafficking.

"[M]ost of the factors upon which [the officer] relied in this case were individually completely innocuous and, even when the potentially inculpatory factors are added to the mix and weighed in the light of the officer's experience and training, the evidence as a whole does not reveal a strong enough connection between [the accused] and the criminal activity alleged …"

> The bottom line here is that most of the factors upon which [the officer] relied in this case were individually completely innocuous and, even when the potentially inculpatory factors are added to the mix and weighed in the light of the officer's experience and training, the evidence as a whole does not reveal a strong enough connection between [the accused] and the criminal activity alleged – namely, possession of cannabis for the purpose of distribution. In saying this, I recognize that police investigations, and traffic stops in particular, are dynamic events that can unfold quickly and unpredictably, and that determining whether there are reasonable grounds for an arrest is not an exact science. Police officers do not have the luxury of judicial reflection. At some point, a police officer will always have to make a judgment call, as [the officer] did here, as to whether there is enough objective evidence to support an exercise of the power to effect an arrest without a warrant. Nonetheless, if challenged, that judgment call will fall to be examined by a court against the reasonable grounds to believe standard. [references omitted, paras. 33-35, 37-39]

The factors, when examined in totality and through the lens of the officer training and experience, suggested only a possibility (reasonable suspicion) and not a probability (reasonable belief) that the accused possessed cannabis for the purpose of distribution. As such, the arrest was unlawful and breached s. 9 of the *Charter*. The search of the vehicle conducted incidental to the unlawful arrest, which led to the discovery of the packaged cocaine, was unreasonable and breached s. 8.

Admissibility?

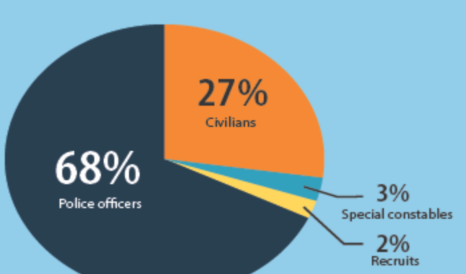
Using the three prong s. 24(2) analysis — the seriousness of the *Charter*-infringing conduct, the impact of the violation on the *Charter*-protected interests of the accused, and society's interest in having the charges adjudicated on their merits — the Court of Appeal excluded the evidence. First, the ss. 8 and 9 *Charter* breaches were of moderate seriousness, falling neither at the high nor low end of the scale which pulled towards exclusion. Second, the breaches had a serious impact on the accused. He was arrested and taken into custody on less than reasonable grounds and his vehicle was then unlawfully searched. This factor also favoured exclusion of the cocaine. Finally, the cocaine was highly reliable evidence and crucial to the Crown's case. This favoured admission, but it could not overcome the other two factors pulling towards exclusion. Although a "close call", on balance, the Court of Appeal ruled the evidence inadmissible.

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

Complete case available at www.canlii.org

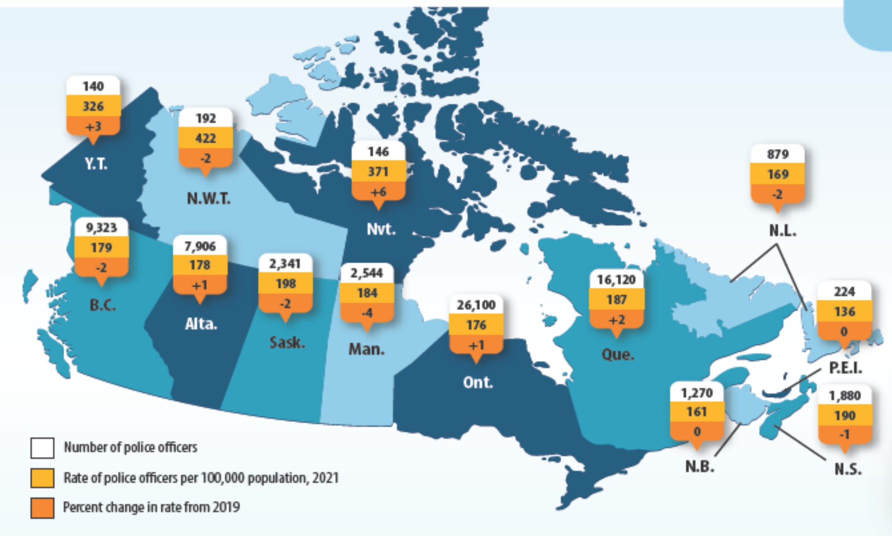
POLICE PERSONNEL AND EXPENDITURES IN CANADA, 2021

POLICE PERSONNEL



NUMBER OF POLICE OFFICERS BY PROVINCE AND TERRITORY

As of May 15, 2021, there were **70,114** police officers in Canada, **1,267 more** than in 2019.
This represents a rate of police strength of **183** officers per 100,000 population, and **is stable** from two years earlier.[1]



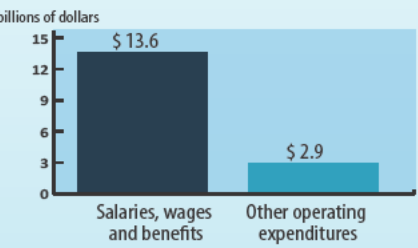
Top 5 measures put in place by police services in response to the pandemic

1. Adjustment of training methods (88%)
2. Change in the workplace layout (77%)
3. Change to how police services deal with suspects in cells (76%)
4. Change of work schedule (70%)
5. Teleworking (65%)

Across Canada, police services received 11.8 million calls for service

POLICE OPERATING EXPENDITURES

In 2020/2021, operating expenditures for policing totalled **$16.5 billion**, up **5%** from 2018/2019.



Close to **$33 million** in additional costs related to the COVID-19 pandemic were spent in 2020/2021 to adequately equip policing personnel.

Just over 4 in 10 police services reported that **20% or more** of their personnel had been absent from work for at least one day at some point in 2020/2021 due to the COVID-19 pandemic.

INDIGENOUS AND VISIBLE MINORITY POLICE OFFICERS[2]

8% of police officers were members of a population group designated as a visible minority

4% of police officiers were Indigenous

WOMEN IN POLICING

	%
Male police officers	78%
Female police officers	22%

- In 2021, there were **404 more** female police officers than in 2019.
- **18%** of commissioned officers and **20%** of non-commissioned officers were women.
- Women accounted for **70%** of civilian positions in police services.
- **33%** of special constables and **31%** of recruits were women.

1. Canada includes personnel from the Royal Canadian Mounted Police operation and corporate headquarters, training academy depot division and forensic labs. They are not represented on the map.
2. Data are collected from police services through self-identification by personnel.

Note: Data on police personnel, women in policing, visible minorities, and Indigenous people are based on a "snapshot date" of May 15, 2021. COVID-19 data refer to the period from April 1, 2020 to March 31, 2021. The other data on this infographic represent the calendar year ending December 31, 2020 (or March 31, 2021 as some police services operate on a fiscal year basis). Percentages may not add up due to rounding. Despite the Police Administration Survey being an annual survey, collection for the 2020 cycle was cancelled due to the pandemic. Therefore, the 2021 cycle data are compared to 2019 cycle data.

Source: Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, Police Administration Survey, 2021.

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SCHOOL OF CRIMINAL JUSTICE & SECURITY

JUSTICE & PUBLIC SAFETY DIVISION

BACHELOR OF LAW ENFORCEMENT STUDIES (BLES)

Get Ahead of the Competition

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

WHAT WILL I LEARN?

This comprehensive program will prepare you to contribute to a just and fair society as a member within a variety of criminal justice and public safety professions. Graduates will obtain:

- An in-depth knowledge of the Canadian criminal justice system.
- Analysis and reasoning skills informed by theory and research.
- Skills required to effectively work within a law enforcement agency.

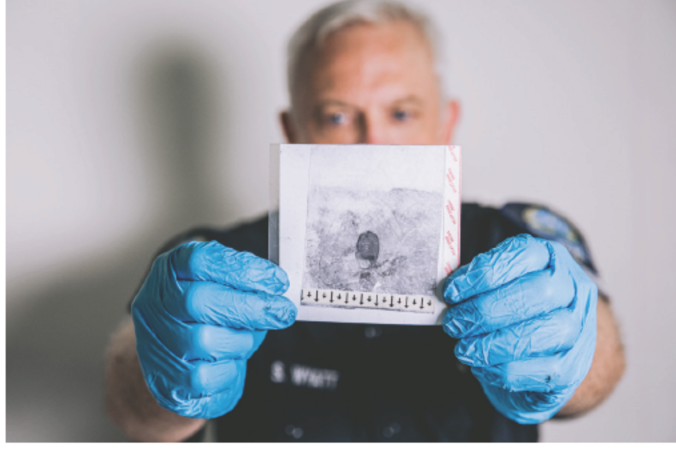
WHO SHOULD TAKE THIS PROGRAM

- Graduates of JIBC's two-year Law Enforcement Studies Diploma (LESD) or applicants a diploma or associate degree in a related field can begin in the third year of the Bachelor of Law Enforcement Studies program.
- Applicants who have completed a peace officer training program with a minimum of three years full-time service in a recognized public safety agency with a Prior Learning Assessment that would allow for 60 credits to be granted towards completion of the degree program.

CAREER FLEXIBILITY

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

- police officer
- conservation officer
- animal cruelty officer
- border services agency official
- fraud investigator
- by-law enforcement officer
- regulatory enforcement officer
- gaming investigator
- correctional officer
- deputy sheriff
- intelligence services officer
- probation officer



BACHELOR OF LAW ENFORCEMENT STUDIES (BLES)

CURRICULUM AT A GLANCE

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

Year 3

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

Year 4

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

PROGRAM FORMAT

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

HOW TO APPLY?

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

FOR MORE INFORMATION:

jibc.ca/bles

bles@jibc.ca
604-528-5778

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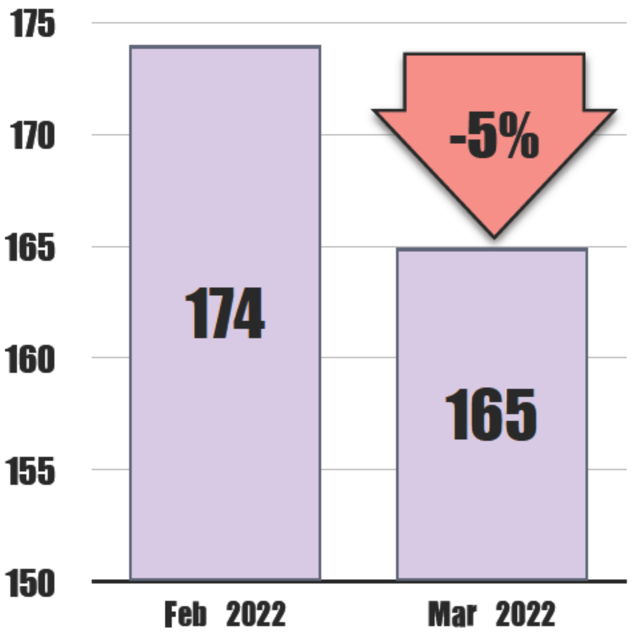
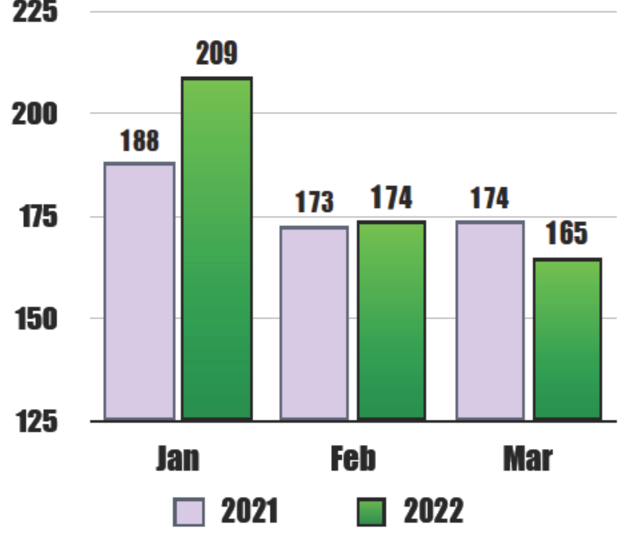
22-084

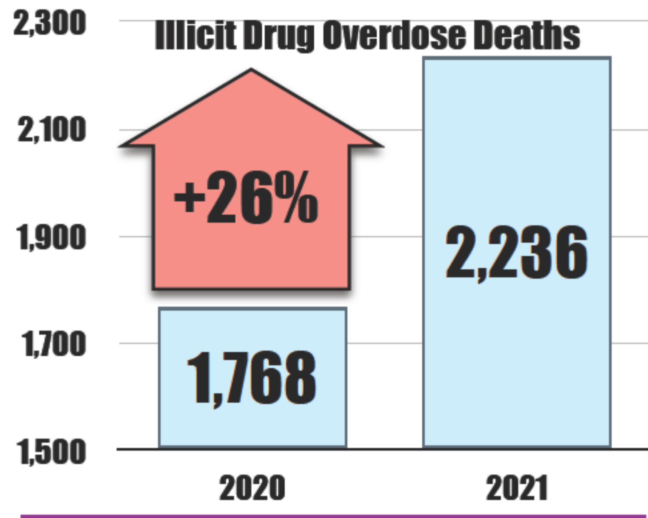
2022 BC ILLICIT DRUG TOXICITY DEATHS

The Office of BC's Chief Coroner has released statistics for illicit drug toxicity deaths (formerly known as illicit drug overdose deaths) in the province from **January 1, 2012 to March 28, 2022**. In March 2022 there were **165** suspected drug toxicity deaths, down slightly from March 2021 (**174**) and down from February 2022 (**174**).





In 2021, there had been a total of **2,236** suspected drug overdose deaths from January to December. This represents an increase of **468** deaths over the 2020 numbers(**1,768**).

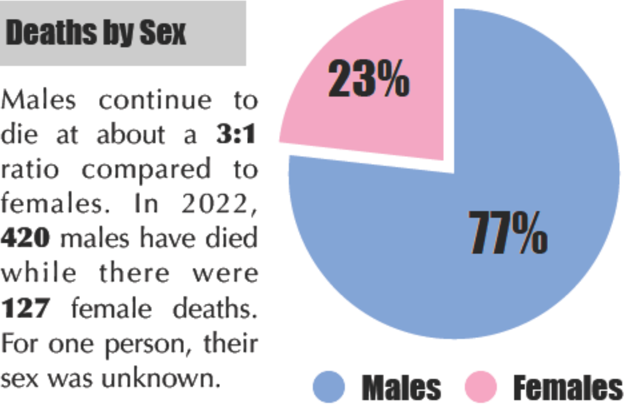


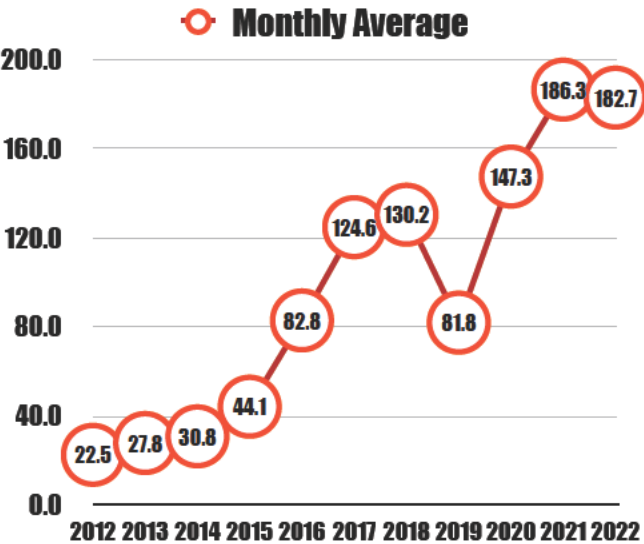
People aged 30-39 have been the hardest hit so far in 2022 with **140** illicit drug toxicity deaths, followed by 50-59 year-olds (**138**) and 40-49 year-olds (**129**). There were **66** deaths among people aged 19-29, **61** deaths among 60-69 year-olds while those under 19 years had **6** deaths. People aged 70-79 had **7** deaths while one person's age was not known. Vancouver had the most deaths with **137** followed by Surrey (**56**), Victoria (**31**), Abbotsford (**26**), Kamloops (**25**), Burnaby (**19**) Prince George (**18**), and Kelowna (**17**).

Overall, the 2022 statistics amount to about **six (6) people dying every day of the year.**

Deaths by Sex

Males continue to die at about a **3:1** ratio compared to females. In 2022, **420** males have died while there were **127** female deaths. For one person, their sex was unknown.

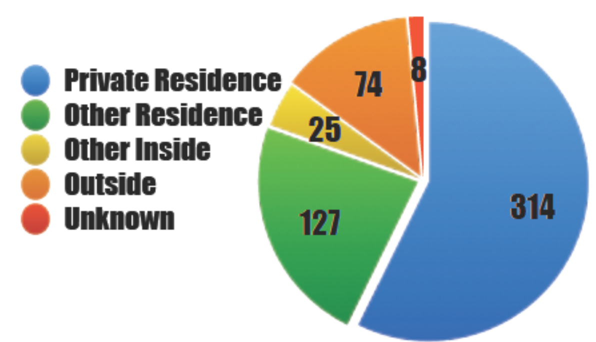




The 2022 data indicated that most illicit drug toxicity deaths (**85%**) occurred inside while **13.5%** occurred outside. For **8** deaths, the location was unknown.

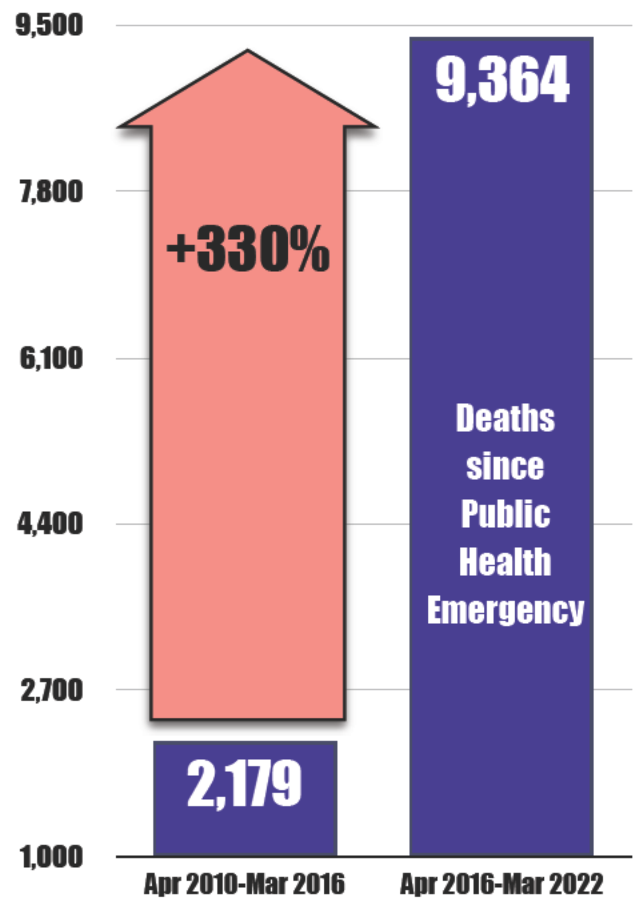
"**Private residence**" includes residences, driveways, garages, trailer homes.
"**Other residence**" includes hotels, motels, rooming houses, shelters, etc.
"**Other inside**" includes facilities, occupational sites, public buildings and businesses.
"**Outside**" includes vehicles, streets, sidewalks, parks, wooded areas, campgrounds and parking lots.

Deaths by location: Jan-Oct 2021



DEATHS SINCE PUBLIC HEALTH EMERGENCY

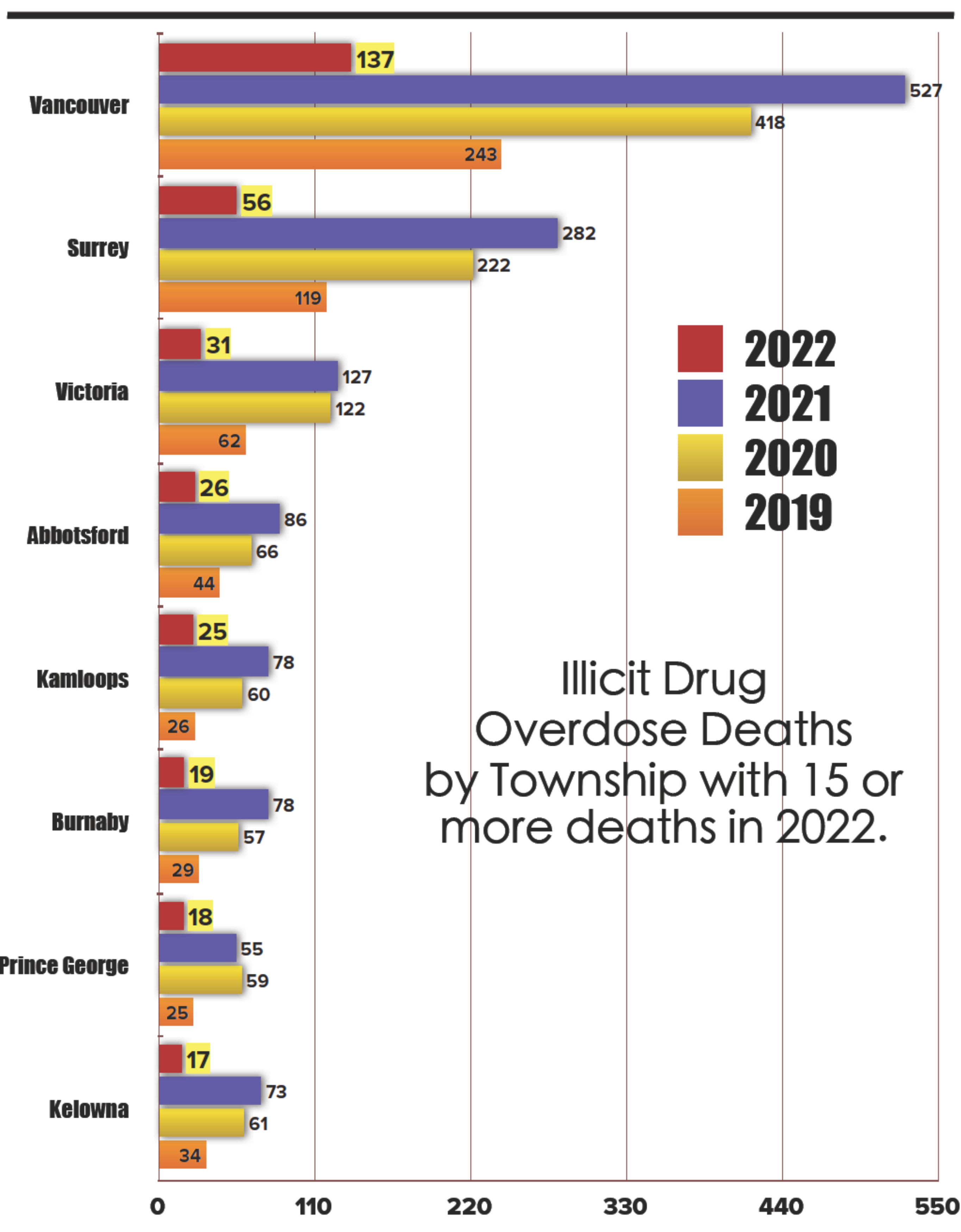
In April 2016, BC's provincial health officer declared a public health emergency in response to the rise in drug overdoses and deaths. The number of overdose deaths in the **72** months preceding the declaration (Apr 2010* — Mar 2016) totalled **2,179**. The number of deaths in the **72** months following the declaration (Apr 2016 — Mar 2022) totalled **9,364**. This is an increase of **324%**.



Source: c t Drug Tox c ty Deaths n BC - January 1, 2011 to December 31, 2021
M n stry of Pub c Safety and So c tor Genera , Coroners Serv ce ebruary 9, 2022
* Ju y - December 2010 stats taken from c t Drug Tox c ty Deaths n BC January 1, 2017 – October 31, 2016 November 14, 2016 draft

TYPES OF DRUGS

The top five detected drugs relevant to illicit drug overdose deaths from 2019 - 2021 were illicit fentanyl and its analogues, which was detected in **85.1%** of deaths, cocaine (**45.7%**), methamphetamine/amphetamine (**41.3%**), ethyl alcohol (**26.4%**) and benzodiazepines (**12.2%**). Other opioids (**22.6%**), such as heroin, codeine, oxycodone, morphine and methadone, and other stimulants (**3.1%**) were also detected.


Vancouver
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Surrey
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Victoria
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62
Abbotsford
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Kamloops
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26
Burnaby
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Prince George
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Kelowna
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61
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110
220
330
440
550
2022
2021
2020
2019
Illicit Drug
Overdose Deaths
by Township with 15 or
more deaths in 2022.

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