JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

BC's MINISTRY OF PUBLIC SAFETY RELEASES POLICE DOG STATISTICS

In February 2019 the Policing and Security Branch of BC's Ministry of Public Safety and Solicitor General released data reported to the Director of Police Services on the use of police services dogs (PSD) for 2017.

2,783 The total number of PSD **locations, apprehensions and arrests**. This included 2,113 by the RCMP and LMIPDS followed by the Vancouver Police (555), Victoria Police (56), Saanich Police (34) and West Vancouver Police (25).

326 The total number of **subjects bitten** by a PSD. A bite is defined as *"a police dog's use of mouth and teeth to grab or hold a person's body or clothes"*. The RCMP and LMIPDS accounted for 213 bites, followed by Vancouver (99), Victoria (7), West Vancouver (6) and Saanich (1). There were 10 non-subject civilians and six non-subject police officers bitten.

5,587 The total number of **tracks or searches for suspects**. This included 4,089 by the RCMP and LMIPDS. Vancouver (1,256), Victoria (98), Saanich (92) and West Vancouver (52) followed.

1,667 The total number of **apprehensions by bite or display**. There were 1,022 apprehensions made by the RCMP and LMIPDS, while Vancouver made 561, followed by Victoria (46), West Vancouver (23) and Saanich (15).

267 The total number of tracks or searches for missing persons.

Abbotsford, Delta, New Westminster, and Port Moody form part of the RCMP Lower Mainland Integrated Police Dog Service (LMIPDS).

363 The total number of searches for drugs. This included 333 by the RCMP and LMIPDS followed by Victoria (19) and Vancouver (11).

449 The total number of searches for explosives or firearms. There were 378 by the RCMP and LMIPDS, while the Transit Police made 34 followed by Vancouver (20 and Victoria (17).

1,251 The total number of searches for evidence. This included 1,159 by the RCMP and LMIPDS followed by Victoria and Saanich with 32 each, Vancouver (12) and West Vancouver (6).

See the complete statistical report here.

Highlights In This Issue

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Looking to refresh or develop your current skills? The JIBC's Advanced Training Program provides in-depth development opportunities for law enforcement officers. Some of our courses involve training in traditional and online investigations; patrol operations, as well as surveillance techniques and developing leadership skills. Sworn municipal officers, RCMP, peace officers, and other law enforcement officers (by approval) are encouraged to register.

Upcoming Courses for 2019

- ☑ **Introduction to Surveillance - Footing** @ New West Campus: September 5-6
- ☑ **Basic Tactical Surveillance** @ New West Campus: September 9-13
- ☑ **General Investigative Skills** @ Victoria Campus: September 16-20
- ☑ **Interviewing Special Needs Witnesses** @ New West Campus: September 18-20
- ☑ **Advanced Tactical Surveillance** @ New West Campus: September 23-26
- ☑ **Search & Seizure** @ New West Campus: September 23-27
- ☑ **Coaching and Mentoring** @ Victoria Campus: September 25-27

Advanced Police Training Contact Information

advancedpolicetraining@jibc.ca

604-528-5761

2019 Course Calendar here

JUSTICE INSTITUTE of BRITISH COLUMBIA | LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

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

5 day weekend: freedom to make your life and work rich with purpose.

Nik Halik & Garrett B. Gunderson.

Austin, TX: Bard Press, 2017.

G 179 H35 2017

Exercise-based interventions for mental illness: physical activity as part of clinical treatment.

edited by Brendon Stubbs & Simon Rosenbaum.

London, UK; San Diego, CA: Elsevier: Academic Press, 2018.

RC 455.2 E947 E94 2018

Evil: the science behind humanity's dark side.

Julia Shaw.

Toronto, ON: Doubleday Canada, 2019.

BF 789 E94 S53 2019

Fundamental justice: section 7 of the Canadian Charter of Rights and Freedoms.

Hamish Stewart.

Toronto, ON: Irwin Law, 2019.

KE 4381.5 S74 2019

Great at work: how top performers do less, work better, and achieve more.

Morten T. Hansen.

New York, NY: Simon & Schuster, 2018.

HD 57 H356 2018

Lead with a story: a guide to crafting business narratives that captivate, convince, and inspire.

Paul Smith.

New York, NY: American Management Association, 2012.

HD 30.3 S5774 2012

The mediator's toolkit: formulating and asking questions for successful outcomes.

Gerry O'Sullivan.

Gabriola Island, BC: New Society Publishers, 2018.

HM 1126 O885 2018

Mental: everything you never knew you needed to know about mental health.

Dr. Steve Ellen & Catherine Deveny.

London, UK: Head of Zeus, 2018.

RA 790 E44 2018

Never enough: the neuroscience and experience of addiction.

Judith Grisel.

New York, NY: Doubleday, 2019.

RC 564 G75 2019

The PTSD workbook: simple, effective techniques for overcoming traumatic stress symptoms.

Mary Beth Williams, PhD, LCSW, CTS & Soili Poijula, PhD.

Oakland, CA: New Harbinger Publications, Inc., 2016.

RC 552 P67 W544 2016

Simplify work: crushing complexity to liberate innovation, productivity, and engagement.

Jesse W. Newton.

New York, NY: Morgan James Publishing, 2019.

HD 58.9 N48 2019

Skin in the game: hidden asymmetries in daily life.

Nassim Nicholas Taleb.

New York, NY: Random House, 2018.

HM 1101 T35 2018

Teaching, coaching and mentoring adult learners: lessons for professionalism and partnership.

edited by Heather Fehring & Susan Rodrigues.

Abingdon, Oxon; New York, NY: Routledge, an imprint of the Taylor & Francis Group, 2017.

LC 5225 L42 T43 2017

SHARE IT. DON'T WEAR IT.

IT'S TIME TO SPEAK UP ABOUT MENTAL HEALTH.

AMBULANCE PARAMEDICS OF BRITISH COLUMBIA | BC EMERGENCY HEALTH SERVICES | BC MUNICIPAL CHIEFS OF POLICE | BRITISH COLUMBIA POLICE ASSOCIATION | BRITISH COLUMBIA PROFESSIONAL FIRE FIGHTERS ASSOCIATION | CANADA BORDER SERVICES AGENCY | FIRE CHIEFS' ASSOCIATION OF BC | FIRST NATIONS EMERGENCY SERVICES SOCIETY OF BRITISH COLUMBIA | GREATER VANCOUVER FIRE CHIEFS ASSOCIATION | PROVINCE OF BC | ROYAL CANADIAN MOUNTED POLICE | TRANSIT POLICE | VOLUNTEER FIREFIGHTERS ASSOCIATION OF BC | WORKSAFEBC

BCFirstRespondersMentalHealth.com

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

www.BCFirstRespondersMentalHealth.com

CBSA SEIZURES

Canada Border Services Agency (CBSA) released its seizure statistics for the 2018-2019 fiscal year (accessed May 19, 2019). The fiscal year begins on April 1 and ends on March 31 the following year.

DRUGS

Cannabis Products	
Grams	1,296,623
Dosage	333,963
ml	25,698

Cannabis products, includes dried and fresh cannabis, cannabis seeds, resin, solids, non-solids, concentrates and synthetic cannabis.

Cocaine/Crack		
2017/2018	2018/2019	Change
2,859,965 grams	1,429,465 grams	-50%

Cocaine/crack includes coca leaves, coca paste, cocaine and cocaine crack.

Heroin		
2017/2018	2018/2019	Change
189,956 grams	119,884 grams	-37%

Fentanyl		
2017/2018	2018/2019	Change
14,605 grams	5,166 grams	-65%

Jewelry		
2017/2018	2018/2019	Change
7,698 seizures	6,839 seizures	-11%

Firearms		
2017/2018	2018/2019	Change
751	696	-7%

Firearms include non-restricted, restricted, and prohibited firearms.

Prohibited Weapons		
2017/2018	2018/2019	Change
10,485	22,264	+112%

Child Pornography		
2017/2018	2018/2019	Change
303	227	-25%

Currency		
2017/2018	2018/2019	Change
$31,280,682	$32,899,456	+5%

Suspected Proceeds of Crime		
2017/2018	2018/2019	Change
$2,831,415	$2,808,831	-1%

Alcohol		
2017/2018	2018/2019	Change
16,303 litres	22,070 litres	+35%

Tobacco		
	2017/2018	2018/2019
Cartons	343,098	14,560
Kg	90,081	161,384
Number	78,729	252,800

Total Seizures		
2017/2018	2018/2019	Change
30,689	47,765	+56%

GROUNDS RELIED UPON FOR ARREST NOT TO BE VIEWED IN ISOLATION

R. v. Omeasoo & White, 2019 MBCA 43

At about 1:40 a.m. the police received information from a 911 caller that a red "Chevy" Silverado truck had cut off the driver of another vehicle. The caller reported that the truck followed the other vehicle and pulled over. Two males exited the truck and were armed with handguns. No shots were fired. The caller, who was not involved in the incident, described the two males as white, one wearing a white hoodie and a baseball cap, and the other wearing a black hoodie or sweater and a baseball cap.

Two police officers near the area responded to this firearm involved road-rage incident. As they drove on the street where the red truck was seen by the caller, they saw no other vehicles on the road. But they did see a red truck parked at a Tim Horton's restaurant nearby. The truck was a Dodge Ram, was the only vehicle in the parking lot, and was occupied by two males. The officers watched the passenger, who was wearing blue jeans, a black shirt and a baseball cap, go into the Tim Horton's restaurant towards the washrooms. Two to four minutes later, they saw him leave the washroom area, go to the cashier and return to the truck carrying a juice bottle. In addition to the cashier, there were at most two other people in the restaurant.

Concerned about the safety of people in the area, the officers went to speak to the truck's occupants at 1:54 a.m. to investigate whether they were involved in the firearms incident. One officer went to the driver's side of the truck and noticed that it was running. The driver was not wearing a baseball cap and the passenger was Indigenous. The second officer went to the passenger side of the truck. He used his flashlight but did not see any firearms. The driver provided identification in the name of the accused White while the passenger verbally identified himself as Joseph Omeasoo. The names were checked in the police computer but there were no outstanding warrants or court orders. At 2:00 a.m. the men were told they were free to go.

One of the officers then went to use the washroom inside the Tim Horton's restaurant. He found a .22 calibre bullet in the urinal and showed it to his partner. The officers determined that they now had reasonable grounds to believe that the men had been involved in the firearms incident and that the passenger had left the bullet in the urinal. At 2:06 a.m., the officer returned to the truck and arrested the men for a "firearms investigation." The accused Omeasoo's name was determined to be Jaden, not Joseph, and it was learned he was breaching a probation order. The men were advised of their s. 10(b) *Charter* rights and the truck was searched. Police found a "crack pipe" and crystal methamphetamine. When they searched the accused Omeasoo at the police station, they found crack cocaine. The truck was again searched at the police station and police found a .22 calibre assault rifle, a prohibited clip for the rifle with ammunition and more than two kilograms of illegal drugs, including cocaine, marihuana, fentanyl, MDMA and methamphetamine. The men were charged with possessing cocaine, methamphetamine and ecstasy for the purpose of trafficking and several firearms offences. The accused White was also charged with additional weapons offences.

Manitoba Court of Queen's Bench

The Crown conceded that the officers' initial contact with the accused was an investigative detention and the police failed to advise the men of their s. 10 rights. The officers did not tell the men why they were being detained nor provide them with their right to counsel. During cross-examination by defence, the officers were questioned about the differences between the information they had received about the firearms incident from the 911 call and what they observed. In particular, defence counsel highlighted the following:

- the truck was a red Dodge Ram not a red Chevrolet Silverado;
- only one of the males was white (the other was Indigenous);

- only one of the males was wearing a baseball cap; and
- the passenger was wearing a black shirt, but neither of the males was wearing a hoodie or a sweater.

One of the officers responded that he could not tell the difference between a Chevrolet Silverado and a Dodge Ram and that, in his 12-years of police experience, people very often get the make and model of a vehicle wrong. When it was suggested to the other officer that the passenger was Indigenous not white, he said, ***"It never crossed my mind."*** He also said that people sometimes get things right and sometimes they get things wrong. The officers testified that they did not believe they had grounds to arrest the accused until the bullet was found in the urinal. At that point, they believed they had reasonable grounds to arrest the men because the truck was found in the area of the firearm incident, it matched the general description of the suspect vehicle, there were two male occupants and they found the bullet in the washroom where the passenger had just been.

The judge found that the accused White's *Charter* rights under ss. 8, 9 and 10 had been breached while the accused Omeasoo's rights had been infringed only under ss. 9 and 10 because he did not have standing to challenge the lawfulness of the search of the truck as its passenger. In the judge's view, the men had been detained when the officers initially approached the truck but were not advised of their s. 10 rights (as conceded by Crown). And, even after finding the bullet the police only had enough to detain the men, not arrest them. He described the connection of the bullet to the firearm incident ***"tentative at best"*** and it did not materially change the facts. Rather, its discovery was as ***"close to being a red herring as it could possibly be, rather than significant new evidence"*** and was insufficient to provide the necessary grounds for arrest. The judge found the initial s. 10 breach tainted all that followed even though the men were advised of their s. 10 rights on arrest. Since the men had been unlawfully arrested the search of the truck was unreasonable as was the search of the accused Omeasoo's person. All of the evidence found in the truck and on the accused Omeasoo was excluded under s. 24(2). The charges were dismissed.

Manitoba Court of Appeal

The Crown argued, among other things, that the trial judge got it wrong in holding that the arrest of the men and the subsequent searches incidental thereto breached the *Charter*. Moreover, if the arrest was lawful, the Crown asserted that the s. 10(b) breach would not result in the exclusion of evidence. The accused, on the other hand, contended (in part) that the trial judge got it right in applying the law to the facts and the admission of the evidence would bring the administration of justice into disrepute.

Arrest

In determining whether the police had the power to arrest, Justice Lemaistre stated:

> Section 495(1)(a) of the Code provides the police with the power to arrest a person whom they believe, on reasonable grounds, has committed an indictable offence without the need to obtain a warrant. The requirement of reasonable grounds involves a subjective belief that is objectively grounded. In other words, a

"Section 495(1)(a) of the Code provides the police with the power to arrest a person whom they believe, on reasonable grounds, has committed an indictable offence without the need to obtain a warrant. The requirement of reasonable grounds involves a subjective belief that is objectively grounded. In other words, a reasonable person, standing in the shoes of the officer would believe reasonable grounds to arrest exist. The police do not need to establish a prima facie case for conviction before making the arrest."

"When determining whether an officer's subjective belief of the existence of reasonable grounds is objectively reasonable, a court must not assess the various factors relied upon by the officer in isolation. The totality of the circumstances known to the officer at the time must be taken into account. The officer is entitled to rely on information received from third parties, reject information he or she believes is unreliable and draw inferences."

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>
> Establishing a reasonable belief is not a high or overly onerous standard to meet. [references omitted, paras. 29-31]

In this case, the Court of Appeal held the trial judge erred in determining whether the officers' subjective beliefs that they had reasonable grounds to arrest the accused after finding the bullet were objectively reasonable. ***"In my view, the trial judge failed to assess the totality of the circumstances when considering the reasonableness of the officers' beliefs that there were grounds to arrest,"*** said Justice Lemaistre. ***"He dealt with the evidence in a piecemeal fashion and failed to consider the cumulative effect of all of the facts and circumstances known to the officers at the time of the arrest on a holistic basis to determine whether, objectively, they had reasonable grounds to believe an offence had been committed."*** And he also failed ***"to consider the facts and circumstances from the perspective of the officers."*** Justice Lemaistre continued:

> The officers testified that they believed that finding the bullet in the washroom minutes after Omeasoo had been there in the context of the firearms investigation, together with the other information that they had, provided the necessary grounds to arrest the accused. In other words, the bullet elevated their suspicion to a belief that the accused possessed a firearm that had just been pointed at a member of the public.
>
> In my view, the trial judge's characterisation of the discovery of the bullet as a "red herring" is a failure to recognise the connection between the bullet and the firearms incident under investigation. It is a failure, as a matter of law, to appreciate the significance of a fact in the context of the surrounding circumstances, which includes the nature of the investigation and the officers' experience and training. [reference omitted, para 38-39]

And further:

> The evidence established that, prior to arresting the accused, the officers had information that two males in a red truck on Archibald Street at Watt Street were involved in a firearms incident. The males were described as white, one wearing a white hoodie and a baseball cap and the other wearing a black hoodie or sweater and a baseball cap. Within 14 minutes after the incident, the officers, who saw no other vehicles along the way, found a red truck with two male occupants. The truck was running and was parked in a Tim Horton's restaurant parking lot not far from the location of the incident. There were no other vehicles in the parking lot and, at most, three people (including the cashier) in the Tim Horton's restaurant. The truck's passenger, who was wearing a black shirt and a baseball cap, went into the Tim Horton's restaurant towards the washrooms. Minutes later, one of the officers found the bullet in the washroom.

"The police are permitted to conduct warrantless searches incident to arrest provided that the arrest is lawful, the search is conducted for a legitimate purpose related to the arrest and the search is reasonably conducted."

> The only discrepancies between the information initially provided to the officers and what they discovered, were the make and model of the red truck; only one of the two males was wearing a baseball cap; one of the males was Indigenous not white; and, while one of the males was wearing a black shirt, neither of the males was wearing a hoodie.
>
> In my view, the officers' beliefs that the males in the truck had been involved in a firearms incident 26 minutes prior to their arrest was objectively reasonable in light of the constellation of factors known to them at the time of the arrest. This is so particularly in light of the evidence which established that [one officer] could not differentiate between a Chevrolet Silverado and a Dodge Ram; it did not occur to [the other officer] that the passenger was Indigenous; and, in both of the officers' experience, details provided by 911 callers can be wrong. In my view, the trial judge erred in finding that the arrests breached section 9 of the Charter. [paras. 41-43]

Search

Under the common law, ***"the police are permitted to conduct warrantless searches incident to arrest provided that the arrest is lawful, the search is conducted for a legitimate purpose related to the arrest and the search is reasonably conducted."*** Since the officers had reasonable grounds to arrest the accused for the firearm incident, the searches of the truck and the accused Omeasoo were well within the scope of this common law power. ***"The searches were connected to the offence and conducted in order to protect the police and the public and to discover and preserve evidence,"*** said Justice Lemaistre. And there was no suggestion that the manner in which the searches were conducted was unreasonable. The warrantless searches did not breach s. 8 of the *Charter*.

Admissibility

Despite the Crown's concession of a s. 10 *Charter* breach when the officers initially approached the truck and detained the accused for investigative purposes but did not advise them of their right to counsel, the Court of Appeal found the evidence should not be excluded:

> The interaction between the officers and the accused during the initial contact was brief, minimally invasive and relatively innocuous. The officers approached the vehicle to investigate whether the occupants had a firearm and to ensure the safety of people in the area. When they found nothing to connect the accused to the firearms incident, the officers released them. The officers proceeded cautiously and acted reasonably and in good faith in the context of a firearms investigation. In my view, the seriousness of the Charter - infringing state conduct does not favour exclusion of the evidence.
>
> The initial detention lasted only six minutes; led to no incriminatory statements or evidence; had almost no impact on the decision to arrest the accused and search them and the truck; and the Charter breach was remedied when the accused were advised of their section 10 rights upon arrest. Any impact of the section 10 when the officers initially approached the truck and spoke to the accused, they were detained for investigative purposes and should have been advised of their section 10 Charter rights. breach on the Charter-protected interests of the accused would not warrant exclusion of the evidence.
>
> The officers were investigating a firearms incident in response to a 911 call. The charges the accused faced were serious. The evidence discovered during the search of the truck and Omeasoo was reliable and essential to the Crown's case. Society has a strong interest in the adjudication of this case on its merits. [references omitted, paras. 52-54]

The Crown's appeal was allowed and a new trial was ordered.

Complete case available at www.canlii.org

'NON-CUSTODIAL' INTERVIEW OF ACCUSED ALREADY UNDER ARREST A 'LEGAL FICTION'

R. v. Heppner, 2019 BCCA 108

Police officers arrested the accused on British Columbia's *Wildlife Act* warrant for unlawfully trafficking in moose meat. He was handcuffed and advised of the reason for his arrest ,and his right to retain and instruct counsel without delay. He was transported to the police station while officers awaited instructions from the warrant's issuing agency. He was booked, fingerprinted and advised that he would likely be released soon on a promise to appear. He was given an opportunity to consult counsel.

The accused was also flagged on CPIC as "Special Interest Police" for an aggravated assault that occurred about two (2) months earlier in a motel. He was the only suspect in the investigation which was being conducted by a nearby police department. The arresting agency's officers contacted the officers in charge of the aggravated assault investigation and told them the accused was in custody. The investigating officers quickly attended the arresting agency to interview the accused. In doing so, they decided to conduct a **"non-custodial"** interview of the accused.

He was escorted from cells to another room where the investigating officers were waiting. He was told the officers were investigating "an assault" that took place at the motel and that he was a suspect in it. The officer told the accused she knew that he was in the custody of the holding agency and the warrant had nothing to do with what they wanted to speak with him about. She also told him that he did not have to talk with them and that he was free to leave at any time. The accused responded, "I'll talk with you." A 32-minute interview followed in which the accused denied he was ever in the motel room where the assault occurred. The accused was escorted back to cells where he was released about three minutes later on a promise to appear. He had been at the police station for about two (2) hours in total.

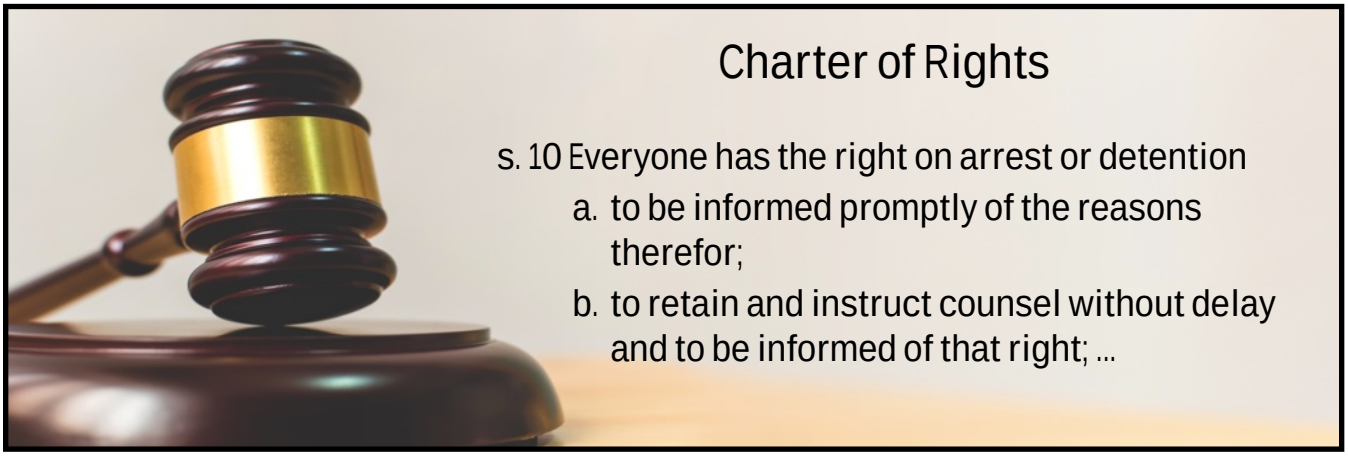
British Columbia Supreme Court

The accused asserted that his rights under ss. 10(a) and (b) of the *Charter* were breached and his statement to police ought to have been excluded under s. 24(2). He argued that he was physically detained at the time of the interview and that it was "staged" in an attempt to circumvent compliance with ss. 10(a) and (b) of the *Charter* in relation to the assault investigation. Since the police to failed to immediately inform him they were investigating an aggravated assault, his s. 10(a) rights were breached. And, since the police shifted the focus of their investigation from the *Wildlife Act* warrant to the aggravated assault, his s. 10(b) rights were also infringed because the police failed to re-inform him of his right to retain and instruct counsel in relation to the assault before interviewing him.

The judge concluded that the accused was not psychologically detained during the interview on the aggravated assault. The accused was sophisticated in dealing with the police, the police questioning was polite and non-accusatory, and the officers made clear there was no connection between the assault investigation and the *Wildlife Act* warrant. Further, the investigators had not concluded their investigation and did not have reasonable grounds to arrest him, the door to the interview room was open, and the officers told him he was free to leave. Since the accused was not detained, the police were under no obligation to comply with s. 10 of the *Charter*. The accused's statement, in which he lied about never being in the motel room, was admitted and used by the Crown to discredit him in cross-examination. He was convicted of aggravated sexual assault.

British Columbia Court of Appeal

The accused challenged his conviction arguing, in part, that the trial judge erred in concluding he was not detained when he gave his statement to police about the assault while in custody on the *Wildlife Act* warrant. The Crown, on the other hand,



submitted that an officer lacking reasonable grounds to arrest for one investigation can nevertheless conduct a "non-custodial" interview of that person while they are detained on another matter. Here, the Crown suggested the repositioning of the accused within the police station, providing an explanation the interview concerned a different investigation, and telling him he could leave the room at any time meant there was no detention for the purposes of the interview.

s. 10 *Charter* - Right to Counsel

Justice Fitch, authoring the Court of Appeal's opinion, first reviewed the reason for the rights afforded under s. 10 of the *Charter*:

> The rights in ss. 10(a) and (b) of the Charter are linked. An arrestee must be informed of the reason(s) for the arrest so he or she can make an informed choice about whether to exercise the right to counsel and, if the right is exercised, to obtain legal advice based on an understanding of the extent of his or her jeopardy. [reference omitted, para. 63]

"Detention" or "arrest" in s. 10 identifies the point at which the right to counsel is triggered.

Detention

In this case, the Appeal Court disagreed with the trial judge's finding that the accused was not detained when he was interviewed. Justice Fitch wrote:

> I cannot accept the factual and legal fiction the Crown would have us endorse. The [accused] was under arrest at all material times. He was under legal compulsion to remain at the WVPD station until he was released on the promise to appear. To suggest that the [accused] was not detained when he was interviewed by the VPD because he could have left the interview room ignores the reality of his situation. In my view, the VPD could no more conduct a "non-custodial" interview of the [accused] in furtherance of the aggravated assault investigation than the WVPD could have had they been asked to conduct the interview on behalf of the VPD. To accede to the Crown's position on this point would permit the police to unfairly manipulate the circumstances of an individual's detention to circumvent the purposes of ss. 10(a) and (b) and the constitutional interests those rights are designed to protect.

"The rights in ss. 10(a) and (b) of the Charter are linked. An arrestee must be informed of the reason(s) for the arrest so he or she can make an informed choice about whether to exercise the right to counsel and, if the right is exercised, to obtain legal advice based on an understanding of the extent of his or her jeopardy."

> It follows that this was a case of physical detention. ... [paras. 66-67]

Since the accused was under detention when he was interviewed, the police should have re-informed him of his right to counsel. There was a change in his jeopardy occasioned by the shift in focus of the investigation from the *Wildlife Act* warrant to the aggravated assault. ***"A detainee must be given a further opportunity to consult with counsel if a significant change in jeopardy occurs during the course of a detention,"*** said Justice Fitch. He continued:

> The [accused's] jeopardy significantly changed when the VPD officers arrived to question him about his involvement in the aggravated assault. The focus of the investigation shifted from trafficking in moose meat to an offence that carries with it a maximum term of imprisonment of 14 years. Although the VPD officers had no confirmation at the time of the interview that the complainant had been sexually assaulted, they knew this was a possibility. The maximum penalty for aggravated sexual assault is life imprisonment.
>
> The legal advice the [accused] received pertained to obtaining his release on a promise to appear in relation to the outstanding warrant. That advice was not at all responsive to the very serious jeopardy he was in at the time of the VPD interview. The [accused] was in need of immediate legal advice to make an informed choice about whether to participate in the interview. The police had a duty to re-inform him of his right to counsel and, if the right was asserted, facilitate further contact with counsel before proceeding with the interview. Their failure to do so resulted in a violation of the [accused's] s. 10(b) rights. [paras. 74-75]

Based on the s. 10(b) breach, the accused's statement was excluded as evidence. The Court of Appeal considered it unnecessary to rule on whether there was also a s. 10(a) breach in the circumstances.

Despite the accused's interview statement being excluded, he had earlier told the same lie in another unchallenged statement which could be used, among other factors, to impeach his credibility and reject his evidence. Thus, the admission of the interview was a harmless error and would not have affected the trial judge's verdict.

"A detainee must be given a further opportunity to consult with counsel if a significant change in jeopardy occurs during the course of a detention."

The accused's appeal was dismissed.

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

GROUNDS FOR ARREST MUST BE VIEWED CUMULATIVELY THROUGH OFFICER's EXPERIENCE

R. v. Holmes, 2019 BCCA 138

A drug investigation team leader received information from police sources suggesting that a man and his wife had been involved in the illegal marihuana trade in the past, and, more recently, the man was charged with drug offences. Police sources also alleged that the man was a marihuana broker for organized gangs. A confidential source told the team leader that the couple packaged marihuana at their house for distribution.

After unsuccessfully attempting to follow the man's vehicle due to his evasive driving manoeuvers, police conducted surveillance of the couple's home including walking by and monitoring a live feed camera installed across the street. When surveillance was carried out, police observed vehicles arriving and leaving the couple's residence. They saw the man and others moving boxes and large bags between the house and the vehicles. One of the vehicles observed on two occasions was a gold coloured Honda Accord driven by a woman, but registered to a male. On the second occasion, the female driver was identified as the accused.

One day, the police saw the accused arrive at the home where she took two black garbage bags from the trunk of the gold Honda and brought them into the house. A little later, the man arrived at the house and the accused helped him unload a number of bags from his vehicle and take them inside. This included a heavy brown sack carried by the accused. Around noon, the accused left the residence but returned a half hour later. She then assisted the man in loading at least three large garbage bags into the trunk of the gold Honda. The accused got into the car and drove away. The police followed and pulled her over soon after she left.

The team leader could smell ***"an overwhelming odour of car freshener"*** when he approached, something he was aware people use to mask the odour of marihuana. He examined her driver's licence, explained he was conducting a drug investigation and asked her to step out of the car. He arrested her for possessing marihuana and her car was searched. A shopping bag and a garbage bag, both containing marihuana, were found in the back seat and three large garbage bags in the trunk contained marihuana. In total, about 73 lbs. of marihuana was discovered.

British Columbia Supreme Court

The judge ruled the accused's arrest lawful. He considered the historical information the team leader had about the man from police sources and a confidential informer concerning his involvement with the police and drug-related offences. He also considered police attempts to follow the man's vehicle that were met with counter-surveillance techniques, and the movement of vehicles and people arriving at and leaving the man's residence. As well, the accused and the man were seen loading large garbage bags into the trunk of the golden Honda. Based on the totality of the circumstances, including the man's interactions with the police, the information obtained from police sources and the confidential informer, and all of the activity seen at the man's residence, the police had reasonable grounds to arrest the accused. The judge also considered the team leader's lengthy experience as a police officer (18 years) and his involvement in many drug investigations. The judge rejected the accused's efforts to challenge the grounds on a "piece meal basis" and noted that the cumulative effect of the evidence must be taken into account when considering whether reasonable grounds for the arrest were present. ***"In these circumstances and upon a consideration of the totality of the information [the team leader] had at the time of the arrest ... , combined with his experience and knowledge ..., it seems to me that he had the necessary reasonable grounds to arrest the accused,"*** said the judge. The evidence obtained from the vehicle search was admitted and the accused was convicted of possessing marihuana for the purpose of trafficking.

British Columbia Court of Appeal

The accused argued, among other things, that the trial judge erred in ruling her warrantless arrest lawful and, therefore, the search of the vehicle she was driving was unreasonable. In her view, the grounds relied on by the arresting officer were problematic. She said she was unknown to the police and her vehicle was not associated with criminal activity. Nor had the reliability of the information from police and the confidential informer been established. Just because she was seen loading and unloading garbage bags on a single occasion was not enough to raise the officer's suspicions to reasonable grounds. And, even though the officer may have held a subjective belief, the grounds were not objectively reasonable. The information relied upon was unsubstantiated, equivocal or insubstantial. Furthermore, she submitted that the evidence ought to have been ruled inadmissible under s. 24(2).

Arrest

Justice Butler, authoring the Court of Appeal decision, first noted the police power of arrest. ***"Pursuant to s. 495(1)(a) of the Criminal Code ..., a peace officer is authorized to arrest without warrant 'a person who … on reasonable grounds, [the officer] believes has committed or is about to***

commit an indictable offence'," he said. ***"For a warrantless arrest to be lawful, the arresting officer must subjectively believe that he or she has the requisite reasonable grounds for arrest and those grounds must be objectively justifiable."***

Here, the judge found the officer had the necessary subjective belief that the bags loaded into the gold Honda contained marihuana. As for whether the grounds were objectively reasonable, the evidence must be viewed cumulatively through the lens of the officer's considerable experience. In this case, Justice Butler found the officer's subjective belief was objectively justified even though no single piece of information was compelling. For example, the historical information was very dated and the recent information was general. There was no information to establish the credibility of the informer, and there could be many innocent explanations for loading and unloading garbage bags. These concerns, however, were compensated by the totality of the circumstances including the man's long history of involvement in the drug trade, his counter-surveillance measures when followed, the comings and goings of people to the home, and the observations of the man and the accused loading large garbage bags into the gold Honda:

> *I am of the view that the information available to [the officer] including the observations of the [man's] residence culminating with the loading of the garbage bags provided grounds for arrest sufficient to meet this standard. As the decisions of this Court have frequently emphasized, the objective reasonableness of the grounds must be viewed through the perspective of a reasonable person standing in the officer's shoes. Further, the pieces of evidence relied on to establish the grounds should not be examined in isolation. [references omitted, para. 42]*

The trial judge did not err in concluding that the officer's subjective belief in grounds for arrest were objectively reasonable. Thus, the search of the gold Honda incidental to the arrest did not breach the accused's *Charter* rights.

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

SAFETY SEARCH INCIDENT TO DETENTION ONLY REQUIRES REASONABLE SUSPICION

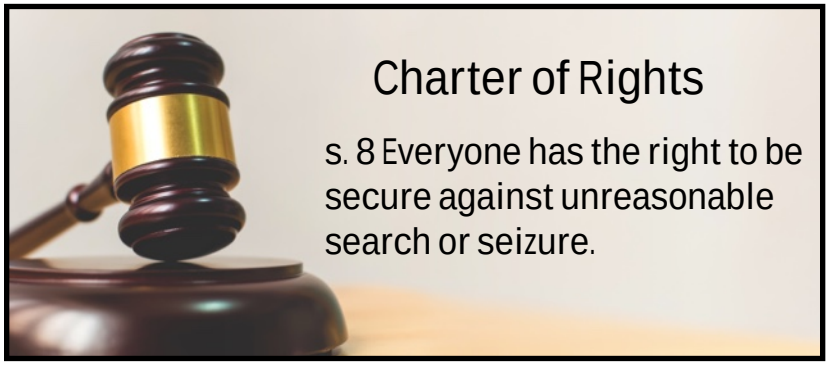
R. v. Webber, 2019 BCCA 208

During daytime hours in July 2016, two patrol officers driving an unmarked police vehicle saw a car being driven in an erratic manner. The car's driver made quick turns in a pedestrian–heavy area and drove through a controlled intersection without stopping, contrary to British Columbia's *Motor Vehicle Act* (*MVA*). The police activated their lights and siren and the car stopped abruptly, causing the driver to jerk forward and backward. The officers saw the driver lean towards the front centre console of the car and make a motion with his right arm.

The officers conducted a records search of the licence plate, which revealed the car was registered to a "Jason Webber" and had been involved in an attempted murder investigation in October 2015. The officers approached the driver and asked him to step out of the vehicle. The accused was shaking and seemed excited. And the vehicle was strewn with empty cans and bottles, two cell phone chargers, a cell phone, various fast food wrappers and half a dozen five-hour energy drinks.

After the accused stepped out of the car he was patted down but no weapons were found. The accused remained by the curb with one officer, while the second officer returned to his vehicle and conducted a second police records check in the name of the accused, now known as "Mark Webber". This records check revealed that: (1) the accused was prohibited from possessing firearms due to a prior extortion conviction; (2) he had been one of two intended victims of the attempted murder associated with the vehicle; (3) the second intended victim was the subject of a drug trafficking investigation; and (4) the suspect in the attempted murder was also associated with drug trafficking. The officer then conducted a safety search of the centre console of the vehicle. As a result, he saw several small bags that appeared to contain

cocaine. The officer stopped his search, arrested the accused, returned to the vehicle and conducted a more thorough search as an incident to arrest. The police seized about 83 grams of cocaine and nine grams of MDMA (ecstasy) from the vehicle that was packaged in various plastic bags. The accused was subsequently charged with two counts of possessing drugs for the purpose of trafficking.



British Columbia Provincial Court

One officer described the accused's motion as a stuffing and pulling motion and that the items seen in the car were consistent with cars involved in drug trafficking. The other officer described the accused's motion as a stuffing motion or a motion where the driver was putting something in the centre console. Both officers testified they were concerned that the driver was pulling out or concealing something in the centre console, possibly a weapon. As for the additional information revealed during the second police records check, an officer said it elevated his concern that a weapon may be concealed in the front centre console. In the officer's view, the weapons prohibition suggested the accused had used weapons in the past. As well, the links between the accused and the drug trade elevated his safety concerns as the officer was aware of frequent violence in the Vancouver drug trade.

Among other things, the accused argued that his rights under ss. 8, 9 and 10 of the *Charter* had been breached. He contended that there was no legal basis for his initial detention, the pat-down search or the search of the car's console. Furthermore, he suggested that he was not informed of the reason for his detention and was not adequately apprised of his right to counsel. In his view, the evidence obtained from the search of the console should have been excluded under s. 24(2) of the *Charter*.

The judge found the initial detention of the accused lawful. Because he failed to stop at a controlled intersection and because of his erratic driving, the police had a legal right to detain the accused. Moreover, the fact the police issued no ticket did not render the detention improper. The accused also had been informed of the reasons for his detention — erratic driving and failing to stop. The judge also ruled that s. 10(b) was not triggered during a traffic stop for driving offences.

As for the pat-down search and the console search, the officer subjectively believed they were both necessary to ensure no weapon was present. The judge also held both searches were objectively reasonable. The judge accepted the officer's evidence that he conducted the pat-down search due to a concern over concealed weapons. In applying a reasonable suspicion standard for the safety searches, he found that ***"reasonable grounds existed to conduct a safety search of both [the accused] and the centre console area of the vehicle"*** when the accused was first detained and the initial police records check was made. In other words, the reasons for both the pat-down and console search were the same. As for the second police records check, it only served to "bolster" the initial grounds and provide additional facts to support the console search. ***"I'am of the view that the stated grounds for searching both [the accused] and the vehicle prior to receiving the information from the second records check were objectively reasonable,"*** said the judge. ***"The second police records check only served to reinforce those grounds."***

The judge also held that safety searches may legitimately attend investigations of *MVA* violations and need not be confined to the person. The search of the console was part of the safety search and this search only became a drug investigation when the drugs were discovered. Both the pat-down search

"The fundamental duty of the police is to protect life and safety. In the course of this duty, police officers put their lives and safety at risk in order to preserve and protect the lives and safety of others. On occasion, in furtherance of this duty, a citizen's liberty will be interfered with. Sometimes, when it is reasonably necessary in the circumstances, the police are authorized to conduct a limited search for the purpose of ensuring their own and the public's safety."

and console search were minimally intrusive, and the console search was limited to the area of the pulling or stuffing motion. Further, the time between the initial detention and the discovery of the drugs was short, no more than 10 minutes. Since there were no *Charter* breaches, there was no reason to exclude the evidence under s. 24(2). The accused was convicted on both charges.

British Columbia Court of Appeal

The accused accepted that his initial detention and the pat-down search of his body were lawful, but asserted that the trial judge erred in concluding that the console search did not breach s. 8 of the *Charter*. In his view, among other things, the trial judge improperly relied upon the officer's evidence that a safety search of the centre console was necessary. Moreover, he contended that the trial judge erred in law by applying the **"reasonable suspicion"** standard rather than the **"reasonable grounds to believe"** standard for determining the scope and necessity of the safety search. He also suggested the trial judge erred by finding his detention during the console search was lawful pursuant to an investigation under the *MVA*. He suggested that the evidence ought to have been excluded under s. 24(2).

In his opening paragraph of the Appeal Court's opinion, Justice Savage, speaking for the unanimous panel, stated:

> The fundamental duty of the police is to protect life and safety. In the course of this duty, police officers put their lives and safety at risk in order to preserve and protect the lives and safety of others. On occasion, in furtherance of this duty, a citizen's liberty will be interfered with. Sometimes, when it is reasonably necessary in the circumstances, the police are authorized to conduct a limited search for the purpose of ensuring their own and the public's safety. [para. 1]

Safety Search: Reasonable Suspicion or Reasonable Grounds to Believe Standard

After reviewing case law, Justice Savage concluded that the appropriate standard for a police safety search incidental to investigative detention is **"reasonable suspicion"**. He noted the judicial debate that has emerged from the Supreme Court of Canada's decision in *R. v. MacDonald*, 2014 SCC 3, and whether that case changed the requisite legal threshold for lawful police safety searches from the **"reasonable suspicion"** standard to the higher standard of **"reasonable grounds to believe**". In his view, the legal standard for a safety search was not elevated by MacDonald. ***"In my opinion, the Supreme Court of Canada did not recalibrate the test for lawful police safety searches from the traditional 'reasonable suspicion' standard,"*** he said. The judge did not err in concluding that the reasonable suspicion standard applied in determining whether a limited safety search was reasonably necessary.

The Console Search

The accused conceded that his pat-down search was lawfully conducted as incident to his investigative detention. Thus, as the Court of Appeal noted, the accused ***"must be taken to accept that there were reasonable grounds (on the elevated standard) to believe the pat-down search for weapons was justified."*** Because the trial judge concluded that both safety searches were justified

"Police have the authority to detain individuals and conduct searches to prevent avoidable harm through brief and minimally intrusive searches, which are not necessarily restricted to physical pat-downs. The powers of investigative detention and search incident thereto are lawfully exercised where the police have reasonable grounds to suspect it is necessary to ensure safety, even if the reason for the initial stop is not a crime. The authorization to conduct a brief, focused protective search, as was done here, does not end at the point in time that charging decisions are being considered or made."

on the basis of the grounds acquired during the initial detention and the first police records check, any concern about the trial judge's characterization concerning the information learned during the second police records check would not have affected his reasoning and was not material to the outcome. And the Appeal Court too found there was no error in the trial ***"judge accepting the police officers' evidence, including their evidence about their safety concerns arising from both what they observed and their knowledge of the local circumstances."*** Justice Savage held the ***"the officers' subjective concerns were objectively reasonable"*** and ***"both officers had observed the pulling or stuffing motion, which was not related to procuring a driver's licence arising from the stop."***

Detention During Console Search

The accused's argument that the police did not continue to have the authority to detain him and conduct a safety search of the centre console after they had decided not to issue him a ticket for contravening the *MVA* before conducting the console search was rejected. ***"In my view, the continued detention and search of [the accused's] vehicle after the officers decided not to issue a ticket under the Motor Vehicle Act was authorized by law,"*** said Justice Savage. ***"Police have the authority to detain individuals and conduct searches to prevent avoidable harm through brief and minimally intrusive searches, which are not necessarily restricted to physical pat-downs. The powers of investigative detention and search incident thereto are lawfully exercised where the police have reasonable grounds to suspect it is necessary to ensure safety, even if the reason for the initial stop is not a crime. The authorization to conduct a brief, focused protective search, as was done here, does not end at the point in time that charging decisions are being considered or made."***

The accused's appeal was dismissed.

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

Editor's Note: Additional facts taken from the trial judge's ruling, File No: 233739-1, November 22, 2017, unreported.

PUBLIC SAFETY CANADA ANNOUNCES 'MEMORIAL GRANT PROGRAM' FOR FIRST RESPONDERS

Public Safety Canada's Memorial Grant Program for First Responders will provide a one-time lump sum, tax free maximum payment of $300,000 to the families of first responders who have died as a result of their duties.

According to its website, *"the Memorial Grant is a non-economic benefit and does not compensate families of first responders for monetary loss (income replacement) or serve as life insurance, but rather, is in recognition of their service and sacrifice."*

FAQs

What is the effective date for eligibility?

The effective date for the Memorial Grant Program for First Responders is April 1, 2018. For eligibility, the date of death must be on or after April 1, 2018. The Grant will not be retroactive. You may apply for the Memorial Grant any time after the date of death.

Who qualifies as a First Responder?

Qualifying First Responders include:

- Police officers
- Firefighters
- Paramedics

To qualify as a first responder, an individual must be employed or formally engaged to carry out the duties by a Canadian emergency service in Canada in the above mentioned groups. This includes all volunteers, auxiliary, reservists and cross-trained personnel.

First responders could have worked for a province or territory, a municipality, a district or region, an indigenous emergency service or the federal government.

Who is eligible for the Memorial Grant Program for First Responders?

Families of first responders who die as a result of their duties are eligible to receive a one-time lump-sum direct payment of $300,000, based upon the following order of priority:

- The spouse or common law partner; or
- If there is no surviving spouse or common law partner, to a surviving child or children divided in equal amounts; or
- If there is no surviving child, to a surviving parent or parents divided in equal amounts; or
- If there is no surviving parent, to surviving brothers and sisters divided in equal amounts; or
- If there are no surviving brothers and sisters, to the deceased's estate.

What is a line of duty death?

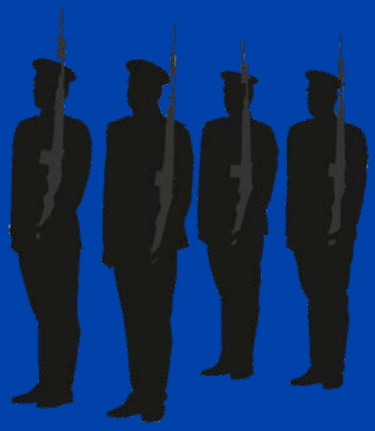
Line of duty deaths includes any death attributable to, and resulting from, the performance of official duties in the following circumstances:

- Death resulting from a fatal injury (e.g., gunshot wound, stabbing, car accident, etc.) while actively engaged in the duties of a first responder in Canada.
- Death resulting from an occupational illness primarily resulting from employment as a first responder (e.g., lung cancer, leukemia, non-Hodgkin's Lymphoma, heart injury or other illness).
- Death resulting from, or reasonably attributable to, psychological impairment, specifically suicide, based on a pre-existing diagnosis or other evidence of an operational stress injury.

"When firefighters, police officers and paramedics put their safety on the line, they are acting in service to all Canadians."
-Memorial Grant Program for First Responders-

2019 BC LAW ENFORCEMENT MEMORIAL SERVICE

Sunday, September 29, 2019 at 1:00 pm
BC Legislature, Victoria, BC



Parade participants to form up at 12:00 noon in the 800 block of Government Street, Victoria, BC.
Parade will step off at 12:40 pm

OTHER WEEKEND EVENTS

6TH ANNUAL BC LAW ENFORCEMENT MEMORIAL GOLF TOURNAMENT

Date: Friday, September 27, 2019
Format: Texas Scramble
Time: 11:00 am Registration / 1:00 pm Shotgun Start
Location: Bear Mountain Golf & Country Club, 1999 Country Club Way, Victoria, BC

6TH ANNUAL BC LAW ENFORCEMENT MEMORIAL RIDE TO REMEMBER

Date: Saturday. September 28, 2019

1ST ANNUAL BC LAW ENFORCEMENT MEMORIAL RUN TO REMEMBER

Date: Saturday. September 28, 2019

BCLEM MEET & GREET

Date: Saturday. September 28, 2019

click here for more info

2007 Ford

... F350 SD 4WD PU was the top vehicle stolen in Canada in 2018 according to the Insurance Bureau of Canada. Their annual list of the **Top 10 Stolen Vehicles** in Canada is based on actual insurance claims data collected from nearly all automobile insurance companies in Canada.

Source: Insurance Bureau of Canada, "Top 10 Stolen Vehicles", accessed on June 22, 2019.

Canada's Top 10 Stolen Vehicles - 2018	
Rank	Vehicle
1	**2007 FORD F350 SD 4WD PU**
2	**2006 FORD F350 SD 4WD PU**
3	**2005 FORD F350 SD 4WD PU**
4	**2004 FORD F350 SD 4WD PU**
5	**2003 FORD F350 SD 4WD PU**
6	**2006 FORD F250 SD 4WD PU**
7	**2001 FORD F350 SD 4WD PU**
8	**2000 FORD F250 SD 4WD PU**
9	**2015 LEXUS GX460 4DR AWD SUV**
10	**2001 FORD F250 SD 4WD PU**

POLICE OFFICER RANKED 14th BEST JOB IN CANADA

Canadian Business has ranked the job of **Police Officer** as the 14th best of 100 jobs in Canada. Nurse practitioner was ranked #1. Other jobs and their ranking included:

- Conservation Officer - 29
- Firefighter - 72
- Lawyer - 75
- Probation & Parole Officer - 86
- Paramedic - 90

'AGGRESSIVE' POLICE CONDUCT AMOUNTED TO ARBITRARY DETENTION: HANDGUN & DRUGS EXCLUDED

R. v. Le, 2019 SCC 34

At about 10:40 p.m. a police officer patrolling a housing cooperative spoke with two security guards responsible for overall security at the complex. The officer asked about a specific individual and showed the security guards a picture of him. The security guards said they had not seen the person, but volunteered information about another unrelated individual who was seen at the back of townhouse. The security guards described the townhouse as a "problem address" associated with drugs trafficking in the backyard. Two other police officers arrived towards the end of the conversation with the security guards.

After speaking to the security guards, the police decided to walk through the complex to the area behind the townhouse that the guards had identified. The backyard was surrounded by a waist-high wooden fence with an opening. There was no gate. The officers saw five young men, including the accused, simply talking. They were not doing anything wrong.

Two officers walked through the fence opening into the backyard. Neither officer asked permission to enter or said anything to the young men before doing so. A third officer patrolled along the fence and then jumped over the fence to enter the backyard. Police asked the men, "what was going on, who they were, and whether any of them lived there." Each of the men were asked to produce identification.

When officers saw one of the men on a couch with his hands behind his back they told him to keep his hands in front of him. The man complied. As police were identifying the men, an officer noticed that the accused had a satchel slung over his shoulder, looked nervous and "bladed" his body. An officer

demanded identification from the accused but he said he didn't have any. When the officer asked what was in the satchel, the accused fled. Police pursued, caught and arrested the accused on a nearby street. A search yielded a fully-loaded, .45 calibre semi-automatic Ruger pistol and a considerable amount of cash. At the police station the accused handed over 13 grams of cocaine, The accused was charged with 10 criminal offences including firearm and drug-related crimes.

Ontario Superior Court of Justice

The judge ruled that the accused was not detained until the officer asked him what he had in the bag slung over his shoulder. Prior to this inquiry, no officer had restrained the accused or made any direction or demand to him, and he believed he was free to leave. At the point of the inquiry, however, the detention was lawful. The officer had reasonable grounds to suspect that the accused was armed. The accused was nervous, fidgety and he bladed his body away from the officer. The investigative detention was therefore justified.

The judge went on to decide that, had there been *Charter* breaches, the evidence would nevertheless be admissible under s. 24(2). He concluded that all three s. 24(2) factors - the seriousness of the *Charter*-infringing state conduct, the impact on the *Charter*-protected interests of the accused and society's interest in an adjudication on the merits - favoured admission of the evidence. The accused was convicted of several firearm and drug-related offences and sentenced to five years in prison.

Ontario Court of Appeal

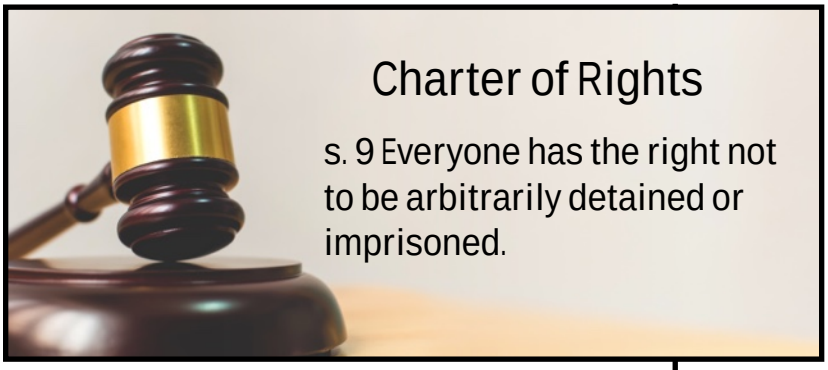
The accused argued, in part, that police breached his s. 9 *Charter* rights. But a majority of the Court of Appeal concluded the trial judge did not err in his findings. The accused's own evidence, that he believed he was free to leave the backyard after police had entered and questioned the men, was an important consideration in determining whether he was detained. Moreover, the Appeal Court upheld the trial judge's decision that the detention that did arise was not arbitrary.

Finally, if there was a *Charter* breach, the evidence was admissible. First, any *Charter*-infringing state conduct was technical, inadvertent, and made in good faith. Second, the impact of any breach on the accused's *Charter*-protected liberty interest was momentary and minimal. Finally, society's interest in an adjudication on the merits favoured admission as the evidence was highly reliable and the crimes very serious.

Justice Lauwers, in dissent, disagreed with the majority's analysis and would have excluded the evidence. In his view, the accused was detained at the moment the police entered the backyard. They were uninvited, did not have permission to enter nor grounds to get a warrant. They also created a physical barrier by blocking the exit and an atmosphere through questioning that would lead a reasonable person in the accused's position to believe that he had no choice but to comply with the police demands. As well, the accused was young, a minority and comparatively small in stature. As for s. 24(2), despite the reliability of the evidence and its importance to the Crown's case,

The Charges

- possessing a firearm without a licence;
- possessing a firearm knowing he was not the holder of a licence;
- possessing a loaded firearm without having an authorization, licence, or registration certificate;
- careless storage of ammunition;
- carrying a firearm in a careless manner;
- breaching orders prohibiting him from possessing a firearm x 2;
- possessing cocaine for the purpose of trafficking;
- possessing cocaine; and
- possessing proceeds of crime under $5,000



the *Charter* breach was serious and its impact on the accused was significant. It's admission would bring the administration of justice into disrepute.

Supreme Court of Canada

The accused appealed his convictions arguing, among other things, that he was arbitrarily detained under s. 9 of the *Charter* and the evidence ought to have been excluded under s. 24(2).

Justices Brown and Martin, authoring the opinion for a three member majority of the Supreme Court, first explained the protection afforded by s. 9:

> Section 9's prohibition of "arbitrary detention" is meant to protect individual liberty against unjustified state interference. Its protections limit the state's ability to impose intimidating and coercive pressure on citizens without adequate justification ... [A] psychological detention by the police, such as the one claimed in this case, can arise in two ways: (1) the claimant is "legally required to comply with a direction or demand" by the police (i.e. by due process of law); or (2) a claimant is not under a legal obligation to comply with a direction or demand, "but a reasonable person in the subject's position would feel so obligated" and would "conclude that he or she was not free to go".
>
> Even, therefore, absent a legal obligation to comply with a police demand or direction, and even absent physical restraint by the state, a detention exists in situations where a reasonable person in the accused's shoes would feel obligated to comply with a police direction or demand and that they are not free to leave. Most citizens, after all, will not precisely know the limits of police authority and may, depending on the circumstances, perceive even a routine interaction with the police as demanding a sense of obligation to comply with every request.
>
> Having said that, not every police-citizen interaction is a detention within the meaning of s. 9 of the Charter. A detention requires "significant physical or psychological restraint". Even where a person under investigation for criminal activity is questioned, that person is not necessarily detained. While "[m]any [police-citizen encounters] are relatively innocuous, ... involving nothing more than passing conversation[,] [s]uch exchanges [may] become more invasive ... when consent and conversation are replaced by coercion and interrogation". In determining when this line is crossed (i.e. the point of detention, for the purposes of ss. 9 and 10 of the Charter), it is essential to consider all of the circumstances of the police encounter. Section 9 requires an assessment of the encounter as a whole and not a frame-by-frame dissection as the encounter unfolds. [references omitted, paras. 25-27]

"Even, therefore, absent a legal obligation to comply with a police demand or direction, and even absent physical restraint by the state, a detention exists in situations where a reasonable person in the accused's shoes would feel obligated to comply with a police direction or demand and that they are not free to leave. Most citizens, after all, will not precisely know the limits of police authority and may, depending on the circumstances, perceive even a routine interaction with the police as demanding a sense of obligation to comply with every request."

Here, the young men were not legally required to answer the questions posed by the police, produce their identification, or follow directions about where they could place their hands. Thus, any analysis needed to focus on whether a reasonable person, standing in the accused's position, would have felt obligated to comply and would not have felt free to leave as the police entered the backyard and made contact with them.

The majority found a detention crystallized before the accused was asked what was in his satchel. In their view, the accused was detained when the police entered the backyard and made contact with him. In finding a detention at this point, the majority's considerations included the following:

- **Circumstances of the encounter:** The police entered a private backyard without a warrant, consent or warning. They immediately started questioning the young men about who they were and what they were doing, demanded identification and issued instructions.

- **Nature of Police Conduct:** The police were trespassing in the backyard of a private residence late at night. Two officers entered through an opening while a third entered over the fence, suggesting a tactical element to the encounter. The young men were questioned, asked for identification and one was told to keep his hands visible. One officer said another yelled this command and the young man complied. Furthermore, the police positioned themselves in a manner that blocked the exit from the backyard and their physical proximity in the small space would lead a reasonable person to conclude that the police were taking control and it was impossible to leave. The presence of others in the backyard would likely increase a perception of detention because a reasonable person would see how the others were treated and think they had to remain and obey police. Finally, even though the interaction lasted less than a minute, the majority described the police conduct that occurred within this short period of time as **"aggressive"**.

- **Particular Characteristics or Circumstances of the Accused:** The accused was 20 years old, of Asian decent (a racialized community), of small stature and had prior street level interactions with the police. His personal view that he felt free to leave the backyard was not determinative of the detention question because the test is objective in nature. ***"The focus of the s. 9 analysis should not, therefore, be on what was in the accused's mind at a particular moment in time, but rather on how the police behaved and, considering the totality of the circumstances, how such behavior would be reasonably perceived,"*** said the majority. "***To find otherwise puts the onus on the claimant to gauge correctly when they are detained and when they are not."***

No statute authorized the police to detain anyone in the backyard nor did the common law power to detain for investigative purposes. When police entered the backyard, they had no information linking any of its yet to be identified occupants to any criminal conduct or suspected criminal conduct. ***"[The accused's] detention was arbitrary because, at the time of detention (when the police entered the backyard), the police had no reasonable suspicion of recent or ongoing criminal activity,"*** said the majority. ***"Investigative objectives that are not grounded in reasonable suspicion do not support the lawfulness of a detention, and cannot therefore be viewed as legitimate in the context of a s. 9 claim."*** Since there was no statutory or common law power that authorized the detention at the point the police entered the backyard, it was arbitrary.

Exclusion of the Evidence

The majority concluded that the admission of the evidence would bring the administration of justice into disrepute. Although the criminal offences were serious and the evidence highly reliable, the police misconduct was serious and had a significant impact upon the accused's liberty. Both of these factors favoured a finding that the admission of the evidence would bring the administration of justice into disrepute:

"This Court has long recognized that, as a general principle, the end does not justify the means."

> The police crossed a bright line when, without permission or reasonable grounds, they entered into a private backyard whose occupants were "just talking" and "doing nothing wrong". The police requested identification, told one of the occupants to keep his hands visible and asked pointed questions about who they were, where they lived, and what they were doing in the backyard. This is precisely the sort of police conduct that the Charter was intended to abolish. Admission of the fruits of that conduct would bring the administration of justice into disrepute. This Court has long recognized that, as a general principle, the end does not justify the means. The evidence must be excluded. [reference omitted, para. 160]

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

A Different View

Justice Moldaver, speaking for himself and the Chief Justice, disagreed that the accused was detained at the moment the police entered the backyard. He stated:

> While it can be difficult to ascertain with any degree of certainty the point at which a psychological detention occurred, I am prepared to find that [the accused] was detained, at the earliest, when the third officer entered the backyard and directed one of the young men to keep his hands in front of him, an order which he complied with immediately. In all the circumstances, upon seeing this clear exercise of police authority and his friend's immediate compliance, it is realistic to conclude that a reasonable person in [the accused's] circumstances would have considered himself effectively deprived of his liberty of choice — even though [the accused] did not consider himself to be detained at this point. [para. 276]

Despite a finding that the detention occurred later in the encounter, the minority nevertheless found it arbitrary. ***"At the moment when [the accused] was detained, the police had not yet developed reasonable grounds to suspect he was armed — a prerequisite to a lawful investigative detention,"*** said Justice Moldaver. ***"That said, the arbitrary detention was momentary, lasting mere seconds before the police developed reasonable grounds to suspect [the accused] was armed, thereby transforming the arbitrary detention into a lawful one."***

Admissibility of the Evidence

Despite finding an arbitrary detention, the minority would admit the evidence. The police conduct sat on the less serious end of the spectrum and its impact on the *Charter* protected interests of the accused was not so great as to overwhelm other considerations. As well, the evidence was real, reliable and essential to he prosecution of very serious criminal offences. ***"In my view, reasonable and well-informed members of the public would regard a decision in this case to exclude the evidence and exonerate an admitted drug dealer who was prepared to reach for a loaded weapon during a violent struggle with the police as not merely alarming, but intolerable,"*** said Justice Moldaver. ***"Our society — which is what s. 24(2), this Court, and the justice system as a whole are each meant to serve — deserves better."*** The minority would have dismissed the accused's appeal.

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

Editor's Note: At the trial and Ontario Court of Appeal much was said about the police entering the backyard and the application fo s. 8 of the *Charter*. The majority of the Supreme Court of Canada was content with disposing of the appeal on the ss. 9 and 24(2) issues

'SAFETY SEARCH' OF VEHICLE REQUIRES SERIOUS SAFETY CONCERNS

R. v. Del Corro, 2019 ABCA 156

Police began investigating a suspect for illegal firearms trafficking and put him under physical surveillance. After learning that the suspect had obtained an authorization to transport a new firearm, police observed him interact through his car window with the accused at a gas station. The accused was driving a black Mercedes. At the time, the lead investigator did not believe this interaction was a firearm transaction, although he thought it might have been a drug deal.

The next day, the suspect picked up the new firearm. Police surveillance lost sight of him but later the same day he was seen to briefly meet with the accused again. The accused entered the backseat of the suspect's vehicle for about two minutes and then left. Nothing was seen exchanged between the two men and the accused did not appear to be carrying anything in his hands when he left. Nevertheless, the lead investigator believed that the suspect had delivered a firearm to the accused and that their meeting the day before had been for payment.

Over the next several weeks, the police did not obtain any more information linking the accused to the suspect or firearms. They tried to arrange surveillance but had difficulty locating him. A couple of weeks later they did locate him but his activities that day were more consistent with drug trafficking than firearms trafficking. The police also determined that the accused did not have a licence to possess firearms. Sometime later, the police received information that the suspect was buying another firearm and had received an authorization to transport. The day after picking up the firearm, the accused arrived at the suspect's home in the Mercedes. The suspect, who was empty-handed, entered the vehicle and the two men drove around to the alley at the back. At the same time, the suspect's roommate arrived at the back of the residence in a truck and exited his vehicle. A brief discussion between the three men ensued. After that, the suspect walked back to his residence, followed by the roommate. The roommate returned to the Mercedes to speak with the accused and then returned to the house. The police could not see what transpired inside the accused's vehicle and did not observe any of the participants exchanging anything. The accused then drove away.

The lead investigator believed he now had reasonable and probable grounds to arrest the accused for unlawful possession of a firearm. He believed that the suspect had delivered a firearm to the accused during the meeting that had just been observed. The lead investigator instructed the tactical team to arrest the accused. He also temporarily suspended the accused's right to counsel to permit the execution of a general search warrant at the suspect's residence.

Police conducted a pat-down search of the accused incident to arrest and also searched the interior of the Mercedes. No firearms were found but police located cocaine, oxycodone and related paraphernalia inside a jacket on the front seat and inside a satchel belonging to the accused on the floor of the back passenger seat. He was re-arrested for possessing controlled substances for the purpose of trafficking. A search of the suspect's residence resulted in both firearms that the investigator thought had been sold to the accused being found.

Alberta Court of Queen's Bench

The accused argued that the police lacked reasonable and probable grounds to arrest him for unlawful possession of a firearm and therefore breached his ss. 8 and 9 rights not to be subjected to an unreasonable search or arbitrary detention.The judge found the lead investigator subjectively believed that he had reasonable and probable grounds to arrest the accused for possessing restricted firearms but concluded his belief was not objectively reasonable, having regard to the information known to him in light of his training and

"Police have the power to detain a suspect under the common law power of investigative detention if they reasonably suspect that the suspect is committing, or has recently committed a crime. The reasonableness of the suspicion must be assessed on an objective view of the totality of the circumstances. The reasonable suspicion test is a low threshold, since the officer's information need only objectively indicate a possibility that a suspect is committing a crime, not a probability."

experience. The information was consistent with too many other possibilities that were innocuous or related to different criminal activity. Since the arrest was without lawful authority, it breached s. 9 of the *Charter*. The search of the accused's person and his vehicle was unreasonable under s. 8 because it was not authorized by the common law power of search incident to arrest, the arrest having been unlawful.

Despite identifying the ss. 8 and 9 breaches, the judge admitted the evidence under s. 24(2). Although the lead investigator did not have reasonable and probable grounds to arrest the accused for illegal possession of a firearm, the judge found he had grounds to investigatively detain the accused for the same offence. The officer then could have conducted a **"safety search"** of both the accused's person and vehicle for weapons "incident to investigative detention" and would have found the drugs anyway. In other words, the police had a constitutionally permissible way to obtain the drugs without breaching the accused's *Charter* rights.

The judge found the breaches were not egregious and the impact of the breaches on the accused were at the "lower end of the spectrum". And, finally, the charges were serious, the evidence was highly reliable and crucial to the Crown's case. Further, the drugs could have been discovered lawfully by a **"safety search"** incident to an investigative detention. Admitting the evidence obtained through the *Charter* breaches would not bring the administration of justice into disrepute. The accused then pled guilty to possessing cocaine for the purpose of trafficking and simple possession of oxycodone.

Alberta Court of Appeal

The accused argued, among other things, that the trial judge erred in finding that the lead investigator could have investigatively detained him for unlawful possession of a firearm and therefore could have lawfully conducted a **"safety search"** of the vehicle for weapons incident to the investigative detention. In addition, these two errors undermined the trial judge's decision to admit the evidence. Thus, the accused argued the drugs should have been excluded.

The Investigative Detention

A majority of the Court of Appeal described the police power to detain for investigative purposes:

> Police have the power to detain a suspect under the common law power of investigative detention if they reasonably suspect that the suspect is committing, or has recently committed a crime. The reasonableness of the suspicion must be assessed on an objective view of the totality of the circumstances. The reasonable suspicion test is a low threshold, since the officer's information need only objectively indicate a possibility that a suspect is committing a crime, not a probability. [references omitted, para. 44]

Since the bar for reasonable suspicion is low, the majority found the information known to the lead investigator at the time of arrest provided a reasonable suspicion that the accused was unlawfully possessing a firearm. Thus, the trial judge's opinion that the lead investigator was entitled to investigatively detain the accused at the time of the arrest was correct.

"There is no general power of search 'incident to investigative detention', unlike the power of search incident to arrest. That means that any search following an investigative detention must be independently justified and does not follow as a matter of course or as 'incidental' to the detention."

The Safety Search of the Vehicle

"There is no general power of search 'incident to investigative detention', unlike the power of search incident to arrest," said the majority. ***"That means that any search following an investigative detention must be independently justified and does not follow as a matter of course or as 'incidental' to the detention."*** The majority noted there is ***"a limited power to conduct a pat-down search following an investigative detention if the officer has a reasonable belief that officer or public safety is at risk"***, but that ***"the exact limits of safety searches incident to investigative detention are unclear."*** And although some appellate courts have extended safety searches to vehicles and backpacks, ***"in every case where a search extends beyond a pat-down, the circumstances must disclose serious safety concerns requiring something more than a pat-down."***

In this case, the majority concluded that the lead investigator could not have lawfully performed a safety search of the vehicle and its contents:

- **The subjective component of the test was not met.** ***"The evidence does not support a finding that [the lead investigator] believed that safety was at stake, necessitating a search of the vehicle and its contents to remove the threat,"*** said the majority. Rather, the evidence was clear that the focus of police was to gather evidence of suspected firearms trafficking. The lead investigator made no mention of officer safety or public safety.

"[I]n every case where a search extends beyond a pat-down, the circumstances must disclose serious safety concerns requiring something more than a pat-down."

- **The objective component of the test was not met.** It was not reasonable to believe, in the circumstances that existed, that there was an imminent threat to safety and that a search was necessary to eliminate the threat. Although firearms were the perceived threat and the lead investigator suspected that the accused had a firearm in his possession, the accused was out of the vehicle, handcuffed, under the control of the tactical team, and no one else was in the vehicle. ***"Once officers found out that [the accused] did not have a firearm on his person and had handcuffed him, there was no further justification for searching the vehicle for a firearm under the guise of a 'safety search',"*** said the majority. ***"Put simply, even if there was a firearm in the vehicle, there was no way for [the accused] to access it. He posed no threat. ... Accordingly, a search of the vehicle and its contents to eliminate a threat posed by a firearm believed to be in the vehicle was not objectively justified."***

Since the requirements for a safety search incident to investigative detention were not satisfied, the lead investigator could not have discovered the drugs in the vehicle lawfully. This error by the trial judge improperly drove his s. 24(2) analysis.

s. 24(2) *Charter*

In conducting a new s. 24(2) analysis, the majority excluded the evidence. While the breaches were not the most serious, they were more than minor, technical or the result of an understandable mistake. This favoured exclusion. The arrest was a significant intrusion on the accused's s. 9 *Charter*-protected liberty interest, and the pat-down search modestly interfered with his s. 8 *Charter*-protected privacy interest in his own body. The searches of the vehicle and its contents, including the jacket and satchel, were significant intrusions on his privacy

interests. This too favoured exclusion. And society's interest in adjudicating the case on its merits through the admission of the highly reliable drug evidence found in the vehicle that was essential to proving the Crown's case for a serious offence did not overcome the *Charter* infringing conduct that significantly intruded on the accused's liberty and privacy interests.

The accused's appeal was allowed, the drugs and related paraphernalia seized from the vehicle were excluded from evidence, and the accused was acquitted on all counts.

A Second Opinion

Justice Strekaf, in dissent, disagreed with the majority that the evidence ought to have been excluded. In her view, the admission of the evidence would not bring the administration of justice into disrepute. ***"This is a case where a police officer made a mistaken judgement call about whether he had reasonable and probable grounds to make an arrest, which the trial judge described as a close call committed in good faith, and where there was no deliberate, egregious, wilful or flagrant disregard of the rights of the accused,"*** said Justice Strekaf. ***"This is not a case where the Court needs to disassociate itself from the police conduct. The impact of the Charter breach was significant, but not at the most serious end of the scale. The evidence was highly reliable and essential to a determination on the merits."*** She would therefore have dismissed the accused's appeal.

Complete case available at www.canlii.org

R. v. Todd, 2019 SKCA 36 timeline	
Traffic Stop	11:22 p.m.
Accused Released	11:25 p.m.
Accused Detained for Investigation	11:28 p.m.
Accused Arrested	11:31 p.m.
Accused Provided s. 10(b) Warning	11:33 p.m.

GENERAL SAFETY CONCERN INSUFFICIENT TO JUSTIFY TWO MINUTE s. 10(b) DELAY

R. v. Todd, 2019 SKCA 36

At 11:22 p.m. a police officer clocked a truck on radar travelling west on Highway #1 at 143 km/h in a 110 km/h speed zone. The officer turned on his emergency lights and the truck stopped without incident. The officer approached the driver's side of the truck and made the following observations:

- The accused had just lit a fresh cigarette;
- He appeared to be more nervous than most individuals at a "routine" traffic stop;
- His hand trembled when he handed over his driver's licence;
- Several air fresheners were attached to the steering column of the truck; and
- The truck, a rental vehicle, was equipped with a radar detection device.

The officer, with 3.5 years on the job and experience with a large number of traffic stops and several *CDSA* investigations supplemented by a one week Pipeline Convoy Jetway Course, suspected illegal drugs were involved. He was aware that a freshly-lit cigarette and air fresheners are often used as masking agents to hide the smell of drugs and he was doubtful a rental company would furnish its vehicle with a radar detector. In addition, the accused appeared more nervous than one might otherwise expect for a routine traffic stop. In spite of his suspicion, the officer continued to treat the matter as a routine traffic stop. He took the accused's licence and registration to his patrol car where he checked it through various police databases, but nothing of interest arose.

The officer returned to the truck at about 11:25 p.m., warned the accused about speeding and told him he was ***"free to go"***. He did this to to release the accused from psychological detention. The officer then purposefully turned away from the accused, took a few steps away from the truck,

stopped, leaned back and then asked if the accused would mind the officer asking a few more questions before he left. The accused agreed and the officer proceeded to ask five or six questions.

The officer questioned the accused about the rental vehicle. The accused said he had hit a deer with his own vehicle, thus necessitating a rental that was equipped with a radar detector. The officer then asked about where the accused had been, how long he had been there, and why he only had one duffle bag for his trip. The officer thought the accused's answers were odd and his nervousness appeared to elevate as their conversation continued. This interaction lasted two to three minutes and the officer believed he now had grounds to detain the accused for a drug investigation. These grounds were based on the officer's earlier observations, the accused's nervousness, his suspicious answers to the questions posed, and how he deflected some of the questions. At about 11:28 p.m., the officer told the accused he was being detained for a drug investigation and instructed him to exit the vehicle and proceed to the patrol car. The officer asked the accused if he had anything in his pockets but did not conduct a pat-down safety search.

The accused was initially compliant but became somewhat resistant and openly questioned the officer's authority to detain him. The officer instructed the accused to enter the patrol car three times, with his last direction taking on a louder, more authoritarian tone. The accused relented and was placed in the back seat. When he asked the officer why he was being detained, he was again told it was related to drugs. The accused then asked the officer whether he could leave if he let the officer look inside the duffle bag. The officer, interpreting the accused's response as "pleading" and "bargaining", combined with his heightened nervousness and panicked reaction believed he now had reasonable grounds to arrest the accused for possessing a controlled substance. The officer arrested the accused at 11:31 p.m. and advised him of his right to counsel and gave the police caution at 11:33 p.m. A search of the truck incident to arrest resulted in cocaine, hash oil and bundles of cash totalling $22,000 being found. The accused was charged with possessing cocaine for the purpose of trafficking.

Saskatchewan Court of Queen's Bench

The judge found the officer had lawfully detained the accused for speeding. He also held, although it was "close to the line", that the officer had a reasonable suspicion to detain him for a drug investigation based on (1) the freshly lit cigarette and air fresheners; (2) the rental vehicle, (3) the radar detector, (4) the purpose of the trip seemed questionable, (5) minimal luggage for a two week trip and (6) the level of nervousness and continued nervousness.

The judge, however, concluded that the utterance the accused made in the back seat of the patrol car was not enough to move from reasonable suspicion for detention to reasonable grounds for arrest. In his view, the accused's "bargaining" behaviour, along with the officer's observations of him, fell short of establishing reasonable grounds for arrest. ***"I find that the accused has persuaded me, on a balance of probabilities, that when I take all of the accumulated observations of the constable, in their best light, and apply his level of training and experience, I do not find that I am able to conclude there are reasonable grounds for the arrest,"*** said the judge. He found the officer acted too quickly and should have either summoned a sniffer dog, spoke further with the accused or conducted other investigation. ***"The power to arrest is only available when the officer subjectively believes he had reasonable and probable grounds to make the arrest,"*** continued the judge. ***"These grounds must be justified from an objective point of view, as assessed from the standpoint of the reasonable person. I do not see that here."***

Based on his findings, the judge ruled that the accused's ss. 7, 8 and 9 *Charter* rights had been infringed, but he offered no opinion on whether there had been a s. 10(b) breach. The judge then moved on to a s. 24(2) analysis and determined that

"For an arrest to be lawful, two things must be established. First, the arresting officer must believe that he or she has reasonable grounds to make the arrest. ... Second, viewed objectively, the grounds articulated by the arresting officer must be reasonable; that is, a reviewing court must ask itself whether a person in the shoes of the officer would be able to conclude there were reasonable grounds for the arrest."

the evidence should be excluded. The officer knew the difference between reasonable suspicion to detain and reasonable grounds to arrest. Although society had an interest in this case being adjudicated, the *Charter* breaches were serious and they had a significant impact on the accused's *Charter*-protected interests. The accused was acquitted.

Saskatchewan Court of Appeal

The Crown appealed the trial judge's ruling arguing that he erred in concluding the arrest was unlawful and therefore the search of the truck that followed was unreasonable. The Crown also asserted that even if there were *Charter* breaches, the evidence ought not to have been excluded. The accused contended that he had been detained at an earlier point in time and the police failed to respect his s. 10(b) right to counsel because they delayed advising him of it.

Lawful Arrest?

Justice Schwann, authoring the Court of Appeal's opinion, described the legal test for arrest as follows:

> For an arrest to be lawful, two things must be established. First, the arresting officer must believe that he or she has reasonable grounds to make the arrest. ... Second, viewed objectively, the grounds articulated by the arresting officer must be reasonable; that is, a reviewing court must ask itself whether a person in the shoes of the officer would be able to conclude there were reasonable grounds for the arrest. [reference omitted, para. 25]

And further:

> As a matter of established law, courts have consistently cautioned trial judges not to conflate reasonable grounds for arrest with the trial burden. While reasonable grounds for arrest contemplates something more than mere suspicion, the Crown does not need to meet the stringent "proof beyond reasonable doubt" standard, the lesser prima facie case standard or even the more relaxed civil "balance of probabilities" standard. ... [T]he "reasonable grounds to believe" standard is one of lesser probability, that is, the reviewing court must ask itself whether the inference drawn by the arresting officer was a reasonable one to have made at the time of arrest based on the circumstances known to the officer at that time. Determining whether reasonable grounds exist requires an assessment of the totality of the circumstances. [references omitted, para. 29]

Here, there was no issue taken with the officer's **subjective** belief. As for the **objective** test, the trial judge erred by focusing on the brevity of the accused's outburst in the patrol car, rather than what he said, how or why he said it, and what reasonable inference the officer could draw from the accused's words and behaviour in light of the other observed indicia. The officer said the accused became panicky, attempted to bargain and acted like he was trapped after being told he believed

"While reasonable grounds for arrest contemplates something more than mere suspicion, the Crown does not need to meet the stringent 'proof beyond reasonable doubt' standard, the lesser prima facie case standard or even the more relaxed civil 'balance of probabilities' standard."

there were illicit drugs and contraband in the truck. The trial judge viewed the utterance in isolation from everything that had transpired. ***"Simply focusing on the brevity of [the accused's] comments to the exclusion of how he said them, the content of what was said and whether [the accused's] utterance was reasonably connected to what [the officer] had just told him (i.e., that he was being detained for drugs) caused the trial judge to view the utterance in isolation from everything that had transpired beforehand,"*** said Justice Schwann. ***"In my view, these nuances should have been instrumental in assessing whether the inference of criminality drawn by [the officer] was a reasonable one for him to have made."*** The officer did not move to arrest from his grounds for detention solely based on what the accused said. The Court of Appeal continued:

> To tie all of this together, I am satisfied that the trial judge took a piecemeal approach to what [the accused] had said in the truck and, in doing so, failed to examine [the officer's] evidence contextually and cumulatively. Furthermore, by focusing on the brevity of [the accused's] utterance and [the officer's] decision to divert from his original plan, the trial judge overemphasized these factors in seeming disregard for the continuum of events that had taken place and the observations that had been made by [the officer] up to the point in time when [the accused] was placed in the back seat of the patrol car. The Crown makes the point, with which I agree, that the additional observations made by [the officer] and, more importantly, [the accused's] own conduct led seamlessly to the point where reasonable grounds for arrest were established. [The accused's] arrest was unquestionably the culmination of a series of dynamic events that unfolded very rapidly. The trial judge was obliged to consider the full range of events in a cumulative, not piecemeal, fashion. Based on the trial judge's written reasons, I am not satisfied he took that approach. [para. 44]

When Did Detention Arise?

The accused submitted that he was psychologically detained when he agreed to answer the officers questions even though he was told he was free to go. Therefore, he suggested he should have been advised of his s. 10(b) rights. Under cross-examination the officer agreed he did not inform the accused that he had no obligation to answer the questions, had no legal authority to detain him at that precise point in time, and considered his questioning to be a drug investigation.

The Court of Appeal described a *Charter* detention as follows:

> Detention is the suspension of an individual's liberty interest. It can consist of either physical or psychological restraint, with psychological detention taking one of two forms. … [P]sychological detention arises either where the individual has a legal obligation to comply with a restrictive request or demand, or where "a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply". [references omitted, para. 53]

Justice Schwann also noted the following points established in the case law:

- Not every interaction between an individual and the police is a "detention" within the meaning of s. 9, even in circumstances where a person is under investigation for criminal activity.
- Section 9 does not prohibit the police from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime.

Detention is the suspension of an individual's liberty interest. It can consist of either physical or psychological restraint, with psychological detention taking one of two forms. … [P]sychological detention arises either where the individual has a legal obligation to comply with a restrictive request or demand, or where "a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply".

- While the police are not foreclosed from interacting with members of the public until such time as they have grounds to connect the individual with a criminal offence, the issue often reduces to whether the individual in question was "psychologically" detained.
- Focused suspicion, in and of itself, does not convert an interaction with police into a detention within the meaning of s. 9.
- There is no bright line separating innocuous police questioning from psychological detention.
- The onus is on the accused to show that, in the circumstances, they were effectively deprived of liberty of choice.
- While it is not fatal for an accused to refrain from testifying about their perception of the police encounter, the accused's contention that he or she had been deprived of liberty must nonetheless find support in the evidence.

Here, the accused did not testify. So, in determining whether a reasonable person in the accused's circumstances would have believed he had no choice but to remain at the scene and answer the questions put to him, the Court of Appeal considered the following:

- **The circumstances giving rise to the encounter:** The encounter started as a routine traffic stop for speeding. Although the officer did not specifically tell the accused the traffic detention was over, he did say he was free to go. The officer had returned the accused's licence and registration and there was nothing physically blocking the accused's truck or inhibiting his exit from the scene. Nor did the officer shine a flashlight in the accused's eyes, or encroach upon his personal space by leaning into the window or holding on to the door.

- **The nature of the police conduct:** The accused was given the option to leave or remain at the scene to answer a few questions. The officer did not command the accused to stay or demand that he answer questions. The officer was professional. The questioning was of short duration – two or three minutes at best – and the officer was not overbearing, and had not leaned into the truck or placed his hands on the window or door.

- **The particular characteristics or circumstances of the individual:** Because the accused did not testify there was no evidence addressing these factors.

Since the accused failed to establish that he was psychologically detained during the brief interaction when he remained at the scene to answer the officer's questions, there was no s. 9 violation at this point. However, the accused was detained when the officer actually told him he was being detained for a drug investigation. But, at this point, the officer had the requisite suspicion to do so.

s. 10(b) Charter

When the officer informed the accused that he was being detained, the accused's s. 10(b) rights were engaged and he was entitled to be informed of his right to retain and instruct counsel without delay. The accused argued that if he had been provided with his right to counsel promptly and not minutes later, he would not have blurted out the "duffle bag" comment that led to his arrest and, therefore, the search of his vehicle incident to arrest and the seizure of drugs and money would not have occurred.

Justice Schwann noted that ***"even a short period of investigative detention does not suspend [the s. 10(b)] Charter right."*** And the phrase "without delay" has been interpreted as immediately. However, absent public or officer safety concerns, generally there is no excuse that would justify a delay in informing the detainee of their right to counsel:

> Officer or public safety concerns can give rise to some measure of delay; however, these concerns must be more than theoretical or general in nature in order to justify suspension of the right to counsel. That is to say, there must

> be some concrete evidence put forth beyond the expression of an abstract concern. Whether there is a legitimate basis to suspend the right to counsel entails a fact-sensitive inquiry. [para. 79]

In this case, the accused's s. 10(b) rights were engaged at 11:28 p.m. when he was informed that he was detained for a drug investigation. He was therefore entitled to be informed of his right to counsel at this time unless it could be suspended on public or officer safety grounds. But here, there was no evidence of a legitimate safety concern that would excuse immediate compliance with s. 10(b):

> Case law tells us that when a safety concern is advanced as the basis for suspending s. 10(b) rights, the arresting officer must provide an evidentiary basis for it. Considered in its entirety, I am not satisfied from the record that [the officer] believed [the accused] posed a danger to officer safety. There was no pat-down search; indeed, [the officer] felt there was no need to conduct one or to handcuff [the accused]. There was no evidence from the database search that [the accused] posed a threat of any sort. There was no evidence the integrity of the investigation could be jeopardized. While [the officer] expressed some concern about the danger of standing on the side of the highway at night, this concern was expressed in no more than a general or theoretical sort of way. In any event, to the extent there was a danger, it was ameliorated when [the officer] directed [the accused] to the passenger side of the patrol car. In my view, the real reason [the officer] delayed giving [the accused] his right to counsel was because, as he said several times in his testimony, he had a plan in mind that he felt would more effectively be executed in the patrol car.
>
> In my view, there was an insufficient evidentiary foundation on the voir dire to support the Crown's assertion that immediate compliance with s. 10(b) was impossible or at least undesirable. As explained, there was a lack of a specific officer safety concern. There was no concern about the integrity of the investigation. While the time frame between when [the accused] was removed from the truck (11:28 p.m.) until the time he was given his right to counsel (11:33 p.m.) was brief, I am satisfied [the officer] could have advised [the accused] of his right to counsel at any point after he asked [the accused] to exit his truck, when he walked [the accused] toward the patrol car, when he asked [the accused] what he had in his pockets, or when [the accused] was placed in the patrol car. Even though this was a relatively fluid situation, based on the voir dire evidence and the absence of a specific safety concern, there was no reasonable basis for [the officer] to have delayed giving [the accused] his right to counsel. Accordingly, [the accused's] right to be informed of his right to retain and instruct counsel was breached. [paras. 84-85]

Evidence Admission

Since the Appeal Court only found a s. 10(b) breach, it conducted a new s. 24(2) *Charter* enquiry. In doing so, the evidence was admitted:

> In my view, the repute of the administration of justice would not be tarnished by the admission of the evidence in this case. The s. 10(b) breach was at the less-serious end of the spectrum. While Mr. Todd argues that had he been given his s. 10(b) right to counsel immediately upon detention, he would not have blurted out what he did in the back seat of the patrol car, his argument is speculative and without evidentiary foundation. This conclusion, combined with society's interests in adjudication on the merits, tips the scales in favour of admission of the evidence. [para. 110]

The Crown's appeal was allowed, the accused's acquittal was set aside and a new trial was ordered.

Complete case available at www.canlii.org

"Case law tells us that when a safety concern is advanced as the basis for suspending s. 10(b) rights, the arresting officer must provide an evidentiary basis for it."

BC's INTERMEDIATE WEAPON USE STATISTICS RELEASED

In February 2019 the Policing and Security Branch of BC's Ministry of Public Safety and Solicitor General released the intermediate weapon use and firearm discharge data reported by BC police agencies for 2017.

41 The total number of **Extended Range Impact Weapon** (ERIW) discharges by police (number of subjects). This is up from 39 in 2016 and 31 in 2015.

POLICE AGENCY - 2017	ERIW DISCHARGES (NUMBER OF SUBJECTS)
Vancouver	23
Abbotsford	7
Victoria	7
New Westminster	2
Delta	1
RCMP	1

252 The total number of **Conducted Energy Weapon (CEW) Discharges** by police (number of subjects). This is up from 222 in 2016 and 168 in 2015.

POLICE AGENCY - 2017	CEW DISCHARGES (NUMBER OF SUBJECTS)
RCMP	187
Vancouver	47
Victoria	7
Abbotsford	3
New Westminster	3
West Vancouver	2
Delta	1
Saanich	1
Metro Vancouver Transit	1

206 The total number of **Oleoresin Capsicum (OC) Spray Discharges** by police (number of subjects). This is up from 141 in 2016 and 193 in 2015.

POLICE AGENCY - 2017	OC DISCHARGES (NUMBER OF SUBJECTS)
RCMP	119
Vancouver	52
Victoria	12
Abbotsford	9
West Vancouver	5
Port Moody	4
Metro Vancouver Transit	3
Nelson	1
Saanich	1

89 The total number of **Baton Applications** by police (number of subjects).This is down from 92 in 2016 but up from 77 in 2015.

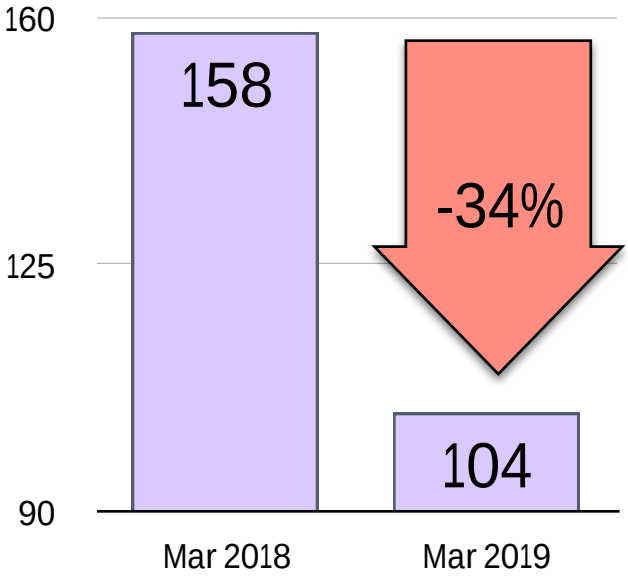
POLICE AGENCY - 2017	BATON APPLICATIONS (NUMBER OF SUBJECTS)
Vancouver	48
RCMP	22
Abbotsford	7
West Vancouver	5
Victoria	4
Metro Vancouver Transit	3

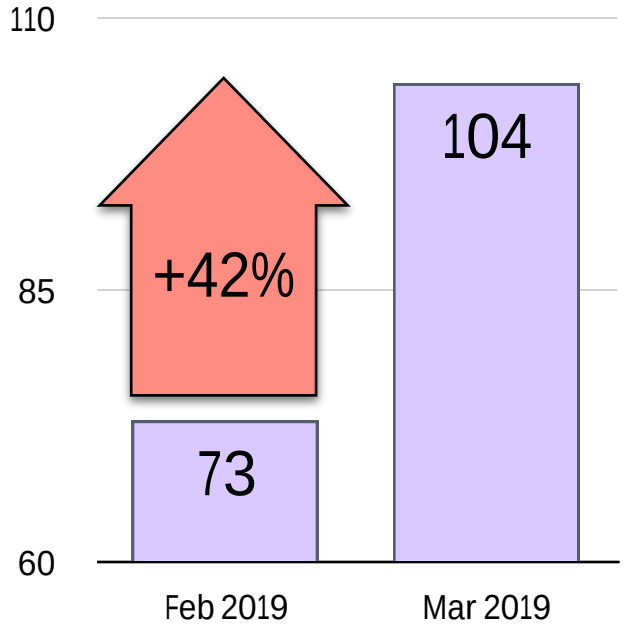
14 The total number of **Firearm Discharge** incidents by police in an operational setting. This is up from nine (9) in 2016 and 12 in 2015.

POLICE AGENCY - 2017	FIREARM DISCHARGES
RCMP	12
Abbotsford	1
Vancouver`	1

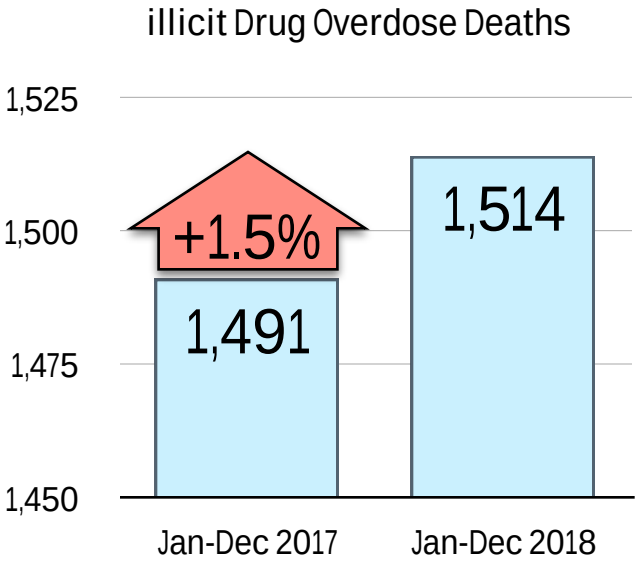
ILLICT DRUG OVERDOSE DEATHS IN 2019

The Office of BC's Chief Coroner has released statistics for illicit drug overdose deaths in the province from **January 1, 2009 to March 31, 2019**. In March 2019 there were 104 suspected drug overdose deaths. This represents a **-34%** decrease over the number of deaths occurring in March 2018 but a **+42%** increase over February 2019.





In 2018, there were a total of **1,514** suspected drug overdose deaths. This is an increase of 23) deaths over the 2017 numbers (**1,491**).



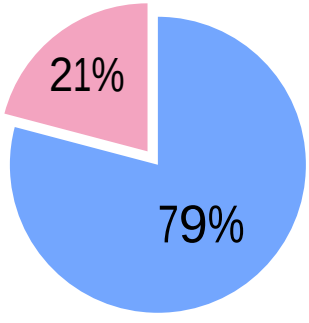
Overall, the 2018 statistics amount to about **four (4) people dying every day of the year.**

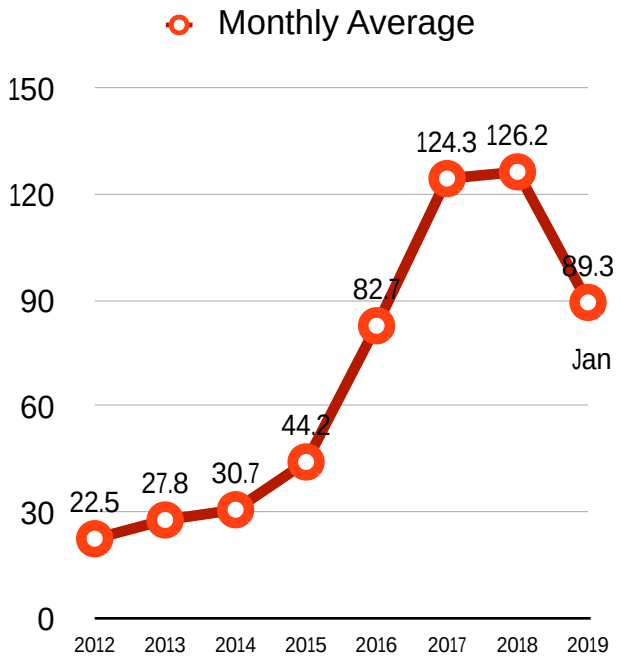
The **1,514** overdose deaths last year amounted to more than a **355%** increase over 2013. The report also attributed fentanyl laced drugs as accounting for the increase in deaths.

People aged 30-39 were the hardest hit so far in 2019 with **65** illicit drug overdose deaths followed by 40-49 year-olds at **62** deaths. People aged 50-59 years-old accounted for **59** deaths while those aged 19-29 had **48** deaths. Vancouver had the most deaths at **72** followed by Surrey (**33**), Abbotsford (**13**), Victoria (**13**), Kamloops (**12**), Burnaby (**7**), Langley (**7**), and New Westminster (**7**).

Deaths by gender

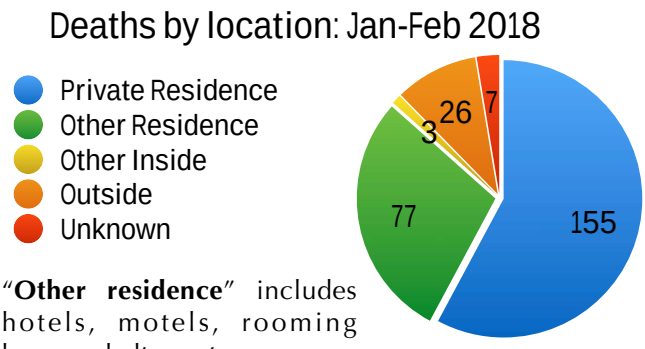
Males continue to die at almost a **4:1** ratio compared to females. In January 2019, **212** males had died while there were **56** female deaths.





The 2019 data indicates that most illicit drug overdose deaths (**87.6%**) occurred inside while **9.7%** occurred outside. For **7** death, the location was unknown.

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



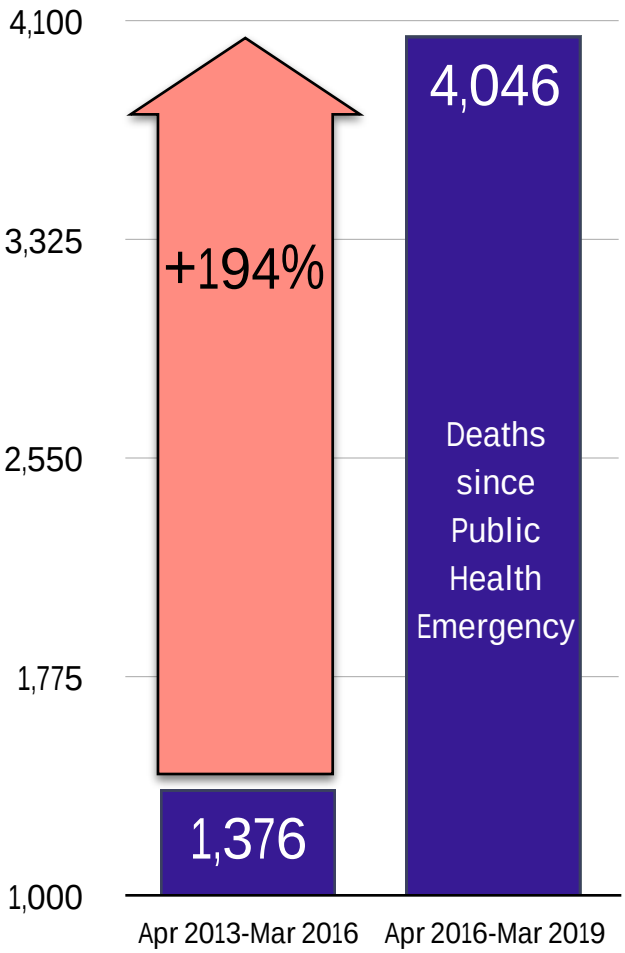
"**Other residence**" includes hotels, motels, rooming houses, shelters, etc.

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

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

DEATHS SINCE PUBLIC HEALTH EMERGENCY

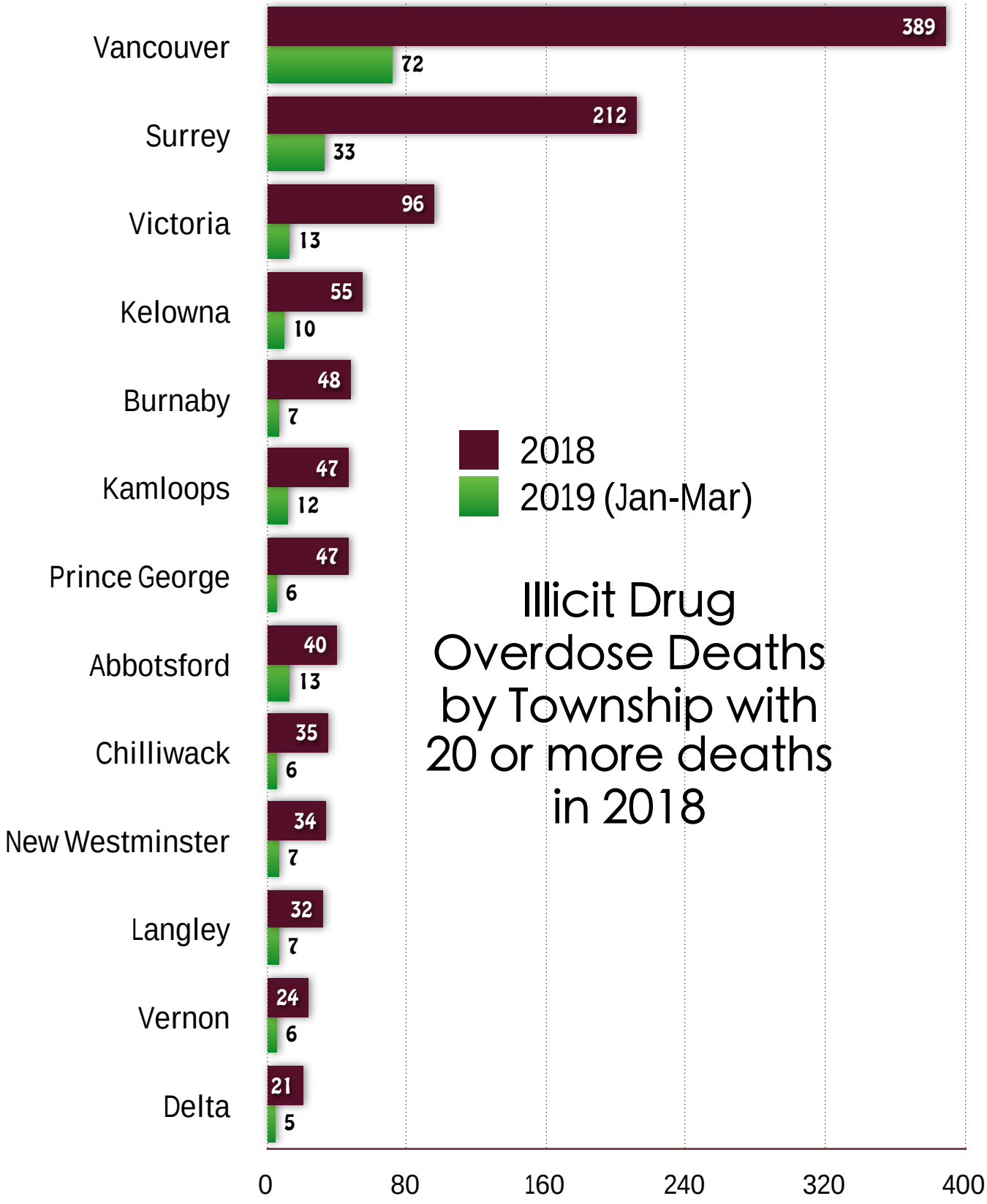
In April 2016, BC's provincial health officer declared a public health emergency in response to the rise in drug overdoses and deaths. The number of overdose deaths in the **36** months preceding the declaration (Apr 2013-Mar 2016) totaled **1,376**. The number of deaths in the **34** months following the declaration (Apr 2016-Mar 2019) totaled **4,046**. This is an increase of **194%**.



Source: Illicit Drug Overdose Deaths in BC - January 1, 2009 to March 31, 2019. Ministry of Public Safety and Solicitor General, Coroners Service. May 15, 2019.

TYPES OF DRUGS

The top five detected drugs relevant to illicit drug overdose deaths from 2016 - 2018 were fentanyl and its analogues, which was detected in **80.1%** of deaths, cocaine (**49.7%**), methamphetamine/amphetamine (**31.3%**), ethyl alcohol (**26.4%**), and heroin (**18.6%**).


Vancouver
389
72
Surrey
212
33
Victoria
96
13
Kelowna
55
10
Burnaby
48
7
Kamloops
47
12
Prince George
47
6
Abbotsford
40
13
Chilliwack
35
6
New Westminster
34
7
Langley
32
7
Vernon
24
6
Delta
21
5
2018
2019 (Jan-Mar)
Illicit Drug Overdose Deaths by Township with 20 or more deaths in 2018
0
80
160
240
320
400

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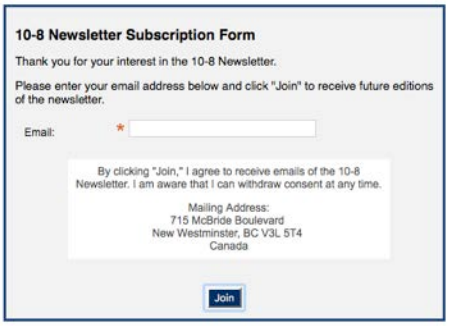

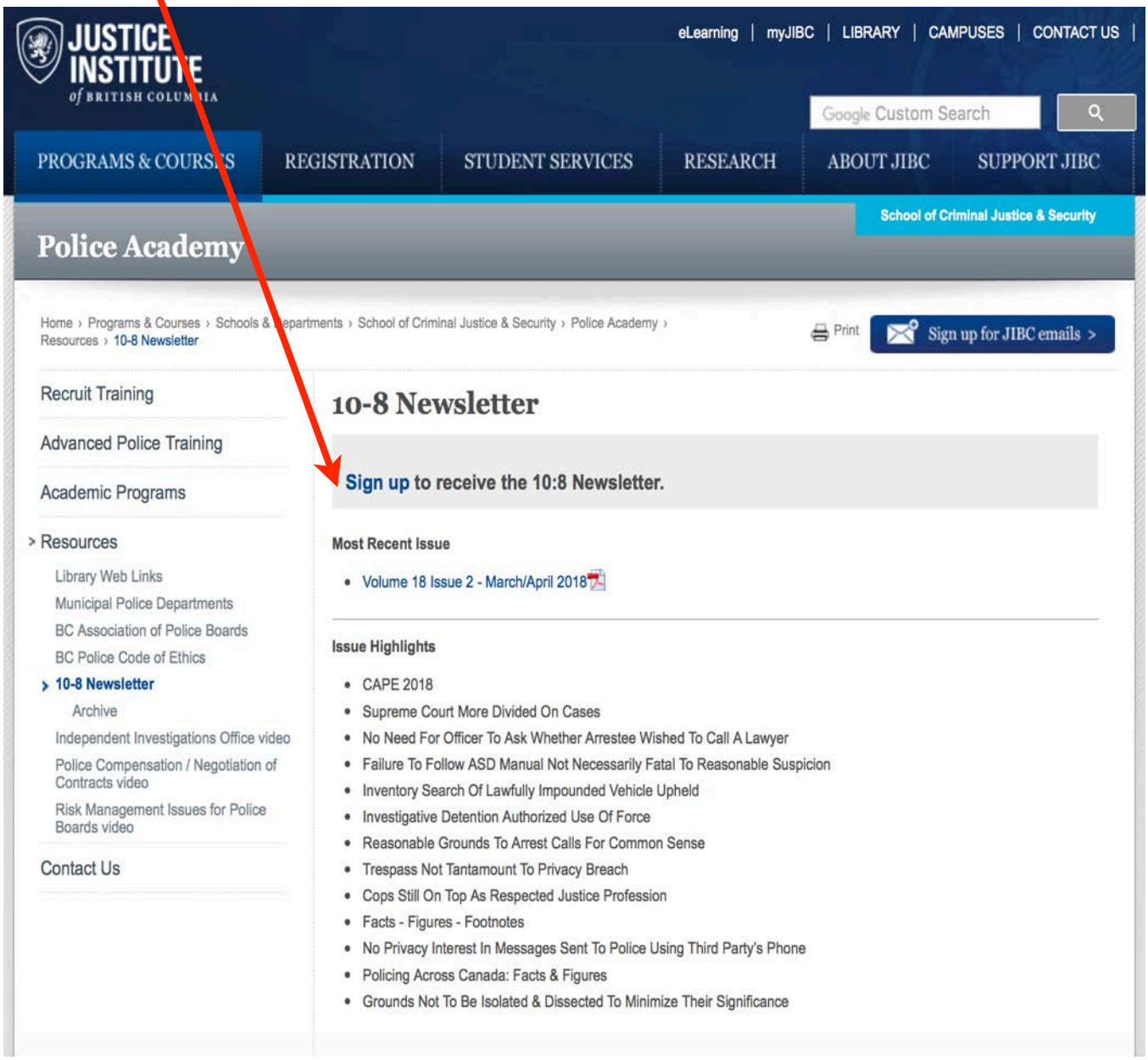

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