JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

IN MEMORIAM

On September 12, 2017 35-year-old Royal Canadian Mounted Police Constable Francis (Frank) Deschênes was killed while on duty. He stopped in his marked police car to help two people in an SUV change their tire. A utility van collided with his police car and the SUV. Constable Deschênes was pronounced deceased at the scene. The two people with the SUV were taken to hospital and released. The driver of the van was also treated at the hospital and taken into police custody, but was later released.

Constable Deschênes had served with the Royal Canadian Mounted Police for 12 years. He was assigned to Traffic Services at the time of his death. He is survived by his wife.

"The most important thing to Frank was to be there, to be the one that helps people that need help. To be the one that can turn the negative into a positive for complete strangers.

We lost Constable Deschênes doing exactly that — helping someone that needed help."

- Dave Connors -

Funeral service for Constable Deschênes

~ Constable Francis Deschênes #51654 ~

Highlights In This Issue

Note-able Quote

"People in general have no notion of the sort and amount of evidence often needed to prove the simplest fact."

Peter Mere Latham

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Upcoming Courses

Advanced Police Training

Advanced training provides opportunities for skill development and career enhancement for police officers. Training is offered in the areas of investigation, patrol operations and leadership for in-service municipal and RCMP police officers.

JIBC Police Academy

See Course List here.

"He served his country and was committed to something much larger than himself of which there is nothing more honourable. He was the guy who did the right thing when no one was watching and that is exactly what Frank was doing when he lost his life. … When you think of a Mountie, Frank epitomizes that image. He put on his uniform with pride, lived our core values through his actions and served others unselfishly with integrity and respect."

Assistant Commissioner Brian Brennan, Commanding Officer of the Nova Scotia RCMP, Remarks, funeral service for Constable Francis Deschênes

Note-able Quote

"Where your focus goes, your energy flows."

Unknown

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.

Application of social media in crisis management: advanced sciences and technologies for security applications.

Babak Akhgar, Andrew Staniforth, David Waddington, editors.

Cham, Switzerland: Springer, 2017.

HM 742 A67 2017

The Canadian justice system: an overview.

Paul Atkinson.

Toronto, ON: LexisNexis, 2017.

KE 444 A85 2017

A definitive guide to behavioural safety: the definitive guide.

Tim Marsh.

Abingdon: Routledge, 2017.

T 55.3 B43 2017

Developing organizational simulations: a guide for practitioners, students, and researchers.

George C. Thornton III, Rose A. Mueller-Hanson, Deborah E. Rupp.

New York, NY: Routledge, Taylor & Francis Group, 2017.

HF 5549.5 E5 T48 2017

Effective people management: your guide to boosting performance, managing conflict and becoming a great leader in your start up.

Pat Wellington.

London: Kogan Page, 2017.

HF 5549 W432 2017

The energy bus: 10 rules to fuel your life, work, and team with positive energy.

Jon Gordon.

Chichester, West Sussex: Wiley, 2015.

HD 66 G665 2015

From accidents to zero: a practical guide to improving your workplace safety culture.

Andrew Sharman.

Abingdon, Oxon; New York, NY: Gower, 2016.

T 55 S448 2016

The inspiration code: how the best leaders energize people every day.

Kristi Hedges.

New York, NY: AMACOM, American Management Association, 2017.

HF 5549.5 M63 H436 2017

Man-made catastrophes and risk information concealment: case studies of major disasters and human fallibility.

Dmitry Chernov, Didier Sornette.

Cham: Springer, 2016.

HD 38.5 C463 2016

Mental disorder and the law: a primer for legal and mental health professionals.

Hy Bloom, Richard D. Schneider.

Toronto, ON: Irwin Law, 2017.

KE 514 B565 2017

Research and evaluation for busy students and practitioners: a time-saving guide.

Helen Kara.

Bristol ; Chicago, IL: Policy Press, 2017.

H 62 K37 2017

Stretch to win.

Ann Frederick, Chris Frederick.

Champaign, IL: Human Kinetics, 2017.

RA 781.63 F74 2017

Trauma and recovery: the aftermath of violence, from domestic abuse to political terror.

Judith Herman, M.D. New York, NY: Basic Books, a member of the Perseus Books Group, 2015.

RC 552 P67 H47 2015

BB GUN SATISFIED DEFINITION OF FIREARM

R. v. Asmann, 2017 ONCA 659

The accused entered a credit union where he was a former customer and account holder. He wore dark clothing, a toque and had his faced masked with a dark scarf. He was also armed with a black handgun. He produced the handgun and demanded money from the tellers. He also ordered people to the ground. Three different tellers obeyed the accused's demands to hand over money and placed it in the bag he provided. The accused then fled the bank with about $26,000, including bait money.

The police found the accused driving a stolen vehicle. They took up chase and a dangerous, high-speed pursuit ensued. The accused crashed his vehicle into a utility pole and fled on foot, but was soon captured. The police found almost all the money in the stolen car along with a .117 calibre (4.5 mm) CO2 operated Crosman C41 semi-automatic air pistol that was used in the robbery. It was not loaded had a detachable BB magazine, The pistol weighed about two pounds, measured 6.75 inches long, was made of metal and had a plastic grip. A warning label indicated that the item was "not a toy" and that "misuse or careless use may cause fatal injury." The magazine could hold up to 20 steel, spherical BB's but no CO2 canister was recovered. The accused also confessed to the robbery, stating he was strapped for cash. He was charged with several offences including robbery using a restricted firearm.

Ontario Superior Court of Justice

The accused plead guilty to failing to stop for police, possessing the stolen vehicle and possessing the stolen money from the bank. However, he plead not guilty to robbery using a restricted firearm. In his view, the Crown had failed to prove beyond a reasonable doubt that the handgun used during the robbery was a firearm, let alone a restricted one. He submitted that the Crown did not prove the pistol fit either definition. As a result, he argued he should only be convicted of robbery.

The Crown, on the other hand, initially suggested that the evidence, when considered in its totality, proved that the handgun met the *Criminal Code* definition of both "firearm" and "restricted firearm." Thus, the Crown contended that the accused should be convicted as charged or, at the least, with the included offence of robbery using a firearm.

An expert from the Centre for Forensic Sciences (CFS) testified that the handgun was test-fired more than 10 times for functionality and velocity. Using a CO2 canister and .177 calibre BB's from the CFS's

BY THE BOOK:

Criminal Code

s. 2 - Firearm Definition

Firearm means a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm.

... ...

s. 84 - Handgun Definition

Handgun means a firearm that is designed, altered or intended to be aimed and fired by the action of one hand, whether or not it has been redesigned or subsequently altered to be aimed and fired by the action of both hands.

... ...

s. 344(1)(a.1) Robbery

Every person who commits robbery is guilty of an indictable offence and liable ... (a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years ...

collection, the handgun operated and fired properly and consistently. The expert also said that the velocity readings for the BB's from 10 different firings ranged from 399 to 455 feet per second. These velocities well exceeded the "Pig's Eye Test" velocity measurement of 214 feet per second, the velocity recognized as capable of penetrating or rupturing a pig's eye (considered a suitable model to the human eye). The expert then opined that the item in question was a handgun under s. 84(1) of the *Criminal Code* because it was designed to be aimed and fired by the action of one hand. It was also a firearm as defined in s. 2 because it was a barrelled weapon from which a projectile (BB's) could be discharged and was capable of causing serious bodily injury to a person; it satisfied the minimum requirements of the Pig's Eye Test. The expert also said the handgun was a "restricted firearm" because its barrel length was greater than 105 mm.

The judge found the handgun met the definition of a firearm under the *Criminal Code*. It was a functioning BB gun and the Crown had proven beyond a reasonable doubt that the handgun was capable of being loaded and fired, and that it could cause serious bodily harm to a person during or immediately following the commission of the offence. The question of whether the firearm was a restricted one was left for another day as the Crown did not seek a conviction on the charge as read, but instead pursued the included offence of "robbery with a firearm". The accused was convicted of this lesser and included offence.

Ontario Court of Appeal

The accused appealed his conviction on the robbery with a firearm offence but it was dismissed. In a short endorsement, the Ontario Court of Appeal found the trial judge accepted that the BB gun fell within the definition of a firearm under s. 2 of the *Criminal Code*. In the Court of Appeal's view, the s. 2 definition of firearm applied to the entire *Criminal Code* and there was "no principled basis upon which to read the word 'firearm' in the robbery provision (s. 344) as not including a device that falls within the definition of firearm in s. 2." As for the other firearm-related definitions and provisions in the *Criminal Code*, they were not engaged.

Complete case available at www.onariocourts.on.ca

Editor's note: Additional facts taken from the trial judge's ruling, transcript of proceedings, May 13, 2015, unreported.

MANNER & LENGTH OF DETENTIONS UNREASONABLE: DAMAGES AWARDED

Godin v. City of Montreal, 2017 QCCA 1180

Three plaintiffs were amongst a group of 60 to 70 other protestors occupying a small and densely populated tent city in Montreal's Victoria Square in support of the "Occupy Wall Street" movement. Municipal authorities ordered the public park, which included Victoria Square, closed on a 24-hour basis. An order to leave was given to the occupants by the police and most of the protestors left voluntarily and peacefully. However, about a dozen people, including the three plaintiffs, refused to leave and attached themselves to each other and a tent. They were arrested, which included two of the plaintiffs having their hands bound behind their backs with plastic tie wraps. They were held in a heated bus parked at the site for approximately 20 to 60 minutes.

Following their arrest, the plaintiffs were photographed and the back of one hand was marked for the purpose of identification with a number in black felt pen and the other in invisible ink. The invisible ink could be viewed under a special light in the event that the black ink was erased or blurred. In the experience of the police, some people refuse to identify themselves or provide a false name and the numbers allow the police to match the person arrested with any possessions seized from them. As well, the numbers provide easy identification should the arrestees return to occupy the square upon their release from

custody. The ink would ordinary be gone from the hand in three days. An extensive video recording was also made by the police of the entire operation. One of the plaintiffs was released on site as his car was parked nearby. Two plaintiffs were not released on site. They were placed in the back of police cars, still bound by plastic ties, and driven to other parts of the city. This prolonged their detentions for about 20 minutes.

All three plaintiffs sued the city of Montreal seeking damages for bodily, moral or material injury under the Civil Code of Quebec for, among other things, marking their hands with invisible and black ink, taking photos of them during their detention, and for the duration and manner of their detention, including the cuffing of their hands with plastic ties and their transport to other parts of the city.

Court of Quebec

The judge dismissed the plaintiffs' actions. He found the plaintiffs failed to demonstrate that the police did not act reasonably. In the judge's view, the techniques used and the force applied were not excessive given the necessity of physically removing the plaintiffs from the square, their persistent refusal and their passive resistance. Marking their hands with invisible and black ink was not offensive in the context of a mass arrest. As for the binding of the hands behind the back with plastic tie wraps, the judge found this to be a lawful common practice. The judge ruled that the detention in a heated bus was, in the circumstances, reasonable. The taking of the plaintiffs' photos following their arrest was for the purposes of identification. And, even if the police did commit a fault, the plaintiffs suffered no damage and any discomfort experienced by them was minor and temporary.

Quebec Court of Appeal

The plaintiffs appealed the trial judge's decision, again arguing the police committed faults against them when their hands were marked following their arrest, their photos were taken, their hands were bound with plastic tie wraps while in custody, and they were transported to other parts of the city prior to their release from custody.

Marking the Hands

The Court of Appeal found that marking the hands with ink was momentary and minimal, did not penetrate the skin, and did not interfere with the plaintiffs' physical, psychological or emotional integrity in more than a fleeting manner. Nor was there any suggestion that the plaintiffs were bothered or suffered psychologically beyond the fact of their arrest by the markings. The police committed no wrong as alleged. And, even if they did, there was no material damage proven.

Source: Facebook posting, Nina Haigh, November 26, 2011.

Photographing

Although there was no statutory authority for the taking of the plaintiffs' photos since they were only arrested for a by-law infraction, the police may nonetheless "take a photo of people they arrest as part of their duty to retain evidence of the offence (i.e. – the identity of the

"A police officer acting reasonably would seek to preserve evidence of the offence including the arrestees' identity and appearance for the purposes of collecting evidence to present to a court. There was consequently no fault committed by the police in taking the photographs in question."

alleged perpetrators). … A photo simply records in visual form what a sketch or notes of a detainee's appearance would preserve in written form." Justice Schrager stated:

> A police officer acting reasonably would seek to preserve evidence of the offence including the arrestees' identity and appearance for the purposes of collecting evidence to present to a court. There was consequently no fault committed by the police in taking the photographs in question. [para. 39]

Furthermore, no damages (bodily, material or moral) had been proven that might have resulted from the taking of the photos after arrest.

Plastic Tie Wraps

The two plaintiffs who had their hands bound with plastic tie raps argued this was unnecessary because they were cooperative and offered no physical resistance once they were removed from the tent. The police, on the other hand, contended that the binding was necessary to prevent the detainees from rubbing out the black ink numbers marked on their hands and to address security concerns.

"Police officers, acting reasonably, may handcuff an arrested person for reasons of security or to execute their duties," said Justice Schrager. "Even though handcuffing may arise upon arrest, the fact of arrest, even if legal, does not automatically give rise to the right to apply handcuffs to a detained person… Handcuffing should not be carried out systematically. Applying handcuffs (or tie wraps) is within the discretion of an arresting officer but there must be a good reason to do it, such as the security of the police or others, including the arrestee. The cuffs or ties can be used to control a detainee when justified in the circumstances."

In this case, the initial binding of the hands was not unreasonable in the circumstances. However, the plaintiffs continued restraint in the back seat of two police cars with their hands bound when they were taken off the bus was unreasonable. At this point, the police had already decided not to charge the two plaintiffs but instead were going to release them.

Detention Duration

The Court of Appeal found the plaintiffs' detentions in the bus for 20 to 60 minutes was not unreasonable. However, the prolonged detention of the two plaintiffs once they were off the bus and were driven to other parts of the city constituted a fault by the police. Once the police decided the

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plaintiffs would not be charged and would be released, their continued detention was not necessary to prevent the continuation or repetition of the occupation of the square and the police were therefore obliged to release them:

> In a word, it was not reasonable to continue to detain them given that they had identified themselves and the police decided to release them without charge. Moreover, the transport to another part of the town was vexatious and harassing. Though the police do not operate a taxi service, if having resolved to release the [plaintiffs], the police really felt the necessity to remove [the plaintiffs] out of the area of Victoria Square to avoid a re-occupation of the square, they could have uncuffed them and offered to drive them home. Instead, they left them handcuffed and transported them without consent to a distant point. This constitutes a fault in what was otherwise reasonable action on the part of the police. [para. 58]

Damages

In assessing damages, the Court of Appeal awarded the two plaintiffs who were zip tied and transported to other parts of the city $2,000 each with interest for moral and material loss related to the inconvenience of the transport and discomfort of the tie wraps. As for the third plaintiff, no damages were awarded to him because his detention was not prolonged and he was not handcuffed. However, his initial order to pay legal costs was reversed given the public interest questions involved in this case.

Complete case available at www.canlii.org

Editor's Note: The plaintiffs' arguments were not based on the Canadian or Quebec's Charters of Rights and Freedoms.

LEGALLY SPEAKING

Reasonableness Doctrine

"Police officers, though justified to use force at times in the accomplishment of their duties are, like all citizens, responsible for faults committed in the exercise of those duties.

The discretion they exercise in the performance of their duties is essential to the proper functioning of the criminal justice system.

In the eyes of the civil law, the police are held to a reasonableness standard so that they must act as the reasonably prudent police officer in similar circumstances lest they engage their civil liability and that of their employer.

The reasonable exercise of discretion by the police does not require that they apply the best method available, but rather that the choice of method used be reasonable in the circumstances. Accordingly, in evaluating the reasonableness of police behaviour, judges should not use the benefit of hindsight, but rather place themselves in the position of the officers at the time that the latter acted." - Quebec Court of Appeal in Godin v. City of Montreal, 2017 QCCA 1180 at paras. 18-21, references omitted.

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CAUSAL CONNECTION NOT REQUIRED BETWEEN BAC & DEATH FOR s. 255(3.1) CHARGE

R. v. Gaulin, 2017 QCCA 705

The accused attended a party where she consumed Vodka shooters. She then left the party with a friend to get cigarettes and gum from a convenience store. On the way back to the party, the accused drove the car even though she had never driven before. She struck a curb, rolled the vehicle and her friend, who was now the passenger, died. A police investigation revealed the accused was impaired by alcohol and had a BAC level greater than 80 mg%. She was charged with impaired driving causing death, driving with a BAC over the legal limit causing an accident resulting in death and hit and run.

Court of Quebec

The accused admitted to having a BAC over the legal limit but denied she was impaired. She also submitted that the Crown had not proven the causal link between the impaired driving or driving over 80 mg% with the passenger's death.

The judge accepted expert evidence that the accused's BAC level was between 158 mg% and 188 mg% and found these levels "reveal without a doubt a state of inebriation or drunkenness." He concluded that the accused was impaired at the time of the accident, but ruled that the causal connection between the impairment or her BAC level and the passenger's death was not proven beyond a reasonable doubt. Rather, the judge found the accused's testimony that her lack of driving experience, not her consumption of alcohol, caused the accident. The accused was acquitted of all charges but was convicted of the lesser and included offence of driving with a BAC over the legal limit.

Quebec Court of Appeal

The Crown appealed the accused's acquittals. In the Crown's view, it was not necessary to establish a causal link between an accused's BAC and the accident resulting in the death of the victim. Rather, it contended that mere proof of a "temporal" link between these two elements was sufficient. The accused, on the other hand, argued that a causal connection between driving with a BAC over the legal limit and the accident resulting in death must be proven.

Justice Belanger, speaking for the Court of Appeal, reviewed the wording of s. 255(3.1) of the *Criminal Code* and the case law that has developed. "The offence set out in s. 255(3.1) … covers cases where a driver who has the care or control of a vehicle, while having a blood alcohol level exceeding the legal limit, causes an accident resulting in the death of another person," he said. This wording, he found, differed from that in s. 255(3) (impaired driving causing death) which requires the need to demonstrate a causal connection between the impaired driving and the death. Justice Belanger went on to conclude that the Crown need not prove a causal link between an accused's BAC and the accident. However, a mere temporal link between driving with a prohibited blood alcohol level and the accident was insufficient:

BY THE BOOK:

Criminal Code

Impaired driving causing death

s. 255(3) Everyone who commits an offence under paragraph 253(1)(a) [operation while impaired] and causes the death of another person as a result is guilty of an indictable offence and liable to imprisonment for life.

… … …

Blood alcohol level over legal limit — death

s. 255(3.1) Everyone who, while committing an offence under paragraph 253(1)(b) [over 80 mg%], causes an accident resulting in the death of another person is guilty of an indictable offence and liable to imprisonment for life.

"A double causal link must be established. First, it must be shown that the driver caused the accident. Then, it must be demonstrated that the accident resulted in injury to or the death of a person. The use of the word 'cause' indicates that the legislator intended to exclude cases where the driver's wrongful conduct cannot be linked to the accident. The driver must necessarily have been the effective cause of the accident."

> A double causal link must be established. First, it must be shown that the driver caused the accident. Then, it must be demonstrated that the accident resulted in injury to or the death of a person. The use of the word "cause" indicates that the legislator intended to exclude cases where the driver's wrongful conduct cannot be linked to the accident. The driver must necessarily have been the effective cause of the accident. [para. 40]

In other words, the Crown must prove a connection between (1) the accused and the cause of the accident and (2) the accident and the death of a person. This interpretation would also prevent a conviction merely because a person had a BAC over the legal limit and was involved in an accident that could not be contributed to them in any way. "Through his or her conduct or driving, the accused must have acted or failed to act in such a way as to have caused an accident," said Justice Belanger. "In short, the accused must have significantly contributed to causing the accident, granting, however, that his or her driving need not be the sole cause of the accident."

In this case, the trial judge erred in requiring proof of a causal connection between the BAC and the death. Instead, the judge was required to consider the following:

- Whether the accused was driving a motor vehicle with a BAC over 80mg% (s. 253(1)(b);
- Whether the accused caused an accident, in that she was a significant contributing cause of the accident as a result of her driving, actions or omissions. However, the accused's driving need not be the sole cause of the accident;
- Whether the accident resulted in the death of another person.

The Court of Appeal also determined that the trial judge erred in his analysis of the causal connection required for an impaired driving causing death charge. A new trial was ordered on both charges.

Complete case available at www.canlii.org

Proving a s. 255(3.1) Criminal Code offence

1. Prove accused was driving with BAC over 80mg%.

2. Prove accused caused an accident.

3. Prove the accident resulted in death.

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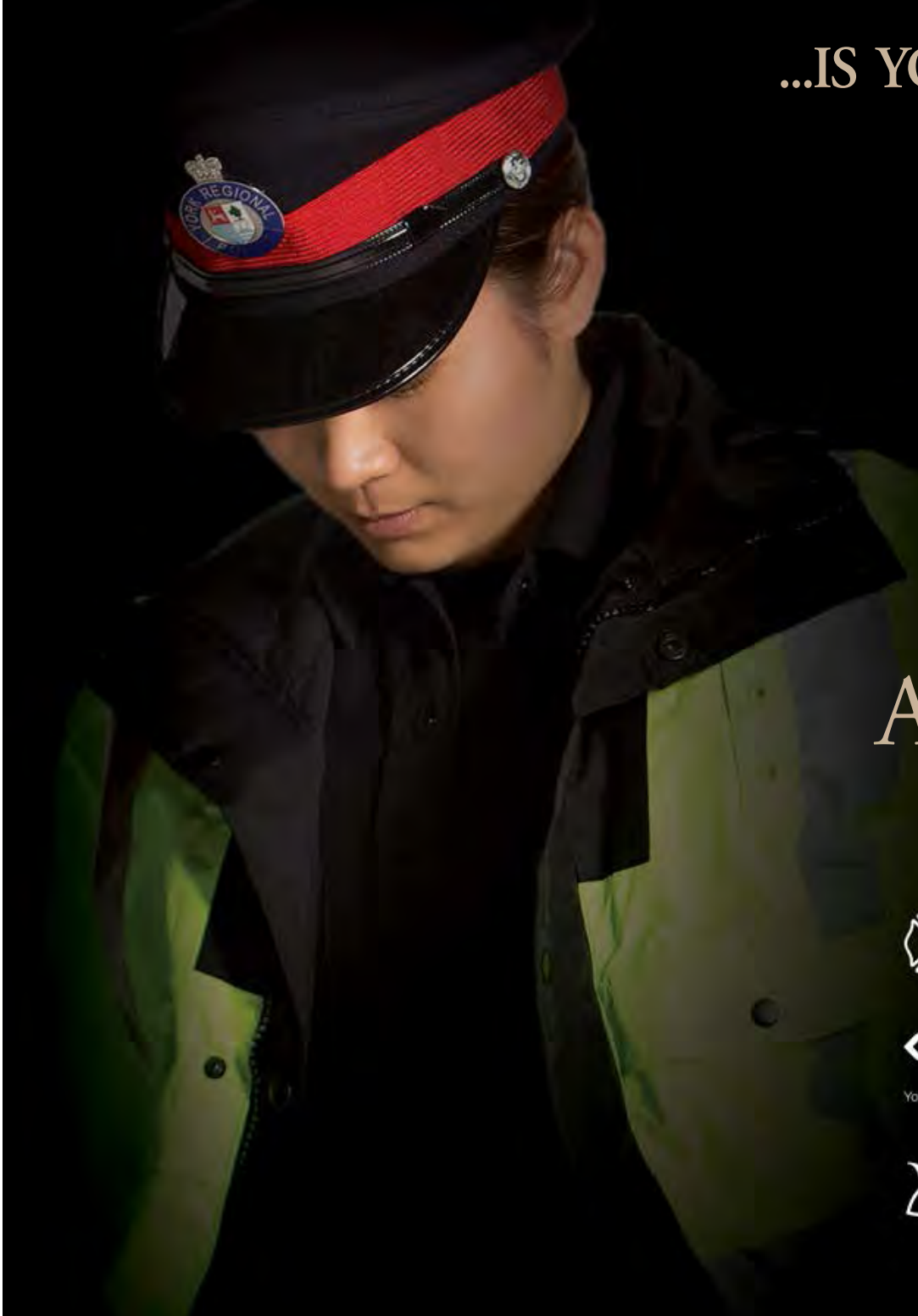

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REQUEST TO SMELL BREATH NOT FUNCTIONALLY DIFFERENT THAN SOBRIETY TESTS

R. v. Rule, 2017 MBCA 86

When a police officer observed a car weaving slightly within its lane, he suspected the driver might be impaired. He pulled the car over. The accused was the driver and he had a passenger. The officer noticed that the accused exhibited signs of impairment, including glassy and watery eyes, flushed cheeks, and slurred speech. He also noticed that the accused fumbled somewhat with his licence when asked to produce it, the passenger appeared to be impaired as well, and an odour of liquor was emanating from the vehicle. In order to determine whether the passenger was the sole source of the odour, the officer requested the accused to blow in his face. The officer was then able to determine that there was an odour of liquor emanating from the accused's breath. This odour strengthened the officer's opinion that the accused was impaired. He was arrested for impaired driving and breathalyzer readings of 150 mg% were obtained. The accused was charged with impaired driving and over 80 mg%.

Manitoba Provincial Court

The accused argued that the officer's request to smell his breath was a violation of his s. 8 *Charter* rights. He asserted that the *Criminal Code* had a set of regulations that specifically outlined what particular devices were considered approved screening devices. Moreover, he submitted that Manitoba's *Highway Traffic Act's* (*HTA's*) standard field sobriety tests were set out in regulation. Therefore, he contended that having an accused blow into a police officer's face was neither prescribed under the *Criminal Code* nor under the *HTA's* standard field sobriety testing regulations. Since blowing in the officer's face was not authorized by law and undermined his dignity and security, he asserted that s. 8 of the *Charter* was violated.

BY THE BOOK:

Manitoba's *Highway Traffic Act*

Peace officer may stop vehicles

s. 76.1(1) A peace officer, in the lawful execution of his or her duties and responsibilities, may require the driver of a vehicle to stop, and the driver of the vehicle, when signalled or requested to stop by a peace officer who is readily identifiable as such, shall immediately come to a safe stop and remain stopped until permitted by the peace officer to depart.

... ...

Peace officer's authority — driver information

s. 76.1(4) Without limiting the generality of subsection (1), a peace officer may, at any time when a driver is stopped,

(a) require the driver to give his or her name, date of birth and address to the officer;

(b) require the driver to produce his or her licence, and the vehicle's insurance certificate and registration card and any other document respecting the vehicle that the peace officer considers necessary;

(c) inspect any item produced under clause (b);

(d) request information from the driver about whether and to what extent the driver consumed alcohol or drugs before or while driving;

(e) require the driver to go through a field sobriety test under section 76.2;

(f) request information from the driver about whether and to what extent the driver is experiencing a physical or mental condition that may affect his or her driving ability; and

(g) inspect the vehicle's mechanical condition and request information from the driver about it.

... ...

Peace officer's authority unaffected

s. 76.1(7) Nothing in this section limits or negates a peace officer's authority to request information from a driver or passenger or to make any observations of a driver or passenger that are necessary for the purposes of road safety enforcement.

"The accused's argument, that the request to smell his breath is fundamentally different than conducting sobriety tests or asking the accused if he had been drinking, is a distinction without a difference. Moreover, the officer's screening measure was minimally intrusive and speedily performed at the roadside and was therefore reasonable."

The judge found no *Charter* breach. He found the British Columbia Court of Appeal case *R. v. Weintz*, 2008 BCCA 233, which dealt with the same issue (the legality of a request to blow breath into an officer's face), was compelling and persuasive. In the *Weintz* case, the Court of Appeal saw no distinction between investigative procedures (such as physical sobriety tests or answering questions put to a driver about drinking) and asking a person to blow breath into the face of the investigating officer. The accused was convicted of driving with a blood alcohol level over 80 mg%.

Manitoba Court of Queen's Bench

An appeal judge found s. 76.1 of the *HTA* provided general police powers to stop vehicles. Case law has determined that those powers implicitly authorize the police to ask whether the driver had been drinking and require the driver to perform sobriety tests. The appeal judge also relied on *Weintz* and noted there was no distinction between the sorts of investigative procedures implicitly authorized under the *HTA* and asking a person to blow breath into the face of the investigating officer. Nor had asking a driver to blow breath into an officer's face been found to violate ss. 7 or 8 of the *Charter*. Relying on *Weintz* and the Supreme Court of Canada decision in *R. v. Orbanski*, 2005 SCC 37, the Queen's Bench judge dismissed the accused's appeal and upheld the conviction.

Manitoba Court of Appeal

The accused sought leave to appeal his conviction on the basis that the Queen's Bench judge erred in law by finding that the officer's request to smell his breath by asking him to blow in the officer's face fell within the ambit of s. 76.1 of the HTA. Since it did not authorized, the request was an unreasonable search.

Chief Justice Chartier, however, denied the accused's request for leave because he was not persuaded that an arguable case of substance was raised:

> As stated in Orbanski, the authority of officers to check the sobriety of drivers arises in relation to the powers that are necessarily implicit in the general statutory vehicle stop provision found in section 76.1 of the HTA and in their duty to enforce section 254 of the Criminal Code ... . Weintz concluded that requesting drivers to blow their breath into an officer's face falls under such general powers.
>
> The accused's argument, that the request to smell his breath is fundamentally different than conducting sobriety tests or asking the accused if he had been drinking, is a distinction without a difference. Moreover, the officer's screening measure was minimally intrusive and speedily performed at the roadside and was therefore reasonable. [paras. 10-11]

The accused's leave to appeal was denied.

Complete case available at www.canlii.org

Editor's Note: Additional facts taken from *R. v. Rule*, 2016 MBPC 17.

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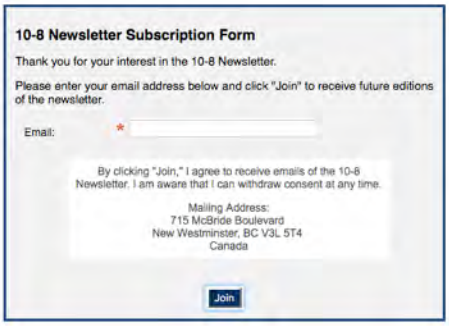
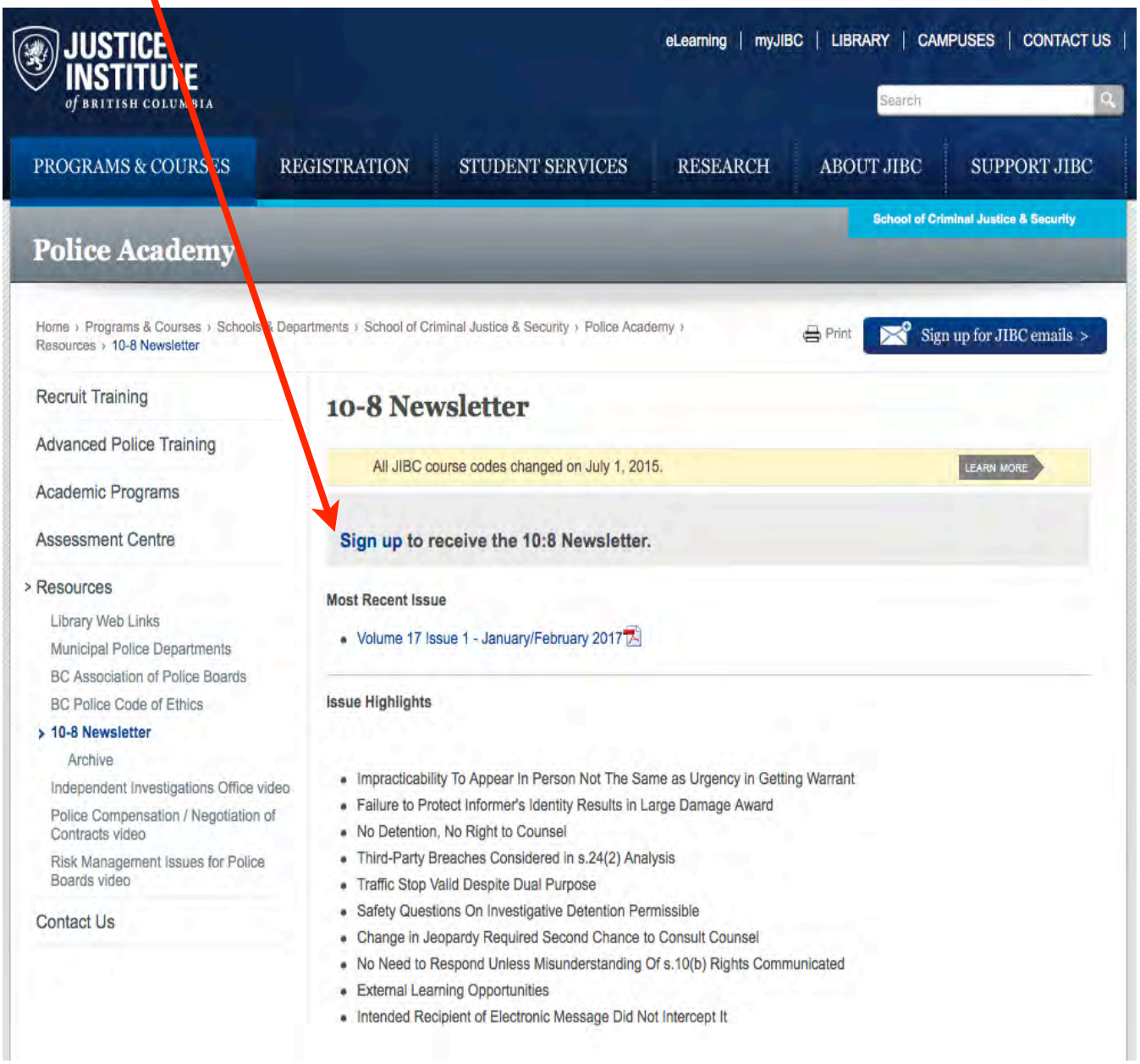
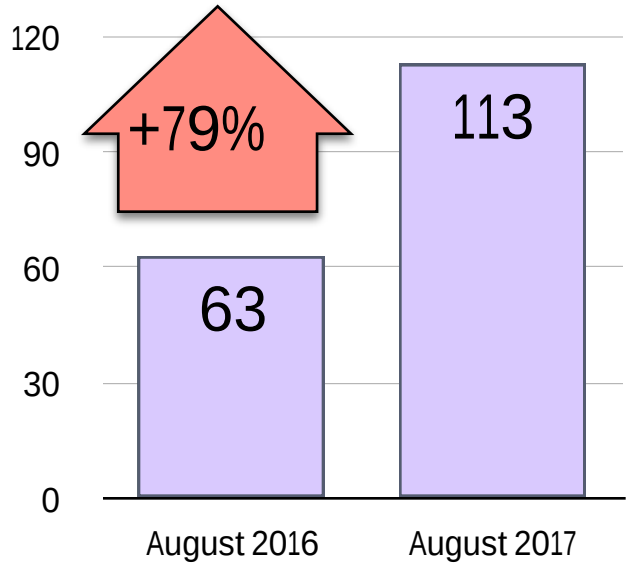


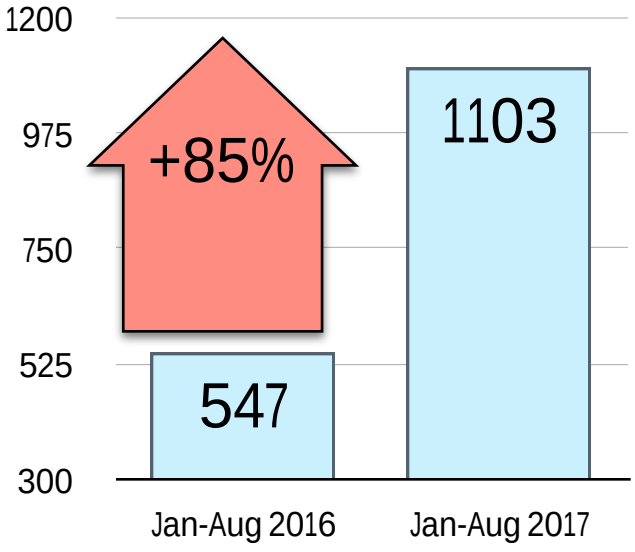


ILLICT DRUG OVERDOSE DEATHS ON THE RISE 5.0

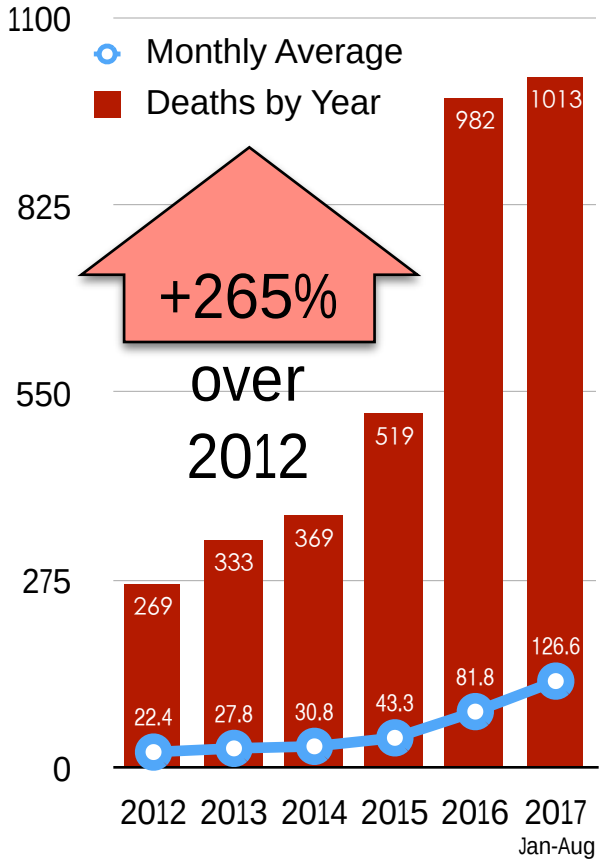
The Office of BC's Chief Coroner has released statistics for illicit drug overdose deaths in the province from **January 1, 2017 to August 31, 2017**. In August there were 113 suspected drug overdose deaths. This represents a 79% increase over the number of deaths occurring in August 2016. This amounts to about seven (7) people dying every two days of the month (or 3.6 people per day).



From January 1 to August 31, 2017 there were a total of **1,013** illicit drug overdose deaths. This is a **85%** increase over the same period last year.

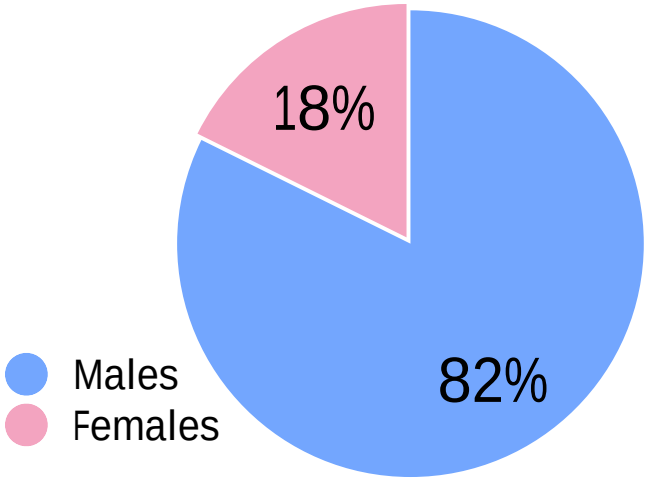


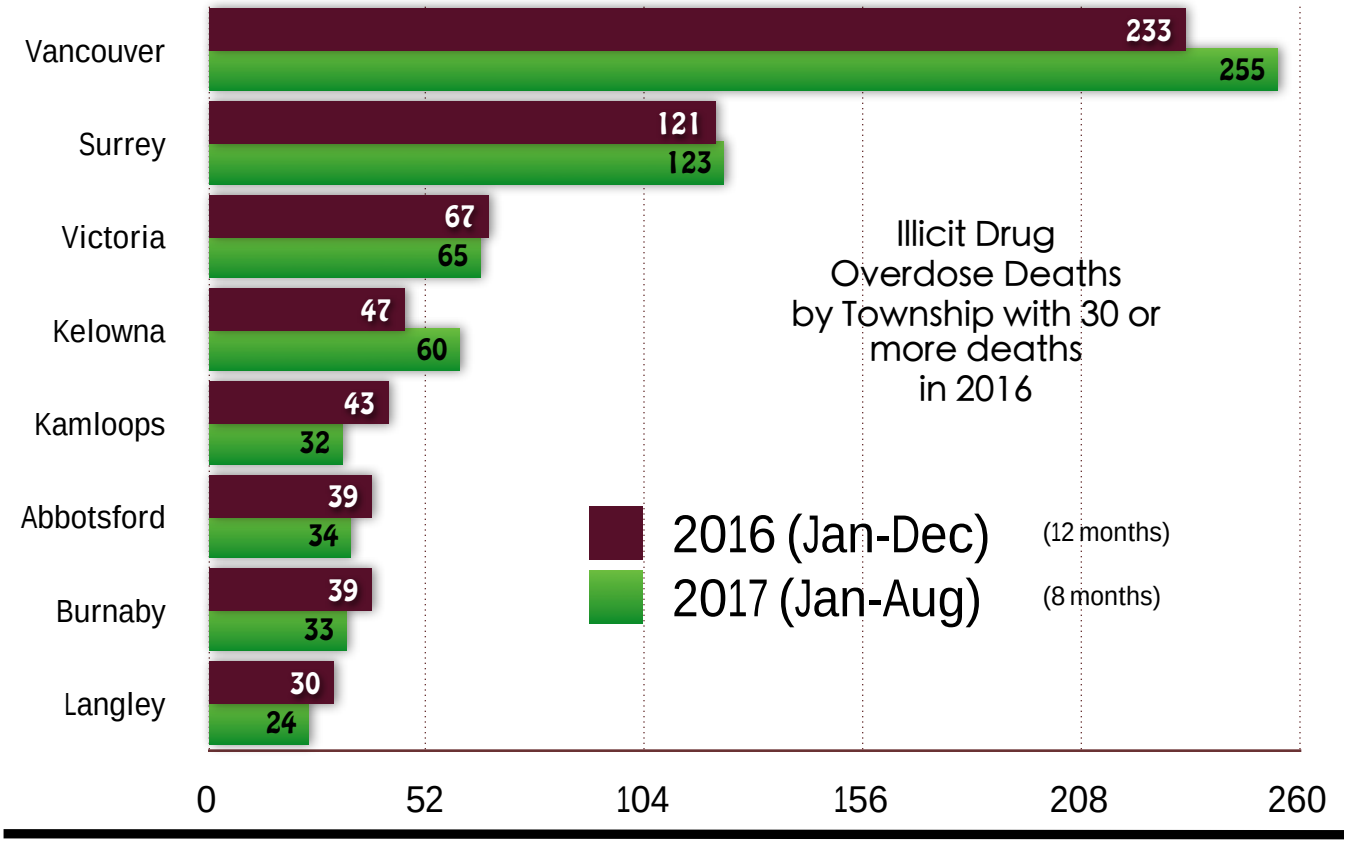
Last year, there were **982** overdose deaths, more than an **89%** increase over the same period in 2015 and a **265%** over 2012. Moreover, the report attributes fentanyl laced drugs as accounting for the increase in deaths. In December 2016 alone, there were **162** deaths. This was the highest recorded number of deaths occurring in a single month in BC and was more than double the monthly average of illicit drug overdose deaths since 2015.



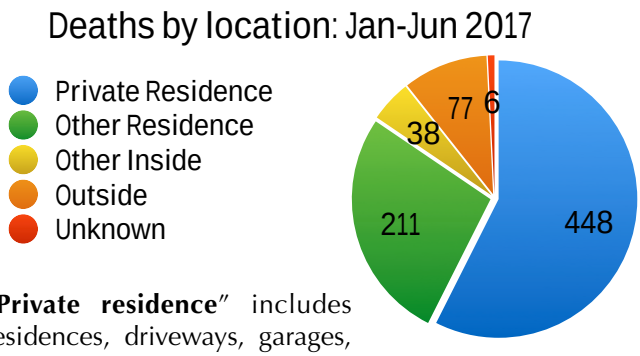
People aged 30-39 have been the hardest hit so far in 2017 with **291** illicit drug overdose deaths followed by 40-49 year-olds at **250** deaths and 50-59 year-olds at **198** deaths. Vancouver had the most deaths at **255** followed by Surrey (**123**), Victoria (**65**), Kelowna (**60**) and Abbotsford (**34**).

Males continue to die at almost a **5:1** ratio compared to females. From January to August 2017, **834** males have died while there were **179** female deaths.





The data indicates that most illicit drug overdose deaths (**88.5%**) occurred inside while **11.0%** occurred outside. For five (5) deaths, the location was unknown.



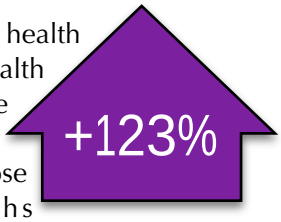
"**Private residence**" includes residences, driveways, garages, trailer homes.

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

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

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

DEATHS SINCE PUBLIC HEALTH EMERGENCY

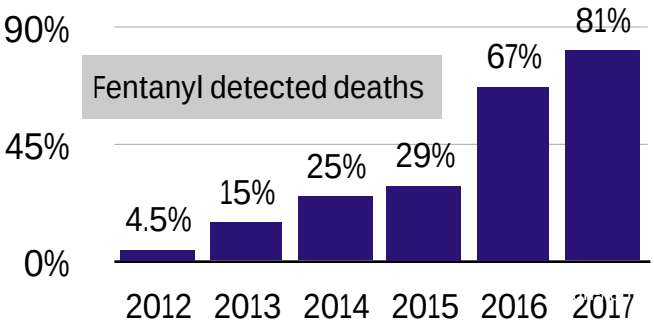


In April 2016, BC's provincial health officer declared a public health emergency in response to the rise in drug overdoses and deaths. The number of overdose deaths in the 17 months preceding the declaration (Nov 2014-Mar 2016) totaled **794**. The number of deaths in the 15 months following the declaration (April 2016-Aug 2017) totaled **1,773**. This is an increase of **123%**.

TYPES OF DRUGS

The top four detected drugs relevant to illicit drug overdose deaths from 2016 and 2017 were fentanyl, which was detected in **64.1%** of deaths, cocaine (**47.6%**), heroin (**32.8%**) and methamphetamine/amphetamine (**31.1%**).

From January to August 2017, fentanyl was detected in **81%** (823) of illicit drug overdose deaths. This is a **151%** increase in which fentanyl was detected in deaths occurring during the same period in 2016 where fentanyl was detected in 328 deaths.



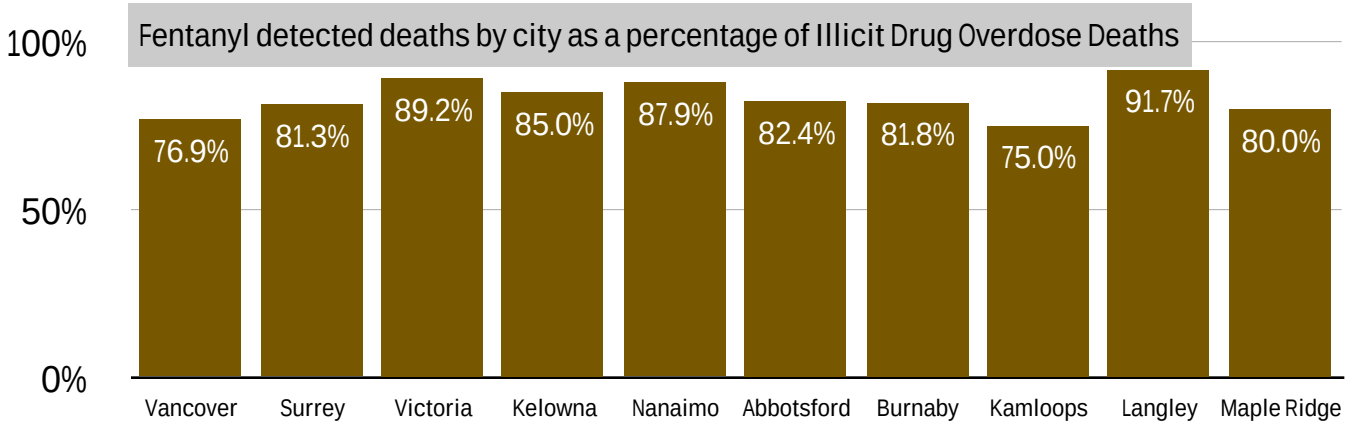
According to Vancouver Coastal Health, drugs users at Insite - a supervised injection site - checked their drugs more than 1,400 times from July 2016 to July 2017. Overall, **80%** of the drugs checked were positive for fentanyl, including **84%** of heroin samples and **65%** of non-opiate drugs like crystal meth and cocaine.

Sources:

-Illicit Drug Overdose Deaths in BC - January 1, 2017 to August 31, 2017.

-Fentanyl Detected Apparent Illicit Drug Overdose Deaths, 2012-2107 YTD.

Ministry of Justice, Office of the Chief Coroner. April 19, 2017.



ASSAULT IS GENERAL INTENT OFFENCE

R. v. Sénécal, 2017 QCCA 954

The police attended the accused's residence at about 9:00 pm in response to a complaint by her spouse alleging incidents of domestic violence and her unauthorized taking of a vehicle. The accused wasn't home, however, six or seven police officers returned after midnight with a view to arresting her. The accused was awake in bed in her underwear. The bedroom was very small; several police officers were gathered at the door. When told by a female officer that the police were there to arrest her, the accused refused to get up. She behaved in an aggressive manner and had the smell of alcohol on her breath. The officers lifted her forcibly from the bed.

The accused asked to go to the bathroom claiming that she was menstruating. She was told that she could not go at that time. The accused then defecated in her underwear while standing. She removed her underwear, which was soiled with diarrhoea. She threw the soiled underwear and it struck the supervising officer in the face. She was charged with assaulting a police officer.

Court of Quebec

Three officers testified at trial and said that the accused threw the underwear with her hand in the direction of the officers. She was then handcuffed. The accused, however, testified she was taken from bed and immediately handcuffed. She said that after soiling her underwear, she then manoeuvred to get her underwear to the floor and then threw the underwear with her leg. She said that she sought to project the underwear towards the bed, which was not in the direction of the officers at the door.

The judge found the accused's explanation "completely unbelievable" and rejected her account that she had shifted to remove her underwear before throwing it with her leg. However, he found there was a reasonable doubt about the accused's intent required for the offence. In his view, the Crown failed to prove that she had applied force intentionally as required by s. 270(1) of the *Criminal Code*:

> Taking into account the size of the bedroom, taking into account that there were one, two, three, four, five, six seven police officers in the bedroom, I have a doubt about her intention to hit [the supervising officer] because she could have hit other police officers that were in-between [the supervising officer] and her. I think it was a reaction of "colère" but she was refused to go to the toilet, because she wasn't getting up from her bed fast enough.
>
> So, I have a reasonable doubt on her intention to hit [the supervising officer] and I again sympathize with [the supervising officer] who showed very ... a very professional attitude and testimony, both at the time and during his testimony because obviously, this is not a way to act.

The accused was acquitted of the assault police officer charge.

BY THE BOOK:

Criminal Code

Assaulting a peace officer

s. 270 (1) Every one commits an offence who

(a) assaults a public officer or peace officer engaged in the execution of his duty or a person acting in aid of such an officer;

(b) assaults a person with intent to resist or prevent the lawful arrest or detention of himself or another person; or

(c) assaults a person

(i) who is engaged in the lawful execution of a process against lands or goods or in making a lawful distress or seizure, or

(ii) with intent to rescue anything taken under lawful process, distress or seizure.

Quebec Court of Appeal

The Crown appealed the accused's acquittal arguing, among other things, that the trial judge erred in law by requiring proof of the accused's intent to assault the specific victim of the crime alleged. In the Crown's view, the trial judge erred in holding that the Crown was required to prove that the accused intended to assault the supervising officer specifically, as opposed to the group of officers of which he was part. The Crown submitted that once it was established that the accused knew the persons at her bedroom door were police officers in the performance of their duties, it only need be shown the same mental element required in respect of common assault to obtain a conviction: the *mens rea* of general intent.

The Court of Appeal agreed with the Crown and found the trial judge applied the law incorrectly:

> [I]t is plain that the Crown had the burden of proving general intent and did not have to show that the [accused] intended to hit [the supervising officer] specifically. It is settled law that the mens rea for common assault, pursuant to paragraph 265(1)(a) Cr.c. is general intent to apply force without consent. The Crown is not required to prove that the accused intended to apply force to a particular person. Given that the [accused] knew the persons in her bedroom were police officers, the remaining mental element to be proven was general intent to apply force. [references omitted, para. 23]

Here, the trial judge concluded that the Crown needed to prove that the accused had the intent to apply force to the supervising officer specifically. This was too high a burden. Therefore, the trial judge mistakenly acquitted the accused because he had a reasonable doubt that she intended to apply force to the supervising officer, as opposed to a general intent to apply force without regard to a particularized victim.

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

IMPAIRMENT OBSERVATIONS NOT MADE DURING COMPELLED DIRECT PARTICIPATION

R. v. Guillemin, 2017 BCCA 328

The accused was involved in a single motor vehicle accident in the early morning hours. His vehicle left the roadway and landed down an embankment. A witness who heard a noise and saw a vehicle "flying through the air" called 911. She had a brief conversation with the occupant of the vehicle and saw him climb up the bank towards a police officer who had arrived at the scene. Two ambulance paramedics helped the accused out of the ditch and assisted him to the ambulance. The police officer went and stood just inside the ambulance. She did not initially speak to the accused because the paramedics were dealing with him. She described the accused as "a bit out of it". He had "slightly slurred speech when he spoke", a "very blank look" and, as he walked to the ambulance, he was "moving very slowly" and was "unsteady on his feet". She could also smell alcohol on his person and noted he had "red, bloodshot, glassy eyes". By the time the paramedics had finished their assessment, the officer had formed the opinion that the accused was impaired. At that point, the officer asked the accused if he had been drinking and he said he had not. The accused was subsequently charged with both impaired driving and over 80 mg%.

British Columbia Provincial Court

The Crown directed a stay of proceedings on the over 80 mg% charge. As for the impaired driving count, the judge found the Crown had proven that the accused was the driver of the vehicle at the time of the accident and that he was impaired at the time of driving. The judge found the police officer's observations were made independently of, and did not result from, any investigation for the purpose of forming grounds to make a demand. The judge then relied on the police officer's evidence that the accused had

"[I]t is clear that the police officer made the observations on which the judge relied while she waited in the ambulance with the [accused] as he was being assessed by the paramedics. At that time she was engaged in another authorized activity; namely, ensuring the [accused's] well-being."

bloodshot and glassy eyes, that he smelled of alcohol and that there was no evidence explaining why the single car accident occurred. However, limited weight was placed on the police officer's evidence that the accused's speech was slurred and no weight on the officer's evidence that the accused was unsteady on his feet or that he moved slowly. The judge also considered alternative explanations such as the possibility that the accused may have fallen asleep. He concluded, "when I take into consideration the accident, the observations of the officer of the smell of alcohol, my limited reliance on slurred speech, and the bloodshot and glassy eyes, I find that the Crown has proven impairment beyond a reasonable doubt." The accused was convicted of of impaired driving.

British Columbia Court of Appeal

The accused argued that the trial judge was not entitled to rely on the evidence of the police officer's observations in concluding that the Crown had proven impairment beyond a reasonable doubt. In his opinion, an officer's observations, in the absence of a motorist being given their s. 10(b) right to counsel, were only allowed to be used by a trial judge in assessing whether or not an officer had reasonable grounds for a breathalyzer or blood demand but could not be used for the purposes of incriminating an accused at trial. This is known as the "limited use doctrine".

But Justice Harris, speaking for the Court of Appeal, noted that the "limited use doctrine" only applied to evidence obtained from compelled direct participation by a motorist in activity intended to provide an officer with the opportunity to gather evidence, such as roadside tests. The doctrine did not apply to observations a police officer might make of a motorist while carrying out other authorized duties.

In this case, the police officer's observations of impairment were made while the accused was being treated by the paramedics and before the officer asked him whether he had been drinking:

> On my review of the record, it is clear that the police officer made the observations on which the judge relied while she waited in the ambulance with the [accused] as he was being assessed by the paramedics. At that time she was engaged in another authorized activity; namely, ensuring the [accused's] well-being. She made her observations and formed the opinion the [accused] was impaired before asking him whether he had been drinking. [para. 23]

The evidence was admissible at trial and the judge could rely on the officer's observations of impairment to prove impairment.

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

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

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