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 November 6, 2017 53-year-old Abbotsford Police Department Constable John Davidson was killed in the line of duty. The Abbotsford Police Department was responding to a report of a possible stolen vehicle in the parking lot of a shopping complex. Shots were fired in the direction of the general public by the suspect and multiple 911 calls were received by police.

As police arrived at the scene shots were fired. It was at this time that Constable Davidson was fatally wounded. The suspect then fled in the stolen vehicle and was subsequently apprehended by police. Oscar Arfmann, 65, of Alberta was charged with Constable Davidson's murder.

Constable Davidson had worked as a police officer for 24 years. He began his law enforcement career in the United Kingdom working for the Northumbria Police from 1993 to 2005. In 2006 he was hired by the Abbotsford Police Department and worked in the Patrol, Youth Squad and Traffic sections. Recently, he completed the Tour de Valley Cops for Cancer ride. Constable Davidson was a dedicated police officer who devoted much of his time to connecting with the community and helping kids. He is survived by his wife and three adult children.

~ Constable John Davidson #386 ~

Highlights In This Issue

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"John Davison is my hero. He's this community's hero. We train our police officers, we ask our police officers that when somebody is putting peoples lives at danger, when there's an active shooter we no longer wait for cover, we no longer set up teams, the first person in goes. John Davison was the first person in and away he went. And he died protecting you and me."

Abbotsford Police Department Chief Constable Bob Rich. Remarks, press briefing , November 7, 2017.

Note-able Quote

"Law: the only game where the best players get to sit on the bench."

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.

Addictive substances and neurological disease: alcohol, tobacco, caffeine, and drugs of abuse in everyday lifestyles.

Edited by Ronald Ross Watson & Sherma Zibadi.

London, UK; San Diego, CA: Academic Press, 2017.

RC 564 A33 2017

Are you fully charged? the 3 keys to energizing your work and life.

Tom Rath.

Arlington, VA: Silicon Guild, 2015.

BF 204.6 R378 2015

Bullying among older adults: how to recognize and address an unseen epidemic.

Robin P. Bonifas, Ph. D., M.S.W.

Baltimore, MD: Health Professions Press, Inc., 2016.

BF 637 B85 B65 2016

Collaborating with the enemy: how to work with people you don't agree with or like or trust.

Adam Kahane; drawings by Jeff Barnum.

Oakland, CA: Berrett-Koehler Publishers, Inc., 2017.

HD 30.3 K34 2017

Coaching and mentoring: practical techniques for developing learning and performance.

Eric Parsloe & Melville Leedham.

New York, NY: Kogan Page Ltd, 2017.

HF 5549.5 C53 P27 2017

Decision making in disaster response: strategies for frontline humanitarian responders.

J.S. Tipper.

Auckland, NZ: Relief Advisory International, 2016.

HV 551.2 T57 2016

Deep leadership: essential insights from high-risk environments.

Joe MacInnis.

Toronto, ON: Alfred A. Knopf Canada, 2012.

HM 1261 M335 2012

Enhancing adult motivation to learn: a comprehensive guide for teaching all adults.

Raymond J. Wlodkowski & Margery B. Ginsberg.

San Francisco, CA: Jossey-Bass, A Wiley Brand, 2017.

LC 5219 W53 2017

From witches to crack moms : women, drug law, and policy.

Susan C. Boyd, Faculty of Human and Social Development, University of Victoria, BC.

Durham, NC: Carolina Academic Press, 2015.

HV 5824 W6 B686 2015

Great answers to tough interview questions.

Martin John Yate.

London, UK: Kogan Page, 2017.

HF 5549.5 I6 Y27 2017

How to lie with charts.

Gerald Everett Jones.

Santa Monica, CA: LaPuerta, 2015.

HF 5718.22 J66 2015

Peer pressure, peer prevention: the role of friends in crime and conformity.

Barbara J. Costello & Trina L. Hope.

New York, NY; London, UK: Routledge, Taylor & Francis Group, 2016.

HM 1246 C67 2016

Show & tell: how everybody can make extraordinary presentations.

Dan Roam.

New York, NY: Portfolio/Penguin, 2016.

HF 5718.22 R629 2016

The stress test: how pressure can make you stronger and sharper.

Ian Robertson.

New York, NY: Bloomsbury, 2017.

BF 575 S75 R579 2017

TRAINING & EXPERIENCE KEY FACTORS IN ASSESSING REASONABLE SUSPICION

R. v. Danielson, 2017 ABCA 422

At 7:30 am on a bitterly cold winter day a police officer assigned to the Roving Traffic Unit, in company his trained narcotic detection dog, stopped the accused driving a rental vehicle on a highway near Lake Louise, Alberta to check his driver's licence and fatigue level. During the interaction, the officer noticed that the accused was unusually nervous and he had provided a suspect explanation for why he was driving to Calgary and how long he had been driving without a break. The officer ran a computer check on the accused and the officer learned he had prior involvement in drug-related matters, which included a relatively recent conviction for possessing a Schedule 1 drug. At this point, the officer concluded that he had reasonable grounds to suspect the accused was transporting a controlled substance. The officer had his drug-detecting dog walk around and search the exterior of the vehicle. The dog's behaviour caused the officer to believe that the accused had drugs in the vehicle for personal use. The accused was arrested, the vehicle searched and three kilograms of cocaine was found hidden in the trunk.

Alberta Court of Queen's Bench

The officer testified that his initial reason for deciding to stop the vehicle was a concern about driver fatigue. Then, after he ran the licence plate, he discovered that the accused was driving a rental vehicle. He said he also wanted to ensure the driver had a valid licence.

The accused argued that the initial stop was not a random stop under Alberta's *Traffic Safety Act* (*TSA*) to check for fatigue and licences but rather a stop designed to detect drugs. As well, he claimed that there was no objectively reasonable basis for his subsequent detention and the search using the drug sniffing dog. In his view, his ss. 8 (unreasonable search and seizure) and 9 (arbitrary detention) *Charter* rights were breached.

> "[A]ll the facts do not have to lead the objective monitor to conclude that the target must have committed or more likely than not has committed a crime. The degree-of-certainty standard is much lower: 'Are the facts objectively indicative of the possibility of criminal behaviour in light of the totality of the circumstances?'"

The judge, however, found that the officer had a legitimate traffic safety purpose for stopping the accused's vehicle. The stop was lawful and the officer acquired the necessary reasonable suspicion to justify detaining the accused and deploying his dog for the drug search. The accused was convicted of possessing cocaine of the purpose of trafficking.

Alberta Court of Appeal

The accused argued that the trial judge erred in finding that his ss. 8 and 9 *Charter* rights were not breached. He submitted that the initial vehicle stop was not valid under the *TSA* because the officer used the stop for the impermissible screening of criminal activity.

The Court of Appeal found the officer's reasons for making a *TSA* stop were not inconsistent nor did the surrounding circumstances cast doubt on the officer's evidence regarding his motivation for stopping the vehicle. The trial judge made no error in holding that the officer had a legitimate traffic safety purpose for deciding to stop the accused's vehicle.

The accused also contended that the officer's subjective belief that there were reasonable grounds to suspect that he had drugs in the vehicle could not be justified on an objective basis. Although Crown counsel conceded that this was a close call, the Court of Appeal concluded the objective bar had been cleared:

"[O]ne must remember that the decision under review is made by a front-line officer without the benefit of argument presented by skilled advocates and the luxury of deliberative time. The detainee is entitled to his freedom and should not be delayed longer than is reasonably necessary."

> We are satisfied that the trial judge's conclusion that the notional objective observer – "a reasonable person armed with the knowledge, training and experience of the investigating officer"– would have determined that the officer had reasonable grounds to suspect that [the accused] had marijuana in the vehicle is correct.
>
> In making this assessment, we are mindful of five important principles.
>
> First, Canada is a free country. A person, in most circumstances, is free to go where he or she pleases when he or she pleases. Canadians cherish freedom of movement.
>
> Second, all the facts do not have to lead the objective monitor to conclude that the target must have committed or more likely than not has committed a crime. The degree-of-certainty standard is much lower: "Are the facts objectively indicative of the possibility of criminal behaviour in light of the totality of the circumstances?"
>
> Third, one must remember that the decision under review is made by a front-line officer without the benefit of argument presented by skilled advocates and the luxury of deliberative time. The detainee is entitled to his freedom and should not be delayed longer than is reasonably necessary.
>
> Fourth, the objective observer is not devoid of common sense. This is not an insignificant factor. Common sense provides considerable guidance when assessing the reasonableness of front-line police decisions.
>
> Fifth, the objective observer's assessment is based on all the information that the officer took into account. That each fact may not have been the basis for a reasonable suspicion is not the test. [footnotes omitted, paras. 11-17]

In this case, the Court of Appeal found the trial judge, in focusing on the key facts that an objective observer must consider, correctly held that the officer had reasonable grounds to suspect that the accused was in possession of drugs and was entitled to deploy the police dog:

> The [accused's] continuing level of nervousness and the manner in which he responded to questions during his roadside interaction caused the officer to access the information bank available to him and acquire more information about [the accused]. His initial assessment was that the explanation for these unusual facts might be criminal acts on the part of the driver. But his training precluded him from characterizing his suspicion as reasonable at this preliminary stage of the investigation. A reasonable observer would have made the same assessment. The computer check revealed that the [accused] had a relatively recent conviction for drug possession, along with other possible drug involvement. Although that information contained some errors and duplicity, the correct information would still have demonstrated some recent prior drug involvement. This additional data gave the officer a reasonable basis for his suspicion.
>
> The officer's knowledge, training and experience are key factors in this case. The officer had extensive experience working on a traffic unit, had conducted thousands of traffic stops and hundreds of drug investigations throughout his career, and his years of experience helped him to determine behaviours and patterns consistent with criminal activity. Things that might seem neutral to a lay person had more significance to this officer. [paras. 19-20]

The accused's appeal was dismissed.

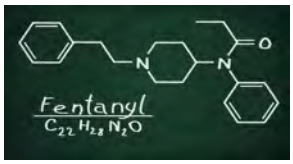
Complete case available at www.canlii.org.ca

Editor's Note: Additional facts taken from a *voire dire* ruling dated April 14, 2016, Docket: 140150038Q1.

DRIVER NOT COMPELLED TO EMPTY POCKET: ARREST & SEARCH LAWFUL

R. v. Aujla, 2017 ABCA 379

After being stopped by members of the gang suppression team for speeding, the accused produced the vehicle registration and insurance documents, but he was unable to produce his driver's licence. He told police he did not have his licence with him. An officer standing on the passenger side of the vehicle noticed a square object that he thought was a wallet in the right thigh pocket of the accused's pants. He told the officer at the driver's door that the accused had a wallet in his pocket and to have him check it. The officer on the driver's side asked the accused twice to look for identification inside the wallet in his right pants pocket. The officer on the passenger side saw the accused put his hand in his pocket twice. When the accused removed his hand from his pocket the second time, the passenger side officer noticed a little corner of a clear baggie with fentanyl pills it it.



The accused was arrested for possessing a controlled substance, and he and his vehicle were searched. Police located a plastic bag containing 454 fentanyl pills in the right thigh pocket of his pants. As well, police discovered additional evidence in their search including 1.867 kgs of cocaine, 769 g of heroin, 410 g of methamphetamine, four cell phones, four scales, packaging material, two unloaded handguns and body armour, and $31,000 cash.

Alberta Provincial Court

The accused testified that the police ordered, instructed, directed or commanded him to empty his pockets. In his view, by compelling him to produce the bag without having the lawful authority to do so the police breached this s. 8 and s. 9 *Charter* rights.

LEGALLY SPEAKING

Fentanyl

"Once an insidious killer of opioid users, the drug fentanyl has emerged to become a notorious Grim Reaper stalking the streets of Canada's cities and towns. Anyone reading or watching the news understands that fentanyl use has become a serious public health crisis to which governments and law enforcement agencies are attempting to respond." - Justice Van Harten in R. v. Aujla, 2016 ABPC 272 at para 1.

The officer on the driver's side denied asking the accused what was in his right pocket, denied ever asking the accused to remove the contents of either pocket, and denied the accused ever produced what was inside either pocket except following his arrest. The officer standing on the passenger side of the vehicle testified they asked him to look in his wallet and pointed to his right pocket but denied demanding that the accused take out the contents of his right pocket or ever produce anything.

The judge rejected the accused's evidence and concluded that the police did not violate ss. 8 or 9 of the *Charter*. Although he was concerned that the police likely had more than one reason to stop the accused, the judge found the officer observed a little corner of the bag of fentanyl pills that became visible when the accused pulled his empty hand out of his pocket. The accused did not empty either pocket. This exposure of the bag triggered the arrest and subsequent search of the accused and the vehicle.

The accused was convicted of 11 firearms and drug related charges including possessing heroin, cocaine, methamphetamine and fentanyl, all for the purposes of trafficking, and possessing unlicenced handguns and body armour. He was sentenced to 7 years' imprisonment (less time served), given a $200 victim fine surcharge on each of the *Criminal*

Code and *CDSA* offence, ordered to provide a sample of his DNA, prohibited from possessing firearms and ammunition for a period of 10 years and the contraband seized was forfeited to the Crown.

Alberta Court of Appeal

The accused challenged his conviction contending, in part, that the search was not authorized by law. In his view, he would not have produced the bag containing the 454 fentanyl pills unless he was compelled to do so.

The Court of Appeal, however, dismissed the accused's arguments. The trial judge properly concluded that the accused was not compelled by police to empty his pockets in order to produce some other form of identification. The Appeal Court found the search was authorized by law. It stated:

> Even though the trial judge did not expressly say so, it is obvious he accepted the evidence of the police officers that they did not directly or indirectly compel the [accused] to produce the contents of his pocket, that they believed the [accused] had a wallet in his pocket that might have contained some form of identification, and that at no time did the [accused] empty his pockets under compulsion. Rather, the [accused's] arrest was triggered upon [the officer on the passenger side] noticing a small corner of a bag containing drugs when the [accused] removed his hand from his pant pocket. [para. 13]

The accused's appeal was dismissed.

Complete case available at www.canlii.org.ca

Editor's Note: Additional facts taken from *R. v. Aujla*, 2016 ABPC 272 and the voire dire ruling Docket: 151383502P1)

Note-able Quote

"New laws are followed by new tricks."
- German Proverb

NERVOUSNESS + AIR FRESHENER + SLIGHT MARIHUANA ODOUR = RGB

R. v. Lotfy, 2017 BCCA 418

After stopping the accused for speeding in his truck at 12:21 pm, the officer approached its driver's side. The driver's window was down and the accused was alone. The officer told the accused he had been stopped for speeding and asked him for his driver's licence, which was produced. The officer felt that accused appeared to be more nervous than usual for a person stopped for speeding. While standing by the open driver's window the officer detected an extremely strong odour of air freshener emanating from the truck. He believed the air freshener to have been recently sprayed and the odour was so strong that it would have caused the officer to have a headache had he been travelling in the truck. The officer saw an air freshener device clipped to one of the air vents near the radio on the truck's dashboard.

The officer returned to his vehicle where he remained for about nine minutes while he wrote out a speeding ticket and conducted a CPIC inquiry. The officer learned that a few months earlier the accused had been arrested for possessing a large quantity of marihuana. Upon returning to the accused's truck, the officer detected a slight odour of vegetative marihuana emanating from it. The accused was arrested for possessing marihuana, advised of his rights and placed in the back of the police vehicle. The officer then searched the truck and found two air fresheners and three cellular telephones in the front cabin area. In the back seat area, police found a hockey bag containing about 20 lbs. of marihuana and a reusable grocery bag containing about 10 lbs. of marihuana. The accused was re-arrested for possessing marihuana for the purpose of trafficking and was again advised him of his rights.

At 12:50 pm, the officer began making notes of the incident in his personal notebook. He recorded "odour of fresh marihuana" in the notebook but

made no note of the accused's nervousness or the air freshener odour. Later that day, in the synopsis section of his Report to Crown the officer mentioned the odour of vegetative marihuana coming from inside the vehicle but he did not mention the accused's nervousness or the air freshener. Then, even later, the officer prepared a computerized occurrence report in which he referenced the accused's nervousness and odour of air freshener.

The accused was charged with possessing marihuana over three kilograms for the purpose of trafficking.

British Columbia Supreme Court

The officer testified that by reason of his experience he was able to distinguish the odour of vegetative marihuana from that of burnt or burning marihuana. As well, the officer stated his grounds for arrest were based on the accused's unusual nervousness, the strong odour of air freshener detected when he first spoke with him and the slight odour of vegetative marihuana detected when he spoke with him the second time. The officer also said that he did not rely on the CPIC information about the accused's earlier arrest as part of his reasonable grounds.

The accused submitted that the officer lacked the requisite reasonable grounds for the arrest and the incidental search that followed was unlawful. In his view, the officer's evidence should not be accepted because he had not recorded the accused's unusual nervousness and the strong odour of air freshener in either his notebook or the synopsis. The Crown, on the other hand, contended that the officer's failure to record the accused's unusual nervousness and the strong odour of air freshener in his notes or the synopsis should not detract from his testimony that those factors formed part of the factual matrix considered in making the decision to arrest under s. 495(1) of the *Criminal Code*.

The judge found the officer's decision to arrest the accused was based on reasonable grounds that he was in possession of some amount of vegetative marihuana. These grounds included the accused's exceptional nervousness and the extreme volume of air freshener detected in his pickup when he was first pulled over, combined with the odour of vegetative marihuana on the second visit to the truck. As for not recording the accused's nervousness and the strong odour of air freshener in either his notebook or the synopsis, the judge concluded this did not render the officer's evidence unreliable. "In a perfect world, an officer's notes and synopsis would be all-inclusive," said the judge. "However, the fact that they lack relevant information does not lead automatically to the result that oral testimony including such information is to be rejected." He continued:

> [T]he absence of notation about nervousness and the air freshener in two of the three documents is not enough for me to reject [the officer's] oral testimony about his grounds for arrest. There is no inconsistency between what [the officer] wrote and what he said in the course of the voir dire, and there is no inconsistency on this point among the three documents the constable prepared. An omission is not the same as an inconsistency. While some omissions in a document, in some contexts, can be fatal to the acceptance of the related oral testimony, the two omissions here are not of that nature. The essential point in of [sic] all [the officer's] documentation was that he smelled marihuana. The fact that his decision to arrest was also grounded in [the accused's] nervousness and the air freshener

BY THE BOOK:

Criminal Code

Arrest without warrant by peace officer

s. 495 (1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

(b) a person whom he finds committing a criminal offence; or ...

"It is well-established that when an accused challenges the validity of a warrantless arrest the burden is on the Crown to show the police acted in a lawful and reasonable manner. To do so, the Crown must prove the facts on which it relies on a balance of probabilities."

> was recorded where one would most readily expect to find it, namely, in the relatively detailed occurrence report.

The judge found the officer to be a credible and reliable witness. The accused's arrest was lawful, the search reasonable and the accused was convicted of possessing marihuana for the purpose of trafficking.

British Columbia Court of Appeal

The accused appealed his conviction arguing, in part, that the trial judge erred in assessing the officer's reliability and in finding his arrest lawful.

Lawful Arrest

The onus rested on the Crown to demonstrate that the officer had the requisite grounds to make the arrest under s. 495(1)(b) of the *Criminal Code*. The accused was not required to prove that the officer did not have the grounds to do so. Justice Frankel, delivering the opinion for the Court of Appeal stated:

> It is well-established that when an accused challenges the validity of a warrantless arrest the burden is on the Crown to show the police acted in a lawful and reasonable manner. To do so, the Crown must prove the facts on which it relies on a balance of probabilities.
>
> When an arrest has been made pursuant to s. 495(1)(b) of the Criminal Code the Crown must establish that the arresting officer had reasonable grounds to believe the person arrested was committing a criminal offence in the officer's presence...
>
> A two-part test is applied in determining the validity of a warrantless arrest. In the context of s. 495(1)(b) the first stage involves factual determinations: (a) whether the arresting officer subjectively believed the person arrested was committing a criminal offence in the officer's presence; and (b) the grounds for such belief, i.e., the factual matrix that informed the officer's decision.
>
> If the Crown proves the officer held the requisite subjective belief, then the second stage involves determining whether the officer's grounds for that belief are objectively reasonable. This is a question of law. It involves determining whether, from an objective perspective, it was reasonable for the officer to believe he or she had come across someone in the very act of committing a criminal offence. The officer's training and experience are relevant in assessing objective reasonableness. [references omitted, paras. 32-35]

Moreover, the accused was conflating the approach to be taken in assessing an officer's reasonable grounds with that which applied to determining whether Crown had proven their case beyond a reasonable doubt. Instead, the Court of Appeal noted, "the reasonable grounds standard—whether in the context of suspicion or belief—requires

"A two-part test is applied in determining the validity of a warrantless arrest. In the context of s. 495(1) (b) the first stage involves factual determinations: (a) whether the arresting officer subjectively believed the person arrested was committing a criminal offence in the officer's presence; and (b) the grounds for such belief, i.e., the factual matrix that informed the officer's decision."

"[T]he reasonable grounds standard—whether in the context of suspicion or belief—requires consideration of the totality of the circumstances, including exculpatory, neutral, or equivocal information of which the police are aware. The police are not required to speculate as to the possible existence of other facts which could provide an innocent explanation for the facts known to them."

consideration of the totality of the circumstances, including exculpatory, neutral, or equivocal information of which the police are aware. The police are not required to speculate as to the possible existence of other facts which could provide an innocent explanation for the facts known to them."

Here, the trial judge concluded that the officer possessed both the subjective belief that the accused was in possession of marihuana and the basis for that belief was objectively reasonable.

Justice Frankel agreed:

> In the present case, [the officer] based his decision to arrest [the accused] on the following facts (i.e., grounds):
>
> (a) [the accused] was the sole occupant of a truck stopped for speeding;
> (b) [the accused] appeared more nervous than usual for someone stopped for speeding;
> (c) initially, an extremely strong odour of air freshener emanated from the truck; and
> (d) several minutes later, the slight odour of vegetative marihuana emanated from the truck.
>
> Evaluating those facts on a practical, common sense, and non-technical basis, I am of the view [the officer's] subjective belief that [the accused] was in possession of marihuana is objectively reasonable. [paras. 66-67]

Credibility and Reliability

The accused suggested that the officer's failure to record his unusual nervousness and the odour of air freshener in his notebook impugned the officer's credibility and reliability. In his view, the trial judge erred in not having regard to the "duty" police officers have to make contemporaneous notes. Even assuming that the officer was under a legal duty to make notes, the Court of Appeal - in rejecting this argument - stated:

> That a discrepancy exists between a police officer's testimony and what is recorded in his or her notebook is something a trier of fact has to consider and weigh in deciding whether to accept the officer's testimony. Each case will depend on its own facts. However, the credibility / reliability analysis will be the same whether an affirmative legal duty to make notes exists or not. [para. 49]

And further:

> The trial judge recognized that a witness's failure to record a matter in a contemporaneous document is a factor to be considered in deciding whether to accept the witness's testimony concerning that matter. After taking into consideration the fact that [the officer] had not recorded [the accused's] unusual nervousness or the strong odour of air freshener in either his notebook or the synopsis, the judge accepted the officer's testimony with respect to those matters. I see no error in the approach the judge took. [para. 54]

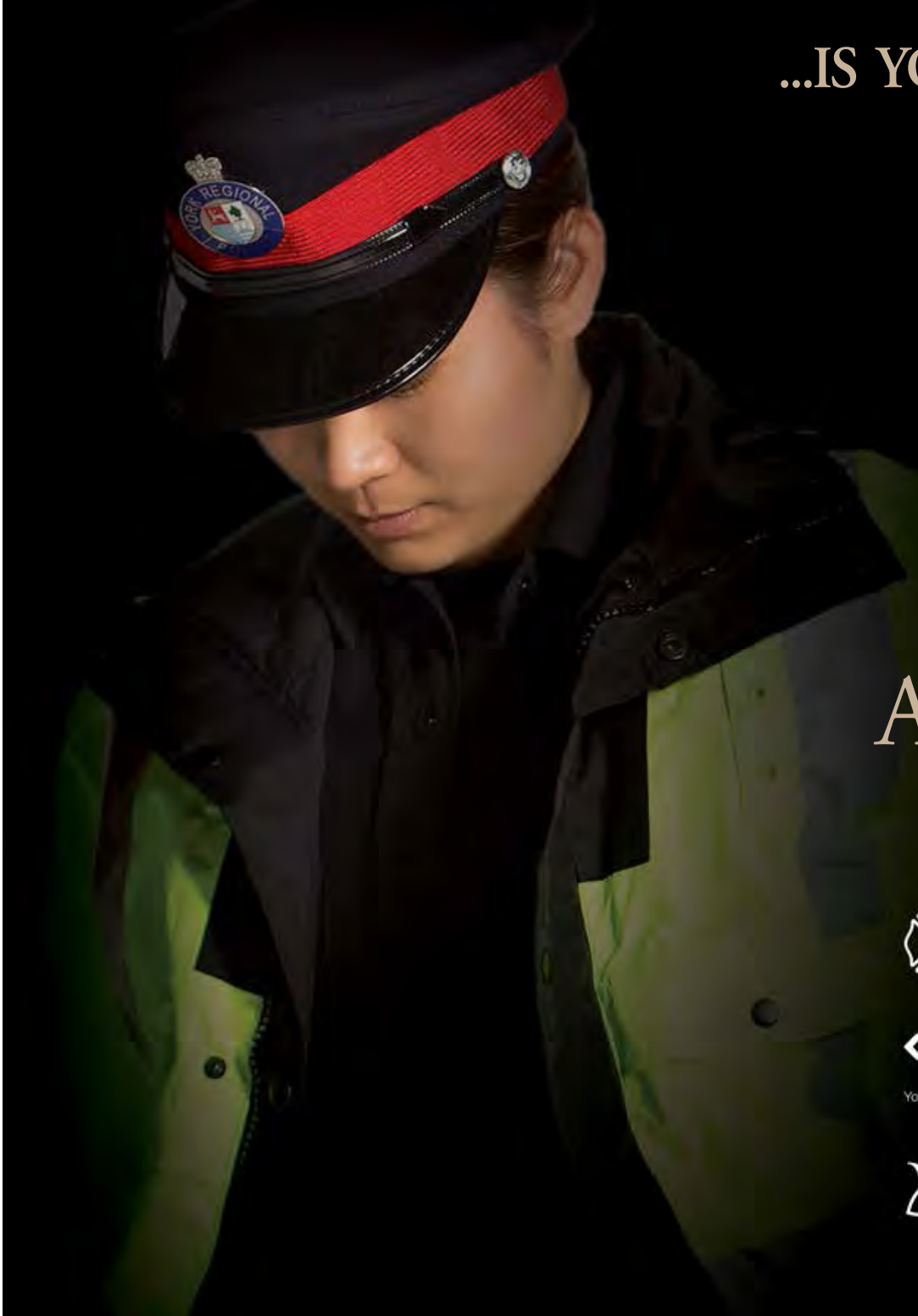
The accused's arrest was lawful, the search of his truck was conducted incidental to that arrest and the accused's appeal was dismissed.

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

"If the Crown proves the officer held the requisite subjective belief, then the second stage involves determining whether the officer's grounds for that belief are objectively reasonable."

SOMETIMES THE LIFE IN NEED OF SAVING

...IS YOUR OWN



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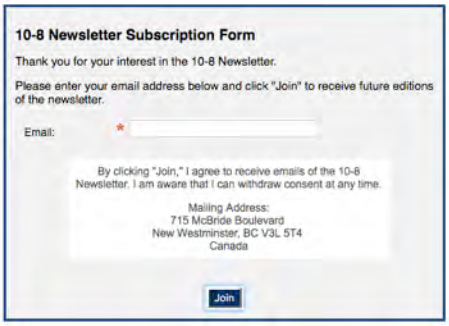
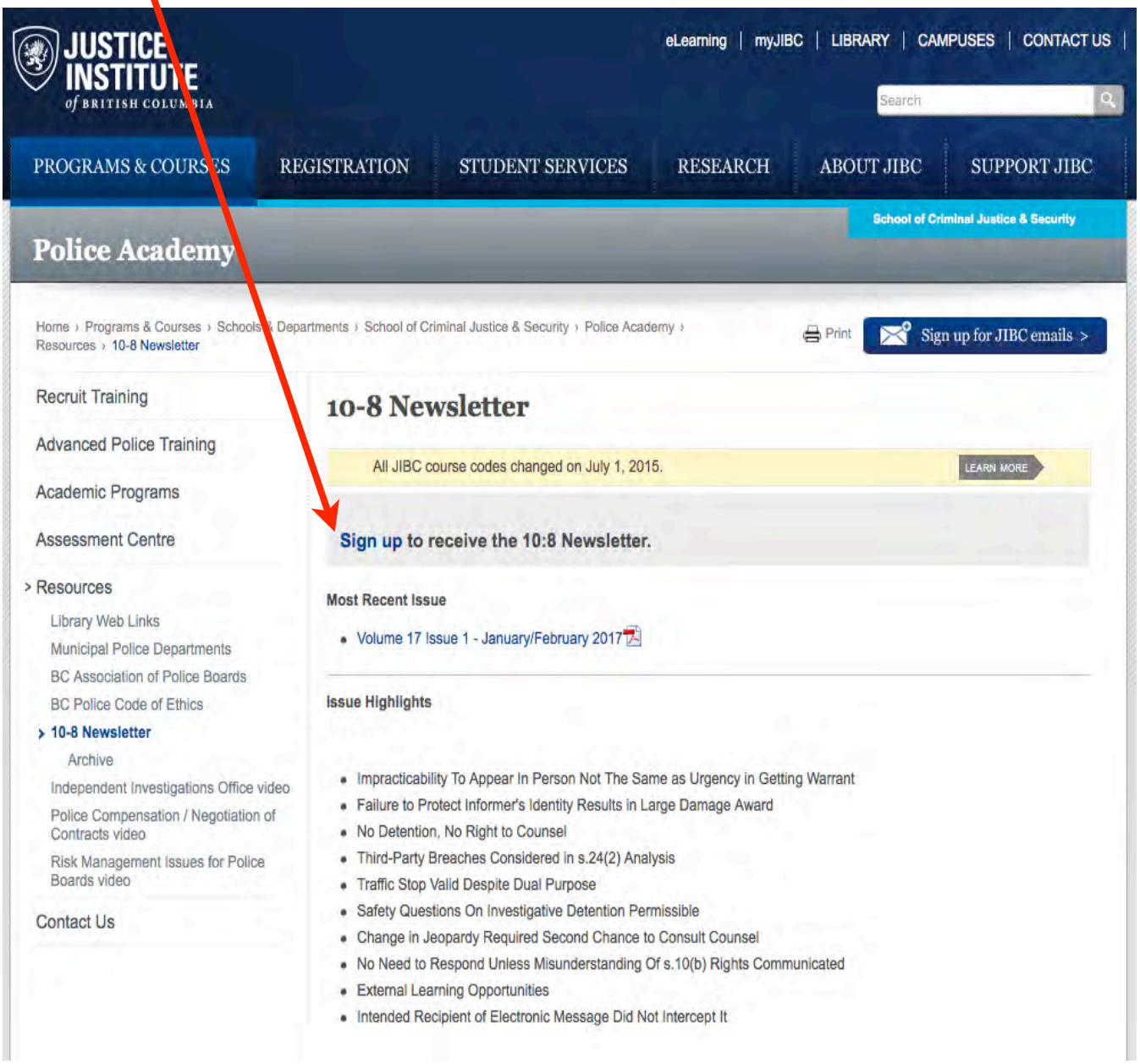
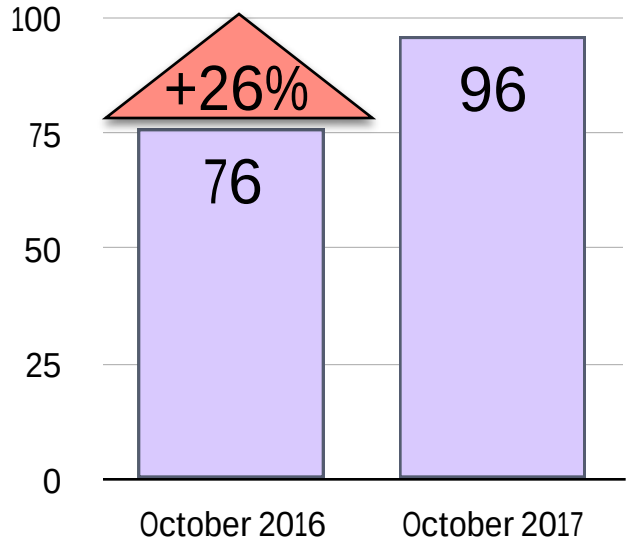


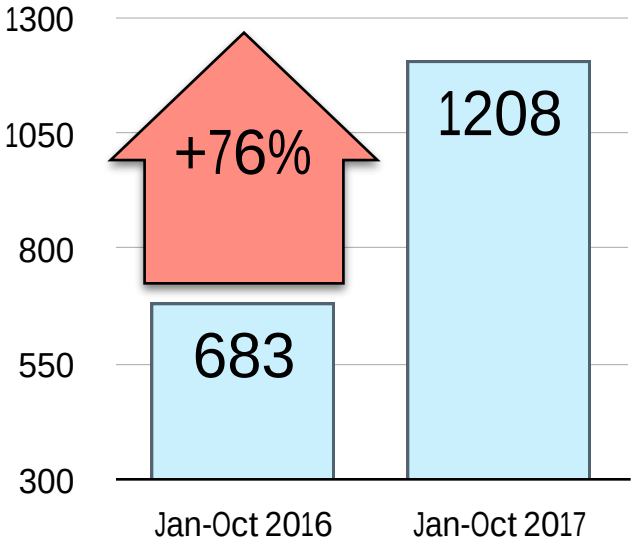


ILLICT DRUG OVERDOSE DEATHS ON THE RISE 6.0

The Office of BC's Chief Coroner has released statistics for illicit drug overdose deaths in the province from **January 1, 2017 to October 31, 2017**. In October there were 96 suspected drug overdose deaths. This represents a 26% increase over the number of deaths occurring in October 2016. This amounts to about three (3) people dying every day of the month.



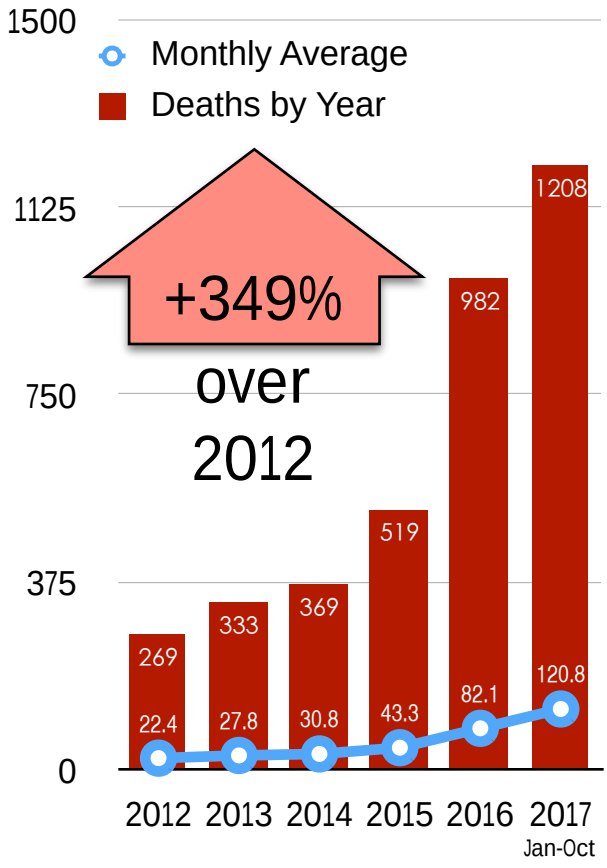
From January 1 to October 31, 2017 there were a total of **1,208** illicit drug overdose deaths. This is a **76%** increase over the same period last year.

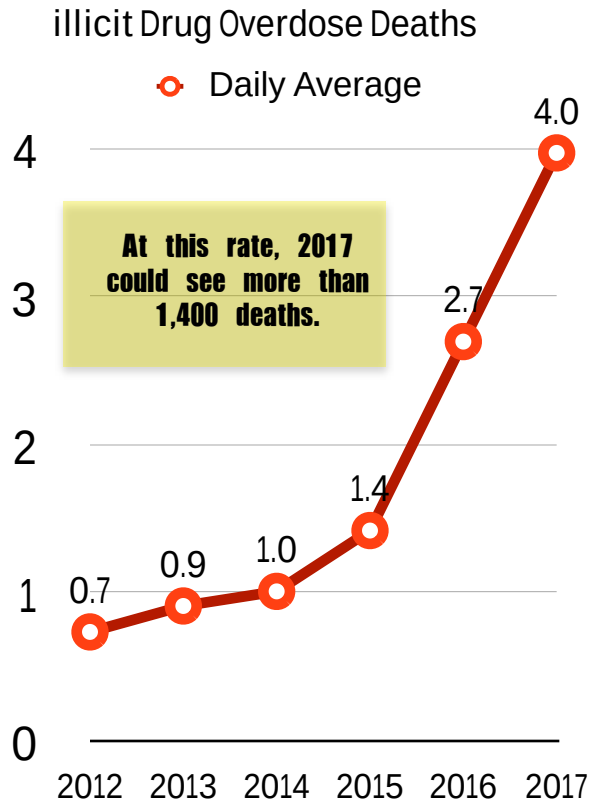


Last year, there were **985** overdose deaths, more than a **90%** increase over the same period in 2015 and a **266%** over 2012. Moreover, the report attributes fentanyl laced drugs as accounting for the increase in deaths. In December 2016 alone, there were **162** deaths. This was the highest recorded 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 **332** illicit drug overdose deaths followed by 40-49 year-olds at **292** deaths and 50-59 year-olds at **246** deaths. Vancouver had the most deaths at **300** followed by Surrey (**148**), Victoria (**78**), Kelowna (**66**), Nanaimo (**43**) and Abbotsford (**42**).

Males continue to die at almost a **5:1** ratio compared to females. From January to October 2017, **995** males have died while there were **213** female deaths.





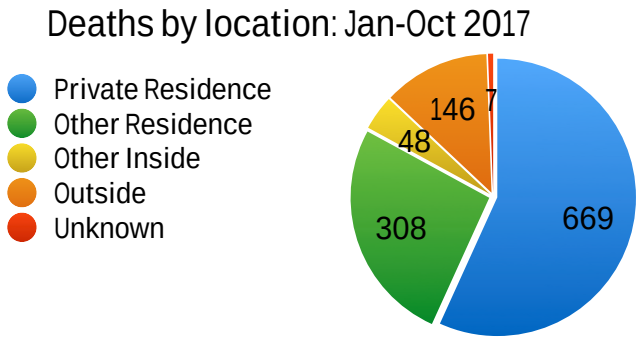
The data indicates that most illicit drug overdose deaths (**87.3%**) occurred inside while **12.1%** occurred outside. For seven (7) deaths, the location was unknown.

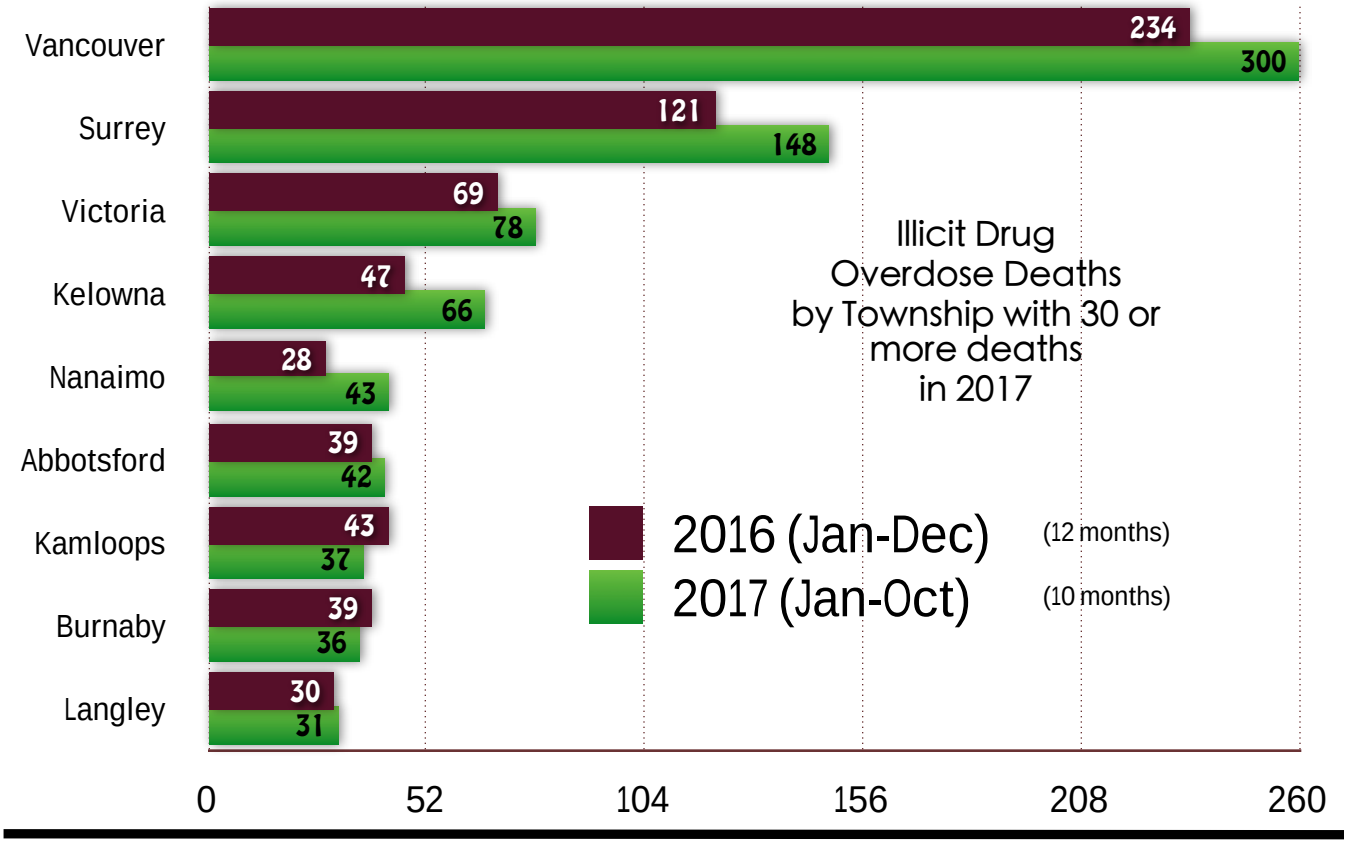
"**Private residence**" includes residences, driveways, garages, trailer homes.

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

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

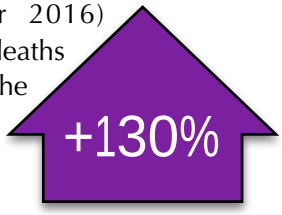
"**Outside**" includes vehicles, streets, sidewalks, parks, wooded areas, campgrounds and parking lots.





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 18 months preceding the declaration (Sep 2014-Mar 2016) totaled **859**. The number of deaths in the 15 months following the declaration (April 2016-Oct 2017) totaled **1,972**. This is an increase of **130%**.

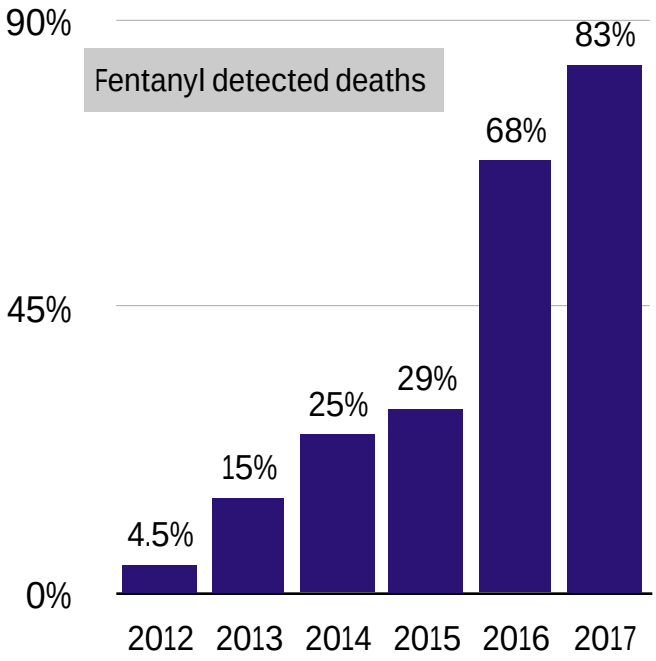


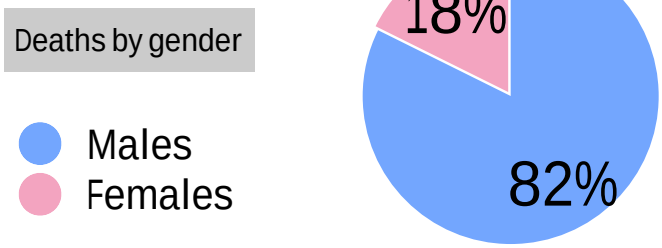
TYPES OF DRUGS

The top four detected drugs relevant to illicit drug overdose deaths from 2016 and 2017 were fentanyl, which was detected in **67.4%** of deaths, cocaine (**48.2%**), heroin (**33.1%**) and methamphetamine/amphetamine (**33.1%**).

From January to October 2017, fentanyl was detected in **83%** (999) of illicit drug overdose deaths. This is a **136%** increase in which fentanyl was detected in deaths occurring during the same period in 2016 where fentanyl was detected in 423 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.



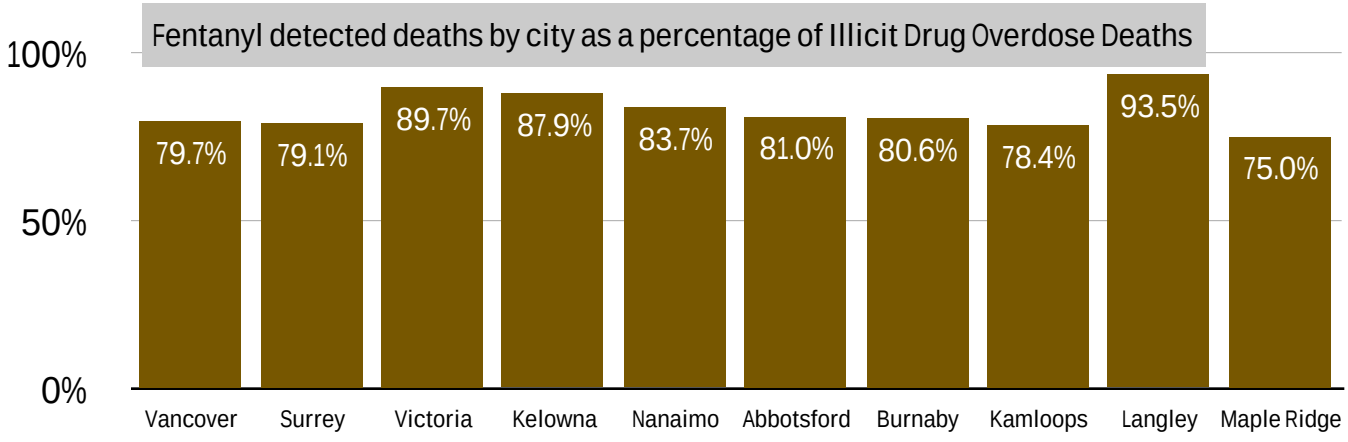


Sources:

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

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

Ministry of Justice, Office of the Chief Coroner. December 11, 2017.



CO-HABITANT CONSENT INFORMED & VOLUNTARY: SEARCH LAWFUL

R. v. Parsons, 2017 NLCA 64

The police took possession, from Canada Post, of a package found to contain 305.4 grams of 73% pure cocaine. The police replaced the cocaine with another substance and added a silent electronic alarm and a tracking device. The package was tracked and subsequently found to be located inside the accused's apartment. The police saw the accused leave his residence carrying a camping-type cooler chest which he placed in the trunk of a car. The police asked the accused to open the trunk and he complied when the officers produced a general warrant. The package that replaced the cocaine was found in the cooler and the accused was arrested and taken to police cells.

At about the same time, a woman named Ms. Jennings, who cohabited with the accused at the time, came out of the apartment. She was detained and returned to the apartment with police. Ms. Jennings was arrested for possessing cocaine and given the appropriate cautions and rights. She decided not to contact a lawyer. Ms. Jennings gave a statement to the police saying she was not involved in any illegal drug transactions and was not aware of any illegal drugs in the apartment.

Ms. Jennings was asked if she would consent to the police conducting a search of the apartment. She was told that the police were looking for drugs, money and documents and that they could obtain a search warrant if necessary. Ms. Jennings gave her verbal consent to the search, but the officers did not proceed until she had signed a Consent to Search form. Ms. Jennings told the police she was in a relationship with the accused and that they had shared occupancy of and expenses for the apartment. Weigh scales and $4,520 in cash were found in the apartment. The accused was jointly charged with another man with conspiring to traffic in cocaine.

Newfoundland & Labrador Supreme Court

At trial, both officers testified that they expected a search warrant would have been authorized by a judge had it been necessary to get one. The judge found Ms. Jennings could consent to the search of the apartment she shared with the accused. The judge stated:

> Ms. Jennings was a co-occupant and had authority over the premises. She was a tenant and the only person named on the lease. Ms. Jennings shared all areas of the apartment in common with [the accused].
>
> …
>
> Ms. Jennings gave a search consent in the context of knowing that [the accused] had just been arrested in relation to suspected drug activity; knowing that she had just been arrested in relation to the same activity; knowing that the purpose of the search was for drugs, documents and cash; knowing she had the right to withhold her consent; and knowing she had the right to insist on a warrant. She gave her consent voluntarily with knowledge that anything found could be used as evidence of a criminal, federal or provincial offence.

The search was therefore lawful. The judge then found that the only rational inference and conclusion to be drawn is that there was a conspiracy to traffic in cocaine and that the accused, along with the other man, were members of that conspiracy. The accused was convicted of conspiracy to traffic in cocaine and he was sentenced to 25 months imprisonment.

Newfoundland & Labrador Court of Appeal

The accused appealed his conviction arguing, among other grounds, that the trial judge erred in his analysis regrading the search of a dwelling-house upon the consent of a cohabitant. Even though the accused was cohabiting with Ms. Jennings and it was she who gave the police permission to search the apartment, the accused submitted that she could not give permission for the search on his behalf.

Co-Habitant Consent Search

In quoting from the recent Ontario Court of Appeal decision in *R. v. Reeves*, 2017 ONCA 365, Justice Welsh, speaking for the Newfoundland & Labrador Court of Appeal, found there was a distinction drawn between shared and private areas of a residence, and that the nature of the living arrangements may affect a person's reasonable expectation of privacy. In *Reeves*, the Ontario Court of Appeal articulated a two-staged inquiry for co-habitant consent:

1. Would the accused reasonably expect that his or her co-resident would have the power to consent to police entry into a common space; and

2. If so, did the co-resident actually consent?

The *Reeves* court noted that the specific facts and circumstances will drive the answer to both of those questions.

Justice Welsh concluded that the trial judge did not err in determining that Ms. Jennings had authority to give permission for the search and that her consent was both informed and voluntary. Further, "the police waited to conduct the search until after Ms. Jennings consented in writing, which occurred after some time had passed so that she had an opportunity to reconsider her position before granting permission for the search. Ms. Jennings maintained her innocence throughout and had an interest in being forthright and cooperative with the police." There was no s. 8 *Charter* breach.

The accused's appeal against conviction was dismissed but his sentence was varied to two year less a day to be served conditionally along with a year of probation.

Complete case available at www.canlii.org

Note-able Quote

"Words are chameleons which reflect the colour of their environment."

- Judge Learned Hand

POLICE PRESENCE LAWFUL: GUN SEIZURES AUTHORIZED BY s. 489(2) CCC

R. v. Warren, 2017 MBCA 106

During the early morning hours police responded to a domestic disturbance call at a rural residence. The first officer to arrive spoke to the accused's common-law wife outside the house. She told him that the accused was intoxicated. She expressed fear for her safety and that of her children. She said that there were "lots of firearms" in the family residence where the accused remained with the children. The accused exited the residence. He approached the officer in a highly agitated state and spoke in a belligerent manner. Fearing for his safety, the officer called for backup officers. The accused returned to the residence. Two additional officers arrived and were told of the information conveyed by the wife. The accused again exited the residence and, as a result of his continued belligerent behaviour, was arrested "to prevent a further breach of the peace."

After the accused was arrested, an officer entered the residence with the wife's sister to check on the children. Upon entering the front door, he saw four unsecured firearms and ammunition in a room directly in front of him, which he seized. As a result of the seizure, the accused was charged with four counts of unlawfully storing an unsecured firearm. A gun safe in plain view beside the entry and additional ammunition identified by the wife were also seized. The seizure of these last two items did not result in any charges. No other search was conducted of the residence. The accused was charged with four counts of careless storage of a firearm under section 86(2) of the *Criminal Code*.

Manitoba Provincial Court

The judge concluded that the seizing officer lawfully entered the home to ensure the children's safety. However, he held that after the seizing officer observed the firearms his "purpose changed from ensuring the safety of the children to evidence

gathering as in regards to the firearms." The judge noted that the seizing officer did not remove the children (who were asleep on the second floor) from the home. "The purpose of the police attending the residence was to ensure the safety of the children and no more," said the judge. "[The seizing officer] should have removed himself from the home and sought the lawful authority to search the home, either through the permission of one of the homeowners or by way of a warrant. His failure to do so was a breach of [the accused's] right to be secure against unreasonable search and seizure." The warrantless seizure of the four firearms from the accused's residence breached his s. 8 *Charter* right to be free from unreasonable search or seizure and the firearms were excluded as evidence under s. 24(2). The accused was acquitted of the four counts of unlawfully storing an unsecured firearm

Manitoba Court of Queen's Bench

The Crown appealed the accused's acquittals and now argued that the seizure of the firearms were authorized under s. 489(2) of the *Criminal Code*. However, the appeal judge ruled that s. 489(2) did not apply because the seizing officer was not lawfully present in the accused's home at the time he observed the firearms. Once the need to ensure the safety of the children no longer existed the seizing officer's justification for being in the home came to an end and he was then under a duty to remove himself from the home and obtain lawful authority to search it. The Crown's appeal was dismissed.

Manitoba Court of Appeal

The Crown again appealed submitting the appeal judge erred in upholding the trial judge' finding of a s. 8 *Charter* breach. In the Crown's view, the seizing officer was initially lawfully in the house pursuant to his common law and statutory duty to ensure the safety of the children and was therefore in execution of his duties when he observed the firearms, which were readily apparent. Since the firearms were unlawfully stored and unsecured, the officer had an immediate right to seize them under s. 489(2).

BY THE BOOK:

Criminal Code

Seizure without warrant

s. 489(2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds

(a) has been obtained by the commission of an offence against this or any other Act of Parliament;

(b) has been used in the commission of an offence against this or any other Act of Parliament; or

(c) will afford evidence in respect of an offence against this or any other Act of Parliament.

The accused, on the other hand, argued that the entry to the home was warrantless with the result that the onus shifted to the Crown to show that the search was otherwise reasonable. Since the purpose of the police presence in the home changed from protection of the children to evidence gathering once the seizing officer observed the firearms, the police should have removed the children from the home, secured the residence and applied for a search warrant. The accused also contended that the police could have simply secured the area where the firearms were located and left the children in the residence while they applied for a warrant.

s. 489(2) *Criminal Code*

Since the police made the seizure without warrant the onus was on the Crown to show that it was reasonable. A search or seizure will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search or seizure was carried out is reasonable.

"The observations by the seizing officer and the decision to seize the impugned items did not change the fact that he was lawfully in the residence. It was at the moment that the seizing officer observed the unlawfully stored, unsecured firearms, that the authority to seize that evidence crystalized pursuant to section 489(2)(c) of the Code."

In this case, the police were lawfully in the residence. The trial judge had found that the original reason for police entry into the residence was to ensure the safety of the children. "This was a domestic dispute where all three adults had been consuming alcohol and the police were advised that there were unsecured guns 'laying around the residence' where young children were present," said Justice Cameron for the Court of Appeal. "There is no serious dispute that, in order to ensure the safety of the children, the police had the authority to enter the residence for the valid purpose of preserving the public peace, preventing crime and protecting life and property." Neither consent nor a warrant was required. Thus, the police were lawfully in the residence to ensure the safety of the children at the time the firearms were observed.

Then, as soon as the seizing officer entered the residence, he observed a firearm in an open case on the floor, a closed firearm case on the floor, a firearm on top of a cabinet and a firearm on top of a fridge beside a box of ammunition. "The observations by the seizing officer and the decision to seize the impugned items did not change the fact that he was lawfully in the residence," said Justice Cameron. "It was at the moment that the seizing officer observed the unlawfully stored, unsecured firearms, that the authority to seize that evidence crystalized pursuant to section 489(2)(c) of the Code." The four firearms were lawfully seized under s. 489(2).

The Crown's appeal was allowed, the accused's acquittals were overturned, the seized guns were admitted as evidence and convictions on the four firearms offences were entered. The matter was then remitted back to the trial judge for sentencing.

Complete case available at www.canlii.org

THIRD-PARTY CONSENT TO ENTER LAWFUL BUT SEARCH OF 'STUFF' NOT AUTHORIZED

R. v. Clarke, 2017 BCCA 453

The accused was a police officer. He owned a residence along with his mother. A woman, Ms. Ferrer, along with her three children, was the accused's tenant and primary occupant of the residence. She had a friendship, business relationship and sexual relationship with the accused. He had his own key and resided there intermittently, coming and going as he wished. Ms. Ferrer had various concerns about the accused and, when she had not seen him for some time, she contacted the police. Among other things, the woman disclosed that the accused stored ammunition in the garage of the residence.

She met with the police and signed a consent form authorizing them to search the residence. The form stated that she voluntarily gave her consent and authorized the two named police officers to search "my residence … for the following goods/items: ammunition, any firearms, marihuana and alcohol. The items to be searched belong to [the accused] and I have control over [them] by virtue of 'own' [selected from a choice of "own, rented, borrowed"] since approx. 2007". The form provided that Ms. Ferrer gave her consent voluntarily, it could be withdrawn at any time during the search, and reflected her understanding that if any of the listed goods were found, they "may be subject to seizure, and [she] may be arrested, charged and prosecuted."

The police conducted a warrantless search of the common areas of the residence, together with the garage that was accessible from the residence through an interior door. Police found an FN FAL

"If the police exceeded the effective scope of her consent without justification, the [accused's] reasonable expectation of privacy will have been unlawfully violated."

semi-automatic rifle was found buried in a pile of items, covered by a tarp and under a shelf or workbench in the garage. They also found a Remington Colt semi-automatic handgun shortly thereafter.

British Columbia Supreme Court

The judge concluded that the accused had a privacy interest in the residence, although it was a significantly reduced privacy interest. Ms. Ferrer testified that "everyone" (including her children) had access to the items in the garage, including, in one corner, what was described as a pile of the accused's outdoor and camping equipment, firearms, ammunition and other items. She said that this area of the garage, where the pile was located, was "strictly his area", and that she did not look through it. When she found items around the house belonging to the accused, she would put them either in that part of the garage or a part of the closet she also considered his. "The manner in which his possessions were left was not indicative of a high subjective expectation of privacy," said the judge. "Objectively speaking, one may not reasonably conclude that a high degree of privacy attached to them piled in open view in the garage."

The judge found the search of the residence and the seizure of the items did not violate the accused's s. 8 *Charter* rights. Although Ms. Ferrer could not consent to a search on behalf of the accused nor otherwise waive his constitutional protection under s. 8, the search was of a common area of the residence that was lawfully conducted pursuant to Ms. Ferrer's valid consent. Moreover, even if the search breached s. 8 fo the *Charter*, the judge would have admitted the evidence under s. 24(2).

The firearms seized in the search were admitted as evidence and the accused was convicted on two counts of possessing a firearm without a licence and registration certificate, contrary to s. 92(1) of the *Criminal Code*.

PRIVACY

Why the trial judge found the accused had a reasonable expectation of privacy:

- Ms. Ferrer knew that the accused and his mother were on title for the residence and she was not.
- The accused would come and go as he chose. He was not at the residence every day. They would text and sometimes he would let her know he was coming and sometimes not. When the accused was at the residence he had access to the whole house. He stayed there part-time when he wanted to.
- Ms. Ferrer said the accused "sort-of lives part-time with me". She said they did not have a set schedule about when he would be at the residence, and that he would come and go as he wanted.
- Ms. Ferrer told the police that the accused was "out here all the time," that he came and went as he pleased and agreed that the residence was "our house".
- Ms. Ferrer said the areas that she considered solely the accused's was the area of the garage where his junk was. She said it was strictly his and that she did not look through it. Similarly, she said he had a part of the closet and a bedside table. When she found his stuff around the house she would put it in either the garage or the closet.

British Columbia Court of Appeal

The accused argued that Ms. Ferrer's consent could not validly authorize either the entry into the residence or the seizure of the firearms because a third party may not waive another person's privacy interest. In the accused's view, the warrantless search of the residence, even where he had an overlapping privacy interest with Ms. Ferrer, breached s. 8 of the

"[I]n assessing whether a search is reasonable by virtue of third-party consent, should look to: (a) whether the accused would reasonably expect that a third party would have the power to consent to a police search; and (b) whether that third party did provide valid consent."

Charter and the evidence of the firearms ought to have been excluded under s. 24(2). The Crown, on the other hand, contended the warrantless search of the common areas of the residence, and the seizure of the firearms, was lawfully authorized by Ms. Ferrer's consent.

Here, the police entered and searched with the consent of one of two people who had "overlapping" privacy interests. The Court of Appeal had to determine whether Ms. Ferrer's consent was effective to authorize police entry into the residence as well as the search and seizure of the accused's property.

Police Entry

In this case, the Court of Appeal agreed with the trial judge that the accused had a diminished reasonable expectation of privacy in the common or shared areas of the residence, including the garage. He was a "co-resident" of the home only to the extent of his intermittent residency there. Ms. Ferrer was the primary occupant of the residence. The garage was a common area of the house where she would park her car. Nevertheless, the accused's diminished expectation of privacy remained protected by s. 8 from unauthorized state intrusion.

Because the police entry was without warrant, it was presumptively unreasonable. However, a warrantless search may be rendered reasonable upon a fully informed and voluntary consent being given. Ms. Ferrer had the authority to allow the police to enter the residence and to enter the common or shared areas of the residence. Justice McKenzie, delivering the Court of Appeal's decision, agreed with the Ontario Court of Appeal analysis on third-party consent in *R. v. Reeves*, 2017ONCA 365, and stated:

> The Reeves test stipulates that the court, in assessing whether a search is reasonable by virtue of third-party consent, should look to: (a) whether the accused would reasonably expect that a third party would have the power to consent to a police search; and (b) whether that third party did provide valid consent. This two-step analysis must be strictly construed in accordance with a purposive and generous interpretation of the Charter. Thus, it is important here to assess whether the police went beyond the permissible scope of the consent provided by Ms. Ferrer, the "co-resident", in that both she and the [accused] had privacy interests in the residence. If the police exceeded the effective scope of her consent without justification, the [accused's] reasonable expectation of privacy will have been unlawfully violated.
>
> The trial judge's determination that Ms. Ferrer's consent was voluntary and informed is not disputed on this appeal.
>
> The question then remaining under the Reeves test is whether the judge erred in determining Ms. Ferrer's consent effectively authorized the police search and seizure of the firearms, i.e. whether the [accused] would reasonably expect that Ms. Ferrer would have the authority to consent to the police search in question.
>
> The [accused] and Ms. Ferrer had overlapping reasonable expectations of privacy in the shared spaces of the residence. These privacy interests were co-mingled. Given normative societal standards, the broader contextual circumstances and absent evidence to the contrary, the [accused] would reasonably have expected Ms. Ferrer would have the authority to consent to police entry into the common areas of the house. Ms. Ferrer was the primary occupant of the residence. The nature of her relationship with the [accused] and their use and treatment of the residence, considered in the totality of the circumstances, supports the conclusion that she could validly consent to police entry into the shared or common areas of the residence. As held in Reeves, "Descriptively, a co-resident knows from the outset that the other co-resident has the right to invite others into shared spaces." [reference omitted, paras. 51-55]

"It is clear that s. 489(2) only permits seizure, not a search," said the Court of Appeal. "The firearms were not visible or in 'plain view' in the garage. They were covered by a pile of the [accused's] other items, and a tarp. Because s. 489(2) does not authorize a search, it cannot serve as lawful authority for the search of the pile of items that resulted in seizure of the firearms."

Although Ms. Ferrer, as a third party, could not by consent or otherwise waive the accused's constitutional rights she could validly authorize the police entry into the residence by consent. In this case, the overlapping expectations of privacy permitted Ms. Ferrer to consent to police entry into common spaces. Therefore, the entry into the residence was authorized by law.

Search & Seizure of Accused's 'Stuff'

The Court of Appeal found that, even though Ms. Ferrer's consent provided lawful authority for the police to enter the shared residence, she could not validly consent to a search of what was considered exclusively the accused's property:

> It cannot be said, on the totality of the circumstances, that the [accused] would have reasonably expected Ms. Ferrer could validly consent to a police search through his tarp-covered pile of property in which they found the firearms. Even though the pile was in the garage, generally a common area, it was a corner of the garage where his "stuff" was kept. Ms. Ferrer recognized this property did not belong to her. She testified this part of the garage was strictly for the [accused's] property and she did not look through it. The evidence reflects that Ms. Ferrer had no privacy interest in the [accused's] property, and it would be incorrect to infer the [accused] would have reasonably expected that she could authorize a police search through it. [para. 64]

Therefore, the trial judge erred in finding Ms. Ferrer's consent extended to authorizing the police to search through the goods in the garage and to seize the items they had no right to take. Here, the Crown tried to prove that the warrantless search was reasonable by impermissibly extending the effective scope of Ms. Ferrer's consent. "The evidence established that Ms. Ferrer had no privacy interest in the [accused's] property in question," said Justice MacKenzie. "Ms. Ferrer had no lawful authority to waive the [accused's] reasonable expectation of privacy in the area of the garage considered his, and in particular, in the property searched and the firearms seized, by giving consent or otherwise."

Thus, the police breached the accused's s. 8 *Charter* rights in searching and seizing his "stuff".

Section 489(2) *Criminal Code*

Section 489(2) of the *Criminal Code*, the Crown's alternative argument, did not authorize the valid seizure of the accused's property that was stored in the garage. "It is clear that s. 489(2) only permits seizure, not a search," said the Court of Appeal. "The firearms were not visible or in 'plain view' in the garage. They were covered by a pile of the [accused's] other items, and a tarp. Because s. 489(2) does not authorize a search, it cannot serve as lawful authority for the search of the pile of items that resulted in seizure of the firearms."

s. 24(2) Charter

The evidence of the two firearms was properly admissible under s. 24(2) of the *Charter* and their exclusion would result in greater harm to society's confidence in the administration of justice than would their admission into evidence. First, the *Charter* violation was not serious. The police acted in good faith; they honestly believed that Ms. Ferrer's consent authorized them to conduct the search. Second, the impact of the breach on the *Charter* protected interests of the accused was low. He had a severely diminished expectation of privacy in his pile of items. Finally, society had a significant interest in the adjudication of this case on its merits. The guns were reliable evidence and critical to the Crown's case.

The accused's appeal was dismissed.

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

FACTORS INSUFFICIENT TO PROVIDE REASONABLE SUSPICION FOR DETENTION & K9 SNIFF

R. v. Urban, 2017 ABCA 436

The accused was driving a brown Dodge minivan on Highway 1, near Lake Louise, Alberta. A police officer working the Roving Traffic Unit noticed the minivan and entered its licence plate into the Police Information Portal (PIP). The results indicated that the name associated with the minivan—the accused—was also associated three times with addresses related to a marijuana grow operation in British Columbia. The officer followed the minivan but passed it when it took an unexpected exit into the village of Lake Louise. The officer radioed to other officers that a vehicle of interest might have entered the village.

Within minutes, the van was back on Highway 1 and the officer followed it. He radioed to another officer that he did not have grounds to stop the minivan. This other officer radioed back that he had run a check on the minivan and the results indicated that the vehicle should be white in colour. This officer radioed that he was going to stop the vehicle under Alberta's *Traffic Safety Act* (*TSA*)

The officer pulled the minivan over and advised the accused that he had been stopped because of the colour discrepancy with the vehicle. He asked for documentation and where the accused was coming from and going to. The accused said that he was travelling from Kelowna to Edmonton to help his pregnant sister with bathroom renovations. At this point the officer saw a box for a child's car seat, a box of size three diapers, tools and equipment, and a small cooler on the floor of the front passenger seat. He believed that the car seat and the diapers were too large for a newborn baby and thus inconsistent with the accused's story about visiting his pregnant sister. He also believed that the cooler was significant because drug traffickers typically do not want to stop for food or leave their vehicle unattended.

The officer decided he had reasonable grounds to suspect that the accused was in possession of drugs and placed him under investigative detention. The officer read the accused the *Charter* caution and the accused waived his right to counsel. A police service dog was deployed to search the minivan's perimeter and the dog's response indicated controlled substances were inside it. The accused was arrested for possessing a controlled substance and re-read the *Charter* caution. The accused again declined to contact legal counsel. The interior of the minivan was searched and 38.16 lbs. of marijuana was found throughout the vehicle, including in the diaper box and the car seat box. The accused was charged with possessing cannabis for the purpose of trafficking.

Alberta Court of Queen's Bench

The accused argued that the evidence seized by police after searching the minivan was obtained in violation of his ss. 8, 9 and 10(b) *Charter* rights and should be excluded under s 24(2).

The officer stopping the accused testified that he always asked questions during a traffic stop about where someone was coming from and going to in order to determine whether the driver was fatigued or impaired. The accused submitted that it was improper for the officer to use his statement about his purpose for travel as a reason for suspecting him of possessing a controlled substance. In his view, answers provided to the police during the s. 10(b) suspension on the right to counsel permitted during a traffic stop could not be used as grounds to detain

"We recognize that the reasonable suspicion standard has become a low bar …: an officer's grounds need only objectively indicate a possibility that the suspect is committing a crime.

him. As well, he contended that his s 10(b) rights were no longer suspended when he was asked where he was going because, at that point, police were no longer detaining him for traffic safety reasons. Thus, his s. 10(b) rights were breached when the police failed to inform him of his right to consult counsel. The judge rejected this submission. She concluded that the officer's purpose for asking about the accused's comings and goings was because of a concern for traffic safety – to find out whether the driver was fatigued because he had driven a long way. Thus, the detention at that point was authorized under the *TSA* and the accused's s. 10(b) rights remained in abeyance.

The judge also ruled that the accused's claims of an arbitrary detention and an unreasonable search when the sniffer dog was used were without merit. She found the officer had reasonable grounds to suspect that the accused was in possession of an illegal substance and had the authority to conduct an investigative detention and a sniffer dog search. The judge found the following factors, considered cumulatively, in light of his training and experience provided the requisite reasonable suspicion:

1. The accused exited Highway 1 and returned to it shortly afterwards in a way that seemed illogical and possibly evasive;

2. The presence of the cooler and some food in the passenger seat, suggested that he did not want to leave the vehicle unattended;

3. The entries on the PIP system reported he had been associated with "three production of cannabis marijuana files" as "a property representative" in British Columbia;

4. The officer's belief that the accused seemed to be taking a route inconsistent with his stated destination. The constable later admitted in court that this was an incorrect belief;

5. The diapers and the car seat inside the vehicle seemed too large for a newborn baby and thus seemed inconsistent with the accused's story, and were commonly used as props for drug trafficking; and

6. The accused's nervousness when he was initially detained, to the point that his hands shook.

The items seized during the search were admitted into evidence and the accused was convicted of possessing marihuana for the purpose of trafficking.

Alberta Court of Appeal

The accused appealed his conviction arguing, in part, that his ss. 8 and 9 *Charter* rights had been breached when he was placed under investigative detention for possessing a controlled substance and in deploying a sniffer dog to search the exterior of his vehicle. He also argued his s. 10(b) right was violated when police did not inform him of his right to counsel when the purpose of investigation changed from traffic safety to detection of crime. He wanted the evidence seized following the search of his vehicle excluded.

Reasonable Suspicion?

The Court of Appeal concluded that the grounds proffered in this case—(1) the cooler; (2) the two boxes for child's car seat and diapers; (3) the PIP search results; (4) the accused's brief exit from Highway 1; and (5) his apparent nervousness when initially detained—did not support a reasonable suspicion that the accused was in possession of drugs even when

assessed as a constellation and not on a one-by-one basis. The Court of Appeal stated:

> Viewed in their entirety, though, do [the officer's] grounds justify a reasonable suspicion of possession of illegal drugs? Four of the five factors are neutral or equally consistent with innocent behaviour as with criminal behaviour: the cooler, the nervousness, the exit from the highway, the PIP entries. Such factors on their own cannot justify a finding of reasonable suspicion although they may form part of a "constellation" of factors that together supports a reasonable suspicion. [The officer's] observation of the boxes in the back seat of the car, together with his training and experience, provide some objective basis for suspecting [the accused] of possessing a controlled substance.
>
> ...
>
> We recognize that the reasonable suspicion standard has become a low bar particularly since Chehil and MacKenzie: an officer's grounds need only objectively indicate a possibility that the suspect is committing a crime.
>
> The dictum in Chehil, at para 31, that innocuous factors that "go both ways" cannot support reasonable suspicion on their own but may when combined with other factors, should not be understood as endorsing a kind of alchemy whereby a group of severally innocuous factors somehow become grounds for reasonable suspicion when considered together. Individually innocuous factors do not support a reasonable suspicion when they are combined with other innocuous factors, unless one factor provides support to another or the innocuous factors, together, are mutually reinforcing. With that said, most of the factors relied on by [the officer] in this case were either neutral or "went both ways".
>
> We conclude, looking at the totality of the evidence through the lens of [the officer], with his training and experience in the detection of drugs, that the constable's subjective belief that [the accused] might be involved in a drug-related offence was not objectively justified. Consequently, he lacked authority at common law to detain [the accused] for the purpose of a controlled substance investigation and to conduct a sniffer dog search of the exterior of [the accused's] vehicle, thereby breaching [the accused's] rights under s 9 (arbitrary detention) and s 8 (unreasonable search and seizure) of the Charter. {references omitted, paras. 40-44]

Right to Counsel

Here, the officer stopped the accused to check his registration under the *TSA*. In doing so, it was assumed that his s 10(b) rights were suspended for the duration of the traffic stop. The accused argued that the officer's question, after the initial stop, about where he was coming from and going to was not to investigate possible traffic safety violations but to detect criminal activity generally. In the accused's opinion, when the officer asked the question his s. 10(b) rights were no longer suspended by implicit operation of the *TSA* and he should have been advised of his right to consult counsel.

But this argument had been rejected by the trial judge. She found that that the officer asked the question for a valid traffic safety purpose – to find out whether the driver was fatigued - and for no other purpose such as to investigate crime generally. Nor was there a change in his jeopardy when the officer asked where he was going to and coming from such that he was now under investigation for a more serious crime. "In this case, the purpose of the initial stop was to investigate an apparent discrepancy in [the accused's] registration and the purpose of the question about [the accused's] comings and goings was to find out if [the accused] was too fatigued to drive safely," said the Court of Appeal. "[His] jeopardy did not change between these two events."

In sum, the accused's ss. 8 and 9 *Charter* rights were breached but not his s. 10(b) right. Since the trial judge did not address whether the evidence should be excluded under s 24(2), the accused and Crown were given time to file written submissions on the admissibility of the evidence.

Complete case available at www.canlii.org

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SENDER MAINTAINED PRIVACY INTEREST IN TEXT MESSAGE ON RECIPIENT's PHONE

R. v. Marakah, 2017 SCC 59

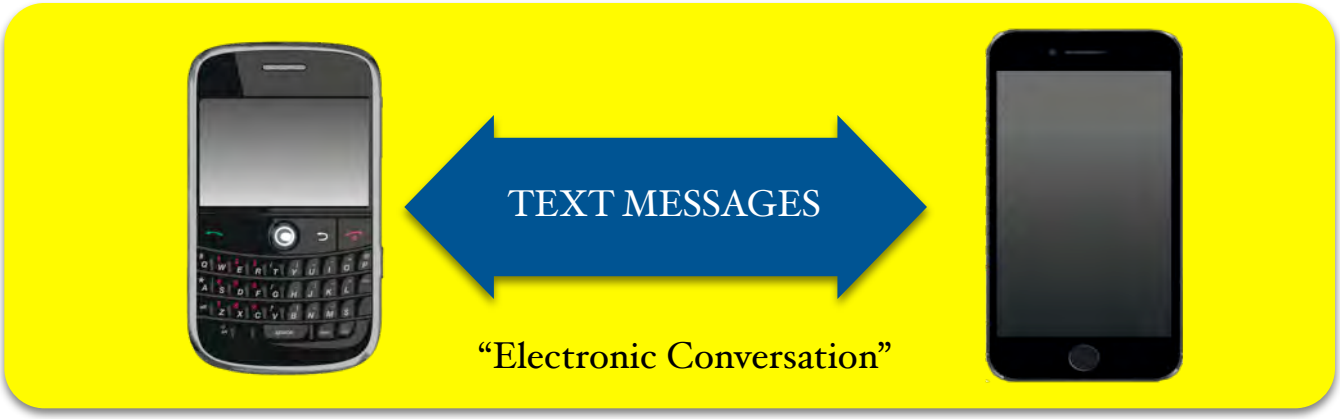
The accused sent text messages to his accomplice about the illegal purchase and sale of firearms. The police obtained warrants to search his home and the home of his accomplice. The accused's BlackBerry was seized and searched. His accomplice's iPhone was also seized and searched. Incriminating text messages were found. The accused was charged with firearms offences and the Crown sought to use the text messages as evidence against him.

Ontario Superior Court of Justice

The judge found the warrant for the accused's residence was invalid and the text messages recovered from his Blackberry should not be admitted as evidence against him because they were obtained in violation of his s. 8 *Charter* right to be secure against unreasonable search and seizure. The judge also found the search of the accomplice's iPhone breached the *Charter*. However, the judge ruled that the accused had no standing to argue that the text messages recovered from his accomplice's iPhone should not be admitted. The text messages on the accomplice's iPhone were admitted as evidence against the accused and he was convicted on two counts of trafficking in firearms, conspiracy to traffic in firearms, possession of a loaded restricted firearm and possession of a firearm without a valid licence. He was sentenced to nine years in prison, less pre-sentence custody.

Ontario Court of Appeal

A majority of the Court of Appeal agreed with the trial judge that the accused had no expectation of privacy in the text messages recovered from his accomplice's iPhone, and therefore did not have standing to argue against their admissibility. The accused's



appeal was dismissed and his convictions were upheld.

Supreme Court of Canada

The accused argued that he did have a reasonable expectation of privacy in the text messages he sent to his accomplice and therefore had standing to argue that his s. 8 *Charter* rights were breached when the police searched and accessed the text messages on his accomplice's iPhone. In his view, those messages ought to have been excluded under s. 24(2).

To claim s. 8 *Charter* protection, an accused must first establish they had a reasonable expectation of privacy in the subject matter of the search. This requires an analysis of whether the accused subjectively expected it would be private and whether this expectation was objectively reasonable.

Chief Justice McLachlin, authoring the four member majority opinion, concluded that the accused, as sender of the test messages, did retain a reasonable expectation of privacy in those text messages on the recipient's phone, in this case his accomplice. Therefore, the accused had standing to argue that his s. 8 rights had been violated when the police accessed the text messages on his accomplice's iPhone.

> "[I]t is difficult to think of a type of conversation or communication that is capable of promising more privacy than text messaging. There is no more discreet form of correspondence. Participants need not be in the same physical place; in fact, they almost never are."

A Reasonable Expectation of Privacy in Text Messages

Describing the subject matter of the search as an "electronic conversation", the majority stated:

> Indeed, it is difficult to think of a type of conversation or communication that is capable of promising more privacy than text messaging. There is no more discreet form of correspondence. Participants need not be in the same physical place; in fact, they almost never are. ...
>
> One can even text privately in plain sight. A wife has no way of knowing that, when her husband appears to be catching up on emails, he is in fact conversing by text message with a paramour. A father does not know whom or what his daughter is texting at the dinner table. Electronic conversations can allow people to communicate details about their activities, their relationships, and even their identities that they would never reveal to the world at large, and to enjoy portable privacy in doing so.
>
> Electronic conversations, in sum, are capable of revealing a great deal of personal information. Preservation of a "zone of privacy" in which personal information is safe from state intrusion is the very purpose of s. 8 of the Charter. As the foregoing examples illustrate, this zone of privacy extends beyond one's own mobile

> device; it can include the electronic conversations in which one shares private information with others. It is reasonable to expect these private interactions — and not just the contents of a particular cell phone at a particular point in time — to remain private. [paras. 35-37]

The majority then went on to conclude that, based on the totality of the circumstances, the accused had an objectively reasonable expectation of privacy in the electronic conversation he had with his accomplice:

> Each of the three factors relevant to this inquiry in this case, place, capacity to reveal personal information, and control, support this conclusion. If the place of the search is viewed as a private electronic space accessible by only [the accused] and [his accomplice], [the accused's] reasonable expectation of privacy is clear. If the place of the search is viewed as [the accomplice's] phone, this reduces, but does not negate, [the accused's] expectation of privacy. The mere fact of the electronic conversation between the two men tended to reveal personal information about [the accused's] lifestyle; namely, that he was engaged in a criminal enterprise. This the police could glean when they had done no more than scrolled through [the accomplice's] messages and identified [the accused] as one of his correspondents. In addition, [the accused] exercised control over the informational content of the electronic conversation and the manner in which information was disclosed. Therefore, [the accused] has standing to challenge the search and the admission of the evidence, even though the state accessed his electronic conversation with [his accomplice] through the latter's iPhone. This conclusion is not displaced by policy concerns. [references omitted, para. 54]

In the majority's view, control was not the sole determining factor in assessing privacy but only one factor to be considered in the totality of the circumstances.

What Should the Police to do?

Chief Justice McLachlin suggested there were three scenarios where text messages in which an accused could establish a reasonable expectation of privacy could be permitted into evidence:

1. **With Warrant**. The police could obtain a warrant prior to accessing the text messages.
2. **Without warrant**. Although warrantless searches are presumptively unreasonable, the Crown could establish on a balance of probabilities that the search was authorized by law, the law was reasonable and the search was carried out in a reasonable manner.
3. **s. 24(2) of the *Charter***. Even where the police breach an accused's s. 8 right, the Crown could argue that the evidence should be admitted under s. 24(2)

Admissibility in this Case

The Crown conceded that the search was unreasonable if the accused had standing (a reasonable expectation of privacy). Thus, the text messages were subject to exclusion under s. 24(2). Although society's interest in the adjudication of the case on its merits was significant and favoured inclusion of the evidence, both the Charter-infringing conduct was sufficiently serious and the impact on the accused's Charter-protected privacy interest was significant to favour exclusion. Both these factors favoured exclusion. The majority excluded the text messages from being used as evidence against the accused.

The accused's appeal was allowed, his convictions were set aside and acquittals were entered on all charges.

A Concurring Opinion

Justice Rowe agreed with the Chief Justice that the accused had a reasonable expectation of privacy in the text messages on his accomplice's iPhone and therefore standing to argue his s. 8 *Charter* rights were breached. However, he was concerned with the consequences of this decision:

> If the sender has a reasonable expectation of privacy in the record of his digital conversation,

> what happens when the recipient wants to show that record to the police? Are we opening the door to challenges by senders of text messages to the voluntary disclosure of those messages by recipients? As Justice Moldaver suggests, this would lead to the perverse result where the voluntary disclosure of text messages received by a complainant could be challenged by a sender who is alleged to have abused the complainant. Furthermore, what Justice Moldaver refers to as large project prosecutions — often with multiple accused allegedly involved in organized crime — would become more complex and might collapse under their own weight if each accused gains standing to challenge the admissibility of messages received by any other person involved in the alleged offence. I see no way within the confines of this case to deal with these concerns, as they do not arise here on the facts. I would say only that principle and practicality must not be strangers in the application of s. 8 or we might well thwart justice in the course of seeking to achieve it. [para. 89]

A Different View: Control Carries the Day

Justice Moldaver, with whom Justice Côté agreed, concluded that the accused had no control whatsoever over the text conversations on his accomplice's iPhone and therefore had no reasonable expectation of privacy in those messages. His accomplice had complete autonomy over those conversations and was free to disclose them to anyone he wished, at any time and for any purpose. "Control is inseparable from the concept of privacy," he said. "A total absence of control is therefore a compelling indicator that there is no reasonable expectation of personal privacy." Justice Moldaver continued:

> When assessing the objective reasonableness of a claimant's expectation of personal privacy in the subject matter of a search, the claimant's control over the subject matter is vital. The standing inquiry is concerned with a claimant's personal connection to the subject matter in the circumstances of the case. Control plays an integral role in defining the strength of that connection. [para. 122]

Since the accused had absolutely no control over the text messages on his accomplice's phone, Justice Moldaver concluded that the accused could not reasonably expect personal privacy in those text messages. Thus, the accused lacked standing to challenge the search of his accomplice's phone and the police access to those text messages. The minority would have dismissed the accused's appeal and upheld his convictions.

Complete case available at www.scc-csc.ca

Editor's Note: It will be interesting to see the impact of this case on law enforcement's ability to access (search for and seize) text messages. There was little guidance provided to the police in situations that fall outside the fact pattern in this case. Remember, this case was about two co-conspirator's communicating by text messages. The accused was not sending text messages to a random person or to a person he thought would disclose them. Furthermore, it cannot be forgotten that the police search of both the accused's phone and his accomplice's phone was not *Charter* compliant. In other words, neither phone was lawfully searched. Had either phone been lawfully searched, either with or without a warrant, this editor believes the outcome in this case would have been different.

This is consistent with the British Columbia Court of Appeal's majority approach in *R. v. Pelluco*, 2015 BCCA 370 which stated that "a person cannot have a reasonable expectation that messages on another person's cellphone will remain private in the face of a lawful search of the device." In other words, the distinction between a lawful search and an unlawful one is important. The *Pelluco* majority found the accused was entitled to expect that the police would not search the messages on his accomplice's phone without lawful authority and, when they did search without authorization, they breached the accused's s. 8 *Charter* right.

The majority in *Marakah*, as well, did not hold that a sender of a text message will always retain a reasonable expectation of privacy in the text message residing on the recipient's phone. Chief Justice McLachlin could not have made this much

clearer when she said, "The conclusion that a text message conversation *can*, in some circumstances, attract a reasonable expectation of privacy does not lead inexorably to the conclusion that an exchange of electronic messages *will always* attract a reasonable expectation of privacy." Thus, there is no doubt that whether or not a sender of a text message has a privacy interest in the text as it exists on the recipient's phone will be assessed on a case-by-case basis.

For example, in the British Columbia case of *R. v. Sandhu*, 2014 BCSC 303, the accused sent threatening text messages. The recipient gave the police his cellphone, and they attempted to enter the text messages into evidence at trial. The trial judge held that the police violated the accused's s. 8 rights in reading the messages without obtaining a warrant. This reasoning was found to be in error by a majority in *Pelluco* (as cited above), which stated that Sandhu's belief his threatening text messages would be kept private was not objectively reasonable:

> It is because the objective reasonableness of an expectation of privacy includes normative elements that I am of the view that the analysis in Sandhu cannot be sustained. In that case, the judge found that the sender of a threatening text message had an objectively reasonable expectation that the recipient would not turn the message over to police. If objective reasonableness were merely a measure of probability, it could be said that the sender had an objectively reasonable expectation of privacy – he could reasonably expect that the threat would be sufficient to silence the victim and his message would, therefore, remain private. Once normative elements of reasonableness are recognized, however, it becomes clear that a person who threatens another has no right to expect that the person who has been threatened will keep the threat private. [*Pelluco* at para. 61]

What are some lawful means to search a cellphone without a warrant? The police may, depending on the circumstances, lawfully search a cellphone as an incident to a lawful arrest (eg. *R. v. Fearon*, 2014 SCC 77). It should be noted that in the *Marakah* case, the Crown failed to justify the search of the accomplice's iPhone as an incident to arrest and Crown conceded its search to be unreasonable once the standing issue was decided.

Another issue that was discussed, but left largely unresolved, was whether the recipient of a text message could voluntarily consent to its disclosure to police. Justice Moldaver opined that the majority's ruling suggested that the police may require a warrant even where a victim voluntarily provides the text message to police. He wrote:

> Under the Chief Justice's approach, where police search a cellphone or other device for an electronic communication, any participant to that communication would have standing to challenge the lawfulness of the search. The same may be true even where a witness voluntarily shares an electronic communication with the police, as there remains uncertainty in the law as to whether reception by police of this evidence amounts to a search engaging s. 8 of the Charter. As such, in these circumstances, s. 8 may be engaged and a search warrant may well be necessary to comply with s. 8. Indeed, the Chief Justice appears to concede that police may require a warrant even where a victim or his or her parents voluntarily provide police with threatening or offensive text messages. [references omitted, para. 181]

But can the recipient of a text message voluntarily provide that message to police? A consent search, it could be argued, would fit within Chief Justice McLachlin's second scenario of justifying the warrantless search of text messages through a search authorized by law. Assuming both parties to a text message share a reasonable expectation of privacy, like those who share a privacy interest in common areas of a home for example, why could one party not voluntarily provide those shared text messages to police just as the co-habitant of a dwelling can consent to the police to enter and search common areas (eg. *R. v. Reeves*, 2017 ONCA 365, *R. v. Clarke*, 2017 BCCA 453, *R. v. Parsons*, 2017 NLCA 64), provided such consent is voluntary and fully informed? Undoubtedly, the issue of a consent search of text messages will arise in cases in the not too distant future. This editor suspects that *Marakah* will not be the final word on accessing text messages of a recipient's phone!

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