



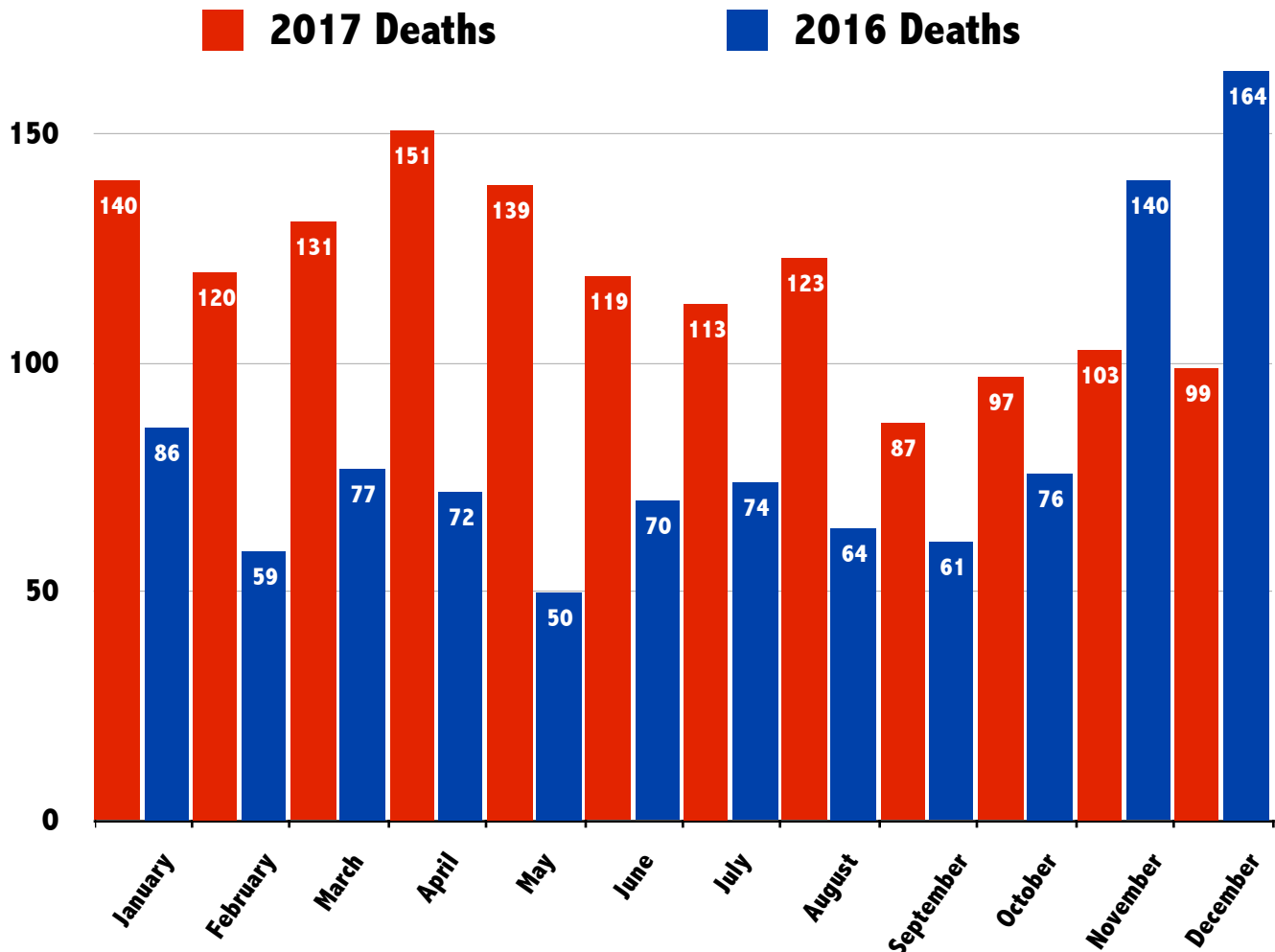
A newsletter devoted to operational police officers in Canada.

BC's 2017 ILLICIT DRUG OVERDOSE STATS RELEASED

The Office of BC's Chief Coroner has announced the 2017 statistics for illicit drug overdose deaths in the province. Last year there were 1,422 overdose deaths, almost a 43% increase over the same period in 2016. Moreover, the report attributes Fentanyl laced drugs as accounting for the increase in deaths. In April 2017 alone, there were 151 deaths.

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Unless otherwise noted all articles are authored by Mike Novakowski, MA, LL.M. The articles contained herein are provided for information purposes only and are not to be construed as legal or other professional advice. The opinions expressed herein are not necessarily the opinions of the Justice Institute of British Columbia. "In Service: 10-8" welcomes your comments or contributions to this newsletter.

Upcoming Courses

Advanced Police Training

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

JIBC Police Academy

See Course List [here](#).

"In Service: 10-8" is now in its 18th year of publication. We salute all of our readers and thank them for all that they do in maintaining public safety is this great nation.

Note-able Quote

"Vision without action is hallucination. Action without vision is random activity."

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.

Co-occurring mental illness and substance use disorders: a guide to diagnosis and treatment.

edited by Jonathan D. Avery, John W. Barnhill.

Arlington, VA: American Psychiatric Association Publishing, 2018.

RC 564.68 C66 2018

Collecting qualitative data: a practical guide to textual, media and virtual techniques.

Virginia Braun, Victoria Clarke, Debra Gray.

Cambridge, UK; New York, NY: Cambridge University Press, 2017.

H 62 B715 2017

Critical inquiries for social justice in mental health.

edited by Marina Morrow and Lorraine Halinka Malcoe.

Toronto; Buffalo; London: University of Toronto Press, 2017.

RA 790.5 C75 2017

DBT skills training manual.

Marsha M. Linehan.

New York, NY: The Guilford Press, 2015.

RC 569.5 B67 L563 2015

Deception in the digital age: exploiting and defending human targets through computer-mediated communications.

Cameron H. Malin, Terry Gudaitis, Thomas J. Holt, Max Kilger.

London; San Diego: Elsevier: Academic Press, 2017.

HV 8079 C65 M25 2017

The discussion book: 50 great ways to get people talking.

Stephen D. Brookfield and Stephen Preskill.

San Francisco, CA: John Wiley & Sons, 2016.

LC 6519 B75 2016

The fearless world of professional safety in the 21st century.

Scott Gesinger.

Abingdon, Oxon; New York, NY: Routledge, 2018.

T 55 G47 2018

The heart of coaching: using transformational coaching to create a high-performance coaching culture.

Thomas G. Crane with Lerissa Patrick.

San Diego, CA: FTA Press, 2017.

HF 5549.5 C53 C69 2017

In command of guardians: executive servant leadership for the community of responders.

Eric J. Russell; foreword by Roger E. Broomé.

Cham, Switzerland: Springer, 2017.

HM 1261 R87 2017

Managing public safety technology: deploying systems in police, courts, corrections, and fire organizations.

Jeffrey A. Rose, Donald C. Lacher.

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

HV 675 R67 2017

The ostrich paradox: why we underprepare for disasters.

Robert Meyer and Howard Kunreuther.

Philadelphia, PA: Wharton Digital Press, 2017.

HD 49 M47 2017

Post-traumatic stress.

Stephen Regel, Centre for Trauma, Resilience and Growth, Nottinghamshire Healthcare NHS Foundation Trust and School of Education, University of Nottingham, UK, Stephen Joseph, Centre for Trauma, Resilience and Growth, Nottinghamshire Healthcare NHS Foundation Trust and School of Education, University of Nottingham, UK.

Oxford, UK: Oxford University Press, 2017.

RC 552 P67 R44 2017

FLEEING FROM ACCIDENT TO AVOID STOLEN AUTO CHARGE STILL HIT & RUN

R. v. Seipp, 2018 SCC 01



Someone stole a car and other items during a break-in. The victim of the break-in drove around the neighbourhood in search of his stolen car. He saw the accused driving it, caught up to the car and tried to overtake it in a roundabout. The two vehicles collided and the accused fled the scene without providing either his name or address. Along with several offences related to the break-in, the accused was charged with failure to stop and provide his name and address at the scene of an accident under s. 252(1) of the *Criminal Code*.

British Columbia Provincial Court



The accused denied breaking into the home. Although he admitted to driving the car, he claimed that a friend of his unexpectedly stopped by his house and invited him to drive around in the car she had. He said he dropped his friend off and continued joyriding until the accident. He also testified that he fled from the collision because he suspected the car was stolen and therefore did not want to be present when the police arrived. The accused was nevertheless convicted on the hit and run charge despite the judge finding he did not cause the accident. He was also convicted of possessing a stolen vehicle, fraud and using a stolen debit card.

British Columbia Court of Appeal



The accused appealed only his hit and run conviction on the basis that an essential element of the hit and run charge required proof of “*intent to escape criminal or civil liability*.” In his view, the proper interpretation of “*escape civil or criminal liability*” is that the intent must relate to avoiding liability in connection with the cause of the accident rather than any liability arising from the general operation of a motor

BY THE BOOK:

Criminal Code



Failure to stop at scene of accident

s. 252 (1) Every person commits an offence who has the care, charge or control of a vehicle, vessel or aircraft that is involved in an accident with

- (a) another person,
 - (b) a vehicle, vessel or aircraft, or
 - (c) in the case of a vehicle, cattle in the charge of another person,
- and with intent to escape civil or criminal liability fails to stop the vehicle, vessel or, if possible, the aircraft, give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance.

vehicle. In this case, the accused testified he fled because he did not want to be found with a stolen vehicle. Since the trial judge concluded that his driving was not the cause of the accident, the accused argued he did not leave the scene to escape civil or criminal liability in relation to the accident.

The Crown submitted that the intention to escape civil or criminal liability must be related to or substantially connected to the accident. In the Crown’s opinion, the accused fled the scene to evade liability for driving a stolen car at the time of the accident. Although his manner of driving did not cause the accident such that he could be held liable for any injuries, his use of the stolen car was a factual cause of the accident. This, the Crown contended, was a sufficient link between the liability he sought to avoid and the collision to establish the *mens rea* for hit and run.

The Court of Appeal found flight to avoid criminal liability for driving a vehicle knowing it was stolen also fit within the scale of liability connected to the accident. ***“The object of the Code offence is to provide a penal incentive for a driver who is involved in an accident, regardless of whether they***

“The evidence on which [the accused] relies is that he fled the scene to avoid criminal liability for possession of a stolen vehicle. This is not evidence to the contrary. Rather, it is evidence that [the accused] intended to avoid criminal or civil liability from his care, charge, or control of the vehicle involved in the accident. Such an intent falls within the ambit of the mens rea established by the expression ‘intent to escape civil or criminal liability’ in s. 252(1).”

are at fault, to remain at the scene, provide their name and address, and offer assistance if another person appears to be injured or in need of assistance,” said Justice Bennett. *“The liability a driver seeks to evade is not narrowly construed as solely arising from the consequences of the accident itself, but must also encompass offences connected to the driving, such as impaired driving, driving while suspended, criminal negligence, and dangerous driving.”*

In this case, *“[the accused] did not want to be identified as the driver of the car, as he was knowingly in possession of a stolen automobile, and was driving it at the time he was involved in the accident,”* said Justice Bennett. *“His flight from the scene was to avoid criminal liability in connection with a vehicle he was driving at the time of the accident.”* So, even if the accused’s explanation that he fled the scene to avoid being found in a stolen vehicle was accepted, the presumption of intent would not have been rebutted. The accused’s appeal was dismissed and his conviction was upheld.

Supreme Court of Canada



A nine member panel of the Supreme Court rejected a further appeal by the accused. In a short oral judgement,

Chief Justice Wagner, speaking for the full court, stated:

[The accused] had control of a vehicle involved in an accident. He fled the scene without providing his name or address. In the absence of evidence to the contrary, this was proof of the requisite intent for the offence.

The evidence on which [the accused] relies is that he fled the scene to avoid criminal liability for possession of a stolen vehicle. This is not evidence to the contrary. Rather, it is evidence that [the accused] intended to avoid criminal or civil liability from his care, charge, or control of the vehicle involved in the accident. Such an intent falls within the ambit of the mens rea established by the expression “intent to escape civil or criminal liability” in s. 252(1).

The accused’s appeal was dismissed.

Complete case available at www.scc-csc.ca

Editor’s note: Additional facts taken from *R. v. Seipp*, 2015 BCCA 54

OFFICER’S COMMENTS DID NOT DENIGRATE COUNSEL

R. v. C.J.J., 2018 ABCA 7



After a stepfather found inappropriate text messages from the accused on his stepdaughter’s phone (victim 1), police were called. The accused was arrested by police and interviewed. The detective also had limited information about a conversation between the accused and another friend of victim 1. The accused was told of the charges related to victim 1 only. He was not told he would be questioned about communications with anyone else. During the lengthy interview the police focussed on the allegations involving victim 1. However, the accused was also asked six questions about victim 1’s friends, including whether he had communicated with her friends by phone and what he would have texted them. He confirmed he communicated with one friend but otherwise said

he had no recollection. The detective also acknowledged during the interview that the accused had spoken to a lawyer and that his lawyer told him not to say anything. The detective also made a few comments about the accused's lawyer's advice:

- "And I understand that. I fully respect that. But I mean I don't know what else you would expect them to say".
- "Okay, but at the same time that person's – that individual offering that advice isn't sitting in your chair with you currently, right"?
- "I'm just going to remind you ... that your lawyer's not the one that's sitting in this chair, facing these charges right now, okay? So if there's a way for you to explain this to me, I'm a reasonable guy, okay? There's nothing that says you have to walk out of here being charged with these offences".
- In response to a comment by the accused that the communications can be explained, and his lawyer will have the details: "well it's unfortunate that we have to spend – that you're going to have to spend that kind of money to, ah, get the truth out. But, hey, that's – that's your choice not mine".

Eight days later the detective received substantially more information about the accused's interactions with two more girls, friends of victim 1. Then, about two months later, the accused was arrested on offences related to the other two girls. This prompted several luring and sex related charges involving victim 1 and her two friends. They all between the ages of 13 and 15 years old.

Alberta Court of Queen's Bench



The accused argued that his statement was not admissible as evidence because the police breached his ss. 10(a) and (b) *Charter* rights. First, he was not aware of his full jeopardy. The police had failed to inform him of all the reasons for his detention as it related to friends of victim 1. Second, the detective denigrated his lawyer's advice such that it amounted to a s. 10(b) breach.

The judge, however, admitted the accused's statement. She found the focus of the initial interview was on the serious charges related to the accused's involvement with victim 1. Although a few questions were asked about contact with other friends, this line of questioning was dropped after the accused admitted to contact but could not remember the details. Nor was the accused charged with any offences related to those friends until after further investigation some months later.

As for the accused's characterization that the detective's statements were designed to undermine the accused's confidence in and relationship with his counsel, the judge found there was no belittling of or denigration of the accused's lawyer. In the judge's view, the detective was simply pointing out that the lawyer was not the one facing questions and that the detective was simply seeking the accused's side of the story. She concluded there was no evidence that these few comments did or would undermine the accused's confidence in his lawyer. The accused was convicted of several counts of luring and other sex related offences.

Alberta Court of Appeal



Among other things, the accused again argued that his rights under ss. 10(a) and (b) of the *Charter* had been breached. He contended that his statement to police should not have been admitted as evidence at trial. In his view, the investigator failed to inform him of all the reasons for his detention and the scope of his jeopardy, and failed to advise him of his right to counsel a second time when the investigation switched to a different offence. As well, he submitted that the interviewer breached his s. 10(b) rights by denigrating his lawyer's advice.

Jeopardy

The Court of Appeal found the trial judge did not err in finding the accused's s. 10(a) and (b) rights were not breached. The Appeal Court first noted:

"A change in the accused's jeopardy arises where the investigation takes a new and more serious turn as events unfold, and the advice of counsel may no longer be adequate to the actual jeopardy that the accused faces. In such circumstances, the detainee must be given a further opportunity to consult with counsel and obtain advice on the new situation."

A change in the accused's jeopardy arises where the investigation takes a new and more serious turn as events unfold, and the advice of counsel may no longer be adequate to the actual jeopardy that the accused faces. In such circumstances, the detainee must be given a further opportunity to consult with counsel and obtain advice on the new situation.
[reference omitted, para. 24]

However, the Court of Appeal recognized that *"not every exploratory question that touches on a different offence gives rise to a change in jeopardy that will require the police to reiterate an accused's right to counsel."* As for these circumstances, the initial interview dealt almost exclusively with the accused's relationship with victim 1. *"The limited questioning regarding her friends was not explored in the initial interview,"* said the Court of Appeal. *"Charges with respect to the other complainants were laid two months later. This was not a change in jeopardy that warranted a reiteration of the [accused's] right to counsel."* Thus, there was no s. 10(b) Charter violation.

Denigration of Counsel

In *R. v. Burlingham*, [1995] 2 SCR 206, the Supreme Court of Canada stated:

... s. 10(b) specifically prohibits the police... from belittling an accused's lawyer with the express goal or effect of undermining the accused's confidence in and relationship with defence counsel. It makes no sense for s 10(b) of the Charter to provide for the right to retain and instruct counsel if law enforcement authorities are able to undermine either an accused's confidence in his or her lawyer or the solicitor-client relationship.

In this case, the Court of Appeal noted that the comments in *Burlington* said to denigrate the

integrity of defence counsel were described as *"repeated disparaging comments made about defence counsel's loyalty, commitment, availability, as well as the amount of his legal fees"*. But here, the trial found that the comments made by the detective did not rise to the same level of denigrating counsel so as to constitute a breach of the accused's s. 10 rights. The trial judge did not err in rejecting the accused's characterization that the detective's statements were designed to undermine the accused's confidence in and relationship with his counsel.

The accused's appeal was dismissed.

Complete case available at www.canlii.org

REASONABLE GROUNDS NOT TO BE DETERMINED IN 'LEGAL LABORATORY'

R. v. Bui, 2018 ABCA 62



Two confidential informants told a police officer that an Asian male, larger in stature, was dealing cocaine. Both informants provided a description of the suspect's car (a Nissan Ultima) and license plate number. Though the officer relied mainly on the informants' handlers in assessing the reliability of the information, he knew that both informants were registered with this police department and, therefore, had undergone background checks to exclude individuals with a history of treachery or lying to police.

The officer ran the license plate number through the motor vehicle database. The license plate matched a 2012 white Nissan Altima registered to the accused. The database also provided the accused's address and a general physical description of him, which confirmed the accused

was of Asian descent. Over a four day period, two notable transactions were observed while the police monitored the accused's car and address. On the first day, the accused drove directly from his residence to a parking lot where an individual jogged up to the car and entered. A minute later, the individual exited the car and jogged to a nearby apartment building. The accused immediately drove away and returned to his residence. On the last day of surveillance, a very similar interaction occurred. The accused again drove directly from his residence to the same location. Upon arrival, an individual entered the car and interacted with the accused for about 30 seconds before returning to the building from which he came.

On this second occasion, the officer directed the accused's arrest. A search of his vehicle upon arrest revealed four packages of powdered cocaine, four packages of crack cocaine, two cell phones, and \$830 cash. No other drug paraphernalia was found in the car. Police then secured and executed a search warrant at the accused's residence where significant quantities of cocaine and paraphernalia for wholesale trafficking was found.

Alberta Court of Queen's Bench



The judge found that s. 495(1)(a) of the *Criminal Code* authorizes an arrest as long as the arresting officer subjectively believes there are reasonable and probable grounds on which to base the arrest and those grounds are justifiable from an objective point of view. The judge, in assessing the grounds for arrest, concluded that the confidential informant information, combined with the surveillance observations and the officer's extensive experience, was sufficient to ground the objective reasonableness for his subjective belief.

As for the search warrant of the accused's residence, the judge found the authorizing justice could have issued it. There were no inaccuracies, omissions, misleading statements or inappropriate inferences made by the affiant. The information about the informants addressed the currency and reliability of their tips, and the ITO noted where specific information was independently verifiable.

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...

And, even though the information did not expressly mention that a lack of drug paraphernalia found in the accused's vehicle was a reason to suspect that evidence of a drug crime would be found in the accused's home, the judge concluded that he was entitled to take into account the reasonable inferences available from the evidence. There were no *Charter* breaches and the accused was convicted of possessing cocaine for the purpose of trafficking and possessing proceeds of crime.

Alberta Court of Appeal



The accused argued that the arresting officer did not have reasonable and probable grounds for arresting him.

Further, the evidence discovered in the car upon arrest, if excised from the information to obtain the warrant, would result in insufficient evidence to support the search warrant. In his opinion, his rights under ss. 8 (search and seizure) and 9 (arbitrary detention) of the *Charter* were breached.

Arrest

The accused conceded that the officer directing the arrest subjectively had the necessary grounds. However, he argued that these grounds were not objectively reasonable. In his opinion, the police observations of the two suspected transactions were insufficient since the police never actually observed any hand-to-hand exchange of drugs. He claimed that the officer did not independently confirm the informants' reliability and did not have

“A court assessing the lawfulness of a warrantless arrest must not apply the governing principles as if they were constructed for application in a legal laboratory.”

confirmation that the accused was the Asian male to whom the informants referred. As such, the informants’ information could not be used to bolster the objective reasonableness of the grounds for arrest.

The Court of Appeal, however, disagreed. *“A court assessing the lawfulness of a warrantless arrest must not apply the governing principles as if they were constructed for application in a legal laboratory,”* said the Court of Appeal. *“In evaluating the lawfulness of an arrest under s. 495(1)(a) of the Criminal Code a court must ask if there are objectively verifiable facts that would have caused a reasonable person with the training and experience of the arrestor and who was aware of the information that caused the officer to make the arrest to conclude that the likelihood the arrestee committed a specific indictable offence was approaching the more-likely-than-not point on the scale of certainty.”*

In this case, an objective observer in the officer’s shoes would have considered:

- Two separate informants had reported that an Asian male driving a Nissan Altima with a specific license plate was selling cocaine;
- These informants were registered with the police – meaning they had undergone background checks to exclude individuals with a history of treachery or lying to police – and were considered credible by the two experienced officers acting as their handlers;
- The license plate number provided by the informants matched the described car;
- The accused was the registered owner of this car and broadly matched the physical description provided by the informants;
- On two occasions, officers observed the accused briefly interact with another person in

Officer’s Experience

The officer was an experienced police officer with over 10 years of experience in various roles tied to drug enforcement. He was a member of the Drug and Gang Enforcement Team and had received training, certification, and experience in covert surveillance and undercover operations for drug investigations. He had observed how drug transactions occur in real-time both as an operator making drug purchases and during surveillance of confirmed drug transactions.

a manner consistent with the way in which the officer had interacted with drug sellers when working as an undercover operative; and

- The officer’s knowledge, training and experience were also significant factors.

“Noncriminal aspects of an informants’ information which are corroborated by observation can be considered as part of ‘the totality of the circumstances’ forming reasonable grounds,” said the Appeal Court. *“Further, the police need not ‘confirm each detail in an informant’s tip so long as the sequence of events actually observed conforms sufficiently to the anticipated pattern to remove the possibility of innocent coincidence’.* In this case, the confidential informants’ information combined with the surveillance observations of the two transactions – which [the officer] believed to be drug transactions based on his significant prior experience – removed the possibility of innocent coincidence.”

Moreover, this was not a case where the police were dealing with a single anonymous informant. Rather, the information came from two known informants, both of whom were registered with the police. As well, there was evidence of the

“Noncriminal aspects of an informants’ information which are corroborated by observation can be considered as part of ‘the totality of the circumstances’”

informants' reliability both from their handlers and from some corroboration of the information they provided.

The trial judge made no error in his determination on the reasonable grounds standard being met. The totality of the confidential informant information, surveillance observations and the officer's experience satisfied the objective reasonableness of the officer's subjective belief.

Search Warrant

The accused also contended that, even if the arrest was based on reasonable grounds, the circumstances of the surveillance and the information to obtain were insufficient to connect any alleged drug activity to his residence. In his submission, the lack of drug paraphernalia in his vehicle was a factor connecting the drug activity to his residence but it was not mentioned as one of the affiant's considerations in the information to obtain.

The Court of Appeal concluded that the trial judge applied the proper test in determining whether the search warrant was properly granted:

The trial judge gave considerable thought to the defence submission that the evidence only supported an inference of drug activity confined to the [accused's] vehicle. He fairly characterized the links to the [accused's] residence as secondary, but noted the significance of the [accused] driving directly from his residence to the location where the transactions occurred without any intermediate stops. He observed that, for both transactions, the same pattern was apparent with the [accused] leaving his residence, travelling directly to the same location, and conducting a brief transaction with an unknown individual. The trial judge further observed that the authorizing justice had evidence of the [accused] regularly parking his vehicle at the residence and being seen taking items into the residence. [para. 21]

There were no ss. 8 or 9 *Charter* violations and the accused's appeal was dismissed.

Complete case available at www.canlii.org

ACCUSED EITHER HAS STANDING, OR NOT

R. v. Vickerson, 2018 BCCA 39



The accused was the target of a police investigation into drug trafficking. Two confidential informants told police that "Conrad" or "JT" (a known nickname of the accused) was selling drugs from his house. One of the informants had purchased drugs from him, and had seen drugs inside his house. Police conducted surveillance on the accused's home over a two month period and observed a number of people arriving, staying a few minutes and then leaving. On one occasion, they observed a truck arrive at the accused's residence and stop outside. A male from the truck (Mr. Schnarr) entered the accused's home, stayed for six minutes, got back into the truck and it drove away. The police stopped the truck and arrested its two occupants including Schnarr, a passenger. When asked by the arresting officer whether he had any weapons or drugs on him, Schnarr said he had drugs hidden in his crotch. Schnarr was handcuffed, read his *Charter* rights and transported to the police station where he was searched. Police found seven 0.5 gram bags of cocaine. As well, police searched Schnarr's mobile phone and found a series of text messages between Schnarr and "JT", along with call logs showing two short conversations between Schnarr and "JT" in the hour proceeding Schnarr's visit to the accused's residence.

The information from the confidential informants, the surveillance, and the evidence from Schnarr's arrest provided the grounds for a telewarrant to search the accused's home. When the police executed the search warrant, they arrested the accused and conducted a search of his person, his vehicle and his residence. As a result of their search, the police found cash, cocaine, MDMA, BZP and TFMPP, plastic baggies, empty pill capsules, a score sheet, pipes containing marihuana residue, a marihuana grinder, and glass pipes.

British Columbia Provincial Court



The accused sought a *voir dire* to determine the validity of the warrant and applied to have the evidence excluded. Among other things, the judge found the accused did not display a reasonable likelihood that the evidence from the confidential informants or the police observations would be excluded. Thus, there was no need to declare a *voir dire* regarding these issues. However, the judge declared a *voir dire* with respect to the evidence obtained through the search of the truck that left the accused's residence and was stopped by police. On this issue, the accused argued that the police did not have reasonable grounds to stop the truck, and arrest and search its occupants. He contended that the evidence of the seven 0.5 gram bags of cocaine, and the information on the mobile phone related to the alias "JT", was collected in violation of s. 8 of the *Charter* and should be excluded.

The judge found the arrest of Schnarr, the truck's occupant, lawful. The police had subjective and objective reasonable grounds to arrest the occupants of the truck based on the lead investigator's observations of the comings and goings to the accused's house during the investigation, which was informed by her experience in over 100 CDSA-related investigations. The seven 0.5-gram bags of cocaine found on Schnarr as an incident to arrest were obtained in compliance with s. 8 of the *Charter* and were therefore admissible and could be included in the ITO. And, even if the search of Schnarr was unlawful, the judge found the accused had no standing to raise a *Charter* issue respecting this evidence.

The text messages and call logs between Schnarr and the accused, however, were excluded and expunged from the ITO. In the judge's view, the accused retained a privacy interest in the "electronic communications", referring to the text messages and call log information located on Schnarr's mobile phone. The judge inferred that the accused had a subjective expectation of privacy and found that he had a right to privacy even

though the arrest of Schnarr (the mobile phone's owner) was lawful. Nevertheless, the judge ruled there were sufficient grounds to support the warrant. Since the warrant was lawful, there was no need to conduct a s. 24(2) *Charter* analysis. The accused was convicted on four counts of possessing illicit drugs for the purpose of trafficking.

British Columbia Court of Appeal



The accused contended, in part, that he had standing to challenge the grounds for the arrest and search of Schnarr (a third party) and that any evidence obtained as a result of the unlawful search should be excluded under s. 24(2) of the *Charter*. In his view, the trial judge erred by determining, after a *voir dire*, that the accused did not have standing to challenge the admissibility of evidence obtained in the unreasonable search of Schnarr. Furthermore, if the accused did have standing, he submitted that the judge erred in finding that the police had reasonable grounds to stop, arrest, and search Schnarr and admit into evidence the drugs found. As well, he asserted that the text messages and call logs, which the trial judge found were unlawfully obtained, ought to have led to the exclusion of all of the evidence under s. 24(2).

The Crown, on the other hand, argued that the accused had no standing to challenge the arrest and search of Schnarr, nor the search of the vehicle he was in. And, even if the accused did have standing, the Crown suggested that Schnarr's arrest and search were lawful anyways. The Crown also argued that the trial judge erred in excluding the evidence of the mobile phone text messages found in Schnarr's telephone.

Standing

"A person is granted standing to challenge a search and seizure in a criminal case when they have a reasonable expectation of privacy," said Justice Bennett, writing the unanimous Court of Appeal decision. ***"The factual matrix is all-important when assessing a reasonable expectation of privacy."*** In this case, the accused was

“Either one has standing or not. The standing analysis is founded on a reasonable expectation of privacy in the thing searched or seized. Standing to challenge the contents of a mobile phone does not translate into standing to challenge searches or seizures where there is no expectation of privacy.”

challenging the search of Schnarr and the seizure of drugs, text messages and call logs pursuant to that search. He even asserted that he should have been able to challenge all aspects of the searches as he had at least **“partial standing”** based on the search of the cellphone. But this partial standing notion was rejected:

Either one has standing or not. The standing analysis is founded on a reasonable expectation of privacy in the thing searched or seized. Standing to challenge the contents of a mobile phone does not translate into standing to challenge searches or seizures where there is no expectation of privacy. [para. 48]

Here, there was nothing to support the accused's submission that he had a reasonable expectation of privacy respecting the search of the vehicle, the arrest and search of Schnarr or the seizure of drugs and the mobile phone. The accused was not present when the vehicle was stopped and searched, he was not in possession or control of the vehicle, he did not own the property, nor was there any evidence he had an attachment to the property.

As for the search of the mobile phone and the discovery of the text messages, the Court of Appeal concluded that the trial judge misapplied the law respecting the privacy interest the sender of a text message may have in the message in the phone of its recipient:

The trial judge's holding that [the accused] had a reasonable expectation of privacy in text messages sent to a third party's mobile phone is grounded in his reading of Pelucco. In his voir dire ruling, the trial judge read Pelucco to “stand for the proposition [sic] the court must infer that the sender of a message has a reasonable expectation of privacy” with respect to messages found in the search of a third party's mobile phone, and thus he excluded the evidence of the text messages without any further analysis. [para. 51]

Although a majority of the Court of Appeal in *R. v. Pelucco*, 2015BCCA 370 found a **“a sender will ordinarily have a reasonable expectation that a text message will remain private in the hands of its recipient,”** whether a sender of a text message has a reasonable expectation of privacy in a received message depends on the totality of the circumstances. As a result, **“Pelucco does not stand for the proposition that the sender of a text message always has a reasonable expectation of privacy in that text message as stored on its recipient's mobile phone.”** This is consistent, Justice Bennett noted, with the recent Supreme Court of Canada decision of *R. v. Marakah*, 2017 SCC 59 where the majority stated, **“depending on the totality of the circumstances, text messages that have been sent and received may in some cases be protected under s. 8.”**

Moreover, the holding in *Pelucco* was inapplicable to situations where the police conduct a lawful search. In this case, the trial judge found Schnarr's arrest lawful. However, rather than considering whether the search of the mobile phone was a lawful search incidental to arrest, he found a breach simply because the accused had a reasonable expectation of privacy. Although the accused had standing to challenge the search of Schnarr's mobile phone, the trial judge failed to consider whether this was a valid search incidental to arrest. Whether or not the search of Schnarr's mobile phone was lawful as an incident to arrest did not need to be answered. The trial judge excluded the evidence of the text messages and the call logs from the ITO based on his misapplication of *Pelucco*, a decision that favoured the accused and therefore did not assist the accused on this appeal.

The accused's appeal was dismissed.

Complete case available at www.canlii.org

STANDARD CAUTION QUESTION BREACHED POLICE DUTY TO HOLD-OFF

R. v G.T.D., 2018 SCC 7



The accused was arrested for the sexual assault of his previous intimate partner. When he was arrested by police, an officer read the standard caution to him on the street. The officer informed the accused of his right to speak with a lawyer, the availability of free duty counsel, and the option of applying to Legal Aid:

I am arresting you for sexual assault and breach of a recognizance. You have the right to retain and instruct a lawyer without delay. This means that before we proceed with our investigation, you may call any lawyer you wish or a lawyer from a free legal advice service immediately. If you want to call a lawyer from a free legal advice service, we will provide you with a telephone, and you can call a toll free number for immediate legal advice. If you wish to contact any other lawyer, a telephone and telephone books will be provided to you. If you are charged with an offence, you may apply to Legal Aid for assistance.

The accused stated he understood and when asked if he wished to speak to a lawyer, the accused responded by stating that he wanted to consult counsel. The police then read a further standard caution. He was told:

You may be charged with sexual assault and breach. You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence. **Do you wish to say anything?**

The accused then immediately responded, "Yeah. Like a boss says I'm raping, I didn't do because I was thinking, like, since we are in a relationship, it's okay. I didn't think it would be a raping because we our two boys together." The accused was transported to the police station where he called a lawyer.

Alberta Provincial Court



The officer testified he read the text of the two cautions, which had been provided by his police department, in accordance with his training. The judge found there was no *Charter* breach respecting the accused's right to counsel. And, even if there was a breach, it was minor and the accused's statement was nevertheless admissible. The officer acted in good faith in reading the standard caution, there was minimal impact on the accused's rights, and the admission of this spontaneous and voluntary statement would not bring the administration of justice into disrepute. The accused was convicted of sexual assault.

Alberta Court of Appeal



The accused argued that once he indicated he wished to consult counsel, the police officer had an implementational duty under the *Charter* to hold off on any questions until he was given a chance to do so. In asking the question, "**Do you wish to say anything?**", the accused asserted the officer breached s. 10(b).

After reviewing the historical context of the police caution, a majority of the Court of Appeal found the positive question ("**Do you wish to say anything?**") breached the accused's right to counsel. Under s. 10(b), the Court of Appeal recognized there were three duties imposed on the police when arresting or detaining an accused:

1. to inform the detainee of their right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel (**INFORMATIONAL**);
2. if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances) (**IMPLEMENTATIONAL**); and
3. to refrain from eliciting evidence from the detainee until they have had that reasonable opportunity (except in cases of urgency or danger) (**IMPLEMENTATIONAL**).

How the courtroom questioning went

Q: ... So you understood that he wanted to speak to a lawyer?

A: Yes, sir.

Q: Which was his right upon detention, right?

A: Yes, sir.

Q: So your obligation was then to take him to a telephone at the station so he could make a call, right?

A: That's correct, sir, yes.

Q: Not question him any further, right?

A: That's correct, sir, and I did not.

Q: Well, you did. You asked him if he wanted to say something.

A: Well, I read the -- the standard caution, sir.

Q: Right. And it concluded with what words, the standard caution?

A: It concluded with: Do you wish to say anything? ...

Q: So your question, Do you want to say anything, I suggest was improper in the circumstances. Is that not your understanding of the law?

A: No, sir. In my experience and -- and by training, this -- the Charter Right to Counsel is read and then the standard caution is read, and then the replies are noted. I did not question [the accused].

Q: Well, you did. You said, Do you want to say anything?

A: Okay.

Q: That's a question, right?

A: I acknowledge, sir, that that is a question and that is printed in the standard caution which has been my practice for ten years to read after the Charter Right to Counsel.

Q: But once the person says they want to speak to a lawyer -- ... -- what is your obligation at that point? Are you able to continue questioning him or --

A: No, sir.

Q: -- is your obligation to take him to a phone?

A: And I did so, sir, yes. As soon as I took him to the station, he was given access to a working telephone.

Q: But you did question him before he was given access to a phone?

A: Okay. Are you asking if I ask -- if I read the standard caution, which I did.

Q: And then you said, Do you want to say anything?

A: Which is part of the standard caution, sir.

Q: Well, it is a question put to the accused, right?

A: Which is printed here which is -- from my training and my experience, what I do.

In this case, asking the question ("***Do you wish to say anything?***") after the accused had asserted a desire to contact counsel breached the third duty to "refrain from eliciting evidence". Even though the officer had no expectation that the accused would say anything at all and had no intention of following up if the accused remained silent, the question nonetheless amounted to a breach. "***Once the detained person asks to speak to counsel, the implementational duty on the police is to 'refrain from eliciting evidence',***" said majority. "***If nothing else, this wording risks prompting an incriminating response before the accused has had an opportunity to consult counsel. If this caution is to be used, the alternative ending 'Do you understand?' is the one that is consistent with the Charter.***" Despite the finding of a Charter breach, the majority would have admitted the accused's statement under s. 24(2). His appeal from conviction was dismissed.



Justice Veldhuis, in dissent, agreed the accused's s. 10(b) right had been violated. In her view, the open-ended question ("***Do you wish to say anything?***") breached the police duty to hold off eliciting evidence. "***The officer concluded by asking the [accused] whether he wanted to say anything,***" said Justice Veldhuis. "***Many, if not most, detainees would treat this concluding question as the arresting officer's invitation to respond to the allegations that led to their arrest.***" She would, however, have excluded the accused's statement as evidence, set aside his conviction and ordered a new trial.

Supreme Court of Canada



The accused again appealed arguing that his statement ought to have been excluded as evidence. A five member panel of the Supreme Court of Canada all agreed that the question ("***Do you wish to say anything?***") breached the accused's s. 10(b) Charter right. "***The right to counsel under s. 10(b) of the Charter obliges police to 'hold off from attempting to elicit incriminatory evidence from the detainee***

“Either one has standing or not. The standing analysis is founded on a reasonable expectation of privacy in the thing searched or seized. Standing to challenge the contents of a mobile phone does not translate into standing to challenge searches or seizures where there is no expectation of privacy.”

until he or she has had a reasonable opportunity to reach counsel’,” said Justice Brown in a short oral judgment. Asking, ***“Do you wish to say anything?”***, at the conclusion of the standard caution used by the police after the accused had already invoked his right to counsel, violated the police duty to “hold off” because it elicited a statement from the accused.



The Supreme Court, however, was divided on whether the breach in this case warranted the exclusion of the accused’s statement. Four justices found the statement should be excluded, substantially for the reasons of Justice Veldhuis at the Alberta Court of Appeal. The majority of the Supreme Court therefore excluded the accused’s statement, allowed the accused’s appeal and ordered a new trial.

Chief Justice Wagner, on the other hand, would have dismissed the appeal on the basis that the breach did not warrant the exclusion of the accused’s statement. In his view, the question was accompanied by clear information about the accused’s choice to speak to the police which attenuated the impact of the state conduct on the accused’s Charter-protected interests and the admission of the statement would not bring the administration of justice into disrepute.

Complete case available at www.scc-csc.ca

Editor’s note: Additional facts taken from *R. v. G.T.D.*, 2017 ABCA 274.

EXTERNAL LEARNING OPPORTUNITIES



11th National Symposium on Tech Crime and Electronic Evidence

March 2, 2018

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Click [here](#).

Courtroom Testimony: A Practical Skills Workshop for Police and Other Law Enforcement Professionals

March 2, 2018

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11th Annual Intensive Course on Drafting and Reviewing Search Warrants

March 5, 2018

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3rd National Symposium on Mental Disorder: Criminal Justice and Community Solutions

March 29, 2018

Join a top tier, multi-disciplinary faculty to explore the transformation of the criminal justice system and innovative community solutions in relation to mentally ill offenders.

Online Replay

Click [here](#).

National Symposium on Criminal Sexual Assault

April 21, 2018

An allegation of sexual assault raises unique challenges for lawyers, judges and investigators. In recent years, the justice system’s handling of these cases has come under sustained scrutiny. Positive outcomes in sexual offence cases are contingent on good education and best practices.

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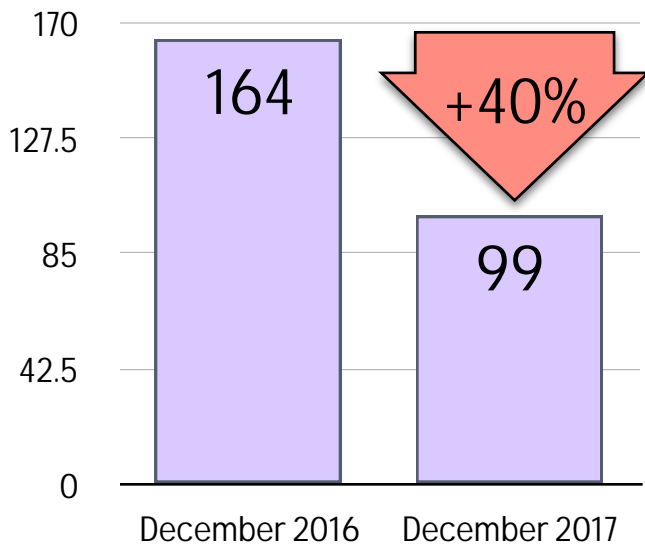
- Volume 17 Issue 1 - January/February 2017

Issue Highlights

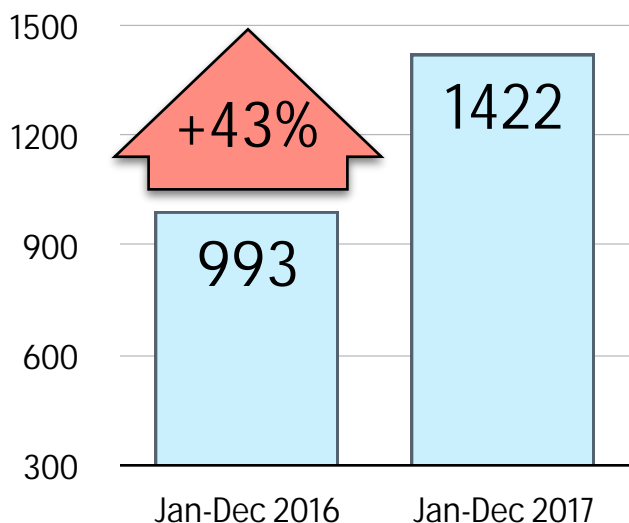
- Impracticability To Appear In Person Not The Same as Urgency in Getting Warrant
- Failure to Protect Informer's Identity Results in Large Damage Award
- No Detention, No Right to Counsel
- Third-Party Breaches Considered in s.24(2) Analysis
- Traffic Stop Valid Despite Dual Purpose
- Safety Questions On Investigative Detention Permissible
- Change in Jeopardy Required Second Chance to Consult Counsel
- No Need to Respond Unless Misunderstanding Of s.10(b) Rights Communicated
- External Learning Opportunities
- Intended Recipient of Electronic Message Did Not Intercept It

ILLICIT DRUG OVERDOSE DEATHS IN 2017

The Office of BC's Chief Coroner has released statistics for illicit drug overdose deaths in the province from **January 1, 2017 to December 31, 2017**. In December there were 99 suspected drug overdose deaths. This represents a 40% decrease over the number of deaths occurring in December 2016. This amounts to about three (3) people dying every day of the month in December.



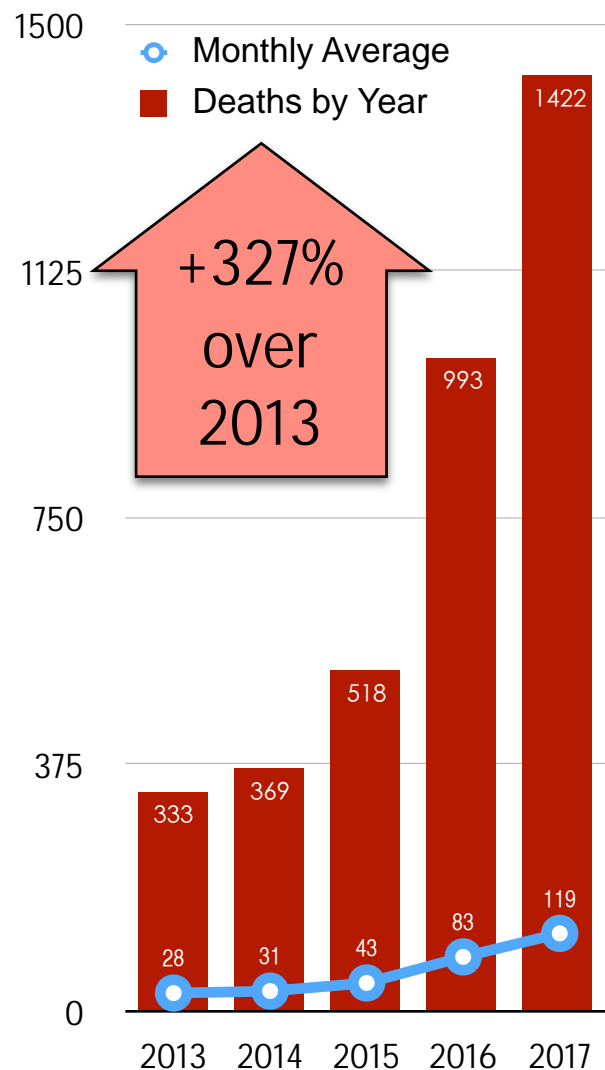
Despite the December decline in deaths, there were a total of **1,422** illicit drug overdose deaths in 2017. This is a **43%** increase over the same period last year.



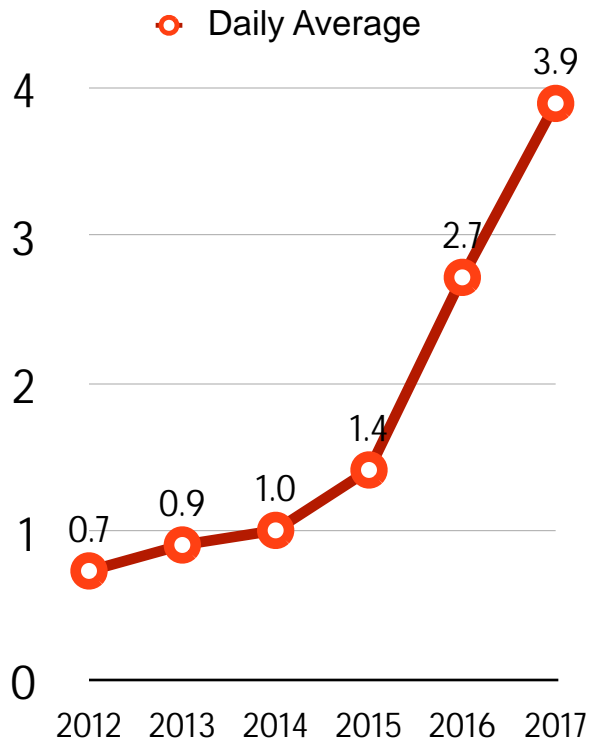
The **1,422** overdose deaths last year amounted to more than a **327%** over 2013. Moreover, the report attributes fentanyl laced drugs as accounting for the increase in deaths.

People aged 30-39 were the hardest hit in 2017 with **392** illicit drug overdose deaths followed by 40-49 year-olds at **334** deaths and 50-59 year-olds at **286** deaths. Vancouver had the most deaths at **358** followed by Surrey (**174**), Victoria (**91**), Kelowna (**75**), Nanaimo (**51**) and Abbotsford (**40**).

Males continue to die at almost a **5:1** ratio compared to females. In 2017, **1,173** males had died while there were **249** female deaths.



illicit Drug Overdose Deaths



The data indicates that most illicit drug overdose deaths (**87.8%**) occurred inside while **11.4%** occurred outside. For eleven (11) deaths, the location was unknown.

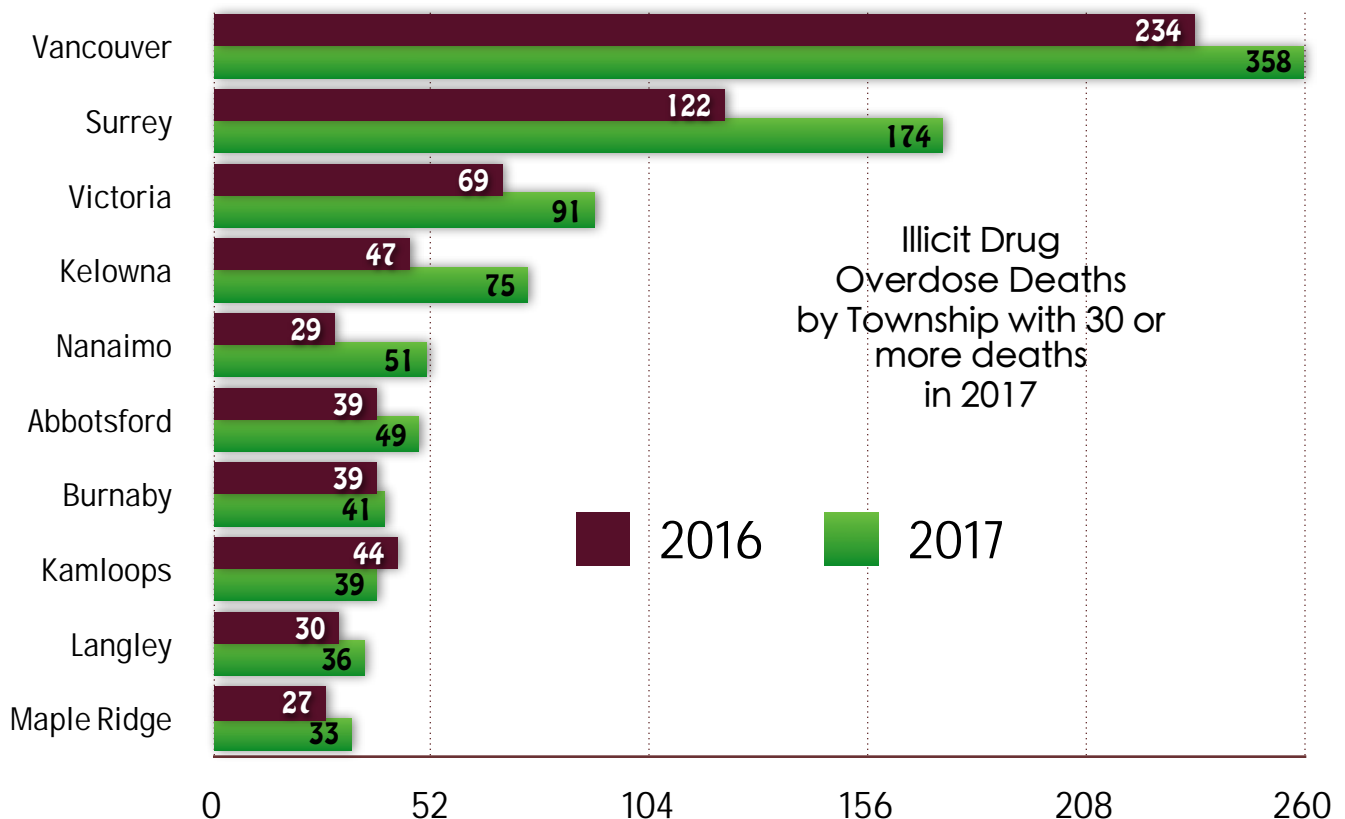
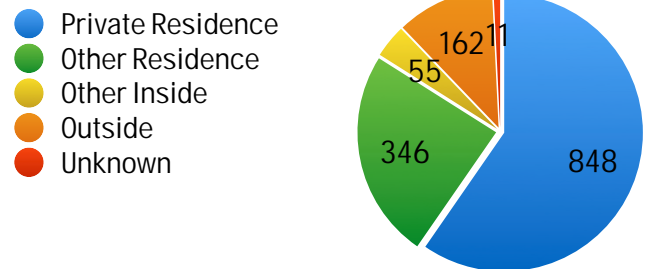
“**Private residence**” includes residences, driveways, garages, trailer homes.

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

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

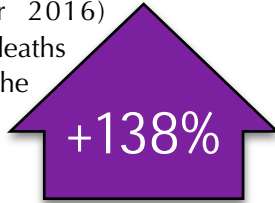
“**Outside**” includes vehicles, streets, sidewalks, parks, wooded areas, campgrounds and parking lots.

Deaths by location: Jan-Oct 2017



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 21 months preceding the declaration (Jul 2014-Mar 2016) totaled **921**. The number of deaths in the 21 months following the declaration (April 2016-Dec 2017) totaled **2,193**. This is an increase of **138%**.

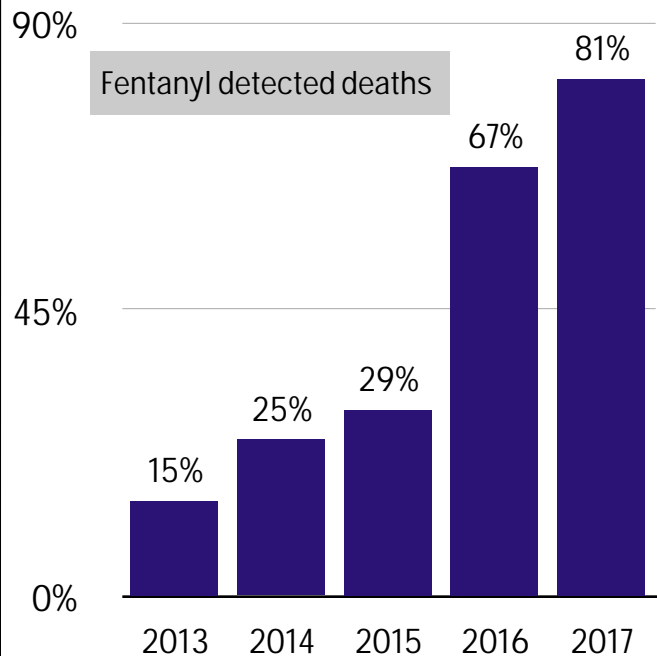


TYPES OF DRUGS

The top four detected drugs relevant to illicit drug overdose deaths from 2016 and 2017 were fentanyl, which was detected in **70.1%** of deaths, cocaine (**47.5%**), methamphetamine/amphetamine (**33.1%**), and heroin (**30.7%**).

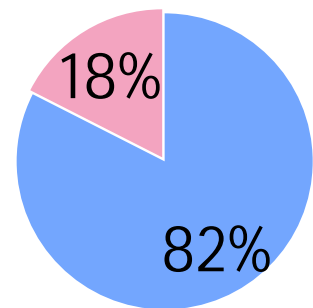
In 2017, fentanyl was detected in **81%** (1,156) of illicit drug overdose deaths. In 2016 fentanyl was detected in 670 deaths, or **67%**.

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.



Deaths by gender

● Males
● Females



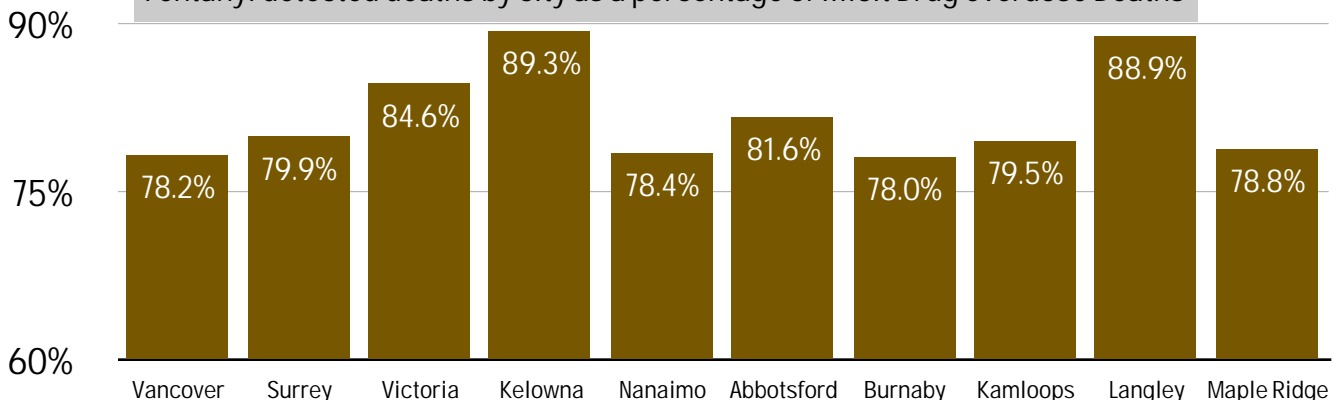
Sources:

-Illicit Drug Overdose Deaths in BC - January 1, 2007 to December 31, 2017.

-Fentanyl Detected Illicit Drug Overdose Deaths, January 1, 2012 to December 31, 2017.

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

Fentanyl detected deaths by city as a percentage of Illicit Drug Overdose Deaths



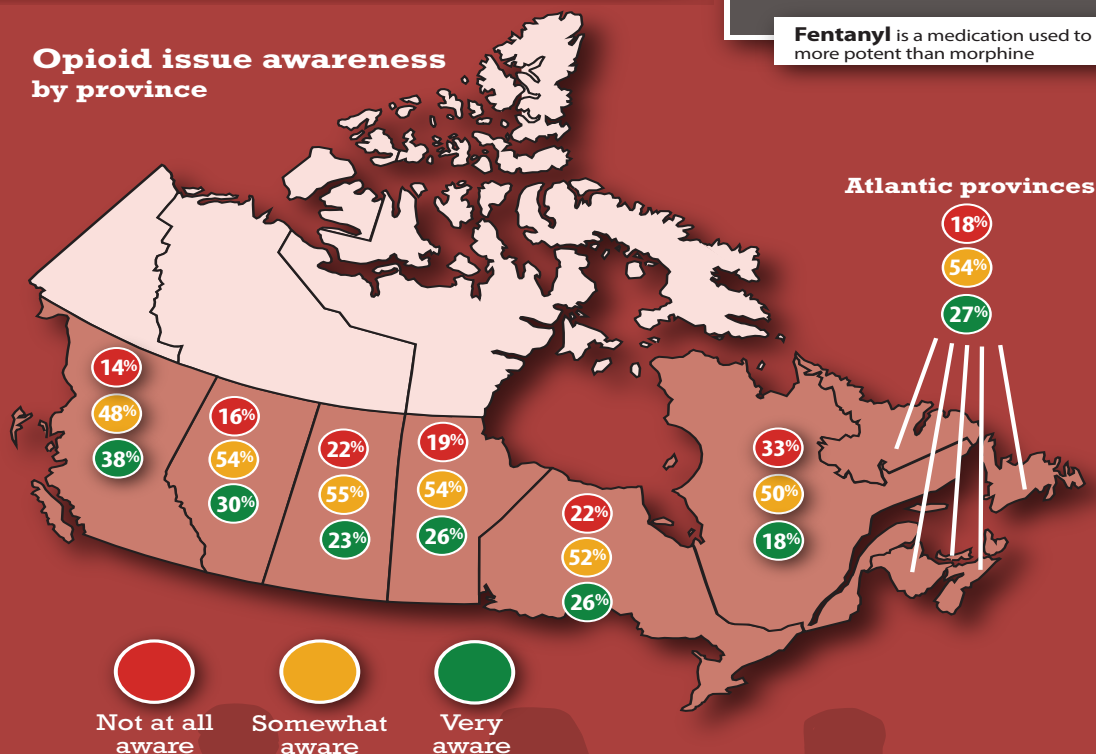
OPIOID awareness in Canada

Opioids are typically pain medications, mostly available by prescription. Some of the most commonly known opioids are fentanyl, OxyContin, morphine and codeine.

3 in 10 Canadians aged 18 and over reported using some form of opioid in the past 5 years.

Of those, more than **1 in 4** have left-over opioids being stored in the home.

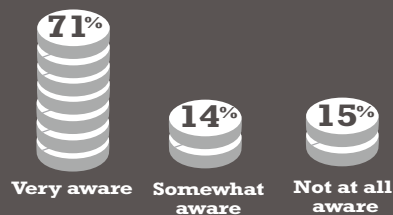
Opioid issue awareness by province



Did you know?

Drugs obtained illegally or on the street have the potential to contain

fentanyl.



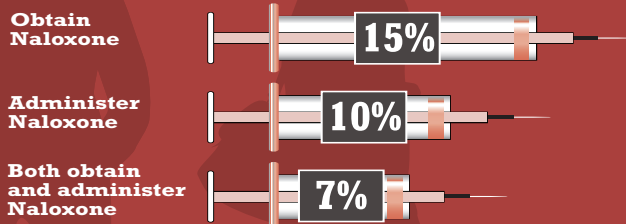
Fentanyl is a medication used to relieve pain that is about 100 times more potent than morphine

Level of awareness

Adverse effects of mixing opioids with other medication



Percentage of Canadians who agreed they would know how to:



Naloxone is a life-saving medication that can stop or reverse an opioid overdose, however, the results are temporary

I would recognize the signs of an opioid overdose



For further information on opioids, please visit the following website:
www.canada.ca/opioids

EYEWITNESS IDENTIFICATION



When considering whether eyewitness identification of an accused has been proven, a court will consider the following factors:

- knowledge of the accused where the person identified was a stranger or witness;
- whether the circumstances of the identification are conducive to accurate identification, such as whether the witness had a clear view, lighting etc.;
- whether pre-trial identification processes, such as a photo-lineup, were flawed;
- whether there was other evidence tending to confirm or support the identification evidence; and
- whether the witness had a bias. (*R. v. O'Keefe*, 2018 NLCA 11)

APPEAL COURT HAS NO JURISDICTION TO STAY DNA ORDER



British Columbia's top court has ruled that it has no power to stay a DNA order pending the disposition of an appeal. The accused had been convicted of aggravated assault and was sentenced to 18 months' incarceration. The sentencing judge also ordered the accused provide a DNA sample under s. 487.051 of the *Criminal Code* because aggravated assault is a primary designated offence. When the accused filed an appeal against his conviction and sentence he wanted the DNA order stayed pending the outcome of his appeal.

A unanimous British Columbia Court of Appeal, however, ruled it did not have the jurisdiction to stay the DNA order since there was no specific power given to a court to grant the stay requested in this case. ***"In my view, a stay of a DNA order does not constitute the kind of ancillary or incidental order that the Court is empowered to make under the Court of Appeal Act,"*** said Justice

Fisher. ***"This is a provincial statute that cannot confer substantive jurisdiction on the Court or on a single justice in criminal matters."*** (*R. v. Kaplan*, 2018 BCCA 31)

DESIRE FOR PRIVACY DIFFERENT THAN EXPECTATION OF PRIVACY



Two accused drug makers obtained possession of a secluded residential property by means of an elaborate fraud. They paid a substantial premium to ensure there was no paper trail connecting them to the property. They then immediately converted the property to a meth lab. When the police executed a search warrant at the house, the two accused tried to flee but were arrested. The house was contaminated and had to be destroyed.

Both accused tried to have the evidence excluded at their trial, arguing their rights under s. 8 of the *Charter* had been breached. Ontario's highest court, however, upheld a trial judge's ruling that the accused did not have a reasonable expectation of privacy in the house and therefore no standing to argue a s. 8 breach. Their connection to the property was tenuous. They obtained the house by fraud and did not use it as a residence. Instead, they used it as a meth lab. Further, they did not have the legal right to admit or exclude others. One of the accused even said that if someone arrived and insisted on staying and calling the police, he would have fled.

"'Expectation' can be ambiguous between two meanings, only one of which is relevant to s. 8 analysis," said the Court of Appeal. ***"In the first sense, a person has an expectation of privacy where he desires privacy and believes it is unlikely, as a matter of fact, that he will be disturbed. In the second sense, a person has an expectation of privacy where she believes she will be undisturbed because she is entitled to be left undisturbed. In s. 8 jurisprudence, subjective expectation is used in this latter sense."*** (*R. v. Van Duong*, 2018 ONCA 115)



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