JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

"They Are Our Heroes. We Shall Not Forget Them."

inscription on Canada's Police and Peace Officers' Memorial, Ottawa

See page 45 for BC's Memorial

Canadian Police and Peace Officers' 41st Annual Memorial Service

September 30, 2018
Parliament Hill
Ottawa, Ontario

Le 41e service commémoratif annuel des policiers et des agents de la paix canadiens

Le 30 septembre 2018
Colline du Parlement
Ottawa (Ontario)

THE MEMORIAL LA COMMÉMORATION

Highlights In This Issue

National Library of Canada Cataloguing in Publication Data

Main entry under title:

In service: 10-8. -- Vol. 1, no. 1 (June 2001) Monthly

Title from caption.

"A newsletter devoted to operational police officers across British Columbia."

ISSN 1705-5717 = In service, 10-8

1. Police - British Columbia - Periodicals. 2. Police - Legal status, laws, etc. - Canada - Cases - Periodicals. I. Justice Institute of British Columbia. Police Academy. II. Title: In service, 10-8. III. Title: In service, ten-eight.

Unless otherwise noted all articles are authored by Mike Novakowski, MA, LLM. 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.

UNITED NATIONS INTERNATIONAL DAY AGAINST DRUG ABUSE & ILLICIT TRAFFICKING

June 26, 2018

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.

The bully-proof workplace: essential strategies, tips, and scripts for dealing with the office sociopath.

Peter J. Dean, MS, PhD, & Molly D. Shepard, MS, MSM.

New York : McGraw-Hill, Education, 2017.

HF 5549.5 E43 D426 2017

Busted: an illustrated history of drug prohibition in Canada.

Susan Boyd.

Winnipeg: Fernwood Publishing, 2017.

HV 5840 C2 B69 2017

Collisions in the digital paradigm: law and rule-making in the internet age.

David Harvey.

Oxford; Portand: Hart Publishing, 2017.

K 4240 H36 2017

Ctrl + Z: the right to be forgotten.

Meg Leta Jones.

New York; London: New York University Press, 2016.

K 3264 C65 J66 2016

Cyber frauds, scams and their victims.

Mark Button & Cassandra Cross.

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

HV 6773 B87 2017

The dynamics of criminological research.

Jennifer Schulenberg.

Don Mills: Oxford University Press, 2016.

HV 6024.5 S383 2016

Improving professional learning: twelve strategies to enhance performance.

Alan B. Knox, foreword by Ronald M. Cervero.

Sterling: Stylus Publishing, LLC, 2016.

LC 1059 K66 2016

In an unspoken voice: how the body releases trauma and restores goodness

Peter A. Levine ; foreword by Gabor Maté.

Berkeley: North Atlantic Books, 2010.

RC 552 T7 L483 2010

The learner-centered curriculum: design and implementation.

Roxanne Cullen, Michael Harris, Reinhold R. Hill; Maryellen Weimer, Consulting Editor.

San Francisco: Jossey-Bass, 2012.

LB 2361.5 C85 2012

Local government in Canada.

C. Richard Tindal, Susan Nobes Tindal, Kennedy Stewart & Patrick J. Smith.

Toronto: Nelson Education, 2017

JS 1709 T55 2016

Open source leadership: reinventing management when there's no more business as usual.

Rajeev Peshawaria.

New York: McGraw-Hill Education, 2018.

HD 57.7 P469 2018

Out of our minds: the power of being creative.

Sir Ken Robinson, PhD.

West Sussex: Capstone, a Wiley brand, 2017.

BF 408 R635 2017

Streetdrugs: a drug identification guide.

Long Lake: Publishers Group West, 2018.

RM 316 S775 2018

Successful manager's handbook: develop yourself, coach others.

Susan H. Gebelein [and others] and the consultants of PDI Ninth House.

Minneapolis: PDI Ninth House; Roswell: PreVisor, 2010.

HD 58.9 S833 2010

CAPE 2018

C.A.P.E.
Canadian Association of Police Educators

A.C.I.F.P.
Association canadienne des intervenants en formation policiere

Canadian Association of Police Educators

PRACADEMICS:

Bridging the Gap Between Academia & Police Training

June 25-29, 2018

www.cape-educators.ca

Pacific Region Training Centre
Chilliwack, British Columbia

More info on p. 34

NO AUTOMATIC RIGHT TO SPEAK TO LAWYER AGAIN

R. v. Watson, 2018 BCCA 74

British Columbia (BC) police were informed by United States (US) investigators that pornographic images had been uploaded to a Microsoft storage service by a user associated with a BC address. BC police then sought and obtained a warrant to search the BC address associated with the uploads. The accused was home when the police arrived and executed the warrant. BC police seized 49 exhibits including a USB containing 663 suspected child pornography images. Three weeks later the accused was arrested at his home. By then, he had already retained a lawyer.

After being informed of the charges, the accused immediately told police he wanted to speak to his lawyer. Nevertheless, the police gave him the standard *Charter* advice and warning. He was transported to the police station where he spoke to a lawyer. After he spoke to a lawyer, the accused was interviewed, for about four hours. Before commencing the interview, the officer confirmed that the accused had spoken to his lawyer and understood the advice he had been given. Part way through the interview, the accused asked to speak to his lawyer again but the request was denied because he had already spoken to his lawyer. The accused stated that his lawyer had told him not to discuss anything with the police. The police officer told him "that was fine" but the police officer would continue talking.

During the interview, the accused asserted his right to silence a number of times and said his lawyer had told him not to discuss anything with the police. He said he knew that anything he said could be used against him. In the course of the interview the accused made several admissions, including:

- He was the owner and only user of the computer the police had seized;
- On the morning of the search he had been looking at pictures on a USB the police had found inserted into his computer desktop tower;
- He knew the images he collected were illegal but that he could not stop himself from looking at them; and
- He agreed with the police officer that the only reason to keep such a collection was for sexual gratification.

The interview was audio and video taped,

British Columbia Provincial Court

The judge found, among other things, that the accused's statement was admissible. First, the judge found the statement was freely and voluntarily given. There was no atmosphere of oppression during the interview nor were any inducements made. The accused was articulate, understood his right to remain silent and had an operating mind at the time he made his statement. Second, the judge found there was no s. 10(b) *Charter* breach. Even though the accused had expressed a wish to speak with counsel again part way through the interview, he had a right to do so only if there were changed circumstances resulting from new procedures, a change in the jeopardy he faced, or a reason to believe that the first information that he had received was deficient. Since none of these factors arose, the judge concluded the police complied with s. 10(b). The accused was convicted of possessing child pornography.

British Columbia Court of Appeal

The accused appealed his conviction arguing, among other things, that the trial judge erred in admitting his statement. Justice Saunders, speaking for the unanimous Appeal Court, disagreed.

The accused's statement was voluntary and did not breach s. 7. The interview was not oppressive. None of the officer's statements were coercive, threatening, or offered an inducement. Nor was the accused confused about the subject matter of the interview.

With respect to s. 10(b), the Court of Appeal found there were no changes in circumstances as described by the Supreme Court of Canada in *R. v. Sinclair*, 2010 SCC 35, such that the police were obligated to provide the accused with a reasonable opportunity to consult counsel again. Justice Saunders stated:

> [T]here were no new procedures involving [the accused]; no change to the jeopardy he was facing; and no reason to believe that [the accused] had not understood his initial legal advice. In particular, the judge's conclusion that [the accused] understood his right to remain silent throughout the interview negates his submission of confusion; no additional charges were layered into the interview that were not first mentioned to him at its beginning; no further investigative methods or other matters were employed that would have engaged his right to consult a lawyer again. [para. 15]

The trial judge did not err in admitting the accused's statement and his appeal was dismissed.

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

Renewed Right to Counsel Revisited

Detainees should be given an opportunity to speak to a lawyer again where there is a change in circumstances (*R. v. Sinclair*, 2010 SCC 35) such as:

1. New "non-routine" procedures involving the detainee which do not generally fall within the expectation of the advising lawyer at the time of the initial consultation (eg. participation in a physical lineup or polygraph).
   - ➡ Recording arrestee's voice during interview for later voice comparison is not a new "non-routine" procedure (*R. v. Wu*, 2010 ABCA 337).
   - ➡ Participating in a re-enactment is not a new "non-routine" procedure. A re-enactment is nothing more than a statement by conduct (*R. v. Ashmore*, 2011 BCCA 18 leave to appeal to SCC refused, [2011] SCCA No 280).
2. A change in the jeopardy facing the detainee (the investigation takes a new and more serious turn as events unfold)
   - ➡ The gradual or progressive revelation of incriminating evidence does not, without more, give rise to a renewed right to counsel. (*R. v. Ashmore*, 2011 BCCA 18 leave to appeal to SCC refused, [2011] SCCA No 280).
   - ➡ The police practice of disclosing information, be it true or false, to encourage a detainee to talk does not, without more, re-trigger s. 10(b) rights (*R. v. Ashmore*, 2011 BCCA 18 leave to appeal to SCC refused, [2011] SCCA No 280).
3. There is reason to question the detainee's understanding of their s. 10(b) right to counsel.

"[T]here were no new procedures involving [the accused]; no change to the jeopardy he was facing; and no reason to believe that [he] had not understood his initial legal advice ...; no additional charges were layered into the interview that were not first mentioned to him at its beginning; no further investigative methods or other matters were employed that would have engaged his right to consult a lawyer again."

VAGUE CHILD WELFARE CONCERN DID NOT JUSTIFY ENTRY

R. v. McMahon, 2018 SKCA 26,

Police received information from a Mobile Crisis Unit (MCU) about an anonymous tip the Unit received concerning the well-being of the accused's children. The tipster stated that the children were not being properly fed and the home had poor living conditions. The MCU requested the RCMP to "go and just take a look, find out what things were like and report back to them". Two officers, a corporal and a constable, attended the accused's home. When they pulled into the yard, the accused exited her house and greeted the officers. The corporal told the accused about the anonymous tip and the purpose for the police visit. The accused asked for a few moments to "clean up" her home before police entered. This request was denied, the corporal explaining it would be inconsistent with the purpose of a spot check.

The accused then turned, opened the door, and entered her residence. Both officers followed her inside and, when they entered, detected the odour of burnt marihuana. The officers walked up the entrance stairs to an open living room and kitchen area where they encountered two other adults and three young children. Police noticed a mason jar containing marihuana bud on top of a microwave stand. The adults, including the accused, were immediately arrested for possessing a controlled substance and the children taken into care. In the course of retrieving a pair of socks for one of the children, police noticed a number of marihuana plants in a separate room in the basement. The residence was secured and a warrant obtained to search the accused's home and out-buildings. Upon executing the warrant, police seized 191 marihuana plants. The accused was charged with unlawfully producing marihuana, possessing it for the purpose of trafficking, and unlawful storage of a firearm.

Saskatchewan Provincial Court

The officer testified the reason for entering the accused's house was to check on the welfare of the children and the conditions of the home. It also was revealed that the occurrence report generated by police dispatch had referenced possible "drug use" in relation to the accused but this "drug use" allegation had not found its way into the search warrant's information to obtain (ITO).

The judge went on to find that the police breached the accused's s. 8 *Charter* rights. In his view, the police were present at the accused's home merely to inquire into the well-being of the children and the anonymous tip to MCU did not constitute reasonable grounds to enter the home. Although the police were entitled to approach the house under the implied licence doctrine and ask the accused questions, the police exceeded its scope when they entered the home.

This warrantless entry was presumptively unreasonable, a presumption the Crown failed to rebut. First, the judge found the accused had not consented to the entry of her home. Second, the police were not acting under their common law duty to protect life and safety; the police did not believe that the lives or safety of the children were in danger. Rather, the corporal was only acting on a vague and anonymous tip. The officer's observations made in the course of the police entry were excised from the ITO and, without them, the warrant should not have been issued. The warrantless, non-consensual, non-urgent search of

the accused's residence was unreasonable. The judge went on to exclude the evidence under s. 24(2) and dismissed all charges.

Saskatchewan Court of Appeal

The Crown appealed the trial judge's ruling arguing he erred in his analysis of the police officers' authority to enter the accused's home. In the Crown's view, there were three legitimate basis' for police entry: (1) Manitoba's *Child and Family Services Act* (*CFSA*); (2) consent; and (3) the common law police duty to preserve peace, prevent crime and protect life and safety.

MANITOBA's *CFSA*

The Crown submitted that the duty to investigate imposed on police under the *CFSA* implicitly authorized entry into a private dwelling, without judicial authorization, in order to investigate whether the children in the home were in need of protection. In the Crown's opinion, a warrantless entry in a non-emergency situation is an implied and necessary off-shoot of the "duty to investigate" imposed by s. 13. Or, in the alternative, the Crown suggested s. 13.1 implicitly authorized police entry when a parent does not expressly refuse entry.

The Court of Appeal considered several *CFSA* sections.

- Under s. 13, an officer is obligated to investigate information they receive if, in the opinion of the officer, reasonable grounds exists to believe that a child is in need of protection.
- Section 13.1 authorizes entry into a private dwelling with a warrant provided, among other things, an officer has reasonable grounds to believe that a child may be in need of protection and a person refuses to give the peace officer access to the child.
- Section 17 authorizes a warrantless intervention on an exigent basis provided the officer has reasonable and probable grounds to believe that a child is both in need of protection and at risk of serious harm.
- The apprehension of a child by police is an interim, highly-intrusive measure that is disruptive to the parent/child relationship and considered a remedy of last resort.
- There was nothing in the *CFSA* that expressly authorizes an officer to enter a private dwelling for the purpose of conducting an investigation.

Even if the Crown's argument that the s. 13 duty on officers to investigate a child protection concern implicitly authorized entry, the officer would first need to be of the opinion that there were reasonable grounds to believe that a child was in need of protection. Here, however, the corporal did not subjectively believe the accused's children were in need of protection. ***"At no place in her testimony did [the corporal] identify the basis or foundation for her belief that [the accused's] children were in need of protection, apart from reference to the anonymous tip (which incidentally alluded to the presence of drugs),"*** said Justice Schwann, authoring the Court of Appeal's opinion. ***"In her mind, the 'check' was required to firstly determine if the children were in need of protection. At no point did [she] articulate any discernible fact(s) that she relied on to support a basis to believe the children were in need of protection, apart from the anonymous tip."*** Further, even if the corporal possessed a subjective belief, it was not objectively reasonable. ***"There was simply no evidence of any confirmatory investigation having been done by Mobile Crisis or, for that matter, [the corporal] to substantiate the reliability of the information provided by the anonymous source,"*** said Justice Schwann.

The trial judge did not err in concluding that the officer did not subjectively believe the accused's children were in need of protection or that any subjective belief would not have been objectively reasonable. Without reasonable grounds, s. 13 was not engaged and therefore there was no corresponding statutory duty imposed on police to investigate. This undermined any "implied power of entry" and there was no need for the Court of Appeal to determine whether the duty to investigate under s. 13 impliedly authorized entry into a private dwelling without warrant.

CONSENT

The Crown contended that the accused's actions indicated that she waived her right to privacy and consented to police entry. First, the Crown suggested that since the accused did not actually refuse police entry, the police had an implied right to enter her home in pursuit of its child protection mandate. Second, the Crown opined that the criminal law informational components for consent did not apply in child protection cases. In its view, a less robust consent standard was warranted in child protection investigations. But the Court of appeal disagreed. ***"Criminal protections for an accused person must [not] be watered down or eschewed entirely simply because the impugned police action arose in a broad, unsubstantiated child protection context,"*** said Justice Schwann, describing a valid consent as follows:

> [F]or consent to be valid, at a minimum, two requirements are necessary: the consent must be voluntary and it must be informed. To be informed, individuals must have the requisite informational foundation to make their choice meaningful. This has been interpreted to mean that an individual must be made aware of his or her right to refuse consent, otherwise the consent is not voluntary. To be voluntary, the person must have a choice. [para. 83]

In this case, the trial judge found no evidence of a valid consent and the evidence amply supported this conclusion. The police did not take any steps to inform the accused of her right to refuse police entry or of their ability to get a warrant under s. 13.1 of the *CFSA* if she refused.

Although the accused was informed about the anonymous tip and the reason for police presence (to conduct a spot check on her house and children), the police made no effort to explain their authority under the *CFSA*, or to identify the accused's right to refuse police entry without a warrant. Neither was she made aware of the potential consequences of her choice. ***"The onus was on the Crown to demonstrate that [the accused's] consent was both voluntary and informed,"*** said Justice Schwann. ***"Knowledge of the options open to her and an appreciation of the consequences are essential components for a valid consent."*** The Crown had failed to meet this onus.

COMMON LAW DUTY

The Crown maintained that the common law police duty to preserve peace, prevent crime and protect life and safety authorized a forced entry. A warrantless entry can sometimes be authorized under the police common law duty to protect life and property provided the entry amounts to a justifiable use of police powers. This analysis requires a consideration of whether the entry was necessary in the circumstances and there were no less intrusive means available. After reviewing the case law concerning the police common law power to enter a residence to protect a person's life or safety, the Court of Appeal noted two important points. ***"First, the police duty to protect life is only engaged when it can be inferred that someone is or may be in some distress,"*** said Justice Schwann. ***"Second, the duty to protect life only justifies warrantless entry where the police reasonably believe the life or safety of someone in the home is in danger and the exercise of the power is both reasonable and necessary."***

In this case, the Court of Appeal agreed with the trial judge that the forced entry was not justified. There was no evidence the children were in distress, nor did the corporal personally think the children were in danger or that their lives or safety were a pressing concern. Rather, the police were on a fact-finding mission (investigating) for MCU to determine whether there was any validity to the anonymous tip. Since they did not have reasonable grounds to believe the children were in distress, entry into the home was not necessary. Furthermore, there were other less intrusive measures other than entry available to the police, such as reporting back to the MCU or seeking a warrant.

The trial judge's decision to exclude the evidence was upheld and the Crown's appeal was dismissed.

Complete case available at www.canlii.org

SFSTs CAN BE USED IN REGULATORY 24-HOUR DRIVING PROIBITION

Kumar v. British Columbia (Attorney General), 2018 BCCA 134

At about 11:30 pm a police officer stopped a truck after observing it straddling the fog line and make a wide left turn into the number two lane rather than the number one lane. When the vehicle was stopped, the officer smelled freshly burnt marijuana on the driver and in the cabin of the truck. The driver had a history of dug possession and, when the occupants were arrested, the officer found rolling papers and marihuana. From his observations at roadside, the officer suspected that the driver's ability to operate a motor vehicle was impaired by drugs. Another officer trained in Standard Field Sobriety Tests (SFSTs), otherwise known as physical coordination tests, was called to the stop to administer these tests. The driver failed all three tests.

- **Horizontal gaze nystagmus test:** the driver was unable to follow the visual stimulus with his eyes.
- **One leg stand test:** the driver lost balance after five seconds on the one leg stand test, and he counted 30 seconds in a 15 second time span.
- **Walk and turn test:** the driver lost balance standing in the heel-toe position while the walk and turn test was being explained and, instead of walking nine steps forward, turning around and walking nine steps back, he walked forward nine steps, then walked backwards.

Police also noted the driver was lethargic and slow in the way he moved, talked and conducted himself. As a result of the tests and observations made, the driver was served a 24-hour driving prohibition under s. 215(3) of BC's *Motor Vehicle Act* (*MVA*).

BY THE BOOK:

s. 215(3) BC's Motor Vehicle Act

s. 215(3) A peace officer may, at any time or place on a highway or industrial road if the peace officer has reasonable and probable grounds to believe that a driver's ability to drive a motor vehicle is affected by a drug, other than alcohol.

s. 254(2)(a) Criminal Code

s. 254(2) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle ... or had the care or control of a motor vehicle..., whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, ...:

(a) to perform forthwith physical coordination tests prescribed by regulation to enable the peace officer to determine whether a demand may be made under subsection (3) or (3.1) and, if necessary, to accompany the peace officer for that purpose.

Evaluation of Impaired Operation (Drugs and Alcohol) Regulations

s. 2 The physical coordination tests to be conducted under paragraph 254(2)(a) of the Criminal Code are the following standard field sobriety tests:

(a) the horizontal gaze nystagmus test;

(b) the walk-and-turn test; and

(c) the one-leg stand test.

British Columbia Supreme Court

The driver sought judicial review of the 24-hour prohibition imposed on him. He wanted an order quashing the prohibition and thereby expunging it from his record. He argued that the officer did not have the requisite grounds to impose the prohibition (ie. there were grounds to believe that

his ability to drive was affected by drugs). First, in the driver's view, the officer was not entitled to rely on the results of the SFST to form his grounds that his ability to drive was affected by a drug. He suggested SFSTs results administered under s. 254(2) of the *Criminal Code* could only be used by an officer for the purposes of forming grounds for making a demand under s. 254(3), not for forming grounds under the MVA for a prohibition. Second, even if the officer could use the SFST results, the driver argued that the officer did not have sufficient grounds to form his opinion.

The judge considered the purpose of s. 215 of the *MVA*. ***"The purpose of the section is to deter individuals from driving when their ability to drive a motor vehicle is impaired by drugs,"*** said the judge. ***"The focus is on the protection of society and the reduction of harm, rather than the individual rights of drivers."***

The judge concluded that the SFSTs were admissible as evidence for the purposes of the *MVA* prohibition that the driver's ability to operate a motor vehicle was impaired by a drug. In her view, just as the results of an Approved Screening Device (ASD) test authorized under the *Criminal Code* can be used to form the requisite grounds to issue a regulatory driving prohibition under the *MVA*, so too can the results of SFSTs.

The contention that the officer did not have sufficient grounds, even with the SFST results, was also rejected. The officer serving the prohibition had sufficient indicia of impairment to form reasonable and probable grounds to issue it. ***"It is common sense to conclude that when a person exhibits the symptoms observed by the officer, and performs the tests in the way the [driver] did, that he is not alert, able to respond quickly or follow directions, all of which would affect a driver's ability to safely operate a motor vehicle,"*** said the judge. The officer's decision to issue the 24-hour prohibition was reasonable. The driver's petition was dismissed.

British Columbia Court of Appeal

The driver appealed the dismissal of his judicial review petition. He again argued that the officer was not entitled to consider the results of the SFST when forming his reasonable and probable grounds to issue the *MVA* prohibition on the basis his ability to drive was affected by a drug, other than alcohol. He maintained that the SFST results could only be used for determining whether a demand may be made under the *Criminal Code* (ss. 254(3) or 254(3.1)), not for purposes of the *MVA*. He contended that the officer could only use powers expressly conferred by the *MVA* and the *MVA* made no mention of using SFSTs.

SFST Admissibility

Justice Saunders, authoring the Appeal Court's decision, rejected the accused's submission. The information lawfully gained from SFSTs could be used by the officer in exercising the statutory power given to police under the *MVA*. There was nothing in the *MVA* that restricted the use of the SFSTs to only a *Criminal Code* investigation:

> As to the effect of the Criminal Code provision, I observe that standard field sobriety tests are simply a regulated, and perhaps improved,

"[T]he standard field sobriety tests have a specific use in criminal proceedings but there is no prohibition on their use in the regulatory proceedings under the Motor Vehicle Act."

> source of observations long used by police officers in the exercise of their statutory and common law duties as police constables. While s. 254(2)(a), establishes the threshold for a demand for blood tests (subsection 3) and for an evaluation (subsection 3.1), I do not understand it to have limited the use by police of such tests for other purposes. That is, s. 254 may be the gateway to application of ss. 254(3) and (3.1) but nothing in s. 254 makes that use of the tests exclusive to those purposes. … [T]he standard field sobriety tests have a specific use in criminal proceedings but there is no prohibition on their use in the regulatory proceedings under the Motor Vehicle Act. [reference omitted, para. 14]

Just as the police are entitled to utilize the results of an ASD for the purpose of imposing a 24-hour prohibition, they can use SFSTs in forming their opinion for the purposes of s. 215 of the *MVA*.

The driver's appeal was dismissed.

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

Editor's Note: Additional facts taken from *Kumar v. British Columbia (Attorney General)*, 2017 BCSC 803. The British Columbia Court of Appeal also heard the appeal of *Dhillon v. British Columbia (Minister of Justice)*, 2018 BCCA 135 at the same time as *Kumar*. In *Dhillon*, the British Columbia Supreme Court also dismissed a petition for judicial review of a 24-hour driving prohibition imposed for driving a motor vehicle while affected by a drug. It was also argued that the SFST results could not be used to establish reasonable and probable grounds to issue the prohibition. The *Dhillon* appeal was also dismissed for the same reasons in *Kumar*.

UNITED NATIONS INTERNATIONAL YOUTH DAY

August 12, 2018

s. 10(a) HAS BOTH TEMPORAL & INFORMATIONAL ELEMENTS

R. v. Roberts, 2018 ONCA 411

After drinking heavily at a restaurant, the accused decided to drive home. She was a psychologist who also instructed at the police college. During her travels, she reached an intersection and pulled into the turning lane and waited at a green light for the oncoming traffic to pass. After several cars went by, she turned left into the path of an oncoming car that she did not see. Three young women in the other car were injured, two of them seriously. One of the young women injured in the collision called 9-1-1 after the collision.

On arrival, the attending police officer saw two damaged vehicles. After speaking to a paramedic already on scene, the officer believed the accused was the driver of one of the vehicles and that she could be impaired. The officer approached the accused and spoke to her as she stood on a grassy boulevard with two other women. The accused said she was not injured, but was unable to explain how the collision occurred. She had difficulty forming complete sentences during a conversation about the events. Noting a slight odour of an alcoholic beverage on the accused's breath, the officer asked her to walk back with him to his police car. The accused complied and the officer observed she appeared unsteady on her feet and she brushed into him twice during the walk on the dry, flat paved surface.

The officer asked the accused to get in the back seat of the police car. She was reluctant. He told her he had to investigate the motor vehicle collision and was concerned with her safety as cars were driving by his police car. She got into the back seat of the police vehicle. The officer now noted a distinct odour of an alcoholic beverage on the accused's breath. She went on to tell the officer she had just come from a restaurant where she drank two large beers. During the conversation her speech was slow, deliberate, and slightly slurred.

BY THE BOOK:

s. 199(1) Ontario's Highway Traffic Act

s. 199(1) Every person in charge of a motor vehicle or street car who is directly or indirectly involved in an accident shall, if the accident results in personal injuries or damage to property apparently exceeding the amount prescribed by regulation, report the accident forthwith to the nearest police officer and furnish him or her with the information concerning the accident as may be required by the officer under subsection (3).

The officer arrested the accused for "impaired operation of a motor vehicle." She was read her rights to counsel, cautioned and given a breath demand. The accused was taken to the police station where she was told that she had been arrested for impaired operation of a motor vehicle and the police were concerned about the injuries of the other people involved. She said she understood that if anyone was hurt she could be held criminally responsible for those injuries. After she spoke to duty counsel she was turned over to a qualified breath technician. He noted her eyes were bloodshot, her breath smelled of a strong odour of alcohol, her balance was slow and careful, and she appeared to have soiled and wet her pants. The accused ultimately provided breath samples of 211 mg% and 201 mg%. She was initially charged with impaired driving and driving over 80 mg%. A few days later those charges were upgraded to two counts of impaired driving causing bodily harm and two counts of causing bodily harm while driving over 80mg%.

Ontario Superior Court of Justice

The accused testified that she felt she had no choice but to comply with the officer's request for information. She argued, among other things, that she was not properly advised of the reasons for her detention under s. 10(a) of the *Charter*. Furthermore, the statements she made to the police could not be used because she believed she was statutorily compelled to provide them, a s. 7 *Charter* breach she claimed. She also submitted that without the statements she made, the police did not have reasonable grounds to arrest her, which breached her s. 9 *Charter* right not to be arbitrarily detained and her s. 8 *Charter* right to be free from unreasonable search or seizure. Finally, she contended that she should have been advised of her s. 10(b) rights before the officer conducted the informal sobriety test when he walked her back to his police car. In her view, the officer's observations during this walk were inadmissible as evidence of her impairment because she was conscripted to do it.

The judge rejected all of the accused's *Charter* arguments. He did not believe the accused felt statutorily compelled to speak to the officers. He found the reason the accused chose to speak to police was to curry favour with them by impressing them with her status as a police college instructor. The judge found the officer had the necessary grounds for arrest, including the statements the accused made and the officer's observations which were not conscripted evidence. In the judge's view, the officer asked the accused to accompany him to his police vehicle because of safety concerns, not for investigative purposes. A jury convicted the accused on two counts of impaired operation of a motor vehicle causing bodily harm and two counts of causing bodily harm while driving over 80 mg%. The last two charges were conditionally stayed.

Ontario Court of Appeal

The accused appealed her convictions maintaining, in part, that her statements to police were statutorily compelled, and that her rights under s. 10(a) had been breached. In her opinion, the responding officer failed to promptly notify her of the reason for her detention and failed to notify her of the actual extent of her jeopardy. As well, she submitted that the officer did not have reasonable grounds to arrest her without her inadmissible

"Breaches of s. 10(a) can be 'temporal' or 'informational'. A temporal breach occurs if an arrested or detained person is not promptly informed of the reasons for their detention. An 'informational' breach arises if the reasons for their detention are not adequately communicated."

statements. Finally, she claimed the trial judge erred in rejecting her assertion that the observations the officer made of her condition as she walked to the police car was conscripted evidence and could not be used as proof of her impairment in proving the offence.

Statements Statutorily Compelled?

Under s. 199(1) of Ontario's *Highway Traffic Act* a person in charge of a motor vehicle involved in an accident must report the accident and furnish information concerning the accident. Such compelled statements are not admissible in criminal proceedings for any purpose, including to incriminate an accused in relation to the contents of that statement or during a *Charter voir dire* to establish whether an officer had reasonable grounds to make an arrest. These statutorily compelled statements will be excluded from evidence. However, the accused had the burden of establishing, on a balance of probabilities, that she gave the report on the basis of an honest and reasonably held belief that she was required by law to report the accident to the person to whom the report was given.

The Court of Appeal concluded that the trial judge did not err in rejecting the accused's claim that she spoke to police out of a sense of statutory compulsion. ***"Where statutory compulsion is claimed, the issue is not simply whether the driver who has spoken knows of the legal duty to report an accident,"*** said Justice Paciocco for the Appeal Court. ***"The issue is whether the reason the driver spoke when they did was because they felt compelled by a legal obligation to do so. In this case, there was an ample evidentiary foundation for the trial judge's conclusion that [the accused's] engagement with the police was motivated not by a sense of legal obligation, but by a desire to influence their course of conduct by impressing them with her role as a police instructor. … The trial judge had ample reason for rejecting [the accused's] statutory compulsion claim on the balance of probabilities."***

Reasonable Grounds?

Since the Court of Appeal ruled the accused's statements were admissible, those statements, coupled with the other evidence in the case, provided reasonable grounds for the officer' s belief that the accused's ability to operate a motor vehicle was impaired by alcohol.

s. 10(a) – Reason for Detention

Under s. 10(a) of the *Charter* a person arrested or detained must be informed promptly of the reasons therefor. ***"Breaches of s. 10(a) can be 'temporal' or 'informational',"*** said Justice Paciocco. ***"A temporal breach occurs if an arrested or detained person is not promptly informed of the reasons for their detention. An 'informational' breach arises if the reasons for their detention are not adequately communicated."***

A Temporal Breach?

The accused submitted that the officer failed to advise her of the reason for her detention before she was asked to accompany him to the police car. Because this issue was not raised at trial, the Appeal Court decided it was not a valid ground for appeal. Nevertheless, the Appeal Court found the temporal violation argument would not have been accepted in any event:

> [The accused's] temporal breach argument was based primarily on the assumption that [she] was detained when [the officer] asked her to accompany him to the police vehicle. The evidence does not support this assumption.

> [The accused] was not physically restrained and she was under no legal obligation to comply with [the officer's] request. Although a reasonable person in [the accused's] position might well conclude that she had been deprived of her liberty when asked by a police officer to "walk with me back to my cruiser", [she] clearly did not subjectively believe that she was being detained. She testified:
>
> > *I understood he had an accident to investigate. I walked with him to the cruiser. I presumed that he'd be doing the same things to everybody else, the witnesses.*
>
> [The accused] was therefore not psychologically detained. On the evidence before the trial judge, this is one of those interactions between the police and members of the public, "even for investigative purposes", that does not constitute a detention within the meaning of the Charter. [reference omitted, para. 66-67]

Moreover, even if the accused was detained when she was asked to walk with the officer to his police car, the evidence would be admissible. ***"In my view it would damage the repute of the administration of justice to exclude the evidence under s. 24(2) of the Charter based on a notional, rather than actual, Charter breach,"*** said Justice Paciocco. ***"[The officer] cannot be expected to have advised [the accused] of the reason for her detention when she was not actually legally detained, and this notional breach would have no impact on her Charter protected interests."***

An Informational Breach?

The accused claimed that the officer failed to adequately inform her of the reason for her arrest because he only told her she was being arrested for the basic offence of impaired driving as opposed to actual reason (ie. the aggravated offence of impaired driving causing bodily harm). In her opinion, she should have been told she was being detained for impaired driving causing bodily harm from the outset. But this argument also was rejected, the Court of Appeal found the officer properly advised the accused of the reason for her detention and gave her adequate information relating to the extent of her jeopardy before she spoke to counsel:

> It is important to understand that s. 10(a) applies if a person is either arrested or detained. One who is being arrested is, of course, being detained. A person can, however, be detained without being arrested. The statuses overlap, but are not identical. If someone is being arrested, it is imperative that they are told of the reasons for their arrest. … [para. 73]

And further:

> Quite simply, if the police wants to use a person detained for one offence as a source of self-incriminating information relating to a different offence – including an aggravated form of the offence for which they have been detained – the police must tell the detainee this before proceeding. Indeed, they must tell the arrested detainee what they are being investigated for before they have been given their right to counsel. If the police interest in another offence arises after a detainee has been given an opportunity to consult counsel, the police must give the detainee another opportunity to consult counsel.
>
> […]
>
> Section 10(a) does not require that detainees be told of the technical charges they may ultimately face. A person will be properly

"Section 10(a) does not require that detainees be told of the technical charges they may ultimately face. A person will be properly advised of the reason for their detention if they are given information that is sufficiently clear and simple to enable them to understand the reason for their detention and the extent of their jeopardy."

> advised of the reason for their detention if they are given information that is sufficiently clear and simple to enable them to understand the reason for their detention and the extent of their jeopardy. [references omitted, para. 76, 78]

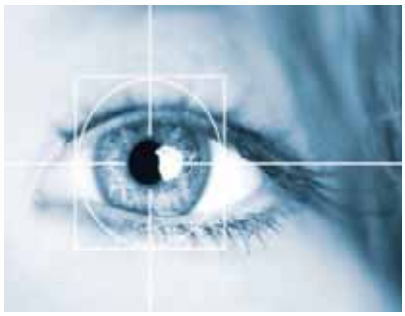
In this case, the officer complied with the s. 10(a) requirements. He had informed the accused of her potential jeopardy of the more serious offence before she spoke to a lawyer. Therefore, she had adequate information about her legal jeopardy to meaningfully exercise her right to counsel and before police took any steps to use her as a source of evidence:

> Specifically, [the officer] told [the accused] that she was being arrested for impaired operation of a motor vehicle. He was right to have done so, even if he suspected she may have committed the more aggravated offence of impaired driving causing bodily harm. On the evidence presented during the voir dire, [the officer] did not have grounds to arrest [the accused] for the aggravated offence. He knew there had been a personal injury accident, but he had no objective basis for concluding that she caused the accident. It was not immediately evident from the position or damage to the vehicles which driver, if any, had been at fault. An accident report had not yet been conducted. And [the accused] was unable to explain what happened. When he arrested her, [the officer] could have justifiably been criticized if he had told [the accused] she was being arrested for impaired driving causing bodily harm. The only grounds he had at the time related to the basic offence of impaired driving. [para. 74]

And further:

> Specifically, [the officer] told [the accused] shortly after they arrived at the station: "Okay. You've been arrested as a result of that, impaired operation of a motor vehicle. That's been really our biggest concern right now is making sure that those people are gonna be Okay." When she asked if she would be released in time to make her teaching engagement at the police college the next day, [the officer] stated: "Kim, I can't make any other assurance, okay. We have to worry about the injuries at the hospital, okay." When [the officer] attempted to make sure she understood what was happening, [the accused] said: "No, no. I understand that if anyone is hurt that, that crime…." In context, [the accused's] comment was a clear acknowledgment that she knew she could be held responsible criminally if injuries were caused. [para. 79]

Observations: Conscripted Evidence?



The accused's assertion that the officer's direction for her to walk to the police car in furtherance of his investigation was a conscripted sobriety test was dismissed. The observations made during this event could therefore be used as proof of guilt at trial. ***"Lawfully obtained evidence conscripted from a detainee through roadside sobriety testing is admissible to establish grounds for an arrest or detention, but such evidence is not admissible as proof of actual alcohol consumption or impairment,"*** said the Appeal Court. ***"According to the law of Ontario, evidence is conscripted in the relevant sense only if the act directed by the officer is, itself, a sobriety test."***

In this case, the accused was not "conscripted" to provide evidence when the officer asked her to walk to the car. ***"In Ontario, a motorist is conscripted within the meaning of the rule only if the directed act itself is a sobriety test,"*** said Justice Paciocco. ***"If an officer directs a motorist to get out of their vehicle as a sobriety test, the observations cannot be admitted at trial to prove impairment. If an officer directs a motorist to get out of the car not as a sobriety test, but to facilitate further investigation, including gathering other information about sobriety through questioning once the driver is outside of the car, observations made of the motorist while exiting the car are admissible at trial to prove***

impairment." Here, the accused had not established that the officer asked her to accompany him for the purpose of observing her sobriety as she walked. ***"Even though the evidence does support the conclusion that [the officer] intended to conduct further investigation once they had walked to the police car, this falls short of what is required in Ontario. There was simply no evidence at the Charter voir dire that [the officer] had directed [the accused] to walk so that he could test her sobriety while walking. [The accused] has not shown, therefore, that she was compelled to participate in roadside testing as she walked to the police vehicle."***

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

CAUTION CAUTION CAUTION CAUTION CAUTION CAUTION

ONTARIO v. B.C.

The Ontario Court of Appeal noted a difference in its law about "conscription" and BC's in relation to the admissibility of observations at trial to prove impairment.

"In British Columbia, a motorist is conscripted within the meaning of this rule if they are directed to act for the purpose of assessing their alcohol consumption, even if the directed act itself is not a sobriety test … [The British Columbia Court of Appeal] explained that if an officer directs a motorist to act for the purpose of investigating an alcohol offence, the motorist will have been conscripted, and observations made will not be available to prove guilt."

On the other hand, ***"in Ontario, a motorist is conscripted within the meaning of the rule only if the directed act itself is a sobriety test. … [The Ontario Court of Appeal] held that if an officer directs a motorist to get out of their vehicle as a sobriety test, the observations cannot be admitted at trial to prove impairment. If an officer directs a motorist to get out of the car not as a sobriety test, but to facilitate further investigation, including gathering other information about sobriety through questioning once the driver is outside of the car, observations made of the motorist while exiting the car are admissible at trial to prove impairment."***

What this Means

If an officer in Ontario asks a driver to step out of their vehicle for the purpose of investigating alcohol consumption and thereby observes the driver stumble when doing so, the observation is admissible as proof of impairment at trial unless it is established that the driver was directed to exit their car so that their manner of exiting the car could be used as a sobriety test (see *R. v. Brode*, 2012 ONCA 140). If an officer in BC asks a driver to step out of their vehicle for the purpose of investigating alcohol consumption, observations made of the driver getting out cannot be admitted at trial as proof of impairment (see *R. v. Visser*, 2013 BCCA 393).

US ATTORNEY GENERAL ENCOURAGES DEATH PENALTY FOR DRUG TRAFFICKERS

In a March 2018 memo to all United States Attorneys, Attorney General Jeff Sessions provided guidance concerning the use of capital punishment in drug-related prosecutions. The memo reads as follows:

> *The opioid epidemic has inflicted an unprecedented toll of addiction, suffering, and death on communities throughout our nation. Drug overdoses, including overdoses caused by the lethal substance fentanyl and its analogues, killed more than 64,000 Americans in 2016 and now rank as the leading cause of death for Americans under 50. In the face of all of this death, we cannot continue with business as usual.*
>
> *Drug traffickers, transnational criminal organizations, and violent street gangs all contribute substantially to this scourge. To combat this deadly epidemic, federal prosecutors must consider every lawful tool at their disposal. This includes designating an opioid coordinator in every district, fully utilizing the data analysis of the Opioid Fraud and Abuse Detection Unit, as well as using criminal and civil remedies available under federal law to hold opioid manufacturers and distributors accountable for unlawful practices.*
>
> *In addition, this should also include the pursuit of capital punishment in appropriate cases. Congress has passed several statutes that provide the Department with the ability to seek capital punishment for certain drug-related crimes. Among these are statutes that punish certain racketeering activities (18 U.S.C. § 1959); the use of a firearm resulting in death during a drug trafficking crime (18 U.S.C. § 924(j)); murder in furtherance of a continuing criminal enterprise (21 U.S.C. § 848(e)); and dealing in extremely large quantities of drugs (18 U.S.C. § 3591(b)(1)).*

> *I strongly encourage federal prosecutors to use these statutes, when appropriate, to aid in our continuing fight against drug trafficking and the destruction it causes in our nation."*

PPSC & THE DECISION TO PROSECUTE

In the last issue of **"In Service: 10-8"** (Volume 18 Issue 2) the BC Prosecution Service's updated charge assessment guidelines were examined. In this issue, the **"Decision to Prosecute Test"** of the Public Prosecution Service of Canada (PPSC) will be reviewed. The PPSC initiates and conducts federal prosecutions on behalf of the federal Crown.

Decision to Prosecute Test

When deciding whether to initiate and conduct a prosecution on behalf of the federal Crown, PPSC counsel must consider two standards:

EVIDENTIAL STANDARD

Is there is a reasonable prospect of conviction based on evidence that is likely to be available at trial?

PUBLIC INTEREST STANDARD

Would a prosecution best serve the public interest?

Evidential Standard

The evidentiary test is whether there is ***a reasonable prospect of conviction***:

> A reasonable prospect of conviction requires that there be more than a bare prima facie case, or in other words, it requires more than evidence that is capable of making out each of the necessary elements of the alleged offence against an accused. However, the test does not require a probability of conviction, that is, it does not require a conclusion that a conviction is more likely than not.
>
> In determining whether this test is satisfied, Crown Counsel must consider the following factors:

When assessing the evidence, Crown Counsel is to consider:

- The availability, competence and credibility of witnesses and their likely impression on the trier of fact (ie. judge or jury);
- The admissibility of evidence implicating the accused;
- Any defences that are plainly open to or have been indicated by the accused;
- The existence of a *Charter* violation that would undoubtedly lead to the exclusion of evidence essential to sustain a conviction; and
- Any other factors which could affect the prospect of a conviction.

The evidential standard must be applied throughout the proceedings, from the time the investigative report is first received until the exhaustion of all appeals.

Public Interest Standard

Crown counsel will only consider the public interest when satisfied that the evidentiary standard to support a charge has been met since it would never be in the public interest to prosecute if there was no reasonable prospect of conviction. However, just because there is sufficient evidence to support a charge does not necessarily mean a prosecution is required. If the Crown is satisfied that the evidential standard has been met, then the Crown must determine whether a prosecution would best serve the public interest.

In assessing public interest, the PPSC Deskbook requires Crown Counsel to consider and weigh a number of factors relevant to any particular case.

The nature of the alleged offence.

- Its seriousness or triviality. The more serious the alleged offence, the more likely the public interest will require that a prosecution be pursued. However, where the alleged offence is not so serious as to plainly require a prosecution, Crown counsel must consider their duty to uphold the laws enacted by Parliament and any important public interest served by conducting a prosecution, for example ensuring compliance with a regulatory regime through prosecution;
- Significant mitigating or aggravating circumstances related to the underlying conduct, for example those set out in the *Criminal Code* or other Acts of Parliament;
- The prevalence and impact of the alleged offence in the community and the need for general and specific deterrence;
- The likely sentence in the event of a conviction;
- The delay between the commission of the alleged offence and the time of the charging decision. Considerations relevant to the impact of any delay include the responsibility of the accused for the delay, the discoverability of the alleged offence by the police or investigative agency, and the complexity and length of the investigation; and/or
- The law that is alleged to have been breached is obsolete or obscure.

The nature of the harm caused by or the consequences of the alleged offence.

- The nature of the harm includes loss or injury caused by the alleged offence and relevant consequences to the victim, the community, the environment, natural resources, safety, public health, public welfare or societal, economic, cultural or other public interests;

- Whether the alleged offence engenders considerable concern in the community;
- The entitlement of any person to criminal compensation, reparation or forfeiture if a prosecution occurs; and/or
- The availability of civil remedies is not a factor that militates against a prosecution.

The circumstances, consequences to and attitude of victims.

- The attitude of the victim of the alleged offence to a prosecution. This may include the attitude of the victim's family members;
- The impact of the alleged offence on the victim and their family including any loss, injury or harm suffered;
- The youth, age, intelligence, vulnerability, disability, dependence, physical health, mental health, and other personal circumstances of the victim;
- Whether the victim was serving the public or was a public official; and/or
- Whether a prosecution is likely to have an adverse effect on the victim's physical or mental health.

The level of culpability and circumstances of the accused.

- The accused's degree of responsibility, level of involvement and whether they were in a position of authority or trust;
- The harm the accused caused, especially to vulnerable victims or other persons;
- The accused's motivation, and in particular any bias, prejudice or hate based on race, national or ethnic origin, language, religion, gender, age, mental or physical disability, sexual orientation, or any other similar factor;
- The accused's agreed upon co-operation with the investigation or prosecution of others, or the extent to which they have already done so;
- The accused's age, intelligence, physical or mental health or infirmity; and/or
- The accused's background, including their antecedents and the likelihood of future illegal conduct.

The need to protect sources of information.

Whether prosecuting would require or cause the disclosure of information that should not be disclosed in the public interest, for example would be injurious to:

- Confidential informants;
- Ongoing investigations;
- International relations;
- National defence; or
- National security.

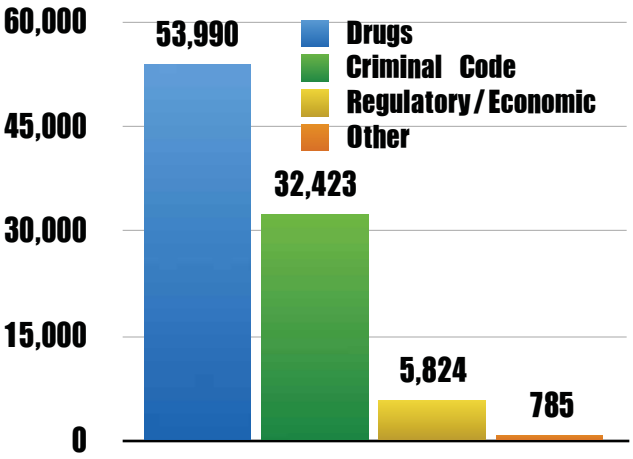
Irrelevant criteria.

A decision whether to prosecute must not be influenced by any of the following:

- The race, national or ethnic origin, colour, religion, sex, sexual orientation, political associations, activities or beliefs of the accused or any other person involved in the investigation;
- Crown counsel's personal feelings about the accused or the victim;
- Possible political advantage or disadvantage to the government or any political group or party; or
- The possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

Source: Public Prosecution Service of Canada Deskbook, Part II : Principles Governing Crown Counsel's Conduct, 2.3 Decision to Prosecute, March 1, 2014.

PPSC Prosecutions by Offence Type

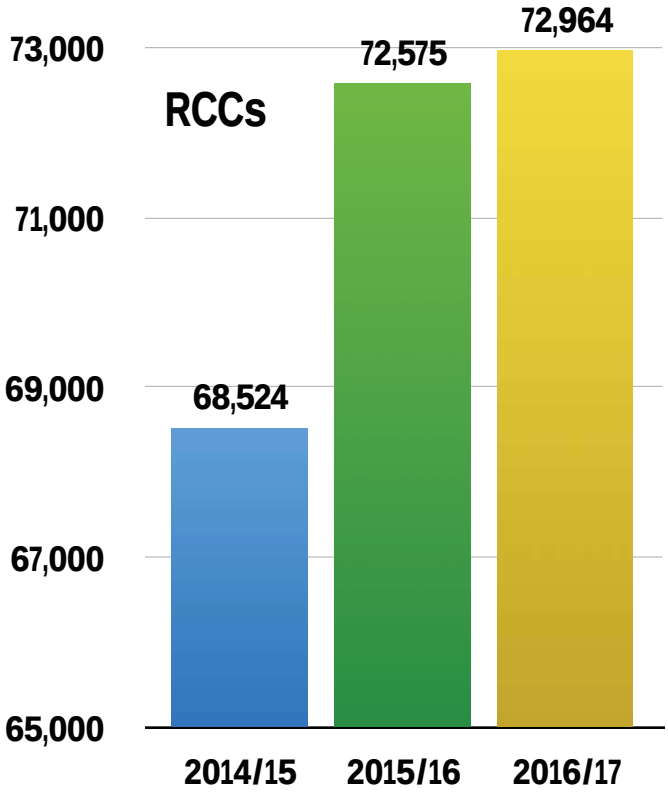


Source: Public Prosecution Service of Canada Annual Report 2016-2017, accessed May 8, 2018.

FACTS - FIGURES - FOOTNOTES

72,964

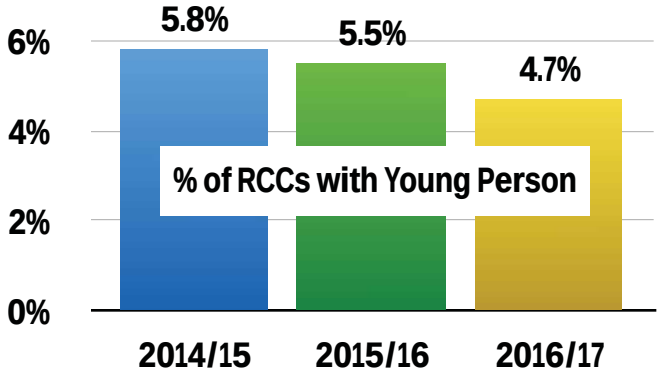
The number of Reports to Crown Counsel (RCCs) received by the BC Prosecution Service from investigative agencies in fiscal 2016/17. In these RCCs, there were a total of **76,368** accused persons . This was the third year in a row for which there was growth in the number of RCCs received and was the highest number of RCCs received since fiscal 2010/11.



Source: BC Prosecution Service, "Annual Report - 2016/17", accessed April 15, 2018.

Young Persons

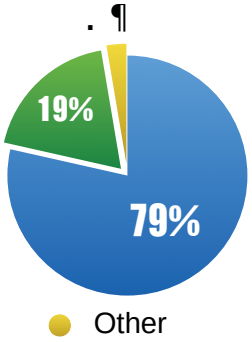
... as a percentage of overall accused named in an RCC submitted to the BC Prosecution Service has declined over the last three years.



Source: BC Prosecution Service, "Annual Report - 2016/17", accessed April 15, 2018.

Police

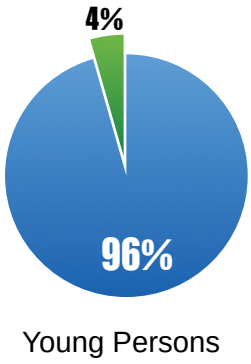
... were the investigative agency most likely to submit an RCC to the BC Prosecution Service. In fiscal 2016/17, police agencies submitted **57,294** RCCs. This was followed by BC Corrections (**13,728**) and other investigative agencies such as wildlife conservation, animal welfare, or financial or insurance agencies (**1,942**).



Source: BC Prosecution Service, "Annual Report - 2016/17", accessed April 15, 2018.

4%

The percentage of accused persons that were young persons (ages 12-17). In fiscal 2016/17, the BC Prosecution Service approved to court **63,733** accused persons. This consisted of **60,906** adults and **2,827** young persons.



Source: BC Prosecution Service, "Annual Report - 2016/17", accessed April 15, 2018.

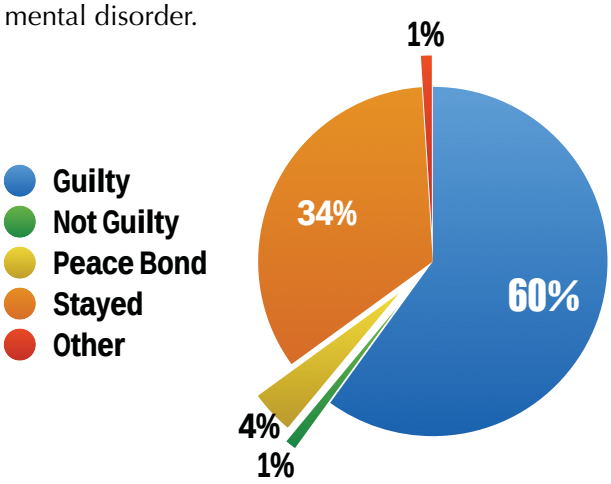
87%

... was the BC Prosecution Services charge approval rate for RCCs submitted by investigative agencies. Data extracted from the **73,050** people named in RCCs for which their was a final charge assessment decision made in fiscal 2016/17 resulted in an **87%** charge approval rate. **12%** resulted in no charges and **1%** were referred to alternative measures.

Source: BC Prosecution Service, "Annual Report - 2016/17", accessed April 15, 2018.

60%

The percentage of prosecutions resulting in a conviction by way of a guilty plea or guilty verdict at trial. Of the **66,622** prosecutions concluded in 2016/17, **60%** had a guilty finding, **1%** were not guilty, **4%** entered into a recognizance to keep the peace, **34%** had their charges stayed, and **1%** were concluded otherwise, such as a finding of unfit to stand trial or not criminally responsible due to a mental disorder.



Source: BC Prosecution Service, "Annual Report - 2016/17", accessed April 15, 2018.

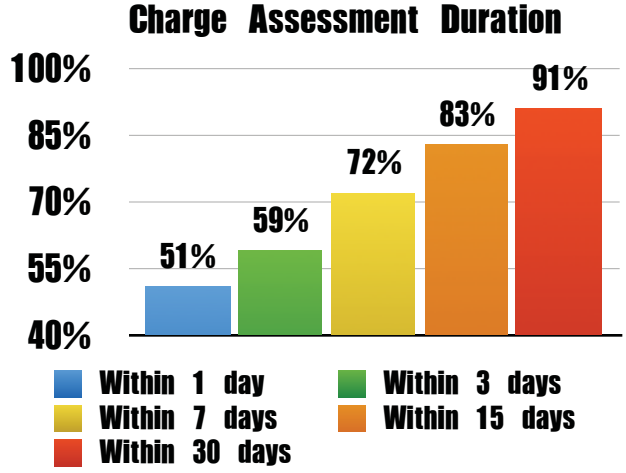
Unreasonable Delay

... was the most common reason why a prosecution was concluded with a Judicial Stay of Proceedings. In fiscal 2016/17 there was a total of **20** prosecutions judicially stayed for a variety of legal reasons. Of those, **9** were stayed because of delay, down from **15** in fiscal 2015/16. Stays of proceedings directed by the BC Prosecution Service, on the other hand, totaled **22,528**. About half of these Crown stays resulted in other consequences for the accused including referrals to alternative measures, a peace bond or a plea on another file.

Source: BC Prosecution Service, "Annual Report - 2016/17", accessed April 15, 2018.

Within 1 Day

The time it takes for BC Crown Counsel to undertake a charge assessment in most cases. From the date a RCC is received until Crown Counsel makes a charge decision, **51%** of cases take a day. **59%** of decisions are made within 3 days, **72%** within 7 days, **83%** within 15 days and **91%** within 30 days.



Source: BC Prosecution Service, "Annual Report - 2016/17", accessed April 15, 2018.

85 days

The median number of days it takes for a file to conclude from the time an information is sworn or filed to the date that all charges on the file have a final disposition.

Source: BC Prosecution Service, "Annual Report - 2016/17", accessed April 15, 2018.

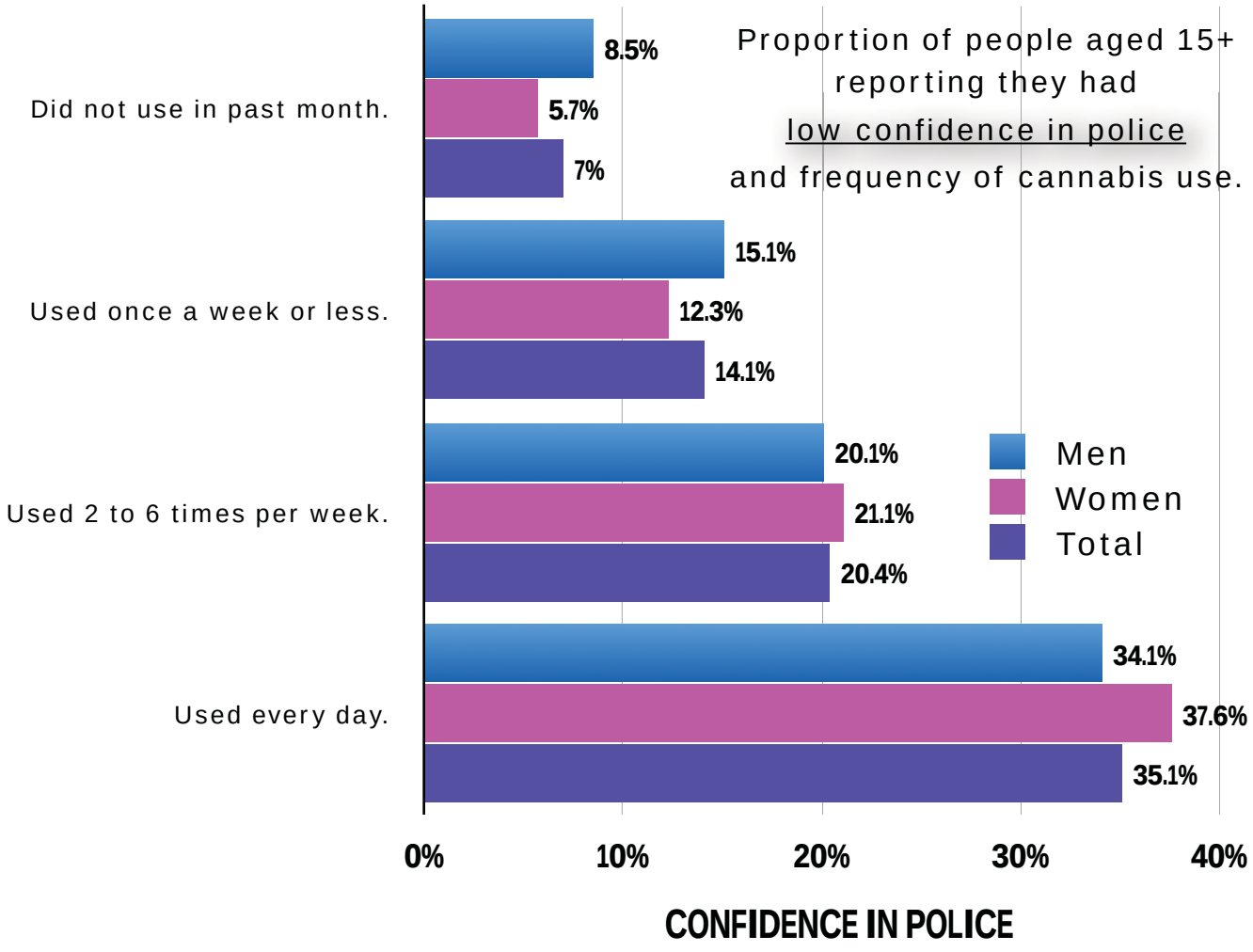
Frequent Pot Users

... are more likely to have lower confidence in the police than those that don't use it. People who said they used cannabis on a daily basis, **37.6%** of women and **34.1%** of men, had low confidence in the police, compared to **5.7%** of women and **8.5%** of men who did not use cannabis in the last month.

38.6% of people using cannabis daily had a lower level of confidence in the criminal court system compared to **23.4%** of those who did not use it in the last month. For women, the difference was more pronounced (non user at **21.3%** vs. daily user at **46%**). For men, there was no statistical difference in confidence levels in the justice system between those that used cannabis (**25.5%**) or not (**35.8%**).

Those who use cannabis more frequently are more likely to report that they have been victims of a violent crime. Only about **3.5%** of people who did not use cannabis in the past month reported being violently victimized in the past year while **22%** of daily users reported being violently victimized.

Source: Insights on Canadian Society, Association between the frequency of cannabis use and selected social indicators, May 3, 2018.



$9,300,000

The value of drugs and property seized as a result of Metro Vancouver's 2017 Crime Stoppers program. The program received **5,597** tips in 2017 which also resulted in **169** arrests.

Source: "2017 Results" [accessed May 5, 2018].

124,008

The number of arrests resulting from the Ontario Crime Stoppers program as at April 4, 2018. Other statistics over this same period of time included:

- **132 891** cases cleared:
- **$8,124,351** in rewards paid.
- **$16,672,779** related to arson loss value.
- **$304,587,768** in property recovered.
- **$1,845,829,936** in seized drugs.
- **$2,150,417,704** in total dollars recovered.

Source: "Ontario Crime Stoppers" [accessed May 5, 2018].

Naloxone

According to the BC Centre for Disease Control (BCCDC), one overdose death was estimated to be prevented for every 10 Take Home Naloxone (THN) kits that were used. And one overdose death was believed to be prevented for every 65 THN kits distributed.

The BCDCC also estimated that a total of **226** overdose deaths were prevented in the first 10 months of 2016. This amounts to **26%** of all possible overdose-deaths in BC being prevented by the THN program during this period. The BCDCC estimated that the THN kit program prevented 300 illicit drug overdose deaths between January 2012 and October 2016. This included an estimated 155 fentanyl-related overdose deaths prevented.

Source: "Estimated impact of the provincial take-home naloxone program on preventing illegal drug-related deaths in B.C., 2012-2106" , April 18, 2018.

Psychotropic Substances

The BCCDC reported that people who overdosed between January 1, 2015 and November 30, 2016 tended to have more prescriptions for psychotropic substances (medications that have effects on the brain such as antidepressants and antipsychotics) than a randomly selected group of BC residents (control group). The study also found that people overdosing during this period were more likely to have had a prescription of opioids for pain and to have used prescription opioids on a long-term basis at some point over the past five years.

Source: "Analyzing prescription drug histories among people who overdose" , February 21, 2018.

Highly Engaged

The BCCDC reported that a high proportion of people who overdosed from illegal drugs were highly engaged with the health care system in the year prior to their overdose. This engagement included emergency department visits, hospital admissions and/or appointments with community physicians. The study also showed that a large group of those overdosing left the emergency department without being seen by a doctor or left without medical advice. Only one in six people who overdosed did not visit the emergency department, hospital or community physician in the year before overdose.

Source: "Analyzing patterns of health care utilization among people who overdose from illegal drugs in British Columbia" , March 7, 2018.

"Drug checking ... has suggested that street heroin in the Downtown East Side does not actually contain any heroin at all, but rather caffeine, fillers, and fentanyl or fentanyl analogues."

Source: "Responding to B.C.'s Illegal Drug Overdose Epidemic, Progress Update February/March 2018" , BC Ministry of Mental Health an Addictions p. 9-10.

TAKE HOME NALOXONE PROGRAM IN BC

SAVING LIVES SINCE AUGUST 2012

CALLING 911 IS THE FIRST & MOST CRITICAL STEP OF OVERDOSE RESPONSE

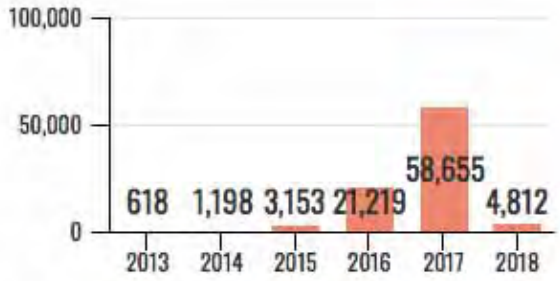
HOWEVER ONLY **51%** CALLED 911 DURING AN OVERDOSE

Naloxone is a medication that reverses the effects of an overdose from opioids (e.g. heroin, methadone, fentanyl, morphine)

Take Home Naloxone (THN) kits are now available, at no cost, for people at risk of an opioid overdose and those most likely to witness and respond to an overdose

SO FAR...

DISTRIBUTION OF KITS



NUMBER OF KITS DISTRIBUTED BY YEAR

INCLUDING

1,584 ACTIVE THN DISTRIBUTION LOCATIONS IN BC

86 HOSPITALS & EMERGENCY DEPTS.

133 FIRST NATION SITES

17 CORRECTIONS FACILITIES

786 COMMUNITY PHARMACIES

3,382 OVERDOSE RESPONSE FORMS RECEIVED

19,864 KITS REPORTED AS USED TO REVERSE AN OVERDOSE

VISIT towardtheheart.com/naloxone/ FOR MORE INFORMATION

WORKING TOGETHER | REDUCING HARM

Last Updated: APRIL 15. 2018

RECOGNISING & RESPONDING

OPIOID OVERDOSE

SIGNS OF OVERDOSE

- No response to stimuli
- Shallow, laboured or no breathing
- Cannot be woken up
- Snoring or gurgling
- Blue/grey lips or finger tips
- Floppy arms or legs

HOW TO RESPOND

- Check for danger
- Call an ambulance and stay on the line
- Put the person in recovery position
- If you have access to narcan/naloxone, assemble the mini-jet or ampoule and inject into thigh or upper arm (if you have a nasal spray, spray into one side of the nasal canal)
- Provide CPR
- If there has been no response within 3-5 minutes, and if you have it available, administer another dose of narcan/naloxone

TIME TO REMEMBER. TIME TO ACT.

International Overdose Awareness Day
prevention and remembrance

31 AUGUST

—

INTERNATIONAL OVERDOSE AWARENESS DAY

FACT SHEET

OPIOIDS

31 AUGUST

INTERNATIONAL OVERDOSE AWARENESS DAY

WHAT ARE OPIOIDS?

Opioids is an umbrella term for natural or synthetic drugs that are derived from – or related to – the opium poppy.

Opioids attach to receptors in the central nervous system, reducing pain signals to the brain. Commonly used opioids include oxycodone, morphine, codeine, heroin, fentanyl, methadone and opium.

SIGNS OF OVERDOSE

Opioids dull the senses, induce relaxation and euphoria. They depress (slow down) breathing and the heart rate.

In high doses, opioids depress the body's natural urge to breathe. When someone is having an overdose they can stop breathing and may die. Even if a person does not die from overdose, they can sustain brain damage.

Signs of overdose can include:

- No response to stimuli
- Shallow/stopped breathing
- Can't be woken up
- Unusual snoring/gurgling sounds
- Blue/grey lips or finger tips
- Floppy arms and legs

If you cannot get a response from someone, do not assume they are asleep. Unusual or deep snoring is a common sign of overdose. Do not let people at risk 'sleep it off'.

OVERDOSE RESPONSE

Sometimes it can take hours for someone to die from an opioid overdose. Action taken as soon as possible could save a life. If you think someone has overdosed, knowing how to respond is crucial:

Check for vital signs:

A Alert: Not responding to voice?
B Breathing: Noisy? Shallow? Slow? Stopped? Strange snoring?
C Colour: For fair-skinned people, blue or pale lips or fingertips? For darker skinned people, grayish or ashen lips and skin colour.

If you see any of these signs, you should immediately move to activate the response plan for opioid overdose.

Before you act, check for dangers such as needles.

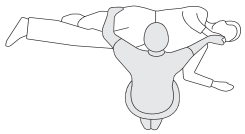
Call an ambulance, tell the operator your location, and stay on the line.

Try to get a response from the person by calling their name and/or giving a sternal rub (rub your knuckles firmly across their sternum).

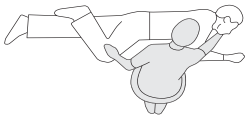
If you can't get a response, put them in the recovery position allowing their airways to remain open.

The Recovery Position

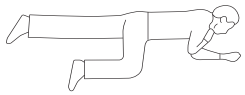
Support face *Place the arm nearest to you at right angles to the body. Place their other hand against their cheek.*



Lift Leg *Get hold of the far leg just above the knee and pull it up, keeping the foot flat on the ground.*



Roll over *Keep their hand pressed against their cheek and pull on the upper leg to roll them towards you and onto their side.*



If you HAVE narcan/naloxone:

1. Assemble the naloxone ready for use and inject the full amount into the outer thigh or upper arm (or use nasal spray).
2. Record the time of administration. Provide this information to paramedics when they arrive.
3. If the person is not breathing, apply rescue breathing (2 breathes every 5 seconds).
4. If there has been no response after 3-5 minutes, give another dose of naloxone. Remember to record the time of administration.

   Note: Naloxone will only temporarily reverse an overdose.

If you DO NOT HAVE narcan/naloxone:

- If the person is breathing, leave in recovery position and monitor breathing.
- If person is not breathing apply rescue breathing and continue until:

– The person starts to breathe on their own
– Ambulance arrives
  – Someone else can take over for you.

WHAT NOT TO DO IN THE EVENT OF A SUSPECTED OVERDOSE

- Do **NOT** leave the person alone.
- Do **NOT** give the person anything to eat or drink, or try to induce vomiting.

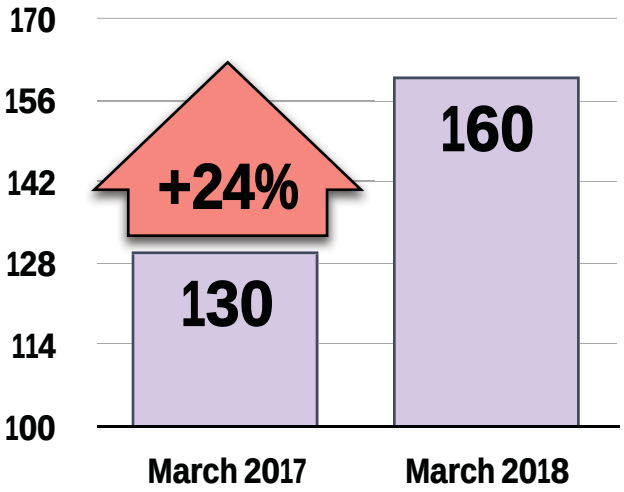
TIME TO REMEMBER. TIME TO ACT.

International Overdose Awareness Day
prevention and remembrance

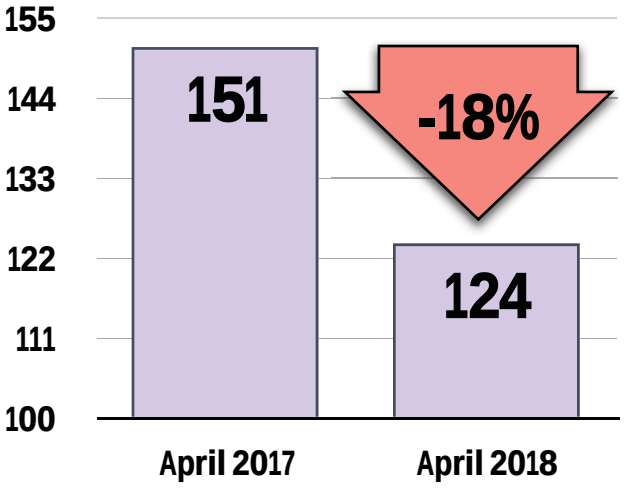
For more information visit www.overdoseday.com

ILLICT DRUG OVERDOSE DEATHS IN 2018

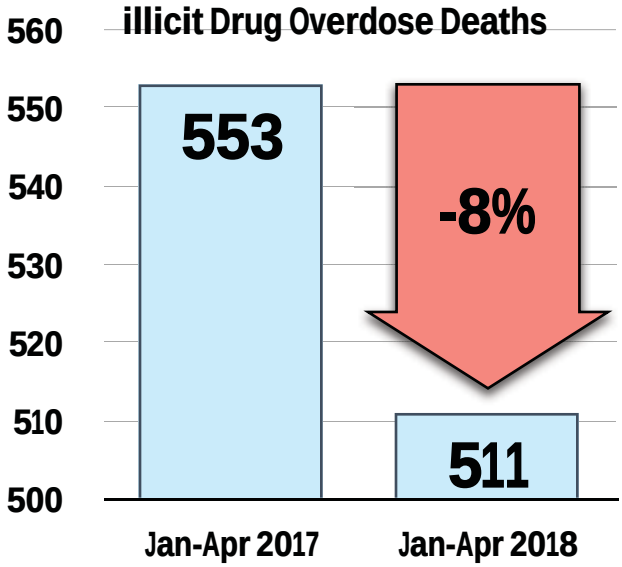
The Office of BC's Chief Coroner has released statistics for illicit drug overdose deaths in the province from **January 1, 2008 to April 30, 2018**. In March there were 160 suspected drug overdose deaths. This represents a **24%** increase over the number of deaths occurring in March 2017 and a **58%** increase over February 2018. The March 2018 statistics amount to about **five (5) people dying every day of the month.**



In April there were 124 suspected drug overdose deaths. This represents an **18%** decrease over the number of deaths occurring in April 2017 and a **24%** decrease over March 2018. The April 2018 statistics amount to about **four (4) people dying every day of the month.**



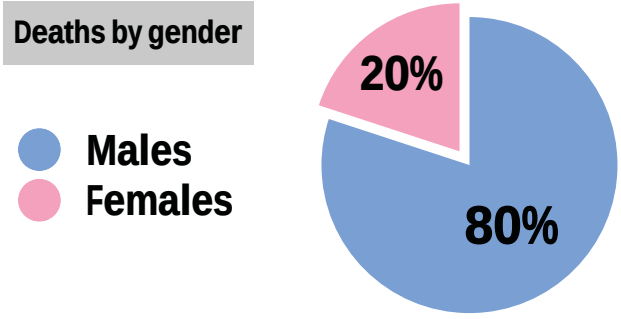
There were a total of **511** illicit drug overdose deaths from January through April 2018. This is 42 deaths less than last year's total at this time.

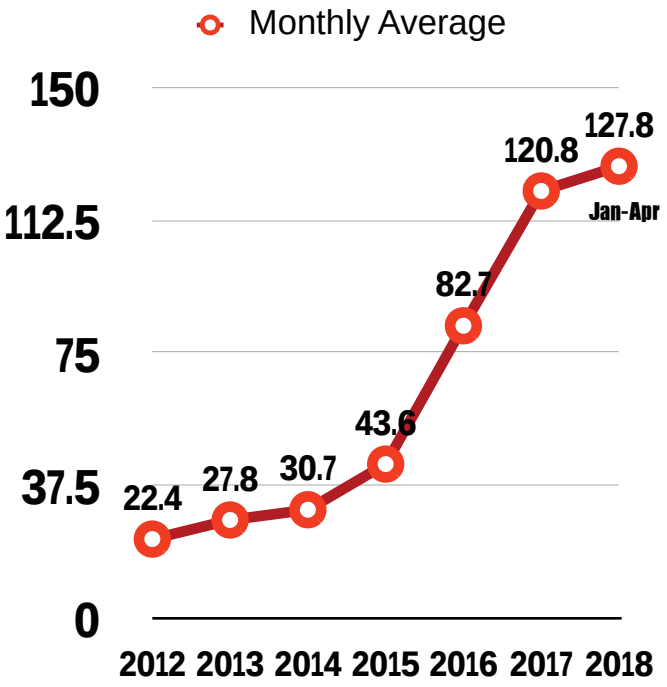


The **1,449** overdose deaths last year amounted to more than a **335%** over 2013. Moreover, the report attributes fentanyl laced drugs as accounting for the increase in deaths.

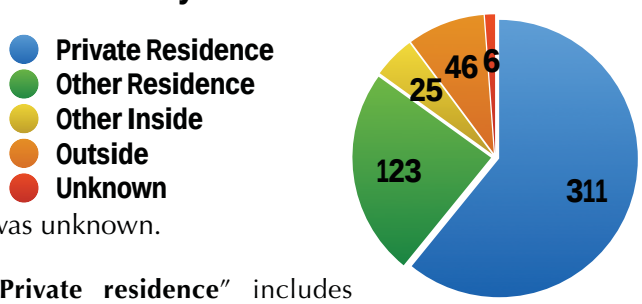
People aged 30-39 were the hardest hit so far in 2018 with **136** illicit drug overdose deaths followed by 40-49 year-olds at **111** deaths. People aged 19-29 years-old had **110** deaths while those aged 50-59 had **108** deaths. Vancouver had the most deaths at **135** followed by Surrey (**80**), Victoria (**39**), Kamloops (**17**), Prince George (**17**) and Kelowna (**15**).

Males continue to die at almost a **5:1** ratio compared to females. From January to April 2018, **409** males have died while there were **102** female deaths.





The 2018 data indicates that most illicit drug overdose deaths (**90%**) occurred inside while **9%** occurred outside. For six (6) deaths, the location was unknown.



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

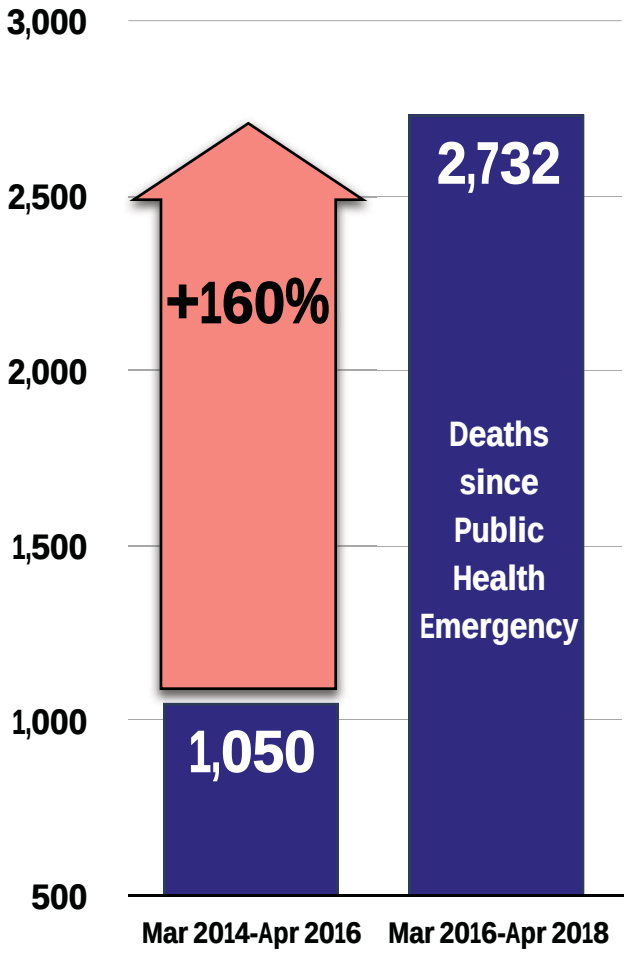
"**Other residence**" includes hotels, motels, rooming houses, shelters, etc.

"**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

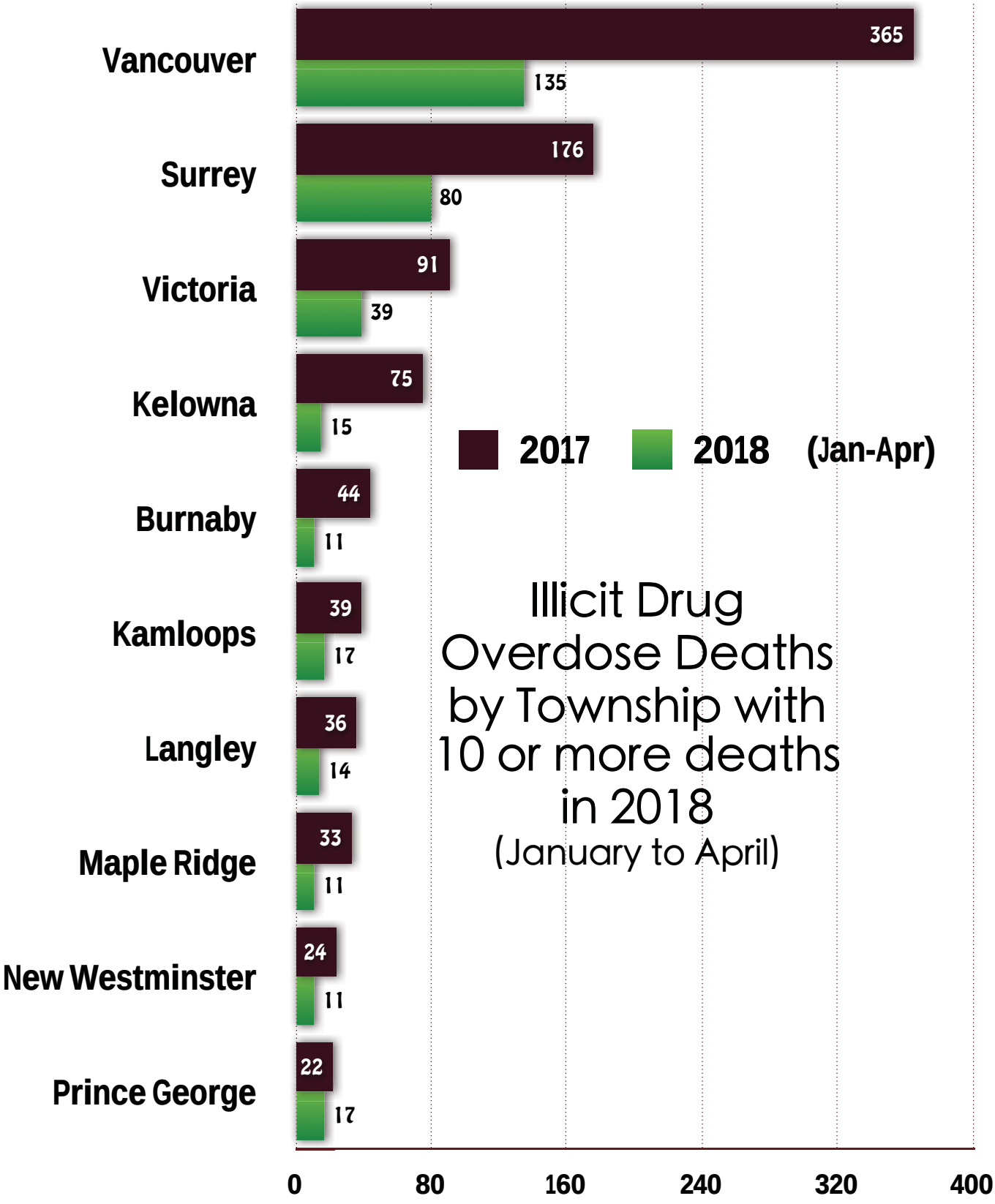
In April 2016, BC's provincial health officer declared a public health emergency in response to the rise in drug overdoses and deaths. The number of overdose deaths in the 25 months preceding the declaration (Mar 2014-Mar 2016) totaled **1,050**. The number of deaths in the 25 months following the declaration (April 2016-April 2018) totaled **2,732**. This is an increase of **160%**.



Source: -Illicit Drug Overdose Deaths in BC - January 1, 2008 to April 30, 2018. Ministry of Justice, Office of the Chief Coroner. June 7, 2018.

TYPES OF DRUGS

The top four detected drugs relevant to illicit drug overdose deaths from 2016 and 2017 were fentanyl, which was detected in **73.5%** of deaths, cocaine (**49.1%**), methamphetamine/amphetamine (**31.8%**), and heroin (**25.6%**).


Vancouver
365
135
Surrey
176
80
Victoria
91
39
Kelowna
75
15
Burnaby
44
11
Kamloops
39
17
Langley
36
14
Maple Ridge
33
11
New Westminster
24
11
Prince George
22
17
2017
2018 (Jan-Apr)
Illicit Drug Overdose Deaths by Township with 10 or more deaths in 2018
(January to April)
0
80
160
240
320
400

Illicit Drug Overdose Deaths in BC, Jan-Apr 2018

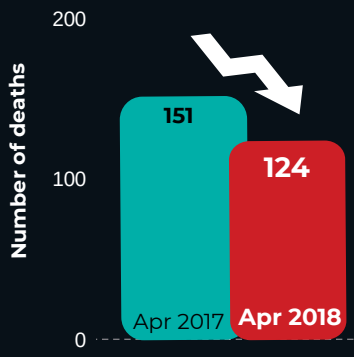
BRITISH COLUMBIA Coroners Service

124 Illicit drug overdose deaths in April 2018

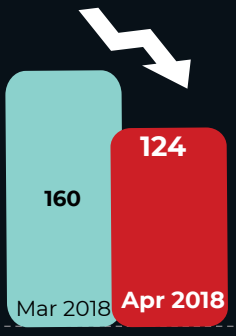
~ 4

illicit drug overdose deaths per DAY in April 2018

18% decrease compared to April 2017

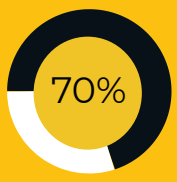


23 % decrease compared to March 2018

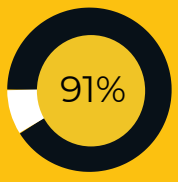


Illicit drug overdose deaths by age group and sex, 2018

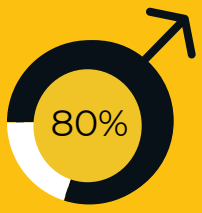
19 to 49 years old



19 to 59 years old

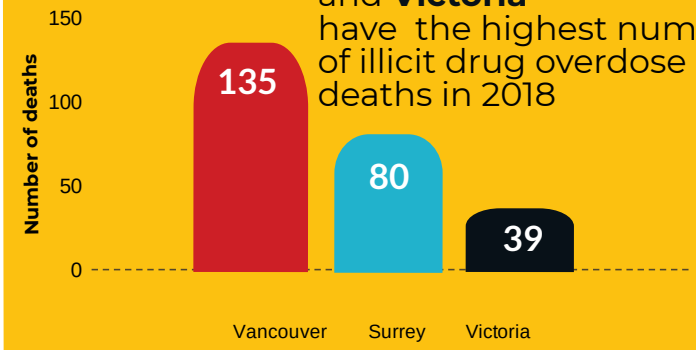


Male



Number of illicit drug overdose deaths by city, 2018

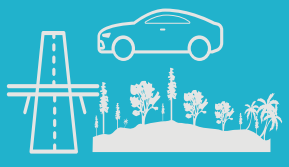
Vancouver, **Surrey** and **Victoria** have the highest number of illicit drug overdose deaths in 2018



Illicit drug overdose deaths by place of injury, BC, 2018

61% at private residences

29% at other inside locations (e.g., other housing, hotel/motel, public buildings)



9% at outdoor locations (e.g., parks, vehicles, streets)

LEGALLY SPEAKING: FENTANYL

"The classic meaning of 'perdition' is a state of eternal punishment and damnation into which a sinful and unpenitent person passes, after death. The modern usage is more secular in nature, and suggests perdition is a place of utter disaster, ruin, or destruction. Where the illicit use of fentanyl is concerned, perdition is precisely the correct term for the ultimate destination of purveyors and users of this substance."

R. v. Fyfe, 2017 SKQB 5

"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 ..."

R. v. Toth, 2017 BCSC 501

"Those who traffic in opiates, cocaine, and synthetic drugs such as methamphetamines have long been described by the courts as 'Merchants of Misery'. I think it is now apt to describe those who traffic in fentanyl as 'Merchants of Death'."

R. v. Joon, 2017 BCPC 301

"[F]entanyl is a scourge. It poses intolerable risks of accidental overdosing because it is so much more powerful than morphine. Illegally manufactured fentanyl can be particularly and unpredictably potent, even tiny amounts of fentanyl mixed into other drugs such as cocaine or heroin may be fatal."

R. v. Smith, 2017 BCCA 112

"In the context of the illicit drug scene in Canada at this time and the ever-present possibility that a powder or pill being sold may contain some amount of fentanyl, it seems to me that sellers, buyers and users of most kinds of illicit drugs are placing themselves in a situation not that dissimilar from their pointing a gun and firing it without knowing if it's loaded, not unlike the dangerous game of chance called Russian roulette. The consequences of involvement in the illegal drug trade are now potentially fatal. "

R. v. Joumaa, 2018 ONSC 317

"Trafficking in fentanyl is almost the equivalent of putting multiple bullets in the chambers of a revolver and playing Russian roulette. It is the most efficient killer of drug users on the market today. Its danger to users is greater than cocaine and heroin."

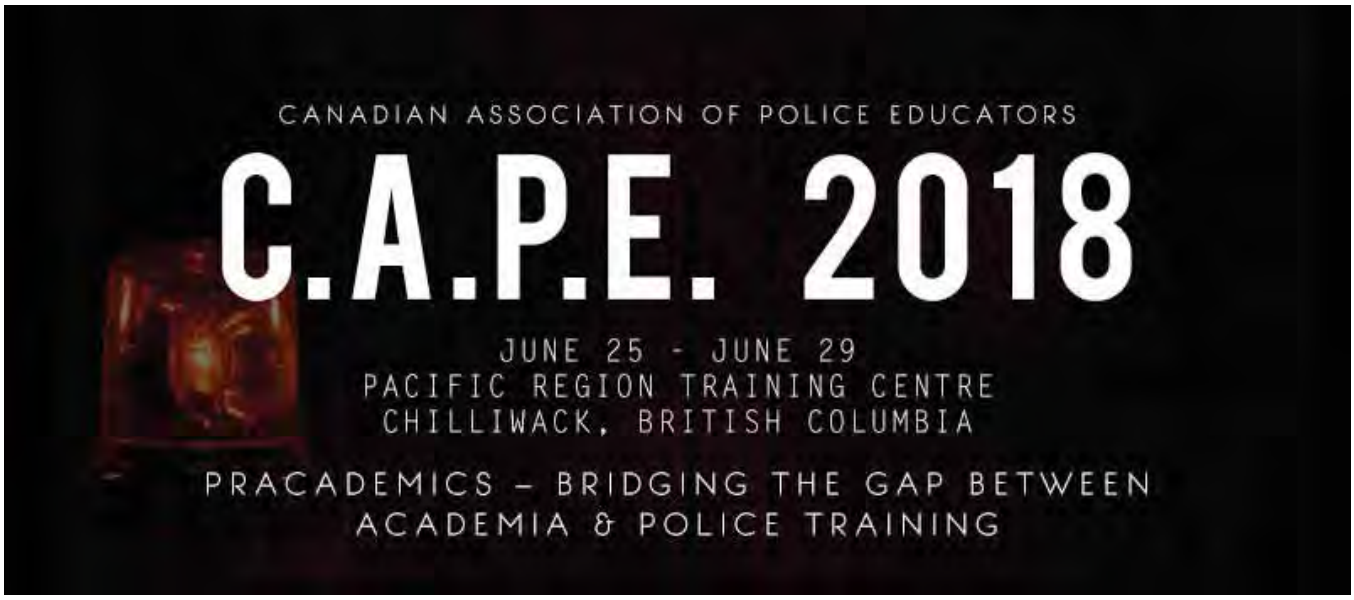
R. v. Frazer, 2017 ABPC 116

"The use of the incredibly dangerous drug fentanyl to increase the potency of heroin has elevated this impact to the point where heroin users are effectively playing Russian roulette when they use heroin and traffickers, even if they do not put the bullet in the chamber, are handing users the gun."

R. v Abraham, 2017 BCSC 2463

"Anyone who is involved in trafficking fentanyl must now understand that they are dealing with a drug that is no different than playing Russian Roulette."

R. v. Ormonde, 2018 ONSC 1295



Canadian Association of Police Educators

The Canadian Association of Police Educators (CAPE) promotes excellence in law enforcement training and education through the guidance of innovative research, program development, knowledge transfer, network facilitation, and collaborative training initiatives. The objectives of CAPE include:

- **Providing** advice and input regarding national and regional law enforcement training and education trends/needs.
- **Advocating** and promoting the commitment to training.
- **Advising** on training specific policy.
- **Liaising** between operational training academies and academic institutions.
- **Guiding** and undertaking law enforcement training and education research.
- **Coordinating** knowledge transfer initiatives.

Presentation topics at the 2018 CAPE Conference include:

- ✓ Police Research in Canada
- ✓ Professionalization of Policing
- ✓ Applying rResearch on Targeted Violence to the Practice of Threat Management in Communities: A US Perspective
- ✓ Problem Based Learning for Policing
- ✓ Practical Applications of Police Use of Force Research
- ✓ Evidence Based Policing
- ✓ Simulators and Bridging the Gap Between Research and Police Training

This conference also provides an opportunity to network and exchange ideas.

cape-educators.ca

UTTERANCE WAS VOLUNTARY & SPONTANEOUS: NO s. 10(b) CHARTER BREACH

R. v. Brazeau, 2018 ABCA 170

At about 12:30 am, a masked man armed with a knife entered a Mac's convenience store and demanded money. He left with a few $5 and $10 bills and toonies. He was seen getting into a grey truck. Police responded and saw a grey truck driving quite fast. After a lengthy chase, police were unable to catch the truck and lost sight of it but soon discovered it in a ditch. The accused was found lying injured next to the truck, near the passenger door. He matched the description of the robber. He was belligerent, smelled of alcohol and had slurred speech. He was arrested and advised of his right to counsel and cautioned. He indicated he wanted to speak to a lawyer at the "cop shop".

An ambulance was called and he was transported to the hospital at 2:14 am. A search of the truck revealed $5 and $10 bills and toonies, as well as two knives, but no mask. A blood demand was made at the hospital at 4:29 am at which time the accused was again asked if he wanted to contact a lawyer. He again declined, stating that he would contact counsel later. When the medical staff decided that they would not discharge the accused from the hospital that night, the police decided to release him on a promise to appear. In the process of releasing the accused, he voluntarily apologized for his driving and for endangering the police officers' lives. He also commented that he would fight the robbery charge because "it's just not like me". The accused was never taken back to the police station and was never questioned by the officers. He was charged with several offences including robbery, dangerous driving, flight from police and impaired driving.

Alberta Provincial Court

A police officer testified that the accused could have been left in the trauma room to use the phone after about 4:19 am. But before that time, the accused could not be left alone to make a phone call because he was immobilized on a spine board, although the officer did say he might have been able to do so on "speaker phone". The judge found the two statements the accused made were spontaneous utterances to the police. They were unsolicited and volunteered, not sought. The police did not question the accused or attempt to elicit any evidence from him. The judge concluded neither utterance was the product of a *Charter* breach. Those statements, apologizing for endangering the officers' lives (which amounted to an admission he was driving the truck) and that he would fight the robbery charge because "it's just not like me", were admitted.

As for s. 10(b), the judge ruled that the first time police were able to give the accused private telephone access was 4:19 am at the hospital, but the accused declined. Moreover, he was not otherwise questioned. The accused was convicted of robbery, failing to stop for police, dangerous driving, and impaired driving.

Alberta Court of Appeal

The accused argued, in part, that the trial judge erred by applying the wrong test in his s. 10(b) analysis. In his view, the police had a duty to hold off when the utterances were made and failed to provide him with the opportunity to contact counsel.

s. 10(b) *Charter*

The Court of Appeal upheld the trial judge's s. 10(b) ruling. The accused had been given the opportunity to contact counsel and declined to do so. And the police did nothing to elicit the statements. ***"There was no attempt to elicit evidence at any time,"*** said the Appeal Court. ***"Given this finding, the only conclusion was there was no s 10(b) violation of the requirement to hold off."***

"[T]he police have a positive obligation to facilitate contact with counsel and any delay in doing so must be justified. Merely being in a hospital does not negate that. … [T]here may be logistical impediments. However, the police have a duty to take reasonable steps to determine whether there is a place where the necessary privacy is available while still allowing police to control the detained person."

As for the contention that the police failed to provide the accused with a reasonable opportunity to contact counsel, it too was rejected. The accused declined the opportunity to contact counsel both at the scene and when asked again at the hospital. ***"No evidence was elicited at the hospital,"*** said the Court of Appeal. ***"The utterances, which were essentially apologies to the police, were made when the [accused] was released on a promise to appear."***

The Court of Appeal noted:

> [T]he police have a positive obligation to facilitate contact with counsel and any delay in doing so must be justified. Merely being in a hospital does not negate that. … [T]here may be logistical impediments. However, the police have a duty to take reasonable steps to determine whether there is a place where the necessary privacy is available while still allowing police to control the detained person. [references omitted, para. 21]

In this case, the delay in providing the accused with an opportunity to contact counsel was reasonable in the circumstances. He was asked at the accident scene is he wished to contact counsel. He indicated he would wait until at the police station. He was then transported by ambulance to the hospital where he was again advised he could contact a lawyer after being read the blood demand but he again declined. Up until this time, the officer said the accused could not have been left alone to make a phone call because he was immobilized on a spine board. In finding the delay reasonable, the Appeal Court stated:

> Having regard to the state the [accused] was in, plus his earlier disinclination to contact counsel at the earliest possible moment, it is difficult to conclude that the delay of approximately one and half hours while the [accused] was being actively treated and getting x-rays was unreasonable in the circumstances, and the trial judge reasonably concluded as such. In any event, no evidence was elicited during that time. Before the police sought the blood sample, the [accused] was again asked if he wished to contact counsel and declined. None of the impugned evidence was elicited at that time. It was only when the [accused] was being released that he made the admitted utterances. [para. 23]

Further, the police held off from eliciting evidence from the accused. They did not question him. It wasn't until police were releasing him on a promise to appear that he voluntarily apologized for endangering their lives. The voluntary unsolicited spontaneous utterances made by the accused were admissible.

The accused's appeal was dismissed.

Complete case available at www.canlii.org

INDUCEMENT BY ITSELF DOES NOT RENDER STATEMENT INVOLUNTARY

R. v. Dixon, 2018 BCCA 181

The accused was arrested by police following a sexual assault in which the victim was administered GHB. The circumstances of the offence were violent and involved choking. The accused forced himself upon the victim despite her repeated attempts to stop him. Some hours later, the victim made a police report.

After his arrest on the sexual assault charge, the police told him he might be released in a few hours. The police also said that the matter might be resolved here and now if the accused made a

statement. The accused did provide a statement and he was subsequently released from custody on an undertaking. The accused, along with another man involved in the incident, was charged with sexual assault and administering a noxious substance (GHB) with intent to cause bodily harm.

British Columbia Provincial Court

The Crown sought to use the accused's statement at trial to cross-examine him for the purpose of establishing inconsistencies between what he told the police and his testimony at trial. The accused argued that the statement he made to police was not voluntary because he was induced into providing it. But the judge disagreed and found the accused's statement was freely and voluntarily made. He went on to reject the accused's evidence that the sex was consensual and convicted him on the sexual assault charge. His co-accused was found guilty of sexual assault and administering the GHB.

British Columbia Court of Appeal

The accused challenged his conviction maintaining, among other things, that the Crown failed to prove his statement to police was voluntary beyond a reasonable doubt. He again contended that he was offered two inducements to make the statement:

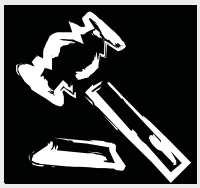
- The police said he might be released in a few hours; and
- The police said the matter might be resolved here and now if he made a statement.

The Court of Appeal, however, rejected the accused's claims. ***"The offering of an inducement does not, by itself, make a statement involuntary,"*** said Justice Tysoe, speaking for the Appeal Court. ***"It is necessary to look at all of the circumstances to determine whether there is a reasonable doubt as to whether the will of the person has been overborne so that the statement cannot be regarded as having been voluntarily given."*** In this case, the Court of Appeal found no *quid pro quo* was offered:

> In the present case, the [accused] was not offered a quid pro quo in exchange for making the statement. While the [accused] was told that he might be released later that afternoon, it was not offered as a quid pro quo. The remark was made independently of whether the [accused] did or did not give a statement.

LEGALLY SPEAKING:

Statement Voluntariness:



"[C]ourts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. This becomes improper only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne. … The most important consideration in all cases is to look for a quid pro quo offer by interrogators, regardless of whether it comes in the form of a threat or a promise." – Supreme Court of Canada Justice Iacobucci in *R. v. Oickle*, 2000 SCC 38.

"The offering of an inducement does not, by itself, make a statement involuntary. It is necessary to look at all of the circumstances to determine whether there is a reasonable doubt as to whether the will of the person has been overborne so that the statement cannot be regarded as having been voluntarily given."

"Quid pro quo" is a Latin phrase literally meaning "something for something."

> Similarly, the police did not offer the quid pro quo that the [accused] might not be charged if he gave a statement. The police officer was simply explaining to the [accused] that he was trying to find the truth and commented that, if the matter got resolved then it would end there, and that if a charge was laid it would end up in court. The comments of the officer could not reasonably be interpreted as a suggestion that the [accused] may not be charged if he provided a statement, especially in view of the fact that he had already agreed to answer questions from the police. [para. 24-25]

The accused failed to demonstrate that the trial judge erred in concluding the Crown had established the voluntariness of the statement. The accused's appeal was dismissed.

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

WELL SAID JUDGE

"IT'S NOT A JOB, FOLKS. IT'S A CALLING"

On April 10, 2018 the the Honourable Associate Justice William W. Bedsworth of Fourth District Court of Appeal delivered the keynote address during the grand opening of Golden West College's Criminal Justice Training Center in Huntington Beach, California. Here is an excerpt from his speech:

"Law enforcement changes hourly, folks. It is no easier to keep up with the changes in law enforcement than it is to keep up with changes in medicine or physics or biology or ballistics or pharmacology. All of which, by the way, are things the modern police officer must know a lot about — must learn and relearn constantly."

...

"Every day, every time a cop picks up a paper or watches the news, she learns about something else she will have to know about probably before her next shift. The amount of education and reeducation our police must assimilate every day is staggering. It requires literally, and I emphasize, I mean this literally, not figuratively, it requires literally more daily re-education than a doctor or lawyer ever needs to do his or her job, and when a peace officer applies that reeducation, he or she has to be a psychologist, a pharmacologist, a teacher, a counselor, a lawyer, an EMT, and a bad-ass superhero, probably all during one shift."

...

"Imagine doing what you do. I don't know what your job is. Whatever your job is, imagine doing it with people throwing rocks at you, people spitting on you, people trying to kill you, and then think about what their job description is.

Their job description, these people in uniform, is putting your life on the line every day for strangers, dealing with the mentally ill, mediating domestic violence, counseling child molestation victims, consoling the bereaved, pulling people out of burning vehicles, chasing psychopathic 15-year-olds down blind, dark alleys, knowing they have a gang (and) gun, but they don't yet have a conscience."

...

"It's not a job, folks. It's a calling, and if you haven't been called, you can't understand those who have been. So, I no longer try to understand them. I just thank the Lord for continuing to turn them out and I suggest you do the same."

Complete keynote available here.

"The amount of education and reeducation our police must assimilate every day is staggering. ... [I]t requires literally more daily re-education than a doctor or lawyer ever needs to do his or her job."

ADMINISTRATIVE ALCOHOL & DRUG RELATED DRIVING PROHIBITIONS

BC's Immediate Roadside Prohibition (IRP) program was introduced in 2010. Under this program, police may issue a 3, 7, 30 or 90-day prohibition at the roadside to alcohol-affected drivers under B.C.'s *Motor Vehicle Act*.

A police officer will issue an IRP when a driver has care or control of a motor vehicle, and following a demand to provide a breath sample on an Approved Screening Device (ASD):

- if the driver has a blood alcohol concentration over 0.05 (50mg%) BAC (the "**Warn**" range)
- if the driver has a blood alcohol concentration over 0.08 (80mg%) BAC (the "**Fail**" range)
- if the driver fails or refuses to comply with a breath test without a reasonable excuse.

For the 3 or 7 day IRP, a police officer may decide to impound the driver's vehicle. For 30 or 90 day IRP's, vehicle impoundment is mandatory.

Administrative Driving Prohibitions

An Administrative Driving Prohibition (ADP) is a 90 day driving prohibition served on drivers who provide a breath test into an approved instrument such as an Intoxilyzer.

If a driver's breath sample indicates a BAC above 0.08 (80mg%), or if the driver refuses to provide a sample of breath, police may issue a 90-day "Notice of Driving Prohibition" and may also charge the driver under the *Criminal Code*. A driver served with an ADP has a 21-day period before the prohibition takes effect.

IMMEDIATE ROADSIDE PROHIBITIONS

	WARN	WARN	WARN	FAIL or REFUSE
ASD Result	BAC .05 - .08	BAC .05 - .08	BAC .05 - .08	BAC over .08
Incident	1st incident	2nd incident within 5 years	3rd incident within 5 years	
IRP Length	3 days	7 days	30 days	90 days
Vehicle Impound Length	3 days (officer discretion)	7 days (officer discretion)	30 days	30 days
Administrative penalty	$200	$300	$400	$500

BC's ALCOHOL DRIVING PROHIBITIONS

	Immediate Roadside Prohibitions						Administrative Driving Prohibitions			
	Warn			90 Days			90 Days			Total IRP & ADP
YEAR	3 day IRP	7 day IRP	30 day IRP	FAIL	REFUSE	Total IRP	FAIL	REFUSE	Total ADP	
2013	6,063	303	26	11,565	1,410	19,367	1,017	341	1,358	20,725
2014	5,701	368	26	11,238	1,470	18,803	1,048	352	1,400	20,203
2015	4,670	351	33	9,286	1,863	16,203	1,125	480	1,605	17,808
2016	4,585	333	33	8,853	1,830	15,634	1,124	463	1,587	17,221
2017	4,243	259	19	8,389	1,715	14,625	1,068	419	1,487	16,112

Source: Alcohol Driving Prohibitions

BC's REVIEWS FOR ALCOHOL DRIVING PROHIBITIONS

	Immediate Roadside Prohibitions						Administrative Driving Prohibitions		
	Warn			90 Days			90 Days		
YEAR	Appeals	Successful	% Successful	Appeals	Successful	% Successful	Appeals	Successful	% Successful
2013	198	47	24%	2,909	768	26%	232	69	30%
2014	211	71	34%	2,877	1,061	37%	247	76	31%
2015	159	55	35%	2,756	1,283	47%	340	155	46%
2016	168	29	17%	2,825	848	30%	325	138	42%
2017	162	29	18%	2,726	670	25%	360	137	38%

Source: Reviews For Alcohol Prohibitions

VEHICLE IMPOUNDMENTS

BC's Vehicle Impoundment (VI) Program is a road safety initiative permitting police to immediately impound vehicles operated by drivers affected by alcohol. Drivers served with an IRP may see the vehicle they were driving impounded for 3, 7 or 30 days, depending on the prohibition length. VI's may also be issued for prohibited, suspended and unlicensed drivers; excessive speeders; stunt drivers and street racers; and improperly seated motorcyclists.

BC VEHICLE IMPOUNDMENTS

TYPE	2013	2014	2015	2016	2017	5 Year Total
BAC - WARN - 3 day VI	3,298	2,799	2,305	2,432	2,354	**13,188**
BAC - WARN - 7 day VI	246	258	236	217	188	**1,145**
BAC - WARN - 30 day VI	70	76	77	43	33	**299**
BAC - FAIL/Refuse - 30 day VI	12,586	12,244	10,767	10,304	9,727	**55,628**
Prohibited/Suspended - 7 day VI	2,529	2,490	2,428	2,211	2,196	**11,854**
Prohibited/Suspended - 30 day VI	768	748	732	664	591	**3,503**
Prohibited/Suspended - 60 day VI	260	246	206	199	186	**1,097**
Unlicensed - 7 day VI	2,020	1,876	1,765	1,526	1,441	**8,628**
Unlicensed - 30 day VI	217	199	156	151	136	**859**
Unlicensed - 60 day VI	30	47	34	32	31	**174**
Excessive Speed - 7 day VI	6,536	6,394	6,871	7,127	5,871	**32,799**
Excessive Speed - 30 day VI	257	296	285	302	239	**1,379**
Excessive Speed - 60 day VI	37	40	27	24	25	**153**
Race - 7 day VI	55	73	62	52	43	**285**
Race - 30 day VI	7	3	2	2	2	**16**
Stunt - 7 day VI	189	189	192	187	134	**891**
Stunt - 30 day VI	9	9	8	17	13	**56**
Stunt - 60 day VI	3	0	0	0	0	**3**
Sitting - 7 day VI	0	2	0	0	1	**3**
Multiple Reasons - 7 day VI	298	277	389	1,442	1,736	**4,142**
Multiple Reasons - 30 day VI	358	424	372	515	505	**2,174**
Multiple Reasons - 60 day VI	21	21	21	49	62	**174**
TOTAL	**29,794**	**28,711**	**26,935**	**27,496**	**25,514**	**138,450**

Source: Vehicle Impoundments

BC's WORKERS COMPENSATION ACT NOW HAS PRESUMPTIVE CAUSE PROVISION

A new mental disorder presumption has been added to BC's *Workers Compensation Act* that provides compensation for workers employed in certain occupations who have developed a disease or disorder, including PTSD, associated to their work. It will apply specifically to first responders: firefighters, police, paramedics, sheriffs and correctional officers.

Under the new legislative amendment, the mental condition is presumed to have arisen due to the nature of the claimant's work, unless the contrary is proved. With a presumptive condition, there is no longer a need to prove that a claimant's disease or disorder is work related.

Previously, workers in these occupations had to provide medical and/or scientific evidence to establish that the condition arose out of their employment, in addition to a diagnosis by a psychiatrist or psychologist.

In short, the legislative amendment establishes a new mental disorder presumption when the condition is a reaction to traumatic events at work.

NEW PRESUMPTIVE CAUSE PROVISION

BC's ***Workers Compensation Act***

Mental disorder

5.1 (1.1) If a worker who is or has been employed in an eligible occupation

(a) is exposed to one or more traumatic events arising out of and in the course of the worker's employment in that eligible occupation, and

(b) has a mental disorder that is recognized, in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, at the time of the diagnosis of the mental disorder under subsection (1) (b) of this section, as a mental or physical condition that may arise from exposure to a traumatic event,

the mental disorder must be presumed to be a reaction to the one or more traumatic events arising out of and in the course of the worker's employment in that eligible occupation, unless the contrary is proved.

[...]

(4) In this section:

"correctional officer" means a correctional officer as defined by regulation of the Lieutenant Governor in Council;

"eligible occupation" means the occupation of correctional officer, emergency medical assistant, firefighter, police officer, sheriff or, without limitation, any other occupation prescribed by regulation of the Lieutenant Governor in Council;

"emergency medical assistant" means an emergency medical assistant as defined in section 1 of the Emergency Health Services Act;

"firefighter" means a member of a fire brigade who is

(a) described in paragraph (c) of the definition of "worker" or employed by the government of Canada, and

(b) assigned primarily to fire suppression duties whether or not those duties include the performance of ambulance or rescue services;

"police officer" means an officer as defined in section 1 of the Police Act;

[...]

"sheriff" means a person lawfully holding the office of sheriff or lawfully performing the duties of sheriff by way of delegation, substitution, temporary appointment or otherwise.

SEE and be SEEN

Driving with proper vehicle lights

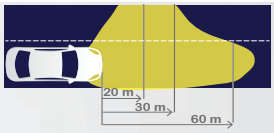
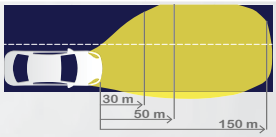
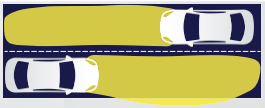
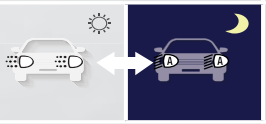
Don't put yourself and others at risk

Make sure you can see the road and other road users – and others can see you! Keep your lights clean and in good working condition. Make sure your headlights are aimed properly.

Turn your headlights on when:

- It's not bright out (e.g. dusk, dawn, night, driving in dark tunnel).
- It's hard to see (e.g. rain).

Understand your vehicle's light options – and know how and when to use them.

SYMBOL	FUNCTION	ILLUSTRATION	INFORMATION
Master light switch	Manually selects the different lighting options of your vehicle.		
Daytime running lights	Makes vehicle more visible during the day.		• Turn on when headlights are off. • Do not provide enough light on the road ahead of your vehicle when it is dark out. **Note: Marking lights are off.**
Headlight lower beam (low beam, passing beam, dipped beam)	Lights up the road just in front of your vehicle.		**Use:** • In urban areas with lit streets. • When following or approaching oncoming vehicles.
Headlight upper beam (high beam, driving beam, main beam)	Lights up a longer distance, allowing you to see far down a dark road.		**Use:** • In rural areas. **Switch off when:** • Another car is coming towards or is driving in front of you. • Driving in fog, rain or snow as light from your upper beams reflects off fog, rain or snow. This makes it even more difficult to see the road and obstacles in front of the vehicle.
Automatic upper beam	Automatically switches off upper beam when there is oncoming traffic or when there is a vehicle ahead.		Ensures that your lights do not cause glare for other drivers.
Automatic headlights	Automatically switches headlights and marking lights on or off according to the amount of light outside the vehicle.		Ensures that your headlights and marking lights are on when you need them.
Front fog lights	Provides better view of the road in fog, as they have a wide beam pattern to light up the road directly in front of your vehicle.		Use if driving in fog or snow.
Rear fog lights	Makes your vehicle more visible to drivers behind you in fog, as they are brighter than tail lights.		Use only if driving in fog, rain or snow as it can be confused with stop lights and distract other drivers.
Marking lights	Activates front position lights, rear position lights (tail lights), side marker lights and licence plate lights.		Make your vehicle more visible to others. **Note: Headlights are off.**

www.tc.gc.ca/SEEandbeSEEN

Transport Canada Transports Canada

Canada

UPCOMING EXTERNAL LEARNING OPPORTUNITIES

OSGOODE
OSGOODE HALL LAW SCHOOL
PROFESSIONAL DEVELOPMENT

The Cannabis Act: Understanding its Impact on Criminal Law

Program Type: One Hour Briefings
Delivery Method: Webinar

July 18, 2018
Webcast — Click here.

12th National Symposium on Tech Crime and Electronic Evidence

January 15, 2019
In Person or Webcast — Click here.

Evidence in Criminal Investigations: Latest Developments in Law & Practice

February 8, 2019
In Person or Webcast — Click here.

12th Annual Intensive Course on Drafting and Reviewing Search Warrants

March 4, 2019 **Optional Workshop: Macrh 5, 2019**
In Person or Webcast — Click here.

7th National Conference on Indigenous Criminal Justice Post Gladue

April 13, 2019
In Person or Webcast — Click here.

12th National Symposium on Money Laundering and Financial Crimes

April 26, 2019
In Person or Webcast Click here.

Recently Added Osgoode Program On Demand

The National Symposium on Sexual Assault Cases in the Criminal Court: The Latest Developments in Law, Science and Practice

Recorded: April 19, 2018. Click here

For More of Osgoode's Best Selling On Demand and Upcoming Online Programs Visit here.

2018 BC LAW ENFORCEMENT MEMORIAL SERVICE

Sunday, September 30, 2018
BC Legislature, Victoria, BC

click here for more info

Parade participants to form up at 12:00 pm in the 700 block of Wharf Street. Parade will step off at 12:40 pm.

OFFICERS BEING HONOURED

Constable John Davidson, Abbotsford Police Department
End of Watch: November 6, 2017

Constable Ian Jordan, Victoria Police Department
End of Watch: April 11, 2018

FACIAL ERROR SHOULD HAVE BEEN NOTICED: WARRANT INVALIDATED

R. v. Campbell, 2018 NSCA 42

Utilizing the tele-warrant procedures, a police officer prepared an ITO for a warrant to search a home. The officer set out his reasonable grounds for believing there was evidence related to several indictable offences in the accused's home and included the time in which the warrant could be executed. A justice of the peace authorized the search warrant. On its face, the justice directed ***"This warrant may be executed between the hours of 6:00 p.m. on the 7th day of May, 2016 and 9:00 p.m. on the 7th day of January, 2016."*** The warrant was executed by police and the accused was charged with unlawfully producing cannabis, two counts of possessing a firearm while prohibited, and unsafe storage of a firearm.

Nova Scotia Provincial Court

The accused argued the warrant was fundamentally flawed on its face because of its date range and thus invalid. The warrantless search therefore constituted a breach of his s. 8 *Charter* right to be secure against unreasonable search and seizure. The judge agreed, finding the error on the face of the warrant was more than a mere typographical error. In the judge's opinion, both the justice of the peace and the police were negligent. She stated:

> … [I]n the circumstances, both the officer who executed, any of the officers who handled and executed the warrant, failed to note that there was a problem on the face of the warrant and the JP failed to note that the time frame that she was authorizing for execution of a warrant was, in fact, an impossibility.
>
> ... It's the opinion of this Court that it represents negligence on the part of both the JP who signed it and the police officer who wrote the dates in, and the officer or officers who, in turn, executed the warrant, because … it's a serious thing and, quite frankly, a great responsibility for people to be able to enter into people's private residences with a warrant, and we should all be sure that warrants are carefully considered, issued only in the proper circumstances, that they are accurate, that the dates are accurate, and anyone handling a warrant after execution should be sure that they have authority to do what is in the warrant by having careful regard to the dates that are contained in the warrant.

Since the warrant was invalid, the search was unreasonable and violated s. 8. As a remedy under s. 24(2), the judge excluded the evidence. She found the facial error could have been noted by the issuing justice or the executing officers with a minimum of care and attention. Moreover, the police were aware that the premises was vacant and, with no apparent risk for the destruction of evidence, there was no need to act expeditiously on the warrant. The accused was acquitted of all charges.

Nova Scotia Court of Appeal

The Crown challenged the trial judge's rulings, arguing that the trial judge erred in both finding the warrant invalid and in excluding the evidence.

The Search Warrant

The Court of Appeal noted that ***"the time frame for execution specified in the warrant is an impossibility and a clear error."*** Nevertheless, the Crown submitted that the erroneous and factually impossible time for the warrant's execution did not render it invalid. Rather than requiring the warrant only need meet the reasonableness standard (authorized by law, based on reasonable grounds and conducted in a reasonable manner), the Crown contended the trial judge required a standard of facial perfection. Here, the Crown argued that the error was a typographical mistake that did not invalidate the warrant, nor render the search of the home unreasonable. The Crown also asserted that the trial judge erred by injecting the common-law concept of negligence into the reasonableness

analysis. The warrant, as the Crown maintained, was presumptively valid and therefore the trial judge erred in quashing it.

The Court of Appeal concluded that the trial judge did not require perfection from the police nor improperly consider the presence of negligence. First, the trial judge was aware that some errors on the face of a warrant could be mere typographical and trivial in nature and would not impact the warrant's presumptive validity while other errors could be far from harmless and invalidate a warrant. Second, negligence is not confined to tort claims and can be used in determining the nature of an error on the face of a warrant. Terms such as "negligence" and "carelessness" are often used by courts when assessing police conduct such as whether the police have grounds for a warrant or when undertaking a s. 24(2) analysis.

In this case, it was not an error for the trial judge to conclude that the failure of the police to notice the obvious error on the face of the warrant was negligent. There is an expectation that an executing officer should assure themselves that they are about to act in accordance with the terms of a warrant. Thus, they need to read it:

> Here, the warrant was not "regular" on its face – it contained an obvious error with respect to the time frame for execution. It was well within the purview of the trial judge to infer either that the obvious error was not noted by police, or conversely, they acted on it notwithstanding the error. No evidence was offered to explain why or how the police acted in the face of an obvious error on the warrant. [para. 36]

s. 24(2) *Charter*

As for the admissibility of the evidence under s. 24(2), the Court of Appeal found the trial judge considered appropriate factors and did not err in excluding it.

The Crown's appeal was dismissed.

Complete case available at www.canlii.org

LINK BETWEEN ACCUSED & SUITCASE MISSING, DESPITE DRUG DOG HIT

R. v. Molnar, 2018 MBCA

A police officer received a tip from a reliable confidential informer that a person named "Andrea Molnar" was travelling by train from Agassiz, British Columbia to Washago, Ontario (two known ports in the drug trade). The informer said Molnar had purchased a one-way ticket with cash and had a locked grey suitcase smelling of marijuana. The police, however, did not have time to act on that tip. A month later, through his usual checks with VIA Rail Canada, the officer learned that an "Andrea Molnar" had purchased a one-way ticket with cash for the same trip. When the train stopped in Winnipeg, the police sought out passenger "Andrea Molnar" (the accused) and detained her for a drug investigation. She was cautioned and remained in a police vehicle while the investigation proceeded.

Based on his experience, the officer determined that he had a reasonable suspicion for a sniffer dog - trained to identify six different types of drugs - check out the baggage compartment of the train. The dog smelled drugs in a grey suitcase, but the only tag on it indicated the destination of Washago. The suitcase had no ownership information nor was it linked to an owner. Once the dog indicated the presence of drugs in the grey suitcase, the accused was arrested for possessing drugs for the purpose of trafficking. The accused was again cautioned and the suitcase was pried open. In it, police found a large garbage bag and coffee grounds (a substance commonly used to mask the odour of marihuana) as well as 20 half-pound vacuumed packed bags of marihuana. The accused's purse and a duffel bag were also searched. These searches provided the luggage ticket that matched the tag number on the grey suitcase and a key to the suitcase. The accused was charged with possessing marihuana for the purpose of trafficking.

Manitoba Court of Queen's Bench

The accused challenged the admissibility of the seized evidence arguing her rights under the *Charter* were breached. The judge found the accused's detention, arrest and searches incidental to it did not violate the *Charter*. In the judge's view, the experienced police officers carefully conducted the investigation "by the book." The police easily had reasonable suspicion to detain the accused and use a drug dog to sniff the luggage. As well, the common law power of search incidental to arrest permitted the police to search the suitcase. The police had reasonable grounds to arrest the accused for possessing marihuana for the purpose of trafficking once the dog made the hit. They searched the suitcase for a valid objective and conducted the search in a reasonable manner. Since there were no *Charter* breaches, it was unnecessary to consider s. 24(2) and the accused was convicted

Manitoba Court of Appeal

The accused conceded that the police had the reasonable suspicion necessary to detain her and to deploy the sniffer dog. However, she argued that the police did not have the required reasonable grounds to arrest her immediately after the sniffer dog's positive hit on the suitcase. In her view, there was not a sufficient connection between herself and the suitcase that provided reasonable grounds at the time of her arrest.

The Arrest

Justice Hamilton, speaking for the unanimous Court of Appeal, agreed there were not objective reasonable grounds to believe that the accused had committed the offence. She held there was not a sufficient connection between the accused and the suitcase.

"The difference between reasonable suspicion and reasonable grounds to believe has been described as the "degree of certainty" … that is required," said Justice Hamilton. ***"Reasonable suspicion is a lower standard."*** It only requires proof that the individual targeted is possibly engaged in criminal activity. Reasonable grounds to arrest, on the other hand, requires a stronger connection between an accused and the offence being investigated. In this case, the Appeal Court found the stronger connection required for arrest was missing.

The Officer's Purported Grounds

The evidence linking the accused to the grey suitcase:

- A month before the arrest, an officer received a tip from a reliable confidential informant that a person named Andrea Molnar was travelling from Agassiz to Washago (two known ports in the drug trade) on a one-way train ticket, paid for by cash, with a locked grey suitcase smelling of marijuana;
- The accused was named Andrea Molnar and was travelling via train from Agassiz to Washago;
- The suitcase was locked and grey, but did not smell of marijuana; and
- The suitcase in question was tagged for the destination of Washago.

Although the dog hit on the suitcase elevated the officer's reasonable suspicion that the suitcase contained marihuana to reasonable grounds (both subjectively and objectively), the hit did not provide any more information to connect the accused to the suitcase. ***"While the objective facts were strong (both subjectively and objectively) for the reasonable suspicion that the accused was travelling with the grey suitcase, it was not strong enough to meet the higher threshold of reasonable grounds to believe required to arrest the accused,"*** said Justice Hamilton. The police did not know that the suitcase belonged to the accused nor had they seen the person in possession of the bag. Although the police had received a tip regarding the accused travelling with a bag, they had no other information tying the accused to the bag:

"To conclude, the difference between reasonable suspicion to detain and reasonable and probable grounds to arrest is a matter of degree. Reasonable suspicion is generally framed in terms of possibility, while reasonable grounds for arrest is linked to probability. Reasonable suspicion is a lower threshold than reasonable grounds to believe."

> To conclude, the difference between reasonable suspicion to detain and reasonable and probable grounds to arrest is a matter of degree. Reasonable suspicion is generally framed in terms of possibility, while reasonable grounds for arrest is linked to probability. Reasonable suspicion is a lower threshold than reasonable grounds to believe. There was no evidence that the grey suitcase in question was the only grey suitcase in the baggage car bound for Washago. While the evidence was strong to establish a reasonable suspicion, particularly after [the dog's] positive hit on the grey suitcase, … the required strong connection between the grey suitcase and the accused for the RCMP to have objective reasonable grounds to arrest her did not exist. [para. 35]

The trial judge erred in law that the police had reasonable grounds to believe that the accused was travelling with the grey suitcase. Therefore, the police did not have reasonable grounds to arrest her and, as a result, her arrest was unlawful as were the searches incidental to it.

s. 24(2) *Charter*

Despite finding a s. 8 *Charter* breach, the Court of Appeal admitted the evidence under s. 24(2). The breach was at the low end of seriousness, minimally impacted the accused's privacy interests, and the evidence was reliable and important to the Crown's case. The long-term repute of the administration of justice would be impacted negatively by excluding the evidence in the circumstances.

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

Complete case available at www.canlii.org

TRAVELLER NOT DETAINED WHEN BORDER OFFICER X-RAYED HIS LUGGAGE

R. v. Peters, 2018 ONCA 493

The accused returned from Jamaica to Toronto and arrived at the Pearson International Airport. He was the subject of a "lookout" on the Canadian Border Services Agency (CBSA) computer and was sent for a secondary customs inspection. At the secondary inspection, the CBSA officer asked the accused questions and elicited answers about the contents of his luggage while it was searched. As a result of his search, the border officer found several sealed plastic bags containing a dried food product. Upon x-ray inspection, each plastic bag revealed round denser areas of organic material in the middle of each bag. The CBSA officer asked the accused several additional questions and obtained his responses about the provenance of the bags and how much he paid for them. When the border officer slit open the bags, he found a round puck-like object wrapped in brown packing tape inside each of the bags. He asked the accused what it was and the accused answered he did not know. The CBSA officer cut into one of the pucks and found white powder. He conducted a narcotics field test, which indicated the presence of cocaine. The accused was arrested for importing almost three (3) kilograms of cocaine,. He was also provided his right to counsel and was cautioned.

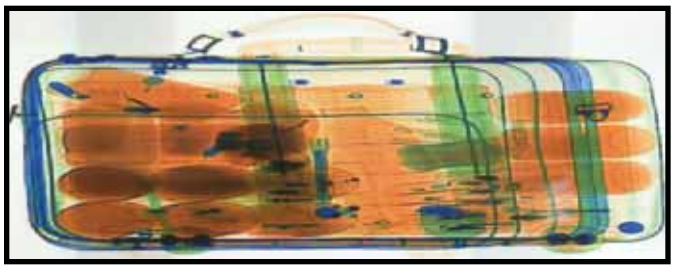
Ontario Superior Court of Justice

The accused sought to have his statements made to the CBSA officers excluded as evidence. But the judge dismissed the application. The judge

found the accused was not detained until the CBSA officer cut into the plastic bags and found the pucks. It was at that time that ***"a reasonable person placed in the position of the border services officer would conclude that there was such a strong particularized suspicion connecting the accused to a specific crime that the questioning and customs examination had changed from one of routine to a focused investigation of a specific offence."*** The judge also concluded that the question and answer following detention could be subject to exclusion, but the accused did not want these excluded. The accused was convicted of smuggling cocaine and sentenced to 6.5 years in prion less credit for pre-trial custody.

Ontario Court of Appeal

The accused argued, in part, that the trial judge erred in determining when he was detained. In his view, he was detained upon the x-raying of his luggage and twas immediately entitled to be advised of his right to counsel at that time. He contended the trial judge applied too high a standard in deciding when detention occurred by conflating the required "reasonable suspicion" test for detention in the border context with reasonable and probable grounds for arrest. The accused also argued the trial judge overemphasized the CBSA officer's subjective belief that there was not a sufficiently strong particularized suspicion that the accused was smuggling illegal drugs when the officer x-rayed the food bags. The accused argued the officer's belief in this regard was not objectively reasonable. Because the CBSA officer continued to ask him incriminating questions after he should have been told about his right to a lawyer, the accused's answers should have been excluded from the evidence at trial.



Detention

The Court of Appeal disagreed with the accused. ***"The trial judge adverted to and applied the correct analysis to determine detention in an international border context, namely, whether the border officer has 'decided, because of some sufficiently strong particularized suspicion, to go beyond routine questioning of a person and to engage in a more intrusive form of inquiry',"*** said the Appeal Court. ***"Where the officer has made that decision, the individual may be detained, even when subject to that routine questioning."***

In this case, the trial judge was unable to say whether the CBSA officer had grounds to arrest the accused at the time of x-ray or such particularized suspicion in relation to a specific offence that the accused was detained. The Court of Appeal found the trial judge properly considered the factual circumstances, including the objective reasonableness of the CBSA officer's subjective belief. And the trial judge did not confuse the test for detention in a customs context with the test for arrest.

> [T]he trial judge weighed all of the evidence to determine that the border officer's subjective belief did not rise to a particularized suspicion that the [accused] may be involved in the illegal importation of drugs, and that this subjective belief was objectively reasonable in the circumstances of this case. In particular, the trial judge accepted the border officer's testimony of his past experience that x-ray anomalies seen in food products often yield innocent results. The officer was not certain whether the anomalies in the plastic bags were due to the bulking of the food product, and the entire constellation of factors he was dealing with had not resulted in such a level of particularized suspicion to take his questioning out of the routine. These were conclusions open to the trial judge to make on the record before him. [para. 11]

The accused appeal was dismissed.

Complete case available at www.canlii.org

POLICE NEED NOT EXHAUST ALL INVESTIGATIVE AVENUES BEFORE MAKING ARREST

Tremblay v. Ottawa (Police Services Board), 2018 ONCA 497

The plaintiffs, Tremblay and his spouse Mongrain, were involved in a dispute with their neighbours. The neighbours alleged their homes were being flooded because of a drainage pipe Tremblay and Mongrain had installed. The neighbours complained to the city, which started a by-law proceeding over the pipe, and also brought a civil suit against Tremblay and Mongrain. Some of the neighbours claimed that Tremblay subsequently engaged in intimidating behaviour toward them and their families.

Police received reports that Tremblay had over 20 encounters with the neighbours, including incidents where he stared at them, photographed them in their backyard and pool, laughed and cursed at them, gave them the finger, intimidated them with his pitbull. It was also alleged that Tremblay interfered with a neighbour's attempts to sell their property by parking an old van next to the property line with a message spray painted on its side in big fluorescent letters, "I AM NOT RESPONSIBLE FOR YOUR BASEMENT FLOODS." The police also received information that gunshots were heard on two occasions coming from the Tremblay property.

Acting on the reports submitted by other officers, the lead investigator conducted a firearms search and found Tremblay had a firearms licence and three (3) firearms registered to him at his residence. Police then, having confirmed that Tremblay had a licence and registration to possess three firearms, obtained a public safety firearms warrant under s. 117.04 of the *Criminal Code*. With assistance from their Tactical Unit, police executed the warrant. They knocked on the door and telephoned the home several times, but no one answered. After waiting 15 minutes, they then breached the front door, called out identifying themselves, and entered the home to clear and search it. Three firearms, three pellet guns, a cross-bow, a machete, a folding knife and ammunition were found and seized. When Tremblay and Mongrain returned home, Tremblay was arrested for intimidation and mischief and transported to the police station. He was then released by police on an undertaking with conditions.

At his criminal trial in the Ontario Court of Justice, Tremblay was acquitted of intimidation and of criminal harassment (a charge that was added by the Crown), but was found guilty of mischief for the message written on the side of the van. His mischief conviction was upheld on appeal to the Ontario Superior Court of Justice but overturned by the Ontario Court of Appeal.

Ontario Superior Court of Justice

The plaintiffs brought a civil action against the police seeking damages of $500,000 from the Ottawa Police Services Board (OSPB), the lead investigator, and thirteen other named officers claiming torts and *Charter* breaches. The judge found the lead investigator and his employer, the OPSB, liable for the following:

- **Negligent investigation** – there was no urgency to the investigation and the police had other options available instead of resorting to arrest and executing a public safety warrant. The judge awarded Tremblay **$10,000**;
- **False arrest and unlawful detention** – the lead investigator did not have reasonable grounds to arrest for intimidation and, although having grounds to arrest for mischief, should not have done so because the public interest could have been satisfied without arrest under s. 495(2) of the *Criminal Code*. The judge awarded Tremblay **$15,000**;
- **Wrongful seizure of weapons** – the judge awarded Tremblay **$5,000**;
- **Breaching s. 8 *Charter*** – the officer failed to make full, fair, and frank disclosure in the ITO for the warrant and the use of the dynamic entry into the home was unreasonable. The judge awarded Mongrain **$10,000**.

The judge also awarded **$10,923.58** in special damages related legal fess and replacing the damaged door and door frame.

Ontario Court of Appeal

The lead investigator and the OPSB appealed the trial judge's ruling. Justice Juriansz, delivering the Court of Appeals decision allowed the appeal and ordered the lawsuit dismissed.

Negligent Investigation

The trial judge suggested that the investigating officer had a number of options available to him short of arrest and pursuing a public safety warrant he should have pursued such personally interviewing neighbours to find out what steps they wanted taken, personally interviewing the plaintiff's to get their side of the story, and discussing ways to de-escalate the tension between the families. She found moving forward with the arrest and search warrant breached the standard of care expected of a reasonable police officer.

The Court of Appeal, however, concluded the trial judge erred in two respects. First, she defined the standard of care for negligent investigation without evidence as to the standard. Second, she imposed a standard of care that was inconsistent with the law:

> ... [T]he legal principles that apply to consideration of the tort of negligent investigation in the context of laying charges, includ[e] the following:
>
> - The appropriate standard of care for the tort of negligent investigation is that of the reasonable police officer in similar circumstances.
> - In the laying of charges, the reasonable standard is informed by the presence of reasonable and probable grounds to believe the suspect has committed the offence.
> - This standard does not require police to establish a prima facie case for conviction.
> - The police are not required to evaluate the evidence to a legal standard or make legal judgments. That is the task of prosecutors, defence lawyers and judges.
> - A police officer is not required to exhaust all possible routes of investigation or inquiry, interview all potential witnesses prior to arrest, or to obtain the suspect's version of events or otherwise establish there is no valid defence before being able to form reasonable and probable grounds. [para. 60]

"The question in assessing whether an arrest was authorized and is therefore lawful is not whether the officer could have done something other than arrest. Rather, the question is: did the officer have grounds to arrest?"

"The question in assessing whether an arrest was authorized and is therefore lawful is not whether the officer could have done something other than arrest," said the Appeal Court. ***"Rather, the question is: did the officer have grounds to arrest?"*** Here, the trial judge found the investigating officer was required to take additional investigative steps before arrest. But that is not the law.

False Arrest

The trial judge erred in holding the investigating officer did not have reasonable grounds to arrest for intimidation. ***"Had the trial judge focused on the elements of the offence of intimidation, and on the information that was available, she would have concluded that there were reasonable grounds to arrest Tremblay for intimidation,"*** said Justice Juriansz.

As for the trial judge's application of s. 495(2) of the *Criminal Code*, the Court of Appeal also found the trial judge erred. ***"Section 495(2)(d) of the Criminal Code stipulates, in part, that a peace officer, despite having grounds to arrest, shall not arrest where he or she believes on reasonable grounds that the public interest may be satisfied without arresting the person,"*** said Justice Juriansz. ***"I observe that s. 495(2) only comes into play once s. 495(1) is satisfied and the peace officer already has grounds to arrest. Section 495(2) does not require the officer to conduct additional investigation to determine if the public interest may be satisfied without arresting the person."*** He continued:

> Section 495(2) places a duty on a police officer who has grounds for arrest under s. 495(1), to not arrest where he or she believes on reasonable grounds that the public interest may be satisfied without arresting the person. The phrase "believes on reasonable grounds" makes clear that the test for applying the limitation in s. 495(2) is both subjective and objective. The police officer must believe that the public interest can be satisfied without arrest, and that subjective belief must be objectively reasonable. Both components must be satisfied. To be clear, it is not enough for a person alleging a violation of s. 495(2) to establish that, objectively, the public interest can be satisfied without an arrest. The person must also establish the police officer believed the public interest could be satisfied without an arrest but went ahead and made the arrest in any event. [para. 93]

Here, the plaintiffs had to prove that the police believed on reasonable grounds that the public interest, having regard to all of the circumstances, could be satisfied without arresting Tremblay. However, ***"on the record, it could not be found that [lead investigator] believed on reasonable grounds that the public interest could be satisfied without arresting Tremblay."*** The investigating officer believed the public interest required Tremblay be placed under certain conditions and it was therefore necessary to arrest him to impose these conditions. Finally, the trial judge erred in

"Section 495(2) places a duty on a police officer who has grounds for arrest under s. 495(1), to not arrest where he or she believes on reasonable grounds that the public interest may be satisfied without arresting the person. The phrase 'believes on reasonable grounds' makes clear that the test for applying the limitation in s. 495(2) is both subjective and objective. The police officer must believe that the public interest can be satisfied without arrest, and that subjective belief must be objectively reasonable."

failing to apply the deeming provision of s. 495(3), which ***"deems an arrest to be lawful notwithstanding s. 495(2) unless the person asserting its application 'alleges and establishes', in the proceedings at issue, that the police violated s. 495(2)."***

The Firearms Warrant

The Court of Appeal found ***"the trial judge's analysis, as a whole, illustrates that, instead of assessing whether the ITO, as amplified, contained reliable evidence that might reasonably be believed, she substituted her own view of the evidence and the particular inferences that she drew from that evidence."*** Had the trial judge properly performed her role in reviewing the warrant, she would have determined that there continued to be at least some evidence that might reasonably be believed on the basis of which the public safety firearms warrant could have been issued.

As for her finding that the manner in which the warrant was executed was unreasonable, the trial judge also erred. First, the Tactical Unit's entry was not "dynamic". Police knocked, phoned the home and waited 15 minutes before breaching the door. The police complied with the knock-and-announce rule. ***"If the police receive no answer, they are entitled to force entry into a home,"*** said Justice Juriansz. By suggesting there were other options available to the police that were far less invasive and traumatic to Tremblay and Mongrain without being put to the police for comment or explanation, the trial judge was ***"Monday morning quarterbacking."*** As the Court of Appeal noted, ***"the trial judge essentially substituted her own after-the-fact view of how the police should have acted, without affording them the opportunity to comment on her alternatives."***

The OPSB and lead investigator's appeal was allowed and the trial judge's order was replaced with an order dismissing the Tremblay and Mongrain action.

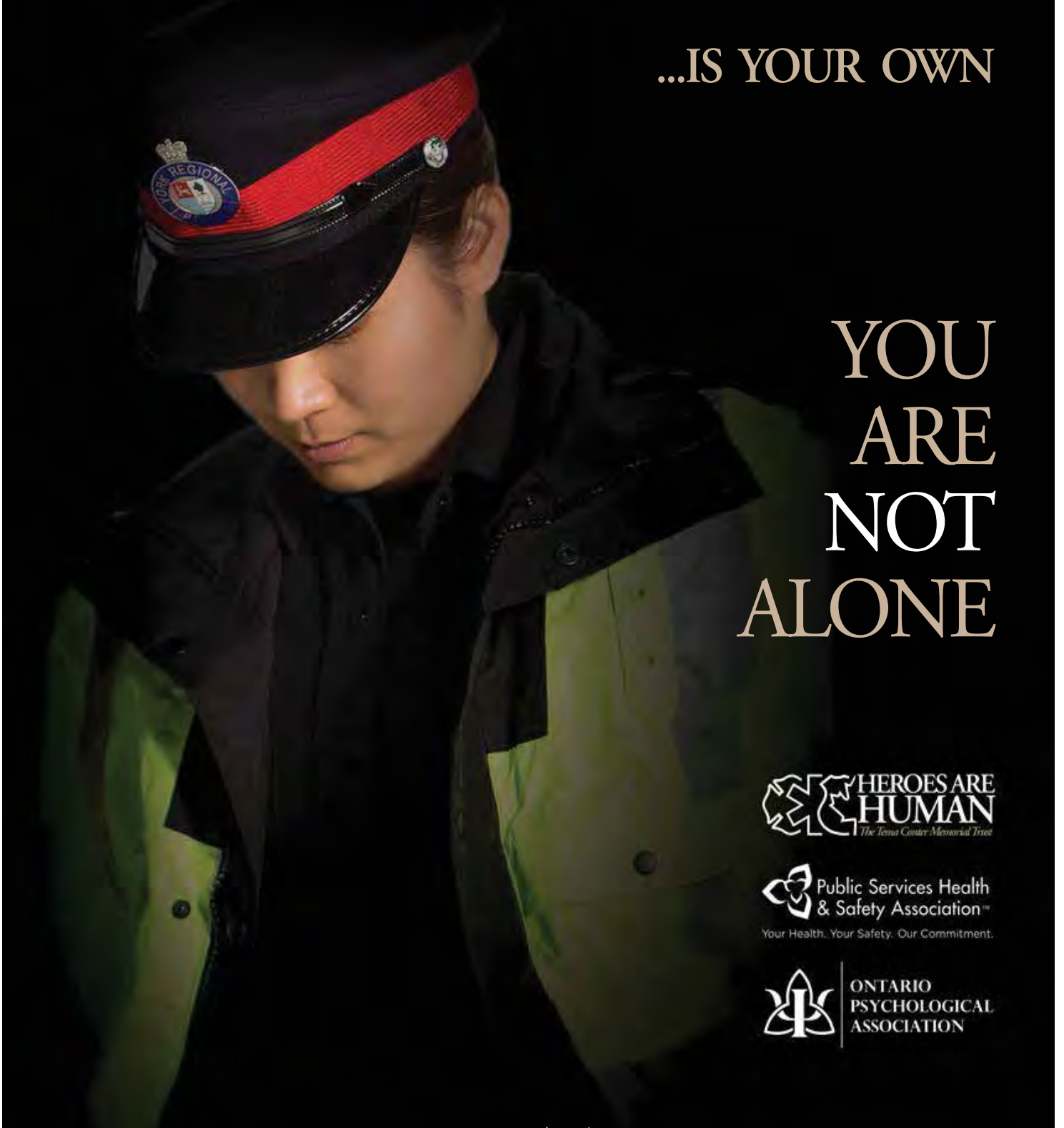
Complete case available at www.ontariocourts.on.ca

Monday Morning Quarterback

- A person who criticizes the actions or decisions of others after the fact, using hindsight to assess situations and specify alternative solutions. (dictionary.com)
- Someone who says how an event or problem should have been dealt with by others after it has already been dealt with. (Cambridge Dictionary online)
- One who second-guesses; a person who unfairly criticizes or questions the decisions and actions of other people after something has happened. (Merriam-Webster online)
- A person who criticizes or suggests alternative courses of action from a position of hindsight after the event in question; a person who, after the event, offers advice or criticism concerning decisions made by others; one who second-guesses. (Collins English Dictionary online)

SOMETIMES THE LIFE IN NEED OF SAVING

...IS YOUR OWN



YOU
ARE
NOT
ALONE

HEROES ARE HUMAN
The Tema Conter Memorial Trust

Public Services Health & Safety Association
Your Health. Your Safety. Our Commitment.

ONTARIO PSYCHOLOGICAL ASSOCIATION

WE ARE HERE TO HELP YOU

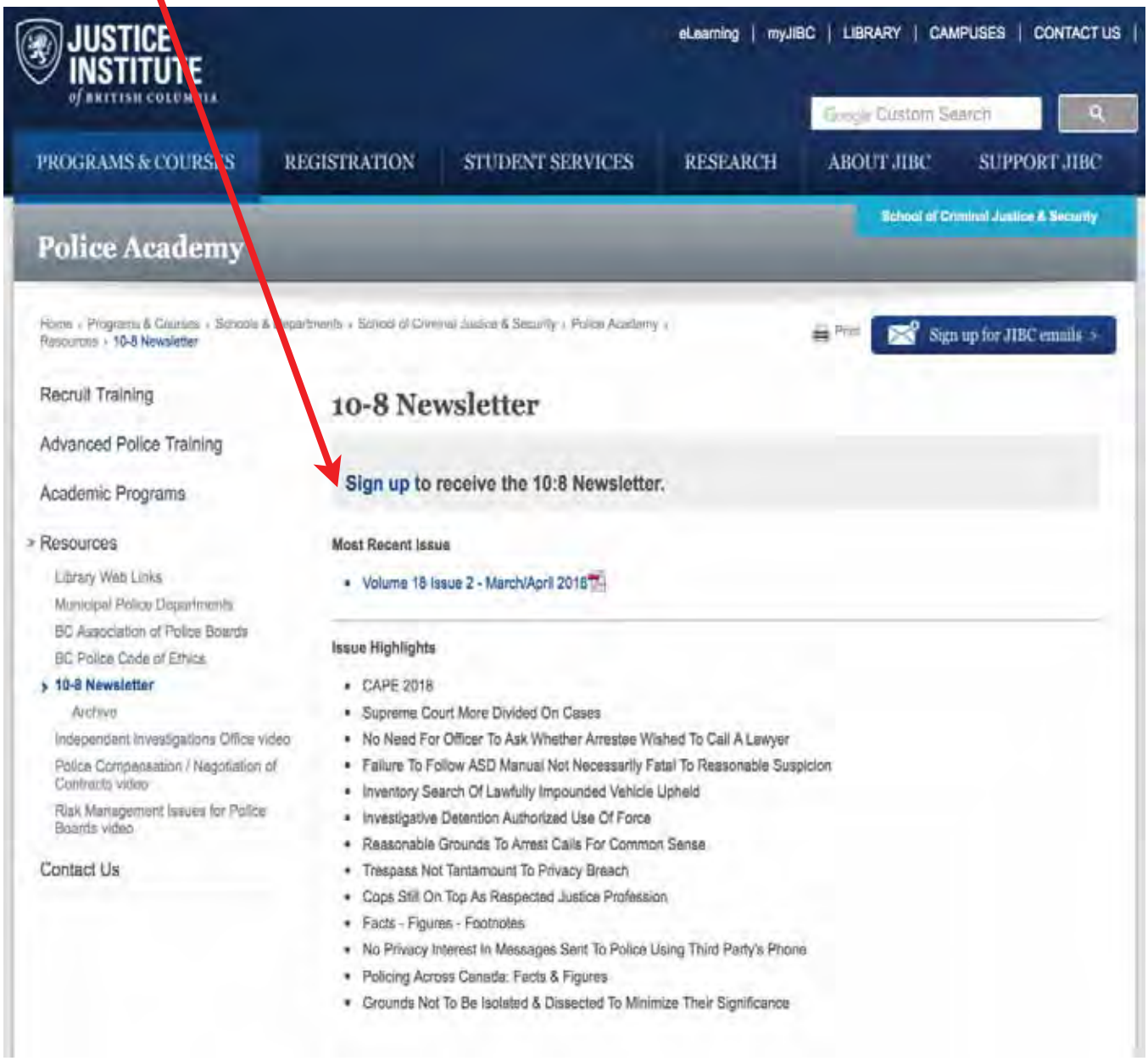
1-888-288-8036

tema.ca

"In Service: 10-8" Sign-up Now

Are you interested in regularly receiving the In Service: 10-8 newsletter by email. You can sign up by clicking here and then clicking on the "Sign up" link:

This "Sign up" link will take you to the free Subscription Form that only requires an email.



From time to time judges try to explain the reasonable grounds standard. Here is a recent effort by a BC Provincial Court judge.

LEGALLY SPEAKING:

Reasonable Grounds for Arrest

"In deciding what constitutes "reasonable grounds", two conditions must exist. Firstly, an arresting officer must subjectively have reasonable grounds to believe the accused committed or was in the process of committing an indictable offence. ...

The second condition requires that those grounds must be justifiable from an objective point of view. This calls for some mental gymnastics in deciding this question. The question is not whether I personally believe those grounds were reasonable, or do I think that an average member of the public would think this was reasonable. It does not mean would a majority of those polled by a professional pollster conclude that [the officer's] grounds for arrest were reasonable. The test is more nuanced than that. The Supreme Court of Canada ... has said that I must decide if a reasonable person with the same experience, training, knowledge, and skills as the officer making the observations would to conclude that there were indeed reasonable grounds for the arrest. In other words, would a reasonable person with [the officer'] experience look at all of the circumstances and say "it's reasonable to conclude that the Accused has committed or is committing an indictable offence"?

The word "reasonable" can mean different things to different people, and case law from court whose decisions are binding on me have offered some helpful guidance on what that word should mean to me. The "reasonable grounds" standard has been described as "a credibly based probability," or "reasonable probability." It requires more than mere suspicion. But it is something less than the civil standard of proof on a balance of probabilities or a prima facie case. ...

Deciding the question of whether or not reasonable grounds for the belief exist involves a consideration of the "totality of the circumstances". If each individual factor taken by itself is insufficient for form reasonable grounds for arrest, I must still consider whether all of these factors taken together and decide on the reasonableness of the conclusion that the Accused was arrestable." – BC Provincial Court Judge K. Skilnick in *R. v. Malhi, 2018 BCPC 143*, paras. 6-9, references omitted

Be the one

on the front line
enforcing the law
keeping communities safe

JUSTICE INSTITUTE
of BRITISH COLUMBIA

BACHELOR OF LAW ENFORCEMENT STUDIES
BACHELOR OF PUBLIC SAFETY ADMINISTRATION

Expand your academic credentials and enhance your career options. Gain the theoretical background, applied skills and specialized knowledge for a career in public safety.

Apply today. **JIBC.ca** **604.528.5590** **register@jibc.ca**
715 McBride Boulevard, New Westminster, BC

15-006

Upcoming Investigation & Enforcement Skills Courses

To register for any of the following courses, click on the course code below or contact the JIBC Registration Office at 604.528.5590 or 1.877.528.5591 (toll free). You can check Ways to Register for other registration methods and for assistance from the registration office. View the full 2018 Course Calendar online for a full list of upcoming Investigation & Enforcement Skills courses in 2018-19.

UPCOMING ONLINE COURSES

August 21 30, 2018
Internet Open Source Investigations (INVE-1022)

October 11, 2018
Introduction to Administrative Law (INVE-1010)

UPCOMING COURSES IN NEW WESTMINSTER

June 25, 2018
Report Writing for Investigators (INVE-1005)

July 14-28, 2018
Introduction to Criminal Law (INVE-1001)

August 27-31, 2018
Introduction to Investigative Skills and Processes (INVE-1003)

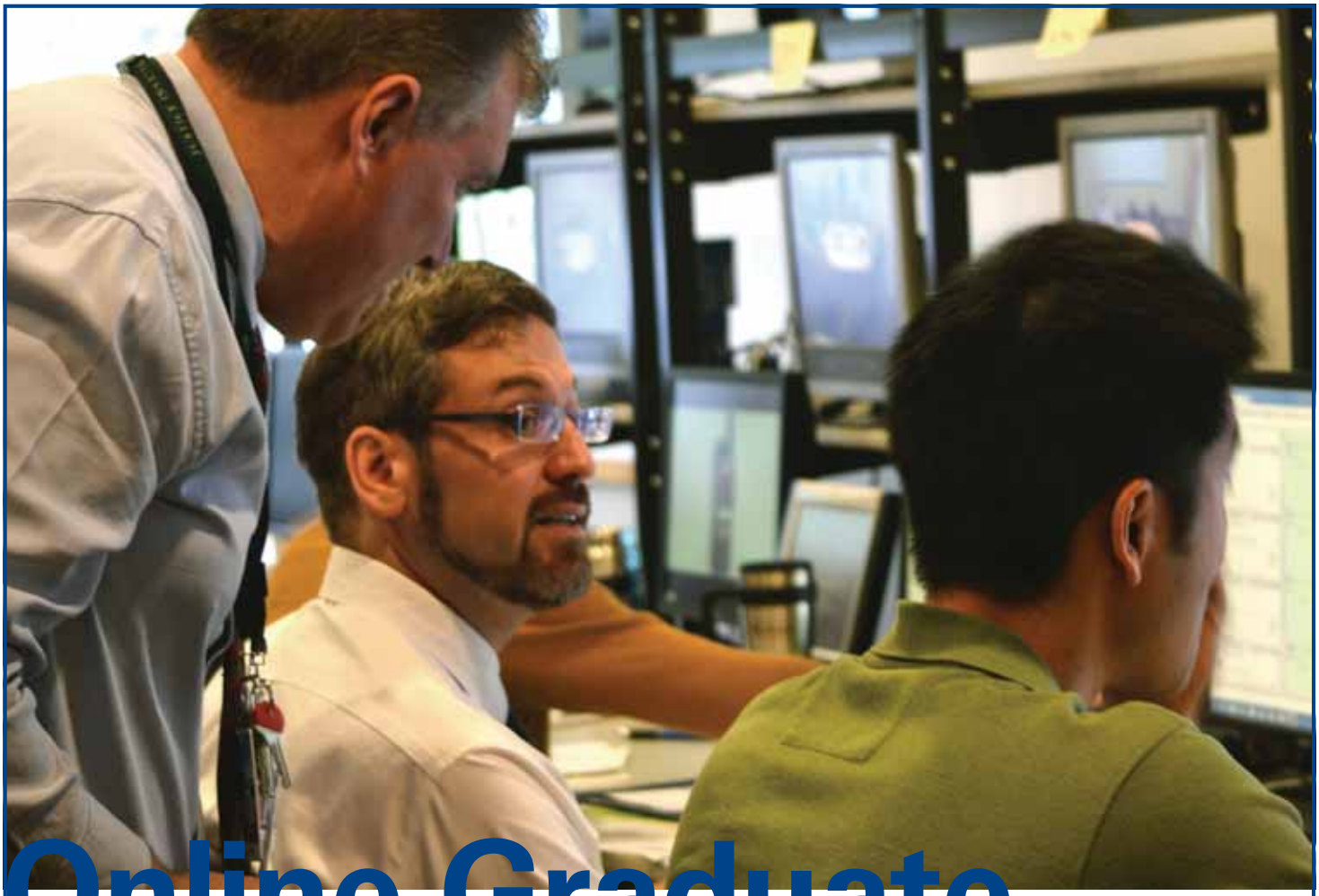
September 6-7, 2018
Introduction to the Criminal Justice System (INVE-1000)

UPCOMING COURSES IN VICTORIA

September 24-26, 2018
Report Writing for Investigators (INVE-1005)

Apply for the Investigation & Enforcement Skills Certificate

Complete the Investigation & Enforcement Skills Certificate, an academic credential that can help you pursue or advance your in the field of investigation, enforcement and public safety. Many people who have completed the requirements for the certificate have gone on to a variety of rewarding careers. Apply online today. For more information, visit the Investigation & Enforcement Skills Certificate webpage.



Online Graduate Certificate Programs

INTELLIGENCE ANALYSIS
TACTICAL CRIMINAL ANALYSIS

Expand your credentials and advance your career with these online graduate certificates. Learn through real world challenges, current cases, curriculum and techniques.

Gain the specialized theoretical foundation and applied skills to function successfully as an analyst.

JUSTICE INSTITUTE of BRITISH COLUMBIA

604.528.5843 **JIBC.ca/graduatestudies**
715 McBride Boulevard, New Westminster, BC

15-007